



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Informal Consultations on “Special Topics”

DRAFT PROVISIONS ON PRIVATISATION

(Report to the Negotiating Group)

Report to the Negotiating Group¹

Draft provisions on Privatisation

1. On 24-27 February 1997 delegations held informal consultations on MAI draft provisions on obligations in the context of privatisations. The current state of discussions is reflected in the attached working document.
2. On some issues, such as the confirmation of the application of National Treatment and MFN treatment to privatisation, the definition of privatisation or special transparency obligations, there has been considerable progress.
3. On the issue of “special shareholder arrangements” intensive discussions have been held. In order to achieve progress on this issue additional proposals were made, and discussed, which draw on the Chairman’s conclusions of the December 1996 meeting of the Negotiating Group [DAFFE/MAI/97(2)].
4. It was noticed by some delegations that some of the issues discussed are of a more general nature and might therefore be picked up in another context, such as
 - the issue of “*de facto* discrimination”, and
 - the definition of “state enterprises” and “government entities”.

Co-ordinator

1 Whereas the attached Working Document has been approved by delegations, this cover note has not been discussed in the informal meeting and therefore reflects the personal view of the co-ordinator.

DRAFT PROVISIONS ON PRIVATISATION²

Paragraph 1 (Application of National Treatment/MFN)

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)³; and
- b) subsequent transactions involving a privatised asset⁴.

[Paragraph 1a (voucher schemes)

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]⁵.

Paragraph 2 (Right to privatise)

Nothing in this Agreement shall be construed as imposing an obligation on a Contracting Party to privatise⁶.

-
2. Two delegations reserve their position on all privatisation obligations. One other delegation considers that dedicated MAI provisions on privatisation are unnecessary, since the basic NT/MFN obligations would apply to privatisation, and thus reserves its position on all such provisions.
 3. One delegation reserves its position.
 4. Four delegations 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 proposed 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.
 5. One delegation is ready to withdraw this proposal if reference to vouchers schemes under paragraph 3, alternative 2, letter d, is deleted.
 6. Two delegations propose to insert “prejudice Contracting Parties’ rules governing the system of property ownership or” between the words “shall” and “between”.

Paragraph 3 (Special share arrangements)⁷

Alternative 1

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.⁸

Alternative 2⁹

[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 3¹⁰

Special share arrangements which explicitly discriminate against foreign investors and their investment are inconsistent with obligations on National Treatment and MFN treatment. It is also understood that other special share arrangements which do not involve *de jure* discrimination could give rise to problems of *de facto* discrimination.

7 Work on paragraph 3 was based on alternative 1, which was supported by a large number of delegations. However, one delegation maintained 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. One other delegation shares this view. Three delegations propose the deletion of paragraph 3.

8 Two delegations would still prefer the inclusion of an illustrative list, such as contained in Room Document 11 or in DAFPE/MAI(97)1.

9 One delegation’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.

10 This alternative draws as closely as possible on the Chairman’s conclusion [DAFFE/MAI(97)2].

Alternative 4¹¹

Footnote to paragraph 1

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

[Alternative 5¹²

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.]

11 Three delegations put forward this language, based on the Chairman's conclusion [DAFFE/MAI(97)2] as a compromise, although it was not their preferred option.

12 This proposal by one delegation has not been discussed by the delegations.

Paragraph 4 (Transparency)

For the purposes of this Article, each Contracting Party¹³ or its designated agency shall promptly publish or otherwise make publicly available¹⁴ the essential features and procedures for participation in each prospective privatisation¹⁵.*

* This footnote confirms the application of the Transparency Article YY. Specifically, 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. [A Contracting Party that gives to its investors and investments access to information concerning the fact of privatisation must at the same time give that access to investors and investments of other Contracting Parties. Any information relevant to the privatisation available to investors of a Contracting Party must be available to investors and investments of other Contracting Parties, e.g. a Contracting Party must provide financial statements on request. A Contracting Party would violate National Treatment if, in order to benefit its investors and their investments, it refrains from making information publicly available, either about the fact of privatisation or about the enterprise or entity to be privatised.]¹⁶ [It is understood that in the case of small scale privatisations, there can be some variance in the methods used to make information available.]

Paragraph 5 (Definition)

“Privatisation means the sale or other disposal by a Contracting Party, in part or in full, of its equity interest in, or the assets of, a [state] enterprise or government entity.**¹⁷

** This article is not meant to cover transactions between different levels or entities of the same Contracting Party.

13 One delegation proposed that the obligation should apply to all levels of government.

14 One delegation wonders about the specific meaning of such a provision.

15 It is understood that the obligation of this article will be met wherever the information on a privatisation operation is made available.

16 Two delegations support the insertion of the sentences in the bracket. The other delegations see no need for such text.

17 Two delegations reserve their position on the definition. Several delegations considered that the terms “state enterprise” and “government entity” would have to be defined in the Agreement. In addition, the inclusion of “state” in the definition would make necessary additional text in order to ensure that in case of sales by several tranches all transactions would be covered even if the company ceased to be a state enterprise.