



---

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

**Expert Group No.4 on “Institutional Matters”**

**IMPLEMENTATION AND OPERATION OF THE MAI**

**(Note by the Chairman)**

## IMPLEMENTATION AND OPERATION OF THE MAI

(Note by the Chairman)

1. The Negotiating Group has invited Expert Group No. 4 to make proposals, including proposals for text where appropriate, on how the MAI Parties should proceed, once negotiations have been concluded, to implement and operate their Agreement. The first part of this note focuses on the period before the MAI comes into force: what preparatory work will the Parties need to do as a group and how should this work be organised? The second part focuses on the criteria for entry into force: what conditions should be met before the Agreement begins to operate? The third part focuses on the period after entry into force: what tasks should a Parties Group carry out to ensure that the Agreement operates efficiently and effectively?

### **I. Preparation for Ratification and Entry into Force**

2. Once the MAI negotiations have been concluded, the signatories will have further work to do to prepare for the entry into force of the Agreement. The signatories will carry out much of the preparatory work on their own. For example, ratification of the Agreement is a domestic matter. However, there may be some tasks that the signatories will want to work on together to ensure that the MAI gets off to a smooth start.

3. Members of the Expert Group may have varying views on what preparatory work the signatories should carry out jointly. The list that follows is offered as a basis for discussion. The Group may take the view that some of the tasks listed should not be undertaken at all, or should not be undertaken on a joint basis. The Group may also be of the view that some tasks should be added to the list. With those caveats, the Group might want to consider the following possible tasks:

- continuing the outreach programme for non-OECD members and, if appropriate, undertaking or continuing accession discussions with one or more non-OECD members;
- developing and implementing an outreach programme for business, labour, consumer and environmental interests;
- completing any unfinished business (for example: updating the Guidelines, if they become associated with the Agreement; elaborating in detail the functions of the Parties Group, on which see paragraph 14 below);
- concluding an agreement on financial administration of the MAI (annual budget of the Parties Group and its Secretariat, the contributions of the Parties and the funding of dispute settlement proceedings) and on housekeeping issues such as location, language and the relationship of the Secretariat to the OECD Secretariat;
- keeping abreast of the status of the ratification process in signatory states;
- ensuring that the Parties Group and its Secretariat are up and running as of the date of implementation of the Agreement.

4. The members of the Negotiating Group may continue to have important responsibilities with respect to the MAI after the conclusion of the substantive negotiations. For example, the Group may choose to supervise the completion of the signature text of the MAI, in the official languages of the Agreement, as well as the other tasks leading up to signature by Ministers. In addition, the Negotiators may be responsible, in many cases, for managing the ratification process in their respective countries. It could be proposed that the Negotiating Group also supervise completion of the kinds of preparatory tasks described in the previous paragraph. The tasks themselves would be carried out by an Interim Group of Signatories. The advantage of this approach is continuity. The Negotiators,

having made the Agreement, are well placed to give guidance to an Interim Group of Signatories and, if necessary, resolve any particularly difficult issues that may arise between the conclusion of the negotiations and entry into force. Alternatively, the Expert Group might adopt the premise that the Negotiating Group will disband once Ministers have signed the Agreement and propose that a new, independent Interim Group of Signatories be established at that time.

*Questions:*

*Should the Expert Group propose that an Interim Group of Signatories (including any non-OECD signatories) be established upon the conclusion of the negotiations that would be responsible for completing specified tasks in preparation for entry into force of the MAI?*

*Should the Negotiating Group continue for the purpose of supervising the work of the Interim Group?*

*What tasks should the Interim Group undertake, recognising that the list of tasks may require fine-tuning before the negotiations conclude?*

*Does the Expert Group consider that terms of reference will need to be established for the Interim Group and, if so, should the terms of reference be the subject of a memorandum of understanding or be incorporated into the MAI?*

## **II. Ratification and Entry into Force**

5. The MAI will need to contain a ratification process that addresses the question of when, and under what circumstances, the Agreement will come into force.

6. The Marrakech Declaration and the Final Act of the Uruguay Round present one option for dealing with these issues. In that case, Ministers agreed on April 15, 1994:

- that they would seek to complete all necessary domestic steps to ratify the WTO Agreement so that it could enter into force by January 1, 1995 or as early as possible thereafter;
- that it would be desirable if all participants accepted the Agreement with a view to its entry into force on that date; and
- that Ministers would meet by late 1994 “to decide on the international implementation of the results [of the negotiations], including the timing of their entry into force”.

7. In essence, the WTO signatories agreed to make their best efforts to ratify the WTO Agreement by a certain date and gave themselves flexibility to proceed to bring the Agreement into force if they determined, by late 1994, that there was a sufficient critical mass to justify implementation.

8. Other multilateral agreements, such as the OECD Shipbuilding Agreement, utilise a second option under which the agreement comes into force on the happening of a specific event. Under this option, the MAI could come into force:

- when all signatories have ratified the Agreement;
- when a certain number of signatories have ratified the Agreement; or
- when signatories representing a certain percentage of investment flow (or representing some other quantifiable value) have ratified the Agreement.

9. The Expert Group might also consider a third option that combines the first two. Under this option, Ministers would declare that ratification by all signatories is desirable and would agree to make best efforts to complete their domestic ratification process by a specified date. Failing ratification by all signatories by that date, the MAI would nevertheless come into force once a certain number of signatories, perhaps representing a certain percentage of investment flow, had ratified the Agreement.

10. The Expert Group may be prepared to propose a specific option at this time. Alternatively, it may take the view that the negotiators will want to know more about the content of the Agreement, and about the prospects for early ratification by all or most signatories, before deciding when, and under what conditions, the MAI will come into force. If that is the view of the Group, it may prefer to prepare an options paper that the Negotiating Group could consider at the opportune time.

*Questions:*

*Does the Expert Group want to propose a ratification process at this time; if so, what should the process be and does the Group want to consider draft text at its next meeting?*

*If the Group does not want to propose a ratification process at this time, does the Group want to prepare an options paper for consideration by the Negotiating Group and, if so, what options should be presented?*

*Should the OECD, a signatory or a neutral outside body be the depository for the MAI?*

### **III. Operation of the MAI**

11. The Negotiators appear to agree that the MAI should provide for a Parties Group supported by a secretariat. This reflects the Report on a MAI submitted to Ministers to which was attached, without prejudice, an annex stating, *inter alia*:

“The prevailing view is that the MAI would be a free-standing agreement with links (still to be defined) to the OECD. The OECD would be responsible for supporting the functioning of a “parties group” where OECD and non-OECD countries that become parties to the agreement would participate on an equal footing. The OECD Agreement on Normal Competitive Conditions in the Commercial Shipbuilding and Repair Industry provides some indications of the role that such a group could have”. [OCDE/GD(95)65]

12. The Negotiators have invited the Expert Group to make proposals on the makeup and functions of the Parties Group, taking account of the needs of a multilateral agreement whose membership is expected to significantly exceed the current membership of the OECD.

13. Members of the Expert Group may want to review the recent note by the Chairman of the Negotiating Group entitled “Implementation of the Agreement: Role of the Parties Group” [DAFFE/MAI(96)24]. That note identifies, and discusses in detail, several possible functions. The Parties Group:

- could continue the outreach programme for non-OECD members and conduct, or support, accession discussions (this may be a particularly important function during the early stages of the Agreement);
- could be a forum for discussion among MAI Parties on matters of mutual interest, including discussion of issues relating to administration or interpretation of the Agreement (Expert Group No. 1 is expected to make proposals on whether the Parties Group should have a formal role in helping to resolve disputes and in securing compliance with panel decisions and, if so, what role);
- could complete unfinished business or business that requires further study (for example, Article 1605 of the NAFTA established a Temporary Entry Working Group to consider, among other things, the

development of measures to further facilitate temporary entry; for the full list of NAFTA Committees and Working Groups, together with details of their respective functions, see Article 2001.2 and Annex 2001.2 of the Agreement);

- could help ensure the effective implementation of the Agreement. for example, by receiving and considering notifications of new measures and changes to existing measures and by periodically assessing the overall functioning of the Agreement;
- could promote further liberalisation by monitoring the adjustment of country reservations, conducting periodic examinations of non-conforming measures or providing a forum for future rounds of negotiations on rolling back non-conforming measures;
- could carry out work arising from the Guidelines, including consultation with business and labour, assuming that the OECD Guidelines become associated with the MAI; and
- could carry out analytical work on the impact of the Agreement on investment flows and the economic performance of MAI Parties.

14. The Expert Group may conclude that some of the functions of the Parties Group can be identified now and that some possible functions will need further consideration when it is known whether there will be unfinished business that will need to be completed after the MAI has come into force. Consequently, the Group may want to concentrate on developing a text that would create a Parties Group and set out its broad functions, leaving more detailed elaboration to a later point in the negotiations or to the interim period prior to entry into force.

15. Finally, the Expert Group may want to consider the composition of the Parties Group and the rules by which it makes decisions. Should it consist of Ministers or their delegates (see Article 2001 of the NAFTA) or “representatives” of the parties (see Article 3 of the OECD Shipbuilding Agreement). Alternatively, should the Parties Group structure contemplate a combination of these two approaches, in which Ministers meet from time to time and representatives of the parties tend to the day-to-day operation of the Agreement (see Article IV of the WTO Marrakech Agreement)? Should decision-making be by consensus or by majority or qualified majority vote?

*Questions:*

*Should the functions of the Parties Group be formulated at a general level or at a detailed level, and what should the functions be?*

*What should be the composition of the Parties Group?*

*What should be its voting procedure?*

*Does the Expert Group want to consider draft text on the Parties Group at its next meeting?*