



Negotiating Group on the Multilateral Agreement on Investment (MAI)

MONOPOLIES/STATE-OWNED ENTERPRISES

(Note by the Chairman)

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1. A *monopoly*, private or public, by definition constitutes a market access barrier for both domestic and foreign investors. It may *act*, however, in a way which discriminates between foreign and domestic firms. This may occur in the context of the application of any regulatory powers a monopoly may have, including concessions it may be entitled to grant, or the goods and services it may produce, purchase or sell.
2. A *state enterprises* may also constitute a non-discriminatory market access barrier. The importance of this barrier may depend, however, on whether the state enterprise is in a monopoly position or whether it operates in competitive sectors. A state enterprise may also benefit (disproportionally) from *special* advantages -- such as state guarantees to obtain credit, specific budgetary allocations, tax benefits and exemptions from competition rules -- which may give it a competitive edge over privately-owned enterprises. In addition, the *actions* taken by a state enterprise may distort competition in favour of domestic firms and to the detriment of foreign firms.

Existing disciplines

3. Existing international disciplines (notably GATT and NAFTA) acknowledge the right of governments to create, allow or maintain monopolies or state enterprises. But they do contain obligations regarding *transparency* and the *behaviour of government-designated* monopolies and state enterprises as purchasers or suppliers of goods or services. Private monopolies fall under the purview of national competition laws and regulations.
4. The GATT has had, for a long time, disciplines on state-trading enterprises (Article XVII). Contracting Parties are obliged to ensure that such state-trading enterprises with exclusive or special privileges act in their purchases and sales in a non-discriminatory way and in accordance with commercial considerations. The Uruguay Round Understanding on Article XVII has further strengthened transparency and notification requirements.
5. The GATT has also developed over time disciplines on *government procurement* which have been expanded in the Plurilateral Government Procurement Agreement (GPA) of 1994. These provisions impose obligations on listed government agencies, public monopolies and state enterprises not to discriminate between domestic and foreign suppliers from other GPA members with respect to the purchase of goods, services and works. The GATS does not contain comparable obligations for services (although multilateral negotiations on government procurement in services are scheduled to take place in the near future). However, members of the GATS must ensure (Article VIII) that *monopoly suppliers or exclusive service suppliers* operating in their territory shall not, in the supply of a monopoly service, act in a manner inconsistent with Member obligations on MFN treatment and their respective commitments.

They must also ensure that these entities do not abuse their dominant position outside the scope of their exclusive rights.

6. NAFTA has provisions on both government-designated monopolies¹ and state enterprises², requiring non-discriminatory treatment with respect to the *implementation of regulatory powers and the production, purchase or sale of monopoly goods and services*. Government-designated monopolies are also required not to abuse their dominant position outside the scope of their exclusive rights.

7. The ECT does not presently contain any special provision on monopolies and state enterprises but the discussions on the Supplementary Treaty are exploring a number of approaches, including transparency and a national treatment obligation for actions taken by monopolies and state enterprises.

8. OECD countries have agreed that *public or government sanctioned private* monopolies should be notified under the Codes and the National Treatment instrument for transparency purposes. These monopolies are also covered by the periodic country FDI reviews. *State enterprises* are treated as akin to private sector entities. They are thus free of the obligations falling on governmental authorities. They are also entitled to benefit fully from the liberalisation provisions of the Codes.

The MAI

9. Because a *monopoly* is by definition non-discriminatory, its existence does not need to be challenged under the MAI. The decision whether or not to *demonopolise* is the prerogative of each State. Government-designated monopolies could nevertheless be subject to the transparency obligations of the MAI in order to make it clear which economic activities are subtracted from competitive sectors.

10. The MAI could also contain obligations requiring government-designated monopolies not to discriminate between domestic and foreign investors in implementing the regulatory powers they have for taking decisions as producers, purchasers and sellers of goods and services. In addition, they could be required not to abuse their dominant position, for instance through cross-subsidisation.

11. Similar disciplines may be contemplated for a *state enterprise* with respect to its regulatory powers as producers, purchasers and sellers of goods and services. As a state enterprise would normally fall under the MAI definition of an investor, it would, however, be entitled to the same rights as those that would accrue to private foreign investors under the MAI.

12. It would be necessary to take account of the interface between MAI provisions on public monopolies and state enterprises and existing WTO disciplines, notably those of the GATS and on government procurement.

¹ NAFTA defines a monopoly as an entity, including a consortium or government agency, that in any relevant market in the territory of a 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.

A government monopoly means a monopoly that is owned or controlled by government interests.

² NAFTA defines a state enterprise as an enterprise owned or controlled, through ownership interests, by a Party.

Questions

- a) *Should the MAI contain a transparency obligation on government-designated monopolies, whether publicly-owned or privately-owned ?*
- b) *Should the MAI contain other provisions requiring that a monopoly should not discriminate between foreign and domestic firms with respect to i) the exercise of a delegated regulatory function ii) the production, purchase or sale of goods and services?*
- c) *Should a state enterprise also be required not to discriminate between domestic and foreign firms with respect to i) the exercise of any delegated regulatory function it may have and ii) the production, purchase or sale of goods and services?*
- d) *Is it understood that a foreign state-owned enterprise would be entitled to the same rights as private investors?*
- e) *Should non-conforming measures to the provisions mentioned in b) and c) be subject to standstill and rollback obligations? If not all, which ones?*