



Negotiating Group on the Multilateral Agreement on Investment (MAI)

IMPLEMENTATION OF THE AGREEMENT: ROLE OF THE PARTIES GROUP

(Note by the Chairman)

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I. Introduction

1. The MAI will be a free-standing treaty. Delegates need to consider how to implement the substantive and procedural provisions of the agreement both before and after the MAI enters into force.

-- *Pre-ratification*

2. In adopting the MAI, Ministers could agree to a ratification period to allow Parties to deposit formal ratification instruments after which the MAI would come into force. The Negotiating Group has not yet considered the question whether the MAI will oblige signatories to apply the agreement provisionally, pending its entry into force. However, in the period immediately following the adoption of the MAI and before its entry into force, it will be necessary to implement at least some of the provisions of the MAI particularly those concerning the accession of non-Member countries, and to conduct other relevant business. An interim group, replacing the present Negotiating Group, could be set up for these purposes and could decide on other transitional matters as necessary.

-- *Post-ratification*

3. In joining the MAI, Parties will be taking on a range of substantive and procedural obligations and commitments. Delegates need to consider how to provide for the effective functioning of the arrangements entered into by the Parties. One option could be that the MAI provides for the creation of a body, consisting of the representatives of the MAI Parties, to carry out the functions assigned to it under the agreement and other functions as may be agreed by the Parties. Such a provision would not require the listing of all possible functions to be assigned to the body, but could leave flexibility to the Parties to decide over the course of implementation of the agreement how those functions could evolve. A more detailed description of functions could be contained in the articles dealing with the specific substantive or procedural obligations and where the Parties have identified a clear role for the body. Once the agreement enters into force, all MAI Parties, OECD and non-OECD, will participate on an equal basis. The term "Parties Group" is used in this note to refer to that body.

4. This note examines the possible role of a Parties Group in implementation of the agreement, including relations with non-Members as part of the accession process and the carrying out of other contacts provided for by the agreement. These issues have been identified in previous discussions of the Negotiating Group and of the Expert or Drafting Groups¹. Implementation might also require consultations with business and labour representatives on matters relating to the agreement, as well as contacts with other international organisations such as the WTO, the IMF, and the Energy Charter Secretariat. These relations could also be entrusted to the Parties Group.

¹ Consolidated Texts of DG1 and DG2 [DAFFE/MAI (96)16], Report by the Expert Group on Dispute Settlement and Geographical Scope [DAFFE/MAI/EG1(96)5], and Accession of non-Member Countries [Note by the Chairman, DAF/MAI(96)13].

II. Monitoring the Implementation of the Agreement

5. The Parties Group could be given a central role as concerns the notification and monitoring of all measures relating to the national treatment and MFN obligations of the agreement. In the first instance, the Parties Group would ensure that **notification** is in accordance with the provisions of the agreement. In the Consolidated Reports (DAFFE/MAI(96)16), Drafting Group 2 considered a notification obligation which would require the Contracting Parties to "notify the Parties Group promptly, and in any case no later than 60 days after their entry into force, of any new measures or any changes to existing measures which significantly affect the performance of its obligations under the agreement". DG2 also considered a draft provision (in brackets) according to which "actions taken pursuant to the article on general exceptions would be notified to the Parties Group". DG2 noted the suggestion that any Contracting Party should be entitled to notify to the Parties Group any measure taken by any other Contracting Party which it considers affects the operations of the agreement.

6. A requirement to notify the Parties Group would assist it in its possible activities in connection with non-conforming measures which are subject to review and rollback, general exceptions, and any temporary derogations from national treatment or MFN obligations (if these are provided for by the agreement); ensuring, in particular, that the conditions associated with the lodging of these measures are fully respected. It would furthermore facilitate transparency and promote consistency in the manner that MAI Parties might report non-conforming measures and in the manner that they might apply the general exceptions provisions.

7. The **monitoring** role of the Parties Group could include periodic examinations of Parties' positions under the MAI to ensure that Parties have notified all non-conforming measures, that there is no breach of standstill, and that the transparency obligations are being fully met. As part of the responsibility to carry out periodic examinations, the Parties Group could be charged with developing recommendations in favour of the removal or limitation of specific measures. These reviews could be conducted on a country-by-country basis, or on a horizontal or sectoral basis, taking into account the degree of liberalisation already achieved.

8. It is also essential that **rollback** be timely and effectively implemented. Rollback ensures the reduction and eventual elimination of non-conforming measures. Combined with standstill, it would produce a ratchet effect where any new liberalisation measures would be "locked in" so they could not be rescinded or nullified over time. The Parties Group could be given a key role to play in this respect by ensuring that Parties carry out their obligation to adjust their reservations to reflect any new liberalisation measure.

III. Managing a "Built-in Agenda"

9. The Parties Group may also be given the task to further elaborate disciplines and rules in areas where the Parties may call for further developments. After the MAI comes into force, continued liberalisation is expected to result from **future rounds of negotiations** designed to remove non-conforming measures. Such negotiations could be organised in the form of horizontal reviews (by category of measures) under the auspices of the Parties Group. Some of the areas covered could include those identified by the Expert Group on Special Topics (EG3) as areas where MAI disciplines might be extended. The Parties Group could be entrusted to carry out analytical work on these issues and prepare proposals for consideration by the Parties.

IV. Dispute Settlement

10. Expert Group 1 has considered the role of a Parties Group as it could relate to the dispute settlement provisions of the MAI (DAFFE/MAI/EG1(96)5). There is no decision on what that role might actually be and this note does not prejudge that question. Expert Group 1 envisaged that the primary role of the Parties Group would be to avoid disputes through the promotion of a reasonable and consistent **interpretation** of the MAI. The Group suggested that it could also serve as a forum for discussing general problems or questions.

11. The Parties Group could consider any question relating to the interpretation or application of the MAI, while avoiding factual disputes concerning a particular investment. The Expert Group expressed some concern about striking the proper balance between allowing the Parties Group to deal with issues of general interest and not improperly intruding into the settlement of specific disputes. It recommended that at the request of any Party to a dispute or of the Party of an investor party to a dispute, the Parties Group would not address the disputed question while it was pending settlement under any of the other procedures provided for in the MAI.

12. The Expert Group is considering whether the Parties Group could issue **clarifications** of any MAI provisions. Clarifications would be limited to abstract explanation of the meaning of the agreement's provisions without reference to any specific case that might be the subject of dispute. They would not legally affect private Party rights which had already been acquired in a final and binding settlement of a dispute.

13. Expert Group 1 did not recommend following the Shipbuilding Agreement in providing for consensus opinions of the Parties Group to have automatic legally binding effect. The majority of delegations think that doing so might impede agreement on clarifications of the MAI and could raise questions of the line between interpretation and modification. Thus, clarifications would not be given any automatic or special binding legal effect, but would have the normal effect that resulted under customary international law, in particular the law of treaties².

14. As concerns **state-state arbitration**, the Parties Group could supplement the basic rules and procedures for state to state arbitration that would be set out in the agreement. The Expert Group also foresaw a possible role for the Parties Group whereby arbitral awards would be notified to the Parties Group within a specified period of time in order for the award to become final and binding. The Parties Group would not adjudicate specific disputes or appeals from awards. However, some limited "safety valve" function regarding aberrant arbitral awards could be considered³.

² A clarification adopted by all the Parties might be considered a type of "subsequent agreement" of the MAI Parties regarding its interpretation. Under Article 31 of the Vienna Convention on the Law of Treaties, subsequent agreements of all the parties regarding the interpretation of a treaty or the application of its provisions "shall be taken into account, together with the context" of the treaty. There is also a possibility that, in certain circumstances, a Party which had participated in a consensus clarification of the MAI might find itself estopped from asserting a differing interpretation in a subsequent dispute.

³ The Parties to the WTO agreements have the ability, by consensus, to block an arbitral Panel "report" from becoming binding. Moreover, the WTO dispute settlement system (which is only state to state) includes a right of a Party to appeal an award to a standing appellate body. There is disagreement whether the MAI Parties Group could have the authority to set aside an aberrant award by consensus, and whether it might be able, by qualified majority, to refer a questionable award to an appellate body - either standing or ad hoc.

15. Notification to the Parties Group could be required for any request to initiate **consultations** or **arbitration** proceedings. A State which has been a Party to consultations, mediation, conciliation, or arbitration would promptly inform the Parties Group of any settlement reached or award issued on a matter affecting the operation of the MAI, including questions of its interpretation. The Parties Group records could serve as a repository of dispute settlements on matters of general interest reached in the context of bilateral consultations, mediation, conciliation, or arbitration.

16. The Parties Group may also become involved, in a limited way, at the stage of **enforcement** of an arbitral award should a Party fail to comply. In the event of such failure, the Parties Group could be empowered, by consensus minus the defaulting Party, to suspend the non-complying Party's right to participate in the Parties Group and its right to invoke the dispute settlement provisions of the MAI. If the agreement foresees recourse to countermeasures, the Parties Group might be given procedural control over the right to invoke such countermeasures.

V. Accession and Relations with Non-Member Countries

17. The Negotiating Group is considering the conditions and procedures relative to the **accession** of non-Member countries to the MAI (DAFFE/MAI(96)13). While decisions concerning the standards for eligibility and the definition of core obligations are still to be taken, a Parties Group could be invested with authority for deciding on accession applications. The Parties Group would be responsible for carrying out an examination to help determine whether the "standard" has been met by providing a country the opportunity to explain its foreign investment policies and by allowing an applicant country to negotiate the terms of its entry. Once the accession procedures were completed, the Parties Group could decide on accession on the basis of unanimity, consensus (possibility for a country which does not agree to abstain), a qualified majority, or any other basis acceptable to the Parties.

18. In the context of examining an accession application, the Parties Group would need to decide whether the applicant country could be permitted, for example, to lodge balance of payments derogations on the free transfer of funds. It would also decide on whether to allow for a transition period for any particular country and what the terms of that transition period would be, including whether to permit temporary reservations which would be phased out over time in order to accommodate specific needs of developing countries.

19. In connection with MAI accession, the Parties Group could consider providing interested countries with **policy advice and assistance** on how to bring their laws and policies in line with the standards of the agreement. Depending on available resources, such countries could be provided access to the Organisation's assistance activities on investment promotion and private sector development.

VI. Other Functions

20. The MAI might contain a **review** provision to the effect that the agreement should be reviewed by the Parties within a specified period of time after it enters into force. If such were the case, the Parties Group could be charged with the responsibility for carrying out this review. The Parties Group might also be responsible for considering and adopting proposals for amendment of the agreement in accordance with the relevant provisions of the agreement.

21. The MAI could provide for the opportunity for **contacts and consultations** with representatives of business and labour (BIAC and TUAC) on matters relating to the MAI. The MAI might also provide

for contacts with other international organisations such as the WTO, IMF, and the Energy Charter Secretariat to consult on matters of common interest. The MAI Parties could request the Parties Group to carry out these contacts and consultations on a basis to be decided by the Parties.

Questions:

- *Do Delegates agree that temporary arrangements will be necessary to implement provisions of the MAI prior to its entry into force? If so, which ones?*
- *Do Delegates agree with the option of setting up a Parties Group under the responsibility of the Parties, to carry out the functions assigned to it by the MAI?*