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

**CONSOLIDATED TEXTS AND COMMENTS  
BY DRAFTING GROUPS N° 1, N° 2 AND N° 3**

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## **A. CONSOLIDATED TEXTS**

## I. 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, [branch], joint venture, association or organisation.

### 2. Investment means:

(a) Every kind of asset owned or controlled[,] directly [or indirectly,] by an investor, including<sup>1</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 to and other form of debt [of an enterprise]; [and rights derived therefrom];

(iv) rights under contracts, including turnkey, construction or management contracts, production or revenue-sharing contracts, [or concession contracts];

(v) claims to money, and claims to performance pursuant to a contract [associated with an investment] [having an economic value];

(vi) intellectual property rights;

(vii) [rights conferred pursuant to law such as concessions, licenses, and permits] **or [any rights conferred by law or contract or by virtue of any concessions, licenses or permits to undertake any economic activity];**

(viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges,

**[unless such assets lack the characteristics of an investment.]**

**[(b) Except for the purposes of expropriation and compensation and protection from strife [and transfers]] "Investment" does not include [inter alia]<sup>2</sup>**

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1 Pending final determination of the scope and content of the agreement, one delegation reserved its position as to whether the positive list should be open or closed.

2 One Delegation proposed to include a generic phrase at the head of the negative list.

**[(i) claims to money that arise solely from commercial transactions[, including the extension of credit,] for the sale of goods or services;]**

**[(ii) traded goods;]**

**[(iii) public debt;] [debt securities and loans of a state enterprise or Contracting Party;]**

**[(iv) foreign exchange operations;]**

**[(v) “*financial operations*”;**

**[unless the transactions [to which such [claims, goods, debt, or -----] relate] otherwise have the characteristics of an investment; or]**

**[unless the respective claims are assets of an enterprise mentioned in paragraph (a) (i); or]**

**[unless such assets are acquired for the purpose of establishing lasting economic relations with an enterprise; or]**

**[(vi) derivatives where the underlying asset is not regarded as an investment],**

**(vii) [real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes] or [moveable or immovable property, and any related rights, acquired for personal use.]**

## II. 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>3</sup>

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3 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. The Group agreed that this matter should be considered in the wider context of “general exceptions”.

### III. TREATMENT OF INVESTORS AND INVESTMENTS

#### 1. NATIONAL TREATMENT AND MOST FAVOURED NATION TREATMENT

1.1. 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.

1.2. 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.

1.3. 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.

#### 2. TRANSPARENCY

2.1. 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>4</sup>

2.2. 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.

**2.3 Nothing in this Agreement shall prevent a Contracting Party from requiring an investor of another Contracting Party, or its investment, to provide routine information concerning that investment solely for information or statistical purposes. No Contracting Party shall be required to furnish or allow access to information concerning particular investors or investments the disclosure of which would impede law enforcement or would be contrary to its laws [policies, or practices]<sup>5</sup> protecting confidentiality.**

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4 The Chairman of the Negotiating Group proposed to remove the brackets on this sentence, noting that several delegations could go along with this proposal provided that there was a satisfactory explanatory statement in the commentary [DAFFE/MAI/M(96)4]. DG3 did not address this issue.

5 Proposed by one delegation.

#### IV. INVESTMENT PROTECTION

##### 1. GENERAL TREATMENT<sup>6</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. [...]

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>7</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

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

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

7 Drafting Group 3 identified four options for calculating compensation which are set out in the commentary.

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.

### 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>8</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>9</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].**

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8 As defined in the Article on definitions.

9 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.

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>10</sup>

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

## 5. SUBROGATION

5.1. If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance [.....]<sup>11</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>12</sup>

5.2. A Contracting Party shall not assert as a defence, counterclaim, 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.

## 6. PROTECTING EXISTING INVESTMENTS

**A: [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 B: [This Agreement shall apply to investments existing at the time of entry into force as well as to those established or acquired thereafter.]**

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

11 Two delegations cannot agree to deletion of the words “non-commercial risks” at this stage.

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

**7. MORE FAVOURABLE TREATMENT**

**[If the provisions of law of a Contracting Party or obligations of a Contracting Party under international law, existing at present or established hereafter, contain a rule, whether general or specific, entitling investors of other Contracting Parties or their investments to a treatment more favourable than is provided for by the present Agreement, such a rule shall, to the extent that it is more favourable, prevail over the present Agreement.]<sup>13</sup>**

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<sup>13</sup> The language of the proposed text is put forward by the one delegation as an illustration of how such a provision could be drafted. It was not fully discussed in DG3.

## V. GENERAL EXCEPTIONS

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

2. Nothing in this Agreement shall be construed:

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

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

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

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

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

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

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

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

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

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

## **B. CONSOLIDATED COMMENTS**

## I. DEFINITIONS OF “INVESTOR” AND “INVESTMENT”

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

### Investor

1. One delegation noted that the use of the word “nationality” may require the development of an annex to the MAI in which participants would be able to clarify the meaning of “nationality” in terms of their respective domestic laws.
2. Some delegations expressed concerns relating to the inclusion of permanent residents in the definition of investor. If permanent residents are included, it would be necessary to specify that permanent residents would be those that are recognised as such under the applicable law of each Contracting Party. Concerns relating to their standing for purposes of dispute settlement could be addressed in the MAI provisions dealing with dispute settlement.
3. Some delegations questioned the inclusion of branches in the definition of investor as in their countries branches do not have the legal capacity to make investments. Other delegations expressed concern that including branches in the definition of investor could give rise to a “free-rider” problem.  
**DG3 identified three options:**

- (a) **Include branches in list with an interpretative statement, which might read<sup>14</sup>:**

**“Whether such an entity can be an investor will depend upon its legal capacity to make an investment on its own behalf under the law of the Contracting Party under which it is constituted or organised and the law of the Contracting Party in which the investment is to be made.” or**

- (b) **Include branches in the definition and permit country specific reservations; or**
- (c) **Delete the reference to branches in the list in the definition of investor and add “within the limits of its legal capacity”.**

**Options (a) and (b) are of the same nature, with only a difference in method: the conditions under which branches would be included could be expressed in a general interpretative note and/or through country specific reservations. Expert Group N°5 on Financial Services Matters should be asked to look at this.**

4. **The issue of sole proprietorship has been raised by one delegation, but not discussed.**
5. **One delegation proposed to add the words “of a Contracting Party” after “legal person” in the definitions of “investor” and “investment” to cover the case of enterprises which may operate, but which are not constituted, in accordance with the applicable law of a Contracting Party. DG3 recognised the point raised by this delegation. Most delegations believed that these enterprises would be covered by the existing texts. If necessary, a possible solution could be found in adding the words “or operating” after “constituted or organised” in the definitions of investor and investment.**

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14 **Work needs to be done on the language of this interpretative statement.**

6. Some delegations suggested that further consideration be given to the possible need for, or desirability of, including in the definition of investor an additional item to cover a Contracting Party (i.e. a State).

## **Investment**

7. The Drafting Group examined a definition of investment on the assumption that the MAI would contain a single, broad definition covering all forms of assets, including tangible and intangible assets. The consideration of such a definition does not prejudge the scope of its application to the various MAI rights and obligations.

8. While the question of the scope and application of the MAI is still to be resolved, the Drafting Group made the following observations. There was consensus in favour of applying a broad definition with respect to the MAI obligations to protect existing investments; however, several delegations expressed concern over how the MAI obligation concerning national treatment would apply in the pre-establishment phase. Some delegations consider that an unqualified application of this obligation to a broad range of assets could interfere with regulations of financial markets and other operations which are not meant to be covered by the MAI. One delegation also considered that an unqualified application would cause confusion with respect to the precise contents of obligations in the pre-establishment phase.

9. To address this concern while maintaining a broad and single definition under the MAI, specific reservations could be lodged wherever a country is not in a position to fully accord national treatment or other MAI obligations. [...]

10. It was noted that NAFTA and the GATS have special provisions concerning financial services, including provisions relating to prudential matters. [...]

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

**12. DG3 agreed on the structure of the article on the definition of investment, i.e. a broad positive list and a limited negative list. There was also agreement on the categories to be included in the negative list, i.e. trade-related transactions (i) and (ii), public debt (iii), foreign exchange operations (iv) and derivatives (vi), real estate for personal use or non-business purposes (vii). For these items the drafting needs to be refined.**

**13. For financial operations (items iv), v) and vi)), advice is requested from Expert Group N° 5 with the aim of better defining the nature of the transactions that must be excluded.**

14. Some delegations are concerned that a broad definition of investment might result in a proliferation of dispute settlement claims. If necessary, this concern can be addressed by limiting access to the MAI dispute settlement mechanism, either through a provision in the dispute settlement article or through limitations in the definition itself.

15. Views differ on whether the definition of investment should cover investments indirectly owned or controlled by investors of a Party. Some delegations are of the opinion that covering such investment offers maximum protection to investors, including access to MAI dispute settlement. In addition, those delegations believe that this approach offers the most flexibility to investors in managing their capital

flows, and avoids diverting investment flows from developing countries. **The Group considered four cases:**

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

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

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

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

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

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

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

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

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

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

**18. Related to it was the question of standing for MAI dispute settlement on which the Negotiating Group might provide guidance to Expert Group N°1. Under investor-state proceedings, most delegations considered that only the parent MAI investor would have standing, but some delegations were open to allowing the intermediary entity to have standing as well. Under state-to-state proceedings, all delegations suggested, as a matter of principle, giving no standing to the non-MAI government of the intermediary.**

**19. There was consensus that case (c) and case (d) investments would be covered by the MAI. There was no further debate on the legal implications.**

**20. Related to each of these cases was the question of which entities and states have standing for MAI dispute settlement, an issue for consideration by Expert Group N°1. This includes which tier or tiers of investors have standing in investor-state dispute settlement and which MAI Party (state or states) have standing in state-to-state dispute settlement.**

**21. One delegation considered that the inclusion of indirectly controlled investments might pose serious problems to the EU Members states as far as their present level of liberalisation is concerned as**

this normally also applies to companies established in the EU, but under control of a non-EU country. One delegation suggested that such problems could eventually be effectively addressed by a general MAI provision on measures taken within Regional Economic Integration Agreements.

\* \* \*

22. Most delegations would prefer the definition of investment to be an open one, **hence** the word “including” in the chapeau [...].

**Item (i)**

An enterprise (being a legal person or any 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, branch, joint venture, association or organisation).

23. The term “enterprise” is defined in parenthesis in the proposed text but could be defined separately. It was agreed that the definition covers, inter alia, scientific research institutes and universities. Most delegations favoured the same definition of enterprise for “investor” and “investment”. It was also proposed to define “enterprise of a Contracting Party”.

24. Some delegations questioned whether “government owned or controlled enterprises” should be considered “investments”. Separately, some delegations thought that the notion “whether private or government owned or controlled” should be deleted given that ownership and control are dealt with in the chapeau.

**Item (ii)**

Shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;

25. This item, as well as item (iii), includes portfolio investment and minority holdings. It is for consideration whether the definition covers strategic alliances and other arrangements involving know-how, intellectual property, or technology or the joint conduct of research and development programmes. This item is also understood to cover an interest in an enterprise that entitles the owner to share in income and profits of an enterprise and its assets. The extent to which the substantive obligations of the agreement will apply to this item and to item (iii), in particular portfolio investment and foreign exchange operations, will need further examination in the light of concerns expressed by some delegations.

**Item(iii)**

Bonds, debentures, loans to and other forms of debt of an enterprise;

26. This item would cover loans of all maturities and debt securities of a state enterprise.

27. One delegation wishes to exclude loans of less than three years, other than loans between affiliates of an enterprise. Other delegations consider that this issue requires further consideration.

28. Some delegations consider that sovereign debt should not be included, while others believe that including sovereign debt (which includes state-owned enterprise debt) requires further consideration. One element to be considered in this respect would be the sovereign liquidity issue. Some delegations pointed out that confiscatory measures by a debtor state entail international responsibility which should be dealt with in the MAI.

**Item (iv)**

Rights under contracts, including turnkey, construction or management contracts, production or revenue-sharing contracts, [or concession contracts];

29. Some delegations thought that items (iv) and (v) should be combined. Some delegations proposed deleting “concession contracts” from item (iv) and to address the question of concessions in a revised item (vii).

30. It was also suggested, by several delegations, to add a reference to franchising, licensing and “BOOT” agreements.

31. Some delegations wish to retain, for further consideration, a previous text for item (iv) which would read as follows:

“an interest arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in such territory, such as under

-- contracts involving the presence of an investor’s property in the territory of a Party, including turnkey or construction contracts, or concessions, or

-- contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.”

**Item (v)**

Claims to money, and claims to performance pursuant to a contract [associated with an investment] [having an economic value];

32. “Claims to money” includes bank deposits. Most delegations consider that this item covers derivatives which are not covered elsewhere in the list of assets.

33. Claims to money may also arise as a result of a sale of goods or services. These claims are not generally considered as investments. The NAFTA excludes such claims unless they are associated with the investment interests which are set out in its definition. The ECT also requires that these claims be associated with an investment. Similar questions arise with respect to “rights under contracts” (item iv).

34. One delegation proposed to address these matters in the MAI by adding the words “associated with an investment” and deleting the words “having an economic value”. Some delegations supported the following alternative text:

“Claims to money and claims to performance pursuant to a contract [associated with an investment] having an economic value, with the exception of :

- (a) Commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Contracting Party to an enterprise in the territory of another Contracting Party;
- (b) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by item (iii); or;
- (c) any other claims to money that do not involve the kinds of interests set out in items (i) through (ix).”

Delegations felt that these matters merit further consideration.

#### **Item (vi)**

Intellectual property rights;

35. All forms of intellectual property are included in the definition of "investment," including copyrights and related rights, patents, industrial designs, rights in semiconductor layout designs, technical processes, trade secrets, including know-how and confidential business information, trade and service marks, and trade names and goodwill. Views differed on whether it is necessary to specifically refer to some of these elements in the definition as part of the illustrative list of assets. Some delegations consider that the question of whether to include “literary and artistic property rights” has not yet been decided. One delegation wishes to cover intellectual property rights under the MAI only when acquired in the expectation of economic benefit or other business purposes.

36. Further work may be needed to clarify the relationship of the MAI to other international agreements that relate to intellectual property, particularly where these conventions might require standards of treatment which differ from the MAI or where these conventions provide for dispute settlement mechanisms.

#### **Item (vii)**

[Rights conferred pursuant to law such as concessions, licenses, and permits; ] or [**any rights conferred by law or contract or by virtue of any concessions, licenses or permits to undertake any economic activity**]

37. Rights such as concessions, licenses and permits are generally meant to cover rights to search for, cultivate, extract or exploit natural resources. Most bilateral treaties, and the ECT, refer to rights conferred by law or under contract and extend protection to such rights. One delegation considered that this item covers public law contracts.

**38. Most delegations preferred to keep concessions in the definitions and to require reservations by any country wishing to discriminate in granting concessions. Some delegations were of the opinion that the issue of the granting of concessions should be kept outside the definition of investments.**

39. Some delegations indicated that certain aspects of concessions raised issues related to monopolies in general and to cross-border government procurement, which might require some special provision or clarification in the MAI.

40. Further work will be necessary, bearing in mind that some delegations believe it is necessary to determine whether the rights conferred by virtue of concessions, or the concession as such, are separate elements under the definition of investment.

**Item (viii)**

any other tangible and intangible, moveable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

41. This category includes real estate which is a common form of property protected under BITs, the ECT and NAFTA. There are different views on item (viii) including whether the definition should cover summer residences or second homes. NAFTA, however, excludes real estate or other property which is not acquired in the expectation, or used for the purpose, of economic benefit or other business purposes, and some delegations prefer such an approach.

**-- Other Elements**

42. Some delegations consider that the MAI should include “returns, or “reinvested returns” as part of the definition of investment as in the ECT.

43. Spain expressed the view that changes of activities of an investment should also be taken into consideration.

[...]

## II. TREATMENT OF INVESTORS AND INVESTMENTS

### General

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

### NATIONAL TREATMENT AND MOST FAVOURED NATION TREATMENT

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

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

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

4. Different views were expressed on the value of a “closed” or “open” list of investment activities to be covered by the National Treatment and MFN provisions, before and/or after establishment. A closed list had the advantage of certainty, but risked omitting elements that could be important to the investor. An open list would cover all possible investment activities, including new activities. But it could also create uncertainties as to the scope of the Agreement and might have adverse effects on the operation of existing bilateral and other investment agreements using a closed list. Several Delegations believed that the list “establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments” should be considered a comprehensive one whose terms were

intended to cover all activities of investors and their investments for both the pre- and post-establishment phases. In their view, this was the preferable approach. It was also suggested that the term “sale or other disposition” should replace “disposal” in Article 1.2 of the draft articles on selected topics on Investment Protection [DAFFE/MAI/DG1(95)3]).

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

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

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

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

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

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

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

8. One delegation made a written proposal to refer, in the treatment of investors/investments article, to the concept of “equivalent competitive opportunities” analogous to that of GATS (Article XVII). This was presented as a means of strengthening the national treatment provision by requiring that foreign investors and their investments have the opportunity to compete on terms equivalent to those enjoyed by

domestic investors. This proposal was considered by some delegations to have positive elements particularly with respect to the treatment of branches of foreign financial institutions. “Equivalent treatment” was the basis of comparison, in the OECD Code of Liberalisation of Current Invisible Operations, between domestic financial institutions and branches, agencies, etc., of foreign financial institutions. Several delegations considered, however, that the introduction of the concept of “equivalent competitive opportunities” into Article 1 might create confusion on how to apply the national treatment and MFN obligations, and might even go beyond what these obligations were intended to cover. Other delegations suggested that issues concerning branches might be solved in the definition of “investments”.

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

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

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

## TRANSPARENCY

1. Public dissemination of measures affecting foreign investment was considered essential to the operation of the MAI. Nevertheless a balance should be struck between this objective and the administrative burden of implementing it.
2. When sub-national, local or other authorities publish or otherwise make publicly available information on matters under their jurisdiction, this would be considered sufficient to meet the obligation of Article 2.1. There would be no obligation to duplicate this information at the federal or central government level.
3. The second sentence of Article 2.1 refers to situations in some countries where governments choose to establish policies that are not expressed in laws, regulations or other measures listed in this paragraph. However, as the legal standing and recourse to these policies varies among Member countries, it was agreed that they should be subject to transparency obligations only for governments which use this approach.
4. Regarding Article 2.2, a majority of delegations considered the establishment of specific enquiry points to be unnecessary. Other delegations considered that these enquiry points could contribute to the effective functioning of the MAI. They could also be useful to foreign investors by making available information of interest to them.
5. Article 2.3 addresses the concerns that may arise with respect to the disclosure of information in the context of law enforcement or laws protecting confidentiality. Such concerns are addressed in other international agreements (GATS, Energy Charter, NAFTA). It was felt unnecessary, however, to add a reference to national security and public order since this issue would be addressed in the general exception article.
6. **One delegation, supported by other delegations, proposed to add an additional sentence to article 2.3 and an additional paragraph on Special Formalities and Information Requirements as follows:**

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

**["Nothing in Article 1.1<sup>15</sup> shall be construed to prevent a Contracting Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another Contracting Party, such as a requirement that investors be residents of the Contracting Party, or that investments be legally constituted under the laws or regulations of the Contracting Party, provided that such formalities do not materially impair the protections afforded by a Contracting Party to investors of another Contracting Party and investments of investors of another Contracting Party pursuant to this Agreement."]**

7. Some delegations expressed concern that the additional texts could be used to circumvent the non-discrimination obligations of the Agreement. There were serious concerns as to the substantive

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15 General Treatment Article.

**implications of the paragraph, in particular relating to the residency requirements. In the opinion of DG3, this issue relates to the rest of the agreement and should be solved at a later stage.**

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

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

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

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

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

[....]

## IV. INVESTMENT PROTECTION

### GENERAL TREATMENT

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

## EXPROPRIATION AND COMPENSATION

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

### **Option A - Investor's Choice**

**The compensation to be paid shall be calculated by summing:**

- (a) **the fair market value of the expropriated investment on the date of expropriation, expressed, at the option of the investor on the date of expropriation, in either:**
  - (i) **the currency of the host state;**
  - (ii) **the currency of the investor's home state;**
  - (iii) **a freely usable currency; or**

- (iv) any other currency acceptable to the host government

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

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

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

**Option B - Government Choice: Multiple currency option**

The compensation to be paid shall be calculated by summing:

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

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

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

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

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

**Option C - Government Choice - Freely Convertible Currency specially defined<sup>16</sup>**

The compensation to be paid shall be calculated by summing:

- (a) the fair market value of the expropriated investment on the date of expropriation expressed in a Freely Convertible Currency chosen by the host government on the date of expropriation at the market rate of exchange prevailing on that date, plus....

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

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

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

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<sup>16</sup> The definition of “Freely Convertible Currency” would need to be the same as that adopted for the “Transfers” provision (article 4.2).

**Option D - No Explicit Coverage of Exchange Loss Provision**

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

9. **A majority of delegations favoured Option D. Some delegations considered that the international law standard of compensation, set out in Article 2, which requires payment of full market value in fully realisable form and without delay, has implicit within it the requirement of offsetting declines in the currency of valuation between the valuation date and the payment, where there was a delay. Others considered this approach to be too vague or to leave the issue open for later dispute. They therefore favoured an explicit provision on the method to be used in calculating expropriation compensation including the choice of reference currency.**
10. **A number of delegations favoured giving the investor a choice of currency. Some favoured limiting the choice to the currencies of the home or host government. Others favoured broadening that choice somewhat. There was a consensus among them that the choice could not be unlimited. Option A illustrates their approach.**
11. **A number of other delegations considered that the choice of currency should be with the host government. Several of those delegations supported Option C. One delegation preferred Option B and requested its inclusion in this report.**
12. **One delegation noted that it could only accept an option which did not allow its currency to be used for calculation if the same limitation were imposed on all MAI parties. It suggested the inclusion of the words "other than its own" after the words "a freely usable currency" in Option B. The same delegation mentioned that another option would be to calculate exchange rate changes on the basis of a basket of currencies.**
13. **It will need to be borne in mind, when considering the accession of non-OECD Members, that the convertibility of the national currency will be important with respect to the transfer obligations of the agreement, including transfers of compensation for expropriation.**
14. **One delegation asked whether the drafting of Article 2 was adequate to avoid excessive scope, raising as an example the case of an investor which had received a permit or authorisation for an investment but then ceased to meet the necessary conditions for it. The Group was of the opinion that this should pose no problem under Article 2 as drafted: cancellation or withdrawal of the permit or authorisation in these circumstances by the Government would not constitute a direct or indirect expropriation or nationalisation of the investment. Comment 2 to Article 2, on loss of an investment through proper application of criminal laws, was not exhaustive.**
15. **One delegation, supported by another delegation, believes it is important to provide guidance to arbitrators on how to determine the "fair market value". This paragraph could read as follows:**  
  
**"Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine the fair market value.**

## TRANSFERS

1. All delegations agreed that the free transfer of returns was a critical element of the protection of the investors. Therefore a clear preference was voiced for listing the main categories of returns in Article 4.1(b) and in particular: "profits, interest, dividends, capital gains, royalties, fees and return in kind". However it was finally agreed not to lengthen the text of Article 4.1(b) provided that these categories are explicitly listed in the definition of returns in the article on definitions of the MAI.
2. The free transfer obligation applies to earnings and other remuneration net after deduction of any withholding for tax or social security purposes. Dispute resolution would be available to investors but not their personnel.
3. The Group heard a presentation on transfers by an expert from the International Monetary Fund regarding the rights and obligations of countries under the Fund Agreement. It recommended that the Negotiating Group deal with this matter, for example, under general provisions concerning the relationship of the MAI to other international agreements.
4. Delegates wished to see no "balance of payments" clause in Article 4. The Negotiating Group will nevertheless need to address the question of general exceptions and temporary derogations for reasons such as balance of payments, public order and preservation of monetary union, including their possible relation to this article. However, it was mentioned that any such provision should not apply to payment of compensation under Article 2.
5. Articles 4.2 and 4.3 ensure -- without imposing it -- the freedom to make transfers in a freely [convertible] currency at a market rate. The reference to the exchange rate in Article 4.3 pertains only to cases where the conversion of funds occurs on the date of transfer.
6. One delegation proposed that the exchange rate for transfers be the rate prevailing on the date on which the investor applies to make such a transfer. This proposal did not attract consensus.
7. **Most delegations considered that the draft Article 4.4 would provide greater investor protection in extreme circumstances. Others thought the provision should not rule out a different solution mutually agreed by the Parties.**
8. **Conversely, a few delegations considered that it would not be useful or necessary to include such a text because: a) the extreme circumstances envisaged were very unlikely to arise in OECD countries; b) it is unlikely that a country without a functioning foreign exchange market would want to join or be able to meet the criteria for joining the MAI; and c) if a provision were included for these cases, the SDR rate may not be the most appropriate or most advantageous rate for the investor.**
9. **It was broadly agreed that this specific matter was independent of the general issues linked to the accession of non-members to the MAI, although the conditions of non-Member accession to the MAI could possibly include a requirement that all MAI countries should meet the requirements of Article VIII of the IMF Agreement and should maintain functioning foreign exchange markets.**
10. In order to emphasise the freedom of transfer, one delegation proposed the following text for the first sentence of Article 4.5: "The freedom of transfer of returns in kind under Article 4.1(b) does

not derogate from the rights of a Contracting Party under the Agreement established by the World Trade Organisation to restrict or prohibit the export or the sale for export of what constitutes the return in kind”. **There was an inconclusive discussion on this matter in DG3.**

11. Article 4.6 is indirectly but closely linked with the issue of free transfer. It allows satisfaction of two important objectives. It is comparable to the language in the Energy Charter Treaty (ECT). Some delegations would include additional specific objectives, such as bankruptcy, insolvency or the protection of the rights of creditors; issuing, trading or dealing in securities; and records of transfers.
12. Other delegations questioned the need and desirability of Article 4.6. To help bridge these different views, one delegation proposed the following language: “Nothing in Article 4 shall be construed to prevent a Contracting Party from the equitable, non-discriminatory and good faith application of measures to protect the rights of creditors, ensure compliance with laws on the issuing, trading and dealing in securities, reports or records of currency transfers and the satisfaction of judgements in civil, administrative and criminal proceedings, provided that such measures and their application shall be consistent with the provisions of Article 1”.
13. **One delegation proposed: “Notwithstanding articles 4.1 to 4.5, a Contracting Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:**
  - (a) bankruptcy, insolvency, or the protection of the rights of creditors;**
  - (b) issuing, trading, or dealing in securities;**
  - (c) criminal or penal offences;**
  - (d) reports or records of transfers; or**
  - (e) ensuring compliance with orders or judgements in adjudicatory proceedings.”**
14. Another important objective concerns taxation but this matter will need to be considered in the context of the general treatment of taxes in the MAI.
15. One delegation suggested adding the following text on forced transfers: “A Contracting Party shall not require the transfer of, or penalise the failure to transfer, the income, earnings, profits or other amounts derived from, or attributable to, an investment in the territory of another Contracting Party by one of its investors.” This proposal did not attract a consensus.

## SUBROGATION

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

[....]

2. The question of subrogation is very directly linked to the settlement of disputes: it will have to be borne in mind as discussions on the latter subject take place. In particular, a key question will be the respective rights of the investor and the Contracting Party or its designated agency subrogated in the rights of this investor.
3. The second paragraph of Article 5 could be placed elsewhere in the agreement, possibly in the dispute settlement section.

## **PROTECTING EXISTING INVESTMENTS**

- 1. There was broad support for inclusion in the MAI of a provision stipulating that the MAI would apply to pre-MAI investments. The debate was not conclusive as to whether to restrict the coverage to investments that were "consistent with the legislation" of the host state.**
- 2. Some delegations wish to specify that the Agreement would not apply to claims arising out of past events or which had already been settled. This is reflected in Option A in the draft text. Another delegation questioned the need for the second sentence in view of Article 28 of the Vienna Convention on the Law of Treaties and proposed the text in Option B, which avoids implying retroactive effect.**
- 3. Some delegations suggested that language be included here or elsewhere, along the lines of the following text from Article 1 of the ECT: "A change in the form in which assets are invested does not affect their character as investments..."**

## **MORE FAVOURABLE TREATMENT**

- 1. This matter was dealt with in part by the Negotiating Group in its general debate on the relationship between the MAI and other international agreements. It will need further work.**
- 2. The Group believes that the relation of the MAI to national laws and/or their international obligations which might provide for more favourable treatment than the MAI is an important issue to be addressed by one of the Expert or Drafting Groups.**

## PROTECTING INVESTOR RIGHTS ARISING FROM OTHER AGREEMENTS

1. The Drafting Group considered the question of provisions which might be included in the MAI on investor rights arising from other agreements. It agreed that its mandate dealt with rights arising from agreements between investors and states rather than from other treaties. It also agreed that the mandate did not include the question of a provision stating that the more favourable of the MAI or those investor-state agreements prevailed. The Group also agreed that discussion of concepts was still necessary and that final drafting would have to follow basic choices to be made by the Negotiating Group. As background to the discussion, the Group had before it the Note of the Negotiating Group Chairman [DAFFE/MAI(95)8/REV1] and a note of the Drafting Group Chairman [DAFFE/MAI/DG1(96)1].

2. Three broad conceptual approaches emerged. These are, in ascending order of ambition : (i) a "zero" option, i.e., no special provision in the MAI on rights under investor-state agreements; (ii) a procedural provision, i.e., a dispute settlement clause; or (iii) a substantive and procedural provision, i.e., a "respect clause".

3. Regarding the first approach, investor-state agreements would normally have their own dispute settlement provisions, be subject to national law and protected by domestic courts and remedies. Without any special provision, investor-state contracts would nevertheless be directly protected by the other substantive provisions of the MAI which covered the fundamental issues, e.g., expropriation, transfers, non-discrimination, and the related dispute settlement mechanisms.

4. The second approach would assure that disputes under investor-state agreements could be brought to international arbitration by an investor, at his option, in the manner provided for under the MAI. This would provide extra choices for investors. In principle, the investor's home state would be involved in the dispute only through subrogation, pursuant to an investment guarantee, unless the dispute also involved questions under the substantive protections of the MAI itself. This approach affords the investor extra procedural protection. It would subject the investor-state agreement and, potentially, the applicable domestic legal regime to an international arbitral judgement. It may also bring international law to bear on the matter.

5. The third approach is the most ambitious. It would make respect for such investor-state agreements into a MAI obligation, giving them substantive protection of the international law rule, *pacta sunt servanda*. Arguably, this could affect the defences of or damages owed by a government asserting rights to cancel or modify a contract for sovereign reasons or to change laws affecting an investment. It also has the following essential procedural effect: violations of the investor-state agreement would be subject to the full range of MAI dispute settlement mechanisms, including state-state consultations and arbitration. In such settlement, the issues would be considered in a broad context including both domestic and international law.

6. The second and third approaches would, in effect, amend investor-state agreements. They could introduce uncertainties about the law and remedies to be applied in case of dispute. They raise the questions of whether and how to draw a line between the kinds of agreements for which the additional protection might be appropriate and those for which it might not, such as purely commercial bargains, or agreements settling tax or other administrative claims.

7. There was no consensus in the Group on the basic choice of approach. That choice may also be affected by outcome on a provision stating that the more favourable of the MAI or those investor-state agreements prevailed. If a decision is taken to pursue either the second (procedural) or third (substantive

and procedural) approach, there would be subsidiary questions, the most important being scope of coverage. Should the provision apply broadly to all investor rights under investor-state agreements? If not, should it be limited by, for example, distinguishing between rights arising under essentially commercial agreements (presumably excluded) and those under which a state is acting as a sovereign (presumably covered) -- a distinction which may be difficult to make in practice; or enumerating or defining categories of covered rights, such as those arising out of investment agreements and authorisations on which an investor has relied?

8. The Group examined the strategic choices and issues thoroughly, in the time available, and clarified their implications. Given the range of views, the Group did not elaborate draft provisions for inclusion in the MAI. However, it agreed to provide the following illustrative provisions to aid in understanding the basic choices. These texts were not examined by the Group and do not represent specific recommendations.

### **ILLUSTRATIVE TEXTS<sup>17</sup>**

#### **Substantive Approach - Inclusive Respect Clause**

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

#### **Procedural Approach - Limited Scope<sup>18</sup> Dispute Settlement Clause**

An investor of another Contracting Party may submit to arbitration in accordance with [the investor-state provisions of the MAI] any investment dispute arising under the provisions of this Agreement or concerning any obligation which the Contracting Party has entered into with regard to a specific investment of the investor through:

- (a) an investment authorisation granted by its competent authorities specifically to the investor or investment, or
- (b) a written investment agreement<sup>19</sup> or contract granting rights with respect to natural resources or other assets or economic activities controlled by the national authorities,

and on which the investor has relied in establishing, acquiring, or significantly expanding an investment.

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17 The approaches of the two illustrative texts are interchangeable: the "inclusive respect clause" could be recast as an "inclusive dispute settlement clause"; the "limited scope dispute settlement clause" could be recast as a "limited scope respect clause."

18 The choice of the precise method of limitation was not discussed in depth.

19 The term "investment agreement" may require definition.

## V. GENERAL EXCEPTIONS

### Paragraph 1

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

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

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

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

### Paragraph 2

-- subparagraph a

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

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

-- subparagraph b

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

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

-- subparagraph c

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

### **Paragraph 3**

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

11. 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.

12. In situations where the state needs to ensure that all investors conform to its laws and regulations which are not in contradiction with the provisions of the agreement, a provision of more general application

might also be needed, as in Article 5 of the Capital Movements Code. The Group could consider a provision similar to that in the Code which would apply to the whole of the agreement. If this were the preferred solution, it might obviate the need for a special provision in the transfer article or elsewhere in the agreement where there might be similar concerns.

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

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

#### **Paragraph 4**

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

#### **Paragraph 5**

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

## Paragraph 6

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

18. 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.

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

20. 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.

## **C. STANDSTILL, ROLLBACK AND THE LISTING OF COUNTRY SPECIFIC RESERVATIONS\***

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

1.1. The MAI aims to ensure a high minimum standard of treatment for investors and their investments, including National Treatment and MFN treatment. Standstill would result from the prohibition of new or more restrictive exceptions to this minimum standard of treatment. From this perspective, a violation of standstill would be a violation of the underlying MAI obligations (e.g. of National Treatment and MFN), and the dispute settlement provisions would apply to such breaches of the MAI obligations.

1.2. Standstill would not apply, however, to any general exceptions (e.g. national security) or to any temporary derogations (e.g. balance of payments) that might be allowed under the MAI.

1.3. For those matters where Contracting Parties are ready to commit to standstill, the Drafting Group considered that:

a) each Contracting Party should list all non-conforming measures in an Annex of the Agreement;

b) the reservations should describe, in the most precise terms possible, the nature and scope of the non-conforming measures. This would ensure that the scope of the reservations is not broader than these measures and, thus, that the reservations are not of a "precautionary" nature;

c) no additional non-conforming measures could be introduced; and

d) an amendment to a non-conforming measure would be permitted provided it did not decrease the conformity of the measure.

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

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

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

a) the obligation or MAI article in respect of which the reservation is taken;

b) the sector(s) or sub-sector(s) covered by the reservation ;

c) the level of government which maintains the non-conforming measure;

d) the legal source or authority of the non-conforming measure;

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\* Taken from DAF/MAI/DG2(96)2

- e) the description of the non-conforming measure; and
- f) the purpose of the non-conforming measure.

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

## 2. ROLLBACK

2.1 Rollback is the liberalisation process by which the reduction and eventual elimination of non-conforming measures to the MAI would take place. It is a dynamic element linked with standstill, which provides its starting point. Combined with standstill, it would produce a "ratchet effect", where any new liberalisation measures would be "locked in" so they could not be rescinded or nullified over time.

2.2 There are a number of ways for achieving rollback. The most commonly known in the trade field is that of successive rounds of negotiations where rollback results from the trade-offs or exchange of trade concessions. Peer pressure through periodic examinations of Member countries' restrictions has been the approach of the OECD liberalisation instruments. Rollback commitments may also be inscribed in schedules of commitments or list of reservations. While this has not been a generalised practice, it has been done in some cases under the OECD instruments.

2.3. Rollback might be achieved through:

a) liberalisation commitments by the Contracting Parties effective on the date of entry into force of the MAI. This would imply that that not all restrictions currently maintained would be included in the list of reservations of the Contracting Parties;

b) rollback commitments inscribed in a country reservation or description of a non-conforming measure by means of a "phase-out" or a "sunset clause" specifying a future date when the non-conforming measure would be removed or made more limited in the future. Phase-out or sunset provisions could not be envisaged for all non-conforming measures. They might be useful, however, where the phase-out of a non-conforming measure is inscribed in domestic legislation or where a Contracting Party is able to commit itself to future liberalisation by a specified date.

2.4. Rollback after the entry into force of the MAI could result from:

a) an obligation for a Contracting Party to adjust its reservations to reflect any new liberalisation measure (the "ratchet" effect).

b) periodic examinations of non-conforming measures. These examinations could lead to recommendations in favour of the removal or limitations of specific measures. These reviews could be conducted on a country-by-country basis, or on an horizontal or sectoral basis, taking into account the degree of liberalisation already achieved; and

c) future rounds of negotiations designed to remove non-conforming measures. The decision to launch future negotiations could be taken at the conclusion of the MAI negotiations or the MAI could provide a specific date for the first round of such negotiations.

2.5 A "Parties Group" could have the role of monitoring the adjustment of country reservations, conducting periodic examinations of non-conforming measures or launching future rounds of negotiations.