



Negotiating Group on the Multilateral Agreement on Investment (MAI)

DEFINITION OF INVESTOR AND INVESTMENT

(Note by the Chairman)

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Most recent bilateral and international investment agreements contain provisions defining the terms "investment" and "investor" relevant for the purposes of the particular agreement. The terms may be used to cover the pre-establishment phase, the post-establishment phase of investment, or both. How the definitions relate to the specific obligations of the agreement, i.e., their effective application, determines the scope of the agreement.

Definition of Investment

Several approaches to the definition of the term "investment" can be found in bilateral investment protection treaties and in multilateral agreements on investment (see DAF/MAI/RD(95)3). The two main approaches can be generally characterised as either "enterprise-based" definitions of investment, akin to the traditional concept of a direct investment and which excludes portfolio investment and real estate, or "asset-based" definitions of investment such as that found in many bilateral investment protection treaties which would include portfolio investment and intangible assets such as intellectual property.

Recent investment treaties use a hybrid approach. The Energy Charter Treaty (ECT), for example, provides a list of assets to illustrate the term "investment" which, under the treaty, refers to any investment associated with an economic activity in the energy sector. The NAFTA links the assets listed in its definition of "investment" to specific activities of an enterprise. In both cases, the assets listed go beyond stocks, bonds, and real property to include goodwill, intellectual property, contracts associated with an investment, etc. The ECT does not presently apply to the pre-establishment phase of investment, but the NAFTA covers both pre and post-establishment.

Delegates will need to consider which of the above approaches, if any, is most likely to ensure that the MAI achieves the high standards for the treatment and protection of investment and a high standard of liberalisation covering both the pre and post-establishment phase of investment.

Under a "broad" definition of investment, the MAI benefits relating to national treatment, non-discrimination, and investment protection would apply to all the forms of "investment" covered in the definition. This would mean that the coverage of the MAI in both the liberalisation and protection areas would extend beyond "direct investment" as defined in the present OECD instruments. However, the effective coverage of the MAI will depend on how the chosen definition relates to the operational obligations such as national treatment for pre and post-establishment.

What do negotiators think about the use of a definition of investment (like the one in NAFTA) which covers both pre and post-establishment, but the application of which might be limited by the way the obligations themselves are defined, or in any other manner that may be agreed?

Definition of Investor

There are two aspects of the definition of the term "investor". One is the extent of the coverage that is intended by the term "investment". The other is who has standing in the agreement to invoke the dispute settlement provisions of the agreement.

The first aspect affects whether the benefits of the MAI will be restricted to the nationals and companies of the contracting parties only or whether third countries' nationals and companies might also benefit. The MAI might cover, for example, investments made by nationals or companies of (i.e. organised in the territory of) one of the contracting parties or it might also cover investments made by nationals or companies located in a third country, provided that the company is owned or controlled by nationals or companies of one of the contracting parties.

Both options may be found in bilateral investment protection treaties as well as in NAFTA and the ECT.

How the term "investor", "national", or "company" is defined in the agreement will also have direct implications for dispute settlement as it will determine who has standing to claim the protection afforded by the agreement.

The definition of "investor" could cover corporate entities (privately-owned, state-owned) , natural persons (including dual nationals), joint ventures, and other forms of business organisations.