



Negotiating Group on the Multilateral Agreement on Investment (MAI)

INSTITUTIONAL MATTERS

REPORT TO THE NEGOTIATING GROUP

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On 21 April, 1997, delegations held informal consultations on institutional matters and further refined the draft MAI texts on implementation and operation of the MAI. The texts are annexed.

In particular, delegations:

- elaborated on the options for decision making under the MAI by developing an option based on the Marrakesh Agreement establishing the WTO; and
- succeeded in producing a cleaner overall text by refining the wording of some articles and reducing the number of footnotes.

Revisions to the text annexed to the March Report to the Negotiating Group [DAFFE/MAI/IN(97)3] are indicated by bold face.

Further policy consideration needs to be given to the issue of decision-making. The views of delegations are reflected in paragraph 3 under the section Ratification and Entry into Force and in Articles I.B.4 and 5, I.C.5 and 6 and the associated footnotes. When the policy on decision making is finalised, there will be a need to revisit the drafting of these articles.

Chair

ANNEX
TEXTS ON INSTITUTIONAL MATTERS

I. IMPLEMENTATION AND OPERATION OF THE MAI

A. Signature, Acceptance and Entry into Force

Signature

This Agreement shall be open for signature at the Depositary, until [date], by Signatories of the Final Act¹ 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 this Agreement acting through the Preparatory Group.

Acceptance and Entry into Force

In the Final Act

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.

In the MAI

3. Not later than [date], the Signatories to this Agreement will meet to determine the date for entry into force and related matters². Decisions shall be made by [consensus] [a [two-thirds] majority³ of the Signatories].

¹ One delegation is considering a formula for the signature of the MAI by its country and its Regions and Communities.

² Delegations agree that there should be an interpretative note as follows: “Related matters” includes such matters as whether there is a critical mass to proceed with entry into force of the Agreement, but not changes to the Agreement.

³ There are additional possibilities for a majority voting rule, including consensus minus one (or some number greater than one), three quarters and a critical mass of delegations comprising a certain percentage of investment flows.

4. This Agreement shall enter into force on the date determined by the Signatories to this Agreement in accordance with paragraph 3 **for the Signatories that have accepted this Agreement as of that date**. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the deposit of its instrument of acceptance.

B. The Preparatory Group

In the Final Act

1. There shall be a Preparatory Group comprised of the Signatories to the Final Act and the Signatories to the Agreement. A Signatory to the Final Act shall cease to be a member if it fails to become a Signatory to the Agreement by the closing date for signature of 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 Signatory to the Agreement; and
- (d) ...⁴

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. 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, except as otherwise provided, where a decision cannot be made by consensus, the decision shall be made by a majority comprising [two thirds] of the Signatories.]⁵

⁴ 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.

⁵ Delegations agree in principle that some decisions should be made by consensus and that it should be possible to make some decisions by majority vote. Some delegations take the view that the previous paragraph provides sufficient flexibility to accommodate this principle. However, many delegations believe that the MAI should state that, failing consensus, decisions may be made by a majority vote. The present paragraph is modelled on Article IX of the Marrakesh Agreement, which provides that the WTO shall continue the GATT practice of decision-making by consensus with the proviso that, except as otherwise provided in the WTO Agreements, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. Delegations hold varying views on whether the MAI should provide that certain decisions, such as Preparatory Group decisions on the eligibility of non-Signatories to the Final Act to sign the Agreement and Parties Group decisions on accession, must be made by consensus. The phrase “except as otherwise provided” contemplates that the MAI might require some decisions to be made by consensus or by a majority voting rule different from a standard rule that would be set out in this paragraph. There are a number of possible formulas for a majority voting rule, including consensus minus one (or some larger number), three quarters and two thirds.

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;
 - (b) [at the request of a Contracting Party, clarify **[by consensus]** the interpretation or application of this Agreement]⁶;
 - (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. 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.
6. **[However, except as otherwise provided, where a decision cannot be reached by consensus, the decision shall be made by a majority comprising [two thirds] of the Contracting Parties.]**⁷
7. The Parties Group shall be assisted by a Secretariat.

As an alternative approach, some delegations propose that the Agreement distinguish between substantive and procedural matters through inclusion of a paragraph along the following lines: “Decisions on procedural matters shall be made by a [two thirds] majority of the Signatories. Where there are differing views, the decision as to whether a matter is procedural shall be made by [consensus] [a two thirds majority of the Signatories].”

⁶ Expert Group No. 1 is considering the role of the Parties Group with respect to Dispute Settlement; this subparagraph would address clarification of interpretation and application outside the Dispute Settlement context. **Delegations have varying** views 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.

⁷ **See footnote 5.** Further consideration needs to be given to the question of an appropriate rule for voting by a REIO. In addition, some delegations propose that the Parties Group have authority to make decisions on budgetary matters by a majority (perhaps two thirds) vote of delegations whose assessed contributions represent, in combination, at least two thirds of the total assessed contributions. Consideration also 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.

8. [Parties Group and Secretariat costs shall be borne by the Contracting Parties as approved and apportioned by the Parties Group.]⁸

D. Additional Issues

Review

The Parties Group may review this Agreement as and when it determines.

Amendment

Any Contracting Party may propose to the Parties Group an amendment to this Agreement. Any amendment adopted by the Parties Group⁹ shall enter into force on the deposit of an instrument of ratification by all of the Contracting Parties, 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 Depositary 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 Depositary, 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.

Depositary

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

Status of Annexes

The Annexes to this Agreement are [an integral part of the Agreement].¹⁰

⁸ Further work is required on paragraphs 7 and 8. **Some delegations noted that funding of the MAI will need to be addressed by delegations in advance of ratification and that there may be a need to include a formula in the Agreement. Apart from a paragraph on costs of the Parties Group, there may be a need for a paragraph in the Final Act on payment of the costs of the Preparatory Group.**

⁹ Delegations agree that when the Parties Group considers a proposed amendment, the Group will need to consider **both the extent to which reservations will be allowed and any proposed reservations themselves. Delegations will consider how best to reflect this thought in the Agreement. It might be reflected in an interpretative note or in the provision on lodging country specific reservations.**

¹⁰ This provision will need to be revisited when the content of the Annexes is known.

Authentic Texts

The English and French [and] texts of this Agreement are equally authentic.¹¹

II. ACCESSION

1. This Agreement shall be open for accession by any State, regional economic integration organisation¹², 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 **Contracting** Parties acting through the Parties Group.

2. Decisions on accession shall be taken by the Parties Group.¹³

3. Accession shall take effect **on the thirtieth day following the** 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, **the Contracting Party** does not consent to such application.

¹¹ 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.

¹² **A definition of this term will need to be agreed.**

¹³ See paragraph **I.B.5** and I.C.6 and footnote 5.