



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.1 on Selected Issues Concerning Dispute Settlement and Geographical Scope

SELECTED ISSUES CONCERNING DISPUTE SETTLEMENT

(Note by the Chairman)

TABLE OF CONTENTS

| | |
|---|----|
| I. Consultation and "Parties Group" | 3 |
| II. State-to-State Dispute Settlement | 4 |
| 1. Consultation | 4 |
| 2. Choice of Regime | 4 |
| a. Ad Hoc or Permanent Dispute Settlement Body | 4 |
| b. Consistency and Safeguards | 5 |
| 3. Remedies | 5 |
| 4. Enforcement | 6 |
| III. Investor-State Dispute Settlement | 6 |
| 1. Consultation | 6 |
| 2. Mediation or Conciliation | 7 |
| 3. Prior Consent | 7 |
| 4. Choice of Regime | 7 |
| 5. Relation with State-to-State Dispute Settlement | 8 |
| 6. "Fork in the Road" | 8 |
| a. Relation between International Arbitration and Domestic Legal Remedies | 8 |
| b. Interim or Injunctive Relief | 9 |
| 7. Investment Rights conferred by Contract or Law | 9 |
| 8. Remedies | 9 |
| 9. Enforcement | 10 |
| IV. Other Issues Common to State and Investor-State Proceedings | 10 |
| 1. Consolidation of Claims | 10 |
| 2. Subrogation | 10 |
| 3. Limitation Periods | 11 |

Selected Issues Concerning Dispute Settlement

(Note by the Chairman)

1. The Negotiating Group which met on December 7-8 held a general orientation debate on dispute settlement issues and decided to refer technical issues to an Experts Group for more detailed examination. It was agreed that dispute settlement procedures should be "simple, clear, efficient and effective" and should result in decisions that are binding on parties to the Agreement and enforceable in their territories. There was also general agreement that the dispute settlement mechanism should be an integral part of the MAI (which itself is to be a self-contained agreement) but that it should also take account of existing dispute settlement mechanisms.
2. The scope of the dispute settlement chapter will depend to a certain extent on the scope of the obligations contained in the MAI. Particularly important in this regard will be the definition of "investment", including the possible application to portfolio investment, as well as the treatment of "special topics" (including national security, privatisation, monopolies and state enterprises, investment incentives, technology, corporate practices, performance requirements, and key personnel). It will have to be decided whether all elements of the dispute settlement mechanism will apply to all obligations of the MAI, or only selected ones. In particular, there will have to be a decision on whether pre- and post-establishment issues should be covered and whether they should be covered in both the investor-state and state-to-state modes.
3. The above issues will need to be addressed at a later stage when the substantive obligations and the main functions of the dispute settlement mechanism are clearer. This paper raises the technical issues that need to be considered in drafting dispute settlement procedures for the MAI, without prejudice to the decisions to be taken on these questions. In examining the technical implications of these issues, the Experts Group could use as a working hypothesis that the MAI dispute settlement procedures will have the broadest possible coverage.

I. Consultation and "Parties Group"

4. The Parties Group could serve as a forum for discussion and consultations between MAI parties in cases where there has been no invocation of formal dispute settlement under the agreement. If requested by a Party, the Group could consider clarifications on any matter covered by the agreement. It could provide a valuable contribution in ensuring consistency and coherence in the interpretation of MAI rules. The consultation/clarification procedures could be modelled on existing OECD Committee procedures designed to assist Member countries in implementing the various investment instruments. The Parties Group could thus provide interpretations on questions of general application of the agreement, or if requested, on specific issues raised by a Contracting Party.
5. Based on the model in the OECD Shipbuilding Agreement, the Parties Group could also consider the consistency with the agreement of measures or practices of any Party and, by consensus, could issue binding opinions on consistency or other matters affecting the operation of the agreement. In the case where the opinion is adopted by less than full consensus, it could serve as an advisory opinion to more formal panel procedures modelled on procedures in the WTO and NAFTA. This latter function is examined below in the context of the state-to-state dispute settlement mechanism. The request for consultations or clarification by the Parties Group would be without prejudice to a Party's right to invoke

Panel proceedings or state-to-state arbitration and could be terminated at any time by the Party that requested the proceeding.

Questions:

- *Should there be a role for the Parties Group in developing clarifications on questions of general application of the agreement and issuing opinions (either binding or advisory)?*

II. State-to-State Dispute Settlement

1. Consultation

6. Informal and non-binding consultation and conciliation procedures between the disputing parties before the commencement of formal state-to-state dispute settlement procedures, can be an effective means of resolving matters in dispute. To prevent potential abuse however, specific time-limits for the consultation procedures could be set. Additionally, where the complainant is of the opinion that the matter is urgent, a provision could allow the consultation procedures to be by-passed. In state-to-state dispute settlement procedures, there is often no provision specifically limiting the period during which consultation may take place although time-limits start to run once one party notifies the other party of its wish to enter into arbitration. WTO procedures involve mandatory consultations before the formal dispute settlement proceedings may begin. The ECT provides for a "reasonable period" for consultation to take place and the NAFTA provides for a differentiated period for consultations ranging from 15 to 45 days depending on the issue and the parties involved.

2. Choice of Regime

a. Ad Hoc or Permanent Dispute Settlement Body

7. A basic choice for state-to-state dispute settlement is whether to adopt a system of ad hoc arbitration panels, whose members are selected for each particular dispute and whose rules may be left open for choice in each case, or to establish a permanent body (tribunal), whose members serve for a term of years and whose rules would probably be set in advance of any particular dispute. An ad hoc body would give the parties to the dispute greater influence on the make-up of the Panel. A standing tribunal would have the advantage of providing greater consistency in the interpretation of the agreement. It would be possible also to make the same tribunal available for investor-to-state disputes.

8. Under the ad hoc approach, there are issues of how the Panel is to be formed. It could be formed by a classic method, e.g., each party (or side) to the dispute would name an equal number of Panel members, those chosen by the parties would select the Chairman, and an "appointing authority" designated by the MAI (e.g., the Parties Group) would appoint any members the parties to the dispute fail to appoint. The MAI might contain general criteria of eligibility for Panellists. One variant would be to provide for a roster of eligible Panellists, drawn up by the Parties Group, from which parties to a dispute and any appointing authority would be required to select unless both parties to the dispute otherwise agreed. Another variant would be to have the Parties Group set up panels for specific disputes.

9. Under the tribunal approach, there are a number of issues which would have to be addressed eventually, such as numbers of members, length of term of office, and resources.

b. Consistency and Safeguards

10. The basic role of a Panel or Tribunal would be to consider submissions from both sides to a dispute over the interpretation or application of the MAI, make an objective assessment of the facts and law, and issue a decision.

11. Decisions might be issued in a two-stage procedure, first in preliminary form for comment to the Panel or Tribunal either by the parties to the dispute alone or by parties to the MAI more generally, either individually or through the Parties Group process. The WTO and NAFTA both have a form of two-stage procedure for issuing binding determinations.

12. Another element, which could be useful particularly if ad hoc Panels are used, is to provide for a standing appellate body, as in the WTO. This would provide for a juridically competent body to assure an overall legal consistency and coherence to the MAI jurisprudence.

13. A political safety valve could also be afforded by giving the Parties Group the ability, by consensus, to issue binding opinions. Such an opinion could effectively set aside an inconsistent Panel or Tribunal decision. This possibility has been provided for in the Shipbuilding Agreement.

Questions:

- *For state-to-state dispute settlement, should the MAI provide for ad hoc arbitration panels set up by the Parties Group, or for a standing MAI dispute settlement body?*
- *Should there be a two stage process for the dispute settlement body to issue a binding decision?*
- *Should there be an appeals body?*

3. Remedies

14. A primary objective in state-to-state dispute settlement is to secure compliance with MAI obligations by the host state. To that end, the dispute settlement body appointed to adjudicate issues would have the ability to make findings of fact and interpret and apply MAI disciplines. It could also be considered whether the dispute settlement body, in addition to making binding determinations, would have the authority to issue recommendations. This body might have the right:

- a. to direct national governments to bring themselves into conformity with MAI rules, or
- b. to award pecuniary relief to an injured party to supplement or act as a substitute for such compliance.

Question:

- *Should decisions be binding on the parties concerned? Should there also be scope for non-binding recommendations?*

4. Enforcement

15. The MAI might contain provisions, beyond rights under customary international law, to promote compliance, by host states, with the dispute settlement decisions. In the first instance, a Parties Group could serve as a forum for discussion of compliance issues, in case of problems in the enforcement of arbitral decisions. However, the possibility of applying some form of sanctions for non-compliance might be necessary as a deterrent.

16. In the GATS, the ultimate sanction for non-compliance involves suspension of equivalent benefits where an offending state fails to comply with a WTO panel decision. However, this may not be appropriate in the MAI as it might involve the retroactive suspension of benefits for established companies. The benefits that might be subject to suspension in the case of non-compliance could be the right to participate in MAI mechanisms (such as the Parties Group) or the denial of the right to access dispute settlement procedures in cases involving establishment. There might also be a possibility of suspension or expulsion of a non-complying state from the MAI in the event of a continued refusal to comply with an arbitral decision. The Parties Group could act as a review body with powers to rule on the issue of compliance with the decision and determine the appropriate remedies.

Questions:

- *Should sanctions for non-compliance with MAI arbitral decisions be provided in the text of the agreement?*
- *If so, is the threat of suspension of equivalent benefits useful in the context of the MAI? How might equivalent benefits be defined?*
- *Would suspension or expulsion of an offending party from the MAI be a useful sanction?*
- *Is there a role for a Parties Group in reviewing and recommending remedies for non-compliance with dispute settlement decisions?*

III. Investor-State Dispute Settlement

1. Consultation

17. Informal and non-binding consultation procedures between disputing parties in the investor-state mode can be effective in resolving investment disputes. A consultation period could also serve as a "cooling-off" period to allow both parties to the dispute to re-assess their positions. The consultation procedure could be limited in time to prevent potential abuse and could be by-passed in cases of urgency. Most BITs, as well as the ECT and the NAFTA, provide for consultation periods that vary between three and six months.

Questions:

- *Should consultation procedures of short duration be a mandatory first step for investors?*

2. *Mediation or Conciliation*

18. An investor might chose to move directly from consultations to mediation under ad hoc procedures, or to formal conciliation under the MAI, ICSID or the International Chamber of Commerce. Mediation would involve the appointment of a mediator who would try to bring about an amicable resolution of the dispute. However, the results are not binding on the disputing parties.

19. Conciliation procedures (under Chapter III of the ICSID Convention for example) involve the appointment of one or more persons who will attempt to clarify the issues and to resolve the dispute on terms acceptable to both parties. The conciliators may recommend a settlement at any stage of the proceedings and may close the procedure if at any time it appears that there is no likelihood of agreement between the parties. A principal distinction between conciliation and arbitration proceedings is that conciliation reports are not binding on the parties to the dispute.

Questions:

- *Should the agreement provide investors with the possibility of recourse to conciliation or mediation procedures?*

3. *Prior Consent*

20. Prior consent by the Parties to arbitration is an important element for investor-state arbitration. Providing unconditional consent for an investor to go to arbitration would promote the fullest possible guarantees of investor rights under the MAI. Such provisions are standard features of both bilateral and multilateral investment instruments although some countries have in the past lodged reservations in respect of the scope of unconditional consent.

Questions:

- *Should investors be given a unilateral right to resort to investor-to-state dispute settlement proceedings?*

4. *Choice of Regime*

21. An investor-state dispute settlement procedure which provides freedom of choice for the investor to select the most appropriate forum and procedures would maximise the protection of investor rights.

- a. A first option would be to provide for the use of existing arbitral regimes such as ICSID, UNCITRAL or the ICC. Both the ICSID and the ICSID Additional Facility rules for investment disputes were specifically designed for the resolution of investor-state disputes and provide detailed rules governing the forum and the procedures for proceedings. The UNCITRAL or ICC rules, which were designed to cover disputes in relation to commercial issues generally, could be an alternative to ICSID.
- b. A second option is to utilise a Parties Group to establish a roster of MAI panellists who could be appointed to specific panels by the Parties in dispute (or by the Parties Group if the Parties themselves are unable to agree). At issue is what procedural rules might be selected

to govern the proceedings before such panels. The rules could be drawn from the regimes mentioned above or they could be developed especially for an MAI panel.

- c. A third option would be to use a standing tribunal which could be set up for state to state dispute settlement to also serve for investor-to-state dispute settlement. The rules governing the operation of such a tribunal could be drawn from existing rules as described above or they could be developed especially for the tribunal. An advantage of a standing tribunal in the MAI is that expertise would be built up in investment-related matters and a body of reasoned and coherent jurisprudence on the interpretation of MAI disciplines would result.

Questions:

- *Should the MAI utilise an existing arbitral regime and specify which regime(s) would apply to an investment dispute? If not, should the freedom to choose the arbitral regime be accorded to the investor? Or should it be made subject to mutual agreement of the investor and the host government, perhaps with a provision specifying the applicable regime in the absence of agreement between the disputing parties?*
- *As an alternative, should an MAI-specific regime be created for investor-state disputes, on an ad hoc basis or should it take the form of a standing tribunal?*
- *Should there be a mechanism for review by an appeals body?*

5. *Relation with State-to-State Dispute Settlement*

22. There is the possibility of parallel procedures in the state-to-state-mode and the investor-state mode of dispute settlement. The ICSID Convention excludes the exercise of diplomatic remedies if ICSID proceedings have been initiated. Many BITs refer to ICSID but otherwise impose no explicit limits on the concurrent exercise of investor-state and state-to-state remedies.

Question:

- *Should the MAI preclude or permit parallel state-to-state and investor-to-state proceedings dealing with the same issues?*

6. *"Fork in the Road"*

a. Relation between International Arbitration and Domestic Legal Remedies

23. Many European BITs permit an investor to maintain concurrent legal and arbitral proceedings in respect of the same complaint or at least allow an investor to change from one procedure to the other. The ECT permits signatories to lodge reservations in respect of the unconditional prior consent to arbitration where parties have initiated proceedings under local law or commenced arbitral proceedings elsewhere. The NAFTA requires an investor to waive his right to initiate or continue proceedings in the courts of any Party to the Agreement, as well as any other dispute settlement proceedings, in order to be eligible to commence arbitral proceedings under the NAFTA.

Question:

- *Should the MAI allow investors to pursue concurrent proceedings and/or change from one procedure to another?*

b. *Interim or Injunctive Relief*

24. An issue relating to "fork-in-the-road" concerns possible rights of recourse to interim or injunctive relief in order to prevent irreparable harm, i.e., to preserve property from dispersal or destruction, during the course of the dispute settlement proceedings. Even in cases where an investor must choose between pursuing international arbitration and domestic legal proceedings, provision could be made to protect investors' rights to interim or injunctive relief. This exception to the "fork in the road" rule would allow the investor to seek interim or injunctive relief under domestic procedures without foreclosing his right to initiate international arbitration. ICSID provides for the possibility of such relief as does the NAFTA and many BITs.

Question:

- *If a "fork in the road" provision is included in the MAI, should an exception be allowed for investor rights to interim or injunctive relief under domestic proceedings?*

7. *Investment Rights conferred by Contract or Law*

25. The Negotiating Group agreed that the MAI should not provide for the enforcement of any rights accruing to investors arising out of international treaties other than the MAI. The MAI could, however, provide a basis for the enforcement of specific investment rights conferred by contract or by administrative act based on domestic law (e.g. concessions).

26. Numerous BITs cover rights of action in respect of breaches by governments of investment authorisations, private contracts, licensing or permit arrangements. The ECT provides that obligations arising out of other agreements, both private and governmental, may, if breached, give rise to a right of redress under the Treaty itself. The NAFTA, on the other hand, specifically limits rights of action to the obligations contained within the Agreement itself.

Question:

- *Should the MAI cover investment rights which are conferred by contract or by administrative act based on domestic law?*

8. *Remedies*

27. There are two options as concerns remedies to be awarded in respect of a successful complaint under investor-state procedures. The MAI could specify the sorts of remedies that might be prescribed by an arbitral tribunal. The NAFTA specifies, for example, either restitution or monetary damages as remedies. The MAI could, in addition, recommend other remedies such as specific performance or decisions finding a measure to be illegal or directing the host state to modify the offending measure. Alternatively, the nature and scope of the remedies could be left to the arbitral tribunal as is the case under most BITs and the ECT.

Questions:

- *Should the MAI provide that dispute settlement decisions be limited to restitution or pecuniary relief? Could it provide that such decisions also include an order to modify any non-conforming measure?*
- *Or should the nature and/or scope of the remedies be left to the arbitrator?*

9. Enforcement

28. Arbitral decisions should be binding on the parties to the arbitration and enforceable in the host state. The MAI might provide that MAI parties adhere to the 1958 New York Convention on the Enforcement of Civil and Criminal Judgements in order to more fully effect compliance with arbitral decisions. However, signature of this Convention does not, per se, guarantee that arbitral decisions will be enforced in a Party's courts since the Convention contains a number of limitations or qualifications such as the "public policy test".

Questions:

- *Should signature of the New York Convention, or the Washington Convention if ICSID procedures are to be utilised, be required of any party to the MAI in order to ensure enforceability of the decisions?*
- *Should the MAI limit the ability of the Parties to make use of any limitations or qualifications to the enforcement of obligations under these conventions?*

IV. Other Issues Common to State and Investor-State Proceedings

1. Consolidation of Claims

29. The NAFTA provides for the possibility of consolidation of multiple claims in both the investor-state and the state-to-state mode. The MAI could include this possibility although consideration might be given to allowing a complaining investor to refrain from being "consolidated" with other claims if he were of the opinion that this would prejudice his claim.

Question:

- *Should the MAI provide for a consolidation of claims procedure in both the investor-state and the state-to-state dispute settlement modes, with an option for the investor who wishes to pursue a separate proceeding?*

2. Subrogation

30. Many BITs in force among OECD Members and other countries provide that a defending host state may not raise, as a defence in a dispute settlement proceeding, the fact that a subrogated state has made payment to an aggrieved investor under a policy of insurance and that therefore there is no further claim in respect of a breach.

Question:

-- *Should there be a subrogation provision in the MAI dispute settlement procedures?*

3. *Limitation Periods*

31. There is also the issue of a possible limitation of the time period during which an investor might raise a claim. Possible periods vary from one year after the occurrence of the event complained of, up to the possibility of no limitation period whatever. The Experts Group could examine the possible implications of limiting recourse to a given time period, balancing the competing interests of fairness to investors, with the necessity of encouraging investors to take timely action to remedy breaches of MAI disciplines.

Question:

-- *Should there be a specific limitation period for a claim to be brought by an investor or by his home state under the MAI?*