



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Drafting Group No.3 on Definition, Treatment and Protection of Investors and Investments

REPORT TO THE NEGOTIATING GROUP

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Drafting Group No.3 met on 12 May 1997 and 30 June 1997 and agreed on the attached Report to the Negotiating Group.

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REPORT TO THE NEGOTIATING GROUP

I. General considerations

1. At the invitation of the Chairman of the Negotiating Group at its April meeting, DG3 considered certain texts developed by Expert Group No.5, with a view to determining:

- a) whether the principles expressed in the EG5 texts should be applied more widely than financial services, and if so, whether there should be any limitations (e.g. sectoral) to such application;
- b) whether the texts generated for the financial services sector need adaptation for the purpose of broader application.

2. The purpose of DG3's consideration was not to review the value of these texts from the perspective of financial services, which is in the hands of the Negotiating Group. DG3 noted that, at the April meeting of the Negotiating Group, there was broad support for texts for financial services purposes on recognition arrangements, authorisation procedures, transparency, information transfer and data processing, and membership of self-regulatory bodies and associations [DAFFE/MAI/M(97)4].

3. Against this background, DG3 examined the following five subjects: A) information transfers and data processing; B) membership of self-regulatory bodies and associations; C) recognition arrangements; D) authorisation procedures; E) transparency. (The financial services texts and associated commentary on these subjects are reproduced in the Annex to this Report.)

4. The Group agreed that these issues need to be considered one by one on their merits. In each case, it is necessary to determine whether inclusion of text for the MAI as a whole would further the purposes of the agreement. It needs to be determined whether the National Treatment and MFN provisions, as well as a general anti-circumvention clause would be adequate to ensure non-discriminatory treatment of foreign investors and their investments. The implications of extending such provisions to sectors other than financial sectors also needs to be fully examined. In any event, the text developed for financial services would need to be modified if intended to apply more widely.

5. Delegations held different views:

- Many delegations indicated that they were not convinced of the desirability of generalising text on any of these issues for the MAI as a whole.
- Several delegations favoured adoption of text for the MAI as a whole and supported further work on the basis of text proposed by one delegation [DAFFE/MAI/DG3/RD(97)16].
- For other delegations, the main concern was to preserve the horizontal integrity of the MAI: from that perspective it would be preferable to have general provisions in the MAI than to have specific provisions for one sector only.

6. The Group also examined two other issues discussed in the Report by EG5 [DAFFE/MAI/EG5(97)4/REV1] that, at its April meeting, the Negotiating Group considered deserve further consideration: the treatment of cross-border services; and paragraph 4.6 of the Transfer Article.

II. Selected Issues

A) *Information transfers and data processing*

7. The provision developed for financial services on information transfers and data processing was initially considered as perhaps the most promising of the four selected issues for generalisation¹. This provision guarantees an absolute right, comparable for instance to the right to transfer funds under the Transfer article of the MAI, of free transfer of financial information and data processing outside the territory of the Contracting Party by an established financial services enterprise where this is necessary for the conduct of ordinary business or in connection with the purchase or sale of data processing services or information.

8. One delegation proposed text extending this EG5 provision to all sectors which reads as follows:

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

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

2. Nothing in paragraph 1:

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

9. Several delegations supported the principle of such a generalised provision. Among these delegations, some suggested that transfers of information into, not only outside, the territory of a Contracting Party should also be free. The Group agreed that this suggestion needs further consideration.

¹ One delegation recalled that it reserved its position with respect to the inclusion of any provision on information transfer and data processing for financial services, and maintains this reservation with respect to any other sectors.

10. Several other delegations felt that a mechanical extension of the provision to all enterprises and all types of information raised new problems with respect to the protection of intellectual property rights and, in connection with paragraph 1b), the treatment of cross-border services in the MAI. One delegation cautioned against going beyond the disciplines such as already exist in the GATS with respect to financial services without having adequately assessed its implications.

11. One delegation considered that a provision along the lines of paragraph 4.6 under consideration for the Transfer article of the MAI should be added to the proposed provision on information transfer. The Group agreed that this matter needs further consideration. One delegation suggested that issues addressed in paragraph 4.6 could be dealt with under a possible provision on public order.

B) *Membership of self-regulatory bodies and associations*

12. Several delegations favoured the adoption of such provisions for the MAI as a whole.

13. Most delegations, however, were not convinced of the necessity of a wider provision on self-regulatory bodies and associations:

- Some of these delegations 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. Two 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.
- Some of these delegations argued 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. (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.)
- Other delegations considered that the proposed provision could introduce new disciplines which are not covered elsewhere in the MAI but which would be difficult to accept for sectors other than financial services. They noted that the matter is under consideration for professional services in the WTO Working Party on Professional Services.

14. In any event, if text is to be adopted for financial services, several delegations noted a concern that, if the text were not generalised to all sectors, 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.

2. It was also noted that the issue of private entities with delegated authority was to be discussed by the Negotiating Group at its 13-14 May meeting in the context of monopolies and concessions [see DAF/MAI(97)22]. The results of that discussion will have to be taken into account in DG3's further consideration of this matter.

C) Recognition arrangements

15. Most delegations were not in favour of a general provision on recognition arrangements. Some argued that the text developed by EG5 is specifically related to prudential measures which are unique to the financial services sector.

16. Some delegations considered that recognition arrangements might give rise to conflict with the MFN obligations, noting that, in addition to its Financial Services Annex, the GATS has provisions on recognition applicable to all services sectors (Article VII). Against this background, one delegation proposed text generalising the EG5 provision to all sectors, supplemented by an anti-circumvention clause along the lines of that in paragraph 3 of Article VII of the GATS, which reads as follows:

“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.”

17. One delegation suggested that possible exceptions to MFN in connection with selective or mutual recognition would be better addressed from the viewpoint of transparency through country-specific reservations. Another delegation considered that transparency can be achieved through a notification of requirement while adopting the proposed text on recognition arrangements.

18. One delegation suggested adopting, for paragraph 3, a language similar to that in paragraph 3 of Article VII of the GATS.

D) Authorisation procedures

19. Some delegations considered that the Financial Services text provides additional disciplines not covered by the MAI Transparency article. One delegation proposed text generalising the Financial Services text as follows:

“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 [120][180] days, and shall promptly notify the applicant of the decision. An application shall not be considered complete until [all relevant hearings are held and] all necessary information is received. Where it is not practicable for a decision to be made within [120][180] days, the regulatory authority shall notify the applicant without undue delay and shall endeavour to make the decision within a reasonable time thereafter.”

20. Many delegations considered that the National Treatment provision would provide sufficient protection for investors.

21. Some delegations were concerned that the proposed generalised provision in the first sentence of paragraph 2 may not be consistent with confidentiality rules applicable for the processing of applications in certain areas.

22. Some delegations considered that paragraph 3 of the Financial Services text and of the above proposed generalised text essentially constitutes a "best endeavour" clause adding little to the substantive obligations of the MAI.

23. Many delegations saw difficulties in extending the provision as the period allowed for a final decision on an application for investment [120/180 days] may be too demanding in some sectors (the energy sector was mentioned) and too generous in others.

24. Several delegations thought that paragraph 3 had some value, but agreed that it might not be appropriate to adopt a specific time period and suggested that the text could be simplified.

25. One delegation suggested to limit the extension of the EG5 text to professional services.

26. In any event, if text is to be adopted for financial services, several delegations noted a concern that, if the text were not generalised to all sectors, the absence of generalisation could be interpreted as implying that authorisation procedures fall outside the scope of the MAI.

E) Transparency

27. Many delegations thought that it might be possible to modify the existing text on transparency (page 14 of the Consolidated Text and Commentary [DAFFE/MAI(97)1/REV2]) to accommodate the content of the transparency provision proposed by EG5 (see Annex).

28. With this objective in mind, one delegation suggested replacing the second sentence of paragraph 3 of the existing text by the following text:

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

- a) information related to particular investors or investments or the financial affairs and accounts of their individual customers, or

- b) any confidential or proprietary information, the disclosure of which would impede law enforcement or be contrary to its laws [policies, or practices]³ protecting confidentiality or prejudice legitimate commercial interests of particular enterprises.”

The Group agreed that this text needs further consideration.

29. One delegation did not favour modifying the existing text on transparency and felt that concerns related to the protection of confidentiality are adequately covered by paragraph 3 of the existing text.

III. Treatment of cross-border services

30. At the April meeting of the Negotiating Group, delegations agreed that the MAI is not intended to cover the provision of services on a cross-border basis (i.e. without establishment of the services supplier in the country where the service is to be supplied) but not all delegations favoured inclusion of an explicit interpretative note on the matter as suggested by EG5 delegations.

31. DG3 considered the issue further.

32. Many DG3 delegations were in favour of the inclusion in the MAI of text making clear that the MAI is not intended to impose obligations on a Contracting Party relating to the cross-border provision of goods and services offered by foreign suppliers not established on its territory.

33. Most of these delegations considered that such a clarification should be made in the Article on the definition of investment. One delegation suggested adding to the interpretative note foreseen for the definition of investment (Footnote 2, page 11 of the Consolidated Texts and Commentary [DAFFE/MAI(97)1/REV2]) the following text: “Claims to assets arising out of the cross-border provision of goods or services fall within the scope of the agreement only to the extent they are held by an enterprise established in the host country”. Some delegations considered that such clarification should be part of the text itself rather than a footnote to the definition of investment.

34. Some other delegations were not in favour of any explicit provision on cross-border trade, considering that the definition of investment is sufficiently clear in this respect. They were concerned that additional provisions such as those proposed above would be confusing, and that revisiting the definition on this issue could harm its integrity.

3. Proposed by one delegation.

IV. Transfers article (paragraph 4.6)

35. DG3 considered two alternative texts for paragraph 4.6 of the transfers article:

Alternative 1 (DG1 text)

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

Alternative 2 (EG5 text, changes from DG1 text shown in bold) ⁴

*“[4.6. Notwithstanding Articles 4.1 to 4.5, a Contracting Party may **prevent a transfer** through the equitable, non-discriminatory and good faith application of **measures to protect the rights of creditors, relating to or ensuring compliance with laws and regulations on the issuing, trading and dealing in securities, futures and derivatives, reports or records of transfers, or in connection with criminal offences and orders or judgements in administrative and adjudicatory proceedings, provided that such measures and their application shall not be used as a means of avoiding the Contracting Party’s commitments or obligations under the Agreement.]”***

36. A majority of delegations could live with Alternative 2 as it stands. Others could accept Alternative 2 with certain modifications. Some modifications suggested were:

- “prevent” could be replaced by “restrict”;
- “required for money laundering [and other law] enforcement purposes” could be added after “reports or records of transfers”;
- a further modification might be made to clarify that a Contracting Party may not use a reporting requirement to delay a transfer.

37. One delegation suggested that Article 14(4)⁵ of the Energy Charter Treaty would be preferable as it contained elements of Alternative 2 without using the term “prevent a transfer” which several delegations found objectionable. Another delegation suggested that replacing “prevent” with “restrict” could make the phrase less objectionable.

38. Some delegations expressed a preference for Alternative 1.

4. One delegation has provided a rearrangement of the text in Alternative 2 which is intended to facilitate further discussion by providing a clearer layout of the text [see DAF/MAI/DG3/RD(97)18].

5. “Notwithstanding paragraphs 1 to 3 [of Article 14], a Contracted Party may protect the rights of creditors, or ensure compliance with laws on the issuing, trading and dealing in securities and the satisfaction of judgements in civil, administrative and criminal adjudicatory proceedings, through the equitable, non-discriminatory and good faith application of its laws and regulations.”

Annex - Selected Financial Services Texts

The following texts are those proposed by EG5 for the purposes of financial services. Associated commentary is based on the Consolidated Text and Commentary document [DAFFE/MAI(97)1/REV2].

A. Information transfer and data processing

1. No Contracting Party shall take measures that prevent transfers of information or the processing of financial information outside the territory of a Contracting Party, including transfers of data by electronic means, where such transfer of information or processing of financial information is:
 - a) necessary for the conduct of the ordinary business of a financial services enterprise located in a Contracting Party that is the investment of an investor of another Contracting Party; or
 - b) in connection with the purchase or sale by a financial services enterprise located in a Contracting Party that is the investment of an investor of another Contracting Party of:
 - i) financial data processing services; or
 - ii) financial information, including information provided to or by third parties.
2. Nothing in paragraph 1:
 - a) affects the financial service enterprise's obligation to comply with any record keeping and reporting requirements; or
 - b) restricts the right of a Contracting Party to protect privacy, including the protection of personal data and the confidentiality of individual records and accounts, so long as such right is not used to circumvent the provisions of the Agreement.

Commentary:

Some EG5 delegations wanted to review paragraph 2 b) of the text further. One delegation reserved its position on this text.

B. Membership of self-regulatory bodies and associations

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

Commentary:

1. EG5's understanding is 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.

2. Most EG5 delegations supported the following interpretative note proposed by one delegation:

“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.”

3. A few EG5 delegations wanted to review further the proposed interpretative note because they considered that it would impose a lesser standard than in the WTO. One delegation suggested adding to the interpretative note: “provided that such access provides equal opportunities”.

C. Recognition arrangements

1. A Contracting Party may recognise prudential measures of any other Contracting Party or non-Contracting Party in determining how the Contracting Party's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonisation or otherwise, may be based on an agreement or arrangement with the other Contracting Party or non-Contracting Party concerned or may be accorded autonomously.

2. A Contracting Party that is a party to such an agreement or arrangement referred to in paragraph 1, whether future or existing, shall afford adequate opportunity for other interested Contracting Parties to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Contracting Party accords recognition autonomously, it shall afford adequate opportunity for any other Contracting Party to demonstrate that such circumstances exist.

D. Authorisation procedures⁶

⁶ Most EG5 delegations recommended adoption of this text. A few delegations felt that no such provisions are necessary.

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

E. Transparency

1. Nothing in this Agreement requires a Contracting Party to furnish or allow access to:
 - a) information related to the financial affairs and accounts of individual customers of financial services enterprises; or
 - b) any confidential or proprietary information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or prejudice legitimate commercial interests of particular enterprises.

Commentary:

EG5 recommended that, in addition to the general Transparency provisions of the MAI, this text be adopted.