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**Negotiating Group on the Multilateral Agreement on Investment (MAI)**

**THE MULTILATERAL AGREEMENT ON INVESTMENT  
CONSOLIDATED TEXTS AND COMMENTARY**

**(Note by the Secretariat)**

## **CONSOLIDATED TEXTS AND COMMENTARY**

### **(Note by the Secretariat)**

This document consolidates the results of the work of Drafting Groups 1-3, Expert Groups 1-5 and informal consultations on dispute settlement, special topics, intellectual property, institutional matters and financial matters. The results of the Negotiating Group's consideration of specific issues are indicated where possible.

The document is divided in two parts: CONSOLIDATED TEXT and COMMENTARY. Country specific proposals on draft text are contained in the Annex.

The status of text is indicated by square brackets, footnotes, or in the Commentary.

Country specific proposals to the Negotiating Group on draft text are reproduced in an annex.

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**PART ONE:**

**CONSOLIDATED TEXT**

# I. GENERAL PROVISIONS

## *PREAMBLE*

The Contracting Parties to this Agreement,<sup>1, 2</sup>

Desiring to strengthen their ties of friendship and to promote greater economic co-operation between them;

Considering that international investment has assumed great importance in the world economy and has considerably contributed to the development of their countries;

Recognising that agreement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, the creation of employment opportunities and the improvement of living standards;

Emphasising that fair, transparent and predictable investment regimes complement and benefit the world trading system;<sup>3</sup>

[Wishing that this Agreement enhances international co-operation with respect to investment and the development of world-wide rules on foreign direct investment in the framework of the world trading system as embodied in the World Trade Organization.]<sup>4</sup>

Wishing to establish a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures;

[Resolved to implement this agreement in a manner consistent with environmental protection and conservation;]

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1. One delegation proposed that the Preamble include the following language on taxation: “aware of the importance of taxation for investments and investors, emphasising that double taxation agreements cover most OECD countries in a satisfactory manner, and that tax policy considerations shall be taken into account in the process of accession of new Contracting Parties, in particular the existence of a network of bilateral tax treaties;” This proposal was not discussed. It may need to be revisited in the light of further consideration of taxation matters by the Negotiating Group.
  2. Two delegations proposed that the Preamble include the following language on natural resources: “Reaffirming the sovereignty and sovereign rights of States over natural resources within the limits of national jurisdiction.”
  3. Some delegations proposed an explicit reference to the World Trade Organisation. One delegation proposed the addition immediately after the words “world trading system” of: “encompassing multilateral and bilateral investment instruments as well as agreements of the World Trade Organisation”. This proposal would need some refinement to ensure that it does not limit the scope of the phrase “world trading system” by excluding, for example, regional agreements.
  4. One delegation proposed this language. Some delegations oppose the inclusion of such language because they believe that it would prejudice, and be prejudicial to, future work on investment in the World Trade Organisation.

[Reaffirming their commitment to the Rio Declaration on Environment and Development and Agenda 21, including to sustainable development as reflected therein,]<sup>5</sup> [and recognising that investment, as an engine of economic growth, can play a key role in ensuring that growth is sustainable, when accompanied by appropriate environmental policies to ensure it takes place in an environmentally sound manner];

[Renewing their commitment to the observance of internationally recognised core labour standards [, i.e. freedom of association, the right to organise and bargain collectively, prohibition of forced labour, the elimination of exploitative forms of child labour, and non-discrimination in employment] [and noting that the International Labour Organisation is the competent body to set and promote core labour standards world-wide.]]

Affirming their decision to create a free-standing Agreement open to accession by all countries;<sup>6</sup>

[OECD Guidelines]<sup>7</sup>

HAVE AGREED AS FOLLOWS

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5. The square brackets in this tiret, the first set of brackets in the next tiret and the overall brackets on this and the next tiret were requested by some delegations which oppose inclusion of texts on the matter concerned in the Preamble. The brackets do not reflect a divergence on drafting at this stage, although some delegations have concerns with respect to the reference to “conservation”. One delegation has put forward additional language on the environment and labour which is set out in the Commentary. One other delegation supports the proposed additional language on the environment.
  6. Some delegations proposed that the statement that the Agreement is open to accession by all countries be strengthened.
  7. Preambular text on the OECD Guidelines has been developed during informal consultations on institutional matters. The text, together with an accompanying footnote, is found on page 85.

## II. SCOPE AND APPLICATION

### DEFINITIONS

#### 1. Investor means:

- (i) a natural person having the nationality of, or who is permanently residing in, a Contracting Party in accordance with its applicable law; or
- (ii) a legal person or any other entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organisation.

#### 2. Investment means:

Every kind of asset owned or controlled, directly or indirectly, by an investor, including<sup>1, 2</sup>:

- (i) an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation);
- (ii) shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;
- (iii) bonds, debentures, loans and other forms of debt, and rights derived therefrom;
- (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
- (v) claims to money and claims to performance;
- (vi) intellectual property rights;
- (vii) rights conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits;
- (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

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- 1. The Negotiating Group agreed that this broad definition of investment calls for further work on appropriate safeguard provisions. In addition, the following issues require further work to determine their appropriate treatment in the MAI: indirect investment, intellectual property, concessions, public debt and real estate.
  - 2. For greater certainty, an interpretative note will be required to indicate that, in order to qualify as an investment under the MAI, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

### ***GEOGRAPHICAL SCOPE OF APPLICATION***<sup>3</sup>

This Agreement shall apply in:

- (a) the land territory, internal waters, and the territorial sea of a Contracting Party, and, in the case of a Contracting Party which is an archipelagic state, its archipelagic waters; and
- (b) the maritime areas beyond the territorial sea with respect to which a Contracting Party exercises sovereign rights or jurisdiction in accordance with international law, as reflected particularly in the 1982 United Nations Convention on the Law of the Sea.<sup>4</sup>

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3. A number of EG1 delegations were of the view that rather than an article on geographical scope, an article should define the "territory" or "area" of a Contracting Party to which the MAI would be applicable and in that case, it could be included in a general definitions part of the agreement. Some delegations had serious misgivings about the feasibility of embarking on this approach.

4. EG1 agreed that an alternative text of subparagraph (b) illustrating the "functional" approach supported by some delegations should be included in order to preserve the approach for future consideration if the Negotiating Group were to decide to pursue that option further. An alternative subparagraph (b), could read:

".....investments beyond the territorial sea under the jurisdiction of a Contracting Party in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea."

## ***APPLICATION TO OVERSEAS TERRITORIES***

1. A State may at any time declare in writing to the Depositary that this Agreement shall apply to all or to one or more of the territories for the international relations of which it is responsible.<sup>5</sup> Such declaration, made prior to or upon ratification, accession or acceptance, shall take effect upon entry into force of this Agreement for that State. A subsequent declaration shall take effect with respect to the territory or territories concerned on the ninetieth day following receipt of the declaration by the Depositary.
2. A Party may at any time declare in writing to the Depositary, that this Agreement shall cease to apply to all or to one or more of the territories for the international relations of which it is responsible. Such declaration shall take effect upon the expiry of one year from the date of receipt of the declaration by the Depositary, with the same effect regarding existing investment as withdrawal of a Party.

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5. In case such a declaration of application were to be accompanied by reservations or exceptions beyond those of the declaring state, these would be subject to acceptance of the other Parties.

### **III. TREATMENT OF INVESTORS AND INVESTMENTS**

#### ***NATIONAL TREATMENT AND MOST FAVOURED NATION TREATMENT***

1. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.
2. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to investors of any other Contracting Party or of a non-Contracting Party, and to the investments of investors of any other Contracting Party or of a non-Contracting Party, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposition of investments.
3. Each Contracting Party shall accord to investors of another Contracting Party and to their investments the better of the treatment required by Articles 1.1 and 1.2, whichever is the more favourable to those investors or investments.

#### ***TRANSPARENCY***

1. Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the operation of the Agreement. Where a Contracting Party establishes policies which are not expressed in laws or regulations or by other means listed in this paragraph but which may affect the operation of the Agreement, that Contracting Party shall promptly publish them or otherwise make them publicly available.<sup>1</sup>
2. Each Contracting Party shall promptly respond to specific questions and provide, upon request, information to other Contracting Parties on matters referred to in Article 2.1.
3. Nothing in this Agreement shall prevent a Contracting Party from requiring an investor of another Contracting Party, or its investment, to provide routine information concerning that investment solely for information or statistical purposes. No Contracting Party shall be required to furnish or allow access to information concerning particular investors or investments the disclosure of which would impede law enforcement or would be contrary to its laws [policies, or practices]<sup>2</sup> protecting confidentiality.

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1. The Chairman of the Negotiating Group proposed to keep this sentence without brackets, noting that several delegations could go along with this proposal provided that there was a satisfactory explanatory statement in the commentary [DAFFE/MAI/M(96)4].

2. Proposed by one delegation.

## ***SPECIAL TOPICS***

### ***TEMPORARY ENTRY, STAY AND WORK OF INVESTORS AND KEY PERSONNEL***<sup>3</sup>

1. Subject to the application of Contracting Parties' national laws, regulations and procedures affecting the entry, stay and work of natural persons:

- (a) Each Contracting Party shall grant temporary entry, stay and authorisation to work<sup>4</sup> and provide any necessary confirming documentation to a natural person of another Contracting Party who is:
  - (i) an investor who seeks to establish, develop, administer or provide advice or essential technical services to the operation of an enterprise<sup>5</sup> to which the investor has committed, or is in the process of committing, a substantial amount of capital, or
  - (ii) an employee employed by an enterprise referred to in (i) above, or by an investor, [for a period of not less than one year,] in a capacity of executive, manager or specialist and who is essential to the enterprise;

so long as that person continues to meet the requirements of this Article;<sup>6</sup>

- (b) (i) Each Contracting Party shall grant temporary entry and stay and provide any necessary confirming documentation to the spouse and minor children of a natural person who has been granted temporary entry, stay and authorisation to work in accordance with this Article. The spouse and minor children shall be admitted for the period of the stay of that person.
- (ii) Each Contracting Party is encouraged<sup>7</sup> to grant authorisation to work to the spouse of the person who has been granted temporary entry, stay, and authorisation to work in accordance with this Article.

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3. Whether there should be an anti-abuse clause, its precise wording, as well as its specific placement is to be decided.

4. Interpretative note: "The granting of an "authorisation to work" may imply that a natural person may have to meet specific professional qualifications required in order to carry out particular activities. Professional qualification criteria that may be applicable are outside the scope of this Article."

5. Enterprise under this Article would have the same meaning as under the definition of Investment.

6. Interpretative note: "It is understood that the national authorities may periodically verify continued eligibility under this paragraph".

7. Some countries prefer "shall endeavour" and may need to refer to capitals before agreeing to deletion.

2. No Contracting Party may deny entry and stay as provided for by this Article, or authorisation to work as provided for by paragraph 1(a) of this Article, for reasons relating to labour market or other economic needs tests or numerical restrictions in national laws, regulations, and procedures.

3. For the purposes of this Article:

**Natural person of another Contracting Party** means a natural person having the nationality of [or who is permanently residing in] another Contracting Party in accordance with its applicable law;<sup>8</sup>

**Executive** means a natural person who primarily directs the management of an enterprise or establishes goals and policies for the enterprise or a major component or function of the enterprise, exercises wide latitude in decision-making and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the enterprise;

**Manager** means a natural person who directs the management of an enterprise, or department, or subdivision of the enterprise, supervises and controls the work of other supervisory, professional or managerial employees, has the authority to hire and fire or recommend hiring, firing, or other personnel actions and exercises discretionary authority over day-to-day operations at a senior level; and

**Specialist** means a natural person who possesses knowledge at an advanced level of expertise and who may be required to possess specific or proprietary knowledge of the enterprise's product, service, research equipment, techniques, or management.

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8. Several delegations have concerns with extending the benefits of the MAI Key Personnel provisions to permanent residents of another Contracting Party. As a result of the Negotiating Group discussion on 23-25 April 1997, the Chairman proposed that at least for the purposes of investors, nationals and permanent residents should be covered. Delegations should reflect further on the inclusion of permanent residents as concerns the categories of executive, manager, or specialist.

*SENIOR MANAGEMENT [AND MEMBERSHIP ON BOARDS OF DIRECTORS]<sup>9</sup>*

No Party may require that an enterprise of that Party that is an investment of an investor of another Party appoint to senior management positions [and membership on boards of directors]<sup>10</sup> individuals of any particular nationality.

*EMPLOYMENT REQUIREMENTS<sup>11</sup>*

A Contracting Party shall permit investors of another Contracting Party and their investments to employ any natural person of the investor's or the investment's choice regardless of nationality and citizenship provided that such person is holding a valid permit of sejour and work delivered by the competent authorities of the former Contracting Party and that the employment concerned conforms to the terms, conditions and time limits of the permission granted to such person.

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9. Three delegations maintained a reservation on the coverage of the article concerning membership on boards of directors.
  10. It was pointed out that there may be a need to define “senior management positions” and “membership on boards of directors”
  11. It is understood that this article would not interfere with national anti-discrimination and labour laws.

## PERFORMANCE REQUIREMENTS<sup>12</sup>

1. A Contracting Party shall not, in connection with the establishment, acquisition, expansion, management, operation or conduct<sup>13</sup> of an investment in its territory of an investor of a Contracting Party or of a non-Contracting Party, impose, enforce or maintain any of the following requirements, or enforce any commitment or undertaking<sup>14</sup>:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services<sup>15</sup> provided in its territory, or to purchase goods or services from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales to the volume or value of its exports or foreign exchange earnings;

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12. One delegation reserved its position on all obligations on performance requirements that go beyond those in the TRIMS Agreement and the Energy Charter Treaty.

13. This listing of investment operations omits the following terms “maintenance, use, enjoyment, sale or other disposition of investments” which appear in the National Treatment/MFN articles. Some delegations reserve on the inclusion of the word “conduct”.

14. One delegation proposes that the following phrase be added at the end of the chapeau of this paragraph: “or condition the receipt or continued receipt of an advantage on compliance with any of the following requirements”. This addition is intended to make clear that the performance requirements article applies in two basic circumstances: *i*) when linked to the establishment, expansion, etc. of an investment; and *ii*) when linked to the granting of an advantage.

Unless expressly stated (as proposed) in paragraph 1, there could always be some uncertainty as to whether the article would apply in cases of granting an advantage. The delegation considers this addition necessary for legal reasons as well as to provide investors with greater certainty. As was the intention in the development of a “one list” approach, the proposed addition would, in the second case (linked to an advantage), limit prohibitions to “requirements” imposed by governments. Extending the prohibitions to only certain (but not all) “commitments and undertakings” would unduly interfere with government practices regarding “voluntary” commitments in exchange for an advantage and could result in a significant burden on Contracting Parties on lodging reservations for government-firm agreements containing “prohibited” voluntary undertakings.

15. Two delegations proposed an interpretative note which could read: “It is understood that this provision does not extend commitments on cross-border provision of services under the GATS.” A number of delegations felt that this concern should be addressed in the context of a general provision on the relationship between the MAI and the WTO obligations. One delegation reserved its position on the inclusion of “services” in 1(c) with respect to requirements associated with the granting of an advantage.

- (f) to transfer technology, a production process or other proprietary knowledge to a natural or legal person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws<sup>16</sup> [or to act in a manner not inconsistent with articles ... of the TRIPS Agreement];
- (g) to locate its headquarters for a specific region or the world market in the territory of that Contracting Party;<sup>17</sup>
- (h) to supply one or more of the goods that it produces or the services that it provides to a specific region or the world market exclusively from the territory of that Contracting Party;
- [(i) to achieve a given level or value of production, investment, sales, employment, or research and development in its territory;]<sup>18</sup>

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- 16. A large number of delegations indicated that they can agree to a final version of this paragraph only if a clear exception is made for the possibility of enforcing competition laws and for the transfer of intellectual property rights, as long as the latter is not contrary to the TRIPS Agreement. The exact wording of this paragraph remains to be determined in consultation with competition and intellectual property experts, to reflect the comments made in paragraph 7 of the Report to the Negotiating Group on Intellectual Property [DAFFE/MAI/(97)13]. In this context questions were raised concerning the meaning of “proprietary knowledge” and the reference to the relevant authorities.
  - 17. One delegation reserves its position on paragraph (g) and notes that the inclusion of (g) may inadvertently oblige Contracting Parties to lodge reservations in respect of basic business incorporation laws in so far as such laws oblige the establishment and/or maintenance of representative or head offices for legal purposes.
  - 18. It was recognised that paragraph *i*) is not intended to interfere with legitimate government employment programmes or employment discrimination laws. A number of delegations conditioned their acceptance of this provision on the elaboration of appropriate language to give greater precision to the obligation and ensure consistency with the article on Key Personnel. Many delegations supported the deletion of this paragraph.

[(j) to hire a given level of [local personnel] [nationals];<sup>19</sup> ]

(k) to establish a joint venture;<sup>20</sup> or

[(l) to achieve a minimum level of local equity participation.]

2. A Contracting Party is not precluded by paragraph 1 from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of a Contracting Party or of a non-Contracting Party, on compliance with any of the requirements, commitments or undertakings set forth in paragraphs [1(a) and] 1(f) through 1(l).<sup>21</sup>

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19. This item is meant to cover specific performance requirements expressed in terms of given numbers or percentages of employees while the article on employment requirements addresses problems of discrimination among natural persons holding a valid permit of sejour and work in a given Contracting Party. Some delegations felt that the prohibition in (j) should apply to the hiring of national, as opposed to local personnel. Some delegations maintained a reserve on this latter proposal. One delegation wondered whether this provision should apply to residency requirements. One other delegation recalled that the Chairman of the Negotiating Group suggested that residency requirements should not be considered to be inconsistent with the obligations of the MAI [DAFFE/MAI(97)14].
20. At the Negotiating Group meeting in April 1997, the Chairman noted that a large majority was in favour of including (k) and (l) in the list of prohibited performance requirements. It would not be necessary to have an interpretative note regarding the application of national treatment and MFN. One delegation reserved its position concerning the inclusion of (k) and (l) noting with respect to (l) the requirement to have provisions for nominal qualifying shares. One other delegation suggested that items (k) and (l) could be combined into one provision since in their view they achieve the same result. One delegation felt that these items should, for the time being, be kept separate.
21. The term “commitments or undertakings” would be deleted if the proposal for the chapeau of paragraph 1 was agreed to. Two delegations supported the inclusion of item 1(a). This would appear necessary to cover *inter alia*, agricultural export support and trade-marketing support programmes. One delegation referred to their concerns on the coverage of services. One other delegation, on the other hand, felt that the inclusion of 1 (a) would be incompatible with the provisions of the WTO Agreement on Subsidies and Countervailing Measures. One delegation felt that there might be questions about export credits or export promotion, which would be better addressed in paragraph 5. One delegation pointed to the difficulty of distinguishing in many instances between export promotion and foreign aid programmes. As regards items (g), (h), (k) and (l), several delegations failed to see the link between these items and the receipt of an advantage and suggested that they not be listed in paragraph 2. One delegation also supported the deletion of the reference to 1 (f).

3. Nothing in paragraphs [1(a),] 1(b), 1(c), 1(d), and 1(e)<sup>22</sup> shall be construed to prevent a Contracting Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Contracting Party or of a non-Contracting Party, on compliance with a requirement, commitment or undertaking to locate production, provide particular services, train or employ [workers] [employees]<sup>23</sup>, construct or expand particular facilities, or carry out research and development in its territory.

4. [Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and 1(c) shall be construed to prevent any Contracting Party from adopting or maintaining measures, including environmental measures:

- (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary for the conservation of living or non-living exhaustible natural resources.]<sup>24</sup>

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22. The listing of the subparagraphs would depend on the coverage of paragraph 2. Several delegations expressed concerns about the scope of the envisaged carve-out. Questions were raised in particular with regard to the reference to the provision of “particular” services and the construction and expansion of particular facilities (which could be assimilated to investment operations). Three delegations considered paragraph 3 to be redundant given the content of paragraph 2.

23. One delegation suggested the use of the term “employee” rather than “worker”.

24. Several delegations shared the view that issues relating to the environment and protection of human, animal or plant life or health would be more appropriately treated in the context of a more general article of the MAI. A number of delegations also remained concerned about the wide coverage of subparagraph (a). Many delegations were willing to consider replacing paragraph 4 with the following interpretative note proposed by one delegation [DAFFE/MAI/ST/RD(97)1]:

“Nothing in paragraphs 1(b) and 1(c) shall be construed to prevent any Contracting Party from adopting or maintaining measures necessary to secure compliance with environmental [laws and regulations] that are not otherwise inconsistent with the provisions of this Agreement and that are necessary for the conservation of living or non-living exhaustible natural resources, or [that are necessary to protect human, animal or plant life or health.]”

One other delegation considered that the phrase “that are not inconsistent with the provisions of this Agreement” did not fit well in this proposal.

5.<sup>25</sup> (a) Paragraphs 1(a), 1(b), and 1(c) do not apply to qualification requirements for goods or services with respect to export promotion [and foreign aid ] programmes<sup>26</sup>;

[(b) paragraphs 1(b), 1(c), 1(f), and 1(h) do not apply to procurement by a Contracting Party or a state enterprise<sup>27</sup>; and]<sup>28</sup>

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25. One delegation proposed the following interpretative note as an alternative for paragraph 5:

“Nothing in paragraph 1(a), (b) and (c) shall be construed to prevent any Contracting Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of a Contracting Party or of a non-Contracting Party, on compliance with qualification requirements for goods or services with respect to export promotion [and foreign aid] programmes.

Nothing in subparagraph 1(b) [or 1(c)] shall be construed to prevent any Contracting Party from applying the WTO rule of Origin of Goods to the qualification for procurement by the Contracting Party or its state enterprise.”

26. Many delegations continued to support the inclusion of foreign aid programmes in paragraph (a). Other delegations felt that this reference should be deleted. Several delegations failed to see the link between export promotion (or export credits for that matter) or foreign aid programmes and investment operations. One delegation noted that it is very difficult in many instances to distinguish between export promotion and foreign aid programmes. One delegation observed that export promotion covers a much narrower field than export credits or subsidies. It also noted that foreign aid programmes are not always given directly to states, but sometimes proceed through private entities such as Non-Governmental Organisations (NGOs). Domestic sourcing requirements imposed on such organisations might result in preferential treatment to domestically-controlled firms over foreign-controlled ones. One delegation felt that these special situations would be better addressed in an interpretative note.

27. The term “state enterprise” would need to be defined.

28. Delegations confirmed that the performance requirements article should not interfere with the Contracting Party’s rights and obligations under the WTO Government Procurement Agreement. Several delegations questioned however whether the proposed carve-out afforded by subparagraph 5(b) would achieve that result or might be construed instead to be in conflict with commitments under the WTO Agreement on Government Procurement. Other delegations believe that the proposed language does not achieve this objective and consider it necessary given that the WTO disciplines do not apply in the same way to all countries and government entities and that it would be desirable to preserve the delicate balance reached under the WTO Government Procurement Agreement. It was generally recognised that the matter needs to be examined further to ensure that consistency is achieved between the MAI and the WTO provisions. There was greater support, nevertheless, for the inclusion of 1(b) and 1 (c) than for the inclusion of 1(f) and 1(h).

Two delegations proposed consideration of the following interpretative note to clarify the relationship with the WTO Government Procurement Agreement:

“The Performance Requirements article does not affect any obligations that may exist under the WTO Government Procurement Agreement.”

This suggestion was not discussed.

(c) paragraphs 1(b) and 1(c) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas;<sup>29</sup>

[(d) paragraph 1(i) does not apply to requirements imposed by a Contracting Party as a part of privatisation operations.]<sup>30</sup>

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29. One delegation suggested that this paragraph could be the subject of an interpretative note.

30. Several delegations supported the inclusion of paragraph 5(d) to avoid any potential conflicts between paragraph 1(i) and privatisation operations. The problems could also be solved if paragraph 1(i) was deleted. Two delegations opposed the inclusion of this provision.

## *PRIVATISATION*<sup>31</sup>

### **Paragraph 1 (Application of National Treatment/MFN)**

1. The obligation on a Contracting Party to accord National Treatment and MFN treatment as defined in Paragraph XX (NT/MFN) applies to:
  - a) all kinds of privatisation, irrespective of the method of privatisation (whether by public offering, direct sale or other method)<sup>32</sup>; and
  - b) subsequent transactions involving a privatised asset<sup>33</sup>.

### **[Paragraph 1a (voucher schemes)]**

2. Notwithstanding paragraph 1, arrangements under which natural persons of a Contracting Party are granted exclusive rights as regards the initial privatisation are acceptable as a method of privatisation under this Agreement provided that the exclusive right as regards the initial privatisation is limited to natural persons only and provided that there is no restriction on subsequent sales]<sup>34</sup>.

### **Paragraph 2 (Right to privatise)**

3. Nothing in this Agreement shall be construed as imposing an obligation on a Contracting Party to privatise<sup>35</sup>.

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31. Two delegations reserve their position on all privatisation obligations. One delegation considers that dedicated MAI provisions on privatisation are unnecessary, since the basic NT/MFN obligations would apply to privatisation, and thus reserves its position on all such provisions.

32. One delegation reserves its position.

33. Four delegations reserve their position on sub-paragraph (b) as it goes beyond the scope of a privatisation article. Delegations agree that this provision does not apply to the behaviour of private entities (corporate practices). It is understood that the meaning of that provision is to prevent Contracting Parties from imposing rules on such secondary transactions which are inconsistent with NT/MFN. In the light of this, some delegations proposed to include language along the lines of “(b) measures governing subsequent ...”. It is felt useful that legal experts examine the ultimate formulation of this provision on the basis of this understanding.

34. One delegation is ready to withdraw this proposal if reference to vouchers schemes under paragraph 3, alternative 2, letter d, is deleted.

35. Two delegations propose to insert “prejudice Contracting Parties’ rules governing the system of property ownership or” between the words “shall” and “be”.

### Paragraph 3 (Special share arrangements)<sup>36</sup>

#### *Alternative 1*

4. Contracting Parties acknowledge that special share arrangements are compatible with Paragraph 1, unless they explicitly or intentionally favour investors or investments of a Contracting Party or discriminate against investors or investments of another Contracting Party on the grounds of their nationality or permanent residency.<sup>37</sup>

#### *Alternative 2<sup>38</sup>*

5. [Special share holding arrangements including, *inter alia*, a) the retention of “golden shares” by Contracting Parties, b) stable shareholder groups assembled by a Contracting Party, c) management/employee buyouts, and d) voucher schemes for members of the public, hold strong potential for discrimination against foreign investors and are, in fact, inconsistent with National Treatment and MFN treatment obligations in many instances.]

#### *Alternative 3<sup>39</sup>*

#### *Footnote to paragraph 1*

6. Special share arrangements which explicitly discriminate (i.e. *de jure*) against foreign investors and their investment are contrary to obligations on National Treatment/MFN treatment. It is also understood that when, in their application, special share arrangements lead to *de facto* discrimination they are also contrary to National Treatment/MFN treatment.

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36. Work on paragraph 3 was based on alternative 1, which was supported by a large number of delegations. However, one delegation maintained its preference for alternative 2. It cannot accept the phrase “are compatible with paragraph 1” (Alternative 1, paragraph 3) on the grounds of the implication that such special rules, regardless of how they are exercised, necessarily conform with NT/MFN. The use, application or exercise of such relevant measures under the tirets (alternative 1) may in fact not conform with NT/MFN. One delegation shares this view and together with one more delegation proposes the deletion of paragraph 3.

37. One delegation would still prefer the inclusion of an illustrative list, such as contained in Room Document 11 or in DAFPE/MAI(97)1.

38. Proposal of one delegation, together with the following note: “As with other measures contrary to obligations on National Treatment and MFN treatment, use of special share arrangements should be subject to listing as reservations. Recognising that Contracting Parties may privatise assets in the future, Contracting Parties will be permitted to take precautionary reservations for the use of special share arrangements in those sectors where Contracting Parties generally have state-owned enterprises or government restrictions.” This proposal was not discussed by the delegations.

39. This language is put forward as a compromise. A number of delegations supporting alternative 1 state their willingness to accept this compromise pending the outcome of the discussions in the Negotiating Group on how to handle *de facto* discrimination in the context of lodging country specific reservations. One delegation suggested the insertion, after “investments” on the second line, of the words “on the ground of nationality”; of the word “intentionally” after “arrangements” on the third line; and, “on the ground of nationality”, after “discrimination” on the same line. This delegation also suggested the inclusion of an illustrative list.

*[Alternative 4<sup>40</sup>*

7. Nothing in this Agreement shall prevent Contracting Parties from using special methods of privatisation or having special rules as regards ownership, management or control of privatised assets such as:

- a Contracting Party or any person designated by the Contracting Party maintaining special shareholder rights to influence or veto any decision concerning such assets after the privatisation,
- arrangements under which managers or other employees of an enterprise are granted special treatment as regards the acquisition of shares of that enterprise,
- arrangements under which shareholders are required to maintain their share in the capital of the enterprise during a certain period of time,
- arrangements under which locals of a certain community are granted special treatment as regards the acquisition of this community's property,

unless they explicitly or intentionally favour investors or investments of a Contracting Party or discriminate against investors or investments of another Contracting Party on the grounds of their nationality or permanent residency.]

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40. This proposal by one delegation has not been discussed by the delegations.

**Paragraph 4 (Transparency)**

8. For the purposes of this Article, each Contracting Party<sup>41</sup> or its designated agency shall promptly publish or otherwise make publicly available the essential features and procedures for participation in each prospective privatisation<sup>42</sup>.\*

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41. One delegation proposed that the obligation should apply to all levels of government.

42. It is understood that the obligation of this article will be met wherever the information on a privatisation operation is made available.

## Footnote

### *\*Alternative 1*

This footnote confirms the application of the Transparency Article YY. Specifically, the obligations to accord National Treatment and MFN Treatment prohibit discrimination against investors and investments of other Contracting Parties with respect to all arrangements for making public information about a privatisation operation. [A Contracting Party that gives to its investors and investments access to information concerning the fact of privatisation must at the same time give that access to investors and investments of other Contracting Parties. Any information relevant to the privatisation available to investors of a Contracting Party must be available to investors and investments of other Contracting Parties, e.g. a Contracting Party must provide financial statements on request. A Contracting Party would violate National Treatment if, in order to benefit its investors and their investments, it refrains from making information publicly available, either about the fact of privatisation or about the enterprise or entity to be privatised.]<sup>43</sup> [It is understood that in the case of small scale privatisations, there can be some variance in the methods used to make information available.]

### *\*Alternative 2<sup>44</sup>*

This footnote confirms the application of the Transparency Article YY. Specifically, the obligations to accord National Treatment and MFN Treatment prohibit discrimination against investors and investments of other Contracting Parties with respect to all arrangements for making public information about a privatisation operation. [A Contracting Party that gives to its domestic investors access to information concerning the fact of privatisation, the enterprise or entity to be privatised, and details of the privatisation process must at the same time give that access to foreign investors. A Contracting Party would violate National Treatment if it refrains from making information publicly available, either about the fact of privatisation, the entity to be privatised, or the details of the privatisation. It is understood that in the case of small scale privatisations, there can be some variance in the methods used to make information available.]

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43. Two delegations support the insertion of the sentences in the bracket. The other delegations see no need for such text.
44. This alternative was proposed by one delegation following bilateral consultations. It was not discussed by the experts.

**Paragraph 5 (Definition)**

9. “Privatisation means the sale or other disposal by a Contracting Party, in part or in full, of its equity interest in, or the assets of, a [state] enterprise or government entity.”\*\*<sup>45</sup>

\*\* This article is not meant to cover transactions between different levels or entities of the same Contracting Party.

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45. Two delegations reserved their position on the definition. Several delegations considered that the terms “state enterprise” and “government entity” would have to be defined in the Agreement. In addition, the inclusion of “state” in the definition would make necessary additional text in order to ensure that in case of sales by several tranches all transactions would be covered even if the company ceased to be a state enterprise.

*MONOPOLIES/STATE ENTERPRISES/CONCESSIONS*<sup>46</sup>

**A. Article on Monopolies**<sup>47</sup>

- [1. Nothing in this Agreement shall be construed to prevent a Contracting Party from maintaining, designating or eliminating a monopoly.]<sup>48</sup>
2. Each Contracting Party shall [endeavour to]<sup>49</sup> accord non-discriminatory treatment when designating a monopoly.

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46. This note assembles proposals made at various stages on the subject of monopolies/State enterprises/concessions, namely those contained in the Consolidated Text [DAFFE/MAI(97)1] of 13 January 1997 and in DAFPE/MAI/ST(97)6 of 21 March 1997.

47. One delegation reserved its position on all obligations on monopolies that go beyond those of the GATT and GATS.

48. The right of governments to designate or maintain a monopoly is not disputed. Some delegations considered, nevertheless, that this right should be made explicit for the sake of clarity and certainty. This right could also be the subject of a footnote or interpretative note on this paragraph. Other delegations continued, however, to favour the deletion of the paragraph, notably on the grounds that it could give rise to questions regarding the obligations on expropriation and compensation and possible market access provisions in the MAI.

49. Delegations remain divided on the desirability of removing these brackets. The issue is linked to the inclusion of provisions in the Agreement on concessions. Some delegations are willing to drop the contents of the brackets if there would be satisfactory provisions in the MAI on concessions.

**Paragraph 3, chapeau:**

3. Each Contracting Party shall ensure that any privately-owned monopoly that its national [or subnational] governments [maintain]<sup>50</sup> or designate and any public monopoly that its national [or subnational] governments maintain or designate:

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50. One delegation has difficulties with the inclusion of the term “maintains” since this could create disciplines with respect to existing contracts between the government and such privately-owned monopolies and have general ramifications on the rights of existing shareholders. Another delegation is of the view that this problem could be increased by the coverage of sub-national entities. Other delegations consider it essential that monopolies designated by sub-national authorities should be covered by the disciplines. They recognised that the reference to national and sub-national governments might not be necessary in light of the solution found for the general treatment of sub-national entities under the MAI.

**Subparagraph a)**<sup>51</sup>

- a) acts in a manner that is not inconsistent with the Contracting Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Contracting Party has delegated to it in connection with the monopoly good or service;

**Subparagraph b)**

- b) provides non-discriminatory treatment to investments of investors of another Contracting Party in its sale of the monopoly good or service [in the relevant market];

**Subparagraph c)**

- c) provides non-discriminatory treatment to investments of investors of another Contracting Party in its purchase of the monopoly good or service [in the relevant market]. This paragraph does not apply to procurement by governmental agencies of goods or services for government purposes and not with a view to commercial resale or with a view to use in the production of goods or services for commercial sale;<sup>52</sup>

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51. There is broad agreement that the issue of delegated regulatory powers of monopolies should be the subject of an anti-circumvention clause. Many delegations felt that the matter could be addressed in the context of a general anti-circumvention clause for the MAI.

52. One delegation raised the issue of the treatment of sub-contracting of monopoly activities. Another delegation remains concerned about the broad scope of carve-out implied by the second sentence and favours its deletion, noting that much, if not all, of the core business of government is not involved in producing goods and services for commercial sale.

## **Subparagraph d)**

### *Alternative 1*<sup>53</sup>

[d) does not use its monopoly position, in a non-monopolised market in its territory, to engage, either directly or indirectly, including through its dealing with its parent company, its subsidiary or other enterprise with common ownership, in anti-competitive practices that [might]<sup>54</sup> adversely affect an investment by an investor of another Contracting Party, including through the discriminatory provision of the monopoly good or service, cross-subsidisation or predatory conduct]<sup>55</sup>;

### *Alternative 2*<sup>56</sup>

[d) which competes, either directly or indirectly, or through an affiliated company, in an economic activity outside the scope of its monopoly rights does not abuse its monopoly position in that activity to act in a manner inconsistent with the obligations of this Agreement;]

### *Alternative 3: zero option*<sup>57</sup>

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53. Four delegations supported this alternative on the basis of it being broader and more precise than alternative 2.
  54. One delegation felt that the inclusion of this term would be necessary to cover damages incurred by foreign investors in the pre-establishment phase.
  55. One delegation could agree to the deletion of the phrase “in particular through the abusive use of prices” on the understanding that this practice was covered by the terms “predatory conduct”. Another delegation considered that the term “abusive use of prices” has a broader coverage than the concept of anti-competitive practices.
  56. This proposal, based on Article VIII of the GATS, was supported by several delegations. These delegations considered that this provision would be useful in dealing with the activities of monopolies outside the scope of their monopoly rights, without getting too deeply into competition policy. One delegation wondered what abuses of monopoly positions would be “inconsistent” with the obligations of the MAI.
  57. Some delegations considered that alternatives 1 and 2 involve too great an intrusion into competition policy and supported their deletion. Two delegations supported alternative 2 as a fallback in view of its more limited implications for competition policy. One delegation supported alternative 3 on the grounds that abuses of dominant positions should be dealt with under competition policy.

**[Subparagraph e)]<sup>58</sup>**

- e) Except to comply with any terms of its designation that are not inconsistent with subparagraph (b) (c) or (d), acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale.

Nothing in Article A shall be construed to prevent a monopoly from charging different prices in different geographic markets, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions in those markets.

Article A, paragraph 3 (e) differences in pricing between classes of customers, between affiliated and non-affiliated firms, and cross-subsidisation are not in themselves inconsistent with this provision; rather, they are subject to this subparagraph when they are used as instruments of anti-competitive behaviour by the monopoly firm].

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58. This is a proposal by two delegations. Many delegates questioned, however, the feasibility and desirability of requiring monopolies to act in accordance with “commercial considerations”. One delegation provided a number of explanations in favour of the inclusion of subparagraph e):

Sub-paragraph (e) would present the advantage of increasing transparency: non-commercial considerations must be both non-discriminatory [as indicated in (b), (c) and (d)] and must be clearly stated in terms of its designation. (Note, however, that if a government wants to continue to pursue social and other non-economic objectives, it can still do so through the designation.) Sub-paragraph (e) would also clarify that outside the terms of a monopoly’s designation, a monopoly should act in accordance with commercial considerations just like any other enterprise (i.e. that it not use its monopoly power to influence the market). This is, in the view of this delegation, particularly important given the potential power of monopolies over markets in the context of accession. Finally, the proposed language in the two notes would make it clear that charging different prices to different customers, for example, might be justified on the basis of commercial considerations. Consideration could be given to a definition of “commercial considerations” along the lines of accepted wording in GATT Article XVII. Many delegations questioned, however, the feasibility and desirability of requiring monopolies to act in accordance with “commercial considerations”.

**[Paragraph 4**<sup>59</sup>

4. Each Contracting Party is allowed to lodge reservation to the Agreement concerning an activity previously monopolised at the moment of the elimination of the monopoly.]

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59. Proposal by one delegation. Some delegations were opposed to the principle of lodging reservations after the entry into force of the MAI. One delegation proposed that such reservations be made the subject of scrutiny by the “Parties Group” to ensure that they do not negatively affect the level of liberalisation under the MAI.

### **Paragraph 5**

5. Each Contracting Party shall notify<sup>60</sup> to the Parties Group any existing designated monopoly within [60]<sup>61</sup> days after the entry into force of the Agreement, any newly designated monopoly within [60] days after its creation, and any elimination of a designated monopoly [and related new reservation to the Agreement]<sup>62</sup> within [60] days after its elimination.

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60. One delegation suggested that the concept of prior notification found in Article VIII.4 of the GATS should also be examined and that the Parties Group should have a role in examining all notifications resulting from this article.

61. It was suggested that the period of three months, which is the notification period for monopolies under paragraph VIII.4 of the GATS, could be an alternative. However, it was felt that the length of the notification period could usefully be decided in light of other notification requirements that might arise under the Agreement.

62. The issue of lodging new reservations for monopolies is linked to the question dealt with under paragraph 4 of this Article.

## Paragraph 6

[6. Neither investors of another Contracting Party nor their investments may have recourse to investor-state arbitration for any matter arising out of paragraph 3 (b), (c), (d) or (e) of this Article.]<sup>63</sup>

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63. Some delegations explained that paragraph 3(a), unlike paragraphs 3(b), 3(c), 3(d) and 3(e), would discipline circumventions of a Contracting Party's obligations -- including non-discriminatory treatment. The same dispute settlement alternatives should therefore be made available as those for when a Contracting Party's own actions are challenged. Three delegations also pointed to the novelty and complexity of the proposed provisions on monopolies, which argue in favour of limiting the dispute settlement procedures to state-to-state disputes apart from paragraph 3(a). They also believed that most governments do not even allow private "anti-trust" actions in their own courts by their citizens; thus it would be a leap to suggest that there be privately-initiated scrutiny of monopolies' anticompetitive actions pursuant to 3(d). These delegations considered that state-to-state dispute settlement should provide a useful procedural compromise. Many delegations considered, however, this paragraph should be deleted as they believe that Contracting Parties should only sign up to commitments that they would be prepared to defend against individual investors.

**[B. Article on [state enterprises][entities with which a Government has a specific relationship]**

**Option 1: zero option<sup>64</sup>**

**Option 2**

**i) Draft text for an anti-circumvention clause<sup>65</sup>**

*Alternative 1*

1. Each Contracting Party shall ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Contracting Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Contracting Party has delegated to it.

*Alternative 2*

1. Each Contracting Party shall ensure that any entity to which a national or subnational government authority has delegated a regulatory, administrative or other governmental authority acts in a manner that is not inconsistent with the Contracting Party's obligations under this Agreement wherever such entity exercises that authority.

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64. Several delegations supported this option. Some of them were willing, however, to consider the coverage of state enterprises in the context of an anti-circumvention clause which would cover all enterprises, *i.e.* both state and private enterprises to which authority has been granted by any level of government. One delegation could not support any of the options presented and will submit an alternative option.

65. Both alternatives address the issue of anti-circumvention of the MAI obligations through the delegation of regulatory, administrative and other governmental authority to entities not covered by the anti-circumvention clause for monopolies found in paragraph 3, subparagraph (a) of the Article on monopolies (see Section A above). The first alternative is limited to state enterprises wherever they exercise regulatory, administrative or other governmental authority. The second alternative covers all entities wherever they exercise regulatory, administrative or other governmental authority without distinction of being privately or publicly owned. Some delegations considered this alternative goes too far in the domain of corporate practices. Other delegations were of the view, however, that it would be both possible and appropriate, in order to ensure the purpose of the anti-circumvention clause, to cover all entities as far as they have been given governmental authority. As with the anti-circumvention clause for monopolies, many delegations argued, however, that these matters could be addressed in the context of a general anti-circumvention clause for the MAI.

ii) **Additional provisions**

*a. No additional provisions.*

*b. Proposal by Canada and the United States<sup>66</sup>*

[2. Each Contracting Party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale, in the Contracting Party's territory, of its goods or services to investors of another Contracting Party and their investments.

3. Neither investors of another Contracting Party nor their investments may have recourse to investor-state arbitration for any matter arising out of paragraph 2 of this Article.<sup>67</sup> ]

*c. Proposal by France<sup>68</sup>*

[2. Each Contracting Party shall ensure that any entity that a national or a subnational government owns or controls through ownership interest or which a national or subnational government's authority has a relationship with through any specific legislative, regulatory or administrative act, any contracts, or any practices related to some of its activities acts in a manner that is not inconsistent with the Contracting Party's obligations under this Agreement.]

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66. Two delegations believe that the need for such provisions is predicated by the fact that state enterprises are different from private enterprises because of the links with governmental authorities. One delegation pointed out that when an enterprise is under civil law and the state is a shareholder, the state does not have any special privilege in comparison with any other shareholder. Therefore the government does not have any special authority to influence the behaviour of enterprises.

67. Some delegations pointed out that this paragraph would be needed whichever alternative was chosen. One delegation would like this paragraph to apply to both paragraphs 1 and 2.

68. This proposal was offered as a compromise by one delegation, which favours, nevertheless, option (a) (*i.e.* no additional provisions) as its first option.

## **C. Definitions Related to Articles on Monopolies [and State Enterprises]**

### **Paragraph 1**

1. “Delegation” means a legislative grant, and a government order, directive or other act transferring to the monopoly or state enterprise, or authorising the exercise by the monopoly or state enterprise of, governmental authority.

### **Paragraph 2**

#### *Alternative 1*

[2. “Designate” means to establish, designate or authorise, or to expand the scope of a monopoly to cover an additional good or service, after the date of entry into force of this agreement.]

#### *Alternative 2*

2. "Designate a monopoly" means to establish or authorise a monopoly, or to expand the scope of a monopoly.

### **Paragraph 3**

#### *Alternative 1*

3. [“Monopoly” means an entity, including a consortium or government agency, that in any relevant market in the territory of a Contracting Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant.]<sup>69</sup>

#### *Alternative 2*

3. "Monopoly" means any person or group of persons, public or private, whatever its legal nature, designated by a national [or local] government authority as the sole supplier or buyer of a commercial good or service in a market in the territory or part of the territory of a Contracting party, [for an indefinite period of time.]<sup>70</sup> [possible carve out for IPR]

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69. One delegation proposes the exclusion of concessions with exclusive rights from the definition of monopolies [see DAF/MAI/EG3/RD(96)14].

70. While it is recognised that the MAI would need to draw a line between monopolies and concessions, serious doubts were expressed about the use of an “indefinite period of time” as possible criterion for the demarcation.

*Alternative 3*<sup>71</sup>

[3. “Monopoly” means any person [or entity], public or private, including a consortium or government agency, designated by a national [or local] government authority as the sole supplier or buyer of a good or service in a relevant [economic] market in the territory of a Contracting Party, but does not include a person or entity that has been granted an exclusive intellectual property right solely by reason of such grant.]

**Paragraph 4**

*Alternative 1*

[4. “Relevant market” means the geographic and commercial market for a good or service.]

*Alternative 2*

[4. “Relevant [economic] market” means the geographic and product market for a good or service in the territory of the Contracting Party.]

**Paragraph 5**

5. “Non-discriminatory treatment” means the better of national treatment and most favoured nation treatment, as set out in the relevant provisions of this Agreement.<sup>72</sup>

**Paragraph 6**

[6. “State enterprises” means, [subject to Annex ....., ] an enterprise owned, or controlled through ownership interest, by a Contracting Party.]<sup>73</sup>

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71. One delegation considers alternative 3 to be acceptable provided that Article A, paragraph 1 is accepted. In that case, it would perhaps be better to replace in paragraph 1 the term “designating” by the term “establishing”.

72. Three delegations questioned the need for this definition.

73. A number of delegations questioned the need for a definition of state enterprises.

**[D. Article on Concessions<sup>74 75</sup>**

**Transparency**

1. Any concession shall abide by the following principles:
  - a) the conditions of participation in awarding procedures shall be published in due time so as to enable the candidates to engage and, in so far as it remains compatible with an efficient operation of the mechanism of attribution of concessions, to accomplish the formalities required by qualifying evaluations ;<sup>76</sup>
  - b) the procedures of awarding are written, at least, in one of the official languages of the OECD. If, for an awarding procedure, any entity authorises propositions to be submitted in more than one language, one of them shall be one of the two official languages of the OECD.<sup>77</sup>
2. This article applies to the delegations covering an amount equal or superior to XX (amount to be decided).
3. This article does not apply to delegations which confer a monopoly as defined in A to the beneficiary of this delegation.

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74. Proposal by one delegation. It was recognised that there is a link between the issue of concessions and monopolies [paragraph 2 of the article on monopolies (see Section A)]. Those delegations favouring the inclusion of provisions on concessions into the MAI are ready to drop their opposition to the inclusion of “best endeavour” in paragraph 2 if the suggested provision on concessions are included in the MAI. Many delegations question the need for this article. Some delegations felt that further work was required to clarify the issues.

75. One delegation provided a background note on natural resources and concessions in the context of the MAI [DAFFE/MAI/ST/RD(97)2].

76. A number of delegations consider that the issue of transparency is particularly important for concessions and that special provisions should be developed on this topic under the MAI. Other delegations wondered why similar provisions have not been proposed for monopolies.

77. Spain proposed to replace the reference to the official languages of the OECD by the official languages of the United Nations. Italy and Japan questioned the need to impose a language requirement for the publication of awarding procedures.

### **Definition**<sup>78</sup>

1. A concession is any delegation, direct or indirect, which entails a transferring of operation of activities, carried out by a governmental authority, national or subnational, or any public or paragraph-public authority.
2. The delegation shall be realised either by any laws, regulations, administrative rulings, or established policies, or by any private or public contract. The aim of the delegation is to entrust to a distinct legal body with the operation of networks or infrastructures, or the exploitation of natural resources, and if needed with the construction of all or part of networks or infrastructures.
3. [*if necessary*: The legal act of delegation includes the modes of payment to the investor. These modes of payment can consist of any price paid by consumers, any royalty, tax licence, subsidy or contribution from the delegatory authority, or any combination of these modes.]

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78. This proposal needs further consideration. One delegation favours the deletion of the reference to natural resources in the proposed text. With respect to mineral resources, including hydrocarbons resources, this delegation also proposes to replace paragraph (vii) of the current definition of “investment” in the MAI, with the following language:

- Rights conferred pursuant to law or contract regarding property ownership over mineral resources, including hydrocarbon resources;
- rights conferred pursuant to any law, regulation, administrative or contractual provision or instrument issued thereunder by which the competent authorities of a Contracting Party entitle an investor or a group of investors, on its own behalf and at its own risk, the exclusive right to prospect for or explore for or produce minerals, including hydrocarbons, in a geographical area.”

## *INVESTMENT INCENTIVES*<sup>79</sup>

### **Provisions**

#### *Alternative 1*

Several delegations believe that no additional text is necessary. They consider that the current draft articles in the MAI are sufficient to cover investment incentives at this time.

#### *Alternative 2*

Many delegations, however, would favour specific provisions on incentives in the MAI although they hold different views as to their nature and scope. Some proposed a built-in agenda for future work. Discussion of possible provisions focused on the following draft article which is regarded as a compromise text by those who would still prefer more far-reaching disciplines.

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79. This text reproduces the contents of DAF/FE/MAI/ST(97)3.

## Article <sup>80</sup>

1. The Contracting Parties confirm that Article XX (on NT and MFN) and Article XX (Transparency) applies to [the granting of]<sup>81</sup> investment incentives.<sup>82</sup>
2. [The Contracting Parties acknowledge that[, in certain circumstances,] even if applied on a non-discriminatory basis, investment incentives may have distorting effects on the flow of capital and investment decisions.<sup>83</sup> [Any Contracting Party which considers that its investors or their investments are adversely affected by an investment incentive adopted by another Contracting Party and having a distorting effect, may request consultations with that Contracting Party.] [The former Contracting Party may also bring the incentive before the Parties Group for its consideration.]]<sup>84,85</sup>

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80. The Group proceeded on the basis of report of EG2 with respect to the treatment of tax incentives [DAFFE/MAI/EG2(97)1].

81. Some delegations favoured the deletion of “the granting of”.

82. While it is agreed that investment incentives should be subject to NT and MFN obligations, there are different views on the desirability of making this explicit. Consequently, some delegations consider this paragraph to be unnecessary. One delegation maintains a pre-scrutiny reservation on the text of this draft article. The dispute settlement mechanism would, in particular, apply to this article. One delegation raises the possibility of taking reservations with regard to NT.

83. Several delegations point out that not all investment incentives are bad -- the problem arises in drawing a line between good and bad incentives. It is suggested that the distorting effects of investment incentives on investment decisions and capital flows should be balanced against their possible benefits in achieving legitimate social objectives. Other delegations note that these concerns were addressed in paragraph 3 of the draft article.

84. Some Delegations remain unconvinced by the need for special consultation procedures for non-discriminatory investment incentives as defined in paragraph 2, although final judgement would need to await the decisions taken on the coverage of the MAI. The presumption is that, as with other agreements, consultations would be the first procedural step of the dispute settlement mechanism of the MAI. It should be possible to revisit the adequacy of the provisions on dispute settlement and the role of the Parties Group when their configuration is better known. One delegation questions whether the dispute settlement mechanism of the MAI could apply to investment distorting investment incentives or to investment incentives granted illegally. These questions would also deserve further attention. Some delegations questioned the role of the parties group in any consultation process.

85. One delegation suggested the first sentence of paragraph 3 could be added to paragraph 4, and the rest of paragraph 3 deleted.

3.<sup>86</sup> [In order to further avoid and minimise such distorting effects and to avoid undue competition between Contracting Parties in order to attract or retain investments, the Contracting Parties [shall] enter into negotiations with a view to establishing additional MAI disciplines [within three years] after the signature of this Agreement.<sup>87</sup> These negotiations shall recognise the role of investment incentives with regard to the aims of policies, such as regional, structural, social, environmental or R&D policies of the Contracting Parties, and other work of a similar nature undertaken in other fora. These negotiations shall, in particular, address the issues of positive discrimination,<sup>88</sup> [transparency<sup>89</sup>], standstill and rollback<sup>90</sup>.]

4. [For the purpose of this Article, an "investment incentive" means:

The grant of a specific advantage arising from public expenditure [a financial contribution] in connection with the establishment, acquisition, expansion, management, operation or conduct of an investment of a Contracting Party or a non-Contracting Party in its territory].

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86. The form and placement of this text would have to be decided.

87. Some delegations feel that the MAI should include additional disciplines on investment incentives from the time it enters into force. Another delegation cautions that additional disciplines could have far-reaching implications for other multilateral agreements as well as for national tax laws and regulatory regimes.

88. Some delegations express the view that positive discrimination should be prohibited and this should be placed in the text.

89. One delegation considers the transparency Article of the MAI would already be sufficient.

90. Some delegations consider it very difficult to recommend future negotiations without agreement on their nature and scope.

*CORPORATE PRACTICES*<sup>91</sup>

*TECHNOLOGY R&D*<sup>92</sup>

*INTELLECTUAL PROPERTY*<sup>93</sup>

*PUBLIC DEBT*<sup>94</sup>

The [rescheduling] of the debts [loans] of a Contracting Party or its appropriate institutions [owed to another Contracting Party or its appropriate institutions and the related [rescheduling] of its debts [loans] owed to [private] investors] will not be subject to [the provisions of this Agreement].

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91. The Chairman concluded [DAFFE/MAI(97)2] that there is full agreement that government-imposed discriminatory practices would be covered by the MAI. In view of the views expressed by a clear majority of delegations, the MAI should not contain disciplines on non-government imposed discriminatory corporate practices. However, Contracting Parties to the MAI should follow future developments in this area and could take up the matter again if the need arises.
92. See Commentary.
93. See Commentary.
94. There was general agreement that public debt rescheduling should fall outside the MAI disciplines. This present draft provision was submitted by one delegation and other delegations and considered by financial experts in informal consultations on 14-15 April, and not yet discussed by the Negotiating Group. Some delegations continued to reserve their position on the inclusion of public debt within the scope of MAI disciplines.

## *NOT LOWERING STANDARDS*<sup>95</sup>

### **[Alternative 1**

The Parties recognise that it is inappropriate to encourage investment by lowering [domestic] health, safety or environmental [standards] [measures]<sup>96</sup> or relaxing [domestic] [core]<sup>97</sup> labour standards.<sup>98</sup> Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such [standards] [measures] as an encouragement for the establishment, acquisition, expansion or retention of an investment in its territory of an investment or an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

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95. Four delegations oppose any provision on these matters. One delegation could accept a provision covering health, safety, and the environment, but not labour. One other delegation could accept only a non-binding provision.
96. If “measure” is preferred, then the word “lowering” should be replaced by “relaxing”. In either case, the term selected should be defined. For reference purposes, delegations mentioned the definition of “measure” in NAFTA or to be found in the Transparency Article of the MAI [DAFFE/MAI(97)1, page 11] and the definition of “standard” in NAFTA and in the WTO Agreement on Technical Barriers to Trade.
97. Delegations noted that no universally accepted definitions existed for “core” or “domestic” standards. Most delegations preferred “domestic” which was recognised to be wider in scope.
98. A major difference of view as between Alternative 1 and Alternative 2 concerns the first sentence of Alternative 1. This sentence is part of a difference of approach as to whether the provision should refer to respect for universal standards or only to the relaxation of domestic standards. Views differ on whether this sentence is useful or necessary.

## Alternative 2

A Contracting Party [shall] [should]<sup>99</sup> not waive or otherwise derogate from, or offer to waive or otherwise derogate from [domestic] health, safety or environmental [measures] [standards] or [domestic] [core] labour standards as an encouragement for the establishment, acquisition, expansion or retention of an investment or an investor.]

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99. If “should” were preferred, it might be desirable to add the last sentence of Alternative 1. Those preferring “should” argued that use of the word “shall” would prevent the authorities offering necessary waivers under domestic law, for example, to help resolve a specific case of damage to the environment and might prevent resolution of particular cases through consultations and persuasion. They also expressed concern that “shall” might expose the authorities to dispute settlement challenge. One delegation expressed concern over the use of the broader phrase “domestic labour” standards with recourse to dispute settlement in that it could create disputes under the MAI over changes in programmes relating to minimum wages or retirement qualifications; this delegation questioned if this was what was intended by this provision. Those preferring “shall” argued that the purpose of this Article is to prohibit a waiver or derogation only if used as an encouragement to an investment.

## **IV. INVESTMENT PROTECTION**

### **1. GENERAL TREATMENT<sup>1</sup>**

1.1. Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security. In no case shall a Contracting Party accord treatment less favourable than that required by international law.

1.2. A Contracting Party shall not impair by [unreasonable or discriminatory] [unreasonable and discriminatory] measures the operation, management, maintenance, use, enjoyment or disposal of investments in its territory of investors of another Contracting Party.

### **2. EXPROPRIATION AND COMPENSATION**

2.1. A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as "expropriation") except:

- a) for a purpose which is in the public interest,
- b) on a non-discriminatory basis,
- c) in accordance with due process of law, and
- d) accompanied by payment of prompt, adequate and effective compensation in accordance with Articles 2.2 to 2.5 below.

2.2. Compensation shall be paid without delay.

2.3. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.

2.4. Compensation shall be fully realisable and freely transferable.

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1. One delegation proposed to delete Article 1.2 and revise Article 1.1 as follows:

“Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security. Such treatment shall also apply to the operation, management, maintenance, use, enjoyment or disposal of such investments. In no such case shall a Contracting Party accord treatment less favourable than that required by international law.”

2.5. [Compensation shall include interest at a commercial rate established on a market basis for the currency of payment from the date of expropriation until the date of actual payment.]<sup>2</sup>

2.6. Due process of law includes, in particular, the right of an investor of a Contracting Party which claims to be affected by expropriation by another Contracting Party to prompt review of its case, including the valuation of its investment and the payment of compensation in accordance with the provisions of this article, by a judicial authority or another competent and independent authority of the latter Contracting Party.

### 3. *PROTECTION FROM STRIFE*

3.1. An investor of a Contracting Party which has suffered losses relating to its investment in the territory of another Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third State, whichever is most favourable to the investor.

3.2. Notwithstanding Article 3.1, an investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the territory of another Contracting Party resulting from

- (a) requisitioning of its investment or part thereof by the latter's forces or authorities, or
- (b) destruction of its investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

shall be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Articles 2.1 to 2.5.

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2. DG3 identified four options for calculating compensation which are set out in the commentary. The Negotiating Group Chairman noted [DAFFE/MAI(97)2] that a large majority were in favour of having no explicit provision in the MAI addressing this issue. However, to respond to the concerns of some countries that this approach might lead to uncertainty, the MAI could contain an interpretative note providing that in the case of undue delay in the payment of compensation on the part of a Contracting Party, any exchange rate loss arising from this delay should be borne by the host country.

#### **4. TRANSFERS**

4.1. Each Contracting Party shall ensure that all payments relating to an investment in its territory of an investor of another Contracting Party may be freely transferred into and out of its territory without delay. Such transfers shall include, in particular, though not exclusively :

- a) the initial capital and additional amounts to maintain or increase an investment ;
- b) returns;<sup>3</sup>
- c) payments made under a contract including a loan agreement;
- d) proceeds from the sale or liquidation of all or any part of an investment ;
- e) payments of compensation under Articles 2 and 3;
- f) payments arising out of the settlement of a dispute;
- g) earnings and other remuneration of personnel engaged from abroad in connection with an investment.

4.2. Each Contracting Party shall further ensure that such transfers may be made in a freely convertible<sup>4</sup> currency. [Freely convertible currency means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.] or [Freely convertible currency means a currency which is, in fact, widely used to make payments for international transactions and is widely traded in the principal exchange markets].

4.3. Each Contracting Party shall also further ensure that such transfers may be made at the market rate of exchange prevailing on the date of transfer.

[4.4. In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate for conversion of currencies into Special Drawing Rights.]

4.5. Notwithstanding Article 4.1(b) above, a Contracting Party may restrict the transfer of a return in kind in circumstances where the Contracting Party is permitted under the GATT 1994 to restrict or prohibit the exportation or the sale for export of the product constituting the return in kind. Nevertheless, a Contracting Party shall ensure that transfers of returns in kind may be effected as authorised or specified in an investment agreement, investment authorisation, or other written agreement between the Contracting Party and an investor or investment of another Contracting Party.<sup>5</sup>

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3. As defined in the Article on definitions.

4. In Article 4.2, the agreement of one delegation on the deletion of “usable” and acceptance of the word “convertible” supposes agreement on its definition and on Article 4.6.

5. One delegation has difficulties with the obligations referred to in the second sentence.

[4.6. Notwithstanding Articles 4.1 to 4.5, a Contracting Party may require reports of transfers of currency or other monetary instruments and ensure the satisfaction of judgements in civil, administrative and criminal proceedings through the equitable, non-discriminatory, and good faith application of its laws and regulations. Such requirements shall not unreasonably impair or derogate from the free and undelayed transfer ensured by this Agreement.]

or

[4.6. Notwithstanding Articles 4.1 to 4.5, a Contracting Party may prevent a transfer through the equitable, non-discriminatory and good faith application of measures to protect the rights of creditors, relating to or ensuring compliance with laws and regulations on the issuing, trading and dealing in securities, futures and derivatives, reports or records of transfers, or in connection with criminal offences and orders or judgements in administrative and adjudicatory proceedings, provided that such measures and their application shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement.]<sup>6</sup>

## **5. SUBROGATION**

If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance<sup>7</sup> given in respect of an investment of an investor in the territory of another Contracting Party, the latter Contracting Party shall recognise the assignment of any right or claim of such investor to the former Contracting Party or its designated agency and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right and claim to the same extent as its predecessor in title.<sup>8</sup>

## **6. PROTECTING EXISTING INVESTMENTS**

[This Agreement shall apply to investments made prior to its entry into force for the Contracting Parties concerned [consistent with the legislation of the Contracting Party in whose territory it was made] as well as investments made thereafter. This Agreement shall not apply to claims arising out of events which occurred, or to claims which had been settled, prior to its entry into force.] or [This Agreement shall apply to investments existing at the time of entry into force as well as to those established or acquired thereafter.]

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6. Text recommended by most EG5 delegations.

7. Two delegations cannot agree to deletion of the words "non-commercial risks" at this stage.

8. One delegation has difficulties with the obligations in this paragraph.

## V. DISPUTE SETTLEMENT<sup>1</sup>

### *STATE-STATE PROCEDURES*

#### A. *GENERAL PROVISIONS*

1. The rules and procedures set out in Articles A-C shall apply to the avoidance of conflicts and the resolution of disputes between Contracting Parties regarding the interpretation or application of the Agreement unless the disputing parties agree to apply other rules or procedures. However, the disputing parties may not depart from any obligation regarding notification of the Parties Group and the right of Parties to present views, under Article B, paragraphs 1.a and 4.c, and Article C, paragraphs 1.a, 4, and 6.e.
2. Contracting Parties and other participants in proceedings shall protect any confidential or proprietary information which may be revealed in the course of proceedings under Articles B and C and which is designated as such by the Party providing the information. Contracting Parties and other participants in the proceedings may not reveal such information without written authorisation from the Party which provided it.
3. [EC or Contracting Party REIO text being developed for possible inclusion]

#### B. *CONSULTATION, CONCILIATION AND MEDIATION*

##### 1. **Consultations**

- a. One or more Contracting Parties may request any other Contracting Party to enter into consultations regarding any dispute between them about the interpretation or application of the Agreement. The request shall be submitted in writing and shall provide sufficient information to understand the basis for the request, including identification of any actions at issue. The requested Party shall enter into consultations within thirty days of receipt of the request. The requesting Contracting Party shall provide the Parties Group with a copy of the request for consultation, at the time it submits the request to the other Contracting Party.
- b. A Contracting Party may not initiate arbitration against another Contracting Party under Article C of this Agreement unless the former Contracting Party has requested consultation and has afforded that other Contracting Party a consultation period of no less than 60 days after the date of the receipt of the request.

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1. Note: It is understood that for a number of delegations further work is needed on dispute settlement. In particular, different options remain in the field of multilateral consultations and scope of dispute settlement. The present text has been prepared by the Chairman of the Expert Group on Dispute Settlement on the basis of the discussions in the group. It needs to be discussed by the Negotiating Group.

## **2. Multilateral Consultations**

- a. In the event that consultations under paragraph 1 of this Article have failed to resolve the dispute within 60 days after the date of receipt of the request for those consultations, the Contracting Parties in dispute may, by agreement, request the Parties Group to consider the matter.
- b. Such request shall be submitted in writing and shall give the reason for it, including identification of any actions at issue, and shall indicate the legal basis for the complaint.
- c. The Parties Group may make recommendations to the Contracting Parties in dispute. The Parties Group shall conclude its deliberations within 60 days after the date of receipt of the request

## **3. Mediation or Conciliation**

If the Parties are unable to reach a mutually satisfactory resolution of a matter through consultations, they may have recourse to good offices or to mediation or conciliation under such rules and procedures as they may agree.

## **4. Confidentiality of Proceedings, Notification of Results**

- a. Proceedings involving consultations, mediation or conciliation shall be confidential.
- b. No Contracting Party may, in any binding legal proceedings, invoke or rely upon any statement made or position taken by another Contracting Party in consultations, conciliation or mediation proceedings initiated under this Agreement, with the exception of factual representations.
- c. The Parties to consultations, mediation, or conciliation under this Agreement shall inform the Parties Group of any mutually agreed solution.

## *C. ARBITRATION*

### **1. Scope and Initiation of Proceedings**

- a. Any dispute between Contracting Parties as to whether one of them has acted in contravention of this Agreement shall, at the request of any Contracting Party that is a party to the dispute and has complied with the consultations requirements of Article B, be submitted to an arbitral tribunal for decision. A request, identifying the matters in dispute, shall be delivered to the other Party through diplomatic channels, unless that Contracting Party has designated another channel for receipt of notification and so notified the Depository, and a copy of the request shall be delivered to the Parties Group.

- b. A Contracting Party may not initiate proceedings under this Article for a dispute which its investor has submitted, or consented to submit, to arbitration under Article D, unless the other Contracting Party has failed to abide by and comply with the award rendered in that dispute or those proceedings have terminated without resolution by an arbitral tribunal of the investor's claim.
- c. If a dispute arises between Contracting Parties as to whether one of them has acted in contravention of a substantially similar obligation of that Contracting Party under this Agreement and another agreement to which both are party, the complaining Contracting Party may submit it for decision under the agreement of its choice. In doing so, it waives its right to submit the matter for decision under the agreement not chosen.

## **2. Formation of the Tribunal**

- a. Within 30 days after receipt of a request for arbitration, the Parties to the dispute shall appoint by agreement three members of the tribunal and designate one of them as Chairman. Except for compelling reasons, the members shall be persons proposed by the Secretary General ICSID. At the option of either party or, where there is more than one Party on the same side of the dispute, either side, two additional members may be appointed, one by each party or side.
- b. If the necessary appointments have not been made within the periods specified in subparagraph a, above, either Party or side to the dispute may, in the absence of any other agreement, invite the Secretary General of the Centre for the Settlement of Investment Disputes to make the necessary appointments. The Secretary-General shall do so, to the extent feasible, in consultations with the Parties to the dispute and within thirty days after receipt of the request.
- c. Parties and the Secretary-General should consider appointment to the tribunal of members of the roster maintained pursuant to subparagraph f, below. If arbitration of a dispute is considered by either Contracting Party to the dispute or the Secretary-General to require special expertise on the tribunal, rather than solely through expert advice under the rules governing the arbitration, the appointment of individuals possessing expertise not found on the roster should be considered.
- d. Members of a particular arbitral tribunal shall be independent and impartial.
- e. Any vacancies which may arise in a tribunal shall be filled by the procedure by which the original appointment had been made.
- f. The Parties Group shall maintain a roster of highly qualified individuals willing and able to serve on arbitral tribunals under this Agreement. Each Contracting Party may nominate up to four persons who shall be included as members of the roster. Nominations are valid for five year terms. At the end of a term, the Contracting Party which nominated a member may renew the nomination or nominate a new member of the roster. A member shall withdraw from the roster if no longer willing or able to serve and the Contracting Party which nominated that member may nominate another member for a full term.

### **3. Consolidation**

- a. Contracting Parties in dispute with the same Contracting Party over the same matter should act together as far as practicable for purposes of dispute settlement under this Article. Where more than one Contracting Party requests the submission to an arbitral tribunal of a dispute with the same Contracting Party relating to the same question, a single arbitral tribunal should be established to consider such disputes whenever feasible.
- b. To the extent feasible, if more than one arbitral tribunal is formed, the same persons shall be appointed as members of both and the timetables of the proceedings shall be harmonised.

### **4. Third Parties**

Any Contracting Party wishing to do so shall be given an opportunity to present its views orally or in writing to the arbitral tribunal on the issues of a legal nature in dispute. Such a Contracting Party shall be given access to the documents of the proceedings, other than confidential or proprietary information designated under Article A, paragraph 2. The tribunal shall establish the deadlines for such submissions in light of the schedule of the proceedings and shall notify such deadlines, at least thirty days in advance thereof, to the Parties Group.

### **5. Scientific and Technical Expertise**

- a. On request of a disputing Contracting Party or, unless the disputing Contracting Parties disapprove, on its own initiative, the tribunal may request a written report of a scientific or technical review board on any factual issue concerning environmental, health, safety or other scientific or technical matters raised by a disputing Contracting Party in a proceeding, subject to such terms and conditions as such Parties may agree.
- b. The board shall be selected by the tribunal from among highly qualified, independent experts in the scientific or technical matters, after consultations with the disputing Parties and the scientific or technical bodies identified by those Parties.
- c. The disputing Contracting Parties shall be provided:
  - i. advance notice of, and an opportunity to provide comments to the tribunal on, the proposed factual issues to be referred to the board; and
  - ii. a copy of the board's report and an opportunity to provide comments on the report to the tribunal.
- d. The tribunal shall take the board's report and any comments by the disputing Contracting Parties on the report into account in the preparation of its award.

## **6. Proceedings and Awards**

- a. The tribunal shall decide disputes in accordance with this Agreement, interpreted and applied in accordance with the applicable rules of international law.
- b. The tribunal may, at the request of a Party, recommend provisional measures which either Party should take to avoid serious prejudice to the other pending its final award.
- c. The tribunal, in its award, shall set out its findings of law and fact, together with the reasons therefore, and may, at the request of a Party, award the following forms of relief:
  - i. a declaration that an action of a Party is in contravention of its obligations under this Agreement;
  - ii. a recommendation that a Party bring its actions into conformity with its obligations under the Agreement;
  - iii. pecuniary compensation for any loss or damage to the requesting Party's investor or its investment; and
  - iv. any other form of relief to which the Party against whom the award is made consents, including restitution in kind to an investor.
- d. The tribunal shall draft its award consistently with the requirement of confidentiality set out in Article A, paragraph 2. It shall issue its award in provisional form to the Parties to the dispute on a confidential basis, as a general rule within 180 days after the date of formation of the tribunal. The parties to the dispute may, within 30 days thereafter, submit written comment upon any portion of it. The tribunal shall consider such submissions, may solicit additional written comments of the parties, and shall issue its final award within 15 days after closure of the comment period.
- e. The tribunal shall promptly transmit a copy of its final award to the Parties Group, which shall make it publicly available.
- f. Tribunal awards shall be final and binding between the parties to the dispute, subject to paragraph 7 below.
- g. Each party shall pay the cost of its representation in the proceedings. The costs of the tribunal shall be paid for equally by the Parties unless the tribunal directs that they be shared differently. Fees and expenses payable to tribunal members will be subject to schedules established by the Parties Group and in force at the time of the constitution of the tribunal.

**7. Nullification**

- a. Either party to the dispute may request the annulment of an award, in whole or in part, on one or more of the following grounds, that:
  - i. the Tribunal was not properly constituted;
  - ii. the Tribunal has manifestly exceeded its powers;
  - iii. there was corruption on the part of a member of the Tribunal or on the part of a person providing decisive expertise or evidence;
  - iv. there has been a serious departure from a fundamental rule of procedure; or
  - v. the award has failed to state the reasons on which it is based.
- b. The request shall be submitted for decision by a tribunal which shall be constituted and operate under the rules applicable to a dispute submitted under paragraph 1 of this article .
- c. Such a request must be submitted within 120 days after the date on which the award was rendered or after the discovery of the facts relevant to nullification on the grounds of corruption, whichever is later and, in any event, within five years after the date on which the award was rendered.
- d. The tribunal may nullify the award in whole or in part. If the award is nullified, the fact of nullification shall be communicated to the Parties Group. In such a case, the dispute may be submitted for decision to a new tribunal constituted under this Article or to any other available forum, notwithstanding the Contracting Parties waiver under paragraph 1.c. of this article.

**8. Default Rules**

The PCA Optional Rules for Arbitrating Disputes between Two States shall apply to supplement provisions of these Articles. The Parties Group may adopt supplemental provisions to ensure the smooth functioning of these rules, in particular to clarify the inter-relationship between these rules and the PCA Optional Rules.

## 9. Response to Non-compliance<sup>2</sup>

- a. If a Contracting Party fails within a reasonable period of time to comply with its obligations as determined in the award, such Contracting Party shall, at the request of any Contracting Party in whose favour the award was rendered, enter into consultations with a view to reaching a mutually acceptable solution. If no satisfactory solution has been agreed within thirty days after the date of the request for consultations, any Contracting Party in whose favour the award was rendered, shall notify the other Contracting Party and the Parties Group if it intends to [take measures in response][suspend the application to the other Contracting Party of obligations under this agreement].
- b. The effect of any such [responsive measures][suspension] must be proportionate to the effect of the other Party's non-compliance.<sup>3</sup> Such measures may not include suspension of the application of Article[s \_ (General Treatment) and] \_ (Expropriation) [and should not include denial of other protections to established investment].
- c. At the request of any Party to the award upon conclusion of the thirty day period for consultation, the Parties Group shall consider the matter. [Until twenty days after the receipt by the Parties Group Secretariat of the request, responsive measures shall not be taken.] The Parties Group may:
  - i. make recommendations, by consensus minus the disputing Contracting Parties;
  - ii. suspend the non-complying Party's right to participate in decisions of the Parties Group, by consensus minus the non-complying Contracting Party; and
  - iii. [by consensus minus the Contracting Party which had intended to take responsive measures, decide that some or all of the responsive measures shall not be taken. The Contracting Party shall comply with that decision.]
- d. Any dispute concerning the alleged failure of a Contracting Party to comply with its obligations as determined in an award or the lawfulness of any responsive measures shall, at the request of any Contracting Party that is party to the dispute, be submitted for decision to the arbitral tribunal which rendered the award or, if the original tribunal is unavailable, to a single member or three member arbitral tribunal designated by the Secretary-General. The request shall be submitted in the same fashion, and the proceedings carried out in accordance with the same rules as are applicable to a request made under paragraph 1.a of this Article, with such modifications as the tribunal deems appropriate, and the final award shall be issued no later than 60 days after the date of the request, in case of the original tribunal, or after the date of its formation, in the case of a new tribunal. [No responsive measures may be taken from the time of submission of a dispute unless authorized by the tribunal as an interim measure or found lawful.]

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2. Note: The text in paragraph 9 has been circulated separately [DAFFE/MAI/DS(97)5]. The Commentary indicates the general state of development on this issue in informal consultations at expert level.

3. As variant of this approach, one delegation suggests utilising language based on the WTO agreements:  
“The level of the suspension of benefits ... shall be equivalent to the level of the nullification or impairment of benefits, which the aggrieved Party reasonably expected to accrue to it, resulting from the non-compliance.”

## ***INVESTOR-STATE PROCEDURES***

### ***D. DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY***

#### **1. Scope and Standing**

- a. This article applies to disputes between a Contracting Party and an investor of another Contracting Party concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or its investment.
- b. An investor of another Contracting Party may also submit to arbitration under this article any investment dispute concerning any obligation which the Contracting Party has entered into with regard to a specific investment of the investor through:
  - i. An investment authorisation granted by its competent authorities specifically to the investor or investment,
  - ii. a written agreement granting rights with respect to [categories of subject matters]  
  
on which the investor has relied in establishing acquiring, or significantly expanding an investment.

#### **2. Means of Settlement**

Such a dispute should, if possible, be settled by negotiation or consultation. If it is not so settled, the investor may choose to submit it for resolution:

- a. to any competent courts or administrative tribunals of the Contracting Party to the dispute;
- b. in accordance with any dispute settlement procedure agreed upon prior to the dispute arising;  
or
- c. by arbitration in accordance with this Article under:
  - i. the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention"), if the ICSID Convention is available;
  - ii. the Additional Facility Rules of the Centre for Settlement of Investment Disputes ("ICSID Additional Facility"), if the ICSID Additional Facility is available;
  - iii. the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"); or
  - iv. the Rules of Arbitration of the International Chamber of Commerce ("ICC").

### **3. Contracting Party Consent**

- a. Subject only to paragraph 3.b, each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.
- b. A Contracting Party may, by notifying the Depositary upon deposit of its instrument of ratification or accession, provide that its consent given under paragraph 3.a only applies on the condition that the investor and the investment waive in writing the right to initiate any other dispute settlement procedure with respect to the same dispute and withdraw from any such procedure in progress before its conclusion. A Contracting Party may, at any time, reduce the scope of that limitation by notifying the Depositary.

### **4. Time periods and notification**

An investor may submit a dispute for resolution pursuant to paragraph 2.c of this Article after sixty days following the date on which notice of intent to do so was received by the Contracting Party in dispute, but no later than five years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute. Notice of intent, a copy of which shall be delivered to the Parties Group, shall specify:

- a. the name and address of the disputing investor;
- b. the name and address, if any, of the investment;
- c. the provisions of this Agreement alleged to have been breached and any other relevant provisions;
- d. the issues and the factual basis for the claim; and
- e. the relief sought, including the approximate amount of any damages claimed.

### **5. Written Agreement of the Parties**

The consent given by a Contracting Party in subparagraph 3.a, together with either the written submission of the dispute to resolution by the investor pursuant to subparagraph 2.c or the investor's advance written consent to such submission, shall constitute the written consent and the written agreement of the parties to the dispute to its submission for settlement for the purposes of Chapter II of the ICSID Convention, the ICSID Additional Facility Rules, Article 1 of the UNCITRAL Arbitration Rules, the Rules of Arbitration of the ICC, and Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Neither party may withdraw its consent unilaterally, except as provided in paragraph 9.e of this Article.

### **6. [EC or Contracting Party REIO text being developed, for possible inclusion]**

## **7. Appointments to Arbitral Tribunals**

- a. Unless the parties to the dispute otherwise agree, the tribunal shall comprise three arbitrators, one appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
- b. If a tribunal has not been constituted within 90 days after the date that a claim is submitted to arbitration, the arbitrator or arbitrators not yet appointed shall, on the request of either disputing party, be appointed by the appointing authority. For arbitration under paragraph 2, subparagraphs c.i, c.ii and c.iii, and paragraph 9, the appointing authority shall be the Secretary-General of ICSID. For arbitration under paragraph 2, subparagraph c.iv, the appointing authority shall be the International Court of Arbitration of the ICC.
- c. The parties to a dispute submitted to arbitration under this article and the appointing authority should consider the appointment of:
  - i. members of the roster maintained by the Contracting Parties pursuant to Article C, paragraph 2.f; and
  - ii. individuals possessing expertise not found on the roster, if arbitration of a dispute requires special expertise on the Tribunal, rather than solely through expert advice under the rules governing the arbitration.
- d. The appointing authority shall, as far as possible, carry out its function in consultation with the parties to the dispute.
- e. In order to facilitate the appointment of arbitrators of the parties' nationality on three member ICSID tribunals under Article 39 of the ICSID Convention and Article 7 of Schedule C of the ICSID Additional Facility Rules, and without prejudice to each party's right independently to select an individual for appointment as arbitrator or to object to an arbitrator on grounds other than nationality:
  - i. the disputing Contracting Party agrees to the appointment of each individual member of a tribunal under paragraph 2.c.i or ii of this Article; and
  - ii. a disputing investor may initiate or continue a proceeding under paragraph 2.c.i or ii only on condition that the investor agrees in writing to the appointment of each individual member of the tribunal.

## **8. Standing of the Investment**

An enterprise constituted or organised under the law of a Contracting Party but which, from the time of the events giving rise to the dispute until its submission for resolution under paragraph 2.c, was an investment of an investor of another Contracting Party, shall, for purposes of disputes concerning that investment, be considered "an investor of another Contracting Party" under this article and "a national of another Contracting State" for purposes of Article 25(2)(b) of the ICSID Convention regarding a dispute not submitted for resolution by the investor which owns or controls it.

## 9. Consolidation of Multiple Proceedings

- a. In the event that two or more disputes submitted to arbitration with a Contracting Party under paragraph 2.c have a question of law or fact in common, the Contracting Party may submit to a separate arbitral tribunal, established under this paragraph, a request for the consolidated consideration of all or part of them. The request shall stipulate:
  - i. the names and addresses of the parties to the proceedings sought to be consolidated,
  - ii. the scope of the consolidation sought, and
  - iii. the grounds for the request.

The Contracting Party shall deliver the request to each investor party to the proceedings sought to be consolidated and a copy of the request to the Parties Group.

- b. The request for consolidated consideration shall be submitted to arbitration under the rules chosen by agreement of the investor parties from the list contained in paragraph 2.c. The investor parties shall act as one side for the purpose of the formation of the tribunal.
- c. If the investor parties have not agreed upon a means of arbitration and the nomination of an arbitrator within 30 days after the date of receipt of the request for consolidated consideration by the last investor to receive it:
  - i. the request shall be submitted to arbitration in accordance with this article under the available arbitration system listed in paragraph 2.c. of this article to which the greatest number of investor parties had submitted claims or, if there is an even distribution, under the UNCITRAL rules, and
  - ii. the appointing authority shall appoint the entire arbitral tribunal, in accordance with paragraph 7.
- d. The arbitral tribunal shall assume jurisdiction over all or part of the disputes and the other arbitral proceedings shall be stayed or adjourned, as appropriate if, after considering the views of the parties, it decides that to do so would best serve the interest of fair and efficient resolution of the disputes and that the disputes fall within the scope of this paragraph.
- e. An investor may withdraw the dispute from arbitration under this paragraph 9 and such dispute may not be resubmitted to arbitration under paragraph 2.c. If it does so no later than 15 days after receipt of notice of consolidation, its earlier submission of the dispute to that arbitration shall be without prejudice to the investor's recourse to dispute settlement other than under paragraph 2.c.
- f. At the request of the Contracting Party, the arbitral tribunal established under this paragraph may decide, on the same basis and with the same effect as under paragraph 9.d, whether to assume jurisdiction over all or part of a dispute falling within the scope of paragraph 9.a which is submitted to arbitration after the initiation of consolidation proceedings.

**10. Preliminary Objections**

- a. Any objection by the Contracting Party to the jurisdiction of the tribunal or to the admissibility of the application shall be raised no later than in the statement of defence.
- b. Upon receipt of such an objection, the tribunal may suspend the proceedings on the merits.
- c. After hearing the parties, the tribunal should give its decision, by which it shall either uphold the objection or reject it, within 60 days after the date on which the objection was made.

**11. Indemnification**

A Contracting Party shall not assert as a defence, counter-claim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an indemnity, guarantee or insurance contract.

**12. Third Party Rights**

The arbitral tribunal shall notify the Parties Group of its formation. Taking into account the views of the parties, it may give to any Contracting Party requesting it an opportunity to submit written views on the legal issues in dispute, provided that the proceedings are not unduly delayed thereby. Any Contracting Party requesting it within thirty days after receipt by the Parties Group of the notification of the tribunal's formation shall be given an opportunity to present its views on issues in dispute in which it has a legal interest.

**13. Scientific and Technical Expertise**

- a. On request of a disputing party or, unless the disputing parties disapprove, on its own initiative, the tribunal may request a written report of a scientific or technical review board on any factual issue concerning environmental, health, safety or other scientific or technical matters raised by a disputing party in a proceeding, subject to such terms and conditions as such parties may agree.
- b. The board shall be selected by the tribunal from among highly qualified, independent experts in the scientific or technical matters, after consultations with the disputing parties and the scientific or technical bodies identified by those parties.
- c. The disputing parties shall be provided:
  - i. advance notice of, and an opportunity to provide comments to the tribunal on, the proposed factual issues to be referred to the board; and
  - ii. a copy of the board's report and an opportunity to provide comments on the report to the tribunal.
- d. The tribunal shall take the board's report and any comments by the disputing parties on the report into account in the preparation of its award.

**14. Applicable law**

- a. Issues in dispute under paragraph 1.a. of this article shall be decided in accordance with this Agreement, interpreted and applied in accordance with the applicable rules of international law.
- b. Issues in dispute under paragraph 1.b. of this article shall be decided in accordance with such rules of law as may be agreed by the parties to the dispute. In the absence of such agreement, such issues shall be decided in accordance with the law of the Contracting Party to the dispute (including its rules on the conflict of laws), the law governing the authorisation or agreement and such rules of international law as may be applicable.

**15. Interim measures of relief**

- a. An arbitral tribunal established under this Article may recommend an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective.
- b. The seeking of interim relief not involving the payment of damages, from judicial or administrative tribunals, by a party to a dispute submitted to arbitration under this article, for the preservation of its rights and interests pending resolution of the dispute, is not deemed a submission of the dispute for resolution for purposes of a Contracting Party's limitation of consent under paragraph 3.b, and is permissible in arbitration under any of the provisions of paragraph 2.c.

**16. Final awards**

- a. The arbitral tribunal, in its award shall set out its findings of law and fact, together with the reasons therefor and may, at the request of a party, provide the following forms of relief:
  - i. a declaration that the Contracting Party has failed to comply with its obligations under the this Agreement;
  - ii. pecuniary compensation, which shall include interest from the time the loss or damage was incurred until time of payment;
  - iii. restitution in kind in appropriate cases, provided that the Contracting Party may pay pecuniary compensation in lieu thereof where restitution is not practicable; and
  - iv. with the Agreement of the parties to the dispute, any other form of relief.
- b. In appropriate cases where the loss or damage was incurred by an investment which remains a going concern, the tribunal may direct that the compensation or restitution be made to the investment.
- c. An arbitration award shall be final and binding between the parties to the dispute and shall be carried out without delay by the party against whom it is issued, subject to its post-award rights under the arbitral systems utilised.

- d. The award shall be drafted consistently with the requirements of paragraph 17 and shall be a publicly available document. A copy of the award shall be delivered to the Parties Group by the Secretary-General of ICSID, for an award under the ICSID Convention or the Rules of the ICSID Additional Facility; by the Secretary-General of the ICC International Court of Arbitration, for an award under its rules; and by the tribunal, for an award under the UNCITRAL rules.

**17. Confidential and Proprietary Information**

Parties and other participants in proceedings shall protect any confidential or proprietary information which may be revealed in the course of the proceedings and which is designated as such by the party providing the information. They shall not reveal such information without written authorisation from the party which provided it.

**18. Place of Arbitration and Enforceability**

Any arbitration under this article shall be held in a state that is party to the New York Convention. Claims submitted to arbitration under this article shall be considered to arise out of a commercial relationship or transaction for purposes of Article 1 of that Convention. Each Contracting Party shall provide for the enforcement of the pecuniary obligations imposed by an award rendered pursuant to this Article D.

**19. Tribunal member fees**

Fees and expenses payable to a member of an arbitral tribunal established under these Articles will be subject to schedules established by the Parties Group and in force at the time of the constitution of the tribunal.

**20. Supplemental Provisions**

The Parties Group may adopt supplemental provisions to ensure the smooth functioning of these rules, in particular to clarify the inter-relationship between these rules and the rules of arbitration available under paragraph 2.c of this article D.

## **VI. EXCEPTIONS AND SAFEGUARDS**

### ***GENERAL EXCEPTIONS***

[1. This Article shall not apply to Articles -- (on expropriation and compensation and protection from strife).]

2. Nothing in this Agreement shall be construed:

a. to prevent any Contracting Party from taking any action [which it considers] necessary for the protection of its essential security interests [including those:]

(i) taken in time of war, [or] armed conflict, [or other emergency in international relations];

(ii) relating to the implementation of national policies or international agreements respecting the non-proliferation [inter alia] of nuclear weapons or other nuclear explosive devices;

[(iii) relating to the production of arms and ammunition;]

b. to require any Contracting Party to furnish or allow access to any information the disclosure of which [it considers] [would be] contrary to its essential security interests;

c. to prevent any Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

[3. Nothing in this Agreement shall be construed to prevent any Contracting Party from taking any action necessary for the maintenance of public order.]

[4. Paragraphs 2 and 3 may not be invoked by a Contracting Party as a means to evade its obligations under this Agreement.]

[5. Actions taken pursuant to this Article shall be notified to the Parties Group in accordance with Article-- of this Agreement.]

[6. If a Contracting Party (the "requesting Party") has reason to believe that actions taken by another Contracting Party (the "other Party") are not in conformity with [Article] [paragraphs --], it may request consultations with that other Party. That other Party shall promptly enter into consultations with the requesting Party and shall provide information to the requesting Party regarding the actions taken and the reasons therefor.]

## ***TRANSACTIONS IN PURSUIT OF MONETARY AND EXCHANGE RATE POLICIES<sup>1</sup>***

1. Articles XX<sup>2</sup> and YY<sup>3</sup> do not apply to transactions carried out in pursuit of monetary or exchange rate policies by a central bank or monetary authority of a Contracting Party.
2. Where such transactions do not conform with Articles XX and YY, they shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement.

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1. This text has been developed in EG5. Most EG5 delegations wanted to consider this matter further. (See Commentary)
2. Article on National Treatment and Most Favoured Nation Treatment.
3. Article on Transparency.

## ***TEMPORARY SAFEGUARD***<sup>4</sup>

1. A Contracting Party may adopt or maintain measures inconsistent with<sup>5</sup>
  - its obligations under Article xx (Transfers);
  - Article yy, para 1.1 (National Treatment) for [cross-border capital transactions as it relates to non-resident investors and investments]:
    - (a) in the event of serious balance-of-payments and external financial difficulties or threat thereof;  
or
    - (b) where, in exceptional circumstances, movements of capital cause, or threaten to cause, serious difficulties for the operation of [economic,]<sup>6</sup> monetary or exchange rate policies.
2. Measures referred to in paragraph 1:
  - [(a) shall provide MFN treatment; ]
  - [[ (b) shall with regard to transfers also provide National Treatment, except as provided in paragraph 1]; ]<sup>7</sup>
  - (c) shall be consistent with the Articles of Agreement of the International Monetary Fund;
  - (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
  - (e) shall be temporary and shall be eliminated as soon as conditions permit;
  - (f) shall be promptly notified to the Parties Group and International Monetary Fund, including any changes in such measures.
3.
  - (a) Measures referred to in paragraph 1 and any changes therein shall be subject to review and approval or non-approval within six months of their adoption and every six months thereafter until their elimination.
  - (b) These reviews shall address the compliance of any measure with paragraph 2, in particular the elimination of measures in accordance with paragraph 2 (e).

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4. This text has been developed during the informal consultations on financial matters at expert level held on 14-15 April 1997.

5. It was recognised that the MAI provisions on performance requirements, which are still under discussion, could have implications for the scope of this paragraph.

6. As a compromise, one delegation suggested “macro economic” policies instead of “economic” policies.

7. Delegations are reviewing the need for paragraph 2a) and b) in the light of the scope of the measures permitted by paragraph 1.

4. Measures [referred to in paragraph 1] that are approved by the International Monetary Fund in the exercise of its jurisdiction shall be considered as consistent with this Article.

5. (a) The Parties Group shall, with regard to measures not falling within paragraph 4, [establish review procedures to] consider the implications of the measures adopted under this Article for the obligations of the Contracting Party concerned under this Agreement.

(b) [In such reviews,] the Parties Group shall request an assessment by the Fund of the conditions mentioned under paragraph 1 and [may/shall] request an assessment by the Fund of the consistency of any measures with paragraphs 2 (a) to (e). Any such Fund assessment shall be accepted by the Parties Group.

(c) Unless the Fund determines that the measure is either consistent or inconsistent with the provisions of this Article, the Parties Group may either approve or disapprove the measure. [The Parties Group shall establish procedures for this purpose.]

(d) The Contracting Parties shall seek agreement with the Fund regarding the role of the Fund in the review procedures established under this Article.

6. Measures approved by the Fund in the exercise of its jurisdiction or determined to be consistent with this Article by the Fund or the Parties Group cannot be subject to dispute settlement.<sup>8</sup>

[7. The provisions of this Article cannot be invoked with regard to transfers of the payments of compensation due under Article zz (*expropriation*).]

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8. The dispute settlement provisions would apply if the measure actually applied differed from that approved or determined to be consistent with this Article. The Fund shall be consulted in any such proceedings involving a measure that the Fund approved or found to be consistent with this Article.

## **VII. FINANCIAL SERVICES<sup>1, 2</sup>**

### ***PRUDENTIAL MEASURES***

1. Notwithstanding any other provisions of the Agreement, a Contracting Party shall not be prevented from taking prudential measures with respect to financial services, including measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by an enterprise providing financial services, or to ensure the integrity and stability of its financial system.
2. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement.

### ***RECOGNITION ARRANGEMENTS***

1. A Contracting Party may recognise prudential measures of any other Contracting Party or non-Contracting Party in determining how the Contracting Party's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonisation or otherwise, may be based on an agreement or arrangement with the other Contracting Party or non-Contracting Party concerned or may be accorded autonomously.
2. A Contracting Party that is a party to such an agreement or arrangement referred to in paragraph 1, whether future or existing, shall afford adequate opportunity for other interested Contracting Parties to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Contracting Party accords recognition autonomously, it shall afford adequate opportunity for any other Contracting Party to demonstrate that such circumstances exist.

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1. EG5 agreed that the financial services sector, which is highly regulated for prudential reasons, is unique in some respects and to some extent calls for specific treatment. However, a number of delegations considered that the general provisions of the MAI are sufficient to meet the needs of the financial services sector in a number of potential areas. In some cases, proposals for text on financial services were considered to have more general application in the MAI. It was suggested that such text could be useful in the development of general disciplines in the MAI.
  2. The Negotiating Group discussed financial services issues at its April 1997 meeting. Proposed text below on prudential measures and the definition of financial services were agreed. The Chairman found that there was broad support, but not consensus, for proposed text on recognition arrangements, authorisation procedures, transparency, information transfer and data processing, and membership of self-regulatory bodies. The Negotiating Group invited Drafting Group No. 3 to consider the possibility of developing comparable provisions for the MAI as a whole. Proposed texts on payments and clearing systems/lender of last resort and dispute settlement have not yet been discussed by the Negotiating Group. Placement of financial services texts is to be decided. See also Commentary.

## ***AUTHORISATION PROCEDURES***

1. Each Contracting Party's regulatory authorities shall make available to interested persons their requirements for completing applications relating to an investment in, or the operations of, a financial services enterprise.
2. On the request of an applicant, the regulatory authority shall inform the applicant of the status of its application. If such authority requires additional information from the applicant, it shall notify the applicant without undue delay.
3. A regulatory authority shall make an administrative decision on a completed application of an investor in a financial services enterprise or a financial services enterprise that is an investment of an investor of another Contracting Party within [120][180] days, and shall promptly notify the applicant of the decision. An application shall not be considered complete until [all relevant hearings are held and] all necessary information is received. Where it is not practicable for a decision to be made within [120][180] days, the regulatory authority shall notify the applicant without undue delay and shall endeavour to make the decision within a reasonable time thereafter.

## ***TRANSPARENCY***<sup>3</sup>

Nothing in this Agreement requires a Contracting Party to furnish or allow access to:

- a) information related to the financial affairs and accounts of individual customers of financial services enterprises; or
- b) any confidential or proprietary information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or prejudice legitimate commercial interests of particular enterprises.

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3. The text proposed here by EG5 is additional to the text of the General Transparency provision (see Section III, Treatment of Investors and Investments).

## ***INFORMATION TRANSFER AND DATA PROCESSING***

1. No Contracting Party shall take measures that prevent transfers of information or the processing of financial information outside the territory of a Contracting Party, including transfers of data by electronic means, where such transfer of information or processing of financial information is:
  - a) necessary for the conduct of the ordinary business of a financial services enterprise located in a Contracting Party that is the investment of an investor of another Contracting Party; or
  - b) in connection with the purchase or sale by a financial services enterprise located in a Contracting Party that is the investment of an investor of another Contracting Party of:
    - i) financial data processing services; or
    - ii) financial information, including information provided to or by third parties.
2. Nothing in paragraph 1:
  - a) affects the financial service enterprise's obligation to comply with any record keeping and reporting requirements; or
  - b) restricts the right of a Contracting Party to protect privacy, including the protection of personal data and the confidentiality of individual records and accounts, so long as such right is not used to circumvent the provisions of the Agreement.

## ***MEMBERSHIP OF SELF-REGULATORY BODIES AND ASSOCIATIONS***

When membership or participation in, or access to, any self-regulatory body, securities or futures exchange or market, clearing agency, or any other organisation or association is required by a Contracting Party in order for investments of investors of any other Contracting Party in a financial services enterprise established in the territory of the Contracting Party to provide financial services on an equal basis with financial services enterprises of the Contracting Party, or when the Contracting Party provides directly or indirectly such entities, privileges or advantages in providing financial services, the Contracting Party shall ensure that such entities accord national treatment to such investments.

## ***PAYMENTS AND CLEARING SYSTEMS/LENDER OF LAST RESORT<sup>4</sup>***

1. Under terms and conditions that accord national treatment, each Contracting Party shall grant to financial services enterprises that are investments of investors of any other Contracting Party established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business.
2. The provisions of this Agreement are not intended to confer access to the Contracting Party's lender of last resort facilities.

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4. These matters need further work with a view to finalising text. See also Commentary.

## ***DISPUTE SETTLEMENT***

### ***DETERMINATION OF CERTAIN FINANCIAL SERVICES ISSUES IN INVESTOR TO STATE PROCEEDINGS***

The following text was considered in informal consultations on financial matters<sup>5</sup>:

“1. Where an investor of a Contracting Party submits a claim under Article D (Investor-State Procedures) against another Contracting Party and the disputing Contracting Party invokes Article xx (Prudential Measures) [Article xx (Temporary Safeguards)] [Article xx (Role of Monetary Authorities)], on request of the disputing Contracting Party, the Tribunal shall refer the matter in writing to [the authority responsible for financial services in each of] the Contracting Parties involved in the dispute for a decision. The Tribunal may not proceed pending receipt of a decision or report under this Article.

2. In a referral pursuant to paragraph 1, the [authorities referred to in paragraph 1] [Contracting Parties] shall consult with each other to decide the issue of whether and to what extent Article xx (Prudential Measures) [Article xx (Temporary Safeguards)] [Article xx (Role of Monetary Authorities)], is a valid defence to the claim of the investor. The [authorities] [Contracting Parties] shall transmit a copy of their decision to the Tribunal [and to the Parties Group]. The decision shall be binding on the Tribunal.

3. Where the [authorities] [Contracting Parties] have not decided the issue within 60 days of the receipt of the referral under paragraph 1, the disputing Contracting Party or the Contracting Party of the investor may request the establishment of an arbitral panel under Article xx (Request for a State to State Arbitral Tribunal) to determine whether, and to what extent, Article xx (Prudential Measures) [Article xx (Temporary Safeguards)] [Article xx (Role of Monetary Authorities)], is a valid defence to the claim of the investor. The Tribunal shall be constituted in accordance with [Article xx (see section A above on Composition of Dispute Settlement Panels in Financial Services Disputes)]. Further to Article xx (Final Report), the panel shall transmit its final report to the [authorities] [Contracting Parties] and to the Investor-State Tribunal. The report shall be binding on the Tribunal.

4. Where no request for the establishment of a State to State Tribunal pursuant to paragraph 3 has been made within 10 days of the expiration of the 60-day period referred to in paragraph 3, the Investor-State Tribunal may proceed to decide the matter.”

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5. An alternative text has also been proposed, under which a special panel of financial experts, consisting of 10 or perhaps 15 members, would decide by consensus or consensus minus one whether a Contracting Party, in the case of a prudential measure, temporary safeguard or action taken in pursuit of monetary or exchange rate policy, has acted in accordance with the MAI [DAFFE/MAI/RD(97)25].

## *COMPOSITION OF DISPUTE SETTLEMENT PANELS IN FINANCIAL SERVICES DISPUTES*

The following proposals for text were considered in informal consultations on financial matters:

### **Proposal 1**

“Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial services under dispute.”

### **Proposal 2**

“Selection of the Panel

1. Where a Party claims that a dispute involves financial [services] matters, Articles C.2 and D.7 as applicable (Panel Formation) shall apply, except that:

(a) where the disputing Parties so agree, the tribunal panel shall be composed entirely of panellists meeting the qualifications in paragraph 2; and

(b) where the disputing Parties do not agree that the panel be composed in accordance with (a),

(i) each disputing Party may select panellists meeting the qualifications set out in paragraph 2, or in Article C.2.c or D.7.c as applicable (Qualifications of Panellists), and

(ii) if the Party complained against invokes Article xx (Prudential Measures) [Article xx (Temporary Safeguards)] [Article xx (Role of Monetary Authorities)], the chair of the panel shall meet the qualifications set out in paragraph 2.

2. Financial services experts shall:

(a) have expertise or experience in financial services law or practice, which may include the regulation of financial institutions;

(b) be chosen strictly on the basis of objectivity, reliability and sound judgement; and

(c) be independent of, and not be affiliated with or take instructions from, any Party.”

## ***DEFINITION OF FINANCIAL SERVICES***

Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

### *Insurance and insurance-related services*

- (i) Direct insurance (including co-insurance):
  - (A) life
  - (B) non-life
- (ii) Reinsurance and retrocession;
- (iii) Insurance intermediation, such as brokerage and agency;
- (iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

### *Banking and other financial services (excluding insurance)*

- (v) Acceptance of deposits and other repayable funds from the public;
- (vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;
- (vii) Financial leasing;
- (viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
- (ix) Guarantees and commitments;
- (x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
  - (A) money market instruments (including cheques, bills, certificates of deposits);
  - (B) foreign exchange;
  - (C) derivative products including, but not limited to, futures and options;
  - (D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
  - (E) transferable securities;
  - (F) other negotiable instruments and financial assets, including bullion.

- (xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
- (xii) Money broking;
- (xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
- (xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
- (xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;
- (xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

## VIII. TAXATION<sup>1</sup>

1. Nothing in this Agreement shall apply to taxation measures except as expressly provided in paragraphs 2 to ...<sup>2</sup> below.
2. Article ... (Expropriation) shall apply to taxation measures.

*Interpretative Note: "When considering the issue of whether a taxation measure effects an expropriation, the following elements should be borne in mind:*

- a) The imposition of taxes does not generally constitute expropriation. The introduction of a new taxation measure, taxation by more than one jurisdiction in respect to an investment, or a claim of excessive burden imposed by a taxation measure are not in themselves indicative of an expropriation.*
- b) A taxation measure will not be considered to constitute expropriation where it is generally within the bounds of internationally recognised tax policies and practices. When considering whether a taxation measure satisfies this principle, an analysis should include whether and to what extent taxation measures of a similar type and level are used around the world.*
- c) While expropriation may be constituted even by measures applying generally (eg, to all taxpayers), such a general application is in practice less likely to suggest an expropriation than more specific measures aimed at particular nationalities or individual taxpayers. A taxation measure would not be expropriatory if it was in force and was transparent when the investment was undertaken.*
- d) Taxation measures may constitute an outright expropriation, or while not directly expropriatory they may have the equivalent effect of an expropriation (so-called "creeping expropriation"). Where a taxation measure by itself does not constitute expropriation it would be extremely unlikely to be an element of a creeping expropriation."*

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1. When the Negotiating Group discussed this draft text in April 1997, the Chairman concluded that there was broad support for the provision on expropriation, but further reflection was needed with respect to the text proposed by EG2 on transparency and dispute settlement. A large majority of delegations favoured no carve-in provision for national treatment on taxes, but seven delegations supported inclusion of such a text and one or two others were undecided. Other issues meriting further work include the treatment of taxes in investment incentives, performance requirements and accession.
  2. In addition to the paragraphs on expropriation and transparency which follow, some delegations proposed a carve-in for national treatment. As an example on how national treatment could be carved in, the following wording was put forward:

- 
- “1. [paragraph 1.1 of] Article XX (National Treatment) shall apply to taxation measures, except that no claim that a taxation measure involves a discrimination<sup>1</sup> shall be submitted to dispute settlement by an investor of a Contracting Party pursuant to Article ... (Investor-State Dispute Settlement):
- (a) Unless the investor concerned has first referred to the Competent Tax Authorities of both Contracting Parties involved in the dispute the issue of whether the tax measure involves a discrimination, nor shall the claim be submitted to dispute settlement within the 24 month period immediately following such referral; and
  - (b) If, within 24 months of the date of referral, the Competent Tax Authorities of both Contracting Parties concerned determine that the tax measure does not involve a discrimination.
2. However, nothing in the above-mentioned Article shall:
- (a) prevent the adoption or enforcement by the Contracting Party of any measure which:
    - (i) differentiates treatment between taxpayers who are not in the same circumstances, in particular with respect to residence, or
    - (ii) is aimed at ensuring the equitable or effective imposition, payment or collection of taxes, or
    - (iii) is aimed at preventing the avoidance or evasion of taxes,provided that the measure does not arbitrarily discriminate between investors or investments of Contracting Parties or arbitrarily restrict benefits accorded under the provisions of this Agreement;
  - (b) have the effect of extending fiscal advantages granted by the Party on the basis of any international agreement or arrangement by which it is or may be bound, or its membership of any Regional Economic Integration Organisation.”

3. Article ... (Transparency) shall apply to taxation measures, except that nothing in this Agreement shall require a Contracting Party to furnish or allow access to information covered by tax secrecy or any other provision or administrative practice protecting confidentiality in domestic laws or international agreements, and including information:

- a) contained in or exchanged pursuant to any agreement or arrangement relating to taxation between governments and investors;
- b) pursuant to any agreement with a foreign government concerning the application or interpretation of an international agreement relating to taxation in the case of an investor, including exchange of information between governments;
- c) concerning the identity of an investor or other information which would disclose any trade, business, industrial, commercial or professional secret or trade process;
- d) pertaining to the negotiation of tax treaties or of any other international agreement relating partly or wholly to taxation or the participation by a government in the work of international organisations; or
- e) the disclosure of which would affect the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxation, or any information the disclosure of which would aid or assist in the avoidance or evasion of taxes;  
[or]
- [f] the disclosure of which would be contrary to the general administrative practice of the Contracting Party.]

- 4.<sup>3</sup>
- [a] The provisions of Article [C] (State to State Dispute Settlement) and Article [D] (Investor to State Dispute Settlement), except for paragraph 1b of Article [D], shall apply to disputes under this Article with regard to taxation measures [to the extent that they fall outside the scope of mutual agreement procedures provided for in double taxation agreements.] However, the issue of whether the measure complained of falls within the definition of taxation measures at paragraph [ ] below shall be decided first.
  - b) Article [D] (Investor to State Dispute Settlement) shall apply to disputes under this Article with regard to taxation measures subject to subparagraph a) above and to the following provisions:
    - i) at the request of the Contracting Party to the dispute, any issue referred to in subparagraph (a) above, or any claim that a taxation measure constitutes an expropriation shall be referred to the Competent Tax Authorities of the Contracting Party of the Investor and the Contracting Party to the dispute, and the proceedings regarding those issues under Article [D] shall be suspended; and
    - ii) notwithstanding paragraph 1(b) of Article [C], if the Competent Tax Authorities determine that the measure does fall within the definition of taxation measures at paragraph [ ] below this Article shall apply, and if the Competent Tax Authorities determine that the measure does not involve an expropriation, the proceedings regarding that issue under Article [D] shall be terminated. If the Competent Tax Authorities concerned do not so determine within [9] months, it may be submitted for resolution [by agreement of] [at the request of either of] the Contracting Parties concerned by arbitration pursuant to Article [C], and any award of a Tribunal pursuant to Article [C] shall be binding upon the Tribunal constituted under Article [D].
  - c) Any Tribunal under Article C or D shall, at the request of either Party to the dispute, convene a technical review board of taxation experts, as provided in Articles [C.5] and [D.13], to consider a taxation matter and shall take its views into account.<sup>4</sup>

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3. There is agreement on the need for a provision along the lines of paragraph 4, but the text needs refinement. Several delegations maintained scrutiny reservations on the text of paragraph 4. Clearly additions or alterations to this text would need to be made if taxation measures are carved into MAI disciplines other than Expropriation and Transparency. One delegation reserved its position on MAI dispute settlement procedures.

4. One delegation put forward the following alternative language for this paragraph:  
“Any Tribunal under Article C or D shall, at the request of either Party to the dispute, convene a technical review board of taxation experts, as provided in Articles [C.5] and [D.13], to consider a taxation matter and shall base its findings on the views expressed by such board.”

5. For the purposes of this Article:

- a) A Competent Tax Authority means the minister or ministry responsible for taxes or their authorised representatives.
- b) “Taxation measures” include
  - i) any provision relating to taxes of the law of the Contracting Party or of a political subdivision thereof or a local authority therein, or any administrative practices of the Contracting Party relating to taxes; and
  - ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.

*Alternative A*

[For greater certainty “taxes” for the purposes of this Article shall be taken to include [social security measures/contributions] [and customs duties].

*Alternative B*

Taxes shall be taken for this purpose to include direct taxes, indirect taxes and [social security measures/contributions] [ and customs duties].

*Interpretative Note: For greater certainty, Article XX (most favoured nation treatment) shall not be invoked to avoid the provisions of paragraph ... (dispute settlement) of this Article.<sup>5</sup>*

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5. Several delegations maintain a scrutiny reservation on the text of this Note.

## IX. RESERVATIONS

### *LODGING OF COUNTRY SPECIFIC RESERVATIONS*<sup>1</sup>

A.<sup>2</sup> Article X (National Treatment), Y (Most Favoured Nation Treatment), [Article Z, ..., and Article ...], do not apply to:

- (a) any existing non-conforming measure that is maintained by a Contracting Party as set out in its Schedule to Annex A of the Agreement;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles X (National Treatment), Article Y (Most Favoured Nation), [Article Z, ..., and Article ...].

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1. One delegation proposed an alternative approach to the drafting of this article as follows:

“(1) Subject to the provisions of this Article a Contracting Party may not make country-specific reservations or exceptions to the present Agreement.

(2) Any non-conforming measure existing at the time of signature has to be listed in the Schedule to Annex A of this Agreement in order to allow the application of paragraph 3. Measures adopted at a later stage and non-conforming measures with regard to Article ..... are excluded from listing.

(3) The provisions of this Agreement do not prevent a Contracting Party from applying

- a) any existing non-conforming measure that is maintained by a Contracting Party as set out in its Schedule to Annex A of the Agreement;
- b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with the provisions of this Agreement.

Any act adopted by a Contracting Party in accordance with the provisions of letters b) and c) shall be promptly notified to the Parties Group to be effective.”

2. It was agreed that part A of the draft article was needed as the core provision to “grandfather” existing non-conforming measures and prevent the introduction of more restrictive measures (“standstill”).

[B.<sup>3</sup> Articles X, Y, [Z,..., and Article ...] do not apply to any measure that Contracting Party [adopts] or [maintains] with respect to sectors, subsectors or activities, as set out in Annex ... of the Agreement.]

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3. Different views were expressed with respect to part B of the draft article which would allow new non-conforming measures to be introduced after the Agreement comes into force. One view was that such a provision might undermine the MAI disciplines to which it applied. The opposite view was that part B would make it easier to preserve high standards in the disciplines of the agreement by allowing flexibility to countries in lodging their reservations.

## **X. RELATIONSHIP TO OTHER INTERNATIONAL AGREEMENTS**

### ***OBLIGATIONS UNDER THE ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND***

Nothing in this Agreement shall be regarded as altering the obligations undertaken by a Contracting Party as a Signatory of the Articles of Agreement of the International Monetary Fund.<sup>1</sup>

### ***THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES***

1. The following draft text was developed on associating the Guidelines with the MAI<sup>2</sup>:
  1. The OECD Guidelines for Multinational Enterprises are set out in Annex (xx).
  2. The Contracting Parties at the invitation of the Organisation for Economic Co-operation and Development are encouraged to participate in the Guidelines work of the Organisation in order to promote co-operation on the application, clarification, interpretation and revision of the Guidelines and to facilitate the maintenance of consensus among the Contracting Parties and the members of the Organisation on the matters addressed in the Guidelines.
  3. The Contracting Parties [shall] [are encouraged to] set up National Contact Points for undertaking promotional activities, handling enquiries and for discussions with the parties concerned on all matters related to the Guidelines so that they can contribute to the solution of problems which may arise in this connection. The business community, employee organisations and other interested parties should be informed of the availability of such facilities.
  4. Annexation of the Guidelines shall not bear on the interpretation or application of the Agreement, including for the purpose of dispute settlement; nor change their non-binding character.
2. Several delegations proposed that the following additional text be added to the list of powers given to the Parties Group under Section XI of the Consolidated Text, paragraph 2:
  - (e) consider revision of the Guidelines referred to in Article (xx) of the [Agreement] [Final Act] by adoption of any revised Guidelines developed in the OECD.

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1. The coverage of this article would include, for example, cases where the Fund would request the imposition of capital controls in accordance with the Fund's Articles of Agreement.

2. EG4 delegations differed on whether this text should be placed in the Final Act or the Agreement.

3. Finally, delegations developed draft text that would be placed in an annex<sup>3</sup> immediately before the Guidelines, as follows:

The following Guidelines for Multinational Enterprises are a joint recommendation by participating Governments to multinational enterprises operating in their territory. Their purpose is to help multinational enterprises ensure that their operations are in harmony with the national policies of the countries in which they operate. The Guidelines include recommendations on general policies, disclosure of information, competition, financing, taxation, employment and industrial relations, environmental protection and science and technology. The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises of 21 June 1976 as amended. Background and official clarifications are found in the publication “The OECD Guidelines for Multinational Enterprises”.

[The text of the preamble to the Declaration on International Investment and Multinational Enterprises, Part I of the Declaration, and the full Annex 1 text of the Guidelines would be set out verbatim]

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3. Delegations differed on whether the annex should be placed in the Final Act or the Agreement.

## **XI. IMPLEMENTATION AND OPERATION**

### ***THE PREPARATORY GROUP***

**(Text to be included in the Final Act)**

1. There shall be a Preparatory Group comprised of the Signatories to the Final Act and the Signatories to the Agreement. A Signatory to the Final Act shall cease to be a member if it fails to become a Signatory to the Agreement by the closing date for signature of the Agreement.
2. The Preparatory Group shall:
  - (a) prepare for entry into force of the Agreement and the establishment of the Parties Group;
  - (b) conduct discussions with non-signatories to the Final Act;
  - (c) conduct negotiations with interested non-signatories to the Final Act and make decisions on their eligibility to become a Signatory to the Agreement; and
  - (d) ...<sup>1</sup>
3. The Preparatory Group shall elect a Chair, who shall serve in a personal capacity. Meetings shall be held at intervals to be determined by the Preparatory Group. The Preparatory Group shall establish its rules and procedures.

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1. This and any subsequent subparagraphs would be necessary only if there is business that remains unfinished at the conclusion of the negotiations that the negotiators consider should be completed by the Preparatory Group; the further subparagraphs would itemise the clean-up tasks to be undertaken by the Preparatory Group.

4. The Preparatory Group shall make decisions by consensus. Such decisions may include a decision to adopt a different voting rule for a particular question or category of questions. A Signatory may abstain and express a differing view without barring consensus.

5. [However, except as otherwise provided, where a decision cannot be made by consensus, the decision shall be made by a majority comprising [two thirds] of the Signatories.]<sup>2</sup>

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2. Delegations agree in principle that some decisions should be made by consensus and that it should be possible to make some decisions by majority vote. Some delegations take the view that the previous paragraph provides sufficient flexibility to accommodate this principle. However, many delegations believe that the MAI should state that, failing consensus, decisions may be made by a majority vote. The present paragraph is modelled on Article IX of the Marrakesh Agreement, which provides that the WTO shall continue the GATT practice of decision-making by consensus with the proviso that, except as otherwise provided in the WTO Agreements, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. Delegations hold varying views on whether the MAI should provide that certain decisions, such as Preparatory Group decisions on the eligibility of non-Signatories to the Final Act to sign the Agreement and Parties Group decisions on accession, must be made by consensus. The phrase “except as otherwise provided” contemplates that the MAI might require some decision to be made by consensus or by a majority voting rule different from a standard rule that would be set out in this paragraph. There are a number of possible formulas for a majority voting rule, including consensus minus one (or some larger number), three quarters and two thirds. As an alternative approach, some delegations propose that the Agreement distinguish between substantive and procedural matters through inclusion of a paragraph along the following lines: “Decisions on procedural matters shall be made by a [two thirds] majority of the Signatories. Where there are differing views, the decision as to whether a matter is procedural shall be made by [consensus] [a two thirds majority of the Signatories].”

## ***THE PARTIES GROUP***

1. There shall be a Parties Group comprised of the Contracting Parties.
2. The Parties Group shall facilitate the operation of this Agreement. To this end, it shall:
  - (a) carry out the functions assigned to it under this Agreement;
  - (b) [at the request of a Contracting Party, clarify [by consensus] the interpretation or application of this Agreement]<sup>3</sup>;
  - (c) consider any matter that may affect the operation of this Agreement; and
  - (d) take such other actions as it deems necessary to fulfil its mandate.
3. In carrying out the functions specified in paragraph 2, the Parties Group may consult governmental and non-governmental organisations or persons.
4. The Parties Group shall elect a Chair, who shall serve in a personal capacity. Meetings shall be held at intervals to be determined by the Parties Group. The Parties Group shall establish its rules and procedures.
5. The Parties Group shall make decisions by consensus. Such decisions may include a decision to adopt a different voting rule for a particular question or category of questions. A Contracting Party may abstain and express a differing view without barring consensus.
6. [However, except as otherwise provided, where a decision cannot be reached by consensus, the decision shall be made by a majority comprising [two thirds] of the Contracting Parties.]<sup>4</sup>

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3. Expert Group No. 1 is considering the role of the Parties Group with respect to Dispute Settlement; this sub-paragraph would address clarification of interpretation and application outside the Dispute Settlement context. Delegations have varying views on the question of whether it is appropriate that the Parties Group expressly be given a formal role in clarifying the interpretation or application of the MAI. On a point of detail, one delegation has expressed the view that the Parties Group should have such authority, but only if more than one Contracting Party makes a request.

4. See footnote 5. Further consideration needs to be given to the question of an appropriate rule for voting by the European Communities. In addition, some delegations propose that the Parties Group have authority to make decisions on budgetary matters by a majority (perhaps two thirds) vote of delegations whose assessed contributions represent, in combination, at least two thirds of the total assessed contributions. Consideration also needs to be given to the question of whether failure to pay budgetary contributions should lead to suspension of the right of a Contracting Party to participate in making decisions.

7. The Parties Group shall be assisted by a Secretariat.

8. [Parties Group and Secretariat costs shall be borne by the Contracting Parties as approved and apportioned by the Parties Group.]<sup>5</sup>

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5. Further work is required on paragraphs 7 and 8. Some delegations noted that funding of the MAI will need to be addressed by delegations in advance of ratification and that there may be a need to include a formula in the Agreement. Apart from a paragraph on costs of the Parties Group, there may be a need for a paragraph in the Final Act on payment of the costs of the Preparatory Group.

## **XII. FINAL PROVISIONS**

### ***SIGNATURE***

This Agreement shall be open for signature at the Depositary, until [date], by Signatories of the Final Act<sup>1</sup> and thereafter until entry into force by any State, or separate customs territory which possesses full autonomy on the matters covered by this Agreement, which is willing and able to take on its obligations on terms agreed between it and the Signatories of this Agreement acting through the Preparatory Group.

### ***ACCEPTANCE AND ENTRY INTO FORCE***

#### **In the Final Act**

1. The Signatories to this Final Act agree to submit the Agreement for the consideration of their respective competent authorities with a view to seeking approval of the Agreement in accordance with their procedures.
2. The Signatories to this Final Act agree on the desirability of acceptance of the Agreement by all signatories with a view to its entry into force by [date] or as early as possible thereafter.

#### **In the MAI**

3. Not later than [date], the Signatories to this Agreement will meet to determine the date for entry into force and related matters<sup>2</sup>. Decisions shall be made by [consensus] [a [two-thirds] majority<sup>3</sup> of the Signatories].
4. This Agreement shall enter into force on the date determined by the Signatories to this Agreement in accordance with paragraph 3 for the Signatories that have accepted this Agreement as of that date. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the deposit of its instrument of acceptance.

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1. One delegation is considering a formula for the signature of the MAI by its government and its Regions and Communities.
  2. Delegations agree that there should be an interpretative note as follows: "Related matters" includes such matters as whether there is a critical mass to proceed with entry into force of the Agreement, but not changes to the Agreement.
  3. There are additional possibilities for a majority voting rule, including consensus minus one (or some number greater than one), three quarters and a critical mass of delegations comprising a certain percentage of investment flows.

## ***ACCESSION***

1. This Agreement shall be open for accession by any State, regional economic integration organisation<sup>4</sup>, and any separate customs territory which possesses full autonomy in the conduct of matters covered by this agreement, which is willing and able to undertake its obligations on terms agreed between it and the Contracting Parties acting through the Parties Group.
2. Decisions on accession shall be taken by the Parties Group.<sup>5</sup>
3. Accession shall take effect on the thirtieth day following the deposit of the instruments of accession with the Depositary.

## ***NON-APPLICABILITY***

This Agreement shall not apply as between any Contracting Party and any acceding Party if, at the time of accession, the Contracting Party does not consent to such application.

## ***REVIEW***

The Parties Group may review this Agreement as and when it determines.

## ***AMENDMENT***

Any Contracting Party may propose to the Parties Group an amendment to this Agreement. Any amendment adopted by the Parties Group<sup>6</sup> shall enter into force on the deposit of an instrument of ratification by all of the Contracting Parties, or at such later date as may be specified by the Parties Group at the time of adoption of the amendment.

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4. A definition of this term will need to be agreed.

5. See Consolidated Text, Section XI, Preparatory Group, paragraph 5 and Parties Group, paragraph 6 and footnote 2 in that Section.

6. Delegations agree that when the Parties Group considers a proposed amendment, the Group will need to consider both the extent to which reservations will be allowed and any proposed reservations themselves. Delegations will consider how best to reflect this thought in the Agreement. It might be reflected in an interpretative note or in the provision on lodging country specific reservations.

***WITHDRAWAL***

1. At any time after five years from the date on which this Agreement has entered into force for a Contracting Party, that Contracting Party may give written notice to the Depositary of its withdrawal from this Agreement.
2. Any such withdrawal shall take effect on the expiry of six months from the date of the receipt of the notice by the Depositary, or on such later date as may be specified in the notice of withdrawal. If a Contracting Party withdraws, the Agreement shall remain in force for the remaining Contracting Parties.
3. The provisions of this Agreement shall continue to apply for a period of fifteen years from the date of notification of withdrawal to an investment existing at that date.

***DEPOSITARY***

The [.....] shall be the Depositary of this Agreement.

***STATUS OF ANNEXES***

The Annexes to this Agreement are [an integral part of the Agreement].<sup>7</sup>

***AUTHENTIC TEXTS***

The English and French [and .....] texts of this Agreement are equally authentic.<sup>8</sup>

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7. This provision will need to be revisited when the content of the Annexes is known.

8. The question arises as to whether the MAI text should be in a language or languages additional to English and French. It should be noted that this question has budgetary implications.

## ***DENIAL OF BENEFITS***

a. [Subject to prior notification to and consultation with the Contracting Party of the investor,] a Contracting Party may deny the benefits of the Agreement to an investor [as defined in 1 (ii)] and to its investments if investors of a non-Party own or control the first mentioned investor and that investor has no substantial business activities in the territory of the Contracting Party under whose law it is constituted or organised.

or

b. [Subject to prior notification and consultation in accordance with Articles XXX (Transparency) and XXX (Consultations), a Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of such Contracting Party and to investments of such investors if investors of a non-Contracting Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Contracting Party under whose law it is constituted or organised.]<sup>9</sup>

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9. Possible additional text not discussed by DG3

[A Contracting Party may deny the benefits of the Agreement to an investor of another Contracting Party that is an enterprise of such Contracting Party and to investment of such investor if investors of a non-Contracting Party own or control the enterprise and the denying Contracting Party:

- (a) does not maintain diplomatic relations with the non-Contracting Party; or
- (b) adopts or maintains measures with respect to the non-Contracting Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.]

Some delegations also proposed a wider denial of benefits clause, in particular, to allow denial in cases where the parent was a national or enterprise of a country with which the investment host state lacked diplomatic relations. DG3 agreed that this matter should be considered in the wider context of “general exceptions”.

**PART TWO:**  
**COMMENTARY**

## I. GENERAL PROVISIONS

### *PREAMBLE*<sup>1</sup>

#### *ENVIRONMENT*

Convinced of the need for optimal use of the world's resources in accordance with the objective of sustainable development.

Recognising that investment can result in changes in the scale and structure of economic activity within countries, with potential effects on health and the environment.

Recognising the interdependent nature of their environments.

Encouraging the protection, conservation, preservation and enhancement of the environment.

Reaffirming their commitment to the Rio Declaration and Agenda 21, including to sustainable development as reflected therein, and recognising that investment, as an engine of economic growth, can play a key role in ensuring that growth is sustainable, when accompanied by appropriate environmental policies to ensure it takes place in an environmentally sound manner.

Noting that principles of relevance to investment include, *inter alia*, those relating to polluter pays, the precautionary approach, public participation and the right of communities to have access to information, and the avoidance of the relocation and transfer of activities causing severe environmental degradation or found to be harmful to human health.

Resolved to implement this agreement in a manner consistent with environmental protection and conservation.

#### *LABOUR*

Recognising that development of economic and business ties can promote respect for core labour standards.

Resolved to foster investment with due regard for the importance of labour laws and core labour standards.

Affirming their commitment to the observance of internationally-recognised core labour standards, i.e., freedom of association, the right to organise and bargain collectively, a prohibition of forced labour, the elimination of exploitative forms of child labour, and non-discrimination in employment.

Noting that, as members of the International Labour Organisation, they have endorsed the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and agreeing to renew their support for that voluntary instrument.

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1. This proposal for additional language has been put forward by one delegation and supported by another delegation. It has not been fully debated.

## II. SCOPE AND APPLICATION

### *DEFINITIONS*

The definitions of “investor” and “investment” need to be carefully reviewed for consistency with text elsewhere in the agreement, and for grammatical precision, including the use of the words “and” and “or”.

#### **Investor**

1. It was noted that branches in Switzerland have the legal capacity to invest. However, this specific situation would be covered by the definition of investor even after deletion of the word “branch” since the list of “legal and other entities” covered by the definition of “investor” is not exclusive.
2. Some delegations called attention to the Belgian suggestion in the EG5 report to add the phrase “provided it has the legal capacity to invest” at the end of the definition of investor. Most delegations considered that this approach was unnecessary and could create legal uncertainty.
3. Some delegations would like to include “Contracting Parties” in the definition of investor arguing that, for consistency, the definition should include all entities with the capacity to invest. They were concerned that a Contracting Party may itself make an investment without being a legal person that is owned or controlled privately or by the government. Most delegations thought that the concept of a legal person or the definition of state-owned enterprises would cover the situation where a State was an economic actor, and consider that the State as such would otherwise be protected by diplomatic processes under international law.
4. The Czech Republic raised the question whether a legal person organised under the applicable law of a Contracting Party but constituted under the law of another State is covered by the text of the definition of investor in paragraph 1. (ii). According to the Czech Commercial Code, a legal person constituted under the law of a foreign country for the purpose of conducting business activities with its permanent seat abroad, may transfer that seat to the Czech Republic provided that the law of the country in which the seat is now located allows relocation. The transfer of the permanent seat shall be effective from the day on which it is entered into the Companies Register. Such an entity is regarded as a Czech resident. However, its internal legal relations, including the liability of the entity’s partners (members) towards third parties, shall be governed by the law of the country under which the legal entity was originally constituted. In the opinion of the Czech Delegation, a possible solution could be found in adding the words “or otherwise established” after “constituted or organised” in the definitions of investor and investment. The Drafting Group considered that the concern raised by the Czech Republic is covered by the definition as currently drafted.

## Investment

1. The draft definition of investment defines investment in terms of assets and includes an illustrative list of assets so as to cover all recognised and evolving forms of investment. The definition would include the products of an investment.

2. Views differ on whether the definition of investment should cover investments indirectly owned or controlled by investors of a Party. Some delegations are of the opinion that covering such investment offers maximum protection to investors, including access to MAI dispute settlement. In addition, those delegations believe that this approach offers the most flexibility to investors in managing their capital flows, and avoids diverting investment flows from developing countries. The Group considered four cases:

- (a) investment by an investor established in another MAI Party, but owned or controlled by a non-MAI investor

(Example: an investment in Austria by a Belgian subsidiary of a non-MAI parent)

- (b) investment by an investor established in a non-MAI Party, but owned or controlled by a MAI Party investor

(Example: an investment in Canada by a non-MAI subsidiary of a Danish parent);

- (c) investment by an investor established in another MAI Party, but owned or controlled by an investor of a third MAI Party

(Example: an investment in France by a German subsidiary of a Hungarian parent); and

- (d) investment in a MAI Party by an investment there covered by the MAI

(Example: an investment in Italy by an Italian subsidiary of a Japanese parent).

3. There was a broadly shared view that case (a) investments should be covered by the MAI. Most delegations favoured providing for certain exclusions in a denial of benefits clause which would permit, but not require, exclusion. Some delegations were concerned about possible abuse of this provision. It was suggested that the condition for exclusion would be where the MAI investor lacked substantial business activity in the MAI Contracting Party. One delegation suggested limiting this to cases in which the investor was constituted “for no other purpose than obtaining MAI benefits” (exact wording not finalised).

4. There was wide support for covering case (b) investments; however, whether to do so was considered a policy issue to be considered by the Negotiating Group.

5. There was consensus that case (c) and case (d) investments would be covered by the MAI.

6. The European Commission considered that the inclusion of indirectly controlled investments might pose serious problems to the EU Members states as far as their present level of liberalisation is concerned as this normally also applies to companies established in the EU, but under control of a non-EU country. The European Commission suggested that such problems could eventually be effectively addressed by a general MAI provision on measures taken within Regional Economic Integration Agreements.

7. The term “enterprise” is defined in parenthesis in the proposed text but could be defined separately. It was agreed that the definition covers, inter alia, scientific research institutes and universities. Most delegations favoured the same definition of enterprise for “investor” and “investment”. It was also proposed to define “enterprise of a Contracting Party”.
8. Item (ii), as well as item (iii), includes portfolio investment and minority holdings. It is for consideration whether the definition covers strategic alliances and other arrangements involving know-how, intellectual property, or technology or the joint conduct of research and development programmes. This item is also understood to cover an interest in an enterprise that entitles the owner to share in income and profits of an enterprise and its assets.
9. Item (iii) covers loans of all maturities and debt securities of a state enterprise.
10. It is understood that “Claims to money” in item (v) includes bank deposits. Most delegations consider that this item covers derivatives which are not covered elsewhere in the list of assets.
11. Claims to money may also arise as a result of a sale of goods or services. These claims are not generally considered as investments.
12. All forms of intellectual property are included in the definition of "investment," including copyrights and related rights, patents, industrial designs, rights in semiconductor layout designs, technical processes, trade secrets, including know-how and confidential business information, trade and service marks, and trade names and goodwill. Views differed on whether it is necessary to specifically refer to some of these elements in the definition as part of the illustrative list of assets. Some delegations consider that “literary and artistic property rights” should not be included. Mexico wishes to cover intellectual property rights under the MAI only when acquired in the expectation of economic benefit or other business purposes.
13. Further work is necessary to clarify the relationship of the MAI to other international agreements that relate to intellectual property, particularly where these conventions might require standards of treatment which differ from the MAI or where these conventions provide for dispute settlement mechanisms. See also discussion below under “Special Topics: Intellectual Property”.
14. Rights such as concessions, licenses and permits are generally meant to cover rights to search for, cultivate, extract or exploit natural resources. Most bilateral treaties, and the ECT, refer to rights conferred by law or under contract and extend protection to such rights. Switzerland considered that this item covers public law contracts.
15. Most delegations preferred to keep concessions in the definitions and to require reservations by any country wishing to discriminate in granting concessions. Some delegations were of the opinion that the issue of the granting of concessions should be kept outside the definition of investments.
16. Some delegations indicated that certain aspects of concessions raised issues related to monopolies in general and to cross-border government procurement, which might require some special provision or clarification in the MAI. France submitted a note on this matter [DAFFE/MAI/RD(96)55].
17. Further work will be necessary, bearing in mind that some delegations believe it is necessary to determine whether the rights conferred by virtue of concessions, or the concession as such, are separate elements under the definition of investment.

18. Norway points out that the granting of authorisations, licences and concessions in both the petroleum and fisheries sectors involve measures relating to the conservation and management of natural resources. In the petroleum sector it also involves the exercise of property rights over hydrocarbon resources. The conservation and management of the living resources in the exclusive economic zone is regulated in the United Nations Convention on the Law of the Sea of 1982. The management of hydrocarbon resources is inter alia regulated in the Energy Charter Treaty and in the EU Directive on the conditions for the granting and use of authorisations for the prospection, exploration and production of hydrocarbons. This directive is incorporated into the Treaty establishing the European Economic Area. In the view of Norway, these issues fall outside the mandate for the negotiation of the MAI.

19. Real estate is a common form of property protected under BITs, the ECT and NAFTA. There are different views on how to treat summer residences or second homes. NAFTA excludes real estate or other property which is not acquired in the expectation, or used for the purpose, of economic benefit or other business purposes, and some delegations prefer such an approach.

## ***GEOGRAPHICAL SCOPE OF APPLICATION***

1. Expert Group 1 identified two approaches for addressing the issue of the geographical scope of application of the MAI; the "geographical" and the "functional" approach, i.e. referring to economic activities relating to investments.
2. Various draft texts were considered reflecting one, or the other, approach. Delegations agreed that it would be difficult at this stage to make a final recommendation to the Negotiating Group, which would attract the full support of the Expert Group, as to which approach should be followed. Many delegations were of the opinion that this question would have to be re-examined once other substantive issues in the MAI, including the definition of investment, and the nature and content of the reservations and exceptions had been examined.
3. Some delegations wish to include in paragraph b) of the proposed text the words "the seabed, its subsoil and the natural resources of the superjacent waters". Other delegations stated that they would need to review the acceptability of the reference to the 1982 United Nations Convention on the Law of the Sea. One delegation wished to exclude the maritime areas from the scope of the agreement.

### **III. TREATMENT OF INVESTORS AND INVESTMENTS**

#### ***GENERAL***

It was understood that the drafting of articles 1 and 2 was without prejudice to other aspects of the Agreement, including definitions, reservations, exceptions, standstill and rollback, and the role of the Parties Group.

#### ***NATIONAL TREATMENT AND MOST FAVOURED NATION TREATMENT***

1. While some delegations would have preferred separate articles on pre- and post-establishment, the majority of delegations felt that a single text would better capture the intended coverage of the agreement and avoid the difficult task of defining the boundary between pre- and post establishment. It was agreed, as a starting point, to work on the basis of a single text. Some delegations pointed to the links between a single text covering treatment of investors both pre- and post-establishment and the issues of definitions and the scope of the Agreement. Two delegations reserved their position pending the outcome of the discussion on these issues. The Drafting Group also felt that the scope of the commitments by individual countries could be identified by using precise language in any agreed reservations to National Treatment/MFN and perhaps by including references to relevant laws or regulations. The Group agreed that all diversification activities are covered by the references to “establishment, acquisition and expansion”.

2. Including the words “in its territory” in Articles 1.1 and 1.2 was suggested for two reasons: *i)* to define the scope of application of national treatment and MFN; and *ii)* to provide an appropriate benchmark for assessing national treatment and MFN. Adding these words would make it clear that the Contracting Parties do not have obligations with regard to investors of another Contracting Party in a third country. One delegation suggested that a third reason for including “in its territory” would be to underline the need to avoid conflicting requirements on multinational enterprises. At the same time, however, it was important not to unduly limit the scope of the agreement, for example by excluding the international activities of established foreign investors and their investments. The place of this term in these paragraphs is still to be determined. It was also suggested that a solution might be found, as in NAFTA, in the article dealing with the scope of the Agreement. Whatever should be decided on this matter, it should be treated consistently throughout the Agreement.

3. Some delegations proposed the “same” or “comparable” treatment as the appropriate standard rather than “no less favourable” treatment. The purpose would be to prevent unlimited competition for international investment funds with consequential costs and distortions to investment flows. However, most delegations considered that this would unacceptably weaken the standard of treatment from the investor’s viewpoint.

4. Different views were expressed on the value of a “closed” or “open” list of investment activities to be covered by the National Treatment and MFN provisions, before and/or after establishment. A closed list had the advantage of certainty, but risked omitting elements that could be important to the investor. An open list would cover all possible investment activities, including new activities. But it could also create uncertainties as to the scope of the Agreement and might have adverse effects on the operation of existing bilateral and other investment agreements using a closed list. Several Delegations believed that the list “establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments” should be considered a comprehensive one whose terms were intended to cover all activities of investors and their investments for both the pre- and post-establishment phases. In their view, this was the preferable approach. It was also suggested that the term “sale or other disposition” should replace “disposal” in Article 1.2 of the draft articles on selected topics on Investment Protection.

5. National treatment and MFN treatment are comparative terms. Some delegations believed that the terms for national treatment and MFN treatment implicitly provide the comparative context for determining whether a measure discriminates against foreign investors and their investments; they considered that the words “in like circumstances” were unnecessary and open to abuse. Other delegations believed that the comparative context should be spelled out and thus inclusion of the phrase “in like circumstances”. Examples of the inclusion of a specific reference are found in the NTI, some BITs and NAFTA. Examples of no specific reference are found in some other BITs and the ECT (although the United States and Canada made a Declaration concerning the term “in like circumstances”).

6. DG3 considered two options: “In like circumstances” deleted (option A) and: “In like circumstances” included (option B).

Regarding Option A. National treatment and MFN treatment are comparative terms. They permit fair and equitable difference in treatment justified by relevant differences of circumstances. In this context, nationality is not relevant. Some delegations may wish to modify this text in the light of the Commentary on Option B below which was not discussed.

Regarding Option B. The U.S. delegation provided the following commentary:

“National treatment and most favoured nation treatment are relative standards requiring a comparison between treatment of a foreign investor and on investment and treatment of domestic or third country investors and investments. The goal of both standards is to prevent discrimination in fact or in law compared with domestic investors or investments or those of a third country. At the same time, however, governments may have legitimate policy reasons to accord differential treatment to different types of investments.

“In like circumstances” ensures that comparisons are made between investors and investments on the basis of characteristics that are relevant for the purposes of the comparison. The objective is to permit the consideration of all relevant circumstances, including those relating to a foreign investor and its investment, in deciding to which domestic or third country investors and investments they should appropriately be compared, while excluding from consideration those characteristics that are not germane to such a comparison.”

7. The question was asked whether the treatment accorded to foreign investors by a sub-federal state or province would meet the national treatment test only if it were no less favourable than the treatment accorded to the investors of the same state or province, or whether it would be sufficient to accord treatment no less favourable than that accorded to the investors from any other state or province. The question will need to be answered by the Negotiating Group in due course.

8. Switzerland made a written proposal to refer, in the treatment of investors/investments article, to the concept of “equivalent competitive opportunities” analogous to that of GATS (Article XVII) [DAFFE/MAI/DG2/RD(96)1]. This was presented as a means of strengthening the national treatment provision by requiring that foreign investors and their investments have the opportunity to compete on terms equivalent to those enjoyed by domestic investors. This proposal was considered by some delegations to have positive elements particularly with respect to the treatment of branches of foreign financial institutions. “Equivalent treatment” was the basis of comparison, in the OECD Code of Liberalisation of Current Invisible Operations, between domestic financial institutions and branches, agencies, etc., of foreign financial institutions. Several delegations considered, however, that the introduction of the concept of “equivalent competitive opportunities” into Article 1 might create confusion on how to apply the national treatment and MFN obligations, and might even go beyond what these obligations were intended to cover. Other delegations suggested that issues concerning branches might be solved in the definition of “investments”.

9. As indicated by the Negotiating Group [DAFFE/MAI/M(95)2], Article 1 is intended to address any problem of de facto as well as de jure discrimination.

10. Switzerland also suggested the addition of a distinct provision on “market access”, modelled on the GATS (Article XVI), to deal with situations where the same restrictions apply to both domestic and foreign investors. Such measures may include both quantitative restrictions (e.g. economic need tests or numerical quotas) and qualitative measures (e.g. restrictions on the legal form of the activities permitted in a given sector). It was considered that this subject raised issues outside the traditional domain of National Treatment and MFN and required prior discussion in the Negotiating Group.

11. Some delegations expressed the view that Article 1.3 was not strictly necessary since it does not add any substantive obligation to Articles 1.1 and 1.2. Article 1.3 underlines, however, that, taken together, the purpose of Articles 1.1 and 1.2 is to give the investors and their investments the better of National Treatment and MFN.

## ***TRANSPARENCY***

1. Public dissemination of measures affecting foreign investment was considered essential to the operation of the MAI. Nevertheless a balance should be struck between this objective and the administrative burden of implementing it.

2. When sub-national, local or other authorities publish or otherwise make publicly available information on matters under their jurisdiction, this would be considered sufficient to meet the obligation of Article 2.1. There would be no obligation to duplicate this information at the federal or central government level.

3. The second sentence of Article 2.1 refers to situations in some countries where governments choose to establish policies that are not expressed in laws, regulations or other measures listed in this paragraph. However, as the legal standing and recourse to these policies varies among Member countries, it was agreed that they should be subject to transparency obligations only for governments which use this approach.

4. Regarding Article 2.2, a majority of delegations considered the establishment of specific enquiry points to be unnecessary. Other delegations considered that these enquiry points could contribute to the effective functioning of the MAI. They could also be useful to foreign investors by making available information of interest to them.

5. Article 2.3 addresses the concerns that may arise with respect to the disclosure of information in the context of law enforcement or laws protecting confidentiality. Such concerns are addressed in other international agreements (GATS, Energy Charter, NAFTA). It was felt unnecessary, however, to add a reference to national security and public order since this issue would be addressed in the general exception article.

6. Mexico, supported by other delegations, proposed to add an additional sentence to article 2.3 and an additional paragraph on Special Formalities and Information Requirements as follows:

(a) [Nothing in this paragraph shall be construed to prevent a Contracting Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.]

(b) [“Nothing in Article 1.1<sup>1</sup> shall be construed to prevent a Contracting Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another Contracting Party, such as a requirement that investors be residents of the Contracting Party, or that investments be legally constituted under the laws or regulations of the Contracting Party, provided that such formalities do not materially impair the protections afforded by a Contracting Party to investors of another Contracting Party and investments of investors of another Contracting Party pursuant to this Agreement.”]

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1. General Treatment Article.

7. Some delegations expressed concern that the additional texts could be used to circumvent the non-discrimination obligations of the Agreement. There were serious concerns as to the substantive implications of the paragraph, in particular relating to the residency requirements.<sup>2</sup>

8. DG3 considered including a notification obligation along the following lines:

*“Each Contracting Party shall notify the (“Parties Group”) promptly, and in any case no later than 60 days after their entry into force, of any new measures or any changes to existing measures which significantly affect the performance of its obligations under the Agreement.”*

9. Such a provision could play a role in support of the possible activities of the Parties Group in connection with non-conforming measures subject to review and rollback, and general exceptions or any temporary derogations. It was agreed that this matter could be revisited once the MAI obligations in these areas had been clearly defined.

10. DG3 noted the suggestion that any Contracting Party should be entitled to notify to the Contracting Parties Group any measure taken by any other Contracting Party which it considers affects the operations of the Agreement. This too may be relevant to the functions of the Parties Group.

11. Japan suggested that consideration be given to an article based on Article 5 (“Controls and Formalities”) of the OECD Codes of Liberalisation.

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2. Paragraphs 6-7 reflect the discussions in the Drafting Group. When this matter was discussed by the Negotiating Group in December 1996, the Chairman concluded “that an additional sentence, based on the sentence in paragraph (a), should be added to Article 2.3 provided that an acceptable formulation was found. He concluded that there was not sufficient support for the inclusion in that article of an additional paragraph (b) which would cover certain residence requirements as part of formalities in connection with the establishment of investments” [DAFFE/MAI(97)2].

## ***SPECIAL TOPICS***

### ***TEMPORARY ENTRY, STAY AND WORK OF INVESTORS AND KEY PERSONNEL***

#### **Paragraph 1**

1. While several delegations supported including a requirement of a "substantial amount of capital" in paragraph 1, others considered it would create uncertainties and could represent an important barrier to certain forms of investment. It was noted that Drafting Group 3 has developed a provision on Denial of Benefits in the context of indirect ownership or control using the concept of "substantial business activity". DG3 decided that it was not necessary to define this term.

2. Some delegations do not think it necessary to include "essential" in this paragraph and emphasise the difficulties associated with defining this term.

3. There are different views on whether to include a prior employment requirement. Some delegations think this requirement can distort the investment process by impacting unfairly on new investors and small/medium enterprises without any corresponding benefit to the "admitting" country. Furthermore, these delegations believe that it may not correspond to the real needs of an investment and should not be used as a measure of whether an individual is essential to an investment. Several delegations thought it necessary to retain such a requirement if only because there is a corresponding requirement in their national immigration laws. One delegation thought it might be necessary to specify that the prior employment relation must be continuous and should immediately precede entry. Another delegation questioned whether the use of prior employment requirements to avoid circumvention of national immigration laws was effective.

#### **Paragraph 3**

##### **Natural person of another Contracting Party<sup>3</sup>**

##### **Executive, Manager, Specialist**

The Expert Group thought the definition of the categories of executive and manager were generally appropriate, except that there might be some overlap between the two. The category of "Specialist" will need some further reflection and may need to refer to the possibility of verifying professional qualifications. One delegation would like to include "trainers" in this category.

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3. See footnote 8 in Consolidated Text.

## *PRIVATISATION*<sup>4</sup>

### **General**

Some delegations questioned the need for a separate article confirming the application of the National Treatment/MFN obligations to privatisation operations. Other delegations felt, on the contrary, that it was worthwhile to underline this important addition to OECD obligations. Privatisation can be a complex and politically sensitive matter. There is thus a need to specify how the MAI obligations would interrelate to particular privatisation transactions or schemes. Foreign investors attached particular importance to transparency.

### **Paragraph 3**

One EG3 delegation doubted whether the provision was fully consistent with the National Treatment/MFN Treatment obligations. Another delegation considered there is a lack of balance, and thus discrimination, inherent in special share arrangements in that they would allow a Contracting Party to retain control while devolving business risks to private investors. Some delegations considered that special share arrangements will remain a feature of individual privatisation schemes and that the MAI should provide some flexibility in this area. A large majority shared the view that these special schemes should not be considered to be inconsistent with the National Treatment and MFN Treatment obligations unless they explicitly or intentionally discriminate against foreign investors. There might be a need, for instance, to set aside a proportion of initial sales to private persons or institutes. As in the case of monopolies, there is also a link with the room of manoeuvre the Contracting Parties would have in regard to the lodging of country specific reservations/exceptions: precautionary reservations would be necessary. Some delegations expressed reservations about the idea of special consultation procedures in this area in addition to those that might be contemplated under the consultation/dispute settlement provisions of the MAI.

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4. These comments reflect the state of the discussion at the end of December 1996 [DAFFE/MAI/EG3(96)21].

## A. Article on Monopolies

### Paragraph 1

There is consensus in EG3 that the right of governments to create, allow or maintain monopolies could not be challenged under the MAI. But there is no consensus on the need to make it explicit in the MAI. Several delegations supported the language confirming the right of governments to designate new monopolies, although this could also be done through an interpretative note. One delegation was of the view that, without such a provision, there would be uncertainties about the scope of application of the MAI in this field. Some delegations remained unconvinced, however, of the need to mention this right explicitly in the Agreement. One delegation noted that government prerogatives on monopolies also apply to their elimination; inclusion of the word “eliminating” at the end of the phrase would make this clear and produce a more balanced provision. Some delegations noted the link between the designation of new monopolies and the MAI article on Expropriation and Compensation. One delegation pointed out that the need for paragraph 1 would be enhanced by the inclusion of market access disciplines in the MAI.

### Paragraph 2

A large majority of EG3 delegations considered that the National Treatment and MFN Treatment obligations should apply to the designation of new monopolies. Several delegations pointed out the difficulty of applying such obligations to every situation that may arise in the future, notably in the context of the introduction of new technologies and felt that a “best endeavour” undertaking would be more appropriate. Delegations also noted the link with the demonopolisation issue and, in particular, that of the lodging of country-specific reservations or exceptions.

### Paragraph 3

1. A large majority of delegations considered that the provisions of the Monopolies article should apply to government-designated monopolies at all levels of government and not be limited to those designated by central governments. One delegation suggested that in the case of privately-owned monopolies, the obligations should apply only to those created after the entry into force of the MAI and not to existing ones. This delegation argued that would be difficult to apply the obligations retroactively to existing privately-owned monopolies while such practical difficulties would not arise with respect to existing government monopolies.

2. Concerning *subparagraph d*), it was recognised in EG3 that monopolies have the capacity to introduce market distortions, notably by cross-subsidising their business activities in competitive sectors. It was also acknowledged that abuse of dominant position was a competition policy issue. Further thought will also need to be given to the meaning of the “abusive use of prices”.

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5. These comments reflect the state of the discussion at the end of December 1996 [DAFFE/MAI/EG3(96)22].

#### **Paragraph 4**

1. EG3 was of the view that demonopolisation operations are generally favourable to liberalisation since they open up new investment activities. Demonopolisation operation would have the effect, however, of extending the obligations of the MAI to a new area. Several delegations felt therefore that the MAI should provide the Contracting Parties with the possibility to lodge new country-specific reservations/exceptions when this situation occurs. This would not be contrary to standstill since country-specific reservations/exceptions introduced at the time of demonopolisation, would, in principle, be subject to standstill. These delegations welcomed, as a result, the flexibility in paragraph 4. An alternative to this approach would be precautionary country-specific reservations/exceptions lodged at the time of the entry into force of the Agreement. This problem clearly belongs to the broader issue of liberalisation and balance of commitments.

2. Some other delegations considered that the possibility of lodging country specific reservations or exceptions should be limited to the time a Contracting Party adheres to the MAI. In the absence of such reservations or exceptions, the National Treatment/MFN obligations would apply to demonopolisation operations. One delegation thought that the combined ability to designate new monopolies and to cover by reservations or exceptions new non-conforming measures could be used to evade MAI obligations.

#### **Paragraph 5**

The desirability of introducing a notification requirement for existing and new monopolies was found by some EG3 delegations to be closely related to the issue of country-specific reservations/exceptions and to a MAI article on Market Access. One delegation wondered what use the Parties Group could make of this information and feared the administrative burden. One delegation suggested that a best endeavour undertaking to provide, *wherever possible*, prior notification of any newly designated monopoly, along the lines of article 1502(a) of NAFTA, might offer a more palatable approach. Another delegation recalled the proposal made in the context of the negotiations of the Supplementary Treaty to the Energy Charter Treaty which limits reporting requirements for government-designated monopolies at the sub-national level to classes of monopolies as opposed to individual monopolies.

#### **Paragraph 6**

A few EG3 delegations proposed to exclude from investor-state arbitration matters arising out of paragraphs 3(b), 3(c), 3(d) or 3(e) of this Article. Other delegations felt that this could set a dangerous precedent for other MAI obligations. One delegation suggested that governments should keep control over the dispute settlement process because the disputes that may arise between government-designated monopolies and foreign investors are most likely be a function of the manner in which these monopolies are regulated than to their own behaviour.

**B. Article on [State enterprises] [entities with which a Government has a specific relationship]**

Several EG3 delegations questioned the need for specific provisions on state enterprises. The problem of anti-circumvention of the MAI obligations could be addressed in the context of a general article on the subject or in the context of corporate practices. State enterprises operating in the competitive sector should be treated no differently than private enterprises. One delegation considered, however, that it is not always certain that governments can divorce themselves from the activities of their state enterprises. Foreign investors may, in any case, entertain this suspicion, particularly where such enterprises play a significant role. A balance should be struck between their rights under the MAI as investors and their obligations as suppliers of goods or services to domestic and foreign investors. One delegation felt that the best way to ensure this balance is to submit state enterprises to the same rights and obligations than private enterprises.

**C. Definitions related to Articles on Monopolies [and State Enterprises]**

1. One delegation suggested brackets around the word “local”. A number of EG3 delegations considered that the concept of government-designated “monopolies” should also cover that of “exclusive suppliers” as in the case of Article VIII of the GATS. One delegation suggested that it be discussed whether enterprises with special concessions, for example banks, should be included or not. It was also noted that the possibility of having a GATT article XVII-type definition relating to “any enterprise” to which a party “formally or in effect” has given exclusive or special privileges”, could be considered. Finally, it was recalled that Article 22 of the ECT covers state as well as “privileged enterprises”.

2. One delegation suggested the insertion of the words “subject to Annex...” to allow, as in NAFTA, that country specific characteristics be taken into account.

## *INVESTMENT INCENTIVES*<sup>6</sup>

1. The discussion on investment incentives in EG3 was based on a Note, including a proposal for draft provision, by the New Zealand [DAFFE/MAI/EG3/RD(96)7] and a proposal by the European Commission [section 6 of DAFFE/MAI/EG3/RD(96)10].
2. Many delegations believed that disciplines on investment incentives would be important for the overall credibility of the MAI while at the same time recognising the role of investment incentives with regard to the aims of policies, such as regional, structural, social, environmental or R&D policies.
3. New Zealand argued that a definition of investment incentives is a necessary prerequisite for increased transparency and disciplines regarding such measures. It suggested a definition of investment incentives based largely on the definitions of subsidies and "specificity" found in the WTO Agreement on Subsidies and Countervailing Measures (ASCM). New Zealand also provided text for a specific transparency provision.
4. Several delegations, however, considered the nature and scope of the disciplines proposed by New Zealand and others to be too ambitious. Since WTO members were still grappling with related issues, it would be premature to include disciplines in the MAI that could duplicate or detract from WTO obligations. They also took the view that there has been insufficient analysis of the nature and impact of incentives and of the nature and extent of any disciplines which would be required given the objectives of the MAI. One delegation believed more work was necessary to identify fully the degree of the negative effect of individual incentives in relation to the policy goals, often beneficial, implemented through those incentives. Problems need to be clearly identified prior to drafting disciplines aimed at addressing those problems.
5. Several delegations also questioned the viability of creating, at this stage, standstill and rollback provisions on non-discriminatory investment incentives. Subjecting investment incentives to the NT and MFN obligations would already constitute a major step forward. One delegation felt that this would also imply submitting investment incentives to transparency obligations and subjecting non-conforming measures to standstill and rollback.
6. Most delegations believed that any plans for disciplines on tax incentives should be taken up by EG2. Some delegations thought that tax measures should be excluded.
7. Some delegations expressed concern that any additional disciplines on investment incentives in the MAI could divert foreign investment to non-Members and place MAI Contracting Parties at a disadvantage relative to non-Members in their ability to retain or attract investment. Such disciplines could also constitute an obstacle to accession to the MAI by non-Members. On the other hand, some delegations noted that it was always envisaged that the MAI, as a high standards agreement, would mandate more liberal FDI regimes among Parties than typically maintained by non-Members, and disputed claims that disciplines on incentives presented any special problems in this regard.

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6. These comments reflect the state of the discussion at the end of December 1996 [DAFFE/MAI/EG3(96)22].

*TECHNOLOGY R&D*

**(Proposal by Canada)**<sup>7</sup>

On the topic of Technology R&D, Canada has proposed the following text:

“Contracting Party funding prerogatives relating to R&D consortia and other activities shall not preclude national treatment for membership in such activities, provided that prospective foreign participants contribute funding commensurate with their role in the consortium and the level of funding contributed by other consortium participants.”<sup>8</sup>

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7. Extract from DAF/MAI/ST(97)1.

<sup>8</sup> A proposal from one delegation has also been made, but was not discussed. It reads as follows: “The participation in, or treatment of, any combination, consortium, research programme, joint or other enterprise activity, including measures affecting technology, shall be regulated by existing international or bilateral S&T co-operation agreements.”

## *INTELLECTUAL PROPERTY*

### **The Definition of Investment**

Virtually all delegations recognised the need for further examination of the concept of intellectual property in the definition. Delegations stressed that decisions on definition are closely linked to the resolution of the substantive problems discussed below. Delegations had varying views on whether the MAI should have an open or closed definition of intellectual property. Of those delegations that proposed a closed definition, some thought that the definition should cover only those rights specified in the TRIPS agreement and others thought that other existing rights should also be covered. Several delegations thought that the definition should exclude copyright and neighbouring rights and databases. In addition, delegations had varying views on whether the definition should cover future as well as existing intellectual property rights. Some delegations thought that it would be important to reflect footnote 2 of the Chair's text on the Definitions of Investment and Investor [DAFFE/MAI(97)7]. That footnote contemplates that an asset, to qualify as an investment, must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

### **National Treatment, Most Favoured Nation Treatment and General Treatment**

1. All delegations agreed that the current formulation of National Treatment and Most Favoured Nation Treatment in the MAI goes beyond existing national and international practice for intellectual property. Delegations formulated three possible approaches. The MAI could provide that National Treatment and MFN:

- (a) would apply to intellectual property without qualification (derogations would be addressed through country-specific reservations);
- (b) would have no application to intellectual property; or
- (c) would apply to intellectual property, but a MAI Party could derogate from NT and MFN in a manner consistent with the TRIPS Agreement and, perhaps, other intellectual property agreements.

2. Virtually all delegations that expressed an opinion supported either approach (b) or (c). Of those delegations, many want to consider whether the approach should also be applied to the MAI provision on General Treatment. In addition, some delegations thought that the concepts of "use" and "enjoyment" in the NT, MFN and General Treatment provisions should not apply to intellectual property.

## **Expropriation and Transfers**

1. Delegations thought that the MAI could significantly improve the existing international law on intellectual property through its investment protection provisions - in particular, the expropriation provisions - although some delegations thought that additional clarification on the actual value added would be helpful. In addition, some delegations expressed the view that the concepts of direct and indirect expropriation and the concept of a measure having an equivalent effect to expropriation should not cover certain intellectual property practices, such as the issuance of compulsory licenses or the revocation, limitation or creation of intellectual property rights, that are permissible under TRIPS and, perhaps, other intellectual property agreements. Delegations identified three approaches protecting these practices:

- (a) make no specific provision in the MAI on the assumption that the MAI provision on expropriation would not be interpreted so as to cover these practices;
- (b) refine the concepts of “equivalent effect” and “indirect expropriation” to ensure that they do not apply to these practices; or
- (c) draft a provision stating that the concepts of expropriation and measure having equivalent effect shall not apply to practices consistent with TRIPS and, perhaps, with other international agreements.

2. Some delegations thought that the provisions of the MAI on Transfers will have no adverse impact on intellectual property practices. However, other delegations expressed concern that these provisions may force some MAI Parties to ensure that certain payments are freely transferable in a manner inconsistent with their intellectual property regimes. Particular concern was expressed about the possible impact of the Transfer provisions on collective management regimes. Delegations considered that this issue will require further study to determine whether there is a problem and, if so, how the problem might be solved.

## **Performance Requirements**

Delegations agreed that restrictions on performance requirements should not cover a requirement that is imposed, or a commitment or undertaking that is enforced, by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws regarding intellectual property rights or to act in a manner not inconsistent with other provisions of the MAI. Currently, there is a square-bracketed text to this effect in the draft MAI text. One delegation proposed that the words “court, administrative tribunal, competition authority” be followed by “or other competent authorities”. A large number of delegations also believed that restrictions on performance requirements should also not cover use of intellectual property rights without the authorisation of the rights holder, to the extent that such use is consistent with the TRIPS Agreement. Finally, one delegation had concerns about the meaning of the phrase “proprietary knowledge”.

## **Monopolies**

Delegations agreed that the definition of monopolies should continue to include bracketed text that would exclude from the definition an entity that has been granted an exclusive intellectual property right solely by reason of such grant. Delegations thought that this issue will require further study to determine whether there is a problem and, if so, how the problem might be solved.

## **Dispute Settlement**

Delegations noted that Expert Group No. 1 is addressing issues arising from the relationship between dispute settlement under the MAI and under other international agreements. Some delegations doubt that overlap between dispute settlement systems gives rise to issues that are unique to the field of intellectual property. Other delegations are concerned that intellectual property may indeed require special attention. In particular, the concerns that were expressed included conflicting panel decisions on TRIPS provisions, the applicability of investor to state dispute settlement to intellectual property and possible problems with forum shopping. These delegations want to consider the issue of dispute settlement further.

## **Other Issues**

During the discussion, delegations identified a number of issues that are new and that require further consideration:

- (a) does the definition of investor as applied to the holder of a right in intellectual property give rise to any issues that need to be addressed;
- (b) when does an intellectual property right take on the characteristics of an investment;
- (c) does the status of a rights holder give rise to any issues that must be addressed with respect to the MAI provisions on key personnel;
- (d) will the MAI contain provisions on corporate practices that might give rise to intellectual property concerns; and
- (e) will the MFN provision of TRIPS be triggered by any substantive or procedural provisions of the MAI and, if so, what is the impact?

## *PUBLIC DEBT*<sup>9</sup>

1. It was agreed that the issue of trade insurance and export credit guarantees still needs to be addressed.
2. A footnote could be added to explain the meaning of “appropriate institutions”.
3. The Czech Republic considered that the obligation of MFN treatment needs to be preserved in the context of public debt rescheduling.
4. Some delegations wished to review whether the carve-out should apply to rescheduling of all public debt, or only to debts owed to other Contracting Parties and to private creditors whose claims were linked to the rescheduling of state-to-state debt.
5. Some delegations continued to reserve their position on the inclusion of public debt within the scope of MAI disciplines.
6. Most delegations remained of the view that, with the exception of the proposed carve-out for debt re-scheduling, public debt should be fully covered by the MAI disciplines. Situations where country public debt management policies may not be consistent with the MAI provisions can be covered by country-specific reservations. A few delegations, however, expressed concern over this approach and considered that public debt management should be totally excluded from the scope of the MAI.

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9. Comments made during the informal consultations on financial matters on 14-15 April.

## **IV. INVESTMENT PROTECTION**

### **1. GENERAL TREATMENT**

1. Reference to "encouragement and promotion of investments", usually found in BITs does not constitute a principle of general treatment but may be included at some other place of the MAI.
2. Depending on the definition of investment/investor adopted in the MAI, the wording of Article 1 ("investments of investors") and subsequent articles may have to be changed.
3. Reference to international law is critical in this article and worded in the most simple manner. This may be a general issue to be discussed when other references to international law are made in other articles of the MAI.
4. The link between general treatment and NT/MFN was underlined as critical. However, since general treatment was considered as an "absolute" principle as opposed to NT/MFN considered as "relative" principles, it was agreed that it was justified to separate the articles on General Treatment and NT/MFN respectively.
5. In the course of discussions it was agreed to suggest that special commitments entered into by a Contracting Party vis-à-vis an investor should be addressed in the MAI in a manner to be discussed at a later stage.
6. Obligations apply in all circumstances (i.e. "at all times"), although specific language was not considered necessary on this point.
7. Regarding Article 1.2, three formulations were suggested which have in practice three different implications. The Swedish proposal is reflected in a footnote and calls for no additional standards with respect to which a government's actions would be measured, but makes clear that the standards in the first paragraph apply to all activities relating to an investment. The other two formulations are shown in brackets and provide either: (i) that a government's actions would be measured as against either one of the two concepts (unreasonable, discriminatory), applied independently or (ii) that a government's actions would be measured against both concepts, applied conjunctively. The group stresses that this choice will have to take into consideration the choices to be made on other aspects of the MAI, such as National Treatment and taxation. DG3 believes that this question is a policy matter for the Negotiating Group which cannot be resolved through a drafting exercise. Sweden subsequently submitted a new proposal to help resolve article 1.2 [DAFFE/MAI/DG3/RD(96)9].

## **2. *EXPROPRIATION AND COMPENSATION***

1. The terms “public purpose” and “public interest” derive from different legal traditions but have very similar meanings. The term chosen “for a purpose which is in the public interest” is considered consistent with both legal traditions; it was previously agreed in the Energy Charter Treaty (ECT).
2. The Drafting Group understands that the violation of criminal laws could result in the loss of an investment (or part thereof) which would not be deemed expropriation, provided those laws and their application are non-discriminatory and otherwise consistent with the standards of this agreement.
3. In cases where the investment consists in total or in part of shares, the rights of the shareholders, if an expropriation takes place, have to be defined. This should derive from the definition of investments in the MAI, if not, a special provision may be needed in Article 2.
4. Expropriation in cases where the investment consists in total or in part of intellectual property rights was seen as critical. It was decided not to suggest specific language on this issue and that it would need to be further revisited in a global context.
5. “Creeping expropriation” in general is covered by the words of Article 2: “measures or measures having equivalent effect”. “Creeping expropriation” through tax measures were mentioned but no specific wording was suggested (see Commentary on “Taxation”).
6. Austria proposed additional text on blocking, freezing, sequestration or any similar measures having expropriatory effect [DAFFE/MAI/DG1/RD(95)4]. After discussion, it was agreed that these concerns were already addressed: temporary actions, when ended, would result in restitution of the property, and, any unlawful aspects of the temporary measure could give rise to damages for breach of other articles, such as Article 1. Should the measures take on a permanent or expropriatory character, they would, (i) if lawful, be subject to Article 2, or (ii) if unlawful, give rise to a right to restitution under customary international law.
7. The Drafting Group considered the problem of exchange rate risk only in the case of delay in the payment of compensation for expropriation to the exclusion of other exchange rate risks to which the investor may be exposed.
8. It identified four options for calculating compensation in order to protect the investor against losses from currency fluctuations before date of payment. In each case, the text would replace the text currently shown in article 2.5.

Option A - Investor's Choice

The compensation to be paid shall be calculated by summing:

(a) the fair market value of the expropriated investment on the date of expropriation, expressed, at the option of the investor on the date of expropriation, in either:

- (i) the currency of the host state;
- (ii) the currency of the investor's home state;
- (iii) a freely usable currency; or
- (iv) any other currency acceptable to the host government

at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercial rate established on a market basis for the currency of valuation, from the date of expropriation until the date of actual payment.

That sum shall be expressed in the currency of payment at the market rate of exchange prevailing on the date of payment for the currency of valuation.

Option B - Government Choice: Multiple currency option

The compensation to be paid shall be calculated by summing:

(a) the fair market value of the expropriated investment on the date of expropriation, expressed, at the option of the host government on the date of expropriation, in either:

- (i) a freely usable currency,
- (ii) the ECU, or
- (iii) any other currency acceptable to the investor

at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercial rate established on a market basis for the currency of valuation, from the date of expropriation until the date of actual payment.

That sum shall be expressed in the currency of payment at the market rate of exchange prevailing on the date of payment for the currency of valuation.

Option C - Government Choice - Freely Convertible Currency specially defined<sup>1</sup>

The compensation to be paid shall be calculated by summing:

- (a) the fair market value of the expropriated investment on the date of expropriation expressed in a Freely Convertible Currency chosen by the host government on the date of expropriation at the market rate of exchange prevailing on that date, plus...
- (b) interest, at a commercial rate established on a market basis for the currency of valuation, from the date of expropriation until the date of actual payment.

That sum shall be expressed in the currency of payment at the market rate of exchange prevailing on the date of payment for the currency of valuation.

The following would be inserted in the definitions article: “A Freely Convertible Currency is a currency which is, in fact, widely used to make payments for international transactions and is widely traded in the principal exchange markets”.

Option D - No Explicit Coverage of Exchange Loss Provision

Compensation shall include interest at a commercially reasonable rate established on a market basis for the currency of payment from the date of expropriation until the date of actual payment.

9. A majority of delegations favoured Option D. Some delegations considered that the international law standard of compensation, set out in Article 2, which requires payment of full market value in fully realisable form and without delay, has implicit within it the requirement of offsetting declines in the currency of valuation between the valuation date and the payment, where there was a delay. Others considered this approach to be too vague or to leave the issue open for later dispute. They therefore favoured an explicit provision on the method to be used in calculating expropriation compensation including the choice of reference currency.

10. A number of delegations favoured giving the investor a choice of currency. Some favoured limiting the choice to the currencies of the home or host government. Others favoured broadening that choice somewhat. There was a consensus among them that the choice could not be unlimited. Option A illustrates their approach.

11. A number of other delegations considered that the choice of currency should be with the host government. Several of those delegations supported Option C. One delegation preferred Option B and requested its inclusion in this report.

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1. The definition of “Freely Convertible Currency” would need to be the same as that adopted for the “Transfers” provision (article 4.2).

12. One delegation noted that it could only accept an option which did not allow its currency to be used for calculation if the same limitation were imposed on all MAI parties. It suggested the inclusion of the words "other than its own" after the words "a freely usable currency" in Option B. The same delegation mentioned that another option would be to calculate exchange rate changes on the basis of a basket of currencies.

13. It will need to be borne in mind, when considering the accession of non-OECD Members, that the convertibility of the national currency will be important with respect to the transfer obligations of the agreement, including transfers of compensation for expropriation.

14. The Austrian delegation asked whether the drafting of Article 2 was adequate to avoid excessive scope, raising as an example the case of an investor which had received a permit or authorisation for an investment but then ceased to meet the necessary conditions for it. The Drafting Group was of the opinion that this should pose no problem under Article 2 as drafted: cancellation or withdrawal of the permit or authorisation in these circumstances by the Government would not constitute a direct or indirect expropriation or nationalisation of the investment. Comment 2 to Article 2, on loss of an investment through proper application of criminal laws, was not exhaustive.

15. The Mexican delegation, supported by the United States delegation, believes it is important to provide guidance to arbitrators on how to determine the "fair market value". This paragraph could read as follows:

"Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine the fair market value.

#### **4. TRANSFERS**

1. All delegations agreed that the free transfer of returns was a critical element of the protection of the investors. Therefore a clear preference was voiced for listing the main categories of returns in Article 4.1(b) and in particular: "profits, interest, dividends, capital gains, royalties, fees and return in kind". However it was finally agreed not to lengthen the text of Article 4.1(b) provided that these categories are explicitly listed in the definition of returns in the article on definitions of the MAI.

2. The free transfer obligation applies to earnings and other remuneration net after deduction of any withholding for tax or social security purposes. Dispute resolution would be available to investors but not their personnel.

3. The Drafting Group heard a presentation on transfers by an expert from the International Monetary Fund regarding the rights and obligations of countries under the Fund Agreement. It recommended that the Negotiating Group deal with this matter, for example, under general provisions concerning the relationship of the MAI to other international agreements.

4. The Negotiating Group will nevertheless need to address the question of general exceptions and temporary derogations for reasons such as balance of payments, public order and preservation of monetary union, including their possible relation to this article. However, it was mentioned that any such provision should not apply to payment of compensation under Article 2.

5. Articles 4.2 and 4.3 ensure -- without imposing it -- the freedom to make transfers in a freely [convertible] currency at a market rate. The reference to the exchange rate in Article 4.3 pertains only to cases where the conversion of funds occurs on the date of transfer.

6. Most delegations considered that the draft Article 4.4 would provide greater investor protection in extreme circumstances. Others thought the provision should not rule out a different solution mutually agreed by the Parties.

7. Conversely, a few delegations considered that it would not be useful or necessary to include such a text because: a) the extreme circumstances envisaged were very unlikely to arise in OECD countries; b) it is unlikely that a country without a functioning foreign exchange market would want to join or be able to meet the criteria for joining the MAI; and c) if a provision were included for these cases, the SDR rate may not be the most appropriate or most advantageous rate for the investor.

8. It was broadly agreed that this specific matter was independent of the general issues linked to the accession of non-Members to the MAI, although the conditions of non-Member accession to the MAI could possibly include a requirement that all MAI countries should meet the requirements of Article VIII of the IMF Agreement and should maintain functioning foreign exchange markets.

9. In order to emphasise the freedom of transfer, Japan proposed the following text for the first sentence of Article 4.5: “The freedom of transfer of returns in kind under Article 4.1(b) does not derogate from the rights of a Contracting Party under the Agreement established by the World Trade Organisation to restrict or prohibit the export or the sale for export of what constitutes the return in kind”.

10. Article 4.6 is indirectly but closely linked with the issue of free transfer. It allows satisfaction of two important objectives. It is comparable to the language in the Energy Charter Treaty (ECT). Some delegations would include additional specific objectives, such as bankruptcy, insolvency or the protection of the rights of creditors; issuing, trading or dealing in securities; and records of transfers. Other delegations questioned the need and desirability of Article 4.6.

11. At the invitation of the Negotiating Group, EG5 reviewed earlier square-bracketed text for paragraph 4.6 of the MAI Article on Transfers. This present text has been developed by EG5 for the MAI Article on Transfers as a whole. Most delegations considered that such provisions are particularly important for financial services. A few delegations felt that no such provisions are necessary.

12. One delegation suggested adding the following text on forced transfers: “A Contracting Party shall not require the transfer of, or penalise the failure to transfer, the income, earnings, profits or other amounts derived from, or attributable to, an investment in the territory of another Contracting Party by one of its investors.” This proposal did not attract a consensus.

## **5. SUBROGATION**

1. It was discussed whether to include reference to private insurance companies in the recognition given in Article 5. A special provision to this effect was considered unnecessary since a Contracting Party may designate its “designated agency” regardless of its private or public status.

2. The respective rights of the investor and the Contracting Party or its designated agency subrogated in the rights of this investor and dealt with in the text on Dispute Settlement.

## **6. PROTECTING EXISTING INVESTMENTS**

1. There was broad support for inclusion in the MAI of a provision stipulating that the MAI would apply to pre-MAI investments. The debate was not conclusive as to whether to restrict the coverage to investments that were “consistent with the legislation” of the host state.

2. Some delegations wish to specify that the Agreement would not apply to claims arising out of past events or which had already been settled. This is reflected in Option A in the draft text. Another delegation questioned the need for the second sentence in view of Article 28 of the Vienna Convention on the Law of Treaties and proposed the text in Option B, which avoids implying retroactive effect.

## **V. DISPUTE SETTLEMENT**

### ***GENERAL***

It is understood that for a number of delegations further work is needed on dispute settlement. In particular, different options remain in the field of multilateral consultations and scope of dispute settlement. The present text has been prepared by the Chairman of the Expert Group on Dispute Settlement on the basis of the discussions in the group. It needs to be discussed by the Negotiating Group.

### ***STATE-TO-STATE PROCEDURES***

#### **Article C.1.a**

1. This paragraph provides that arbitration is available for a dispute over whether a Party has acted in contravention of the Agreement. It is understood that ‘action’ includes failure to act when the Agreement requires it. A key question, which this formulation does not prejudice, and leaves open for the arbitral tribunal to decide in light of all the relevant circumstances and the jurisprudence is, when is a dispute over a legislative measure of a Party ripe for arbitration, if its terms, which provide for action violative of the Agreement, have not yet been applied to a concrete case in that fashion.

2. In light of the opinion of the ICJ in the ELSI case, consideration was given to including in the MAI an express provision that there was no requirement of exhaustion of local remedies before resort might be had to MAI dispute settlement for injury to an investor. There was full agreement that the intent was not to require exhaustion of local remedies before MAI dispute settlement could be invoked. However, it was decided to record that in Commentary, rather than include in the articles of the MAI a provision which might cast doubt on the dispute settlement provisions of other investment agreements which had the same intent and which were silent on the matter.

3. Mexico has serious concerns in relation to this provision.

#### **Article C 1.b**

Article C paragraph 1.b, based on ICSID Article 27, is intended to assure that the initiation of any form of investor-state arbitration provided by the MAI would restrain parallel state-state proceedings under the MAI to the same extent as, but no more than, would initiation of ICSID arbitration for a MAI Contracting Party which is also an ICSID party. This is a very limited preclusion, effecting the right to bring the very same claim. The ICSID observer confirmed that ICSID Article 27 should not preclude a state-to-state arbitration of an issue of treaty interpretation or application which was also involved in the investor-state dispute, as long as this did not amount to the espousal of the claim of the investor. It was recognised that an award in such a state-state proceeding would not affect an award rendered in the investor-state proceeding.

#### **Article C 6**

The “applicable rules” referred to in Article C 4 are those concerning the interpretation and application of treaties. Accordingly, this provision would not provide a basis for a Panel to rule on a dispute about a Contracting Party’s compliance with other international legal obligations.

## **Article C 9**

1. There was full agreement on the desirability of strong procedural safeguards for resort to countermeasures. This would prevent problems which unilateral recourse to countermeasures can produce. However, there was disagreement on the role of the Parties Group in this process.
2. On the permissible scope of countermeasures, there was agreement that expropriation of investments and denial of treatment in accordance with international law were not available countermeasures. There was broad willingness to consider some hierarchy of responses -- to discourage countermeasures against established investment. However, views were fairly evenly divided between delegations favoring a broad approach which would generally allow any responsive measure permitted under customary international law, including measures in the field of trade, and those favoring limiting responses to suspension of benefits under the MAI itself.
3. The broader customary law approach might not, in reality, be as far from the MAI only approach as it might appear to be. For example, certain responses permitted under customary law would run counter to obligations of MAI parties under the GATT, GATS or other WTO agreements. By neither expressly authorizing suspension of benefits under other agreements nor precluding challenge of such retaliatory suspension under the WTO DSU, a MAI party would run the full risk that any retaliation in areas protected under those agreements, without obtaining a waiver under them, would be found to be a violation of those other obligations, notwithstanding alleged rights of retaliation under the customary law of state responsibility. This risk would flow in part from the possibility that a WTO panel would not consider any state responsibility argument but would deal with a dispute strictly within the terms of the WTO agreements themselves; it would also flow in part from the legal uncertainties which some delegations believe exist concerning the right to respond to violation of one treaty by action in contravention of another unrelated one. Provided that the MAI, unlike the OECD's shipbuilding agreement, neither expressly authorized retaliatory suspension of benefits under WTO agreements nor waived the MAI Parties rights to complain under the WTO system for a retaliation found lawful under the MAI, the practical scope of the broad option is likely to be severely constrained.

## ***INVESTOR-TO-STATE PROCEDURES***

### **Article D.1.a**

1. Pursuant to Article D.1.a, an alleged breach of the MAI must be causally linked to loss or damage to the investor or investment for the investor to have standing to bring a claim against the host state, but the damage, while imminent, would not need to have been incurred before the dispute is ripe for arbitration. Further a lost opportunity to profit from a planned investment would be a type of loss sufficient to give an investor standing to bring an establishment dispute under this article, without prejudice to the question of whether a specific amount of lost profits might later prove too remote or speculative to be recoverable as damages. The claim would be initiated on the basis of allegations of loss or damage, but their existence and actual amount would remain to be demonstrated, along with the remainder of the investor's case, during the proceedings on the merits of the dispute.

2. This Article, which includes effects on the investor, applies to all the investor's rights including those relating to establishment.

### **Article D.1.b**

1. Some countries could accept the procedural solution on condition that there are no reservations permitted; were reservations permitted they would wish to return to the full respect clause. Australia, Canada, Hungary, Korea, Mexico and Norway wish to reserve their position. Positions are divided on the types of agreement to be covered.

2. Provided that the law specified under Article D.14.b were applicable under both options, and the respect clause were excepted from state-state dispute settlement, the full respect clause and the procedural solution would appear to be similar in their legal effect.

### **Article D.2.a**

The reference in this article to submission of a dispute to "any competent courts" leaves open the possibility that a Contracting Party might choose not to make the MAI directly enforceable in its courts.

### **Article D.2.c**

Under Article D.2.c, the investor may freely choose among the arbitral options. Country reservations limiting the choice of UNCITRAL and ICC to cases in which the ICSID and additional facility options were not available would be acceptable.

### **Article D.3**

Norway and Iceland have problems of a constitutional nature with unconditional prior consent. Korea has serious concerns with it.

#### **Article D.6**

This paragraph would be intended to assure that, in cases of mixed or unclear division of competence between the EC and a member state, both would be in the proceedings and responsibility would be covered, without burdening the investor with this issue. Whether or not this should be generalised beyond the EC to any other future REIO contracting party, i.e., a REIO with legal capacity and competence on MAI matters, is being considered as well.

#### **Article D.8**

Article D.8 is a variant of the clauses which appear in many investment agreements, allowing the established company to have standing to bring the claim to arbitration against the host state. Country specific reservations to this clause or an annex listing countries to which it does not apply would be acceptable.

#### **Article D.9**

1. This paragraph would represent a compromise between those delegations which want consolidation to be only with the case by case agreement of the investors concerned and those which wish consolidation to be mandatory, with the investor only able to withdraw from it with prejudice to its right to resort to other dispute settlement. Subparagraph e would allow withdrawal to be without prejudice other than under Article D.2.c.

2. Mexico has serious concerns in relation to this provision.

#### **Article D.14**

Unlike in cases under Article 14 (a) in which domestic law may be applicable as law, domestic law may be considered as a relevant fact in cases under Article 14 (b).

#### **Article D.18**

This paragraph provides for the enforceability of awards in accordance with the New York Convention in the courts of parties to it. While it does not require that MAI Contracting Parties become party to the New York Convention, it does requires them to provide for the enforcement of MAI pecuniary awards.

## **VI. EXCEPTIONS AND SAFEGUARDS**

### ***GENERAL EXCEPTIONS***

#### **Paragraph 1**

1. It has been proposed that the general exceptions provisions not be applicable to all of the obligations under the agreement. The ECT (Article 24(1)) is an example of a multilateral agreement that does not allow for general exceptions to be taken with regard to specific obligations concerning compensation for losses or expropriation. Bilateral treaty practice differs on this matter. Some delegations thought that a reference to paragraph 2(c) would be necessary to clarify that actions pursuant to a UN Charter obligation would in any case prevail over the MAI (see paragraph 9, below). The Austrian delegation submitted a proposal which would have the same effect by changing the order of the paragraphs.

2. The question is whether certain obligations of the agreement are considered so central to investor protection, for example compensation in case of expropriation, that a provision should limit the right of a Contracting Party to invoke this Article for actions that would be inconsistent with its obligation to pay compensation in the case of an expropriation.

3. The majority view was that the MAI should provide an absolute guarantee that an investor will be compensated for an expropriated investment. This was questioned by the United States delegation which doubted that in time of war whether a country would be able to pay compensation, in all cases, to an investor of a party with which it is in conflict. In the case that general exceptions would be permitted to override MAI obligations, delegations might further consider whether this should be limited to only essential security interests.

4. One delegation raised the issue of the need to ensure that this provision would not apply retroactively. Delegations pointed to customary international law rules limiting retroactive application of treaties. They agreed this was a valid point, but that it applied more generally to the entire agreement and should be addressed elsewhere.

#### **Paragraph 2**

-- subparagraph a

1. Canada, supported by other delegations, requested square brackets be put around the phrase "which it considers" in the chapeau, as well as brackets around the phrase "or other emergency in international relations" at the end of (i). In the opinion of these delegations, these proposals would help safeguard against potential abuse by constraining the self-judging nature of the provision and by limiting its scope. One delegation believes that, based on an ICJ decision, such a change would eliminate the self-judging nature of the provision.

2. There were different views on whether to delete the phrase "including those" in the chapeau, which would make the list a closed one. Recent agreements like the NAFTA, the ECT, the GATS, and the Shipbuilding agreement do not define essential security interests but provide elements clarifying the purpose of the provision. The Austrian Delegation thought that in a closed list it would also be necessary to amend element (ii) (by inserting the phrase "inter alia" after the word "non-proliferation") to cover international non-proliferation agreements, other than those relating to nuclear weapons for example agreements concerning chemical weapons. Denmark, supported by other delegations, proposed the inclusion of an additional element (iii).

-- subparagraph b

3. This provision is found in recent agreements (NAFTA, ECT, GATS, Shipbuilding). Canada, supported by other delegations, requested that square brackets be put around the phrase "it considers" (to be replaced by "would be") to help safeguard against potential abuse by constraining the self-judging nature of the provision. One delegation believes that, based on an ICJ decision, such a change would eliminate the self-judging nature of the provision.

4. Several delegations noted that this issue also arose in the context of the discussion on transparency in the National Treatment chapter. Japan pointed out that in its opinion this paragraph would also apply to concerns relating to public order.

-- subparagraph c

5. Agreements such as the NAFTA, GATS, and the Shipbuilding agreement include a general exception provision relating to obligations for the maintenance of international peace and security. These provisions refer specifically to obligations under the UN Charter. Some delegations thought it unnecessary to refer to this obligation because the supremacy of the UN Charter over international treaties is not disputed, but they agreed not to insist on its deletion if others wanted to make this explicit. Others were of the opinion that this reference was too restrictive because it might not cover actions taken pursuant to regional security arrangements. To address this point, the Canadian delegation proposed including, after the words "UN Charter", the phrase "or equivalent arrangements authorised by a competent international organisation". The United States saw this as an issue of clarification rather than one of restrictiveness and suggested including, after the word "under", the phrase "or consistent with".

### **Paragraph 3**

1. Some countries believe that a reference to public order is necessary to allow countries to take exceptional measures based on this principle. France indicated in a written submission [DAFFE/MAI/DG2/RD(96)2] that a public order clause was meant to ensure certain objectives, including the non-discriminatory application of its laws and the prevention of disturbances to the public order that could be posed by certain foreign investments. It thought that given the different circumstances of foreign and domestic investors as concerns the protection of public order, it would not be possible, in all cases, to accord equivalent treatment to these different types of investors. Delegations recognised the interest of a state in ensuring the application of its criminal laws, anti-terrorist measures, and money laundering regulations, for example. But not all delegations were convinced that it is necessary to discriminate between foreign and domestic investors in order to protect public order. Austria remarked that if the MAI went beyond national treatment obligations to include the concept of market access, then the broader interpretation of public order would be necessary.

2. Several delegations were of the opinion that provision might need to be made for cases where information requirements or other formalities might be required of foreign investors because they are not in the same situation as domestic investors. This question also arose in the context of the discussion of the transfer provisions in the investment protection chapter where the host state would want to preserve its right to require certain reports without being in contradiction of the absolute right of free transfer otherwise provided by the agreement. Article 1111 of the NAFTA was cited as a possible model to take account of these situations. The question arose whether in fact this was not a matter of "equivalent treatment" which could be included in the context of national treatment.

3. In situations where the state needs to ensure that all investors conform to its laws and regulations which are not in contradiction with the provisions of the agreement, a provision of more general application might also be needed, as in Article 5 of the Capital Movements Code. The Group could consider a provision similar to that in the Code which would apply to the whole of the agreement. If this were the preferred solution, it might obviate the need for a special provision in the transfer article or elsewhere in the agreement where there might be similar concerns.

4. Several proposals were made with the intent to narrow the scope of a public order exception. The German delegation proposed limiting the public order concept to exceptions to the national treatment principle and to make the MAI dispute settlement mechanism applicable. Japan remarked, however, that if the MAI went beyond national treatment obligations to include the concept of market access, then the broader interpretation of public order would still be necessary. The European Commission suggested a reference to the ECJ principles of proportionality and the exclusion of economic purposes as additional limitative qualifications to public order

5. Delegations in favour of including a public order exception agreed that its use should be strictly controlled. These delegations felt that the actions relating to public order would not be self-judging and would be subject to the limitation in paragraph 4 and to the procedures in paragraph 6. France, supported by Spain, stated that these limitations and procedures should apply in the same way to other general exceptions and that all general exceptions should be treated in the same way in relation to the applicability of the dispute settlement mechanism.

#### **Paragraph 4**

Paragraph 4 would apply to all exceptions in this article. It is another way of formulating the obligation that parties must be in good faith when invoking this article and cannot avail themselves of it as a pretext for not complying with their obligations under the agreement. A good faith obligation already exists in international law and the United States has concerns that by restating it in the agreement, we may create a different standard. Some delegations thought it might be useful to follow the ECT (Article 24) and GATS (Article XIV) provisos that public order or other general exceptions must not constitute a disguised restriction or that they are invoked without proper justification. This paragraph could be considered to have the effect of allowing a party which had reason to believe that another party had made improper use of this article to challenge such use as contrary to the objectives of the article. A decision on paragraph 4, in the opinion of several delegations, would have to wait until such time that consideration of paragraphs 2 and 3 had been completed.

## Paragraph 5

The content of this paragraph would need to await a discussion of the role of a "Parties Group". The requirement to notify measures is intended to facilitate transparency and to promote consistency in the manner that MAI Parties might apply the general exceptions provisions. Some delegations thought that the 1991 clarification by the CIME that "measures taken for economic, cultural or other reasons should be identified as such and should not be shielded by an excessively broad interpretation of public order and essential security interests..", might also assist the Parties in applying these provisions.

## Paragraph 6

1. Most delegations were in favour of providing for a mechanism for consultation/dispute settlement. It would be understood that entering into consultations would not prejudice the right of either Party to invoke the other procedures of the agreement to which it might be entitled. The question remains whether paragraph 4 provides an objective standard which, if violated, can give rise to an actionable cause.

2. Paragraph 6 could be adapted depending on how parties wish to proceed. There are several options which can be considered:

a) actions relating to any of the provisions of this article could be subject to consultations (as provided for in the article or by reference to the consultations procedures of the agreement), and to the dispute settlement provisions of the agreement to the extent that the provisions are not entirely self-judging;

b) actions relating to any of the provisions of this article could be subject to consultations (as provided for in this article or by reference to the consultations procedures of the agreement), to the exclusion of recourse to the dispute settlement provisions of the agreement;

c) actions relating to the public order provisions of paragraph 3, could be subject to consultations (as provided for in this article or by reference to the consultations procedures of the agreement), and to the dispute settlement provisions of the agreement.

3. In the view of the United States, any dispute settlement mechanism provided in the MAI would be rendered superfluous by the self-judging nature of the general exception provisions. This delegation also questioned whether it would be necessary to provide a specific consultation mechanism in this article separate from the general consultation mechanism of the MAI.

4. Whatever the procedure agreed for general exceptions, it will have to be considered in the context of the MAI provisions on the role of the Parties Group and the dispute settlement procedures.

## ***TRANSACTIONS IN PURSUIT OF MONETARY AND EXCHANGE RATE POLICIES***

1. Most EG5 delegations wanted to consider this issue further, including in particular whether the transactions referred to in paragraph 1 should be explicitly limited to: 1) open market transactions in government securities; and 2) foreign exchange intervention transactions. Some delegations considered that there should be a broad carve-out for activities conducted in pursuit of monetary or exchange rate policies by a central bank or monetary authority.

2. The Group also considered a text which would preserve the freedom of the monetary authority to decide not to carry out transactions with foreign non-residents but which would prevent the monetary authority from discriminating against resident (established) foreign investors when choosing the counterpart of a transaction. This text would be added at the end of paragraph 1. It would read as follows:

“... with investors or their investments which are not legal persons constituted or organised under the applicable law of the Contracting Party or with natural persons who do not have the nationality of, or who are not permanently residing in the Contracting Party in accordance with its applicable law”.

Some delegations considered that such an addition would not be appropriate. Other delegations wished to reflect further on this matter.

3. One delegation asked whether restrictions on the sale of financial instruments to non-residents falls under the above provisions or under the temporary safeguard clause (see below). In response, it was said that under the above provisions the monetary authority would be free to determine whether or not to sell instruments to non-residents, while restrictions imposed by the authorities on the sale by residents other than the monetary authority to non-residents should fall under the safeguard clause.

## ***TEMPORARY SAFEGUARD<sup>1</sup>***

1. Some Delegations questioned the need to allow for a derogation from National Treatment.
2. In paragraph 1 a), the words “and external financial difficulties” can be found in the GATS. It is understood that inclusion of these words narrows the scope of the safeguard clause. A few delegations wished to review further the meaning of the phrase “and external financial difficulties.”
3. Belgium reserved its position on the role of the Fund with respect to paragraph 1(b).
4. Some delegations wished to review further the relationship between this safeguard clause and the Fund Articles of Agreement because an extension of the Fund’s jurisdiction is under consideration.
5. Regarding paragraph 3 a), the Fund representative proposed that there should be flexibility in the timing of reviews, for example, for countries implementing a Fund-supported programme, in order to coincide the review under the MAI safeguard article with a scheduled review by the Fund’s Executive Board of the policies under the programme.
6. In paragraph 5 c), the United States suggested that decisions by the Parties Group to approve or disapprove a measure shall be made by consensus minus one.
7. Concerning paragraph 7, Denmark proposed an alternative text which reads:

“The provisions of this Article cannot be invoked with regard to direct investment, proceeds from the sale or liquidation of a direct investment, compensation from expropriation and from strife, returns on direct investment and unspent earnings of personnel engaged from abroad in connection with an investment”.

Many Delegations preferred to delete paragraph 7 entirely so as not to qualify the scope of the safeguard article.

8. With respect to panel consultations with the Fund in the context of Dispute Settlement, the Fund representative proposed inclusion of the following text:

“If the dispute concerns Article A (Temporary Safeguards) or Article B (Obligations in the Fund), the panel shall consult with the Fund and accept its decisions as to consistency of the measures with its Articles of Agreement and its assessments made under paragraph[s] 1 [and 2] of Article A.

It was agreed that this proposal needs to be discussed.

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1. Comments made during the informal consultations on financial matters on 14-15 April.

## **VII. FINANCIAL SERVICES<sup>1</sup>**

### ***PRUDENTIAL MEASURES***

1. The proposed Article applies to measures taken with respect to financial services. Given the coverage of the MAI, the Article will apply to measures affecting investors and their investments in the financial services area and not all aspects of international trade in financial services. The Expert Group No.5 considered that there was no need to make this point explicit in the proposed Article.

2. The proposed text recognises the right of a Party to take prudential measures which do not conform with National Treatment, MFN and the other provisions of the Agreement, provided that the measures are not used as a means of avoiding Party's commitments and obligations. One delegation suggested that a requirement that prudential measures be not more restrictive than necessary to meet the prudential objective might be included in the proposed Article.

3. One delegation asked whether restrictions on transfers taken in connection with orders or judgements related to civil, administrative and criminal proceedings, etc. would be covered by paragraph 1 of the proposed article, subject to the anti-abuse provision of paragraph 2. This question may be related to paragraph 4.6 in the "Transfers" Article.

4. In paragraph 1 of the proposed Article, the Expert Group opted for the term "enterprise". This term was understood to be broader than "institution" which is generally only an entity expressly authorised to do business and regulated or supervised under the law of the party in whose territory it is located.

5. Except for one delegation (Australia), EG5 took the view that the exercise of a Party's right to take prudential measures which do not conform with the provisions of the Agreement should in principle be subject to the dispute settlement mechanism of the MAI. Most delegations were of the view that financial services expertise should be required for any arbitration panel for disputes on issues relevant to financial services.

6. EG5 felt it would be desirable that the Agreement define certain terms including the term "measure".

### ***AUTHORISATION PROCEDURES***

1. Most EG5 delegations recommended adoption of the draft text on authorisation procedures.

2. It was suggested that provisions on authorisation procedures may have a broader application than financial services.

3. A few delegations felt that no such provisions are necessary as they considered that the provisions would not add to the basic obligations of the agreement.

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1. This Commentary reflects comments made in EG5 and informal consultations on financial matters at expert level.

## ***TRANSPARENCY***

1. The Expert Group No. 5 recommended that, in addition to the general Transparency provisions of the MAI, such specific text for financial services be adopted.

2. The Group also considered a provision proposed by one delegation calling for advance notification, to the extent practicable, to all interested persons of any measure of general application that the Contracting Party proposes to adopt which may affect the operation of the agreement, in order to allow an opportunity for such persons to comment on the measure. The text reads as follows:

“Each Contracting Party shall, to the extent practicable, provide in advance to all interested persons any measure of general application that the Contracting Party proposes to adopt which may affect the operation of the Agreement, in order to allow an opportunity for such persons to comment on the measure. Such measure shall be provided:

- a) by means of official publication;
- b) in other written form; or
- c) in such other form as permits an interested person to make informed comments on the proposed measure.”

While delegations agree to the value of prior consultation, a majority of delegations expressed concerns that the above proposed provision may be unduly burdensome, and would not be practical.

## ***INFORMATION TRANSFER AND DATA PROCESSING***

1. The Expert Group No. 5 recommended adoption of the draft text on information transfer and data processing<sup>2</sup>.

2. The Group considered that this text may have a broader application than financial services and invited the Negotiating Group to consider this possibility.

3. It is the Group’s common understanding that such provisions do not prejudice in any way the right of Contracting Parties to take prudential measures as provided by the prudential carve-out article [DAFFE/MAI(97)1, page 11].

4. The European Commission provided comments (circulated after the March meeting as DAF/MAI/EG5/RD(97)10) on the reasons why the term “privacy” in paragraph 2 b) should be adopted, instead of the term “personal privacy” used in the GATS. Some delegations wanted to review this aspect of the text further.

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2. One delegation reserved its position.

## ***MEMBERSHIP OF SELF-REGULATORY BODIES AND ASSOCIATIONS***

1. The Expert Group No. 5 recommended adoption of the proposed text.
2. It is the Expert Group's common understanding that these provisions do not prevent self-regulatory bodies and associations, including deposit insurance institutions, from applying the requirements of the relevant rules and regulations for access to membership as long these requirements are consistent with the provisions of this Agreement.
3. Most delegations supported the following interpretative note proposed by one delegation:

“Contracting Parties may meet their obligations on access to clearing systems for branches of financial services enterprises by providing indirect access, for example, through an enterprise incorporated in the territory of the Contracting Party concerned.”
4. A few delegations wanted to review further the proposed interpretative note because they considered that it would impose a lesser standard than in the WTO. One delegation suggested adding to the interpretative note: “provided that such access provides equal opportunities”.

## ***PAYMENTS AND CLEARING SYSTEMS/LENDER OF LAST RESORT***

1. The Expert Group No.5 noted that these issues were related to the role of monetary authorities and agreed to consider further the proposed text.
2. Most delegations supported the following interpretative note proposed by one delegation:  
  
“Contracting Parties may meet their obligations on access to clearing systems for branches of financial services enterprises by providing indirect access, for example, through an enterprise incorporated in the territory of the Contracting Party concerned.”
3. A few delegations wanted to review further the proposed interpretative note because they considered that it would impose a lesser standard than in the WTO. One delegation suggested adding to the interpretative note: “provided that such access provides equal opportunities”.

## *DISPUTE SETTLEMENT*<sup>3</sup>

### *DETERMINATION OF CERTAIN FINANCIAL SERVICES ISSUES IN INVESTOR TO STATE PROCEEDINGS*

1. Delegations considered whether the MAI should provide for a special procedure, in investor to state proceedings, to determine whether certain financial services measures (specifically, prudential measures, temporary safeguards and actions taken by a monetary authority) are consistent with the MAI.
2. Some delegations believe that the decision of a Contracting Party to invoke prudential measures, and perhaps some other kinds of measures, should not be subject to the dispute settlement provisions of the MAI.
3. Some delegations believe that an investor to state panel should be free to decide all financial services issues. These delegations are concerned that a special provision dealing with certain financial services matters could lead to a call for special provisions in other areas.
4. The majority of delegations believe that MAI Parties should have a voice in the question of whether a prudential measure, and perhaps a temporary safeguard or action by a monetary authority, is consistent with the MAI. These delegations hold the view that there must be a balance between the interest of an investor in pursuing its remedies under the MAI and the need for stability in financial markets.

### *COMPOSITION OF DISPUTE SETTLEMENT PANELS IN FINANCIAL SERVICES DISPUTES*

1. Delegations agree that panellists in state to state and investor to state proceedings should have the necessary expertise relevant to prudential issues and other financial services issues when the dispute involves such an issue.
2. A majority of delegations believe that the MAI should contain a provision that requires or encourages Parties to appoint financial services experts as panellists in such disputes.
3. However, some delegations believe that the current dispute settlement provisions on appointments to panels, which would enable a disputing Party to appoint a financial expert to a panel if it so desired, are adequate. These delegations are concerned that a special provision on appointment of financial services experts might lead to calls for such provisions with respect to other areas of expertise.
4. While the Group has not reached agreement on the principle of a specific provision on appointment of financial services experts, and have not had an opportunity to discuss text in detail, two proposals for a provision have been put forward for consideration.
5. Under the first proposal, the MAI would contain a provision modelled after a provision in the GATS Annex on Financial Services.

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3. Comments made during the informal consultations on financial matters on 14-15 April.

## ***DEFINITION OF FINANCIAL SERVICES***

1. The recommended definition of financial services is the same as that used in the GATS.
2. One EG5 delegation asked whether transfer of credit risks (for instance, credit swaps) and the provision of stored value cards were considered as financial services. EG5 understood the proposed list of financial services as an open-ended one. Therefore, it was considered that, unless otherwise specified, the services in question should be regarded as financial services.

## ***OTHER ISSUES***

### *NEW FINANCIAL SERVICES*

1. Several EG5 delegations considered that owing to the rapid pace of innovation in the financial services sector, it is important to ensure that an investor in the host country can introduce a new service to that market and that, as there are not adequate points of comparison, relying on the National Treatment principle alone could effectively exclude a foreign-owned establishment from introducing new financial services. Therefore these delegations favoured the preparation of specific text.

2. Three delegations supported the introduction in the MAI of specific provisions concerning new financial services. The Group considered two options for text:

#### Option 1

“ A Contracting Party shall permit financial services enterprises of any other Contracting Party established in its territory to offer any new financial services.”

#### Option 2

“A Contracting Party shall permit a financial services enterprise established in its territory that is an investment of an investor of any other Contracting Party to offer in its territory any financial service that is not offered in the territory of the Contracting Party but which is offered in the territory of another Contracting Party. A Contracting Party may determine the institutional and juridical form through which the service may be provided and may require authorisation for the provision of the service. Where such authorisation is required, a decision shall be made within a reasonable time and the authorisation may only be refused for prudential reasons”.

3. Most delegations questioned the need for specific provision and preferred to rely on the National Treatment provision of the MAI, possibly accompanied by an interpretative note.

### *“ACQUIRED RIGHTS”*

1. EG5 considered suggestions made by one delegation that there may need to be provisions concerning the “acquired rights” of foreign financial services enterprises established in a Contracting Party [see DAFFE/MAI/EG5/RD(96)1].

2. Some delegations considered that it was unclear what the concept of “acquired rights” referred to. The European Commission provided comments on this matter (circulated after the March meeting as DAFFE/MAI/EG5/RD(97)9). Delegations wished to give further consideration to these comments. Some delegations considered that this matter is linked to “standstill” and should be addressed in the general framework of the Agreement.

3. Other delegations considered that the inclusion of provisions on “acquired rights” could create distortions in the treatment of investors depending on the date of their respective establishment. Those delegations considered that a Contracting Party should have the ability to apply new regulations to all financial institutions operating on its territory so long as these regulations are consistent with the provisions of the Agreement.

### *RIGHT OF INITIAL ESTABLISHMENT, EQUALITY OF COMPETITIVE OPPORTUNITY AND APPLICATION OF NATIONAL TREATMENT IN SUB-NATIONAL UNITS OF GOVERNMENT*

1. One EG5 delegation made proposals for text in these areas [DAFFE/MAI/EG5/RD(96)1]. A few other delegations expressed support for the proposal on right of initial establishment and equality of competitive opportunity.

2. Most delegations did not support adoption of text in these areas. They considered that these issues go beyond financial services issues and have been addressed or are under consideration within the broader framework of the Agreement. A few delegations considered that specific market access disciplines for financial services should be developed in the MAI.

*RESTRICTIONS BASED ON DOTATION CAPITAL OF BRANCHES OF FINANCIAL SERVICES ENTERPRISES*

1. One EG5 delegation proposed the following text:

“Some countries still require branches of foreign banks to maintain dotation capital. To the extent that dotation capital requirements are imposed on branches of banks of another Contracting Party, any operational restrictions based on capital applicable to branch offices shall not be based on such dotation capital. Rather, Contracting Parties shall base such operational restrictions on the world-wide consolidated capital of the parent bank.”

Detailed comments explaining the rationale for this proposal are contained in paragraph 31 of the Aide-Memoire in DAFFE/MAI/EG5/M(97)1.

2. While two other delegations supported this proposal, several delegations considered that the measures referred to in the above text were justifiable on prudential grounds and should be permitted under the MAI. Some delegations considered that the issue should preferably be dealt with on a bilateral basis (between national supervisory authorities).
3. Delegations agreed that any such measures should not discriminate between branches of non-resident financial institutions and domestic financial institutions.

*“INDIRECT INVESTMENT”*

1. One EG5 delegation expressed concern that the extension of the protection of the MAI to indirect investment may not be appropriate for the financial services sector for prudential reasons, particularly in instances where there is a lack of appropriate co-operation arrangements with the supervisory authorities of non-MAI countries [DAFFE/MAI/EG5/RD(97)7].
2. A number of delegations wanted to consider the matter further. Other delegations considered that the MAI provided safeguards to adequately address these concerns, including the prudential carve-out, the proposed denial-of-benefits clause, and possible specific provisions for financial services in the dispute settlement process (see below).

## **VIII. TAXATION**

### ***EXPROPRIATION***

1. EG2 agreed to carve in taxes for expropriation and agreed on the text set out in paragraph 2 of the Draft Article on Taxation.

2. The Group reconfirmed that taxes as such are not expropriatory. It developed a clarifying text providing elements to be considered when determining whether a specific measure should be considered expropriatory. The Group agreed that the text should be included in the MAI as an Interpretative Note having full legal force.

3. Most delegations supported inclusion of the following additional statement in the Interpretative Note: "MAI Parties understand that no taxation measures of the Parties effective at the time of signature of the Agreement could be considered as expropriatory or having the equivalent effect of expropriation." Some delegations were not in a position to associate themselves with such a statement.

4. The Group agreed that the Tax Authorities of only two countries should be involved in the procedure described in paragraph 2 and both should be MAI Parties. One of the Parties would certainly be the host country to the investment, but the other might need to be defined taking into account the extent to which indirect investments will be covered by the MAI.

### ***TRANSPARENCY***

1. EG2 agreed to carve in transparency.

2. The Group also agreed that the general Article on transparency in the consolidated text (paragraphs 2.1, 2.2 and 2.3) should apply to taxes. However the Group considers the inclusion of the term "policies or practices" in paragraph 2.3 of the general Article on Transparency to be necessary for tax purposes, and additional text needs to be included in the Taxation Article to protect the confidentiality of certain types of information specific to tax matters, including information shared between the Authorities of different countries on a confidential basis. The Group developed an agreed text for this purpose (paragraph 3 of the Draft Article on Taxation).

## ***NATIONAL TREATMENT***

1. The vast majority of EG2 delegations was opposed to any carve-in for taxes with respect to National Treatment. These delegations emphasised the need to see tax measures affecting National Treatment in the context of international treaty obligations and tax policy as a whole, and the need of governments to preserve the freedom to introduce new measures especially in the light of economic and technological developments. These delegations also emphasised the extent to which tax treaties, including the protection provided by non-discrimination obligations, provide comprehensive protection to investors. Moreover these delegations emphasised that double taxation agreements cover most OECD countries and that the mutual agreement procedures under tax treaties have a long and successful history of resolving tax disputes within a reasonable time period. Subjecting taxes to the national treatment obligation would undermine both tax agreements (through forum shopping) and the MAI. This problem could be aggravated by the accession to the MAI of Non-OECD Members, particularly certain countries with which OECD Members would not be willing to conclude tax treaties. Problems of legal interpretation were also mentioned as creating uncertainty and exposing Tax Authorities to unjustified dispute settlement claims. These delegations shared the concern that any carve-in for taxes with respect to National Treatment would not allow the effective operation of its anti-avoidance measures and tax treaty network. Based on these arguments and taking into consideration points raised in paragraph 8, the consensus of the Group was to present a single text to the Negotiating Group with a footnote.

2. Five EG2 delegations (Germany, Italy, Belgium, Switzerland and the European Commission) favoured a "carve-in" for taxes with respect to National Treatment subject to safeguards specific to taxation. The Swiss with the support of the German delegation provided a text specifying what this carve-in provision might entail. The five delegations considered that the MAI, as a high standards investment agreement, should not carve-out taxation measures from National Treatment. These delegations agree that the tax treaty network, though extensive, does not cover all likely signatories to the MAI (nor even all OECD countries). In their view some treaties do not contain a sufficiently comprehensive non-discrimination provision. They also felt that incorporating the National Treatment obligation in the body of the text would strengthen the accession criteria from a tax policy viewpoint. These delegations also argued that subjecting tax disputes arising in connection with National Treatment to binding dispute settlement procedures under the MAI would encourage tax authorities to resolve disputes that would not otherwise be resolved (within a reasonable period of time) in accordance with the mutual agreement procedures established under double taxation agreements. These delegations felt that the tax policy concerns that had been identified in paragraph 7 were adequately addressed by the Swiss text. The Group did not discuss this text in detail, however, as the vast majority did not feel that such a carve-in was appropriate.

## ***MOST FAVOURED NATION TREATMENT***

1. EG2 agreed that neither direct taxes proper nor social security contributions/taxes should be carved into the MFN provision of the MAI.

2. EG2 also agreed that as indirect taxes do not usually discriminate against foreign investors and are, in any case, adequately covered both by non-discrimination provisions in bilateral tax treaties and similar provisions in other multilateral agreements, such taxes should not be carved-in into the MFN provision either.

## ***PERFORMANCE REQUIREMENTS***

Many questions were raised in EG2 as to the potential impact of the discipline on Performance Requirements on standard features of the tax systems of Member countries. Based on the difficulties that the current Performance Requirements text would pose for Member countries' tax systems, the Group, at this stage, does not recommend covering taxes.

## ***TRANSFERS***

EG2 agreed that taxation measures should not be subject to the Article on transfers.

## ***INVESTMENT INCENTIVES***

1. In response to the request from EG3, EG2 had an extensive discussion on the desirability and feasibility of including tax incentives in the national treatment and MFN articles. This discussion took place in the light of the emerging consensus in EG3 that investment incentives should be subject to both national treatment and MFN obligations, without necessarily including explicit text to this effect.

2. On the issue of limiting or restricting the scope of tax incentives, the Group noted the distorting effect of positive discrimination in favor of foreign investors, but also the ongoing work of this issue in other fora. Discussions showed that defining tax incentives generally, and undesirable ones particularly, would be extremely difficult. Also, the vast majority of delegates felt that the approach to carving out taxation measures from national treatment and MFN obligations should include taxation incentives as such incentives are clearly taxation measures. There should therefore be no carve-in of taxation measures to incentives provisions. The vast majority of the Group did not see any reason for subjecting tax incentives to any disciplines different from those applying to taxation measures in general.

3. However, some delegations believed that including tax incentives would add to the value of the proposed disciplines of the incentives Article, and would avoid a shift from non-tax incentives (covered by the investment incentives Article) into tax incentives (not covered). These delegations therefore proposed a carve-in of tax incentives for purposes of the investment incentives Article. One delegation felt that it would, in principle, be possible to define specific tax incentives, a view supported by another delegation. The vast majority of delegations rejected this view, and examples were given to illustrate the difficulty.

4. Equally, it might be observed that work has only recently begun in the WTO on a subsidies code under the GATS and in the CFA special sessions on harmful tax competition. So there must be concern that work in the MAI on further disciplines on incentives risks running into conflict with work elsewhere if attempts are made to plan out a programme of future work at this stage; it may be possible to develop a programme later, but it would appear sensible to consider this only after a full appraisal has been carried out into exactly how any MAI disciplines are intended to fit with those being developed elsewhere (and the relative time-scales involved).

## ***DISPUTE SETTLEMENT***

1. EG2 considered that dispute settlement would not only arise for taxation to the extent that taxation matters were carved back into the MAI, but also for the purpose of determining what constitutes a taxation measure for the purpose of the carve-out.

2. To the extent that tax matters are covered under the MAI disciplines other than transparency and expropriation, the Group agreed that primacy should be given to mutual agreement procedures under tax treaties. Tax authorities should have the necessary flexibility to settle tax related disputes and tax expertise should be required at all stages of MAI dispute settlement including consultations and arbitration procedures although this might not need to be explicit in the case of state-to-state disputes.

3. The European Commission pointed out that unrestricted access to the Investor to State dispute settlement procedures was a core feature of the MAI. While recognising that the appropriate input of tax experts and competent tax authorities into the procedures was a justified concern, it considered that some features of the Draft Taxation Article contain major changes to the general rules on Investor to State dispute settlement. This particularly concerns the possibility to suspend an Investor to State procedure and turn it into a State to State procedure under certain conditions. It would also arise if the proposal, currently set-out in a footnote, were adopted to bind a panel to the findings of a review board of tax experts.

4. Some delegations noted that a procedural modification to Investor-State dispute settlement in the case of expropriation claims involving taxation measures is a standard feature of their country's investment treaties.

5. Taxation measures are generally not subject to dispute settlement. The fact that the proposed paragraph in the Taxation Article on dispute settlement is a significant departure from this practice underlines the insertion of the footnote by Australia.

## ***RELATIONSHIP BETWEEN THE MAI AND OTHER INTERNATIONAL AGREEMENTS***

1. EG2 did not see any benefit from carving taxation measures into the "non-derogation" clause [DAFFE/MAI/EG3(96)7].

2. The Group noted that, however remote, the possibility existed that an investor of a MAI Contracting Party might seek to obtain access to international arbitration rather than the arbitration procedures provided in the Taxation Article by relying on its bilateral investment agreements in combination with the MFN provision in the MAI. To avoid this possibility, the Group agreed to an interpretative note to the Draft Article on Taxation.

## ***ACCESSION***

1. EG2 expressed concern about accession to the MAI of "tax havens", whether as Contracting Parties or as dependent territories of Contracting Parties. It was generally felt that tax havens, which are usually characterised by low (or zero) tax rates and/or extremely narrow tax bases as well as bank secrecy laws restricting exchange of tax information, provide opportunities for tax evasion and therefore pose a serious threat to countries' tax revenues.
2. The Group believed that the above concern would not require specific accession criteria if taxation were subject to neither national treatment nor MFN obligations under the MAI.
3. The Group considered nevertheless that tax policy considerations should be taken into account in accession to the MAI. It therefore considered that tax authorities should be involved in the process by which accession candidates are judged.

## ***DEFINITIONS***

1. A large majority of EG2 delegations were in favour of defining taxes in order to provide certainty for investors by clarifying the dividing line between those measures that are carved out or back into the MAI.
2. The main outstanding issue is whether or not the definition of "taxes" should include social security measures or contributions, which are not normally considered taxes in some countries. This matter remains to be resolved.
3. The reference to customs duties is a placeholder pending clarification of the relationship between the MAI and international trade in goods and services.

## **IX. RESERVATIONS<sup>1</sup>**

### ***STANDSTILL AND THE LISTING OF COUNTRY SPECIFIC RESERVATIONS***

1. The MAI aims to ensure a high minimum standard of treatment for investors and their investments, including National Treatment and MFN treatment. Standstill would result from the prohibition of new or more restrictive exceptions to this minimum standard of treatment. From this perspective, a violation of standstill would be a violation of the underlying MAI obligations (e.g. of National Treatment and MFN), and the dispute settlement provisions would apply to such breaches of the MAI obligations.
2. Standstill would not apply, however, to any general exceptions (e.g. national security) or to any temporary derogations (e.g. balance of payments) that might be allowed under the MAI.
3. For those matters where Contracting Parties are ready to commit to standstill, the Drafting Group considered that:

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1. The list of country specific reservations is in DAF/MAI/RES(97)31.

- a) each Contracting Party should list all non-conforming measures in an Annex of the Agreement;
- b) the reservations should describe, in the most precise terms possible, the nature and scope of the non-conforming measures. This would ensure that the scope of the reservations is not broader than these measures and, thus, that the reservations are not of a "precautionary" nature;
- c) no additional non-conforming measures could be introduced; and
- d) an amendment to a non-conforming measure would be permitted provided it did not decrease the conformity of the measure.

Of course, if the MAI obligations were expanded, Article 1.5 (a) - (d) would come into play again with respect to the new or enlarged obligations.

4. The Drafting Group considered that further discussion is needed on the question of country specific reservations in certain sensitive sectors and new economic activities that may emerge in the future. Some delegations suggested flexibility could be achieved by separate annexes to the Agreement for the listing of country specific reservations in these areas.

5. The Drafting Group also considered that a standard presentation of the non-conforming measures listed in Contracting Parties' specific reservations would enhance transparency and facilitate the operation of the Agreement. The Drafting Group felt that specific reservations listed in the schedules of the Contracting Parties should include the following elements:

- a) the obligation or MAI article in respect of which the reservation is taken;
- b) the sector(s) or sub-sector(s) covered by the reservation ;
- c) the level of government which maintains the non-conforming measure;
- d) the legal source or authority of the non-conforming measure;
- e) the description of the non-conforming measure; and
- f) the purpose of the non-conforming measure.

6. For practical reasons, however, the amount of information to be provided should be limited to the minimum necessary to describe the non-conforming measures. This may be particularly relevant to sub-national (e.g. state and local) measures, not all of which may merit listing.

## ***ROLLBACK***

1. Rollback is the liberalisation process by which the reduction and eventual elimination of non-conforming measures to the MAI would take place. It is a dynamic element linked with standstill, which provides its starting point. Combined with standstill, it would produce a "ratchet effect", where any new liberalisation measures would be "locked in" so they could not be rescinded or nullified over time.
2. There are a number of ways for achieving rollback. The most commonly known in the trade field is that of successive rounds of negotiations where rollback results from the trade-offs or exchange of trade concessions. Peer pressure through periodic examinations of Member countries' restrictions has been the approach of the OECD liberalisation instruments. Rollback commitments may also be inscribed in schedules of commitments or list of reservations. While this has not been a generalised practice, it has been done in some cases under the OECD instruments.
3. Rollback might be achieved through:
  - a) liberalisation commitments by the Contracting Parties effective on the date of entry into force of the MAI. This would imply that that not all restrictions currently maintained would be included in the list of reservations of the Contracting Parties;
  - b) rollback commitments inscribed in a country reservation or description of a non-conforming measure by means of a "phase-out" or a "sunset clause" specifying a future date when the non-conforming measure would be removed or made more limited in the future. Phase-out or sunset provisions could not be envisaged for all non-conforming measures. They might be useful, however, where the phase-out of a non-conforming measure is inscribed in domestic legislation or where a Contracting Party is able to commit itself to future liberalisation by a specified date.
4. Rollback after the entry into force of the MAI could result from:
  - a) an obligation for a Contracting Party to adjust its reservations to reflect any new liberalisation measure (the "ratchet" effect).
  - b) periodic examinations of non-conforming measures. These examinations could lead to recommendations in favour of the removal or limitations of specific measures. These reviews could be conducted on a country-by-country basis, or on an horizontal or sectoral basis, taking into account the degree of liberalisation already achieved; and
  - c) future rounds of negotiations designed to remove non-conforming measures. The decision to launch future negotiations could be taken at the conclusion of the MAI negotiations or the MAI could provide a specific date for the first round of such negotiations.
5. The "Parties Group" could have the role of monitoring the adjustment of country reservations, conducting periodic examinations of non-conforming measures or launching future rounds of negotiations.

## ***LODGING OF COUNTRY SPECIFIC RESERVATIONS***

1. The Drafting Group held a brief preliminary discussion of this matter on 26 March 1997 on the basis of a Note by the Chair [DAFFE/MAI/DG3(97)6]. Following further discussion on 24 April 1997, it was agreed to put forward the Draft Article as set out above and to include as Commentary the following observations which were initially developed as an Aide-Memoire to the discussion of 26 March [DAFFE/MAI/DG3/M(97)3].
2. The Group agreed that its objective was to prepare the text of a draft article, together with any necessary commentary. The Drafting Group did not need to resolve the important policy issues outstanding in regard to the lodging of reservations as these were under discussion in the Negotiating Group. The existing commentary in the Chairman's note should not be considered as a first draft of the commentary to be prepared by the Group.
3. It was agreed that part A of the draft article was needed as the core provision to “grandfather” existing non-conforming measures and prevent the introduction of more restrictive measures (“standstill”).
4. Different views were expressed with respect to part B of the draft article which would allow new non-conforming measures to be introduced after the Agreement comes into force. One view was that such a provision might undermine the MAI disciplines to which it applied. The opposite view was that part B would make it easier to preserve high standards in the disciplines of the agreement by allowing flexibility to countries in lodging their reservations.
5. Different views were also expressed regarding the disciplines against which reservations should be permitted. While some favoured an open list, others argued for a limited closed list of disciplines comprising National Treatment, MFN and new disciplines (special topics). It was suggested that the disciplines listed in the chapeau text of parts A and B should remain incomplete for the time being pending political decisions by the Negotiating Group.
6. In part A of the draft article, subparagraphs a) and c) seemed broadly acceptable to most delegations on a first reading. Subparagraph b) also attracted support although some questioned the need to provide for the possibility that parliaments might fail to renew laws immediately.
7. It was suggested that the term “measure” should be defined and reference was made to the definitions used in NAFTA<sup>2</sup>, GATS<sup>3</sup> and the transparency article in the MAI [DAFFE/MAI(97)1, page 11]. One delegation objected to the use of the transparency definition which was said to be unsuitable for the purpose of lodging reservations.

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2. NAFTA Article 201: Definitions:

“measure includes any law, regulation, procedure, requirement or practice”;

3. GATS Article XXVIII:

“measure means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form”;

8. Another suggestion was that reservations should be lodged with respect to "treatment" as this was the term used in the National Treatment and MFN articles. Others considered this approach unsatisfactory.

9. The question was raised whether national law or the description of the measure in the reservation would define the limits of Parties' obligations under the MAI. Delegations underlined the need for certainty in this regard and reference was made to the four introductory paragraphs of Annex I to NAFTA. This discussion drew attention to the important relationship between the Article itself and the form and content of the country reservations (see Annex).

10. Questions were raised about whether the provisions of the draft article, especially part A, could be applied uniformly to all levels of government and to regional economic integration organisations.

11. Finally, it was proposed to add a provision to protect existing investments in the event that those investments had been established under conditions more favourable than those guaranteed by the reservations of the country concerned. NAFTA contains a provision along these lines<sup>4</sup>.

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4. NAFTA Article 1108 (4) (Reservations and Exceptions):

"No Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective."

*Annex*

**Standard presentation of individual country-specific reservations**

**Sector:**

**Sub-Sector:**

**Obligation or MAI article in respect of which the Reservation is taken:**

**Level of Government:**

**Legal source or authority of the Measure:**

**Succinct Description of the Measure:**

**Purpose or Motivation of the Measure:**

**ANNEX:**  
**COUNTRY SPECIFIC PROPOSALS FOR DRAFT TEXTS**

# **GEOGRAPHICAL SCOPE**

**(Paper from one delegation)**

## **I. Introduction**

The main objective of the multilateral international agreements must be to assist governments in their efforts to maintain the international peace and security, since no international agreement can be drafted in a way to disregard the existing international peace and security.

No agreement can include provisions which may violate the rights and interests of a party or parties, or upset the sensitive balance of international order.

This delegation would like to highlight the fact that there was a broad acceptance, during MAI negotiations of the principle that international peace and security shall be respected.

## **II. Perspective of MAI**

The aim of MAI should be to provide a comprehensive protection for investors and investments. However if it diverges from the existing definition of territory under international law this may raise legal complications. On this Delegation's view, it is not the intention of the OECD members to raise new international legal complications.

## **III. Some Comments on the Draft Provision on Geographical Scope-DAFFE/MAI(97)1**

Regarding the draft article MAI shall apply not only in the land territory, the internal waters and the territorial sea of each party, (the definition of "territory" already comprises with respect to international law), but also in the maritime areas beyond the territorial sea as well as the archipelagic waters.

None of the OECD members is an archipelagic State. In addition to this fact, it has not been taken into consideration that without contemplating all maritime issues between archipelagic states and their views on draft article, such a provision may produce contingencies between the relevant states as well as on investors and investments.

It should be recalled that not every state has ratified the 1982 UNCLOS. Furthermore, this Convention does not include any specific investment-related provisions. In the light of these facts, establishment of a relationship between MAI and the UNCLOS should be avoided. Consequently if a reference to the UNCLOS is going to be preferred, it is our view that a broader view should be followed in order to avoid discrepancies.

It should not be overlooked that there are many jurisdictional issues between the opposite or adjacent coastal states, even regarding the air territory above maritime areas, arising from the claims to extend the air territory beyond the frontiers of territorial sea. Therefore the area of application of MAI should be defined in a way so as not to produce negative effects on the nature and extent of already existing maritime issues and increase the number of countries involved to such cases. Extending the scope to the maritime areas to which a new international agreement shall apply will certainly aggravate the already existing disputes. This will also be a risk for the third countries and investors into which they never wanted to be involved.

#### **IV. Conclusion**

This Delegation should like to reiterate its opposition to the extension of the scope of MAI to cover maritime areas and offer the following text:

“This Agreement shall apply in the land territory, internal waters and the territorial sea of a Contracting Party.”

## **CLAUSE FOR REGIONAL ECONOMIC INTEGRATION ORGANISATIONS (REIO-CLAUSE)**

### **(Contribution from one delegation)**

One delegation has presented the principle reasons for the inclusion of a clause for Regional Economic Integration Organisations in the Multilateral Agreement on Investment at the April meeting of the Negotiating Group (DAFFE/MAI/RD(96) 21).

Building on this contribution, the Community herewith submits its proposal for such a REIO-clause.

Article X

on

Regional Economic Integration Organisations (REIOs)

1. For the purpose of this Agreement, a REIO is an organisation of sovereign States which have committed themselves to abolish in substance all barriers to investment among themselves and to which these States have transferred competence on a range of matters within the purview of this Agreement, including the authority to adopt legislation and to make decisions binding on them in respect of those matters.
2. Article ..... (MFN clause) shall not prevent a Contracting Party which is a Member State of a REIO from according more favourable treatment to investors and their investments from other Member States of the organisation as a result of the measures applied within the framework of that organisation than it accords to investors and their investments from other Contracting Parties.
3. Nothing in this Agreement shall prevent a REIO and its Member States from applying, consistent with the objectives of this Agreement, new harmonised measures adopted within the framework of such organisation and which replace the measures previously applied by these States.
4. A Contracting Party which joins a REIO shall not be prevented from applying in place of its previous national legislation the corresponding legislation of the said organisation from the day of its accession to it. If a Contracting Party has concluded an agreement with a REIO and its Member States in preparation for its accession to it, nothing in this Agreement shall prevent it from aligning its national legislation to the measures applied in the framework of such organisation, nor shall this Agreement prevent Member States of a REIO from extending to the investors and their investments of such a Contracting Party more favourable treatment as referred to in paragraph 2.

## **DRAFT ARTICLE ON CONFLICTING REQUIREMENTS** *(Amendment of the proposal introduced by one delegation)<sup>1</sup>*

### **(Contribution from one delegation)**

**Paragraph 1.** A Contracting Party shall not prohibit outside its territory, directly or indirectly, or cause to refrain, an investor from another Contracting Party from acting in accordance with the latter Contracting Party's laws, regulations or express policies unless those laws, regulations or express policy are contrary to international law (conflicting requirement).

"Express policy" means a situation in which the conduct of an investor is not explicitly regulated but allowed on the basis of general principles of law or general policy in the relevant country

### **REASONS FOR REFORMULATING PARAGRAPH 1 OF THE PROPOSAL BY ONE DELEGATION**

1. It appears to be necessary to cover not only cases where a contracting party is (directly) requiring an investor to behave in a certain way but also cases where the Contracting Party enjoins sanctions on investors when they behave in that way (e.g. loss of rights or advantages that would otherwise be granted).

2. The wording proposed by one delegation "*to act in conflict*" seems to be unduly narrow as it implies that there is an open conflict between two legal orders, one imposing to do X, the other to do Y in the same situation. Those cases exist, but are extremely rare (e.g. a Saudi Arabian law imposes on investors not to export to or invest in Israel/a US law imposes on American investors abroad not to accept boycott against Israel). The normal situation is, however, that the legal order of a Contracting Party simply allows certain activities (e.g. Norway permits whaling) whilst the legal order of another Contracting Party prohibits investors such activities, even abroad (e.g. the UK would not allow its investors at home and abroad to invest in whaling).

In this case there would be no real conflict according to one delegation's proposal as the investor can abide by the UK rule without entering in conflict with the Norwegian laws.

Thus, there is a choice to make between the two concepts. The "*open conflict*" rule does in the EC view not serve much purpose.

Moreover, a "*conflict*" in the meaning of requirements that are really opposed to one another is not possible between a law on the one hand and a "*policy*" on the other as a pure policy measure is not mandatory. If one would choose the narrow approach (open conflict), the reference to such policy measure would have to be deleted.

3. It seems to be useful to require that the measures of the Contracting party concerned are not contrary to international law otherwise they do not merit protection (e.g. a country exploits unlawfully the continental shelf of another country; measures against investors contributing to such behaviour can be sanctioned).

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1. Original proposal by one delegation included in DAF/MAI/RD(96)23 is reproduced at the end of this contribution.

4. As the term "*conflicting requirement*" reappears more often in the text it is preferable to give it the form of a definition.

5. The term "*express policy*" is new and it seems useful, for reasons of legal clarity, to define it.

**Paragraph 2.** The Parties Group may receive notice of conflicting requirements from:

- a) A Contracting Party which considers that [.....] another Contracting Party imposes or enforces, or intends to do so, conflicting requirements on investors or investments of investors in respect of conduct within its territory;
- b) A Contracting Party which is considering imposing or enforcing or which has imposed or enforced conflicting requirements on investors or investments of investors in respect of conduct within the territory of another Contracting Party.

#### Commentary

Simple streamlining of the text.

**Paragraph 3.** A Contracting Party may at any time advise the Parties Group that it does not regard a conflicting requirement that has been notified by another Contracting Party pursuant to paragraph 2 as objectionable. In such cases, paragraph 1 [...] does not apply to such requirements *in the relation between the Contracting Parties concerned*.

#### Commentary

Some amendments are necessary to align the wording to the amended paragraph 1.

In addition, it should be made clear that the non-objection of one Contracting Party to the measure has no legal effect for other Contracting Parties.

**Paragraph 4**(Unchanged).

**Paragraph 5** (Unchanged until the third stroke; the third stroke contains a full concept in itself and should become a new paragraph 6).

**Paragraph 6** If the conflicting requirements have been imposed consistent with international law in order to minimise or avoid substantial effects within a Contracting Party of actions outside that Contracting Party, the waiver shall be granted unless the Contracting Party in whose territory the conduct occurs has taken reasonable measures to ensure that such effects do not recur.

#### Commentary

Paragraph 6 introduces a useful concept of legitimate "self defence", applicable e.g. in case a Contracting Party would allow drug production or far reaching and serious pollution of the environment; there may be however also cases where the decision is not so easy to find (e.g. advertising directed from one country to the other using methods not allowed in the latter; investment in border shops selling articles which are not authorised in a contracting party etc.).

## Draft Article on Conflicting Requirements<sup>1</sup>

1. A Contracting Party shall not impose or enforce measures that require an investor or an investment of an investor to act in conflict with the laws, regulations or express policies of another Contracting Party in whose territory such acts occur.
2. The MAI Parties Group may receive notice of conflicting requirements from:
  - a) A Contracting Party which considers that measures or proposed measures of another Contracting Party impose or enforce conflicting requirements on investors or investments of investors in respect of conduct within its territory;
  - b) A Contracting Party which is considering imposing or enforcing, or which has imposed or enforced conflicting requirements on investors or investments of investors in respect of conduct within the territory of another Contracting Party.
3. A Contracting Party in whose territory conduct occurs may at any time advise the Parties Group that it does not regard a requirement that has been notified pursuant to paragraph 2 as objectionable. In such cases, paragraph 1 of this Article does not apply to such requirements.
4. If a conflicting requirement has been notified to the Parties Group, and the Contracting Party in whose territory the conduct occurs has not provided the notification provided for by paragraph 3, the Parties Group may, at the request of the state which exercises jurisdiction outside its territory, consider whether a waiver should be granted from the prohibition on conflicting requirements set out in paragraph 1.
5. In considering whether to grant a waiver from paragraph 1, the Parties Group shall have regard to the following considerations:
  - The results of consultations between the affected states regarding the manner in which the conflict could be minimized or avoided.
  - Whether, as a result of the conflicting requirement any investor or investment of an investor has been or may be subjected to treatment that is unfair or inequitable.
  - If the conflicting requirement has been imposed consistent with international law in order to minimize or avoid substantial effects within a Contracting Party of actions outside that Contracting Party, the waiver shall be granted unless the Contracting Party in whose territory the conduct occurs has taken reasonable measures to ensure that such effects do not recur.

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1. Taken from DAFFE/MAI/RD(96)23, Contribution by one delegation.

## DRAFT ARTICLE ON SECONDARY INVESTMENT BOYCOTTS

*(Based on the one delegation's proposal,<sup>1</sup>  
drafting changes are indicated and explained in the footnotes)*

### **(Contribution from one delegation)**

No Contracting Party may take measures that

- i) either<sup>2</sup> impose or may be used to impose liability on investors or investments of investors of another Contracting Party;

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1. Original proposal by one delegation included in DAF/MAI/RD(96)24 is reproduced as follows:

“Draft Article on Secondary Investment Boycotts

No Contracting Party may take measures that

- (i) impose or may be used to impose liability on investors or investments of investors of another Contracting Party; or
- (ii) prohibit dealing with investors or investments of investors of another Contracting Party

because of investments they own or control, directly or indirectly, in a third country in accordance with the laws and regulations of such third country.”

2. Purely a drafting amendment.

- ii) *or* prohibit, or *impose sanctions*<sup>3</sup> for, dealing with investors or investment of investors of another Contracting Party;

because of investments an investor of another Contracting Party makes, owns or controls, directly or indirectly, in a third country in accordance with [*international law*<sup>4</sup> *and*] regulations of such third country.

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3. Broader wording is suggested because in some cases a sanction can be applied without explicit prohibition. There is a danger of circumvention.

4. Consistency with international law should be required because a measure merits protection by an international agreement only if this measure is consistent with international law.

## **INTRODUCTION OF AN EXCEPTION CLAUSE FOR CULTURAL INDUSTRIES**

### **(Contribution from one delegation)**

After in-depth analysis of the implications of the MAI, one delegation has come to the conclusion that the basic principles of this agreement raise application problems for cultural industries (notably the printing, press and audio-visual sectors). In fact, policies designed to preserve cultural and linguistic diversity may not be entirely compatible with the disciplines of the agreement and so could be endangered.

As regards direct restrictions on foreign investment, the standstill commitment is likely to make existing limitations ineffective, since sectors using new technologies would not be subject to such limitations. This would be unacceptable for one delegation and would undermine the results of the Uruguay Round for the audio-visual sector. On completion of the Round, only three OECD Members undertook specific commitments in the audio-visual sector. The other signatories - including the European Union and its Member States - did not agree to a standstill commitment with respect to mode 3 of the GATS ("establishment of a commercial presence") in this sector.

As regards indirect restrictions on investment, the type of disciplines to be included in the MAI are not yet precisely known. However, the audio-visual and press sectors are governed by specific regulations in which linguistic and/or nationality criteria play a central role. In this respect, it should be clear in MAI that a State may treat two enterprises of these sectors differently, in particularly according to the linguistic content of the goods produced or the services supplied.

The Most Favoured Nation clause and National Treatment principle would also be difficult to apply to these sectors. In fact, various international agreements, including coproduction agreements, make exceptions to the Most Favoured Nation clause and offer foreign enterprises of third countries preferential or even national treatment.

The MAI should allow the Signatories to implement policies designed to promote cultural and linguistic diversity and consequently, to protect and promote industries ensuring such diversity.

Only a cultural exception would make it possible to protect cultural industries from the disciplines covered by the agreement. This general exception could be drafted as follows:

"Nothing in this agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activity of these companies, in the framework of policies designed to preserve and promote cultural and linguistic diversity."

## **DRAFT CLAUSE ON PUBLIC ORDER**

### **(Proposal from one delegation)**

Nothing in this Agreement shall be construed to prevent a Contracting Party from taking actions strictly necessary for the maintenance of public order. However, such action shall be subject to the principle of proportionality and not constitute a means of arbitrary discrimination or of disguised evasion or obligations under this Agreement. This provision cannot be invoked solely for economic reasons.

Comment: It is understood that the clause would not be self judging but open to dispute settlement.

## SUBNATIONAL MEASURES

### (Contribution from one delegation)

The application of the MAI to sub-federal entities raises a particular issue with regard to the application of national treatment. Delegations will recall that Commentary number 7, on the MAI's national treatment article, page 100 of the Consolidated Texts and Commentary, (DAFFE/MAI(97)1) reads:

*“The question was asked whether the treatment accorded to foreign investors by a sub-federal state or province would meet the national treatment test only if it were no less favourable than the treatment accorded to the investors of the same state or province, or whether it would be sufficient to accord treatment no less favourable than that accorded to the investors from any other state or province. The question will need to be answered by the Negotiating Group in due course.”*

The MAI intends to set high standards of liberalisation, and it is therefore believed that foreign investors would benefit most if the sub-federal entity would accord to them “in state” treatment.

This issue has been the subject of debate in other fora, lately notably in the GATS context. These discussions have shown that legal clarity and certainty in this regard are of considerable importance.

It is therefore proposed to add the following language to the National Treatment Article in a separate paragraph:

**1.4. If a sub-federal entity of a Contracting Party accords to its own investors and their investments treatment more favourable than to investors and investments of other sub-federal entities of the same Contracting Party it shall in accordance with paragraphs 1 to 3 extend the more favourable treatment to investors of other Contracting Parties and to their investments.**

We would appreciate the view of other Delegations with regard to inclusion of the principle as well as the proposed language in the MAI.

## **TAXATION**

### **(Contribution from one delegation)**

Paragraph which could be inserted in the preamble of the MAI:

“aware of the importance of taxation for investments and investors, emphasising that double taxation agreements cover most OECD countries in a satisfactory manner, and that tax policy considerations shall be taken into account in the process of accession of new Contracting Parties, in particular the existence of a network of bilateral tax treaties ;”

## **SOCIAL SECURITY CONTRIBUTIONS**

**(Proposal by one delegation)**

Taxation Article

paragraph 1 should read as follows:

“Nothing in this Agreement shall apply to taxation and social security measures, except as expressly provided in paragraphs 2 to .... below.”

paragraph 5, option B

“Taxes shall be taken for this purpose to include direct taxes, indirect taxes and social security contributions paid to general government.”

**THE RELATIONSHIP BETWEEN  
THE SVALBARD TREATY AND THE MAI**

**(Contribution from one delegation)**

Draft Article to be included in Part X (Other Provisions)

In the event of a conflict between the Treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and this Agreement, the Svalbard Treaty shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties with respect to the Svalbard Treaty. In the event of such a conflict or a dispute as to whether there is such a conflict or as to its extent, Part V (Dispute Settlement) and Part VII (Relationship to other International Agreements) of this Agreement shall not apply.

## LABOUR MARKETS INTEGRATION AGREEMENTS

### (Contribution from five delegations)

During the MAI negotiations in Paris delegations have agreed on the inclusion of a provision regarding “key personnel”.<sup>1</sup> The basic provision is that the Contracting Parties are obliged to permit certain groups of natural persons to enter into and stay in a Contracting State in connection with investments covered by the MAI, subject to the application of Contracting Parties’ national laws, regulations and procedures affecting the entry, stay and work of natural persons. Under the stated condition, the same groups of natural persons are entitled to work permits in connection with covered investments. A Contracting Party may make the issue of such permits conditional on the submission of formal written applications for such permits in accordance with its relevant laws and regulations.

For more than 40 years the Nordic countries have maintained a special legal regime for the entry by their nationals into their respective employment markets.<sup>2</sup> Under this regime nationals of the Nordic countries may move freely from one country to another and are not required to obtain residence permits and/or work permits from the relevant national authorities. It goes without saying that this also covers nationals of the five countries in their capacity as investors or key personnel. The regime covers all groups of workers and also provides for certain social benefits regardless of nationality. The rules of the Nordic common labour market are thus more favourable to nationals of the Nordic countries than the rules applicable to nationals of third countries.<sup>3</sup>

The historical, economic and political ties between the five Nordic countries as well as the similarities in their welfare systems have motivated the integration of their labour markets and have been the rationale for the intergovernmental agreements on the subject. Thus, the motivation for the Nordic Labour Market agreements goes far beyond purely economic considerations.

While it would seem clear that the MAI is not intended to interfere with integrated labour markets, such as the Nordic Labour Market, it cannot be excluded that the Most Favoured Nation provision of the MAI<sup>4</sup> to some extent interferes with the Nordic Labour Market.

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1. For the latest draft text see document DAFFE/MAI/ST(97)4, p. 3-4.

2. The rules are contained in an Agreement of May 22, 1954 concerning exemption from requirements of passport, residence and work permits, an Agreement of July 12, 1957 concerning the suspension of passport control at the common Nordic borders and in the Nordic Convention on Social Security of 1955 (new Convention 1992). The Agreement of May 22, 1954 has been replaced by a subsequent agreement which entered into force on August 1, 1983. The duration of the Agreement is indefinite.

3. Another distinct legal regime is applicable to nationals of the EU and EEA states.

4. See document DAFFE/MAI(97)1, p. 11.

Even if there are important differences between the scope of MAI and the WTO General Agreement on Trade in Services, which e.g. directly covers movement of natural persons, it is worth recalling that the Nordic countries obtained special coverage for integrated labour markets in GATS, through the insertion of article V bis of that agreement. This provision allows Contracting Parties to enter into labour markets integration agreements without having to extend to nationals of third countries by means of MFN treatment an benefits deriving from such an agreement.

In order to obtain complete legal certainty concerning the relationship between the MAI and substantially integrated labour markets the Nordic Countries propose the insertion of a provision similar to GATS art. V bis in the MAI. This would not in any way derogate from the binding MAI obligation regarding key personnel.

Based on the above, five delegations suggest the insertion of a GENERAL labour markets integration provision in the MAI with the following wording<sup>5</sup>:

*“Labour markets integration agreements*

Paragraph 1

Nothing in this Agreement shall prevent any of the Contracting Parties from being a party to an agreement establishing full integration of the labour markets between the parties to such an agreement.

Paragraph 2

For the purpose of this Agreement the term “labour markets integration agreements” means agreements which allow citizens of the parties to such agreements a right of free entry to the employment markets of the parties concerned and which exempts citizens of parties to the agreement from requirements concerning residency and work permits. Labour markets integration agreements may also include measures concerning conditions of pay, other conditions of employment and social benefits.”

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5. The wording is based on the GATS article V bis.

## **MAI: PROPOSED ANNEX ON THE SAMI PEOPLE**

### **(Contribution by three delegations)**

THE CONTRACTING PARTIES,

RECOGNIZING the obligations and commitments these countries with regard to the Sami people under national and international law,

NOTING, in particular, that these countries are committed to preserving and developing the means of livelihood, language, culture and way of life of the Sami people,

CONSIDERING the dependence on traditional Sami culture and livelihood on primary economic activities, such as reindeer husbandry in the traditional areas of Sami settlement,

HAVE AGREED on the following provisions.

#### **Article 1**

Notwithstanding the provisions of this Agreement, exclusive rights to reindeer husbandry within traditional Sami areas may be granted to the Sami people.

#### **Article 2**

This Annex may be extended to take account of any further development of exclusive Sami rights linked to their traditional means of livelihood. The Parties Group may adopt the necessary amendments to this Annex.