



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Informal Consultations on Dispute Settlement

DISPUTE SETTLEMENT: DRAFT TEXT

DISPUTE SETTLEMENT

STATE-STATE PROCEDURES

A. General Provisions

1. The rules and procedures set out in Articles A-C shall apply to the avoidance of conflicts and the resolution of disputes between Contracting Parties regarding the interpretation or application of the Agreement unless the disputing parties agree to apply other rules or procedures. However, the disputing parties may not depart from any obligation regarding notification of the Parties Group and the right of Parties to present views, under Article B, paragraphs 1.a and 4.c, and Article C, paragraphs 1.a, 4, and 6.e.
2. Contracting Parties and other participants in proceedings shall protect any confidential or proprietary information which may be revealed in the course of proceedings under Articles B and C and which is designated as such by the Party providing the information. Contracting Parties and other participants in the proceedings may not reveal such information without written authorisation from the Party which provided it.
3. [REIO text being developed for possible inclusion]

B. Consultation, Conciliation And Mediation

1. Consultations

- a. One or more Contracting Parties may request any other Contracting Party to enter into consultations regarding any dispute between them about the interpretation or application of the Agreement. The request shall be submitted in writing and shall provide sufficient information to understand the basis for the request, including identification of the measures at issue. The requested Party shall promptly enter into consultations. The requesting Contracting Party shall notify the Parties Group of the request for consultation.
- b. A Contracting Party may not initiate arbitration against another Contracting Party under Article C of this Agreement unless the former Contracting Party has requested consultation and has afforded that other Contracting Party a consultation period of no less than 60 days after the date of the receipt of the request.

2. Multilateral Consultations

- a. In the event that consultations under paragraph 1 of this Article have failed to resolve the dispute within 50 days after the date of receipt of the request for those consultations, the Contracting Parties in dispute may, by agreement, request the Parties Group to consider the matter.

- b. Such request shall be submitted in writing and shall give the reason for it, including identification of the measures at issue, and shall indicate the legal basis for the complaint.
- c. The Parties Group may make recommendations to the Contracting Parties in dispute. The Parties Group shall conclude its deliberations within 60 days after the date of receipt of the request

3. Mediation or Conciliation

If the Parties are unable to reach a mutually satisfactory resolution of a matter through consultations, they may have recourse to good offices or to mediation or conciliation under such rules and procedures as they may agree.

4. Confidentiality of Proceedings, Notification of Results

- a. Proceedings involving consultations, mediation or conciliation shall be confidential.
- b. No Contracting Party may, in any binding legal proceedings, invoke or rely upon any statement made or position taken by another Contracting Party in consultations, conciliation or mediation proceedings initiated under this Agreement.
- c. The Parties to consultations, mediation, or conciliation under this Agreement shall inform the Parties Group of any mutually agreed solution.

C. Arbitration

1. Scope and Initiation of Proceedings

- a. Any dispute between Contracting Parties as to whether one of them has acted in contravention of this Agreement shall, at the request of any Contracting Party that is a party to the dispute and has complied with the consultations requirements of Article B, be submitted to an arbitral tribunal for decision. A request, identifying the matters in dispute, shall be delivered to the other Party through diplomatic channels, unless that Contracting Party has designated another channel for receipt of notification and so notified the Depositary, and a copy of the request shall be delivered to the Parties Group.
- b. A Contracting Party may not initiate proceedings under this Article for a dispute which its investor has submitted, or consented to submit, to arbitration under Article D, unless the other Contracting Party has failed to abide by and comply with the award rendered in that dispute or those proceedings have terminated without prejudice to the investor's claim on the merits.
- c. If a dispute arises between Contracting Parties as to whether one of them has acted in contravention of substantially the same obligation of that Contracting Party under this Agreement and another agreement, the complaining Contracting Party may submit it for binding decision to the forum of its choice. In doing so, it waives its right to submit the matter for such decision to the other forum.

2. Formation of the Tribunal

- a. Within 30 days after receipt of a request for arbitration, the Parties to the dispute shall appoint by agreement three members of the tribunal and designate one of them as Chairman. Except for compelling reasons, the members shall be persons proposed by the Secretary General ICSID. At the option of any party or side, two additional members may be appointed, one by each party or side.
- b. If the necessary appointments have not been made within the periods specified in subparagraph a, above, either Party or side to the dispute may, in the absence of any other agreement, invite the Secretary General of the Centre for the Settlement of Investment Disputes to make the necessary appointments. The Secretary-General shall do so, as far as possible, in consultations with the Parties and within thirty days after receipt of the request.
- c. Parties and the Secretary-General should consider appointment to the tribunal of members of a roster of highly qualified individuals willing and able to serve on arbitral tribunals under this Agreement, nominated by the Contracting Parties. If arbitration of a dispute requires special expertise on the tribunal, rather than solely through expert advice under the rules governing the arbitration, the appointment of individuals possessing expertise not found on the roster should be considered. Each Contracting Party may nominate up to four members of the tribunal roster. Nominations are valid for renewable terms of five years.
- d. Any vacancies which may arise in a tribunal shall be filled by the procedure by which the original appointment had been made.
- e. Members of a particular arbitral tribunal shall be independent and impartial.

3. Consolidation

- a. Contracting Parties in dispute with the same Contracting Party over the same matter should act together as far as practicable for purposes of dispute settlement under this Article. Where more than one Contracting Party requests the submission to an arbitral tribunal of a dispute with the same Contracting Party relating to the same question, a single arbitral tribunal should be established to consider such disputes whenever feasible.
- b. To the extent feasible, if more than one arbitral tribunal is formed, the same persons shall be appointed as members of both and the timetables of the proceedings shall be harmonised.

4. Third Parties

Any Contracting Party wishing to do so shall be given an opportunity to present its views to the arbitral tribunal on the issues in dispute. The tribunal shall establish the deadlines for such submissions in light of the schedule of the proceedings and shall notify such deadlines, at least thirty days in advance thereof, to the Parties Group.

5. Scientific and Technical Expertise

- a. On request of a disputing Contracting Party or, unless the disputing Contracting Parties disapprove, on its own initiative, the tribunal may request a written report of a scientific or technical review board on any factual issue concerning environmental, health, safety or other scientific or technical matters raised by a disputing Contracting Party in a proceeding, subject to such terms and conditions as such Parties may agree.
- b. The board shall be selected by the tribunal from among highly qualified, independent experts in the scientific or technical matters, after consultations with the disputing Parties and the scientific or technical bodies identified by those Parties.
- c. The disputing Contracting Parties shall be provided:
 - i. advance notice of, and an opportunity to provide comments to the tribunal on, the proposed factual issues to be referred to the board; and
 - ii. a copy of the board's report and an opportunity to provide comments on the report to the tribunal.
- d. The tribunal shall take the board's report and any comments by the disputing Contracting Parties on the report into account in the preparation of its award.

6. Proceedings and Awards

- a. The tribunal shall decide disputes in accordance with this Agreement, interpreted and applied in accordance with the applicable rules of international law.
- b. The tribunal may, at the request of a Party, recommend provisional measures which either Party should take to avoid serious prejudice to the other pending its final award.
- c. The tribunal, in its award, shall set out its findings of law and fact, together with the reasons therefore, and may, at the request of a Party, award the following forms of relief:
 - i. declaration that a measure of a Party is inconsistent with its obligations under this Agreement;
 - ii. a recommendation that a Party bring its actions into conformity with its obligations under the Agreement;
 - iii. pecuniary compensation; and
 - iv. any other form of relief to which the Party against whom the award is made consents, including restitution in kind.

- d. The tribunal shall draft its award consistently with the requirement of confidentiality set out in Article A, paragraph 2. It shall issue its award in provisional form to the Parties to the dispute on a confidential basis, as a general rule within 180 days after the date of formation of the tribunal. The parties to the dispute may, within 30 days thereafter, submit written comment upon any portion of it. The tribunal shall consider such submissions, may solicit additional written comments of the parties, and shall issue its final award within 15 days after closure of the comment period.
- e. The tribunal shall promptly transmit a copy of its final award to the Parties Group, which shall make it publicly available.
- f. Tribunal awards shall be final and binding between the parties to the dispute, subject to paragraph 7 below.
- g. Each party shall pay the cost of its representation in the proceedings. The costs of the tribunal shall be paid for equally by the Parties unless the tribunal directs that they be shared differently. Fees and expenses payable to tribunal members will be subject to schedules established by the Parties Group and in force at the time of the constitution of the tribunal.

7. Nullification

- a. Either party to the dispute may request the annulment of an award, in whole or in part, on one or more of the following grounds that:
 - i. the Tribunal was not properly constituted;
 - ii. the Tribunal has manifestly exceeded its powers;
 - iii. there was corruption on the part of a member of the Tribunal or on the part of a person providing decisive expertise or evidence;
 - iv. there has been a serious departure from a fundamental rule of procedure; or
 - v. the award has failed to state the reasons on which it is based.
- b. The request shall be submitted for decision by a tribunal which shall be constituted and operate under the rules applicable to a dispute submitted under paragraph 1 of this article except that notice to the Parties Group shall not be required and paragraph 4, on third parties, shall not apply.
- c. Such a request must be submitted within 120 days after the date on which the award was rendered or after the discovery of the facts relevant to nullification on the grounds of corruption, whichever is later.
- d. The tribunal may nullify the award in whole or in part. If the award is nullified, the fact of nullification shall be communicated to the Parties Group. The dispute may be submitted for decision to a new tribunal constituted under this Article or to any other available forum, notwithstanding the Contracting Parties waiver under paragraph 1.c. of this article.

8. Default Rules

The PCA Optional Rules for Arbitrating Disputes between Two States shall apply to supplement provisions of these Articles. Supplementary provisions necessary to the proper functioning of the agreed system may be adopted by the Parties Group.

9. Enforcement of Awards

INVESTOR-STATE PROCEDURES

D. Disputes Between an Investor and a Contracting Party

1. Scope and Standing

- a. This article applies to disputes between a Contracting Party and an investor of another Contracting Party concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or its investment.
- b. An investor of another Contracting Party may submit to arbitration under this article any investment dispute concerning any obligation which the Contracting Party has entered into with regard to a specific investment of the investor through:
 - i. An investment authorisation granted by its competent authorities specifically to the investor or investment,
 - ii. a written investment agreement or contract granting rights with respect to natural resources or other assets or economic activities

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

2. Means of Settlement

Such a dispute should, if possible, be settled by negotiation or consultation. If it is not so settled, the investor may choose to submit it for resolution:

- a. to any competent courts or administrative tribunals of the Contracting Party to the dispute;
- b. in accordance with any dispute settlement procedure agreed upon prior to the dispute arising;
or
- c. by arbitration in accordance with this Article under:
 - i. the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention"), if the ICSID Convention is available;
 - ii. the Additional Facility Rules of the Centre for Settlement of Investment Disputes ("ICSID Additional Facility"), if the ICSID Additional Facility is available;
 - iii. the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"); or
 - iv. the Rules of Arbitration of the International Chamber of Commerce ("ICC").

3. Contracting Party Consent

- a. Subject only to paragraph 3.b, each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.
- b. A Contracting Party may, by notifying the Depositary upon deposit of its instrument of ratification or accession, provide that its consent given under paragraph 3.a only applies on the condition that the investor and the investment waive the right to initiate any other dispute settlement procedure with respect to the same dispute and withdraw from any such procedure in progress before its conclusion. A Contracting Party may, at any time, reduce the scope of that limitation by notifying the Depositary.

4. Time periods and notification

An investor may submit a dispute for resolution pursuant to paragraph 2.c of this Article after sixty days following the date on which notice of intent to do so was received by the Contracting Party in dispute, but no later than five years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute. Notice of intent, a copy of which shall be delivered to the Parties Group, shall specify:

- a. the name and address of the disputing investor;
- b. the name and address, if any, of the investment;
- c. the provisions of this Agreement alleged to have been breached and any other relevant provisions;
- d. the issues and the factual basis for the claim; and
- e. the relief sought, including the approximate amount of any damages claimed.

5. Written Agreement of the Parties

The consent given by a Contracting Party in subparagraph 3.a, together with either the written submission of the dispute to resolution by the investor pursuant to subparagraph 2.c or the investor's advance written consent to such submission, shall constitute the written consent and the written agreement of the parties to the dispute to its submission for settlement for the purposes of Chapter II of the ICSID Convention, the ICSID Additional Facility Rules, Article 1 of the UNCITRAL Arbitration Rules, the Rules of Arbitration of the ICC, and Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

6. [REIO text being developed, for possible inclusion]

7. Appointments to Arbitral Tribunals

- a. Unless the parties to the dispute otherwise agree, the tribunal shall comprise three arbitrators, one appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
- b. If a tribunal has not been constituted within 90 days after the date that a claim is submitted to arbitration, the arbitrator or arbitrators not yet appointed shall, on the request of either disputing party, be appointed by the appointing authority. For arbitration under paragraph 2, subparagraphs c.i, c.ii and c.iii, and paragraph 9, the appointing authority shall be the Secretary-General of ICSID. For arbitration under paragraph 2, subparagraph c.iv, the appointing authority shall be the International Court of Arbitration of the ICC.
- c. The parties to a dispute submitted to arbitration under this article and the appointing authority should consider the appointment of:
 - i. members of the roster maintained by the Contracting Parties pursuant to Article C, paragraph 2.c; and
 - ii. individuals possessing expertise not found on the roster, if arbitration of a dispute requires special expertise on the Tribunal, rather than solely through expert advice under the rules governing the arbitration.
- d. The appointing authority shall, as far as possible, carry out its function in consultation with the parties to the dispute.
- e. In order to facilitate the appointment of arbitrators of the parties' nationality on three member ICSID tribunals under Article 39 of the ICSID Convention and Article 7 of Schedule C of the ICSID Additional Facility Rules, and without prejudice to each party's right independently to select an individual for appointment as arbitrator or to object to an arbitrator on grounds other than nationality:
 - i. the disputing Contracting Party agrees to the appointment of each individual member of a tribunal under paragraph 2.c.i or ii of this Article; and
 - ii. a disputing investor may initiate or continue a proceeding under paragraph 2.c.i or ii only on condition that the investor agrees in writing to the appointment of each individual member of the tribunal.

8. Standing of the Investment

An enterprise constituted or organised under the law of a Contracting Party but which, from the time of the events giving rise to the dispute until its submission for resolution under paragraph 2.c, was an investment of an investor of another Contracting Party, shall, for purposes of disputes concerning that investment, be considered "an investor of another Contracting Party" under this article and "a national of another Contracting State" for purposes of Article 25(2)(b) of the ICSID Convention regarding a dispute not submitted for resolution by the investor which owns or controls it.

9. Consolidation Of Multiple Proceedings

- a. In the event that two or more disputes submitted to arbitration with a Contracting Party under paragraph 2.c have a question of law or fact in common, the Contracting Party may submit to a separate arbitral tribunal, established under this paragraph, a request for the consolidated consideration of all or part of them. The request shall stipulate:
 - i. the names and addresses of the parties to the proceedings sought to be consolidated,
 - ii. the scope of the consolidation sought, and
 - iii. the grounds for the request.

The Contracting Party shall deliver the request to each investor party to the proceedings sought to be consolidated and a copy of the request to the Parties Group.

- b. The request for consolidated consideration shall be submitted to arbitration by the arbitration system chosen by agreement of the investor parties from the list contained in paragraph 2.c. The investor parties shall act as one side for the purpose of the formation of the tribunal.
- c. If the investor parties have not agreed upon a means of arbitration and the nomination of an arbitrator within 30 days after the date of receipt of the request for consolidated consideration by the last investor to receive it:
 - i. the request shall be submitted to arbitration in accordance with this article under the available arbitration system listed in paragraph 2.c. of this article to which the greatest number of the individual claims had been submitted or, if there is an even distribution, under the UNCITRAL rules, and
 - ii. the appointing authority shall appoint the entire arbitral tribunal, in accordance with paragraph 7.
- d. The arbitral tribunal shall assume jurisdiction over all or part of the disputes and the other arbitral proceedings shall be stayed or adjourned, as appropriate if, after considering the views of the parties, it decides that to do so would best serve the interest of fair and efficient resolution of the disputes and that the disputes fall within the scope of this paragraph.
- e. An investor may withdraw the dispute from arbitration under this article. If it does so within 15 days of receipt of notice of consolidation, its earlier submission of the dispute to that arbitration shall be without prejudice to the investor's recourse to diplomatic protection or other dispute settlement.
- f. At the request of the Contracting Party, the arbitral tribunal established under this paragraph may decide, on the same basis and with the same effect as under paragraph 9.d, whether to assume jurisdiction over all or part of a dispute falling within the scope of paragraph 9.a which is submitted to arbitration after the initiation of consolidation proceedings.

10. Preliminary Objections

- a. Any objection by the Contracting Party to the jurisdiction of the tribunal or to the admissibility of the application shall be made in writing within 15 days after receipt of notification of the appointment of the tribunal or within 15 days from the date the relevant facts become known or should have become known to that Party whichever is later.
- b. Upon receipt of such a preliminary objection, the tribunal may suspend the proceedings on the merits.
- c. After hearing the parties, the tribunal should give its decision, by which it shall either uphold the objection or reject it. The decision should be given within 60 days after the date on which the objection was made.

11. Indemnification

A Contracting Party shall not assert as a defence, counter-claim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an indemnity, guarantee or insurance contract.

12. Third Party Rights

The arbitral tribunal may, taking into account the views of the parties, give to any Contracting Party requesting it an opportunity to submit written views on the legal issues in dispute, provided that the proceedings are not unduly delayed thereby.

13. Scientific and Technical Expertise

- a. On request of a disputing party or, unless the disputing parties disapprove, on its own initiative, the tribunal may request a written report of a scientific or technical review board on any factual issue concerning environmental, health, safety or other scientific or technical matters raised by a disputing party in a proceeding, subject to such terms and conditions as such parties may agree.
- b. The board shall be selected by the tribunal from among highly qualified, independent experts in the scientific or technical matters, after consultations with the disputing parties and the scientific or technical bodies identified by those parties.
- c. The disputing parties shall be provided:
 - i. advance notice of, and an opportunity to provide comments to the tribunal on, the proposed factual issues to be referred to the board; and
 - ii. a copy of the board's report and an opportunity to provide comments on the report to the tribunal.
- d. The tribunal shall take the board's report and any comments by the disputing parties on the report into account in the preparation of its award.

14. Applicable law

a. Issues in dispute under paragraph 1.a. of this article shall be decided in accordance with this Agreement, interpreted and applied in accordance with the applicable rules of international law.

b. Issues in dispute under paragraph 1.b. of this article shall be decided in accordance with the applicable law of the Contracting Party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

15. Interim measures of relief

a. An arbitral tribunal established under this Article may recommend an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective.

b. The seeking, by a party to a dispute submitted to arbitration under this article, of interim relief not involving the payment of damages, from judicial or administrative tribunals, for the preservation of its rights and interests pending resolution of the dispute, is not deemed a submission of the dispute for resolution for purposes of a Contracting Party's limitation of consent under paragraph 3.b, and is permissible in arbitration under any of the provisions of paragraph 2.c.

16. Final awards

a. The arbitral tribunal, in its award shall set out its findings of law and fact, together with the reasons therefor and may, at the request of a party, provide the following forms of relief:

- i. a declaration that the Contracting Party has failed to comply with its obligations under the MAI;
- ii. pecuniary compensation, which shall include interest from the time the loss or damage was incurred until time of payment;
- iii. restitution in kind in appropriate cases, provided that the Contracting Party may pay pecuniary compensation in lieu thereof where restitution is not practicable; and
- iv. with the Agreement of the parties to the dispute, any other form of relief.

b. In appropriate cases where the loss or damage was incurred by an investment which remains a going concern, the tribunal may direct that the compensation or restitution be made to the investment.

c. An arbitration award shall be final and binding between the parties to the dispute and shall be carried out without delay by the party against whom it is issued, subject to its post-award rights under the arbitral systems utilised.

d. The award shall be drafted consistently with the requirements of paragraph 14 and shall be a publicly available document. A copy of the award shall be delivered to the Parties Group by the Secretary-General of ICSID, for an award under the ICSID Convention or the Rules of the ICSID Additional Facility; by the Secretary-General of the ICC International Court of

Arbitration, for an award under its rules; and by the tribunal, for an award under the UNCITRAL rules.

17. Confidential and Proprietary Information

Parties and other participants in proceedings shall protect any confidential or proprietary information which may be revealed in the course of the proceedings and which is designated as such by the party providing the information. They shall not reveal such information without written authorisation from the party which provided it.

18. Place of Arbitration and Enforceability of Awards

Any arbitration under this article shall be held in a state that is party to the New York Convention. Claims submitted to arbitration under this article shall be considered to arise out of a commercial relationship or transaction for purposes of Article 1 of that Convention. Each Contracting Party shall recognise an award rendered pursuant to this Agreement as binding and shall enforce the pecuniary obligations imposed by that award as if it were a final judgement of its courts.

19. Tribunal member fees

Fees and expenses payable to a member of an arbitral tribunal established under these Articles will be subject to schedules established by the Parties Group and in force at the time of the constitution of the tribunal.

COMMENTARY

STATE-TO-STATE

Recent Texts

Paragraphs C.1.c (requiring a Contracting Party to elect among available fora for the dispute), C.5 (scientific and technical boards), and C. 7 (nullification) are texts first seen at the February session.

Article C.1.a

This paragraph provides that arbitration is available for a dispute over whether a Party has acted in contravention of the Agreement. It is understood that ‘action’ includes failure to act when the Agreement requires it. A key question, which this formulation does not prejudice, and leaves open for the arbitral tribunal to decide in light of all the relevant circumstances and the jurisprudence is, when is a dispute over a legislative measure of a Party ripe for arbitration, if its terms, which provide for action violative of the Agreement, have not yet been applied to a concrete case in that fashion.

Article C 1.b

Article C paragraph 1.b, based on ICSID Article 27, is intended to assure that the initiation of any form of investor-state arbitration provided by the MAI would restrain parallel state-state proceedings under the MAI to the same extent as, but no more than, would initiation of ICSID arbitration for a MAI Contracting Party which is also an ICSID party. This is a very limited preclusion, effecting the right to bring the very same claim. The ICSID observer confirmed that ICSID Article 27 should not preclude a state-to-state arbitration of an issue of treaty interpretation or application which was also involved in the investor-state dispute, as long as this did not amount to the espousal of the claim of the investor. It was recognised that an award in such a state-state proceeding would not affect an award rendered in the investor-state proceeding.

Article C 4

The “applicable rules” referred to in Article C 4 are those concerning the interpretation and application of treaties. Accordingly, this provision would not provide a basis for a Panel to rule on a dispute about a Contracting Party’s compliance with other international legal obligations.

Article C 5

The Financial and Tax Groups may have views bearing on this.

INVESTOR-TO-STATE

Article D.1.a

Pursuant to Article D.1.a, an alleged breach of the MAI must be causally linked to loss or damage to the investor or investment for the investor to have standing to bring a claim against the host state, but the damage, while imminent, would not need to have been incurred before the dispute is ripe for arbitration. Further a lost opportunity to profit from a planned investment would be a type of loss sufficient to give an investor standing to bring an establishment dispute under this article, without prejudice to the question of whether a specific amount of lost profits might later prove too remote or speculative to be recoverable as damages. The claim would be initiated on the basis of allegations of loss or damage, but their existence and actual amount would remain to be demonstrated, along with the remainder of the investor's case, during the proceedings on the merits of the dispute.

This Article, which includes effects on the investor, applies to all the investor's rights including those relating to establishment.

Article D.1.b

Some countries could accept the procedural solution on condition that there are no reservations permitted; were reservations permitted they would wish to return to the full respect clause. Provided that the applicable law as provided under D.14.b. were applicable under both options, and the respect clause were excepted from state-state dispute settlement, the full respect clause and the procedural solution appear to be equivalent in their legal effect.

Article D.2.c

Under Article D.2.c, the investor may freely choose among the arbitral options. Country reservations limiting the choice of UNCITRAL and ICC to cases in which the ICSID and additional facility options were not available would be acceptable.

Article D.3

Two delegations have problems of a constitutional nature with unconditional prior consent.

Article D.6

This paragraph would be intended to assure that, in cases of mixed or unclear division of competence between a REIO and a member state, both would be in the proceedings and responsibility would be covered, without burdening the investor with this issue. Whether or not this should be generalised beyond an existing REIO to any other future REIO contracting party, i.e., a REIO with legal capacity and competence on MAI matters, is being considered as well.

Article D.8

Article D.8 is a variant of the clauses which appear in many investment agreements, allowing the established company to have standing to bring the claim to arbitration against the host state. Country specific reservations to this clause or an annex listing countries to which it does not apply would be acceptable.

Article D.9

This paragraph would represent a compromise between those delegations which want consolidation to be only with the case by case agreement of the investors concerned and those which wish consolidation to be mandatory, with the investor only able to withdraw from it with prejudice to its right to resort to other dispute settlement. Subparagraph e would allow withdrawal to be without prejudice.

Article D.13

This paragraph is new. The Financial and Tax Groups may have views bearing on this.

Article D.18

The final sentence of Article D, paragraph 18, preclude a Contracting Party from denying enforcement based on limitations in its acceptance of the New York Convention, or on a claim that the subject matter was incapable of settlement by arbitration or that enforcement of the award would be contrary to its public policy.