



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.5 on “Financial Services Matters”

BALANCE-OF-PAYMENTS CLAUSE

(Note by the Chair)

BALANCE-OF-PAYMENTS CLAUSE

(Note by the Chair)

1. EG5, at its meeting on 27-29 January 1997, agreed that, given the broad definition of investment envisaged for the MAI¹, a b.o.p clause permitting temporary departure from the disciplines of the MAI would be appropriate. (Some delegations felt that the b.o.p. clause would be necessary regardless of the scope of the definition of investment.)
2. EG5 agreed that the provisions of the GATS provide a useful starting point for such a b.o.p. clause. The MAI clause should only cover “crisis” situations or the threat of such situations developing and include provisions to ensure an early return to the disciplines of the MAI. The IMF should play a key role in determining whether recourse to the b.o.p. clause would be justified under the MAI. [See DAFPE/MAI/EG5(97)2].
3. The Group also considered the scope of a b.o.p. clause in the MAI:
 - a. The Group agreed that a b.o.p. clause should cover both transfers and underlying transactions. Some delegations wished to reflect further on this matter.
 - b. It agreed that the b.o.p. clause should cover capital outflows. A number of delegations considered that it should also cover capital inflows, while other delegations reserved their position on this matter. The Group agreed that further consideration to this matter is needed.
 - c. Most delegations were of the opinion that compensation from expropriation should not be excluded from the scope of the b.o.p. clause to avoid preferential treatment of certain categories of investors. Some delegations, however, felt that compensation from expropriation should be protected from the b.o.p. clause.
4. Furthermore, the Group agreed that, if the GATS provisions were to be used as a model for a b.o.p. clause of the MAI, the text of the GATS would have to be adapted to the characteristics of an investment agreement. In addition, delegations questioned the need to retain, in the MAI, provisions along the lines of Article XII (3) of the GATS.
5. Finally, the Group agreed that the dispute settlement provisions of the MAI should not apply to measures which have been authorised under the b.o.p. clause (whether by the IMF or the Parties Group). Application of the measures, however, would be subject to the normal dispute settlement provisions, both state-to-state and investor-to-state. Some delegations considered that further consideration of this matter is needed.
6. In light of these considerations, a draft text for the b.o.p. clause is proposed below for consideration by the Group. This text stays very close to Article XII of the GATS (reproduced in Annex to

¹ At its meeting on 29-31 January 1997, the Chairman of the Negotiating Group proposed a text on the definition of investment where the negative list and all square brackets were deleted [DAFFE/MAI(97)7]. The Negotiating Group agreed that the Chairman’s text provides the basis for its further work on the MAI. A footnote to this text recognises that this broad definition calls for further work on a number of matters, including appropriate safeguard provisions.

this Note), but modifications have been made to conform to the guidance of the January meeting of EG5. (Changes are indicated in bold and deletions are indicated in bolded square brackets.) In some cases options are offered in square brackets. A brief commentary on certain of these provisions follows the draft Article A, together with a draft Article B concerning respect of obligations in the IMF Articles of Agreement.

“Article A.

Restrictions to safeguard the balance of payments

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a **Contracting Party** may adopt or maintain [...] **measures otherwise inconsistent with its obligations under this Agreement**, including **restrictions** on payments or transfers **under Article xx²**. [...]

2. The restrictions referred to in paragraph 1:

- (a) shall not discriminate among **Contracting Parties**;
- (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
- (c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other **Contracting Party**;
- (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
- (e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.

[...]

3. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the **Parties Group**.

4. (a) **Contracting Parties** applying the provisions of this Article shall consult promptly with the **Parties Group** on restrictions adopted under this Article.

(b) The **Parties Group** shall establish procedures for [...] consultations with the objective of enabling such recommendations to be made to the **Contracting Party** concerned as it may deem appropriate.

(c) Such consultations shall assess the balance-of-payments situation of the **Contracting Party** concerned and the restrictions adopted or maintained under this Article, taking into account, *inter alia*, such factors as:

² This refers to the Transfers Article of the MAI which can be found on page 41 of the Consolidated Texts and Commentary [DAFFE/MAI(97)1].

- (i) the nature and extent of the balance-of-payments and the external financial difficulties;
- (ii) the external economic and **financial** [...] environment of the consulting **Contracting Party**;
- (iii) alternative corrective measures which may be available.

(d) The consultations shall address the compliance of any restrictions with paragraph 2, in particular the progressive phaseout of restrictions in accordance with paragraph 2 (e).

(e) In such consultations, [...] the assessment by the International Monetary Fund of the balance-of-payments and the external financial situation of the consulting **Contracting Party and the compliance of any restrictions with paragraph 2 shall be accepted by the Parties Group**.

5. If the Parties Group determines, [by consensus] [consensus minus one] [a two-thirds majority] that the measures adopted or maintained by the consulting Contracting Party [are not justified] [do not comply with the provisions of this Article], the measures shall not be continued beyond [ninety] days. In reaching such determination, decisions of the International Monetary Fund shall be accepted by the Parties Group. [...]"

Commentary

1. As worded, paragraph 1 would cover measures affecting both underlying transactions and transfers, and both capital outflows and capital inflows.

2. Paragraph 4 a) of the proposed Article A leaves open the precise modalities of the procedures to follow in cases of invocation by a Contracting Party of the b.o.p. derogation clause. These modalities would have to be determined by the Parties Group. Examples of such modalities may include a requirement that the Contracting Party concerned notify the reasons for invoking the b.o.p. derogation clause, periods within which the restrictions shall be reconsidered by the Parties Group, and the possibility for another Contracting Party to refer to the Parties Group for reconsideration of the case at issue³.

3. Paragraph 4 e) of the proposed Article A has been adapted to give the Fund a determining role in assessing the b.o.p. and external financial situation of a Contracting Party resorting to the b.o.p. derogation clause. This adaptation is meant to eliminate the possibility that the MAI Parties Group might override the Fund's position and thus avoid the possibility of institutional conflicts and uncertainty.. The Fund's overall assessment -- not only the statistical and factual findings presented by the Fund, as under Article XII (5) e) of the GATS -- shall be accepted by the Parties Group. In making such an assessment, the Fund would be free to make a determination as to whether the adoption or maintenance of restrictions is justified. There may be situations where the Fund does not provide an assessment with respect to all the issues addressed in paragraphs 2 and 4c). In these situations, the evaluation of the pending issues would be left to the Parties Group. .

³ The OECD Code of Liberalisation of Capital Movements contains procedural provisions to this effect, in particular under its Article 13 (see Annex).

4. Paragraph 4 deals with consultations and recommendations only. It could be argued that it does not by itself prevent a Contracting Party from maintaining its restrictions even if the outcome of the consultation/recommendation process is that invocation of the derogation clause is not justified and that the restrictions should be removed. To remedy this possible gap, paragraph 5 is submitted for the Group's consideration.

5. Paragraph 5 provides for formal ex-post approval by the Parties Group within a period of time to be determined. It also provides that if the Fund makes a decision that the measures concerned are justified, the Parties Group will be bound to endorse the Fund's decision.

6. Approval by the Fund (or, in the absence of a decision by the Fund, by the Parties Group) could not be subject to the dispute settlement of the MAI. But whether the practical implementation of the restrictions meets the conditions under which their adoption or maintenance have been approved could be subject to the dispute settlement of the MAI, for example if the measure concerned were implemented in a way that results in discrimination among Contracting Parties.

7. EG5 may wish to consider whether the Article should contain an additional paragraph or an interpretative note specifying the scope of application of dispute settlement in regard of the invocation of the b.o.p. clause. EG5 may also wish to consider whether the Fund should have a role in the dispute settlement process.

8. Paragraph 6 of Article XII of the GATS, which deals with procedures to follow with respect to a Contracting Party which is not a member of the IMF, has not been retained. The Parties Group would have the power to determine the procedures to follow in the (unlikely) event that a MAI Party is not a member of the IMF.

9. There may be no need for any further provisions on the IMF beyond those included in the b.o.p. clause. It would seem inappropriate to include in the MAI a reference to the **rights** of a Contracting Party under the IMF's Articles of Agreement as contained in Article XI of the GATS, since the thrust of the MAI is to liberalise investment flows while rights of the Fund's members -- at least under the Articles of the Agreement currently force -- include, *inter alia*, the right to exercise controls on capital transfers under Article VI (3) of the IMF and that of maintaining or adapting to changing circumstances restrictions on payments and transfers for current international transactions under Article XIV on Transitional Arrangements⁴. Moreover, the proposed paragraphs 4 e) and 5 for the MAI b.o.p. clause would seem to be sufficient to protect the role of the IMF as guardian of the international monetary system and lender of last resort in the event of financial crises.

⁴ Possible amendments to the Fund's Articles to extend IMF jurisdiction to capital movements are under discussion. However, whether such an extension would apply to transactions in addition to transfers, capital inflows as well as capital outflows, etc. is still unknown.

10. For greater certainty, however, it might be useful to include a clause in the MAI to recall that the MAI Contracting Parties would remain bound to their IMF obligations. Such a clause could draw on the formula adopted by the OECD Code of Liberalisation of Capital Movements (see Annex), to read as follows:

“Article B

Obligations in 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. “

ANNEX

Balance -of-payments clauses in other international agreements

GATS

Article XII

Restrictions to Safeguard the Balance of Payments

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.
2. The restrictions referred to in paragraph 1:
 - (a) shall not discriminate among Members;
 - (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
 - (c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;
 - (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
 - (e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.
3. In determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.
4. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the General Council.
5. (a) Members applying the provisions of this Article shall consult promptly with the Committee on Balance-of-Payments Restrictions on restrictions adopted under this Article.

(b) The Ministerial Conference shall establish procedures⁵ for periodic consultations with the objective of enabling such recommendations to be made to the Member concerned as it may deem appropriate.

(c) Such consultations shall assess the balance-of-payment situation of the Member concerned and the restrictions adopted or maintained under this Article, taking into account, *inter alia*, such factors as:

- (i) the nature and extent of the balance-of-payments and the external financial difficulties;
- (ii) the external economic and trading environment of the consulting Member;
- (iii) alternative corrective measures which may be available.

(d) The consultations shall address the compliance of any restrictions with paragraph 2, in particular the progressive phaseout of restrictions in accordance with paragraph 2(e).

(e) In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member.

6. If a Member which is not a member of the International Monetary Fund wishes to apply the provisions of this Article, the Ministerial Conference shall establish a review procedure and any other procedures necessary.

Article XI

Payments and Transfers

1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.

⁵ It is understood that the procedures under paragraph 5 shall be the same as the GATT 1994 procedures.

NAFTA

Article 2104: Balance of Payments

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures that restrict transfers where the Party experiences serious balance of payments difficulties, or the threat thereof, and such restrictions are consistent with paragraphs 2 through 4 and are:

- (a) consistent with paragraph 5 to the extent they are imposed on other transfers than cross-border trade in financial services; or
- (b) consistent with paragraphs 6 and 7 to the extent they are imposed on cross-border trade in financial services.

General Rules

2. As soon as practicable after a Party imposes a measure under this Article, the Party shall:

- (a) submit any current account exchange restrictions to the IMF for review under Article VIII of the Articles of Agreement of the IMF;
- (b) enter into good faith consultations with the IMF on economic adjustment measures to address the fundamental underlying economic problems causing the difficulties; and
- (c) adopt or maintain economic policies consistent with such consultations.

3. A measure adopted or maintained under this Article shall:

- (a) avoid unnecessary damage to the commercial, economic or financial interests of another Party;
- (b) not be more burdensome than necessary to deal with the balance of payments difficulties or threat thereof;
- (c) be temporary and be phased out progressively as the balance of payments situation improves;
- (d) be consistent with paragraph 2(c) and with the Articles of Agreement of the IMF; and
- (e) be applied on a national treatment or most-favored-nation treatment basis, whichever is better.

4. A Party may adopt or maintain a measure under this Article that gives priority to services that are essential to its economic program, provided that a Party may not impose a measure for the purpose of protecting a specific industry or sector unless the measure is consistent with paragraph 2(c) and with Article VIII(3) of the Articles of Agreement of the IMF.

Restrictions on Transfers Other than Cross-Border Trade in Financial Services

5. Restrictions imposed on transfers, other than on cross-border trade in financial services:
- (a) where imposed on payments for current international transactions, shall be consistent with Article VIII(3) of the Articles of Agreement of the IMF;
 - (b) where imposed on international capital transactions, shall be consistent with Article VI of the Articles of Agreement of the IMF and be imposed only in conjunction with measures imposed on current international transactions under paragraph 2(a);
 - (c) where imposed on transfers covered by Article 1109 (Investment - Transfers) and transfers related to trade in goods, may not substantially impede transfers from being made in a freely usable currency at a market rate of exchange; and
 - (d) may not take the form of tariff surcharges, quotas, licenses or similar measures.

Restrictions on Cross-Border Trade in Financial Services

6. A Party imposing a restriction on cross-border trade in financial services:
- (a) may not impose more than one measure on any transfer, unless consistent with paragraph 2(c) and with Article VIII(3) of the Articles of Agreement of the IMF; and
 - (b) shall promptly notify and consult with the other Parties to assess the balance of payments situation of the Party and the measures it has adopted, taking into account among other elements
 - (i) the nature and extent of the balance of payments difficulties of the Party,
 - (ii) the external economic and trading environment of the Party, and
 - (iii) alternative corrective measures that may be available.
7. In consultations under paragraph 6(b), the Parties shall:
- (a) consider if measures adopted under this Article comply with paragraph 3, in particular paragraph 3(c); and
 - (b) accept all findings of statistical and other facts presented by the IMF relating to foreign exchange, monetary reserves and balance of payments, and shall base their conclusions on the assessment by the IMF of the balance of payments situation the Party adopting the measures.

OECD CODE OF LIBERALISATION OF CAPITAL MOVEMENTS

Article 7

CLAUSES OF DEROGATION

- a. If its economic and financial situation justifies such a course, a Member need not take the whole of the measures of liberalisation provided for in Article 2(a).
- b. If any measures of liberalisation taken or maintained in accordance with the provisions of Article 2(a) result in serious economic and financial disturbance in the Member State concerned, that Member may withdraw those measures.
- c. If the overall balance of payments of a Member develops adversely at a rate and in circumstances, including the state of its monetary reserves, which it considers serious, that member may temporarily suspend the application of measures of liberalisation taken or maintained in accordance with the provisions of Article 2(a).
- d. However, a Member invoking paragraph (c) shall endeavour to ensure that its measures of liberalisation:
 - i) cover, twelve months after it has invoked that paragraph, to a reasonable extent, having regard to the need for advancing towards the objective defined in sub-paragraph *ii*), transactions and transfers which the Member must authorise in accordance with Article 2(a) and the authorisation of which it has suspended, since it invoked paragraph (c); and
 - ii) comply, eighteen months after it has invoked that paragraph, with its obligations under Article 2(a).
- e. Any Member invoking the provisions of this Article shall do so in such a way as to avoid unnecessary damage which bears especially on the financial or economic interests of another Member and, in particular, shall avoid any discrimination between other Members.

Article 13

NOTIFICATION AND EXAMINATION OF DEROGATIONS MADE UNDER ARTICLE 7

- a. Any Member invoking the provisions of Article 7 shall notify the Organisation forthwith of its action, together with its reasons therefor.
- b. The Organisation shall consider the notification and reasons submitted to it in accordance with the provisions of paragraph (a) with a view to determining whether the Member concerned is justified in invoking the provisions of Article 7 and, in particular, whether it is complying with the provisions of paragraph (e) of that Article.

c. If the action taken by a Member in accordance with the provisions of Article 7 is not disapproved by the Organisation, that action shall be reconsidered by the Organisation every six months or, subject to the provisions of Article 15, on any other date which the latter may deem appropriate.

d. If, however, in the opinion of a Member other than the one which has invoked Article 7, the circumstances justifying the action taken by the latter in accordance with the provisions of that Article have changed, that other Member may at any time refer to the Organisation for reconsideration of the case at issue.

e. If the action taken by a Member in accordance with the provisions of paragraph (a), (b) or (c) of Article 7 has not been disapproved by the Organisation, then if that Member subsequently invokes paragraph (a), (b) or (c) of Article 7 of the Code of Liberalisation of Current Invisible Operations, or, having invoked one paragraph of Article 7 of this Code, invokes another paragraph of that Article, its case shall be reconsidered by the Organisation after six months have elapsed since the date of the previous consideration, or on any other date which the latter may deem appropriate. If another Member claims that the Member in question is failing to carry out its obligations under paragraph (e) of Article 7 of this Code or paragraph (e) of Article 7 of the Code of Liberalisation of Current Invisible Operations, the Organisation shall consider the case without delay.

f. *i)* If the Organisation, following its consideration in accordance with paragraph (b), determines that a Member is not justified in invoking the provisions of Article 7 or is not complying with the provisions of that Article, it shall remain in consultation with the Member concerned, with a view to restoring compliance with the Code.

ii) If, after a reasonable period of time, that Member continues to invoke the provisions of Article 7, the Organisation shall reconsider the matter. If the Organisation is then unable to determine that the Member concerned is justified in invoking the provisions of Article 7 or is complying with the provisions of that Article, the situation of that Member shall be examined at a session of the Council convened by its Chairman for this purpose unless the Organisation decides on some other procedure.

Article 14

EXAMINATION OF DEROGATIONS MADE UNDER ARTICLE 7 MEMBERS IN PROCESS OF ECONOMIC DEVELOPMENT

a. In examining the case of any Member which it considers to be in the process of economic development and which has invoked the provisions of Article 7 the Organisation shall have special regard to the effect that the economic development of the Member has upon its ability to carry out its obligations under paragraph (a) of Articles 1 and 2.

b. In order to reconcile the obligations of the Member concerned under paragraph (a) of Article 2 with the requirements of its economic development, the Organisation may grant that Member a special dispensation from those obligations.

Article 15

SPECIAL REPORT AND EXAMINATION CONCERNING DEROGATIONS MADE UNDER ARTICLE 7

a. A Member invoking the provisions of paragraph (c) of Article 7 shall report to the Organisation, within ten months after such invocation, on the measures of liberalisation it has restored or proposes to restore in order to attain the objective determined in sub-paragraph (d*i*) of Article 7. The Member shall, if it continues to invoke these provisions, report to the Organisation again on the same subject -- but with reference to the objective determined in sub-paragraph (d*ii*) of Article 7 -- within sixteen months after such invocation.

b. If the Member considers that it will not be able to attain the objective, it shall indicate its reasons in its report and, in addition, shall state:

i) what internal measures it has taken to restore its economic equilibrium and what results have already been attained, and

ii) what further internal measures it proposes to take and what additional period it considers it will need in order to attain the objective determined in sub-paragraph (d*i*) or (d*ii*) of Article 7.

c. In cases referred to in paragraph (b), the Organisation shall consider within a period of twelve months, and, if required, of eighteen months from the date on which the Member invoked the provisions of paragraph (c) of Article 7, whether the situation of that Member appears to justify its failure to attain the objective determined in sub-paragraph (d*i*) or (d*ii*) of Article 7 and whether the measures taken or envisaged and the period considered by it as necessary for attaining the objective determined, appear acceptable in the light of the objectives of the Organisation in the commercial and financial fields.

d. If a Member invokes the provisions of both paragraph (c) of Article 7 of this Code and paragraph (c) of Article 7 of the Code of Liberalisation of Current Invisible Operations, the periods of twelve and eighteen months referred to in paragraph (c) shall run from the date of the earlier invocation.

e. If following any of the examinations provided for in paragraph (c) the Organisation is unable to approve the arguments advanced by the Member concerned in accordance with the provisions of paragraph (b), the situation of that Member shall be examined at a session of the Council convened by its Chairman for this purpose unless the Organisation decides on some other procedure.

Article 4

OBLIGATIONS IN EXISTING MULTILATERAL INTERNATIONAL AGREEMENTS

Nothing in this Code shall be regarded as altering the obligations undertaken by a Member as a Signatory of the Articles of Agreement of the International Monetary Fund or other existing multilateral international agreements.