



Negotiating Group on the Multilateral Agreement on Investment (MAI)

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

PREAMBLE TO THE MAI AND PROVISION ON NOT LOWERING STANDARDS

(Note by the Chairman)

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I. INTRODUCTION

1. At its December meeting, the Negotiating Group charged DG3 with the task of preparing draft text for:
 - a) a preamble of the MAI; and
 - b) a provision which calls for MAI countries not to lower standards in order to attract investment.
2. The Negotiating Group provided guidance on how to tackle these two tasks as far as the environment and labour standards are concerned. This guidance is summarised in the summary records of previous Negotiating Group meetings [DAFFE/MAI/M(96)6 and DAFPE/MAI/M(96)7].
3. The Negotiating Group did not provide guidance with respect to other matters to be dealt with in the Preamble (except on the issue of the OECD Guidelines, which is being handled within the context of institutional matters and does not need to be addressed by DG3).

II. PREAMBLE

4. The Preamble is an opportunity to describe a shared vision of the MAI. It should be brief and should focus on a few key messages. The issues it could address include the following: What previous relationships and achievements does the MAI build on? What will the MAI do to improve the economy of each of the participating states? How do the economic benefits of the Agreement relate to other important policy objectives such as preservation of the environment? How does the MAI help the cause of multilateral progress in world trade and investment?
5. The Preamble, in addressing these kinds of questions, will place the MAI and its technical provisions in an historical and policy context. Thus, from a political perspective, the Preamble is an important element of the Agreement that needs to be carefully drafted. From a legal perspective, and absent a provision to the contrary, the Preamble may have some interpretive value if the meaning of a technical provision, in a given instance, is ambiguous. That is the import of Article 31 of the Vienna Convention, which states that the context of a treaty includes its preamble, and that a treaty shall be interpreted in accordance with the ordinary meaning of its terms in their context and in light of the treaty's object and purpose.
6. In developing the Preamble, Delegations may find it useful to examine the form and content of preambles to various Bilateral Investment Treaties, the Energy Charter Treaty, the Marrakesh Agreement and the NAFTA. In the paragraphs that follow, an attempt has been made to identify the kinds of issues that the Preamble might address.

The Historical Context of the MAI

7. In the Preamble, the Parties might recall their history of economic co-operation and resolve to build on past achievements. In this context, there could be a reference to the OECD and OECD instruments, in particular, the Codes of Liberalisation and the Declaration and Decisions on International Investment.

The Nature of the MAI

8. The Preamble might state that the Parties resolve to establish mutually advantageous rules on investment that will foster a stable and secure business environment and encourage investment in their respective economies. The wording of the Ministerial Mandate for the MAI negotiations may be helpful in developing this part of the Preamble. The Mandate called for an agreement that would:

"provide 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"

Participation in the MAI

9. The Parties might also affirm the free-standing nature of the MAI and their openness to accession. On this point, the Ministerial Mandate called for the Agreement to:

"be a free-standing international treaty open to all OECD Members and the European Communities, and to accession by non-OECD Member countries".

The Benefits of the MAI

10. The Preamble might state that the MAI will help the economies of the Parties become more diversified and prosperous, create new employment opportunities and help improve working conditions and living standards.

The MAI and other Economic Agreements

11. The Preamble might state that the MAI will contribute to the development of multilateral rules on, and international co-operation with respect to, investment.

The Environment

12. As recorded in the Summary Record of the Negotiating Group orientation debate on environmental matters [DAFFE/MAI/M(96)6], Delegations agreed that the MAI could address environmental concerns in the preamble as follows¹:

-- the preamble could contain a reference to sustainable development and the need for protection and conservation of the environment.

¹ One Delegation identified additional issues worthy of further consideration by the Group, such as the Rio Declaration, Agenda 21, and elements of the NAFTA Supplemental Agreement on the Environment.

13. It follows that the text of the MAI preamble might stress the importance of:

"promotion of sustainable development"; and

"environmental protection and conservation".

Labour Standards

14. As recorded in the summary record of the Negotiating Group's orientation debate on labour matters, the chairman concluded that there was a clear majority in favour of a statement in the preamble similar to one in the Singapore Ministerial Declaration, which reiterates Parties' "commitment to the observance of internationally recognised core labour standards" established by the ILO together with a possible reference to OECD guidelines.

15. Accordingly, the text in the preamble might stress the commitment to:

"observance of internationally recognised core labour standards²."

Consumer Protection

16. In addition, although it has not been discussed by the Negotiating Group, the matter of internationally recognised rights of consumers was raised by representatives of consumer groups during the December 4 briefing of NGOs concerning the MAI [see DAF/MAI(97)6].

17. The Group might consider whether it wishes to include reference to consumer rights in the Preamble, and if so, whether they would wish to refer to the UN Guidelines for consumer protection.

III. NOT LOWERING STANDARDS

18. As regards the matter of not lowering standards, the only topics suggested for consideration by the Negotiating Group are the environment and labour standards.

Environment

19. With regard to the environment, Delegations agreed that:

-- the text of the agreement could provide that countries should not compete for investment by lowering environmental standards and should agree to consultations at the request of interested parties (modelled on NAFTA 1114(2)).

² In a 1996 study, core labour standards were defined as including the elimination of child labour exploitation, prohibition of forced labour, non-discrimination in employment, freedom of association and the right to organise and collective bargaining (see "Trade, Employment and Labour Standards: a Study of Core Workers' Rights and International Trade", OECD, 1996).

Labour Standards

20. According to the Summary Record of the December meeting of the Negotiating Group [DAFFE/MAI/M(96)7], the Chairman concluded that a clear majority of delegations was in favour of:

- a specific provision along the lines of paragraph 2 of Article 1114 of the NAFTA stating that Parties recognise that it is inappropriate to relax domestic labour standards in an effort to encourage foreign investment.

At the outset of the January meeting, one delegation requested that the Summary Record be modified to read as follows:

- a specific provision along the lines of paragraph 2 of Article 1114 of the NAFTA stating that Parties should not relax domestic core labour standards in an effort to encourage foreign investment.

This modification was accepted by the Negotiating Group [see DAF/MAI/M(97)1].

21. The following text, modelled on the NAFTA 1114(2), is offered for the consideration of delegations.³

"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. 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."

³ This text is modelled on Article 1114 of the NAFTA, which is reproduced at paragraph 7 of the Annex to this Note. The words "establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition" track the national treatment article of the MAI rather than the NAFTA. The MAI national treatment article reads as follows: "Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments."

ANNEX⁴

TEXTS FROM OTHER AGREEMENTS AND DECLARATIONS

Alternative Language for the Preamble

Environment

1. 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".
2. Likewise, the preamble of the NAFTA mentions the three countries' resolve to "PROMOTE sustainable development" and "STRENGTHEN the development and enforcement of environmental laws and regulations".
3. The Energy Charter Treaty recognises "the increasingly urgent need for measures to protect the environment" in its preamble.
4. References are also made to "the objectives of sustainable development" and "environmental protection" in paragraph 16 of the Singapore Ministerial Declaration.

Labour Standards

5. In the case of internationally accepted language concerning labour standards, the preamble to the NAFTA mentions countries' resolve to "PROTECT, enhance and enforce basic workers' rights".
6. Paragraph 4 (Core Labour Standards) of the Singapore Ministerial Declaration reads as follows. "We renew our commitment to the observance of internationally recognised core labour standards. The International Labour Organisation (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalisation contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration."

NAFTA Article 1114: Environmental Measures

7. The text of this Article is as follows.
 1. 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 investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

⁴ Texts from other agreements pertaining to the environment and labour matters are reproduced in DAF/MAI/RD(96)44 and DAF/MAI/RD(96)50, respectively.

2. 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.

NAFTA Supplemental Agreement (North American Agreement on Environmental Co-operation)

8. This Agreement establishes a Commission for Environmental Co-operation as a forum in which the NAFTA Parties can pursue trade and environment-related goals. The Commission's mission is to "facilitate cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic trade and social links between Canada, Mexico and the United States".⁵ Comprised of a Council of Ministers of the Environment from the NAFTA countries, a Secretariat and a Public Advisory Committee, the Commission facilitates cooperative approaches to regional environmental problems and goals and helps resolve complaints from the public about the level of environmental enforcement. In addition, the Agreement contains an arbitration regime in the event that a NAFTA Party believes that another Party has persistently failed to enforce an environmental law.

Transnational Corporations and Sustainable Development: A Review of Agenda 21

9. This document outlines some of the areas where there is intergovernment consensus on what multinational enterprises should do to protect the environment and work towards sustainable development. It was produced as an Annex to: Follow-up to the United Nations Conference on the Environment and Development as related to Transnational Corporations: Report of the Secretary General to the Commission on Transnational Corporations, April 1993, E/C.10/1993/14.

10. Agenda 21 adopts an approach to environmental protection which goes considerably beyond the OECD guidelines. For example, it 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" in specific situations, including the management of hazardous waste and chemicals.⁶

⁵ The Commission has an internet site at <http://www.cec.org> which contains its mission statement and much other information, including the texts of the North American Agreement for Environmental Cooperation in English (<http://www.cec.org/english/agreement/index.html>), French (<http://www.cec.org/french/agreement/index.html>) and Spanish (<http://www.cec.org/spanish/agreement/index.html>).

⁶ It is also noteworthy in this regard that according to the OECD Guideline on Accident Prevention and Emergency Response, OECD-based enterprises "should ... achieve a level of safety at least equivalent to that reached for similar facilities in the country of origin".