



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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[General Provisions

1. The Contracting Parties may agree on any procedure of their choosing to achieve a mutually acceptable solution to a dispute which is consistent with this agreement.
2. Proceedings involving consultations, mediation or conciliation are without prejudice to the position of the Parties on disputed issues in the event of further procedures.]

A. Consultations

1. A Contracting Party shall promptly enter into consultations when requested by any other Contracting Party regarding any question of [observance,] interpretation, or application of the agreement, including the incompatibility with the agreement of any measure actually taken [or officially proposed] [or required to be taken] by the Contracting Party.
2. Such request shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue, such facts as will assist in understanding the request, and an indication of the legal basis for the complaint. Either Contracting Party may notify the Parties Group of the request for consultation.
3. A Contracting Party may not initiate arbitration against another Contracting Party under this agreement unless the former Contracting Party has requested consultation and has afforded that other Contracting Party 60 days from the date of the request on which to consult on the matters raised in the request.

B. Mediation or Conciliation

1. A Party to a dispute may refer any matter which has not been resolved through consultations to mediation or conciliation with the consent of the other Party concerned.
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 Secretary General of ICSID to serve as nominating authority for a mediator or conciliator in consultation with the Parties.

C. Results of Consultations, Conciliation, Mediation

1. The Parties to consultations, mediation, or conciliation under this agreement shall inform the Parties Group of any mutually agreed solution.

D. Confidentiality of Proceedings and Protection of Proprietary Information

1. Proceedings involving consultations, mediation or conciliation shall be confidential.
2. Contracting Parties shall protect any confidential or proprietary information which may be revealed in the course of consultation, mediation or conciliation proceedings and, in particular, may not reveal such information without formal authorisation from the Party(ies) providing the information.

Commentary

1. *There was broad agreement to include some general provisions providing that Contracting Parties can agree on any procedures of their choosing to decide any matter in dispute and specifically stating that consultation, conciliation, or mediation procedures were without prejudice to the position of the Parties on disputed issues in the event of any further procedures under the dispute settlement mechanism of the agreement. It should be considered whether a "freedom of choice" provision should have mandatory or recommended exceptions, e.g., the right of other Contracting Parties to submit views on a question of MAI interpretation in arbitration proceedings and the transmittal of awards to Parties Group as public documents. The placement of these provisions is to be decided.*
2. *Delegations were concerned with protecting the confidentiality of the consultations, conciliation, or mediation proceedings as well as protecting any proprietary information which may be revealed in the course of such consultations. A provision has been included dealing with the confidentiality of the proceedings or proprietary information. The placement of this provision is to be determined.*
3. *One delegation requested the inclusion of a provision that recognises the right of a REIO to associate itself with any case touching on REIO Law. One delegate raised a similar right of association for the EFTA Surveillance Authority for matters within its competence. The group agreed to examine this proposal.*
4. *There was general agreement to delete the section on multilateral consultations. The deletion of an institutionalised role for the Parties Group in the dispute settlement mechanism is without prejudice to the ability of any Contracting Party to raise a matter relating to the general interpretation of the agreement within the Parties Group. Delegations were of the opinion that this latter role is more properly considered in the discussion of the general role of a Parties Group.*

STATE-STATE ARBITRATION

Article A. Initiation of Proceedings

1. Any dispute between the Contracting Parties concerning [the interpretation or application of] [an alleged non-compliance with] this Agreement [which has not been resolved within 60 days of a request for consultations pursuant to Article _] shall, at the request of any Contracting Party that is a party to the dispute, be submitted to an arbitral tribunal¹ for binding decision.² 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. A Contracting Party may not initiate proceedings under this Article for a dispute regarding the infringement of rights of an investor which that investor has submitted to arbitration under Article __, unless the other Contracting Party has failed to abide by and comply with the award rendered in that dispute.]

Article B Formation of the Tribunal

1. [*Alternative A*] Within [60] days 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 within [60] days of the appointment of the other two members, will be Chairman of the tribunal. 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 B*] [...]

[*Alternative C*] Within [60] days 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 [Parties Group Secretariat] [Secretary General ICSID]. If the Parties agree, the tribunal shall include two additional members [appointed in the same manner], [one appointed by each Party to the dispute].

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

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 a) One delegation.
b) See Article E.7.

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 in consultations, as far as possible, with the Parties.

3. Parties and the appointing authority are encouraged to consider making appointments to the tribunal from 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 renewable terms of five years.
4. Any vacancies which may arise in a tribunal shall be filled by the procedure by which the original appointment had been made.

Article C. Independence and Impartiality

1. Members of the tribunal roster and of a particular arbitral tribunal shall be independent and impartial.
2. Prospective members shall disclose to those considering their nomination or appointment any circumstances likely to give rise to doubts as to their impartiality or independence. A member of a tribunal, once appointed, shall disclose such circumstances to the Parties to the dispute whom the member has not previously informed and shall inform them immediately of such circumstances which arise thereafter.
3. Any tribunal member may be challenged by a Party to the dispute if there are justifiable doubts as to the arbitrator's impartiality or independence not known at the time of appointment. A challenge shall be communicated in writing, with the reasons justifying it, to all Parties to the dispute and members of the tribunal. Challenges shall be made within [15 days] of the appointment or the date the circumstances giving rise to justified doubts became known. The Party which appointed the member may only challenge for reasons not known at the time of appointment.
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 Article B-2 above].

Article D. Joinder/Consolidation

1. Where more than one Contracting Party requests the submission to an arbitral tribunal of a dispute with the same Contracting Party [relating to the same measure] [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.

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 the interpretation of any of the provisions of this Agreement in dispute. The tribunal shall establish the deadlines for such submissions in light of the schedule of the proceedings.
2. The arbitral tribunal will decide disputes [in accordance with this Agreement and the applicable rules of international law] [customary rules of international law regarding the interpretation and application of treaties].
3. The tribunal may, at the request of a Party, recommend 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, at the request of a Party, 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 comment or objection to any portion of it. The tribunal shall consider such submissions, 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] [consensus minus one], otherwise decides within thirty days from receipt of a copy of the award.
8. Each party shall pay the cost of its representation in the proceedings. The costs of the Tribunal 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 [PCA] arbitration rules shall apply to matters not governed by other provisions of these Articles.

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].

Commentary

1. *Article A.1. The desirability of requiring a consultation request and consultation period as a precondition to invoking state-to-state arbitration has been questioned by some delegations.*
2. *Article A.2. This revised paragraph, based on ICSID Article 27, is intended to assure that the initiation of any form of investor-state arbitration provided by the MAI would restrain parallel state-state proceedings under the MAI to the same extent as, but no more than, would initiation of ICSID arbitration for a MAI contracting party which is also an ICSID party. This is a very limited preclusion, effecting the right to bring the very same claim. The ICSID observer confirmed that ICSID Article 27 should not preclude a state-to-state arbitration of an issue of treaty interpretation or application which was also involved in the investor-state dispute, as long as this did not amount to the espousal of the claim of the investor. It was recognised that an award in such a state-state proceeding would not affect an award rendered in the investor-state proceeding.*
3. *Article D and Article E1. Delegations considered that further work needed to be done on the question of joinder, e.g., whether it should be mandatory and in what circumstances, whether there should be a special panel and summary procedure for resolving issues of joinder. The present draft was based on the WTO model, but the NAFTA investor-state joinder provisions take a different approach. Regarding third party intervention, the questions of rights beyond the right to present a view (E1) and, consequently, of the award binding the intervenor were raised. One delegation undertook to provide a new draft for consideration.*
6. *Article E4, forms of relief. The question of when pecuniary damages might be appropriate was raised for further consideration. The meaning of "measures" was also mentioned as possibly needing clarification.*
7. *Article E5. Whether to require provision of all or part of an award in provisional form was questioned by several delegations.*
8. *Article E6. One delegation suggested that the provision on making awards public was related to a larger issue of confidential information and data which needed to be considered globally.*

9. *Article E7. Views were divided on having a provision for Parties Group consensus to block an award and it was the general view that further consideration was needed of this, along with the possibility of some appellate procedure.*