



Negotiating Group on the Multilateral Agreement on Investment (MAI)

DEFINITION OF INVESTMENT AND INVESTOR

(Note by the Chairman)

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1. The Negotiating Group had a first discussion of the definition of investment and investor at its meeting in October on the basis of a note by the Chairman [DAFFE/MAI(95)2] and country contributions [DAFFE/MAI/RD(5)4 and ADD1]. The Chairman concluded that this issue should be re-examined on the basis of a new note that addressed the implications of the definition for the substantive obligations of the MAI [see Summary Record DAF/MAI/M(95)3].

Investment

2. The definition of investment, and how it interrelates with the substantive obligations of the agreement, will determine the scope of Contracting Parties' rights and obligations in the MAI. The objective should be to protect all forms of property of the foreign investor and to ensure their establishment and participation in enterprises. The definition should be broad enough to cover all recognised and evolving forms of investment. It is not intended however that the definition would systematically cover all items of the Code, such as pure financial transactions that might occur in the capital market, money market, or the foreign exchange market.

3. One approach to defining investment is to provide a list of assets (usually non-exclusive) which are covered under the agreement. This approach is typically found in bilateral investment protection treaties. If applied in the MAI to pre-establishment investment, it might result in creating unintended obligations on certain transactions. Another approach is the more narrow definition of direct investment which is in the OECD Code of Liberalisation of Capital Movements (see Annex, paragraph 2). However, this could result in excluding significant forms of investment in enterprises such as portfolio investment. The third is the model provided by recent multilateral agreements that deal with investment such as the NAFTA, which provide a broad list of assets but link them to the activities of an enterprise.

4. In light of the discussion at the October meeting of the Negotiating Group, this note proposes that the MAI adopt a broad definition of investment, including tangible and intangible assets (as in bilateral treaties), applying to pre and post-establishment and linked to the activities of an enterprise (as in the NAFTA). The definition would include an illustrative list of the assets that could be considered an "investment" under the agreement. The annex to this note considers the different elements most commonly found in bilateral investment treaties.

5. The definition of investment must be considered in relation to the obligations of the agreement that will apply. The language of the substantive obligations themselves might limit the application of the definition. Ultimately, Member countries might be permitted to take specific reservations if certain obligations were too broad. In particular, consideration needs to be given to the following questions:

- What would be the implications of extending obligations relating to the treatment of investors and investment (national treatment, most favoured nation, transparency) to each of the elements in the definition?
- How would specific protection obligations (expropriation and compensation, right to transfer funds) apply?
- Would dispute settlement, including investor-to-state, apply to all the elements?

Investor

6. The definition of "investor" is an essential one within the context of the MAI for purposes of determining which persons or entities benefit from the agreement and who would be eligible to take a claim to dispute settlement.
7. Most investment agreements define investors to include natural persons who are either citizens or permanent residents of a Party to the agreement.
8. In the case of entities, the situation is slightly more complicated. Under the Energy Charter Treaty, an investor is a company organised in accordance with the law of a Contracting Party. Under NAFTA, enterprises constituted under the laws of a NAFTA party benefit from the investment chapter. Enterprises organised in third countries but controlled by a NAFTA investor do not qualify for coverage.
9. A broad definition of investor would cover not only entities such as corporations and limited partnerships but also sole proprietorships, joint ventures, branches and representative offices.
10. Questions to be considered in this context include:
 - *Should "investor" under the MAI cover natural persons (citizens and permanent residents) of a Party and enterprises constituted in accordance with the law of a Party?*
 - *Should "investor" also include companies organised in third countries but controlled by an investor of a Party?*
 - *Should entities such as direct branches, sole proprietorships, representative offices, or non-profit organisations be covered?*

ANNEX

ILLUSTRATIVE LIST OF ELEMENTS

This list is based on the lists most commonly used in bilateral investment protection treaties to define "assets" or "investment". ECT and NAFTA were also used as a basis of comparison. This annex examines the specific elements with regard to existing obligations of OECD Member countries under the Liberalisation Codes and raises questions concerning the implications of coverage under the MAI. These questions will need to be addressed when considering the drafting of specific provisions for the MAI.

(i) Tangible and intangible, moveable and immovable, property and any related property rights, such as leases, mortgages, liens and pledges.

1. This category includes real estate which is a common form of property protected under BITs and multilateral agreements such as the ECT and NAFTA. Item I/A of the OECD Capital Movements Code is understood to cover real estate necessary to a direct investment. Canada's BITs and NAFTA exclude real estate which is not acquired in the expectation, or used for the purpose, of economic benefit or other business purposes.

-- *Should the national treatment and MFN standards on entry and establishment in the MAI apply to real estate which is not associated with participation in, or creation or extension of, an enterprise?*

-- *Should the MAI protection obligations, including expropriation and compensation and the right to transfer funds, apply without regard to the purpose for which the real estate is acquired?*

(ii) A company or business enterprise, shares, stock, or other forms of equity participation in a company or business enterprise, bonds, debentures, and other debt of a company or business enterprise.

2. Direct investment under the Codes includes the creation or extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership of an existing enterprise, as well as participation in a new or existing enterprise. Pre-establishment obligations in the MAI would correspond to existing obligations under the Codes as regards direct investment. Similarly, MAI protection obligations on direct investment, including expropriation and compensation, and the transfer of funds, etc., would correspond to the coverage provided by BITs and the ECT.

3. The definition could cover shares and equity participation in a company or business enterprise which are directly linked to the operation of the enterprise. In the pre-establishment phase, the MAI obligations of national treatment and non-discrimination should allow for the purchase of shares by foreign investors on the same basis as national investors. As assets, this investment would be covered by the protection obligations in the MAI.

4. Debt securities of a company including long term bonds and debentures may also be considered investments.

Should this include short-term debt securities as well? Should public debt or public funds also be considered as investment? NAFTA explicitly excludes debt security of a state enterprise from the definition of investment. Should the MAI provide for a similar exclusion?

5. Other questions which relate to these elements of the definition of investment concern the scope of the term "company or business enterprise". Some BITs specifically include joint ventures (Canada, Netherlands). Under the Codes, Member countries cannot maintain restrictions on the mode of operation (subsidiary, branch, agency or other).

(iii) Claims to money and claims to performance pursuant to a contract having an [economic] [financial] value.

6. This element, which includes loans, is a common feature in most bilateral investment protection treaties, other than those of the United States. This could include short-term as well as long-term loans unless a specific maturity is provided for. The OECD Codes includes a loan of five years or longer as part of direct investment. The NAFTA requires that the original maturity of the loan be at least three years.

Should the MAI fix a minimum maturity date for loans?

7. Some claims to money may arise as a result of commercial transactions, including a sale of goods or services, and the question is whether such claims, generally not considered as "investments", might nevertheless be captured by a broad definition of "assets". The ECT requires that these claims must be associated with an investment. The NAFTA specifically excludes from the scope of the definition of investment any claim to money that arises solely from commercial contracts for the sale of goods or services... or by the extension of credit in connection with a commercial transaction.

Should the MAI provide for a similar exclusion? Should the exclusion be limited to pre-establishment obligations only, thus allowing such claims to be protected under the investment protection provisions of the agreement?

(iv) Intellectual property rights.

8. 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.

9. The coverage of intellectual property as an element of the definition of investment in the MAI could result in extending MAI obligations and standards to this form of property. This could require defining 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.

Should the MAI limit coverage of intellectual property to the investment protection provisions of the agreement? What procedure could be adopted to avoid overlap with dispute settlement provisions in intellectual property agreements?

(v) rights conferred pursuant to law [or under contract], such as licenses and permits.

10. Bilateral treaties recognise that rights such as licenses and permits constitute a form of property. Although not always 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.

What would be the implications of extending the pre-establishment obligations which would apply under the MAI? Would the national treatment and MFN standards facilitate market access by foreign investors wishing to obtain licenses or permits?

11. US BITS and NAFTA which confer both pre and post establishment obligations, include a category of property which relates to contractual rights, such as under turnkey, construction contracts, ...production or revenue sharing contracts, concessions, or other similar contracts. NAFTA relates these interests to contracts involving the presence of an investor's property in the territory of the Party including turnkey, construction contracts, or concessions or contracts where remuneration depends on the production, revenues or profits of an enterprise. This implies that there must be a substantial level of risk and commitment by an investor which would justify consideration as an investment, without which the obligations of the agreement would not apply.

Should the MAI include a similar category of property - in addition to/in lieu of - rights conferred pursuant to law?

12. Many bilaterals contain provisions that any change in the form of an investment does not affect its character as an investment and specify that the term "investment" includes all investments, whether made before or after the date of entry into force of the agreement.

Is it necessary that the MAI include such provisions or would the same result follow from interpretation of the intention of the drafters?