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Negotiating Group on the Multilateral Agreement on Investment (MAI)

SELECTED ISSUES ON DISPUTE SETTLEMENT

(Note by the Chairman)

This document was issued during the MAI negotiations which took place between 1995 and 1998.
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SELECTED ISSUES ON DISPUTE SETTLEMENT

(Note by the Chairman)

1. The High Level meeting on 16-17 February, 1998 confirmed that dispute settlement is a fundamental element of the MAI. Many delegations expressed strong support for both the state-state and investor-state modes of dispute settlement provided for in the agreement. However, there remain a number of concerns and questions particularly in the area of investor-state dispute settlement and its application to pre-establishment. Some delegations want also to prevent investors from bringing claims relating to post-establishment matters based on interpretations of MAI articles that governments would not advance.

2. Some of these concerns were addressed in the informal consultations on dispute settlement held on 23-24 February [see report DAFFE/MAI/DS(98)1]. The report notes that delegations are examining solutions to certain issues including the award by a state-state panel of pecuniary damages for specific losses of an investor or an investment, prior unconditional consent to investor state dispute settlement, a procedural REIO clause for state and investor state dispute settlement, and increasing transparency in state-state and investor-state dispute settlement procedures. Some delegations favour including special dispute settlement procedures for the determination of certain financial matters in investor-state dispute settlement. One delegation would also prefer to make multilateral consultations in the Parties Group a mandatory prerequisite to investor-state arbitration which might alleviate concerns about abusive interpretation of MAI articles.

3. This note selects three of the outstanding issues and makes proposals for consideration by the Negotiating Group. It does not deal with prior unconditional consent or the application of investor-state dispute settlement to the pre-establishment phase which will need to be reviewed by the Negotiating Group at a later time.

Initiation of arbitration in state-state dispute settlement ("Ripeness of a dispute")

4. The present version of the Consolidated Text provides for the initiation of state-state arbitration on any dispute between Contracting Parties "as to whether one of them <u>has acted in contravention of this Agreement</u>". Certain delegations believe that this provision overly restricts the ability of a complaining state to bring a case to international arbitration at an appropriately early stage, particularly with regard to a measure adopted, but not yet applied, to a MAI investor or investment. Other delegations recall that the present wording represents a compromise solution but have said they are ready to consider alternative wording.

5. The language proposed below seeks to provide greater flexibility for bringing a case to arbitration than the present Consolidated Text. For further clarity, it could be accompanied by an interpretative note, or commentary. The proposal is in two parts: paragraph (a) sets out the alternative wording in bold, and paragraph (b) the text of the interpretative note or commentary.

(a) Article C.1.a:

"Any dispute between Contracting Parties as to whether one of them **acts in a manner inconsistent with its obligations under this Agreement** shall, at the request of any Contracting Party that is a party to the dispute and has complied with the consultations requirements of Article B, be submitted to an arbitral tribunal for decision. [Rest of paragraph unchanged.]

(b) Interpretative note or commentary:

It is understood that a Contracting Party may "act", in the sense of Article C.1.a, by failing to act when the Agreement requires it. Further, where a dispute relates to a legislative measure that provides for action in contravention of the Agreement, but no such action has yet been taken, the standard set out in the Article leaves it open for the arbitral tribunal to decide, under the applicable jurisprudence, in light of all relevant circumstances, whether the measure is ripe for arbitration.

-- Can delegations accept this proposal?

The response to non-compliance with an arbitral award in state-state dispute settlement.

6. Views remain divided on the substantive nature and scope of countermeasures which should be permitted under the MAI, in particular whether counter-measures should be limited to the investment area, i.e., to the suspension of obligations under the MAI, or whether counter-measures outside the investment area could be taken. In the present version of the Consolidated Text, these two options are in brackets.

7. While there is broad consensus that an aggrieved Party might suspend obligations under the MAI (including dispute settlement) vis-à-vis the Party that has failed to comply with an arbitral award, there is some scepticism about the efficacy and desirability of counter-measures in the investment area. Consideration was given to the proposal to delete all references to counter-measures, but some delegations fear this would leave too much scope for adopting unilateral counter-measures.

8. A possible solution could be for the MAI to provide for the suspension of the application of MAI obligations by the aggrieved Party without approval by the Parties Group, as well as the possibility of other responses by the aggrieved Party after notification to the Parties Group, and to provide for multilateral responses which would carry the full authority of the Parties Group acting in accordance with its responsibility for the effective functioning of the MAI. Such a provision might read as follows:

Response to non-compliance

a. If a Contracting Party fails within a reasonable period of time to comply with its obligations as determined in the award, such Contracting Party shall, at the request of any Contracting Party in whose favour the award was rendered, enter into consultations with a view to reaching a mutually acceptable solution. If no satisfactory solution has been agreed within thirty days after the date of the request for consultations, any Contracting Party in whose favour the award was rendered, shall notify the other Contracting Party and the Parties Group **if it intends to suspend the application to the other Contracting Party of obligations under this Agreement or if it wishes to take other measures in response which would derogate from legal duties normally owing to the other Contracting Party.**

b. The effect of **suspension of obligations under this Agreement or other measures in response** must be proportionate to the effect of the other Party's non-compliance. Such measures may not include suspension of the application of Articles XX (General Treatment) and YY (Expropriation) and should not include denial of other protections to established investment.

c. At the request of any Party to the award upon conclusion of the thirty day period for consultation, the Parties Group shall consider the matter. **The aggrieved Contracting Party shall not implement the suspension of obligations under this Agreement and shall not take other measures in response** until twenty days after the receipt of the **notification** by the Parties Group Secretariat**.** The Parties Group may**, pending full compliance with the award:**

   i. make recommendations, by consensus minus the disputing Contracting Parties;

   ii. suspend, by consensus minus the non-complying Party:

   (a) the non-complying Contracting Party's right to participate in decisions of the Parties Group;

   (b) the eligibility of investments in the non-complying Party for investment guarantee insurance or any other public support by any other Contracting Party; and

   (c) the application to the non-complying Contracting Party of obligations of the other Contracting Parties under the Agreement.

d. Any dispute concerning the alleged failure of a Contracting Party to comply with its obligations as determined in an award or the lawfulness of any responsive measures shall, at the request of any Contracting Party that is party to the dispute, be submitted for decision to the arbitral tribunal which rendered the award or, if the original tribunal is unavailable, to a single member or three member arbitral tribunal designated by the Secretary-General. The request shall be submitted in the same fashion, and the proceedings carried out in accordance with the same rules as are applicable to a request made under paragraph 1.a of this Article, with such modifications as the tribunal deems appropriate, and the final award shall be issued no later than 60 days after the date of the request, in case of the original tribunal, or after the date of its formation, in the case of a new tribunal. No responsive measures may be taken from the time of submission of a dispute unless authorised by the tribunal as an interim measure or found lawful.

-- Can delegations accept this proposal?

The establishment of an appeal mechanism in the MAI.

9. At the High Level Meeting on 16-17 February, one delegation proposed the establishment of an appeal mechanism in the MAI for both state-state and investor-state dispute settlement [DAFFE/MAI/RD(98)11. Delegations in the informal consultations broadly agreed with the objectives of ensuring the development of a coherent jurisprudence and permitting an appeal where there may have been an error in law -- particularly concerning the interpretation of MAI obligations. However, concerns were expressed about the delays and costs an appeal might add to dispute settlement, particularly the traditional forms of investor-state arbitration, and its departure from the philosophy of fast, inexpensive and final one step arbitration.

10. As an alternative, the MAI dispute settlement mechanism could be left as it stands now subject to a review of the practical experience with the mechanism in five years. If, as a result of that review, Contracting Parties agree to introduce an appeals body, this could be done pursuant to the amendment article in the Agreement.

-- *Can delegations accept the alternative proposal in paragrah 10?*