



Negotiating Group on the Multilateral Agreement on Investment (MAI)

MAI AND THE ENVIRONMENT

(Note by the Chairman)

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I. INTRODUCTION

1. It is recognised that liberalisation of international investment flows and sound environmental policies should be mutually reinforcing. However, the issue arises as to whether a closer integration of policies concerning the environment and international investment is required in order to ensure that environmental considerations are taken into account in the policy process. Mr von Websky, chairman of the OECD Environment Policy Committee (EPOC), has written a personal note circulated to all EPOC delegates identifying a number of approaches that could be considered for integrating environmental matters into the MAI [DAFFE/MAI/RD(96)45].

2. The suggestion is sometimes made that the liberalisation of investment flows might, under certain circumstances, contribute to the degradation of environmental standards. In this regard, it is noteworthy that the definition of national treatment in the MAI would not prevent countries from attempting to attract FDI by applying looser environmental standards for foreign investors than for its own investors. Nor would it prevent countries from setting equally low environmental standards for foreign and domestic investors alike in order to attract FDI (the so-called "pollution haven" problem). While there is little evidence that loose environmental standards are actually being used in an attempt to attract FDI, the question arises as to whether or how any actual or potential threat to environmental standards should be addressed in the MAI.

3. It is clear that the MAI will not impinge upon national governments' freedom to implement their own policies concerning health, safety and environmental standards, provided those standards are no more stringent for foreign than for domestic investors as required by the National Treatment provision.

4. The next section presents how this issue has been addressed, in a variety of different ways, in selected international agreements.

II. EXISTING AGREEMENTS

WTO Agreements

5. The Agreement establishing the WTO includes in its preamble a direct reference to the objective of sustainable development and the need to protect and preserve the environment.

6. Governmental measures applied for environmental purposes may be subject to various provisions of the WTO Agreements. For instance, Article III of the GATT ("National Treatment") may be relevant to environmental regulation. At the same time, environmental measures may be covered by the terms of Article XX ("General Exceptions") of the GATT. Article XIV of the General Agreement on Trade in Services (GATS) is a similar, but not identical, provision in the case of services.

7. Article 13 of the Dispute Settlement Understanding enables dispute panels to seek expert advice.

8. Specific reference to environmental considerations and provisions may also be found in the Agreement on Subsidies and Countervailing Measures, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Technical Barriers to Trade (TBT), the Agreement on Sanitary and Phytosanitary Measures (SPS) and the Agreement on Agriculture. There is also a Decision on Trade in Services and the Environment.

NAFTA

9. NAFTA contains a statement concerning the environment in its preamble, a specific Article, and a detailed side agreement dealing with environmental matters. The preamble mentions countries' resolve to "promote sustainable development" and "strengthen the development and enforcement of environmental laws and regulations". In addition, Article 1114 ("Environmental Measures") of the Subchapter A (Investment) of Chapter Eleven of the NAFTA states that "nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure, otherwise consistent with this Chapter, that it considers appropriate to ensure that the investment activity in its territory is taken in a manner sensitive to environmental concerns."

10. Article 1114 also states that "Parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety and environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment or an investor."

11. The side agreement contains non-binding rules designed to promote compliance with environmental standards in host countries. Under Article 14 of the side-agreement, the trilateral Commission for Environmental Co-operation (CEC) can investigate complaints against NAFTA governments for "failing to effectively enforce" domestic environmental laws. The side agreement also authorises the CEC to prepare periodic reports on the state of the environment and to make recommendations.

The Energy Charter Treaty (ECT)

12. The ECT recognises "the increasingly urgent need for measures to protect the environment" in its preamble. It also includes a reference establishes a "best-efforts" commitment to environmental goals in the energy sector in the form of Article 19 ("Environmental Aspects"). The latter contains a general statement of commitments and enumerates some eleven types of "softly" worded actions which Contracting Parties "shall accordingly" take. In addition, Article 24 ("Exceptions") refers to the need "to protect, human, animal or plant life or health".

OECD Instruments

13. The OECD Guidelines are addressed to multinational enterprises. They are recommendations to MNEs designed to ensure that they operate in harmony with the policies of the countries where they are located. The Guidelines include a chapter containing non-binding rules on environmental protection related to standards in the host country. The Guidelines recommend, among other things, that "Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate,...take due account of the need to protect the environment and avoid creating environmentally-related health problems". Although not binding, the Guidelines have considerable moral weight as they send a clear message of the importance OECD governments attach to the protection of the environment and their collective expectations concerning the behaviour and activities of multinational enterprises in this regard. They have also been endorsed by the BIAC and TUAC.

14. In addition, Article 5 ("Controls and Formalities") of the Codes of Liberalisation permits Members "to take any measures required to prevent evasion of their laws or regulations." Laws and regulations presumably include those concerning the environment.

Other Intergovernmental Declarations

15. Other intergovernmental declarations, notably Agenda 21, embody a much more radical approach to environmental protection, going considerably beyond the OECD guidelines. For example, Agenda 21 states that multinational enterprises should, among many other things, "introduce policies and commitments to adopt equivalent or not less stringent standards of operation as in the country of origin".

III. THE MAI

16. MAI negotiators need to determine whether they consider it appropriate to include in the MAI any specific provisions on the environment, or respond in some other way to the environmental concerns expressed. The possibilities identified by Mr. von Websky are:

- to refer in the MAI preamble to the objective of sustainable development and preservation of the environment;
- to make a political statement that investment liberalisation should be complemented by convergence of environmental requirements;
- to promote a high level of environmental performance by foreign investors, without creating new environmental requirements in the MAI;
- to include an MAI obligation that Parties do not relax environmental requirements in order to attract foreign investors;
- to provide a role for environmental expertise in MAI dispute settlement procedures; and
- to incorporate the OECD Guidelines on Multinational Enterprises into the MAI, without changing their non-binding character, and to consider strengthening their environmental chapter to take account of recent developments in environmental policy.

17. In the light of the foregoing discussion, the following questions arise:

1. *Is it appropriate to make specific provisions for the environment in the MAI?*
2. *If so, should these provisions take the form of one or more of the following:*
 - a) *a statement in the preamble of the MAI, possibly along the lines of the statements in the preambles of either the agreement establishing the WTO or the NAFTA;*
 - b) *a general provision recalling that parties are free to set their own environmental legislation and standards provided that such legislation and standards conform with the national treatment requirement;*
 - c) *a more specific provision along the lines of Article 1114 of the NAFTA discouraging the relaxation of national environmental standards as means of stimulating foreign investment;*
 - d) *the association of the OECD Guidelines with the MAI;*
 - e) *other approaches.*