



Negotiating Group on the Multilateral Agreement on Investment (MAI)

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

**GENERALISATION OF FINANCIAL SERVICES PROVISIONS:
SELECTED OUTSTANDING ISSUES**

(Note by the Chairman)

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1. The Group is invited to conclude its work on the possible generalisation of certain financial services texts. This Note identifies a number of outstanding issues and suggests how they might be presented to the Negotiating Group in a final report by DG3 on these matters. (Elements of a draft final report are proposed in Annex 1.)

1. *Information transfer and data processing*

2. This is an area where the Group, except four delegations, has agreed on the value of a generalisation and appears prepared to recommend to the Negotiating Group adoption of the generalised text developed so far [see Annex 1].

3. However, the Group noted that paragraph 1 of the proposed provision introduces an element of cross-border trade in services in the MAI and that the extent to which this would raise a problem should be studied further. Some delegations considered that the proposed provision does not provide rights to foreign service suppliers established outside the territory of a Contracting Party to supply services on its territory but only confers rights to an investor established on its territory to have access to data processing services and information available abroad (or to sell them abroad). Some other delegations considered that paragraph 1 may confer rights of market access to non-resident service suppliers.

4. With respect to paragraph 2b) of the proposed text, the Group noted that delegations are still examining whether it provides adequate protection. One delegation also expressed a concern as to whether this provision would meet its concerns about protecting the investor's ability to transfer data. Delegations were invited to provide proposals for text which would meet their concerns, at this meeting of the Group.

Questions:

- 1. Would the Group agree to recommend to the Negotiating Group adoption of the proposed generalised text in Annex 1 on the understanding that it is not intended to provide rights to foreign service suppliers established outside the territory of a Contracting Party to supply services on its territory but only to confer rights to an investor established on its territory to have access to data processing services and information available abroad (or to sell them abroad)? Should this understanding be recorded explicitly in the Agreement?***
- 2. Unless the Group can agree on a proposal for new text for paragraph 2 b), would the Group agree to mention in a Commentary that remaining concerns may be matters for further discussion through bilateral consultations among delegations concerned?***

2. *Transparency*

5. This is another area where the Group is prepared to recommend to the Negotiating Group adoption of the text developed so far [see Annex 1].

6. Paragraph b) of the proposed text includes a square-bracketed reference to “policies, or practices” in addition to “laws” protecting confidentiality (to which the disclosure of confidential or proprietary information would be contrary).

Question: Can the text in square-brackets be deleted?

3. Recognition arrangements

7. This is an area where an option for text has been developed, but where the Group remained divided as to whether the MAI should contain generalised text on recognition arrangements with respect to non-financial services.

8. The option for generalised text developed by the Group would permit unilateral or mutual recognition arrangements subject to a requirement to afford adequate opportunity to third parties to negotiate, or demonstrate that circumstances exist for, access to similar arrangements.

9. Some delegations recommend adoption of this generalised text. Recognition arrangements might be open to challenge under the MFN obligation of the MAI. These delegations 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.

10. 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.

Question: Does the Group agree that the desirability of including such a provision for non-financial services should now be referred to the Negotiating Group as a matter for its political decision?

4. Authorisation procedures

11. This is an area where, although an option for generalised text is available, the Group (except few delegations) is not convinced of the desirability of a generalisation. It seems that, for many delegations, this is to a large extent because the generalised text would not add much to the generic obligations of the MAI.

12. However, there is 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. One solution to address this concern might be to introduce 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.

Question: Does the Group wish to recommend to the Negotiating Group 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”?

5. *Membership of self-regulatory bodies and associations*

13. This is an area where the Group is not convinced of the desirability of a generalisation. No text is available.

14. Again, however, there is 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 discriminatory measures in relation to membership of self-regulatory bodies and associations are not subject to the generic obligations of the MAI.

Question: Does the Group wish to address this concern through the proposed 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”?

Annex 1

Proposed Elements of a Draft Final Report by DG3 to the Negotiating Group (adapted from DAFFE/MAI/DG3(97)15)

1. Without prejudice to the value of Financial Services texts as they stand now, the Group considered possible broader application of proposed financial services texts. Except four delegations, the Group recommends adoption of the generalised text concerning information transfer and data processing. It also recommends adoption of a new text for paragraph 3 of the Transparency Article. The Group is divided as to the desirability of a generalised text on recognition arrangements and refers the matter to the Negotiating Group for its political decision. Except a few delegations, the Group is not convinced of the value of a generalisation of the financial services text concerning authorisation procedures. It is not convinced of the value of a generalisation concerning membership of self-regulatory bodies and associations. [Finally, the Group recommends adoption of 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”. *To be adjusted in light of the outcome of the discussions on paragraph 12, page 4*]

1. Information transfer and data processing

Text

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, intellectual and industrial property¹, and the confidentiality of individual records and accounts, so long as such right is not used to circumvent the provisions of the Agreement.

Commentary

2. The provision developed by EG5 for financial services on information transfers and data processing 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.

3. DG3 developed text extending the EG5 provision to all sectors and recommends its adoption^{2,3}.

4. It was understood that the above proposed text as it stands covers transfers of information into, as well as out of, the territory of a Contracting Party.

5. [However, the Group noted that paragraph 1 of the proposed provision introduces an element of cross-border trade in services in the MAI and that the extent to which this would raise a problem should be studied further. Some delegations considered that the proposed provision does not provide rights to foreign service suppliers established outside the territory of a Contracting Party to supply services on its territory but only confers rights to an investor established on its territory to have access to data processing services and information available abroad (or to sell them abroad). Some other delegations considered that paragraph 1 may confer rights of market access to non-resident service suppliers. ***To be adjusted in light of the outcome of the discussions on paragraph 3, page 2***]

6. One delegation raised the issue of the relation between this text and on-going discussions on Electronic Commerce.

7. [With respect to paragraph 2b), the Group noted that delegations are still examining whether it provides adequate protection. One delegation also expressed a concern as to whether this provision would meet its concerns about protecting the investor's ability to transfer data. ***To be adjusted in light of the outcome of the discussions on paragraph 4, page 2***]

1. The Group noted that the issue of protection of intellectual property rights should be looked at in the broader context of on-going discussions on the subject.

2. One delegation 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.

3. Two delegations reserved their position in respect of such a generalisation. One delegation, which maintains a scrutiny reserve with respect to the Financial Services text, also reserved its position on generalisation.

2. *Transparency*

Text

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 particular investors or investments, or
- b) any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws [policies, or practices]⁴ protecting confidentiality or prejudice legitimate commercial interests of particular enterprises.

Commentary

8. The Group considered that it is 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. The Group recommends replacing the second sentence of paragraph 3 of the existing text by the proposed text.

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.

3. *Recognition arrangements*

Text

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.

4. Proposed by one delegation.

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.

Commentary [To be adjusted in light of the outcome of the discussions on paragraphs 9 and 10, page 3]

10. Some delegations recommend adoption of generalised text. Recognition arrangements might be open to challenge under the MFN obligation of the MAI. These delegations 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.

11. 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.

12. One delegation suggested considering, for paragraph 1, a language similar to that in paragraph 1 of Article VII of the GATS and agreed to return to this suggestion at the next meeting of the Group on the basis of a proposal for text.

4. Authorisation procedures

Text

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.

Commentary [*To be adjusted in light of the outcome of the discussions on paragraph 12, page 4*]

13. Some delegations considered that the text proposed in the above paragraph 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.

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

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

16. Three delegations reserved their positions on paragraph 3 because the character of a “best endeavour” clause included in the EG5 text is not retained in the present text of the proposed paragraph 3. Two of these delegations have indicated that they may reconsider their positions in light of a further examination of commitments already undertaken under Article VI (3) of the GATS.

17. 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.

5. *Membership of self-regulatory bodies and associations*

Commentary

18. The Group 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 governments⁵. (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.)

19. [In any event, if text is to be adopted for financial services, 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. *To be adjusted depending on the outcome of the discussions on paragraph 14, page 4*]

5. It can be noted that, at the October round of informal consultations on Special Topics, delegations agreed on a draft article for all entities, including private entities, exercising any delegated regulatory, administrative or other governmental authority [DAFFE/MAI/ST(97)13/REV1, Section VI] which confirms this understanding.