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Negotiating Group on the Multilateral Agreement on Investment (MAI)

Informal Consultations on "Special Topics"

RESULTS OF THE INFORMAL DISCUSSION ON SPECIAL TOPICS ON 24-26 MARCH 1997

(Report to the Negotiating Group)

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RESULTS OF THE INFORMAL DISCUSSION ON SPECIAL TOPICS

24-26 March 1997

I. TEMPORARY ENTRY, STAY AND WORK OF INVESTORS AND KEY PERSONNEL

This issue was not discussed at the March meeting. The basis for further work is the text from the February meeting which is reproduced here in order to present a complete report.

Draft Article on temporary, stay and work of investors and key personnel

1. Subject to the application of Contracting Parties' national laws, regulations and procedures affecting the entry, stay and work of natural persons:

(a) Each Contracting Party shall grant temporary entry, stay and authorisation to work[1] and provide any necessary confirming documentation to a natural person of another Contracting Party who is:

(i) an investor who seeks to establish, develop, administer or provide advice or essential technical services to the operation of an enterprise[2] to which the investor has committed, or is in the process of committing, a substantial amount of capital, or

(ii) an employee employed by an enterprise referred to in (i) above, or by an investor, [for a period of not less than one year,] in a capacity of executive, manager or specialist and who is essential to the enterprise;

so long as that person continues to meet the requirements of this Article[3];

(b) (i) Each Contracting Party shall grant temporary entry and stay and provide any necessary confirming documentation to the spouse and minor children of a natural person who has been granted temporary entry, stay and authorisation to work in accordance with this Article. The spouse and minor children shall be admitted for the period of the stay of that person.

(ii) Each Contracting Party is encouraged[4] to grant authorisation to work to the spouse of the person who has been granted temporary entry, stay, and authorisation to work in accordance with this Article.

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1. Interpretative note: "The granting of an "authorisation to work" may imply that a natural person have to meet specific professional qualifications required in order to carry out particular activities. Professional qualification criteria that may be applicable are outside the scope of this Article."

2. Enterprise under this Article would have the same meaning as under the definition of Investment.

3. Interpretative note: "It is understood that the national authorities may periodically verify continued eligibility under this paragraph".

4. Some countries prefer "shall endeavour" and may need to refer to capitals before agreeing to deletion.

[The national laws, regulations and procedures referred to above shall not be invoked by a Contracting Party as a means of evading its obligations under this Article[5].]

2. No Contracting Party may deny entry and stay as provided for by this Article, or authorisation to work as provided for by paragraph 1(a) of this Article, for reasons relating to labour market or other economic needs tests or numerical restrictions in national laws, regulations, and procedures.

3. For the purposes of this Article:

[**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;][6]

Executive means a natural person who primarily directs the management of an enterprise 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 may be required to possess specific or proprietary knowledge of the enterprise's product, service, research equipment, techniques, or management.

5. Whether there should be an anti-abuse clause, its precise wording, as well as its specific placement, here or elsewhere in the Agreement, is to be decided.

6. Several delegations have concerns with extending the benefits of the MAI Key Personnel provisions to permanent residents of another Contracting Party. This issue arises in two cases: (i) "investor" as currently defined and (ii) "executive", "manager", "specialist".

II. ARTICLE ON PERFORMANCE REQUIREMENTS[7]

1. A Contracting Party shall not, in connection with the establishment, acquisition, expansion, management, operation or conduct[8] of an investment in its territory of an investor of a Contracting Party or of a non-Contracting Party, impose, enforce or maintain any of the following requirements, or enforce any commitment or undertaking[9]:

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

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

(c) to purchase, use or accord a preference to goods produced or services[10] 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 to the volume or value of its exports or foreign exchange earnings;

(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

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7. One delegation reserved its position on all obligations on performance requirements that go beyond those in the TRIMS Agreement and the Energy Charter Treaty.

8. This listing of investment operations omits the following terms “maintenance, use, enjoyment, sale or other disposition of investments” which appear in the National Treatment/MFN articles. Some delegations reserve on the inclusion of the word “conduct”.

9. One delegation proposes that the following phrase be added at the end of the chapeau of this paragraph: “or condition the receipt or continued receipt of an advantage on compliance with any of the following requirements”. This addition is intended to make clear that the performance requirements article applies in two basic circumstances: *i)* when linked to the establishment, expansion, etc. of an investment; and *ii)* when linked to the granting of an advantage.

Unless expressly stated (as proposed) in paragraph 1, there could always be some uncertainty as to whether the article would apply in cases of granting an advantage. The delegation considers this addition necessary for legal reasons as well as to provide investors with greater certainty. As was the intention in the development of a “one list” approach, the proposed addition would, in the second case (linked to an advantage), limit prohibitions to “requirements” imposed by governments. Extending the prohibitions to only certain (but not all) “commitments and undertakings” would unduly interfere with government practices regarding “voluntary” commitments in exchange for an advantage and could result in a significant burden on Contracting Parties on lodging reservations for government-firm agreements containing “prohibited” voluntary undertakings.

10. One delegation proposed an interpretative note which could read: "It is understood that this provision does not extend commitments on cross-border provision of services under the GATS." A number of delegations felt that this concern should be addressed in the context of a general provision on the relationahip between the MAI and the WTO obligations. One other delegation reserves its position on the inclusion of “services” in 1(c) with respect to requirements associated with the granting of an advantage.

undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws[11] [or to act in a manner not inconsistent with articles ... of the TRIPS Agreement];

(g) to locate its headquarters for a specific region or the world market in the territory of that Contracting Party;[12]

(h) to supply one or more of the goods that it produces or the services that it provides to a specific region or the world market exclusively from the territory of that Contracting Party;

[(i) to achieve a given level or value of production, investment, sales, employment, or research and development in its territory;][13]

[(j) to hire a given level of local personnel;][14]

(k) to establish a joint venture;[15] or

[(l) to achieve a minimum level of local equity participation.]

2. A Contracting Party is not precluded by paragraph 1 from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of a Contracting Party or of a

11. A large number of delegations indicated that they can agree to a final version of this paragraph only if a clear exception is made for the possibility of enforcing competition laws and for the transfer of intellectual property rights, as long as the latter is not contrary to the TRIPS Agreement. The exact wording of this paragraph remains to be determined in consultation with competition and intellectual property experts, to reflect the comments made in paragraph 7 of the Report to the Negotiating Group on Intellectual Property [DAFFE/MAI/(97)13]. In this context questions were raised concerning the meaning of "proprietary knowledge" and the reference to the relevant authorities.

12. Two delegations reserve their position on paragraph (g) and notes that the inclusion of (g) may inadvertently oblige Contracting Parties to lodge reservations in respect of basic business incoporation laws in so far as such laws oblige the establishment and/or maintenance of representative or head offices for legal purposes.

13. It was recognised that paragraph *i)* is not intended to interfere with legitimate government employment programmes or employment discrimination laws. A number of delegations conditioned their acceptance of this provision on the elaboration of appropriate language to give greater precision to the obligation and ensure consistency with the article on Key Personnel. Many delegations supported the deletion of this paragraph.

14. Paragraph *(j)* was left in brackets pending the outcome of the discussions on a separate provision on employment requirements.

15. Some delegations felt that the subjects covered by paragraphs k) and l) were adequately covered by National Treatment/MFN Treatment provisions. Other delegations suggested that the retainment of the paragraphs might be facilitated by the addition of the following language to paragraph 2: "For greater certainty, the National Treatment/MFN treatment obligations apply to all cases covered by this paragraph". One delegation reserves its position concerning the inclusion of (k) and (l).

non-Contracting Party, on compliance with any of the requirements, commitments or undertakings set forth in paragraphs [1(a) and] 1(f) through 1(l).[16]

3. Nothing in paragraphs [1(a),] 1(b), 1(c), 1(d), and 1(e)[17] 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, commitment or undertaking to locate production, provide particular services, train or employ workers, construct or expand particular facilities, or carry out research and development in its territory.

4. [Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and 1(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;

(c) necessary for the conservation of living or non-living exhaustible natural resources.][18]

5.[19] (a) Paragraphs 1(a), 1(b), and 1(c) do not apply to qualification requirements for goods or services with respect to export promotion [and foreign aid] programmes[20];

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16. Three delegations supported the inclusion of 1(a). The term "commitments" or "undertakings" would be deleted if one delegation's proposal for the chapeau of paragraph 1 was agreed to. One other delegation supported the deletion of the reference to paragraphs 1(f), 1(g) and 1(h).

17. The listing of the subparagraphs would depend on the coverage of paragraph 2. Two delegations expressed concern over the scope of the carve-out resulting from paragraphs 2 and 3.

18. Several delegations shared the view that issues relating to the environment and protection of human, animal or plant life or health would be more appropriately treated in the context of a more general article of the MAI. A number of delegations also remained concerned about the wide coverage of subparagraph (a). Many delegations were willing to consider replacing paragraph 4 with the following interpretative note proposed by one delegation [DAFFE/MAI/ST/RD(97)1]:

"Nothing in paragraphs 1(b) and 1(c) shall be construed to prevent any Contracting Party from adopting or maintaining measures necessary to secure compliance with environmental [laws and regulations] that are not otherwise inconsistent with the provisions of this Agreement and that are necessary for the conservation of living or non-living exhaustible natural resources, or [that are necessary to protect human, animal or plant life or health.]"

19. One delegation proposed the following interpretative note as an alternative for paragraph 5:

"Nothing in paragraph 1(a), (b) and (c) shall be construed to prevent any Contracting Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of a Contracting Party or of a non-Contracting Party, on compliance with qualification requirements for goods or services with respect to export promotion [and foreign aid] programmes.

Nothing in subparagraph 1(b) [or 1(c)] shall be construed to prevent any Contracting Party from applying the WTO rule of Origin of Goods to the qualification for procurement by the Contracting Party or its state enterprise."

[(b)paragraphs 1(b), 1(c), 1(f), and 1(h) do not apply to procurement by a Contracting Party or a state enterprise[21]; and][22]

(c) paragraphs 1(b) and 1(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;[23]

[(d)paragraph 1(i) does not apply to requirements imposed by a Contracting Party as a part of privatisation operations.]

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20. Many delegations continued to support the inclusion of foreign aid programmes in paragraph (a). Many other delegations felt that this reference should be deleted.

21. 'State enterprise" would need to be defined elsewhere in the Agreement.

22. Delegations confirmed that subparagraph (b) should not interfere with the contracting Party's rights and obligations under the WTO Government Procurement Agreement. There was also greater support for the inclusion of reference to 1 (b) and 1(c) than to reference to 1 (f) and 1 (h).

23. One delegation suggested that this paragraph could be the subject of an interpretative note.

III. ARTICLE ON PRIVATISATION[24]

Paragraph 1 (Application of National Treatment/MFN)

The obligation on a Contracting Party to accord National Treatment and MFN treatment as defined in Paragraph XX (NT/MFN) applies to:

a) all kinds of privatisation, irrespective of the method of privatisation (whether by public offering, direct sale or other method) [25]; and

b) subsequent transactions involving a privatised asset[26].

[***Paragraph 1a (voucher schemes)***

Notwithstanding paragraph 1, arrangements under which natural 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 natural persons only and provided that there is no restriction on subsequent sales][27].

Paragraph 2 (Right to privatise)

Nothing in this Agreement shall be construed as imposing an obligation on a Contracting Party to privatise[28].

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24. Two delegations reserve their position on all privatisation obligations. One other delegation considers that dedicated MAI provisions on privatisation are unnecessary, since the basic NT/MFN obligations would apply to privatisation, and thus reserves its position on all such provisions.

25. One delegation reserves its position.

26. Four delegations reserve their position on sub-paragraph (b) as it goes beyond the scope of a privatisation article. Delegations agree that this provision does not apply to the behaviour of private entities (corporate practices). It is understood that the meaning of that provision is to prevent Contracting Parties from imposing rules on such secondary transactions which are inconsistent with NT/MFN. In the light of this, some delegations proposed to include language along the lines of "b) measures governing subsequent ...". It is felt useful that legal experts examine the ultimate formulation of this provision on the basis of this understanding.

27. One delegation is ready to withdraw this proposal if reference to vouchers schemes under paragraph 3, alternative 2, letter d, is deleted.

28. Two delegations propose to insert "prejudice Contracting Parties' rules governing the system of property ownership or" between the words "shall" and "be".

Paragraph 3 (Special share arrangements) [29]

Alternative 1

Contracting Parties acknowledge that special share arrangements are compatible with Paragraph 1, unless they explicitly or intentionally favour investors or investments of a Contracting Party or discriminate against investors or investments of another Contracting Party on the grounds of their nationality or permanent residency.[30]

Alternative 2[31]

[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.]

Alternative 3[32]

Footnote to paragraph 1

Special share arrangements which explicitly discriminate (i.e. *de jure*) against foreign investors and their investment are contrary to obligations on National Treatment/MFN treatment. It is also understood that when, in their application, special share arrangements lead to *de facto* discrimination they are also contrary to National Treatment/MFN treatment.

[Alternative 4[33]

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29. Work on paragraph 3 was based on alternative 1, which was supported by a large number of delegations. However, one delegation maintained its preference for alternative 2. It cannot accept the phrase "are compatible with paragraph 1" (Alternative 1, paragraph 3) on the grounds of the implication that such special rules, regardless of how they are exercised, necessarily conform with NT/MFN. The use, application or exercise of such relevant measures under the tirets (alternative 1) may in fact not conform with NT/MFN. One delegation shares this view. Two delegations propose the deletion of paragraph 3.

30. One delegation would still prefer the inclusion of an illustrative list, such as contained in Room Document 11 or in DAFFE/MAI(97)1.

31. 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." This proposal was not discussed by the delegations.

32. This language is put forward as a compromise. A number of delegations supporting alternative 1 state their willingness to accept this compromise pending the outcome of the discussions in the Negotiating Group on how to handle *de facto* discrimination in the context of lodging country specific reservations. One delegation suggested the insertion, after "investments" on the second line, of the words "on the ground of nationality"; of the word "intentionally" after "arrangements" on the third line; and, "on the ground of nationality", after "discrimination" on the same line. This delegation also suggested the inclusion of an illustrative list.

33. This proposal by one delegation has not been discussed by the delegations.

Nothing in this Agreement shall prevent Contracting Parties from using special methods of privatisation or having special rules as regards ownership, management 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,

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

unless they explicitly or intentionally favour investors or investments of a Contracting Party or discriminate against investors or investments of another Contracting Party on the grounds of their nationality or permanent residency.]

Paragraph 4 (Transparency)

For the purposes of this Article, each Contracting Party[34] or its designated agency shall promptly publish or otherwise make publicly available the essential features and procedures for participation in each prospective privatisation[35].*

Footnote

**Alternative 1*

This footnote confirms the application of the Transparency Article YY. Specifically, the obligations to accord National Treatment and MFN Treatment prohibit discrimination against investors and investments of other Contracting Parties with respect to all arrangements for making public information about a privatisation operation. [A Contracting Party that gives to its investors and investments access to information concerning the fact of privatisation must at the same time give that access to investors and investments of other Contracting Parties. Any information relevant to the privatisation available to investors of a Contracting Party must be available to investors and investments of other Contracting Parties, e.g. a Contracting Party must provide financial statements on request. A Contracting Party would violate National Treatment if, in order to benefit its investors and their investments, it refrains from making information publicly available, either about the fact of

34. One delegation proposed that the obligation should apply to all levels of government.

35. It is understood that the obligation of this article will be met wherever the information on a privatisation operation is made available.

privatisation or about the enterprise or entity to be privatised.][36] [It is understood that in the case of small scale privatisations, there can be some variance in the methods used to make information available.]

**Alternative 2*[37]

This footnote confirms the application of the Transparency Article YY. Specifically, the obligations to accord National Treatment and MFN Treatment prohibit discrimination against investors and investments of other Contracting Parties with respect to all arrangements for making public information about a privatisation operation. [A Contracting Party that gives to its domestic investors access to information concerning the fact of privatisation, the enterprise or entity to be privatised, and details of the privatisation process must at the same time give that access to foreign investors. A Contracting Party would violate National Treatment if it refrains from making information publicly available, either about the fact of privatisation, the entity to be privatised, or the details of the privatisation. It is understood that in the case of small scale privatisations, there can be some variance in the methods used to make information available.]

Paragraph 5 (Definition)

"Privatisation means the sale or other disposal by a Contracting Party, in part or in full, of its equity interest in, or the assets of, a [state] enterprise or government entity.**[38]

** This article is not meant to cover transactions between different levels or entities of the same Contracting Party.

36. Two delegations support the insertion of the sentences in the bracket. The other delegations see no need for such text.

37. This alternative was proposed by one delegation following bilateral consultations. It was not discussed by the experts.

38. Two delegations reserve their position on the definition. Several delegations considered that the terms "state enterprise" and "government entity" would have to be defined in the Agreement. In addition, the inclusion of "state" in the definition would make necessary additional text in order to ensure that in case of sales by several tranches all transactions would be covered even if the company ceased to be a state enterprise.

IV. ARTICLES ON MONOPOLIES/STATE ENTERPRISES/CONCESSIONS[39]

A. Article on Monopolies[40]

[1. Nothing in this Agreement shall be construed to prevent a Contracting Party from maintaining, designating or eliminating a monopoly.] [41]

2. Each Contracting Party shall [endeavour to][42] accord non-discriminatory treatment when designating a monopoly.

Paragraph 3, chapeau*: [DAFFE/MAI/ST(97)6]*

3. Each Contracting Party shall ensure that any privately-owned monopoly that its national [or subnational] governments [maintain][43] or designate and any public monopoly that its national [or subnational] governments maintain or designate:

Subparagraph *a)*

Alternative 1 (Consolidated Text)

[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;][44]

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39. This note assembles proposals made at various stages on the subject of monopolies/State enterprises/concessions, namely those contained in the Consolidated Text [DAFFE/MAI(97)1] of 13 January 1997 and in DAFFE/MAI/ST(97)6 of 21 March 1997.

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

41. The right of governments to designate or maintain a monopoly is not disputed. Some delegations considered, nevertheless, that this right should be made explicit for the sake of clarity and certainty. This right could also be the subject of a footnote or interpretative note on this paragraph. Other delegations continued, however, to favour the deletion of the paragraph, notably on the grounds that it could give rise to questions regarding the obligations on expropriation and compensation and possible market access provisions in the MAI.

42. Delegations remain divided on the desirability of removing these brackets. The issue is linked to the inclusion of provisions in the Agreement on concessions (see Section IV). Some delegations are willing to drop the contents of the brackets if there would be satisfactory provisions in the MAI on concessions.

43. At least one delegation had difficulties with the inclusion of the term "maintains" since this could create disciplines with respect to existing contracts between the government and such privately-owned monopolies and have general ramifications on the rights of existing shareholders. The importance of this problem could be increased by the coverage of sub-national entities.

44. 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) is 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

Alternative 2 (see B below)

Subparagraph b) ***[DAFFE/MAI/ST(97)6]***

b) provides non-discriminatory treatment to investments of investors of another Contracting Party in its sale of the monopoly good or service [in the relevant market];

Subparagraph c) ***[DAFFE/MAI/ST(97)6]***

c) provides non-discriminatory treatment to investments of investors of another Contracting Party 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][45];

Subparagraph d) [46]

Alternative 1 (Consolidated Text)

[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 anti-competitive 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]][47].

Alternative 2 [DAFFE/MAI/ST(97)6]

[d) which competes, either directly or indirectly, or through an affiliated company, in an economic activity outside the scope of its monopoly rights does not abuse its monopoly

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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) .

45. Some delegations reserved their positions pending clarification of the interaction of this provision with the WTO Government Procurement Agreement. It was also considered that the questions raised by sub-contracting of monopoly activities will need to be revisited in light of the language agreed on in subparagraph (c).

46. Both alternatives received a certain degree of support. Some other delegations felt, however, these two alternatives were too much of an intrusion in the area of competition policy and preferred the deletion of subparagraph (d). Those delegations which supported the first alternative did so on the grounds that it is narrower and more precise because limited to the predatory aspects of monopoly behaviour. Those supporting the second alternative feltet that this version presented the advantage of relying on GATS language (article VIII). Some delegations recalled, however, the differences in approaches between the MAI and the GATS ("top down" versus "bottom up").

47. 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).

position in that activity to act in a manner inconsistent with the obligations of this Agreement;]

Subparagraph e) ***(Consolidated text)***

[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.][48]

[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.]

[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 anti-competitive behaviour by the monopoly firm].

[**Paragraph 4** ***[DAFFE/MAI/ST(97)6]*** [49]

4. Each Contracting Party is allowed to lodge reservation to the Agreement concerning an activity previously monopolised at the moment of the elimination of the monopoly.]

Paragraph 5[50]

Alternative 1 (Consolidated Text)

[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.]

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48. Proposal by two delegations. A large majority of delegations question the feasibility and desirability of requiring monopolies to act in accordance with "commercial considerations". The last two paragraphs could end up in an interpretative note.

49. Proposal by one delegation. Some delegations were opposed to the principle of lodging reservations after the entry into force of the MAI. One other delegation proposed that such a reservation be made the subject of scrutiny by the "Parties Group" to ensure that they do not negatively affect the level of liberalisation under the MAI.

50. Some delegations propose that the concept of "prior notification" applies to both the designation and elimination of monopolies. One delegation also considers that the "Parties Group" will have a role in examining these notifications. Other delegations felt that the notification period of 60 days may be too short in comparison to the three months period provided by GATS.

Alternative 2 [DAFFE/MAI/ST(97)6]

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

Paragraph 6

[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.][51]

[B. Article on State Enterprises[52]

Alternative 1 (Consolidated Text)

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.[53]

51. Some delegations explained 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.

52. Two delegations reserve their positions on all obligations on state enterprises that go beyond those of the GATT and the GATS. Two other delegations consider that state enterprises should not be treated differently from private. One delegation would delete article.

53. One delegation considers this paragraph would be needed whichever alternative was chosen. One other delegation would like this paragraph to apply to both paragraphs 1 and 2.

Alternative 2 [DAFFE/MAI/ST(97)6]

Entities with which government has a specific relationship[54]

Each Contracting Party shall ensure that any entity:

-- that a national or subnational governments own or control through ownership interest;

-- to which a national or subnational governments authority have delegated any regulatory, administrative or other governmental authority;

-- or with which a national or subnational governments authority has relationship, through any specific legislative, regulatory or administrative act, any contracts, or any practices related to some of its activities;

acts in a manner that is not inconsistent with the Contracting Party's obligations under this Agreement.][55]

C. Definitions Related to Articles on Monopolies [and State Enterprises]

Paragraph 1

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.

Paragraph 2

Alternative 1 (Consolidated Text)

[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.]

Alternative 2 [DAFFE/MAI/ST(97)6]

2. "Designate a monopoly" means to establish or authorise a monopoly, or to expand the scope of a monopoly.

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54. Proposal by the co-ordinator to replace paragraph 3(a) of the article on monopolies and the whole article on state enterprises. While most delegations considered the first two tirets could provide a basis for further work, serious reservations were expressed over the possible inclusion of entities covered by the third tiret.

55. A number of delegations are concerned about the breadth of this obligation. They consider the drafting could be improved by aligning it to the language of alternative 1, paragraph 1, which reads: "wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Contracting Party has delegated to it".

Paragraph 3

Alternative 1 (Consolidated Text)

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.][56]

Alternative 2 [DAFFE/MAI/ST(97)6]

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 good or service in a market in the territory or part of the territory of a Contracting party, [for an indefinite period of time.][57] [possible carve out for IPR]

Paragraph 4

[4. "Relevant market" means the geographic and commercial market for a good or service.][58]

Paragraph 5

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.

Paragraph 6

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

56. One delegation proposes the exclusion of concessions with exclusive rights from government-designated monopolies [see DAFFE/MAI/EG3/RD(96)14].

57. While it is recognised that the MAI would need to draw a line between monopolies and concessions, serious doubts were expressed about the use of an "indefinite period of time" as possible criterion for the demarcation.

58. One delegation suggests adding "in the territory of the Contracting Party" at the end of the sentence and to replace "commercial" by "product".

[D. Article on Concessions *[DAFFE/MAI/ST(97)6]* [59] [60]

Transparency

Any concession shall abide by the following principles:

a) the conditions of participation in awarding procedures shall be published in due time so as to enable the candidates to engage and, in so far as it remains compatible with an efficient operation of the mechanism of attribution of concessions, to accomplish the formalities required by qualifying evaluations ;[61]

b) the procedures of awarding are written, at least, in one of the official languages of the OECD. If, for an awarding procedure, any entity authorises propositions to be submitted in more than one language, one of them shall be one of the two official languages of the OECD.[62]

This article applies to the delegations covering an amount equal or superior to XX (amount to be decided).

This article does not apply to a delegations which confer a monopoly as defined in A to the beneficiary of this delegation.

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59. Proposal by one delegation. The issue of concession is linked to paragraph 2 of the article on monopolies (see Section A). Those delegations favouring the inclusion of provisions on concessions into the MAI are ready to drop their opposition the inclusion of "best endeavour" in paragraph 2. Some delegations question the need for this article.

60. One delegation provided a background note on natural resources and concessions in the context of the MAI [DAFFE/MAI/ST/RD(97)2].

61. While it is considered that the language could be modified in some respects, a number of delegations consider such transparency provisions to be useful in the context of concessions. Other delegations wonder why such a transparency provision is not proposed for monopolies.

62. It was noted that the use of the official languages in the OECD would be determined by the institutional provisions of the Agreement.

Definition[63]

A concession is any delegation, direct or indirect, which entails a transferring of operation of activities, carried out by a governmental authority, national or subnational, or any public or paragraph-public authority.

The delegation shall be realised either by any laws, regulations, administrative rulings, or established policies, or by any private or public contract. The aim of the delegation is to entrust to a distinct legal body with the operation of networks or infrastructures, or the exploitation of natural resources, and if needed with the construction of all or part of networks or infrastructures.

[*if necessary:* The legal act of delegation includes the modes of payment to the investor. These modes of payment can consist of any price paid by consumers, any royalty, tax licence, subsidy or contribution from the delegatory authority, or any combination of these modes.]]

63. This proposal needs further consideration. One delegation favours the deletion of the reference to natural resources in the proposed text. With respect to mineral resources, including hydrocarbons resources, the delegation also proposes to replace paragraph (vii) of the current definition of "investment" in the MAI, with the following language:

"-- Rights conferred pursuant to law or contract regarding property ownership over mineral resources, including hydrocarbon resources;

-- rights conferred pursuant to any law, regulation, administrative or contractual provision or instrument issued thereunder by which the competent authorities of a Contracting Party entitle an investor or a group of investors, on its own behalf and at its own risk, the exclusive right to prospect for or explore for or produce minerals, including hydrocarbons, in a geographical area."

V. INVESTMENT INCENTIVES (Report by the co-ordinator Mark Blackmore)

An informal group discussion was carried out on Monday 24 March. Most delegations were present at the discussion. The commentary in the consolidated text provides further background and augmentation to country positions.

The vice chair of the tax experts group provided a summary of that group's discussions. The group noted the input from EG2 and agreed to proceed on the working assumption that tax incentives would be excluded from the definition of investment incentives.

There continued to be divergent views on whether or not there should be an investment incentives article in the MAI. Several delegations supported alternative 1 in the consolidated text that no additional article is necessary for investment incentives in the MAI. Other delegations noted that they were prepared to proceed with text along the lines of alternative 2.

Without prejudice to countries views on alternatives, discussion proceeded on the basis of text proposed under alternative 2.

While there was agreement that investment incentives were and should be subject to the NT/MFN/Transparency obligations, with country specific reservations permitted (as in other areas), there were different views on the desirability of making this explicit. Some delegations consider these paragraphs to be unnecessary and could even be harmful. Other delegations saw value in restating that these obligations apply to investment incentives. There was discussion on the intent of the words "the granting of" with respect to transparency, with some delegations concerned that it altered the meaning of the Transparency article.

Views differed on the inclusion of the introductory sentence in paragraph 3 that investment incentives had distorting effects. Delegations noted investment incentives may have distorting effects on the flow of capital (otherwise they would not be needed), but also noted that this was sometimes desirable to meet social and other objectives. Some delegations considered the inclusion of such "political" language inappropriate in a legal text. Some delegations saw no value in including disciplines on investment incentives, given the work going on in other fora, particularly the WTO and expressed concern about uncertainty for investors resulting from ambiguity in the application of this provision.

Some delegations were not in favour of special consultation procedures (paragraph 3) and a built-in agenda (BIA) (paragraph 4). These delegations, in particular with regard to paragraph 3, expressed concerns that consultations without clear disciplines could put investors in extremely precarious situations, which would not be in the interest of investors. Other delegations said that alternative 2 and these paragraphs in particular already represented a compromise from their preferred position of substantive disciplines on incentives, but were prepared to work on text along these lines, including the issue of positive discrimination. Some delegations continue to seek clarification on the meaning of "positive discrimination".

It was noted that further work on investment incentives may need to be considered alongside or as part of a possible general BIA for the MAI as a whole. However, this did not preclude this group considering whether a BIA was desirable for incentives.

Some delegations expressed the view that the need for any definition of investment incentives was dependent on the scope of the disciplines envisaged. They argued that application of

NT/MFN/Transparency to investment incentives would not require a specific definition given the top down nature of the MAI. Some delegations noted the current definition narrowed the scope of the article and potentially the scope of NT/MFN/Transparency on incentives. Some delegations said that the definition could be considered in the context of the built-in agenda proposed in paragraph 4.

A few delegations continued to be of the view that tax incentives should be included in the definition.

Annex[64]

Provisions on Investment Incentives
(Reflecting the Informal Consultations of 24 March)

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.

Article [65]

1. The Contracting Parties confirm that Article XX (on NT and MFN) and Article XX (Transparency) applies to [the granting of][66] investment incentives. [67]

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.[68] [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.] [The former Contracting Party may also bring the incentive before the Parties Group for its consideration.]] [69,70]

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64. This annex reproduces the contents of DAFFE/MAI/ST(97)3.

65. The Group proceeded on the basis of report of EG2 with respect to the treatment of tax incentives.

66. Some delegations favoured the deletion of "the granting of".

67. 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.

68. 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.

69. 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

3.[71] [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.[72] 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,[73] [transparency[74]], standstill and rollback[75].]

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

The grant of a specific advantage arising from public expenditure [a financial contribution] 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].

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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. Some delegations questioned the role of the parties group in any consultation process.

70. One delegation suggested the first sentence of paragraph 3 could be added to paragraph 4, and the rest of paragraph 3 deleted.

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

72. 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.

73. Some delegations express the view that positive discrimination should be prohibited and this should be placed in the text.

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

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

VI. ARTICLES ON SENIOR MANAGEMENT [AND MEMBERSHIP ON BOARDS OF DIRECTORS] AND ON EMPLOYMENT REQUIREMENTS

A. Articles on Senior Management [and Membership on Boards of directors[76]]

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 [and membership on boards of directors][77] individuals of any particular nationality.

B. Article on Employment Requirements[78]

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.

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76. Three delegations maintained a reservation on the coverage of the article concerning membership on boards of directors.

77. It was pointed out that there may be a need to define “senior management positions” and “membership on boards of directors”

78. It is understood that this article would not interfere with national anti-discrimination and labour laws.