



Negotiating Group on the Multilateral Agreement on Investment (MAI)

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

**CONCEPTUAL FRAMEWORK FOR A
MAI DISPUTE SETTLEMENT MECHANISM**

(Note by the Chairman)

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INTRODUCTION

1. This note sets out for further consideration a possible conceptual framework for an MAI dispute settlement mechanism. Commentary and issues for further consideration reflecting the discussion at the last meeting are provided in italics.

2. While many options remain open, the broad outlines of MAI dispute settlement system could be described as follows:

- The MAI would first utilise informal methods of dispute avoidance or settlement, both bilateral and, as appropriate, multilateral;
- There would 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;
- With one reservation, delegations wish to see the MAI provide for advance prior consent by the Parties to such arbitration;
- Subject to one reservation, the arbitral mechanism would be essentially ad hoc, with certain institutional aspects, in particular a roster of qualified arbiters;
- Arbitral awards would be binding on the Parties to the proceeding, without an automatic right of appeal;
- 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; 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 on which reservations are 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;
- The rights of interested third Parties to participate in panel proceedings;
- Whether and how to provide for joinder of disputes with common issues;
- What remedies to allow a panel to impose beyond declaratory and pecuniary relief;

- How to deal with possible aberrant awards; and
- How to provide for effective countermeasures in the event a Party fails to comply with an arbitral award, while safeguarding against unregulated unilateral countermeasures.

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.

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 (whether a State or an investor), 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 general explanation of the agreement's provisions without reference to any specific case that might be the subject of dispute.

7. Clarifications would not have special binding legal effect, but would have their normal effect 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. This would not preclude some limited "safety valve" function regarding aberrant arbitral awards.

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. Though arbitral awards would be generally public (see paragraph 34, below) the Parties Group could decide on public disclosure of other categories of reported settlements.

12. No Party would be required to furnish 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

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 of legally binding effect. 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 consensus 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, such agreements "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 such 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. In the MAI, the Parties Group could have the authority to set aside an aberrant award by consensus. Or, it might be able, by qualified majority, to refer a questionable award to an appellate body - either standing or ad hoc. See proposed elements in paragraph 22 (state to state).

II. CONSULTATIONS, CONCILIATION AND MEDIATION

A. Bilateral consultations

14. It is proposed that a MAI Party 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; or
- b) an investor of another MAI Party regarding any alleged infringement of rights afforded it under the MAI which has resulted, or can be reasonably be expected 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. It is proposed that:

- a) a Party may not initiate arbitration against another Party under the MAI unless it has requested consultation, identifying the matters in dispute, and has afforded that other Party 60 days within which to consult on them;
- b) a similar consultation/cooling off period 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. The proposal in paragraph b) would limit the standing of an investor to invoke mandatory consultations to cases in which it has a real and direct interest.

Concerning paragraph 15, an alternative proposal is to require coherence between the positions taken by a Party in pre-arbitration consultations and those it may take in the arbitration itself.

Concerning paragraph 16, There is a difference of view about consultations as a pre-condition for arbitration, particularly investor to state. The WTO system (state to state) requires that a disputed matter 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. If so desired, this could also be provided for with regard to an investor to state dispute either at the initiative of the investor Party, or that of the host Party acting alone or with the investor's consent.

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, including, as appropriate, the ICSID and UNCITRAL conciliation rules;
- 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 of 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 ad hoc arbitration as the mandatory form of state to state third party binding dispute settlement.

21. The consent of a Party to arbitration under this provision would not apply to any dispute with respect to which an investor has invoked the arbitration provisions of the MAI, unless those proceedings do not result in a final and binding award.

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 and not a dispute over matters which might be entirely self-judging or 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 ad hoc arbitration by way of the MAI on these matters. To meet this concern, Parties could, for example, accept a formal "understanding" that disputes over the law of the sea are not included within the concerned Party's acceptance of the MAI dispute settlement mechanism.

Final and Binding Awards

22. An arbitral award would be considered final and binding upon the Parties to the arbitral proceedings, with the following proposed qualifications:

- 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 either that it shall not become final or that it shall be referred to an appellate panel.
- b) The arbitral award ceases to be binding upon the Parties to it, to the extent that it is inconsistent with a Parties Group clarification of the MAI in which they have participated.

Rules and Procedures

23. The MAI would set out basic rules and procedures for state to state arbitration. The Parties Group could supplement, but not modify, these rules. For particular disputes, the rules could be amended by the Parties to the dispute. The UNCITRAL rules could serve as default rules.

Roster and Panellist Qualifications

24. A roster of eligible panellists would be established and maintained by the Parties Group. It is proposed that:

- a) Each MAI Party may name five persons to the roster;
- b) Nominations will be for fixed terms of five years;
- c) In the event that special expertise may be appropriate for a particular dispute or class of disputes, the Parties Group may establish a special roster from which panellists may be drawn.
- d) Nominees will be included on the roster unless challenged on the basis of lack of competence or of conflict of interest. Challenges will be decided by the Parties Group, acting by qualified majority.

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.

Commentary

While it is unlikely that unqualified candidates would be nominated for the roster, the possibility of challenging a nomination would provide a safeguard in an extreme case and might deter unsound nominations.

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. It is proposed that a panel be composed of three members, including a president, chosen by agreement of the Parties to the dispute. Other options could include:

-- 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, it is proposed that those appointments would be made by the Secretary-General of the OECD, 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 most control for a Party. 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".

There was a preference to designate a permanent appointing authority in the MAI, i.e., the OECD Secretary-General as in paragraph 27. Given the range of new issues that may be included in the MAI and its connection to the OECD, the OECD Secretary-General seems the most appropriate appointing authority for state to state arbitration.

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 joinder, as follows:

- a) Where more than one Party wishes to submit to a Panel a dispute over the same matter, a single Panel shall be formed to consider the disputes wherever feasible;
- b) If more than one Panel is formed, to the greatest extent possible the same persons shall serve as panellists and the timetables of the proceedings shall be harmonised;
- c) A Panel which has been formed to consider a dispute may decide, upon the request of another MAI party in dispute over the same matter, to join the proceedings as a party.

31. The controlling law would be the provisions of the MAI, interpreted and applied in accordance with relevant rules of international law applicable in the relations between the parties.

32. The MAI should stipulate the remedies that a panel can 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) 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 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. 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 joinder requests.

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. This provision would not preclude the consideration of domestic law, where that was a relevant factor under the MAI and the domestic law was consistent with the MAI.

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.

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 and to address the risk of frivolous complaints. 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".

39. Parties that would be listed in an Annex would not consent where the investor has previously submitted the dispute under paragraph 36 a) or b) except that this will not affect the right of a party to submit a dispute to judicial or administrative tribunals for the purpose of seeking interim injunctive relief.

40. Consent would apply to any claim submitted to a Party more than six years 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 is subject to the right of a party to an investor-state dispute to invoke a cooling off period for consultation of a maximum of 60 days from the date the investor notified the party of the dispute.

42. The designated appointing authority would be the Secretary-General of ICSID, who would give particular consideration to selecting persons on the MAI arbitration rosters.

43. Arbitration would be held in a New York Convention state.

44. The MAI could make provision for joinder. The following is proposed:

- a) Where more than one investor wishes to submit to a single Panel a dispute raising common issues of law and fact, they may submit a joint request to do so and shall 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 may 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 necessary.

46. Parties could undertake to make best efforts to carry out Panel recommendations on interim relief, to the extent feasible under their laws.

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

Prior unconditional consent to binding investor/state arbitration as provided in paragraph 38, is the normal investment treaty system and is very broadly considered an essential feature of a state of the art MAI.

One 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.

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

A number of delegations could support a stronger proposal than that in paragraph 46 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.

C. Enforcement and Failure to Comply

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

49. MAI Parties would provide for the judicial enforcement in their territories of pecuniary awards issued in state to state and investor to state arbitration pursuant to the MAI.

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

- (a) The Parties Group, by consensus minus the defaulting Party, may 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 may invoke the breach as grounds for suspension of the MAI dispute settlement provisions vis-a-vis the defaulting Party.

51. Measures in response to a failure to comply shall be subject to dispute settlement under the MAI, the right to which may not be suspended or terminated.

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.

Delegates may wish to reflect further on how the MAI could meet these concerns. Can an effective exclusive list of countermeasures be developed? Should recourse to countermeasures be subjected to procedural controls, e.g., prior approval by a Panel?