



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.5 on “Financial Services Matters”

SELECTED ISSUES IMPORTANT FOR, OR SPECIFIC TO, FINANCIAL SERVICES

(Note by the Chair)

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1. According to the mandate given by the Negotiating Group, in addition to the development of text on the treatment of prudential measures, the Group may identify and, where appropriate, make proposals on other issues important for, or specific to, financial services which need to be addressed under the agreement.
2. This Note discusses six issues, against the background of articles of the MAI currently under discussion and relevant articles from other international agreements. The Group may wish to consider the relevance of these issues in the MAI context, the appropriateness of the general provisions of the MAI in dealing with these issues and whether special provisions are required. If special provisions are required, the Group may wish to make proposals for text on these issues.
3. In making proposals regarding financial services, the Group is invited to keep in mind that the general objective of the MAI is to be a “state-of-the-art” agreement, setting high standards of investment liberalisation and protection and that the treatment of financial services under the MAI should be consistent with this objective.
4. On most issues identified in this Note, other international agreements, such as the GATS, NAFTA and the OECD Code of Liberalisation of Current Invisible Operations, provide models. The GATS provides three levels of provision depending on the issues concerned: articles applicable to all services sectors; the Annex on financial services; and the Understanding on Commitments in Financial Services. (While the application of the Understanding is optional, almost all OECD Members used it in scheduling their specific commitments on financial services.)
5. These models should be used as possible benchmarks, keeping in mind that the MAI is an agreement which applies to investors and investments and not to all aspects of international trade in financial services.

I. Recognition and harmonisation arrangements

6. The treatment of recognition and harmonisation arrangements under the National Treatment and MFN obligations is an important issue for financial services as there is an increasing number of instances where host countries recognise, generally on the basis of bilateral or regional mutual recognition arrangements, the prudential standards of other countries and may agree to waive certain requirements with respect to financial institutions originating from these other countries.
7. Article VII of the GATS (see Annex to this Note) allows Members to recognise qualifications obtained, requirements met or licences granted in one or several other Member countries. It introduces a right for third countries to try and demonstrate that their licensing requirements, etc. are equivalent to those of the beneficiaries of recognition arrangements and should be recognised.
8. In addition, the GATS Annex on Financial Services provides that a Member may recognise prudential measures of any other country in determining how the member’s measures relating to financial

services shall be applied. At the same time, it creates an obligation to afford third countries adequate opportunity to negotiate their accession to recognition arrangements (see Annex to this Note).

9. Article 1406 of NAFTA on Most-Favored-Nation Treatment contains somewhat similar provisions (see Annex).

10. For the time being, the MAI does not contain specific provisions on recognition arrangements. The article of the MAI on National Treatment and Most-Favored-Nation currently under consideration reads as follows:

“1.1. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.

1.2. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to investors of any other Contracting Party or of a non-Contracting Party, and to the investments of investors of any other Contracting Party or of a non-Contracting Party, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposition of investments.

1.3. Each Contracting Party shall accord to investors of another Contracting Party and to their investments the better of the treatment required by Articles 1.1 and 1.2, whichever is the more favourable to those investors or investments.”

11. Does the Group consider that recognition arrangements require a separate provision in the agreement and, if this were the case, what would be the appropriate text?

II. Transparency

12. The GATS has no transparency provisions specific to financial services. However, transparency is covered in the general provisions (Article III), which applies to financial services (see Annex). Article 1411 of the Financial Services Chapter of NAFTA contain provisions on transparency (see Annex). The most important elements seem to be the following: a best endeavour to notify in advance measures under preparation; a requirement to process completed applications within 120 days; protection of the confidentiality of information relating to customers of financial services; and the establishment of enquiry points.

13. An article for the MAI on Transparency is currently under consideration, which reads as follows:

“2.1. Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the operation of the Agreement. Where a Contracting Party establishes policies which are not expressed in laws or regulations or by other means listed in this paragraph but which may affect the operation of the Agreement, that Contracting Party shall promptly publish them or otherwise make them publicly available.

2.2. Each Contracting Party shall promptly respond to specific questions and provide, upon request, information to other Contracting Parties on matters referred to in Article 2.1.

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

14. Does the Group consider that the current MAI article is sufficient to deal with issues important for, or specific to, financial services, or that there are elements which should be added because of the specific needs of financial services? For example, the Group could consider whether the transparency provisions should include notification in advance of new measures; time limits on processing of applications; and establishment of enquiry points.

III. New financial services

15. The treatment of new services may require special consideration to ensure that an investor in the host country can introduce a new service to that market. Such an investor may not be able to rely on the principles of MFN or National Treatment because, by their nature, these principles may not be applicable in this situation. In the financial services sector, given that it is extensively regulated, the risk of an investor not being permitted to introduce a new service may be higher than in other sectors. Special consideration may also be warranted owing to the rapid pace of innovation in the financial services sector. Both the GATS and NAFTA contain provisions to address this issue.

16. The Understanding on Commitments in Financial Services of the GATS contains a provision on New Financial Services under which “a Member shall permit financial service suppliers of any other Member established in its territory to offer in its territory any new financial service”.

17. Under Article 1407 of the Financial Services Chapter of NAFTA, “each Party shall permit a financial institution of another Party to provide any new financial service of a type similar to those services that the Party permits its own financial institutions, in like circumstances, to provide under its domestic law. A Party may determine the institutional and juridical form through which the service may be provided and may require authorization for the provision of the service. Where such authorization is required, a decision shall be made within a reasonable time and the authorization may only be refused for prudential reasons.”

18. At present, the MAI does not contain a provision on new financial services. Does the Group consider that the MAI should contain a separate provision on new financial services and, if this were the case, what would be the appropriate text?

19. The outcome of the discussion on the treatment of new financial services should also contribute to the on-going work of DG3 on issues relating to non-discriminatory measures.

IV. Data transfer

20. Limitations on the ability of investors to freely transfer data for processing to or from their investments in a host country can act as a deterrent to investors. The Group will need to consider whether

the circumstances of the financial services sector are unique in this area and whether special provisions will be necessary in the MAI to cover these concerns.

21. Both the Understanding on Commitments in Financial Services of the GATS and Article 1407 of the Financial Services Chapter of NAFTA (see Annex) contain separate provisions under which a financial institution of another party must be permitted to transfer information for data processing necessary to the conduct of normal business activities.

22. Does the Group consider the MAI should contain a provision on data transfer and, if this were the case, what would be the appropriate text?

V. Self-regulatory organisations

23. Self-regulatory bodies such as stock exchanges and investment dealer associations can play a significant role in the regulation of the financial services sector, notably in the securities area. Many jurisdictions delegate regulatory responsibilities to these bodies or require financial services suppliers to be members of such bodies in order to supply services. Accordingly, both the GATS and the NAFTA contain provisions to ensure that the Agreement (including the MFN and the National Treatment provisions) applies to such bodies.

24. The Understanding on Commitments in Financial Services of the GATS has a provision which reads as follows:

“When membership or participation in, or access to, any self-regulatory body, securities or futures exchange or market, clearing agency, or any other organization or association, is required by a Member in order for financial service suppliers of any other Member to supply financial services on an equal basis with financial service suppliers of the Member, or when the Member provides directly or indirectly such entities, privileges or advantages in supplying financial services, the Member shall ensure that such entities accord national treatment to financial service suppliers of any other Member resident in the territory of the Member.”

25. Article 1402 of the Financial Services Chapter of NAFTA provides that “where a Party requires a financial institution or a cross-border financial service provider of another Party to be a member of, participate in, or have access to, a self-regulatory organization to provide a financial service in or into the territory of that Party, the Party shall ensure observance of the obligations of this Chapter by such self-regulatory organisation”.

26. The OECD Code of Liberalisation of Current Invisible Operations contains a provision under which “Members shall be responsible for assuring that discrimination by nationality is not practised in their jurisdiction as to conditions for membership in any private professional association, self-regulatory body, securities exchange or market, or other private association, membership in which it is necessary to engage in banking or financial services on an equal basis with domestic enterprises or natural persons, or which confers particular privileges or advantages in providing such services”.

27. Does the Group consider that the MAI should contain a provision on self-regulatory organisations, and if this were the case, what would be the appropriate text?

VI. Payments system/lender of last resort

28. The payments system and “lender of last resort” policies of central banks are critical to the stability of a country’s financial system and indirectly to macroeconomic stability. Central banks must have the flexibility to take the appropriate measures in these areas. The Group should consider whether such flexibility exists under the general provisions of the MAI or whether it would be appropriate to include special provisions in the MAI.

29. The Understanding on Commitments in Financial Services of the GATS has a provision which reads as follows: “Under terms and conditions that accord national treatment, each Member shall grant to financial service suppliers of any other Member established in its territory 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. This paragraph is not intended to confer access to the Member's lender of last resort facilities.”

30. Article 1401.3(b) of NAFTA provides that “nothing in this Chapter shall be construed to prevent a Party, including its public entities, from exclusively conducting or providing in its territory: ... activities or services for the account or with the guarantee or using the financial resources of the Party, including its public entities”. “Public entities” are defined in Article 1416 as: “... a central bank or monetary authority of a Party, or any financial institution owned or controlled by a Party”.

31. Does the Group consider that provisions should be introduced in the MAI with respect to the payments system/tender of last resort issues, and if so, what would be the appropriate text?

Annex

TEXTS ON SELECTED FINANCIAL SERVICES ISSUES FROM OTHER INTERNATIONAL AGREEMENTS

I. Selective recognition and harmonisation arrangements

GATS

Article VII:

Recognition

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.
2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.
3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.
4. Each Member shall:
 - (a) within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;
 - (b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;
 - (c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

Annex on Financial Services

Recognition

(a) A Member may recognize prudential measures of any other country in determining how the Member's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

(b) A Member that is a party to such an agreement or arrangement referred to in subparagraph (a), whether future or existing, shall afford adequate opportunity for other interested Members 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 Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that such circumstances exist.

(c) Where a Member is contemplating according recognition to prudential measures of any other country, paragraph 4(b) of Article VII shall not apply.

NAFTA

Article 1406: Most-Favored-Nation Treatment

2. A Party may recognize prudential measures of another Party or of a non-Party in the application of measures covered by this Chapter. Such recognition may be:

- a) accorded unilaterally;
- b) achieved through harmonization or other means; or
- c) based upon an agreement or arrangement with the other Party or non-Party.

3. A Party according recognition of prudential measures under paragraph 2 shall provide adequate opportunity to another Party to demonstrate that circumstances exist in which there are or would be equivalent regulation, oversight, implementation of regulation, and if appropriate, procedures concerning the sharing of information between the Parties.

4. Where a Party accords recognition of prudential measures under paragraph 2(c) and the circumstances set out in paragraph 3 exist, the Party shall provide adequate opportunity to another Party to negotiate accession to the agreement or arrangement, or to negotiate a comparable agreement or arrangement.

II. Transparency

GATS

Article III

Transparency

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.
2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.
3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.
4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.
5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.

NAFTA

Article 1411

1. In lieu of Article 1802(2) (Publication), each Party shall, to the extent practicable, provide in advance to all interested persons any measure of general application that the Party proposes to adopt 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.

2. Each Party's regulatory authorities shall make available to interested persons their requirements for completing applications relating to the provision of financial services.
3. 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.
4. A regulatory authority shall make an administrative decision on a completed application of an investor in a financial institution, a financial institution or a cross-border financial service provider of another Party relating to the provision of a financial service within 120 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 days, the regulatory authority shall notify the applicant without undue delay and shall endeavor to make the decision within a reasonable time thereafter.
5. Nothing in this Chapter requires a Party to furnish or allow access to:
 - (a) information related to the financial affairs and accounts of individual customers of financial institutions or cross-border financial service providers; or
 - (b) any confidential 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.
6. Each Party shall maintain or establish one or more inquiry points no later than 180 days after the date of entry into force of this Agreement, to respond in writing as soon as practicable, to all reasonable inquiries from interested persons regarding measures of general application covered by this Chapter.

III. Data Transfer

GATS

Understanding on Commitments in Financial Services

Transfers of Information and Processing of Information

8. No Member shall take measures that prevent transfers of information or the processing of financial information, including transfers of data by electronic means, or that, subject to importation rules consistent with international agreements, prevent transfers of equipment, where such transfers of information, processing of financial information or transfers of equipment are necessary for the conduct of the ordinary business of a financial service supplier. Nothing in this paragraph restricts the right of a Member to protect personal data, personal privacy and the confidentiality of individual records and accounts so long as such right is not used to circumvent the provisions of the Agreement.

NAFTA

Article 1407

2. Each Party shall permit a financial institution of another Party to transfer information in electronic or other form, into and out of the Party's territory, for data processing where such processing is required in the ordinary course of business of such institution.