



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Informal Consultations on Dispute Settlement

DISPUTE SETTLEMENT: REPORT TO THE NEGOTIATING GROUP

**INFORMAL CONSULTATIONS DISPUTE SETTLEMENT
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1. Informal consultations on dispute settlement were held on 31 October 1997.
2. Experts examined the technical comments made by ISCID (DAFFE/MAI/DS(97)7) and, in several cases, agreed on changes to the draft articles set out in the Consolidated Text. (See Annex.)
3. Experts also reviewed in general terms the comments by BIAC on an earlier draft of the dispute settlement procedure (DAFFE/MAI/RD(97)29). They agreed that the concerns expressed by BIAC had been adequately considered and most were already addressed in the present draft of the Consolidated Text. For one technical comment, on consolidation, the experts agreed upon a change to the Consolidated Text. (See Annex).
4. The Experts discussed a contribution by one delegation (DAFFE/MAI/DS/RD(97)1), proposing removal of the right to recover damages under state-state proceedings, thereby effectively reserving to investor-state proceedings all claims for recovery of damages to investors. Most delegations favoured retaining the possibility of such damage awards in state-state proceedings. The issue remains unresolved, but the delegations most concerned will consult informally during the December meetings.
5. Progress was made on the proposal by one delegation (DAFFE/MAI/RD(97)44) for a REIO clause for dispute settlement matters: Articles A3 and D2. One other delegation circulated and explained a revision of the above draft (DAFFE/MAI/DS/RD(97)3), which was welcomed by the delegation as substantially in accord with its own text. The two delegations agreed to continue discussions which might lead to a common position in December.
6. Experts also examined a note by one delegation (DAFFE/MAI/DS(97)8) on the MAI and agreements between investors and host states, intended to preclude MAI panels from giving effect to contractual provisions whereby investors waived the rights granted by the MAI. This proposal is principally relevant in the context of the “procedural option”, rather than a “full respect clause”, and this broader issue remained a political matter which will need to be decided in time by the Negotiating Group.¹ One other delegation suggested a technical reformulation of the proposal, which it will discuss with the author, in view of its potential relevance to the procedural option.
7. Experts noted a contribution by one delegation (DAFFE/MAI/DS/RD(97)2) proposing a non-derogation clause regarding other international law obligations more favourable to the investor. They agreed that this was not a dispute settlement matter and invited the delegation to refer it to the Negotiating Group.²

1. The Consolidated Text and Commentary do not presently contain a draft “full respect” clause. However, background discussion of the issue and text of such a clause may be found in the Consolidated Reports of Drafting Groups 1 and 2, DAFFE/MAI(96)16, at pp. 27-29.
2. This issue had been reviewed by EG4 on institutional matters which recommended that, at present, it saw no need for such a provision in the MAI given the international law governing the matter. For this reason, the present version of the Consolidated Text does not contain a previous draft clause on non-derogation.

ANNEX

Proposed Modifications to the Dispute Settlement Provisions

Article C.5: To make clear that an individual expert can be used and not just a multi-member board, insert “or expert” after “review board” in subparagraphs a. and b., “board” in subparagraph c.i. and “board’s” in c.ii.; and delete “board’s” in subparagraph d.

Article D.7. b: It would be useful to be clear when a claim is considered “submitted to arbitration” for purposes of the time period before the appointing authority is to act. The Secretariat would review the various arbitral rules and propose clarifications if needed.

Article D.9. c: To avoid complications in case the parties to proceedings being consolidated cannot agree on the arbitral institution or rules to be used, make UNCITRAL rules apply by default in all such cases. Accordingly, delete from “under the available” through “if there is an even distribution,”.

Article D.10. a: To avoid prejudice to the possibility of counterclaims by the Contracting Party in an investor-state arbitration, delete “by the Contracting Party”.

Article D.11: As previously agreed, the following footnote would be included in the Consolidated Text: “Subparagraph 11 (indemnification) does not bar as a defence, counter-claim, right of set-off or for any other reason, that the Contracting Party has already paid indemnification or other compensation to the subrogee or assignee of the investor’s rights in the matter.”