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**Negotiating Group on the Multilateral Agreement on Investment (MAI)**

**Expert Group No.5 on “Financial Services Matters”**

**ISSUES RELATING TO THE DEFINITION OF INVESTORS**

**(Note by the Secretariat)**

## ISSUES RELATING TO THE DEFINITION OF INVESTORS

(Note by the Secretariat)

### A. Introduction

1. Since the outset of the negotiations, the objective for the MAI has been a single broad definition of "investment" to be applied to all substantive obligations of the agreement. It has since been agreed to adopt an asset-based definition, along an approach similar to that followed in most bilateral investment treaties.

2. As the discussions have progressed, certain questions have arisen in particular regarding application to the provisions of the MAI on National Treatment and Transfers of a broad definition of investment including portfolio investments and other claims arising from certain foreign exchange and financial operations undertaken by non-resident investors.

3. Six different approaches have been identified to deal with this situation:

- 1) including in the definition of investment a positive list of assets which correspond to an "investment" for the purposes of the MAI and a negative list of assets what do not correspond to an "investment". This is the structure agreed by Drafting Group No 3 (DG3), the positive list being broad and the negative list limited.
- 2) attaching qualifications to individual items in the illustrative list of assets constituting an investment (e.g. "claims ... associated with an investment", or "claims ... having an economic value");
- 3) adding a "footer" to the positive list of assets ("unless such assets lack the characteristics of an investment"), or to the negative list (e.g. "unless such assets are acquired for the purpose of establishing lasting economic relations with an enterprise");
- 4) adding a "header" to the negative list of assets (e.g. the negative list applies only for purposes other than investor protection);
- 5) relying on country-specific reservations;
- 6) relying on general safeguards (see below) to deal with any difficulties.

These different approaches are not mutually exclusive (although it is clearly desirable to avoid unnecessary complexity).

4. In its report to the Negotiating Group, DG3 sought advice from EG5 on a text which combines the four first options. In particular:

- The text contains a "positive" list of assets that an investor may own or control and that constitute an investment in the sense of the MAI. This list, which is an open-ended illustrative one, currently includes an "enterprise" (broadly defined), any forms of equity participation in

an enterprise, debt of an enterprise, and a series of other assets, including intangible assets [see Annex to this Note];

- Assets under consideration for inclusion in the "negative" list include in particular real estate and other property for non-business or personal purposes, claims to money arising only from trade, traded goods, public debt, (claims arising from) foreign exchange operations, (claims arising from) financial operations, and (claims arising from) derivatives not based on an underlying asset otherwise defined as an investment.

5. More specifically EG5 has been requested to better define the nature of the transactions that have been identified by DG3 for possible inclusion in the negative list and that are designated in the text currently under consideration as : " (iv) foreign exchange operations", " (v) financial operations' " and " (vi) derivatives where the underlying assets is not regarded as an investment".

6. At its October meeting, EG5 requested the Secretariat to analyse the operational implications of different options by exploring examples where the definition would be inserted into the substantive obligations of the agreement.

## **B. General considerations**

7. Among the MAI's substantive provisions, those relating to National Treatment, Transfers, and Expropriation & Compensation and Protection from Strife may be the most critical to the discussion on the definition of investment.

### ***National Treatment***

8. The National Treatment article of the MAI stipulates that "each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments."

9. Under this article, foreign investors have the same right as national investors to expand, manage, operate, etc. the enterprises that they control and that are already established in the country and operating under the host country's laws and regulations. This means that such foreign-controlled enterprises should be allowed to undertake any and all of the activities and investments which are permitted to domestic-controlled enterprises. This would remain true no matter how many types of financial claims might be included in the negative list. For instance, foreign-controlled financial institutions established in the country would be as free as domestic-controlled financial institutions to engage in foreign exchange and financial transactions and derivatives, including cross-border operations, permitted under relevant domestic financial regulations.

10. At the same time, under the National Treatment article, non-resident investors have the same right as residents to establish an enterprise or acquire other claims constituting an investment in the meaning of the MAI. For instance, non-resident investors would be as free as residents to make portfolio equity investment, acquire domestic commercial paper and other short-term corporate debt instruments available for sale on the domestic market or to open deposit accounts with domestic banks. These operations involve cross-border inflows of capital.

11. It seems to be primarily in the perspective of cross-border investments that some delegations have expressed concerns with respect to the inclusion of claims arising from foreign exchange operations, derivatives and other financial operations in the definition of the MAI of an investment. The reasons for concern may be that full freedom for non-residents to acquire such claims could result in large and volatile capital movements that affect the conduct of monetary policy, the balance of payments and the exchange rate, possibly due to the short maturities and the potentially high liquidity of the categories of cross-border investment involved and their sensitivity to interest-rate and exchange-rate developments. *Delegations in favour of some exclusion of financial assets from the definition of investment may wish to comment on the reasons for seeking such an exclusion and on the precise categories of assets with respect to which their concerns lie.*

### ***Transfer***

12. The provision of the MAI regarding transfers provides an absolute right to foreign investors to make cross-border transfers that are necessary to the making of an investment and to the repatriation abroad of returns on investment and the proceeds of the liquidation of such an investment.

13. This means that a Contracting Party could not, for instance, use a National Treatment argument to justify restrictions on transfers by foreign investors. Therefore, the ability to discourage non-residents' acquisitions of certain domestic financial assets or to stop a reversal in the flow of capital involved through restrictions on transfers would not be available to a Contracting Party, if the assets concerned were regarded as investments under the MAI.

14. At the same time, it is important to note in a balance-of-payments perspective that there should be no concern regarding capital outflows by resident nationals, as the MAI is not requiring a Contracting Party to allow its nationals to acquire financial instruments issued by non-residents, other claims on non-residents or any other foreign assets.

### ***Expropriation and Compensation, Protection from Strife***

15. While concerns seem to primarily relate to the acquisition by non-resident investors of claims on residents arising from certain foreign exchange and financial operations, delegations may wish to consider whether there is any need to exclude the claims arising from these operations from the expropriation and compensation provisions of the MAI.

16. At the last meeting of DG3, one example was given to illustrate this issue. A number of OECD countries restrict the purchase from abroad by foreign non-residents of real estate for residential purposes such as summer houses and secondary homes. Several delegations indicated that they wish to maintain this restriction, but see no major difficulties to provide protection with respect to those residences that foreigners may have been permitted to acquire.

17. Along a similar approach, one might make the case that the provisions of the MAI on expropriation and compensation and protection from strife should remain applicable to assets which have been (lawfully) acquired by a foreign-controlled enterprise established in the country and operating under the host country's laws and regulations.

18. This could be achieved by endorsing a "header" like that currently under consideration for the negative list. As it reads now, the header would restore that all assets on the negative list to the definition of investment for the purposes of the expropriation and compensation and protection from strife.

*Delegations may wish to consider whether this proposed header should be retained or modified to apply only to the protection of assets owned by established foreign-controlled enterprises.*

### ***The possible role of safeguards***

19. *Delegations may wish to consider whether appropriate safeguards would be sufficient to address concerns relating to portfolio investment and other financial assets identified above. If so, there would be no need to exclude them from the obligations of the MAI.*

20. Such safeguards might include in particular a derogation clause for balance-of-payments reasons. The need for such clause is under consideration by the negotiating Group, although there are different views concerning its advisability. As recognised, however, in previous discussions within the Negotiating Group, DG3 and EG5, there is a link between the broadness of the scope of the definition of investment and the possible need for a balance-of-payments safeguard clause. The Negotiating Group will return to this issue.

21. An additional safeguard, that might be considered relevant in particular in connection with transfers and payments, would be a provision similar to that appearing in the OECD Code of Liberalisation of Capital Movements, under Member countries are entitled to require that foreign exchange operations, including the physical movements of means of payment, be effected through banks and other “authorised resident agents”, if such a requirement is designed to ensure compliance with laws and regulations (including exchange controls, taxation, etc.). *Delegations may wish to consider whether the introduction of such a provision might help for the purposes of the MAI.*

### **C. Three financial items in the negative list**

22. EG5 has been requested to better define items that have been designated in the text currently under consideration as: "(iv) foreign exchange operations", "(v) 'financial operations'" and "(vi) derivatives where the underlying assets is not regarded as an investment".

#### ***"(iv) Foreign exchange operations"***

23. Under the OECD Code of Liberalisation of Capital Movements, this item is understood to cover only claims arising from purchases and sales of domestic currency or foreign currencies for other foreign currencies, whether on a spot basis or forward. It does not cover transactions in foreign-currency denominated financial instruments. *Delegations may wish to confirm that a similar interpretation would apply to item (iv).*

24. The rationale for proposing to include this item in the negative list seems to be to avoid giving non-residents the right under the MAI to engage in cross-border acquisitions of currencies exclusively motivated by exchange rate expectations and arbitrage. *Delegations may wish to comment further on the reasons for including item (iv) in the negative list.*

25. At the same time, many foreign exchange operations are necessary to the execution of payments and transfers in connection with the making, operation and liquidation of an underlying investment. At the October meeting of EG5, it was pointed out that, as a minimum, where the underlying investment is to be covered by the MAI, the associated foreign exchange operations should also be covered.

26. The MAI article on transfers provides for such a right except if foreign exchange operations were to be placed on the negative list. In this hypothesis, to ensure that foreign exchange operations in connection to an investment as defined by the MAI are covered by the Agreement, *delegations may wish to consider specifying the item along the following lines for instance: "claims arising from foreign exchange operations other than those connected to an investment as defined [in the positive list]"*. The terms "claims arising from" would be added, as suggested by a delegation, for consistency with the reference to assets rather than operations in the definition lists.

***"(vi) derivatives where the underlying asset is not regarded as an investment"***

27. Derivatives<sup>1</sup> are instruments having their own life, irrespective of the assets on which they are based. They can be used for the purpose of hedging (against country risks, sector-specific stock price fluctuations, interest rate or exchange rate changes) as well as for "speculation". It is not always easy to distinguish "speculative" operations from "hedging" operations.

28. As it reads, item (vi) would exclude from the definition of investment those derivatives which are not based on an underlying investment in the sense of the MAI. The rationale may be that the use of derivatives is desirable for the purpose of the MAI insofar as it would facilitate the making of an investment in the sense of the MAI (which it can indeed do by providing protection against risks associated with such an investment). The current wording of item (vi) would exclude, however, the possibility for instance to use contracts based on Treasury bills -- which may be on the negative list -- to create hedging instruments for investments on the positive list.

29. On the assumption that item (vi) is to be included in the negative list, as for the item on foreign exchange operations, it may be appropriate to refer to "claims arising from derivatives where the underlying asset is not regarded as an investment as defined [in the positive list]." *Delegation may wish to consider whether that such a definition should be retained.*

30. *Delegations may also wish to specify that derivatives based on foreign currencies should fall under the scope of the item on derivatives.* Otherwise, this would imply that non-residents could be prevented from hedging against exchange rate risks associated with a cross-border acquisition of an asset defined as an investment under the MAI, which would depart from the general principle that investors can hedge against risks associated with an investment.

***"(v) 'financial operations' "***

31. This item has been proposed by some delegations for inclusion in the negative list, as a residual designed to catch claims arising from all other financial operations (in addition to investment in public debt, foreign exchange operations and derivatives) to which obligations of the MAI would not apply.

32. The coverage of the terms "financial operations" can be very broad. Claims from such operations can be shares, debt securities, loans, bank deposits, etc..

33. "Financial operations" may cover various capital market transactions undertaken by non-residents. This includes: a) the purchase of domestic securities, whether on the territory of the country where the issuing enterprise is located or abroad; b) their resale, whether to residents or to other non-residents; c) the sale of foreign securities to residents, whether on the territory of their country or abroad ; and d) the issue of securities by non-residents on domestic primary markets and their introduction

on domestic recognised secondary markets. However, while items a) and b) would be covered by the MAI, items c) and d) represent capital outflows which are not covered by the MAI (see Section B on transfers).

34. The MAI would not require a Contracting Party to allow its residents to issue securities abroad, as the application of National Treatment has no meaning in this context. *Delegations may wish to confirm this interpretation.*

35. As it reads now, the positive list covers a large measure of what can be referred to as “financial operations”, since the acquisition of shares in an enterprise would qualify as an “investment” regardless the amount involved as well as the acquisition of a debt of an enterprise regardless of its maturity. The positive list also includes “claims to money” which, according to the commentary provided by DG3, could cover derivatives and bank deposits.

36. Depending on the objective pursued, several criteria could be considered to make distinctions between “financial” operations for inclusion in the positive list and those for the negative list. Such criteria could include:

- As far as debt securities and loans are concerned, their maturity. If the threshold for debt securities applies to the original maturity, this may not be sufficient to prevent volatility of capital flows, as, depending on the liquidity of the market, debt securities can be sold back on short notice. At the same time, restrictions with respect to remaining maturities may have disruptive effects on the functioning of the market;
- Minimum amounts for equity participation by individual investors;
- The liquidity of the instruments concerned, although there may be no clear measurements by which the liquidity of an instrument can be assessed;
- The intent motivating the investment. For instance, the acquisition of collective investment securities marketed by financial institutions specialised in collective investment services may be motivated by portfolio diversification rather than for the purpose of exercising an influence on the management on a particular enterprise<sup>2</sup>. In other instances, it may be more difficult to identify the intention of an investment. For example, it may not be possible to determine whether an interest-bearing deposit account is opened by non-residents only for the purpose of having access to the domestic money market or as part of the necessary steps to make a direct investment in the country concerned.

*Delegations may wish to consider if such distinctions are feasible and desirable and if so, to which particular items (shares, debt securities, loans, bank deposits, etc.) they should be applied.*

## Notes

<sup>1</sup> It is common to distinguish between forward-based derivatives and options-based derivatives. Forward-based derivatives represent contracts under which one party is obligated to buy [sell] and the counterparty is obligated to sell [buy] a specified amount of an underlying asset for a predetermined price at some future date. Option-based derivatives give the buyer the right, but not the obligation, to purchase or sell a specified amount of an underlying asset at a specified price on or before a specified date. The underlying assets in derivatives can be commodities, common equities, bonds, foreign currencies, stock indices, interest rates, differences in price between two financial instruments, etc.

<sup>2</sup> On the other hand, establishment of, or participation in the capital, of specialised institutions for collective investment definitively qualify as investment under items (i) or (ii) of the positive lists.

## Annex

### A. EXTRACT FROM DAFFE/MAI/DG3(96)1

#### 4. DEFINITION OF INVESTMENT ("Positive List/Negative List")

**I. Issue** In accordance with the mandate received from the Negotiating Group, adding selectively to the positive list and considering a negative list.

**II. Text** (a) Investment means: Every kind of asset owned or controlled[,] directly [or indirectly,] by an investor, including<sup>1</sup>.

- (i) an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the 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 form of debt [of an enterprise]; [and rights derived therefrom];
- (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] [any rights conferred by law or contract or by virtue of any concessions, licenses or permits to undertake any economic activity];
- (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges,

[unless such assets lack the characteristics of an investment.]

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<sup>1</sup> Pending final determination of the scope and content of the agreement, one delegation reserves its position as to whether the positive list should be open or closed.

[(b) Except for the purposes of expropriation and compensation and protection from strife [and transfers]] "Investment" does not include [*inter alia*]<sup>2</sup>

[(i) claims to money that arise solely from commercial transactions[, including the extension of credit,] for the sale of goods or services;]

[(ii) traded goods;]

[(iii) public debt;] [debt securities and loans of a state enterprise or Contracting Party;]

[(iv) foreign exchange operations;]

[(v) "*financial operations*";]

[unless the transactions [to which such [claims, goods, debt, or -----] relate] otherwise have the characteristics of an investment; or]

[unless the respective claims are assets of an enterprise mentioned in paragraph (a) (i); or]

[unless such assets are acquired for the purpose of establishing lasting economic relations with an enterprise; or]

[(vi) derivatives where the underlying asset is not regarded as an investment],

(vii) [real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes] or [moveable or immovable property, and any related rights, acquired for personal use.]

### III. Commentary

1. There is agreement on the structure of the article, i.e. a broad positive list and a limited negative list.

2. There is also agreement on the categories to be included in the negative list, i.e. trade-related transactions (i) and (ii), public debt (iii), foreign exchange operations (iv) and derivatives (vi), real estate for personal use or non-business purposes (vii). For these items the drafting needs to be refined.

3. For financial operations (items iv), v) and vi)), advice is requested from Expert Group N° 5 with the aim of better defining the nature of the transactions that must be excluded.

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<sup>2</sup> One Delegation proposed to include a generic phrase at the head of the negative list.

**B. EXTRACT FROM SECTION B. “CONSOLIDATED COMMENTS” OF DAFTE/MAI(96)16/REV1**

**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 prejudice 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. [...]

10. It was noted that NAFTA and the GATS have special provisions concerning financial services, including provisions relating to prudential matters. [...]

11. 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.

**12. DG3 agreed on the structure of the article on the definition of investment, i.e. a broad positive list and a limited negative list. There was also agreement on the categories to be included in the negative list, i.e. trade-related transactions (i) and (ii), public debt (iii), foreign exchange operations (iv) and derivatives (v), real estate for personal use or non-business purposes (vi). For these items the drafting needs to be refined.**

**13. For financial operations (items iv), v) and vi)), advice is requested from Expert Group N° 5 with the aim of better defining the nature of the transactions that must be excluded.**

14. 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.

15. 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 Group considered four cases:**

- (a) **investment by an investor established in another MAI Party, but owned or controlled by a non-MAI investor**

(Example: an investment in Austria by a Belgian subsidiary of a non-MAI parent)

- (b) **investment by an investor established in a non-MAI Party, but owned or controlled by a MAI Party investor**

(Example: an investment in Canada by a non-MAI subsidiary of a Danish parent);

- (c) **investment by an investor established in another MAI Party, but owned or controlled by an investor of a third MAI Party**

(Example: an investment in France by a German subsidiary of a Hungarian parent); and

- (d) **investment in a MAI Party by an investment there covered by the MAI**

(Example: an investment in Italy by an Italian subsidiary of a Japanese parent).

16. There was a broadly shared view that case (a) investments should be covered by the MAI. Most delegations favoured providing for certain exclusions in a denial of benefits clause which would permit, but not require, exclusion. Some delegations were concerned about possible abuse of this provision. It was suggested that the condition for exclusion would be where the MAI investor lacked substantial business activity in the MAI Contracting Party. One delegation suggested limiting this to cases in which the investor was constituted “for no other purpose than obtaining MAI benefits” (exact wording not finalised).

17. There was wide support for covering case (b) investments; however, whether to do so was considered a policy issue to be considered by the Negotiating Group.

18. Related to it was the question of standing for MAI dispute settlement on which the Negotiating Group might provide guidance to Expert Group N°1. Under investor-state proceedings, most delegations considered that only the parent MAI investor would have standing, but some delegations were open to allowing the intermediary entity to have standing as well. Under state-to-state proceedings, all delegations suggested, as a matter of principle, giving no standing to the non-MAI government of the intermediary.

19. There was consensus that case (c) and case (d) investments would be covered by the MAI. There was no further debate on the legal implications.

20. Related to each of these cases was the question of which entities and states have standing for MAI dispute settlement, an issue for consideration by Expert Group N°1. This includes which

**tier or tiers of investors have standing in investor-state dispute settlement and which MAI Party (state or states) have standing in state-to-state dispute settlement.**

21. One delegation considered that the inclusion of indirectly controlled investments might pose serious problems to REIO Members states as 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.

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22. Most delegations would prefer the definition of investment to be an open one, **hence** the word “including” in the chapeau [...].

**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).

23. 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”.

24. 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;

25. 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;

26. This item would cover loans of all maturities and debt securities of a state enterprise.
27. 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.
28. 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];

29. 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).
30. It was also suggested, by several delegations, to add a reference to franchising, licensing and “BOOT” agreements.
31. 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];

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

33. 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).

34. 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;

35. 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.

36. 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; ] or [**any rights conferred by law or contract or by virtue of any concessions, licenses or permits to undertake any economic activity**]

37. 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. One delegation considered that this item covers public law contracts.

**38. Most delegations preferred to keep concessions in the definitions and to require reservations by any country wishing to discriminate in granting concessions. Some delegations were of the opinion that the issue of the granting of concessions should be kept outside the definition of investments.**

**39. Some delegations indicated that certain aspects of concessions raised issues related to monopolies in general and to cross-border government procurement, which might require some special provision or clarification in the MAI.**

**40. Further work will be necessary, bearing in mind that some delegations believe it is necessary to determine whether the rights conferred by virtue of concessions, or the concession as such, are separate elements under the definition of investment.**

#### **Item (viii)**

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

41. 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**

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

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

[...]