



Negotiating Group on the Multilateral Agreement on Investment (MAI)

THE MAI AND LABOUR MATTERS

(Note by the Chairman)

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I. Introduction

1. Since the conclusion of the Uruguay Round Agreements, the issue of trade and labour standards has come to the forefront of the policy agenda¹. Given the rapid expansion of international investment flows, links between FDI and labour standards are also attracting attention, and CIME contributed a chapter on this subject to a wide-ranging OECD Study on Trade and Labour Standards.

2. Several pieces of empirical evidence reported in the OECD study may help to place the relevance of labour standards for the MAI in perspective. First, "the bulk of FDI ... is directed to OECD countries where compliance with core labour standards is by and large guaranteed in law and practice." Second, there is little evidence that foreign investors from OECD countries are violating core labour standards. Third, "while core labour standards may not be systematically absent from the location decisions of OECD investors in favour of non-OECD destinations, aggregate FDI data suggest that core labour standards are not important determinants in the majority of cases." Fourth, evidence of a positive association over time between successfully sustained trade reforms and improvements in core labour standards suggests a mutually supportive relationship also between investment liberalisation and improvements in the same standards.

II. Existing Mechanisms

3. The Annex contains an overview of international agreements that wholly or partially address the issue of labour standards. Except for the ILO Tripartite Declaration and the OECD Guidelines, these mechanisms are at most indirectly related to investment.

III. The MAI

4. By virtue of the National Treatment provision, the MAI would not impinge upon governments' freedom to set and enforce their own national labour standards, provided those standards are no more stringent for foreign investors and investments than for domestic investors and investments.

5. However, the definition of national treatment in the MAI would not prevent countries from attempting to attract FDI by applying looser labour standards to foreign-owned enterprises than to domestically-owned firms. Nor would it prevent countries from denying or inadequately enforcing internationally recognised labour standards for foreign and domestic investors alike in order to encourage FDI.

¹ Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade, 1996. For the purposes of the study, "core" labour standards are: elimination of child labour exploitation, prohibition of forced labour, freedom of association, the right to organise and bargain collectively, and non-discrimination in employment. These labour standards derive from the Universal Declaration of Human Rights.

6. Delegations are invited to indicate which is the appropriate way to address labour matters in the MAI. An element to be considered in this context is the possible effect on accession to the MAI by non-member countries.

7. At the Heads of Delegation lunch held on 24 October 1996, broad support was expressed for an approach containing the following elements:

- a) Core labour standards could be mentioned in the preamble of the MAI, as in the NAFTA which mentions countries' resolve to "PROTECT, enhance and enforce basic workers' rights".
- b) A specific provision stating that the Parties recognise it is inappropriate to encourage international investment either by not enforcing certain national labour laws on foreign enterprises or by denying core labour standards across-the-board. A clause of this kind exists in Article 1114 of the NAFTA, although that provision addresses other matters, notably the environment.
- c) The OECD Guidelines would be associated with the MAI without changing their legal status as non-binding recommendations. As the Guidelines do not explicitly include the prohibition of forced labour, exploitation of child labour and discrimination, consideration might be given to revising the Guidelines to include those core standards.

8. If provisions on core labour standards are adopted, a definition may be necessary. For this purpose, the definition adopted in the OECD Study could be used, namely elimination of child labour exploitation, prohibition of forced labour, freedom of association, the right to organise and bargain collectively, and non-discrimination in employment.

Questions

1. Would the following package of provisions in the MAI concerning labour standards be appropriate?
 - a) A statement concerning core labour standards in the preamble of the MAI, possibly along the lines of the one in the preamble of the NAFTA.
 - b) A more specific provision along the lines of paragraph 2 of Article 1114 of the NAFTA stating that parties should not deny core labour standards and rights in an effort to attract foreign investment.
 - c) The association of the OECD Guidelines with the MAI, provided those Guidelines retain their non-binding character and can be updated after the agreement enters into force.
2. Should the MAI contain any other provisions on labour standards?
3. Would it be useful to define "core" labour standards for purposes of the MAI? If so, is the definition of "core" labour standards used in the OECD study appropriate?

ANNEX

EXISTING MECHANISMS

United Nations Acts

1. In addition to the Universal Declaration of Human Rights, three United Nations (UN) acts (the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights, and the Convention on Rights of the Child) contain relatively detailed provisions on core labour standards that have been ratified by over 120 countries including all OECD Members.

International Labour Organisation (ILO)

2. The ILO Conventions constitute the most comprehensive set of international labour standards. These Conventions are supplemented by monitoring/peer review procedures. By virtue of their membership, all members of the ILO subscribe to the principles of freedom of association and collective bargaining. Certain ILO Conventions provide for internationally-negotiated definitions of core labour standards: Conventions 87 and 98 provide detailed provisions on freedom of association, the right to organise and collective bargaining; Conventions 29 and 105 prohibit all forms of forced labour; and Convention 111 provides for non-discrimination in employment²

3. The ILO has also reached a consensus on a set of guidelines in the form of the 1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The Tripartite Declaration sets out principles in the fields of employment training, conditions of work and life and industrial relations, which governments, employers' and employees' organisations of the home as well as the host countries together with multinational enterprises are recommended to observe on a voluntary basis. By means of references to UN and ILO Conventions, the Declaration covers all the core labour standards listed in paragraph 5 above. It also contains a direct reference (in paragraph 45) to the use of incentives stating that "where governments of host countries offer special incentives to attract foreign investment, these incentives should not include any limitation of the workers' freedom of association or the right to organise and bargain collectively." Implementation of the Declaration is the objective of regular reviews and there is a procedure for examining disputes concerning its application by means of an interpretation of its provisions.

WTO Agreements

4. The WTO Agreements contain very little by way of discipline on labour standards and rights. However, Article XX of the GATT 1994 does provide for certain exceptions where "measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". Such measures may relate, among other things, to "the products of prison labour".

² Although there is general agreement on the principles underlying these Conventions, some of their provisions or their interpretation may be at variance with national laws and regulations. This partly explains why several OECD Members (Canada, Japan, Mexico, New Zealand, Switzerland, Turkey, the U.K. and U.S.) have not ratified all five Conventions. None of these Conventions has been ratified by all OECD countries. It is also noteworthy that no ILO convention addresses the issue of child labour exploitation as such. Instead, Convention 138 provides for minimum employment age, while remaining silent on non-exploitative forms of child labour.

Energy Charter Treaty (ECT) and Bilateral Investment Agreements

5. The ECT does not contain any explicit provisions dealing with labour standards. No examples are known of bilateral investment agreements that contain provisions dealing with labour standards.

North American Free Trade Agreement (NAFTA)

6. Apart from the preamble to the NAFTA, which mentions countries' resolve to "PROTECT, enhance and enforce basic workers' rights", there are no specific provisions in the Agreement concerning labour standards and rights. These matters are handled instead by a "side agreement" -- The North American Agreement on Labour Cooperation (NAALC).

7. The NAALC promotes mutually recognised labour principles including core labour standards and other standards such as occupational health and safety of workers and protection of migrant workers (Articles 1, 3 and 49). It is noteworthy that the NAALC refers not to internationally agreed minimum labour standards, such as those defined in relevant ILO Conventions, but to standards defined under the national legislation of the parties. The NAALC also provides for the monitoring of labour issues and permits filing of trade-related complaints with each country about non-enforcement of mutually recognised labour laws.

8. Although it does not encompass labour standards, Article 1114 of the NAFTA addresses a concern similar to that arising in connection with the use of domestic health, safety and environmental standards, namely the possible relaxation or lack of enforcement of such standards as a means of attracting foreign investment. More specifically, paragraph 2 of Article 1114 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. 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."

OECD Guidelines for Multinational Enterprises

9. The OECD Guidelines, which are voluntary and addressed to enterprises, include a separate chapter on employment and industrial relations, whereby multinational enterprises are encouraged to respect employees' rights to representation, refrain from unfair influence in labour negotiations or during organising campaigns, and to negotiate constructively on employment conditions. Enterprises are also encouraged inter alia to provide reasonable notice of changes in operations that would have major effects on employees and to co-operate in order to mitigate any adverse effects from such changes. Although not binding, the Guidelines have considerable moral weight as they send a clear message of the importance OECD governments attach to the respect of certain standards and their collective expectations concerning the behaviour and activities of multinational enterprises. They have also been endorsed by the BIAC and TUAC. Wherever the ILO Tripartite Declaration refers to the behaviour expected of enterprises, its provisions are parallel to the OECD Guidelines and do not conflict with them.