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

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

**DRAFT REPORT TO THE NEGOTIATING GROUP**

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### **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.

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

4. A majority of delegations was not convinced of the desirability of developing text on any of these issues for the MAI as a whole. These delegations considered that the need for such provisions had not been demonstrated. The National Treatment and MFN provisions and an anti-circumvention clause should be adequate to ensure non-discriminatory treatment of foreign investors and their investments. To go beyond these disciplines would have implications that have not been adequately assessed. A number of delegations said that they would prefer no provisions at all, not even for financial services.

5. Several delegations favoured the development of text for the MAI as a whole for all or some of the issues raised in the financial services text. For a few delegations, the disciplines developed for the financial services sector, which is a leading sector in the globalisation process, go beyond national treatment and their adoption for the MAI as a whole would contribute to a high standards agreement. For some 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. There was consensus in the Group that, if provisions additional to those for financial services were adopted, they should apply to the MAI as a whole and not be limited to specific sectors. In any case, it was also agreed that substantial redrafting would be needed.

7. Given the results of its discussions so far and the need for further technical work, DG3 agreed that further consideration of these matters was necessary before reaching any firm conclusions.

8. For each of the selected issues discussed thereafter, the Negotiating Group will have to determine whether to apply the proposed text to the MAI as a whole, to retain it only for the financial services sector, or not to include any text at all in the MAI.

## **II. Selected Issues**

### **A) *Information transfers and data processing***

9. Many delegations initially considered that the provision developed for financial services on information transfers and data processing was perhaps the most promising of the four selected issues for generalisation. However further discussion of technical issues caused some delegations to reconsider their position.

10. Some delegations felt that a mechanical extension of the provision to all enterprises and all types of information might raise new problems, for instance with respect to the protection of intellectual property rights and the treatment of cross-border services in the MAI.

11. A number of delegations considered that if a clause were drafted, it should apply only to companies that have particular need for access to information for their activities.

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

12. Several delegations favoured the adoption of such provisions for the MAI as a whole. One delegation gave professional services as an example where restrictions imposed by self-regulatory bodies exist in its country and with respect to which its country is prepared to lodge reservations under the MAI. Another delegation suggested adopting an interpretative note applicable to all sectors.

13. Most delegations, however, were not convinced of the necessity of a wider provision on self-regulatory bodies and associations<sup>1</sup>:

- 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

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1. 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.

treated in the same way as private companies; accordingly, measures they take would fall outside the scope of the MAI.)

- 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.

### **C) *Recognition arrangements***

14. 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.

15. Some delegations considered that recognition arrangements might give rise to conflict with the MFN obligation. They noted that in addition to its Financial Services Annex, the GATS has provisions on recognition applicable to all services sectors (Article VII).

### **D) *Authorisation procedures***

16. It was argued that generalising paragraphs 1 and 2 of the Financial Services text would be rather straightforward technically, but delegations held different views as its advisability. Many delegations considered that the National Treatment provision would provide sufficient protection for investors while others questioned this.

17. Many delegations considered that paragraph 3 of the Financial Services text essentially constitutes a "best endeavour" clause adding little to the substantive obligations of the MAI. They also 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 (one delegation cited the petroleum sector) and too generous in others.

18. 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.

## 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 DAFPE/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 procedures<sup>2</sup>**

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.

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<sup>2</sup> Most EG5 delegations recommended adoption of this text. A few delegations felt that no such provisions are necessary.