



# The Multilateral Agreement on Investment



## The MAI Negotiating Text (as of 24 April 1998)

*This document consolidates the text of the agreement considered in the course of the MAI negotiations so far. The texts reproduced here result mainly from the work of expert groups and have not yet been adopted by the MAI Negotiating Group. They are presented with footnotes and proposals that are still under consideration. The final text will be accompanied by country specific exceptions which will form an integral part of the agreement. The Commentary to this text will be issued separately.*



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## ANNEX 1

### COUNTRY SPECIFIC PROPOSALS FOR DRAFT TEXTS

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# I. GENERAL PROVISIONS

## *PREAMBLE*

The Contracting Parties to this Agreement,<sup>1 2 3</sup>

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

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

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

Emphasising that fair, transparent and predictable investment regimes complement and benefit the world trading system;<sup>4</sup>

[Wishing that this Agreement enhances international co-operation with respect to investment and the development of world-wide rules on foreign direct investment in the framework of the world trading system as embodied in the World Trade Organization;]<sup>5</sup>

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

[Recognising that investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable, when accompanied by appropriate environmental policies to ensure it takes place in an environmentally sound manner] [Recognising that appropriate environmental policies

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1. One delegation, with the support of another delegation, proposes that the Preamble include the following language on natural resources: “Reaffirming the sovereignty and sovereign rights of States over natural resources within the limits of national jurisdiction”.
  2. Three delegations continue to oppose any reference to labour in the Preamble. One delegation is willing to consider preambular language on the environment as part of the entire package on labour and environment. Another delegation also opposes any reference to the environment unless its concerns are met.
  3. It is the strong feeling of many delegations that preambular reference to the environment be limited to one paragraph and that it be as short as possible. Similarly, it was the feeling of many delegations that preambular reference to labour be limited to one paragraph and that it be as short as possible.
  4. Some delegations propose an explicit reference to the World Trade Organisation. One delegation proposes the addition immediately after the words “world trading system” of: “encompassing multilateral and bilateral investment instruments as well as agreements of the World Trade Organisation”. This proposal would need some refinement to ensure that it does not limit the scope of the phrase “world trading system” by excluding, for example, regional agreements.
  5. One delegation proposes this language. Some delegations oppose the inclusion of such language because they believe that it would prejudice, and be prejudicial to, future work on investment in the World Trade Organisation.

can play a key role in ensuring that economic development, to which investment contributes, is sustainable]<sup>6</sup>, and resolving to [desiring to]<sup>7</sup> implement this agreement [in accordance with international environmental law and]<sup>8</sup> in a manner consistent with sustainable development, as reflected in the Rio Declaration on Environment and Development and Agenda 21, [including the protection and preservation of the environment and principles of the polluter pays and the precautionary approach]<sup>9, 10 11 12</sup>;

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6 There is about even support for each “recognising” formulation.

7 Four delegations object to “resolving to” and would prefer “desiring to”.

8 This phrase raises the questions whether the MAI intends to set a presumption that multilateral environmental agreements have precedence and over it, and, if so, whether a preambular reference establishes that presumption. One delegation is strongly opposed to the inclusion of this phrase because it is impossible to define precisely.

9 While a majority favour explicit mention of these two principles, a number of delegations prefer a more general reference to Rio Declaration and Agenda 21 principles without specifics. One delegation would explicitly mention two additional principles: “public participation and the right of communities to have access to information, and the avoidance of relocation and transfer of activities causing severe environmental degradation or found to be harmful to human health”.

10 One delegation proposes additional language: “and recognising that such environmental policies shall not constitute a means of disguised restriction on international trade and investment;”. Some delegations support this proposal in concept but wonder if it belonged in the Preamble or in a more general anti-abuse clause in the MAI.

11 One delegation, supported by another delegation, would insert four additional turrets from its alternative for the Preamble:

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

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

Recognising the interdependent nature of their environments;

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

12 One delegation believes that the proposal for two paragraphs of preambular language on the environment as set out in the report by DG3 reflected broadly shared ideas of substance and was prepared to continue work on the basis of that text. Bracketed text in that proposal related primarily to nuance. The paragraph now contained in the text has lost or weakened at least two concepts that had been broadly shared by the group. This delegation would like to know why a number of delegations appear to find it a preferred basis on which to continue work. The two key concepts that have been lost and the substance of this delegation’s concern are set out below:

1. The commitment (or desire) of Parties to implement the agreement in a manner consistent with environmental protection and conservation has been omitted. In the current text this idea is expressed only as a subsidiary notion to the Rio declaration when in fact environmental protection and conservation should be a generally affirmed principle that is not limited to the provisions of Rio.
2. A clear statement of reaffirmation of commitment to the Rio Declaration, writ large, is not clearly made. In the current text, parties resolve to implement the agreement in a manner consistent only with specific ideals (sustainable development and/or international environmental law) as reflected in the Rio Declaration; they do not reaffirm a commitment to the Rio Declaration as a whole. Furthermore, the new text adds the idea of implementing



Renewing their commitment to the Copenhagen Declaration of the World Summit on Social Development<sup>13</sup> and to observance of internationally recognised core labour standards, i.e. freedom of association, the right to organise and bargain collectively, prohibition of forced labour, the elimination of exploitative forms of child labour, and non-discrimination in employment, and noting that the International Labour Organisation is the competent body to set and deal with core labour standards world-wide.<sup>14 15</sup>

Affirming their decision to create a free-standing Agreement open to accession by all countries;<sup>16</sup>

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the agreement in accordance with the specified concepts of Rio; this is an idea that has not been explicitly discussed by the group.

Therefore, based on the report by DG3, and in addition to the position set out in footnote 8 above, the proposal of this delegation is:

Resolving to implement this agreement in a manner consistent with environmental protection and conservation;

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

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

<sup>13</sup> A number of delegations maintain a scrutiny reserve to consider whether there should also be explicit mention of the Singapore WTO Ministerial.

14 One delegation could not support a reference to labour in the preamble if it included explicit statement of basic principles of core labour standards.

15 One delegations would insert three additional turrets from its alternative for the Preamble:

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

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

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

16. Some delegations propose that the statement that the Agreement is open to accession by all countries be strengthened.

[Noting] [Affirming their support for] the OECD Guidelines for Multinational Enterprises and emphasising that implementation of the Guidelines, which are non-binding and which are observed on a voluntary basis, will promote mutual confidence between enterprises and host countries and contribute to a favourable climate for investment;<sup>17</sup>

HAVE AGREED AS FOLLOWS:

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17. One delegation proposes that the Preamble state that the Guidelines include, in particular, recommendations on employment and industrial relations and environmental protection; other delegations are of the view that the text introducing the Guidelines as an annex should specify the eight subject areas, including those just mentioned, on which the Guidelines make recommendations (see Section III below). In addition, one delegation would like to add words to the effect that the Contracting Parties consider the Guidelines to be “a valuable part of the framework for the consideration of issues of investment and multilateral enterprises.”

## II. SCOPE AND APPLICATION

### *DEFINITIONS*

**1. Investor means:**

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

**2. Investment means:**

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

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

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

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

This Agreement shall apply in:

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

### ***APPLICATION TO OVERSEAS TERRITORIES***<sup>5</sup>

1. A State may at any time declare in writing to the Depositary that this Agreement shall apply to all or to one or more of the territories for the international relations of which it is responsible.<sup>6</sup> Such declaration, made prior to or upon ratification, accession or acceptance, shall take effect upon entry into force of this Agreement for that State. A subsequent declaration shall take effect with respect to the territory or territories concerned on the ninetieth day following receipt of the declaration by the Depositary.
2. A Party may at any time declare in writing to the Depositary, that this Agreement shall cease to apply to all or to one or more of the territories for the international relations of which it is responsible. Such declaration shall take effect upon the expiry of one year from the date of receipt of the declaration by the Depositary, with the same effect regarding existing investment as withdrawal of a Party.

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3. A number of EG1 delegations were of the view that rather than an article on geographical scope, an article should define the "territory" or "area" of a Contracting Party to which the MAI would be applicable and in that case, it could be included in a general definitions part of the agreement. Some delegations had serious misgivings about the feasibility of embarking on this approach.
  4. EG1 agreed that an alternative text of subparagraph (b) illustrating the "functional" approach supported by some delegations should be included in order to preserve the approach for future consideration if the Negotiating Group were to decide to pursue that option further. An alternative subparagraph (b), could read:  
".....investments beyond the territorial sea under the jurisdiction of a Contracting Party in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea."
  5. One delegation has submitted an alternative draft text concerning this article (see Annex 1).
  6. In case such a declaration of application were to be accompanied by reservations or exceptions beyond those of the declaring state, these would be subject to acceptance of the other Parties.

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

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

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

#### ***TRANSPARENCY***

1. Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the operation of the Agreement. Where a Contracting Party establishes policies which are not expressed in laws or regulations or by other means listed in this paragraph but which may affect the operation of the Agreement, that Contracting Party shall promptly publish them or otherwise make them publicly available.<sup>1</sup>
2. Each Contracting Party shall promptly respond to specific questions and provide, upon request, information to other Contracting Parties on matters referred to in Article 2.1.
3. Nothing in this Agreement shall prevent a Contracting Party from requiring an investor of another Contracting Party, or its investment, to provide routine information concerning that investment solely for information or statistical purposes. Nothing in this Agreement requires a Contracting Party to furnish or allow access to:
  - a) information related to the financial affairs and accounts of individual customers of particular investors or investments, or

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1. The Chairman of the Negotiating Group proposes to keep this sentence without brackets, noting that several delegations could go along with this proposal provided that there was a satisfactory explanatory statement in the commentary.

- b) any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws<sup>2</sup> protecting confidentiality or prejudice legitimate commercial interests of particular enterprises.

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

1. Subject to the application of Contracting Parties' national laws, regulations and procedures affecting the entry, stay and work of natural persons<sup>4</sup>:

(a) Each Contracting Party shall grant temporary entry, stay and authorisation to work<sup>4</sup> and provide any necessary confirming documentation to a natural person of another Contracting Party who is:

(i) an investor who seeks to establish, develop, administer or provide advice or essential technical services to the operation of an enterprise<sup>5</sup> in the territory of the former Contracting Party to which the investor has committed, or is in the process of committing, a substantial amount of capital, or

(ii) an employee employed by an enterprise referred to in (i) above, or by an investor<sup>6</sup>, [who may be required to have been employed for a specified minimum period, for example one year],<sup>7</sup> in a capacity of executive, manager or specialist and who is essential to the enterprise;

so long as that person continues to meet the requirements of this Article;<sup>8</sup>

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2. Two delegations propose to insert after "laws", the terms "policies, or practices". One delegation can only support the proposed text for paragraph 3 of the Transparency article if these terms are inserted.
3. Whether there should be an anti-abuse clause, its precise wording, as well as its specific placement is to be decided.
4. Interpretative note: "The granting of an "authorisation to work" may imply that a natural person may have to meet specific professional qualifications required in order to carry out particular activities. Professional qualification criteria that may be applicable are outside the scope of this Article."
5. "Enterprise" under this Article would have the same meaning as under the MAI definition of "investment."
6. It is recalled that the MAI definition of an "investor" includes both natural and legal persons. It is understood that the national authorities may impose on investors some requirements under domestic immigration laws regulations and procedures given the content of the chapeau of paragraph 1.
7. The phrase "*who may be required to have been employed for a specified minimum period, for example one year*" reproduces an amendment proposed by one delegation. It is generally agreed, however, that legally speaking, it is not necessary to clarify in the text that specific minimum periods, for example one year, are allowed by the chapeau of paragraph 1. Some delegations consider, however, the retention of this language to be a political necessity.
8. Interpretative note: "It is understood that the national authorities may periodically verify continued eligibility under this paragraph."

(b) (i) Each Contracting Party shall grant temporary entry and stay and provide any necessary confirming documentation to the spouse and minor children of a natural person who has been granted temporary entry, stay and authorisation to work in accordance with subparagraph (a) above. The spouse and minor children shall be admitted for the period of the stay of that person.

(ii) Each Contracting Party is encouraged<sup>9</sup> to grant authorisation to work to the spouse of the person who has been granted temporary entry, stay and authorisation to work in accordance with subparagraph (a) above.

2. No Contracting Party may deny entry and stay as provided for by this Article, or authorisation to work as provided for by paragraph 1(a) of this Article, for reasons relating to labour market or other economic needs tests or numerical restrictions in national laws, regulations, and procedures<sup>10</sup>

3. For the purposes of this Article:

Natural person of another Contracting Party means a natural person having the nationality of [or who is permanently residing in]<sup>11</sup> another Contracting Party in accordance with its applicable law;

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

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

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

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

10. There is no substantive disagreement about making it clear in an interpretative note that "numerical restrictions referred to in this paragraph are restrictions on the maximum number of natural persons who can enter, stay or work in the Contracting Party." A number of delegations maintain a scrutiny reserve on the wording of this interpretative note.

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

***NATIONALITY REQUIREMENTS FOR EXECUTIVES, MANAGERS AND MEMBERS OF BOARDS OF DIRECTORS***

No Contracting Party may require that an enterprise of that Contracting Party that is an investment of an investor of another Contracting Party appoint as executives, managers<sup>12</sup> and members of boards of directors<sup>13</sup> individuals of any particular nationality.

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12. The definitions of “Executive” and “Manager” are the same as those provided by the article on Temporary Entry, Stay and Work of Investors and Key Personnel in section I of the report. The placement of these definitions in the Agreement could be considered at a later stage. It is understood that technical differences between MAI definitions and national definitions of these terms could be highlighted in country specific reservations.
  13. Three delegations reserve on the coverage of membership in boards of directors. Given the diversity of corporate governance rules across countries, it is proposed that the MAI rely on national definitions.



### ***EMPLOYMENT REQUIREMENTS<sup>14</sup>***

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

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14. It is understood that this article would not interfere with domestic anti-discrimination and labour laws.

## **PERFORMANCE REQUIREMENTS<sup>15 16</sup>**

1. A Contracting Party shall not, in connection with the establishment, acquisition, expansion, management, operation, maintenance, use, enjoyment, sale or other disposition<sup>17</sup> of an investment in its

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15. One delegation reserves its position on all obligations on performance requirements that go beyond those in the TRIMS Agreement and the Energy Charter Treaty. Another delegation maintains a reserve on the prohibition of requirements listed in paragraph 1(a) through (e), when linked to an advantage. Another delegation maintains a reserve on the scope of the article. One delegation reserves its position on the scope of paragraphs 3 to 5 of this article.

16. At the February 1998 consultations, One delegation proposed the following interpretative note to paragraph 1 of the Performance Requirements article as a possible solution to the concerns raised in footnotes 26,27, 29-32 and 37-39. This interpretative note could do away with the need for paragraphs 4 and 5(c) (both alternatives) and lead to the deletion of footnotes 26, 29-32 and 37-39. This proposal reads:

*“The Contracting Parties agree that the Performance Requirements Article relates to requirements, undertakings and commitments which are directly imposed on or made by investors and/or their investments in connection with the investment. It does not intend to cover provisions applicable as the general law of the land governing in particular customs, trade or environment matters such as duties (including anti-dumping duties, preferential rates, origin rules) quantitative restrictions, safeguard measures, trade sanctions, measures necessary to protect human, animal or plant life or health or the conservation of living or non-living exhaustible natural resources.*

*The Article is without prejudice to the rights and obligations of Contracting Parties under the WTO rules”.*

Delegations agree to consider this proposal further. Some delegations expressed concern that use of the terms “in particular” and “such as” could result in an uncertain and overbroad carve out, which would undermine the article’s coverage, perhaps even exempting any law of general application. Several delegations state their preference for recording this understanding in the form of an interpretative note rather than in a separate article since, in their view, an interpretative note would be more enlightening for arbitrators about the real intentions of negotiators. It would be very difficult, on the other hand, to draft an article that would translate faithfully this intention into legal text. A number of delegations wonder whether “environment matters” and “measures necessary to protect human, animal or plant life or health or the conservation of living or non-living exhaustible natural resources” should be covered by this note. This also relates to how these subjects would be treated elsewhere under the MAI (see also footnote 29). Some delegations propose the deletion of the phrase “intend to” at the beginning of the second sentence of this delegation’s text to give greater precision to the proposed interpretative note.

One delegation restates its position that the Performance Requirements article should not apply to conditions imposed on an investment which are linked to cross-border trade (such as refunds, preferential rates, rules of origin, and anti-dumping duties). This could be made it clear in a separate indent to paragraph 2 (see footnote 27).

17. A large majority of delegations consider that the enumeration of activities in the chapeau should closely follow the list of activities in the National Treatment/MFN articles to avoid any confusion over the meaning of any differences in the lists. They consider furthermore that there are no substantive grounds for the deletion of the terms “maintenance, use, enjoyment” since the implications for intellectual property rights are taken care of by the proposed carve-out in paragraph 1(f) and the consequences of keeping them as regards land assets are immaterial. It is noted that these are also arguments for not mentioning these terms

territory of an investor of a Contracting Party or of a non-Contracting Party, impose, enforce or maintain<sup>18</sup> any of the following requirements, or enforce any commitment or undertaking<sup>19</sup>:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services<sup>20</sup> provided in its territory, or to purchase goods or services from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales to the volume or value of its exports or foreign exchange earnings;

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in the chapeau. One delegation favours the deletion of these terms. Two delegations question the relevancy of the terms “sale or other disposition”.

- 18. One delegation reserves its position on the inclusion of the word “maintain”. This delegation suggests that the use of this word could oblige Contracting Parties to undertake the burdensome task of having to expunge all possible non-conforming requirements from existing laws, regulations, contracts, etc. It should be sufficient, and less burdensome, for a Contracting Party to be obliged not to “impose” and “enforce” such requirements.
- 19. One delegation presented an explanatory note on the formulation of NAFTA article 1106 which, in its view, is significantly clearer than the proposed MAI article on Performance Requirements. In order to improve on the MAI articles, this delegation proposes that the following phrase be added at the end of the chapeau of this paragraph: “or condition the receipt or continued receipt of an advantage on compliance with any of the following requirements”. This addition is intended to make clear that the performance requirements article applies in two basic circumstances: *i*) when linked to the establishment, expansion, etc. of an investment; and *ii*) when linked to the granting of an advantage.

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

The other delegations feel, however, that there is no need to modify the structure of the Article.

- 20. It is understood that item (c) is not meant to cover the provision of cross-border services as defined under the GATS. It is felt that this understanding could be recorded by using the following language: “*This provision does not obligate a Contracting Party to permit cross-border trade in services beyond the obligations it has undertaken pursuant to GATS.*” This understanding could also be part of a general provision in the Agreement concerning the relationship between the MAI and the GATS. One delegation reserves its position on the inclusion of “services” in 1(c) with respect to requirements associated with the granting of an advantage. It is noted that the relationship between the MAI and the GATS is an issue that could be addressed in a number of ways, including by way of individual footnotes.

- (f) to transfer technology, a production process or other proprietary knowledge to a natural or legal person in its territory, except when the requirement
  - is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws, or
  - concerns the transfer of intellectual property and is undertaken in a manner not inconsistent with the TRIPS Agreement;<sup>21</sup>
- (g) to locate its headquarters for a specific region or the world market in the territory of that Contracting Party;<sup>22</sup>

- 
- 21. The wording of this tiret is being elaborated in consultations with intellectual property experts. These experts have not agreed whether the current wording covers future IPRS and moral rights. It remains to be seen how the article will relate to other agreements such as the Rome and Berne Conventions. Paragraphs 1(b) and 1(c) may also have implications for IPRs. Some delegations note that a general provision for interpreting MAI obligations in a manner consistent with other obligations under international agreements would avoid the need for specific language for IPRs. It is understood that the concept of “proprietary knowledge” has a broader coverage than that of “trade secrets” or “undisclosed information” (see TRIPS Article 39) and can include information collected by an investor from publicly available sources by “the sweat of the brow”.
  - 22. One delegation reserves its position on paragraph (g) and notes that the inclusion of (g) may inadvertently oblige Contracting Parties to lodge reservations in respect of basic business incorporation laws in so far as such laws oblige the establishment and/or maintenance of representative or head offices for legal purposes. It is noted that the prohibition is intended to apply to head offices or headquarters and not to the establishment of other offices.

- (h) to supply one or more of the goods that it produces or the services that it provides to a specific region or the world market exclusively from the territory of that Contracting Party;
- (i) to achieve a given level or value of research and development in its territory;<sup>23</sup>
- (j) to hire a given level of nationals;<sup>24</sup>
- (k) to establish a joint venture with domestic participation;<sup>25</sup> or
- (l) to achieve a minimum level of domestic equity participation other than nominal qualifying shares for directors or incorporators of corporations.<sup>26</sup>

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23. Two delegations maintain a scrutiny reserve on this paragraph while two other delegations maintain the view that paragraph (i) should be deleted.

24. There is wide agreement to retain paragraph (j) with the inclusion of the following footnote with the same legal standing as the paragraph itself:

*“Nothing in this paragraph shall be construed as interfering with programmes targeted at disadvantaged regions/persons or other equally legitimate employment policy programmes. It is also understood that permanent residency requirements are not inconsistent with this paragraph.”*

It is confirmed that this provision will not overlap with the MAI article on Employment Requirements since it is meant to cover specific performance requirements expressed in terms of given numbers or percentages of employees while the article on employment requirements addresses problems of discrimination among natural persons holding a valid permit of sejour and work in a given Contracting Party.

Two delegations continue to favour the deletion of paragraph (j).

25. Paragraph (k) includes joint ventures even if not covered by paragraph 1(l) because they do not involve equity participation. It allows, however, joint venture requirements, not involving a requirement of domestic participation, which may be motivated by an economic concern to spread risk.

Some delegations, maintain a scrutiny reserve on paragraph (k) and (l) on the basis that they are covered by the National Treatment provision of the MAI.

Some delegations point out to the difficulty of defining “joint-ventures”. It is agreed to clarify in an interpretative note that “Paragraphs 1(k) and (l) do not prevent a Contracting Party from establishing a joint venture in which it is the domestic participant itself”. Italy points out it is most unlikely that the Contracting Party would be the participant in a joint venture and proposes the phrase “a Contracting Party, a state agency or a state enterprise”. It is also noted that Paragraph 2 of the Privatisation article states that “Nothing in this Agreement” shall be construed as imposing an obligation to privatise.

26. The phrase “other than nominal qualifying shares for directors or incorporators of corporations” clarifies that this performance requirement will not be breached merely because members of boards of directors and those who establish a corporation (incorporators) may be required by domestic law, as a condition of that position, to hold a small equity participation in the corporation.

2. A Contracting Party is not precluded by paragraph 1 from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of a Contracting Party or of a non-Contracting Party, on compliance with any of the requirements, commitments or undertakings set forth in paragraphs 1(f) through 1(l).<sup>27 28</sup>

3. [ ]<sup>29</sup>

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27. It is understood that the receipt or continued receipt of an advantage with respect to paragraphs (k) and (l) will need to be granted on a non-discriminatory basis (provided that no country reservation has been lodged).

Several delegations consider that the concerns that paragraph 5(abis) intends to cover in respect of rights and obligations under the WTO agreements would better be addressed by the reinsertion of paragraph 1(a) in paragraph 2. This would avoid, in particular, confusion and overlap with respect to the dispute settlement provision of the MAI and the WTO. In that regard, some delegations note, in particular, a concern that if the extent of paragraph 1(a)'s disciplines were defined, [as proposed in one of the alternatives to paragraph, 5(a bis) (see footnote 34)], by reference to WTO Disciplines, then if paragraph 1(a) were to become a subject of MAI dispute settlement, the MAI arbitral panel would have to determine whether a WTO violation had occurred, which would be an inappropriate role for it to undertake. Two delegations would also support a reference to paragraphs 1(b) and 1(c) in paragraph 2 to exclude the coverage of advantages associated with services from paragraph 1. Some delegations view adding paragraphs 1(b) and 1(c) to paragraph 2 as an undesirable "TRIMs-minus" solution because TRIMs covers paragraphs 1(b) and 1(c) with respect to goods in all circumstances. Other delegations consider that the reinsertion of any of these items would result in too much of a carve-out from paragraph 1 because this carve-out would apply across the board to all sectors or economic activities and not limited to the exclusions allowed under the WTO provisions. They favour instead a solution in the context of paragraph 5(a bis).

At the February 1998 consultations, a majority of delegations reiterated their preference for a solution along the more limited parameters of paragraph 5(a bis).

28. In February 1998, one delegation considered that the concerns with respect to paragraphs 4 and 5 could better be addressed by the addition of a second indent to paragraph 2. This indent could read:

"Requirements or obligations expressed in laws, regulations and other government measures of a general application concerning conditions of, or incentives linked to, cross-border trade on goods or services are not covered by paragraph 1."

This provision could also be relevant for the understanding recorded in footnote 19 about the coverage of paragraph 1(c). Several delegations reserved their judgement on this proposal. It was recognised, however, that it could provide a way to avoid a problematic overlap between the dispute settlement procedures of the MAI and WTO which has been associated with an earlier proposal outlined in footnote 35. On the other hand, this would still constitute a limitation to investor-to-state dispute settlement.

29. It is agreed to transform the previous paragraph 3 in the special topics report into an interpretative footnote to paragraph 1 with the same legal standing and which reads:

*"For the avoidance of doubt, nothing in paragraph 1(a), 1(b), 1(c), 1(d) and 1(e) shall be construed to prevent a Contracting Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Contracting Party or of a non-Contracting Party, on compliance with a requirement, commitment or undertaking to locate production, provide particular services, train or employ personnel, construct or expand particular facilities, or carry out research and development in its territory."*

One delegation notes that the question of the status of footnotes and interpretative notes for the MAI remains to be determined.

4.<sup>30</sup> [Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and 1(c) shall be construed to prevent any Contracting Party from adopting or maintaining measures, including environmental measures:

- (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary for the conservation of living or non-living exhaustible natural resources.]<sup>31 32</sup>

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30. A majority of delegations see no need for paragraph 4. They consider that the proposed text is too broad, especially that of paragraph 4(a). Some delegations also wonder whether there is a need for an interpretative note. If there is such a need, a majority of delegations consider that it should be along the line proposed by one delegation which reads as follows:

“Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and 1(c) shall be construed to prevent any Contracting Party from adopting or maintaining measures necessary to secure compliance with environmental laws and regulations [that are not otherwise inconsistent with the provisions of this Agreement and] that are necessary for the conservation of living or non-living resources, [or that are necessary to protect human, animal or plant life or health.]”

It is recognised that the Negotiating Group’s general deliberations on environmental issues would provide guidance with regard to a solution regarding this paragraph. The retention of this paragraph may also depend on the final position of delegations concerning the proposals by two delegations outlined in footnotes 16 and 28 respectively.

31. One delegation would like the words “within its jurisdiction” to be added to paragraph 4(c) to make it clear that this provision has no extra-territorial ramifications.

32. One delegation believes that paragraph 4 is properly framed and that its scope should not be limited to environmental measures, which would be the consequence of another delegation’s proposal. It suggests replacing the words “necessary for” by “relating to”, which are used in article XX of GATT 1994. One delegation has withdrawn the example it provided in footnote 29 in the special topics report; the example did not describe a situation that would be disciplined by this article .

One delegation favours the retention of paragraph 4.

It is confirmed that no other general exceptions covered by Article XX of GATT 1994 would need to be covered by the proposed paragraph 4. The same confirmation is given with respect to Article XI of GATT 1994 on the General Elimination of Quantitative Restrictions.

- 5.<sup>33</sup> (a) Paragraphs 1(a), 1(b), and 1(c) do not apply to qualification requirements for goods or services with respect to export promotion<sup>34</sup> and foreign aid programmes;

[(a *bis*) Paragraph 1(a), 1(b), and 1(c) do not apply to:<sup>35</sup>

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33. Prior to the submission of its proposal in footnote 15, one delegation favoured the inclusion of the following header to paragraph 5: “Without prejudice to rights and obligations under the WTO” to ensure that the WTO obligations are not modified by the provision.
34. One delegation suggests adding the word “and investment” after the word “export”. It also suggests clarifying by means of an interpretative note the meaning of “promotion” for the purposes of this article.
35. The obligations of the Performance Requirements article relate to requirements, undertakings and commitments that are directly imposed on or made by investors and their investments. In addition, they are not intended to discipline “advantages” as such. It is recognised that the performance requirements article raises questions about the relationship with the WTO Agreements, notably relating to agriculture, services and government procurement.

In this connection, it is agreed that the performance requirements article should not undo or undermine the Contracting Parties obligations under any WTO Agreements. It is also generally recognised that this article should not interfere with WTO rights and obligations in the agricultural sector. Some delegations consider in addition that the MAI should not attempt to discipline subsidies relating to services since this matter is presently being addressed in the WTO.

Paragraph 5(a bis) has been proposed as a way of addressing these concerns. Discussions on this proposal focused on: a) the need of specific reference to measures covered by WTO Agreements; b) the coverage of such a reference; and c) whether it could be a viable alternative to the inclusion of a reference of paragraph 1(a), and possibly paragraphs 1(b) and 1(c) in paragraph 2.

One delegation questions the need for subparagraph (5 abis) since the underlying problems could be addressed in country specific exceptions. One delegation questions the exclusion of the agriculture sector with respect to export performance requirements not linked to an advantage. It also wonders whether paragraph 5(a bis) would provide an exception for duty drawback programs outside the agriculture sector (e.g., chemicals).

Two delegations have proposed the following language as a possible alternative to paragraph 5(a bis):

*“Paragraphs 1(a), 1(b) and 1(c) do not apply to measures consistent with rights and obligations under the WTO Agreements.”* One delegation also proposes to limit the scope of this wording by adding the phrase *“if linked to an advantage”* at the end of this sentence.

While some delegations recognise that the proposals by these two delegations presented above could provide a technical solution, several delegations remain concerned about the reference to WTO disciplines which, as noted in footnote 27, could lead a MAI panel to pass judgement on WTO provisions. There is general agreement that a MAI panel should not be put in a situation of interpreting WTO disciplines. One delegation notes that under the safeguard provisions of the MAI, the IMF would be consulted in any MAI dispute settlement case involving a measure that the IMF approved or found to be consistent with the MAI. This delegation suggests that a similar solution could be found in the dispute settlement provisions of the MAI where it could be stated that WTO provisions can only be interpreted by WTO.

The following examples were provided to focus discussion on which cases should or should not be covered by the Performance Requirements article, so that the article’s exclusions (paragraph 2) and exceptions (paragraph 5) can be drafted appropriately.

1. A Contracting Party screens investments:

(a) In connection with the establishment of a widget manufacturing plant, a Contracting Party imposes a requirement that the investor export 100 percent of the widgets produced.



- [measures] [advantages] related to the production, processing and trade of agricultural and processed agricultural products<sup>36</sup>;
- advantages related to trade<sup>37</sup> in services;]

b) Paragraphs 1(b), 1(c), 1(f), and 1(h) do not apply to procurement by a Contracting Party or an entity that is owned or controlled by a Contracting Party;<sup>38</sup>

[c) paragraphs 1(b) and 1(c) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.<sup>39</sup>]

(b) Same as 1(a), but the investor receives an advantage: no customs duties are imposed on manufacturing equipment or materials.

2. A Contracting Party allows any investor to establish a widget manufacturing plant:

(a) Any widget manufacturer may operate in an “export processing zone” but if it does so, it is required to export 100 per cent of the widgets produced in the zone. No customs duties are imposed on manufacturing equipment or materials that enter the zone.

(b) Any widget manufacturer may operate in an “export processing zone”. No customs duties are imposed on manufacturing equipment or materials that enter the zone. Customs duties are imposed on any products produced in the zone that are sold within a Contracting Party’s territory.

36. A number of delegations would prefer the use of the more general term “measures” while other delegations would prefer the term “advantages” which is also used in the TRIMS Agreement. Two delegations question the need to extend the coverage of this indent to the production and processing of agricultural products and to processed agricultural products. One delegation proposes, on the other hand, that the indent also should be extended to apply to fisheries products including processed ones.

37. One delegation suggests that the second indent of subparagraph 5(a bis) should apply as well to advantages linked to the provision of services and proposes the insertion of the words “the provision and” before the word “trade”.

38. It is agreed to add the following interpretative note:

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

Two delegations consider that a reference to paragraph 1(i) may be needed if that paragraph is retained.

39. One delegation provided the following example to illustrate the need for subparagraph (c).

“A French manufacturer of textiles located in the US manufactures and cuts cloth for garments in the US, sends it to a country eligible for the special programme (e.g., Jamaica), to be assembled into finished garments, and then re-imports the garments into the US for retail sale. The tariff rate on the re-imported garments is lower than on garments from other countries. Without the subparagraph 5(c) exception, subparagraphs 1(b) and 1(c) would prevent the US from offering the special access programme, which is consistent with existing international obligations. Many MAI countries have similar programmes.”

Several other delegations believe that customs tariff issues fall outside the scope of this article and thus there is no need for the proposed general carve-out in subparagraph 5(c). There may also be a link with the issues raised with respect to paragraph (a).

[c) Paragraphs 1(a), 1(b), 1(c) and 1(d) do not apply to customs duties, exemptions from such duties and preferential tariffs or to any trade measure regulating imports and exports provided that such measures are not applied in an arbitrary or unjustified manner, and do not constitute a disguised restriction on investment.<sup>40</sup>]

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40. As indicated in footnote 15, one delegation considers that the Performance Requirements article should not apply to the general law of the land governing customs and trade.

## ***PRIVATISATION***<sup>41</sup>

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

1. The obligation on a Contracting Party to accord National Treatment and MFN treatment as defined in Paragraph XX (NT/MFN) applies to:
  - a) all kinds of privatisation, irrespective of the method of privatisation (whether by public offering, direct sale or other method)<sup>42</sup>; and
  - b) subsequent transactions involving a privatised asset.<sup>43</sup>

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

2. Notwithstanding paragraph 1, arrangements under which natural persons of a Contracting Party are granted exclusive rights as regards the initial privatisation are acceptable as a method of privatisation under this Agreement provided that the exclusive right as regards the initial privatisation is limited to natural persons only and provided that there is no restriction on subsequent sales].<sup>44</sup>

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

3. Nothing in this Agreement shall be construed as imposing an obligation on a Contracting Party to privatise.<sup>45</sup>

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41. Four delegations reserve their position on all privatisation obligations.

42. One delegation reserves its position.

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

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

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

### **Paragraph 3 (Special share arrangements)<sup>46 47</sup>**

#### ***Alternative 1***

4. Contracting Parties acknowledge that special share arrangements are compatible with Paragraph 1, unless they explicitly or intentionally favour investors or investments of a Contracting Party or discriminate against investors or investments of another Contracting Party on the grounds of their nationality or permanent residency.<sup>48</sup>

#### ***Alternative 2<sup>49</sup>***

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

#### ***Alternative 3<sup>50</sup>***

#### ***Footnote to paragraph 1***

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

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

47. It was recalled that the issue of providing the possibility for lodging reservations after the entry into force of the MAI concerning privatisations is under consideration in the Negotiating Group.

48. One delegation would still prefer the inclusion of an illustrative list, such as contained in the Consolidated Text.

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

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

*[Alternative 4<sup>51</sup>*

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

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

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

**Paragraph 4 (Transparency)<sup>52</sup>**

8. For the purposes of this Article, each Contracting Party or its designated agency shall promptly publish or otherwise make publicly available the essential features and procedures for participation in each prospective privatisation<sup>53</sup>.\*

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51. This proposal by one delegation has not been discussed by delegations.

52. One delegation reserves its position on the Transparency article. It considers that a principle of parallelism should guide the treatment of privatisation and that of concessions, which are two connected fields. It also considers the transparency obligations should apply to all levels of government. This delegation therefore conditions its agreement concerning the insertion of a transparency clause for privatisation to the inclusion of a similar clause for concessions.

53. It is understood that the obligation of this article will be met wherever the information on a privatisation operation is made available. One delegation notes that there is a need for discussion of the potential implications of the proposed transparency provision for legitimate financial market transactions. This delegation proposes the addition of the following interpretative note: "It is understood that paragraph 4 does not place any obligation on a Contracting Party to take actions that could prejudice respect for, or compliance with, the requirements of securities and exchange laws." While several delegations did not need this clarification, they did not oppose that it be added to the Agreement as an interpretative note.

**\*Footnote**

This footnote confirms the application of the Transparency Article YY. This footnote also confirms that the obligations to accord National Treatment and MFN Treatment prohibit discrimination against investors and investments of other Contracting Parties with respect to all arrangements for making public information about a privatisation operation. It is also understood that there can be variance in the methods used to make information available, including in the case of small scale privatisations.

### **Paragraph 5 (Definition)**

9. Privatisation means the sale by a Contracting Party, in part or in full, of its equity interests<sup>54</sup> in any entity<sup>55</sup> or other disposal having substantially the same effect.\*

\* This definition:

- does not cover transactions between different levels or entities of the same Contracting Party;
- excludes transactions in the normal conduct of business.<sup>56</sup>

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54. One delegation considered that the sale of the assets of a state company such as the sale of a division of an entity are to be covered by the definition. It also felt that it was necessary to replace the term “equity interests” by “ownership interests” to clarify the scope of the definition. Another delegation would have preferred to return to the previous definition but could accept the alternative wording “equity or other interests”. Another delegation reserved on the phrase “or other disposal having substantially the same effect”.

55. One delegation is of the view that the word “entity” should be qualified by the addition of “it owns or controls through ownership interests.”

56. It is understood that transactions by entities created for the purpose of the sale or other disposal of a Contracting Party’s equity interests in an entity are captured by the revised definition in accordance with the MAI Article on entities with delegated governmental authority (See section VIII).

## *MONOPOLIES/STATE ENTERPRISES/CONCESSIONS*

### **A. Article on Monopolies<sup>57</sup>**

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from maintaining, designating or eliminating a monopoly.<sup>58</sup>
2. Each Contracting Party shall [endeavour to]<sup>59</sup> accord non-discriminatory treatment when designating a monopoly.

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

58. It is understood that paragraph 1 is without prejudice to the article on Expropriation and Compensation. One delegation continues to believe that "Agreement" should be replaced with "Article" but will consider this proposal for an interpretative note that would be an integral part of the Agreement.

59. Delegations remain divided on the desirability of removing these brackets. One delegation is linking the issue on the inclusion of the inclusion into the MAI of special provisions on concessions; it is also linking it on the definition of monopolies (see footnote 81).

A large part of the discussion in February 1998 focused on a draft alternative text splitting paragraph 2 in the two following paragraphs:

"2. Each Contracting Party shall endeavour to accord non-discriminatory treatment when designating a publicly-owned monopoly.

3. Each Contracting Party shall accord non discriminatory treatment when designating a privately- owned monopoly."

Leaving aside the question of the definition of monopolies and the problems of distinguishing between privately-owned and publicly-owned monopolies, several delegations reacted favourably to the proposed differentiation in the nature of the obligations for the designation of publicly-owned monopolies ( best endeavour) and the designation of privately-owned monopolies. Some delegations feel that paragraph 2 is self-evident and would not therefore be necessary. One delegation indicates that it could agree to a best endeavour undertaking but only for "government monopolies" (for instance the establishment of a government department or entity to provide a new service to the public). It therefore favours a National Treatment obligation for the designation of other types of publicly-owned monopolies (like state enterprises). Italy proposes to replace the words " Contracting Party" by the words "Contracting Party, state agency or state enterprise".

A majority of delegations feel that non-discriminatory treatment should be provided, in any case, when the designation of monopoly involves an investor of a Contracting Party other than the Contracting Party itself (for instance a private investor or public investor of another Contracting Party or another state). In other words, National Treatment should apply when the designation of a monopoly is subject to a competitive process. Delegations were invited to reflect whether the following text would adequately translate this thought:

"Each Contracting Party shall accord non-discriminatory treatment when designating a monopoly, when such designation involves an investor of a Contracting Party other than the Contracting Party itself".

Some delegations are unsure about the meaning of the terms "involves". Other delegations wonder whether "emanations" from the Contracting Party itself should be excluded from the bidding process and whether this should be made explicit in the text. Some other delegations felt that local authorities (such as municipalities) should be allowed to participate in a competitive procedure. Some other delegations



3. Each Contracting Party shall ensure that any privately-owned monopoly that its national [or subnational] governments [maintain]<sup>60</sup> or designate and any public monopoly that its national [or subnational] governments maintain or designate:

**Subparagraph a)**

a) provides non-discriminatory treatment to investments of investors of another Contracting Party in its supply of the monopoly good or service in the relevant market<sup>61</sup>

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considered that the proposal still leaves too much discretion to the government in the designation of public monopolies.

An alternative proposal has since been circulated to delegations.

A few delegations continued to favour a best endeavour clause for both situations (the designation of a publicly-owned and privately-owned monopoly) and proposed the deletion of the brackets in paragraph 2 of the draft text.

60. One delegation considers that all the provisions of the Monopoly article should not apply to monopolies at subnational levels of government. It also has difficulties with the inclusion of the term “maintains” since this could create disciplines with respect to existing contracts between the government and such privately-owned monopolies and have general ramifications on the rights of existing shareholders. One delegation considers that the disciplines of paragraph 3 should not apply to monopolies designated by subnational authorities. Other delegations consider it essential that monopolies designated by subnational authorities should be covered by the disciplines. They recognise that the reference to national and subnational governments is also related to the coverage of the monopoly definition (see footnote 74) and more broadly to the solution found for the general treatment of subnational entities under the MAI.

### **Subparagraph b)**

- b) provides non-discriminatory treatment to investments of investors of another Contracting Party in its purchase of the monopoly good or service in the relevant market. This paragraph does not apply to procurement by governmental agencies of goods or services for government purposes and not with a view to commercial resale or with a view to use in the production of goods or services for commercial sale;<sup>61</sup>

### **Subparagraph c)**

#### *Alternative 1*<sup>62</sup>

- c) does not abuse its monopoly position, in a non-monopolised market in its territory, to engage, either directly or indirectly, including through its dealing with its parent company, its subsidiary or other enterprise with common ownership, in anticompetitive practices that adversely affect [an investor or]<sup>63</sup> an investment by an investor of another Contracting Party, including through the discriminatory provision of the monopoly good or service, cross-subsidisation or predatory conduct.<sup>64</sup>

#### *Alternative 2: zero option*<sup>65</sup>

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61. One delegation raises the issue of the treatment of sub-contracting of monopoly activities.
62. This draft article originally proposed by one delegation is supported by several delegations. Another delegation notes that the reference to “anti-competitive practices” should not be problematic since the GATS contains obligations with respect to anti-competitive practices as an integral part of the GATS agreement on basic telecommunications (cf. GATS Telecoms Reference Paper).
63. The inclusion of the term “investor” would confirm the application of subparagraph (c) to the pre-establishment phase. Some delegations indicate that their support for Alternative 1 is conditional upon the coverage of the pre-establishment phase. A number of delegations note, however, that this coverage could also create problems with respect to the dispute settlement provisions of the MAI and consider that it should not be retained.
64. One delegation could agree to the deletion of the phrase “in particular through the abusive use of prices” on the understanding that this practice was covered by the terms “predatory conduct”. Another delegation considers that the term “abusive use of prices” has a broader coverage than the concept of anti-competitive practices.
65. The zero option is supported by some delegations to avoid undue intrusion into the competition policy field. A number of these delegations support, as a fallback position, the inclusion of a subparagraph (c) based on article VIII of the GATS which reads as follows:
- “c) which competes, either directly or indirectly, or through an affiliated company, in an economic activity outside the scope of its monopoly rights does not abuse its monopoly position in that activity to act in a manner inconsistent with the obligations of this Agreement;”
- One delegation considers that this proposal adds little in substance to the Monopoly article and could even be politically counterproductive.

**[Subparagraph d)]<sup>66</sup>**

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

[Nothing in Article A shall be construed to prevent a monopoly from charging different prices in different geographic markets, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions in those markets.<sup>67</sup>

Article A, paragraphs 3(c) and 3(d) differences in pricing between classes of customers, between affiliated and non-affiliated firms, and cross-subsidisation are not in themselves inconsistent with this provision; rather, they are subject to this subparagraph when they are used as instruments of anti-competitive behaviour by the monopoly firm].<sup>68</sup>

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66. A large majority of delegations are in favour of the deletion of subparagraph (d) and the following two paragraphs. One delegation is prepared to accept the removal of subparagraph (d) provided that these two paragraphs are maintained as interpretative notes. Two delegations, which are proponents of subparagraph (d) in its entirety, wish to maintain their position for inclusion in the article.

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

Many delegations remain sceptical, however, about the feasibility and desirability of requiring monopolies to act in accordance with "commercial considerations".

67. Delegations discussed whether this paragraph should be maintained as an interpretative note, particularly in case subparagraph (d) is deleted. One delegation considers that this clarification has a bearing on all the provisions of paragraph 3, particularly subparagraph 3(a). Another delegation is of the view that the only relevant link with other subparagraphs, with the exception of subparagraph (d), is to subparagraph (a). In this context, subparagraph (d) is not necessary because of the general understanding that the non-discrimination principle in subparagraph (a) is limited to "like circumstances" thereby allowing for differentiation on the basis of commercial considerations. While other delegations did not exclude a possible link to other subparagraphs, for example subparagraph (b), they support its deletion.

68. A large majority are of the view that the clarification intended by this paragraph is not necessary, especially if subparagraph (d) is deleted. One delegation considers that this explanatory paragraph is also relevant to subparagraph 3(c).

4. Each Contracting Party is allowed to lodge a reservation to the Agreement concerning an activity previously monopolised at the moment of the elimination of the monopoly.]<sup>69</sup>

5. Each Contracting Party shall notify<sup>70</sup> to the Parties Group any existing designated monopoly within [60]<sup>71</sup> days after the entry into force of the Agreement, any newly designated monopoly within [60] days after its creation, and any elimination of a designated monopoly [and related new reservation to the Agreement]<sup>72</sup> within [60] days after its elimination.

[6. Neither investors of another Contracting Party nor their investments may have recourse to investor-state arbitration for any matter arising out of paragraph 3 of this Article.]<sup>73</sup>

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69. Proposal by one delegation. Some delegations are opposed to the principle of lodging country exceptions after into force of the MAI. Another delegation proposes that such reservations be made the subject of scrutiny by the “Parties Group” to ensure that they do not negatively affect the level of liberalisation under the MAI.

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

71. It is suggested that the period of three months, which is the notification period for monopolies under paragraph VIII.4 of the GATS, could be an alternative. The length of the notification period could also be decided in light of other notification requirements that might arise under the Agreement. One delegation points out to the difficulty it would have in notifying the very large number of monopolies designated by subnational authorities. It is agreed that a solution needs to be found to the practical problem that the Contracting Parties may encounter with respect to the designation of every single monopoly designated at a subnational level authority. It is suggested that the alternative approach found in the Energy Charter to notify a summary of the types of monopolies under the jurisdiction of subnational levels of government could be considered. One delegation does not agree that this paragraph applies with respect to subnational governments.

72. The issue of notification of monopolies is also linked to the question dealt with under paragraph 4 of this Article.

73. Three delegations point to the novelty and complexity of the proposed provisions on monopolies, which argue in favour of limiting the dispute settlement procedures to state-to-state disputes. They also believe that most governments do not even allow private “anti-trust” actions in their own courts by their citizens; thus it would be a leap to suggest that there be privately-initiated scrutiny of monopolies’ anti-competitive actions pursuant to 3(c). These delegations consider that state-to-state dispute settlement should provide a useful procedural compromise. Many delegations consider, however, this paragraph should be deleted as they believe that Contracting Parties should only sign up to commitments that they would be prepared to defend against individual investors.

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

**i) Zero option.<sup>74</sup>**

**ii) Additional provisions**

**a. Proposal by two delegations<sup>75</sup>**

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

2. Neither investors of another Contracting Party nor their investments may have recourse to investor-state arbitration for any matter arising out of paragraph 2 of this Article.<sup>76</sup>]

**b. Proposal by one delegation<sup>77</sup>**

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

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74. A large majority of delegations support this option, particularly since the anti-circumvention clause in Section VIII is intended to cover all enterprises, *i.e.* both state and private enterprises, to which authority has been granted .

A number of delegations underline the legal and practical difficulties that governments would encounter in ensuring the conformity of the behaviour of state enterprises and all their affiliates with the obligations of additional provisions, such as those proposed by two delegations.

75. Two delegations believe that the need for such provisions is predicated by the fact that state enterprises are different from private enterprises because of the links with governmental authorities. They felt that the term "state enterprise" could be replaced by "an enterprise that it owns or controls".

One delegations points out that under existing legislation in their country, the state as a shareholder has no special privilege in comparison with any other shareholder. This would require legislative action.

76. Some delegations point out that this paragraph would be needed whichever alternative is chosen. Other delegations consider that any additional disciplines that might be adopted would need to be subject to both state-to-state and investor-to-state dispute settlement. One delegation would like this paragraph to apply to both paragraph 1 and the article on Entities with Delegated Governmental Authority.

77. This proposal is offered as a compromise by one delegation which favours, nevertheless, Option (a) (*i.e.* no additional provisions) as its first option. It is meant to cover all possible avenues for exercising influence other than government ownership (such as through the granting of contracts to private enterprises). This proposal did not receive broad support.

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

1. “Delegation” means a legislative grant, and a government order, directive or other act transferring to the monopoly or state enterprise, or authorising the exercise by the monopoly or state enterprise of, governmental authority.
2. “Designate” means to establish or authorise, or to expand the scope of a monopoly.<sup>78</sup>
3. “Monopoly” means any person or entity designated by a [national [or subnational]<sup>79</sup> government authority] [Contracting Party] as the sole supplier or buyer of a good or service in a relevant market in the territory of a Contracting Party . It does not include a person or entity that has an exclusive intellectual property right solely by reason of such right or the exercise of such right<sup>80 81</sup>.

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78. One delegation maintains a scrutiny reserve on this paragraph which is also related to the coverage of the chapeau of paragraph 3 of the article on monopolies.

79. A large majority of delegations consider that, in substance, the MAI disciplines on monopolies should apply to all levels of governments. This could be achieved in a number of ways. The preferred option by most delegations holding this view is the second bracketed text “Contracting Party”. This would present the advantage of ensuring consistency with the coverage of this term across the Agreement. Other delegations remain of the opinion, however, that the most secure way to capture all designated monopolies would be to have a specific reference to subnational authorities in the definition. One delegation suggests the alternative wording of “the competent authority of a Contracting Party”; this language is considered to be a promising compromise for delegations supporting the broadest definition of monopolies and should be discussed further. One delegation could accept the deletion of the reference to “national or subnational government” on the understanding that a reference would be made in paragraph 3 in Section A that it does not apply to subnational monopolies. Another delegation favours a definition limited to monopolies designated by national governments and suggests the deletion of the reference to “subnational” authorities”.

80. There is agreement that the definition of monopolies should explicitly exclude exclusive rights derived agreed by intellectual property rights. The present wording takes into account drafting changes in the Intellectual Property Experts Group. These experts would also like to add at the end of the second sentence the following bracketed text. Such an addition would read “[nor does it include an entity charged with the collective management of intellectual property rights]”. This phrase would exclude royalty collection agencies (which sometimes have a legal monopoly).

Some delegations reserve their position pending the outcome, *inter alia*, of the discussion on the relationship between monopolies and concessions, authorisations, etc.

81. Delegations agree to delete the bracketed text at the end of the second sentence : “[ nor does it include a person or entity that has an exclusive right such as concession, license, authorisation or permit. ]. France agreement’s is subject to a satisfactory solution to the drafting of paragraph 2 of draft article on monopolies based on the various alternatives outlined in footnote 59. It is also based on the understanding, that France would like to see recorded as a new sentence at the end of the monopoly definition that “this definition encompasses a person or entity which has been granted exclusive rights such as concessions, licenses, authorisations or permits. This understanding was not agreed, at least as written. One delegation mentioned the usefulness of distinguishing between the granting of exclusive rights for the access to a resource (mineral resource, the use of the radioelectric spectrum) from those exclusive rights given for the marketing of a good in its relevant market (such as the right to sell gasoline). In this delegation’s view, the exclusivity in the first case does not necessarily give monopoly rights (there could be more than one transmitter of telephone signals using different parts of the radioelectric spectrum or several exploiters of mineral resources using different mine sites°. In the second case, however, an exclusive right to commercialise a good in the relevant market constitutes a monopoly because this right is given expressly to one person or entity in a given market).

4. “Relevant market” means the geographic and product market for a good or service in the territory of the Contracting Party.<sup>82</sup>

5. “Non-discriminatory treatment” means the better of national treatment and most favoured nation treatment, as set out in the relevant provisions of this Agreement.<sup>83</sup>

[6. “State enterprises” means, [subject to Annex ...., ] an enterprise owned, or controlled through ownership interest, by a Contracting Party.]<sup>84</sup>

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There is a broad consensus that, in conformity with item (vii) of the MAI definition of “investment”, any rights conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits are to be covered fully by the obligations of the MAI. Several delegations also share the view that any person or entity which acquires monopoly rights as a result of the implementation of such law or contract should also fulfil the obligations of paragraph 3 of the Monopoly article in the exercise of such rights. These delegations disagree, however, on how or whether to translate these understandings into text.

Some delegations are opposed to the inclusion of concessions into the monopoly definition; they consider that these are two different legal concepts which should be treated separately under the MAI. Accordingly, one delegation considers that the bracketed text at the end of the second sentence of the definition of monopoly “nor does it include a person or entity that has an exclusive right such as concession, license, authorisation or permit” should be maintained. One delegation also considers that monopolies and concessions are different legal entities. However, the exclusion of concessions from this definition would imply too much of a carve-out for the MAI. This is the reasoning behind the various attempts made by this delegation (footnote 54) to ensure the highest level of obligations possible in these two areas. Ideally, in this delegation’s view, the problem of the interface between monopolies and concessions should be solved in the definition itself; this could be done adopting the legal approach embodied in articles 90-91 of the EC Treaty which covers both exclusive rights (i.e. monopolies) and special rights.

Delegations are invited to reflect further on these issues.

82. Some delegations propose the inclusion of the word “commercial” before “goods and services” to clarify, in particular, that the “relevant markets” for monopolies would not include government services such as the delivery of passports or driving licenses. A majority of delegations also recognises that the inclusion of the terms “in the territory of the Contracting Party” at the end of the paragraph presents the advantage of giving greater precision to the concept of “relevant market”, also used in paragraphs 3(a) and 3(b) of article A on monopolies. The inclusion of these terms would also do away with the need for making a similar reference in paragraph 3 on the definition of “Monopoly”.

One delegation is of the view that the proposed definition needs to be improved for greater precision and clarity. Another delegation draws the attention to the fact that the concept of “relevant market” has been discussed in the OECD Competition Policy Committee and that the result of this work should be taken into account.

One delegation proposes to add the following sentences after “Contracting Party”: “A product market for a good or a service covers that good or service and its close substitutes. A product or service is a close substitute of another product or service when a small but significant increase in the price of the other product or service, all other prices remaining equal, leads to a significant increase in the demand for the first product or service.” This delegation argues that this definition will be useful to narrow down the definition of monopoly and will exclude from it those firms that although have been granted exclusive rights compete in the market against other firms producing close substitutes. Other delegations point out that the notion of close substitutes is normally included in national competition policies and consider the addition by this delegation unnecessary.

83. Three delegations question the need for this definition.

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84. A number of delegations question the need for a definition of state enterprises.



[D. **Article on Concessions**<sup>85 86</sup>

*Transparency*

The procedure for granting a concession<sup>87</sup> must envisage, at least, one publication in a journal of official notices. The notice must contain all the relevant information about the purpose and nature of the activity subject to concession, its conditions and deadline. The publication must be made sufficiently in advance in order to enable all interested persons to submit applications or additional relevant information. The reasons for the rejection of an application will be made known to the applicant upon request. ]

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85. This draft article reproduces a compromise proposal by one delegation after it became clear that the revised proposal by another delegation found in section VI.D of the special topics report did not attract sufficient support to serve as a basis for discussing specific transparency provisions on concessions. This proposal is intended to establish transparency requisites when granting a concession. In no case it intends to establish an obligation for the Contracting Parties in relation to the type of procedure to followed when granting a concession. Accordingly, it covers the possibility of granting concessions through tender as well as non-tender procedures. Some delegations feel that an article along these lines could be useful when the government takes the initiative of announcing that an activity is open to an application for a concession.

Several delegations continue to question the need for an additional article to the general Transparency article of the MAI. Some of these delegations note that the procedures for the award of concessions are defined by their domestic legislations. Some delegations note that their domestic legal regime does not provide for a tendering process for the granting of concessions. A few delegations remain opposed to the inclusion of any article on concessions, whatever its form or content . One delegation stresses the link between disciplines on concessions and disciplines on monopolies (see footnotes 54 and 80 ).

Some delegations see some parallelism between a Transparency article for concessions and the Transparency article envisaged for Privatisation in section V of the report. The Chairman invites delegations sharing this view to explore how this Privatisation Transparency article could be modified or adapted for concessions.

86. One delegation provided a background note on natural resources and concessions in the context of the MAI.

87. One delegation would prefer the phrase “concession contract” instead of the word “concession”.

*[Definition*<sup>88</sup>

1. A concession is any delegation, direct or indirect, which entails a transferring of operation of activities, carried out by a government authority, national or subnational, or any public or para-public authority[, to a distinct and independent legal entity].
2. The delegation shall be realised either by any laws, regulations, administrative rulings or established policies, or by any private or public contract. The aim of the delegation is to entrust to a distinct [and independent] legal body with the operation of public services, including the operation of networks or infrastructures, or the exploitation of natural resources<sup>89</sup> and if needed with the construction of all or part of networks or infrastructures.
3. [*If necessary*: The legal act of delegation includes the modes of payment to the investor. These modes of payment can consist of any price paid by consumers, any royalty, tax licence, subsidy or contribution from the delegatory authority, or any combination of the modes ]].

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88. This definition reproduces a draft proposal by one delegation, supported by another delegation (provided that concessions are explicitly excluded from the definition of monopoly -- see footnote 80), as amended by this delegation in January 1998 (the changes are bracketed in paragraphs 1 and 2). This draft definition has never been discussed at length by delegations. It is recognised that the need for it would arise only if the MAI were to include special transparency provisions on concessions. It is recognised that the elaboration of a definition for concessions could be a rather difficult task given the different coverage of this concept in national legislations.

89. One delegation proposes the deletion of the reference to natural resources

**[VII. ARTICLE ON THE GRANTING OF AUTHORISATIONS FOR THE PROSPECTION, EXPLOITATION AND PRODUCTION OF MINERALS, INCLUDING HYDROCARBONS<sup>90 91</sup>**

“(1) For the purpose of the present Article, “authorisation” means any law, regulation, administrative or contractual provision or instrument issued thereunder by which the competent authorities of a Contracting Party entitle any investor or a group of investors to exercise, on its own behalf and on its own risk, the exclusive right to prospect or explore for or produce minerals, including hydrocarbons, in a geographical area.

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90 Proposal by one delegation. This delegation also proposes to add to paragraph (vii) of the current definition of “investment” in the MAI, the following language with respect to mineral resources, including hydrocarbons resources:

“-- Rights conferred pursuant to law or contract regarding property ownership over mineral resources, including hydrocarbon resources;

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

91. There is general agreement that the MAI obligations (NT, MFN, Performance Requirements...) should apply fully to the granting of authorisations for the prospection, exploitation and production of minerals, including hydrocarbons. This is also valid for any rights granted in connection with the prospection, exploitation and production of any other natural resources. Views differ, however, as to whether additional language, along the lines that proposed by one delegation or another formulation, need to be incorporated into the MAI to confirm this understanding.

Some delegations are prepared to work on the basis of the text provided some amendments are made to it. One delegation suggests replacing the word “authorisation” by the word “concessions” which would correspond more accurately to this delegation’s legal situation as well to that of other countries. Some delegations consider that the words “To the extent that the measures are consistent with the Agreement” would convey greater certainty as to the consistency of the proposed article with other MAI provisions that the words “Consistent with the present Agreement,” appearing at the beginning of paragraph 2. Some delegations wonder if the reference to state participation in sup-paragraph 2(c) is all that necessary; some other delegations consider, that other conditions or requirements may need to be mentioned. Several delegations are of the view that paragraph 3 could create confusion as the applicability of the National Treatment/MFN obligations and support its deletion. In their view, the operative part of the article should be limited to the paragraph 2. Other delegations see value in referring specifically to these obligations in the paragraph to avoid potential problems of interpretation of the MAI obligations to the granting of authorisations, concessions, etc. in the future. One delegation suggests the addition of the words “when granting the authorisation s” at the end of paragraph 3.

Drawing on the approach elaborated under the draft privatisation article, some delegations propose a two-pronged alternative solution which would a) recognise the sovereign rights of the State over the country’s natural resources while b) confirming the full applicability of the MAI obligations at the time of the granting to MAI investors and their investments of any specific right under a concession, license, authorisation or permit concerning the prospection, exploitation or production of all natural resources, including hydrocarbons or minerals.

- (2) Consistent with the present Agreement, the Contracting Parties may establish:
- (a) procedures to be followed for the granting of authorisations according to which all interested investors may submit applications pursuant to this article<sup>92</sup>;
  - (b) criteria on the basis of which authorisations are granted;
  - (c) conditions and requirements, including requirement of state participation, concerning the exercise or termination of the activities of prospecting, exploring for and producing minerals, including hydrocarbons, whether contained in the authorisation or to be accepted prior to the grant of the authorisation.
- (3) The Contracting Parties shall apply such procedures, criteria, conditions and requirements as referred to in paragraph (2) above in a transparent and objective manner and in a way which ensures that there is no discrimination on grounds of nationality between investors as regards access to and exercise of the activities of prospecting, exploring for and producing minerals, including hydrocarbons. ]

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92. One delegation proposes to delete the last part of the sentence “according to which all interested investors may submit applications pursuant to this article” since the wording of this phrase implies that when a Contracting Party has procedures for the granting of authorisation, these procedures must involve a tender process.

### ***ENTITIES WITH DELEGATED GOVERNMENTAL AUTHORITY<sup>93</sup>***

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

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93. This article covers all entities, including monopolies and state enterprises, with respect to the exercise of any delegated regulatory, administrative or other governmental authority. This provision renders the need for a provision on this subject under the Monopolies article unnecessary. Paragraph 3(a) in the special topics report could accordingly be deleted. One delegation can only consider this provision if its concern relating to the chapeau of the Monopoly Article (see footnote 59) could be adequately covered and, secondly, points out that the Vienna Convention of the Law of Treaties may, in the view of this delegation, make this provision redundant.

Several delegations consider it essential that the proposed anti-circumvention clause apply to monopolies designated by subnational authorities. It is recognised, however, that this matter is linked to the general treatment of subnational entities under the MAI.

## *INVESTMENT INCENTIVES*

### **Provisions**

#### *Alternative 1*

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

#### *Alternative 2*

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

## Article <sup>94</sup>

1. The Contracting Parties confirm that Article XX (on NT and MFN) and Article XX (Transparency) applies to [the granting of]<sup>95</sup> investment incentives.<sup>96</sup>
2. [The Contracting Parties acknowledge that[, in certain circumstances,] even if applied on a non-discriminatory basis, investment incentives may have distorting effects on the flow of capital and investment decisions.<sup>97</sup> [Any Contracting Party which considers that its investors or their investments are adversely affected by an investment incentive adopted by another Contracting Party and having a distorting effect, may request consultations with that Contracting Party.] [The former Contracting Party may also bring the incentive before the Parties Group for its consideration.]]<sup>98 99</sup>

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94. The Group proceeded on the basis of report of EG2 with respect to the treatment of tax incentives.
  95. Some delegations favour the deletion of “the granting of”.
  96. While it is agreed that investment incentives should be subject to NT and MFN obligations, there are different views on the desirability of making this explicit. Consequently, some delegations consider this paragraph to be unnecessary. One delegation maintains a pre-scrutiny reservation on the text of this draft article. The dispute settlement mechanism would, in particular, apply to this article. One delegation raises the possibility of taking reservations with regard to NT.
  97. Several delegations point out that not all investment incentives are bad -- the problem arises in drawing a line between good and bad incentives. It is suggested that the distorting effects of investment incentives on investment decisions and capital flows should be balanced against their possible benefits in achieving legitimate social objectives. Other delegations note that these concerns were addressed in paragraph 3 of the draft article.
  98. Some Delegations remain unconvinced by the need for special consultation procedures for non-discriminatory investment incentives as defined in paragraph 2, although final judgement would need to await the decisions taken on the coverage of the MAI. The presumption is that, as with other agreements, consultations would be the first procedural step of the dispute settlement mechanism of the MAI. It should be possible to revisit the adequacy of the provisions on dispute settlement and the role of the Parties Group when their configuration is better known. One delegation questions whether the dispute settlement mechanism of the MAI could apply to investment distorting investment incentives or to investment incentives granted illegally. These questions would also deserve further attention. Some delegations question the role of the parties group in any consultation process.
  99. One delegation suggests the first sentence of paragraph 3 could be added to paragraph 4, and the rest of paragraph 3 deleted.

3.<sup>100</sup> [In order to further avoid and minimise such distorting effects and to avoid undue competition between Contracting Parties in order to attract or retain investments, the Contracting Parties [shall] enter into negotiations with a view to establishing additional MAI disciplines [within three years] after the signature of this Agreement.<sup>101</sup> These negotiations shall recognise the role of investment incentives with regard to the aims of policies, such as regional, structural, social, environmental or R&D policies of the Contracting Parties, and other work of a similar nature undertaken in other fora. These negotiations shall, in particular, address the issues of positive discrimination,<sup>102</sup> [transparency<sup>103</sup>], standstill and rollback<sup>104</sup>.]

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

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

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

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

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

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

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



***RECOGNITION ARRANGEMENTS***<sup>105</sup>

***AUTHORISATION PROCEDURES***<sup>106</sup>

***MEMBERSHIP OF SELF-REGULATORY BODIES***<sup>107</sup>

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105. See Commentary.

106. See Commentary.

107. See Commentary

## ***INTELLECTUAL PROPERTY***

Intellectual property issues are being examined by intellectual property experts. The most recent status of discussions is reproduced here.

### **Transfers<sup>108</sup>**

Agreed: text on collective management charges should be added to the first sentence in paragraph 2 of the Commentary on Transfers after “purposes”: “, or any authorised deduction by an entity charged with collective management of intellectual property rights.”

Not agreed: whether the modified paragraph should remain in the Commentary or be placed in the text of the Agreement.

### **Monopolies<sup>109</sup>**

Agreed: the definition of “monopoly” should be amended to refine the definition’s treatment of intellectual property rights:

“Monopoly” means any person or entity designated by a [national [or subnational] government authority] [Contracting Party] as the sole supplier or buyer of a good or service in a relevant market in the territory of a Contracting Party, but does not include a person or entity that has an exclusive intellectual property right, concession, licence authorisation or permit solely by reason of such right or exercise of such right [nor does it include an entity charged with the collective management of intellectual property rights].

Not agreed: as indicated by the final bracketed phrase, whether entities charged with collective management of IPRs should also be excluded from the definition.

### **Performance Requirements<sup>110</sup>**

Agreed: paragraph 1(f) in the Article on Performance Requirements requires explicit reference to the transfer of IPRs. Not agreed:

- (a) whether the current wording of paragraph 1(f) adequately covers future IPRs and moral rights; and
- (b) whether paragraphs 1(b) and (c) of the Article on Performance Requirements have an impact on IPRs.

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108. See Section IV, below.

109. See Section III, above.

110. See Section III, above.

## **Expropriation<sup>111</sup>**

Agreed: text is needed to ensure that certain IP management and legal provisions do not constitute expropriation.

Not agreed: flowing from proposed text:

“The creation, limitation, revocation, annulment, statutory licensing, compulsory licensing and compulsory collective management of IPRs, the withholding of authorised deductions by an entity charged with the collective management of IPRs, and the sharing of remuneration between different holders of IPRs are not expropriation within the terms of this agreement, to the extent that they are not inconsistent with specialised IPR conventions.”

- (a) whether there should be a specific IP text or reliance on a general text clarifying that expropriation does not include normal government regulatory activity;
- (b) whether and how the statement should be qualified;
- (c) whether that list of actions should be exhaustive or illustrative;
- (d) whether the current wording adequately covers future rights;
- (e) whether the question of consistency with IPR agreements should be worded positively;
- (f) whether a specific IP text should be in the text of the Agreement, in an interpretative footnote or in the Commentary; and
- (g) whether the word “creation” adequately covers the intended concept.

## **National Treatment and MFN Treatment<sup>112</sup> and General Treatment<sup>113</sup>**

Agreed: MAI obligations should not extend NT/MFN obligations in existing IP agreements.

Not agreed:

- (a) whether there should be a NT/MFN exception through a link to existing IP agreements;
- (b) whether there should be a NT/MFN exception to MAI obligations for IPRs;
- (c) whether the eventual solution should also be applied to the General Treatment articles; and
- (d) the applicability of the MAI obligations with respect to future IPRs.

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111. See Section IV, below.

112. See Section III, above

113. See Section IV, below.

### **Definitions of “Investment” and “Investor”<sup>114</sup>**

Agreed: there needs to be clarification of the definition of “investment”. The required clarification is tied to the resolution of the eventual substantial MAI obligations for IPRs.

Not agreed:

- (a) whether the definition of “investment” should be limited to those IPRs included in the TRIPS Agreement;
- (b) whether it should exclude copyrights and related rights;
- (c) whether it should include future IPRs;
- (d) whether it should include only the “economic aspects” of IPRs;
- (e) whether it should include only those rights provided domestically; and
- (f) what implications the definition of “investor” has for an IP “rightsholder”.

### **Dispute Settlement<sup>115</sup>**

Agreed: IP experts wish to limit forum shopping and conflicting jurisprudence with the WTO.

Not agreed:

- (a) how to achieve these goals;
- (b) the desirability of applying investor-state dispute settlement to IPRs; and
- (c) whether the existing MFN obligations in the TRIPS Agreement create the risk of “free-riders”.

### **Information Transfers and Data Processing<sup>116</sup>**

Agreed: there are concerns that the text of the generalisation of financial services (see Information Transfer and Data Processing, page 57) has implications for IPRs, and may have to be amended or deleted to take these concerns into account.

### **Exhaustion of Rights**

Not agreed: whether there needs to be any language on this issue to ensure that the MAI does not create new obligations in this area.

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114. See Section II, above.

115. See Section V, below.

116. See Section IV, below.

***PUBLIC DEBT***<sup>117</sup>

***CORPORATE PRACTICES***<sup>118</sup>

***TECHNOLOGY R&D***<sup>119</sup>

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117. See Commentary.

118. The Chairman concluded that there is full agreement that government-imposed discriminatory practices would be covered by the MAI. In view of the views expressed by a clear majority of delegations, the MAI should not contain disciplines on non-government imposed discriminatory corporate practices. However, Contracting Parties to the MAI should follow future developments in this area and could take up the matter again if the need arises.

119. See Commentary.

## **NOT LOWERING STANDARDS (LABOUR AND ENVIRONMENT)<sup>120 121 122</sup>**

### **Alternative 1**

[The Parties recognise that it is inappropriate to encourage investment by lowering [domestic] health, safety or environmental [standards] [measures]<sup>123</sup> or relaxing [domestic] [core]<sup>124</sup> labour standards.<sup>125</sup> Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such [standards] [measures] as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.]

### **Alternative 2**

[A Contracting Party [shall] [should]<sup>126</sup> not waive or otherwise derogate from, or offer to waive or otherwise derogate from [domestic] health, safety or environmental [measures] [standards] or

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- 120 Three delegations continue to oppose any reference to a “not lowering standards” article on labour. One delegation 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.
- 121 One delegation anticipates presenting proposed text based on its *Draft Position Paper on “Labour and the Environment” (Regarding “not lowering standards”)* presented to the High Level Meeting on 16 February 1998.
- 122 One delegation suggests that any alternative referring to the term “domestic labour standards” should be accompanied by a definition of that term so as to ensure a common understanding of its meaning within the agreement.
123. If “measure” is preferred, then the word “lowering” should be replaced by “relaxing”. In either case, the term selected should be defined. For reference purposes, delegations mentioned the definition of “measure” in NAFTA or to be found in the Transparency Article of the and the definition of “standard” in NAFTA and in the WTO Agreement on Technical Barriers to Trade.
124. Delegations note that no universally accepted definitions existed for “core” or “domestic” standards. Most delegations prefer “domestic” which was recognised to be wider in scope.
125. A major difference of view as between Alternative 1 and Alternative 2 concerns the first sentence of Alternative 1. This sentence is part of a difference of approach as to whether the provision should refer to respect for universal standards or only to the relaxation of domestic standards. Views differ on whether this sentence is useful or necessary.
126. If “should” were preferred, it might be desirable to add the last sentence of Alternative 1. Those preferring “should” argued that use of the word “shall” would prevent the authorities offering necessary waivers under domestic law, for example, to help resolve a specific case of damage to the environment and might prevent resolution of particular cases through consultations and persuasion. They also express concern that “shall” might expose the authorities to dispute settlement challenge. One delegation expresses concern over the use of the broader phrase “domestic labour” standards with recourse to dispute settlement in that it could create disputes under the MAI over changes in programmes relating to minimum wages or retirement qualifications; this delegation questions if this is what is intended by this provision. Those preferring “shall” argued that the purpose of this Article is to prohibit a waiver or derogation only if used as an encouragement to an investment.

[domestic] [core] labour standards as an encouragement for the establishment, acquisition, expansion or retention of an investment of an investor.]

**Alternative 3**<sup>127</sup>

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.]

**Alternative 4 (Environment Only)**<sup>128</sup>

1. The Parties recognise that it is inappropriate to encourage investment by relaxing health, safety or environmental measures.

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

3. In addition, a Contracting Party should not encourage investment by lowering its health, safety and environmental standards in general. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.]

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127 Proposal of one delegation.

128 Proposal of one delegation.

**PROPOSED “ADDITIONAL CLAUSE” ON LABOUR AND ENVIRONMENT** <sup>129</sup>

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129. One delegation proposes to delete paragraph 4 of the existing 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.

One delegation proposes 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” presented to the Negotiating Group on 14 January 1998 also proposes the language of NAFTA Article 1114(1).



## **IV. INVESTMENT PROTECTION**

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

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

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

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

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

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

2.2. Compensation shall be paid without delay.

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

2.4. Compensation shall be fully realisable and freely transferable.

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

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

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

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

### 3. *PROTECTION FROM STRIFE*

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

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

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

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

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

#### **4. TRANSFERS**

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

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

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

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

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

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

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3. As defined in the Article on definitions.

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

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

4.6.<sup>6</sup> Notwithstanding paragraphs 1 to 5 of this Article, a Contracting Party may delay or prevent a transfer through the equitable, non-discriminatory and good faith application of measures:

(a) to protect the rights of creditors,

(b) relating to or ensuring compliance with laws and regulations

(i) on the issuing, trading and dealing in securities, futures and derivatives,

(ii) concerning reports or records of transfers, or

(c) in connection with criminal offences and orders or judgements in administrative and adjudicatory proceedings;

provided that such measures and their application shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement.<sup>7</sup>

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6. This version of paragraph 4.6 was refined by DG3 taking account of earlier proposals by financial experts.

7. Some DG3 delegations consider that if the footer were to be deleted and included in a MAI general anti-abuse clause, the need to re-introduce a more specific footer, such as the one proposed by one delegation, "provided that such measures and their application shall not unreasonably impair the free and undelayed transfer ensured by this Agreement", may have to be considered.

## **5. INFORMATION TRANSFER AND DATA PROCESSING**<sup>8</sup>

1. No Contracting Party shall take measures that prevent transfers of information or the processing of information outside the territory of a Contracting Party, including transfers of data by electronic means, where such transfer of information or processing of information is:

- a) necessary for the conduct of the ordinary business of an enterprise located in a Contracting Party that is the investment of an investor of another Contracting Party; or
- b) in connection with the purchase or sale by an enterprise located in a Contracting Party that is the investment of an investor of another Contracting Party of:
  - i) data processing services; or
  - ii) information, including information provided to or by third parties.

2. Nothing in paragraph 1:

- a) affects the enterprise's obligation to comply with any record keeping and reporting requirements; or
- b) restricts the right of a Contracting Party to protect privacy, including the protection of personal data, intellectual and industrial property, and the confidentiality of individual records and accounts, so long as such right is not used to circumvent the provisions of the Agreement.

## **6. SUBROGATION**

If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance<sup>9</sup> given in respect of an investment of an investor in the territory of another Contracting Party, the latter Contracting Party shall recognise the assignment of any right or claim of such investor to the former Contracting Party or its designated agency and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right and claim to the same extent as its predecessor in title.<sup>10</sup>

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8. DG3 recommends adoption of this generalised text after taking account of the text earlier by financial experts.

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

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

**7. *PROTECTING EXISTING INVESTMENTS***

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

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

### *STATE-STATE PROCEDURES*

#### A. *GENERAL PROVISIONS*

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

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

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

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

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

## **2. Multilateral Consultations**

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

## **3. Mediation or Conciliation**

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

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

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

## **C. ARBITRATION**

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

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



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

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

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

### **3. Consolidation**

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

### **4. Third Parties**

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

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

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

## **6. Proceedings and Awards**

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

## **7. Nullification**

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

## **8. Default Rules**

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

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

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

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2. Note: The text in paragraph 9 has been circulated separately. The Commentary indicates the general state of development on this issue in informal consultations at expert level.

3. As variant of this approach, one delegation suggests utilizing language based on the WTO agreements:

“The level of the suspension of benefits ... shall be equivalent to the level of the nullification or impairment of benefits, which the aggrieved Party reasonably expected to accrue to it, resulting from the non-compliance.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



## 9. Consolidation of Multiple Proceedings

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

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

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

## **10. Preliminary Objections**

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

## **11. Indemnification**

A Contracting Party shall not assert as a defence, counter-claim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an indemnity, guarantee or insurance contract.<sup>4</sup>

## **12. Third Party Rights**

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

## **13. Scientific and Technical Expertise**

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

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4. This subparagraph does not bar as a defence, counter-claim, right of set-off or for any other reason, that the Contracting Party has already paid indemnification or other compensation to the subrogee or assignee of the investor's rights in the matter.

- d. The tribunal shall take the report and any comments by the disputing Contracting Parties on the report into account in the preparation of its award.

**14. Applicable law**

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

**15. Interim measures of relief**

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

**16. Final awards**

- a. The arbitral tribunal, in its award shall set out its findings of law and fact, together with the reasons therefor and may, at the request of a Party, provide the following forms of relief:
  - i. a declaration that the Contracting Party has failed to comply with its obligations under the this Agreement;
  - ii. pecuniary compensation, which shall include interest from the time the loss or damage was incurred until time of payment;
  - iii. restitution in kind in appropriate cases, provided that the Contracting Party may pay pecuniary compensation in lieu thereof where restitution is not practicable; and
  - iv. with the Agreement of the parties to the dispute, any other form of relief.
- b. In appropriate cases where the loss or damage was incurred by an investment which remains a going concern, the tribunal may direct that the compensation or restitution be made to the investment.

- c. An arbitration award shall be final and binding between the parties to the dispute and shall be carried out without delay by the party against whom it is issued, subject to its post-award rights under the arbitral systems utilised.
- d. The award shall be drafted consistently with the requirements of paragraph 17 and shall be a publicly available document. A copy of the award shall be delivered to the Parties Group by the Secretary-General of ICSID, for an award under the ICSID Convention or the Rules of the ICSID Additional Facility; by the Secretary-General of the ICC International Court of Arbitration, for an award under its rules; and by the tribunal, for an award under the UNCITRAL rules.

**17. Confidential and Proprietary Information**

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

**18. Place of Arbitration and Enforceability**

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

**19. Tribunal member fees**

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

**20. Supplemental Provisions**

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

## **VI. EXCEPTIONS AND SAFEGUARDS**

### ***GENERAL EXCEPTIONS*<sup>1</sup>**

1. This Article shall not apply to Article IV, 2 and 3 (Expropriation and compensation and protection from strife).
2. Nothing in this Agreement shall be construed:
  - a. to prevent any Contracting Party from taking any action which it considers necessary for the protection of its essential security interests:
    - (i) taken in time of war, or armed conflict, or other emergency in international relations ;
    - (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons of mass destruction;
    - (iii) relating to the production of arms and ammunition;
  - b. to require any Contracting Party to furnish or allow access to any information the disclosure of which it considers contrary to its essential security interests;
  - c. to prevent any Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
3. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Contracting Parties, or a disguised investment restriction, nothing in this Agreement shall be construed to prevent any Contracting Party from taking any measure necessary for the maintenance of public order.<sup>2</sup>
4. Actions or measures taken pursuant to this Article shall be notified to the Parties Group.
5. If a Contracting Party (the "requesting Party") has reason to believe that actions or measures taken by another Contracting Party (the "other Party") under this article have been taken solely for economic reasons, or that such actions or measures are not in proportion to the interest being protected, it may request consultations with that other Party in accordance with Article V, B.1 (State-State Consultation Procedures). That other Party shall provide information to the requesting Party regarding the actions or measures taken and the reasons therefor.

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1. This text was proposed for discussion by the Chairman. It is under consideration by the Negotiating Group.
2. The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

### ***TRANSACTIONS IN PURSUIT OF MONETARY AND EXCHANGE RATE POLICIES<sup>3</sup>***

1. Articles XX (National Treatment), YY (Most Favoured Nation Treatment) and ZZ (Transparency) do not apply to transactions carried out in pursuit of monetary or exchange rate policies by a central bank or monetary authority of a Contracting Party.
2. Where such transactions do not conform with Articles XX (National Treatment), YY (Most Favoured Nation Treatment) and ZZ (Transparency), they shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement.

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3. While one delegation questions 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 can support adoption of this text.

## ***TEMPORARY SAFEGUARD***

1. A Contracting Party may adopt or maintain measures inconsistent with its obligations under:
  - Article xx (Transfers);
  - Article yy, paragraph 1.1 (National Treatment) relating to cross-border capital transactions<sup>4</sup>
    - (a) in the event of serious balance-of-payments and external financial difficulties or threat thereof; or
    - (b) where, in exceptional circumstances, movements of capital cause, or threaten to cause, serious difficulties for macroeconomic management, in particular monetary and exchange rate policies<sup>5</sup>.
2. Measures referred to in paragraph 1:
  - (a) shall be consistent with the Articles of Agreement of the International Monetary Fund;
  - (b) shall not exceed those necessary to deal with the circumstances described in paragraph 1<sup>6</sup>;
  - (c) shall be temporary and shall be eliminated as soon as conditions permit.
3.
  - (a) Measures referred to in paragraph 1 shall be promptly notified to the Parties Group and to the International Monetary Fund, including any changes in such measures.
  - (b) Measures referred to in paragraph 1 and any changes therein shall be subject to review and approval or disapproval within six months of their adoption and every six months thereafter until their elimination.
  - (c) These reviews shall address the compliance of any measure with paragraph 2, in particular the elimination of measures in accordance with paragraph 2 (c).

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4. It is understood that such measures may not discriminate between resident entities owned or controlled by investors of other Contracting Parties and resident entities controlled by local investors. Some delegations question whether this bullet is necessary, but would like to consider the IMF arguments in this respect. See Commentary.
  5. Several delegations feel that the reference to “macroeconomic management” is too broad. They could accept paragraph 1 (b) if “macroeconomic management, in particular monetary and exchange rate policies” were replaced with “the operation of monetary or exchange rate policies”. Some delegations question whether paragraph 1 (b) was necessary. On the other hand, other delegations would have preferred a provision in which restrictions could be taken in cases of serious difficulties for “the operation of economic, monetary or exchange rate policies”.
  6. One delegation suggests adding: “and shall provide for the least disruptive effect to the functioning of the Agreement”. Reference is also made in this context to the language in paragraph 2. (c) of Article XII of the GATS: “shall avoid unnecessary damage to the commercial, economic and financial interest of any other Member”.

4. Measures referred to in paragraph 1 and any changes therein that are approved by the International Monetary Fund in the exercise of its jurisdiction shall be considered as consistent with this Article.
5. With regard to measures referred to in paragraph 1, and any changes therein, not falling within paragraph 4:
  - (a) The Parties Group shall consider the implications of the measures adopted under this Article for the obligations of the Contracting Party concerned under this Agreement.
  - (b) The Parties Group shall request an assessment by the International Monetary Fund of the conditions mentioned under paragraph 1 and of the consistency of any measures with paragraph 2. Any such assessment by the International Monetary Fund shall be accepted by the Parties Group.
  - (c) Unless the International Monetary Fund determines that the measure is either consistent or inconsistent with the provisions of this Article, the Parties Group may either approve or disapprove the measure. The Parties Group shall establish procedures for this purpose.
6. The Contracting Parties shall seek agreement with the International Monetary Fund regarding the role of the International Monetary Fund in the review procedures established under this Article.
7. Measures referred to in paragraph 1 and any changes therein that are approved by the International Monetary Fund in the exercise of its jurisdiction or determined to be consistent with this Article by the International Monetary Fund or the Parties Group cannot be subject to dispute settlement<sup>7</sup>.

#### Additional Article

If a dispute arises under this Article or under Article ..... (obligations under the Articles of Agreement of the Fund), a Dispute Settlement Panel shall request an assessment by the International Monetary Fund of the consistency of the measures with its Articles of Agreement, of the conditions mentioned under paragraph 1 and of the consistency of any measures as applied with paragraph 2. Any such assessment by the International Monetary Fund shall be accepted by the Panel.<sup>8</sup>

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7. The dispute settlement provisions would apply if the measure as actually applied differed from that approved or determined to be consistent with this Article.
  8. Text proposed by the IMF and supported by most delegations. Placement of this proposed text in the Agreement may need to be considered further. Four delegations oppose the proposal that assessments by the IMF shall be accepted by the Panel and expressed concern that, as drafted, this text leaves no room for the Panel to assess compliance with the MAI Safeguard provision.



## **VII. FINANCIAL SERVICES<sup>1, 2 3</sup>**

### ***PRUDENTIAL MEASURES***

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

### ***RECOGNITION ARRANGEMENTS***

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

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1. EG5 has agreed that the financial services sector, which is highly regulated for prudential reasons, is unique in some respects and to some extent calls for specific treatment. However, a number of delegations consider that the general provisions of the MAI are sufficient to meet the needs of the financial services sector in a number of potential areas.
  2. The Negotiating Group has discussed financial services issues at its April 1997 and January 1998 meetings. The proposed text on prudential measures and the definition of financial services were agreed. Proposed texts on payments and clearing systems/lender of last resort and dispute settlement have not yet been discussed by the Negotiating Group. Placement of financial services texts is to be decided. See also Commentary.
  3. With the exception of a few delegations who are hesitant, DG3 recommends the adoption of an Interpretative Note stating that "the inclusion of text specific to financial services shall be without prejudice to the interpretation of the obligations of the MAI with respect to other sectors".

## ***AUTHORISATION PROCEDURES***

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

## ***TRANSPARENCY***

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

- a) information related to the financial affairs and accounts of individual customers of financial services enterprises, or
- b) any confidential or proprietary information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or prejudice legitimate commercial interests of particular enterprises.<sup>4</sup>

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

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

1. No Contracting Party shall take measures that prevent transfers of information or the processing of financial information outside the territory of a Contracting Party, including transfers of data by electronic means, where such transfer of information or processing of financial information is:

- a) necessary for the conduct of the ordinary business of a financial services enterprise located in a Contracting Party that is the investment of an investor of another Contracting Party; or
- b) in connection with the purchase or sale by a financial services enterprise located in a Contracting Party that is the investment of an investor of another Contracting Party of:
  - i) financial data processing services; or
  - ii) financial information, including information provided to or by third parties.

2. Nothing in paragraph 1:

- a) affects the financial service enterprise's obligation to comply with any record keeping and reporting requirements; or
- b) restricts the right of a Contracting Party to protect privacy, including the protection of personal data and the confidentiality of individual records and accounts, so long as such right is not used to circumvent the provisions of the Agreement.

## ***MEMBERSHIP OF SELF-REGULATORY BODIES AND ASSOCIATIONS<sup>5</sup>***

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

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5. See Commentary.

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

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.

## ***DISPUTE SETTLEMENT***

### ***DETERMINATION OF CERTAIN FINANCIAL ISSUES IN INVESTOR TO STATE PROCEEDINGS<sup>6</sup>***

### ***COMPOSITION OF DISPUTE SETTLEMENT PANELS IN FINANCIAL MATTERS DISPUTES<sup>7</sup>***

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

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6. No text was submitted by financial services experts following their informal consultations on 11-13 February 1998 to the Negotiating Group for adoption. The group was divided as to the need for specific provisions for Investor-State dispute settlement in certain financial matters. Delegations which favoured specific provisions have suggested texts reproduced under the Commentary.
  7. A majority of delegations support this text, based on a similar provision contained in the GATS Financial Services Annex, whereas other delegations are in favour of more detailed procedures to select panellists (see Commentary). Others would prefer no specific provisions on this issue.

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

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

### *Insurance and insurance-related services*

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

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

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

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

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

1. Nothing in this Agreement shall apply to taxation measures except as expressly provided in paragraphs 2 to 5 below.<sup>2</sup>

2. Article ... (Expropriation) shall apply to taxation measures.<sup>3</sup>

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

a) contained in or exchanged pursuant to any agreement or arrangement relating to taxation between governments and investors;

b) pursuant to any agreement with a foreign government concerning the application or interpretation of an international agreement relating to taxation in the case of an investor, including exchange of information between governments;

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### 1. **Political Declaration of the Contracting Parties:**

Contracting Parties recognise the importance of the principle of non-discriminatory treatment in taxation for foreign investors and their investments. In this respect, they refer to their commitments under their agreements for the avoidance of double taxation. The Contracting Parties shall pursue their efforts to conclude agreements for the avoidance of double taxation, where appropriate, with Contracting Parties with which they have not yet entered into such agreements.

2. One delegation proposes to add an additional paragraph to the Taxation article as follows:

“This Article shall not affect the rights of a Contracting Party and its investors as contained in any other international agreement covering taxation, including bilateral investment protection treaties.”

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

a) The imposition of taxes does not generally constitute expropriation. The introduction of a new taxation measure, taxation by more than one jurisdiction in respect to an investment, or a claim of excessive burden imposed by a taxation measure are not in themselves indicative of an expropriation.

b) A taxation measure will not be considered to constitute expropriation where it is generally within the bounds of internationally recognised tax policies and practices. When considering whether a taxation measure satisfies this principle, an analysis should include whether and to what extent taxation measures of a similar type and level are used around the world. Further, taxation measures aimed at preventing the avoidance or evasion of taxes should not generally be considered to be expropriatory.

c) While expropriation may be constituted even by measures applying generally (e.g., to all taxpayers), such a general application is in practice less likely to suggest an expropriation than more specific measures aimed at particular nationalities or individual taxpayers. A taxation measure would not be expropriatory if it was in force and was transparent when the investment was undertaken.

d) Taxation measures may constitute an outright expropriation, or while not directly expropriatory they may have the equivalent effect of an expropriation (so-called "creeping expropriation"). Where a taxation measure by itself does not constitute expropriation it would be extremely unlikely to be an element of a creeping expropriation.

- c) concerning the identity of an investor or other information which would disclose any trade, business, industrial, commercial or professional secret or trade process;
- d) pertaining to the negotiation of tax treaties or of any other international agreement relating partly or wholly to taxation or the participation by a government in the work of international organisations; or
- e) the disclosure of which would affect the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxation, or any information the disclosure of which would aid or assist in the avoidance or evasion of taxes.

4. The provisions of Article [C] (State to State Dispute Settlement) and Article [D] (Investor to State Dispute Settlement), [except for paragraph 1b of Article [D]], and only those provisions, shall apply to a dispute under paragraph 2 or 3 of this Article.<sup>4,5</sup>

5. For the purposes of this Article:

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

Taxes shall be taken for this purpose to include direct taxes, indirect taxes and social security contributions.<sup>6</sup>

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- 4. Interpretative Note: “For greater certainty regarding the application of Articles (C)(5) and (D)(13), the terms “scientific or technical” in those provisions shall refer to taxation; and the written report of such a board shall be obtained on request of a disputing party. The written report of such a board regarding paragraph 2 of this Article shall include an analysis of whether the measure falls within one or more of the elements of footnote [2] (Interpretative Note on the Application of Expropriation to Taxation); and a conclusion of the board that the measure falls within one or more of the elements described in subparagraph (b) or (c), shall be taken into account by the tribunal in the preparation of its award. Paragraph 4 of this Article shall not apply to claims arising out of events that occurred, or claims that have been settled, prior to the entry into force of this Agreement for the Contracting Party applying the taxation measure.” One delegatoin wishes to see the second and third sentences of this note in square brackets. Another delegation would delete the interpretative note entirely.
  - 5. Interpretative Note: For greater certainty, Article XX (most favoured nation treatment) shall not be invoked to avoid the provisions of paragraph ... (dispute settlement) of this Article. Several delegations maintain a scrutiny reservation on the text of this Note.



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6. One delegation has a scrutiny reserve on the treatment of social security. Another delegation proposes that social security benefits be carved out of the agreement. One delegation proposes a general carve-out of social security and proposed the following separate article: “Nothing in this Agreement shall apply to social security.”

## IX. COUNTRY SPECIFIC EXCEPTIONS

### LODGING OF COUNTRY SPECIFIC EXCEPTIONS<sup>1 2</sup>

A.<sup>3</sup> *Articles X (National Treatment), Y (Most Favoured Nation Treatment), [Article Z, ..., ... and Article ...]*<sup>4</sup>, do not apply to:

*(a) any existing non-conforming measure as set out by a Contracting Party in its Schedule to Annex A of the Agreement, to the extent that the measure is maintained, continued or promptly renewed<sup>5</sup> in its legal system<sup>6 7</sup>;*

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1. It is generally agreed to replace the term “reservations” by the term “exceptions”. Under treaty law, “reservations” normally have reciprocal effect unless otherwise specified. This is clearly not intended to be the case with respect to Country Schedules. Any possible confusion with general exceptions could be taken care of by the qualification “country-specific”. The use of the term “exception” would not prevent the listing of a measure with a reciprocity requirement. It would help avoid confusion in the case of any genuine “reservations” in the treaty law sense were to be made and called as such.
  2. The draft article to address existing measures should be examined in conjunction with the proposed introduction to Annex A of the Agreement and the standard presentation suggested for the lodging of country specific reservations (reproduced in footnote 12). These three elements combined provide the methodology for lodging country specific exceptions under the MAI.
  3. It is agreed that part A of the draft article is needed as the core provision to “grandfather” existing non-conforming measures and prevent the introduction of more restrictive measures (“standstill”).
  4. It is agreed that the disciplines listed in the chapeau text of parts A and B of the draft Article should remain incomplete for the time being pending political decisions by the Negotiating Group. The text could also be reviewed after negotiators have decided how measures by sub-national entities and regional economic integration organisations should be treated across the MAI.
  5. All delegations agree that foreign investors should benefit from any liberalisation measure as soon as the relevant law, regulation or practice ... enters into force. The words “continued or promptly renewed in its legal system” at the end of the sentence are intended to make this clear. One delegation maintains a scrutiny reserve on this addition, notably in order to examine its potential implications for this delegation’s obligations under other international agreements such as GATS.
  6. It is generally agreed to include the following explanatory note to the article A (a): “It is understood that the term “legal system” includes government policies enunciated under the framework of domestic legislation and subordinate measures.” One delegation proposes to add to this explanatory note the phrase “which creates rights or obligations to investors or investments”; this would make it clear that “legal system” does not include, for instance, political declarations with no effect on investors and their investments.
  7. Two delegations seek the opinion of the Group whether and how Part A of Article A can take care of temporary liberalisation undertakings. Some delegations consider that this possibility should be provided only if the temporary liberalisation measures are announced prior to the entry into force of the MAI. Some other delegations consider that a temporary liberalisation measure could be consistent with Part A (a) if the temporary nature of the liberalisation and its duration were clearly reflected in the legal system at the time the liberalisation was put into effect. Some delegations consider that this delegation’s question relates to the issue of the implementation of a non-conforming measure. They feel that Part A would provide the possibility to temporarily implement a measure in a more liberal way than the way described in a country schedule. Other delegations, believe on the contrary that this interpretation is not compatible with the ratchet effect built in Part A, namely that a return to a more restrictive regime should not be possible. Such an interpretation is also bound to create legal uncertainty for the investor and even encourage a proliferation

*(b) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not increase the non-conformity of the measure, as it existed immediately before the amendment, with Articles X (National Treatment), Article Y (Most Favoured Nation), [Article Z, ..., and Article ...].<sup>8</sup>*

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of temporary measures. Delegations are invited to reflect further on this issue. One delegation may also wish to develop a text proposal.

8. Delegations agree that notification of a reduction in the non-conformity of a measure would not be necessary for its effective application under the MAI. Notification is a matter of transparency and should be addressed separately.

It is agreed that article 79 of the Vienna Convention concerning Corrections of Errors in texts or Certified Copies of Treaties would do away with the need of a notification obligation for rectifications of errors.

Delegations identified three policy issues for consideration by the Negotiating Group:

- a) First, whether there is a need for a notification obligation for modifications in the non-conformity of measures.

Some delegations consider that a mandatory notification obligation for changes in country exceptions lists would be too cumbersome. Update of the country lists could be a result of a possible review mechanism. Some other delegations consider that it would be highly desirable to ensure that country lists of exceptions are kept up to date as this would enhance the usefulness of the MAI for foreign investors. This could, according to some delegations, be done at regular intervals (for instance once a year).

The Group recalls in this context by way of illustration the following proposal in page 108 the Consolidated Text and Commentary:

“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 change in the non-conformity of its measures with obligations under the Agreement, including the motivation or purpose of the change.”

- b) Second, whether such notification obligation would have implications for the role of the Parties Group and, if so, what should be the role of the Parties Group on this regard; and

- c) Third, whether it would be allowed to rectify errors or omissions made in good faith. Delegations note the following proposal made by one delegation to address this issue:

“Modifications made to take care of errors or omissions made in good faith relating to Annex ..., along with information about the likely circumstances of the change, shall be notified to the Parties Group and shall become effective provided there is no objection within 30 days after their notification.”

Several delegations support this proposal given the complexity and novelty of the MAI as regards the top down approach to the lodging of country exceptions. They consider that the safeguard provided by the possibility to object is sufficiently dissuasive to prevent an abusive recourse to this provision. Some delegations, on the contrary, have serious misgivings about the proposal. Some of them point out to the difficulty of defining the terms “good faith”. Others feel the proposal is too broad. Others stress the moral hazards. Two delegations also wonder whether it is necessary to have an explicit provision in this article given existing practice.

The Group notes the technical issue raised by one delegation on how to relate a Contracting Party’s notification to a modification of its Schedule to the Agreement. It also notes one delegation’s proposal for a possible solution to this issue.

*“(c) A Contracting Party shall notify a change to its Schedule to Annex A of the Agreement to reflect any changes to the non-conformity of measures as provided for in paragraph (b) above.”*

- [B.<sup>9</sup> *Articles X; Y, [Article Z, ...,and Article ...] do not apply to any measure that a Contracting Party [adopts] or [maintains] with respect to sectors, subsectors or activities, as set out in its Schedule to Annex B of the Agreement.*]
- [C. *No Contracting Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex B<sup>10</sup>, require an investor of another Contracting Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.*]

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9. There are different views 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 is that such a provision might undermine the MAI disciplines to which it applied. The opposite view is 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 exceptions.
10. It is agreed that Part C is applicable only to non-conforming measures referred to in Part B. The objective of Part C is to protect existing rights of foreign investors against discriminatory treatment resulting from measures permitted under Part B. This situation is different from that of expropriation of assets of established enterprises which is addressed in the expropriation chapter of the MAI. This favourable reaction to the proposed wording does not prejudice acceptance of Part B, however. One delegation can accept Part C subject to an interpretative note which would read as follows:

“A Contracting Party may, under this Article, take steps that seek to ensure compliance with any measure notified under Annex A or Annex B. Any such action shall not be taken as reducing the conformity of the measure notified in Annex A or Annex B.”

***Introduction to Annex A<sup>11</sup> of the Agreement listing country-specific exceptions<sup>12</sup>***

1. *The Schedule of a Contracting Party sets out, pursuant to Article ... [on the lodging of country specific exceptions], the exceptions taken by that Party with respect to existing measures that do not conform with obligations imposed by:*

*(a) Article X (National Treatment),*

*(b) Article Y (Most-Favoured-Nation Treatment),*

*(c) Article Z (...), or*

*(...) Article (...).*

*together with any commitment to eliminate or reduce the non-conformity of any of the measures.*<sup>13</sup>

2. *Each exception sets out the following elements<sup>14</sup>:*

*(a) Sector refers to the general sector in which the exception is taken;*

*(b) Sub-Sector refers to the specific sector in which the exception is taken;*

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11. It was agreed to withhold the drafting of the introduction of “Annex B” until the Negotiating Group had taken a political decision on the status and coverage of Part B of the Article. Moreover, a number of delegations felt that the wording of such introduction might need to be drafted in a limited way (i.e. to cover only cases of privatisation or demonopolisation). Two delegations circulated a proposal for text on the introduction of Annex B which was not discussed by the Group.

12. The following format has been followed by delegations for submitting their initial lists of country specific exceptions :

“Sector:

Sub-Sector:

Obligation or MAI article in respect of which an Exception is taken:

Level of Government:

Legal source or authority of the Measure:

Succinct Description of the Measure:

Motivation or purpose of the Measure:”

13. One delegation reserves its position on the issue of future liberalisation commitments.

14. A large majority of delegations consider that the presentation would gain in transparency by incorporating an “industry classification” element into the reservation. Both the Common Product Classification (CPC) or Standard Industrial Classification (ISIC) could provide a useful reference for identifying non-conforming measures. The CPC system may perhaps be more appropriate to services sectors given the GATS precedent. But this should not detract from delegations’ ongoing efforts to finalise country exceptions. Delegations thus should feel free to provide such entries on a voluntary basis using the relevant international or comparable domestic classifications. The introduction of an “industry classification” could also be taken up in the context of future updates or negotiations on country schedules.

- (c) *Obligation specifies the MAI provision referred to in paragraph 1 for which an exception is taken;*
- (d) *Level of Government indicates the level of government maintaining the measure for which an exception is taken;*
- (e) *Legal source or authority of the measure identifies the specific legal source of the exception, whether in the form of a law, regulation, rule, decision, or any other form;*<sup>15</sup>
- (f) *Succinct Description of the Measure sets out [the]<sup>16</sup> non-conforming aspects of the existing measures for which the exception is taken, together with any commitment to eliminate or reduce the non-conformity of the measure<sup>17</sup>; [and*
- (g) *Motivation or purpose describes the rationale for a given measure].<sup>18</sup>*

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15. In order to clarify the automatic ratchet effect of List A measures, the Chairman proposed the addition of the following phrase at the end of paragraph (e): “as of the date of entry into force of the Agreement, or as continued, renewed or amended after that date.”

This issue is solved by the revised paragraph (a) of Part A or the Article but this language may be relevant to the discussion of a notification obligation.

- 16. The bracketed text, proposed by one delegation, is supported by several delegations. Other delegations wish to maintain a scrutiny reserve.
- 17. As in footnote 13, one delegation maintains a full reservation with regard to commitments for future liberalisation.
- 18. A majority of delegations can support the inclusion of element (g) since it would give the reasons for the non-conformity of a given measure. Some of this support is based on the condition that the information provided under element (g) would not be considered in the context of dispute settlement. Some delegations consider that this information should be provided on a voluntary basis only. Some delegations consider that this information should be provided in the context of the MAI negotiations but should not be retained in the final text of exceptions. Some delegations believe that element (g) should be deleted altogether: the purpose or motivation of an exception, even it could be fully and accurately described, is not relevant to the scope of the exception. It is agreed that this issue should be submitted to the Negotiating Group for its consideration.

3.<sup>19</sup> *In the interpretation of an exception, elements (a) to (f)<sup>20</sup> shall be considered. In the event of a discrepancy between the non-conformity of the measure as set out in the legal source or authority identified and the non-conformity as set out in the other elements in their totality, the exception shall be deemed to apply to the non-conformity of the measure as set out in the legal source or authority. However if the non-conformity of the measure as set out in the legal source or authority exceeds the scope of non-conformity as set out in the other elements in so substantial and material a manner that it would be unreasonable to conclude that the legal source or authority element should prevail, the other elements shall prevail to the extent of that discrepancy.*

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19. There is substantive agreement over the present version of paragraph 3, which is based on a compromise proposal by one delegation. A number of delegations wish to maintain a scrutiny reserve for legal scrub purposes. Some delegations reserve their position considering that the legal source or authority should prevail in all circumstances. Another delegation points to the difficulty that a domestic court may encounter , in case the description element would prevail, in applying a measure which is not inscribed in an existing law.
20. Three delegations consider that only elements (a) to (e) should be taken into account. Some delegations want element (g) to be taken into account as well.

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

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

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

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

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

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

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



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

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

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

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

## **XI. IMPLEMENTATION AND OPERATION**

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

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

1. The Signatories to the Final Act and the Signatories to the Agreement shall meet in a Preparatory Group. A Signatory to the Final Act shall cease to be eligible to attend these meetings if it fails to become a Signatory to the Agreement by the closing date for signature of the Agreement.
2. In the Preparatory Group, the participating Signatories shall:
  - (a) prepare for entry into force of the Agreement and the establishment of the Parties Group;
  - (b) conduct discussions with non-signatories to the Final Act;
  - (c) conduct negotiations with interested non-signatories to the Final Act with a view to their becoming signatories to the Agreement.
3. The participating Signatories shall elect a Chair, who shall serve in a personal capacity. Meetings shall be held at intervals to be determined by participating Signatories under rules and procedures they shall determine.
4. Except where otherwise provided, the Preparatory Group shall make decisions by consensus. A Signatory may abstain and express a differing view without barring consensus.
5. Decisions under paragraph 4 may include a decision to adopt a different voting rule for a particular question or category of questions.<sup>1</sup>
6. Where a decision cannot be made by consensus, the decision shall be made by a majority comprising [three quarters] [two thirds] of the Signatories.
7. Paragraph 6 shall not apply to the following decisions:
  - (a) decisions under paragraph 5; [and]
  - (b) decisions under Article ... [see section XI of the Consolidated Text on decisions by the Preparatory Group on the eligibility of non-signatories to the Final Act to become a Signatory to the Agreement], which shall be made by [consensus] [a majority comprising ...]; [and]

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1. Delegations discussed the question of whether this paragraph should be deleted and concluded that the question requires further consideration.

8. Where the European Community exercises its right to vote, it shall have a number of votes equal to the number of its Member States which are Contracting Parties to this Agreement. The number of votes of the European Community and its Member States shall in no case exceed the number of the Member States of the European Community which are Contracting Parties to this Agreement.<sup>2</sup>

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2. This text is a proposal by one delegation. Some delegations indicate that they want to consider whether the MAI should contain such a provision. Assuming that it should, two questions were raised: whether the provision should apply only in cases where this delegation has competence and whether this delegation should be restricted to casting a number of votes equal to the number of its Member States that are present when the vote takes place. It is also suggested that a provision might be drafted that applied to Regional Economic Integration Organisations rather than specifically to the European Community.

### ***THE PARTIES GROUP***<sup>3</sup>

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

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3. Institutional experts also consider the issue of *decision-making in the MAI*, including contributions by Delegations and a proposal by the Chairman of the informal consultations. There is no consensus on this matter nor on the related question of *voting by the European Community*. These issues, and other outstanding questions concerning the *Depositary* and *Authentic Texts of the MAI*, need to be considered by the Negotiating Group at an appropriate time.

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

5. See footnote 3.

8. Paragraph 7 shall not apply to the following decisions:
- (a) decisions under paragraph 6;
  - (b) decisions under Article ... [see section XII of the Consolidated Text on amendment], which shall be made by consensus;
  - (c) decisions under Article ... [see Section XII of the Consolidated Text on accession], [which shall be made by consensus] [which shall be made, failing consensus, by a [three quarters] [two thirds] majority] [which shall be made by a [three quarters] [two thirds] majority]; and
  - (d) decisions on budgetary matters, which shall be made by [consensus] [a [three quarters] [two thirds] majority] [of Contracting Parties whose assessed contributions represent, in combination, at least two thirds of the total assessed contributions].
9. The Parties Group shall be assisted by a Secretariat.
10. [Parties Group and Secretariat costs shall be borne by the Contracting Parties as approved and apportioned by the Parties Group.]<sup>6</sup>
11. Where the European Community exercises its right to vote, it shall have a number of votes equal to the number of its Member States which are Contracting Parties to this Agreement. The number of votes of the European Community and its Member States shall in no case exceed the number of the Member States of the European Community which are Contracting Parties to this Agreement.<sup>7</sup>

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6. Further work is required on paragraphs 9 and 10. Some delegations note that funding of the MAI will need to be addressed by delegations in advance of ratification and that there may be a need to include a formula in the Agreement.

7. This text is a proposal by one delegation. Some delegations want to consider whether the MAI should contain such a provision. Assuming that it should, two questions have been raised: whether the provision should apply only in cases where the Commission has competence and whether the Commission should be restricted to casting a number of votes equal to the number of its Member States that are present when the vote takes place. It has also been suggested that a provision might be drafted that applied to Regional Economic Integration Organisations rather than specifically to the European Community.

## **XII. FINAL PROVISIONS**

### ***SIGNATURE***

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

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

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

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

#### **In the MAI**

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

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1. Under this formulation, all signatories of the Agreement must agree the terms of a new signatory.
  2. Delegations agree that there should be an interpretative note as follows: "Related matters" includes such matters as whether there is a critical mass to proceed with entry into force of the Agreement, but not changes to the Agreement.
  3. There are additional possibilities for a majority voting rule, including consensus minus one (or some number greater than one), three quarters and a critical mass of delegations comprising a certain percentage of investment flows.

## ***ACCESSION<sup>4</sup>***

1. This Agreement shall be open for accession by any State, regional economic integration organisation<sup>5</sup>, and any separate customs territory which possesses full autonomy in the conduct of matters covered by this agreement, which is willing and able to undertake its obligations on terms agreed between it and the Contracting Parties acting through the Parties Group.
2. Decisions on accession shall be taken by the Parties Group.<sup>6</sup>
3. Accession shall take effect on the thirtieth day following the deposit of the instruments of accession with the Depositary.

## ***NON-APPLICABILITY***

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

## ***REVIEW***

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

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4. It was generally agreed that an appropriate clause to address the situation of non-Members could provide a strong political message that such participation was welcome. Delegations agree to put forward the following text for consideration by the Negotiating Group. There are different views on where to place such a clause, including in the Preamble, in a Final Act, or in the text of the MAI dealing with Accession. Some delegations are concerned about the political visibility of the clause and it is noted that delegations would have the option of highlighting it in individual national statements:

“In reviewing applications for adherence to the MAI, the Parties will give full consideration to the particular circumstances of each applicant, including the possible need for country specific exceptions to accommodate the applicant’s development interests. Where appropriate, the Parties will consider requests for such exceptions in the context of the applicant’s overall reform of its domestic investment regime, including the possibility of time-limited exceptions where a transitional period is necessary to implement such reform.”

5. A definition of this term will need to be agreed.
6. See Consolidated Text, Section XI, Preparatory Group, paragraph 7 and Parties Group, paragraph 8.

## ***AMENDMENT***

Any Contracting Party may propose to the Parties Group an amendment to this Agreement. Any amendment adopted by the Parties Group<sup>7</sup> shall enter into force on the deposit of an instrument of ratification by all of the Contracting Parties, or at such later date as may be specified by the Parties Group at the time of adoption of the amendment.

## ***REVISIONS TO THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES<sup>8</sup>***

For Guidelines Annex changes any Contracting Party may make a unilateral statement upon signature:

In the event of modification of the Guidelines, Annex -- will be modified accordingly with respect to (Contracting Party name) provided that it has not made a declaration to the contrary within 180 days of notification by the depositary of the adoption of the modification.

or

In the event of modification of the Guidelines, Annex -- will be modified accordingly with respect to (Contracting Party name) provided that it has made a declaration to that effect to the depositary.

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7. Delegations agree that when the Parties Group considers a proposed amendment, the Group will need to consider both the extent to which reservations will be allowed and any proposed reservations themselves. Delegations will consider how best to reflect this thought in the Agreement. It might be reflected in an interpretative note or in the provision on lodging country specific exceptions.
  8. Delegations considered the need for a provision on how to take account of revisions to the Guidelines without the necessity of formal amendment of the MAI. They agreed to recommend to the Negotiating Group that any Contracting Party could, upon signature of the MAI, make one of two unilateral statements describing how it would take account of modification of the Guidelines. These two alternative statements are presented in the text.



## ***WITHDRAWAL***

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

## ***DEPOSITARY***

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

## ***STATUS OF ANNEXES***

The Annexes to this Agreement are [an integral part of the Agreement].<sup>9</sup>

## ***AUTHENTIC TEXTS***

The English and French [and .....] texts of this Agreement are equally authentic.<sup>10</sup>

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

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

## ***DENIAL OF BENEFITS***

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

or

b. [Subject to prior notification and consultation in accordance with Articles XXX (Transparency) and XXX (Consultations), a Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of such Contracting Party and to investments of such investors if investors of a non-Contracting Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Contracting Party under whose law it is constituted or organised.]<sup>11</sup>

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11. Possible additional text not discussed by DG3

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

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

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

**ANNEX 1**

**COUNTRY SPECIFIC PROPOSALS FOR DRAFT TEXTS**

## SCOPE

### (Contribution from one delegation)

1. This delegation notes that while the draft text of the MAI contains Part II which is entitled "Scope and Application", there is no scope provisions other than provisions that relate to geographical scope. Accordingly, it is not obvious from the preliminary provisions of the text to what precisely the agreement purport to apply.
2. Other recent trade agreements such as the General Agreement on Trade in Services (the "GATS") and the North American Free Trade Agreement ("NAFTA") set out the extent of the scope of the agreement.
3. Article I:1 of the GATS states that it applies to "...measures by Members affecting trade in services." The investment chapter of NAFTA states that it chapter applies to measures of a Party relating to "...investors of another Party... (and) investments of another Party in the territory of the Party..."<sup>12</sup>
4. This delegation believes that a provision setting out the scope of the agreement is important in order to identify the extent of the obligation being undertaken. This delegation notes that many of the contributions made by participants have implicitly assumed that the agreement applies to government measures.<sup>13</sup> In addition, the draft format for the lodging of country-specific reservations uses the concept of measures in describing the reservation.
5. This delegation, as a signatory to both the GATS and NAFTA, submits that the concept of obligations applying to government measures is the correct approach. Stating so explicitly in the text of the agreement is good practice and allows countries to make a clear evaluation of their obligation and further permits them to reach a clear judgement as to what matters need to be reserved.
6. Countries should only be bound with respect to their measures. Not all actions, statements or actions of a government necessarily constitutes a measure and the proposition that all such matters could be adjudicated is a matter that should be of some concern to governments. While it is perhaps unlikely that another government or a dissatisfied investor might initiate dispute settlement over, for example, a statement that in and of itself has no legal effect, it is possible that such a matter could be raised in dispute settlement in addition to a more substantive claim. In this delegation's view this would be wrong as being outside the scope to which we envisage the agreement applying. This is not to say that some actions by government that are not measures could not be placed before an arbitral panel as, for example, being evidence that a measure has violated a provision of the agreement.
7. This delegation proposes that a scope and application provision could be drafted as follows:

"This Agreement applies to measures adopted or maintained by Contracting Party relating to investors of another Contracting Party and investments of investors of another Contracting Party in the territory of the Contracting Party."

"measure" includes any law, regulation, procedure, requirement or practice;"

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12 See: Article 1101(1) of Chapter 11 of NAFTA for full text.

13 See, for example, the contribution on Secondary Investment Boycotts, the contribution from France on an Exception Clause for Cultural Industries and the contribution on Social Security Contributions.

## **GEOGRAPHICAL SCOPE**

### **(Contribution from one delegation)**

#### **I. Introduction**

The main objective of the multilateral international agreements must be to assist governments in their efforts to maintain the international peace and security, since no international agreement can be drafted in a way to disregard the existing international peace and security.

No agreement can include provisions which may violate the rights and interests of a party or parties, or upset the sensitive balance of international order.

This delegation would like to highlight the fact that there was a broad acceptance, during MAI negotiations of the principle that international peace and security shall be respected.

#### **II. Perspective of MAI**

The aim of MAI should be to provide a comprehensive protection for investors and investments. However if it diverges from the existing definition of territory under international law this may raise legal complications. On this Delegation's view, it is not the intention of the OECD members to raise new international legal complications.

#### **III. Some Comments on the Draft Provision on Geographical Scope**

Regarding the draft article MAI shall apply not only in the land territory, the internal waters and the territorial sea of each party, (the definition of "territory" already comprises with respect to international law), but also in the maritime areas beyond the territorial sea as well as the archipelagic waters.

None of the OECD members is an archipelagic State. In addition to this fact, it has not been taken into consideration that without contemplating all maritime issues between archipelagic states and their views on draft article, such a provision may produce contingencies between the relevant states as well as on investors and investments.

It should be recalled that not every state has ratified the 1982 UNCLOS. Furthermore, this Convention does not include any specific investment-related provisions. In the light of these facts, establishment of a relationship between MAI and the UNCLOS should be avoided. Consequently if a reference to the UNCLOS is going to be preferred, it is our view that a broader view should be followed in order to avoid discrepancies.

It should not be overlooked that there are many jurisdictional issues between the opposite or adjacent coastal states, even regarding the air territory above maritime areas, arising from the claims to extend the air territory beyond the frontiers of territorial sea. Therefore the area of application of MAI should be defined in a way so as not to produce negative effects on the nature and extent of already existing maritime issues and increase the number of countries involved to such cases. Extending the scope to the maritime areas to which a new international agreement shall apply will certainly aggravate the already existing disputes. This will also be a risk for the third countries and investors into which they never wanted to be involved.

#### **IV. Conclusion**

This Delegation should like to reiterate their opposition to the extension of the scope of MAI to cover maritime areas and offer the following text:

“This Agreement shall apply in the land territory, internal waters and the territorial sea of a Contracting Party.”

## APPLICATION TO OVERSEAS TERRITORIES AND NON-APPLICABILITY IN THE MULTILATERAL AGREEMENT INVESTMENT

### (Contribution from one delegation)

1. The clause on application to overseas territories stipulates that any State may, at any time, notify the depositary of the Agreement of the extension of such State to one or more territories for whose foreign relations it is responsible.

2. The consequences of such clause are as follows:

- Any State can unilaterally modify the territorial scope of the Agreement at any time.
- It is bound to notify the depositary only; the other states are not informed thereof either by the party in question or by the depositary.

3. The outcome is imbalance among the Contracting Parties, since they cannot react to a unilateral declaration of territorial application by any one of them. The territorial clause should be amended in order to reach a balance in the obligations assumed by the Contracting Parties. The territorial clause should provide that:

- The depositary must notify such territorial extension to the other States party to the Agreement.
- The latter should be afforded a reasonable period of time from receipt of the notice from the depositary in which to comment or declare that they deem such extension unsuitable.
- The extension should become effective once the above period lapses, excluding their application to any State party to the Agreement lodging its opposition to such extension.

4. The clause should then be re-worded as follows:

“A State may at any time declare in writing to the Depositary **and to the other Contracting Parties** that this Agreement shall apply to all or one or more of the territories for the international relations of which it is responsible. **The Contracting Parties, once so informed may within 30 days after receipt of the declaration lodge any comment they wish, including their opposition to the extension of the Agreement to the above-mentioned territories. In the latter case, the non applicability clause shall apply.** The declaration, made prior to or upon ratification, accession or acceptance, shall take effect upon entry into force of this Agreement for that State. A subsequent declaration shall take effect with respect to the territory or territories concerned on the ninetieth day **after the conclusion of the third day period for comments**”.

5. Furthermore, the non-applicability clause should provide not only for the non-application of the MAI between a Contracting Party and the Party adhering to the Agreement, but also for the possibility that, when a Contracting Party extends the Agreement to a territory for whose foreign relations it is responsible, other Contracting Parties may oppose or refrain from applying the Agreement to such territory (in respect of both direct investment originating in such territory and indirect investment channelled through it).

6. The non-applicability clause would be re-worded as follows:

This Agreement shall not apply as between any Contracting Party and any acceding Party if, at the time of accession, the Contracting Party does not consent to such application. **This Agreement shall not apply as between any Contracting Party and any territory or territories for the international relations of which a Contracting Party is responsible if, at the time of the declaration, the former Contracting Party does not consent to such application.**



## SCOPE OF APPLICATION

### (Contribution from one delegation)

1. This Agreement shall apply:
  - a) in the land territory, internal waters, and the territorial sea of a Contracting Party, and, in the case of a Contracting Party which is an archipelagic state, its archipelagic waters; and
  - b) beyond the territorial sea with respect to the exercise by a Contracting Party of its sovereign rights or jurisdiction in accordance with international law.
2. This Agreement applies to measures adopted or maintained by a Contracting Party relating to investors of another Contracting Party and to their investments in accordance with its provisions.
3. This Agreement does not apply to measures taken by a Contracting Party in exercising its rights and performing its duties under international law with respect to the conservation, management and utilisation of the living resources in the sea.
4. Nothing in this Agreement shall prejudice the positions of the Contracting Parties with respect to:
  - a) issues related to sea boundary delimitations, or
  - b) which of them is entitled to exercise sovereignty, sovereign rights or jurisdiction within a particular geographical area, or with respect to a particular activity within a particular geographical area.

The Contracting Parties recognise that such questions are governed by international law and relevant international agreements.

## **SCOPE OF APPLICATION - EXPLANATORY NOTE TO THIS DELEGATION'S PROPOSAL**

This proposal is based on and elaborates further Article 2 in the proposals by the Chairman.

Paragraph 1(a) of this proposal is identical with paragraph 1(a) of Article 2 in the proposal by the Chairman.

Paragraph 1(b) of this proposal is based on paragraph 1(b) of Article 2 in the proposal of the Chairman. However, the text has been redrafted with a view to ensure consistency with the law of the sea, and notably with Articles 55, 56 and 77 of the United Nations Convention on the Law of the Sea of 1982 (UNCLOS).

Paragraph 2 of this proposal is inspired by Article 1.1 of the GATS and Article 1101 of the NAFTA. Reference is also made to the proposal of one delegation contained in the Consolidated Text. Like another delegation, this delegation believes that such a provision is important in order to clarify the extent of the obligations being undertaken.

Paragraph 3 of this proposal aims at ensuring that the conservation, management and utilisation of the living resources in the sea are excluded from the scope of application of MAI. It is the firm conviction of the Government of this delegation that these issues, which are regulated in UNCLOS Part V and in bilateral and regional fisheries agreements, should not be covered by MAI.

Paragraph 4 of this proposal is based on paragraph 2 of Article 2 in the proposal of the Chairman. It is a disclaimer to deal with concerns expressed by some delegations. In subparagraph (a) the Norwegian proposal uses the language "sea boundary delimitations" as used in UNCLOS Article 298 (1)(a)(i) instead of the language "the delimitation of maritime zones" as used in the proposal of the Chairman. The reason is that it is understood that references to "maritime zones" and "maritime areas" may cause difficulties to some delegations. Furthermore, in the proposal the following sentence is added: "The Contracting Parties recognise that such questions are governed by international law and relevant international agreements".

Like in the proposal of the Chairman, with a view to accommodate the concerns of some delegations references to the UNCLOS have been avoided in this delegation's proposal.

## GOVERNMENT PROCUREMENT OF SERVICES

### (Contribution from one delegation)

1. Negotiators have been conscious of the need to ensure that the MAI is compatible with other international agreements, including those of the IMF and WTO. The MAI should not create obligations on Parties that conflict with their obligations under those agreements.
2. In this regard, this delegation considers it important to make clear that the MAI does not apply to government procurement of services, or to the provision of social services.
3. The whole rationale for the negotiations to develop a Multilateral Agreement on Investment rests on ensuring fair, transparent and predictable investment regimes. The rules and disciplines applying to services were negotiated in detail during the Uruguay Round resulting in the General Agreement on Trade in Services. This latter agreement specifically excludes services supplied in the exercise of governmental authority. GATS Article XIII also states that the MFN, market access and national treatment provisions in Articles II, XVI and XVII “shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.” A further set of negotiations on services will take place in the WTO in 2000. Furthermore, the WTO Agreement on Government Procurement deals specifically with government procurement of services.
4. This delegation holds the view that it is not appropriate, nor consistent with agreements negotiated in the WTO, for the MAI to extend its coverage to government procurement of services or the provision of social services. We believe that other delegations share this view. This is reflected in the fact that experts have sought to preserve existing obligations on government procurement in various places in the text, such as in the draft articles on Monopolies and Performance Requirements. In addition, some countries have tabled draft reservations relating to existing and future measures pertaining to government procurement and to provision of social services.
5. This delegation believes a generic solution in the text would be the most appropriate way to clarify the issue. Accordingly, this delegation proposes that an Article on Government Procurement be added to the MAI as follows:

“Nothing in this Agreement applies to the government procurement of services, or the provision of social services.”

## **SUBSTANTIVE APPROACH TO THE RESPECT CLAUSE**

### **(Contribution from one delegation)**

Each Contracting Party shall observe any other obligation in writing, it has assumed with regard to investments in its territory by investors of another Contracting Party.

Disputes arising from such obligations shall only be settled under the terms of the contracts underlying the obligations.

## **RESPECT CLAUSE**

### **(Contribution from one delegation)**

Each Contracting Party shall observe any obligation it has entered into with regard to a specific investment of an investor of another Contracting Party.

**CLAUSE FOR REGIONAL ECONOMIC INTEGRATION  
ORGANISATIONS (REIO-CLAUSE)**

**(Contribution from one delegation)**

This delegation has presented the principle reasons for the inclusion of a clause for Regional Economic Integration Organisations in the Multilateral Agreement on Investment at the April meeting of the Negotiating Group.

Building on this contribution, this delegation herewith submits its proposal for such a REIO-clause.

Article X

on

Regional Economic Integration Organisations (REIOs)

1. For the purpose of this Agreement, a REIO is an organisation of sovereign States which have committed themselves to abolish in substance all barriers to investment among themselves and to which these States have transferred competence on a range of matters within the purview of this Agreement, including the authority to adopt legislation and to make decisions binding on them in respect of those matters.
2. Article ..... (MFN clause) shall not prevent a Contracting Party which is a Member State of a REIO from according more favourable treatment to investors and their investments from other Member States of the organisation as a result of the measures applied within the framework of that organisation than it accords to investors and their investments from other Contracting Parties.
3. Nothing in this Agreement shall prevent a REIO and its Member States from applying, consistent with the objectives of this Agreement, new harmonised measures adopted within the framework of such organisation and which replace the measures previously applied by these States.
4. A Contracting Party which joins a REIO shall not be prevented from applying in place of its previous national legislation the corresponding legislation of the said organisation from the day of its accession to it. If a Contracting Party has concluded an agreement with a REIO and its Member States in preparation for its accession to it, nothing in this Agreement shall prevent it from aligning its national legislation to the measures applied in the framework of such organisation, nor shall this Agreement prevent Member States of a REIO from extending to the investors and their investments of such a Contracting Party more favourable treatment as referred to in paragraph 2.

**CLAUSE FOR REGIONAL ECONOMIC INTEGRATION  
ORGANISATIONS (REIO - CLAUSE)**

**(Contribution from three delegations)**

Hereby three delegations, supporting in principle the draft text of REIO-Clause proposed by another delegation in the wording contained in Annex of the “Multilateral Agreement on Investment: Consolidated text and commentary“, do submit , for the sake of clarity, their proposal for modification of last sentence of the paragraph 4 of the mentioned REIO-Clause, which should read as follows:

„ A Contracting Party which joins a REIO shall not be prevented from applying in place of its previous national legislation the corresponding legislation of the said organisation from the day of its accession to it.

If a Contracting Party has concluded an agreement with a REIO and its Member States in preparation for its accession to it, nothing in this Agreement shall prevent it from aligning its national legislation to the measures applied in the framework of such Organisation. *This Agreement shall prevent neither this Contracting Party nor a Member State of that REIO from according more favourable treatment resulting from such an alignment to each other’s investors and their investments than they accord to investors and their investments from other Contracting Parties.* “

## PACKAGE OF ADDITIONAL ENVIRONMENTAL PROPOSALS

### (Contribution by one delegation)

In addition to the environmental elements in the preamble, the article based on NAFTA 1114, and the association of the OECD Guidelines for Multinational Enterprises, this delegation proposes the following additional language to address environmental issues in the MAI.

#### 1) **Health, Safety and Environment**

Two new paragraphs, to add to the already tabled NAFTA 1114.2-type provision (regarding the lowering of standards for the purpose of attracting investment).

- a) **“Nothing in this Agreement shall be construed to prevent a 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.”** (Text same as NAFTA 1114.1)
- b) **“Parties, through the cooperation of relevant international organizations and industry, where appropriate, should encourage investors wherever they operate to introduce policies and make commitments to follow environmentally protective standards regarding toxic chemicals and hazardous waste generation and disposal.”**

#### 2.) **Maintaining and Enforcing High Environmental Standards**

**“Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party should ensure that its laws and regulations provide for high levels of environmental protection and should continue to improve those laws and regulations. Moreover, each Party should effectively enforce its environmental laws and regulations through appropriate governmental action.”**

#### 3) **Environmental Impact Assessments**

**“Each Party should require or undertake, as appropriate, and consistent with Articles \*\* on most-favoured national and national treatment, environmental impact assessments for proposed investment in its territory that is likely to have a significant adverse impact on health or the environment and is subject to a decision of a competent national authority.”**

In addition, we propose the following additional language. While this language is not strictly environmental, it addresses some environmental concerns that were identified during our analysis of the potential environmental implications of the MAI.

#### 4) **“In Like Circumstances”**

The following language already tabled for a footnote or interpretive note to “in like circumstances” in the national and MFN treatment articles would also include new language **in bold**:



“National Treatment and most favoured nation treatment are relative standards requiring a comparison between treatment of a foreign investor and its 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 of 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. **Similarly, governments may have legitimate policy reasons to accord differential treatment as between domestic and foreign investors and their investments in certain circumstances, for example where needed to secure compliance with domestic laws that are not inconsistent with national treatment and most favoured nation treatment. Moreover, the fact that a measure applied by a government has a different effect on an investment or investor of another Party would not in itself render the measure inconsistent with national treatment and most favoured nation treatment.**

“ ‘In like circumstances’ ensures that comparisons are made between investors and investment 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.”

#### 5) **Transparency**

A new phrase (**in bold**) would be added to the already tabled articles on Transparency. The brackets in the text below are presently in the draft MAI text itself.

“2.3 Nothing in this Agreement shall prevent a Contracting Party from requiring an investor of another Contracting Party, or its investment, **to provide or allow the verification of information to ensure compliance with the first Contracting Party’s laws and regulations,** or to provide routine information concerning that investment solely for information or statistical purposes. No contracting Party shall be required to furnish or allow access to information concerning particular investors or investments the disclosure of which would impede law enforcement or would be contrary to its laws [policies, or practices] protecting confidentiality.”

In addition, this delegation is continuing to consider the need to address other environmental concerns in the text. In particular, we are continuing to review the expropriation and general treatment articles to ensure concerns in that area are addressed. We also note that we will need to ensure that MAI obligations do not conflict with the Climate Change Convention.

**DRAFT ARTICLE ON CONFLICTING REQUIREMENTS**  
*(Amendment of the proposal introduced by one delegation)<sup>1</sup>*

**(Contribution from one delegation)**

**Paragraph 1.** A Contracting Party shall not prohibit outside its territory, directly or indirectly, or cause to refrain, an investor from another Contracting Party from acting in accordance with the latter Contracting Party's laws, regulations or express policies unless those laws, regulations or express policy are contrary to international law (conflicting requirement).

"Express policy" means a situation in which the conduct of an investor is not explicitly regulated but allowed on the basis of general principles of law or general policy in the relevant country

**REASONS FOR REFORMULATING PARAGRAPH 1 OF THE PROPOSAL BY ONE DELEGATION**

1. It appears to be necessary to cover not only cases where a contracting party is (directly) requiring an investor to behave in a certain way but also cases where the Contracting Party enjoins sanctions on investors when they behave in that way (e.g. loss of rights or advantages that would otherwise be granted).

2. The wording proposed by one delegation "*to act in conflict*" seems to be unduly narrow as it implies that there is an open conflict between two legal orders, one imposing to do X, the other to do Y in the same situation. Those cases exist, but are extremely rare (e.g. a Saudi Arabian law imposes on investors not to export to or invest in Israel/a US law imposes on American investors abroad not to accept boycott against Israel). The normal situation is, however, that the legal order of a Contracting Party simply allows certain activities (e.g. this delegation permits whaling) whilst the legal order of another Contracting Party prohibits investors such activities, even abroad (e.g. another delegation would not allow its investors at home and abroad to invest in whaling).

In this case there would be no real conflict according to the proposal by one delegation as the investor can abide by the rule of another delegation without entering in conflict with this country's laws.

Thus, there is a choice to make between the two concepts. The "*open conflict*" rule does in the view of one delegation not serve much purpose.

Moreover, a "*conflict*" in the meaning of requirements that are really opposed to one another is not possible between a law on the one hand and a "*policy*" on the other as a pure policy measure is not mandatory. If one would choose the narrow approach (open conflict), the reference to such policy measure would have to be deleted.

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1. Original proposal by one delegation included in is reproduced at the end of this contribution.

3. It seems to be useful to require that the measures of the Contracting party concerned are not contrary to international law otherwise they do not merit protection (e.g. a country exploits unlawfully the continental shelf of another country; measures against investors contributing to such behaviour can be sanctioned).

4. As the term "*conflicting requirement*" reappears more often in the text it is preferable to give it the form of a definition.

5. The term "*express policy*" is new and it seems useful, for reasons of legal clarity, to define it.

**Paragraph 2.** The Parties Group may receive notice of conflicting requirements from :

- a) A Contracting Party which considers that [.....] another Contracting Party imposes or enforces, or intends to do so, conflicting requirements on investors or investments of investors in respect of conduct within its territory;
- b) A Contracting Party which is considering imposing or enforcing or which has imposed or enforced conflicting requirements on investors or investments of investors in respect of conduct within the territory of another Contracting Party.

#### Commentary

Simple streamlining of the text.

**Paragraph 3.** A Contracting Party may at any time advise the Parties Group that it does not regard a conflicting requirement that has been notified by another Contracting Party pursuant to paragraph 2 as objectionable. In such cases, paragraph 1 [...] does not apply to such requirements *in the relation between the Contracting Parties concerned*.

#### Commentary

Some amendments are necessary to align the wording to the amended paragraph 1.

In addition, it should be made clear that the non-objection of one Contracting Party to the measure has no legal effect for other Contracting Parties.

**Paragraph 4** (Unchanged).

**Paragraph 5** (Unchanged until the third stroke; the third stroke contains a full concept in itself and should become a new paragraph 6).

**Paragraph 6** If the conflicting requirements have been imposed consistent with international law in order to minimise or avoid substantial effects within a Contracting Party of actions outside that Contracting Party, the waiver shall be granted unless the Contracting Party in whose territory the conduct occurs has taken reasonable measures to ensure that such effects do not recur.

### Commentary

Paragraph 6 introduces a useful concept of legitimate "self defence", applicable e.g. in case a Contracting Party would allow drug production or far reaching and serious pollution of the environment; there may be however also cases where the decision is not so easy to find (e.g. advertising directed from one country to the other using methods not allowed in the latter; investment in border shops selling articles which are not authorised in a contracting party etc.).

## **Draft Article on Conflicting Requirements<sup>1</sup>**

1. A Contracting Party shall not impose or enforce measures that require an investor or an investment of an investor to act in conflict with the laws, regulations or express policies of another Contracting Party in whose territory such acts occur.
2. The MAI Parties Group may receive notice of conflicting requirements from:
  - a) A Contracting Party which considers that measures or proposed measures of another Contracting Party impose or enforce conflicting requirements on investors or investments of investors in respect of conduct within its territory;
  - b) A Contracting Party which is considering imposing or enforcing, or which has imposed or enforced conflicting requirements on investors or investments of investors in respect of conduct within the territory of another Contracting Party.
3. A Contracting Party in whose territory conduct occurs may at any time advise the Parties Group that it does not regard a requirement that has been notified pursuant to paragraph 2 as objectionable. In such cases, paragraph 1 of this Article does not apply to such requirements.
4. If a conflicting requirement has been notified to the Parties Group, and the Contracting Party in whose territory the conduct occurs has not provided the notification provided for by paragraph 3, the Parties Group may, at the request of the state which exercises jurisdiction outside its territory, consider whether a waiver should be granted from the prohibition on conflicting requirements set out in paragraph 1.
5. In considering whether to grant a waiver from paragraph 1, the Parties Group shall have regard to the following considerations:
  - The results of consultations between the affected states regarding the manner in which the conflict could be minimized or avoided.
  - Whether, as a result of the conflicting requirement any investor or investment of an investor has been or may be subjected to treatment that is unfair or inequitable.
  - If the conflicting requirement has been imposed consistent with international law in order to minimize or avoid substantial effects within a Contracting Party of actions outside that Contracting Party, the waiver shall be granted unless the Contracting Party in whose territory the conduct occurs has taken reasonable measures to ensure that such effects do not recur.

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1. Taken from a contribution by one delegation.

## DRAFT ARTICLE ON SECONDARY INVESTMENT BOYCOTTS

*(Based on the proposal by one delegation,<sup>1</sup>  
drafting changes are indicated and explained in the footnotes)*

No Contracting Party may take measures that

- i) either<sup>2</sup> impose or may be used to impose liability on investors or investments of investors of another Contracting Party;

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1. Original proposal by one delegation is reproduced as follows:

“Draft Article on Secondary Investment Boycotts

No Contracting Party may take measures that

(i) impose or may be used to impose liability on investors or investments of investors of another Contracting Party; or

(ii) prohibit dealing with investors or investments of investors of another Contracting Party

because of investments they own or control, directly or indirectly, in a third country in accordance with the laws and regulations of such third country.”

2. Purely a drafting amendment.

ii) *or* prohibit, or *impose sanctions*<sup>3</sup> for, dealing with investors or investment of investors of another Contracting Party;

because of investments an investor of another Contracting Party makes, owns or controls, directly or indirectly, in a third country in accordance with [*international law*<sup>4</sup> *and*] regulations of such third country.

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3. Broader wording is suggested because in some cases a sanction can be applied without explicit prohibition. There is a danger of circumvention.

4. Consistency with international law should be required because a measure merits protection by an international agreement only if this measure is consistent with international law.

## **INTRODUCTION OF AN EXCEPTION CLAUSE FOR CULTURAL INDUSTRIES**

### **(Contribution from one delegation)**

After in-depth analysis of the implications of the MAI, this delegation has come to the conclusion that the basic principles of this agreement raise application problems for cultural industries (notably the printing, press and audio-visual sectors). In fact, policies designed to preserve cultural and linguistic diversity may not be entirely compatible with the disciplines of the agreement and so could be endangered.

As regards direct restrictions on foreign investment, the standstill commitment is likely to make existing limitations ineffective, since sectors using new technologies would not be subject to such limitations. This would be unacceptable for this delegation and would undermine the results of the Uruguay Round for the audio-visual sector. On completion of the Round, only three OECD Members undertook specific commitments in the audio-visual sector. The other signatories - including the European Union and its Member States - did not agree to a standstill commitment with respect to mode 3 of the GATS ("establishment of a commercial presence") in this sector.

As regards indirect restrictions on investment, the type of disciplines to be included in the MAI are not yet precisely known. However, the audio-visual and press sectors are governed by specific regulations in which linguistic and/or nationality criteria play a central role. In this respect, it should be clear in MAI that a State may treat two enterprises of these sectors differently, in particular according to the linguistic content of the goods produced or the services supplied.

The Most Favoured Nation clause and National Treatment principle would also be difficult to apply to these sectors. In fact, various international agreements, including coproduction agreements, make exceptions to the Most Favoured Nation clause and offer foreign enterprises of third countries preferential or even national treatment.

The MAI should allow the Signatories to implement policies designed to promote cultural and linguistic diversity and consequently, to protect and promote industries ensuring such diversity.

Only a cultural exception would make it possible to protect cultural industries from the disciplines covered by the agreement. This general exception could be drafted as follows:

"Nothing in this agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activity of these companies, in the framework of policies designed to preserve and promote cultural and linguistic diversity."



## SUBNATIONAL MEASURES

### (Contribution from one delegation)

The application of the MAI to sub-federal entities raises a particular issue with regard to the application of national treatment. Delegations will recall that Commentary number 7, on the MAI's national treatment article, page 100 of the Consolidated Texts and Commentary reads:

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

The MAI intends to set high standards of liberalisation, and it is therefore believed that foreign investors would benefit most if the sub-federal entity would accord to them “in state” treatment.

This issue has been the subject of debate in other fora, lately notably in the GATS context. These discussions have shown that legal clarity and certainty in this regard are of considerable importance.

It is therefore proposed to add the following language to the National Treatment Article in a separate paragraph:

**1.4. If a sub-federal entity of a Contracting Party accords to its own investors and their investments treatment more favourable than to investors and investments of other sub-federal entities of the same Contracting Party it shall in accordance with paragraphs 1 to 3 extend the more favourable treatment to investors of other Contracting Parties and to their investments.**

We would appreciate the view of other Delegations with regard to inclusion of the principle as well as the proposed language in the MAI.

**THE RELATIONSHIP BETWEEN  
THE SVALBARD TREATY AND THE MAI**

**(Contribution from one delegation)**

Draft Article to be included in Part X (Other Provisions)

In the event of a conflict between the Treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and this Agreement, the Svalbard Treaty shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties with respect to the Svalbard Treaty. In the event of such a conflict or a dispute as to whether there is such a conflict or as to its extent, Part V (Dispute Settlement) and Part VII (Relationship to other International Agreements) of this Agreement shall not apply.

## LABOUR MARKETS INTEGRATION AGREEMENTS

### (Contribution from five delegations)

During the MAI negotiations in Paris delegations have agreed on the inclusion of a provision regarding “key personnel”.<sup>1</sup> The basic provision is that the Contracting Parties are obliged to permit certain groups of natural persons to enter into and stay in a Contracting State in connection with investments covered by the MAI, subject to the application of Contracting Parties’ national laws, regulations and procedures affecting the entry, stay and work of natural persons. Under the stated condition, the same groups of natural persons are entitled to work permits in connection with covered investments. A Contracting Party may make the issue of such permits conditional on the submission of formal written applications for such permits in accordance with its relevant laws and regulations.

For more than 40 years the Nordic countries have maintained a special legal regime for the entry by their nationals into their respective employment markets.<sup>2</sup> Under this regime nationals of the Nordic countries may move freely from one country to another and are not required to obtain residence permits and/or work permits from the relevant national authorities. It goes without saying that this also covers nationals of the five countries in their capacity as investors or key personnel. The regime covers all groups of workers and also provides for certain social benefits regardless of nationality. The rules of the Nordic common labour market are thus more favourable to nationals of the Nordic countries than the rules applicable to nationals of third countries.<sup>3</sup>

The historical, economic and political ties between the five Nordic countries as well as the similarities in their welfare systems have motivated the integration of their labour markets and have been the rationale for the intergovernmental agreements on the subject. Thus, the motivation for the Nordic Labour Market agreements goes far beyond purely economic considerations.

While it would seem clear that the MAI is not intended to interfere with integrated labour markets, such as the Nordic Labour Market, it cannot be excluded that the Most Favoured Nation provision of the MAI<sup>4</sup> to some extent interferes with the Nordic Labour Market.

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1. **For the latest draft text see document DAF/MAI/ST(97)4, p. 3-4.**

2. The rules are contained in an Agreement of May 22, 1954 concerning exemption from requirements of passport, residence and work permits, an Agreement of July 12, 1957 concerning the suspension of passport control at the common Nordic borders and in the Nordic Convention on Social Security of 1955 (new Convention 1992). The Agreement of May 22, 1954 has been replaced by a subsequent agreement which entered into force on August 1, 1983. The duration of the Agreement is indefinite.

3. Another distinct legal regime is applicable to nationals of the EU and EEA states.

4. See document Consolidated Text, p. 11.

Even if there are important differences between the scope of MAI and the WTO General Agreement on Trade in Services, which e.g. directly covers movement of natural persons, it is worth recalling that the Nordic countries obtained special coverage for integrated labour markets in GATS, through the insertion of article V bis of that agreement. This provision allows Contracting Parties to enter into labour markets integration agreements without having to extend to nationals of third countries by means of MFN treatment an benefits deriving from such an agreement.

In order to obtain complete legal certainty concerning the relationship between the MAI and substantially integrated labour markets the Nordic Countries propose the insertion of a provision similar to GATS art. V bis in the MAI. This would not in any way derogate from the binding MAI obligation regarding key personnel.

Based on the above these five delegations suggest the insertion of a GENERAL labour markets integration provision in the MAI with the following wording<sup>5</sup>:

*“Labour markets integration agreements*

Paragraph 1

Nothing in this Agreement shall prevent any of the Contracting Parties from being a party to an agreement establishing full integration of the labour markets between the parties to such an agreement.

Paragraph 2

For the purpose of this Agreement the term “labour markets integration agreements” means agreements which allow citizens of the parties to such agreements a right of free entry to the employment markets of the parties concerned and which exempts citizens of parties to the agreement from requirements concerning residency and work permits. Labour markets integration agreements may also include measures concerning conditions of pay, other conditions of employment and social benefits.”

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5. The wording is based on the GATS article V bis.

## **MAI: PROPOSED ANNEX ON THE SAMI PEOPLE**

### **(Contribution by three delegations)**

THE CONTRACTING PARTIES,

RECOGNIZING the obligations and commitments of these countries with regard to the Sami people under national and international law,

NOTING, in particular, that these countries are committed to preserving and developing the means of livelihood, language, culture and way of life of the Sami people,

CONSIDERING the dependence on traditional Sami culture and livelihood on primary economic activities, such as reindeer husbandry in the traditional areas of Sami settlement,

HAVE AGREED on the following provisions.

#### **Article 1**

Notwithstanding the provisions of this Agreement, exclusive rights to reindeer husbandry within traditional Sami areas may be granted to the Sami people.

#### **Article 2**

This Annex may be extended to take account of any further development of exclusive Sami rights linked to their traditional means of livelihood. The Parties Group may adopt the necessary amendments to this Annex.

## **DISPUTE SETTLEMENT**

### **(Contribution from one delegation)**

Investor-State Procedures  
Article D, paragraph 3 - Contracting Party Consent

Paragraph 3a should be amended to read:

- a) Subject only to paragraphs 3b and 3c, each Contracting Party hereby gives .....

Add a new paragraph 3c:

- c) On the basis of reciprocity a Contracting Party may, by notifying the depositary upon deposit of its instrument of ratification or accession declare that:
- (i) it does not give its consent under paragraph 3a to the submission of a dispute to international arbitration under the ICSID Convention in accordance with this Article; and
  - (ii) it does not give its consent under paragraph 3a to the submission of a dispute to international arbitration in cases where under the provisions of the New York Convention recognition and enforcement of the award may be refused by its competent authority.

**DISPUTE SETTLEMENT**

**PROPOSAL FOR INTERPRETATIVE NOTE ON THE ARTICLE ON FINAL  
AWARDS IN INVESTOR-STATE PROCEDURES (Article D 16(a) (iii))**

**(Contribution from one delegation)**

“Restitution in kind means factual restoration of property and property rights”.

## **Dispute Settlement**

### **Response to Non-compliance**

#### **(Contribution from one delegation)**

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



**Article \_\_<sup>1</sup>**

**Advisory Opinion**

**Suggestion for MAI dispute settlement or institutional matter experts**

1. The Parties Group may set up a legal advisory body, on either an ad hoc or permanent basis, on the interpretation and application of the Agreement.
2. Members of the legal advisory group may include a national of parties which have substantial interests in the issue under consideration.
3. The legal advisory group should, unless otherwise decided by the Parties Group, conclude its legal opinion no later than 90 days following the submission by the Parties Group.
4. A Contracting Party may request the Parties Group to consider whether it will ask a legal opinion of the legal advisory body, regarding the compatibility of another Contracting Party's measures with the Agreement.

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<sup>1</sup>This suggested Article might be included in the provisions with regard to the Parties Group's competence.

## **Maintaining the Overall Level of Liberalisation**

### **(Contribution from one delegation)**

1. During the latest stages of the MAI-negotiations it became evident that the strict application of the standstill-principle without allowing for any exceptions would be difficult because of problems with respect to certain

- \* disciplines,
- \* sectors,
- \* internal policies, and
- \* future developments.

2. Means suggested to address these concerns are, inter alia:

- \* general exceptions,
- \* broadly formulated country specific reservations,
- \* "List B"-reservations, and
- \* specific provisions on, e.g., demonopolization and privatisation.

3. Without a corrective element all these approaches

- \* complicate the assessment of and/or may lead to future distortions in the overall balance of commitments among Contracting Parties, and, more generally,
- \* tend to favour "bad" guys having lodged such reservations and/or willing to introduce new non-conforming measures,

thereby considerably deteriorating the legal quality of the agreement (which would then fall short of what was achieved in GATS) and the benefits to be gained from the MAI by Contracting Parties in general and the "good" guys in particular.

4. This delegation has therefore on earlier occasions proposed to introduce the concept of a legally binding and enforceable "substantive standstill" (the "maintain-the-overall-level-of liberalisation-rule")<sup>1</sup>, which would, while allowing for some flexibility, apply without exception and therefore avoid the problems mentioned in Para 4.

5. The Annex contains a suggestion for such an article on "Maintaining the overall level of liberalisation".

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1. The corresponding "substantive rollback-principle" could be formulated as a "enhancing the overall level of liberalisation rule".

## Annex

### ARTICLE XX MAINTAINING THE OVERALL LEVEL OF LIBERALISATION

(1) A Contracting Party intending to take or taking a nonconforming measure under Articles xy, ....., xz ["list B", all general exceptions] shall do so only consistent with the objectives of this Agreement and in accordance with the provisions of this Article. It shall ensure that the overall level of liberalisation is maintained, if necessary through compensatory adjustments.

(2) Compensatory adjustments shall be made on a most-favoured-nation basis.

(3) A Contracting Party shall notify its intent to take such a nonconforming measure to the Parties Group as soon as possible and not later than 3 months before the intended date of implementation of the nonconforming measure. The notification shall contain a description of the nonconforming measure, its likely impact on the overall level of liberalisation and envisaged compensatory adjustments.

(4) At the request of any Contracting Party the benefits of which under this Agreement may be affected by the intended nonconforming measure, the Parties Group shall take up the subject with a view to reaching agreement on any compensatory adjustments necessary to maintain the overall level of liberalisation.

(5) If such agreement is not reached within [...] months, any Contracting Party may, within a further [...] days, refer the matter to an arbitral tribunal in accordance with [Part C of State-State Dispute Settlement Procedures].

(6) The arbitral tribunal may, in its award, state that

(i) the overall level of liberalisation is maintained and no compensatory adjustments are necessary;

(ii) the overall level of liberalisation is not maintained and the compensatory adjustments proposed or implemented are adequate and sufficient;

or

(iii) the overall level of liberalisation is not maintained and the compensatory adjustments proposed or implemented by the modifying Contracting Party are inadequate or insufficient.

(7) Necessary procedural rules shall be established by the Parties Group within [...] months after the entry into force of the Agreement.

## ANNEX 2

### CHAIRMAN'S PROPOSALS ON ENVIRONMENT AND RELATED MATTERS AND ON LABOUR<sup>1</sup>

1. The approach to the environment and to labour has evolved to achieve balance between MAI disciplines and other important areas of public policy of concern to MAI Parties and to avoid unintended consequences on normal regulatory practices. Details of the three anchors of preamble, text and association of the OECD Guidelines for Multinational Enterprises, are still under consideration. Annexed to this Chairman's Note is a package of proposals for text on environment and labour that in comprehensive fashion brings together the outstanding aspects of our work.<sup>2</sup>

2. Some portions of this package of proposals address more general concerns than just environmental or labour implications of the MAI, including the proposal for the national treatment and most favoured nation treatment articles and the proposal for the expropriation and general treatment articles.

#### Environment and Related Matters

3. The portions of this package of proposals that address environmental concerns in a specific manner are the Preamble, the affirmation of the right of Contracting Parties to regulate in a non-discriminatory manner, the "not lowering measures" provision and the exception to the performance requirements disciplines.

4. To respect the need for balance, the proposal for the environmental language in the Preamble seeks as concise a formulation as possible while making the key explicit references. Any additional proposals for preambular language currently before the Negotiating Group could be reconsidered in the context of a political declaration or associated with the MAI in some other way.

5. The inclusion of "in like circumstances" in the national treatment and most favoured nation treatment provisions, plus the interpretative note, would address concerns about the practical implementation of the "de facto" discrimination principle and preserve the necessary scope for non-discriminatory regulation.

6. A specific affirmation that the MAI does not inhibit normal non-discriminatory government regulatory activity seems necessary in the environmental field. Combined with the other elements of this

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1 This text reproduces the content of the Note by the Chairman dated 9 March 1998. When this Note was discussed by the Negotiating Group in April 1998, a large majority expressed support for the overall approach and believed that it could be a basis for further work.

2 The dispute settlement procedures also take account of environmental and labour concerns through the possibility of appointment to panels of individuals with special expertise (Article V.C.2(c) for State-State proceedings), panel recourse to environmental and other necessary expertise (Articles V.C.5 and V.D.13) and through proposals for transparency of panel proceedings through the Parties Group. Furthermore, a review of the OECD Guidelines for Multinational Enterprises is scheduled to begin this year. The environment and employment and industrial relations chapters of the Guidelines will receive a thorough scrutiny during the review process.

package of proposals, this represents a targeted approach. Another approach would be a general exception inspired by GATT Article XX, which would eliminate the need for some other elements of this package, notably the exception to the provisions on performance requirements.

7. The proposal for binding "not lowering measures" language is limited to domestic measures and the circumstances of a particular investment. The interpretative note spells out the widely-shared views that governments must have the ability to adjust their overall environmental standards over time, and that investment should not be enticed by relaxing standards. Further consideration of the implications of binding language for the dispute settlement procedures may be required.

8. The proposal for an interpretative note for the expropriation and general treatment articles responds to the agreement at the High Level Meeting that it needs to be made clear that the MAI will not inhibit the exercise of the normal regulatory powers of government and that the exercise of such powers will not amount to expropriation.

9. The exception article for the provisions on performance requirements is needed because they go beyond non-discrimination. The exception covers those performance requirements that could affect compliance with laws and regulations, or that could affect health, safety or the environment.

10. The package of proposals includes annexation of the OECD Guidelines to the text of the MAI, without changing their non-binding character.

## **Labour**

11. The portions of this package of proposals that address labour concerns in a specific manner are the Preamble and the binding "not lowering measures" provision.

12. As with environment, the proposal sets out a concise formulation that maintains the key explicit references supported by the large majority of MAI Parties. As with environment, any additional proposals for preambular language currently before the Negotiating Group could be reconsidered in the context of a political declaration or associated with the MAI in some other way.

13. The inclusion of "in like circumstances" in the national treatment and most favoured nation treatment provisions, plus the interpretative note, would address concerns about the practical implementation of the "de facto" discrimination principle and preserve the necessary scope for non-discriminatory regulation. This could be as true for labour concerns as for environmental concerns.

14. A specific affirmation that the MAI does not inhibit normal non-discriminatory government regulatory activity, to the extent that it addresses health and safety concerns, could cover measures that set labour standards.

15. The proposal for binding "not lowering measures" language is limited to domestic measures and the circumstances of a particular investment. "Domestic" is chosen as the main qualifier because approaches to "core" or "core international" labour standards appear to vary greatly among MAI Parties. "Measures" has been chosen for consistency with MAI drafting where there is a need to refer to the means

by which governments take action (by domestic legislation, regulation, directives, policy, etc).<sup>3</sup> The interpretative note spells out the widely-shared views that governments must have the ability to adjust their overall labour market policies as appropriate over time, and that investment should not be enticed by relaxing standards. Further consideration of the implications of binding language for dispute settlement may be required.

16. As stated above, the exception article for the provisions on performance requirements is needed because they go beyond the non-discrimination. The exception covers performance requirements that could affect compliance with laws and regulations, or that could affect health, safety or the environment.

17. Finally, the package of proposals includes annexation of the OECD Guidelines to the text of the MAI, without changing their non-binding character.

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3 See the Articles on performance requirements, recognition arrangements, expropriation and compensation, transfers, exceptions, temporary safeguards, prudential measures, information transfer and data processing, and taxation.

## ANNEX: PACKAGE OF PROPOSALS FOR TEXT ON ENVIRONMENT AND LABOUR

### 1. *Preamble*

"Recognising that investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable, when accompanied by appropriate environmental and labour policies;

"Re-affirming their commitment to the Rio Declaration on Environment and Development, and Agenda 21 and the Programme for its Further Implementation, including the principles of the polluter pays and the precautionary approach; and resolving to implement this Agreement in a manner consistent with sustainable development and with environmental protection and conservation;

"Renewing their commitment to the Copenhagen Declaration of the World Summit on Social Development and the observance of internationally recognised core labour standards, i.e., freedom of association, the right to organise and bargain collectively, prohibition of forced labour, the elimination of exploitative forms of child labour, and non-discrimination in employment, and noting that the International Labour Organisation is the competent body to set and deal with core labour standards world-wide;"

### 2. *National Treatment and Most Favoured Nation Treatment*

"1. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords in like circumstances to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.

2. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords in like circumstances to investors of any other Contracting Party or of a non-Contracting Party, and to the investments of investors of any other Contracting Party or of a non-Contracting Party, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.

3. Each Contracting Party shall accord to investors of another Contracting Party and to their investments the better of the treatment required by Articles 1.1 and 1.2, whichever is the more favourable to those investors or investments.\*"

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\*Interpretative Note: National Treatment and most favoured nation treatment are relative standards requiring a comparison between treatment of a foreign investor and investments and treatment of domestic or third country investors and investments. Governments may have legitimate policy reasons to accord differential treatment to different types of investments. Similarly, governments may have legitimate policy reasons to accord differential treatment as between domestic and foreign investors and their investments in certain circumstances, for example where needed to secure compliance with domestic laws that are not inconsistent with national treatment and most favoured nation treatment. The fact that a measure applied by a government has a different effect on an investment or investor of another Party would not in itself render the measure inconsistent with national treatment and most favoured nation treatment. The objective of "in like circumstances" is to permit the consideration of all relevant circumstances, including those relating to a foreign investor and its investments, in deciding to which domestic or third country investors and investments they should appropriately be compared.

### 3. *Affirmation of Right to Regulate*

"A Contracting Party may adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns, provided such measures are consistent with this agreement."

### 4. *"Not Lowering Measures"*

"A Contracting Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its domestic health, safety, environmental, or labour measures, as an encouragement to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of an investment of an investor.\*"

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"\*Interpretative Note: The Parties recognise that governments must have the flexibility to adjust their overall health, safety, environmental or labour standards over time for public policy reasons other than attracting foreign investment."

### 5. *Expropriation and General Treatment\**

#### "1. GENERAL TREATMENT

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

#### "2. EXPROPRIATION AND COMPENSATION

"1. A Contracting Party shall not expropriate or nationalise an investment in its territory of an investor of another Contracting Party or take any measure tantamount to expropriation or nationalisation except: ..."

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"\*Interpretative Note: Articles -- on General Treatment, and -- on Expropriation and Compensation, are intended to incorporate into the MAI existing international legal norms. The reference in Article IV.2.1 to expropriation or nationalisation and "measures tantamount to expropriation or nationalisation" reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments. Nor would such normal and non-discriminatory government activity contravene the standards in Article --.1 (General Treatment)."

### 6. *Performance Requirements*

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



- (a) necessary to secure compliance with measures that are not inconsistent with the provisions of this Agreement;
- (b) necessary to protect human, animal or plant life or health; or
- (c) necessary for the conservation of living or non-living exhaustible natural resources."

**7. *OECD Guidelines for Multinational Enterprises***

The OECD Guidelines for Multinational Enterprises will be annexed to the text of the MAI.