



Negotiating Group on the Multilateral Agreement on Investment (MAI)

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

**SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR
AND A CONTRACTING PARTY**

(Note by the Chairman)

SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY

1. Disputes between a Contracting Party and an investor of another Contracting Party which concern an alleged breach of an obligation of the former under this Agreement¹ relating to an investment² of the latter shall, if possible, be settled amicably.
2. If such a dispute has not been settled amicably³, the investor may choose to submit it for resolution:
 - a) to the courts or administrative tribunals of the Contracting Party to the dispute;
 - b) in accordance with any applicable previously agreed dispute settlement procedure; or
 - c) in accordance with this Article to:
 - i) the International Centre for Settlement of Investment Disputes ("the Centre"), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention"), if the Contracting Party of the investor and the Contracting Party party to the dispute are both parties to the ICSID Convention;
 - ii) the Centre under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, if the Contracting Party of the investor or the Contracting Party to the dispute, but not both, is a party to the ICSID Convention;
 - iii) a sole arbitrator or ad hoc arbitration tribunal⁴ established under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"); or

1 This formula does not cover disputes over a breach of the Contracting Party's obligations under an investment authorisation to or agreement with the investor, unless respect for such obligations is made into an obligation of the MAI.

2 Delegations may wish to consider specifying "whether or not already established". It seems unnecessary to specify here the location of the investments covered, since the substantive articles will define the scope of the obligations.

A more precise statement of the criteria for standing to invoke the dispute settlement mechanism is found in NAFTA Article 1116, as well as in the post NAFTA Canadian BIT, which specify the requirement that the investor has "incurred loss or damage by reason of or arising out of the breach" as an element of standing.

3 For a cooling off period, see paragraph 3..

4 The UNCITRAL rules provide for three arbitrators to be appointed unless the parties to the dispute agree that there shall be only one. This ECT based provision gives the Contracting Parties' agreement and leaves the choice of one or three to the investor.

- iv) the International Chamber of Commerce,⁵ by a sole arbitrator or ad hoc tribunal under its rules for arbitration.
3. A dispute may be submitted for resolution pursuant to paragraph 2(c)⁶ of this Article after sixty days from the date notice of intent to do so was provided to the Contracting Party party to the dispute, but no later than [three][six] years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute.⁷
4. a) Subject only to subparagraph 4(b), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
- b) For a Contracting Party which has submitted notice pursuant to this subparagraph to the Depository no later than deposit of its instrument of ratification or accession, consent under the preceding subparagraph does not apply where the investor has previously submitted the dispute under subparagraph 2(a) or (b).⁸ Each such Contracting Party shall make publicly available through the Parties Group Secretariat up-to-date information concerning its policies, practices and conditions in this regard.
- c) An investor may seek interim relief, not involving the payment of damages, from the judicial or administrative tribunals of a Contracting Party, for the preservation of its rights and interests pending resolution of the dispute, without being deemed, thereby, to have submitted the dispute for resolution for purposes of subparagraph 4(b).⁹
5. a) The consent given by Contracting Parties in subparagraph 4(a), together with the written submission of the dispute to resolution by the investor pursuant to subparagraph 2(c), shall, for purposes of Chapter II of the ICSID Convention, the ICSID Additional Facility Rules, the Rules for Arbitration of the International Chamber of Commerce, and Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), constitute the written consent and the written agreement of the parties to the dispute to its submission for settlement by the means selected.

5 Suggested by the Conceptual Framework, DAF/MAI/EG1(96)7.

6 This provision is designed to leave unaffected the rules for investor access to domestic courts and administrative tribunals

7 A sixty day cooling off period is suggested in the Conceptual Framework, as is a cut-off date or statute of limitations provision. A more precise version of the cut-off provision is found in NAFTA Article 1116, paragraph 2.

8 The question has been raised by one writer as to whether this fork in the road language does or should operate to bar access to international arbitration where the investor was required by local law to submit the dispute to the domestic procedures. This doubt could be avoided by adding language making the fork provision applicable only where submission to local remedies is not required.

9 This sentence is based on NAFTA. Question: what is or should be the result under this language when the domestic tribunal can only give interim relief if it is seized with the underlying dispute or claim?

- b) For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C of the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on grounds other than nationality:
- i) the disputing Contracting Party agrees to the appointment of each individual member of a tribunal under subparagraph 2(c)(i) and (ii) of this Article; and
 - ii) a disputing investor may submit or continue a claim under subparagraph 2(c)(i) or (ii) only on condition that the investor agrees in writing to the appointment of each individual member of the tribunal.¹⁰
- c) The parties to a dispute submitted to arbitration under subparagraph 2(c) and the appointing authority for such a case are encouraged to consider making appointments to the tribunal from members of the roster maintained by the Contracting Parties. The designated appointing authority for a case submitted for arbitration under the UNCITRAL rules is the Secretary General of ICSID.¹¹

6. An enterprise constituted or organised under the law of a Contracting Party but which, immediately before the events giving rise to the dispute, was an investment of an investor of another Contracting Party, shall, for purposes of disputes concerning that investment, be considered "an investor of another Contracting Party" under this article and "a national of another Contracting State" for purposes of Article 25(2)(b) of the ICSID Convention.¹²

7. Any arbitration under this article shall, at the request of any party to the dispute, be held in a state that is party to the New York Convention. Claims submitted to arbitration under this article shall be considered to arise out of a commercial relationship or transaction for purposes of Article 1 of that Convention.

8. In the event that a tribunal established under the consolidation provisions of paragraphs_____ so decides, it shall assume jurisdiction over disputes submitted to arbitration pursuant to paragraph 2(c) and the other proceedings shall be stayed or adjourned, as appropriate.¹³

10 This subparagraph (b), based on NAFTA Article 1125, is intended to assure that a three member panel may include nationals of the parties to the dispute, without requiring that each member of the panel be, in fact, chosen by agreement.

11 Provision called for by the Conceptual Framework. It would be legally possible to make the ICSID Secretary General the appointing authority for ICC cases as well, but that would be unusual given the institutional nature of the ICC facility, whose Court of Arbitration is available to appoint arbitrators.

12 This is a variant of the clauses which appear in many investment agreements, allowing the established company to have standing to bring the claim to arbitration against the host state. Such a clause would be redundant under the drafting approach of the French BIT. The NAFTA takes a very different approach, of specifically providing for the investor to have the right to bring a claim as representative of the investment, and provides specifically for such matters as waivers by the enterprise itself and for payment of any award of damages to the enterprise.

13 This paragraph is intended to raise the issue of a consolidation tribunal, a possible model for which may be found in Article 1126 of the NAFTA.

9. [Subrogation and indemnification texts, found in the Investment Protection section of the Consolidated Texts, DAF/MAI(96)16/REV1¹⁴, might be placed in the investor-state dispute settlement section.]

10. If a dispute submitted to arbitration pursuant to this Article concerns the interpretation of a provision of this Agreement, the Contracting Party to the dispute shall promptly inform the other Contracting Parties, through the Parties Group Secretariat. The arbitral tribunal shall give to any Contracting Party wishing to do so an opportunity to present its views on the interpretation of the provision in dispute.¹⁵

11. A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules and principles of international law.

12. Arbitration awards, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of a Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall make provision for the effective enforcement of awards made pursuant to this Article and shall carry out without delay any such award issued in a proceeding to which it is party.

13. Fees payable to a member of an arbitral tribunal established under these Articles will be subject to schedules established by the Parties Group and in force at the time of the tribunal member's appointment.¹⁶

14. The tribunal shall transmit a certified copy of an award of arbitration pursuant to this Article to the Secretariat of the Parties Group as a publicly available document, except to the extent the tribunal determines that it contains confidential business information or personal data.¹⁷

¹⁴ **“Subrogation**

If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance¹ given in respect of an investment of an investor in the territory of another Contracting Party, the latter Contracting Party shall recognise the assignment of any right or claim of such investor to the former Contracting Party or its designated agency and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right and claim to the same extent as its predecessor in title.²

A Contracting Party shall not assert as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an indemnity, guarantee or insurance contract.

1. Two delegations cannot agree to deletion of the words “non-commercial risks” at this stage.
2. One delegation has difficulties with the obligations in this paragraph.”

15 Provision to parallel the draft State-State provision.

16 Provision to parallel that in draft State-State provisions.

17 Provision parallels that in the draft State-State provisions.