



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.3 on “Special Topics”

DRAFT ARTICLE ON PERFORMANCE REQUIREMENTS

(Note by the Chairman)

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Paragraph 1¹

No Contracting Party may impose, enforce or maintain any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, operation, or conduct of an investment of an investor of a Contracting Party or of a Non-Contracting Party in its territory²:

[(a) to export a given level or percentage of goods or [services³];

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods produced [or services provided] in its territory, or to purchase goods [or services] from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

[(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;]

[(f) [to transfer technology, a production process or other proprietary knowledge to a natural or legal person in its territory] [except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of the Agreement];]

[(g) to locate its headquarters for a specific region or the world market in a Contracting Party] or to supply one or more of the goods that it produces or the services that it provides to a specific region or world market exclusively from the territory of a Contracting Party;].

1 It is yet to be decided whether paragraphs 1 and 3 of this Article can be combined into one. Some Delegations propose that paragraph 1 should begin “Subject to paragraph 3 . . . “.

2 The place of this term is still to be determined in the National Treatment and Most Favoured Nation Treatment provisions [See DAFFE/MAI(96)16/REV1, A.II.1].

3 One delegation reserves its position on the coverage of services in subparagraphs (a) and (c).

(h)[to achieve a given level or value of production, investment, manufacturing, [sales]⁴, employment, research and development in its territory];

(i) [to hire a given level or type of local personnel];

[(j) to establish a joint venture;] or

[(k)(Others to be defined)⁵].

Paragraph 2

[A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). [For greater certainty, Articles XXX on National Treatment and MFN apply to the measure.]]

Paragraph 3 (Alternative 1)

No Contracting Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory⁶ of an investor of a Contracting Party or of a non-Contracting Party, on compliance with any of the following requirements:

[(a)to export a given level or percentage of goods or services];

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods [and services]⁷ produced in its territory;

(d)to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such an investment;

(e)to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings; or

[(f) others to be defined.]

4 Some Delegations considered that PR obligations should apply to minimum domestic sales requirements, for example in the event of a domestic shortage of oil. Other Delegations expressed concern that such requirements should not be included because that might undermine the right of Contracting Parties to impose export bans in appropriate circumstances.

5 Some Delegations suggested that local equity requirements should be added to the list because of the importance of such requirements as an obstacle to investments. Other Delegations expressed the view that such requirements would be covered by the National Treatment and MFN provisions.

6 See note 2.

7 It is yet to be determined how this provision would exclude contracted services.

Paragraph 1 shall not apply insofar as a Contracting Party conditions the receipt or continued receipt of an advantage on compliance with requirements other than those set out above.

Paragraph 3 (*Alternative 2*)

Paragraph 1 (f) (g?) (h) (i) (j) (k?)⁸ do not apply if the requirements described in one or more of these provisions condition the receipt or continued receipt of an advantage in connection with the establishment, acquisition, expansion, management or operation, or conduct of an investment of an investor (of a Contracting Party or a non-Contracting Party, in its territory), in particular if the requirements and the advantage are subject to a contractual obligation between the investor or investment on the one side and the host state or its sub-federal entities on the other.

[Paragraph 4

Nothing in paragraph 3 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 to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.]

[Paragraph 5

Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3a) or (b) 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;
- (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.]

8 One delegation reserves its position on the inclusion of subparagraph (a).