



---

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

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

**REPORT TO THE NEGOTIATING GROUP**

## **EXPERT GROUP NO. 4**

### **REPORT TO THE NEGOTIATING GROUP**

Expert Group No. 4 is charged with considering the following topics:

- a. Implementation and operation of the MAI, including the role of the Parties Group
- b. Accession of Non-Members
- c. Relationship of the MAI to the WTO Agreements and other international agreements
- d. Associating the OECD Guidelines with the MAI.

The Group met on 18 October and 21-22 November 1996 and has developed texts on the following topics (Annex): implementation and operation of the MAI, accession of non-members and non-derogation in relation to other international agreements. Footnotes to the text indicate areas where further policy consideration or drafting work is required.

The Expert Group held a discussion on the relationship between the MAI and the WTO Agreements and concluded that the texts will require comparison as the MAI negotiations proceed. The Group is ready to continue work on this matter through selective review of the Consolidated Texts at an appropriate time in order to identify and consider any problems arising from the relationship between the Agreements.

The Group noted that questions relating to the relationship between the MAI and other international agreements may arise during the work of other Groups and should be taken into account by the Groups concerned.

Expert Group No. 4 is scheduled to meet on 24 January 1997 to develop proposals, including proposals for text where appropriate, on associating the OECD Guidelines with the MAI, and is scheduled to report to the Negotiating Group on this topic at its meeting of 29-31 January, 1997.

Chair

ANNEX  
TEXTS ON INSTITUTIONAL MATTERS

**I. IMPLEMENTATION AND OPERATION OF THE MAI**

**A. Signature, Ratification and Entry into Force**

**Signature**

This Agreement shall be open for signature at the Depositary, until [date], by Signatories of the Final Act<sup>1</sup> and thereafter until entry into force by any State, or separate customs territory which possesses full autonomy on the matters covered by this Agreement, which is willing and able to take on its obligations on terms agreed between it and the Signatories of [the Final Act] [this Agreement] acting through the Preparatory Group.

**Ratification and Entry into Force**

Option 1<sup>2</sup>

This Agreement shall enter into force on [date] or on the deposit of the [xxth] instrument of ratification by a Signatory to the Agreement, whichever is later.

Option 2<sup>3</sup>

1. The Signatories to this Final Act agree to submit the Agreement for the consideration of their respective competent authorities with a view to seeking approval of the Agreement in accordance with their procedures.
2. The Signatories to this Final Act agree on the desirability of acceptance of the Agreement by all signatories with a view to its entry into force by [date] or as early as possible thereafter.
3. Not later than [date], the Signatories to this Agreement will meet to determine the date for entry into force and related matters. Decisions shall be made by [consensus] [a [two-thirds] majority of the Signatories].
4. This Agreement shall enter into force on the date determined by the Signatories to this Agreement in accordance with paragraph 3.

---

<sup>1</sup>One country is considering whether there will need to be a provision in the MAI contemplating that the MAI would be signed, for this country, by representatives of its various regions and communities.

<sup>2</sup>The text of this option would be contained in the MAI.

<sup>3</sup>Paragraphs 1 and 2 would be contained in the Final Act; paragraphs 3 and 4 would be in the MAI.

**B. The Preparatory Group<sup>4</sup>**

1. There shall be a Preparatory Group comprised of the Signatories to [this Final Act] [the Agreement].
2. The Preparatory Group shall:
  - (a) prepare for entry into force of the Agreement and the establishment of the Parties Group;
  - (b) conduct discussions with non-signatories to the Final Act;
  - (c) conduct negotiations with interested non-signatories to the Final Act and make decisions on their eligibility to become a Contracting Party; and
  - (d) ...<sup>5</sup>
3. The Preparatory Group shall elect a Chair, who shall serve in a personal capacity. Meetings shall be held at intervals to be determined by the Preparatory Group. The Preparatory Group shall establish its rules and procedures.
4. [Subject to paragraph 5,] the Preparatory Group shall make decisions by consensus. Such decisions may include a decision to adopt a different voting rule for a particular question or category of questions. A Signatory may abstain and express a differing view without barring consensus.
5. [However, where a decision cannot be reached by consensus, the decision shall be made by a majority comprising [two-thirds] of the Signatories.]<sup>6</sup>

**C. The Parties Group**

1. There shall be a Parties Group comprised of the Contracting Parties.
2. The Parties Group shall facilitate the operation of this Agreement. To this end, it shall:
  - (a) carry out the functions assigned to it under this Agreement;<sup>7</sup>
  - (b) [at the request of a Contracting Party, clarify the interpretation or application of this Agreement]<sup>8</sup>;

---

<sup>4</sup>The Preparatory Group text would be contained in the Final Act.

<sup>5</sup>This and any subsequent subparagraphs would be necessary only if there is business that remains unfinished at the conclusion of the negotiations that the negotiators consider should be completed by the Preparatory Group; the further subparagraphs would itemise the clean-up tasks to be undertaken by the Preparatory Group.

<sup>6</sup>See footnote 10.

<sup>7</sup>This subparagraph refers to any operational functions and any future work as may be specified elsewhere in the MAI.

- (c) consider any matter that may affect the operation of this Agreement; and
  - (d) take such other actions as it deems necessary to fulfil its mandate.
3. In carrying out the functions specified in paragraph 2, the Parties Group may consult governmental and non-governmental organisations or persons.
4. The Parties Group shall elect a Chair, who shall serve in a personal capacity. Meetings shall be held at intervals to be determined by the Parties Group. The Parties Group shall establish its rules and procedures.
5. [Subject to paragraph 6,] the Parties Group shall make decisions by consensus. Such decisions may include a decision to adopt a different voting rule for a particular question or category of questions. A Contracting Party may abstain and express a differing view without barring consensus.<sup>9</sup>
6. [However, where a decision cannot be reached by consensus:
- (a) [decisions on budgetary matters shall be made by a [two-thirds] majority of Contracting Parties whose assessed contributions represent, in combination, at least [two-thirds] of the total assessed contributions specified therein]; and
  - (b) [decisions on accession and other matters shall be made by a [two-thirds] majority of the Contracting Parties.]<sup>10</sup>
7. The Parties Group shall be assisted by a Secretariat.
8. [Parties Group and Secretariat costs shall be borne by the Contracting Parties as approved and apportioned by the Parties Group.]<sup>11</sup>

---

<sup>8</sup>Expert Group No. 1 is considering the role of the Parties Group with respect to Dispute Settlement; this sub-paragraph would address clarification of interpretation and application outside the Dispute Settlement context. Within Expert Group No. 4, there is a lively debate on the question of whether it is appropriate that the Parties Group expressly be given a formal role in clarifying the interpretation or application of the MAI. On a point of detail, one delegation has expressed the view that the Parties Group should have such authority, but only if more than one Contracting Party makes a request.

<sup>9</sup>Consideration needs to be given to the question of whether failure to pay budgetary contributions should lead to suspension of the right of a Contracting Party to participate in making decisions.

<sup>10</sup>Further work needs to be done on paragraph 6. This work would include consideration of whether the MAI should draw a line between substantive and procedural questions and whether it should include an appropriate rule for voting by a REIO. If all decisions were required to be made by consensus, paragraph 6 would be deleted.

<sup>11</sup>Further work is required on paragraphs 7 and 8. If it is decided that the MAI itself should contain provisions on the initial budgetary principles and formula and on the structure and functions of a Secretariat, it is proposed that Expert Group No. 4 or another Group be invited to make proposals, including proposals for text where appropriate, on these matters.

## **D. Additional Issues**

### Review and Amendment

1. The Parties Group may review this Agreement as and when it determines.<sup>12</sup>
2. Any Contracting Party may propose to the Parties Group an amendment to this Agreement. Any amendment adopted by the Parties Group<sup>13</sup> shall enter into force on the deposit of an instrument of ratification by all of the Contracting Parties<sup>14</sup>, or at such later date as may be specified by the Parties Group at the time of adoption of the amendment.

### Withdrawal

1. At any time after five years from the date on which this Agreement has entered into force for a Contracting Party, that Contracting Party may give written notice to the Depository of its withdrawal from this Agreement.
2. Any such withdrawal shall take effect on the expiry of [six months] from the date of the receipt of the notice by the Depository, or on such later date as may be specified in the notice of withdrawal. If a Contracting Party withdraws, the Agreement shall remain in force for the remaining Contracting Parties.
3. The provisions of this Agreement shall continue to apply for a period of [fifteen years] from the date of notification of withdrawal to an investment existing at that date.

### Depository

The [.....] shall be the Depository of this Agreement.

### Status of Annexes

The Annexes to this Agreement are [an integral part of the Agreement].<sup>15</sup>

### Authentic Texts

The English and French [and .....] texts of this Agreement are equally authentic.<sup>16</sup>

---

<sup>12</sup>Some delegations wish to study this paragraph further.

<sup>13</sup>There may be a need for a provision that would enable a Contracting Party to take a reservation to an amendment adopted by the Parties Group.

<sup>14</sup>One delegation wants to consider whether an amendment should come into force upon ratification by fewer than all of the Contracting Parties. In that case, it may be necessary to provide that an amendment shall be in force only as between those Contracting Parties that have ratified the amendment.

<sup>15</sup> This provision will need to be revisited when the content of the Annexes is known.

<sup>16</sup>The question arises as to whether the MAI text should be in a language or languages additional to English and French. It should be noted that this question has budgetary implications.

## **II. ACCESSION**

1. This Agreement shall be open for accession by any State, regional economic integration organisation<sup>17</sup>, and any separate customs territory which possesses full autonomy in the conduct of matters covered by this agreement, which is willing and able to undertake its obligations on terms agreed between it and the Parties acting through the Parties Group.
2. Decisions on accession shall be taken by the Parties Group.<sup>18</sup>
3. Accession shall take effect thirty days from the date of deposit of the instruments of accession with the Depositary.

## **[III. NON-APPLICABILITY**

This Agreement shall not apply as between any Contracting Party and any acceding Party or group of countries if, at the time of accession, either does not consent to such application.]<sup>19</sup>

## **[IV. NON-DEROGATION**

If the provisions of law of a Contracting Party or obligation of a Contracting Party under an international agreement or customary international law, existing at present or established hereafter, contain a rule, whether general or specific, entitling investors of other Contracting Parties or their investments to a treatment more favourable than is provided for by the present agreement, nothing in this agreement shall be construed to derogate therefrom to the extent that it is more favourable.]<sup>20</sup>

---

<sup>17</sup> This term may need to be defined, here or elsewhere in the Agreement.

<sup>18</sup> The decision on accession would be taken in accordance with the voting provision for the Parties Group set out in paragraphs I. C. 5 and I. C. 6 above.

<sup>19</sup> Some delegations wish to reflect further on this provision. If the MAI provides that consensus of all the Contracting Parties is necessary for accession, this provision could facilitate accession where there is a particular problem between a Contracting Party and an acceding state. One delegation expressed the view that a non-application clause would be essential if consensus were not required for accession.

<sup>20</sup> Some delegations think that this provision is unnecessary and believe that it might create legal uncertainty. Other delegations agree that the provision is not legally necessary, but stress its political value, in that it makes it clear to investors that they will have the benefit of the most favourable provision.