



Negotiating Group on the Multilateral Agreement on Investment (MAI)

MAI AND ENVIRONMENT AND LABOUR STANDARDS

(Note by the Chairman)

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The Negotiating Group has for some time been considering the treatment of environment and labour standards under the MAI. The last discussion of these issues showed evolution in Delegations' thinking (Summary Record of the Meeting held on 30 June-2 July 1997, DAFPE/MAI/M(97)6, p. 3). There was growing support for, although no consensus on, the "three anchor" architecture developed last October (see Chairman's Note, DAFPE/MAI(96)30), involving the Preamble, not lowering standards and associating the OECD Guidelines on Multinational Enterprises. There have been proposals for strengthening those "anchors", such as making binding a provision for not lowering standards. Texts concerning performance requirements and on the role of environmental or safety experts in advising dispute settlement tribunals have also been developed. The existing texts and commentary are attached as Annex 1 to this Note.

In addition, one delegation suggested other ideas last July, and another one proposed an environmental review of the MAI at the September meeting (DAFFE/MAI/RD(97)43). They have not been fully debated.

Delegations must now consider where the Negotiating Group stands on these matters, and how it wishes to proceed. Delegations will also want to reflect on the results of the Informal Consultation with NGOs to be held on 27 October.

Existing Texts

Preamble

The existing options for text for the Preamble need considerable further work. They reflect a variety of positions on references to the Rio Declaration and sustainable development, to appropriate environmental policies and to "core" labour standards (whether domestic or international, or both). In addition, the Commentary sets out a proposal by one delegation, supported by another one, containing additional elements such as references to optimal use of the world's resources and public participation and access to information.

Not Lowering Standards

The options for text are inspired by NAFTA Article 1114(2). There are several possibilities for developing this provision: depending on whether it should be binding, whether the standards ought to be domestic or international, or both, whether they should be "core" standards, and whether there ought to be a single provision or separate provisions for environment and labour standards.

Performance Requirements

The current negotiating text, the result of the Informal Consultations on Special Topics in September, sets out widely accepted principles for exceptions to the prohibitions against performance requirements. They include exceptions for environmental and other measures relating to laws and regulations not inconsistent with the agreement, necessary to protect human, animal or plant life or health, or necessary for the conservation of non-renewable resources. The tasks now are to decide where these matters ought to be addressed in the agreement and to refine the text.

Dispute Settlement

Reference to environmental matters is made explicitly in the provisions dealing with the designation of expert panels to assist dispute settlement tribunals in either state-to-state or investor-state disputes.

OECD Guidelines

The existing text addresses the OECD Guidelines for Multinational Enterprises under the heading: Relationship to Other International Agreements (DAFFE/MAI(97)1/REV2, p. 86 and 87), including proposed text for associating the Guidelines with the MAI, either to the agreement itself or to the Final Act. Informal consultations have also resulted in text for a preambular reference to the OECD Guidelines (DAFFE/MAI/IN(97)2, section I).

Other Suggestions

During the 30 June-2 July meeting of the Negotiating Group, one delegation presented additional ideas for dealing with environmental matters. They included (a) encouraging a provision modelled on NAFTA Article 1114(1) to make it clear that the MAI will not prevent countries from adopting or maintaining environmental measures, (b) encouraging investors to manage toxic chemicals and hazardous wastes in an environmentally friendly manner, (c) promoting environmental assessment of investments that might have significant adverse environmental effects, (d) recognising that implementation of environmental measures can be non-discriminatory but need not be identical in all cases (depending on the circumstances), and (e) explicitly acknowledging the rights of countries to verify information from investors to ensure compliance with their laws and regulations.

In September, one country made a proposal for an environmental review of the MAI (DAFFE/MAI/RD(97)43).

Questions

1. *Further discussion is clearly needed to refine the options for text already under consideration concerning the Preamble, not lowering standards, performance requirements and the association of the OECD Guidelines. Should DG3 be instructed to consider this work and report to the Negotiating Group in January, 1998?*

2. *Which of the other suggestions deserves further consideration?*

Do delegations have specific texts to propose?

How should these proposals be tackled?

ANNEX 1: EXISTING TEXTS AND COMMENTARY

A. PREAMBLE

DAFFE/MAI(97)1/REV2, p. 10 (Consolidated Text)

PREAMBLE

[Reaffirming their commitment to the Rio Declaration on Environment and Development and Agenda 21, including to sustainable development as reflected therein,]¹ [and recognising that investment, as an engine of economic growth, can play a key role in ensuring that growth is sustainable, when accompanied by appropriate environmental policies to ensure it takes place in an environmentally sound manner];

[Renewing their commitment to the observance of internationally recognised core labour standards [, i.e. freedom of association, the right to organise and bargain collectively, prohibition of forced labour, the elimination of exploitative forms of child labour, and non-discrimination in employment] [and noting that the International Labour Organisation is the competent body to set and promote core labour standards world-wide.]]

Affirming their decision to create a free-standing Agreement open to accession by all countries;²

[OECD Guidelines]³

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1. The square brackets in this tiret, the first set of brackets in the next tiret and the overall brackets on this and the next tiret were requested by some delegations which oppose inclusion of texts on the matter concerned in the Preamble. The brackets do not reflect a divergence on drafting at this stage, although some delegations have concerns with respect to the reference to “conservation”. One delegation has put forward additional language on the environment and labour which is set out in the Commentary. One other delegation supports the proposed additional language on the environment.
 2. Some delegations proposed that the statement that the Agreement is open to accession by all countries be strengthened.
 3. Preambular text on the OECD Guidelines has been developed during informal consultations on institutional matters. The text, together with an accompanying footnote, is found on page 86.

PREAMBLE¹

ENVIRONMENT

Convinced of the need for optimal use of the world's resources in accordance with the objective of sustainable development.

Recognising that investment can result in changes in the scale and structure of economic activity within countries, with potential effects on health and the environment.

Recognising the interdependent nature of their environments.

Encouraging the protection, conservation, preservation and enhancement of the environment.

Reaffirming their commitment to the Rio Declaration and Agenda 21, including to sustainable development as reflected therein, and recognising that investment, as an engine of economic growth, can play a key role in ensuring that growth is sustainable, when accompanied by appropriate environmental policies to ensure it takes place in an environmentally sound manner.

Noting that principles of relevance to investment include, *inter alia*, those relating to polluter pays, the precautionary approach, public participation and the right of communities to have access to information, and the avoidance of the relocation and transfer of activities causing severe environmental degradation or found to be harmful to human health.

Resolved to implement this agreement in a manner consistent with environmental protection and conservation.

LABOUR

Recognising that development of economic and business ties can promote respect for core labour standards.

Resolved to foster investment with due regard for the importance of labour laws and core labour standards.

1. This proposal for additional language has been put forward by one delegation and supported by one other delegation. It has not been fully debated.

Affirming their commitment to the observance of internationally-recognised core labour standards, i.e., freedom of association, the right to organise and bargain collectively, a prohibition of forced labour, the elimination of exploitative forms of child labour, and non-discrimination in employment.

Noting that, as members of the International Labour Organisation, they have endorsed the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and agreeing to renew their support for that voluntary instrument.

B. PERFORMANCE REQUIREMENTS

DAFFE/MAI/ST(97)13, pp. 7 and 8 (Special Topics Group)

PERFORMANCE REQUIREMENTS

3.¹ Nothing in paragraphs [1(a),] 1(b), 1(c), 1(d), and 1(e) shall be construed to prevent a Contracting Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Contracting Party or of a non-Contracting Party, on compliance with a requirement, commitment or undertaking to locate production, provide particular services, train or employ personnel, construct or expand particular facilities, or carry out research and development in its territory.

4. [Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and 1(c) shall be construed to prevent any Contracting Party from adopting or maintaining measures, including environmental measures:

- (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

1. The majority of delegations regard the inclusion of paragraphs 1 (a) to (e) to be redundant or irrelevant since they could not see how paragraph 1 could interfere with any of the specific requirements, commitments and undertakings covered by paragraph 3. Proponents of this paragraph consider it necessary for greater certainty since the measures concerned are encountered in many countries. It might therefore be helpful to insert the words "for greater certainty" at the beginning of the paragraph. Other delegations consider the content of paragraph 3 should at best be covered by a footnote. One delegation will prepare an explanatory note on the relationship between paragraph 3 and other paragraphs of the article.

- (b) necessary to protect human, animal or plant life or health;
- (c) necessary for² the conservation of living or non-living exhaustible natural resources.]³

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- 2. One delegation suggests replacing the words “necessary for” by “relating to”, which are used in article XX of GATT 1994.
 - 3. Several delegations share the view that issues relating to the environment and protection of human, animal or plant life or health would be more appropriately treated in the context of a more general article of the MAI. It would also be necessary to take into account the outcome of the Negotiating Group’s deliberations on environmental issues.

A possible compromise supported by a majority of delegations might be to replace paragraph 4 with the following interpretative note proposed by one delegation:

“Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and 1(c) shall be construed to prevent any Contracting Party from adopting or maintaining measures necessary to secure compliance with environmental [laws and regulations] [that are not otherwise inconsistent with the provisions of this Agreement and] that are necessary for the conservation of living or non-living exhaustible natural resources, [or that are necessary to protect human, animal or plant life or health.]”

One delegation continues to believe that paragraph 4 is properly framed and that its scope should not be limited to environmental measures, which would be the consequence of the above proposal. This delegation provided the following example of the utility of paragraph 4(a) in a non-environmental context:

“As part of its operations, an investor has need for a product available from two sources -- one domestic and one foreign. However, the foreign supplier has a long history of violating the host government’s customs laws. Accordingly, as a sanction, customs officials preclude the foreign supplier from bringing the product into the host’s territory. This forces the investor to use a domestic source of supply. Paragraph 4(a) makes clear that this cannot be challenged as a violation of paragraph 1(b) or 1(c). Even though the measure limits an investor to using goods produced in its territory, the measure has been invoked for a legitimate purpose (not as a disguised restriction on investment) and has been taken to secure compliance with a customs law that is not inconsistent with the MAI.”

This delegation, supported by one other delegation, seeks retention of paragraph 4, including subparagraph 4(a), to provide clarity that this type of conduct does not violate the performance requirements article, and to reduce the likelihood of having to defend such a claim in dispute settlement.

It is confirmed that no other general exceptions covered by Article XX of GATT 1994 need to be covered by paragraph 4.

C. NOT LOWERING STANDARDS

DAFFE/MAI(97)1/REV2, pp. 48 and 49 (Consolidated Text)

NOT LOWERING STANDARDS¹

[Alternative 1

The Parties recognise that it is inappropriate to encourage investment by lowering [domestic] health, safety or environmental [standards] [measures]² or relaxing [domestic] [core]³ labour standards.⁴ Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such [standards] [measures] as an encouragement for the establishment, acquisition, expansion or retention of an investment in its territory of an investment or an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

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1. Four delegations oppose any provision on these matters. One delegation could accept a provision covering health, safety, and the environment, but not labour. One other delegation could accept only a non-binding provision.
 2. If “measure” is preferred, then the word “lowering” should be replaced by “relaxing”. In either case, the term selected should be defined. For reference purposes, delegations mentioned the definition of “measure” in NAFTA or to be found in the Transparency Article of the MAI [DAFFE/MAI(97)1, page 11] and the definition of “standard” in NAFTA and in the WTO Agreement on Technical Barriers to Trade.
 3. Delegations noted that no universally accepted definitions existed for “core” or “domestic” standards. Most delegations preferred “domestic” which was recognised to be wider in scope.
 4. A major difference of view as between Alternative 1 and Alternative 2 concerns the first sentence of Alternative 1. This sentence is part of a difference of approach as to whether the provision should refer to respect for universal standards or only to the relaxation of domestic standards. Views differ on whether this sentence is useful or necessary.

Alternative 2

A Contracting Party [shall] [should]⁵ not waive or otherwise derogate from, or offer to waive or otherwise derogate from [domestic] health, safety or environmental [measures] [standards] or [domestic] [core] labour standards as an encouragement for the establishment, acquisition, expansion or retention of an investment or an investor.]

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5. If “should” were preferred, it might be desirable to add the last sentence of Alternative 1. Those preferring “should” argued that use of the word “shall” would prevent the authorities offering necessary waivers under domestic law, for example, to help resolve a specific case of damage to the environment and might prevent resolution of particular cases through consultations and persuasion. They also expressed concern that “shall” might expose the authorities to dispute settlement challenge. One delegation expressed concern over the use of the broader phrase “domestic labour” standards with recourse to dispute settlement in that it could create disputes under the MAI over changes in programmes relating to minimum wages or retirement qualifications; this delegation questioned if this was what was intended by this provision. Those preferring “shall” argued that the purpose of this Article is to prohibit a waiver or derogation only if used as an encouragement to an investment.

D. DISPUTE SETTLEMENT

DAFFE/MAI(97)1/REV2, pp. 57 and 65 (Consolidated Text)

DISPUTE SETTLEMENT

5. Scientific and Technical Expertise

- a. On request of a disputing Contracting Party or, unless the disputing Contracting Parties disapprove, on its own initiative, the tribunal may request a written report of a scientific or technical review board on any factual issue concerning environmental, health, safety or other scientific or technical matters raised by a disputing Contracting Party in a proceeding, subject to such terms and conditions as such Parties may agree.
- b. The board shall be selected by the tribunal from among highly qualified, independent experts in the scientific or technical matters, after consultations with the disputing Parties and the scientific or technical bodies identified by those Parties.
- c. The disputing Contracting Parties shall be provided:
 - i. advance notice of, and an opportunity to provide comments to the tribunal on, the proposed factual issues to be referred to the board; and
 - ii. a copy of the board's report and an opportunity to provide comments on the report to the tribunal.
- d. The tribunal shall take the board's report and any comments by the disputing Contracting Parties on the report into account in the preparation of its award.

13. Scientific and Technical Expertise

- a. On request of a disputing party or, unless the disputing parties disapprove, on its own initiative, the tribunal may request a written report of a scientific or technical review board on any factual issue concerning environmental, health, safety or other scientific or technical matters raised by a disputing party in a proceeding, subject to such terms and conditions as such parties may agree.
- b. The board shall be selected by the tribunal from among highly qualified, independent experts in the scientific or technical matters, after consultations with the disputing parties and the scientific or technical bodies identified by those parties.

- c. The disputing parties shall be provided:
 - i. advance notice of, and an opportunity to provide comments to the tribunal on, the proposed factual issues to be referred to the board; and
 - ii. a copy of the board's report and an opportunity to provide comments on the report to the tribunal.
- d. The tribunal shall take the board's report and any comments by the disputing parties on the report into account in the preparation of its award.

E. OECD GUIDELINES

DAFFE/MAI(97)1/REV2, pp. 86 and 87 (Consolidated Text)

RELATIONSHIP TO OTHER INTERNATIONAL AGREEMENTS

THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

1. The following draft text was developed on associating the Guidelines with the MAI¹:
 1. The OECD Guidelines for Multinational Enterprises are set out in Annex (xx).
 2. The Contracting Parties at the invitation of the Organisation for Economic Co-operation and Development are encouraged to participate in the Guidelines work of the Organisation in order to promote co-operation on the application, clarification, interpretation and revision of the Guidelines and to facilitate the maintenance of consensus among the Contracting Parties and the members of the Organisation on the matters addressed in the Guidelines.
 3. The Contracting Parties [shall] [are encouraged to] set up National Contact Points for undertaking promotional activities, handling enquiries and for discussions with the parties concerned on all matters related to the Guidelines so that they can contribute to the solution of problems which may arise in this connection. The business community, employee organisations and other interested parties should be informed of the availability of such facilities.
 4. Annexation of the Guidelines shall not bear on the interpretation or application of the Agreement, including for the purpose of dispute settlement; nor change their non-binding character.
2. Several delegations proposed that the following additional text be added to the list of powers given to the Parties Group under Section XI of the Consolidated Text, paragraph 2:
 - (e) consider revision of the Guidelines referred to in Article (xx) of the [Agreement] [Final Act] by adoption of any revised Guidelines developed in the OECD.

1. EG4 delegations differed on whether this text should be placed in the Final Act or the Agreement.

3. Finally, delegations developed draft text that would be placed in an annex² immediately before the Guidelines, as follows:

The following Guidelines for Multinational Enterprises are a joint recommendation by participating Governments to multinational enterprises operating in their territory. Their purpose is to help multinational enterprises ensure that their operations are in harmony with the national policies of the countries in which they operate. The Guidelines include recommendations on general policies, disclosure of information, competition, financing, taxation, employment and industrial relations, environmental protection and science and technology. The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises of 21 June 1976 as amended. Background and official clarifications are found in the publication “The OECD Guidelines for Multinational Enterprises”.

[The text of the preamble to the Declaration on International Investment and Multinational Enterprises, Part I of the Declaration, and the full Annex 1 text of the Guidelines would be set out verbatim]

2. Delegations differed on whether the annex should be placed in the Final Act or the Agreement.

DAFFE/MAI/IN(97)2 (Institutional Matters Group)

Text for the MAI Preamble

1. Delegations developed the following draft text for the Preamble to the MAI:

[Noting] [Affirming their support for] the OECD Guidelines for Multinational Enterprises and emphasising that implementation of the Guidelines, which are non-binding and which are observed on a voluntary basis, will promote mutual confidence between enterprises and host countries and contribute to a favourable climate for investment;¹

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1. One delegation proposed that the Preamble state that the Guidelines include, in particular, recommendations on employment and industrial relations and environmental protection; other delegations were of the view that the text introducing the Guidelines as an annex should specify the eight subject areas, including those just mentioned, on which the Guidelines make recommendations (see Section III below). In addition, one delegation would like to add words to the effect that the Contracting Parties consider the Guidelines to be “a valuable part of the framework for the consideration of issues of investment and multilateral enterprises.”