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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. Following review of the Chairman's note on accession of non-Members [DAFFE/MAI/EG4(96)2], the Expert Group on Institutional Matters agreed to examine proposed text for an accession provision in the MAI. At the last discussion, the Chairman noted consensus that accession to the MAI should be determined by a country's ability to assume the obligations of the MAI. An accession provision should not refer explicitly to conditions or standards on which accession applications would be assessed. Delegations concurred on the necessity of an examination process that would determine whether a particular country was in a position to undertake the obligations of the agreement. Transition arrangements could be considered on a case-by-case basis.

2. Most delegations agreed that the accession process could begin from the time of signature but there were different views whether this process could be completed before the MAI enters into force. This note proposes a text to take account of the possibility of signature of the MAI by non-Members prior to entry into force and an accession provision for countries joining the MAI after it has entered into force. As requested by some delegations, the Annex to this note provides examples of non-application clauses found in other agreements.

### Signature

3. If countries wanted to provide for the possibility of signature of the MAI and participation in the preparatory arrangements by non-Members prior to entry into force,<sup>1</sup> the clause regarding signature of the Agreement (see Note by the Chairman on Implementation and Operation of the MAI, DAFPE/MAI/EG4(96)3, paragraph A.1) could provide as follows:

"1. This Agreement shall be open for signature at the Depository, until it enters into force, by States<sup>2</sup> that have signed the [Final Act/Memorandum of Understanding] and by any State that is willing and able to take on its obligations on terms to be agreed between it and the Signatories [acting through the Preparatory Group established pursuant to the Final Act.]"<sup>3</sup>

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<sup>1</sup> Some delegations would prefer to restrict signature and participation in preparatory arrangements to those countries which have taken part in the negotiations. At the same time, they may not want to unnecessarily delay the accession process for certain non-Members. In this case, the MAI could provide for the Preparatory Group, for example, to engage in accession discussions with certain non-Members which would enable them to negotiate their terms of accession, in time to accede to the Agreement when it enters into force.

<sup>2</sup> The provision may need to take account of the possibility of signature or accession by non-states, for example a regional economic integration organisation, and possibly a separate customs territory which possesses full autonomy in the conduct of its external commercial relations or other relevant matters.

<sup>3</sup> The functions of a Preparatory Group are under consideration, see Chairman's note DAFPE/MAI/EG4(96)3.

## Accession

4. The accession provision, below, put forward for consideration could serve to determine eligibility to join the MAI and would apply to non-Members that accede to the Agreement after it has entered into force.

"1. This Agreement shall be open for accession by any State<sup>4</sup> that is willing and able to undertake its obligations on terms to be agreed between it and the Parties [acting through the Parties Group established pursuant to this Agreement]<sup>5</sup>.

2. Decisions on accession shall be taken by [the Parties who]<sup>6</sup> shall approve the terms of accession in accordance with [voting rule on accession, see Chairman's note on Implementation and Operation of the MAI, paragraph C.5]."

## Non-Application Clauses

5. Delegates expressed the wish to examine the possibility of including in the accession provision, a clause of non-application as between any Party and any acceding country. Whether the MAI should contain such a clause is linked to the question of the voting rule on accession. The Annex to this note reproduces examples of non-application clauses from NAFTA and the WTO.

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<sup>4</sup> same as (2), above.

<sup>5</sup> Delegates are considering the mechanism for agreeing on terms of accession. The terms of accession will be the result of the examination process to determine a country's eligibility to join the MAI and could be agreed by the Parties, or by whatever group is set up to represent the Parties, or by some other arrangement.

<sup>6</sup> Once the terms of accession have been agreed, a formal decision on accession could be taken by the Parties, or by whatever group is set up to represent the Parties, or by some other arrangement.

## ANNEX

### NON-APPLICATION CLAUSES

NAFTA contains a non-application clause in its accession provision  
Article 2204, paragraph 2:

"This Agreement shall not apply as between any Party and any acceding country or group of countries if, at the time of accession, either does not consent to such application."

WTO, Article XIII provides:

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1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.
2. Paragraph 1 may be invoked between original Members of the WTO who were contracting parties to the General Agreement on Tariffs and Trade 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.
3. Paragraph 1 shall apply between a Member and another Member which accedes under Article XII only if the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.
4. The Ministerial Conference may review the operation of this Article in particular cases at the request of any Member and make appropriate recommendations."
5. Non-application of a Plurilateral Trade Agreement between parties to that Agreement shall be governed by the provisions of that Agreement."