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**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)**

**REPORT OF THE DRAFTING GROUP ON THE  
DEFINITION OF “INVESTOR” AND “INVESTMENT”**

**DEFINITION OF  
“INVESTOR” AND “INVESTMENT”**

**Investor means:**

- (i) a natural person having the nationality of [or who is permanently residing in] a Contracting Party in accordance with its applicable law; or
- (ii) a legal person or any other entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, [branch], joint venture, association or organisation.

**Investment means:**

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

- (i) an enterprise (being a legal person or any other entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation).
- (ii) shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;
- (iii) bonds, debentures, loans to and other forms of debt of an enterprise;
- (iv) rights under contracts, including turnkey, construction or management contracts, production or revenue-sharing contracts, [or concession contracts];
- (v) claims to money, and claims to performance pursuant to a contract [associated with an investment] [having an economic value];
- (vi) intellectual property rights;
- (vii) [rights conferred pursuant to law such as concessions, licenses, and permits; ]
- (viii) any other tangible and intangible, moveable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

## COMMENTARY

The definitions of “investor” and “investment” need to be carefully reviewed for consistency with text elsewhere in the agreement, and for grammatical precision, including the use of the words “and” and “or”.

### **Investor**

1. One delegation noted that the use of the word “nationality” may require the development of an annex to the MAI in which participants would be able to clarify the meaning of “nationality” in terms of their respective domestic laws.
2. Some delegations expressed concerns relating to the inclusion of permanent residents in the definition of investor. If permanent residents are included, it would be necessary to specify that permanent residents would be those that are recognised as such under the applicable law of each Contracting Party. Concerns relating to their standing for purposes of dispute settlement could be addressed in the MAI provisions dealing with dispute settlement.
3. Some delegations questioned the inclusion of branches in the definition of investor as in their countries branches do not have the legal capacity to make investments. Other delegations expressed concern that including branches in the definition of investor could give rise to a “free-rider” problem. One possibility to deal with this issue could be to insert into the MAI a denial of benefits clause with regard to such entities of a foreign investor that do not undertake substantial business in the host country.
4. Some delegations considered that “sole proprietorship” should not be included in (ii) since this is already fully covered by (i).
5. One country proposes in (ii) to place the words “of a Contracting Party” immediately after the words “a legal person” so that all legal persons would be covered, be they originally organised under the law of the country in question or other law.
6. Some delegations suggested that further consideration be given to the possible need for, or desirability of, including in the definition of investor an additional item to cover a Contracting Party (i.e. a State).

### **Investment**

7. The Drafting Group examined a definition of investment on the assumption that the MAI would contain a single, broad definition covering all forms of assets, including tangible and intangible assets. The consideration of such a definition does not prejudge the scope of its application to the various MAI rights and obligations.
8. While the question of the scope and application of the MAI is still to be resolved, the Drafting Group made the following observations. There was consensus in favour of applying a broad definition with respect to the MAI obligations to protect existing investments; however, several delegations expressed concern over how the MAI obligation concerning national treatment would apply in the pre-establishment phase. Some delegations consider that an unqualified application of this obligation to a broad range of assets could interfere with regulations of financial markets and other operations which are

not meant to be covered by the MAI. One delegation also considered that an unqualified application would cause confusion with respect to the precise contents of obligations in the pre-establishment phase.

9. To address this concern while maintaining a broad and single definition under the MAI, specific reservations could be lodged wherever a country is not in a position to fully accord national treatment or other MAI obligations. Alternatively, the application of those obligations in the pre-establishment phase could be qualified. In this respect, one delegation proposed to add a provision, as a separate article, as follows:

“The obligation of [national treatment, MFN treatment.....] for the pre-establishment phase shall apply to investment made for the purpose of establishing lasting economic relations with an undertaking, such as, in particular, investments which give the responsibility of exercising an effective influence on the management thereof.”

It was noted that NAFTA and the GATS have special provisions concerning financial services, including provisions relating to prudential matters. These various matters need to be addressed by the Negotiating Group.

10. The draft definition of investment defines investment in terms of assets and includes an illustrative list of assets so as to cover all recognised and evolving forms of investment. The definition would include the products of an investment.

11. One country proposes to add at the end of the illustrative list a phrase applicable to the entire definition of investment which would read as follows:

“so long as such assets consist or take the form of an investment”.

This approach attempts to meet the goal of defining investment in terms of assets, but at the same time links the definition to those assets that bear a clear relation to investment. Similar to the draft text, this country practice uses asset-based examples of investment, but avoids defining investment in terms of assets in order to exclude certain assets (e.g. traded goods) that are generally agreed not to be investments. This circular definition of investment is used to strike a careful balance: including, within the scope of the MAI all the forms that an investment may take, while excluding items that should not receive the MAI's protection. While it might be possible to obtain this result with a non-circular definition, the delegation believes that this would be extremely difficult, in particular it would make the drafting more complex, and would result in a loss of transparency. Other delegations have doubts about the circular definition approach. Some delegations prefer that the coverage of assets in the definition include only those assets acquired or used for economic, or business, purposes. These matters will require further examination.

12. Some delegations are concerned that a broad definition of investment might result in a proliferation of dispute settlement claims. If necessary, this concern can be addressed by limiting access to the MAI dispute settlement mechanism, either through a provision in the dispute settlement article or through limitations in the definition itself.

13. Views differ on whether the definition of investment should cover investments indirectly owned or controlled by investors of a Party. Some delegations are of the opinion that covering such investment offers maximum protection to investors, including access to MAI dispute settlement. In addition, those delegations believe that this approach offers the most flexibility to investors in managing their capital flows, and avoids diverting investment flows from developing countries. The standing of controlled

enterprises for purposes of dispute settlement and the issue of espousal of investors' claims by different Contracting Parties could be addressed in the dispute settlement provisions of the MAI.

14. Some delegations opposed covering investment made by an investor of a non-MAI party, even though owned or controlled by an MAI investor. The issue of free-riders was also discussed. Some delegations suggested that these issues could possibly be resolved through a denial of benefits provision.

15. One delegation considered that the inclusion of indirectly controlled investments might pose serious problems to REIO Members far as their present level of liberalisation is concerned as this normally also applies to companies established in the REIO, but under control of a non-REIO country. The delegation suggested that such problems could eventually be effectively addressed by a general MAI provision on measures taken within Regional Economic Integration Agreements.

16. Most delegations would prefer the definition of investment to be an open one. The word "including" in the chapeau is in brackets while delegations consider the implications of the scope of the definition.

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**Item (i)**

An enterprise (being a legal person or any entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation).

17. The term "enterprise" is defined in parenthesis in the proposed text but could be defined separately. It was agreed that the definition covers, inter alia, scientific research institutes and universities. Most delegations favoured the same definition of enterprise for "investor" and "investment". It was also proposed to define "enterprise of a Contracting Party".

18. Some delegations questioned whether "government owned or controlled enterprises" should be considered "investments". Separately, some delegations thought that the notion "whether private or government owned or controlled" should be deleted given that ownership and control are dealt with in the chapeau.

**Item (ii)**

Shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;

19. This item, as well as item (iii), includes portfolio investment and minority holdings. It is for consideration whether the definition covers strategic alliances and other arrangements involving know-how, intellectual property, or technology or the joint conduct of research and development programmes. This item is also understood to cover an interest in an enterprise that entitles the owner to share in income and profits of an enterprise and its assets. The extent to which the substantive obligations of the agreement will apply to this item and to item (iii), in particular portfolio investment and foreign exchange operations, will need further examination in the light of concerns expressed by some delegations.

**Item(iii)**

Bonds, debentures, loans to and other forms of debt of an enterprise;

20. This item would cover loans of all maturities and debt securities of a state enterprise.
21. One delegation wishes to exclude loans of less than three years, other than loans between affiliates of an enterprise. Other delegations consider that this issue requires further consideration.
22. Some delegations consider that sovereign debt should not be included, while others believe that including sovereign debt (which includes state-owned enterprise debt) requires further consideration. One element to be considered in this respect would be the sovereign liquidity issue. Some delegations pointed out that confiscatory measures by a debtor state entail international responsibility which should be dealt with in the MAI.

**Item (iv)**

Rights under contracts, including turnkey, construction or management contracts, production or revenue-sharing contracts, [or concession contracts];

23. Some delegations thought that items (iv) and (v) should be combined. Some delegations proposed deleting “concession contracts” from item (iv) and to address the question of concessions in a revised item (vii). It was also suggested, by several delegations, to add a reference to franchising, licensing and “BOOT” agreements.
24. Some delegations wish to retain, for further consideration, a previous text for item (iv) which would read as follows:

“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.”

**Item (v)**

Claims to money, and claims to performance pursuant to a contract [associated with an investment] [having an economic value];

25. “Claims to money” includes bank deposits. Most delegations consider that this item covers derivatives which are not covered elsewhere in the list of assets.

26. Claims to money may also arise as a result of a sale of goods or services. These claims are not generally 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. Similar questions arise with respect to “rights under contracts” (item iv).

27. One delegation proposed to address these matters in the MAI by adding the words “associated with an investment” and deleting the words “having an economic value”. Some delegations supported the following alternative text:

“Claims to money and claims to performance pursuant to a contract [associated with an investment] having an economic value, with the exception of :

(a) Commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Contracting Party to an enterprise in the territory of another Contracting Party;

(b) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by item (iii); or;

(c) any other claims to money that do not involve the kinds of interests set out in items (i) through (ix).”

Delegations felt that these matters merit further consideration.

**Item (vi)**

Intellectual property rights;

28. All forms of intellectual property are included in the definition of "investment," including copyrights and related rights, patents, industrial designs, rights in semiconductor layout designs, technical processes, trade secrets, including know-how and confidential business information, trade and service marks, and trade names and goodwill. Views differed on whether it is necessary to specifically refer to some of these elements in the definition as part of the illustrative list of assets. Some delegations consider that the question of whether to include “literary and artistic property rights” has not yet been decided. One delegation wishes to cover intellectual property rights under the MAI only when acquired in the expectation of economic benefit or other business purposes.

29. 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 (vii)**

[Rights conferred pursuant to law such as concessions, licenses, and permits; ]

30. Rights such as concessions, licenses and permits 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 extend protection to such rights.

31. One delegation considered that this item covers public law contracts. Some delegations proposed to replace the text of item (vii) with the following text from the ECT: “Any rights conferred by law or contract or by virtue of any licenses or permits granted pursuant to law to undertake any economic activity...”

**Item (viii)**

any other tangible and intangible, moveable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

32. This category includes real estate which is a common form of property protected under BITs, the ECT and NAFTA. There are different views on item (viii) including whether the definition should cover summer residences or second homes. NAFTA, however, excludes real estate or other property which is not acquired in the expectation, or used for the purpose, of economic benefit or other business purposes, and some delegations prefer such an approach.

**-- Other Elements**

33. Some delegations consider that the MAI should include “returns, or “reinvested returns” as part of the definition of investment as in the ECT.

34. Views differ on whether to specify that any change in the form of an investment does not affect its character as an investment.

35. One delegation expressed the view that changes of activities of an investment should also be taken into consideration.

36. Some delegations felt that an illustrative list of assets that do not constitute an investment could help to clarify the limits of the definition and should be included.

37. The broadly shared view that the MAI should cover all investment whether made before or after the date of entry into force of the agreement could be dealt with in the definition of investment if not dealt with elsewhere.