



Negotiating Group on the Multilateral Agreement on Investment (MAI)

SELECTED ISSUES FROM EXPERT GROUP N° 4 ON INSTITUTIONAL MATTERS

(Note by the Chairman)

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1. In its December report [DAFFE/MAI/EG4(96)7], Expert Group No. 4 provided the Negotiating Group with proposed text on signature, ratification and entry into force of the MAI and on an institutional framework for the Agreement. The text has now been incorporated in “MAI: Consolidated Texts and Commentary” [DAFFE/MAI(97)1]. This note discusses two outstanding policy issues that the Negotiating Group might fruitfully consider at this time; namely, entry into force of the MAI and decision-making in the Preparatory Group and Parties Group.

I. Ratification and Entry into Force

2. Article IX of the Consolidated Texts [DAFFE/MAI(97)1, p. 70] sets out proposed text on ratification and entry into force of the MAI. The Expert Group succeeded in developing two options:

Option 1¹

This Agreement shall enter into force on [date] or on the deposit of the [xxth] instrument of ratification by a Signatory to the Agreement, whichever is later.

Option 2²

1. The Signatories to this Final Act agree to submit the Agreement for the consideration of their respective competent authorities with a view to seeking approval of the Agreement in accordance with their procedures.

2. The Signatories to this Final Act agree on the desirability of acceptance of the Agreement by all signatories with a view to its entry into force by [date] or as early as possible thereafter.

3. 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].

4. This Agreement shall enter into force on the date determined by the Signatories to this Agreement in accordance with paragraph 3.

3. Under the first option, the participants in these negotiations would specify a target date for entry into force of the MAI. The Agreement would enter into force on that date only if a sufficient number of Signatories have deposited instruments of ratification. In the event of delays in the ratification process, the MAI would come into force once the specified number of Signatories have completed the process. Consequently, the MAI would not come into force if, by the target date, only a few Signatories have ratified. On the other hand, the Agreement would come into force once a sufficient number complete the process even if all do not.

¹ The text of this option would be contained in the MAI.

² Paragraphs 1 and 2 of this option would be contained in the Final Act; paragraphs 3 and 4 would be in the MAI.

4. The second option is based on the WTO model. In the Marrakech Declaration and the Final Act of the Uruguay Round, Ministers agreed on April 15, 1994:

- that they would seek to complete all necessary domestic steps to ratify the WTO Agreement so that it could enter into force by January 1, 1995 or as early as possible thereafter;
- that it would be desirable if all participants accepted the Agreement with a view to its entry into force on that date; and
- that Ministers would meet by late 1994 “to decide on the international implementation of the results [of the negotiations], including the timing of their entry into force”.

5. Option 2 would give the MAI participants greater flexibility than Option 1. The Final Act would set out a target date for entry into force of the Agreement. Prior to that date, the MAI participants would meet to determine the specific date for entry into force and related matters. Before fixing the date, the participants would decide whether, and when, there is likely to be a sufficient critical mass of Contracting Parties to justify implementation.

Question:

Do the members of the Negotiating Group favour Option 1 or Option 2?

II. Decision-making by the Preparatory and Parties Groups

6. Article VIII of the Consolidated Texts [DAFFE/MAI(97)1, p. 67] sets out proposed text on the composition, organisation and functions of the Preparatory Group and Parties Group. Preparatory Group paragraph 4 and Parties Group paragraph 5 would establish the principle of decision-making by consensus. The policy question for the Negotiating Group is whether the Preparatory and Parties Groups should be able to make decisions by majority vote in cases where consensus cannot be achieved. The Expert Group has developed text on the consensus principle as well as bracketed text on decision-making in the absence of consensus.

7. In the case of the Preparatory Group, the text reads as follows:

4. [Subject to paragraph 5,] the Preparatory Group shall make decisions by consensus. Such decisions may include a decision to adopt a different voting rule for a particular question or category of questions. A Signatory may abstain and express a differing view without barring consensus.

5. [However, where a decision cannot be reached by consensus, the decision shall be made by a majority comprising [two-thirds] of the Signatories.]

8. The text on decision-making by the Parties Group differs in that it envisages a special rule for decision-making on budgetary matters:

5. [Subject to paragraph 6,] the Parties Group shall make decisions by consensus. Such decisions may include a decision to adopt a different voting rule for a particular question or category of questions. A Contracting Party may abstain and express a differing view without barring consensus.

6. [However, where a decision cannot be reached by consensus:

(a) [decisions on budgetary matters shall be made by a [two-thirds] majority of Contracting Parties whose assessed contributions represent, in combination, at least [two-thirds] of the total assessed contributions specified therein]; and

(b) [decisions on accession and other matters shall be made by a [two-thirds] majority of the Contracting Parties.]

Questions:

In cases where consensus cannot be achieved, should the Preparatory Group and Parties Group have authority to make decisions by majority vote?

Should the Groups have such authority on all questions or should consensus be required on some questions? If the latter, on which questions?³

Should decisions made by majority vote, if permitted, require a two-thirds majority?

Should decisions by the Parties Group on budgetary matters be subject to the special rule set out in subparagraph 6(a) of the draft text?

9. The Expert Group report also notes that it will be necessary, at some point, to consider whether there should be an appropriate rule for voting by the European Communities. In addition, the report raises the question of whether a failure to pay budgetary contributions should lead to suspension of the right of a Contracting Party to participate in decision-making. These issues will need to be taken up at an appropriate time.

³ The Expert Group report notes that a distinction could be drawn between decisions on substantive questions and decisions on procedural questions, the former requiring consensus. However, it is frequently unclear whether an issue is of a substantive or procedural nature and many issues involve elements of both substance and procedure.