



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Informal Consultations on “Special Topics”

**RESULTS OF THE INFORMAL CONSULTATIONS ON SPECIAL TOPICS
ON 27 AND 29 OCTOBER 1997**

(Report to the Negotiating Group)

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 27 October and 29 October (afternoon).

Chairman

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I. ARTICLE ON NATIONALITY REQUIREMENTS FOR EXECUTIVES, MANAGERS AND MEMBERS OF BOARDS OF DIRECTORS

No Contracting Party may require that an enterprise of that Contracting Party that is an investment of an investor of another Contracting Party appoint as executives, managers¹ and members of boards of directors² individuals of any particular nationality.

II. ARTICLE ON EMPLOYMENT REQUIREMENTS³

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. The definitions of "Executive" and "Manager" are the same as those provided by the article on Temporary Entry, Stay and Work of Investors and Key Personnel in the Consolidated Text and Commentary DAF/MAI(97)1/REV2. The placement of these definitions in the Agreement could be considered at a later stage. It is understood that technical differences between MAI definitions and national definitions of these terms could be highlighted in country specific reservations.
 2. Three countries reserve on the coverage of membership on boards of directors. Given the diversity of corporate governance rules across countries, it is proposed that the MAI rely on national definitions.
 3. It is understood that this article would not interfere with domestic anti-discrimination and labour laws.

III. ARTICLE ON PERFORMANCE REQUIREMENTS⁴

1. A Contracting Party shall not, in connection with the establishment, acquisition, expansion, management, operation, maintenance, use, enjoyment, sale or other disposition⁵ 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;

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- 4. One country reserves its position on all obligations on performance requirements that go beyond those in the TRIMS Agreement and the Energy Charter Treaty. One country also maintains a reserve on the scope of the article. Another country reserves its position on the scope of paragraphs 3 to 5 of this article.
 - 5. Delegations agree that the listing of investment operations in the Performance Requirements article should not use the term “conduct” in the chapeau as it is not consistent with the list in the National Treatment/MFN articles. Delegations are considering whether to add some or all the elements of the phrase “maintenance, use, enjoyment, sale or other disposition”, which is found in the National Treatment/MFN articles, before the words “of an investment”. One country wonders whether performance requirements can be applied to the sale or other disposition. Delegations are invited to finalise their position on this matter for the next round of informal consultations.
 - 6. One country presented an explanatory note on the formulation of NAFTA article 1106 [DAFFE/MAI/ST/RD(97)7] which, in its view, is significantly clearer than the proposed MAI article on Performance Requirements. In order to improve on the MAI articles, this country 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.

According to this country, 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 country 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 in the MAI article, 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, according to this country, 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.

The other delegations feel, however, that there is no need to modify the structure of the Article. In order to clarify the coverage of this paragraph, the Chairman invites Delegations to consider the addition of the phrase at the end of the chapeau: “including as a condition for the receipt or continuation of the receipt of an advantage”.

- (c) to purchase, use or accord a preference to goods produced or services⁷ 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 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 not inconsistent with 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

7. It is understood that item (c) is not meant to cover the provision of cross-border services as defined under the GATS. It is felt that this understanding could be recorded by using the following language: “This provision does not obligate a Contracting Party to permit 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 country reserves its position on the inclusion of “services” in 1(c) with respect to requirements associated with the granting of an advantage. It is noted that the relationship between the MAI and the GATS is an issue that could be addressed in a number of ways, including by way of individual footnotes.

8. The wording of this tiret is being elaborated in consultations with intellectual property experts. It remains to be seen how the article will relate to other agreements such as the Rome and Berne Conventions. Several intellectual property experts suggest an alternative to the reference of the TRIPS Agreement as a reminder of continuing consideration about whether future IPRs will be covered. Paragraphs 1(b) and 1(c) may also have implications for IPRs. Some delegations note that a general provision for interpreting MAI obligations in a manner consistent with other obligations under international agreements would avoid the need for specific language for IPRs. It is understood that the concept of “proprietary knowledge” has a broader coverage than that of “trade secrets” or “undisclosed information” (see TRIPS Article 39) and can include information collected by an investor from publicly available sources by “the sweat of the brow”.

9. One country 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 incorporation laws in so far as such laws oblige the establishment and/or maintenance of representative or head offices for legal purposes.

- (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 research and development in its territory;]¹⁰
- [(j) to hire a given level of nationals;]¹¹;
- (k) to establish a joint venture with local participation;¹² or
- (l) to achieve a minimum level of local equity participation other than nominal qualifying shares for directors or incorporators of corporations.¹³

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10. A majority of delegations support or can accept the inclusion of paragraph 1(i). Some delegations sharing this view suggest that paragraph 1(i) should also cover requirements to achieve a given level or value of investment. One country maintains a scrutiny reserve and opposes language that would broaden the scope of the current text for paragraph 1(i). Some other delegations maintain the view that the provision should be deleted. Given that the coverage of paragraph 1(i) has been considerably shortened, the Chairman proposes the deletion of the brackets and the retention of the bracketed text.
11. A majority of delegations support or can accept the retention of paragraph (j). It is confirmed that this provision does not overlap with the MAI article on Employment Requirements 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. It is also confirmed that permanent resident requirements would not be inconsistent with the proposed prohibition on the hiring of nationals. Several countries would like to see the deletion of this paragraph. One country indicates that this requirement could interfere with national employment policies. Another notes that before the MAI is concluded Contracting Parties would need to assure themselves, to a greater degree that it is possible to date, that the effect of paragraph 1(j) and the MAI article on Employment Requirements is not to interfere with programmes that might be targeted at disadvantaged regions/persons or other legitimate employment programmes.
12. Paragraph (k) includes joint ventures even if not covered by paragraph 1(l) because they do not involve equity participation. It allows, however, joint venture requirements not involving a requirement of local participation which may be motivated by an economic concern to spread risk. Some delegations maintain a scrutiny reserve on paragraph (k) and (l) on the basis that they are covered by the National Treatment provision of the MAI.
13. The phrase “other than nominal qualifying shares for directors or incorporators of corporations” clarifies that this performance requirement will not be breached merely because members of boards of directors and those who establish a corporation (incorporators) may be required by domestic law, as a condition of that position, to hold a small equity participation in the corporation.

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(f) through 1(l).¹⁴

3.¹⁵ Nothing in paragraphs [1(a),] 1(b), 1(c), 1(d), and 1(e) 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.

14. Several delegations express 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. The term “commitments or undertakings” would be deleted if the proposal for the chapeau of paragraph 1 is agreed to.

Several delegations fail to see the link between items (h), (k) and (l) and the receipt of an advantage and suggest they not be listed in paragraph 2. Some delegations consider that the inclusion of a reference to paragraphs (k) and (l) in paragraph 2 would be inconsistent with the National Treatment obligation and support its deletion. Other delegations point out that the reference to paragraphs (k) and (l) does not constitute an exemption to the National Treatment obligation. Thus the receipt or continued receipt of an advantage would have to be granted on a non-discriminatory basis (provided that no country reservation have been lodged).

15. The majority of delegations regard the inclusion of paragraphs 1 (a) to (e) to be redundant or irrelevant since they could not see how paragraph 1 could interfere with any of the specific requirements, commitments and undertakings covered by paragraph 3. Proponents of this paragraph, however, consider it necessary for political reasons to make clear that the measures listed, which are encountered in many countries, will continue to be allowed. One country noted in ST/RD(97)7 that as some of the specific requirements could be construed as local requirements the text needs to make clear that they are not. Other delegations propose that this concern be addressed in an explanatory footnote with the same legal effect as a paragraph.

4.¹⁶ [Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and 1(c) shall be construed to prevent any Contracting Party from adopting or maintaining measures, including environmental measures:

- (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary for the conservation of living or non-living exhaustible natural resources.]^{17 18}

16. A majority of delegations see no need for paragraph 4. They consider that the proposed text is too broad, especially that of paragraph 4(a). Some delegations also wonder whether there is a need for an interpretative note. If there is such a need, a majority of delegations consider that it should be along the line proposed by one country which reads as follows:

“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 resources, [or that are necessary to protect human, animal or plant life or health.]”

It is recognised that the Negotiating Group’s general deliberations on environmental issues would provide guidance with regard to a solution regarding this paragraph.

17. One country would like the words “within its jurisdiction” to be added to paragraph 4(c) to make it clear that this provision has no extra-territorial ramifications.

18. One country believes that paragraph 4 is properly framed and that its scope should not be limited to environmental measures, which would be the consequence of another country’s proposal. The former country provided the following example of the utility of paragraph 4(a) in a non-environmental context:

“As part of its operations, an investor has need for a product available from two sources -- one domestic and one foreign. However, the foreign supplier has a long history of violating the host government’s customs laws. Accordingly, as a sanction, customs officials preclude the foreign supplier from bringing the product into the host’s territory. This forces the investor to use a domestic source of supply. Paragraph 4(a) makes clear that this cannot be challenged as a violation of paragraph 1(b) or 1(c). Even though the measure limits an investor to using goods produced in its territory, the measure has been invoked for a legitimate purpose (not as a disguised restriction on investment) and has been taken to secure compliance with a customs law that is not inconsistent with the MAI.”

One delegation also suggests replacing the words “necessary for” by “relating to”, which are used in article XX of GATT 1994.

One country favours the retention of paragraph 4, including sub-paragraph 4(a), to provide clarity that this type of conduct does not violate the performance requirements article, and to reduce the likelihood of having to defend such a claim in dispute settlement.

It is confirmed that no other general exceptions covered by Article XX of GATT 1994 would need to be covered by the proposed paragraph 4. The same confirmation is given with respect to Article XI of GATT 1994 on the General Elimination of Quantitative Restrictions.

5. (a) Paragraphs 1(a), 1(b), and 1(c) do not apply to qualification requirements for goods or services with respect to export promotion¹⁹ and foreign aid programmes;

[(*abis*) Paragraph 1(a), (b), and (c) do not apply to:

- measures in the agricultural sector, and
- subsidies related to trade in services..];²⁰

(b) paragraphs 1(b), 1(c), 1(f), and 1(h) do not apply to procurement by a Contracting Party or an entity that it is owned or controlled by a Contracting Party;²¹ and

(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.^{22 23}

19. One country suggests adding the word “and investment” after the word “export”. It also suggests clarifying by means of an interpretative note the meaning of “promotion” for the purposes of this article.

20. The performance requirement article raises questions about the relationship between performance requirement prohibitions and existing rights and obligations in the WTO Agreements (agriculture, services, government procurement and intellectual property). These questions will have to be addressed either in this article or in some other more general way in the agreement.

Two countries propose the following language as a possible solution to this problem:

“Paragraph 1(a), (b), and (c) do not apply to measures [covered by and] consistent with rights and obligations under the WTO Agreements.”

21. It is agreed to add the following interpretative note:

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

One country considers that a reference to paragraph 1(i) may be needed if that paragraph is retained. It also wonders whether the paragraph 5(a) bis would provide an exception for duty drawback programmes outside the agriculture sector (e.g. chemicals).

22. Discussion regarding this subparagraph focused on the following example provided by the one country, which others found useful and requested to be recorded:

“A manufacturer of textiles from country A, located in country B, manufactures and cuts cloth for garments in that country, sends it to a third country eligible for the special programme, to be assembled into finished garments, and then re-imports the garments into country B for retail sale. The tariff rate on the re-imported garments is lower than on garments from other countries. Without the subparagraph 5(c) exception, subparagraphs 1(b) and 1(c) would prevent country B from offering the special access programme, which is consistent with existing international obligations. Many MAI countries have similar programmes.”

Several delegations believe that customs tariff issues fall outside the scope of this Article and thus there is no need for the proposed general carve-out. This issue should be discussed further; there may be also a link with the issues raised with respect to paragraph (a).

23. It has been agreed to delete paragraph 5 (d) in DAF/MAI(97)13/REV1/FINAL.

IV. ARTICLE ON PRIVATISATION²⁴

Paragraph 1 (Application of National Treatment/MFN)

1. The obligation on a Contracting Party to accord National Treatment and MFN treatment as defined in Paragraph XX (NT/MFN) applies to:
 - a) all kinds of privatisation, irrespective of the method of privatisation (whether by public offering, direct sale or other method);²⁵ and
 - b) subsequent transactions involving a privatised asset.²⁶

[Paragraph 1a (voucher schemes)]

2. Notwithstanding paragraph 1, arrangements under which natural persons of a Contracting Party are granted exclusive rights as regards the initial privatisation are acceptable as a method of privatisation under this Agreement provided that the exclusive right as regards the initial privatisation is limited to natural persons only and provided that there is no restriction on subsequent sales].²⁷

Paragraph 2 (Right to privatise)

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

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

25. One country reserves its position.

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

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

28. Two countries propose inserting “prejudice Contracting Parties’ rules governing the system of property ownership or” between the words “shall” and “be”.

Paragraph 3 (Special share arrangements)^{29 30}

Alternative 1

4. Contracting Parties acknowledge that special share arrangements are compatible with Paragraph 1, unless they explicitly or intentionally favour investors or investments of a Contracting Party or discriminate against investors or investments of another Contracting Party on the grounds of their nationality or permanent residency.³¹

Alternative 2³²

5. [Special share holding arrangements including, *inter alia*, a) the retention of “golden shares” by Contracting Parties, b) stable shareholder groups assembled by a Contracting Party, c) management/employee buyouts, and d) voucher schemes for members of the public, hold strong potential for discrimination against foreign investors and are, in fact, inconsistent with National Treatment and MFN treatment obligations in many instances.]

Alternative 3³³

Footnote to paragraph 1

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

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

30. It was recalled that the issue of providing the possibility for lodging reservations after the entry into force of the MAI concerning privatisations is under consideration in the Negotiating Group.

31. One country would still prefer the inclusion of an illustrative list, such as contained in DAFPE/MAI(97)1.

32. One country’s proposal, together with the following note: “As with other measures contrary to obligations on National Treatment and MFN treatment, use of special share arrangements should be subject to listing as reservations. Recognising that Contracting Parties may privatise assets in the future, Contracting Parties will be permitted to take precautionary reservations for the use of special share arrangements in those sectors where Contracting Parties generally have state-owned enterprises or government restrictions.” This proposal was not discussed by the delegations.

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

[Alternative 4³⁴

7. Nothing in this Agreement shall prevent Contracting Parties from using special methods of privatisation or having special rules as regards ownership, management or control of privatised assets such as:

- a Contracting Party or any person designated by the Contracting Party maintaining special shareholder rights to influence or veto any decision concerning such assets after the privatisation,
- arrangements under which managers or other employees of an enterprise are granted special treatment as regards the acquisition of shares of that enterprise,
- arrangements under which shareholders are required to maintain their share in the capital of the enterprise during a certain period of time,
- arrangements under which locals of a certain community are granted special treatment as regards the acquisition of this community's property,

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

Paragraph 4 (Transparency)³⁵

8. For the purposes of this Article, each Contracting Party or its designated agency shall promptly publish or otherwise make publicly available the essential features and procedures for participation in each prospective privatisation.^{36*}

34. This proposal has not been discussed by the delegations.

35. One country reserves its position on the Transparency article. It considers that a principle of parallelism should guide the treatment of privatisation and that of concessions, which are two connected fields. It also considers the transparency obligations should apply to all levels of government. This country therefore conditions its agreement concerning the insertion of a transparency clause for privatisation to the inclusion of a similar clause for concessions.

36. It is understood that the obligation of this article will be met wherever the information on a privatisation operation is made available. One country proposes the addition of the following interpretative note: "It is understood that paragraph 4 does not place any obligation on a Contracting Party to take actions that could prejudice respect for, or compliance with, the requirements of securities and exchange laws." While several delegations did not need this clarification, they did not oppose that it be added to the Agreement as an interpretative note.

***Footnote**

This footnote confirms the application of the Transparency Article YY. This footnote also confirms that the obligations to accord National Treatment and MFN Treatment prohibit discrimination against investors and investments of other Contracting Parties with respect to all arrangements for making public information about a privatisation operation.³⁷

Paragraph 5 (Definition)*

9. “Privatisation means the sale or other disposal by a Contracting Party, in part or in full, of its equity interest in, or the assets³⁸ of, a [state] enterprise or government entity.**^{39 40 41}

* It is understood that the definition should not reduce the applicability of National Treatment/Most Favoured Nation in the area of privatisation.

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

37. It is understood that this wording would not prevent compliance with national securities and exchange laws. It is also understood that there can be variance in the methods used to make information available, including in the case of small scale privatisations.

38. One country proposes inclusion of the following interpretative note: “It is understood that the reference to the assets in paragraph 5 means “all or substantially all” of the assets of a state enterprise or government entity. Some delegations reserve their position on this proposal because it could leave out a significant proportion of privatisations. Some delegations consider that privatisation should not include small transactions, such as fire sales. Other delegations do not see the need for the proposed interpretative note.

39. It is understood that “privatisation” means the sale of all equity interests held by a Contracting Party. Some delegations are in favour of deleting reference to “state enterprise or government entity” given the coverage of an “enterprise” in the MAI definition of “investment” [Section II, DAFPE/MAI(97)1/REV2]. If retained, the terms “state enterprise” and “government entity” would have to be defined in the Agreement. The inclusion of the word “state” in the definition would also make additional text necessary to ensure that, in case of sales by several tranches, all transactions would be covered even if the company ceased to be a state enterprise. In reserving its position on the definition, one country notes that a state enterprise has an independent legal status, which is not the case for a government entity. Another country also reserves its position on the definition. A third considers that privatisation should not include portfolio transactions by governments.

40. One country proposes replacing “a state enterprise or government entity” by “any entity that it owns or controls”. This would dispense with the need to define the terms “state enterprise” or “government entity”.

41. A new proposal was circulated in DAFPE/MAI/ST/RD(97)8. The Chairman invited delegations to work toward a final solution regarding the definition at the next round of consultations.

V. ARTICLES ON MONOPOLIES/STATE ENTERPRISES/CONCESSIONS

A. Article on Monopolies⁴²

[1. Nothing in this Agreement shall be construed to prevent a Contracting Party from maintaining, designating or eliminating a monopoly.]⁴³

2. Each Contracting Party shall [endeavour to]⁴⁴ accord non-discriminatory treatment when designating a monopoly.

Paragraph 3,⁴⁵ chapeau:

3. Each Contracting Party shall ensure that any privately-owned monopoly that its national [or subnational] governments [maintain]⁴⁶ or designate and any public monopoly that its national [or subnational] governments maintain or designate:

Subparagraph a)

a) 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;

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

43. The right of governments to designate or maintain a monopoly is not disputed. Some delegations consider, 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 continue, 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.

44. 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.

45. A large majority of delegations consider that the issue of delegated regulatory powers of monopolies should be the object of an article on an anti-circumvention clause for entities with delegated governmental authority; they accordingly supported the deletion of paragraph 3(a) in DAF/MAI/ST(97)13.

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

Subparagraph b)

- b) 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;⁴⁷

Subparagraph c)

*Alternative 1*⁴⁸

- c) does not abuse its monopoly position, in a non-monopolised market in its territory, to engage, either directly or indirectly, including through its dealing with its parent company, its subsidiary or other enterprise with common ownership, in anticompetitive practices that adversely affect [an investor or]⁴⁹ 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.⁵⁰

*Alternative 2: zero option*⁵¹

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47. One country raises the issue of the treatment of sub-contracting of monopoly activities. Another 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.
48. This draft article originally proposed in DAFTE/MAI/ST/RD(97)6 is supported by several delegations. One country notes that the reference to “anti-competitive practices” should not be problematic since the GATS contains obligations with respect to anti-competitive practices as an integral part of the GATS agreement on basic telecommunications (cf. GATS Telecoms Reference Paper).
49. The inclusion of the term “investor” would confirm the application of subparagraph (c) to the pre-establishment phase. Some delegations indicate that their support for Alternative 1 is conditional upon the coverage of the pre-establishment phase. A number of delegations note, however, that this coverage could also create problems with respect to the dispute settlement provisions of the MAI and consider that it should not be retained.
50. One country 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 considers that the term “abusive use of prices” has a broader coverage than the concept of anti-competitive practices.
51. The zero option is supported by some delegations to avoid undue intrusion into the competition policy field. A number of these delegations support, as a fallback position, the inclusion of a subparagraph (c) based on article VIII of the GATS which reads as follows:
- “c) 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;”
- One country considers that this proposal adds little in substance to the Monopoly article and could even be politically counterproductive.

[Subparagraph d)]⁵²

- d) Except to comply with any terms of its designation that are not inconsistent with subparagraph (a) or (b), 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.⁵³

Article A, paragraphs 3 (c) and 3(d) 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].⁵⁴

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52. This proposal is supported by three countries. Many delegates question, however, the feasibility and desirability of requiring monopolies to act in accordance with “commercial considerations”.

One country provides a number of explanations in favour of the inclusion of subparagraph (d). In its view, sub-paragraph (d) would present the advantage of increasing transparency: non-commercial considerations must be both non-discriminatory [as indicated in (a), and (b)] 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 (d) 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 one country, 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 remain sceptical, however, about the feasibility and desirability of requiring monopolies to act in accordance with “commercial considerations”.

53. Delegations discussed whether this paragraph should be maintained as an interpretative note, particularly in case subparagraph (d) is deleted. One country considers that this clarification has a bearing on all the provisions of paragraph 3, particularly subparagraph 3(a). Another is of the view that the only relevant link with other subparagraphs, with the exception of subparagraph d), is to subparagraph (a). In this context, subparagraph (d) is not necessary because of the general understanding that the non-discrimination principle in subparagraph (a) is limited to “like circumstances” thereby allowing for differentiation on the basis of commercial considerations. While other delegations did not exclude a possible link to other subparagraphs, for example subparagraph (b), they support its deletion.
54. A large majority are of the view that the clarification intended by this paragraph is not necessary, especially if subparagraph d) is deleted. One country considers that this explanatory paragraph is also relevant to subparagraph 3(c).

[Paragraph 4⁵⁵

4. Each Contracting Party is allowed to lodge a 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 notify⁵⁶ to the Parties Group any existing designated monopoly within [60]⁵⁷ 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]⁵⁸ 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.]⁵⁹

55. Proposal by one country. Some delegations are opposed to the principle of lodging reservations after the entry into force of the MAI. One country proposes 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.

56. One country suggests 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.

57. It is 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. The length of the notification period could also be decided in light of other notification requirements that might arise under the Agreement.

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

59. Three countries point 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. They also believe 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(c). These delegations consider that state-to-state dispute settlement should provide a useful procedural compromise. Many delegations consider, 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.

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

i) Zero option.⁶⁰

ii) Additional provisions

a. Proposal by two countries⁶¹

[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.⁶²]

b. Proposal by one country⁶³

[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 in connection with these activities.]

60. A large majority of delegations support this option, particularly since the anti-circumvention clause in Section VI is intended to cover all enterprises, *i.e.* both state and private enterprises, to which authority has been granted .

A number of delegations underline the legal and practical difficulties that governments would encounter in ensuring the conformity of the behaviour of state enterprises and all their affiliates with the obligations of additional provisions, such as those proposed by two countries.

61. Two countries 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. They felt that the term "state enterprise" could be replaced by "an enterprise that it owns or controls".

One country points out that under existing legislation the state as a shareholder has no special privilege in comparison with any other shareholder. This would require legislative action.

62. Some delegations point out that this paragraph would be needed whichever alternative is chosen. Other delegations consider that any additional disciplines that might be adopted would need to be subject to both state-to-state and investor-to-state dispute settlement. One country would like this paragraph to apply to both paragraphs 1 and 2.

63. This proposal is offered as a compromise by one country which favours, nevertheless, Option (a) (*i.e.* no additional provisions) as its first option. It is meant to cover all possible avenues for exercising influence other than government ownership (such as through the granting of contracts to private enterprises). This proposal did not receive broad support.

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.⁶⁴

Paragraph 3

3. “Monopoly” means any person or entity designated by a [national [or subnational]⁶⁵ 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 [, concession, license, authorisation or permit]⁶⁶ solely by reason of such grant or the exercise of such right.⁶⁷

64. One country 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.

65. A large majority of delegations consider 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 remain of the opinion, however, that the most secure way to capture all designated monopolies would be to have a specific reference to subnational authorities in the definition. One country suggests the alternative wording of “the competent authority of a Contracting Party”; this language is considered to be a promising compromise for delegations supporting the broadest definition of monopolies and should be discussed further. Two countries continue to favour a definition limited to monopolies designated by national governments and suggest the deletion of the reference to “local” government or “subnational” authorities”.

66. Some delegations [for the reasons specified in DAF/MAI/EG3/RD(96)14] consider that concessions, licenses, authorisations or permits with exclusive rights should be excluded from the definition of monopolies. They note 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.”

67. There is agreement that the definition of monopolies should explicitly exclude exclusive rights derived from intellectual property rights. Intellectual property experts are also discussing the merit of adding at the end of the paragraph another phrase to exclude royalty collection agencies (which usually have a legal monopoly). Such an addition would read “[nor does it include an entity charged with the collective management of intellectual property rights]”.

Some delegations reserve their position pending the outcome, *inter alia*, of the discussion on the relationship between monopolies and concessions, authorisations, etc.

Paragraph 4

4. “Relevant market” means the geographic and product market for a good or service in the territory of the Contracting Party.⁶⁸

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.⁶⁹

Paragraph 6

[6. “State enterprises” means, [subject to Annex ...,] an enterprise owned, or controlled through ownership interest, by a Contracting Party.]⁷⁰

68. Some delegations propose 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 recognises that the inclusion of the terms “in the territory of the Contracting Party” at the end of the paragraph presents 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 country is of the view that the proposed definition needs to be improved for greater precision and clarity.

69. Three countries question the need for this definition.

70. A number of delegations question the need for a definition of state enterprises.

[D. Article on Concessions^{71 72}

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;⁷³
- 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.⁷⁴

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.

71. Proposal by one country. It is 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 is included in the MAI. Many delegations question the need for this article. Some delegations feel that further work is required to clarify the issues.

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

73. 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 wonder why similar provisions have not been proposed for monopolies.

74. One country proposes replacing the reference to the official languages of the OECD by the official languages of the United Nations. Two countries question the need to impose a language requirement for the publication of awarding procedures.

Definition⁷⁵

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 para-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.]

VI. ARTICLE ON ENTITIES WITH DELEGATED GOVERNMENTAL AUTHORITY⁷⁶

Each Contracting Party shall ensure that any entity to which it 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 delegated authority.

75. This proposal needs further consideration. One country favours the deletion of the reference to natural resources in the proposed text. With respect to mineral resources, including hydrocarbons resources, this country also proposes replacing 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."

76. This article covers all entities, including monopolies and state enterprises, with respect to the exercise of any delegated regulatory, administrative or other governmental authority. This provision renders the need for a provision on this subject under the Monopolies article unnecessary. Paragraph 3(a) in DAFPE/MAI/ST/13 could accordingly be deleted. One country can only consider this provision if its concern relating to the chapeau of the Monopoly Article (see footnote 44) could be adequately covered and, secondly, points out that the Vienna Convention of the Law of Treaties may, in the its view, make this provision redundant.

Several delegations consider it essential that the proposed anti-circumvention clause apply to monopolies designated by subnational authorities. It is recognised, however, that this matter is linked to the general treatment of subnational entities under the MAI.

VII. ARTICLE ON INVESTMENT INCENTIVES

Provisions

Alternative 1

Several delegations believe that no additional text is necessary. They consider that the current draft articles in the MAI are sufficient to cover investment incentives at this time.

Alternative 2

Many delegations, however, would favour specific provisions on incentives in the MAI although they hold different views as to their nature and scope. Some proposed a built-in agenda for future work. Discussion of possible provisions focused on the following draft article which is regarded as a compromise text by those who would still prefer more far-reaching disciplines.

Article⁷⁷

1. The Contracting Parties confirm that Article XX (on NT and MFN) and Article XX (Transparency) applies to [the granting of]⁷⁸ investment incentives.⁷⁹

2. [The Contracting Parties acknowledge that[, in certain circumstances,] even if applied on a non-discriminatory basis, investment incentives may have distorting effects on the flow of capital and investment decisions.⁸⁰ [Any Contracting Party which considers that its investors or their investments are adversely affected by an investment incentive adopted by another Contracting Party and having a distorting effect, may request consultations with that Contracting Party.] [The former Contracting Party may also bring the incentive before the Parties Group for its consideration.]]^{81,82}

77. The Group proceeded on the basis of report of EG2 with respect to the treatment of tax incentives [DAFFE/MAI/EG2(97)1].

78. Some delegations favour the deletion of “the granting of”.

79. While it is agreed that investment incentives should be subject to NT and MFN obligations, there are different views on the desirability of making this explicit. Consequently, some delegations consider this paragraph to be unnecessary. One country maintains a pre-scrutiny reservation on the text of this draft article. The dispute settlement mechanism would, in particular, apply to this article. One delegation raises the possibility of taking reservations with regard to NT.

80. Several delegations point out that not all investment incentives are bad -- the problem arises in drawing a line between good and bad incentives. It is suggested that the distorting effects of investment incentives on investment decisions and capital flows should be balanced against their possible benefits in achieving legitimate social objectives. Other delegations note that these concerns were addressed in paragraph 3 of the draft article.

81. Some Delegations remain unconvinced by the need for special consultation procedures for non-discriminatory investment incentives as defined in paragraph 2, although final judgement would need to await the decisions taken on the coverage of the MAI. The presumption is that, as with other agreements, consultations would be the first procedural step of the dispute settlement mechanism of the MAI. It should be possible to revisit the adequacy of the provisions on dispute settlement and the role of the Parties Group when their configuration is better known. One delegation questions whether the dispute settlement mechanism of the MAI could apply to investment distorting investment incentives or to investment incentives granted illegally. These questions would also deserve further attention. Some delegations question the role of the parties group in any consultation process.

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

3.⁸³ [In order to further avoid and minimise such distorting effects and to avoid undue competition between Contracting Parties in order to attract or retain investments, the Contracting Parties [shall] enter into negotiations with a view to establishing additional MAI disciplines [within three years] after the signature of this Agreement.⁸⁴ These negotiations shall recognise the role of investment incentives with regard to the aims of policies, such as regional, structural, social, environmental or R&D policies of the Contracting Parties, and other work of a similar nature undertaken in other fora. These negotiations shall, in particular, address the issues of positive discrimination,⁸⁵ [transparency],⁸⁶ standstill and rollback.]⁸⁷

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

The grant of a specific advantage arising from public expenditure [a financial contribution] in connection with the establishment, acquisition, expansion, management, operation or conduct of an investment of a Contracting Party or a non-Contracting Party in its territory].

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

84. Some delegations feel that the MAI should include additional disciplines on investment incentives from the time it enters into force. Another delegation cautions that additional disciplines could have far-reaching implications for other multilateral agreements as well as for national tax laws and regulatory regimes.

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

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

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

*Commentary*⁸⁸

1. The discussion on investment incentives in EG3 was based on a Note, including a proposal for draft provision, by the one country [DAFFE/MAI/EG3/RD(96)7] and a proposal by a delegation [section 6 of DAFPE/MAI/EG3/RD(96)10].
2. Many delegations believed that disciplines on investment incentives would be important for the overall credibility of the MAI while at the same time recognising the role of investment incentives with regard to the aims of policies, such as regional, structural, social, environmental or R&D policies.
3. One country argued that a definition of investment incentives is a necessary prerequisite for increased transparency and disciplines regarding such measures. It suggested a definition of investment incentives based largely on the definitions of subsidies and “specificity” found in the WTO Agreement on Subsidies and Countervailing Measures (ASCM). This country also provided text for a specific transparency provision.
4. Several delegations, however, considered the nature and scope of the disciplines proposed by this country and others to be too ambitious. Since WTO members were still grappling with related issues, it would be premature to include disciplines in the MAI that could duplicate or detract from WTO obligations. They also took the view that there has been insufficient analysis of the nature and impact of incentives and of the nature and extent of any disciplines which would be required given the objectives of the MAI. One delegation believed more work was necessary to identify fully the degree of the negative effect of individual incentives in relation to the policy goals, often beneficial, implemented through those incentives. Problems need to be clearly identified prior to drafting disciplines aimed at addressing those problems.
5. Several delegations also questioned the viability of creating, at this stage, standstill and rollback provisions on non-discriminatory investment incentives. Subjecting investment incentives to the NT and MFN obligations would already constitute a major step forward. One delegation felt that this would also imply submitting investment incentives to transparency obligations and subjecting non-conforming measures to standstill and rollback.
6. Most delegations believed that any plans for disciplines on tax incentives should be taken up by EG2. Some delegations thought that tax measures should be excluded.
7. Some delegations expressed concern that any additional disciplines on investment incentives in the MAI could divert foreign investment to non-Members and place MAI Contracting Parties at a disadvantage relative to non-Members in their ability to retain or attract investment. Such disciplines could also constitute an obstacle to accession to the MAI by non-Members. On the other hand, some delegations noted that it was always envisaged that the MAI, as a high standards agreement, would mandate more liberal FDI regimes among Parties than typically maintained by non-Members, and disputed claims that disciplines on incentives presented any special problems in this regard.

88. These comments reflect the state of the discussion at the end of December 1996 [DAFFE/MAI/EG3(96)22].