



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.4 on “Institutional Matters”

REPORT TO THE NEGOTIATING GROUP

EXPERT GROUP NO. 4

REPORT TO THE NEGOTIATING GROUP

1. Expert Group No. 4 considered association of the OECD Guidelines with the MAI and developed the following draft text, which would form part of the Preamble to the Agreement:

[Noting] [Affirming their support for] the OECD Guidelines for Multinational Enterprises, set out in Annex [xx] of the [Final Act of the Conference on the] Multilateral Agreement on Investment:

- which contain joint recommendations to multinational enterprises to help assure that their operations are in harmony with national policies of the countries in which they operate, [including, in particular, recommendations concerning labour and environmental practices, and]
- [which the Contracting Parties consider a valuable part of the framework for the consideration of issues of investment and multilateral enterprises;]¹ and

[noting] emphasising that implementation of the Guidelines, which are non-binding and voluntary, will promote mutual confidence between the enterprises and the host countries and contribute to a favourable climate for investment;²

2. Delegations held a range of views on the relationship between the MAI and the Guidelines. Some delegations took a minimalist approach under which the Contracting Parties to the MAI would simply note the existence of the OECD Guidelines and leave **implementation** procedures entirely to the OECD framework. Other delegations favoured a maximalist approach under which the MAI Contracting Parties would affirm support for the Guidelines and assume responsibility for their implementation. However, many delegations were ready to consider a middle approach, with different views being expressed on the extent to which MAI parties should be involved in the implementation.

3. The Group considered that it would be necessary to devise some mechanism to allow non-OECD Parties to the MAI to participate in the **revision** of the Guidelines. Some delegations thought that this could be achieved within the OECD framework, including participation in the Committee on International Investment and Multinational Enterprises. Some other delegations argued that the Parties Group should take the lead role in revision of the Guidelines. There would appear to be four options: first, the OECD could have the lead role in revision of the Guidelines; secondly, the MAI Parties could have the lead role; thirdly, the OECD members and the MAI Parties could have joint authority to revise the Guidelines by

¹ The Expert Group was divided on whether a clause of this kind should be retained. A number of delegations believed that, if were retained, the wording of the clause will require further work to ensure that it does not imply that the Guidelines should be an aid to interpretation of the MAI.

² The Expert Group was of the view that the wording of this clause, for presentational rather than substantive reasons, will require further work.

One delegation proposed that the preamble contain an additional clause expressing the willingness of the MAI Parties to participate in OECD work on the Guidelines and to support the results of such work.

consensus; and finally, the OECD members and the MAI Parties could have authority, failing consensus, to diverge in their approaches to revision.

4. The Expert Group considered the role of the Guidelines in the **accession** process. In part reflecting the range of views discussed above, two main options emerged. The applicant state could be given the option of accepting, or not accepting, the Guidelines and follow-up procedures. Alternatively, the state could be required to accept the Guidelines and follow-up procedures, including designation of a national contact point and participation in the relevant forum. Some delegations expressed the view that the second option might discourage developing countries from joining the MAI. However, one delegation argued that developing countries would consider the Guidelines an attractive feature.

5. The Group also considered whether the Guidelines should be taken into account in interpreting the MAI. With the exception of one delegation, the Group was of the view that the Guidelines should not have a bearing on interpretation of the Agreement. Some delegations thought that a general statement to this effect would be sufficient (for example, “The Association of the Guidelines with the Agreement shall be deemed not to bear on the interpretation or application of the Agreement”) while others proposed that there be an additional, more specific, statement in the provisions on dispute settlement.

6. Finally, the Group considered whether the Guidelines should be simply referred to in the Preamble or also attached as an annex and, if annexed, whether to the Final Act or to the MAI itself. Some delegations thought that there should be a reference in the Preamble without annexation. Other delegations favoured annexation, some preferring annexation to the Final Act and others to the MAI. The range of views on this question would appear to reflect the range of views referred to in the second paragraph of this report. Attached to this report is wording which reflects the options.³

7. The Chair has attempted faithfully to reflect the Expert Group discussion in this Report. However, it should be noted that delegations did not have an opportunity to comment on the final text of the Report.

Chair

³ A few delegations proposed that there be an annex to the MAI setting out binding follow-up procedures along the Second Revised OECD Decision on the Guidelines.

ANNEX TO THE REPORT

The following texts illustrate how, together with the MAI preamble, the Guidelines might be associated with the MAI. The need for, and precise content of, such texts will depend on policy choices previously described regarding the association of the Guidelines. These illustrative texts, which include some brackets reflecting open policy issues, have not been discussed in depth by the Expert Group.

1. **Final Act or MAI:**

x. Signatories note the [affirmation of support] [reference] in the preamble of the MAI [for] [to] the Guidelines for Multinational Enterprises jointly recommended by member countries of the Organisation for Economic Co-operation and Development, the text of which is set out in Annex [xx] of this Final Act. [They note as well the invitation issued by the Council of the OECD to MAI Contracting Parties not members of the Organisation to adhere to the [OECD Guidelines and] Second Revised OECD Decision on the Guidelines and join in the Guidelines work of the Organisation. Considering the inter-relationship of investment and multinational enterprises, they urge that all MAI Contracting Parties do so, in order to promote broad co-operation on the application, clarification and interpretation of the Guidelines and to facilitate the maintenance of consensus among MAI Contracting Parties and OECD Members on such matters.]

2. **Guidelines Text Annex [Final Act or MAI]:**

The following text, referred to [in paragraph x of this Final Act and] in the preamble of the Agreement, is a non-binding joint recommendation of voluntary guidelines by the Governments participating in it to multinational enterprises operating in their territory. The Guidelines are [an OECD instrument] subject to modification by [consensus of] the participating Governments [within the OECD framework]. The association of the Guidelines with the MAI cannot be deemed to bear on the interpretation or application of the Agreement.

The text is part of the OECD Declaration on International Investment and Multinational Enterprises, of 21 June 1976 - C(76)99(Final), as amended. Background and official clarifications are found in the publication "OECD Guidelines for Multinational Enterprises".

OECD Guidelines for Multinational Enterprises

[The text of the preamble ("CONSIDERING"), the Part I Declaration of the Guidelines and the entire Annex I would be set out verbatim]