



Negotiating Group on the Multilateral Agreement on Investment (MAI)

**Drafting Group No.2 on Selected Topics Concerning Treatment of Investors and Investment
(Pre/Post Establishment)**

DRAFT ARTICLE ON GENERAL EXCEPTIONS

(Note by the Chairman)

Draft Article**

General Exceptions

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

2. Nothing in this Agreement shall be construed:

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

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

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

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

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

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

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

COMMENTARY

Paragraph 1

1. It has been proposed that the general exceptions provisions not be applicable to all of the obligations under the agreement. The ECT (Article 24(1)) is an example of a multilateral agreement that does not allow for general exceptions to be taken with regard to specific obligations concerning compensation for losses or expropriation. Bilateral treaty practice differs on this matter.

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

3. Not all delegations could subscribe to the majority view that the MAI should provide an absolute guarantee that an investor will be compensated for an expropriated investment. In the case that general exceptions would be permitted to override MAI obligations, delegations might further consider whether this should be limited to only essential security interests.

Paragraph 2

-- subparagraph a

4. Recent agreements like the NAFTA, the ECT, the GATS, and the Shipbuilding agreement do not define essential security interests but provide elements clarifying the purpose of the provision. Element (iii) in an earlier text relating to traffic in arms was deleted, reflecting comments by most delegations that it did not seem relevant in an investment agreement.

5. The phrase "including those" is in square brackets indicating that there is no consensus in the Drafting Group on whether the list should be closed or open.

-- subparagraph b

6. This provision is found in recent agreements (NAFTA, ECT, GATS, Shipbuilding).

-- subparagraph c

7. Agreements such as the NAFTA, GATS, and the Shipbuilding agreement include a general exception provision relating to obligations for the maintenance of international peace and security. These provisions refer specifically to obligations under the UN Charter. Some delegations were of the opinion that this reference was too restrictive because it might not cover actions taken pursuant to regional security arrangements.

Paragraph 3

8. The brackets in this text reflect the lack of consensus in the Drafting Group on whether the article should include a public order exception. Some countries believe that a reference to public order is necessary to allow countries to take measures in cases where there is no immediately applicable national

law. One delegation indicated in a written submission [DAFFE/MAI/DG2/RD(96)2] that a public order clause was meant to ensure certain objectives, including the non-discriminatory application of its laws. Delegations recognised the interest of a state in ensuring the application of its criminal laws, anti-terrorist measures, and money laundering regulations, for example. But not all delegations were convinced that it is necessary to discriminate between foreign and domestic investors in order to protect public order.

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

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

11. Delegations in favour of including a public order exception agreed that its use should be strictly controlled. The actions relating to public order would not be self-judging and would be subject to the limitation in paragraph 4. There was also some support for including a proviso that such actions should not nullify or impair any benefit a Contracting Party may reasonably expect under the agreement to an extent greater than is strictly necessary to the stated end (ECT).

Paragraph 4

12. A new paragraph 4 has been added to take account of comments that safeguards be provided to prevent abusive recourse to this article. As drafted, it would apply to exceptions based on essential security interests and on public order. Paragraph 4 is another way of formulating the obligation that parties must be in good faith when invoking this article. A party may not avail itself of the protection of this article if the action taken is not necessary to protect the interests covered thereby.

Paragraph 5

13. Pending discussion of the role of a "Parties Group", the Drafting Group preferred deleting the reference to the examination of measures taken pursuant to this article. The requirement that the measures be notified was retained in brackets. This requirement is intended to facilitate transparency and to promote consistency in the manner that MAI Parties might apply the general exceptions provisions. Some delegations thought that the 1991 clarification by the CIME that "measures taken for economic, cultural or other reasons should be identified as such and should not be shielded by an excessively broad interpretation of public order and essential security interests..", might also assist the Parties in applying these provisions.

Paragraph 6

14. Most delegations were in favour of providing for a mechanism for consultation/dispute settlement. It would be understood that entering into consultations would not prejudice the right of either Party to invoke the other procedures of the agreement to which it might be entitled. However, to the extent that exceptions for essential security interests are self-judging, they would not, by their nature, be matters for dispute settlement. The question remains whether paragraph 4 provides an objective standard which, if violated, can give rise to an actionable cause.

15. Some delegations suggested that the invocation of this article on the basis of essential security interests should be subject to consultation procedures only. Paragraph 6 could be adapted depending on how parties wish to proceed. There are several options which can be considered:

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

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

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

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