



Negotiating Group on the Multilateral Agreement on Investment (MAI)

**Drafting Group No.2 on Selected Topics Concerning Treatment of Investors and Investment
(Pre/Post Establishment)**

DEFINITION OF INVESTOR AND INVESTMENT

(Note by the Chairman)

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Investor means:

natural persons (citizens) [and permanent residents] of a Contracting Party and enterprises organised in accordance with the law of a Contracting Party [that seek to make, are making, or have made an investment]; and

Investment means every kind of asset owned or controlled, directly or indirectly, by an Investor, [including] :

- (i) an enterprise;
- (ii) shares, stock or other forms of equity participation in an enterprise;
- (iii) bonds, debentures, and other debt of an enterprise;

[(iv) an interest arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in such territory, such as under

-- contracts involving the presence of an investor's property in the territory of a Party, including turnkey or construction contracts, or concessions, or

-- contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;]

[(v) an interest in an enterprise that entitles the owner to share in

-- income or profits of the enterprise;

-- the assets of that enterprise on dissolution;]

(vi) claims to money and claims to performance pursuant to a contract having an economic value;

(vii) intellectual property rights;

(viii) rights conferred pursuant to law such as licenses and permits;

(ix) any other tangible and intangible, movable and immovable property and any related property rights, such as leases, mortgages, liens and pledges.

COMMENTARY

Investor

1. This proposal includes natural persons who are citizens of a Party to the agreement, as determined by the applicable national law of the Party. It is for consideration whether permanent residents should also be included given the complications that this might create with regard to access to dispute settlement. Under the ICSID Convention, permanent residents would not have access to its dispute settlement provisions. If included in the definition, permanent residents might access dispute settlement through the other forms of arbitration foreseen by the agreement, including UNCITRAL.

2. NAFTA includes in its definition of investor, the concept that an investor is one which seeks to make, is making, or has made an investment. **Several delegations were of the opinion that the concept of “seeking to make” would be too vague unless there was a requirement of a concrete or material undertaking on the part of the investor.** NAFTA and the ECT also contain a definition of investor of a non-contracting party which is intended as a standard of reference for the MFN obligation. Delegates may wish to consider whether it is necessary to include similar provisions in the MAI.

3. Views differ whether the definition should include legal persons not constituted under the law of a Party but that are controlled, directly or indirectly, by nationals (persons and enterprises) of a Party, which is the practice in some bilateral treaties. Concerns were raised that this approach might create a free-rider problem and could result in coverage of "shell" companies. **US BIT practice is to deny the benefits of the agreement to investors whose ownership, at one or more levels, includes nationals from states with whom the member state may not have normal economic relations, or investors whose companies have no substantial business activities in the other country.**

Investment

4. The draft definition of investment takes account of the NAFTA, ECT, and bilateral investment agreements. It defines investment in terms of assets and includes an illustrative list of assets so as to provide maximum protection to all recognised and evolving forms of investment. **The question was raised whether investment also includes the products of an investment.**

5. To deal with the potential risk that a broad definition might result in a proliferation of dispute settlement claims, access to the MAI dispute settlement mechanism could be limited either through a provision in the dispute settlement article, or through limitations in the definition itself.

6. **The consideration of a broad, open list of assets for the definition of investment under the MAI does not prejudice the scope of application of the various MAI obligations.**

7. **While there was consensus in favour of applying a broad definition with respect to the MAI obligations to protect existing investments and to grant national treatment to foreign-controlled enterprises once established in the country, several delegations expressed concern over the application of the MAI obligation concerning national treatment for non-resident investors, i.e. in the establishment phase. Those delegations consider that an unqualified application of this obligation to a broad range of assets could interfere with regulations on financial markets and other operations which are not meant to be covered by the MAI.**

8. To address this concern while maintaining a broad and single definition of investment under the MAI, one solution, inspired from existing agreements, would be to qualify the application of the national treatment obligation in the phase of establishment of an investment by non-resident investors. For instance, NAFTA and the GATS have special provisions, including a prudential carve-out, concerning establishment in financial services. Certain bilateral investment treaties (e.g. Swiss agreements) exclude acquisitions by non-residents of secondary residences from their liberalisation provisions, while maintaining a protection obligation for secondary residences lawfully acquired.

9. Another response to this question, proposed by one delegation, is to define an investment as every kind of asset so long as such assets consist or take the form of an investment. This approach is meant to exclude certain assets (e.g. traded goods) that are generally agreed not to be investments. This approach is recognised to be circular, however. Other delegations suggested linking the assets in the definition to real economic, or business, purposes. These matters will require further examination.

Item (i) an enterprise

10. The MAI may need to define the term "enterprise". A definition as in the NAFTA could include any entity constituted or organised under law, whether or not for profit, and whether privately-owned or government-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association, and a branch of any enterprise. Some BITs also specifically include joint ventures (Canada, Netherlands). **There is a question whether scientific institutions and universities would also be covered.** Under the Codes, Member countries cannot maintain restrictions on the mode of operation (subsidiary, branch, agency or other form of legal person).

Item (ii) shares, stock or other forms of equity participation in an enterprise

11. This item includes portfolio investment which does not raise particular difficulties when applied to investment protection obligations. The extent to which other substantive obligations of the agreement will apply to portfolio investment may need further examination in the light of concerns which have been expressed by some delegations.

Item (iii) bonds, debentures, and other debt of an enterprise

12. Debt securities of an enterprise, including long term bonds and debentures, would be considered investments. The question arises whether some limitations should be set to exclude short-term debt securities. NAFTA sets a specific term (3) years for debt obligations to be covered or requires that the enterprise be an affiliate of the investor.

13. Delegates should consider whether the MAI should also apply to government debt securities. NAFTA explicitly excludes debt security of a state enterprise from the definition of investment.

Item (iv) an interest arising from the commitment of capital or other resources the territory of a Contracting Party to economic activity in such territory, such as under

-- contracts involving the presence of an investor's property in the territory of a Contracting Party, including turnkey or construction contracts, or concessions, or

- contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.

14. This is the model used in the NAFTA which implies that there must be a substantial level of risk and commitment by an investor which would justify consideration as an investment. This item (and item v, below) are in brackets to indicate that in an illustrative list of assets, it might not be necessary to include this in the definition since whether or not such interests constitute an "investment" will depend on the facts of a particular case.

Item (v) an interest in an enterprise that entitles the owner to share in

- income or profits of the enterprise, or
- the assets of that enterprise on dissolution;

15. These elements, which are found also in the NAFTA, would cover strategic alliances and other arrangements involving the sharing of know-how, intellectual property, or technology or the joint conduct of research and development programmes.

Item (vi) claims to money and claims to performance pursuant to a contract having an economic value;

16. This element, which includes loans, is a common feature in most bilateral investment protection treaties and the ECT. This could include short-term as well as long term loans unless a specific maturity is provided for. The OECD Code includes a loan of five years or longer as part of direct investment. NAFTA requires that the original maturity of the loan be at least three years; an intra-company loan, regardless of maturity, would also be covered.

17. Claims to money may also arise as a result of a sale of goods or services. These claims are generally not considered as investments. The NAFTA excludes such claims unless they are associated with the investment interests which are set out in its definition. The ECT also requires that these claims be associated with an investment.

Item (vii) intellectual property rights

18. BITs and multilateral agreements recognise that all forms of intellectual property constitute "investment". The agreements vary in the degree of specificity with which such rights are defined. Goodwill is most often treated as an element of intellectual property rights. Canada's BITs list goodwill separately. Otherwise this category of assets generally includes copyrights and related rights, patents, industrial designs, rights in semiconductor layout designs, trade secrets, including know-how and confidential business information, trade and service marks, and trade names. Some of these elements might be included in the definition as part of the illustrative list of assets.

19. Further work may be needed to clarify the relationship of the MAI to other international agreements that relate to intellectual property, particularly where these conventions might require standards of treatment which differ from the MAI or where these conventions provide for dispute settlement mechanisms.

Item (viii) rights conferred pursuant to law such as licenses and permits;

20. Bilateral treaties recognise that rights such as licenses and permits constitute a form of property. Although not always explicitly mentioned, these rights are generally meant to cover rights to search for, cultivate, extract or exploit natural resources. Most bilateral treaties, and the ECT, refer to rights conferred by law or under contract and therefore extend protection to these forms of property.

Item (ix) any other tangible and intangible, movable and immovable property and any related property rights, such as leases, mortgages, liens and pledges.

21. This category includes real estate which is a common form of property protected under BITs and the ECT and NAFTA. **There are different views whether the definition should cover summer residences or secondary homes.** Canada's BITs and NAFTA, for example, exclude real estate which is not acquired in the expectation, or used for the purpose, of economic benefit or other business purposes.

-- Other Elements

22. This definition does not include an item relating to "returns", as is done in the ECT. **Some delegations consider that the MAI should include "returns, or "reinvested returns" as part of the definition of investment.**

23. Many bilaterals contain provisions that any change in the form of an investment does not affect its character as an investment. They may also specify that the term "investment" includes all investments, whether made before or after the date of entry into force of the agreement. It is for consideration whether such provisions are necessary in the MAI.