



Negotiating Group on the Multilateral Agreement on Investment (MAI)

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

REPORT TO THE NEGOTIATING GROUP

DRAFTING GROUP NO. 3

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The Report of the Drafting Group is in three parts:

- I. Intellectual Property
- II. Draft Text on the Preamble to the MAI
- III. Provision on Not Lowering Standards

The Drafting Group did not have an opportunity to review section III of the Report; however, I believe that the text faithfully records the outcome on this matter.

I. Intellectual Property

1. Delegations discussed the treatment of intellectual property in the MAI. While all delegations were of the view that the MAI should not interfere with the framework of existing international intellectual property agreements, delegations disagreed on the appropriate means of achieving this goal, the appropriate treatment of future intellectual property rights and the relationship of the MAI with future intellectual property agreements.

- (a) Most delegations were of the view that applying in principle MAI obligations to intellectual property rights would strongly interfere with existing and future agreements in the field of intellectual property. National Treatment and MFN, in particular, were identified as areas of overlap and conflict. These delegations believe that the MAI should alter neither the scope nor obligations of international treaties on intellectual property nor prejudice future development of such treaties nor new international rule-making on intellectual property rights. Two approaches were put forward to address these concerns:
 - (i) some delegations thought, in particular, that literary and artistic works do not constitute investments and, together with neighbouring rights and databases, should be excluded from the definition of investment as this is the only sure way to avoid overlap or conflict; and
 - (ii) some delegations were prepared to consider other means of addressing the applicability of the MAI to existing and future international law on intellectual property rights.
- (b) Several delegations thought that, in principle, MAI obligations should apply to all investments that consist of intellectual property and they believe that such application will not interfere with existing agreements. They believe that specific concerns about intellectual property should be addressed through specific solutions rather than a carve-out from the coverage of the Agreement.

2. Guidance will need to be given by the Negotiating Group with respect to the alternative approaches identified in paragraph one above. Further consideration may need to be given to the following kinds of issues:

- The definition of investment;¹
- National Treatment, MFN and reciprocity;
- Investment protection provisions, particularly on expropriation and transfers;
- Other MAI provisions such as performance requirements and monopolies;
- Dispute settlement.

1 One delegation was of the view that it may be necessary, as well, to consider the definition of investor.

II. Draft Text on the Preamble to the MAI

The Contracting Parties to this Agreement,

Desiring to strengthen their ties of friendship and to promote greater economic co-operation between them;

Considering that international investment has assumed great importance in the world economy and has considerably contributed to the development of their countries;

Recognising that agreement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, create employment opportunities and improve living standards;

Emphasising that fair, transparent and predictable investment regimes complement and benefit the world trading system;²

Wishing to establish a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures;

[Resolved to implement this agreement in a manner consistent with environmental protection and conservation;]²

[Reaffirming their commitment to the Rio Declaration on Environment and Development and Agenda 21, including to sustainable development as reflected therein,]³ [and recognising that investment, as an engine of economic growth, can play a key role in ensuring that growth is sustainable, when accompanied by appropriate environmental policies to ensure it takes place in an environmentally sound manner];

[Renewing their commitment to 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 promote core labour standards world-wide.]]²

2 Some delegations proposed an explicit reference to the World Trade Organisation. One delegation proposed the addition immediately after the words “world trading system” of: “encompassing multilateral and bilateral investment instruments as well as agreements of the World Trade Organisation”. One other delegation proposed the following language: “Noting that this Agreement will contribute to international co-operation with respect to investment and to the development of rules in the World Trade Organisation.”

3 The square brackets in this tirit, the first set of brackets in the next tirit and the overall brackets on this and the next tirit were requested by some delegations which oppose inclusion of texts on the matter concerned in the Preamble. The brackets do not reflect a divergence on drafting at this stage, although some delegations have concerns with respect to the reference to “conservation”. One delegation has put forward additional language on the environment and labour which is set out in an attachment.

Affirming their decision to create a free-standing Agreement open to accession by all countries;⁴

[Guidelines]

HAVE AGREED AS FOLLOWS

4 Some delegations proposed that the statement that the Agreement is open to accession by all countries be strengthened.

Attachment: Additional Language proposed by one delegation

Environment

Convinced of the need for optimal use of the world's resources in accordance with the objective of sustainable development.

Recognising that investment can result in changes in the scale and structure of economic activity within countries, with potential effects on health and the environment.

Recognising the interdependent nature of their environments.

Encouraging the protection, conservation, preservation and enhancement of the environment.

Reaffirming their commitment to the Rio Declaration and Agenda 21, including to sustainable development as reflected therein, and recognising that investment, as an engine of economic growth, can play a key role in ensuring that growth is sustainable, when accompanied by appropriate environmental policies to ensure it takes place in an environmentally sound manner.

Noting that principles of relevance to investment include, *inter alia*, those relating to polluter pays, the precautionary approach, public participation and the right of communities to have access to information, and the avoidance of the relocation and transfer of activities causing severe environmental degradation or found to be harmful to human health.

Resolved to implement this agreement in a manner consistent with environmental protection and conservation.

Labour

Recognising that development of economic and business ties can promote respect for core labour standards.

Resolved to foster investment with due regard for the importance of labour laws and core labour standards.

Affirming their commitment to the observance of internationally-recognised core labour standards, i.e., freedom of association, the right to organise and bargain collectively, a prohibition of forced labour, the elimination of exploitative forms of child labour, and non-discrimination in employment.

Noting that, as members of the International Labour Organisation, they have endorsed the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and agreeing to renew their support for that voluntary instrument.

III. Provision on Not Lowering Standards

1. In accordance with its mandate, the Group discussed the drafting of a specific provision along the lines of paragraph 2 of Article 1114 of the NAFTA on not lowering standards in order to attract investment.

2. The Group considered the following text proposed by the Chairman:

"The Parties recognise that it is inappropriate to encourage investment by **lowering environmental standards or relaxing domestic labour standards**. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such **standards** as an encouragement for the establishment, acquisition, expansion, **operation, management, maintenance, use, enjoyment and sale or other disposition** of an investment 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."⁵

3. Several delegations reiterated their opposition to any such specific provision in the MAI.

4. Some other delegations expressed their preference for a text corresponding more closely to the NAFTA language⁶. One delegation proposed incorporation of a reference to "core labour standards" in a text otherwise identical to Article 1114(2). One other delegation proposed a reference to "domestic" rather than "core" labour standards. One delegation proposed an alternative text⁷.

5. While many delegations considered that the Chairman's text provided a suitable basis for a specific MAI provision in this regard, they identified several issues that would have to be resolved:

- whether the first sentence of the Chairman's text is necessary, and if so, whether it should refer only to specific investment and specific standards;

⁵ The bold text highlights departures from the language of NAFTA Article 1114(2).

⁶ The text of NAFTA Article 1114(2) is as follows:

"The Parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety or 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."

⁷ The text is as follows:

"Contracting Parties shall not waive or otherwise derogate from, or offer to waiver or otherwise derogate from, domestic health, safety or environmental requirements or their enforcement as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment or an investor."

- whether the word "shall" rather than "should" is appropriate in the second sentence, in which case, it would follow that there would be a binding obligation subject to dispute settlement and therefore the last sentence of the Chairman's text on consultations would be deleted;
- whether the provision should encompass domestic labour standards or be confined to core labour standards;
- whether the second sentence of the Chairman's text should correspond to the text of the National Treatment Article of the MAI or to that of NAFTA 1114(2), which includes "retention" but excludes "operation, management, maintenance, use, enjoyment and sale or other disposition"; and
- whether such a specific provision would apply to all levels of government.