

Unclassified

DAFFE/MAI/DG3/RD(98)8/FINAL



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

OLIS : 22-Dec-1999
Dist. : 23-Dec-1999

PARIS

Or. Eng.

**DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
NEGOTIATING GROUP ON THE MAI (MULTILATERAL AGREEMENT ON INVESTMENT)**

Drafting Group No. 3 on Definition, Treatment and Protection of Investors and Investments

NON-PAPER: CASE EXAMPLES TO BE CONSIDERED IN CONNECTION WITH ARTICLE ON "NOT LOWERING STANDARDS"

(Country contribution)

This document was distributed at the meeting of the Drafting Group which took place on 15 and 19-20 January 1998. It was declassified in accordance with a proposal by the Secretary-General [C(99)187] which was adopted by the Council at its 964th Session on 9 December 1999.

85893

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

DAFFE/MAI/DG3/RD(98)8/FINAL
Unclassified

Or. Eng.

**NON-PAPER: CASE EXAMPLES TO BE CONSIDERED
IN CONNECTION WITH ARTICLE ON “NOT LOWERING STANDARDS”**

(Contribution by one country)

The issue to be addressed in each of the following examples is: Should a Contracting Party that alters the application of its otherwise applicable environmental, health, safety, or labour laws in the manner described in the example be considered to have violated MAI obligations? It is hoped that considering this range of examples may help negotiators: 1) draft a MAI provision on “not lowering standards” in a manner that covers appropriately that which should be covered; and 2) determine whether alleged violations of the undertaking should be subject to dispute settlement or only to consultations. One aspect of the latter issue is whether sufficient precision can be achieved in drafting so that there is not a risk of significant unintended consequences if the provision were to be subject to dispute settlement.

Example 1 (national park lease -- domestic environmental standard example):

A Contracting Party leases to a private entity acreage in a national park (e.g. one country government leases acreage in a National Park), home to a delicate wetlands ecosystem, and exempts the leased land from certain otherwise applicable laws and regulations, which generally preclude building on wetlands and/or in national parks, in order to authorize one of the following:

- 1) 5,000 acres for the world’s largest casino resort or a large industrial plant;
- 2) 50 acres for a paid parking lot for park users;
- 3) 5 acres or 50,000 acres for an environmental research center, to be operated by a renowned non-profit NGO.

In each of the 3 examples above, assume the following alternatives:

- a) As currently written, the applicable law does not afford discretion to approve such an investment; a change in law will be required, which could be enacted either as: 1) a law of general application; or 2) a specific exemption for the particular investment from the law otherwise applicable.
- b) The law need not be changed by the legislature, but it is accompanied by regulations that, as currently written, could not be construed to authorize the project; thus, the regulations would need to be modified to provide administrative flexibility sufficient to permit the project.
- c) The law is accompanied by regulations that do not specifically permit such a project, but the regulations have a “catch-all” clause that gives a government official sufficient discretion to issue the necessary approvals for the project without a change in law or regulations.
- d) The law is accompanied by regulations that did not, when initially implemented, permit such an investment, but the regulations were subsequently amended as part of a general revision/update, without any particular investment being specifically under consideration at the time; as amended, the regulations permit the particular investment.

- e) The law is accompanied by regulations that specifically permit such an investment, but do not describe the rationale for permitting the investment.
- f) The law and/or accompanying regulations specifically permit a waiver of otherwise applicable regulations in order to encourage either 1) investment generally; or 2) particular types of investment.
- g) The law and/or accompanying regulations specifically permit a waiver of otherwise applicable regulations when such a waiver is determined to be in the general public interest based on a balancing test that analyzes prospective environmental degradation and balances that against other factors, one of which is an interest in promoting investment to encourage job formation.

Example 2 (advertising ban -- domestic health standard example):

As a public health matter, a REIO (regional economic integration organization) and its member states prohibit advertising of a certain product they consider to have negative health effects (e.g., alcohol or tobacco). The REIO issues a directive to that effect, which is required to be implemented by legislation/regulations in each of the member states. As initially issued, the directive does not contain any exceptions. In reaction, producers of the product threaten to move sporting events they sponsor out of the region and not to build a planned stadium or sponsor new events in the region. Some also threaten not to build new manufacturing facilities in the region. Assume the following alternative scenarios thereafter:

- a) The REIO and its member states decide that they cannot afford to lose such a significant source of existing and new investment; accordingly, the directive's advertising prohibition is rescinded across the board as it relates to all sporting events.
- b) Faced with the prospect of litigation by manufacturers/distributors of the product challenging the advertising prohibition, the REIO and its member states conclude that such product manufacturers/distributors might prevail in a legal challenge. All affected manufacturers/distributors do file such a challenge in court. The case is settled out of court via one of the following sets of terms: 1) the directive is rescinded as it relates to sporting events; or 2) the directive is phased in over a much longer period for advertising related to sporting events than for other types of advertising.
- c) Same situation as b), but the case is brought by only one manufacturer initially and is settled by rescission (or extended phase-in-period) for the one category of sporting event (e.g., soccer, tennis, or Formula 1 racing) the particular company sponsors.
- d) After issuance of the initial directive, the REIO and its member states (which have a very wide range of reactions to the manufacturers'/distributors' threat, to the perceived utility of the directive in promoting public health, and to the desirability of attracting/retaining investment) reconsider and conclude that such an advertising ban would be better left to the discretion of individual member states. Thus, a modified directive is issued along one of the following lines: 1) member states are given authority to issue waivers in individual cases, and no criteria are specified in the directive for the issuance of the waivers; 2) member states are given authority to issue individual waivers, and criteria are specified that involve a balancing of public policy interests, including health concerns, job creation, and creating a favorable investment climate; 3) member states are given authority to issue waivers to

encourage sport-related investment (some do, while others maintain the same terms as in the initial directive); or 4) the directive is simply withdrawn and the matter of whether and to what extent to ban such advertising is returned to member state discretion.

- e) After issuance of the initial directive, the REIO and its member states decide that a more effective approach, which would have the advantage of encouraging sport-related investment, would be to allow advertising of the product in the context of sporting events, but to impose a gate tax at sponsored events and use the proceeds to support a carefully targeted government public information campaign the highlight the health hazards of the product and discourage its use. The directive is rescinded as it relates to sporting events (or to the sport sponsored by one particular company); thereafter, a separate directive is issued respecting the gate tax and public information campaign.
- f) Same situation as e). After a trial period, the government's public information campaign discouraging use of the product is determined not to have been effective and it is discontinued.

Example 3 (domestic labour standards example):

A Contracting Party experiences a national or regional recession and high levels of unemployment. In response, it desires to attract new investment and retain and expand existing investment. The Contracting Party concludes that its labour laws, taken as a whole, are not conducive to this objective and that modifications would enhance competitiveness, foster investment, and reduce unemployment. It ascertains, for example, that its minimum wage (expressed in real terms) is the highest in the world and is 10 per cent higher than the next highest MAI Contracting Party's minimum wage; worker productivity is not correspondingly high. Assume a law is passed along the lines of one of the alternatives set forth in 1)-3), and that it is applicable in one of the circumstances set forth in alternatives a)-f):

- 1) Overtime pay rate is reduced from 200 per cent to 150 per cent of base pay.
- 2) Length of domestic work week, recently reduced legislatively from 40 hours to 37 hours, with no reduction in weekly pay, is increased to 38 hours, with no increase in weekly pay. (Alternatively, assume the work week is reduced once, from 40 to 38 hours/week, with no pay reduction -- so the same result is achieved but not lowering of standards is involved.)
- 3) Obligation to provide a smoke-free work environment for employees is rescinded.

The circumstances in which the foregoing options may be made applicable are:

- a) Applicable nationwide.
- b) Applicable to all entities within any area designated by law as an "export processing zone".
- c) Applicable to specified categories of industry [e.g., particular "infant" or distressed industries (or, in the case of 3), for cocktail lounges and bars] for a limited time period.
- d) Applicable within specifically targeted geographic areas selected on the basis that unemployment exceeds a given percentage -- say 40 per cent.

- e) Applicable within an area that is defined geographically -- but within the area there is only one entity; it has been experiencing economic difficulties and is on the verge of closing; the reduction in operating costs attributable to the measure will enable it to remain viable and is supported by employees.
- f) A government official is authorized to issue determinations on a case-by-case basis, making the provision applicable based on criteria along one of the following lines:
 - 1) to reduce unemployment in areas where sustained unemployment levels exceed a designated percentage;
 - 2) to increase investment in areas in which sustained unemployment levels exceed a designated percentage;
 - 3) for any reason identified with specificity by the official in the exemption certificate or at the official's sole discretion, with no requirement to identify any reason.