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

**Drafting Group No.3 on Definition, Treatment and Protection of Investors and Investments**

**REPORT TO THE NEGOTIATING GROUP**

## **REPORT TO THE NEGOTIATING GROUP**

1. In accordance with its mandate, the Drafting Group focused its attention on the definition of "investor" and "investment" and made substantial progress in resolving the outstanding issues.
2. The Drafting Group, taking into account the advice of EG5 on Financial Services Matters:
  - a. clarified the meaning of "legal person" in the definition of "investor";
  - b. clarified the coverage of several items on the positive list in the definition of "investment", and shortened and simplified the negative list;
  - c. resolved several other matters relating to these definitions and simplified the commentary to the text.
3. The Drafting Group also took note that there are crucial concerns with respect to a broad definition of investment that relate to cross border transactions which may have financial implications. It therefore recommends that EG5 be invited to finalise its advice on the possible need for safeguards provisions in the MAI especially with respect to the balance of payments; it also recommends that the Group pay due attention to the role of the International Monetary Fund. EG5 should also finalise its advice with respect to items of a financial character on the negative list.
4. Taking full account of this further advice, the Drafting Group will submit a draft proposal on the definition of investment for the MAI.

## DRAFTING GROUP NO. 3

### REPORT TO THE NEGOTIATING GROUP

#### A. Definition of Investor and Investment

##### 1. 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<sup>12</sup>, joint venture, association or organisation.

##### 2. Investment means:

- (a) Every kind of asset owned or controlled[,] directly [or indirectly,] by an investor, including<sup>3</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]<sup>4</sup>; and rights derived therefrom;

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1 One delegation has proposed to delete this term from paragraph (ii) considering that a sole proprietorship would be covered by the term "natural person" in paragraph (i).

2 Taking account of the advice by Expert Group N°5 on Financial Matters, the Group considered that branches should be deleted from the definition of investor. Two delegations requested some time to verify that deletion of branches does not pose a problem for non-financial sectors.

3 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.

4 Some delegations proposed to retain "of an enterprise" in order to clarify that debts of an enterprise are covered. The Group agreed to retain this in brackets pending clarification of whether natural persons are to be included or excluded. If the Group decides to include natural persons it can do so explicitly by adding "and of a natural person" after the words "of an enterprise" or it can do so implicitly by deleting any reference to enterprise. If the Group decides to exclude natural persons it might wish to reflect this on the negative list. Concerns relating to public debt would also be addressed via the negative list.

- (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
- (v) claims to money and claims to performance<sup>5 6</sup>;
- (vi) intellectual property rights<sup>7</sup>;
- (vii) rights conferred pursuant to law or contract [such as] or [by virtue of]<sup>8</sup> concessions<sup>9</sup>, licenses, authorisations<sup>10</sup>, and permits<sup>11</sup>.
- (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.]

- (b) "Investment" does not include<sup>12 13</sup>:

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

[(ii) financial assets;]

[unless the transactions [to which such debt or other assets relate] otherwise have the characteristics of an investment; or]

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5 Some delegations wish to verify the consequences of omitting the words "pursuant to a contract" at the end of item (v).

6 Some delegations wish to verify the consequences of omitting from item (v) the words "having an economic value" to determine the possible need to retain these words in the definition.

7 Several delegations have concerns relating to this item. One delegation proposed that literary and artistic works should not be included in the definition of investment.

8 If the words "such as" are retained, one delegation would wish to add the following two elements to the negative list:

- the granting of authorisations, licences and concessions for the prospection, exploration and production of hydrocarbons;
- the licensing of fishermen, fishing vessels and equipment.

9 One delegation proposed that the term "concessions" may need to be defined, taking account of the substantive obligations to be agreed.

10 One delegation reserves its position on the inclusion of the word "authorisations".

11 Two delegations reserve their positions.

12 Some delegations wish to retain for further consideration the idea that the negative list would not apply for purposes of expropriation and compensation and protection from strife and transfers.

13 A formula needs to be found to deal with the relationship between the MAI and obligations concerning international trade in goods and services. In this regard, one delegation referred to paragraph 34 of the Commentary on the Consolidated Texts [DAFFE/MAI(96)16/REV1]. Two other delegations prefer to retain on the negative list "claims to money that arise solely from commercial transactions including the extension of credit for the sale of goods and services".

[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]

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

[(iv) 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]<sup>14</sup>,

[(v) moveable or immovable property, and any related rights, acquired for personal use].

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14 One delegation wants a broader exclusion of real estate and proposes to replace this text by “real estate or rights associated with land”.

## **B. Commentary**

### **1. Investor**

#### *Commentary to (i):*

With the agreement of one delegation, paragraph 1 of the Commentary to the Consolidated Texts [DAFFE/MAI(96)16/REV1] regarding the word “nationality” is deleted.

#### *Commentary to (ii):*

1. Some delegations called attention to the suggestion made by one delegation in the EG5 report [DAFFE/MAI/EG5(96)5] to add the phrase "provided it has the legal capacity to invest" at the end of the definition of investor. Most delegations considered that this approach was unnecessary and could create legal uncertainty.

2. Some delegations would like to include “Contracting Parties” to the definition of investor arguing that, for consistency, the definition should include all entities with the capacity to invest. They were concerned that a Contracting Party may itself make an investment without being a legal person that is owned or controlled privately or by the government. Most delegations thought that the concept of a legal person or the definition of state-owned enterprises would cover the situation where a State was an economic actor, and consider that the State as such would otherwise be protected by diplomatic processes under international law.

3. One delegation raised the question whether a legal person organised under the applicable law of a Contracting Party but constituted under the law of another State is covered by the text of the definition of investor in paragraph 1. ii). According to the Commercial Code of this country a legal person, constituted under the law of a foreign country for the purpose of conducting business activities, with its permanent seat abroad may transfer that seat to the country in question provided that the law of the country in which the seat is now located allows relocation. The transfer of the permanent seat shall be effective from the day on which it is entered into the Companies Register. Such an entity is regarded as a resident of this country. However, its internal legal relations, including the liability of the entity’s partners (members) towards third parties, shall be governed by the law of the country under which the legal entity was originally constituted. In the opinion of the delegation, a possible solution could be found in adding the words “or otherwise established” after “constituted or organised” in the definitions of investor and investment. The Drafting Group considered that the concern raised by the delegation is covered by the definition as currently drafted.

#### *Commentary to (i) and (ii):*

One delegation suggests adding to the definition of investor the words “who acquires, owns or controls an investment in another Contracting Party” and some elements presently addressed by the definition of investment.

## **2. Investment**

### ***Commentary to item (iii)***

The Group noted that the relation between this obligation and national legislation may need to be considered further. One delegation wishes to exclude loans of less than three years, other than loans between affiliates of an enterprise. Many delegations considered, however, that such an exclusion would be contrary to the objective of a broad definition. If there is no consensus on this issue it will have to be referred to the Negotiating Group.

### ***Commentary to item (iv)***

The Group agreed to delete the commentary in paragraphs 29 and 30 and to retain the alternative text to items (iv), (v) and (vii) as proposed in paragraph 31.

### ***Commentary to item (vii)***

One delegation points out that the granting of authorisations, licences and concessions in both the petroleum and fisheries sectors involve measures relating to the conservation and management of natural resources. In the petroleum sector it also involves the exercise of property rights over hydrocarbon resources. The conservation and management of the living resources in the exclusive economic zone is regulated in the United Nations Convention on the Law of the Sea of 1982. The management of hydrocarbon resources is inter alia regulated in the Energy Charter Treaty and in the EU Directive on the conditions for the granting and use of authorisations for the prospection, exploration and production of hydrocarbons. This directive is incorporated into the Treaty establishing the European Economic Area. In the view of the delegation, these issues fall outside the mandate for the negotiation of a Multilateral Agreement on Investment (MAI).

### ***Other elements***

With agreement of one delegation, paragraph 43 in the Commentary to the Consolidated Texts regarding “changes of activities of an investment” is deleted.