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

**Expert Group No.5 on “Financial Services Matters”**

**SUMMARY RECORD**

**Meeting on 16-17 October 1996**

## EXPERT GROUP N° 5 ON "FINANCIAL SERVICES MATTERS"

### SUMMARY RECORD

16-17 October 1996

#### 1. Adoption of the Agenda

The Group adopted the Agenda [DAFFE/MAI/EG5/A(96)1].

#### 2. Treatment of Prudential Measures

The Group:

- Considered the draft text on prudential measures with respect to financial services set out in the Chair's Note [DAFFE/MAI/EG5(96)1];
- Agreed on texts and commentary attached to them. (See Annex, points A and B, to this Summary Record).

#### 3. Other Issues, including the Definition of Investors and Investments

The Group:

- Considered selected issues regarding the definitions of "investor" and "investment" set out in the Chair's Note [DAFFE/MAI/EG5(96)1];
- Agreed, as a working hypothesis, to consider including "branches" in the definition of "investor" without square brackets, together with an interpretative note. (See Annex, point C);
- Discussed the definition of "investment" currently under consideration by DG3 [DAFFE/MAI/DG3(96)1]; and agreed to return to this matter at the Group's next meeting, on the basis of an analytical note by the Secretariat;
- Noted that there were other issues which may need to be addressed by the Group. The Chair noted in particular the following six issues that had been raised during the discussion: mutual recognition arrangements; data transfer; transparency; self-regulatory organisations; new financial services; and payments system/lender of last resort. Other issues mentioned by delegations included: non-discriminatory barriers; acquired rights; dispute settlement; capital requirements with respect to branches; the treatment of public entities; implications of a balance-of-payments clause for financial services; relationships between the IMF agreement and the MAI; country reservations with respect to financial services. The Chair made a distinction between issues to be addressed in the short term and those which will require attention in a longer term. The Chair will prepare a note on "short-term" issues for consideration at the Group's next meeting.

#### 4. Further Work and Other Business

The Group decided to meet again on 5-6 December 1996.

## Annex

### A. PRUDENTIAL MEASURES

#### I. Text

1. The Group considered that the MAI should include a prudential clause very similar to that contained in the Annex on Financial Services of the GATS. The Group suggested that the text of such a clause could read as follows:

“Article A. Prudential measures

1. Notwithstanding any other provisions of the Agreement, a Contracting Party shall not be prevented from taking prudential measures with respect to financial services, including measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by an enterprise [providing] financial services, or to ensure the integrity and stability of its financial system.
2. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement.”

#### II. Commentary:

2. The proposed draft 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 Group considered that there was no need to make this point explicit in the proposed draft Article.

3. 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 draft Article.

4. 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 of the Agreement [DAFFE/MAI(96)16/REV1].

5. Delegations were of the view that prudential measures derived from co-operation between the supervisory authorities of the home country and the host country are covered by the proposed draft Article. Further consideration needs to be given to the treatment of these measures, particularly as they may relate to recognition and harmonisation arrangements.

6. In paragraph 1 of the proposed draft Article, the 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. The Group is still considering whether the term “providing” is appropriate, or alternatively “providing or engaging in”.

7. Except for one delegation, the Group 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. The Group considered, however, that it would be premature to make specific proposals to the Negotiating Group in this regard, until the work by EG1 is further advanced.

8. The Group felt it would be desirable that the Agreement define certain terms including the term “measure”.

## **B. DEFINITION OF FINANCIAL SERVICES**

### **I. Text**

The Group considered that the MAI should contain a definition of financial services similar to that used in the GATS, and if possible the same definition. The Group considered a definition Article which would read as follows:

“Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

#### *Insurance and insurance-related services*

(i) Direct insurance (including co-insurance):

(A) life

(B) non-life

(ii) Reinsurance and retrocession;

(iii) Insurance intermediation, such as brokerage and agency;

(iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

#### *Banking and other financial services (excluding insurance)*

(v) Acceptance of deposits and other repayable funds from the public;

(vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;

(vii) Financial leasing;

(viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;

(ix) Guarantees and commitments;

(x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:

(A) money market instruments (including cheques, bills, certificates of deposits);

(B) foreign exchange;

(C) derivative products including, but not limited to, futures and options;

(D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;

(E) transferable securities;

(F) other negotiable instruments and financial assets, including bullion.

(xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;

(xii) Money broking;

(xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;

(xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;

(xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;

(xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.”

## **II. Commentary**

One delegation asked whether transfer of credit risks (for instance, credit swaps) and the provision of stored value cards were considered as financial services. The Group 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.

## C. DEFINITION OF INVESTOR ("BRANCHES")

### I. Text

The Group agreed, as a working hypothesis, to consider including "branches" in the definition of "investor" without square brackets, together with an "interpretative note" which could read as follows:

["Whether such an entity can be an investor will depend upon its legal capacity to make an investment on its own behalf under the law of the Contracting party under which it is constituted or organised and the law of the Contracting party in which the investment is to be made."]

### II. Commentary

1. While a large majority of delegations can accept this approach, several delegations indicated that their position is not yet definitive.
2. Delegations favouring inclusion of branches underlined the growing importance of branches as a vehicle for international business, especially in the financial sector. To delete branches from the definition of "investor" would send the wrong signal since the MAI is intended to be an ambitious agreement with comprehensive coverage. The legal situation is evolving, at least in some countries, and it would be desirable for the MAI to cover cases where branches are recognised to have the legal capacity to invest.
3. Delegations with reservations on this proposal questioned whether there are any cases where branches have the legal capacity to invest other than in the name of their parent. Although some delegates felt that further consideration was necessary, no such cases had been identified in the financial services sector. If MAI rights were given to branches of non-MAI investors, a free-rider problem would arise. The risk of abuse could be addressed in the "Denial of Benefits" clause [DAFFE/MAI(96)16/REV1]. Reference was also made to the definition of "person of a Party" in the NAFTA (Article 1416).
4. Inclusion of branches as investors may give rise to questions of standing in dispute settlement procedures. This should be reviewed by EG1.
5. One Delegation proposed that those MAI Parties which recognise the legal capacity of branches to invest should be identified in some way in the MAI.
6. Some Delegations would prefer to rely on country specific reservations and dispense with the interpretative note.
7. The Group agreed to consider further whether including branches in the definition of investor gives rise to problems unique to the financial services sector.