



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.3 on “Special Topics”

REPORT TO THE NEGOTIATING GROUP

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1. I am pleased to present the second report of the Expert Group on Special Topics (attached).
2. Work has advanced on all six topics on which the Group has been requested to report in December. Draft text has been prepared in each case. However, many square brackets and footnotes remain and in some cases delegations hold different views on whether the text should figure in Articles of the MAI or in interpretative notes, and in some cases on whether there should be text at all. The text and footnotes should be read against the background of the attached commentary and the information contained in the Group's earlier report [DAFFE/MAI/EG3(96)7].
3. This report contains alternative text on a number of important issues. These alternatives generally represent policy options which will require the attention of the Negotiating Group. However, considerable technical work remains to be done. The Expert Group is ready to carry this work forward should the Negotiating Group so wish.
4. The Group also considered the note by one delegation on research and development/technology [DAFFE/MAIEG3/RD(96)8] and agreed to bring this proposal to the Negotiating Group for possible consideration when the main provisions of the Agreement would be more clearly defined.

Anders Ahnlid
Chairman

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I. KEY PERSONNEL

A. Draft Article on Temporary entry and stay of investors and key personnel¹

Except as explicitly provided for in [paragraph 5 of] this Article, nothing in this Agreement shall prevent the application of Contracting Parties' national laws relating to immigration and labour. [These shall not be invoked by a Contracting Party as a means of evading its obligations under this Article.]^{2, 3, 4}

1. Each Contracting Party shall grant temporary entry and stay and provide any necessary confirming documentation to a natural person of another Contracting Party who is:

(a) an investor who seeks to establish, develop, administer⁵ or provide advice or essential technical services to the operation of an [enterprise] [investment] to which the investor has committed, or is in the process of committing, a substantial amount of capital⁶, or

[(b) an employee employed by an [enterprise] [investment]⁷ referred to in (a) above, in a capacity of executive, manager or specialist and who is essential⁸ to such [enterprise] [investment]]⁹

or

[(b) an employee of an [enterprise] [investment] of another Contracting Party for a period of not less than one year, seeking to:

¹ One delegation reserves its position on this article except for paragraph 5.

² The chapeau clause would carve out labour and immigration laws from the coverage of the other substantive articles of the Agreement. The bracketed options in the chapeau reflect a difference of view as to the extent to which the provisions of this article would prevail in the event of conflict with national immigration and labour laws. There are three main options: first, all of this article would prevail, except paragraph 4b) which is drafted as a best endeavours obligation; the second option is that only paragraph 5 would prevail. The third option, which is a variant of the second, adds an “anti-abuse” clause shown in square brackets.

³ One delegation suggests referring here to “regulations and policies” as well as “laws”.

⁴ One delegation proposes that the chapeau should also include the application of general wage and working conditions based on laws, regulations and collective agreements.

⁵ This term is understood to include liquidation of an investment.

⁶ “Substantial amount of capital” is a relative test which would be met if capital were substantial with respect to the size of the investor or the size of the investor’s share in an investment, taking into account the field of activity of the investor and the investment. Some delegations question the use of this term.

⁷ It is proposed to replace “investment” by “investor” in this subparagraph as well as in the alternative paragraph 1b).

⁸ One delegation proposes that the essentiality test apply only to specialists.

⁹ Several delegations support inclusion in this subparagraph of a prior employment requirement of at least one year.

(i) establish a subsidiary or affiliate of that [enterprise] [investment] to which the [enterprise] [investment] has committed, or is in the process of committing, a substantial amount of capital, or

(ii) render services to a subsidiary or affiliate of that [enterprise] [investment]¹⁰

provided that the employee is employed in a capacity of executive, manager or specialist [and that such employee is essential to the present investment.]]

[2. To be eligible for temporary entry and stay pursuant to subparagraph (a) or (b), a natural person must comply with applicable measures relating to public health and safety¹¹, criminal law, and national security.]¹²

3. Temporary entry and stay shall be granted to a person for [a period not exceeding 1-3 years] so long as that person continues to meet the requirements of this Article.¹³

4. (a) Each Contracting Party shall grant temporary entry and stay and provide any necessary confirming documentation to the spouse and minor children of a person who has been granted temporary entry and stay in accordance with this Article. The spouse and minor children shall be admitted [under the conditions] and for the same duration¹⁴ as that person.

(b) Each Contracting Party shall endeavour to grant authorisation to work to the spouse of the person who has been granted temporary entry and stay in accordance with this Article.¹⁵

5. No Contracting Party may:

(a) as a condition for temporary entry and stay in accordance with this Article, require labour market or other economic needs tests or procedures;¹⁶ or

¹⁰ In one delegation's opinion, this does not include direct sales or services rendered to unaffiliated enterprises.

¹¹ Two delegations propose to replace "public safety" by "public order".

¹² There is a proposal to delete paragraph 2 with the understanding that the article would be governed by the chapeau clause and that the General Exceptions provisions of the Agreement would also be applicable. One delegation considers that the chapeau and paragraph 2 serve complementary but distinct functions.

¹³ It is understood that the national authorities may periodically verify continued eligibility under this paragraph.

¹⁴ One delegation suggests replacing "for the same duration as that person" by "for a period not longer than the stay of that person".

¹⁵ Some delegations prefer that this undertaking be a binding obligation. Others do not want any provision of this kind in the MAI.

¹⁶ One delegation reserves on paragraph 5a.

(b) impose or maintain any numerical restriction relating to temporary entry and stay in accordance with this Article.¹⁷.

6. For the purposes of these paragraphs:

[Natural person of another Contracting Party means a natural person having the nationality of [or who is permanently residing in] another Contracting Party in accordance with its applicable law;]

[Enterprise of another Contracting Party means a legal person or any other entity constituted or organised under the applicable law of another Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organisation, and a branch of an enterprise;]

Executive means a natural person who primarily directs the management of an [enterprise] [investment] or establishes goals and policies for the enterprise or a major component or function of the enterprise, exercises wide latitude in decision-making and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the enterprise;

Manager means a natural person who directs the management of an enterprise, or department, or subdivision of the enterprise, supervises and controls the work of other supervisory, professional or managerial employees, has the authority to hire and fire or recommend hiring, firing, or other personnel actions and exercises discretionary authority over day-to-day operations at a senior level; and

Specialist means a natural person [who possesses knowledge at an advanced level of expertise and who possesses proprietary knowledge of the enterprise's product, service, research equipment, techniques, or management.]

¹⁷ Regarding paragraph 5 a) and b), some delegations explain that for political reasons their countries would wish to continue to maintain economic needs tests and numerical restrictions. These countries would have to take a reservation if the MAI were to have a legally binding obligation not to impose labour market or economic needs tests or numerical restrictions. An alternative is proposed which would allow those countries to maintain labour market tests or numerical restrictions as long as they are not applied to deny temporary entry and stay to investors or key personnel of an MAI Party. Such an alternative could read:

“No Contracting Party may deny temporary entry and stay in accordance with this Article for reasons relating to labour market or other economic needs tests or numerical restrictions in national laws.”

B. Draft article on employment requirements

[A Contracting Party shall permit investors of another Contracting Party and their investments to employ any natural person of the investor's or the investment's choice regardless of nationality and citizenship provided that such person is holding a valid permit of sejour and work delivered by the competent authorities of the former Contracting Party [and that the employment concerned conforms to the terms, conditions and time limits of the permission granted to such person.]] (Based on ECT, article 11 (2)).

[No Contracting Party may apply national employment quotas relating to the employment of a natural person by an investor or an investment of another Contracting Party provided the person is holding a valid permit of sejour and work delivered by the competent authorities of the former Contracting Party.]

II. PERFORMANCE REQUIREMENTS

Draft Article^{1, 2}

Paragraph 1

No Contracting Party may impose, enforce or maintain any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, operation, or conduct of an investment of an investor of a Contracting Party or of a Non-Contracting Party in its territory³:

- (a) to export a given level or percentage of goods or services⁴;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

¹ Particular concerns of some delegations in relation to this article could be covered by country-specific reservations.

² One delegation reserves its position on all obligations on performance requirements in the MAI that go beyond those in the TRIMs Agreement and the Energy Charter Treaty. One other delegation expresses concerns over the possible retroactive application of this article to performance requirements agreed in the context of privatisation operations.

³ The place of the term “in its territory” is still to be determined in the National Treatment and Most Favoured Nation Treatment provisions [see DAFFE/MAI(96)16/REV1].

⁴ One delegation reserves its position on subparagraph (a). Another delegation reserves its position on the inclusion of services in subparagraphs (a), (c) and (e) pending clarification of its implications. It also wishes to maintain a scrutiny reservation on the coverage of “purchase” in subparagraph (c) .

- (f) to transfer technology, a production process or other proprietary knowledge to a natural or legal person in its territory [except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of the Agreement]⁵;
- (g) to locate its headquarters for a specific region or the world market in that Contracting Party⁶.
- (h) to supply one or more of the goods that it produces or the services that it provides to a specific region or world market exclusively from the territory of that Contracting Party;
- [(i) to achieve a given level or value of production, investment, manufacturing, sales⁷, employment, research and development in its territory;]⁸
- [(j) to hire a given level or type of local personnel;]
- (k) to establish a joint venture⁹; or

⁵ One delegation reserves its position on the first part of subparagraph (f). Two delegations are concerned with the breadth of the derogation implied by the square bracketed text. One other delegation can accept subparagraph (f) only in its complete form. It was explained by those delegations favouring the full text that, as in the WTO “TRIPS” Agreement and NAFTA, the purpose of the exception for competition enforcement contained in the brackets is to clarify that normal administration of competition laws sometimes calls for limited licensing (or divestiture) of patents or “know-how” to remedy situations of monopoly or abuse, and that such individual applications of law do not constitute mandatory technology transfer. This exception is not likely to be used frequently. Delegations should further consult their competition authorities on this matter to determine its relevance to their own “antitrust” laws. Other delegations are of the view that further consideration needs to be given to the means of ensuring consistency with IPR provisions in existing international agreements (WIPO, TRIPS,) since these may allow certain compulsory performance requirements under certain conditions.

⁶ One delegation reserves its position on subparagraph(g).

⁷ Some delegations consider that PR obligations should apply to minimum domestic sales requirements, for example in the event of a domestic shortage of oil. Other delegations express concern that such requirements should not be included because that might undermine the right of Contracting Parties to impose export bans in appropriate circumstances.

⁸ Several delegations consider the language of this subparagraph to be too general and propose its deletion. Moreover, its key aspects are already covered in subparagraphs (a) to (h). One delegation proposes deletion of the terms “investment” and “employment” while another one proposes deletion of the word “employment”. One delegation suggests that the performance requirements listed in subparagraph (l) be discussed further before a decision is taken regarding their deletion.

⁹ A few delegations prefer to delete this subparagraph and to rely instead on the National Treatment/MFN provisions, possibly supplemented by an explanatory note. Another approach would be to develop a separate provision on specific types of legal entity along the lines of GATS Article XVI on market access.

[(1) to achieve a minimum level of local equity participation¹⁰.]

Paragraph 2

[A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f)¹¹. For greater certainty, Articles XXX on National Treatment and MFN apply to the measure.]¹²

Paragraph 3¹³

Alternative 1

No Contracting Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Contracting Party or of a non-Contracting Party, on compliance with any of the following requirements:¹⁴

(a) to export a given level or percentage of goods or services¹⁵;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods and services¹⁶ produced in its territory;

¹⁰ Several delegations prefer to delete this subparagraph and rely instead on the National Treatment and MFN provisions.

¹¹ Many delegations consider this provision to be unnecessary. No one questions the need for the MAI to allow Contracting Parties to take non-discriminatory measures necessary to ensure the respect of health, safety and environmental requirements. However, delegations doubt that such measures would run counter to the prohibition of performance requirements concerning the transfer of technology. They also suggest that such measures might better be addressed in an explanatory note, to paragraph 1, in paragraph 5 of this Article, or in the general exception provision of the Agreement.

¹² Several delegations consider that this sentence may be unnecessary or could be picked up in a more general provision dealing with the relationship between National Treatment/MFN and other provisions of the Agreement.

¹³ The alternative texts for this paragraph offer different presentational options. They do not imply differences of substance.

¹⁴ One delegation proposed a simplified presentation of paragraph 3 which would read: "... on compliance with any of the requirements listed in paragraph 1 a) - e)." However, this approach could be adopted only if the same language of the subparagraphs applied in paragraphs 1 and 3. One delegation proposes that the list of requirements be an open-ended illustrative list.

¹⁵ Several delegations wish to consider further the inclusion of services in paragraph 3. One concern related to the treatment of tax measures relating to services.

¹⁶ It is yet to be determined how this provision would exclude contracted services. A related question is whether to include, as in subparagraph 1(c), purchases from "persons in its territory".

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such an investment;

(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings; or

[(f) others to be defined¹⁷.]

Paragraph 1 shall not apply insofar as a Contracting Party conditions the receipt or continued receipt of an advantage on compliance with requirement other than those set out above.

Alternative 2

Paragraph 1¹⁸ (f) (g) (h) (i) (j) (k)(l) do not apply if the requirements described in one or more of these provisions are conditions for the receipt or continued receipt of an advantage in connection with the establishment, acquisition, expansion, management or operation, or conduct of an investment of an investor (of a Contracting Party or a non-Contracting Party, in its territory), [in particular if the requirements and the advantage are subject to a contractual obligation between the investor or investment on the one side and the host state or its sub-federal entities on the other].

[Paragraph 4

Nothing in paragraph 3 shall be construed to prevent a Contracting Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Contracting Party or of a non-Contracting Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.]

[Paragraph 5

Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3 (b) or (c) shall be construed to prevent any Contracting Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

(b) necessary to protect human, animal or plant life or health; or

(c) necessary for the conservation of living or non-living exhaustible natural resources.]

¹⁷ One delegation suggests the addition of joint venture and local equity participation requirements.

¹⁸ One delegation reserves its position on the inclusion of subparagraph (a).

[Paragraph 6¹⁹

The provision of:

- a) Paragraphs (1)(a), (b) and c) and (3)[(a), (b) and (c) do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programmes.
 - b) Paragraph (1)(b), (c), (f) and (i), and 3(b) and (c) do not apply to procurement by a Contracting Party or a state enterprise; and
 - (c) Paragraphs (3)(b) and (c) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.]
- [(d)Paragraph (1)(i) does not apply to requirements imposed by a Contracting Party as a part of privatisation operations.]

¹⁹ Proposal by one delegation, supported by another one, for paragraph 6 (a) - (c). Proposal by one other delegation for subparagraph (d).

III. PRIVATISATION

Draft Provisions¹

Paragraph 1 (National Treatment and Most-Favoured Nation Treatment)²

Alternative 1

[Each Contracting Party shall accord treatment as defined in Paragraph XX (National Treatment /MFN Treatment) in case of a privatisation, both as regards the initial privatisation³ and as regards [subsequent transactions] [involving a privatised asset][secondary sales] between investors or investments]⁴.

Alternative 2

[The obligation to accord National Treatment and MFN treatment applies to all aspects of privatisation of a government-controlled enterprise, irrespective of the method of privatisation (whether by public offering, direct sale, or other method) or the timing of a particular sale (initial issue or subsequent sale).]⁵

Paragraph 2 (Right to privatise)

[Nothing in this Agreement shall [prejudice Contracting Parties' rules governing the system of property ownership or]⁶ be construed as imposing an obligation on a Contracting Party to privatise.]

¹ Two delegations reserve their position on all privatisation obligations.

² Some delegations suggest the text might alternatively be adopted as an "interpretative note". One delegation does see any value added in reaffirming the application of NT/MFN obligations to privatisation.

³ Several delegations reserve on the inclusion of obligations on initial privatisation. Two delegations suggest exclusion of voucher system.

⁴ Two delegations state that the obligations on subsequent transactions should not interfere with the normal business prerogatives of privatised enterprises. Sharing this view, one other delegation suggests dividing paragraph 1 into two parts as follows:

“a) Each Contracting Party shall accord treatment as defined in Paragraph XX (NT/MFN) in case of a privatisation.

b) Each Contracting Party shall not impose any obligation or condition incompatible with Paragraph XX (NT/MF) as regards subsequent transactions involving a privatised asset.”

⁵ Proposal by one delegation.

⁶ Most delegations favour the deletion of the text in square brackets. Two delegations reserve on this proposal.

Paragraph 3 (Special share arrangements)⁷

Alternative 1

a. Contracting Parties acknowledge that [methods of privatisation and]⁸ special rules as regards the ownership, [management]⁹, or control of privatised assets [such as]:

-- a Contracting Party or any person designated by the Contracting Party maintaining special shareholder rights to influence or veto any decision concerning such assets after the privatisation,

-- arrangements under which managers or other employees of an enterprise are granted special treatment as regards the acquisition of shares of that enterprise,

[--arrangements under which shareholders are required to maintain their share in the capital of the enterprise during a certain period of time, or to guarantee the achievement or maintenance of a certain level or value of investment, manufacturing, production or employment of the enterprise,]¹⁰

[-- a Contracting Party being free to choose categories of buyers in a privatisation process]¹¹

[-- arrangements under which locals of a certain community are granted special treatment as regards the acquisition of this community's property,]¹²

[are compatible with Paragraph 1, unless [in like circumstances]¹³ they explicitly or intentionally favour national investors or discriminate against foreign investors because of their nationality [or residence]].¹⁴

b. [Arrangements under which physical persons of a Contracting Party are granted exclusive rights as regards the initial privatisation are acceptable as a method of privatisation under this Agreement provided that the exclusive right as regards the initial privatisation is limited to physical persons only and provided that there is no restriction on subsequent sales.]¹⁵

⁷ Three delegations support deletion of paragraph 3.

⁸ Proposal by one delegation.

⁹ Proposal by one delegation.

¹⁰ Proposal by one delegation.

¹¹ Proposal by one delegation.

¹² Proposal by one delegation.

¹³ Proposed addition by one delegation.

¹⁴ Combination of proposals by three delegations.

¹⁵ Proposal by one delegation.

c. [Contracting Parties acknowledge¹⁶, however, that such special rules may, in certain circumstances, adversely affect the rights of investors or investments of another Contracting Party.] A Contracting Party which considers that another Contracting Party has taken such measures, may request consultations with that Contracting Party¹⁷.

Alternative 2

[Special share holding arrangements including, *inter alia*, a) the retention of “golden shares” by Contracting Parties, b) stable shareholder groups assembled by a Contracting Party, c) management/employee buyouts, and d) voucher schemes for members of the public, hold strong potential for discrimination against foreign investors and are, in fact, inconsistent with National Treatment and MFN treatment obligations in many instances.]¹⁸

Paragraph 4 (Transparency)¹⁹

Alternative 1

Obligations pursuant to the Transparency Article YY apply to any privatisation in its territory and in particular to its conditions and timing.²⁰

Alternative 2

For the purposes of this Article, each Contracting Party shall publish promptly the essential features and procedures for participation in each privatisation that is undertaken.²¹

Alternative 3

This note confirms the application of the Transparency Article YY. Specifically, the obligations to accord National Treatment and MFN treatment will prohibit discrimination against a foreign investor in respect of all arrangements for making public information about the enterprise to be privatised. A government that gives, to domestic investors, access to information concerning the fact of privatisation must at the same

¹⁶ Proposal by one delegation.

¹⁷ Two delegations reserve on the principle of consultations. It was noted that such consultations may have a different character from those foreseen under the normal dispute settlement procedures of the MAI.

¹⁸ One delegation’s proposal, together with the following note: “As with other measures contrary to obligations on National Treatment and MFN treatment, use of special share arrangements should be subject to listing as reservations. Recognising that Contracting Parties may privatise assets in the future, Contracting Parties will be permitted to take precautionary reservations for the use of special share arrangements in those sectors where Contracting Parties generally have state-owned enterprises or government restrictions.”

¹⁹ Some delegations feel no need for a specific transparency provision for privatisation unless it goes beyond the Transparency Article YY in the Consolidated Texts. However, any additional obligations would need to include appropriate protection of confidentiality.

²⁰ Proposal by one delegation.

²¹ Proposal by one delegation.

time give that same access to foreign investors. For very small scale privatisations, that fact may be made known to local investments of foreign investors. Any business information available to domestic investors must be available to foreign investors, *e.g.*, the government must provide financial statements on request. Governments would violate National Treatment if, in order to benefit domestic investors, they refrain from making information publicly and widely available, either about the fact of privatisation or about the privatising enterprise.²²

Paragraph 5 (Definition)²³

Alternative 1²⁴

“Privatisation” means a partial or complete sale or other form of transfer of [the function of the government or]²⁵ ownership or control of assets²⁶ [of nationally owned enterprises]²⁷ from a Contracting Party²⁸ to [a private]²⁹ [an investor or an investment] [the private sector].

However, for the purpose of this agreement privatisation does not mean the following transactions:³⁰

- the sale or other form of transfer of ownership or control of debt securities of the Contracting Party, unless they have attached preferred rights to acquired shares;
- [the granting of concessions;]

²² Proposal by one delegation.

²³ It remains open whether the definition of privatisation should be “asset-based” or “entity-based”. An asset-based definition, however, might be too broad and lead to a long list of assets to be excluded. An entity-based definition might be too narrow since it excludes such transactions as the sale of government buildings. It might also be open to abuse since an entity could be effectively privatised through the sale of its assets. *Alternative 1* is an asset-based approach. *Alternative 2* is a combination of entity- and asset-based approaches.

²⁴ A number of delegations have concerns about the coverage of real estate. The issue also raises the problem of de minimis rules.

²⁵ Proposed addition by one delegation.

²⁶ One delegation would add: “which according to domestic laws and regulations may be privatised...”

²⁷ Proposed addition by one delegation.

²⁸ The issue of subnationals is expected to be dealt with in another part of the Agreement. Otherwise one might insert: “or any subnational thereof.”

²⁹ There is broad agreement that state enterprises should be able to participate in privatisation operations on an equal footing with private companies. Accordingly, many delegations consider that the word “private” should be deleted. There is also agreement that privatisation does not cover intra-government transfers: one delegation noted that the text in the final tiret of the definition suggested in alternative 1 will take care of this concern.

³⁰ Several delegations wish to exclude small transactions, especially in real estate. One delegation suggests a de minimis exemption level of \$US 50-100 million, below which privatisation transactions are exempted from obligations. However, another delegation questions whether the range proposed qualifies as “de minimis”, especially for real estate transactions.

- [the sale or other form of transfer of ownership or control of real estate [including arable land]³¹];
- [the sale or other form of transfer of ownership or control of assets to a non-private investor of the same Contracting Party];
- [.....]

Alternative 2

“Privatisation” means the sale or other disposition of equity interests of a Contracting Party in a state enterprise³² or governmental entity, or the sale or other disposition of the assets of a state enterprise or governmental entity.³³

Alternative 3³⁴

Privatisation means a partial or complete sale or other form of transfer of the function of the government or ownership or control of assets of nationally owned enterprises from a Contracting Party to an [private] investor or an investment.

However, for the purpose of this agreement privatisation does not mean the following transactions:

- the sale or other form of transfer of control of debt securities of the Contracting Party, unless they have attached preferred rights to acquired shares;
- [the granting of concessions;]
- [the sale or other form of transfer of control of real estate;]
- [.....]

³¹ Proposal by one delegation.

³² “State enterprise” would need to be defined.

³³ Proposal by one delegation.

³⁴ Proposal by one delegation.

IV. MONOPOLIES/STATE ENTERPRISES

Draft Articles

A. Draft Article A: Monopolies¹

[1. Nothing in this Agreement shall be construed to prevent a Contracting Party from maintaining, designating or eliminating a monopoly.]²

2. Each Contracting Party shall [endeavour to]³ accord non-discriminatory treatment when designating a monopoly.

3. Each Contracting Party shall ensure that [any monopoly that [its national or subnational governments]⁴ [its national government] maintains or designates] or [any privately-owned monopoly that it designates and any government monopoly that it maintains or designates]:

[a] acts in a manner that is not inconsistent with the Contracting Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Contracting Party has delegated to it in connection with [the purchase or sale of] the monopoly good or service;⁵

¹ One delegation reserves its position on all obligations on monopolies that go beyond those of the GATT and GATS.

² The right of governments to designate or maintain a monopoly is not disputed. A number of delegations favour, however, the deletion of the paragraph on the grounds that it could give rise to questions regarding the expropriation and compensation obligations of the MAI and prejudice the Negotiating Group's discussion on market access. Moreover, the MAI is not the proper context to state this right. Other delegations favour the inclusion of the paragraph for the sake of clarity and certainty.

³ A number of delegations are prepared to delete "endeavour to". Other delegations wish to maintain a scrutiny reserve pending the definition of the monopoly concept and clarification of the intent of the paragraph. Some delegations suggest that the designation of a monopoly should not be based on nationality considerations.

⁴ Most delegations consider that the obligations of the Article should apply to all levels of government.

⁵ There is broad agreement that the issue of delegated regulatory powers of monopolies would be more adequately addressed in the context of a general anti-circumvention clause for the MAI. Sub-paragraph (a) can be kept in, nevertheless, as a marker. If the issue were to be addressed in paragraph 3, however, the text might be improved by ending the sentence after the words "delegated to it" or by harmonising it with the rest of the paragraph with the addition of the words "purchase and sale". One delegation supports the deletion of sub-paragraph (a) on the ground that sub-paragraphs 3(b), (c), (d) would cover the concerns dealt with in sub-paragraph (a).

b) provides non-discriminatory treatment⁶ to investors of another Contracting Party⁷ and their investments in its sale⁸ of the monopoly good or service in the relevant market;

[c) provides non-discriminatory treatment to investors of another Contracting Party and their investments in its purchase of the monopoly good or service in the relevant market. This paragraph does not apply to procurement by governmental agencies of goods or services for government purposes and not with a view to commercial resale or with a view to use in the production of goods or services for commercial sale;]⁹

[d) does not use its monopoly position, in a non-monopolised market in its territory, to engage, either directly or indirectly, including through its dealing with its parent company, its subsidiary or other enterprise with common ownership, in anticompetitive practices that might adversely affect an investment by an investor of another Contracting Party, including through the discriminatory provision of the monopoly good or service, cross-subsidisation or predatory conduct [, in particular through the abusive use of prices]]¹⁰.

[e) Except to comply with any terms of its designation that are not inconsistent with subparagraph (b) (c) or (d), acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale.]¹¹

[Nothing in Article A shall be construed to prevent a monopoly from charging different prices in different geographic markets, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions in those markets.]¹²

[Article A, paragraph 3 (e) differences in pricing between classes of customers, between affiliated and non-affiliated firms, and cross-subsidisation are not in themselves inconsistent with this provision;

⁶ One delegation wishes to maintain a scrutiny reserve pending clarification of the non-discriminatory obligation for sales by monopolies in which governments maintain golden shares. One other delegation notes that sub-paragraph (e) addresses this concern.

⁷ One delegation wishes to limit the obligations of sub-paragraph (b), (c), and (d) to “investments of investors of a Contracting Party in its territory”.

⁸ Two delegations wonder whether the coverage should not go beyond the sale and purchase of a monopoly good or service. One other delegation proposes to replace “sale” by “supply”.

⁹ A number of delegations want to study the implications of this sub-paragraph further, notably in relation to the GATT Agreement on Government Procurement. One delegation favours its deletion. Some delegations reserve their position on the second sentence.

¹⁰ While four delegations support the general thrust of sub-paragraph (d), several delegations are concerned about its intrusion into the area of competition policy, notably through the reference to ‘anti-competitive practices’. One delegation proposes to replace the term “anti-competitive” by “discriminatory”. One other delegation favours a simplification of sub-paragraphs (c) and (d).

¹¹ Proposal by two delegations. A number of delegations question the feasibility and desirability of requiring monopolies to act in accordance with “commercial considerations”.

¹² Proposal by two delegations not discussed by the Expert Group.

rather, they are subject to this subparagraph when they are used as instruments of anticompetitive behaviour by the monopoly firm].¹³

[4. In case of a demonopolisation which has the effect of extending the obligations under the Agreement to a new area, the principle of standstill does not intend to prevent any Contracting Party from lodging any reservation to the Agreement for this new area.]

[5. Each Contracting Party shall notify to the Parties Group any existing monopoly within [60] days after the entry into force of the Agreement and any newly created monopoly within [60] days after its creation.]¹⁴

[6. Neither investors of another Contracting Party nor their investments may have recourse to investor-state arbitration for any matter arising out of paragraph 3 (b), (c), (d) or (e) of this Article.]¹⁵

[B. Draft Article B: [State Enterprises¹⁶]

1. Each Contracting Party shall ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Contracting Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Contracting Party has delegated to it.

2. Each Contracting Party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale, in the Contracting Party's territory, of its goods or services to investors of another Contracting Party and their investments.

3. Neither investors of another Contracting Party nor their investments may have recourse to investor-state arbitration for any matter arising out of paragraph 2 of this Article.]

C. Definitions Related to Monopolies [and State Enterprises]

1. "Delegation" means a legislative grant, and a government order, directive or other act transferring to the monopoly or state enterprise, or authorising the exercise by the monopoly or state enterprise of, governmental authority.

¹³ Proposal by two delegations not discussed by the Expert Group.

¹⁴ One delegation proposes that the concept of "prior notification" for newly designated- monopolies be examined in this paragraph. Other delegations feel that the notification period of 60 days may be too short. One delegation reserves its position on the whole paragraph.

¹⁵ One delegation explains that paragraph 3(a), unlike paragraphs 3(b), 3(c), 3(d) and 3(e), would discipline circumventions of a Contracting Party's obligations -- including non-discriminatory treatment. The same dispute settlement alternatives should therefore be made available as those for when a Contracting Party's own actions are challenged.

¹⁶ One delegation reserves its position on all obligations on state enterprises that go beyond those of the GATT and the GATS. Another delegation considers that state enterprises should not be treated differently from private enterprises and that the MAI obligations on corporate practices should apply to both situations. One delegation would delete article B.

[2. “Designate” means to establish, designate or authorise, or to expand the scope of a monopoly to cover an additional good or service, after the date of entry into force of this agreement.]

3. [“Monopoly” means an entity, including a consortium or government agency, that in any relevant market in the territory of a Contracting Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant] or [“Monopoly” means any person, public and private, designated by a national [or local] government authority as the sole supplier or buyer of a good or service in a given market in the territory of a Contracting Party.]¹⁷

[4. “Relevant market” means the geographic and commercial market for a good or service.]¹⁸

5. “Non-discriminatory treatment” means the better of national treatment and most favoured nation treatment, as set out in the relevant provisions of this Agreement.

[6. “State enterprises” means, [subject to Annex,] and enterprise owned, or controlled through ownership interest, by a Contracting Party.]

¹⁷ One delegation proposes the exclusion of concessions from government-designated monopolies [see DAF/MAI/EG3/RD(96)14]. Two other delegations consider that further work on concessions is needed in the broader context of the MAI.

¹⁸ One delegation suggests adding “in the territory of the Contracting Party” at the end of the sentence.

V. INVESTMENT INCENTIVES

A. *General Observations*

1. The discussion on investment incentives was based on a Note, including a proposal for draft provision, by two delegations [DAFFE/MAI/EG3/RD(96)7 and section 6 of DAFFE/MAI/EG3/RD(96)10].
2. Many delegations believed that disciplines on investment incentives would be important for the overall credibility of the MAI while at the same time recognising the role of investment incentives with regard to the aims of policies, such as regional, structural, social, environmental or R&D policies.
3. One delegation argued that a definition of investment incentives is a necessary prerequisite for increased transparency and disciplines regarding such measures. It suggested a definition of investment incentives based largely on the definitions of subsidies and "specificity" found in the WTO Agreement on Subsidies and Countervailing Measures (ASCM). The delegation also provided text for a specific transparency provision.
4. Several delegations, however, considered the nature and scope of the disciplines proposed by the delegation and others to be too ambitious. Since WTO members were still grappling with related issues, it would be premature to include disciplines in the MAI that could duplicate or detract from WTO obligations. They also took the view that there has been insufficient analysis of the nature and impact of incentives and of the nature and extent of any disciplines which would be required given the objectives of the MAI. One delegation believed more work was necessary to identify fully the degree of the negative effect of individual incentives in relation to the policy goals, often beneficial, implemented through those incentives. Problems need to be clearly identified prior to drafting disciplines aimed at addressing those problems.
5. Several delegations also questioned the viability of creating, at this stage, standstill and rollback provisions on non-discriminatory investment incentives. Subjecting investment incentives to the NT and MFN obligations would already constitute a major step forward. One delegation felt that this would also imply submitting investment incentives to transparency obligations and subjecting non-conforming measures to standstill and rollback.
6. Most delegations believed that any plans for disciplines on tax incentives should be taken up by EG2. Some delegations thought that tax measures should be excluded.
7. Some delegations expressed concern that any additional disciplines on investment incentives in the MAI could divert foreign investment to non-members and place MAI Contracting Parties at a disadvantage relative to non-members in their ability to retain or attract investment. Such disciplines could also constitute an obstacle to accession to the MAI by non-members. On the other hand, some delegations noted that it was always envisaged that the MAI, as a high standards agreement, would mandate more liberal FDI regimes among Parties than typically maintained by non-members, and disputed claims that disciplines on incentives presented any special problems in this regard.

B. Draft Provisions

Alternative 1

Several delegations believe that no additional text is necessary. They consider that the current draft articles in the MAI are sufficient to cover investment incentives at this time.

Alternative 2

Many delegations, however, would favour specific provisions on incentives in the MAI although they hold different views as to their nature and scope. Some proposed a built-in agenda for future work. Discussion of possible provisions focused on the following draft article which is regarded as a compromise text by those who would still prefer more far-reaching disciplines.

Draft Article ¹

1. The Contracting Parties confirm that Article XX (on NT and MFN) applies to the granting of investment incentives.²
2. The Contracting Parties acknowledge that[, in certain circumstances,] even if applied on a non-discriminatory basis, investment incentives may have distorting effects on the flow of capital and investment decisions.³ Any Contracting Party which considers that its investors or their investments are adversely affected by an investment incentive adopted by another Contracting Party and having a distorting effect, may request consultations with that Contracting Party.⁴ The former Contracting Party may also bring the incentive before the Parties Group for its consideration.

¹ Some delegations feel that tax measures should not be covered by this Article.

² While it is agreed that investment incentives should be subject to NT and MFN obligations, there are different views on the desirability of making this explicit. Consequently, some delegations consider this paragraph to be unnecessary. One delegation maintains a pre-scrutiny reservation on the text of this draft article. The dispute settlement mechanism would, in particular, apply to this article. One delegation raises the possibility of taking reservations with regard to NT.

³ Several delegations point out that not all investment incentives are bad -- the problem arises in drawing a line between good and bad incentives. It is suggested that the distorting effects of investment incentives on investment decisions and capital flows should be balanced against their possible benefits in achieving legitimate social objectives. Other delegations note that these concerns were addressed in paragraph 3 of the draft article.

⁴ Some Delegations remain unconvinced by the need for special consultation procedures for non-discriminatory investment incentives as defined in paragraph 2, although final judgement would need to await the decisions taken on the coverage of the MAI. The presumption is that, as with other agreements, consultations would be the first procedural step of the dispute settlement mechanism of the MAI. It should be possible to revisit the adequacy of the provisions on dispute settlement and the role of the Parties Group when their configuration is better known. One delegation questions whether the dispute settlement mechanism of the MAI could apply to investment distorting investment incentives or to investment incentives granted illegally. These questions would also deserve further attention.

3.⁵ In order to further avoid and minimise such distorting effects and to avoid undue competition between Contracting Parties in order to attract or retain investments, the Contracting Parties [shall] enter into negotiations with a view to establishing additional MAI disciplines [within three years] after the signature of this Agreement.⁶ These negotiations shall recognise the role of investment incentives with regard to the aims of policies, such as regional, structural, social, environmental or R&D policies of the Contracting Parties, and other work of a similar nature undertaken in other fora. These negotiations shall, in particular, address the issues of positive discrimination,⁷ [transparency⁸], standstill and rollback⁹.

4. For the purpose of this Article, an "investment incentive" means:

Alternative 1

The grant of a specific advantage arising from public expenditure¹⁰ in connection with the establishment, acquisition, expansion, management, operation or conduct of an investment of a Contracting Party or a non-Contracting Party in its territory.

Alternative 2

The definition proposed by one delegation (see attachment).

⁵ The form and placement of this text would have to be decided.

⁶ Some delegations feel that the MAI should include additional disciplines on investment incentives from the time it enters into force. Another delegation cautions that additional disciplines could have far-reaching implications for other multilateral agreements as well as for national tax laws and regulatory regimes.

⁷ Some delegations express the view that positive discrimination should be prohibited.

⁸ One delegation considers the transparency Article of the MAI would already be sufficient.

⁹ Some delegations considers it very difficult to recommend future negotiations without agreement on their nature and scope.

¹⁰ The question of including tax measures needs to be considered in the light of work by EG2.

*Attachment**

1.1 For the purpose of this Agreement, an investment incentive shall be deemed to exist if:

(a) there is a financial contribution by a government, i.e., where:

(i) a government provides a direct transfer of funds (*e.g.*, grants, loans, and equity infusion), potential direct transfers of funds or liabilities (*e.g.*, loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (*e.g.* fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

and

(b) a benefit is thereby conferred;

and

(c) the financial contribution meets the requirements for specificity as defined in paragraph 2.1 below;

[or]

[(d) possible text defining regulatory incentives, or a subset thereof]

* Definition proposed by one delegation. The term ‘government’ as used in this Article is intended to refer to all levels of government to which the MAI’s obligations apply.

2.1 In order to determine whether a financial contribution, as defined in paragraph 1 of this Article, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as 'certain enterprises') within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a financial contribution to certain enterprises, such a financial contribution shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions^{**} governing the eligibility for, and the amount of, a financial contribution, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the financial contribution may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of financial contribution to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a financial contribution.^{***} In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the financial contribution programme has been in operation.

2.2 A financial contribution which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific financial contribution for the purposes of this Agreement.

2.3 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

^{**} Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application such as number of employees or size of enterprise.

^{***} In this regard, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall, in particular, be considered.

VI. CORPORATE PRACTICES AND SENIOR MANAGEMENT AND BOARD OF DIRECTORS

A. Corporate practices¹

Option I

Draft Article

Paragraph 1 (Obligations on government imposed corporate practices)²

Contracting Parties shall not [encourage] or [require] a company established in its territory, by law [or other government measures], to conduct its activities [in a manner inconsistent with the Contracting Party's obligations] pursuant to [any] provisions of this Agreement.

[Such [encouragement] or [requirement] inconsistent with the Contracting Party's obligations includes³:

- limits to the acquisition of shares of the voting capital the company which distinguishes between investors or investments of that Contracting Party and investors or investments of other Contracting Parties;
- rules on the nationality or residency of members of the company's board of directors;
- the issuing of different classes of shares with different voting rights with provisions governing the right of foreigners;
- [others to be defined].]

¹ One delegation reserves its position on Option I, paragraph 1; paragraph 3, alternatives 2, 3 and 4; paragraph 4; and, Option II. Another delegation considers that if the behaviour of state enterprises were to be covered by this article, there would no need to have a specific article on state enterprises. The coverage of state enterprises in this article could be achieved by adding the words "public and private" before "company" in paragraph 1 and before "corporations" in paragraph 2.

² While several delegations favour the general thrust of paragraph 1, it is felt necessary to discuss further its content, notably that of the square brackets; for example, the word "require" could be replaced with "impose" and the word "any" with "National Treatment/MFN/Transparency". Some delegations wonder whether it is necessary to list specific examples of corporate practices. Four of them, in particular, stress the problem of including residency provision for boards of directors which is a regulatory requirement in their countries. Some delegations noted a possible inconsistency between the second tiret and the draft article on senior management and board of directors presented below.

³ One delegation favours a closed list.

Paragraph 2 (Introduction to obligations on non-government imposed corporate practices)⁴

Contracting Parties recognise that corporate practices not imposed by Contracting Parties can involve discriminatory treatment of foreign investors [and their investments].⁵

Paragraph 3 (Obligations on non-government imposed corporate practices)⁶

Alternative 1⁷

Contracting Parties shall require that the statutes, articles of association and by-laws of their corporations shall not contain provisions providing for the discriminatory treatment of foreign investors [and their investments].

Alternative 2⁸

Contracting Parties shall require that the statutes, articles of association and by-laws of their corporations listed in security exchanges shall not contain provisions providing for the discriminatory treatment of foreign investors [and their investments].

Alternative 3⁹

Contracting Parties shall ensure that the articles of association of enterprises established under its law do not provide for the following types of rules:

- limits to the acquisition of shares of the voting capital the company which distinguishes between investors or investments of that Contracting Party and investors or investments of other Contracting Parties;
- rules on the nationality or residency of members of the company's board of directors;
- the issuing of different classes of shares with different voting rights with provisions governing the right of foreigners;
- [others to be defined].

⁴ The text of this paragraph may need to be modified in accordance with the approach adopted for paragraph 3.

⁵ One delegation reserves its position on the inclusion of "and their investments" in paragraphs 2 and 3.

⁶ Several delegations have serious reservations about creating obligations on corporate practices which are not mandated by governments since this would interfere with the freedom of business to contract and may be difficult to implement. One delegation suggests the addition of the word "explicitly" between "provisions" and "providing".

⁷ Proposal by one delegation.

⁸ Proposal by one delegation aiming at limiting the obligations to practices by corporations listed in security exchanges.

⁹ Proposal by one delegation.

Contracting Parties shall endeavour ¹⁰to effectively limit the use of corporate practices which may [*de facto* discriminate against] [which may have distorting effects on]¹¹ foreign investors [and their investments], including:

- the designation of voting rights to shareholders which are not proportionate to the shareholder's stake in the company capital¹²;
- the issue of preference shares without voting rights;
- provisions in the articles of association which confer on the holders of a particular category of shares an exclusive right to put forward nominations for a majority of those members of the administrative organ whose appointment is a matter for the general meeting.
- [others to be defined].

Alternative 4

Zero option

Paragraph 4 (Transparency)¹³

Contracting Parties shall provide at the request of another Contracting Party information on certain corporate practices of its own investors or investments, subject to its domestic law [and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Contracting Party]. [At the request of the information-providing Contracting Party this information must be kept confidential by the requesting Contracting Party.]¹⁴

Paragraph 5 (Consultations)¹⁵

Each Contracting Party shall, at the request of any other Contracting Party, enter into consultation with a view to eliminating corporate practices¹⁶ of the type not covered by paragraph 3, alternative 1. The Contracting Party addressed shall accord full and sympathetic consideration to such a request and shall co-

^{10.} One delegation expresses concern about the relationship between a best endeavour clause and the dispute settlement mechanism of the MAI.

¹¹ It needs to be determined whether this best endeavour provision should be limited to cases of "discrimination" against foreign investment or measures that "may negatively affect" such investments.

^{12.} One delegation reserves its position on this indent.

¹³ With a view of giving greater focus to the transparency provisions, one delegation proposed the following alternative language: "Subject to confidentiality requirements, Contracting Parties shall make publicly available the articles of association of enterprises established in their territory."

¹⁴ Proposal by one delegation. It is suggested that legal experts verify if the version in the latter square bracket might overcome the conditionality of this provision contained in the former square bracket (as in GATS).

¹⁵ Proposal by one delegation. One other delegation reserves its position on this paragraph.

¹⁶ One delegation suggests the insertion of "not discriminatory effect" after "corporate practices".

operate through the supply of publicly available non-confidential information of relevance to the matter in question. The Contracting Party shall provide information available on corporate practices to the requesting Contracting Party, subject to its domestic laws and practices and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Contracting Party.^{17, 18}

Paragraph 6 (Dispute settlement)¹⁹

Dispute settlement as provided for in the Agreement shall apply in relation to paragraphs 3, 4 and 5.²⁰

Option II

A number of delegations believe that no text on corporate practices is necessary. The existing draft MAI provisions would be sufficient to cover government measures which mandate corporate practices which discriminate against foreign investors or their investments. They consider that the MAI should not get into the domain of private corporate practices.²¹

B. Senior management and board of directors²²

Draft Article

Paragraph 1

No Party may require that an enterprise of that Party that is an investment of an investor of another Party appoint to senior management positions individuals of any particular nationality.

Paragraph 2

[A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is an investment of an investor of another Party, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.]²³

¹⁷ Proposal by one delegation.

¹⁸ One delegation considers that the consultations should pertain to corporate practices referred to in paragraph 2.

¹⁹ Proposal by one delegation. One other delegation reserves its position on this paragraph.

²⁰ A number of delegations wish to study further the relationship between the proposed consultation procedures and the dispute settlement mechanism of the MAI. There are strong reservations about submitting corporate practices to investor-to-state dispute settlement.

²¹ There are also reservations about using Article IX of the GATS as a precedent for disciplining corporate practices since this article relates to restrictive business practices in a competition policy context.

²² One delegation reserves its position on this article.

²³ Most delegations reserve their position on paragraph 2.

COMMENTARY

I. KEY PERSONNEL

A. Temporary entry and stay

Paragraph 1

1. While several delegations supported including a requirement of a "substantial amount of capital" in this paragraph, others considered it would create uncertainties and could represent an important barrier to certain forms of investment. It was noted that Drafting Group 3 has developed a provision on Denial of Benefits in the context of indirect ownership or control using the concept of "substantial business activity" [see DAF/MAI/DG3(96)1]. DG3 decided that it was not necessary to define this term.

2. Some delegations do not think it necessary to include "essential" in this paragraph and emphasise the difficulties associated with defining this term.

3. Delegations are considering whether subparagraphs a) and b) should refer to an "enterprise" or more broadly to "investment".

4. There are alternative texts proposed for subparagraph b). The first alternative is the approach submitted by one delegation. The second alternative includes a prior employment requirement. Some delegations think this requirement can distort the investment process by impacting unfairly on new investors and small/medium enterprises without any corresponding benefit to the "admitting" country. Furthermore, these delegations believe that it may not correspond to the real needs of an investment and should not be used as a measure of whether an individual is essential to an investment.

5. While there were different views as to the length of a prior employment requirement, if included, several delegations thought it necessary to retain such a requirement if only because there is a corresponding requirement in their national immigration laws. One delegation thought it might be necessary to specify that the prior employment relation must be continuous and should immediately precede entry. Another delegation questioned whether the use of prior employment requirements to avoid circumvention of national immigration laws was effective.

Paragraph 2

6. This paragraph is in brackets pending consideration of its relation to the chapeau clause.

Paragraph 4

7. Some delegations believe this issue to represent a de facto barrier to the movement of key personnel and would be willing to grant temporary entry and stay to spouses and minor children. Some countries would go further and grant the right for spouses to work under the MAI. A difficulty would be to agree on what is meant by "spouse" and by "minor" children.

8. Other delegations might consider a best efforts provision as concerns the temporary entry and stay of spouses and minor children but would have strong objections to authorising work permits. They are of the opinion that an MAI provision to grant work permits to spouses to work anywhere in the economy would create a "common labour market for MAI spouses" and give rights to the spouse that go beyond what the agreement grants to the investor. One delegation pointed to the need to ensure subsistence for spouses and children in order to grant temporary entry and stay. Some delegations expressed concern that not authorising work permits for spouses might reduce significantly the effectiveness of the Article.

Natural person of another Contracting Party

Paragraph 6

9. There are different views as to whether, for the purposes of these provisions, natural persons covered should be restricted to nationals or permanent residents of another MAI Contracting Party. There was a discussion that for key personnel, nationality should not be a criteria as long as the key personnel is an employee of an MAI investment. Some delegations do not think it necessary to define this term here since it would be covered by the definition of investor elsewhere in the agreement. One delegation clarified that it could not accept the inclusion of permanent residents as concerns the provisions for temporary entry and stay although it agrees with the inclusion of residents for the purpose of the general definition of "investor" in the agreement.

10. One delegation made a proposal for consideration which would multilateralise their bilateral treaty practice, as follows:

"Investors who are nationals of countries with whom we have certain treaty obligations (including our bilateral investment treaty partners) may, if they meet certain criteria regarding the nature of the investment, obtain visas to our country that permit them, and certain of their key employees who are also citizens of the same country, to enter and remain in our country while they are actively involved with the investment. There are known as "treaty investor", visas.

In the context of the Multilateral Agreement on Investment, it would seem inconsistent with its liberalising goals to require that key personnel of an investor be of the same nationality as the investor in order to qualify for a "treaty investor" visa. One approach we would be prepared to explore would be to permit issuance of a "treaty investor" visa to any key employee of a qualified MAI-country investor who was himself or herself a national of an MAI-country, whether or not an employee has the same nationality as the investor. Thus, assuming that Germany, France and our country all join the MAI, a French key employee of a German company would be eligible for a "treaty investor" visa if the German company were to make a qualifying investment in our country.

We do not propose expanding the criteria for eligibility for a "treaty investor" visa, either in terms of the nature of the investment requires, or in terms of the types of personnel who qualify. We merely are suggesting that nationality not be a limiting factor, provided that the investor, and the key employee seeking the visa, are both nationals of MAI-member countries. Nevertheless, such a change in the "treaty investor" programme would require an amendment to the legislation that authorises such visas."

Enterprise

11. Most delegations did not think that these provisions should include a definition of the "enterprise" of another Contracting Party since it is already defined in the general definitions of the agreement.

Executive, Manager, Specialist

12. The Expert Group thought the definition of the categories of executive and manager were generally appropriate, except that there might be some overlap between the two. The category of "Specialist" will need some further reflection and may need to refer to the possibility of verifying professional qualifications. One delegation would like to include "trainers" in this category.

B. Employment requirements

13. This provision would permit an investor to hire persons without regard to nationality. While the MAI should prevent the application of national employment quotas or labour market (economic needs) tests, it should not be used by a foreign investor to circumvent the application of certain national laws such as anti-discrimination laws. It should also not prevent a Party from ensuring compliance with its laws as concerns the conditions it attaches to the granting of sejour and work permits. However, any administrative practices necessary for purposes of verification should not be used to undermine or nullify the provision.

III. PRIVATISATION

General

14. Some delegations question the need for a separate article confirming the application of the National Treatment/MFN obligations to privatisation operations. Other delegations feel, on the contrary, that it was worthwhile to underline this important addition to OECD obligations. Privatisation can be a complex and politically sensitive matter. There is thus a need to specify how the MAI obligations would interrelate to particular privatisation transactions or schemes. Foreign investors attach particular importance to transparency. While acknowledging differences of opinion over the best approach to this issue and leaving its options open, the Expert Group agreed to work on the basis of the proposed text.

Paragraph 2

15. Some delegations wondered how this provision would interrelate to the MAI provisions on expropriation and compensation.

Paragraph 3

16. One delegation wondered whether the provision was fully consistent with the National Treatment/MFN Treatment obligations. Another delegation considered there is a lack of balance, and thus discrimination, inherent in special share arrangements in that they would allow a Contracting Party to retain control while devolving business risks to private investors. Some delegations considered that special share arrangements will remain a feature of individual privatisation schemes and that the MAI should provide some flexibility in this area. A large majority shared the view that these special schemes should not be considered to be inconsistent with the National Treatment and MFN Treatment obligations unless they explicitly or intentionally discriminate against foreign investors. There might be a need, for instance, to set aside a proportion of initial sales to private persons or institutes. As in the case of monopolies, there is also a link with the room of manoeuvre the Contracting Parties would have in regard to the lodging of country specific reservations/exceptions: precautionary reservations would be necessary. Some delegations expressed reservations about the idea of special consultation procedures in this area in addition to those that might be contemplated under the consultation/dispute settlement provisions of the MAI.

Paragraph 5

17. The proposed definition was considered to be a good starting point for discussion. However, as it stands, the definition would cover sales from one government to another or between a government and a state enterprise. These sales do not result in increased participation from the private sector and may thus not be compatible with the concept of privatisation. The expression “transfer of control” may not be appropriate for partial sales. Account should be taken of the definition discussed in paragraph 66 of the Expert Group’s Report to the Negotiating Group [DAFFE/MI/EG3(96)7].

V. MONOPOLIES

General

Paragraph 1

18. There is consensus that the right of governments to create, allow or maintain monopolies could not be challenged under the MAI. But there is no consensus on the need to make it explicit in the MAI. Several delegations supported the language confirming the right of governments to designate new monopolies, although this could also be done through an interpretative note. One delegation was of the view that, without such a provision, there would be uncertainties about the scope of application of the MAI in this field. Some delegations remained unconvinced, however, of the need to mention this right explicitly in the Agreement. One delegation noted that government prerogatives on monopolies also apply to their elimination; inclusion of the word “eliminating” at the end of the phrase would make this clear and produce a more balanced provision. Some delegations noted the link between the designation of new monopolies and the MAI article on Expropriation and Compensation [Section IV of DAF/MAI(96)16/REV1]. One delegation pointed out that the need for paragraph 1 would be enhanced by the inclusion of market access disciplines in the MAI.

Paragraph 2

19. A large majority of delegations considered that the National Treatment and MFN Treatment obligations should apply to the designation of new monopolies. Several delegations pointed out the difficulty of applying such obligations to every situation that may arise in the future, notably in the context of the introduction of new technologies and felt that a “best endeavour” undertaking would be more appropriate. Delegations also noted the link with the demonopolisation issue and, in particular, that of the lodging of country-specific reservations or exceptions.

Paragraph 3

20. A large majority of delegations considered that the provisions of the Monopolies article should apply to government-designated monopolies at all levels of government and not be limited to those designated by central governments. One delegation suggested that in the case of privately-owned monopolies, the obligations should apply only to those created after the entry into force of the MAI and not to existing ones. This delegation argued that it would be difficult to apply the obligations retroactively to existing privately-owned monopolies while such practical difficulties would not arise with respect to existing government monopolies.

21. Several delegations considered desirable to confirm in *subparagraph (a)* the application of the MAI obligations, notably that of National Treatment and MFN, to the delegation of regulatory powers. Some delegations felt this problem could be addressed in the context of a general anti-circumvention clause covering all provisions of the MAI. One delegation wondered if the language not being “inconsistent with the Contracting Parties obligations” was precise enough to avoid different interpretations. A few delegations questioned the need altogether for an anti-circumvention clause in the Agreement.

22. There was general agreement in favour of an obligation along the lines of *subparagraph b)* requiring government-designated monopolies to provide non-discriminatory treatment in their *sales of*

monopoly goods or services. This obligation would not apply, however, to the sale of goods or services produced in competition with private operators.

23. Concerning the coverage of *purchases* of monopoly goods and services in *paragraph c)*, the desirability of excluding procurement transactions covered by the GATT Agreement on Government Procurement (GPA) was not disputed, but it remained unclear what remaining procurement practices would be captured by the MAI as a result of this exclusion. One clear-cut example was marketing boards with monopsony powers over particular commodities. It was also noted that GPA covers the monopsony purchases of government-agencies but not those of government-designated privately-owned monopolies. This matter would need to be discussed further. One delegation mentioned that the plurilateral character of this GPA could give rise to a free-rider problem. One delegation suggested the term “monopsony” should be used when referring to the purchase of “a monopoly good or service”. Some delegations felt that this was an intrusion of the MAI in the area of competition policy giving cause for concern.

24. Concerning *subparagraph d)*, it was recognised that monopolies have the capacity to introduce market distortions, notably by cross-subsidising their business activities in competitive sectors. It was also acknowledged that abuse of dominant position was a competition policy issue. Further thought will also need to be given to the meaning of the “abusive use of prices”.

Paragraph 4

25. Demonopolisation operations are generally favourable to liberalisation since they open up new investment activities. Demonopolisation operation would have the effect, however, of extending the obligations of the MAI to a new area. Several delegations felt therefore that the MAI should provide the Contracting Parties with the possibility to lodge new country-specific reservations/exceptions when this situation occurs. This would not be contrary to standstill since country-specific reservations/exceptions introduced at the time of demonopolisation, would, in principle, be subject to standstill. These delegations welcomed, as a result, the flexibility in paragraph 4. An alternative to this approach would be precautionary country-specific reservations/exceptions lodged at the time of the entry into force of the Agreement, an avenue resisted by the Negotiating Group. This problem clearly belongs to the broader issue of liberalisation and balance of commitments.

26. Some other delegations considered that the possibility of lodging country specific reservations or exceptions should be limited to the time a Contracting Party adheres to the MAI. In the absence of such reservations or exceptions, the National Treatment/MFN obligations would apply to demonopolisation operations. One delegation thought that the combined ability to designate new monopolies and to cover by reservations or exceptions new non-conforming measures could be used to evade MAI obligations.

Paragraph 5

27. The desirability of introducing a notification requirement for existing and new monopolies was found by some delegations to be closely related to the issue of country-specific reservations/exceptions and to a MAI article on Market Access. One delegation wondered what use the Parties Group could make of this information and feared the administrative burden. One delegation suggested that a best endeavour undertaking to provide, *wherever possible*, prior notification of any newly designated monopoly, along the lines of article 1502(a) of NAFTA, might offer a more palatable approach. Another delegation recalled the proposal made in the context of the negotiations of the Supplementary Treaty to the Energy Charter Treaty which limits reporting requirements for government-designated monopolies at the sub-national level to classes of monopolies as opposed to individual monopolies.

Paragraph 6

28. A few delegations proposed to exclude from investor-state arbitration matters arising out of paragraphs 3(b), 3(c), 3(d) or 3(e) of this Article. Other delegations felt that this could set a dangerous precedent for other MAI obligations. One delegation suggested that governments should keep control over the dispute settlement process because the disputes that may arise between government-designated monopolies and foreign investors are most likely be a function of the manner in which these monopolies are regulated than to their own behaviour.

B. State enterprises

29. Several delegations questioned the need for specific provisions on state enterprises. The problem of anti-circumvention of the MAI obligations could be addressed in the context of a general article on the subject or in the context of corporate practices. State enterprises operating in the competitive sector should be treated no differently than private enterprises. One delegation considered, however, that it is not always certain that governments can divorce themselves from the activities of their state enterprises. Foreign investors may, in any case, entertain this suspicion, particularly where such enterprises play a significant role. A balance should be struck between their rights under the MAI as investors and their obligations as suppliers of goods or services to domestic and foreign investors. One delegation felt that the best way to ensure this balance is to submit state enterprises to the same rights and obligations than private enterprises.

C. Definitions

30. The Expert Group agreed to pursue its discussion of the definition of “Monopolies” on the basis of the proposed text. One delegation suggested brackets around the word “local”. A number of delegations considered that the concept of government-designated “monopolies” should also cover that of “exclusive suppliers” as in the case of Article VIII of the GATS. One delegation suggested that it be discussed whether enterprises with special concessions, for example banks, should be included or not. It was also noted that the possibility of having a GATT article XVII-type definition relating to “any enterprise” to which a party “formally or in effect” has given exclusive or special privileges”, could be considered. Finally, it was recalled that Article 22 of the ECT covers state as well as “privileged enterprises”.

31. While the concept of “relevant market” was considered to be more appropriate than that of “given market”, some delegations felt that the term “commercial market” needed to be discussed further.

32. One delegation suggested the insertion of the words “subject to Annex...” to allow, as in NAFTA, that country specific characteristics be taken into account.

VI. CORPORATE PRACTICES/SENIOR MANAGEMENT AND BOARD OF DIRECTORS

A. Corporate Practices

Option A

Paragraph 1

33. A number of delegations expressed a clear preference for the first option which would limit the obligation of a Contracting Party to that of not encouraging or requiring a company to engage in certain practices. A difference could be introduced between shares traded in the stock exchange and other types of shares. Other delegations felt, however, that this provision amounts to an anti-circumvention clause, an article under consideration for the MAI as a whole. One delegation suggested that the term “other government measures” would need to be defined.

34. Some delegations specifically questioned the merits of including an illustrative list of corporate practices. Other delegations expressed reservations to the inclusion of some of the practices listed (such as residency requirements and issuance of different classes of shares). One delegation warned that “negative pledges” are common practices in certain countries and limiting their use could negatively affect the commercial interests of those which make use of them.

Paragraph 2

35. Delegations recognised that corporate practices can constitute an impediment to international investment. It was also felt that the MAI should not fall behind the GATS.

Paragraph 3, Alternative 1

36. Several delegations considered that the prohibition of discriminatory provisions in company statutes, articles of association and by-laws proposed in alternative 1 goes too far in limiting the freedom to contract and infringing upon the autonomy of the business sector. It would require legislative action in all OECD countries on a politically delicate subject. A best endeavour provision in this area would appear to be more realistic approach.

Paragraph 3, Alternative 3

37. With regard to the “best endeavour” provision, contained in this alternative, a number of delegations considered that it would intrude too much into the private sector domain and should not be pursued. Some delegations wondered how the “*de facto*” concept would be interpreted.