Unclassified **DAFFE/MAI/ST(97)14/FINAL**

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

21 January 2000

Negotiating Group on the Multilateral Agreement on Investment (MAI)

Informal Consultations on "Special Topics"

RESULTS OF THE INFORMAL CONSULTATIONS ON SPECIAL TOPICS ON 1-2 DECEMBER 1997

(Report to the Negotiating Group)

This document was issued during the MAI negotiations which took place between 1995 and 1998.
All available documentation can be found on the OECD website: www.oecd.org/daf/investment

REPORT TO THE NEGOTIATING GROUP

I am pleased to submit the attached report which presents the results of the informal discussions on SPECIAL TOPICS held on 1-2 December 1997. The report includes the results of the informal discussion on Concessions held on 1 December 1997 (afternoon).

Chairman

TABLE OF CONTENTS

I. TEMPORARY ENTRY, STAY AND WORK OF INVESTORS 4

II. ARTICLE ON NATIONALITY REQUIREMENTS FOR EXECUTIVES, MANAGERS AND MEMBERS OF BOARDS OF DIRECTORS 7

III. ARTICLE ON EMPLOYMENT REQUIREMENTS 7

IV. ARTICLE ON PERFORMANCE REQUIREMENTS 8

V. ARTICLE ON PRIVATISATION 14

VI. ARTICLES ON MONOPOLIES/STATE ENTERPRISES/CONCESSIONS 20

VII. ARTICLE ON THE GRANTING OF AUTHORISATIONS FOR THE PROSPECTION, EXPLOITATION AND PRODUCTION OF MINERALS, INCLUDING HYDROCARBONS 29

VIII. ARTICLE ON ENTITIES WITH DELEGATED GOVERNMENTAL AUTHORITY 30

IX. ARTICLE ON INVESTMENT INCENTIVES 31

I. TEMPORARY ENTRY, STAY AND WORK OF INVESTORS[1]

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

(a) Each Contracting Party shall grant temporary entry, stay and authorisation to work[2] and provide any necessary confirming documentation to a natural person of another Contracting Party who is:

(i) an investor who seeks to establish, develop, administer or provide advice or essential technical services to the operation of an enterprise[3] in the territory of the former Contracting Party to which the investor has committed, or is in the process of committing, a substantial amount of capital, or

(ii) an employee employed by an enterprise referred to in (i) above, or by an investor,[4] [who may be required to have been employed for a specified minimum period, for example one year][5] in a capacity of executive, manager or specialist and who is essential to the enterprise;

so long as that person continues to meet the requirements of this Article;[6]

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

(ii) Each Contracting Party is encouraged[7] to grant authorisation to work to the spouse of the person who has been granted temporary entry, stay and authorisation to work in accordance with subparagraph (a) above.

---

1. Whether there should be an anti-abuse clause, its precise wording, as well as its specific placement is to be decided.
2. Interpretative note: "The granting of an 'authorisation to work' may imply that a natural person may have to meet specific professional qualifications required in order to carry out particular activities. Professional qualification criteria that may be applicable are outside the scope of this Article."
3. "Enterprise" under this Article would have the same meaning as under the MAI definition of "investment".
4. It is recalled that the MAI definition of an "investor" includes both natural and legal persons. One country maintains a scrutiny reserve on whether an "investor" in this context should be limited to a legal person.
5. The bracketed text has been amended after a discussion on a proposal by one country [DAFFE/MAI/ST/RD(97)9]. It is generally agreed, however, that strictly speaking, this text is not necessary given the content of the chapeau of paragraph *1*. Delegations are invited to reflect further on this country's proposal.
6. Interpretative note: "It is understood that the national authorities may periodically verify continued eligibility under this paragraph".
7. Some countries prefer "shall endeavour" and may need to refer to capitals before agreeing to deletion.

2. No Contracting Party may deny entry and stay as provided for by this Article, or authorisation to work as provided for by paragraph 1(a) of this Article, for reasons relating to labour market or other economic needs tests or numerical restrictions in national laws, regulations, and procedures.[8]

3. For the purposes of this Article:

Natural person of another Contracting Party means a natural person having the nationality of [or who is permanently residing in] another Contracting Party in accordance with its applicable law;[9]

Executive means a natural person who primarily directs the management of an enterprise or establishes goals and policies for the enterprise or a major component or function of the enterprise, exercises wide latitude in decision-making and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the enterprise;

Manager means a natural person who directs the management of an enterprise, or department, or subdivision of the enterprise, supervises and controls the work of other supervisory, professional or managerial employees, has the authority to hire and fire or recommend hiring, firing, or other personnel actions and exercises discretionary authority over day-to-day operations at a senior level; and

Specialist means a natural person who possesses knowledge at an advanced level of expertise and who may be required to possess specific or proprietary knowledge of the enterprise's product, service, research equipment, techniques, or management.

---

8. There is no substantive disagreement about making it clear in an interpretative note that "numerical restrictions referred to in this paragraph are restrictions on the maximum number of natural persons who can enter, stay or work in the Contracting Party." A number of delegations maintain a scrutiny reserve on the wording of this interpretative note.

9. Several delegations have concerns with extending the benefits of the MAI Key Personnel provisions to permanent residents of another Contracting Party. As a result of the Negotiating Group discussion on 23-25 April 1997, the Chairman proposed that at least for the purposes of investors, nationals and permanent residents should be covered. Delegations should reflect further on the inclusion of permanent residents as concerns the categories of executive, manager, or specialist.

Commentary

Paragraph 1

1. While several delegations supported including a requirement of a "substantial amount of capital" in paragraph 1, others considered it would create uncertainties and could represent an important barrier to certain forms of investment. It was noted that Drafting Group 3 has developed a provision on Denial of Benefits in the context of indirect ownership or control using the concept of "substantial business activity". DG3 decided that it was not necessary to define this term.

2. Some delegations do not think it necessary to include "essential" in this paragraph and emphasise the difficulties associated with defining this term.

3. There are different views on whether to include a prior employment requirement. Some delegations think this requirement can distort the investment process by impacting unfairly on new investors and small/medium enterprises without any corresponding benefit to the "admitting" country. Furthermore, these delegations believe that it may not correspond to the real needs of an investment and should not be used as a measure of whether an individual is essential to an investment. Several delegations thought it necessary to retain such a requirement if only because there is a corresponding requirement in their national immigration laws. One delegation thought it might be necessary to specify that the prior employment relationship must be continuous and should immediately precede entry. Another delegation questioned whether the use of prior employment requirements to avoid circumvention of national immigration laws was effective.

Paragraph 3

Natural person of another Contracting Party[10]

Executive, Manager, Specialist

The Expert Group thought the definition of the categories of executive and manager were generally appropriate, except that there might be some overlap between the two. The category of "Specialist" will need some further reflection and may need to refer to the possibility of verifying professional qualifications. One delegation would like to include "trainers" in this category.

10. See footnote 9.

II. 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, managers[11] and members of boards of directors[12] individuals of any particular nationality.

III. ARTICLE ON EMPLOYMENT REQUIREMENTS[13]

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.

---

11. 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 section I of the report. 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.

12. Three countries reserve on the coverage of membership in boards of directors. Given the diversity of corporate governance rules across countries, it is proposed that the MAI rely on national definitions.

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

IV. ARTICLE ON PERFORMANCE REQUIREMENTS[14]

1. A Contracting Party shall not, in connection with the establishment, acquisition, expansion, management, operation, maintenance, use, enjoyment, sale or other disposition[15] of an investment in its territory of an investor of a Contracting Party or of a non-Contracting Party, impose, enforce or maintain[16] any of the following requirements, or enforce any commitment or undertaking:[17]

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

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

---

14. One country reserves its position on all obligations on performance requirements that go beyond those in the TRIMS Agreement and the Energy Charter Treaty. Another 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.

15. The enumeration of activities in the chapeau follows the list of activities in the National Treatment/MFN articles. It is recognised, however, that consistency with the National Treatment/MFN list may not be appropriate in all cases. Many delegations question the insertion of the words "maintenance, use, enjoyment"; some delegations seek clarification regarding the implications of including this phrase in this article, including whether the phrase has a particular meaning with respect to intellectual property rights. Some delegations question the relevancy of the words "sale or other disposition" while some other delegations favour their inclusion. One country would support the reinsertion of the word "conduct" and, with a view to ensuring consistency with the definition of privatisation in Section V, the replacement of the words "other disposition" by the words "other disposal". Delegations are invited to finalise their position on this matter.

16. One country reserves its position on the inclusion of the word "maintain". This country questions whether the use of this word could oblige Contracting Parties to undertake the burdensome task of having to expunge all possible non-conforming requirements from existing laws, regulations, contracts, etc. It should be sufficient, and less burdensome, for a Contracting Party to be obliged not to "impose" and "enforce" such requirements.

17. 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.

(c) to purchase, use or accord a preference to goods produced or services[18] 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;[19]

(g) to locate its headquarters for a specific region or the world market in the territory of that Contracting Party;[20]

---

18. 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. This 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.

19. 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".

20. 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 incoporation laws in so far as such laws oblige the establishment and/or maintenance of representative or head offices for legal purposes. It is noted that the prohibition is intented to apply to head offices or headquarters and not to the establishment of other offices.

(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;][21]

[(j) to hire a given level of nationals;[22]]

(k) to establish a joint venture with local participation;[23] or

(l) to achieve a minimum level of local equity participation other than nominal qualifying shares for directors or incorporators of corporations.[24]

---

21. Given that the coverage of paragraph 1(i) has been considerably shortened and that a majority of delegations can support or accept its inclusion, the Chairman proposes the deletion of the brackets and the retention of the bracketed text. One country maintains a scrutiny reserve. Some other delegations maintain the view that the provision should be deleted.

22. A majority of delegations can support or accept the retention of paragraph (j) on the understanding that permanent resident requirements will not be inconsistent with it and that the proposed prohibition on the hiring of nationals will not interfere with programmes targeted at disadvantaged regions/persons or other legitimate employment programmes. Another country proposes that this understanding be recorded in an interpretative note. It is also confirmed that this provision will 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. Some delegations favour the deletion of this paragraph. Another country indicates that this requirement could interfere with national employment policies.

23. 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.

24. 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).[25]

3.[26] 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.

---

25. It is understood that the receipt or continued receipt of an advantage with respect to paragraphs (k) and (l) will need to be granted on a non-discriminatory basis (provided that no country reservation has been lodged).

Several delegations consider that the concerns that paragraph 5(a)bis intends to cover in respect of rights and obligations under the WTO agreements would better be addressed by the reinsertion of paragraph 1(a) in paragraph 2. This would avoid, in particular, confusion and overlap with respect to the dispute settlement provision of the MAI and the WTO. In that regard, some delegations note, in particular, a concern that if the extent of paragraph 1(a)'s disciplines, as proposed in one of the alternatives to paragraph, 5(a)bis (see footnote 31), then if paragraph 1(a) were to become a subject of MAI dispute settlement, the MAI arbital panel would have to determine whether a WTO violation had occurred, which would be an inappropriate role for it to undertake. Two countries would also support a reference to paragraphs 1(b) and 1(c) in paragraph 2 to exclude the coverage of advantages associated with services from paragraph 1. Some delegations view adding paragraphs 1(b) and 1(c) to paragraph 2 as an undesirable "TRIMs-minus" solution because TRIMs covers paragraphs 1(b) and 1(c) with respect to goods in all circumstances. Other delegations consider that the reinsertion of any of these items would result in too much of a carve-out from paragraph 1 because this carve-out would apply across the board to all sectors or economic activities and not limited to the exclusions allowed under the WTO provisions. They favour instead a solution in the context of paragraph 5(a).

26. A large majority of delegations regard this paragraph 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. They are willing however to consider the transformation of the paragraph into a footnote in light of the advice of the OECD legal adviser that a footnote in a treaty is an integral part of its text and has the full legal value which flows from that. Some delegations, however, continue to consider it necessary to make clear that the measures listed, which are encountered in many countries, will continue to be allowed. One country notes in DAFFE/MAI/ST/RD(97)7 that as some of the specific requirements could be construed as local preferences or domestic content requirements, the text needs to make it clear that they are not. This country also notes that the issue of the status of footnotes and interpretative notes for the MAI remains to be determined.

4.[27] [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.][28,29]

---

27. 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.

28. Another 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.

29. A third 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 the first country's proposal. The third 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."

The third country also suggests replacing the words "necessary for" by "relating to", which are used in article XX of GATT 1994.

Another 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 promotion[30] and foreign aid programmes;

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

- measures in the agricultural sector, and
- subsidies related to trade in services..];[31]

(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;[32] 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.**[33,34]**

---

30. 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.

31. The performance requirement article raises questions about the relationship between performance prohibitions and existing rights and obligations in the WTO Agreements (agriculture, services, government procurement and intellectual property).

One country proposes adding the following phrase after "agriculture sector": "covered by and consistent with rights and obligations under the WTO Agreements". Another country questions excluding this sector in respect to export performance requirements not linked to an advantage.

Discussions on paragraph 5(a)bis focused on: a) the need of specific reference to measures covered by WTO Agreements; b) the coverage of such a reference; and c) its relationship to paragraph 2.

It is agreed that the performance requirement article should not undo or undermine the Contracting Parties obligations under any WTO Agreements. It is also generally recognised that this article should not interfere with WTO rights and obligations in the agricultural sector. Some delegations consider in addition that the MAI should not attempt to discipline subsidies relating to services since this matter is presently being addressed in the WTO. The third country notes that the proposed carve-out refers to "subsidies" whereas paragraph 1 covers "advantages" more broadly. Some delegations are of the view that these concerns should better be addressed in the context of paragraph 2.

Two countries have proposed the following language as a possible alternative to paragraph 5(a)bis.

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

32. 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. This country also wonders whether paragraph 5(a) bis would provide an exception for duty drawback programmes outside the agriculture sector (e.g. chemicals).

33. Discussion regarding this subparagraph focused on the following example provided by this 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 country B, sends it to country C which is eligible for the special programme, to be assembled into finished garments, and then re-imports the garments into the country B for retail sale. The tariff rate on the

V. ARTICLE ON PRIVATISATION[35]

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);[36] and

(b) subsequent transactions involving a privatised asset.[37]

[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].[38]

---

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 this country A 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 also be a link with the issues raised with respect to paragraph (a). Another country agrees to circulate any relevant material in advance of the next round of consultations.

34. It has been agreed to delete paragraph 5 (d) in DAFFE/MAI(97)13/REV1.

35. Three countries reserve their position on all privatisation obligations.

36. Another country reserves its position.

37. 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.

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

Paragraph 2 (Right to privatise)

3. Nothing in this Agreement shall be construed as imposing an obligation on a Contracting Party to privatise.[39]

39. 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)[40,41]

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.[42]

Alternative 2[43]

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 3[44]

Footnote to paragraph 1

6. Special share arrangements which explicitly discriminate (i.e. *de jure*) against foreign investors and their investments 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.

---

40. 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. Another country proposes the deletion of paragraph 3.

41. 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.

42. Another country would still prefer the inclusion of an illustrative list, such as contained in DAFFE/MAI(97)1.

43. 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.

44. 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. Another 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 4[45]

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)[46]

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.[47]*

45. This proposal by one country has not been discussed by the delegations.

46. Another 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 that 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.

47. It is understood that the obligation of this article will be met wherever the information on a privatisation operation is made available. Another country notes that there is a need for discussion of the potential implications of the proposed transparency provision for legitimate financial market transactions. This 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.[48]

48. 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. One country proposes that the agreed exclusion of the *minimis* or fire sales from the transparency obligation be recorded in an interpretative footnote.

Paragraph 5 (Definition)

9. Privatisation means any measure amounting to a sale or other disposal by a Contracting Party, in part or in full, of its equity interests[49] in any entity.*

* This definition:

– does not cover transactions between different levels or entities of the same Contracting Party;

– covers any sequential sales or disposals (sales or disposals in tranches);[50] [51]

– excludes transactions in the normal conduct of business of that entity.[52]

---

49. One country considers that the sale of the assets of a state company such as the sale of a division of an entity are to be covered by the definition. Another country would prefer to return to the previous definition but could accept the alternative wording "equity or other interests". Delegations agree to return to the meaning of the phrase "any measure amounting to" at the next meeting.

50. There is wide agreement in substance that sequential sales or disposals of equity interests are covered by the revised definition. A majority of delegations consider that this second indent is not necessary in view of the revised definition of privatisation. One delegation considers that it may still be important to confirm their coverage through the retention of such an indent. Delegations are invited to consider this matter further. One country maintains that the reference to "entity" in the revised definition in paragraph 9 should be qualified by the addition of "it owns or controls through ownership interests."

51. Given that the revised definition does not make a specific reference to "assets", it is agreed that it is no longer necessary to envisage the following third indent: "[excludes *de minimis* sales or disposals, for example in the form of fire sales or disposal of outdated office equipment;] [excludes sale or disposal of surplus property;]".

52. It is understood that transactions by entities created for the purpose of the sale or other disposal of a Contracting Party's equity interests in an entity are captured by the revised definition in accordance with the MAI Article on entities with delegated governmental authority (See section VIII).

VI. ARTICLES ON MONOPOLIES/STATE ENTERPRISES/CONCESSIONS

A. Article on Monopolies[53]

[1. Nothing in this Agreement shall be construed to prevent a Contracting Party from maintaining, designating or eliminating a monopoly.][54]

2. Each Contracting Party shall [endeavour to][55] accord non-discriminatory treatment when designating a monopoly.

Paragraph 3,[56] chapeau*:*

3. Each Contracting Party shall ensure that any privately-owned monopoly that its national [or subnational] governments [maintain][57] 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;

---

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

54. 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. It is understood that the expression "Nothing in this Agreement" would not allow a Contracting Party to escape its obligations under the MAI article on Expropriation and Compensation. Another country would be prepared to agree to the removal of the brackets if an alternative language, such as the one considered under the MAI article on General Exceptions ("This Article shall not apply to the Article on Expropriation and Compensation") was to be adopted.

55. 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.

56. 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 DAFFE/MAI/ST(97)13.

57. 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;[58]

Subparagraph c)

Alternative 1[59]

(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] [60] 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. [61]

Alternative 2: zero option[62]

---

58. One country raises the issue of the treatment of sub-contracting of monopoly activities. Another country remains concerned about the broad scope of the 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.

59. This draft article originally proposed by one country [DAFFE/MAI/ST/RD(97)6] is supported by several delegations. Another 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).

60. 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.

61. 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 country considers that the term "abusive use of prices" has a broader coverage than the concept of anti-competitive practices.

62. 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)[63]

[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.[64]

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].[65]

---

63. A large majority of delegations are in favour of the deletion of subparagraph (d) and the following two paragraphs. One country is prepared to accept the removal of subparagraph (d) provided that these two paragraphs are maintained in the article. Two countries, which are also proponents of subparagraph (d), wish to maintain their position.

    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 the 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".

64. 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 country 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.

65. 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 4 [66]

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 notify[67] to the Parties Group any existing designated monopoly within [60] [68] 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] [69] 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.][70]

---

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

67. 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.

68. 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.

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

70. 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. [71]

ii) Additional provisions

a. Proposal by two countries[72]

[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.[73]]

b. Proposal by one country [74]

[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 government's 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.]**]**

---

71. A large majority of delegations support this option, particularly since the anti-circumvention clause in Section VIII 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.

72. These 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 in its country the state as a shareholder has no special privilege in comparison with any other shareholder. This would require legislative action.

73. 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.

74. 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.[75]

Paragraph 3

3. "Monopoly" means any person or entity designated by a [national [or subnational][76] 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][77] solely by reason of such grant or the exercise of such right. [78]

---

75. 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.

76. 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".

77. There is a broad consensus that, in conformity with item (vii) of the MAI definition of "investment", any rights conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits are to be covered fully by the obligations of the MAI. One country underlines, however, that because the proposed definition of "monopoly" in paragraph 3 is so inadvertently broad, it encompasses these rights and, as a result, these rights are, in practice, "carved out" from the MAI obligations. Another country reserves its position.

    All delegations but one favour the deletion of the bracketed text "[, concessions, licenses, authorisations or permits]". Another country supports the deletion of the bracketed text because it considers that monopolies and concessions encompass different legal concepts and thus monopolies provisions shall not apply to concessions. This latter understanding should be introduced explicitly in the text.

    The subject of intellectual property rights is generally considered to be a different issue, which merits the proposed exclusion in the definition.

    During an earlier discussion; many delegations supported a compromise consisting of a separate interpretative note to paragraph 3, which reads as follows:

    "** "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.[79]

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.[80]

Paragraph 6

One country provides explanations for its proposed retention of the bracketed text. Monopolies and concessions are two different legal entities and have two opposite economic effects, namely, in the first case, to subtract an economic activity from competition and in the second case, to organise competition with respect to a particular economic activity. These differences call for a different treatment of MAI obligations with respect to the designation of monopolies ("a best endeavour obligation"), for instance to provide a public good or service, and the granting of concessions (full National Treatment/MFN obligations). However, the MAI could impose a non-discriminatory obligation on the behaviour of persons or entities which have been conferred "monopoly rights". One way of achieving this result could be to modify the last phrase of the definition as follows:

"but does not include a person or entity to which rights have been conferred pursuant to law or contract such as concessions, licenses, authorisations, irrespective of whether these rights involve monopoly rights. However, any person or entity which acquires monopoly rights as a result of the implementation of such law or contract must fulfil the obligations of paragraph 3 of the Monopoly article in the exercise of such rights. Also it does not include a person or entity that has been granted an exclusive intellectual property right solely by reason of such grant or the exercise of such right."

Another way will be to add at the end of the monopoly definition, as it had been initially proposed by one country, the words "for an indefinite period of time".

78. 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.

79. 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 recognise 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(a) and 3(b) 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. Another country draws attention to the fact that the concept of "relevant market" has been discussed in the OECD Competition Policy Committee [DAFFE/CLP/CSG(93)7] and that the result of this work should be taken into account.

80. Three countries question the need for this definition.

[6.   “State enterprises” means, [subject to Annex ....,] an enterprise owned, or controlled through ownership interest, by a Contracting Party.][81]

[D.   Article on Concessions[82] [83]

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;[84]

(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.[85]

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.

---

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

82. 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.

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

84. 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.

85. 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.

Definition[86]

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.]

---

86. This proposal needs further consideration. One country proposes the deletion of the reference to natural resources in the proposed text. With respect to mineral resources, including hydrocarbons resources, this country also proposes adding to paragraph (vii) of the current definition of "investment" in the MAI, 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 to exercise, 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."

VII. ARTICLE ON THE GRANTING OF AUTHORISATIONS FOR THE PROSPECTION, EXPLOITATION AND PRODUCTION OF MINERALS, INCLUDING HYDROCARBONS[87]

"(1) For the purpose of the present Article, "authorisation" means any law, regulation, administrative or contractual provision or instrument issued thereunder by which the competent authorities of a Contracting Party entitle any investor or a group of investors to exercise, on its own behalf and at its own risk, the exclusive right to prospect or explore for or produce minerals, including hydrocarbons, in a geographical area.

(2) Consistent with the present Agreement,[88] the Contracting Parties may establish:

(a) procedures to be followed for the granting of authorisations according to which all interested investors may submit applications pursuant to this article;

(b) criteria on the basis of which authorisations are granted;

(c) conditions and requirements, including requirement of state participation, concerning the exercise or termination of the activities of prospecting, exploring for and producing minerals, including hydrocarbons, whether contained in the authorisation or to be accepted prior to the grant of the authorisation.

(3) The Contracting Parties shall apply such procedures, criteria, conditions and requirements as referred to in paragraph (2) above in a transparent and objective manner and in a way which ensures that there is no discrimination on grounds of nationality between investors as regards access to and exercise of the activities of prospecting, exploring for and producing minerals, including hydrocarbons."

---

87. A majority of delegations could accept the following proposal by one country as a basis for clarifying the treatment under the MAI of the granting of authorisations for the prospection, exploitation and production of minerals, including hydrocarbons, which is considered to be an important area of economic activity in a number of MAI countries. A number of delegations reserve nevertheless their position on part or all of the language of the proposed article. Some delegations reserve the right to examine the proposal, including in light of other provisions of the MAI, before taking a position on the article.

88. It is understood that the measures or procedures covered by the proposal will need to be consistent with the MAI obligations. In addition, some delegations wonder whether this understanding would better be formulated by replacing the phrase "Consistent with the present Agreement", by the following alternative formulation: "To the extent that the measures are consistent with the Agreement".

VIII. ARTICLE ON ENTITIES WITH DELEGATED GOVERNMENTAL AUTHORITY[89]

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.

---

89. 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 DAFFE/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 57) could be adequately covered and, secondly, points out that the Vienna Convention of the Law of Treaties may, in this country's 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.

IX. 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.

Article[90]

1. The Contracting Parties confirm that Article XX (on NT and MFN) and Article XX (Transparency) applies to [the granting of][91] investment incentives. [92]

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.[93] [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.]] [94,95]

---

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

91. Some delegations favour the deletion of "the granting of".

92. 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.

93. 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.

94. 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.

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

3.[96] [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.[97] 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,[98] [transparency],[99] standstill and rollback.[100]]

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].

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

97. 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.

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

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

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

Commentary[101]

1. The discussion on investment incentives in EG3 was based on a Note, including a proposal for draft provision, by one country [DAFFE/MAI/EG3/RD(96)7] and a proposal by one delegation [section 6 of DAFFE/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. This 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.

---

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