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

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

**REPORT TO THE NEGOTIATING GROUP**

## **REPORT TO THE NEGOTIATING GROUP**

1. I am pleased to present the third report to the Expert Group on Special Topics (attached).
2. The Expert Group met on 27-29 (a.m.) January 1997 meeting to carry out the tasks assigned to it by the Negotiating Group. These tasks involved the examination of three new topics (Research&Development/Technology, Non-discriminatory barriers ("market needs" tests) and further consideration of outstanding issues on five of the topics it had examined previously (Key Personnel, Performance Requirements, Privatisation, Monopolies/State Enterprises and Investment Incentives). The conclusions reached by the Chairman of the Negotiating Group at its December 1996 meeting on selected EG3 topics were made available to the Expert Group.
3. Given the increased flexibility suggested by the Chairman of the Negotiating Group on working methods and the heavy agenda of the meeting, the Expert Group decided to meet in plenary session only on the first and last half-days of the meeting to allow for informal sessions and consultations in between. It also agreed that the discussion of outstanding issues from its earlier work be led by co-ordinators.
4. While every outstanding issue could not be resolved, the new arrangements proved to be valuable in narrowing down options and clarifying or deepening the understanding of country positions. It also produced, in some cases, draft text or agreement on the way to proceed for some of the more difficult issues. The Expert Group recommends that work on all the issues discussed be carried forward on the basis of texts presented in parts II, III and IV and taking into account the results of the informal discussions, notably those presented in Parts V to VI.
5. Part I presents the conclusions reached by the Expert Group on the three topics discussed in plenary. Parts II to VI discusses the areas of progress that co-ordinators were able to make during their informal sessions or consultations.
6. With the presentation of this report, the Expert Group's current mandate can be deemed to be completed unless the Negotiating Group decides otherwise.

Anders Ahnlid  
Chairman

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## I. CONCLUSIONS OF NEW TOPICS DISCUSSED IN PLENARY

### I. R&D/Technology

1. Discussion of issues concerning R&D/technology was based on a note [DAFFE/MAI/EG3/RD(96)8] together with a proposal by one delegation [DAFFE/MAI/EG3/RD(96)11]. The key question raised was whether a specific provision might be necessary in order to ensure non-discrimination, *de jure* or *de facto*, as far as foreign participation in public R&D consortia and related activities is concerned.

2. While the Group agreed that National Treatment and MFN obligations would address problems of *de jure* and *de facto* discrimination arising from government actions in the context of R&D programmes, consortia and related activities (subject to country-specific reservations), the question arose as to whether any additional language was necessary in order to clarify this matter. One delegation felt that it might be necessary to clarify that the R&D activities have to be conducted in the territory of the Contracting Party concerned. It was also recognised that the issue was relevant to the subject of performance requirements.

3. Inclusion of an additional paragraph along the lines of the delegation's proposal into the National Treatment/MFN Article attracted little support. Several delegates nevertheless expressed interest in exploring the possibility of having a clarification of the matter in a footnote or an interpretative note. On the other hand, a number of delegations remained opposed to any such clarification on the grounds that it is unnecessary and might even call into question the meaning of National Treatment. One delegation proposed an alternative wording to this proposal<sup>1</sup>.

4. At the conclusion of the deliberations, the delegation that is the author of this proposal, submitted draft text for a clarifying note for the consideration of delegations<sup>2</sup>.

### II. Non-Discriminatory Barriers ("Market Needs" Tests)

5. Discussion of the subject of non-discriminatory barriers was based on a proposal by one delegation [DAFFE/MAI/EG3/RD(97)2] and a note by the Chairman [DAFFE/MAI/EG3(97)1]. Experts addressed the issue of whether or not any specific provisions in the MAI were necessary in order first to prohibit non-discriminatory barriers in the form of market needs tests or, second, to clarify the application

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1. This reads "The participation in, or treatment of, any combination, consortium, research programme, joint or other enterprise activity, including measures affecting technology, shall be regulated by existing international or bilateral S&T co-operation agreements."

2. This reads: "Contracting Party funding prerogatives relating to R&D consortia and other activities shall not preclude national treatment for membership in such activities, provided that prospective foreign participants contribute funding commensurate with their role in the consortium and the level of funding contributed by other consortium participants."

of the national treatment provision *i*) relation to *de facto* discrimination that might arise as a consequence of *i.e.* "market needs" tests.

6. Two options for addressing these issues were advanced by the delegation. Option I would involve the addition to the Article containing the National Treatment and MFN obligations of a provision defining *de facto* discrimination associated with, for example, "market needs" tests.

7. Option II consisted of a separate Article ensuring a total prohibition on the application of "market needs" tests, including those of a non-discriminatory nature.

8. Option II did not attract much support. However, some delegations expressed interest in having a prohibition of market needs tests, generally or in specific sectors, along the lines of paragraph 11 of the Chairman's note. One delegation could envisage such a prohibition in the field of services; in its view the problem of market needs tests was essentially limited to services.

9. As the National Treatment and MFN obligations would apply to *de facto* as well as to *de jure* discrimination, a majority of Delegations saw no real need for any additional rules along the lines of Option I. Indeed, several delegations felt that such a provision could raise more problems than it would solve. On the other hand, some delegations felt that a provision in the treatment article along the lines of Article XVII.3 of the GATS might be worth exploring, taking into account the differences in approach with the MAI, although probably not by Expert Group N°3. Such a provision might, according to those delegations, provide useful guidance as to the interpretation of the national treatment provision in situations of possible *de facto* breaches of that provision. It could also avoid problems of interpretation with regard to future investment disputes.

### **III. Concessions**

10. The Expert Group held a preliminary discussion on the topic of concessions on the basis of a proposal by one delegation [DAFFE/MAI/RD(97)1].

11. The Group agreed that concessions were an important issue and should be covered by the MAI. It also thanked this delegation for submitting draft text of a possible definition and transparency provision for the MAI.

12. On the subject of definition, there was general recognition that concessions was a form of assets and should therefore be included in the definition of "investment" to be adopted for the MAI. Most<sup>2</sup> delegations further considered that such a definition should not be limited, as proposed by this delegation, to concessions for the provision of public or collective services, but should also cover other sectors or activities where it is widely in use, such as the exploitation of natural resources. A few delegations chose to reserve their position on the possible coverage of concessions. One delegation underlined the distinctive character of concessions.

13. A distinction was also made between the coverage of the definition and the application of the core obligations of the MAI (notably National Treatment/MFN). It would be important in this respect to take due account of other international obligations in this field such as those contracted by OECD countries under the GATT Government Procurement Agreement. One delegation, in fact, expressed serious doubts that the MAI could, given the political sensitivity of the issues at stake, go beyond these obligations and suggested that the GATT obligations be carved out altogether from the MAI.

14. There was not, for lack of time, a great deal of discussion on the proposed transparency rules, but a number of delegations appeared receptive to the idea of separate and slightly more detailed

procedures in this field than those presently envisaged under the Transparency Article of the MAI. Other delegations also reserved their judgement on this matter. The possible ties with transparency provisions of the GPA were also noted.

15. The Group concluded that this proposal deserves further examination.

## **II. KEY PERSONNEL** **(Report by one delegation)**

1. The delegation hosted an informal open session on key personnel on January 27, 1997. Twenty-one delegations attended this meeting. The discussion focused on the "chapeau" paragraph, on the basis of the consolidated text (DAFFE/MAI(97)1, pp. 12-14), and contributions from two delegations. There was also a discussion on the paragraph 5 (labour market tests and numerical restrictions) of the consolidated text. Finally, the informal group recognised that several other issues are still outstanding, and would require further examination.
2. Based on discussions in the informal open session, the Informal Group proposes the following text for the draft article on key personnel. The footnotes to paragraphs of the consolidated texts are preserved and are not reproduced here.
3. As a new participant in MAI Negotiations, one delegation took this opportunity to express its reservation with respect to paragraph 4(b) of the consolidated text (spousal employment) and wished to be added to those delegations referred to in the second sentence of footnote 17 of the consolidated text.

## Proposed Text

### A. Temporary entry and stay of investors and key personnel

1. [Except as explicitly provided for in paragraph 2 of this Article, nothing in this Agreement shall prevent] [Subject to]<sup>3</sup> the application of Contracting Parties' national laws[, regulations and procedures]<sup>4</sup> relating<sup>5</sup> to entry, stay and work of natural persons<sup>6:7 8</sup> [(Anti-abuse clause)]<sup>9 10</sup>

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

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3. Two alternative texts are proposed for the introductory clause of this sentence. The first one reflects the consolidated texts' version of the "chapeau" paragraph. The second one is proposed by one delegation. Some delegations support this wording, while others expressed preferences for the first wording which, in their view, provides greater transparency.
4. One delegation would like to reflect further on the inclusion of these terms.
5. Some delegations suggest to replace "relating to" by "affecting", in order to make it clear that the chapeau allows for the application of regulations pertaining to professional services.
6. One delegation suggests the following wording: "... relating to the entry and stay of a natural person involved in an economic activity."
7. Many participants of the informal group felt that paragraph 2 of the consolidated texts' version (applicable measures relating to public health and safety, criminal law, and national security) was no longer necessary, in light of the revised "chapeau". One delegation reserves on the deletion of this paragraph.
8. Some delegations raised concerns as to the legal implication for MAI obligations of such a "chapeau" and wish to reflect further on this matter.
9. Several delegations were of the opinion that an "anti-abuse" clause would be useful for the purpose of this article. The bracketed wording found in the consolidated texts states:  
"[These shall not be invoked by a Contracting Party as a means of evading its obligations under this Article.]"  
Some delegations made reference to paragraph 4 of the GATS "Annex on Movement of Natural Persons Supplying Services under the Agreement", which reads as follows:  
"The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment." (emphasis added)  
Other delegations expressed strong reservations as to the inclusion in the key personnel article of an "anti-abuse" clause. Some were especially concerned regarding the GATS version of such a clause because they perceive it as inappropriately framed for an investment agreement involving Investor-State dispute settlement.  
Some of the delegations that favour having an "anti-abuse" clause applied to this article believed that this could be accomplished through a general "anti-abuse" clause in the MAI. The issue of the inclusion of a general provision has not yet been discussed in the context of these negotiations. Some of these delegations felt that such a clause could be discussed by one of the Experts or Drafting Groups in February.
10. One delegation seeks clarification with respect to the following question in relation to the anti-abuse clause: "If a Contracting Party's immigration authority requires, under its law or regulations, an additional criteria other than substantial amount of capital (such as an office) for recognising a natural person as an "investor", would it be considered a breach of MAI obligations? Would it change the situation if the MAI would include an anti-abuse clause?"

(i) an investor who seeks to establish, develop, administer or provide advice or essential technical services to the operation of an [enterprise] [investment] 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] [investment] referred to in (a) above, in a capacity of executive, manager or specialist and who is essential to such [enterprise] [investment]]

**or**

[(ii) an employee of an [enterprise] [investment] of another Contracting Party for a period of not less than one year, seeking to:

(A) establish a subsidiary or affiliate of that [enterprise] [investment] to which the [enterprise] [investment] has committed, or is in the process of committing, a substantial amount of capital, or

(B) render services to a subsidiary or affiliate of that [enterprise] [investment]

provided that the employee is employed in a capacity of executive, manager or specialist [and that such employee is essential to the present investment.]]

(b) Temporary entry and stay shall be granted to a person for [a period not exceeding 1-3 years] so long as that person continues to meet the requirements of this Article.

(c) (i) Each Contracting Party shall grant temporary entry and stay and provide any necessary confirming documentation to the spouse and minor children of a person who has been granted temporary entry and stay in accordance with this Article. The spouse and minor children shall be admitted [under the conditions] and for the same duration as that person.

(ii) Each Contracting Party shall endeavour to grant authorisation to work to the spouse of the person who has been granted temporary entry and stay in accordance with this Article.

[2. [Notwithstanding paragraph 1,]<sup>11</sup> no Contracting Party may:

(a) as a condition for temporary entry and stay in accordance with this Article, require labour market or other economic needs tests or procedures; or

(b) impose or maintain any numerical restriction relating to temporary entry and stay in accordance with this Article.]

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11. This addition is proposed in the case the phrase "[Subject to]" is favoured for paragraph 1.

**or**

- [2. [Notwithstanding paragraph 1,]<sup>7</sup> no Contracting Party may deny temporary entry and stay in accordance with this Article for reasons relating to labour market or other economic needs tests or numerical restrictions in national laws.]<sup>12</sup>
3. (Definitions; as in the consolidated text)

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12. Some delegations favour this alternative text, which is from footnote 19 of the consolidated text. This wording would address concerns of countries that would wish to continue to maintain economic needs tests or numerical restrictions, while agreeing not to apply these measures to MAI natural persons covered by this article. Two delegations indicated that they would still need to file a reservation for this paragraph under either options.

While agreeable to the alternative text, some delegations felt that it would be necessary to ensure that the application of these measures follows clear and transparent rules. The reference to "national laws" might need to be expanded in light of the possible inclusion of "regulations and procedures" in the "chapeau".

### III. PERFORMANCE REQUIREMENTS (Report by one delegation)

Informal group discussion resulted in a newly restructured proposed text of the Performance Requirements article, set forth below. Although no extended discussion took place regarding the substance of bracketed paragraphs 3-6, a number of delegations indicated their desire to address in depth the issues raised by these paragraphs (most particularly, paragraphs 4 and 5). In that connection, at the request of several delegations, the delegation that had prepared the report, undertook to provide additional information regarding the relationship of paragraph 4 to certain obligations arising under the Montreal Protocol.

#### Proposed Text

*(Note: Brackets and footnotes from the existing draft text are meant to be preserved, although footnotes are not set forth in this re-organised draft.)*

1. [No Contracting Party [may] [shall]] [A Contracting Party shall not], in connection with the establishment, acquisition, expansion, management, operation or conduct of an investment **in its territory** of an investor of a Contracting Party or of a non-Contracting Party ~~in its territory~~, impose, enforce or maintain any of the following requirements, or enforce any commitment or undertaking:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services 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 to act in a manner not inconsistent with other provisions of this Agreement];
- (g) to locate its headquarters for a specific region or the world market in **the territory of** that Contracting Party;

- (h) to supply one or more of the goods that it produces or the services that it provides to a specific region or **the** world market exclusively from the territory of that Contracting Party;
- [(i) to achieve a given level or value of production, investment, manufacturing, sales, employment, or research and development in its territory;]
- [(j) to hire a given level or type of local personnel;]
- [(k) to establish a joint venture; or]
- [(l) to achieve a minimum level of local equity participation.]

2. **Alternative A:** A Contracting Party is precluded by paragraph 1 from conditioning the receipt or continued receipt of an advantage, in connection with an investment<sup>Φ</sup> **in its territory** of a Contracting Party or of a non- Contracting Party ~~in its territory~~, on **compliance with** any of the requirements[, **commitments or undertakings**] set forth in paragraphs\* [1(a)] [1(b)] through 1(e), but is not precluded by paragraph 1 from doing so regarding any of the requirements[, **commitments or undertakings**] set forth in paragraphs\* [1(a) and ] 1(f) through 1(l) .

2. **Alternative B:** A Contracting Party is not precluded by paragraph 1 from conditioning the receipt or continued receipt of an advantage, **in connection with an investment in its territory of a Contracting Party or of a non- Contracting Party**, on compliance with any of the requirements[, **commitments or undertakings**] set forth in paragraphs\* [1(a) and] 1(f) through 1(l).

[3. 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 a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.] (*Old para. 4.*)

4. [A measure that requires an investment to use a technology to meet generally applicable health, safety, or environmental requirements shall not, on the basis of such requirement, be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles XXX on National Treatment and MFN apply to the measure.] (*Old para. 2.*)

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

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Φ. Paragraph 3, Alternative 2, of the consolidated text used the phrase “in connection with the establishment, acquisition, expansion, management, or operation or conduct of an investment” rather than “in connection with an investment” (which was used in Paragraph 3, Alternative 1, of the consolidated text and is used here). Delegations may wish to reflect further regarding which phrasing is preferable.

(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.]

[6. ~~The provision of:~~

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

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

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

**\* Delegations are considering which paras. are appropriately referenced at particular points.**

#### **IV. PRIVATISATION** **(Report by one delegation)**

1. On 27 January delegates met in order to discuss certain aspects of the draft provisions on privatisation. Notably discussed were the issues of definition of “privatisation” and transparency obligations as regards privatisation.

##### **A. *Definition of privatisation***

2. Delegations discussed possible drafts on the basis of Alternatives 1 and 2 to Paragraph 5 of privatisation (DAFFE/MAI/97)1).

3. A thorough discussion of those two alternatives revealed that most differences are rather textual than substantive. Therefore it was possible to reduce the gap between the two alternatives. In particular, a large majority of delegations agreed that the definition should make reference to “partial” and “complete” sales of assets, as well as the “disposal” of assets. The remaining difference relates to the question if the definition should cover a transaction in any “asset” owned or controlled by a Contracting Party or, more specifically, to assets in or of an enterprise or government entity.

4. A majority of delegations, supporting the first alternative pointed out, that in their view, the second one would not sufficiently cover all possible forms of privatisation of government owned or controlled assets.

5. Most delegations considered that a “negative list” to such a definition would not be necessary. However, some delegations stated that they would still prefer such a negative list. In particular, some delegations mentioned “small transactions” as to be excluded from the scope of the definition of privatisation (as outlined in footnote 68 of document DAFPE/MAI(97)1) and one delegation suggested to extend the negative list by the following two items: “transfer of ownership or control of state-owned assets to pension funds or compensation funds” and “reprivatisation”.

6. As regards transactions consisting of an intra-government transfer of assets, all delegations agreed that such transactions should not be covered by the provisions on privatisation. There was disagreement as to whether the present (two alternatives of) definition would do so. It was agreed to clarify this exclusion of intra-government transfers in a footnote, although a number of delegations maintained that they would consider such a footnote redundant. One delegation stated that it would prefer such transactions to be excluded by means of an appropriately drafted negative list entry.

7. One delegation stated that it would continue to prefer Alternative 3 in Document DAFPE/MAI(97)1, as this would in particular ensure that such a definition would not interfere with its own domestic legal system which would exclude the sale of real estate from the notion of “privatisation”.

**B. Transparency**

8. Delegations discussed possible drafts on the basis of Alternatives 1 to 3 to Paragraph 4 of privatisation (DAFFE/MAI/97)1).

9. It was agreed to propose text as stated under Alternative 2 with a footnote or interpretative note on the basis of Alternative 3. A number of delegations which supported this approach reserved their position on the precise wording of this footnote/interpretative note.

10. One delegation maintained that it would prefer Alternative 1 and therefore maintain a general reserve on such an approach. Some delegations raised the point of ensuring a balance between transparency and administrative burden.

## **V. MONOPOLIES/STATE ENTERPRISES**

### **(Report by one delegation)**

1. At the informal open session held on 28 January 1997 afternoon, delegations discussed a) draft Article A on Monopolies, section III of the draft consolidated text and commentary on the MAI (DAFFE/MAI(97)1) b) the related draft Definition in Article C and draft article B on state enterprises appearing in the same section. Delegations also had at their disposal the conclusions of the Chairman of the Negotiating Group on Selected EG3 issues and a background note by one delegation. The following conclusions were reached.

#### **A. *Substantive obligations on Monopolies***

2. With the exception of one or two delegations, there was broad agreement over the substance of the obligations defined by paragraphs a) to c) which relate to the monopolistic activities of monopolies. Paragraph a) could end up be part of a general anti-circumvention clause of the MAI but it was clearly applicable in the case of monopolies. There was also broad agreement over the desirability of disciplining the sale or purchase of a monopoly good or service even if views differed about the degree of intrusion of competition policy this would imply.

3. The broad agreement over the inclusion of paragraphs a) to c) under the MAI, was nevertheless based on the view that both the state-to-state and investor-to-state procedures would apply to these provisions. Some delegations warned, however, that there could be complicating factors in allowing investor-to-state recourse for paragraphs b) and c) and suggested further thought be given to the matter.

4. There was no quarrel that paragraph d) dealt with a competition policy issue but delegations came to two opposite conclusions as whether this could be accepted. A number of delegations considered that the intrusion into competition policy was very small, notably in comparison with the benefits foreign investors could derive from such a provision. Other delegations indicated that their competition authorities were opposed to this paragraph. The discussion had the merit of clarifying that substitution of the words "anti-competitive practices" by "discriminatory" would not solve the problem.

5. Delegations were invited to reflect, however, whether Article VIII.2 of GATS could not offer useful analogies for text, taking into account the differences of approaches between the MAI and the GATS.

6. There was also scepticism over the inclusion of paragraph e) although it was also recognised that more time would be required to come to a conclusion.

#### **B. *Definitions***

7. There was general agreement that the two alternatives in paragraph 3 of draft article C did not differ much in substance and that it should therefore be possible to combine them. It was also acknowledged that the greatest difficulty in application here is to draw the line between those cases where the designated area of activity is so small as to hold no more than one operator (one licence per mine) and those designated monopolies that concern "market" in a real economic sense where they could be room for several market participants (the designation of a monopoly for all mines). In other words, the problem is to define the appropriate market ("relevant market", "given market"...).

8. Another drafting question is whether an explicit carve-out on intellectual property rights would be necessary.

9. One delegation asked whether systems of territorial divisions for some professional services (e.g. notaries) would fall under the definition of monopolies.

10. The difference between monopolies and concessions was also briefly discussed. It was felt that not all exclusive rights from concessions would be excluded from the concept of monopoly although the degree of overlap was not necessarily great. This also raises the question of the appropriate market. Further work on this question is desirable.

11. The two authors of the draft definitions were invited to get together to develop a single definition for consideration by delegations .

### **C. *State enterprises***

12. A majority of delegations considered that the MAI should contain provisions on state enterprises despite the fact that the MAI will not contain provisions on the behaviour of enterprises (*i.e.* corporate practices). They also felt that they probably could go along with the obligations outlined in paragraphs 1 and 2 of draft article C.

13. Some delegations argued that state enterprises do not necessarily act differently from private enterprises. When they compete with private firms, they should not be covered by the MAI unless they exercise a delegated regulatory power. These delegations considered that state enterprises and private firms competing in the same market should be treated in the same way.

## **VI. INVESTMENT INCENTIVES** **(Report by one delegation)**

1. The informal discussion on investment incentives was based on two background papers prepared by one delegation [DAFFE/MAI/EG3/RD(97)5, DAFPE/MAI/EG3/RD(97)6] and the draft text in the consolidated text.
2. Delegations reiterated their general positions with respect to treatment of investment incentives in the MAI. These were largely as articulated in previous EG3 meetings and at the December meeting of the NG.
3. In light of their reading of the Chairman's summary of the December Negotiating Group meeting, many delegations supported a specific article in the MAI. There are a range of views on the scope of disciplines the article should contain (including the idea of a built-in agenda). Some delegations wished to secure the work already achieved as reflected in the draft article in the consolidated text.
4. Several delegations supported alternative one in the consolidated text, namely that no additional article is necessary for investment incentives in the MAI.
5. There was general agreement that in paragraph 1 of the draft article, transparency should be added. There was no discussion of paragraphs 2 and 3.
6. Delegations agreed that the issue of including tax incentives in any definition of investment incentives was for the NG to decide taking into account the broad policy aims of EG3 and the advice of EG2 on the feasibility of distinguishing tax incentives from other tax measures and the risks associated with doing so. A number of delegations noted that it was up to individual delegations to reconcile their own views with regard to the treatment of tax incentives.
7. Those delegations supporting a specific MAI article expressed the objective of subjecting tax and non-tax incentives to the same disciplines, since disciplining only non-tax incentives would induce a move to the use of tax incentives. A number of delegations noted the practical difficulties of distinguishing tax incentives from other tax measures (and hence potentially subjecting them to different MAI obligations) and specifying these in detail. Other delegations did not think this issue was insurmountable. One delegation noted that specific examples of the problems associated with not subjecting tax incentives to MAI obligations would contribute to discussion at EG2. Delegations also noted the importance of resident/non-resident and compliance principles underlying taxation regimes.
8. Some delegations argued that not subjecting tax incentives to the same disciplines as other incentives would not create scope for discrimination because of the existence of double taxation agreements. Other delegations noted that these bilateral agreements did not cover all MAI countries or all forms of discrimination in the tax field and there was value added in taking a multilateral approach.

9. Some delegations expressed the view that any definition of investment incentives was dependent on the scope of the disciplines envisaged. They argued that application of just NT/MFN/Transparency to investment incentives would not require a specific definition given the top down nature of the MAI. That is, unless carved-out, investment incentives, or any particular subset thereof, would be subject to the MAI obligations.

10. Delegations discussed the two alternative definitions in the consolidated text and particularly the aspects of “specificity” and “financial contribution”. Many delegations agreed that both concepts were the appropriate ones. While it was agreed that both definitions were conceptually the same, there was more support for the short definition contained in alternative one. There were different views as to the coverage of the term “public expenditure” and whether or not it encompassed tax incentives. Some delegations noted that combining disciplines on positive discrimination and such a specificity based definition would not discipline all aspects of tax competition.