



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Informal Consultations on “Special Topics”

**WORKING PAPER ON NATURAL RESOURCES AND CONCESSIONS
IN THE CONTEXT OF THE MAI**

(Country Contribution)

Working Paper on Natural Resources and Concessions in the Context of the MAI

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I. Sovereignty and sovereign rights over natural resources

1. Since the inception of the modern international legal order, the sovereignty of States over natural resources within their territories has been a well established rule of general international law.

2. Since World War II sovereign rights of the coastal States over natural resources on the continental shelf and in their exclusive economic zone (EEZ) have been established through the codification and progressive development of the law of the sea and notably through the Geneva Convention of 1958 on the Continental Shelf and the United Nations Convention on the Law of the Sea of 1982 (UNCLOS). Today the sovereign rights of the coastal States over natural resources on the continental shelf and in their EEZ must also be seen as part of general international law.

3. Sovereignty and sovereign rights over natural resources apply with respect to their exploration and exploitation, conservation and management, and include an exclusive right to establish a system of property ownership over mineral resources, including hydrocarbon resources. In the UNCLOS the pertinent rules are found in articles 56 and 77.

4. Sovereignty and sovereign rights over natural resources are reaffirmed in several international instruments:

5. The Energy Charter Treaty (ECT) article 18(1) provides that: "The Contracting Parties recognise state sovereignty and sovereign rights over energy resources. They reaffirm that these rights must be exercised in accordance with and subject to the rules of international law".

6. Article 1(2) common to the International Covenant on Economic, Social and Cultural Rights and The International Covenant on Civil and Political Rights of 1966 provides that: "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

7. In its resolution 1803 (XVII) of 1962 on permanent sovereignty over natural resources the United Nations General Assembly declares *inter alia*: "Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith; States and international organisations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter [of the United Nations] and the principles set forth in the present resolution".

8. Sovereignty and sovereign rights over natural resources are also reaffirmed in instruments adopted within the framework of the European Union (EU) and the European Economic Area (EEA):

9. In Directive 94/22/EC of the Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospecting, exploration and production of hydrocarbons (the Licensing Directive), the eighth preambular paragraph reads: "Whereas Member States have sovereignty and sovereign rights over hydrocarbon resources on their territories".

10. The Licensing Directive was integrated into the Agreement on the European Economic Area (the EEA Agreement) on 1 September 1995. In this context the EEA Joint Committee adopted a joint statement containing a Declaration by the Parties to the EEA Agreement in which they *inter alia* recall "that States have sovereignty and sovereign rights over petroleum resources".

II. Property ownership over natural resources

11. There is no property ownership over living resources in the EEZ or in the territorial sea or internal waters of a State. The issue arises only with respect to natural resources whether living or non-living, on the land territory of a State, and with respect to the non-living resources of those parts of the sea-bed and its subsoil which are parts of the internal waters, territorial sea, continental shelf or EEZ of a coastal State. The issue is notably pertinent with respect to mineral resources, including hydrocarbon resources.

12. The sovereignty and sovereign rights of States over natural resources include an exclusive right to establish a system of property ownership over mineral resources, including hydrocarbon resources.

13. Some international instruments relating to international economic co-operation, capital movements, and investment liberalisation and protection contain provisions to the effect that the instrument in question shall in no way prejudice the rules in Contracting Parties governing the system of property ownership over mineral resources including hydrocarbon resources:

14. ECT article 18(2) provides that: "Without prejudice to the objectives of promoting access to energy resources, and exploration and development thereof on a commercial basis, the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources".

15. ECT article 18(2) is based on article 222 of the EC Treaty which reads: "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership." The EEA Agreement contains a similar provision in its article 125.

16. In the joint statement adopted by the EEA Joint Committee when the Licensing Directive was integrated into the EEA Agreement the Contracting Parties to the EEA Agreement *inter alia* take note "that the Licensing Directive in no way prejudices the rules in Contracting Parties governing the system of property ownership".

III. Conservation and management of natural resources

A. *Some general comments.*

17. Sovereignty and sovereign rights over natural resources apply with respect to their conservation and management. States have an exclusive right to enact laws and regulations and to take other measures for the conservation and management of natural resources on their territories and continental shelf and in their EEZ. States also have obligations under international law to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered. As appropriate, the coastal State and competent international organisations, whether subregional, regional or global, shall co-operate to this end (See UNCLOS articles 61, 62, 63, 64, 65, 66, 67 and 68.)

B. *Conservation and management of living resources in the EEZ.*

18. The coastal State shall determine the allowable catch of the living resources in its EEZ (UNCLOS article 61(1)). UNCLOS article 62(4) contains the following open-ended list of conservation measures and other terms and conditions which the coastal State may establish in its laws and regulations:

- (a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms for remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;
- (b) determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;
- (c) regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;
- (d) fixing the age and size of fish and other species that may be caught;
- (e) specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;
- (f) requiring, under the authorisation and control of the coastal State, the conduct of specified fisheries programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;
- (g) the placing of observers or trainees on board such vessels by the coastal State;
- (h) the landing of all or any part of the catch by such vessels in the ports of the coastal State;
- (i) Terms and conditions relating to joint ventures or other co-operative arrangements;

(j) requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;

(k) enforcement procedures.

UNCLOS article 62(5) provides that coastal States shall give due notice of conservation and management laws and regulations.

C. Conservation and management of energy and hydrocarbon resources

19. The issue of conservation and management of energy resources is *inter alia* dealt with in ECT article 18(3) which reads: "Each State continues to hold in particular *the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the optimisation of their recovery and the rate at which they may be depleted or otherwise exploited*, to specify and enjoy taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploitation, development and reclamation within its Area, and to participate in such exploration and exploitation, *inter alia*, through direct participation by the government or through state enterprises." (Italics added.)

20. In the Licensing Directive the issue of conservation of hydrocarbon resources is regulated in article 2(1) which reads: "Member States retain the right to determine the areas within their territory to be made available for the exercise of the activities of prospecting, exploring for and producing hydrocarbons." Resource management is regulated in article 6(2) of the Directive which reads: "Member States may, to the extent justified by national security, public safety, public health, security of transport, protection of the environment, protection of biological resources and natural treasures possessing artistic, historic or archaeological value, safety of installations and of workers, *planned management of hydrocarbon resources (for example the rate at which hydrocarbons are depleted or the optimisation of their recovery)* or the need to secure tax revenues, impose conditions and requirements on the exercise of the activities set out in article 2(1)." (Italics added.)

21. Resource management is also provided for in the joint statement adopted by the EEA Joint Committee when the Licensing Directive was integrated into the EEA Agreement. In the joint statement the Contracting Parties to the EEA Agreement *inter alia* recognise "exclusive rights to resource management, *inter alia* exploration and exploitation policies, the optimization of development and production and the rate at which petroleum resources may be depleted or otherwise exploited".

D. The MAI and the conservation and management of natural resources

22. In the mandate for the MAI negotiations, the guidelines under which the negotiations are carried out are formulated as follows:

- "provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures;
- be a free-standing international treaty open to all OECD Members and the European Communities, and to accession by non-OECD Member countries".

23. It is also stated that the agreement, *inter alia*, should:

- a) "set high standards for the treatment and protection of investment;
- b) go beyond existing commitments to achieve a high standard of liberalisation covering both the establishment and post-establishment phase with broad obligations on national treatment, standstill, roll-back, non-discrimination/MFN, and transparency, and apply disciplines to areas of liberalisation not satisfactorily covered by the present OECD instruments;..".

24. The mandate and the guidelines do not make it clear that the MAI negotiations are to cover the international legal regulation of the conservation and management of natural resources as described above. The negotiating parties may want to consider safeguard clauses with a view to draw the dividing line between legal regulations of investment liberalisation and protection on the one hand and of the conservation and management of natural resources on the other.

IV. Some further observations concerning the utilisation of the living resources in the EEZ

25. The utilisation of the living resources in the EEZ is regulated in UNCLOS articles 62, 69 and 70. The pertinent provisions of article 62 reads as follows:

- i) The coastal State shall promote the objective of optimum utilisation of the living resources in the exclusive economic zone without prejudice to article 61.
- ii) The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.
- iii) In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimise economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

26. UNCLOS article 61 regulates the conservation of living resources, article 69 the right of land-locked states and article 70 the right of geographically disadvantaged states.

27. It will be seen that several of the relevant factors which the coastal State shall take into account in giving access to other States to its EEZ are in formal contradiction with the principle of non-discrimination as generally applied in the context of investment liberalisation and protection. It consequently gives rise to considerable problems to bring the utilisation of the living resources in the EEZ in under the regulations of the MAI. Two approaches seem to be possible in order to solve these problems. Either one may choose formally to exclude the utilisation of the living resources in the EEZ from the regulation of the MAI, or one may choose to include in the MAI a provision to the effect that in the event of any inconsistency between the MAI and the UNCLOS, the provisions of the latter shall apply. If one chooses the latter of these two approaches, one may also want to consider to include in the MAI a provision to the effect that the MAI shall not apply to the licensing of fishermen, fishing vessels and equipment, as the purpose of such licensing is normally the conservation and management of the living resources in the EEZ and the coastal State would not be able to fulfil its obligations under UNCLOS article 62 if a principle of non-discrimination were to apply to such licensing. Under no circumstances is national treatment or MFN-treatment with regard to access to living resources to be envisaged if no surplus exists.

28. In the handling of these questions negotiating parties which are parties to UNCLOS have to act within the framework of UNCLOS article 311(2) and (3) which reads as follows:

- This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
- Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

V. The granting and the using authorisations for the prospection, exploration and production of minerals, including hydrocarbons.

A. *Introductory comments*

29. In the context of the Licensing Directive the term "authorisation" is defined as "any law, regulation, administrative or contractual provision or instrument issued thereunder by which the competent authorities of a Member State entitle an entity to exercise, on its own behalf and at its own risk, the exclusive right to prospect or explore for or produce hydrocarbons in a geographical area" (Licensing Directive article 1(3)). The inclusion of a similar definition might also be appropriate in the context of the MAI with respect to authorisations for the prospection, exploration and production of minerals, including hydrocarbons. It should be noted that in different legal instruments other terms such as licences and concessions are often used to describe such authorizations. The discussion of the possible inclusion of the granting and using of authorisations for the prospection and production of minerals, including hydrocarbons into the MAI will be structured as follows: (1) the phase preceding the granting of the authorisation, (2) the granting of the authorisation, and (3) the phase following granting of the authorisations.

B. *The phase preceding the granting of the authorisation*

30. The phase preceding the granting of an authorisation normally is initiated by the competent authorities by means of a notice inviting applications. The pertinent legislation of a State will normally lay down procedures for inviting and submitting applications as well as for the treatment thereof. It may be an important aim of such procedures to ensure transparency and that all interested entities may submit applications.

31. The State may specify criteria on the basis of which authorisations will be granted as well as conditions and requirements which will apply to the exercise and termination of the activity covered by the authorisation by virtue of laws, regulations and administrative provisions in force at the time of submission of the application. Such conditions and requirements may be contained in the authorisation itself or may be accepted by the applicant prior to the grant of the authorisation. The criteria on the basis of which authorisations will be granted may relate for instance to the technical and financial capability of the applicants and the way in which they propose to prospect, to explore and/or to bring into production the geographical area in question. The criteria and requirements which will apply to the exercise and termination of the activity covered by the authorisation may relate for instance to resource management, national security, public safety, public health, and protection of the environment. The State may also impose requirements in its capacity of resource owner. State participation is an example of such a requirement.

C. *The granting of the authorisation*

32. The granting of an authorisation for the prospection and production of minerals, including hydrocarbons, is an exercise of public authority. It involves the application of such criteria, conditions and requirements as described above. It is normally regulated in the administrative law of the State in question, and takes place through an administrative act. The administrative law of the State in question may contain provisions to ensure that the criteria, conditions and requirements described above are applied in a non-discriminatory manner and that there is no discrimination between entities as regards access to the activities in question.

D. *The phase following the granting of the authorisation*

33. The authorisation entitles the successful applicant to exercise, on its own behalf and on its own risk the exclusive right to prospect or explore for or produce minerals, such as hydrocarbons, in a given geographical area subject to the criteria, conditions and requirements contained in the authorisation or which are accepted by the successful applicant prior to the grant of the authorisation.

E. *Legal regulation of the granting and using of authorisations for the prospection, exploration and production of minerals, including hydrocarbons.*

34. Within the EU and the EEA the Licensing Directive contains rules to ensure transparent procedures for inviting and submitting applications for authorisations for the prospection, exploration and production of hydrocarbons, and to ensure transparency in the treatment of such applications. The Directive also contains rules to ensure that all interested entities may submit applications. Furthermore, the Directive contains rules to ensure that the conditions and requirements which will apply to the exercise and termination of the activities covered by the authorisation are applied in a non-discriminatory manner and that there is no discrimination between entities as regards access to the activities in question. ECT article 18(4) aims at ensuring the same objectives.

35. The current consolidated texts of the MAI contain no such rules. It may be argued that such rules would fall outside the discipline of investment liberalisation and consequently outside the mandate of the MAI negotiations. The issues involved are not included in the definition of the term "investment" as contained in ECT article 1(6). It should also be noted that ECT article 18(4) is contained in Part IV of the ECT on Miscellaneous Provisions and not in its Part III on Investment Promotion and Protection.

36. Should it be decided to bring these issues within the scope of application of the MAI, one would have to negotiate substantive rules to regulate them. It would create legal uncertainty to include these issues in the scope of application of the MAI through the definition of the term "investment" without any such substantive rules. In this respect it should also be kept in mind that the principle of non-discrimination as defined in the MAI for the purpose of investment liberalisation may not necessarily be the most suitable definition of the term in relation to the granting of authorisations for the prospection, exploration and production of minerals, including hydrocarbons. In the EEA Agreement the principle of non-discrimination is defined as follows (article 4, which corresponds to article 6 in the EC Treaty): "Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited". This definition of the principle of non-discrimination is different from that of the MAI. The most notable difference follows from the qualification "without prejudice to any special provisions contained therein". The content of the principle of non-discrimination as contained in article 6 of the EC Treaty has been qualified further through the jurisprudence of the Court of Justice of the European Community.

37. While the issues arising during the phase preceding the granting of an authorisation for the prospection, exploration and production of minerals, including hydrocarbons, and in the context of the granting of such authorisation, do not easily lend themselves to inclusion in an asset-based definition of the term investment, and, consequently, a strong case can be made for their exclusion from the MAI negotiations, the same is not case for rights conferred by virtue of such authorisations. Such rights should therefore be fully covered by the MAI.

VI. Proposals

A. *The preamble*

38. The negotiating parties may want to include in the preamble a provisions reaffirming the sovereignty and sovereign rights of States over natural resources within the limits of national jurisdiction. Such a possible preambular paragraph may for instance read as follows:

39. "*Reaffirming* the sovereignty and sovereign rights of States over natural resources within the limits of national jurisdiction."

B. *The definition of investment*

40. With respect to mineral resources, including hydrocarbons resources, negotiating parties may want to replace paragraph (vii) in the current definition of the term "investment" with the following two paragraphs:

- 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 to exercise, on its own behalf and its own risk, the exclusive right to prospect for or explore for or produce minerals, including hydrocarbons, in a geographical area.

C. Possible safeguard clauses

41. The negotiating parties may want to consider the inclusion into the MAI of one or more of the following safeguard clauses:

- In the event of any inconsistency between this Agreement and the United Nations Convention on the Law of the Sea, the provisions of the latter shall prevail.
- This Agreement shall not apply to the licensing of fishermen, fishing vessels and equipment
- This Agreement shall in no way prejudice the rules in Contracting Parties governing the system of property ownership over mineral resources, including hydrocarbon resources
- Nothing in this Agreement shall affect the rights and duties of Contracting Parties under general international law with respect to the conservation and management of natural resources