



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.5 on “Financial Services Matters”

SUMMARY RECORD

Meeting on 27-29 January 2001

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1. Adoption of the Agenda

The Group adopted the Agenda [DAFFE/MAI/EG5/A(97)1].

2. Definition of “investment” and possible safeguard provisions

The Group discussed this item on the basis of a note by the Chair [DAFFE/MAI/EG5(97)1] and adopted a report on this matter to the Negotiating Group [sent on OLIS on 30 January 1997 as DAF/MAI/EG5(97)2].

3. Financial services: follow-up

The Group continued its work on the issues identified in its December Report to the Negotiating Group [DAFFE/MAI/EG5(96)5]. The inventory of issues discussed and follow-up work required are contained in the Aide-Memoire annexed to this Summary Record.

4. Other Business

a. The Group discussed Article 4.6 of the MAI on Transfers in the light of the conclusions of the December meeting of the Negotiating Group (see Aide-Memoire).

b. The Group will meet again on 13-14 March 1997 with a view to concluding its consideration of the issues identified in the Aide-Memoire, taking into account the results of the Negotiating Group's meeting on 29-31 January 1997.

Annex

AIDE-MEMOIRE
Inventory of issues for consideration at the March meeting

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The Chair encourages delegations to review all outstanding issues following the discussions at the January meeting of EG5, including those dealt with in the Group's Report to the Negotiating Group DAFFE/MAI/EG5(97)2. Delegations should be prepared to consider these issues at the next meeting in March with a view to reaching conclusions.

Delegations are also encouraged to review the Consolidated Texts and Commentary [DAFFE/MAI(97)1] as a whole to check whether there are any provisions which raise specific, or particularly important, issues for financial services which may not have been identified so far by the Group.

Four delegates will play the role of co-ordinators with respect to certain subjects (see document). These co-ordinators will remain in contact with the Chair and the Secretariat as preparatory work proceeds.

A. Balance-of-Payments Clause

1. The Group had an extensive discussion of what the key elements of a balance-of-payments clause might be. The Chair will circulate a draft text for consideration at the March meeting.

B. Definition of Investment and Safeguard Provisions

1. Monetary and exchange rate policies and role of monetary authorities

2. In addition to a balance-of-payments safeguard clause, the Group considered possible provisions relating to monetary and exchange rate policies and the role of monetary authorities.

3. The Group noted a provision in the GATS Annex on Financial Services by which the GATS does not apply to "services supplied in the exercise of governmental authority". Such services mean the following:

- "a) activities conducted by a central bank or monetary authority or by an other public entity in pursuit of monetary or exchange rate policies;
- b) activities forming party of a statutory system of social security or public retirement plans; and
- c) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government."

4. This issue is linked to that relating to proprietary actions of government raised in the context of the discussions on the possible safeguard clauses [see DAFFE/MAI/EG5(97)2] and will need to be considered further in March.

5. One delegation has agreed to take the lead in preparing for a further discussion on the question of safeguards at the March meeting [see DAFPE/MAI/EG5(97)2]. Comments by delegations should be transmitted ahead of the meeting to Mr G.

2. *Public debt*

6. The Group, for the first time, discussed the issue of whether public debt should be included in the negative list. No conclusions were reached.

7. Mr A. from one delegation has agreed to co-ordinate the preparatory work on this matter before the March meeting [see DAFPE/MAI/EG5(97)2]. Comments by delegations should be transmitted ahead of this meeting to Mr A.

3. *“Indirect investment”*

8. Concerns were raised that the extension of the protection of the MAI to indirect investment may not be appropriate in all cases for the financial services sector. One delegation proposed to prepare a note on this matter for consideration at the March meeting.

C. Transfers

9. In his conclusions of the meeting of the Negotiating Group held on 18-20 December 1996, the Chairman noted that countries were ready to accept a provision to take account of the concerns addressed in paragraph 4.6 in the Transfers article of the MAI. He invited those countries that are particularly interested in this subject to propose a text that would be acceptable to the Negotiating Group [DAFFE/MAI(97)2].

10. Responding to this invitation, a group of countries led by Mr B. prepared the following text:

“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, to ensure 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 be consistent with the provisions of Article 1 (General Treatment)]. [Such measures shall not unreasonably impair or derogate from the free and undelayed transfer ensured by this Agreement.]”

11. The Group agreed to return to this matter at its March meeting with a view to finalising the text. Mr B. agreed to co-ordinate preparatory work on this subject before the March meeting. Comments by delegations should be transmitted ahead of the meeting to Mr. B.

D. Financial Services¹

1. Transparency

12. The Group considered the text which resulted from its December meeting [DAFFE/MAI/EG5(96)5].

13. The issues outlined in the December Report of EG5 remained outstanding. The Group agreed to return to these issues at its March meeting.

2. New financial services

14. The Group considered the texts which resulted from its December meeting [DAFFE/MAI/EG5(96)5].

15. One delegation proposed a modification to the text in Option 2 (which is based on Section B, paragraph 7, and the definition of new financial services in Section D, paragraph 3 of the GATS Understanding). The text was modified to clarify the scope for host country regulatory review as provided for in NAFTA. The delegation also commented that the right to introduce new instruments and services would also be subject to the prudential carveout.

16. The text thus modified would read as follows:

“A Contracting Party shall permit a financial services enterprise established in its territory that is an investment of an investor of any other Contracting Party to offer in its territory any financial service that is not offered in the territory of the Contracting Party but which is offered in the territory of another Contracting Party. A Contracting Party may determine the institutional and juridical form through which the service may be provided and may require authorisation for the provision of the service. Where such authorisation is required, a decision shall be made within a reasonable time and the authorisation may only be refused for prudential reasons”.

17. The Group noted that the issues outlined in the December Report of EG5 remained outstanding and agreed to return to them at its March meeting..

3. Information transfer and data processing

18. The Group considered the text which resulted from its December meeting [DAFFE/MAI/EG5(96)5].

19. The Group considered an amendment proposed by one delegation. The amended text would read as follows:

“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

1. One delegation reserves its position concerning financial services issues subject to further consultations with its financial services industry.

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.”

20. One delegation raised an issue in respect of bank secrecy. The Chair invited this delegation to provide a note on this subject.

21. The Group noted that the issues outlined in the December Report of EG5 remain outstanding, and agreed to return to them at its March meeting with a view to finalising a text.

4. Membership of self-regulatory bodies and associations

22. The Group considered the text which resulted from its December meeting [DAFFE/MAI/EG5(96)5].

23. A group of countries led by Mr. S., prepared revisions to this text. The revised text 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 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.”

24. The Group agreed that, subject to possible refinement of the drafting, such a provision should be in the MAI.

25. It also agreed that an interpretative note should be added to provide: “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”.

26. Questions were raised about a suggestion made at the December meeting to include: “provided that such access provides equal opportunities”. Further consideration of this matter is needed.

27. The Group agreed to return to these matters at its March meeting with a view to finalising the text. Mr S. agreed to co-ordinate preparatory work on this subject before the March meeting. Comments from delegations should be transmitted to him ahead of the meeting.

5. Payments and clearing systems/Lender of last resort

28. The issues which remain outstanding are also under consideration in relation to self-regulatory bodies and associations. Once these issues are resolved, the text regarding payments and clearing systems will be amended accordingly.

6. Right of establishment, equality of competitive opportunity and sub-national units of government

29. In regard to these three issues, questions which remain outstanding are the same as those raised at EG5’s December meeting. The Group agreed to return to these matters at the March meeting.

7. Restrictions based on dotation capital of branches of financial services enterprises.

30. One delegation proposed the following text.

“Some countries still require branches of foreign banks to maintain dotation capital. To the extent that dotation capital requirements are imposed on branches of banks of another Contracting Party, any operational restrictions based on capital applicable to branch offices shall not be based on such dotation capital. Rather, Contracting Parties shall base such operational restrictions on the world-wide consolidated capital of the parent bank.”

31. The delegation made the following comments in relation to this text:

Branches are an integral part of a bank and do not have separate capital. Some countries impose so-called “dotation” or “endowment” capital requirements on branches of foreign banks, under which a branch must hold certain assets as the functional equivalent of capital. Dotation capital requirements may impose significant costs on a foreign bank’s operations *vis-a-vis* those of domestic banks, especially if the dotation capital requirements are used as the basis for regulatory limits on counterparty and market exposures such as loans to a single borrower, investments in fixed assets, and/or foreign exchange positions.

Basing regulatory limits on dotation capital means that while a domestic bank is permitted to operate in the host-country market on the basis of consolidated world-wide capital, the foreign bank is prevented from doing so. Therefore, in order to provide national treatment for foreign banks, Contracting Parties should not use dotation capital requirements as the basis for any operational limits applicable to host country branches of foreign banks. Such limits should be

based on the consolidated world-wide capital of the foreign bank as opposed to the dotation capital of the branch.

32. The Group agreed to return to this matter at its March meeting.

8. “Acquired rights”

33. It was unclear whether the concept of “acquired rights” referred to “stand-still” or “grand-fathering”. The Group agreed to return to this issue at its March meeting on the basis of a proposal for text and commentary by one delegation.

9. Dispute settlement

34. Delegations confirmed the general view expressed in the December Report of EG5 that financial services expertise should be required for any arbitration panel for disputes on issues relevant to financial services. The Group noted that there are provisions to this effect in the GATS and NAFTA. It agreed to consider this matter further at the March meeting.

35. The Group also identified the role of investor-to-state dispute settlement as an issue in the context of financial services. It was mentioned that in the NAFTA, if an investor of a Contracting Party has a claim against an action taken for prudential reasons by another contracting Party, this claim cannot go directly to the arbitration process, but must initially be submitted to the Contracting Party of the investor. Only if this Contracting Party considers the claim justified may the dispute settlement process be initiated. This procedure is aimed at avoiding possible abuse of the dispute settlement procedures. One delegation agreed to prepare a note on this matter for consideration at the March meeting.

10. Accession of non-Members

36. One delegation noted that other international agreements have special provisions regarding developing countries which may be relevant to conditions of accession of non-Members to the MAI with respect to the financial sector. This delegation offered to provide a note for consideration at the next meeting.

11. Consistency between the GATS and the MAI.

37. The Group noted that further consideration to this matter may be needed.