



Negotiating Group on the Multilateral Agreement on Investment (MAI)

INSTITUTIONAL MATTERS

(Note by the Chairman)

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1. On 21 April, 1997, delegations held informal consultations on institutional matters and further refined the draft MAI texts on implementation and operation of the MAI. The resulting report to the Negotiating Group [DAFFE/MAI/IN(97)4] states that further policy consideration needs to be given to the issue of decision making. In addition, a number of delegations expressed the view during the consultations that there is a need to address the question of funding principles for the MAI.

Decision Making

2. The draft text on institutional matters [DAFFE/MAI/IN(97)4] contemplates decision making by the Signatories to the MAI, the Preparatory Group and the Parties Group:

- the Signatories would meet on an appropriate date after the conclusion of the negotiations to determine the date for entry into force of the MAI and related matters (see the Article on Acceptance and Entry into Force, paragraph 3);
- the Preparatory Group would make decisions relating to preparation for entry into force of the Agreement and decisions on the eligibility of non-signatories to the Final Act to become a Signatory (see the Article on the Preparatory Group); and
- the Parties Group would make decisions relating to the operation of the Agreement and particular functions, such as accession, assigned to it under the Agreement (see the Article on the Parties Group).

3. In the case of the Preparatory Group and Parties Group, delegations agree that these Groups should make decisions, as a general rule, by consensus, but that they should have authority to make some decisions by majority vote. Some delegations believe that the following provision provides sufficient flexibility to accommodate this principle (in the case of the Parties Group, substitute “Parties Group” and “Contracting Party” for “Preparatory Group” and Signatory” respectively):

“The Preparatory Group shall make decisions by consensus. Such decisions may include a decision to adopt a different rule for a particular question or category of questions. A Signatory may abstain and express a differing view without barring consensus.”

4. However, many delegations believe that the MAI should state that decisions may be made, failing consensus, by majority vote. These delegations have proposed that the MAI contain a provision modeled on Article IX of the Marrakesh Agreement, which in material part reads as follows:

“The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting.”¹

¹ Article IX of the Marrakesh Agreement is accompanied by a footnote, which reads as follows: “The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”

5. If this model were adopted, the provision set out in paragraph 3 above would be followed by a provision along the following lines (in the case of the Parties Group, substitute “Contracting Parties” for “Signatories”):

“However, except as otherwise provided, where a decision cannot be made by consensus, the decision shall be made by a majority comprising [two thirds] of the Signatories.”

6. This provision would give the Preparatory and Parties Groups express authority, failing consensus, to make decisions by majority vote. While the clause currently refers to a majority comprising two thirds, other formulas are possible, such as consensus minus one (or some number greater than one), three quarters, simple majority and weighted majority. The phrase “except as otherwise provided” contemplates that the MAI might require that certain specific decisions be made by consensus or by a majority voting rule different from the general rule that would be set out in this paragraph. Delegations have identified a number of subjects, including accession to the MAI, amendment of the Agreement and determination of the annual operating budget, where a special rule might be appropriate.¹

7. As noted above, the draft text also contemplates that the Signatories would decide after the conclusion of the negotiations on the date for entry into force. The relevant provision reads as follows:

“Not later than [date], the Signatories to this Agreement will meet to determine the date for entry into force and related matters. Decisions shall be made by [consensus] [a [two thirds] majority of the Signatories].”²

8. This provision presents a basic policy choice between consensus and majority decision making. If decision making is by majority, there are a number of possible formulae: consensus minus one (or some number greater than one), three quarters, two thirds and a critical mass of delegations comprising a certain percentage of investment flows.

9. The Negotiating Group may want to give guidance on the following questions:

Questions

Do delegations agree that the Preparatory Group and Parties Group should make decisions, as a general rule, by consensus?

Do delegations agree that the participants in informal consultations on institutional matters should develop draft language, modeled on the Article IX of the Marrakesh Agreement, that

¹ As an alternative approach, some delegations have proposed that the Agreement distinguish between substantive and procedural matters through inclusion of a paragraph along the following lines (in the case of the Parties Group, substitute “Contracting Parties” for “Signatories”: “Decisions on procedural matters shall be made by a [two thirds] majority of the Signatories. Where there are differing views, the decision as to whether a matter is procedural shall be made by [consensus] [a two thirds majority of the Signatories]”.

² This provision would be accompanied by an interpretative note, as follows: ““Related matters” includes such matters as whether there is a critical mass to proceed with entry into force of the Agreement, but not changes to the Agreement.”

would expressly authorise the Preparatory Group and Parties Group to make some decisions, failing consensus, by majority vote?

If so, should the draft language contemplate a majority comprising consensus minus one (or some number larger than one), three quarters, two thirds, simple majority or some other formula?

Should the draft language contemplate the possibility that some decisions, such as decisions on accession, amendments or annual budget, might be subject, failing consensus, to a special voting rule?

When the Signatories meet to decide on the date for entry into force and related matters, should they make decisions by consensus or by majority and, if the latter, what should be the majority voting formula?

Funding Principles for the MAI

10. During this week's informal consultations on institutional matters, some delegations noted that there is a need to develop funding principles for the Preparatory Group and the Parties Group and Secretariat. In addition, some delegations noted that it may be important to have agreed principles in place before national legislatures are asked to ratify the Agreement. The Chair proposes to develop a proposal on funding principles for the consideration of delegations at an appropriate time.