



Negotiating Group on the Multilateral Agreement on Investment (MAI)

SELECTED ISSUES ON MONOPOLIES/STATE ENTERPRISES/CONCESSIONS

(Note by the Chairman)

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1. As a result of informal discussions held on 21-22 April 1997 [DAFFE/MAI/ST(97)11], significant progress has been made in the elaboration of special MAI disciplines on Monopolies. In particular, there is now broad agreement on text providing that:

- Delegated regulatory powers of government-designated monopolies should be subject to an anti-circumvention clause [Article A, paragraph 2 a)];
- Each Contracting Party should ensure that its designated monopolies provide non-discriminatory treatment to investments of investors of any other Contracting Party with respect to both the sale and purchase of the monopoly goods or services [Article A, paragraphs 2 b) and c)];
- Designated monopolies should be notified to the Parties Group (Article A, paragraph 5).

2. Among the issues to be resolved, a number of questions identified during the informal discussions require policy guidance from the Negotiating Group (see Annex). The following three matters merit discussion at this stage. Other issues raised in the Annex could be considered at a later stage.

a) *Behaviour of designated monopolies*

3. While there is agreement to discipline the behaviour of designated monopolies with respect to the sale or purchase of a monopoly good or service, a majority of delegations consider that the MAI should also contain provisions on the behaviour of designated monopolies in *non-monopolised markets*. Views differ on whether these disciplines should target the “anti-competitive practices” of designated monopolies (alternative 1) or “the abuse of monopoly positions” (alternative 2).

Question:

Should the MAI contain disciplines on the practices of designated monopolies in non-monopolised markets and, if so, can alternative 1 and alternative 2 be reconciled in some way?

b) *Demonopolisation*

4. Delegations remain divided as to whether new country-specific reservations could be introduced at the time of demonopolisation. A possible compromise might be to allow Contracting Parties to designate, upon entry into force of the MAI, monopolies or sectors in which they wished to keep the right

to lodge future reservations. A similar solution was put forward at the Negotiating Group in April in the context of privatisation.

Question:

Should the MAI provide that Contracting Parties designate at the time of entry into force of the Agreement, the monopolies or sectors for which they wish to keep the right to lodge future reservations?

c) Concessions

5. This appears to be one of the most difficult special topics and one on which experts have spent less time. My understanding is that some delegations view the issue of transparency as a particularly important one for the application of the National Treatment/MFN provisions to concessions, notably for the operation of networks or infrastructures. It would be desirable to provide guidance to experts on what provisions, if any, they should develop.

Question:

Should the MAI contain specific transparency provisions on concessions? If so, should concessions be defined in the context of such provisions?

Annex

I. Introduction

This Annex outlines issues identified on the occasion of the informal discussions on Special Topics on 21-22 April 1997 which the experts considered require guidance from the Negotiating Group. Each subject is introduced by a succinct description of the policy considerations before the Negotiating Group, followed by suggested points of discussion.

II. Articles on Monopolies/State-Owned Enterprises

1. *Designation, Maintenance and Elimination of Monopolies (Article A, paragraphs 1-2)*

1. The right of governments to designate, maintain or eliminate monopolies is not disputed. The question arises, however, as to whether or not the MAI should, for the sake of clarity and certainty, recognise this right through an explicit provision or an interpretative note. There is also the question of whether the designation of a new monopoly should be done on a non-discriminatory basis.

-- *Should the right of governments to designate, maintain or eliminate monopolies be made explicit in the MAI through a separate provision or an interpretative note?*

-- *Should governments be required to accord non-discriminatory treatment when designating a new monopoly or should this be done on a best endeavour basis?*

2. *Application of the Monopoly disciplines to designated privately-owned monopolies (Article A, chapeau of paragraph 3)*

2. A majority of delegations consider that the monopoly provision should apply to private and public monopolies without qualification. However, a few delegations consider that MAI disciplines on Monopolies should not apply to privately-owned monopolies designated prior to the entry into force of the MAI since this could create problems with regard to existing contracts with the government and affect the acquired rights of the shareholders.

-- *Should privately-owned monopolies designated prior to the entry into force of the MAI be treated in the same way as privately-owned monopolies designated after that date?*

3. *Practices of designated monopolies in non-monopolised markets [Article A, subparagraph (d) of paragraph 3]*

3. A number of delegations consider that a Contracting Party should be required to ensure that a designated monopoly does not use its monopoly position, in a non-monopolised market in its territory, to engage in "anti-competitive" practices to the detriment of an investor of another Contracting Party or its investments (alternative 1). Other delegations (including those which would prefer no provision at all as a first option) could support a provision based on Article VIII of the GATS to ensure that a designated monopoly "does not abuse its monopoly position" rights to act in a manner inconsistent with the Agreement when competing in an economic activity outside the scope of its monopoly powers (alternative 2).

- *Should the MAI discipline the activities of designated monopolies outside the scope of their monopoly rights by targeting “anti-competitive practices” (alternative 1) or “abuse of monopoly positions” (alternative 2)?*

4. Lodging of reservations at the time of demonopolisation (Article A, paragraph 4)

4. Views are divided as to whether new country-specific reservations could be introduced at the time of demonopolisation. When a related question was discussed by the Negotiating Group in April in the context of privatisation, it was suggested, as a possible compromise, that Contracting Parties could designate, upon entry into force of the MAI, sectors in which they wished to keep the right to lodge future reservations. Given the similarity of issues raised demonopolisation and privatisation operations, this compromise solution proposed for privatisations might also be appropriate for demonopolisation.

- *Should the MAI provide that Contracting Parties designate, upon entry into force of the Agreement, monopolies in which they wished to keep the right to lodge future reservations?*

5. Anti-circumvention clause for other entities than monopolies [Article B, paragraph 1]

5. The question arises as to whether the Contracting Parties should ensure that entities other than monopolies act in a manner not inconsistent with the MAI wherever they exercise a regulatory, administrative or other governmental authority. [There is broad agreement for the inclusion of an anti-circumvention clause for monopolies under Article A, Paragraph 3(a)]

- *Should the anti-circumvention provisions of the MAI extend to all entities that have been given a delegated authority, in the exercise of that authority, without distinction of being publicly or privately owned or controlled, or should they be limited to government-owned or -controlled entities?*

III. Article on Concessions (Article D)

6. Some delegations view the issue of transparency as particularly important one for the application of the National Treatment/MFN provisions to concessions, notably with regard to those granted for the operation of networks or infrastructures. They consider that the MAI should contain specific provisions on this subject. Other delegations question the need for such a provision. The question on how to deal with concessions relating to exploitation of natural resources has also been raised in this context.

Given that the proposed definitions for monopolies (Section C, Paragraph 3) will cover concessions with monopoly rights, and irrespective of how other concessions might be defined in the Agreement, should the MAI:

- *Include specific transparency provisions on the granting of concessions with respect to the operation of networks or infrastructures?*
- *Would this imply that concessions need to be defined in the context of this provision?*