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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: PERFORMANCE REQUIREMENTS AND MONOPOLIES ON 14 MAY 1997

## (Report to the Negotiating Group)

## I. ARTICLE ON PERFORMANCE REQUIREMENTS[1]

1. A Contracting Party shall not, in connection with the establishment, acquisition, expansion, management, operation or conduct[2] 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[3]:

(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[4] 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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1. One delegation reserved its position on all obligations on performance requirements that go beyond those in the TRIMS Agreement and the Energy Charter Treaty. One delegation also maintained a scrutiny reserve on the scope of the article.

2. 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".

3. 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.

4. Two delegations 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 reserved 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[5] [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;[6]

(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;][7]

**[**(j) to hire a given level of [local personnel] [nationals];[8] ]

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5. 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.

6. One delegation reserves its 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.

7. It was recognised that paragraph *i)* is not intended to interfere with legitimate government employment programmes or employment discrimination laws. Several delegations supported, however, the deletion of this paragraph on the basis that it is vague, too broad, and likely to encompass appropriate governmental conduct as well as conduct warranting discipline. It was noted that item (i) is unnecessary in as much as most practices identified as objectionable would also violate national treatment or other obligations and would create confusion regarding the appropriate scope of the local content prohibition in paragraph 1(b). Concern was expressed, for example, that item (i) could make it difficult or impossible to negotiate build-operate transfer (BOT) contracts, thereby jeopardising a Contracting Party's ability to finance critical infrastructure projects. Private investors whose BOT projects were not financial successes could invoke MAI investor-state dispute settlement to attempt to avoid contractual obligations on the basis that they violate item (i). Another potential problem area related to building permits which may contain conditions (e.g. road widening, construction of a parking garage, extension of sewer lines) that could be construed as performance requirements prohibited by item (i). A number of delegations reserved their position on the inclusion of this item pending further clarification of its coverage and relationship to paragraphs 2 and 3. Other delegations supported the inclusion of item (i) and stressed its importance, in particular in relation to non-OECD countries. These delegations were also of the view that the concerns expressed with respect to item (i) could be dispelled by additional clarifications. One delegation undertook to come up with a proposal to that effect for the next session of the informal consultations on Performance Requirements.

8. This item is meant to cover specific performance requirements expressed in terms of given numbers or percentages of employees while the article on employment requirements addresses problems of discrimination among natural persons holding a valid permit of sejour and work in a given Contracting Party. Some delegations felt that the concerns raised in item (j) were satisfactorily covered by the article on employment requirements. Some delegations felt that the prohibition in (j) should apply to the hiring of national, as opposed to local personnel. Some delegations maintained a reserve on this latter proposal. One delegation felt that this provision should apply in the same manner to both national and permanent residents so as to be consistent with the draft article on Key Personnel. One other delegation recalled that

(k) to establish a joint venture;[9] 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 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).[10]

3. Nothing in paragraphs [1(a),] 1(b), 1(c), 1(d), and 1(e)[11] 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] [employees][12], 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:

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the Chairman of the Negotiating Group suggested that residency requirements should not be considered to be inconsistent with the obligations of the MAI [DAFFE/MAI(97)14].

9. Several 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 reserved its position concerning the inclusion of (k) and (l) noting with respect to (l) the requirement to have provisions for nominal qualifying shares. One delegation suggested that items (k) and (l) could be combined into one provision since in their view they achieve the same result. Another delegation felt that these items should, for the time being, be kept separate.

10. The term "commitments or undertakings" would be deleted if one delegation's proposal for the chapeau of paragraph 1 was agreed to. Two delegations supported the inclusion of item 1(a). This would appear necessary to cover *inter alia*, agricultural export support and trade-marketing support programmes. One of the two delegations referred to their concerns on the coverage of services. Another delegation, on the other hand, felt that the inclusion of 1 (a) would be incompatible with the provisions of the WTO Agreement on Subsidies and Countervailing Measures. One delegation felt that there might be questions about export credits or export promotion, which would be better addressed in paragraph 5. One delegation pointed to the difficulty of distinguishing in many instances between export promotion and foreign aid programmes, both terms have therefore to be included. As regards items (g), (h), (k) and (l), several delegations failed to see the link between these items and the receipt of an advantage and suggested that they not be listed in paragraph 2. Some delegations also supported the deletion of the reference to 1 (f). One delegation considered that paragraph 2 should exclude, in any case, production and sales activities listed in item (i) of paragraph 1.

11. The listing of the subparagraphs would depend on the coverage of paragraph 2. Several delegations expressed concerns about the scope of the envisaged carve-out. Questions were raised in particular with regard to the reference to the provision of "particular" services and the construction and expansion of particular facilities (which could be assimilated to investment operations). Three delegations considered paragraph 3 to be redundant given the content of paragraph 2.

12. One delegation suggested the use of the term "employee" rather than "worker".

(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.][13]

5.[14] (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[15];

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13. 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 :

"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 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.]"

One delegation considered that the phrase "that are not inconsistent with the provisions of this Agreement" did not fit well in this proposal.

14. One delegation proposed the following interpretative note as an alternative for paragraph 5 (a):

> "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, 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."

This delegation also proposed the following additional subparagraph or interpretative note to paragraph 5:

> "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 (a), (b) and (c) shall be construed to prevent any Contracting Party from applying trade measures that are set forth in [Article XX of] the GATT 1994.

The delegation explained that this proposal intends to cover some of the exceptions allowed in Article XX of GATT 1994, namely paragraphs (b), (d )and (g) of this latter article. It also invited delegations to consider whether the other subparagraphs of article XX of GATT 1994 need to be mentioned as exceptions to Performance Requirements obligations of the MAI.

15. Many delegations continued to support the inclusion of foreign aid programmes in paragraph (a). Other delegations felt that this reference should be deleted. Several delegations failed to see the link between export promotion (or export credits for that matter) or foreign aid programmes and investment operations. One delegation noted that it is very difficult in many instances to distinguish between export promotion and foreign aid programmes. Another delegation observed that export promotion covers a much narrower field than export credits or subsidies. It also noted that foreign aid programmes are not always given directly to states, but sometimes proceed through private entities such as Non-Governmental Organisations (NGOs). Domestic sourcing requirements imposed on such organisations might result in preferential treatment to

[(b)paragraphs 1(b), 1(c), 1(f), and 1(h) do not apply to procurement by a Contracting Party or a state enterprise[16]; and] [17]

(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;[18]

[(d)paragraph 1(i) does not apply to requirements imposed by a Contracting Party as a part of privatisation operations.] [19]

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domestically-controlled firms over foreign-controlled ones. One delegation felt that these special situations would be better addressed in an interpretative note.

16. The term "state enterprise" would need to be defined.

17. Delegations confirmed that the performance requirements article should not interfere with the Contracting Party's rights and obligations under the WTO Government Procurement Agreement. Several delegations questioned however whether the proposed carve-out afforded by subparagraph 5(b) would achieve that result or might be construed instead to be in conflict with commitments under the WTO Agreement on Government Procurement. Other delegations believe that the proposed language does achieve this objective and consider it necessary given that the WTO disciplines do not apply in the same way to all countries and government entities and that it would be desirable to preserve the delicate balance reached under the WTO Government Procurement Agreement. **One delegation suggested that this paragraph could be the subject of an interpretative note.** It was generally recognised that the matter needs to be examined further to ensure that consistency is achieved between the MAI and the WTO provisions. There was greater support, nevertheless, for the inclusion of 1(b) and 1(c) than for the inclusion of 1(f) and 1(h).

Two delegations proposed consideration of the following interpretative note to clarify the relationship with the WTO Government Procurement Agreement:

"The Performance Requirements article does not affect any obligations that may exist under the WTO Government Procurement Agreement."

This suggestion **received a favourable reaction from other delegations.**

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

19. Several delegations supported the inclusion of paragraph 5(d) to avoid any potential conflicts between paragraph 1(i) and privatisation operations. The problems could also be solved if paragraph 1(i) was deleted. Two delegations opposed the inclusion of this provision.

## II. ARTICLES ON MONOPOLIES/STATE ENTERPRISES/CONCESSIONS

### A. Article on Monopolies[20]

[1. Nothing in this Agreement shall be construed to prevent a Contracting Party from maintaining, designating or eliminating a monopoly.] [21]

2. Each Contracting Party shall [endeavour to][22] accord non-discriminatory treatment when designating a monopoly.

**Paragraph 3, chapeau*:***

3. Each Contracting Party shall ensure that any privately-owned monopoly that its national [or subnational] governments [maintain][23] or designate and any public monopoly that its national [or subnational] governments maintain or designate:

**Subparagraph a)**[24]

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 monopoly good or service;

**Subparagraph b)**

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

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

21. 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.

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

23. One delegation has 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. Another delegation is of the view that this problem could be increased by the coverage of sub-national entities. Other delegations consider it essential that monopolies designated by sub-national authorities should be covered by the disciplines. They recognised that the reference to national and sub-national governments might not be necessary in light of the solution found for the general treatment of sub-national entities under the MAI.

24. There is broad agreement that the issue of delegated regulatory powers of monopolies should be the subject of an anti-circumvention clause. Many delegations felt that the matter could be addressed in the context of a general anti-circumvention clause for the MAI.

**Subparagraph c)**

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;[25]

**Subparagraph d)**

***Alternative 1***[26]

[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][27] 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][28];

***Alternative 2***[29]

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

25. One delegation raised the issue of the treatment of sub-contracting of monopoly activities. One other delegation remains concerned about the broad scope of carve-out implied by the second sentence and favours its deletion, noting that much, if not all, of the core business of government is not involved in producing goods and services for commercial sale.

26. Four delegations supported this alternative on the basis of it being broader and more precise than alternative 2.

27. One delegation felt that the inclusion of this term would be necessary to cover damages incurred by foreign investors in the pre-establishment phase.

28. One delegation could agree to the deletion of the phrase "in particular through the abusive use of prices" on the understanding that this practice was covered by the terms "predatory conduct". Another delegation considered that the term "abusive use of prices" has a broader coverage than the concept of anti-competitive practices.

29. This proposal, based on Article VIII of the GATS, was supported by five delegations. These delegations considered that this provision would be useful in dealing with the activities of monopolies outside the scope of their monopoly rights, without getting too deeply into competition policy. One other delegation wondered what abuses of monopoly positions would be "inconsistent" with the obligations of the MAI.

***Alternative 3: zero option***[30]
[**Subparagraph e)**[31]

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.

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** [32]

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**

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30. Some delegations considered that alternatives 1 and 2 involve too great of an intrusion into competition policy and supported their deletion. Two delegations supported alternative 2 as a fallback in view of its more limited implications for competition policy. One other delegation supported alternative 3 on the ground that abuses of dominant positions should be dealt with under competition policy.

31. This is a proposal by two delegations. Many delegates questioned, however, the feasibility and desirability of requiring monopolies to act in accordance with "commercial considerations". One of the two delegations provided a number of explanations in favour of the inclusion of subparagraph e):

Sub-paragraph (e) would present the advantage of increasing transparency: non-commercial considerations must be both non-discriminatory [as indicated in (b), (c) and (d)] and must be clearly stated in terms of its designation. (Note, however, that if a government wants to continue to pursue social and other non-economic objectives, it can still do so through the designation.) Sub-paragraph (e) would also clarify that outside the terms of a monopoly's designation, a monopoly should act in accordance with commercial considerations just like any other enterprise (i.e. that it not use its monopoly power to influence the market). This is, in the view of the delegation, particularly important given the potential power of monopolies over markets in the context of accession. Finally, the proposed language in the two notes would make it clear that charging different prices to different customers, for example, might be justified on the basis of commercial considerations. Consideration could be given to a definition of "commercial considerations" along the lines of accepted wording in GATT Article XVII. Many delegations questioned, however, the feasibility and desirability of requiring monopolies to act in accordance with "commercial considerations".

32. Proposal by one delegation. Some delegations were opposed to the principle of lodging reservations after the entry into force of the MAI. Another delegation proposed that such reservations 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.

5. Each Contracting Party shall notify[33] to the Parties Group any existing designated monopoly within [60] [34] days after the entry into force of the Agreement, any newly designated monopoly within [60] days after its creation, and any elimination of a designated monopoly [and related new reservation to the Agreement] [35] 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.][36]

## B. Article on [state enterprises][entities with which a Government has a specific relationship]

***Option 1***[37]

**Zero option.**

33. One delegation suggested that the concept of prior notification found in Article VIII.4 of the GATS should also be examined and that the Parties Group should have a role in examining all notifications resulting from this article.

34. It was suggested that the period of three months, which is the notification period for monopolies under paragraph VIII.4 of the GATS, could be an alternative. However, it was felt that the length of the notification period could usefully be decided in light of other notification requirements that might arise under the Agreement.

35. The issue of lodging new reservations for monopolies is linked to the question dealt with under paragraph 4 of this Article.

36. 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. Three delegations also pointed to the novelty and complexity of the proposed provisions on monopolies, which argue in favour of limiting the dispute settlement procedures to state-to-state disputes apart from paragraph 3(a). They also believed that most governments do not even allow private "anti-trust" actions in their own courts by their citizens; thus it would be a leap to suggest that there be privately-initiated scrutiny of monopolies' anticompetitive actions pursuant to 3(d). These delegations considered that state-to-state dispute settlement should provide a useful procedural compromise. Many delegations considered, however, this paragraph should be deleted as they believe that Contracting Parties should only sign up to commitments that they would be prepared to defend against individual investors.

37. Several delegations supported this option. Some of them were willing, however, to consider the coverage of state enterprises in the context of an anti-circumvention clause which would cover all enterprises, *i.e.* both state and private enterprises to which authority has been granted by any level of government. One delegation could not support any of the options presented and will submit an alternative option.

***Option 2***

***i) Draft text for an anti-circumvention clause[38]***
***Alternative 1***

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.

***Alternative 2***

1. Each Contracting Party shall ensure that any entity to which a national or subnational government authority has delegated a regulatory, administrative or other governmental authority acts in a manner that is not inconsistent with the Contracting Party's obligations under this Agreement wherever such entity exercises that authority.

***ii) Additional provisions***

***a.* No additional provisions.**

***b. Proposal by two delegations[39]***

[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.[40] ]

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38. Both alternatives address the issue of anti-circumvention of the MAI obligations through the delegation of regulatory, administrative and other governmental authority to entities not covered by the anti-circumvention clause for monopolies found in paragraph 3, subparagraph (a) of the Article on monopolies (see Section A above). The first alternative is limited to state enterprises wherever they exercise regulatory, administrative or other governmental authority. The second alternative covers all entities wherever they exercise regulatory, administrative or other governmental authority without distinction of being privately or publicly owned. Some delegations considered this alternative goes too far in the domain of corporate practices. Other delegations were of the view, however, that it would be both possible and appropriate, in order to ensure the purpose of the anti-circumvention clause, to cover all entities as far as they have been given governmental authority. As with the anti-circumvention clause for monopolies, many delegations argued, however, that these matters could be addressed in the context of a general anti-circumvention clause for the MAI.

39. The two delegations believe that the need for such provisions is predicated by the fact that state enterprises are different from private enterprises because of the links with governmental authorities. One other delegation pointed out that when an enterprise is under civil law and the state is a shareholder, the state does not have any special privilege in comparison with any other shareholder. Therefore the government does not have any special authority to influence the behaviour of enterprises.

40. Some delegations pointed out that this paragraph would be needed whichever alternative was chosen. One delegation would like this paragraph to apply to both paragraphs 1 and 2.

### *c. Proposal by one other delegation*[41]

[2. Each Contracting Party shall ensure that any entity that a national or a subnational government owns or controls through ownership interest or which a national or subnational governments authority has a relationship with 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.]

## 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

2. "Designate" means to establish or authorise, or to expand the scope of a monopoly[42].

### Paragraph 3

3. "Monopoly" means any person or entity designated by a [national [or local][43] government authority] [Contracting Party] as the sole supplier[44] or buyer of a good or service in a relevant market in the territory of a Contracting Party.[45]

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41. This proposal was offered as a compromise by one delegation, which favours, nevertheless, option (a) (*i.e.* no additional provisions) as its first option.

42. One delegation maintains a scrutiny reserve on this paragraph which is also related to the coverage of the chapeau of paragraph 3 of the article on monopolies.

43. A majority of delegations prefer to replace "a national or local government authority" by "a Contracting Party" since the MAI would apply to all levels of governments. Some delegations consider, however, that a specific reference to subnational authorities is necessary since in their view it is not certain that all monopolies designated by subnational authorities would be captured by the expression "designated by a Contracting Party". One delegation is in favour of the deletion of the reference to "local" government authorities.

44. For the sake of consistency, it has been decided to replace in paragraph 3 (b) the word "sale" with "supply".

45. This definition was agreed on an *ad referendum* basis. It is subject to a satisfactory outcome on the substantive provisions on monopolies/state enterprises/concessions.

***Two alternatives for an additional phrase at the end of paragraph 3[46]:***

[, but does not include a person or entity that has been granted an exclusive intellectual property right solely by reason of such grant.]

[, but does not include a person or entity that has been granted an exclusive intellectual property right, concession, license, authorisation or permit solely by reason of such grant.]

**Paragraph 4**

4. "Relevant market" means the geographic and product market for a good or service in the territory of the Contracting Party.[47]

**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.[48]

**Paragraph 6**

[6. "State enterprises" means, [subject to Annex ...., ] an enterprise owned, or controlled through ownership interest, by a Contracting Party.][49]

**[D. Article on Concessions**[50] [51]

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46. There is substantial agreement that the definition of monopolies should explicitly exclude exclusive rights derived from intellectual property rights. A large majority of delegations supported, as a result, the first alternative wording for an additional phrase at the end of paragraph 3. Three delegations [for the reasons specified in DAFFE/MAI/EG3/RD(96)14] considered, however, there should be a similar exclusion for concessions, licenses, authorisations or permits and therefore proposed the second alternative phrase at the end of paragraph 3. They noted that the terms "concession, license, authorisation or permit" are listed in item (vii) of the definition of investment in the MAI.

    During the discussion, a large majority of delegations supported a compromise consisting of a separate note to paragraph 3, which would read as follows:

    "** This definition does not include a person or entity that has been granted an exclusive intellectual property right solely by reason of such grant. "Concessions" and "authorisations" involve government designations, but do not necessarily convey monopoly rights."

    It was also felt that more discussion is necessary on the relationship between monopolies and concessions, authorisations, etc.

47. Some delegations proposed the inclusion of the word "commercial" before "goods and services" to clarify, in particular, that the "relevant markets" for monopolies would not include government services such as the delivery of passports or driving licenses. A majority of delegations also recognised that the inclusion of the terms "in the territory of the Contracting Party" at the end of the paragraph presented the advantage of giving greater precision to the concept of "relevant market", also used in paragraphs 3(b) and 3(c) of article A on monopolies. The inclusion of these terms would also do away with the need for making a similar reference in paragraph 3 on the definition of "Monopoly". One delegation was of the view that the proposed definition needs to be improved for greater precision and clarity.

48. Three delegations questioned the need for this definition.

49. A number of delegations questioned the need for a definition of state enterprises.

***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 ;[52]

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.[53]

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

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

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50. Proposal by one delegation. It was recognised that there is a link between the issue of concessions and monopolies [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 to the inclusion of "best endeavour" in paragraph 2 if the suggested provision on concessions are included in the MAI. Many delegations question the need for this article. Some delegations felt that further work was required to clarify the issues.

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

52. A number of delegations consider that the issue of transparency is particularly important for concessions and that special provisions should be developed on this topic under the MAI. Other delegations wondered why similar provisions have not been proposed for monopolies.

53. One delegation proposed to replace the reference to the official languages of the OECD by the official languages of the United Nations. Two other delegations questioned the need to impose a language requirement for the publication of awarding procedures.

***Definition***[54]

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.]

54. 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."