



Negotiating Group on the Multilateral Agreement on Investment (MAI)

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

**DISPUTE SETTLEMENT: CONSULTATION/CONCILIATION
AND STATE-TO-STATE ARBITRATION**

(Note by the Chairman)

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A. Bilateral Consultations

1. A Contracting Party shall promptly enter into consultations when requested by:
 - a) any other Contracting Party regarding any question of interpretation or application of the agreement, including the compatibility with the agreement of any measure actually taken or officially proposed by the Contracting Party;
 - b) an investor of another Contracting Party regarding any measure actually taken which allegedly infringes rights afforded it under the agreement and which has resulted, or which it reasonably expects to result, in injury to it.
2. Such request shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and the facts of the case, and an indication of the legal basis for the complaint. A Contracting Party shall notify the [Parties Group] of its request for consultation.
3. The purpose of consultations shall be to find a mutually acceptable solution consistent with the agreement and shall be without prejudice to the position of either Party on disputed issues in the event of formal dispute settlement procedures.
4. A Contracting Party may not initiate arbitration against another Contracting Party under this agreement unless it has requested consultation and has afforded that other Contracting Party 60 days within which to consult on them.

B. Multilateral Consultations

1. In the event that bilateral consultations have failed to resolve the dispute, either Contracting Party may request the [Parties Group] to consider the matter.
2. Such request shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and the facts of the case, and an indication of the legal basis for the complaint.
3. Multilateral consultations in the [Parties Group] shall be without prejudice to the position of either Contracting Party on disputed issues in the event of formal dispute settlement procedures.

C. Mediation or Conciliation

1. Parties to a dispute agree to consider referring any matter which has not been resolved through bilateral or multilateral consultations to mediation or conciliation.
2. The rules under which the dispute is referred to mediation or to conciliation shall be agreed by the Parties to a dispute.
3. The Parties to a dispute may request the [Parties Group Chairman] to serve as nominating authority for a mediator or conciliator.

D. Results of Consultations, Conciliation, Mediation

1. The Parties to bilateral or multilateral consultations or to mediation or conciliation shall inform the [Parties Group] of significant developments in the consultations as they occur and of their results.

Commentary

Concerning article A, paragraph 1 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 1 a) includes proposed measures, which some question, there may be a need to clarify when a measure is "officially proposed".

Paragraph 1 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 1 b) not apply to a matter which is sub judice in a domestic court.

Concerning paragraph 4, 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.)

Concerning article B, paragraph 1, 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.

STATE TO STATE ARBITRATION

Article A. Initiation of Proceedings

1. Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement which has not been resolved within [two] months of a request for consultations pursuant to Article _ shall, at the request of any party to the dispute, be submitted to an arbitral tribunal for binding decision.¹ A request, identifying the matters in dispute, shall be delivered to the other party through diplomatic channels and a copy of the request shall be delivered to the [Parties Group].
2. To the extent the dispute is subject to an on-going investor to state arbitral proceeding under Article _ or has been addressed by final and binding award on the merits in that proceeding, it shall not be subject to arbitration under this article [without the express consent of the requested Contracting Party].

Article B Formation of the Tribunal

1. [*Alternative A*] Within two months of receipt of a request for arbitration, each Party shall appoint one member of the tribunal. The two members shall select a national of a third state who, on approval by the two Parties, shall be appointed Chairman of the tribunal within two months of the appointment of the other two members. If there are two or more Contracting Parties on a side of dispute, they shall be considered one party for purposes of appointment.

[*Alternative B*] Within two months of 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. At the option of any party, two additional members may be appointed, one by each party. If there are two or more Contracting Parties on a side of dispute, they shall be considered one party for purposes of appointment.

[*Alternative C*] Within two months of 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 Secretariat. If the Parties agree, the tribunal shall include two additional members appointed in the same manner.

¹ NOTE. It is proposed that the Final Act include a provision to the effect that signatories will not object to a reservation by which a Party addresses the case in which resolution of a dispute under this Agreement would require decision on a disputed question of the law of the sea. Such a reservation may provide that the Party does not consent to the decision of any disputed question of the law of the sea by an arbitral tribunal formed under this Agreement, provided that the reservation is accompanied by the Party's consent to submission of such a question and, at the option of the other party to the dispute, the entire dispute to the International Court of Justice or other competent international tribunal.

2. If the necessary appointments have not been made within the periods specified in paragraph 1, above, either Party to the dispute may, in the absence of any other agreement, invite [the Secretary-General of the OECD][the President of the ICJ or, if the President is a national of a party to the dispute, the most senior member of the ICJ not a national of a party to the dispute][the Secretary General of the Centre for the Settlement of Investment Disputes][the Secretary-General of the Permanent Court of Arbitration] to make the necessary appointments.
3. [Except for compelling reasons, e.g., the need for a special expertise, appointments to the tribunal shall be made from] [In making appointments to the tribunal, consideration shall be given to] members of a roster of highly qualified individuals, willing and able to serve on arbitral tribunals under this Agreement, nominated by the Contracting Parties. Each Contracting Party may nominate up to three members of the tribunal roster. Nominations are valid for five years.
4. Any vacancies which may arise in a tribunal shall be filled by the procedure applicable to the original appointment.

Article C. Independence and Impartiality

1. Members of the tribunal roster and of a particular arbitral tribunal shall be independent and impartial.
2. A prospective member shall disclose to those considering his nomination or appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. A member of a tribunal, once appointed, shall disclose such circumstances to the parties whom he has not previously informed.
3. Any tribunal member may be challenged if there are justifiable doubts as to the arbitrator's impartiality or independence. A challenge shall be communicated in writing, with the reasons justifying it, to all Parties to the dispute and members of the tribunal.
4. A challenged appointment shall terminate if accepted by the other Party or by the member, without any implication of acceptance of the validity of the grounds for the challenge. If this does not occur, the appointment may be terminated by decision of the [appointing authority named in paragraph 3.b, above].

Article D. Joinder/Consolidation

1. Where more than one Contracting Party requests the submission to an arbitral tribunal a dispute with the same Contracting Party raising common issues of law or fact, the disputes shall, if feasible, be considered by a single arbitral tribunal.
2. 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.
3. If the Parties to the disputes are in dispute over the interpretation or application of this article and cannot agree to its resolution by an arbitral tribunal which has been requested or formed, the dispute under this article shall, at the request of any Party to the dispute, be submitted for

binding decision to a special panel to be formed in accordance with the procedures set out in Article B and which shall decide its own rules of procedure.

Article E. Proceedings and Awards

1. Any Contracting Party wishing to do so shall be given an opportunity to present its views to the arbitral tribunal on any dispute concerning the interpretation of the provisions of this Agreement. Any such dispute which has not been clearly identified in the request for arbitration shall be promptly notified [to the Parties Group] by the tribunal.
2. The arbitral tribunal will decide disputes in accordance with this Agreement and the applicable rules of international law.
3. The tribunal may indicate provisional measures which either Party should take to avoid serious prejudice to the other pending its final award.
4. The tribunal, in its award, shall state the reasons for its findings of law and fact and may award the following forms of relief:
 - a) a declaration that a measure of a Party is incompatible with its obligations under this Agreement;
 - b) pecuniary compensation; and
 - c) any other form of relief to which the Party against whom the award is made consents, including restitution.
5. The tribunal shall first issue its award in provisional form to the Parties to the dispute, who may, within thirty days, submit written objection to any portion of it. The tribunal shall consider any objections, may solicit additional written views of the parties, and shall issue its final award promptly thereafter.
6. The tribunal shall promptly transmit a copy of its final award [to the Parties Group] as a publicly available document, except to the extent that the Panel, having considered the Parties' views, determines that the document contains confidential business information or personal data.
7. Tribunal awards shall be final and binding upon the parties to the dispute [unless the Parties Group, by consensus, otherwise decides within thirty days from receipt of a copy of the award].
8. The costs of the proceedings shall be paid for equally by the Parties unless the tribunal directs that they be shared differently. Fees payable to tribunal members will be subject to schedules established by [the Parties Group] and in force at the time of the tribunal members' appointment.

Article F. Default Rules

Unless the parties to the dispute decide otherwise, the UNCITRAL Arbitration Rules shall apply, *mutatis mutandis*, to matters not governed by other provisions of this article.

Article G. Enforcement of Awards

1. In the event of non-compliance with an award of an arbitral tribunal, the Contracting Party in whose favour it was issued may raise the matter [in the Parties Group]. [The Parties Group] shall endeavour to bring about compliance. It may, by consensus minus the defaulting Party, suspend the non-complying Party's right to participate [in the Parties Group] and its right to invoke Articles _ through _ (the state to state arbitration provisions) of this Agreement.
2. Pecuniary awards which have not been complied with within one year from the date of the award may be enforced in the courts of any Contracting Party with jurisdiction over assets of the defaulting Party.
3. [Possible exhaustive list of permitted countermeasures - no draft provided].
4. [Possible procedural safeguards on resort to countermeasures - no draft provided].