



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Drafting Group No.1 on Selected Topics Concerning Investment Protection

**DRAFT ARTICLES ON SELECTED TOPICS
ON INVESTMENT PROTECTION: REVISED TEXT**

(Note by the Chairman)

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(Noted by the Chairman)

**Article A
GENERAL TREATMENT**

- (1) Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security. In no case shall a Contracting Party accord treatment less favourable than that required by international law.
- (2) A Contracting Party shall not impair by unreasonable [or discriminatory] measures the operation, management, maintenance, use, enjoyment, or disposal of investments in its territory of investors of another Contracting Party.

**Article B
EXPROPRIATION AND COMPENSATION¹**

- (1) A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as "expropriation") except:
- a) [for a public purpose] [in the public interest,]
 - b) on a non-discriminatory basis,
 - c) in accordance with due process of law, and
 - d) accompanied by payment of prompt, adequate and effective compensation in accordance with paragraphs (2) to (5) below.
- (2) Compensation shall be paid without delay.
- (3) Compensation shall be equivalent to the fair market value of the expropriated investment on the date of expropriation. The fair market value shall not reflect any change in value occurring because the intended expropriation had become publicly known before the date of expropriation.
- (4) Compensation shall be fully realisable, in a freely [convertible] currency, and freely transferable.
- (5) Compensation shall include interest at **[an appropriate market rate]** [a normal commercial rate] [a commercially reasonable rate] from the date of expropriation until the date of actual payment.

¹. Compensation appeared as a separate item of the list of "selected topics concerning investment protection". However, it is usually dealt with in the same article as expropriation.

[The applicable rate of exchange shall be the market rate of exchange prevailing on the date immediately before the expropriation became known.]²

(6) Due process of law includes, in particular, the right of an investor of a Contracting Party which claims to be affected by expropriation by another Contracting Party to prompt review of its case, including the valuation of its investment and the payment of compensation in accordance with the provisions of this article, by a judicial authority or another competent and independent authority of the latter Contracting Party.

Article C PROTECTION FROM STRIFE

(1) An investor of a Contracting Party which has suffered losses relating to an investment in the territory of another Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event in the territory of the latter Contracting Party, shall be accorded by the first Contracting Party, as regards restitution, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third State, whichever is most favourable to the investor.

[(2) Notwithstanding paragraph (1), an investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the territory of another Contracting Party resulting from

- (a) requisitioning of its investment or part thereof by the latter's forces or authorities; or
- (b) destruction of its investment or part thereof by the latter's forces or authorities, [which was not required by the necessity of the situation,]

shall be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective in accordance with Article B.]

Article D TRANSFERS

(1) Each Contracting Party shall ensure that all payments relating to an investment in its territory of an investor of another Contracting Party may be freely transferred into and out of its territory. Such transfers shall include, in particular, though not exclusively :

- a) the initial capital and additional amounts to maintain or increase an investment ;
- b) returns³ ;

² To be resolved in the light of further consideration of (a) proposal by one delegation (attached) on "fair market value" for compensation for expropriation and (b) the text on transfers in Article D. The term chosen should be of general application, not specific to any national legislation.

³ As defined in the Article on definitions.

- c) payments made under a contract entered into by the investor, including a loan agreement ;
- d) proceeds from the sale or liquidation of all or any part of an investment ;
- e) payments of compensation under Articles B and C;
- f) payments arising out of the settlement of a dispute ;
- [g) earnings and other remuneration of personnel engaged from abroad in connection with an investment.]

(2) Each Contracting Party shall further ensure that such transfers [may/shall] be made in a freely [usable/convertible] currency.

(3) Each Contracting Party shall also further ensure that such transfers [shall/may] be made without delay at the market rate of exchange prevailing on the date of transfer.

[(4) In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate for conversion of currencies into Special Drawing Rights.]

[(5) Each Contracting Party shall ensure that transfers of returns in kind may be made as authorised or specified in an investment authorisation, investment agreement, or other written agreement between the Party and an investment or an investor of another Party.]

[(6) Notwithstanding paragraphs (1) to (5), a Contracting Party may require reports of transfers of currency or other monetary instruments and ensure the satisfaction of judgements in civil, administrative and criminal proceedings through the equitable, non-discriminatory, and good faith application of its laws and regulations. Such requirements shall not unreasonably impair or derogate from the free and undelayed transfer ensured by this Agreement.]

[Possible provision on forced transfers by investors⁴]

Article E SUBROGATION

(1) If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance against non-commercial risks 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.

⁴ Proposal by one delegation (attached).

COMMENTS

Article A

- Reference to "encouragement and promotion of investments", usually found in BITs does not constitute a principle of general treatment but may be included at some other place of the MAI.
- Depending on the definition of investment/investor adopted in the MAI, the wording of Article A ("investments of investors") and subsequent articles may have to be changed.
- Reference to international law is critical in this article and worded in the most simple manner. This may be a general issue to be discussed when other references to international law are made in other articles of the MAI.
- The link between General treatment and NT/MFN was underlined as critical. However, since General treatment was considered as an "absolute" principle as opposed to NT/MFN considered as "relative" principles, it was agreed that it was justified to separate the articles on General treatment and NT/MFN respectively.
- In the course of discussions it was agreed to suggest that special commitments entered into by a Contracting Party vis-à-vis an investor should be included in the MAI in a manner to be discussed at a later stage.
- Obligations apply in all circumstances (i.e. "at all times"), although specific language was not considered necessary on this point.

Article B

- In cases where the investment consists in total or in part of shares, the rights of the shareholders, if an expropriation takes place, have to be defined. If this does not derive from the definition of investments in the MAI, special provision may be needed in Article B.
- Expropriation in cases where the investment consists in total or in part of intellectual property rights was seen as critical. It was not decided however to suggest specific language on this issue.
- "Creeping expropriation" through tax measures was mentioned but no specific wording was suggested, notably in as much as no final decision has been taken yet on the treatment of tax issues in the MAI in general.
- The cases of "freezing" of assets were mentioned, without suggestion of language in this Article.

Article D

- All delegations agreed that the free transfer of returns was a critical element of the protection of the investors. Therefore a clear preference was voiced for listing the main categories of returns in Article D (1) b) and in particular: "profits, dividends, capital gains, royalties, fees". However it was

finally agreed not to lengthen the text of Article D (1) b) provided that these categories are explicitly listed in the definition of returns in the article on definitions of the MAI.

- The reference to the exchange rate in Article D (3) pertains only to cases where the investor wishes to convert funds on the date of transfer.
- The Group heard a presentation on transfers by an expert from the International Monetary Fund regarding the rights and obligations of countries under the Fund Agreement. The Group recommended that this matter be dealt with under general provisions concerning the relationship of the MAI to other international agreements.
- Delegates wished to see no “balance of payments” clause in the transfer article: this matter will be dealt with by the Negotiating Group in particular when it addresses the relationship of the MAI to other international agreements.
- Article D (6) is indirectly but closely linked with the issue of free transfer. It allows satisfaction of two important objectives. Another important objective concerns taxation but this matter will need to be considered in the context of the general treatment of taxes in the MAI.

Article E

- It was discussed whether to include subrogation of private insurance companies - as a complement to "the Contracting Party or its designated agency" - in the rights of an investor. Considering the very wide implications of such an approach, tantamount to legislating the right of subrogation in a multilateral treaty, it was preferred not to engage in this direction, subject to further reflection by all delegations.
- The question of subrogation is very directly linked to the settlement of disputes: it will have to be borne in mind as discussions on the latter subject take place. In particular, a key question will be the respective rights of the investor and the Contracting Party or its designated agency subrogated in the rights of this investor.

ANNEX I

COMMENT AND SUGGESTED TEXT ON COMPENSATION FOR EXPROPRIATION BY ONE DELEGATION (Article B)

It is important to separate the concepts of payment for expropriation and the transferability of such payments.

Payments can be effective if paid either:

in a freely usable currency, or

in a currency that is not freely usable.

In either case, effective compensation must include rules on market valuation and on interest for any delay in payment.

Where payment is made in a currency that is not freely usable, the expropriating Party must also bear the exchange rate risk.

Investors have asked for the choice of currency of payment, since at times compensation is left in the host country to be reinvested or for other uses. Investors should have this choice.

In contrast, transfers of compensation for expropriation should be treated as any other transfer.

The country's BIT practice requires each Party to permit an investor to make any transfer in a freely usable currency in the following terms:

“3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid -- converted into the currency of payment at the market rate of exchange prevailing on the date of payment -- shall be no less than:

- (a) the fair market value on the date of expropriation, converted into a freely usable currency, at the market rate of exchange prevailing on that date, plus
- (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.”

ANNEX II

PROPOSAL ON FORCED TRANSFERS BY ONE DELEGATION (Article D)

It is suggested that the following paragraph be added to Article D:

“A Contracting Party shall not require the transfer of, or penalise the failure to transfer, the income, earnings, profits or other amounts derived from, or attributable to, an investment in the territory of another Contracting Party by one of its investors.”

While there is no readily apparent need for such a provision among OECD members, this language is intended to state a principle rather than address a particular problem. However, this is not a hypothetical possibility in that it should be remembered that such a requirement was imposed by a member country on its investors in the 1960s. Furthermore, in considering the possible accession of non-member countries, it should be noted that some countries do have repatriation requirements. Therefore it seems appropriate to add such a principle to the text of Article D.