



Negotiating Group on the Multilateral Agreement on Investment (MAI)

**CHAIRMAN'S NOTE ON ENVIRONMENT AND RELATED MATTERS
AND ON LABOUR**

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1. The approach to the environment and to labour has evolved to achieve balance between MAI disciplines and other important areas of public policy of concern to MAI Parties and to avoid unintended consequences on normal regulatory practices. Details of the three anchors of preamble, text and association of the OECD Guidelines for Multinational Enterprises, are still under consideration. Annexed to this Chairman's Note is a package of proposals for text on environment and labour that in comprehensive fashion brings together the outstanding aspects of our work.¹

2. Some portions of this package of proposals address more general concerns than just environmental or labour implications of the MAI, including the proposal for the national treatment and most favoured nation treatment articles and the proposal for the expropriation and general treatment articles.

Environment and Related Matters

3. The portions of this package of proposals that address environmental concerns in a specific manner are the Preamble, the affirmation of the right of Contracting Parties to regulate in a non-discriminatory manner, the "not lowering measures" provision and the exception to the performance requirements disciplines.

4. To respect the need for balance, the proposal for the environmental language in the Preamble seeks as concise a formulation as possible while making the key explicit references. Any additional proposals for preambular language currently before the Negotiating Group could be reconsidered in the context of a political declaration or associated with the MAI in some other way.

5. The inclusion of "in like circumstances" in the national treatment and most favoured nation treatment provisions, plus the interpretative note, would address concerns about the practical implementation of the "de facto" discrimination principle and preserve the necessary scope for non-discriminatory regulation.

6. A specific affirmation that the MAI does not inhibit normal non-discriminatory government regulatory activity seems necessary in the environmental field. Combined with the other elements of this package of proposals, this represents a targeted approach. Another approach would be a general exception inspired by GATT Article XX, which would eliminate the need for some other elements of this package, notably the exception to the provisions on performance requirements.

7. The proposal for binding "not lowering measures" language is limited to domestic measures and the circumstances of a particular investment. The interpretative note spells out the widely-shared views that governments must have the ability to adjust their overall environmental standards over time, and that

¹ The dispute settlement procedures also take account of environmental and labour concerns through the possibility of appointment to panels of individuals with special expertise (Article V.C.2(c) for State-State proceedings), panel recourse to environmental and other necessary expertise (Articles V.C.5 and V.D.13) and through proposals for transparency of panel proceedings through the Parties Group (DAFFE/MAI/DS(98)1, Annex III). Furthermore, a review of the OECD Guidelines for Multinational Enterprises is scheduled to begin this year. The environment and employment and industrial relations chapters of the Guidelines will receive a thorough scrutiny during the review process.

investment should not be enticed by relaxing standards. Further consideration of the implications of binding language for the dispute settlement procedures may be required.

8. The proposal for an interpretative note for the expropriation and general treatment articles responds to the agreement at the High Level Meeting that it needs to be made clear that the MAI will not inhibit the exercise of the normal regulatory powers of government and that the exercise of such powers will not amount to expropriation.

9. The exception article for the provisions on performance requirements is needed because they go beyond non-discrimination. The exception covers those performance requirements that could affect compliance with laws and regulations, or that could affect health, safety or the environment.

10. The package of proposals includes annexation of the OECD Guidelines to the text of the MAI, without changing their non-binding character.

Labour

11. The portions of this package of proposals that address labour concerns in a specific manner are the Preamble and the binding "not lowering measures" provision.

12. As with environment, the proposal sets out a concise formulation that maintains the key explicit references supported by the large majority of MAI Parties. As with environment, any additional proposals for preambular language currently before the Negotiating Group could be reconsidered in the context of a political declaration or associated with the MAI in some other way.

13. The inclusion of "in like circumstances" in the national treatment and most favoured nation treatment provisions, plus the interpretative note, would address concerns about the practical implementation of the "de facto" discrimination principle and preserve the necessary scope for non-discriminatory regulation. This could be as true for labour concerns as for environmental concerns.

14. A specific affirmation that the MAI does not inhibit normal non-discriminatory government regulatory activity, to the extent that it addresses health and safety concerns, could cover measures that set labour standards.

15. The proposal for binding "not lowering measures" language is limited to domestic measures and the circumstances of a particular investment. "Domestic" is chosen as the main qualifier because approaches to "core" or "core international" labour standards appear to vary greatly among MAI Parties. "Measures" has been chosen for consistency with MAI drafting where there is a need to refer to the means by which governments take action (by domestic legislation, regulation, directives, policy, etc).² The interpretative note spells out the widely-shared views that governments must have the ability to adjust their overall labour market policies as appropriate over time, and that investment should not be enticed by relaxing standards. Further consideration of the implications of binding language for dispute settlement may be required.

² See the Articles on performance requirements, recognition arrangements, expropriation and compensation, transfers, exceptions, temporary safeguards, prudential measures, information transfer and data processing, and taxation.

16. As stated above, the exception article for the provisions on performance requirements is needed because they go beyond the non-discrimination. The exception covers performance requirements that could affect compliance with laws and regulations, or that could affect health, safety or the environment.

17. Finally, the package of proposals includes annexation of the OECD Guidelines to the text of the MAI, without changing their non-binding character.

Questions

Environment

Do Delegations support the package set out in the Annex?

Are there additional proposals regarding the environment that should be considered for a political declaration to accompany the Agreement?

Labour

Do Delegations support the package set out in the Annex?

Are there additional proposals regarding labour that should be considered for a political declaration to accompany the Agreement?

ANNEX: PACKAGE OF PROPOSALS FOR TEXT ON ENVIRONMENT AND LABOUR

1. *Preamble*

"Recognising that investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable, when accompanied by appropriate environmental and labour policies;

"Re-affirming their commitment to the Rio Declaration on Environment and Development, and Agenda 21 and the Programme for its Further Implementation, including the principles of the polluter pays and the precautionary approach; and resolving to implement this Agreement in a manner consistent with sustainable development and with environmental protection and conservation;

"Renewing their commitment to the Copenhagen Declaration of the World Summit on Social Development and 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 deal with core labour standards world-wide;"

2. *National Treatment and Most Favoured Nation Treatment*

1. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords in like circumstances to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.

2. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords in like circumstances to investors of any other Contracting Party or of a non-Contracting Party, and to the investments of investors of any other Contracting Party or of a non-Contracting Party, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.

3. Each Contracting Party shall accord to investors of another Contracting Party and to their investments the better of the treatment required by Articles 1.1 and 1.2, whichever is the more favourable to those investors or investments.*"

*Interpretative Note: National Treatment and most favoured nation treatment are relative standards requiring a comparison between treatment of a foreign investor and investments and treatment of domestic or third country investors and investments. Governments may have legitimate policy reasons to accord differential treatment to different types of investments. Similarly, governments may have legitimate policy reasons to accord differential treatment as between domestic and foreign investors and their investments in certain circumstances, for example where needed to secure compliance with domestic laws that are not inconsistent with national treatment and most favoured nation treatment. The fact that a measure applied by a government has a different effect on an investment or investor of another Party would not in itself render the measure inconsistent with national treatment and most favoured nation treatment. The objective of "in like circumstances" is to permit the consideration of all relevant circumstances, including those relating to a foreign investor and its investments, in deciding to which domestic or third country investors and investments they should appropriately be compared.

3. *Affirmation of Right to Regulate*

"A Contracting Party may adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns, provided such measures are consistent with this agreement."

4. "Not Lowering Measures"

"A Contracting Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its domestic health, safety, environmental, or labour measures, as an encouragement to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of an investment of an investor.*"

*Interpretative Note: The Parties recognise that governments must have the flexibility to adjust their overall health, safety, environmental or labour standards over time for public policy reasons other than attracting foreign investment."

5. *Expropriation and General Treatment**

"1. 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. Such treatment shall also apply to the operation, management, maintenance, use, enjoyment or disposal of such investments. In no such case shall a Contracting Party accord treatment less favourable than that required by international law.

"2. EXPROPRIATION AND COMPENSATION

"1. A Contracting Party shall not expropriate or nationalise an investment in its territory of an investor of another Contracting Party or take any measure tantamount to expropriation or nationalisation except: ..."

*Interpretative Note: Articles -- on General Treatment, and -- on Expropriation and Compensation, are intended to incorporate into the MAI existing international legal norms. The reference in Article IV.2.1 to expropriation or nationalisation and "measures tantamount to expropriation or nationalisation" reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments. Nor would such normal and non-discriminatory government activity contravene the standards in Article --.1 (General Treatment)."

6. *Performance Requirements*

"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 measures that are not inconsistent with the provisions of this Agreement;

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

7. *OECD Guidelines for Multinational Enterprises*

The OECD Guidelines for Multinational Enterprises will be annexed to the text of the MAI.