



Negotiating Group on the Multilateral Agreement on Investment (MAI)

SCOPE OF DISPUTE SETTLEMENT

(Note by the Chairman)

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1. At its 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]. Furthermore, in considering the question of the scope of dispute settlement in its June 1996 meeting, the Chairman noted the majority view that investor-state dispute settlement should apply to all the obligations of the agreement [DAFFE/MAI/M(96)4].
2. Formal dispute settlement under the MAI could not be invoked against a Party except with regard to its own legal obligations under the Agreement. Accordingly, it would not apply to measures covered by either a MAI Party's specific reservations, a temporary derogation (if any are granted), or the general exceptions. Disputes about the meaning and scope of reservations, derogations and general exceptions, i.e., whether a complained of measure was or was not covered by them, would be subject to MAI dispute settlement except to the extent that they were "self-judging."
3. The scope of dispute settlement is also linked to the substantive obligations of the agreement, in particular the definition of investment/investor. Drafting Group 3 and Expert Group 5 are examining ways for dealing with some delegations' concerns regarding the application of a broad, asset-based definition of investment to some of the MAI obligations. The different solutions under consideration might reduce some of the potential concerns with investor-state disputes.

State-State Dispute Settlement

4. Under the draft text by Expert Group 1 on Dispute Settlement and Geographical Scope (Articles A-C) [DAFFE/MAI(97)1], the state-state procedures, including binding arbitration, would apply to legal disputes concerning all the obligations of Parties under the MAI.¹ At this time, the Negotiating Group might confirm the basic substantive scope of dispute settlement.

Do delegations agree that binding and compulsory third party settlement applies to state-state legal disputes regarding all of the MAI obligations?

¹ There is a technical scope issue of how ripe a dispute must be for it to be subject to compulsory binding settlement, but no issue of substantive scope has so far been raised. One delegation would want a choice of submitting to the ICJ a MAI dispute which required decision of law of the sea issues.

Investor-State Dispute Settlement

5. The scope of application of investor-state procedures is an issue which is still to be decided; the principal issue being whether the MAI dispute settlement mechanism should cover disputes involving the investor's pre-establishment rights.² Article D has been drafted on the assumption that it apply to all the investor's rights including those relating to establishment (see Consolidated Texts and Commentary DAF/MAI(97)1). A number of countries, however, maintain a reservation on this point.

- a. *As a matter of principle, can delegations agree that the substantive scope of the investor-state arbitral procedure will include legal disputes relating to all MAI obligations (pre and post establishment)?*
- b. *Would some, or all, of the following limitations help resolve the concerns expressed by some delegations with respect to the application of investor-state arbitration to all MAI legal disputes:*
 - *limiting damages in pre-establishment cases by excluding damages for potential profits from the investment;*³
 - *limiting remedies to a declaration that a measure of a Party is incompatible, or that a Party has failed to comply with its obligations under the agreement;*⁴
 - *limiting standing for indirect investment dispute settlement to the parent MAI investor;*⁵
 - *requiring approval by the Contracting Party of the investor before that investor would be allowed submit a dispute for binding arbitration.*⁶

² Other issues include whether an investor must have actually incurred damage before a dispute can be brought to arbitration, whether to include protection of investor rights under other investment agreements with and authorisations from a MAI party and whether to restrict compulsory investor-state arbitration to "commercial" disputes.

³ The question of the adequacy of "loss or damage" for pre-establishment has been considered by Expert Group 1. Discussion confirmed the understanding that a lost opportunity to profit from a planned investment would be a type of loss sufficient to give an investor standing to bring an establishment dispute under the article, without prejudice to the question of whether a specific amount of lost profits might later prove too remote or speculative to be recoverable as damages.

⁴ The language is still under consideration by Expert Group 1

⁵ The question of the coverage of indirect investment under the MAI is presently under consideration.

⁶ This might provide some some measure of control over claims, especially those in the pre-establishment phase, but could also off-set, to a large degree, one of the advantages of investor-state dispute settlement, that of de-politicising the dispute.