



Negotiating Group on the Multilateral Agreement on Investment (MAI)

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

**REPORT ON SELECTED ISSUES CONCERNING DISPUTE SETTLEMENT
AND GEOGRAPHICAL SCOPE**

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1. The Negotiating Group charged the Expert Group with drafting specific provisions on the geographical scope of application of the agreement and with considering the relevant aspects of dispute settlement. The Group was requested to report to the Negotiating Group in April 1996 and to submit proposals, including proposals for text, in accordance with its mandate.
2. The Expert Group met in January, March and April and discussed the geographical application of the MAI (Annex 1), the application of the MAI to overseas territories (Annex 2), and a framework for dispute settlement (Annex 3). A general observation was that, in light of the interrelation between these issues and the other substantive issues being considered elsewhere, final recommendations for texts/solutions in all cases should not be expected at the Expert Group level until further progress is made regarding these other substantive questions.
3. Regarding the issue of the geographical scope of application of the MAI, the Group put forward a text representing one approach on which there is significant convergence of views. It also agreed to include in its report a text, illustrating an alternative approach, for future consideration if the Negotiating Group were to decide to pursue that option further. The Group recommends that this question be re-examined when other substantive elements of the MAI have been decided.
4. The Group discussed the question of the application of the MAI to overseas territories. The Group agreed to present the Negotiating Group with a draft text which addresses this issue.
5. The Group had a thorough discussion of the issues relating to a dispute settlement mechanism in the MAI, including the role and function of a Parties Group, consultations, conciliation and mediation, and binding third party dispute settlement (state-state and investor-state). While a broad conceptual framework for dispute settlement has emerged, delegations were particularly concerned that the different options identified not be foreclosed at this stage.
6. The Expert Group is of the view that it would be more productive to return to these issues after further progress has been made on other aspects of the negotiations.

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ANNEX 1

GEOGRAPHICAL SCOPE OF APPLICATION OF THE MAI

1. The Expert Group identified two approaches for addressing the issue of the geographical scope of application of the MAI; the "geographical" and the "functional" approach, i.e. referring to economic activities relating to investments.

2. Various draft texts were considered reflecting one, or the other, approach. Delegations agreed that it would be difficult at this stage to make a final recommendation to the Negotiating Group, which would attract the full support of the Expert Group, as to which approach should be followed. Many delegations were of the opinion that this question would have to be re-examined once other substantive issues in the MAI, including the definition of investments, and the nature and content of the reservations and exceptions had been examined.

3. The Group wished, however, to reflect to the Negotiating Group the status of its discussions on this issue so far. To this end, it decided to put forward the following text preferred by most delegations at this stage:

"This Agreement shall apply in:

(a) the land territory, internal waters, and the territorial sea of a Contracting Party, and, in the case of a Contracting Party which is an archipelagic state, its archipelagic waters; and

(b) the maritime areas beyond the territorial sea with respect to which a Contracting Party exercises sovereign rights or jurisdiction in accordance with international law, as reflected particularly in the 1982 United Nations Convention on the Law of the Sea."

4. Some delegations wish to include in this the words "the seabed, its subsoil and the natural resources of the superjacent waters". Other delegations stated that they would need to review the acceptability of the reference to the 1982 United Nations Convention on the Law of the Sea. One delegation wished to exclude the maritime areas from the scope of the agreement.

5. The Group also agreed that an alternative text of subparagraph (b) illustrating the "functional" approach supported by some delegations should be included in this report in order to preserve the approach for future consideration if the Negotiating Group were to decide to pursue that option further. An alternative subparagraph (b), could read:

".....investments beyond the territorial sea under the jurisdiction of a Contracting Party in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea."

6. A number of delegations were of the view that rather than an article on geographical scope, an article should define the "territory" or "area" of a Contracting Party to which the MAI would be applicable and in that case, it could be included in a general definitions part of the agreement. Some delegations had serious misgivings about the feasibility of embarking on this approach.

ANNEX 2

APPLICATION TO OVERSEAS TERRITORIES

A State may at any time declare in writing to the Depositary that this Agreement shall apply to all or to one or more of the territories for the international relations of which it is responsible. Such declaration, made prior to or upon ratification, accession or acceptance, shall take effect upon entry into force of this Agreement for that State. A subsequent declaration shall take effect with respect to the territory or territories concerned on the ninetieth day following receipt of the declaration by the Depositary.

A Party may at any time declare in writing to the Depositary, that this Agreement shall cease to apply to all or to one or more of the territories for the international relations of which it is responsible. Such declaration shall take effect upon the expiry of one year from the date of receipt of the declaration by the Depositary, with the same effect regarding existing investment as withdrawal of a Party.

Commentary

In case such a declaration of application were to be accompanied by reservations or exceptions beyond those of the declaring state, these would be subject to acceptance of the other Parties.

Paragraph 2 is drafted on the assumption that MAI would contain a withdrawal clause that would provide for continuing protection of additional investments for a period of years following the host Party's withdrawal.

ANNEX 3

CONCEPTUAL FRAMEWORK FOR AN MAI DISPUTE SETTLEMENT MECHANISM

INTRODUCTION

1. This note sets out for further consideration a possible conceptual framework for an MAI dispute settlement mechanism, along with commentary reflecting the discussion.
2. While many options remain open, the broad outlines of MAI dispute settlement system could be described as follows:
 - The MAI would encourage parties first to utilise informal methods of dispute avoidance or settlement, both bilateral and, as appropriate, multilateral;
 - There could be a non-adjudicatory role for a Parties Group;
 - There would be binding third party settlement through both investor-to-state arbitration and state-to-state arbitration;
 - The MAI could provide the prior consent by the Parties to such arbitration;
 - The compulsory state to state arbitral mechanism could be by ad hoc Panels, with certain institutional aspects, in particular a roster, at least indicative, of qualified arbiters;
 - For investor to state arbitration, the MAI would provide for use of existing fora;
 - Arbitral awards would be binding on the Parties to the proceeding;
 - Awards would not limit any legal discretion of a Party concerning the manner for bringing its measures into conformity with the MAI;
 - Pecuniary awards would be enforceable in domestic courts, at least in investor to state cases; and
 - The MAI should expressly address and regulate the application of countermeasures in the event a Party fails to comply with an arbitral award.
3. In addition to the issues of prior consent and the reliance on ad hoc arbitration noted above, the principal open issues are:

- Which of the many rules on the composition of Panels should be adopted for state to state arbitration;
- Whether the roster should be merely indicative, or have special weight;
- The rights of interested third Parties to participate in Panel proceedings;
- Whether and how to provide for joining disputes with common issues of law and fact;
- What remedies to allow a Panel to impose beyond declaratory relief in state to state cases and declaratory and pecuniary relief in investor state cases;
- Whether to provide a right of appeal for state to state, or possibly even investor to state cases;
- How, absent appeal, to deal with possible aberrant awards;
- How to provide for effective countermeasures in the event a Party fails to comply with an arbitral award, while safeguarding against unregulated unilateral countermeasures; and
- The relationship between state to state and investor to state arbitration.

4. This paper does not address the issue of the scope of the dispute settlement system of the MAI as a whole, or that of its state-to-state and investor-to-state parts -- which may depend, to a certain extent, on the substantive obligations of the agreement. In addition, there remain many technical questions on which further work remains to be done at the expert level, to flesh out the dispute settlement system in complete detail.

I. ROLE AND FUNCTIONS OF A PARTIES GROUP

1. The primary role of a Parties Group would be to avoid disputes through the promotion of a reasonable and consistent interpretation of the MAI. It would also serve as a forum for discussing general problems or questions.

2. The Parties Group could consider any question relating to the interpretation or application of the MAI, while avoiding factual disputes concerning a particular investment.

3. The fact that a question submitted to the Parties Group for consideration is at issue in a particular dispute would be without prejudice to the right of a Party to the dispute to have recourse to dispute settlement.

4. At the request of any Party to a dispute or of the Party of an investor party to a dispute, the Parties Group would not address the disputed question while it was pending settlement under any of the other procedures provided for in the MAI.

5. The Parties Group could issue clarifications of any MAI provisions.

6. Clarifications would be limited to abstract explanation of the meaning of the agreement's provisions without reference to any specific case that might be the subject of dispute.

7. Clarifications would not be given any automatic or special binding legal effect, but would have the normal effect that resulted under customary international law, in particular the law of treaties. They would not legally affect private Party rights which had already been acquired in a final and binding settlement of a dispute.

8. The Parties Group would not adjudicate specific disputes or appeals from awards. However, some limited "safety valve" function regarding aberrant arbitral awards could be considered.

9. The Parties Group records could serve as a repository of dispute settlements on matters of general interest reached in the context of bilateral consultations, mediation, conciliation, or arbitration.

10. A State which has been a Party to consultations, mediation, conciliation, or arbitration would promptly inform the Parties Group of any settlement reached or award issued on a matter affecting the operation of the MAI, including questions of its interpretation.

11. The Parties Group could consider public disclosure of categories of reported settlements other than arbitral awards, the latter would be generally public (see paragraph 34, below).

12. No Party would be required to furnish the Parties Group information concerning a particular investor or investment the disclosure of which would be contrary to its laws protecting confidentiality.

13. The Parties Group may also become involved, in a limited way, at the stage of enforcement of an arbitral award should a Party fail to comply (see paragraph 50 below).

Commentary

There is some concern about striking the proper balance between allowing the Parties Group to deal with issues of general interest and not improperly intruding into the settlement of specific disputes. Paragraph 4 may, in particular, need review in this respect, as may the role of the investor in notification of settlements.

The development of clarifications by the Parties Group would parallel the role played by the CIME and CMIT regarding the present OECD instruments. The Group does not recommend following the Shipbuilding Agreement in providing for consensus opinions to have automatic legally binding effect. The majority of delegations think that doing so might impede agreement on clarifications of the MAI and could raise questions of the line between interpretation and modification.

A clarification adopted by all the Parties might be considered a type of "subsequent agreement" of the MAI Parties regarding its interpretation. Under Article 31 of the Vienna Convention on the Law of Treaties, subsequent agreements of all the parties regarding the interpretation of a treaty or the application of its provisions "shall be taken into account, together with the context" of the treaty. There is also a possibility that, in certain circumstances, a Party which had participated in a consensus clarification of the MAI might find itself estopped from asserting a differing interpretation in a subsequent dispute.

The Parties to the WTO agreements have the ability, by consensus, to block an arbitral Panel "report" from becoming binding. Moreover, the WTO dispute settlement system (which is only state to state) includes a right of a Party to appeal an award to a standing appellate body. There is disagreement whether the MAI Parties Group could have the authority to set aside an

aberrant award by consensus, and whether it might be able, by qualified majority, to refer a questionable award to an appellate body - either standing or ad hoc. See, in particular, paragraph 22 (state to state) and the last comment following paragraph 47.

II. CONSULTATIONS, CONCILIATION AND MEDIATION

A. Bilateral consultations

14. A MAI Party would promptly enter into consultations when requested by:
- a) any other MAI Party regarding any question of interpretation or application of the MAI, including the compatibility with the MAI of any measures actually taken or officially proposed by the Party (such requests would be notified to the Parties Group); or
 - b) an investor of another MAI Party regarding any measure actually taken which allegedly infringes rights afforded it under the MAI and which has resulted, or which it reasonably expects to result, in injury to it.
15. Consultations would be with a view to finding a mutually acceptable solution consistent with the MAI; positions taken in such consultations would be without prejudice to the positions of either Party on disputed issues in the event of formal dispute settlement proceedings.
16.
 - a) A Party would not be entitled to initiate arbitration against another Party under the MAI unless it had requested consultation, identifying the issues in dispute, and had afforded that other Party 60 days within which to consult on them.
 - b) A consultation/cooling off period could also be required for investor to state arbitration.

Commentary

Concerning paragraph 14(a), one delegation prefers to restrict compulsory bilateral state to state consultation to dispute settlement, using the Parties Group for other mandatory MAI consultation. If 14(a) includes proposed measures, which some question, there may be a need to clarify when a measure is “officially proposed”. Paragraph 14(b) would limit the standing of an investor to invoke mandatory consultations to cases in which it has a real and direct interest; some delegations consider it too restrictive in imposing a test of “reasonable expectation” of injury. It has also been proposed that 14(b) not apply to a matter which is sub judice in a domestic court.

Concerning paragraph 16, There is a difference of view about consultations as a pre-condition for arbitration, particularly investor to state, and the duration of any cooling-off period. The WTO system (state to state) requires that a disputed issue be raised at the pre-arbitration stage to be eligible for arbitration and provides a sixty day period for consultations to resolve the dispute before it can be brought to a Panel (unless the parties agree earlier that consultations have failed to solve it.)

B. Multilateral Consultations

17. In the event a dispute between Parties concerning the interpretation of the MAI has not been resolved through bilateral consultations, either may raise it for consideration by the Parties Group (as

provided in Part A, above). This would make explicit that the Parties Group could be used to initiate a form of multilateral consultations before a Party invokes binding arbitration. This might also be provided for with regard to an investor to state dispute by or with the agreement of the investor's Party.

Commentary

Paragraph 17 raises the same concerns of balance that are mentioned in the first paragraph of the commentary following paragraph 13.

C. Mediation or Conciliation

18. The Parties to a dispute:

- a) should consider submitting the dispute to mediation or to conciliation under rules of the Parties' choice;
- b) may request the Parties Group Chairman to serve as nominating authority for a mediator or conciliator.

Commentary

Although it is not legally necessary for the MAI to refer to mediation or conciliation, it could explicitly encourage Parties to have recourse to these methods.

III. BINDING THIRD PARTY DISPUTE SETTLEMENT

A. State to State Arbitration

Scope and Form

19. Any dispute between Parties concerning the interpretation or application of the MAI, including the compatibility with the MAI of any measure or action taken by a Party, which has not been resolved by a requested consultation, could be submitted to an arbitral Panel, at the request of any Party to the dispute. This would, in effect, follow the WTO precedent which makes the admissibility of an issue in arbitration depend on its having been raised for resolution through consultation.

20. There is very broad support for arbitration by ad hoc MAI Panels as the mandatory form of state to state third party binding dispute settlement.

21. Arbitration under this provision would not apply to any dispute which was covered by a final and binding investor to state arbitral award or under consideration by an ongoing investor to state arbitral proceeding.

Commentary

The Expert Group noted that "Any dispute concerning the interpretation or application of the MAI" in paragraph 19 above is understood to mean any "legal" dispute. This would not include a dispute over matters which might be entirely discretionary for a Party.

As concerns paragraph 20, some delegations propose that the MAI could provide that the ICJ or a MAI tribunal be considered as an additional or alternative forum under the MAI. One delegation considers these alternatives essential if there is any possibility that a matter submitted for dispute would touch on issues requiring interpretation of the law of the sea convention. It would not be able to accept compulsory ad hoc arbitration by way of the MAI on these matters. For another delegation, this question would be avoided by excluding certain maritime areas from the agreement.

Final and Binding Awards

22. An arbitral award would be considered final and binding upon the Parties to the arbitral proceedings.

Commentary

The following possible qualifications may be considered:

- a) The arbitral award becomes final and binding after 30 days have elapsed from its notification to the Parties Group unless, within that time, the Parties Group, by consensus, decides that it shall not become final.*
- b) The arbitral award may be subject to appeal, either by right or upon decision of a qualified majority of the Parties Group.*
- c) The arbitral award may be subject to nullification proceeding on limited specified grounds.*

Rules and Procedures

23. The MAI would set out basic rules and procedures for state to state arbitration. The Parties Group could supplement these rules consistently with the MAI. For particular disputes, the parties to the dispute could agree to apply modified rules. The UNCITRAL rules could serve as default rules to fill gaps.

Commentary

Two delegations would have difficulty accepting binding rule supplements adopted by the Parties Group rather than by treaty amendment. Another Delegation suggested it might be preferable to adopt modified UNCITRAL rules rather than negotiate a set of new rules in the MAI.

Roster and Panellist Qualifications

24. A roster of potential panellists would be established and maintained by the Parties Group. Each MAI Party could name three persons to the roster. Nominations would be for renewable fixed terms of five years.

25. Persons serving as members of a particular Panel would be required to be impartial, independent and free of conflict of interest. Persons would have to decline or withdraw from an appointment in case of any existing or potential conflict of interest. A procedure could be included in the MAI for addressing conflict of interest challenges in specific Panel proceedings.

Commentary

The role of the roster beyond indicative list remains open. Several delegations stressed that it should leave open the possibility for parties to a dispute to name an expert or experts to a Panel when special expertise was required in a particular dispute

While it is unlikely that unqualified candidates would be nominated for the roster, the possibility of challenging a nomination could provide a safeguard in an extreme case and might deter unsound nominations. However, the preference was to reserve challenges to the Panel stage.

There was a difference of view as to whether the MAI should also address other required qualifications for Panel, or Roster members - as does the WTO Dispute Settlement Understanding -- such as competence in international investment law. While this might be reassuring to parliaments considering accepting the dispute settlement mechanism, the interest of each Party to appoint competent people would most likely make such a provision unnecessary. Moreover, there is a risk that including eligibility requirements might be used as a basis for a subsequent challenge of an award in a domestic enforcement proceeding.

Composition and Size of Panel

26. A Panel could be composed of three members, including a president, chosen by agreement of the Parties to the dispute. Other options could include:

- a three member Panel to which each Party selects one member and those two select the third;
- a five member Panel if the Parties so desire, or if a Party elects to name an arbitrator without the agreement of the other Party (in which case, the other Party would also unilaterally elect an arbitrator and the three additional members, including a president, would then be selected by agreement).
- a sole arbitrator if the Parties so agree.

27. If the Parties fail to designate one or more members or the president, those appointments would be made by an appointing authority after consulting with the Parties to the dispute.

Commentary

A wide variety of views were expressed regarding size and the autonomy of Parties to select arbitrators. The classic method of a three member Panel, each Party or side selecting one member, and the third selected either by agreement or by the first two members, ensures a high degree of control for a Party. However, this could result in a Panel in which only the third member is truly acting as an impartial judge, although some delegations thought this an adequate safeguard. Others consider that the multilateral nature of the MAI calls for decisions on its interpretation to be made by a Panel, the majority of which should function as impartial judges.

The MAI could provide for a system of nominations to the Panel by the Secretariat. The roster could be available to the Parties and appointing authority as an indicative list for their selections, or they could be required to use it. Under the WTO system - where a Panel is composed of three members unless the Parties agree to five - the Panel is nominated by the

Secretariat, which has available rosters and indicative lists, and the Parties may only oppose the nominations "for compelling reasons". In practice, this operates consensually.

There was a preference to designate a permanent appointing authority in the MAI. Given the range of new issues that may be included in the MAI and its connection to the OECD, the OECD Secretary-General may be the appropriate appointing authority for state to state arbitration. On the other hand, it might be preferable to choose the head of a body more focused on dispute settlement and broader in its membership, such as ICSID, the PCA or the ICJ.

Other Rules and Procedures

28. The Parties Group should be notified of the initiation of arbitration proceedings. This could be done by delivering a copy of a request to initiate an arbitration, identifying the matters in dispute.
29. MAI Parties not party to the dispute could be given an opportunity to present their views to the Panel on any disputed issue of interpretation of the MAI.
30. The MAI could include a provision for joining complaints along the following lines:
 - a) Where more than one Party wishes to submit to a Panel a dispute with common issues of law and fact, a single Panel should be formed to consider the disputes wherever feasible;
 - b) If more than one Panel is formed, to the greatest extent possible the same persons should serve as panellists and the timetables of the proceedings should be harmonised;
 - c) A Panel which has been formed to consider a dispute might be given the power to decide, upon the request of another MAI Party in dispute, to join that Party as party to the proceedings.
31. The substantive law to be applied would be the provisions of the MAI, but other international law would be relevant as concerns the interpretation and application of a treaty. Domestic law could be taken into account where it was relevant under the MAI and consistent with it.
32. The MAI should stipulate the remedies that a Panel could include in an award. These remedies are still being considered but they could include:
 - a) a declaration that a measure of a Party is incompatible with the MAI;
 - b) the granting of a pecuniary award as relief for the violation of the complaining party's rights up to the time of the award;
 - c) the granting of a pecuniary award as prospective relief, applicable in the event of failure by the Party to bring its measures into conformity with the MAI;
 - d) restitution in appropriate cases;
 - e) a recommendation that a Party bring its measure into conformity with the MAI;
 - f) such other relief as the Party concerned consents to.

33. Before issuing an award, a Panel could provide a draft to the parties to the dispute, who will have 30 days in which to comment. The Panel would consider those comments and issue its final decision within 30 days thereafter.

34. A copy of any final decision should be provided to the Parties Group which would make it publicly available, except to the extent a Panel, having considered the parties views, may have determined that it contains confidential business information or personal data.

Commentary

Some concern was expressed with extensive third party participation in a MAI arbitration. The WTO dispute settlement understanding provides for third parties with "a substantial interest in a matter before a Panel" to have "an opportunity to be heard by the Panel and to make written submissions". These submissions are to be reflected in the Panel's report. The proposal in paragraph 29 would limit interventions to disputed issues of MAI interpretation and would provide no right to be heard, or to have written views "taken into account". It would not be necessary in this case to stipulate "substantial" interest on the part of third party since all MAI Parties have an interest in a Panel interpretation of the MAI.

Paragraph 30 a) and b) are based on the WTO model. However, unless something akin to the WTO system of appointing Panels were adopted, the various parties and appointing authorities might have more trouble to work out the formation, ab initio, of a joint Panel or identically composed separate Panels. Accordingly, it may be necessary to provide as in c) for the first Panel formed to have the right to decide upon requests to join. It has been suggested that such requests require consent of the original parties.

Paragraph 31 makes clear that the substantive law to be applied is that of the MAI but recognises the relevance of other international law as concerns the interpretation of a treaty and its bearing on the application of a treaty. One delegation suggests expressly including other treaties. Another questions any reference to domestic law.

The principal response to a Panel finding of a MAI violation is expected to be action by the losing Party to bring itself into conformity with its legal obligations under the MAI, as required by international law. However, there is concern that a Panel award should not take the form of an express direction to a Party to modify a law or take a particular administrative step. This could impinge on legitimate discretion where there are alternative means of compliance, raise politically sensitive sovereignty issues, or confront constitutional barriers in certain cases. Restricting possible remedies to declaratory relief, pecuniary awards and consent decrees could reduce the risks of non-compliance or unenforceable awards -- and with it the scope of the problem of countermeasures. Some delegations question any provision for pecuniary awards in state to state arbitration; some question this for investor to state.

B. Investor-to-State procedures

35. The question whether investor to state arbitration should cover all the disciplines of the MAI is still under consideration. The following proposal does not prejudice the outcome of this consideration.

36. At the choice of the investor, any covered investment dispute may be submitted for resolution:

- a) to the courts or administrative tribunals of the MAI Party to the dispute;
- b) in accordance with any applicable, previously agreed dispute settlement procedure; or
- c) in accordance with the arbitration provisions below.

37. The MAI could include a provision to clarify the standing of an investor to invoke the MAI dispute settlement provisions. It also needs to be considered whether provision should be made here or elsewhere for subrogation.

38. MAI Parties give unconditional consent to submission of a covered dispute to arbitration under ICSID (if Party to ICSID), the rules of the ICSID Additional Facility, the UNCITRAL rules, or the ICC Court of Arbitration -- the choice among these being with the investor. Covered disputes are considered "commercial". MAI Parties could be encouraged to join ICSID.

39. Parties would be allowed not to consent for cases in which the investor has previously submitted the dispute under paragraph 36 a) or b), but this would not affect the right of an investor to submit a dispute to judicial or administrative tribunals for the purpose of seeking interim injunctive relief.

40. Consent would not apply to any claim submitted to a Party more than a fixed period of years (to be determined) from the date on which the investor knew or should have known of the matter giving rise to the claim, except in case of force majeure or other extenuating circumstances which could justify a longer period.

41. Consent might be subject to the right of a party to an investor-state dispute to invoke a short cooling-off period for consultation.

42. The designated appointing authority could be the Secretary-General of ICSID, who would be requested to consider to selecting persons on the MAI arbitration roster.

43. Non-ICSID arbitration would be held in a New York Convention state.

44. The MAI could make provision for joining or consolidating complaints:

- a) Where more than one investor wishes to submit to a single Panel a dispute raising common issues of law and fact, they could submit a joint request to do so and would be treated as a single party for the purposes of formation of the Panel;
- b) If more than one Panel is formed, to the greatest extent possible the same persons should serve as panellists and the timetables of the proceedings should be harmonised;
- c) A Panel which has been formed to consider a dispute between an investor and a Party to the MAI could be empowered to decide upon the request of another investor, which has a dispute with the Party raising common issues of law and fact, to join the proceedings as a party.

45. It could be considered whether other provisions for managing large numbers of cases would be desirable.

46. Parties could undertake to make best efforts to carry out Panel recommendations on interim relief.

47. A copy of a final decision will be delivered to the Parties Group and made publicly available by it, except to the extent that it has been determined by a Panel to contain confidential business information or personal data.

Commentary

One delegation questions the need to consent to all the fora in paragraph 38. Another delegation considers that the MAI should only provide that Parties "may give" consent to investor-state arbitration, so that consent is not automatic upon adhering to the MAI. That delegation proposes an alternative investor/state dispute mechanism, in which Parties agree that investors could submit disputes for consideration by a commission which could submit them to binding settlement. That proposal, set out in DAFPE/MAI/EG1/RD(96)5, is incorporated in this report by reference and may be raised for consideration in the future.

Paragraph 39 provides for an absolute "fork in the road". This is considered by some delegations as being overly restrictive. Some oppose any fork; others propose a fork in the road just prior to domestic judgement on the merits. There has also been a view expressed that exhaustion of local remedies should be required.

Paragraph 42 gives indicative weight to the roster for the appointing authority in investor to state arbitration. One delegation proposes that the MAI roster be given a central role for investor to state arbitral panel selection.

For investor/state cases, some delegations consider the consent of the parties essential to allow joining or consolidation. Another considers that the consent of the parties should not be required.

A number of delegations could support a stronger proposal than that in paragraph 46, one which would require making interim relief available domestically. However, this could raise significant problems for a number of other countries whose legal systems do not currently afford such a possibility. Further, to undertake an obligation to enforce interim relief ordered by an arbitral Panel could raise the same sensitivities and problems as injunctive relief in a final award.

One delegation suggests providing for appeal of investor/state awards to a MAI roster appellate Panel.

C. Enforcement and Failure to Comply

48. The Parties should carry out final and binding arbitral awards in good faith.

49. MAI Parties would provide for the judicial enforcement in their territories of any pecuniary awards.

50. In the event a Party fails to comply with an arbitral decision, the other Parties could co-operate with any specially affected Parties to bring about compliance:

- (a) The Parties Group, by consensus minus the defaulting Party, might suspend the non-complying Party's right to participate in the Parties Group and its right to invoke the dispute settlement provisions of the MAI.
- (b) If the failure to comply persists, any other Party might invoke the breach as grounds for suspension of the MAI dispute settlement provisions vis-a-vis the defaulting Party.

51. An exclusive list of countermeasures might be developed.

52. Recourse to countermeasures might be subject to procedural control by the Parties Group or a Panel.

53. Measures in response to a failure to comply could be subject to dispute settlement under the MAI, the right to which would not be subject to suspension or termination.

Commentary

There is a broadly shared view that the MAI should permit any Parties specially affected by the default to take effective countermeasures, but this should be subject to regulation and safeguards, rather than a unilateral invocation of customary law rights. There is also a consensus that retaliation in the investment field is particularly difficult. How to meet these concerns requires further reflection.