



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Drafting Group No.1 on Selected Topics Concerning Investment Protection

**REPORT OF THE DRAFTING GROUP CONCERNING THE PROTECTION OF
INVESTOR RIGHTS ARISING FROM OTHER AGREEMENTS**

REPORT OF THE DRAFTING GROUP CONCERNING THE PROTECTION OF INVESTOR RIGHTS ARISING FROM OTHER AGREEMENTS

1. The Drafting Group considered the question of provisions which might be included in the MAI on investor rights arising from other agreements. It agreed that its mandate dealt with rights arising from agreements between investors and states rather than from other treaties. It also agreed that the mandate did not include the question of a provision stating that the more favourable of the MAI or those investor-state agreements prevailed. The Group also agreed that discussion of concepts was still necessary and that final drafting would have to follow basic choices to be made by the Negotiating Group. As background to the discussion, the Group had before it the Note of the Negotiating Group Chairman [DAFFE/MAI(95)8/REV1] and a note of the Drafting Group Chairman [DAFFE/MAI/DG1(96)1].
2. Three broad conceptual approaches emerged. These are, in ascending order of ambition : (i) a "zero" option, i.e., no special provision in the MAI on rights under investor-state agreements; (ii) a procedural provision, i.e., a dispute settlement clause; or (iii) a substantive and procedural provision, i.e., a "respect clause".
3. Regarding the first approach, investor-state agreements would normally have their own dispute settlement provisions, be subject to national law and protected by domestic courts and remedies. Without any special provision, investor-state contracts would nevertheless be directly protected by the other substantive provisions of the MAI which covered the fundamental issues, e.g., expropriation, transfers, non-discrimination, and the related dispute settlement mechanisms.
4. The second approach would assure that disputes under investor-state agreements could be brought to international arbitration by an investor, at his option, in the manner provided for under the MAI. This would provide extra choices for investors. In principle, the investor's home state would be involved in the dispute only through subrogation, pursuant to an investment guarantee, unless the dispute also involved questions under the substantive protections of the MAI itself. This approach affords the investor extra procedural protection. It would subject the investor-state agreement and, potentially, the applicable domestic legal regime to an international arbitral judgement. It may also bring international law to bear on the matter.
5. The third approach is the most ambitious. It would make respect for such investor-state agreements into a MAI obligation, giving them substantive protection of the international law rule, *pacta sunt servanda*. Arguably, this could affect the defences of or damages owed by a government asserting rights to cancel or modify a contract for sovereign reasons or to change laws affecting an investment. It also has the following essential procedural effect: violations of the investor-state agreement would be subject to the full range of MAI dispute settlement mechanisms, including state-state consultations and arbitration. In such settlement, the issues would be considered in a broad context including both domestic and international law.
6. The second and third approaches would, in effect, amend investor-state agreements. They could introduce uncertainties about the law and remedies to be applied in case of dispute. They raise the questions of whether and how to draw a line between the kinds of agreements for which the additional protection might be appropriate and those for which it might not, such as purely commercial bargains, or agreements settling tax or other administrative claims.

7. There was no consensus in the Group on the basic choice of approach. That choice may also be affected by outcome on a provision stating that the more favourable of the MAI or those investor-state agreements prevailed. If a decision is taken to pursue either the second (procedural) or third (substantive and procedural) approach, there would be subsidiary questions, the most important being scope of coverage. Should the provision apply broadly to all investor rights under investor-state agreements? If not, should it be limited by, for example, distinguishing between rights arising under essentially commercial agreements (presumably excluded) and those under which a state is acting as a sovereign (presumably covered) -- a distinction which may be difficult to make in practice; or enumerating or defining categories of covered rights, such as those arising out of investment agreements and authorisations on which an investor has relied?

8. The Group examined the strategic choices and issues thoroughly, in the time available, and clarified their implications. Given the range of views, the Group did not elaborate draft provisions for inclusion in the MAI. However, it agreed to provide the following illustrative provisions to aid in understanding the basic choices. These texts were not examined by the Group and do not represent specific recommendations.

ILLUSTRATIVE TEXTS¹

Substantive Approach - Inclusive Respect Clause

Each Contracting Party shall observe any obligation it has entered into with regard to a specific investment of a national of another Contracting Party.

Procedural Approach - Limited Scope² Dispute Settlement Clause

An investor of another Contracting Party may submit to arbitration in accordance with [the investor-state provisions of the MAI] any investment dispute arising under the provisions of this Agreement or concerning any obligation which the Contracting Party has entered into with regard to a specific investment of the investor through:

- (a) an investment authorisation granted by its competent authorities specifically to the investor or investment, or
- (b) a written investment agreement³ or contract granting rights with respect to natural resources or other assets or economic activities controlled by the national authorities,

and on which the investor has relied in establishing, acquiring, or significantly expanding an investment.

¹ The approaches of the two illustrative texts are interchangeable: the "inclusive respect clause" could be recast as an "inclusive dispute settlement clause"; the "limited scope dispute settlement clause" could be recast as a "limited scope respect clause."

² The choice of the precise method of limitation was not discussed in depth.

³ The term "investment agreement" may require definition.