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**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  
ON LABOUR AND ENVIRONMENT**

## **REPORT TO THE NEGOTIATING GROUP**

I am pleased to submit the attached report which represents the results of DG3 discussions on Labour and Environment held on 15 and 19 January, 1998. It covers the three topics identified in DAFPE/MAI/DG3(97)18: preambular language; “not lowering standards”, and an “additional clause” which considers the approaches of GATT Article XX, NAFTA Article 1114(1) and paragraphs 3 and 4 of the negotiating text on performance requirements.

This report contains options for text on preambular language. It reviews issues relating to “not lowering standards” and the “additional clause” and various proposals for text for each. The February meeting will continue consideration of these subjects.

Chairman

## I. PREAMBLE (LABOUR AND ENVIRONMENT)

### *Preamble*<sup>1 2</sup>

...

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

...

[Recognising that investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable, when accompanied by appropriate environmental policies to ensure it takes place in an environmentally sound manner] [Recognising that appropriate environmental policies can play a key role in ensuring that economic development, to which investment contributes, is sustainable]<sup>3</sup>, and resolving to [desiring to]<sup>4</sup> implement this agreement [in accordance with international environmental law and]<sup>5</sup> in a manner consistent with sustainable development, as reflected in the Rio Declaration on Environment and Development and Agenda 21, [including the protection and preservation of the environment and principles of the polluter pays and the precautionary approach]<sup>6,7 8 9</sup>

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<sup>1</sup> Three delegations continue to oppose any reference to labour in the Preamble. One of the three is willing to consider preambular language on the environment as part of the entire package on labour and environment. One delegation also opposes any reference to the environment unless its concerns are met.

<sup>2</sup> It was the strong feeling of many delegations that preambular reference to the environment be limited to one paragraph and that it be as short as possible. Similarly, it was the feeling of many delegations that preambular reference to labour be limited to one paragraph and that it be as short as possible.

<sup>3</sup> There is about even support for each “recognising” formulation.

<sup>4</sup> Four delegations object to “resolving to” and would prefer “desiring to”.

<sup>5</sup> This phrase raises the questions whether the MAI intends to set a presumption that multilateral environmental agreements have precedence and over it, and, if so, whether a preambular reference establishes that presumption. One delegation is strongly opposed to the inclusion of this phrase because it is impossible to define precisely.

<sup>6</sup> While a majority favour explicit mention of these two principles, a number of delegations prefer a more general reference to Rio Declaration and Agenda 21 principles without specifics. One delegation would explicitly mention two additional principles: “public participation and the right of communities to have access to information, and the avoidance of relocation and transfer of activities causing severe environmental degradation or found to be harmful to human health”.

<sup>7</sup> One delegation proposed additional language: “and recognising that such environmental policies shall not constitute a means of disguised restriction on international trade and investment;”. Some delegations supported this proposal in concept but wondered if it belonged in the Preamble or in a more general anti-abuse clause in the MAI.

<sup>8</sup> One delegation, supported by another one, would insert four additional tirts from its alternative for the Preamble (DAFFE/MAI/DG3(97)18, Annex, pp. 6-7):

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

Renewing their commitment to the Copenhagen Declaration of the World Summit on Social Development<sup>10</sup> and to 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 deal with core labour standards world-wide.<sup>11 12</sup>

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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;

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One delegation believes that the proposal for two paragraphs of preambular language on the environment as set out in DAFPE/MAI/DG3(97)19 reflected broadly shared ideas of substance and was prepared to continue work on the basis of that text. Bracketed text in that proposal related primarily to nuance. The paragraph now contained in the text has lost or weakened at least two concepts that had been broadly shared by the group. The delegation would like to know why a number of delegations appear to find it a preferred basis on which to continue work. The two key concepts that have been lost and the substance of the delegation's concern are set out below:

1. The commitment (or desire) of Parties to implement the agreement in a manner consistent with environmental protection and conservation has been omitted. In the current text this idea is expressed only as a subsidiary notion to the Rio declaration when in fact environmental protection and conservation should be a generally affirmed principle that is not limited to the provisions of Rio.
2. A clear statement of reaffirmation of commitment to the Rio Declaration, writ large, is not clearly made. In the current text, parties resolve to implement the agreement in a manner consistent only with specific ideals (sustainable development and/or international environmental law) as reflected in the Rio Declaration; they do not reaffirm a commitment to the Rio Declaration as a whole. Furthermore, the new text adds the idea of implementing the agreement in accordance with the specified concepts of Rio; this is an idea that has not been explicitly discussed by the group.

Therefore, based on DAFPE/MAI/DG3(97)19, p. 10, and in addition to the position set out in footnote 8 above, the delegation's proposal is:

Resolving to implement this agreement in a manner consistent with environmental protection and conservation;

Reaffirming their commitment to the RIO Declaration on Environment and Development 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 environmental sound manner;

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

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A number of delegations maintain a scrutiny reserve to consider whether there should also be explicit mention of the Singapore WTO Ministerial.

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One delegation could not support a reference to labour in the preamble if it included explicit statement of basic principles of core labour standards.

## II. NOT LOWERING STANDARDS<sup>13 14</sup>

### 1. Should there be separate articles for labour and for environment?

A substantial majority of delegations indicating their position believe there should be separate articles.<sup>15</sup> One delegation took the position that there should only be one. At least five delegations are flexible, depending on the answers to other questions: whether the reference would be to environmental “measures” and labour “standards”; and whether those references would be qualified as being “core”, “domestic” and/or “international”.

### 2. Should these articles be binding or non-binding?

One delegation introduced a paper with various scenarios (fact situations plus a range of government actions or measures) to focus attention on the possible coverage of binding articles. Delegations are invited to reflect further on the scenarios in the course of coming to a position. About half the delegations indicating their position believe the articles should be binding for both labour and environment. A few are uncertain, depending on whether the provisions are limited to specific investments (see Question 7, below). A few believe they should not be binding in one or either case.<sup>16</sup>

### 3. & 4. Should these articles refer to “measures” or “standards” or, perhaps in the case of labour, both? Should they refer to “domestic” or “core” or “international” measures or standards?

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<sup>12</sup> One delegation would insert three additional tirts from its alternative for the Preamble (DAFFE/MAI/DG3(97)18, Annex, pp. 6-7):

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;

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

<sup>13</sup> Three delegations continue to oppose any reference to a “not lowering standards” article on labour. One of the three thinks the issue of “not lowering standards” in the environmental area would be more appropriately dealt with in the context of a general article on investment incentives.

<sup>14</sup> One delegation suggested that there was a confusing redundancy in Alternative 1 for Not Lowering Standards in DAFTE/MAI/DG3(97)18, p. 8 (which reproduces the consolidated negotiating text, DAFTE/MAI(97)1/REV2, p. 48): should the fifth line not delete the first “of an investment” and read “retention of an investment in its territory of an investment...”? The delegation also suggested that there is a typographical error in both alternatives: should not the reference in each be to an “investment ~~of~~ of an investor”?

<sup>15</sup> One delegation would like to have similar obligations applied to environment and to labour law.

<sup>16</sup> One delegation proposed text for a non-binding provision only on environment:

The Parties recognise that it is inappropriate to encourage investment by relaxing health, safety or environmental domestic laws. Accordingly, a Party should not waive or offer to waive the application of domestic law as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.

Most delegations believe that the Agreement should address environmental “measures” and labour “standards”. A few delegations believe “measures” should be used with both the labour and the environment articles. A few delegations would prefer “standards” in both the labour and environmental articles. One delegation pointed out that while “standards” might have widely recognised meaning in the context of international labour conventions, especially those of the ILO, “measures” would be more familiar in the language of international investment agreements regardless of specific subject-matter. “Measures” is also the term used consistently in the rest of the MAI with reference to government action.

Most of those delegations which spoke would refer to “domestic” measures or standards for labour and for environment. One delegation proposed to qualify “domestic standards” as those covering the objectives as laid down in international core labour standards. Two other delegations prefer “domestic” for environment and “core” for labour. One delegation prefers to refer to “domestic environmental laws”. One other delegation prefers “core” for labour. At least two delegations were still considering whether the articles should refer to “international” measures or standards. One delegation would like to get more clarity on the meaning of all of these terms.

One delegation suggested a different approach, with separate articles on domestic measures and international laws or standards, respectively.<sup>17</sup> A number of delegations expressed interest in such an approach and intend to give it further study.

#### **5. Should they refer to other matters (such as health and safety) and, if do, how?**

While no delegation opposed additional references, not all expressed a view. Most delegations would add references to “health and safety” but did not specify exactly how. Some expressed uncertainty but did not rule it out.

#### **6. Should binding provisions be subject to MAI dispute settlement?**

This question is related to larger outstanding questions about the scope and application of MAI dispute settlement in the context of general government regulatory activity. Of delegations indicating a position, one said that investor-state dispute settlement should not be available to challenge binding labour and environment articles while another delegation said that neither investor-state nor state-to-state dispute settlement ought to be available. One delegation said that they should.

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<sup>17</sup> The proposal by one delegation has three turrets, the first modelling the first sentence of Alternative 1 in DAF/MAI/DG3(97)18, p. 8 (which reproduces the consolidated negotiating text, DAF/MAI(97)1/REV2, p. 48):

1. The Parties recognise that it is inappropriate to encourage investment by lowering domestic health, safety or environmental measures or relaxing international core labour standards.
2. A Contracting Party [shall] [should] accord to investors of another Contracting Party and their investments treatment no more favourable than it accords its own investors by waving or otherwise derogating from, or offering to waive or otherwise derogate from domestic health, safety, environmental or labour measures, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of an investment.
3. A Contracting Party [shall] [should] not take any measure which derogates from, or offer to derogate from, international health, safety or environmental laws or international core labour standards as an encouragement for investment on its territory.

**7. Should the not lowering standards articles relate to broad measures changing a country's investment climate or to measures or waivers specific to a particular investment?**

Here again, delegations have not completed their individual considerations. Several delegations favoured coverage of only measures for specific investments. It was suggested that “specific” be inserted before “investment” in both Alternatives 1 and 2. The proposal by one delegation (see footnote 17) seeks to distinguish between the waiver of or derogation from domestic measures for specific investments and derogation from international laws or standards to change the investment climate.

**III. ADDITIONAL ARTICLE**

The discussion was based on three sets of language (set out in the Annex to DAFPE/MAI/DG3(97)18: GATT Article XX; NAFTA Article 1114(1); and paragraphs 3 and 4 of the MAI text on performance requirements).<sup>18</sup> There was agreement on the objective of protecting government regulators and their normal non-discriminatory work. There was agreement that this is a broader issue, not just relevant to labour and environmental regulation. There was also agreement that the discussion has bearing on specific concerns about other portions of the current negotiating text (such as the scope of the expropriation and the General Treatment articles, the “like circumstances” and *de facto* expropriation discussions, application of the dispute settlement articles and limits in the performance requirement articles).

While acknowledging that this context means that a more general approach may be appropriate for the MAI, several possible solutions for labour and environment concerns were discussed. At the conceptual level, the group discussed the merits and demerits of a “general exception” approach such as that of GATT Article XX, and of a “clarification” approach such as that of NAFTA Article 1114(1). There was some support for proposal by one delegation along the lines of the former.<sup>19</sup> NAFTA parties had proposals building on the latter.<sup>20</sup>

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<sup>18</sup> Some delegations felt that a more general approach based on either GATT Article XX or NAFTA Article 1114(1), or some combination of the two, would eliminate the need for paragraph 4 in the draft performance requirements article. Given the similarity of the performance requirements language to GATT Article XX language, others are not sure and intend to study the question further.

<sup>19</sup> The proposal by one delegation would delete paragraph 4 of the existing negotiating text on performance requirements and add a general exception article:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on investment, nothing in this agreement shall be construed to prevent the adoption, maintaining or enforcement by any Contracting party of measures:

- (a) necessary to protect human, animal or plant life or health
- (b) relating to the conservation of living or non-living exhaustible natural resources.

<sup>20</sup> One delegation proposed as a general article the text of NAFTA Article 1114(1) with a second paragraph to address investment outflows:

Nothing in this agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

The language and approach of GATT Article XX appealed to some delegations because it is a known quantity, applicable to the TRIMS and TRIPS Agreements, and used in the Energy Charter Treaty. It has already been the subject of jurisprudence. It also has the sort of built-in anti-abuse language some other delegations see as necessary. Several delegations felt that such a general approach better protected future regulatory requirements. But other delegations questioned whether this trade agreement language was appropriate in an investment agreement given differences between movements in goods and services, on one hand, and capital movements, on the other. They felt that the existing jurisprudence was problematic relating to environmental matters. They also expressed concern that a “general” exception would require awkward drafting because it would only appear necessary for four MAI disciplines (NT/MFN, General Treatment, expropriation and certain performance requirements) and might therefore require limitation with respect to the rest of the MAI.

The NAFTA language and approach (which in the view of one delegation would have to be combined with the addition of “in like circumstances” to the MAI NT/MFN articles) was advanced as a more focused approach. It is not a “general exception”; rather, in the scheme of the NAFTA, Article 1114(1) is meant to “tilt the balance” in favour of the environment by establishing a presumption that normal measures do not violate NAFTA investment obligations. Delegations expressing concern with the Article 1114(1) approach are uncomfortable with the effect of “in like circumstances” and with the self-judging character of Article 1114(1). They questioned whether the words “otherwise consistent” gives this text a clarification or a general exception character, and are unsure of the meaning of “undertaken in a manner sensitive to environmental concerns”. They too saw drafting disadvantages: compared to a general exception approach, the NAFTA approach might require a variety of MAI discipline-specific provisions.

The second paragraph of the proposal by one delegation (see footnote 20) adds a new element to a NAFTA-based formulation. Its intention is to ensure that environmental measures are not used to restrict investment *outflows* with the effect that potential host countries feel pressured to adopt the environmental standards of foreign investors' home countries. It was the subject of some support (reflecting possible worries of developing countries) and some concerns. Among the concerns was the relationship of such language to provisions of multilateral environmental agreements that sanction discriminatory treatment depending on enforcement of environmental regulations. The delegation intends to give further consideration to this matter.

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Likewise, no Contracting party shall adopt, maintain or enforce any environmental measure in a manner which would constitute a disguised restriction for investment outflows from that Contracting Party to another Contracting party, or for investment among Contracting parties.

The “Package of Additional Environmental Proposals by one delegation” presented to the Negotiating Group on 14 January also proposes the language of NAFTA Article 1114(1).