



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 the Agreement. This note proposes draft text to establish procedures for signature, ratification and entry into force, as well as an institutional framework for the MAI. As some delegations noted at the first meeting of Expert Group No. 4, the roles of the Preparatory Group and the Parties Group will become clearer as the substantive obligations of the MAI emerge. Consequently, the texts that follow establish a framework for the Preparatory Group and Parties Group. Other Expert Groups would elaborate some of their specific functions. For example, Expert Group No. 1 is considering what role the Parties Group should have, if any, in dispute settlement, and will draft text accordingly. This framework approach to the Preparatory and Parties Groups is reflected, in particular, in sub-paragraphs B.2(c) and C.2(b) below.
2. In some instances, it may be preferable to locate text in a Final Act/Memorandum of Understanding rather than in the MAI itself. This is indicated at appropriate places in the draft texts that follow.

Draft Articles

A. Signature, Ratification and Entry into Force

Signature

1. This Agreement shall be open for signature at the Depository, until it enters into force, by States that have signed the [Final Act/Memorandum of Understanding] and by States¹

Ratification and Entry into Force

Comment: There would appear to be three questions with respect to ratification and entry into force. Should the MAI come into force when all signatories, or fewer than all signatories, ratify the Agreement? Should the MAI set out a fixed date or target date by which ratification must or should take place? Alternatively, should the MAI provide that the Parties shall decide, in their discretion, when there is a sufficient critical mass to justify implementation and on what date? Arising from these questions, several options for draft text are set out below.

Option 1

1. This Agreement shall enter into force when all States that were Signatories to the Agreement as of [day] [month] [year] have deposited instruments of ratification.

¹ The Chairman's Note entitled "Accession of Non-Members" [DAFFE/MAI/EG4(96)4] considers the question of whether some non-OECD members might sign the MAI after the conclusion of the negotiations but before entry into force; after consideration of that issue, this article should be revisited.

Option 2

1. This Agreement shall enter into force on [day] [month] [year] provided that, by that date, all States that were Signatories to the Agreement as of [day] [month] [year] have deposited instruments of ratification.

Option 3

1. This Agreement shall enter into force on [day] [month] [year], subject to the deposit of instruments of ratification by the States that were Signatories to the Agreement as of [day] [month] [year]. If one or more Signatories have not deposited such instrument by that date, the Agreement shall enter into force when the last instrument has been deposited.

Option 4

1. This Agreement shall come into force on the deposit of the [xxth] instrument of ratification by a State that was a Signatory to the Agreement as of [day] [month] [year].

Option 5

1. This Agreement shall enter into force on [day] [month] [year] provided that, by that date, there has been deposited the [xxth] instrument of ratification by a State that was a Signatory to the Agreement as of [day] [month] [year].

Option 6

1. This Agreement shall enter into force on [day] [month] [year], subject to the deposit of instruments of ratification by [number] of the States that were Signatories to the Agreement as of [day] [month] [year]. If one or more Signatories have not deposited such instrument by that date, the Agreement shall enter into force when the [xxth] instrument has been deposited.

Option 7

1. ²By signing the present [Final Act/Memorandum of Understanding], the representatives agree to submit this Agreement for the consideration of their respective competent authorities with a view to seeking approval of the Agreement in accordance with their procedures.

2. ³The representatives agree on the desirability of acceptance of this Agreement by all signatories with a view to its entry into force by [day] [month] [year] or as early as possible thereafter. Not later than [date], representatives will meet to determine the date for entry into force.

² This paragraph would be contained in a Final Act/Memorandum of Understanding.

³ This paragraph would be contained in a Final Act/Memorandum of Understanding.

3. ⁴This Agreement shall enter into force on the date determined by the representatives of the Parties in accordance with the [Final Act/Memorandum of Understanding].⁵

B. The Preparatory Group⁶

1. The Signatories hereby establish a Preparatory Group composed of a representative of each Signatory.

2. The Preparatory Group shall:⁷

(a) prepare for and facilitate the entry into force of this Agreement and the establishment of the Parties Group and Secretariat;

(b) conduct discussions with States that have an interest in the Agreement including States that have an interest in accession;

(c) carry out the tasks referred to in Annex X⁸.

3. The Preparatory Group shall elect a Chairman, who shall serve in his personal capacity. The Preparatory Group shall establish its rules and procedure and shall make its decisions by consensus. A Signatory may abstain and express a differing view without barring consensus.⁹

⁴ This paragraph would be contained in the MAI itself.

⁵ If the MAI sets out obligations that will be phased in over time, the following additional clause might be advisable: "A Contracting Party which deposits an instrument of ratification of this Agreement after its entry into force shall implement those obligations that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had deposited its instrument of ratification on the date of its entry into force."

⁶ The Preparatory Group text might best be contained in a Final Act/Memorandum of Understanding.

⁷ One delegation has expressed the view that the Negotiating Group should supervise the work of the Preparatory Group.

⁸ This subparagraph would be necessary only if there is business that remains unfinished at the conclusion of the negotiations and that the Signatories consider should be completed by the Preparatory Group; the Annex would itemise the clean-up tasks to be undertaken by the Group.

⁹ Under this paragraph, the Preparatory Group would be required to make all decisions by consensus. Alternatively, the Preparatory Group, like the Parties Group, could be authorised to make some decisions, failing consensus, by qualified or simple majority. See paragraphs C.5 and 6 on the Parties Group below.

C. The Parties Group

1. The Contracting Parties hereby establish a Parties Group composed of a representative of each of the Contracting Parties; alternates, advisors and experts may take part in the proceedings as deemed necessary by that Contracting Party.
2. The Parties Group shall:
 - (a) facilitate the implementation and operation of this Agreement;
 - (b) carry out the functions assigned to it under this Agreement;¹⁰;
 - (c) at the request of a Contracting Party, clarify the interpretation or application of this Agreement¹¹; and
 - (d) consider any other matter that may affect the operation of this Agreement.
3. In carrying out the functions specified in paragraph 2, the Parties Group may consult governmental and non-governmental organisations or persons, establish subsidiary bodies and take such other actions as may be required.
4. The Parties Group shall annually elect a Chairman, who shall serve in his personal capacity. Meetings shall be held at regular intervals to be determined by the Parties Group. The Parties Group shall establish its rules and procedure.
5. The Parties Group shall make decisions by consensus with respect to amendment of this Agreement and accession¹² to this Agreement. A Contracting Party may abstain and express a differing view without barring consensus.
6. The Parties Group shall endeavour, on matters other than amendment and accession, to make decisions by consensus. If agreement cannot be reached by consensus:
 - (a) decisions on budgetary matters shall be made by a qualified majority of Contracting Parties whose assessed contributions represent, in combination, at least three-fourths of the total assessed contributions specified therein; and
 - (b) decisions on other matters shall be made by a simple majority.
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.

¹⁰ This subparagraph refers to any operational functions and any future work as may be specified elsewhere in the MAI.

¹¹ 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.

¹² Alternatively, decisions on accession might be made by qualified majority, in which case the issue of accession would be addressed immediately before or after paragraph 6(a) below.

D. Additional Issues

Review and Amendment

1. The Parties Group may review this Agreement as and when it determines.
2. Any Contracting Party may propose to the Parties Group an amendment to this Agreement. Any amendment adopted by the Parties Group shall enter into force on the deposit of an instrument of ratification by all 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. A Contracting Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the Depository. If a Contracting Party withdraws, the Agreement shall remain in force for the remaining Contracting Parties.
2. The provisions of this Agreement shall continue to apply for a period of [number] years from the date of withdrawal to an investment made in the territory of a Contracting Party that has withdrawn by an investor of another Contracting Party or in the territory of another Contracting Party by an investor of the Contracting Party that has withdrawn.

Depository

1. The shall be the Depository of this Agreement.

Authentic Texts

1. The English, French and ... texts of this Agreement are equally authentic.