



Negotiating Group on the Multilateral Agreement on Investment (MAI)

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

ELEMENTS OF AN MAI DISPUTE SETTLEMENT MECHANISM

(Note by the Chairman)

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I. CONSULTATIONS AND DISPUTE AVOIDANCE

A. Parties Group

1. The Parties Group may consider any matter relating to the interpretation or application of the MAI or the realisation of its objectives and may issue clarifications of any of its provisions.
2. The fact that a matter brought before the Parties Group for consideration or clarification is at issue in an actual dispute is without prejudice to the right of a party to the dispute to have recourse to dispute settlement.
3. MAI Parties to consultations, mediation, conciliation, or arbitration, will notify the Parties Group of any settlement reached or award issued, except to the extent this would disclose confidential business information. The Parties Group may also assist in the event of failure to comply with an arbitral decision.

B. Bilateral Consultations

4. An MAI Party will enter into consultations requested by:
 - (a) any other MAI Party regarding any matter relating to the interpretation or application of the MAI or the realisation of its objectives, including the compatibility with the MAI of any of the requested party's actual or proposed measures; or
 - (b) an investor of another MAI Party regarding any matter which the investor considers to have an adverse effect on its enjoyment of rights under the MAI.
5. Such consultations would be without prejudice to the positions of either party in the event of formal dispute settlement proceedings.

C. Mediation or Conciliation

6. By agreement of the parties to dispute under the MAI, the dispute may be submitted to mediation or to conciliation under the rules of the parties' choice, including the ICSID and UNCITRAL conciliation rules. The Parties Group Chairman will, upon request, serve as nominating authority.

II. BINDING THIRD PARTY DISPUTE SETTLEMENT

A. State to State Arbitration

7. 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 shall be submitted to an arbitral panel, at the request of any party to the dispute.
8. Arbitral awards shall be final and binding upon the parties to the arbitral proceedings.

9. Arbitration shall be governed by the UNCITRAL rules, except as otherwise provided by the MAI, the Parties Group, the parties to the particular dispute or the panel.
10. A roster of eligible panellists will be established and maintained by the Parties Group. Each MAI Party may nominate two persons, who will be included on the roster if found eligible by the Parties Group (acting by qualified majority) and who may be withdrawn by the nominating party at any time. A party may nominate a person to the roster whenever there are fewer than two of its nominees on it.
11. Panel members shall be persons with demonstrated expertise in the areas of law covered by the MAI and a reputation for competence, fairness, and integrity. They would be required to be impartial, independent and to decline, or withdraw from, an appointment in case of any existing or potential conflict of interest.
12. A panel will be composed of five members, including a president. The panel will be selected as follows:
 - (a) Each party (or side, if there is more than one party on a side of the dispute) will name one panel member of its choice and those two will name the remaining members and designate one of them as president.
 - (b) If a party fails to name a member, or the two members named by the parties fail to agree on the remaining members or president, those positions would be filled by an appointing authority named for a renewable term of five years by the Parties Group.
 - (c) The panel members not directly appointed by the parties to the dispute will be drawn from the roster of eligible panellists maintained by the Parties Group.
13. A request to initiate an arbitration will be notified to the Parties Group.
14. Any MAI Party, not party to the dispute, shall be given an opportunity to have its views considered on any issue relevant to the arbitration.
15. With the agreement of the parties to the dispute, a party with a direct interest in a matter submitted to arbitration will be allowed to become party to the arbitration, as part of the side with which its interests are most closely associated.
16. A panel will apply the MAI and any rules and principles of international law affecting the matter at issue.
17. In deciding upon the relief to be granted, a Panel shall give due consideration to any constitutional limitations upon the party.
18. Before issuing an award, a panel will provide a draft of it to the parties to the dispute and to any other MAI parties that had submitted views. They will have 21 days in which to comment. The panel will consider those comments and issue its final decision within 30 days after close of the comment period.
19. Final decisions will be notified to the Parties Group and made publicly available, except to the extent they contain confidential business information.

B. Investor-to-State procedures

20. 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.
21. MAI Parties give unconditional consent to submission of a covered dispute to arbitration under 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.
- a) Parties listed in an Annex do not consent where the investor has previously submitted the dispute under paragraph 20 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, as provided in paragraph 25, below.
 - b) Consent does not apply to any claim submitted to a party more than three years from the date on which the investor knew or should have known of the matter giving rise to the claim.
 - c) Consent is subject to the right of a party to an investor-state dispute to invoke a cooling off period of a maximum of 90 days from the date the dispute arose.
22. Absent other provision or agreement, the Secretary-General of ICSID is the designated appointing authority. Appointing authorities for MAI arbitration shall, wherever possible, utilise the MAI arbitration rosters.
23. At the request of either party, arbitration under the investor-state provisions of the MAI will be held in a New York Convention state.
24. With the agreement of the parties to the dispute before it, other investors with common interests may join the side of the investor.
25. Parties will make interim relief available in their territories for matters which have been submitted to arbitration under the MAI, either by providing for the enforceability of interim relief indicated or granted in arbitration under the MAI or by providing for the possibility of interim relief being granted directly by their courts in cases which have been submitted for settlement by MAI arbitration.
26. In deciding upon the relief to be granted, a Panel shall give due consideration to any constitutional limitations upon the party.
27. Arbitral awards shall be final and binding on the parties to the arbitral proceedings. Final decisions will be notified to the Parties Group and made publicly available, except to the extent that they contain confidential business information.

C. Enforcement and Failure to Comply

28. All MAI Parties will provide for the enforcement in their territories of pecuniary awards issued in arbitration, without prejudice to immunities enjoyed by state property as determined by relevant international conventions.

[29. Such awards are deemed to be consistent with the “ordre public” of the parties.]

30. Failure to comply with an arbitral award under the MAI is deemed to constitute a material breach of the MAI.

31. In the event a party fails to comply with an arbitral decision, the other parties shall 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, except for its rights as provided for in paragraph 32 below.

(b) If the failure to comply persists, any other party may invoke the breach as grounds for suspension of the MAI in appropriate part in its relations with the defaulting party.

32. Measures by any party 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

1. This Note does not address the issue of the scope of the dispute settlement system of the MAI which will depend, to a certain extent, on the substantive obligations of the agreement. Neither does it prejudge whether the system will cover pre and post-establishment.

2. The proposed elements of an MAI dispute settlement system take into account the discussion at the first meeting of the Experts Group. They are intended as an intermediate step towards drafting proposals. For the sake of convenience, some elements are written in treaty-like language.

Parties Group

3. The essential role of the Parties Group in this proposal is to help avoid disputes by serving as a forum for discussing general problems or questions. In this respect, the development of clarifications by the Parties Group would parallel the role played by the CIME and CMIT regarding the present instruments. Clarifications would be limited to providing a general explanation of the agreement's provisions without reference to any factual situations what might be the subject of dispute.

4. The Parties Group would also function as the depository of dispute settlement resolutions reached in the context of bilateral consultations, mediation, conciliation, or arbitration. This, combined with the ability to issue clarifications can promote consistency of MAI interpretations (see paragraph 6 below). The Group may also become involved in the stage of enforcement of an arbitral award should a party fail to comply (see paragraph 19 below).

5. The proposal does not include legally binding Parties Group opinions, adopted by consensus, as provided for in the OECD Shipbuilding Agreement. The point was made in the Expert Group that consensus opinions with legally binding effect might impede agreement on clarifications of the MAI and could raise questions of the line between interpretation and modification.

6. Even without a formally binding effect, the Parties Group clarifications would have sufficient impact to avert a future incorrect arbitral or court reading of the MAI. A consensus clarification would be a type of "subsequent agreement" of the parties to a MAI 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; moreover, a party which had participated in a consensus clarification/interpretation of the MAI might find itself estopped from asserting a differing interpretation in a subsequent dispute.

Bilateral Consultations

7. This proposal does not include a mandatory waiting period for state-state arbitration. For investor-state, a short "cooling off" period is provided which runs from the date when the dispute arose.

Relation between State-to-state and Investor-to-state procedures

8. Discussion in the Expert Group indicated that a majority of countries were disinclined to allow parallel state-to-state and investor-to-state arbitration procedures in respect of the same issue of law or fact, although it was recognised that this would be an unlikely occurrence. Delegations might consider whether a provision is needed to determine the relation between state-to-state and investor-state procedures.

Arbitration

General approach

9. The Expert Group considered the options of providing a standing, permanent tribunal or a purely ad hoc arbitration system found in bilateral investment treaties. Some delegations were of the opinion that a permanent arbitral tribunal should not be entirely ruled out because it presents inherent advantages as concerns consistency of decisions and the development of MAI jurisprudence. This would also resolve a constitutional difficulty for one country. The proposal represents a compromise between these options and reflects the preponderant view expressed in the Expert Group. It respects the multilateral character of the MAI while preserving flexibility for the parties to a dispute and avoiding undue complications for investors.

10. For both state-state and investor-state arbitration, the system involves notification to the Parties Group, a roster system, the publication of awards (which not only contributes to a jurisprudence, but also opens awards to public analysis and criticism), and the possibility of clarifications by the Parties Group. There was some discussion in the Expert Group about the possibility of an appeals body but this text does not envisage such a body.

11. For state-state cases, the presumption is that parties consent to arbitrate any dispute concerning the interpretation or application of the MAI. This is understood to mean any "legal" dispute and not a dispute over matters which might be entirely self-judging or discretionary for a party. For investor-state cases, the mechanism would provide for prior, and largely unconditional, consent of MAI Parties to arbitrate any "covered dispute". This proposal does not address what the possible limitation of the scope of the investor-state procedure might be. It would give the investor a range of arbitral choices. The proposal adopts the Energy Charter Treaty compromise of providing countries which require it an optional "fork in the road" between arbitration under the MAI provisions and other dispute settlement means, such as domestic courts.

Forming the Panel

12. The roster system is proposed for use in both state-state and investor-state arbitration. Each party (or side) to the dispute will have the right to name a panel member directly, without regard to the list.

13. In order to give non-Members which later accede to the MAI a voice in the selection of the appointing party for state-to-state arbitration, the Parties Group is given the authority to name the appointing party. The MAI could appoint, as an interim first term selection, the Secretary-General of the OECD. For investor-state arbitration, the Secretary-General of ICSID is suggested as the appropriate choice from the outset with the Parties Group empowered to change that designation.

14. The proposal foresees a five member panel for state-state arbitration. A large panel provides more stability of interpretation and there are precedents for such panels in other multilateral agreements, e.g., the Law of the Sea Convention. However, most countries agree that this can be very costly. For investor-state, there would be a three-member panel.

15. All MAI Parties would have the right to submit views to a panel in a state-state arbitration on any issue relevant to the arbitration. A point to be considered is whether that should include a right to make oral presentations, along with the parties to the dispute, or merely a right to submit memoranda. For investor-state arbitration, another investor could be given the right to join with the consent of the original

parties to the proceedings. The proposal does not deal with the consolidation of claims which would not be applicable in an ad hoc procedure.

Interim Injunctive Relief

16. To assist investors to avoid irreparable harm pending an arbitral award, the mechanism allows for interim injunctive relief to be afforded under the MAI Parties' domestic legal systems, and gives a choice of methods for doing so.

Remedies

17. Most delegations were in favour of a broad range of remedies including restitution, declaratory awards, and pecuniary relief. This proposal allows the panel to choose among appropriate remedies in both state-to-state and investor-state arbitration. It limits this freedom by directing the panel to give due consideration to any constitutional limitations on a party to satisfy an arbitral award. This is meant to provide a state with the possibility of offering compensation in lieu of restitution. The other option is for the MAI to specify the remedies that could be prescribed by an arbitral tribunal.

Non-compliance

18. Paragraph 29 of the proposed text, reflects comments by some delegations that the MAI should address a potential loophole in the New York Convention system by providing that MAI arbitral awards would be deemed consistent with parties' public policy ("ordre public"). The Group should consider whether such a provision is feasible/desirable in the MAI. Further, the MAI would require parties to make MAI pecuniary arbitral awards enforceable in their courts, covering gaps which might exist in New York Convention coverage. The question also arises whether the MAI should allow parties to set aside an arbitral award on the same grounds as provided for under the ICSID Convention.

19. The proposal deals with non-compliance by stating that failure to comply with an award constitutes a material breach of the MAI, to which other parties have the right to respond under the law of treaties and related customary international law, including the partial suspension of the MAI with the defaulting party. The proposals build on the provisions of Article 60, paragraph 2, of the Vienna Convention by providing that:

- (a) the Parties Group, by consensus minus the defaulting party, could suspend the defaulting party's right to participate in the Parties Group and to utilise the MAI dispute settlement machinery; and
- (b) in the event of persistent failure to comply, each MAI Party would have the individual right to suspend an appropriate part of the MAI in its relations with the defaulting party.

20. Most delegations thought that retaliatory measures beyond those in paragraph 19 a) and b) would not be appropriate in an investment agreement. It is for consideration whether the MAI should limit the rights of the party especially affected by the default to respond to the breach, e.g., by providing an adequate but exhaustive list of authorised responses, or by requiring a prior authorisation of the Parties Group or arbitral panel for responsive measures beyond those described in 19 above. The proposal provides one safeguard for measures taken in response to failure to comply with an arbitral award by making such measures themselves subject to challenge under a non-suspendable consent to arbitration.