Unclassified **DAFFE/MAI(98)8/REV1**

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

22 April 1998

Negotiating Group on the Multilateral Agreement on Investment (MAI)

THE MULTILATERAL AGREEMENT ON INVESTMENT

COMMENTARY TO THE CONSOLIDATED TEXT

(Note by the Secretariat)

This document contains the commentary to text of the agreement considered in the course of the MAI negotiations so far. The text reproduced here results mainly from the work of expert groups and has not yet been adopted by the Negotiating Group. The Negotiating Text itself, which is presented with footnotes and proposals that are still under consideration, is available separately as DAFFE/MAI(98)7/REV1.

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II. SCOPE AND APPLICATION

DEFINITIONS

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

Investor

1. It was noted that branches in Switzerland have the legal capacity to invest. However, this specific situation would be covered by the definition of investor even after deletion of the word “branch” since the list of “legal and other entities” covered by the definition of “investor” is not exclusive.

2. Some delegations called attention to a suggestion by one delegation in the EG5 report to add the phrase "provided it has the legal capacity to invest" at the end of the definition of investor. Most delegations considered that this approach was unnecessary and could create legal uncertainty.

3. Some delegations would like to include “Contracting Parties” in the definition of investor arguing that, for consistency, the definition should include all entities with the capacity to invest. They were concerned that a Contracting Party may itself make an investment without being a legal person that is owned or controlled privately or by the government. Most delegations thought that the concept of a legal person or the definition of state-owned enterprises would cover the situation where a State was an economic actor, and consider that the State as such would otherwise be protected by diplomatic processes under international law.

4. One delegation raised the question whether a legal person organised under the applicable law of a Contracting Party but constituted under the law of another State is covered by the text of the definition of investor in paragraph 1. (ii). According to this delegation’s Commercial Code, a legal person constituted under the law of a foreign country for the purpose of conducting business activities with its permanent seat abroad, may transfer that seat to this country provided that the law of the country in which the seat is now located allows relocation. The transfer of the permanent seat shall be effective from the day on which it is entered into the Companies Register. Such an entity is regarded as a resident of this country. However, its internal legal relations, including the liability of the entity’s partners (members) towards third parties, shall be governed by the law of the country under which the legal entity was originally constituted. In the opinion of this delegation, a possible solution could be found in adding the words “or otherwise established” after “constituted or organised” in the definitions of investor and investment. The Drafting Group considered that the concern raised by this delegation is covered by the definition as currently drafted.

Investment

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

2. Views differ on whether the definition of investment should cover investments indirectly owned or controlled by investors of a Party. Some delegations are of the opinion that covering such investment offers maximum protection to investors, including access to MAI dispute settlement. In addition, those delegations believe that this approach offers the most flexibility to investors in managing their capital flows, and avoids diverting investment flows from developing countries. The Group considered four cases:

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

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

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

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

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

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

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

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

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

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

5. There was consensus that case (c) and case (d) investments would be covered by the MAI.

6. One delegation considered that the inclusion of indirectly controlled investments might pose serious problems to the EU Members states as far as their present level of liberalisation is concerned as this normally also applies to companies established in the EU, but under control of a non-EU country. This delegation suggested that such problems could eventually be effectively addressed by a general MAI provision on measures taken within Regional Economic Integration Agreements.

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

8. Item (ii), as well as item (iii), includes portfolio investment and minority holdings. It is for consideration whether the definition covers strategic alliances and other arrangements involving know-how, intellectual property, or technology or the joint conduct of research and development programmes. This item is also understood to cover an interest in an enterprise that entitles the owner to share in income and profits of an enterprise and its assets.

9. Item (iii) covers loans of all maturities and debt securities of a state enterprise.

10. It is understood that "Claims to money" in item (v) includes bank deposits. Most delegations consider that this item covers derivatives which are not covered elsewhere in the list of assets.

11. Claims to money may also arise as a result of a sale of goods or services. These claims are not generally considered as investments.

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

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

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

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

16. Some delegations indicated that certain aspects of concessions raised issues related to monopolies in general and to cross-border government procurement, which might require some special provision or clarification in the MAI. This issue is being discussed by the "Special Topics" experts.

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

18. One delegation points out that the granting of authorisations, licences and concessions in both the petroleum and fisheries sectors involve measures relating to the conservation and management of natural resources. In the petroleum sector it also involves the exercise of property rights over hydrocarbon resources. The conservation and management of the living resources in the exclusive economic zone is regulated in the United Nations Convention on the Law of the Sea of 1982. The management of hydrocarbon resources is inter alia regulated in the Energy Charter Treaty and in the EU Directive on the conditions for the granting and use of authorisations for the prospection, exploration and production of hydrocarbons. This directive is incorporated into the Treaty establishing the European Economic Area. In the view of one delegation, these issues fall outside the mandate for the negotiation of the MAI.

19. Real estate is a common form of property protected under BITs, the ECT and NAFTA. There are different views on how to treat summer residences or second homes. NAFTA excludes real estate or other property which is not acquired in the expectation, or used for the purpose, of economic benefit or other business purposes, and some delegations prefer such an approach.

GEOGRAPHICAL SCOPE OF APPLICATION

1. Expert Group 1 identified two approaches for addressing the issue of the geographical scope of application of the MAI; the "geographical" and the "functional" approach, i.e. referring to economic activities relating to investments.

2. Various draft texts were considered reflecting one, or the other, approach. Delegations agreed that it would be difficult at this stage to make a final recommendation to the Negotiating Group, which would attract the full support of the Expert Group, as to which approach should be followed. Many delegations were of the opinion that this question would have to be re-examined once other substantive issues in the MAI, including the definition of investment, and the nature and content of the reservations and exceptions had been examined.

3. Some delegations wish to include in paragraph b) of the proposed text the words "the seabed, its subsoil and the natural resources of the superjacent waters". Other delegations stated that they would need to review the acceptability of the reference to the 1982 United Nations Convention on the Law of the Sea. One delegation wished to exclude the maritime areas from the scope of the agreement.

III. TREATMENT OF INVESTORS AND INVESTMENTS

GENERAL

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

NATIONAL TREATMENT AND MOST FAVOURED NATION TREATMENT

1. While some delegations would have preferred separate articles on pre- and post-establishment, the majority of delegations felt that a single text would better capture the intended coverage of the agreement and avoid the difficult task of defining the boundary between pre- and post establishment. It was agreed, as a starting point, to work on the basis of a single text. Some delegations pointed to the links between a single text covering treatment of investors both pre- and post-establishment and the issues of definitions and the scope of the Agreement. Two delegations reserved their position pending the outcome of the discussion on these issues. DG3 also felt that the scope of the commitments by individual countries could be identified by using precise language in any agreed reservations to National Treatment/MFN and perhaps by including references to relevant laws or regulations. The Group agreed that all diversification activities are covered by the references to "establishment, acquisition and expansion".

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

3. Some delegations proposed the "same" or "comparable" treatment as the appropriate standard rather than "no less favourable" treatment. The purpose would be to prevent unlimited competition for international investment funds with consequential costs and distortions to investment flows. However, most delegations considered that this would unacceptably weaken the standard of treatment from the investor's viewpoint.

4. Different views were expressed on the value of a "closed" or "open" list of investment activities to be covered by the National Treatment and MFN provisions, before and/or after establishment. A closed list had the advantage of certainty, but risked omitting elements that could be important to the investor. An open list would cover all possible investment activities, including new activities. But it could also create uncertainties as to the scope of the Agreement and might have adverse effects on the operation of existing bilateral and other investment agreements using a closed list. Several Delegations believed that the list "establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments" should be considered a comprehensive one whose terms were intended to cover all activities of investors and their investments for both the pre- and post-establishment phases. In their view, this was the preferable approach. It was also suggested that the term "sale or other disposition" should replace "disposal" in Article 1.2 of the draft articles on selected topics on Investment Protection.

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

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

> Regarding Option A. National treatment and MFN treatment are comparative terms. They permit fair and equitable difference in treatment justified by relevant differences of circumstances. In this context, nationality is not relevant. Some delegations may wish to modify this text in the light of the Commentary on Option B below which was not discussed.
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> Regarding Option B. One delegation provided the following commentary:
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> *"National treatment and most favoured nation treatment are relative standards requiring a comparison between treatment of a foreign investor and on investment and treatment of domestic or third country investors and investments. The goal of both standards is to prevent discrimination in fact or in law compared with domestic investors or investments or those of a third country. At the same time, however, governments may have legitimate policy reasons to accord differential treatment to different types of investments.*
>
> *"In like circumstances" ensures that comparisons are made between investors and investments on the basis of characteristics that are relevant for the purposes of the comparison. The objective is to permit the consideration of all relevant circumstances, including those relating to a foreign investor and its investment, in deciding to which domestic or third country investors and investments they should appropriately be compared, while excluding from consideration those characteristics that are not germane to such a comparison."*

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

8. As indicated by the Negotiating Group, Article 1 is intended to address any problem of *de facto* as well as *de jure* discrimination.

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

TRANSPARENCY

1. Public dissemination of measures affecting foreign investment was considered essential to the operation of the MAI. Nevertheless a balance should be struck between this objective and the administrative burden of implementing it.

2. When sub-national, local or other authorities publish or otherwise make publicly available information on matters under their jurisdiction, this would be considered sufficient to meet the obligation of Article 2.1. There would be no obligation to duplicate this information at the federal or central government level.

3. The second sentence of Article 2.1 refers to situations in some countries where governments choose to establish policies that are not expressed in laws, regulations or other measures listed in this paragraph. However, as the legal standing and recourse to these policies varies among Member countries, it was agreed that they should be subject to transparency obligations only for governments which use this approach.

4. Regarding Article 2.2, a majority of delegations considered the establishment of specific enquiry points to be unnecessary. Other delegations considered that these enquiry points could contribute to the effective functioning of the MAI. They could also be useful to foreign investors by making available information of interest to them.

5. Article 2.3 addresses the concerns that may arise with respect to the disclosure of information in the context of law enforcement or laws protecting confidentiality. Such concerns are addressed in other international agreements (GATS, Energy Charter, NAFTA). It was felt unnecessary, however, to add a reference to national security and public order since this issue would be addressed in the general exception article.

6. One delegation, supported by other delegations, proposed to add an additional sentence to article 2.3 and an additional paragraph on Special Formalities and Information Requirements as follows:

> *"(a) [Nothing in this paragraph shall be construed to prevent a Contracting Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.]"*
>
> *(b) ["Nothing in Article 1.1[1] shall be construed to prevent a Contracting Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another Contracting Party, such as a requirement that investors be residents of the Contracting Party, or that investments be legally constituted under the laws or regulations of the Contracting Party, provided that such formalities do not materially impair the protections afforded by a Contracting Party to investors of another Contracting Party and investments of investors of another Contracting Party pursuant to this Agreement."]*

1. General Treatment Article.

7. Some delegations expressed concern that the additional texts could be used to circumvent the non-discrimination obligations of the Agreement. There were serious concerns as to the substantive implications of the paragraph, in particular relating to the residency requirements.[2]

8. DG3 considered that it is possible to modify the existing text on transparency (see "Treatment of Investors and Investments" in Section III of the Consolidated Text) to accommodate the content of the transparency provision proposed by EG5 (see "Financial Services" in Section VII of the Consolidated Text). The Group recommended replacing the second sentence of paragraph 3 of the existing text by the text on "transparency" proposed by EG5.

9. Some delegations expressed concern that the reference to the "public interest" included in the EG5 text is not retained in the present text of the proposed general provision, so that secrecy relating to operations by central banks and monetary authorities may not be protected by paragraph b). However, these delegations consider that this concern could be met through the adoption of text under consideration by financial services experts intended to exclude from the general Transparency obligation of the MAI transactions by central banks and monetary authorities in pursuit of monetary and exchange rate policies. This matter should be reconsidered after the conclusion of the discussions on an article regarding transactions by central banks and monetary authorities in pursuit of monetary and exchange rate policies.

10. DG3 considered including a notification obligation along the following lines:

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

11. 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.

12. DG3 noted the suggestion that any Contracting Party should be entitled to notify to the Contracting Parties Group any measure taken by any other Contracting Party which it considers affects the operations of the Agreement. This too may be relevant to the functions of the Parties Group.

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

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2. Paragraphs 6-7 reflect the discussions in the Drafting Group. When this matter was discussed by the Negotiating Group in December 1996, the Chairman concluded "that an additional sentence, based on the sentence in paragraph (a), should be added to Article 2.3 provided that an acceptable formulation was found. He concluded that there was not sufficient support for the inclusion in that article of an additional paragraph (b) which would cover certain residence requirements as part of formalities in connection with the establishment of investments".

TEMPORARY ENTRY, STAY AND WORK OF INVESTORS AND KEY PERSONNEL

Paragraph 1

1. While several delegations supported including a requirement of a "substantial amount of capital" in paragraph 1, others considered it would create uncertainties and could represent an important barrier to certain forms of investment. It was noted that Drafting Group 3 has developed a provision on Denial of Benefits in the context of indirect ownership or control using the concept of "substantial business activity". DG3 decided that it was not necessary to define this term.

2. Some delegations do not think it necessary to include "essential" in this paragraph and emphasise the difficulties associated with defining this term.

3. There are different views on whether to include a prior employment requirement Some delegations think this requirement can distort the investment process by impacting unfairly on new investors and small/medium enterprises without any corresponding benefit to the "admitting" country. Furthermore, these delegations believe that it may not correspond to the real needs of an investment and should not be used as a measure of whether an individual is essential to an investment. Several delegations thought it necessary to retain such a requirement if only because there is a corresponding requirement in their national immigration laws. One delegation thought it might be necessary to specify that the prior employment relation must be continuous and should immediately precede entry. Another delegation questioned whether the use of prior employment requirements to avoid circumvention of national immigration laws was effective.

Paragraph 3

Natural person of another Contracting Party

Executive, Manager, Specialist

The Expert Group thought the definition of the categories of executive and manager were generally appropriate, except that there might be some overlap between the two. The category of "Specialist" will need some further reflection and may need to refer to the possibility of verifying professional qualifications. One delegation would like to include "trainers" in this category.

PRIVATISATION

General

Some delegations questioned the need for a separate article confirming the application of the National Treatment/MFN obligations to privatisation operations. Other delegations felt, on the contrary, that it was worthwhile to underline this important addition to OECD obligations. Privatisation can be a complex and politically sensitive matter. There is thus a need to specify how the MAI obligations would interrelate to particular privatisation transactions or schemes. Foreign investors attached particular importance to transparency.

Paragraph 3

One EG3 delegation doubted whether the provision was fully consistent with the National Treatment/MFN Treatment obligations. Another delegation considered there is a lack of balance, and thus discrimination, inherent in special share arrangements in that they would allow a Contracting Party to retain control while devolving business risks to private investors. Some delegations considered that special share arrangements will remain a feature of individual privatisation schemes and that the MAI should provide some flexibility in this area. A large majority shared the view that these special schemes should not be considered to be inconsistent with the National Treatment and MFN Treatment obligations unless they explicitly or intentionally discriminate against foreign investors. There might be a need, for instance, to set aside a proportion of initial sales to private persons or institutes. As in the case of monopolies, there is also a link with the room of manoeuvre the Contracting Parties would have in regard to the lodging of country specific reservations/exceptions: precautionary reservations would be necessary. Some delegations expressed reservations about the idea of special consultation procedures in this area in addition to those that might be contemplated under the consultation/dispute settlement provisions of the MAI.

MONOPOLIES/STATE ENTERPRISES/CONCESSIONS

A. Article on Monopolies

Paragraph 2

A large majority of EG3 delegations considered that the National Treatment and MFN Treatment obligations should apply to the designation of new monopolies. Several delegations pointed out the difficulty of applying such obligations to every situation that may arise in the future, notably in the context of the introduction of new technologies and felt that a "best endeavour" undertaking would be more appropriate. Delegations also noted the link with the demonopolisation issue and, in particular, that of the lodging of country-specific reservations or exceptions.

Paragraph 4

1. EG3 was of the view that demonopolisation operations are generally favourable to liberalisation since they open up new investment activities. Demonopolisation operation would have the effect, however, of extending the obligations of the MAI to a new area. Several delegations felt therefore that the MAI should provide the Contracting Parties with the possibility to lodge new country-specific reservations/exceptions when this situation occurs. This would not be contrary to standstill since country-specific reservations/exceptions introduced at the time of demonopolisation, would, in principle, be subject to standstill. These delegations welcomed, as a result, the flexibility in paragraph 4. An alternative to this approach would be precautionary country-specific reservations/exceptions lodged at the time of the entry into force of the Agreement. This problem clearly belongs to the broader issue of liberalisation and balance of commitments.

2. Some other delegations considered that the possibility of lodging country specific reservations or exceptions should be limited to the time a Contracting Party adheres to the MAI. In the absence of such reservations or exceptions, the National Treatment/MFN obligations would apply to demonopolisation operations. One delegation thought that the combined ability to designate new monopolies and to cover by reservations or exceptions new non-conforming measures could be used to evade MAI obligations.

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

Several EG3 delegations questioned the need for specific provisions on state enterprises. The problem of anti-circumvention of the MAI obligations could be addressed in the context of a general article on the subject or in the context of corporate practices. State enterprises operating in the competitive sector should be treated no differently than private enterprises. One delegation considered, however, that it is not always certain that governments can divorce themselves from the activities of their state enterprises. Foreign investors may, in any case, entertain this suspicion, particularly where such enterprises play a significant role. A balance should be struck between their rights under the MAI as investors and their obligations as suppliers of goods or services to domestic and foreign investors. One delegation felt that the best way to ensure this balance is to submit state enterprises to the same rights and obligations than private enterprises.

INVESTMENT INCENTIVES

1. The discussion on investment incentives in EG3 was based on a Note, including a proposal for draft provision, and a proposal by one delegation.

2. Many delegations believed that disciplines on investment incentives would be important for the overall credibility of the MAI while at the same time recognising the role of investment incentives with regard to the aims of policies, such as regional, structural, social, environmental or R&D policies.

3. One delegation argued that a definition of investment incentives is a necessary prerequisite for increased transparency and disciplines regarding such measures. It suggested a definition of investment incentives based largely on the definitions of subsidies and "specificity" found in the WTO Agreement on Subsidies and Countervailing Measures (ASCM). This delegation also provided text for a specific transparency provision.

4. Several delegations, however, considered the nature and scope of the disciplines proposed by one delegation and others to be too ambitious. Since WTO members were still grappling with related issues, it would be premature to include disciplines in the MAI that could duplicate or detract from WTO obligations. They also took the view that there has been insufficient analysis of the nature and impact of incentives and of the nature and extent of any disciplines which would be required given the objectives of the MAI. One delegation believed more work was necessary to identify fully the degree of the negative effect of individual incentives in relation to the policy goals, often beneficial, implemented through those incentives. Problems need to be clearly identified prior to drafting disciplines aimed at addressing those problems.

5. Several delegations also questioned the viability of creating, at this stage, standstill and rollback provisions on non-discriminatory investment incentives. Subjecting investment incentives to the NT and MFN obligations would already constitute a major step forward. One delegation felt that this would also imply submitting investment incentives to transparency obligations and subjecting non-conforming measures to standstill and rollback.

6. Most delegations believed that any plans for disciplines on tax incentives should be taken up by EG2. Some delegations thought that tax measures should be excluded.

7. Some delegations expressed concern that any additional disciplines on investment incentives in the MAI could divert foreign investment to non-Members and place MAI Contracting Parties at a disadvantage relative to non-Members in their ability to retain or attract investment. Such disciplines could also constitute an obstacle to accession to the MAI by non-Members. On the other hand, some delegations noted that it was always envisaged that the MAI, as a high standards agreement, would mandate more liberal FDI regimes among Parties than typically maintained by non-Members, and disputed claims that disciplines on incentives presented any special problems in this regard.

RECOGNITION ARRANGEMENTS

1. In considering whether text proposed for financial services should be adopted for the MAI as a whole, some DG3 delegations recommend adoption of a generalised text along the following lines:

> *"1. A Contracting Party may recognise prudential measures in financial services of another country, or standards or criteria for the authorisation, licensing or certification of investors of another country and their investments. On the basis of such recognition, a Contracting Party may accord to investors of another country and their investments more favourable treatment than it accords to investors of any other country and its investments. Such recognition, which may be achieved through harmonisation or otherwise, may be based on an agreement or arrangement with any other Contracting Party or non-Contracting Party concerned or may be accorded autonomously.*
>
> *2. A Contracting Party that is a party to an agreement or arrangement referred to in paragraph 1, whether future or existing, shall afford adequate opportunity for other interested Contracting Parties to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight and implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between parties to the agreement or arrangement. Where a Contracting Party accords recognition autonomously, it shall afford adequate opportunity for any other Contracting Party to demonstrate that these circumstances exist.*
>
> *3. A Contracting Party shall not accord recognition in a manner which would constitute a means of avoiding the Contracting Party's commitments or obligations under the Agreement."*

It is acknowledged that recognition arrangements might be open to challenge under the MFN obligation of the MAI. These delegations in favour of the above text consider that in case of a dispute Contracting Parties might rely on a "like circumstances" test to justify their recognition arrangements and/or the openness of these arrangements to third parties. However, they prefer that this justification is explicitly stated in the Agreement.

2. Many delegations were not in favour of a generalised text on recognition arrangements:

- Some delegations held the view that mutual recognition arrangements are not compatible with the MFN obligation of the MAI and would be better addressed through country-specific reservations;
- Some delegations argued that the text developed by EG5 is specifically related to prudential measures which are unique to the financial services sector;
- Delegations did not identify non-financial services sectors other than professional services which could lend themselves to recognition arrangements.

3. DG3 agreed that the desirability of a generalised text on recognition arrangements should be referred to the Negotiating Group as a matter for its political decision.

4. One delegation suggested considering, for paragraph 1, a language similar to that in paragraph 1 of Article VII of the GATS.

AUTHORISATION PROCEDURES

1. In considering whether text proposed for financial services should be adopted for the MAI as a whole, some DG3 delegations considered that the text proposed below provides additional disciplines which are not covered by the MAI Transparency and National Treatment provisions and which are desirable in order to establish minimum standards for the processing of applications relating to an investment:

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

2. Many delegations considered that the MAI Transparency and National Treatment provisions would provide sufficient protection for investors.

3. Some delegations considered that paragraph 3 of the above proposed generalised text adds little to the substantive obligations of the MAI.

4. Two delegations reserved their positions on paragraph 3 because the character of a "best endeavour" clause included in the text on Financial Services (see Section VII of the Consolidated Text) is not retained in the present text of the proposed paragraph 3. One delegation has indicated that it may reconsider its position in light of a further examination of commitments already undertaken under Article VI (3) of the GATS.

5. However, there was a concern that, if text is to be adopted for financial services only, there could be a risk that the absence of generalisation could be interpreted as implying that procedures for the processing of applications relating to an investment are not subject to the generic obligations of the MAI. Except a few delegations who were hesitant, the Group recommended to address this concern by introducing an Interpretative Note stating that "the inclusion of text specific to financial services shall be without prejudice to the interpretation of the obligations of the MAI with respect to other sectors". This Interpretative Note would apply with respect to any financial services-specific texts more generally.

MEMBERSHIP OF SELF-REGULATORY BODIES

1. In considering whether text proposed for financial services should be adopted for the MAI as a whole, DG3 was not convinced of the value of a general provision on self-regulatory bodies and associations:

- It considered that any regulatory requirement to be member of an association or organisation the membership of which is reserved to nationals would fall under the NT obligation. Three delegations gave professional services as an example where such restrictions exist in their countries and with respect to which their countries are prepared to lodge reservations under the MAI, even in the absence of specific provisions on this matter.

- It also considered that the NT obligation of the MAI extends to discriminatory measures taken by self-regulatory bodies and associations to the extent that they perform their functions under an authority delegated by governments[3]. (Where self-regulatory bodies and associations possess no such delegated authority, they should be treated in the same way as private companies; accordingly, measures they take would fall outside the scope of the MAI, subject to MAI anti-circumvention clauses.)

2. As for the issue of "authorisation procedures" above, if text is to be adopted for financial services only, some delegations noted a possibility that the absence of generalisation could be interpreted as implying that membership requirements and measures by self-regulatory bodies with delegated authority fall outside the scope of the MAI. This concern is addressed by the proposed Interpretative Note included as footnote 1 in the section on Financial Services in the Consolidated Text.

3. This understanding is consistent with the draft article for Entities with Delegated Governmental Authority [see Section III of the Consolidated Text].

TECHNOLOGY R&D

(Proposal by one delegation) [4]

On the topic of Technology R&D, one delegation has proposed the following text:

> *"Contracting Party funding prerogatives relating to R&D consortia and other activities shall not preclude national treatment for membership in such activities, provided that prospective foreign participants contribute funding commensurate with their role in the consortium and the level of funding contributed by other consortium participants.*[5]*"*

4. Extract from Special Topics Report.

5 A certain proposal has also been proposed, but was not discussed. It reads as follows: "The participation in, or treatment of, any combination, consortium, research programme, joint or other enterprise activity, including measures affecting technology, shall be regulated by existing international or bilateral S&T co-operation agreements."

PUBLIC DEBT

a. Public debt rescheduling

1. There was consensus among financial experts that the MAI should not interfere with bilaterally or multilaterally agreed public debt rescheduling/reduction arrangements. It was also agreed that debt default by sovereign debtors should not be considered to be expropriation.

2. Following further scrutiny of the provisions of the MAI and further consultations with participants in the Paris Club, there was increasing convergence of views that no specific provisions were needed on public debt rescheduling. A number of delegations considered, nevertheless, that in order to avoid unnecessary dispute under the MAI dispute settlement mechanism, there would be merit to add an explicit interpretative note or forms of carve-out for public debt rescheduling/reorganisation. They suggested that Paris Club representatives could meet to assess the need for such interpretative note.

3. Several delegations could support a text proposed by the Secretary of the Paris Club which reads as follows: "Contracting Parties confirm that the MAI shall not affect the principle of comparability of treatment of public and private creditors with regard to debt reorganisation under the Paris Club". It was suggested that the reference to the Paris Club unnecessarily narrows the scope of this proposal and that it could be deleted. One delegation was of the opinion that only those Contracting Parties that are participating in the Paris Club or other debt reorganisation fora could confirm statements such as that proposed by the Secretary of the Paris Club above, not the MAI Contracting Parties.

4. Under a second proposal refined by one delegation, the MAI would include a provision which reads as follows: 'The rescheduling of the debts [that is consistent with international laws and practices,] of a Contracting Party or its appropriate institutions owed to another Contracting Party or its appropriate institutions and the related rescheduling of its debts owed to a private creditor will not be subject to the provisions of this Agreement".

5. One delegation proposed to attach to this text the following interpretative note:

-- *"The rescheduling of the debts" includes debt reduction and refinancing;*

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

-- *"Its appropriate institutions" includes public entities that conduct activities for the account or with the guarantee or using the financial resources of the Government, and private entities when its transaction is covered by the guarantee of the Government of a Contracting Party or its public sector or is insured by ECAs.*

-- *"ECAs" means export credit agencies supported by government.*

6. Under a third proposal proposed by one delegation, the MAI would include a provision which would read as follows:

> *"A breach by a government of a public debt obligation in the context of a general debt default or general debt restructuring, including an imminent debt default or restructuring, is not a breach*

of the MAI. Any general rescheduling or reorganisation of such public debt obligations is not subject to the MAI, and a sanctioning by a government of a general workout of debt contracted by private parties is not a breach of the MAI.

A general debt restructuring includes, but is not limited to, a debt restructuring in the Paris Club or the London Club. A breach of a public debt payment obligation by a government is a failure of a government, or entity or enterprise controlled by a government, to make a timely payment of its obligation under

a) a public debt instrument; or
b) a governmental guarantee.

A "public debt instrument" includes a bond or note issued by a government, or a loan made to a government."

Another delegation wished to consider this proposal further.

7. One delegation proposed to attach to this text the following interpretative note:

"This Article restates existing international law and practice, particularly as related to treaties with provisions on investment, and clarifies their applicability to the MAI.". It commented that to have a complete package on public debt, one has also to obtain a narrow interpretation of "investment agreement" in the investor-to-state dispute settlement provisions.

8. One delegation considered that, in case any text implying interference with MAI obligations would be retained in the MAI, the obligations of MFN treatment and Transparency need to be preserved in the context of public debt rescheduling.

9. One delegation continued to reserve its position on the inclusion of public debt within the scope of MAI disciplines.

b) Public debt management

10. Most delegations remained of the view that, with the exception of a possible carve-out for debt re-scheduling as discussed above, public debt should be fully covered by the MAI disciplines. Situations where country public debt management policies may not be consistent with the MAI provisions can be covered by country-specific reservations. Two delegations, however, expressed concern over this approach and considered that public debt management should be totally excluded from the scope of the MAI.

NOT LOWERING STANDARDS [6] [7]

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

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

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

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

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

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

Most of those delegations which spoke would refer to "domestic" measures or standards for labour and for environment. One delegation proposed to qualify "domestic standards" as those covering the objectives as laid down in international core labour standards. Three delegations prefer "domestic" for

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6 In DG3, three countries continue to oppose any reference to a "not lowering standards" article on labour. One delegation thinks the issue of "not lowering standards" in the environmental area would be more appropriately dealt with in the context of a general article on investment incentives.

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSED ADDITIONAL ARTICLE ON LABOUR AND ENVIRONMENT

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[10] One delegation's proposal has three tirets, the first modelling the first sentence of Alternative 1 in the DG3 report, p. 8 (which reproduces the consolidated negotiating text):

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

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

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

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

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

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

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

[12] One delegation's proposal would delete paragraph 4 of the existing negotiating text on performance requirements and add a general exception article:

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

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

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

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

awkward drafting because it would only appear necessary for four MAI disciplines (NT/MFN, General Treatment, expropriation and certain performance requirements) and might therefore require limitation with respect to the rest of the MAI.

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

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

IV. INVESTMENT PROTECTION

1. GENERAL TREATMENT

1. Reference to "encouragement and promotion of investments", usually found in BITs does not constitute a principle of general treatment but may be included at some other place of the MAI.

2. Depending on the definition of investment/investor adopted in the MAI, the wording of Article 1 ("investments of investors") and subsequent articles may have to be changed.

3. Reference to international law is critical in this article and worded in the most simple manner. This may be a general issue to be discussed when other references to international law are made in other articles of the MAI.

4. The link between general treatment and NT/MFN was underlined as critical. However, since general treatment was considered as an "absolute" principle as opposed to NT/MFN considered as "relative" principles, it was agreed that it was justified to separate the articles on General Treatment and NT/MFN respectively.

5. In the course of discussions it was agreed to suggest that special commitments entered into by a Contracting Party vis-à-vis an investor should be addressed in the MAI in a manner to be discussed at a later stage.

6. Obligations apply in all circumstances (i.e. “at all times”), although specific language was not considered necessary on this point.

7. Regarding Article 1.2, three formulations were suggested which have in practice three different implications. One delegation’s 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.

2. EXPROPRIATION AND COMPENSATION

1. The terms “public purpose” and “public interest” derive from different legal traditions but have very similar meanings. The term chosen “for a purpose which is in the public interest” is considered consistent with both legal traditions; it was previously agreed in the Energy Charter Treaty (ECT).

2. The Drafting Group understands that the violation of criminal laws could result in the loss of an investment (or part thereof) which would not be deemed expropriation, provided those laws and their application are non-discriminatory and otherwise consistent with the standards of this agreement.

3. In cases where the investment consists in total or in part of shares, the rights of the shareholders, if an expropriation takes place, have to be defined. This should derive from the definition of investments in the MAI, if not, a special provision may be needed in Article 2.

4. Expropriation in cases where the investment consists in total or in part of intellectual property rights was seen as critical. It was decided not to suggest specific language on this issue and that it would need to be further revisited in a global context.

5. "Creeping expropriation" in general is covered by the words of Article 2: “measures or measures having equivalent effect”.

6. One delegation proposed additional text on blocking, freezing, sequestration or any similar measures having expropriatory effect. After discussion, it was agreed that these concerns were already addressed: temporary actions, when ended, would result in restitution of the property, and, any unlawful aspects of the temporary measure could give rise to damages for breach of other articles, such as Article 1. Should the measures take on a permanent or expropriatory character, they would, (i) if lawful, be subject to Article 2, or (ii) if unlawful, give rise to a right to restitution under customary international law.

7. The Drafting Group considered the problem of exchange rate risk only in the case of delay in the payment of compensation for expropriation to the exclusion of other exchange rate risks to which the investor may be exposed.

8. It identified four options for calculating compensation in order to protect the investor against losses from currency fluctuations before date of payment. In each case, the text would replace the text currently shown in article 2.5.

Option A - Investor's Choice

The compensation to be paid shall be calculated by summing:

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

(i) the currency of the host state;
(ii) the currency of the investor's home state;
(iii) a freely usable currency; or
(iv) any other currency acceptable to the host government

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

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

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

Option B - Government Choice: Multiple currency option

The compensation to be paid shall be calculated by summing:

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

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

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

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

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

Option C - Government Choice - Freely Convertible Currency specially defined[14]

The compensation to be paid shall be calculated by summing:

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

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

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

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

Option D - No Explicit Coverage of Exchange Loss Provision

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

9. A majority of delegations favoured Option D. Some delegations considered that the international law standard of compensation, set out in Article 2, which requires payment of full market value in fully realisable form and without delay, has implicit within it the requirement of offsetting declines in the currency of valuation between the valuation date and the payment, where there was a delay. Others considered this approach to be too vague or to leave the issue open for later dispute. They therefore favoured an explicit provision on the method to be used in calculating expropriation compensation including the choice of reference currency.

10. A number of delegations favoured giving the investor a choice of currency. Some favoured limiting the choice to the currencies of the home or host government. Others favoured broadening that choice somewhat. There was a consensus among them that the choice could not be unlimited. Option A illustrates their approach.

11. A number of other delegations considered that the choice of currency should be with the host government. Several of those delegations supported Option C. One delegation preferred Option B and requested its inclusion in this report.

14. The definition of "Freely Convertible Currency" would need to be the same as that adopted for the "Transfers" provision (article 4.2).

12. One delegation noted that it could only accept an option which did not allow its currency to be used for calculation if the same limitation were imposed on all MAI parties. It suggested the inclusion of the words "other than its own" after the words "a freely usable currency" in Option B. The same delegation mentioned that another option would be to calculate exchange rate changes on the basis of a basket of currencies.

13. It will need to be borne in mind, when considering the accession of non-OECD Members, that the convertibility of the national currency will be important with respect to the transfer obligations of the agreement, including transfers of compensation for expropriation.

14. One delegation asked whether the drafting of Article 2 was adequate to avoid excessive scope, raising as an example the case of an investor which had received a permit or authorisation for an investment but then ceased to meet the necessary conditions for it. The Drafting Group was of the opinion that this should pose no problem under Article 2 as drafted: cancellation or withdrawal of the permit or authorisation in these circumstances by the Government would not constitute a direct or indirect expropriation or nationalisation of the investment. Comment 2 to Article 2, on loss of an investment through proper application of criminal laws, was not exhaustive.

15. One delegation, supported by another delegation, believes it is important to provide guidance to arbitrators on how to determine the "fair market value". This paragraph could read as follows:

"Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine the fair market value.

4. *TRANSFERS*

1. All delegations agreed that the free transfer of returns was a critical element of the protection of the investors. Therefore a clear preference was voiced for listing the main categories of returns in Article 4.1(b) and in particular: "profits, interest, dividends, capital gains, royalties, fees and return in kind". However it was finally agreed not to lengthen the text of Article 4.1(b) provided that these categories are explicitly listed in the definition of returns in the article on definitions of the MAI.

2. The free transfer obligation applies to earnings and other remuneration net after deduction of any withholding for tax or social security purposes. Dispute resolution would be available to investors but not their personnel.

3. The Drafting Group heard a presentation on transfers by an expert from the International Monetary Fund regarding the rights and obligations of countries under the Fund Agreement. It recommended that the Negotiating Group deal with this matter, for example, under general provisions concerning the relationship of the MAI to other international agreements.

4. The Negotiating Group will nevertheless need to address the question of general exceptions and temporary derogations for reasons such as balance of payments, public order and preservation of monetary union, including their possible relation to this article. However, it was mentioned that any such provision should not apply to payment of compensation under Article 2.

5. Articles 4.2 and 4.3 ensure -- without imposing it -- the freedom to make transfers in a freely [convertible] currency at a market rate. The reference to the exchange rate in Article 4.3 pertains only to cases where the conversion of funds occurs on the date of transfer.

6. Most delegations considered that the draft Article 4.4 would provide greater investor protection in extreme circumstances. Others thought the provision should not rule out a different solution mutually agreed by the Parties.

7. Conversely, a few delegations considered that it would not be useful or necessary to include such a text because: a) the extreme circumstances envisaged were very unlikely to arise in OECD countries; b) it is unlikely that a country without a functioning foreign exchange market would want to join or be able to meet the criteria for joining the MAI; and c) if a provision were included for these cases, the SDR rate may not be the most appropriate or most advantageous rate for the investor.

8. It was broadly agreed that this specific matter was independent of the general issues linked to the accession of non-Members to the MAI, although the conditions of non-Member accession to the MAI could possibly include a requirement that all MAI countries should meet the requirements of Article VIII of the IMF Agreement and should maintain functioning foreign exchange markets.

9. In order to emphasise the freedom of transfer, one delegation proposed the following text for the first sentence of Article 4.5: "The freedom of transfer of returns in kind under Article 4.1(b) does not derogate from the rights of a Contracting Party under the Agreement established by the World Trade Organisation to restrict or prohibit the export or the sale for export of what constitutes the return in kind".

10. One delegation suggested adding the following text on forced transfers: "A Contracting Party shall not require the transfer of, or penalise the failure to transfer, the income, earnings, profits or other amounts derived from, or attributable to, an investment in the territory of another Contracting Party by one of its investors." This proposal did not attract a consensus.

5. SUBROGATION

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

2. The respective rights of the investor and the Contracting Party or its designated agency subrogated in the rights of this investor is dealt with in the text on Dispute Settlement.

6. PROTECTING EXISTING INVESTMENTS

1. There was broad support for inclusion in the MAI of a provision stipulating that the MAI would apply to pre-MAI investments. The debate was not conclusive as to whether to restrict the coverage to investments that were "consistent with the legislation" of the host state.

2. Some delegations wish to specify that the Agreement would not apply to claims arising out of past events or which had already been settled. This is reflected in Option A in the draft text. Another delegation questioned the need for the second sentence in view of Article 28 of the Vienna Convention on the Law of Treaties and proposed the text in Option B, which avoids implying retroactive effect.

V. DISPUTE SETTLEMENT

GENERAL

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

STATE-TO-STATE PROCEDURES

Article C.1.a

1. This paragraph provides that arbitration is available for a dispute over whether a Party has acted in contravention of the Agreement. It is understood that 'action' includes failure to act when the Agreement requires it. A key question, which this formulation does not prejudice, and leaves open for the arbitral tribunal to decide in light of all the relevant circumstances and the jurisprudence is, when is a dispute over a legislative measure of a Party ripe for arbitration, if its terms, which provide for action violative of the Agreement, have not yet been applied to a concrete case in that fashion.

2. In light of the opinion of the ICJ in the ELSI case, consideration was given to including in the MAI an express provision that there was no requirement of exhaustion of local remedies before resort might be had to MAI dispute settlement for injury to an investor. There was full agreement that the intent was not to require exhaustion of local remedies before MAI dispute settlement could be invoked. However, it was decided to record that in Commentary, rather than include in the articles of the MAI a provision which might cast doubt on the dispute settlement provisions of other investment agreements which had the same intent and which were silent on the matter.

3. One delegation has serious concerns in relation to this provision.

Article C 1.b

Article C paragraph 1.b, based on ICSID Article 27, is intended to assure that the initiation of any form of investor-state arbitration provided by the MAI would restrain parallel state-state proceedings under the MAI to the same extent as, but no more than, would initiation of ICSID arbitration for a MAI Contracting Party which is also an ICSID party. This is a very limited preclusion, effecting the right to bring the very same claim. The ICSID observer confirmed that ICSID Article 27 should not preclude a state-to-state arbitration of an issue of treaty interpretation or application which was also involved in the investor-state dispute, as long as this did not amount to the espousal of the claim of the investor. It was recognised that an award in such a state-state proceeding would not affect an award rendered in the investor-state proceeding.

Article C 6

1. The "applicable rules" referred to in Article C 6 are those concerning the interpretation and application of treaties. Accordingly, this provision would not provide a basis for a Panel to rule on a dispute about a Contracting Party's compliance with other international legal obligations.

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

Article C 9

1. There was full agreement on the desirability of strong procedural safeguards for resort to countermeasures. This would prevent problems which unilateral recourse to countermeasures can produce. However, there was disagreement on the role of the Parties Group in this process.

2. On the permissible scope of countermeasures, there was agreement that expropriation of investments and denial of treatment in accordance with international law were not available countermeasures. There was broad willingness to consider some hierarchy of responses -- to discourage countermeasures against established investment. However, views were fairly evenly divided between delegations favouring a broad approach which would generally allow any responsive measure permitted under customary international law, including measures in the field of trade, and those favouring limiting responses to suspension of benefits under the MAI itself.

3. The broader customary law approach might not, in reality, be as far from the MAI only approach as it might appear to be. For example, certain responses permitted under customary law would run counter to obligations of MAI parties under the GATT, GATS or other WTO agreements. By neither expressly authorising suspension of benefits under other agreements nor precluding challenge of such retaliatory suspension under the WTO DSU, a MAI party would run the full risk that any retaliation in areas protected under those agreements, without obtaining a waiver under them, would be found to be a violation of those other obligations, notwithstanding alleged rights of retaliation under the customary law of state responsibility. This risk would flow in part from the possibility that a WTO panel would not consider any state responsibility argument but would deal with a dispute strictly within the terms of the WTO agreements themselves; it would also flow in part from the legal uncertainties which some delegations believe exist concerning the right to respond to violation of one treaty by action in contravention of another unrelated one. Provided that the MAI, unlike the OECD's shipbuilding agreement, neither expressly authorised retaliatory suspension of benefits under WTO agreements nor waived the MAI Parties rights to complain under the WTO system for a retaliation found lawful under the MAI, the practical scope of the broad option is likely to be severely constrained.

INVESTOR-TO-STATE PROCEDURES

Article D.1.a

1. Pursuant to Article D.1.a, an alleged breach of the MAI must be causally linked to loss or damage to the investor or investment for the investor to have standing to bring a claim against the host state, but the damage, while imminent, would not need to have been incurred before the dispute is ripe for arbitration. Further a lost opportunity to profit from a planned investment would be a type of loss sufficient to give an investor standing to bring an establishment dispute under this article, without prejudice to the question of whether a specific amount of lost profits might later prove too remote or speculative to be recoverable as damages. The claim would be initiated on the basis of allegations of loss or damage, but their existence and actual amount would remain to be demonstrated, along with the remainder of the investor's case, during the proceedings on the merits of the dispute.

2. This Article, which includes effects on the investor, applies to all the investor's rights including those relating to establishment.

Article D.1.b

1. Some countries could accept the procedural solution on condition that there are no reservations permitted; were reservations permitted they would wish to return to the full respect clause. Six delegations wish to reserve their position. Positions are divided on the types of agreement to be covered.

2. Provided that the law specified under Article D.14.b were applicable under both options, and the respect clause were excepted from state-state dispute settlement, the full respect clause and the procedural solution would appear to be similar in their legal effect.

Article D.2.a

The reference in this article to submission of a dispute to "any competent courts" leaves open the possibility that a Contracting Party might choose not to make the MAI directly enforceable in its courts.

Article D.2.c

Under Article D.2.c, the investor may freely choose among the arbitral options. Country reservations limiting the choice of UNCITRAL and ICC to cases in which the ICSID and additional facility options were not available would be acceptable.

Article D.3

Two delegations have problems of a constitutional nature with unconditional prior consent. Another delegation has serious concerns with it.

Article D.6

This paragraph would be intended to assure that, in cases of mixed or unclear division of competence between the EC and a member state, both would be in the proceedings and responsibility would be covered, without burdening the investor with this issue. Whether or not this should be generalised beyond the EC to any other future REIO contracting `party, i.e., a REIO with legal capacity and competence on MAI matters, is being considered as well.

Article D.8

Article D.8 is a variant of the clauses which appear in many investment agreements, allowing the established company to have standing to bring the claim to arbitration against the host state. Country specific reservations to this clause or an annex listing countries to which it does not apply would be acceptable.

Article D.9

1. This paragraph would represent a compromise between those delegations which want consolidation to be only with the case by case agreement of the investors concerned and those which wish consolidation to be mandatory, with the investor only able to withdraw from it with prejudice to its right to resort to other dispute settlement. Subparagraph e would allow withdrawal to be without prejudice other than under Article D.2.c.

2. One delegation has serious concerns in relation to this provision.

Article D.14

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

Article D.18

This paragraph provides for the enforceability of awards in accordance with the New York Convention in the courts of parties to it. While it does not require that MAI Contracting Parties become party to the New York Convention, it does requires them to provide for the enforcement of MAI pecuniary awards.

VI. EXCEPTIONS AND SAFEGUARDS

GENERAL EXCEPTIONS

Paragraph 1

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

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

3. The majority view was that the MAI should provide an absolute guarantee that an investor will be compensated for an expropriated investment. This was questioned by one delegation which doubted that in time of war whether a country would be able to pay compensation, in all cases, to an investor of a party with which it is in conflict.

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

Paragraph 2

-- subparagraph a

1. One delegation, supported by other delegations, would prefer square brackets be put around the phrase "which it considers" in the chapeau. In the opinion of these delegations, these proposals would help safeguard against potential abuse by constraining the self-judging nature of the provision and by limiting its scope. One delegation believes that, based on an ICJ decision, such a change would eliminate the self-judging nature of the provision.

-- subparagraph b

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

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

-- subparagraph c

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

Paragraph 3

1. Some countries believe that public order is necessary to allow countries to take exceptional measures based on this principle. One delegation indicated in a written submission 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.

2. Several delegations were of the opinion that provision might need to be made for cases where information requirements or other formalities might be required of foreign investors because they are not in the same situation as domestic investors. Article 1111 of the NAFTA was cited as a possible model to take account of these situations. The question arose whether in fact this was not a matter of "equivalent treatment" which could be included in the context of national treatment.

3. In situations where the state needs to ensure that all investors conform to its laws and regulations which are not in contradiction with the provisions of the agreement, a provision of more general application might also be needed, as in Article 5 of the Capital Movements Code.

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

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

TRANSACTIONS IN PURSUIT OF MONETARY AND EXCHANGE RATE POLICIES

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

2. One delegation proposed a narrower carve-out that would substitute for the text in paragraphs 1 and 2 above. Under this proposal, the transactions referred to in paragraph 1 would be limited to open market transactions in securities and foreign exchange intervention transactions, and the central bank or monetary authority would be subject to the non-discrimination disciplines with respect to foreign investors established on its territory. Selection by a central bank or monetary authority of a counter-party in an individual transaction would not be subject to dispute settlement, but systematic discrimination could be challenged under the dispute settlement system. Most delegations considered that such a narrowing of the carve-out would not be appropriate. Another delegation was also prepared to consider a narrow carve-out and considered that this proposal deserves further consideration before reaching a firm conclusion.

3. One delegation suggested that the text of the provision should be broadened in order to stabilise the stock market.

4. Delegations asked whether restrictions on the sale of financial instruments to non-residents falls under the above provisions or under the temporary safeguard clause. In response, it was said that under the above provisions the central bank or monetary authority would be free to determine whether or not to sell instruments to non-residents, while restrictions imposed by the authorities on the sale by residents other than the central bank or monetary authority to non-residents should fall under the safeguard clause.

TEMPORARY SAFEGUARD

1. On request, the IMF's representative offered the following comments: "Concerning the second bullet in Article A.1, the National Treatment provision would liberalise access to a broad range of financial assets by non-residents and thus give rise to cross border capital flows. Exchange control regulations are normally designed to control specific classes of transactions as they refer to resident transactions with non-residents (or vice versa), such as borrowing abroad by residents or the acquisition of local financial assets by non-residents. Entities that are nationals of the same contracting party, could in some circumstances be considered as residents or non-residents for exchange control purposes. In order to limit the scope of the derogation, it is understood that a measure taken under this provision does not normally discriminate between resident entities owned or controlled by investors of other contracting parties and resident entities controlled by local entities. It is also understood that exchange controls could apply to resident capital transactions abroad or non-resident capital transactions in the local market".

2. Several delegations felt that the reference to "macroeconomic management" was too broad. They could accept paragraph 1 (b) if "macroeconomic management, in particular monetary and exchange rate policies" were replaced with "for the operation of monetary or exchange rate policies". Some delegations questioned whether paragraph 1 (b) was necessary. On the other hand, other delegations would have still preferred a provision in which restrictions could be taken in cases of serious difficult for the operation of economic, monetary or exchange rate policies.

3. Some delegations noted that paragraph 1 of Article A does not cover measures, taken in the circumstances described in (a) or (b), which might derogate from the MAI provisions on performance requirements, and considered that this matter merits further consideration.

4. It was agreed that measures referred to in paragraph 1 of Article A shall provide MFN treatment, and shall also provide National Treatment except as specifically provided in paragraph 1, but that it is not necessary or appropriate to include text to this effect.

5. It is understood that the second bullet of paragraph 1 and paragraph 1 (b) of Article A were considered necessary by the International Monetary Fund to cover cases where countries may need to introduce restrictions on capital flows for reasons of serious balance-of-payments and macroeconomic management difficulties. This is consistent with the position taken in the IMF Executive Board's "Report to the Interim Committee on the Liberalisation of Capital Movements under an Amendment of the Articles", September 1997.

6. With respect to paragraph 1 (b) of Article A, some delegations expressed concern that, since the circumstances indicated in paragraph 1 (b) were not foreseen under GATS as enabling the imposition of restrictions on capital movements, the adoption of such a provision in the MAI could result in lower standards in the MAI than in the GATS. In their view, it would be paradoxical that the MAI could allow the adoption of restrictions if they were in contradiction with the GATS, and it was questioned whether countries could in practice implement such measures. In the view of other delegations, however, there are no reasons to consider that restrictions approved under the MAI could be contrary to the GATS.

7. Considering that many of their bilateral investment protection agreements do not have derogation clauses allowing for the imposition of restrictions on transfers, several delegations supported addition of a paragraph 8 in Article A which would read as follows: "The provisions of this Article cannot be invoked with regard to transfers of the payments of compensation due under Article zz

(expropriation)." Most delegations opposed this proposal, on the understanding that the Temporary Safeguard article only provides for a delay in the transfer of payments of compensation but does not affect foreign investors' rights to compensation under the Article on Expropriation.

VII. FINANCIAL SERVICES[15]

PRUDENTIAL MEASURES

1. The proposed Article applies to measures taken with respect to financial services. Given the coverage of the MAI, the Article will apply to measures affecting investors and their investments in the financial services area and not all aspects of international trade in financial services. The Expert Group No.5 considered that there was no need to make this point explicit in the proposed Article.

2. The proposed text recognises the right of a Party to take prudential measures which do not conform with National Treatment, MFN and the other provisions of the Agreement, provided that the measures are not used as a means of avoiding Party's commitments and obligations. One delegation suggested that a requirement that prudential measures be not more restrictive than necessary to meet the prudential objective might be included in the proposed Article.

3. One delegation asked whether restrictions on transfers taken in connection with orders or judgements related to civil, administrative and criminal proceedings, etc. would be covered by paragraph 1 of the proposed article, subject to the anti-abuse provision of paragraph 2. This question may be related to paragraph 4.6 in the "Transfers" Article.

4. In paragraph 1 of the proposed Article, the Expert Group opted for the term "enterprise". This term was understood to be broader than "institution" which is generally only an entity expressly authorised to do business and regulated or supervised under the law of the party in whose territory it is located.

5. Except for one delegation, EG5 took the view that the exercise of a Party's right to take prudential measures which do not conform with the provisions of the Agreement should in principle be subject to the dispute settlement mechanism of the MAI. Most delegations were of the view that financial services expertise should be required for any arbitration panel for disputes on issues relevant to financial services.

6. EG5 felt it would be desirable that the Agreement define certain terms including the term "measure".

AUTHORISATION PROCEDURES

1. Most EG5 delegations recommended adoption of the draft text on authorisation procedures.

2. A few delegations felt that no such provisions are necessary as they considered that the provisions would not add to the basic obligations of the agreement.

15. This Commentary reflects comments made in EG5 and informal consultations on financial matters at expert level.

TRANSPARENCY

Expert Group No. 5 considered a provision proposed by one delegation calling for advance notification, to the extent practicable, to all interested persons of any measure of general application that the Contracting Party proposes to adopt which may affect the operation of the agreement, in order to allow an opportunity for such persons to comment on the measure. The text reads as follows:

> *"Each Contracting Party shall, to the extent practicable, provide in advance to all interested persons any measure of general application that the Contracting Party proposes to adopt which may affect the operation of the Agreement, in order to allow an opportunity for such persons to comment on the measure. Such measure shall be provided:*
>
> *a) by means of official publication;*
> *b) in other written form; or*
> *c) in such other form as permits an interested person to make informed comments on the proposed measure."*

While delegations agree to the value of prior consultation, a majority of delegations expressed concerns that the above proposed provision may be unduly burdensome, and would not be practical.

INFORMATION TRANSFER AND DATA PROCESSING

1. The Expert Group No. 5 recommended adoption of the draft text on information transfer and data processing[16].

2. The Group considered that this text may have a broader application than financial services and invited the Negotiating Group to consider this possibility.

3. It is the Group's common understanding that such provisions do not prejudice in any way the right of Contracting Parties to take prudential measures as provided by the prudential carve-out article.

4. One delegation provided comments (circulated after the March meeting) on the reasons why the term "privacy" in paragraph 2 b) should be adopted, instead of the term "personal privacy" used in the GATS. Some delegations wanted to review this aspect of the text further.

16. One delegation reserved its position.

MEMBERSHIP OF SELF-REGULATORY BODIES AND ASSOCIATIONS[17]

1. One delegation proposed the following interpretative note:

> *"Contracting Parties may meet their obligations on access to clearing systems for branches of financial services enterprises by providing indirect access, for example, through an enterprise incorporated in the territory of the Contracting Party concerned."*

2. A number of delegations supported this proposal. They considered that providing foreign investors' branches only indirect access to clearing systems was common prudential practice in many countries and that in the absence of such an interpretative note there is a risk that this practice could be challenged under the MAI dispute settlement mechanisms.

3. A greater number of delegations opposed the proposed interpretative note. They considered that restrictions on direct access where justified by the specific circumstances in which a branch can meet legitimate prudential requirements are protected by the MAI prudential clause; they furthermore considered that Contracting Parties have still the option to lodge country-specific exceptions, would they feel the protection of the prudential clause insufficient. They were also concerned that the proposed interpretative note, which does not exist in the GATS, would impose a lesser standard in the MAI than in the WTO, because it would release Contracting Parties from any obligation to provide a prudential justification for their restriction.

4. One delegation, which opposed the proposed interpretative note, proposed, in a spirit of compromise, an amended text for paragraph 1 which reads as follows: " Under terms and conditions that accord national treatment, each Contracting Party shall grant to financial services enterprises <u>supervised by recognised supervisory authorities</u> that are investments of investors of any other Contracting Party established in its territory <u>direct and indirect</u> access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business".

5. EG5 delegations confirmed their understanding that these provisions do not prevent self-regulatory bodies and associations, including deposit insurance institutions, from applying the requirements of the relevant rules and regulations for access to membership as long these requirements are consistent with the provisions of this Agreement, with the exception of one delegation which cannot concur to the qualification as long these requirements are consistent with the provisions of this Agreement with respect to deposit insurance institutions.

17. Comments made during the informal consultations on financial matters on 19 February 1998.

PAYMENTS AND CLEARING SYSTEMS/LENDER OF LAST RESORT[18]

1. One delegation proposed the following interpretative note:

> *"Contracting Parties may meet their obligations on access to clearing systems for branches of financial services enterprises by providing indirect access, for example, through an enterprise incorporated in the territory of the Contracting Party concerned."*

2. A number of delegations supported this proposal. They considered that providing foreign investors' branches only indirect access to clearing systems was common prudential practice in many countries and that in the absence of such an interpretative note there is a risk that this practice could be challenged under the MAI dispute settlement mechanisms.

3. A greater number of delegations opposed the proposed interpretative note. They considered that restrictions on direct access, where justified by the specific circumstances in which a branch can meet legitimate prudential requirements, are protected by the MAI prudential clause; they furthermore considered that Contracting Parties have still the option to lodge country-specific exceptions, would they feel the protection of the prudential clause insufficient. They were also concerned that the proposed interpretative note, which does not exist in the GATS, would impose a lesser standard in the MAI than in the WTO, because it would release Contracting Parties from any obligation to provide a prudential justification for their restriction.

4. One delegation, which opposed the proposed interpretative note, proposed, in a spirit of compromise, an amended text for paragraph 1 which reads as follows: " Under terms and conditions that accord national treatment, each Contracting Party shall grant to financial services enterprises supervised by recognised supervisory authorities that are investments of investors of any other Contracting Party established in its territory direct and indirect access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business".

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

18. Comments made during the informal consultations on financial matters on 19 February 1998.

DISPUTE SETTLEMENT [19]

DETERMINATION OF CERTAIN FINANCIAL MATTERS IN INVESTOR TO STATE PROCEEDINGS

1. Delegations were divided as to the need for specific provisions for Investor-State dispute settlement in certain financial matters. Delegations which favoured specific provisions have suggested texts reproduced below.

2. The Delegations which opposed specific provisions indicated that:

-- The general provisions were fair and transparent and provided all the necessary protections against frivolous challenges to prudential measures, especially in view of the prudential carve-out;

-- If the affected countries were able to agree on the need to prevent an Investor-State procedure, there was a concern that this would slow down dispute settlement proceedings and deny rights for financial institutions that would be recognised for investors in any other sectors;

-- Special provisions for financial services would unduly undermine the integrity and consistency of the MAI;

-- The existence of special procedures for one sector could cast doubts as to the reliability of the whole dispute settlement system for all other sectors;

-- Other sectors and many other issues also have specificities which, if they resulted in special provisions, would lead to a chain reaction of calls for special treatment.

3. The Delegations that were in favour of adding special provisions for financial issues noted that:

-- The financial services sector, including monetary and exchange rate policies and possibly also temporary safeguards, has particular characteristics which justify unique treatment within the MAI, as compared to other sectors, including that it is highly regulated for prudential reasons and that the health of this sector has spill-over effects to the rest of the economy. This is reflected in the prudential carve-out;

-- The sensitivity of prudential and other financial matters requires that financial authorities of the country of origin of the investor and of the country of investment have the possibility to avert disputes involving prudential regulations when they are manifestly not justified;

-- There is a need to balance the right of investors with the need to ensure that policy makers/regulators feel relatively unconstrained in their ability to take measures for prudential reasons, without an unreasonable expectation of challenges;

-- Consultations between regulatory authorities were not provided for under the provisions of the MAI on Investor-State procedures;

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19. Comments made during the informal consultations on financial matters on 19 February 1998.

-- The existence of similar provisions in other plurilateral agreements covering financial services where Investor-State procedures are established;

-- Financial experts should be required for disputes on issues related to financial services. This would ensure the efficacy of the prudential carve-out and that persons having the technical knowledge and understanding of the sector would be capable of reviewing a particular financial services dispute.

4. The main components of the special procedures envisaged by these delegations are:

- A screening mechanism to seek agreement on whether the alleged defence is valid; and

- A mechanism to ensure that the necessary expertise is available as required by a Contracting Party.

The following summarises the intent of the special procedures envisaged:

1) An initial screen by financial authorities in each party will provide a check on frivolous investor claims and an opportunity to discuss the prudential justification of measures. If the authorities agree the measure is prudential, the dispute with respect to the prudential matter is terminated. If there is no agreement the process continues;

2) A State-to-State arbitral panel involving an experts tribunal which provides the opportunity for objective review by experts. If there is agreement that the measure is prudential, the dispute with respect to the prudential measure is terminated. If there is no agreement or agreement that the measure is not prudential, the process proceeds to (3). Some delegations favouring the overall special procedures for Investor-State settlement felt that the step set forth in this paragraph may not be essential;

3) Investor-State tribunal proceedings as per general article with option of financial experts, if desired, but other expertise possible.

5. Most delegations which favour special procedures for prudential measures also favour application of these procedures for transactions in pursuit of monetary and exchange rate policies. A few delegations among this group of delegations would equally favour special procedures for measures under the safeguard provision. Among delegations in favour of special procedures, a majority would prefer the text proposed in paragraph 6 and many of them could also accept the proposed text in paragraph 7 as a compromise.

6. In this context, delegations considered the following text:

Option 1

"1. Where an investor of a Contracting Party submits a claim under Article D (Investor-State Procedures) against another Contracting Party and the disputing Contracting Party invokes Article xx (Prudential Measures) Article xx (Transactions in Pursuit of Monetary and Exchange Rate Policies) [Article xx (Temporary Safeguards)], on request of the disputing Contracting Party, the Tribunal shall refer the matter in writing to [the appropriate financial authority in each of] the Contracting Parties involved in the dispute for a decision. The Tribunal may not proceed pending receipt of a decision or report under this Article.

2. In a referral pursuant to paragraph 1, the [authorities referred to in paragraph 1] [Contracting Parties] shall consult with each other to decide the issue of whether [and to what extent] Article xx (Prudential Measures) Article xx (Transactions in Pursuit of Monetary and Exchange Rate Policies) [Article xx (Temporary Safeguards)], is a valid defence to the claim of the investor. The [authorities] [Contracting Parties] shall transmit a copy of their common decision to the Tribunal and to the Parties Group. The decision shall be binding on the Tribunal.

3. Where the [authorities] [Contracting Parties] have not decided the issue within 60[20] days of the receipt of the referral under paragraph 1, the disputing Contracting Party or the Contracting Party of the investor may request the establishment of an arbitral panel under Article xx (Request for a State to State Arbitral Tribunal) to determine whether[, and to what extent,] Article xx (Prudential Measures) Article xx (Transactions in Pursuit of Monetary and Exchange Rate Policies) [Article xx (Temporary Safeguards)], is a valid defence to the claim of the investor. The Tribunal shall be constituted in accordance with [Article xx (see Article B below on Composition of Dispute Settlement Panels in Financial Services Disputes)]. Further to Article xx (Final Report), the panel shall transmit its final report to the [authorities] [Contracting Parties], to the Investor-State Tribunal and to the Parties Group. The report shall be binding on the Tribunal.

4. Where no request for the establishment of a State to State Tribunal pursuant to paragraph 3 has been made within 10 days of the expiration of the 60-day period referred to in paragraph 3, the Investor-State Tribunal may proceed to decide the matter."

7. One delegation proposed an alternative to the above text, which reads as follows:

Option 2

"1. Where an investor of a Contracting Party submits a claim under Article D (Investor-State Procedures) against another Contracting Party and the disputing Contracting Party invokes Article xx (Prudential Measures) Article xx (Transactions in Pursuit of Monetary and Exchange Rate Policies) [Article xx (Temporary Safeguards)], on request of the disputing Contracting Party, the Tribunal shall refer the matter in writing to [the appropriate financial authority in each of] the Contracting Parties involved in the dispute for a decision[21]. The Tribunal may not proceed pending receipt of a decision or report under this Article.

2. In a referral pursuant to paragraph 1, the [authorities referred to in paragraph 1] [Contracting Parties] shall consult with each other to decide the issue of whether [and to what extent] Article xx (Prudential Measures) Article xx (Transactions in Pursuit of Monetary and Exchange Rate Policies) [Article xx (Temporary Safeguards)], is a valid defence to the claim of the investor. The [authorities] [Contracting Parties] shall transmit a copy of their common decision to the Tribunal and to the Parties Group. The decision shall be binding on the Tribunal.

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20. One delegation considered that 60 days may be too short a period to decide the issues in question.

21. Two delegations suggested adding at the end of this sentence the following text: ", unless the investor rejects this request within 20 days". Some delegations considered that such an addition would undermine the purpose of a special dispute settlement regime for financial matters.

3. Where the [authorities] [Contracting Parties] have not decided the issue within 60[22] days of the receipt of the referral under paragraph 1, the Investor-State Tribunal shall proceed to decide the matter."

Paragraphs 1 and 2 are unchanged from the corresponding text in option 1 above; paragraph 3 is revised and paragraph 4 is deleted.

COMPOSITION OF DISPUTE SETTLEMENT PANELS IN FINANCIAL SERVICES DISPUTES

1. Delegations agree that panellists in State-to-State and Investor-State proceedings should have the necessary expertise relevant to prudential issues and other financial services issues when the dispute involves such an issue.

2. The large majority of delegations agreed that at least some provisions establishing the need for appropriate financial expertise of panel members in cases involving financial matters should be included in the MAI. A slight majority of the delegations preferred to reproduce in the MAI a text modelled along the lines of the provision contained in the GATS Annex on Financial Services, which is the text proposed above. Some other delegations also indicated that they could accept it as a minimum. Other delegations indicated that no specific provision for financial services was necessary.

3. A number of delegations indicated that more elaborate and detailed provisions to determine panel composition in cases involving financial matters were necessary to reflect the need for panels to have adequate expertise, in particular in prudential issues. These could provide for:

1) In State-to-State or Investor-State Panels involving financial issues, financial experts are appointed by each party, either from a general roster or as required outside the roster; in addition,

2) Where prudential issues are involved, requiring that the chair of the panel be a financial expert.

Those delegations suggested that the following text should be inserted:

"Selection of the Panel

1. Where a Party claims that a dispute involves financial [services] and monetary matters, Articles C.2 and D.7 as applicable (Panel Formation) shall apply, except that:

(a) where the disputing Parties so agree, the tribunal panel shall be composed entirely of panellists meeting the qualifications in paragraph 2; and

22. One delegation considered that 60 days may be too short a period to decide the issues in question.

(b) where the disputing Parties do not agree that the panel be composed in accordance with (a),

(i) each disputing Party may select panellists meeting the qualifications set out in paragraph 2, or in Article C.2.c or D.7.c as applicable (Qualifications of Panellists), and

(ii) if the Party complained against invokes Article xx (Prudential Measures) Article xx (Transactions in Pursuit of Monetary and Exchange Rate Policies) [Article xx (Temporary Safeguards)] the chair of the panel shall meet the qualifications set out in paragraph 2.

2. Financial services experts shall:

(a) have expertise or experience in financial services law or practice, which may include the regulation of financial institutions;

(b) be chosen strictly on the basis of objectivity, reliability and sound judgement; and

(c) be independent of, and not be affiliated with or take instructions from, any Party."

4. One delegation believes that the decision of a Contracting Party to involve prudential measures should not be subject to the dispute settlement provisions of the MAI.

DEFINITION OF FINANCIAL SERVICES

1. The recommended definition of financial services is the same as that used in the GATS.

2. One EG5 delegation asked whether transfer of credit risks (for instance, credit swaps) and the provision of stored value cards were considered as financial services. EG5 understood the proposed list of financial services as an open-ended one. Therefore, it was considered that, unless otherwise specified, the services in question should be regarded as financial services.

OTHER ISSUES

NEW FINANCIAL SERVICES

1. Several EG5 delegations considered that owing to the rapid pace of innovation in the financial services sector, it is important to ensure that an investor in the host country can introduce a new service to that market and that, as there are not adequate points of comparison, relying on the National Treatment principle alone could effectively exclude a foreign-owned establishment from introducing new financial services. Therefore these delegations favoured the preparation of specific text.

2. Three delegations supported the introduction in the MAI of specific provisions concerning new financial services. The Group considered two options for text:

Option 1

" A Contracting Party shall permit financial services enterprises of any other Contracting Party established in its territory to offer any new financial services."

Option 2

"A Contracting Party shall permit a financial services enterprise established in its territory that is an investment of an investor of any other Contracting Party to offer in its territory any financial service that is not offered in the territory of the Contracting Party but which is offered in the territory of another Contracting Party. A Contracting Party may determine the institutional and juridical form through which the service may be provided and may require authorisation for the provision of the service. Where such authorisation is required, a decision shall be made within a reasonable time and the authorisation may only be refused for prudential reasons".

3. Most delegations questioned the need for specific provision and preferred to rely on the National Treatment provision of the MAI, possibly accompanied by an interpretative note.

"ACQUIRED RIGHTS"

1. EG5 considered suggestions made by one delegation that there may need to be provisions concerning the "acquired rights" of foreign financial services enterprises established in a Contracting Party.

2. Some delegations considered that it was unclear what the concept of "acquired rights" referred to. One delegation provided comments on this matter (circulated after the March meeting). Delegations wished to give further consideration to these comments. Some delegations considered that this matter is linked to "standstill" and should be addressed in the general framework of the Agreement.

3. Other delegations considered that the inclusion of provisions on "acquired rights" could create distortions in the treatment of investors depending on the date of their respective establishment. Those delegations considered that a Contracting Party should have the ability to apply new regulations to all financial institutions operating on its territory so long as these regulations are consistent with the provisions of the Agreement.

RIGHT OF INITIAL ESTABLISHMENT, EQUALITY OF COMPETITIVE OPPORTUNITY AND APPLICATION OF NATIONAL TREATMENT IN SUB-NATIONAL UNITS OF GOVERNMENT

1. One EG5 delegation made proposals for text in these areas. A few other delegations expressed support for the proposal on right of initial establishment and equality of competitive opportunity.

2. Most delegations did not support adoption of text in these areas. They considered that these issues go beyond financial services issues and have been addressed or are under consideration within the broader framework of the Agreement. A few delegations considered that specific market access disciplines for financial services should be developed in the MAI.

RESTRICTIONS BASED ON DOTATION CAPITAL OF BRANCHES OF FINANCIAL SERVICES ENTERPRISES

1. One EG5 delegation proposed the following text:

> *"Some countries still require branches of foreign banks to maintain dotation capital. To the extent that dotation capital requirements are imposed on branches of banks of another Contracting Party, any operational restrictions based on capital applicable to branch offices shall not be based on such dotation capital. Rather, Contracting Parties shall base such operational restrictions on the world-wide consolidated capital of the parent bank."*

Detailed comments explaining the rationale for this proposal are contained in paragraph 31 of the Aide-Memoire.

2. While two other delegations supported this proposal, several delegations considered that the measures referred to in the above text were justifiable on prudential grounds and should be permitted under the MAI. Some delegations considered that the issue should preferably be dealt with on a bilateral basis (between national supervisory authorities).

3. Delegations agreed that any such measures should not discriminate between branches of non-resident financial institutions and domestic financial institutions.

"INDIRECT INVESTMENT"

1. One EG5 delegation expressed concern that the extension of the protection of the MAI to indirect investment may not be appropriate for the financial services sector for prudential reasons, particularly in instances where there is a lack of appropriate co-operation arrangements with the supervisory authorities of non-MAI countries.

2. A number of delegations wanted to consider the matter further. Other delegations considered that the MAI provided safeguards to adequately address these concerns, including the prudential carve-out, the proposed denial-of-benefits clause, and possible specific provisions for financial services in the dispute settlement process (see below).

VIII. TAXATION

EXPROPRIATION

1. Most delegations supported inclusion of the following additional statement in the Interpretative Note:

> "MAI Parties understand that no taxation measures of the Parties effective at the time of signature of the Agreement could be considered as expropriatory or having the equivalent effect of expropriation." Some delegations were not in a position to associate themselves with such a statement.

2. The Group agreed that the Tax Authorities of only two countries should be involved in the procedure described in paragraph 2 and both should be MAI Parties. One of the Parties would certainly be the host country to the investment, but the other might need to be defined taking into account the extent to which indirect investments will be covered by the MAI.

ACCESSION

1. EG2 expressed concern about accession to the MAI of "tax havens", whether as Contracting Parties or as dependent territories of Contracting Parties. It was generally felt that tax havens, which are usually characterised by low (or zero) tax rates and/or extremely narrow tax bases as well as bank secrecy laws restricting exchange of tax information, provide opportunities for tax evasion and therefore pose a serious threat to countries' tax revenues.

2. The Group believed that the above concern would not require specific accession criteria if taxation were subject to neither national treatment nor MFN obligations under the MAI.

3. The Group considered nevertheless that tax policy considerations should be taken into account in accession to the MAI. It therefore considered that tax authorities should be involved in the process by which accession candidates are judged.

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

IX. COUNTRY SPECIFIC EXCEPTIONS

STANDSTILL AND THE LISTING OF COUNTRY SPECIFIC RESERVATIONS[23]

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

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

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

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

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

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

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

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

4. DG2 considered that further discussion is needed on the question of country specific reservations in certain sensitive sectors and new economic activities that may emerge in the future. Some delegations suggested flexibility could be achieved by separate annexes to the Agreement for the listing of country specific reservations in these areas.

5. The Drafting Group also considered that a standard presentation of the non-conforming measures listed in Contracting Parties' specific reservations would enhance transparency and facilitate the operation of the Agreement. For practical reasons, however, the amount of information to be provided should be limited to the minimum necessary to describe the non-conforming measures. This may be particularly relevant to sub-national (e.g. state and local) measures, not all of which may merit listing.

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23. The present section presents the results of the work of Drafting Group No. 2. References to “reservations” are understood to refer to “country specific exceptions” in accordance with a subsequent recommendation of DG3.

ROLLBACK

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

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

3. Rollback might be achieved through:

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

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

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

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

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

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

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

LODGING OF COUNTRY SPECIFIC EXCEPTIONS

1. It was agreed in DG3 that part A of the draft article was needed as the core provision to "grandfather" existing non-conforming measures and prevent the introduction of more restrictive measures ("standstill").

2. Different views were expressed with respect to part B of the draft article which would allow new non-conforming measures to be introduced after the Agreement comes into force. One view was that such a provision might undermine the MAI disciplines to which it applied. The opposite view was that part B would make it easier to preserve high standards in the disciplines of the agreement by allowing flexibility to countries in lodging their reservations.

3. Different views were also expressed regarding the disciplines against which reservations should be permitted. While some favoured an open list, others argued for a limited closed list of disciplines comprising National Treatment, MFN and new disciplines (special topics). It was suggested that the disciplines listed in the chapeau text of parts A and B should remain incomplete for the time being pending political decisions by the Negotiating Group.

4. It was suggested that the term "measure" should be defined and reference was made to the definitions used in NAFTA[24], GATS[25] and the transparency article in the MAI. One delegation objected to the use of the transparency definition which was said to be unsuitable for the purpose of lodging reservations.

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24. NAFTA Article 201: Definitions:

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

25. GATS Article XXVIII:

"measure means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form";