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Negotiating Group on the Multilateral Agreement on Investment (MAI)

THE MULTILATERAL AGREEMENT ON INVESTMENT

COMMENTARY TO DRAFT CONSOLIDATED TEXT

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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 one of the countries 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 one delegation’s 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. One delegation 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 Commercial Code of this country, 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 country in question 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 resident of this country. 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 this 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 delegation 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. One delegation 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 delegation 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 differ 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. One delegation 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.

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. One delegation considered that this item covers public law contracts.

15. Most delegations preferred to keep concessions in the definition and to require exceptions 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. This issue is being discussed by the "Special Topics" experts.

17. Further work may 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. One delegation 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 the delegation, 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, 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. DG3 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 two delegations 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. One 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. 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.

9. 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. One delegation, supported by other delegations, proposed to add an <u>additional sentence</u> to article 2.3 <u>and</u> an <u>additional paragraph</u> 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[1] 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."]

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.[2]

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. One delegation suggested that consideration be given to an article based on Article 5 ("Controls and Formalities") of the OECD Codes of Liberalisation.

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].

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

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.

PRIVATISATION

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.

MONOPOLIES/STATE ENTERPRISES/CONCESSIONS

A. Article on Monopolies

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 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.

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.

INVESTMENT INCENTIVES

1. The discussion on investment incentives in EG3 was based on a Note, including a proposal for draft provision, by one delegation [DAFFE/MAI/EG3/RD(96)7] and a proposal by another delegation [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. One delegation 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). The delegation also provided text for a specific transparency provision.

4. Several delegations, however, considered the nature and scope of the disciplines proposed by the delegation 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.

TECHNOLOGY R&D

(Proposal by one delegation) [3]

On the topic of Technology R&D, the delegation 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.[4]"

3. Extract from DAFFE/MAI/ST(97)1.

4 A proposal by one other delegation has also been proposed, 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."

PUBLIC DEBT [5]

a) Public debt rescheduling

1. One delegation suggested adding the following two interpretative notes to this text:

-- "The rescheduling of the debts" includes debt reduction;

-- "The debts of a Contracting Party or its appropriate institutions" includes the commercial debts covered by the guarantee of the Government of a Contracting Party or its public sector and the debts as far as the corresponding payments in local currency have been deposited.

2. A footnote could also be added to explain the meaning of "appropriate institutions".

3. Under the second proposal, one delegation proposed alternative language to the above text, which reads as follows:

> "Reorganisation of debts due by a Contracting Party to another Contracting Party or its appropriate institutions, including the related obligations of comparability of treatment between all creditors, whether public or private, shall prevail over the terms of this Agreement."

4. The term "reorganisation of debts", which is meant to be broader than rescheduling and to include in particular refinancing, would need to be defined. One delegation suggested defining it as "changes in the terms and conditions applying to debts". Any definition would also need to identify the range of bilateral and multilateral debt rescheduling agreements which would be covered by the proposed provision and their implications for third parties.

5. Some delegations considered that the MAI obligations to which debt rescheduling/reorganisation would not be subject should be clearly identified. One delegation considered that the obligations of MFN treatment and Transparency need to be preserved in the context of public debt rescheduling [DAFFE/MAI/RD(97)30].

6. Under the third proposal, one delegation suggested that " there might be an alternative approach to the current text's sweeping exclusion of rescheduled public debt. This approach would add an interpretative note to the definition of "investment" that would make clear that:

-- consistent with international law and practice, particularly as related to treaties with provisions on investment, MAI obligations (e.g., on expropriation, transfers, treatment) do not apply to a government's failure to pay on government debt or government-guaranteed debt;

-- breach of a debt agreement does not in itself constitute a breach of any of the provisions of the MAI (e.g., expropriation, transfers, treatment); and

-- public debt does not include government obligations to pay for goods and services purchased from an investor.

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5. Comments made during the informal consultations on financial matters on 30 June and 2 July 1997.

The interpretative note would provide guidance for tribunals in both state-to-state and investor-to-state arbitration. The interpretative note would be accompanied by an express exclusion of public debt and government-guaranteed debt from the "investment agreement" provision of investor-to-state dispute settlement. "

7. Another issue was the range of public debt to be covered by any carve-out for public debt rescheduling, including whether government debt securities, in addition to loans, should be covered. 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. It was also agreed that the issue of trade insurance and export credit guarantees still needs to be addressed.

8. Some delegations continued to reserve their position on the inclusion of public debt within the scope of MAI disciplines.

b) Public debt management

9. 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.

10. One delegation suggested that this issue may be related to privatisation.

NOT LOWERING STANDARDS [6] [7]

1. Should there be separate articles for labour and for environment?

A substantial majority of delegations indicating their position believe there should be separate articles.[8] One delegation took the position that there should only be one. At least five delegations are flexible, depending on the answers to other questions: whether the reference would be to environmental "measures" and labour "standards"; and whether those references would be qualified as being "core", "domestic" and/or "international".

2. Should these articles be binding or non-binding?

One delegation introduced a paper with various scenarios (fact situations plus a range of government actions or measures) to focus attention on the possible coverage of binding articles. Delegations are invited to reflect further on the scenarios in the course of coming to a position. About half the delegations indicating their position believe the articles should be binding for both labour and environment. A few are uncertain, depending on whether the provisions are limited to specific investments (see Question 7, below). A few believe they should not be binding in one or either case.[9]

3. & 4. Should these articles refer to "measures" or "standards" or, perhaps in the case of labour, both? Should they refer to "domestic" or "core" or "international" measures or standards?

Most delegations believe that the Agreement should address environmental "measures" and labour "standards". A few delegations believe "measures" should be used with both the labour and the environment articles. A few delegations would prefer "standards" in both the labour and environmental articles. One delegation pointed out that while "standards" might have widely recognised meaning in the context of international labour conventions, especially those of the ILO, "measures" would be more familiar in the language of international investment agreements regardless of specific subject-matter. "Measures" is also the term used consistently in the rest of the MAI with reference to government action.

Most of those delegations which spoke would refer to "domestic" measures or standards for labour and for environment. One delegation proposed to qualify "domestic standards" as those covering

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6 Three delegations continue to oppose any reference to a "not lowering standards" article on labour. One of them thinks the issue of "not lowering standards" in the environmental area would be more appropriately dealt with in the context of a general article on investment incentives.

7 One delegation suggested that there was a confusing redundancy in Alternative 1 for Not Lowering Standards in DAFFE/MAI/DG3(97)18, p.8 (which reproduces the consolidated negotiating text, DAFFE/MAI(97)1/REV2, p. 48): should the fifth line not delete the first "of an investment" and read "retention ~~of an investment~~ in its territory of an investment..."? The delegation also suggested that there is a typographical error in both alternatives: should not the reference in each be to an "investment ~~or~~ <u>of</u> an investor"?

8 One delegation would like to have similar obligations applied to environment and to labour law.

9 One delegation proposed text for a non-binding provision only on environment:

> The Parties recognise that it is inappropriate to encourage investment by relaxing health, safety or environmental domestic laws. Accordingly, a Party should not waive or offer to waive the application of domestic law as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.

the objectives as laid down in international core labour standards. Three delegations prefer "domestic" for environment and "core" for labour. One other delegation prefers to refer to "domestic environmental laws". One delegation prefers "core" for labour. At least two delegations were still considering whether the articles should refer to "international" measures or standards. One delegation would like to get more clarity on the meaning of all of these terms.

One delegation suggested a different approach, with separate articles on domestic measures and international laws or standards, respectively.[10] A number of delegations expressed interest in such an approach and intend to give it further study.

5. Should they refer to other matters (such as health and safety) and, if do, how?

While no delegation opposed additional references, not all expressed a view. Most delegations would add references to "health and safety" but did not specify exactly how. Some expressed uncertainty but did not rule it out.

6. Should binding provisions be subject to MAI dispute settlement?

This question is related to larger outstanding questions about the scope and application of MAI dispute settlement in the context of general government regulatory activity. Of delegations indicating a position, one said that investor-state dispute settlement should not be available to challenge binding labour and environment articles while another delegation said that neither investor-state nor state-to-state dispute settlement ought to be available. One delegation said that they should.

7. Should the not lowering standards articles relate to broad measures changing a country's investment climate or to measures or waivers specific to a particular investment?

Here again, delegations have not completed their individual considerations. Several delegations favoured coverage of only measures for specific investments. It was suggested that "specific" be inserted before "investment" in both Alternatives 1 and 2. The proposal by one delegation (see footnote 5) seeks to distinguish between the waiver of or derogation from domestic measures for specific investments and derogation from international laws or standards to change the investment climate.

PROPOSED ADDITIONAL ARTICLE ON LABOUR AND ENVIRONMENT

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10 The proposal by the delegation has three tirets, the first modelling the first sentence of Alternative 1 in DAFFE/MAI/DG3(97)18, p. 8 (which reproduces the consolidated negotiating text, DAFFE/MAI(97)1/REV2, p. 48):

1. The Parties recognise that it is inappropriate to encourage investment by lowering domestic health, safety or environmental measures or relaxing international core labour standards.

2. A Contracting Party [shall] [should] accord to investors of another Contracting Party and their investments treatment no more favourable than it accords its own investors by waving or otherwise derogating from, or offering to waive or otherwise derogate from domestic health, safety, environmental or labour measures, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of an investment.

3. A Contracting Party [shall] [should] not take any measure which derogates from, or offer to derogate from, international health, safety or environmental laws or international core labour standards as an encouragement for investment on its territory.

The discussion was based on three sets of language (set out in the Annex to DAFFE/MAI/DG3(97)18: GATT Article XX; NAFTA Article 1114(1); and paragraphs 3 and 4 of the MAI text on performance requirements).[11] There was agreement on the objective of protecting government regulators and their normal non-discriminatory work. There was agreement that this is a broader issue, not just relevant to labour and environmental regulation. There was also agreement that the discussion has bearing on specific concerns about other portions of the current negotiating text (such as the scope of the expropriation and the General Treatment articles, the "like circumstances" and *de facto* expropriation discussions, application of the dispute settlement articles and limits in the performance requirement articles).

While acknowledging that this context means that a more general approach may be appropriate for the MAI, several possible solutions for labour and environment concerns were discussed. At the conceptual level, the group discussed the merits and demerits of a "general exception" approach such as that of GATT Article XX, and of a "clarification" approach such as that of NAFTA Article 1114(1). There was some support for an E.C. proposal along the lines of the former.[12] NAFTA parties had proposals building on the latter.[13]

The language and approach of GATT Article XX appealed to some delegations because it is a known quantity, applicable to the TRIMS and TRIPS Agreements, and used in the Energy Charter Treaty. It has already been the subject of jurisprudence. It also has the sort of built-in anti-abuse language some other delegations see as necessary. Several delegations felt that such a general approach better protected future regulatory requirements. But other delegations questioned whether this trade agreement language was appropriate in an investment agreement given differences between movements in goods and services, on

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11 Some delegations felt that a more general approach based on either GATT Article XX or NAFTA Article 1114(1), or some combination of the two, would eliminate the need for paragraph 4 in the draft performance requirements article. Given the similarity of the performance requirements language to GATT Article XX language, others are not sure and intend to study the question further.

12 The proposal by one delegation would delete paragraph 4 of the existing negotiating text on performance requirements and add a general exception article:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on investment, nothing in this agreement shall be construed to prevent the adoption, maintaining or enforcement by any Contracting party of measures:
>
> (a) necessary to protect human, animal or plant life or health
>
> (b) relating to the conservation of living or non-living exhaustible natural resources.

13 One delegation proposed as a general article the text of NAFTA Article 1114(1) with a second paragraph to address investment outflows:

> Nothing in this agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
>
> Likewise, no Contracting party shall adopt, maintain or enforce any environmental measure in a manner which would constitute a disguised restriction for investment outflows from that Contracting Party to another Contracting party, or for investment among Contracting parties.

The "Package of Additional Environmental Proposals by one delegation" presented to the Negotiating Group on 14 January also proposes the language of NAFTA Article 1114(1).

one hand, and capital movements, on the other. They felt that the existing jurisprudence was problematic relating to environmental matters. They also expressed concern that a "general" exception would require awkward drafting because it would only appear necessary for four MAI disciplines (NT/MFN, General Treatment, expropriation and certain performance requirements) and might therefore require limitation with respect to the rest of the MAI.

The NAFTA language and approach (which in the view of one delegation would have to be combined with the addition of "in like circumstances" to the MAI NT/MFN articles) was advanced as a more focused approach. It is not a "general exception"; rather, in the scheme of the NAFTA, Article 1114(1) is meant to "tilt the balance" in favour of the environment by establishing a presumption that normal measures do not violate NAFTA investment obligations. Delegations expressing concern with the Article 1114(1) approach are uncomfortable with the effect of "in like circumstances" and with the self-judging character of Article 1114(1). They questioned whether the words "otherwise consistent" gives this text a clarification or a general exception character, and are unsure of the meaning of "undertaken in a manner sensitive to environmental concerns". They too saw drafting disadvantages: compared to a general exception approach, the NAFTA approach might require a variety of MAI discipline-specific provisions.

The second paragraph of the proposal by one delegation (see footnote 20) adds a new element to a NAFTA-based formulation. Its intention is to ensure that environmental measures are not used to restrict investment ***outflows*** with the effect that potential host countries feel pressured to adopt the environmental standards of foreign investors' home countries. It was the subject of some support (reflecting possible worries of developing countries) and some concerns. Among the concerns was the relationship of such language to provisions of multilateral environmental agreements that sanction discriminatory treatment depending on enforcement of environmental regulations. The delegation intends to give further consideration to this matter.

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 proposal by one delegation 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. The delegation 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”.

6. One delegation 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[1]

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.

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. One 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. One delegation, supported by another 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, one delegation 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. 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 is 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 is under consideration 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. One delegation 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

1. The "applicable rules" referred to in Article C 6 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.

2. One delegation has serious concerns in relation to the provisions in paragraph c(iii) and c(iv).

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 favouring a broad approach which would generally allow any responsive measure permitted under customary international law, including measures in the field of trade, and those favouring 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 authorising 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 authorised 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. Six delegations 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

Two delegations have problems of a constitutional nature with unconditional prior consent. One delegation 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. One delegation has serious concerns in relation to this provision.

Article D.14

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

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. The text by the Chairman proposes 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. One 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 one 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.

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. One delegation, supported by other delegations, would prefer square brackets be put around the phrase "which it considers" in the chapeau. 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.

-- subparagraph b

2. This provision is found in recent agreements (NAFTA, ECT, GATS, Shipbuilding). One delegation, 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.

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

-- subparagraph c

4. 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, one delegation proposed including, after the words "UN Charter", the phrase "or equivalent arrangements authorised by a competent international organisation". One other delegation 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 public order is necessary to allow countries to take exceptional measures based on this principle. One delegation 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. One other delegation 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. 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.

4. Several proposals were made with the intent to narrow the scope of a public order exception. One delegation proposed limiting the public order concept to exceptions to the national treatment principle and to make the MAI dispute settlement mechanism applicable. One other delegation 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. One delegation suggested a reference to the ECJ principles of proportionality and the exclusion of economic purposes as additional limitative qualifications to public order

5. The proposed text by the Chairman contains a public order exception with strict limitations. The actions relating to public order are not self-judging and are subject to the notification and consultation procedures in the article. One delegation, supported by another one, 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.

TRANSACTIONS IN PURSUIT OF MONETARY AND EXCHANGE RATE POLICIES[1]

1. While some delegations questioned the need for any specific provisions carving out transactions by a central bank or monetary authority in pursuit of monetary and exchange rate policies, most delegations would support adoption of this text.

2. 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. In response, it was said that under the above provisions the central bank or 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 central bank or monetary authority to non-residents should fall under the safeguard clause.

3. One delegation made a proposal for a narrower carve-out that would substitute for the text in paragraphs 1 and 2 above [see DAFFE/MAI/FS/RD(97)1]. Under this proposal, the transactions referred to in paragraph 1 would be limited to open market transactions in securities and foreign exchange intervention transactions, and the central bank or monetary authority would be subject to the non-discrimination disciplines with respect to foreign investors established on its territory. Selection by a central bank or monetary authority of a counterparty in an individual transaction would not be subject to dispute settlement, but systematic discrimination could be challenged under the dispute settlement system. The majority of delegations considered that such a narrowing of the carve-out would not be appropriate. Some delegations were prepared to consider a narrow carve-out and considered that this proposal deserves further consideration before reaching a firm conclusion.

4. It was suggested that the need for specific provisions carving out transactions by a central bank or monetary authority in pursuit of monetary and exchange rate policies should be assessed in the broader context of the MAI as a whole. It was also suggested that such assessment should consider the extent to which transactions by a central bank or monetary authority may be carved-out in the GATS taken as a **whole [see for instance the various options considered in DAFFE/MAI/EG5/RD(97)6**], taking account of the fact that the GATS does not contain investor-to-state dispute settlement provisions as in the MAI.

1. Comments made during the informal consultations on financial matters on 30 June and 2 July 1997.

TEMPORARY SAFEGUARD[2]

1. 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". Two delegations were of the view that the word "and" should be replaced by "and/or".

2. 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.

3. 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.

4. Concerning paragraph 8, one delegation 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 8 entirely so as not to qualify the scope of the safeguard article.

2. Comments made during the informal consultations on financial matters on 30 June and 2 July 1997.

VII. FINANCIAL SERVICES[1]

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, 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

Expert Group No. 5 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[2].

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, p. 11].

4. One delegation provided comments (circulated after the March meeting as DAFFE/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.

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[3]

1. Delegations noted that these issues were related to the transactions by a central bank or monetary authority in pursuit of monetary and exchange rate policies. They considered further the following text:

> "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."

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."

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".

3. One delegation opposed the proposed interpretative note. The same delegation proposed an amended text for paragraph 1 which reads as follows: " Under terms and conditions that accord national treatment, each Contracting Party shall grant to financial services enterprises supervised by recognised supervisory authorities that are investments of investors of any other Contracting Party established in its territory direct 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".

4. In connection with paragraph 2, one delegation considered that in setting rules for access to lender-of-the-last resort facilities, a Contracting Party should accord National Treatment to foreign-controlled financial institutions established on its territory, unless they operate in the form of a branch.

3. Comments made during the informal consultations on financial matters on 30 June and 2 July 1997.

DISPUTE SETTLEMENT [4]

Delegations considered draft text on the application of dispute settlement with respect to financial matters without prejudice to the question of whether special procedures should be included in the MAI for financial matters.

DETERMINATION OF CERTAIN FINANCIAL MATTERS IN INVESTOR TO STATE PROCEEDINGS

1. A majority of delegations considered that the MAI should provide for a special procedure, in investor to state proceedings, to determine whether certain financial measures are consistent with the MAI. These delegations hold the view that there must be a balance between the interests of an investor in pursuing remedies under the MAI and the need for stability in financial markets. Most of these delegations agreed that such measures should include prudential measures and transactions by a central bank or monetary authority. A few delegations were of the view that they should also include temporary safeguard measures.

2. 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 unduly delay the settlement of disputes and could lead to a call for special provisions in other areas.

3. 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.

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. Some delegations wished to consider possible refinement to the language in paragraphs 2. (b) and (c) in the light of the general provisions on Dispute Settlement.

5. Subsequent to the informal meeting, one delegation submitted the following proposal: “Financial services could be added in the articles C.5 and D.13 of the agreement concerning scientific and technical expertise in the way that in addition to environmental, health, safety or other scientific or technical matters a written report of a review board may be requested also on financial services. So the necessary expertise

4. Comments made during the informal consultations on financial matters on 30 June and 2 July 1997.

relevant to the financial services would be guaranteed and no special procedure would be needed". This proposal was not discussed.

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. One delegation 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. 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 [DAFFE/MAI/EG5/RD(96)1]. 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.

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.

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. 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.

2. 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.

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.

4. The Negotiating Group is invited to give further consideration to the Accession procedures to ensure that respect for the principle of non-discriminatory treatment in taxation will be one of the elements taken into account in the accession process.

IX. COUNTRY SPECIFIC EXCEPTIONS [1]

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:

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. DG2 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. 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.

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1. The present section presents the results of the work of Drafting Group No. 2 on the issue of standstill and rollback of country specific exceptions.

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 country exceptions. 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 country exceptions of the Contracting Parties;

b) rollback commitments inscribed in a country exception 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 country exceptions 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 exceptions, conducting periodic examinations of non-conforming measures or launching future rounds of negotiations.

LODGING OF COUNTRY SPECIFIC EXCEPTIONS

1. 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").

2. 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.

3. 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.

4. It was suggested that the term "measure" should be defined and reference was made to the definitions used in NAFTA[2], GATS[3] and the transparency article in the MAI. 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”;