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**Negotiating Group on the Multilateral Agreement on Investment (MAI)**

**Expert Group No.3 on “Special Topics”**

**DRAFT ARTICLE ON MONOPOLIES/STATE ENTERPRISES**

**(Note by the Chairman)**

## DRAFT ARTICLE ON MONOPOLIES/STATE ENTERPRISES

(Note by the Chairman)

### I. Draft Article A: Monopolies

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

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

3. Each Contracting Party shall ensure that [any monopoly that [it] [its national government] maintains or designates] or [any privately-owned monopoly that it designates and any government monopoly that it maintains or designates]:

[a] acts in a manner that is not inconsistent with the Contracting Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Contracting Party has delegated to it in connection with the monopoly good or service;]

b) provides non-discriminatory treatment to investors of another Contracting Party and their investments in its sale of the monopoly good or service in the relevant market;

[c] provides non-discriminatory treatment to investors of another Contracting Party and their investments 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;]

d) does not use its monopoly position [,in a non-monopolised market in its territory,] to engage, either directly or indirectly, including through its dealing with its parent company, its subsidiary or other enterprise with common ownership, in anticompetitive practices that might adversely affect an investment by an investor of another Contracting Party, including through the discriminatory provision of the monopoly good or service, cross-subsidisation or predatory conduct [, in particular through the abusive use of prices].

[4. In case of a demonopolisation which has the effect of extending the obligations under the Agreement to a new area, the principle of standstill does not intend to prevent any Contracting Party from lodging any reservation to the Agreement for this new area.]

[5. Each Contracting Party shall notify to the Parties Group any existing monopoly within 60 days after the entry into force of the Agreement and any newly created monopoly within 60 days after its creation.]

[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) or (c) of this Article.]

## **[II. Draft Article B: State Enterprises**

1. Each Contracting Party shall ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Contracting Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Contracting Party has delegated to it.

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.]

## **[III. Definitions Related to Monopolies [and State Enterprises]**

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.

[2. "Designate" means to establish, designate or authorise, or to expand the scope of a monopoly to cover an additional good or service, after the date of entry into force of this agreement.]

3. ["Monopoly" means an entity, including a consortium or government agency, that in any relevant market in the territory of a Contracting Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant] or ["Monopoly" means any person, public and private, designated by a national [or local] government authority as the sole supplier or buyer of a good or service in a given market in the territory of a Contracting Party.]

[4. "Relevant market" means the geographic and commercial market for a good or service.]

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.

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

## COMMENTARY

### I. Monopolies

#### General

1. The Expert Group agreed to combine the proposals by two delegations [DAFFE/EG3/MAI/RD(96)5 and DAFFE/EG3/MAI/RD(96)6] into a single text. The present commentary summarises the views expressed on the various elements of these contributions.

#### Paragraph 1

2. **There is consensus that the right of governments to create, allow or maintain monopolies could not be challenged under the MAI. But there is no consensus on the need to make it explicit in the MAI.** Several delegations supported the language confirming the right of governments to designate new monopolies, although this could also be done through an interpretative note. **One delegation was of the view that, without such a provision, there would be uncertainties about the scope of application of the MAI in this field.** Some delegations remained unconvinced, however, of the need to mention this right explicitly in the Agreement. One delegation noted that government prerogatives on monopolies also apply to their elimination; inclusion of the word “eliminating” at the end of the phrase would make this clear and produce a more balanced provision. Some delegations noted the link between the designation of new monopolies and the MAI article on Expropriation and Compensation [Section IV of DAFFE/MAI(96)6/REV1]. One delegation pointed out that the need for paragraph 1 would be enhanced by the inclusion of market access disciplines in the MAI.

#### Paragraph 2

3. **A large majority of delegations considered** that the National Treatment and MFN Treatment obligations should apply to the designation of new monopolies. Several delegations pointed out the difficulty of applying such obligations to every situation that may arise in the future, notably in the context of the introduction of new technologies and felt that a “best endeavour” undertaking would be more appropriate. Delegations also noted the link with the demonopolisation issue and, in particular, that of the lodging of country-specific reservations or exceptions (see paragraph 8 below).

#### Paragraph 3

4. A large majority of delegations considered that the provisions of the Monopolies article should apply to government-designated monopolies at all levels of government and not be limited to those designated by central governments. One delegation suggested that in the case of privately-owned monopolies, the obligations should apply only to those created after the entry into force of the MAI and not to existing ones. This delegation argued that would be difficult to apply the obligations retroactively to existing privately-owned monopolies while such practical difficulties would not arise with respect to existing government monopolies.

5. Several delegations considered desirable to confirm in *subparagraph (a)* the application of the MAI obligations, notably that of National Treatment and MFN, to the delegation of regulatory powers. Some delegations felt this problem could be addressed in the context of a general anti-circumvention clause covering all provisions of the MAI. **One delegation wondered if the language not being “inconsistent with the Contracting Parties obligations” was precise enough to avoid different**

**interpretations.** A few delegations questioned the need altogether for an anti-circumvention clause in the Agreement.

6. There was general agreement in favour of an obligation along the lines of *subparagraph b)* requiring government-designated monopolies to provide non-discriminatory treatment in their *sales* of monopoly goods or services. This obligation would not apply, however, to the sale of goods or services produced in competition with private operators.

7. Concerning the coverage of *purchases* of monopoly goods and services in *paragraph c)*, the desirability of excluding procurement transactions covered by the GATT Agreement on Government Procurement (GPA) was not disputed, but it remained unclear what remaining procurement practices would be captured by the MAI as a result of this exclusion. One clear-cut example was marketing boards with monopsony powers over particular commodities. It was also noted that GPA covers the monopsony purchases of government-agencies but not those of government-designated privately-owned monopolies. This matter would need to be discussed further. One delegation mentioned that the plurilateral character of this GPA could give rise to a free-rider problem. One delegation suggested the term “monopsony” should be used when referring to the purchase of “a monopoly good or service”. Some delegations felt that this was an intrusion of the MAI in the area of competition policy giving cause for concern.

8. Concerning *subparagraph d)*, it was recognised that monopolies have the capacity to introduce market distortions, notably by cross-subsidising their business activities in competitive sectors. It was also acknowledged that abuse of dominant position was a competition policy issue. While some delegations expressed reservations about the merits of covering this problem in the MAI, it was agreed that this provision should be studied further at the next meeting of the Expert Group. Further thought will also need to be given to the meaning of the “abusive use of prices”.

#### **Paragraph 4**

9. **Demonopolisation operations are generally favourable to liberalisation since they open up new investment activities. But demonopolisation operation would have the effect of extending the obligations of the MAI to a new area. Several delegations felt therefore that the MAI should provide the Contracting Parties with the possibility to lodge new country-specific reservations/exceptions when this situation occurs. This would not be contrary to standstill since country-specific reservations/exceptions introduced at the time of demonopolisation, would, in principle, be subject to standstill. These delegations welcomed, as a result, the flexibility in paragraph 4. An alternative to this approach would be precautionary country-specific reservations/exceptions lodged at the time of the entry into force of the Agreement, an avenue resisted by the Negotiating Group. This problem clearly belongs to the broader issue of liberalisation and balance of commitments.**

10. Some **other** delegations considered that the possibility of lodging country specific reservations or exceptions should be limited to the time a Contracting Party adheres to the MAI. In the absence of such reservations or exceptions, the National Treatment/MFN obligations would apply to demonopolisation operations. One delegation thought that the combined ability to designate new monopolies and to cover by reservations or exceptions new non-conforming measures could be used to evade MAI obligations.

#### **Paragraph 5**

11. The desirability of introducing a notification requirement for existing and new monopolies was found by some delegations to be closely related to the issue of country-specific reservations/exceptions and to a MAI article on Market Access. One delegation wondered what use the Parties Group could make

of this information and feared the administrative burden. One delegation suggested that a best endeavour undertaking to provide, *wherever possible*, prior notification of any newly designated monopoly, along the lines of article 1502(a) of NAFTA, might offer a more palatable approach. Another delegation recalled the proposal made in the context of the negotiations of the Supplementary Treaty to the Energy Charter Treaty which limits reporting requirements for government-designated monopolies at the sub-national level to classes of monopolies as opposed to individual monopolies.

## Paragraph 6

12. A few delegations proposed to exclude from investor-state arbitration matters arising out of paragraphs 3b) or c) of this Article. Other delegations felt that this could set a dangerous precedent for other MAI obligations. One delegation suggested that governments should keep control over the dispute settlement process because the disputes that may arise between government-designated monopolies and foreign investors are most likely to be a function of the manner in which these monopolies are regulated than to their own behaviour.

## II. State enterprises

13. Several delegations questioned the need for specific provisions on state enterprises. The problem of anti-circumvention of the MAI obligations could be addressed in the context of a general article on the subject (see paragraph 4 above) **or in the context of corporate practices [see DAFFE/MAI/EG3(96)21]**. State enterprises operating in the competitive sector should be treated no differently than private enterprises. The United States delegation considered, however, that it is not always certain that governments can divorce themselves from the activities of their state enterprises. Foreign investors may, in any case, entertain this suspicion, particularly where such enterprises play a significant role. A balance should be struck between their rights under the MAI as investors and their obligations as suppliers of goods or services to domestic and foreign investors. **One delegation felt that the best way to ensure this balance is to submit state enterprises to the same rights and obligations than private enterprises.**

## III. Definitions

14. The Expert Group agreed to pursue its discussion of the definition of “Monopolies” on the basis of the texts proposed by the United States and France. One delegation suggested brackets around the word “local” in the French proposal. A number of delegations considered that the concept of government-designated “monopolies” should also cover that of “exclusive suppliers” as in the case of Article VIII of the GATS. **One delegation suggested that it be discussed whether enterprises with special concessions, for example banks, should be included or not.** It was also noted that the possibility of having a GATT article XVII-type definition relating to “any enterprise” to which a party “formally or in effect” has given exclusive or special privileges”, could be considered. Finally, it was recalled that Article 22 of the ECT covers state as well as “privileged enterprises”.

15. While the concept of “relevant market” was considered to be more appropriate than that of “given market”, some delegations felt that the term “commercial market” needed to be discussed further.

16. One delegation suggested the insertion of the words “subject to Annex...” to allow, as in NAFTA, that country specific characteristics be taken into account.