



Negotiating Group on the Multilateral Agreement on Investment (MAI)

SCOPE OF DISPUTE SETTLEMENT

(Note by the Chairman)

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1. At its December 1995 orientation debate on dispute settlement, the Negotiating Group agreed that dispute settlement is an important element for the implementation of the MAI obligations [DAFFE/MAI/M(95)3]. In the investment field, dispute settlement, investor-state and state-state, is a cornerstone and is found in bilateral investment treaties, the ECT, and NAFTA.
2. The report to the Negotiating Group by Expert Group N° 1 on selected issues concerning dispute settlement and geographical scope [DAFFE/MAI/EG1(96)5] noted that the scope of dispute settlement would depend on the substantive obligations of the agreement, including the definitions of investor and investment. Also relevant will be decisions concerning the inclusion or not of a specific MAI provision on rights under investor-state agreements.
3. Another general consideration concerns the interrelation between the MAI and other international agreements, including bilateral tax treaties, and the dispute settlement provisions of those agreements. This note does not address these issues as taxation is being studied by Expert Group 2, and the relation between the MAI and other agreements, including WTO, is scheduled for discussion by the Negotiating Group at its meeting in September 1996.
4. Taking into account that many substantive issues are still to be resolved, the Negotiating Group indicated its readiness to examine some general principles regarding the objective and scope of the MAI dispute settlement mechanism. The report by EG1 noted that for state-state dispute settlement, any dispute between Parties concerning the interpretation or application of the MAI, including the compatibility with the MAI of any measure or action taken by a Party, which has not been resolved by consultation, could be submitted to dispute settlement. In light of this report, the present note focuses on investor-state dispute settlement.
5. From the Negotiating Group's debate on dispute settlement, the Chairman concluded that the effectiveness of the MAI would be enhanced by providing for investor-state dispute settlement. There were different views on how to apply this general principle. Some delegations thought that investors should be able to submit any dispute on any obligation contained in the MAI; including the possibility of bringing disputes with a host country on pre-establishment obligations. Others wanted to reserve pre-establishment disputes to the state-state mechanism.
6. In principle, dispute settlement between investor-state could be linked to any contravention of direct rights owed to investors irrespective of whether these occur in the pre or post-establishment phase. There are certain inherent limitations to this principle. Formal binding dispute settlement would not be available for measures, areas, sectors, etc. which are specifically out of the scope of the agreement. The same is true for non-conforming measures listed in accordance with the MAI (country specific reservations); temporary derogations (if any); and general exceptions, to the extent that these would not be considered entirely "self-judging".

7. This delimitation might already deal with some concerns. To the extent that there are remaining reservations, delegations should consider how to qualify the application of investor-state dispute settlement.

8. One of the main reasons advanced for including investor-state dispute settlement on all MAI obligations is that business is strongly in favour of unqualified dispute settlement in the MAI. They are concerned that it will often be difficult to clearly distinguish between pre and post-establishment disputes. Investors consider the existence of a neutral, binding, and enforceable forum for dispute settlement with host governments as an important factor in investment decisions. It is a fundamental element in BITs. The likely accession to the MAI by non-OECD Member countries and the right to access international arbitration might further contribute to investor confidence. Ensuring the widest possible scope of investor-state dispute settlement contributes to the depoliticisation of investment disputes which might otherwise arise between Contracting Parties and which could disrupt the smooth functioning of the agreement.

9. Nevertheless, some delegations have indicated that they have difficulties with accepting binding third party arbitration, particularly investor-state dispute settlement for pre-establishment obligations. Some of these objections have to do with the nature of the obligations themselves in the pre-establishment phase, i.e. that they relate to decisions affecting a country's sovereignty over the entry and establishment of investment. There is also concern that investor-state dispute settlement could give rise to a proliferation of unfounded, frivolous disputes. Another concern is that of compatibility with other multilateral dispute settlement mechanisms.

10. One approach which has been proposed is to qualify the application of investor-state dispute settlement to certain areas or obligations. However, a general non-application to pre-establishment obligations would be too sweeping. To deal with this concern it could be envisaged to limit the remedies available to investors in pre-establishment disputes. Investors could also be required to show a potential prejudicial effect of the contested government measure. Another possibility could be to require consent by the investor's government before a claim can be raised.

Questions:

- *Should investor state dispute settlement apply to all the obligations of the agreement, including those arising in the pre-establishment phase?*
- *Should this principle be qualified; if so, in what way?*
- *Should EG1 be requested to develop texts on dispute settlement, including investor-state dispute settlement?*