



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Informal Consultations on “Special Topics”

INFORMAL CONSULTATIONS ON MONOPOLIES

MONOPOLIES

Draft paragraph 3

3. Each Contracting Party shall ensure that any privately-owned monopoly that its national [or subnational]¹ governments [maintains]² or designates and any public monopoly that its national [or subnational] governments 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;³
- b) provides non-discriminatory treatment to investments of investors of another Contracting Party⁴ in its sale⁵ of the monopoly good or service [in the relevant market]⁶;
- c) provides non-discriminatory treatment to investments of investors of another Contracting Party⁷ in its purchase of the monopoly good or service [in the relevant market]⁸. [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

¹ Most delegations consider that the obligations of the Article should apply to all levels of government.

² Some delegations are concerned about the application of the obligation of this paragraph to existing privately owned monopolies.

³ 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). This delegation will submit a draft for an anti-circumvention clause for the next round of discussions on Monopolies.

⁴ It needs to be verified whether this language adequately covers the pre-establishment phase.

⁵ One delegation proposes to replace "sale" by "supply".

⁶ Most delegations were in favour of deleting the reference "in the relevant market" as this issue would be solved in the context of the definition of monopolies.

⁷ It needs to be verified whether this language adequately covers the pre-establishment phase.

⁸ Most delegations were in favour of deleting the reference "in the relevant market" as this issue is likely to be solved in the context of the definition of monopolies.

⁹ The relation with the GATT Agreement on Government Procurement needs to be studied further. One delegation reserved its position on the second sentence while another one maintained a waiting reserve on the latter part of the sentence.

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.

Possible alternative text for sub-paragraph d)¹¹

[d) which competes, either directly or through an affiliated company, in an economic activity outside the scope of its monopoly rights does not abuse its monopoly position in that activity to act in an manner inconsistent with the obligations of this Agreement.]

[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.]¹²

[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.]¹³

[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; rather, they are subject to this subparagraph when they are used as instruments of anticompetitive behaviour by the monopoly firm].¹⁴

New proposal by one delegation for the definition of monopolies (see paragraphs 3 and 4 of Part C of the Monopolies section of the consolidated text DAFPE/MAI(97)1)

3. “Monopoly” means any person or group of persons, public or private, whatever its legal nature, designated by a national [or local] government authority as the sole supplier or buyer of a commercial [or marketable] good or service in the territory or a part of the territory of a Contracting Party, for an indefinite period of time.

4. (deleted)

Rationale:

¹⁰ Several Delegations expressed concerned about the intrusion of this provision into the area of competition policy.

¹¹ Delegates agreed to examine language for an alternative to paragraph 3(c) based on article VIII.2 of the GATS.

¹² Proposal by two delegations. This proposal did not meet with the agreement of other delegations. The two delegations were invited to provide examples of the situations covered by sub-paragraph d). This could provide the basis for determining the merits of the inclusion of such a provision in the MAI. The following two paragraphs encountered similar reservations from delegations.

¹³ Proposal by the two delegations not discussed by the Expert Group N°3.

¹⁴ Proposal by the two delegations not discussed by the Expert Group N°3.

The words “or group of persons..., whatever its legal nature” aim at including all kinds of persons from the legal point of view, as, for example monopolistic consortium.

The word “designated” implies that *de facto* (and not *de jure*) monopolies are not included in this definition.

The word “commercial” (or “marketable”) aims at excluding public non-marketable activities such as justice, the police, the army, etc. ... and constituencies for delegated public authorities such as notaries ...

The words “for an indefinite period of time” are an attempt to draw the line with non-monopolistic exclusive rights as concessions (for instance, a mining concession for a given mine, etc. ...), which should not be included in the definition of monopoly and which are usually (always?) granted for a definite period of time.

Comments

- This proposal has been discussed among experts. Some consider that this definition should include the concept of “market”, or even the concept of “relevant market”. Some have strong difficulties with the term “relevant”.
- The addition of “for an indefinite period of time” deserves further consideration.
- A possible carve out for IPR needs to be discussed further.