Unclassified **DAFFE/MAI/ST(97)12/REV1**

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

22 July 1997

Negotiating Group on the Multilateral Agreement on Investment (MAI)

Informal Consultations on "Special Topics"

RESULTS OF THE INFORMAL CONSULTATIONS ON SPECIAL TOPICS ON 2 JULY 1997

(Report to the Negotiating Group)

This document was issued during the MAI negotiations which took place between 1995 and 1998.
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REPORT TO THE NEGOTIATING GROUP

I am pleased to submit the attached report on Special Topics which presents the results of the informal discussions held on 2 July 1997.

Chairman

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I. ARTICLE ON SENIOR MANAGEMENT [AND MEMBERSHIP ON BOARDS OF DIRECTORS[1]]

No Contracting Party may require that an enterprise of that Contracting Party that is an investment of an investor of another Contracting Party appoint to senior management positions [and membership on boards of directors][2] individuals of any particular nationality.

II. ARTICLE ON EMPLOYMENT REQUIREMENTS[3]

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

2. A large majority of delegations considered there is no need to define “senior management positions” or “membership on boards of directors”.

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

III. ARTICLE ON PERFORMANCE REQUIREMENTS[4]

1. A Contracting Party shall not, in connection with the establishment, acquisition, expansion, management, operation or conduct[5] 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[6]:

(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[7] 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;

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4. 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 other delegation also maintained a reserve on the scope of the article. One delegation reserved its position on the scope of paragraphs 3 to 5 of this article.

5. 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".

6. 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. This 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.

7. It is understood that item (c) is not meant to cover the provision of cross-border services as defined under the GATS. It was felt that this understanding could be recorded by using the following language: "This provision does not obligate a Contracting Party to permet cross-border trade in services beyond the obligations it has undertaken pursuant to GATS." This understanding could also be part of a general provision in the Agreement concerning the relationship between the MAI and the GATS. One delegation reserved its position on the inclusion of "services" in 1(c) with respect to requirements associated with the granting of an advantage. **The discussion also noted that the relationship between the MAI and the GATS was an issue that could be addressed in a number of ways, including by way of individual footnotes.**

(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 undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws, [or

-- concerns the transfer of intellectual property and is undertaken in a manner specifically permitted by articles ... of the TRIPS Agreement][8];

(g) to locate its headquarters for a specific region or the world market in the territory of that Contracting Party;[9]

(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;

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8. While the exact wording of this paragraph would need to be finalised in consultation with intellectual property experts, it was felt desirable to adopt a new presentation to distinguish between situations arising from the application of competition laws and regulations and those covered by the TRIPS Agreement. Delegations were invited to reflect upon the most appropriate formulation for the second tiret in sub-paragraph (f). It is understood that the concept of "proprietary knowledge" has a broader coverage than that of "trade secrets" and can include undisclosed information collected by an investor. **The term "specifically permitted" is narrower in scope than the term "not inconsistent with" which it replaced.**

9. 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.

[(i) to achieve a given level or value of production, investment, sales, or research and development in its territory;][10]

[(j) to achieve a given level of employment or hire a given level of local personnel;[11]]

(k) to establish a joint venture;[12] or

[(l) to achieve a minimum level of local equity participation.][13]

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10. In order to have a strong article on performance requirements with the inclusion of the elements contained in item (i) while at the same time avoiding unintended effects on legitimate domestic policies, one delegation proposed the following interpretative note:

    "For the avoidance of doubt, this provision does not **affect generally** applicable incorporation, safety or prudential requirements resulting from either contractual obligations or from generally required authorisations related to an investment which **do** not intend to authorise the investment as such, e.g. building permits or similar."

    While expressing appreciation for this draft note and recognising that it could capture some of the concerns expressed previously by delegations [DAFFE/MAI/ST(97)11/REV1, section I, footnote 7], notably with respect to BOT contracts and building permits, several delegations felt, nevertheless, that the above proposal would not cover all situations and could give rise to unintended consequences detrimental to legitimate government regulatory objectives and to the normal functioning of the economy. The language does not cover, for instance, the field of consumer protection or health care, specific employment requirements germane to specific projects (operation of an international bridge, the establishment of "food courts" in public buildings**,** concessions granted on a "work or lose it" **basis or government activity associated with anti-dumping.** Problematic scenarios are conceivable with respect to any of the fields covered by item (i). A number of delegations also indicated their governments could not accept the proposed disciplines for regional economic programmes, employment creation or social programmes. One delegation indicated their support of the deletion of subparagraph (i) relates to production, investment and employment undertakings sought in the context of privatisation programmes. For all these reasons, several delegations remained in favour of the deletion of paragraph (i). They also felt that it would be wiser to rely on the National Treatment obligation. Other delegations continued to see merit in exploring how legitimate policy concerns could be accommodated. Delegations were invited to reflect further upon this matter and to submit proposals for a solution before the next informal meeting on special topics.

11. It was considered useful to regroup performance requirements relating to employment and the hiring of personnel in a single item and to move the reference to level of employment from item (i) to (j) while acknowledging that these terms covered different situations. Several delegations considered that the notion of local personnel could encompass that of "nationals". Some delegations had difficulty, however, with the inclusion of the term "local personnel" and felt that it should be replaced by the term "nationals". One delegation noted that "local personnel" could be interpreted as *de facto* prohibiting all residency requirements. It also recalled that 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]. Irrespective of the final coverage of item (j), it was confirmed that it would not overlap with the MAI article on Employment Requirements (see section II) since it 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.

12. It was recalled that when the Negotiating Group discussed the subjects covered by paragraphs k) and l), a majority of delegations expressed a preference for listing these two items in the performance requirements article even though it was recognised that they were adequately covered by National Treatment/MFN Treatment provisions [DAFFE/MAI/M(97)4] The value added would be to make it prominently clear to investors that these types of performance requirements are prohibited.

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).[14]

3. Nothing in paragraphs [1(a),] 1(b), 1(c), 1(d), and 1(e)[15] 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 personnel, 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;

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13. One delegation has pointed out that item (l) could create problems with respect to company law provisions for nominal qualifying shares.

14. Several delegations expressed uneasiness about the content of paragraphs 2 and 3 while acknowledging that their concerns also relate to the way the whole article on performance requirements has been constructed. Delegations were invited to reflect upon how to make clearer what belongs to which article for the next round of consultations on special topics.

Many of the points made with regard to the specific coverage of paragraph 2 were maintained. In particular, the term "commitments or undertakings" would be deleted if one delegation's proposal for the chapeau of paragraph 1 was agreed to. Two delegations continued to support the inclusion of item 1(a). One of the two delegations indicated that this inclusion would appear necessary to cover, *inter alia*, agricultural export support and trade-marketing support programmes. The other one referred to their concerns on the coverage of services. One other delegation suggested that the questions on export credits or export promotion 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 must therefore be included. **According to the representative of the WTO, the inclusion of item 1(a) could permit under the MAI a variety of measures that are inconsistent with the prohibitions contained in Article 3 of the Agreement on Subsidies and Countervailing Measures; thus, the issue is posed how rights and obligations under that Agreement could be preserved.** Several delegations failed to see the link between items (g), (h), (k) and (l) and the receipt of an advantage and suggested 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, in any case, exclude production and sales activities listed in item (i) of paragraph 1.

15. The listing of the subparagraphs obviously depends 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.

(c) necessary for the conservation of living or non-living exhaustible natural resources.][16]

5. (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 [17];

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16. 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). A possible compromise supported by a majority of delegations might be to replace 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. Delegations were invited to consider how the wording of this possible interpretative note might be improved.

    The delegation that proposed the above note, also felt that the other general exceptions provided for international trade by Article XX of GATT 1994, and notably those found in paragraphs (c) -- the importations or exportations of gold or silver --, (d) -- measures to secure compliance with laws and regulations that are not inconsistent with the Agreement -- and (g) -- the conservation of natural resources -- might also be relevant in connection with the prohibitions of performance requirements under consideration under paragraphs 1(a), (b) and (c). This could be the object of a separate interpretative note along the following lines:

    > "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.

    Some delegations were sceptical that such an additional interpretative note is needed. Delegations were invited, however, to clarify their positions on this matter for the next round of consultations.

17. It was agreed that paragraph (a) should deal with both export promotion and foreign aid programmes. One delegation proposed that paragraph 5(a) be replaced by the following interpretative note:

    "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."

[(b)paragraphs 1(b), 1(c), 1(f), and 1(h) do not apply to procurement by a Contracting Party or a state enterprise[18]; and] [19]

(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;[20]

[(d)paragraph 1(i) does not apply to requirements imposed by a Contracting Party as a part of privatisation operations.] [21]

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

19. 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.

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

21. 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. **The relationship of the proposed paragraph 5 to rights and obligations under the WTO Agreement on Subsidies and Countervailing Measures may require further consideration.**

IV. ARTICLES ON MONOPOLIES/STATE ENTERPRISES/CONCESSIONS

A. Article on Monopolies[22]

[1. Nothing in this Agreement shall be construed to prevent a Contracting Party from maintaining, designating or eliminating a monopoly.] [23]

2. Each Contracting Party shall [endeavour to][24] 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][25] or designate and any public monopoly that its national [or subnational] governments maintain or designate:

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

23. 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.

24. 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.

25. 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.

Subparagraph a)[26]

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];

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;[27]

Subparagraph d)

Alternative 1[28]

[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][29] 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][30];

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26. 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.

27. One delegation raised the issue of the treatment of sub-contracting of monopoly activities. Another 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.

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

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

30. 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.

Alternative 2[31]

[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;]

Alternative 3: zero option[32]

[**Subparagraph e)**[33]

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].

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31. 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.

32. 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.

33. 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). In its view, 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".

[**Paragraph 4** [34]

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

5. Each Contracting Party shall notify[35] to the Parties Group any existing designated monopoly within [60] [36] 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] [37] 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.][38]

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

Option 1[39]

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34. 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 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.

35. 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.

36. 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.

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

38. 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' anti-competitive 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.

Zero option.

Option 2

i) Draft text for an anti-circumvention clause[40]

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[41] 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.

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39. 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.

40. All three 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. **The third alternative, proposed by one delegation, is formulated without using the term "state enterprise" which the delegation considers inadequate to protect investors against circumventory actions.** This alternative was considered by several delegations as a useful basis for the discussion. Some delegations considered alternatives 1 and 2 go 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 recognised, however, that these matters could be addressed in the context of a general anti-circumvention clause for the MAI.

41. The issue of whether there should be an explicit reference to both national and subnational governments is also linked to the way this subject will be dealt with in the definition of monopolies (see section C, paragraph 3).

Alternative 3

1. Each Contracting Party shall ensure that any entity that it owns or controls and/or to which it has delegated a regulatory, administrative or other governmental authority acts in a manner that is consistent with the Contracting Party's obligations under this Agreement wherever such entity exercises any regulatory, administrative or other governmental authority that the Contracting Party has delegated to it.

ii) Additional provisions

a. **No additional provisions.**

b. Proposal by two delegations[42]

[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.[43]]

c. Proposal by one other delegation[44]

[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.

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42. 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 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.

43. 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.

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

Paragraph 2

2. "Designate" means to establish or authorise, or to expand the scope of a monopoly[45].

Paragraph 3

3. "Monopoly" means any person or entity designated by a [national [or subnational][46] government authority] [Contracting Party] as the sole supplier or buyer of a good or service in a relevant market in the territory of a Contracting Party [, but does not include a person or entity that has been granted an exclusive intellectual property right[47][, concession, license, authorisation or permit][48] solely by reason of such grant].

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45. 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.

46. A large majority of delegations considered that, in substance, the MAI disciplines on monopolies should apply to all levels of governments. This could be achieved in a number of ways. The preferred option by most delegations holding this view would be to replace "a national or subnational government authority" by "a Contracting Party". This would present the advantage of ensuring consistency with the coverage of this term across the Agreement. Other delegations in this group remained of the opinion, however, the most secure way to capture all designated monopolies would be to have a specific reference to subnational authorities in the definition. One delegation suggested the alternative wording of "the competent authority of a Contracting Party"; this language was considered to be a promising compromise for delegations supporting the broadest definition of monopolies and should be discussed further. Two delegations continued to favour a definition limited to monopolies designated by national governments and suggested the deletion of the reference to "local" government or "subnational" authorities".

47. There is broad agreement that the definition of monopolies should explicitly exclude exclusive rights derived from intellectual property rights. Some delegations reserved their position pending the outcome, *inter alia*, of the discussion on the relationship between monopolies and concessions, authorisations, etc.

48. Some delegations [for the reasons specified in DAFFE/MAI/EG3/RD(96)14] considered that concessions, licenses, authorisations or permits with exclusive rights should be excluded from the definition of monopolies. They noted that the terms "concession, license, authorisation or permit" are listed in item (vii) of the definition of investment in the MAI.

During an earlier discussion, many 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."

Paragraph 4

4. “Relevant market” means the geographic and product market for a good or service in the territory of the Contracting Party.[49]

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.[50]

Paragraph 6

[6. “State enterprises” means, [subject to Annex ....,] an enterprise owned, or controlled through ownership interest, by a Contracting Party.][51]

[D. Article on Concessions[52 53]

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 ;[54]

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49. 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.

50. Three delegations questioned the need for this definition.

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

52. 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.

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

54. 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.

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.[55]

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.

Definition[56]

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.]

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55. 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.

56. 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, this 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."