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

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

**ACCESSION OF NON-MEMBERS**

**(Note by the Chairman)**

## ACCESSION OF NON-MEMBERS

(Note by the Chairman)

1. At the Negotiating Group's orientation debate last April on the accession of non-Members, the Chairman noted "...broad consensus that accession to the MAI should be open to any country willing and able to meet the obligations and that there should be no additional criteria for membership". Furthermore, the Negotiating Group recognised "...the necessity to define the standards for participation, perhaps on the basis of a set of core principles or conditions and a level of reservations that would be comparable to that of the Parties. Transition periods to allow non-Members to accede without fully applying all the rules could be considered." [DAFFE/MAI/M(96)3].

2. The Negotiating Group recommended the creation of an expert group to define the standards or minimum requirements for accession and to examine the general accession principles that could be included in the MAI and the more detailed rules which could be left to a Parties Group. The accession procedures of the WTO were referred to as a possible model.

3. This note looks at the basic accession procedures in certain other international agreements, and raises questions relating to the standards to be used for accession to the MAI. It may not be necessary at this stage to resolve all of the issues concerning conditions for accession. The note does not propose text but suggests elements that might be contained in an MAI accession provision.

### **I. Existing Agreements**

#### The WTO

4. The accession provisions of the Marrakesh Agreement Establishing the WTO (Article XII) are based on the accession provisions of the GATT (1947). They provide that any State, or separate customs territory, may accede to the agreement on terms to be agreed between it and the WTO. Decisions on accession are taken by the Ministerial Conference which shall approve the terms of accession by a two-thirds majority of the WTO Members.

5. In practice, a request for membership is referred by the WTO General Council to a Working Party. The Working Party, open to all WTO Members, is responsible for examining the trade regime of the country in question. There is a standard format to assist the country requesting accession in presenting the initial information in its examination of the trade regime. Thereafter, members of the Working Party typically ask questions and request further information from the acceding government. The Working Party needs to agree on the commitments contained in its report. This process involves both multilateral and bilateral negotiations. A protocol concerning the precise terms of accession is annexed to the report and submitted for approval by the WTO Members, together with negotiated schedules of market access commitments in goods and services.

## The ECT

6. Article 41 of the Energy Charter Treaty provides for accession by states and Regional Economic Integration Organisations which have signed the Charter, on terms to be approved by the Charter Conference. Decisions on accession by the Charter Conference are taken by unanimity of the Contracting Parties present and voting (Article 36).

## OECD Shipbuilding Agreement

7. Article 12 of the Shipbuilding Agreement provides that States with a commercial shipbuilding and repair industry may accede to the agreement. Accession is subject to the approval of the Parties Group, acting by consensus (Article 3).

## **II. Considerations for the MAI**

### Accession Standards

8. As accession to the MAI will be open to any country willing and able to join, Parties will need a way to help determine whether a country is "able" to join the MAI; i.e. how far it can go in accepting the obligations imposed by the MAI. Overall, countries acceding to the MAI would be expected to make strong commitments to the fundamental principles of the MAI, especially national treatment and MFN as concerns the treatment of investors and investments and would also be expected to have reached a satisfactory level of liberalisation and investment protection as compared to other MAI Parties.

9. In addition to acceptance of the fundamental principles, there appears to be support for defining "core" conditions applicable to all MAI Parties and which countries requesting accession would be expected to accept. Core conditions could be defined in terms of criteria, for example:

- a) Whether the country requesting accession can meet specific obligations such as investment protection and dispute settlement. Transition arrangements could be considered in particular cases (see below, paragraph 12).
- b) Whether a country requesting accession has met the requirements of Article VIII of the IMF Agreement and whether it maintains a functioning foreign exchange market.
- c) Whether the country requesting accession is prepared to adhere to the Guidelines (assuming their association with the MAI).

10. In addition, Expert Group 3 on Special Topics is considering whether certain obligations relating to key personnel, for example, should be free of reservations. Expert Group 2 on Taxation observed that the accession of non-OECD countries would raise important questions from a tax viewpoint which will need further consideration.

11. Assuming that the country requesting accession can meet the core conditions, MAI Parties may still want to assess against a benchmark whether that country has reached a satisfactory level of investment liberalisation and protection compared to other MAI Parties. This could involve an "examination" (see below, paragraph 13) which could look at the following elements:

- a) the nature and type of an applicant country's proposed list of reservations,
- b) the overall number of proposed reservations,
- c) the type of reservations, or the sectors in which the reservations are found.

12. Countries applying for accession would be expected to meet high standards of compliance as concerns the "core" conditions. Transition arrangements could be agreed to allow countries a measure of flexibility in meeting some of the MAI obligations. Such arrangements might need to be decided on a case-by-case basis, depending on the country applying for accession. Transition arrangements could relate to:

- a) the lodging of reservations to the national treatment and MFN obligations;
- b) the possibility of lodging a balance of payments derogation on the free transfer of funds subject to certain conditions;
- c) the possibility of acceding to the MAI provided that certain measures be phased-out according to a pre-determined time schedule.

#### Accession Procedures

13. Countries applying for accession would be expected to negotiate the terms of their accession to the MAI with MAI Parties, presumably through an Interim or Parties Group (see Chairman's Note on Implementation and Operation). The examination of the proposed reservations could be carried out in a way similar to that used for assessing whether candidates for OECD Membership are able to meet the obligations of OECD members in the field of foreign direct investment. Examinations could be conducted by the Parties Group, or by a separate working group (permanent or ad hoc) created by the Parties to review and make recommendations on accession requests. These examinations could be carried out at meetings of the Group or by written procedure. Recommendations would be submitted to the Parties which would collectively decide on the accession request.

14. In connection with MAI accession, the Parties 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 resources, such countries could be provided access to the Organisation's assistance activities on investment promotion and private sector development.

15. There were different views in the Negotiating Group on the question of the timing of accession discussions with non-Members. It has been put forward that requests for accession by non-Members could be considered prior to ratification of the MAI which would imply that some non-Members could become Parties to the MAI from the date of its entry into force. Delegates should confirm whether the MAI will be open to accession at any time from the date of signature of the agreement.

### III. Options for the MAI

16. The MAI might have a general provision containing the following elements:

- that any State<sup>1</sup> that is willing and able to undertake the obligations of the Agreement can accede to the MAI;
- that accession would be subject to approval of the terms of accession by a body to be specified (see paragraph 18, below);
- that accession would require approval by the Parties acting in accordance with the applicable voting rule (see paragraph 19, below).

17. The accession provision might go further and specify that only states that have Article VIII status under the IMF Agreement and that have functioning foreign exchange markets are eligible to apply for accession, or it might specify any of the other core conditions on which there is a agreement.

18. The accession article could identify the body responsible for approving accession requests. Options include the MAI Parties acting through an MAI conference, the Parties Group, or some other arrangement. In addition, the MAI might refer to some of the stages in the accession process, e.g., examination, review, recommendation by the Parties Group or a working group on accession.

19. Delegates will need to decide on the applicable voting rule for approval of accession requests. Options include: unanimity, consensus, qualified majority, or some other rule. The voting rule could be set out in the accession article or specified elsewhere.

20. Delegates might wish to consider whether it is desirable to refer to possible transition arrangements in the article on accession or whether this should be left entirely to the discretion of the body that will examine accession requests.

#### Questions:

- Should the accession article in the MAI contain only the basic provisions relating to accession? Or should it also refer to any "core" conditions or standards?
- Do delegates agree that the MAI should be open for accession from the time of signature?
- Should there be an examination process to assess whether a country requesting accession has reached a satisfactory level of liberalisation and protection?

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<sup>1</sup> Term may need to take account of the possibility of signature or accession by non-states.