



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.3 on “Special Topics”

**PROPOSAL FOR A DRAFT ARTICLE:
TEMPORARY ENTRY AND STAY AND EMPLOYMENT REQUIREMENTS**

(Note by the Chairman)

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[Except for the provisions of paragraph 5 below, nothing in this article shall prevent the application of Contracting Parties' national laws relating to immigration and labour [consistent with the object or purpose of this article]].

A. Temporary entry and stay of investors and key personnel

1. Each Contracting Party shall grant temporary entry and stay and provide confirming documentation to a natural person of another Contracting Party who is:

- (a) an investor who seeks to establish, develop, administer or provide advice or key [essential] technical services to the operation of an [enterprise] [investment] to which the investor has committed, or is in the process of committing, a substantial amount of capital, or
- [(b) an employee employed by an [enterprise] [investment] referred to in (a) above, in a capacity of executive, manager or specialist [and who is essential] to such [enterprise] [investment]]

or

- [(b) an employee of an [enterprise] [investment] of another Contracting Party [for a period of [not less than one year]], seeking to:
 - (i) establish a subsidiary or affiliate of that [enterprise] [investment] to which the [enterprise] [investment] has committed, or is in the process of committing, a substantial amount of capital, or
 - (ii) render services to a subsidiary or affiliate of that [enterprise] [investment]

provided that the employee is employed in a capacity of executive, manager or specialist [and that such employee is essential to the present investment].]

[2. To be eligible for temporary entry and stay pursuant to subparagraph (a) or (b), a natural person must comply with applicable measures relating to public health and safety, and national security, including criminal law.]

3. Temporary entry and stay shall be granted for [a period [not exceeding 2-3 years] [of not less than 2 years]] [as long as that person remains essential to the present investment] insofar as that person continues to meet the requirements of paragraph 2, above.

4. Each Contracting Party shall grant:

(a) temporary entry and stay and provide confirming documentation to the spouse and minor children of a natural person of another Contracting Party who have been granted temporary entry and stay in accordance with paragraphs 1-3, above; and

[(b) authorisation to work to the spouse of a natural person of another Contracting Party who has been granted temporary entry and stay in accordance with paragraphs 1-3.]

(c) authorisations under (a) or (b) of this paragraph shall be subject to the same terms and conditions as those applying to natural persons under paragraphs 1-3 and shall be granted for the same duration as the stay of the natural person admitted under paragraph 1.

5. No Contracting Party may:

(a) as a condition for temporary entry and stay under paragraphs 1 and 4, require economic needs tests [or other procedures of similar effect]; or

(b) impose or maintain any numerical restriction relating to temporary entry and stay under paragraphs 1 and 4.

6. For the purposes of these paragraphs:

[Natural person of another Contracting Party means a natural person having the nationality of [or who is permanently residing in] another Contracting Party in accordance with its applicable law;]

[Enterprise of another Contracting Party means a legal person or any other entity constituted or organised under the applicable law of another Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organisation, and a branch of an enterprise;]

Executive means a natural person who primarily directs the management of an [enterprise] [investment] or establishes goals and policies for the enterprise or a major component or function of the enterprise, exercises wide latitude in decision-making and receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the enterprise;

Manager means a natural person who directs the management of an enterprise, or department, or subdivision of the enterprise, supervises and controls the work of other supervisory, professional or managerial employees, has the authority to hire and fire or recommend hiring, firing, or other personnel actions and exercises discretionary authority over day-to-day operations at a senior level; and

Specialist means a natural person [who possesses knowledge at an advanced level of expertise and who possesses proprietary knowledge of the enterprise's product, service, research equipment, techniques, or management.]

B. EMPLOYMENT REQUIREMENTS

[A Contracting Party shall permit investors of another Contracting Party and their investments to employ any natural person of the investor's or the investment's choice regardless of nationality and citizenship provided that such person is holding a valid permit of sejour and work delivered by the competent authorities of the former Contracting Party [and that the employment concerned conforms to the terms, conditions and time limits of the permission granted to such person.] (Based on ECT, article 11 (2))

[No Contracting Party may apply national employment quotas relating to the employment of a natural person by an investor or an investment of another Contracting Party provided the person is holding a valid permit of sejour and work delivered by the competent authorities of the former Contracting Party.]

COMMENTARY ON DRAFT TEXT

1. This text addresses the issues of temporary entry and stay and employment requirements which have been considered by the Group in the context of a key personnel provision in the MAI. A draft provision on senior management and boards of directors previously in this text will be considered in the context of the provisions relating to corporate practices.

2. The chapeau clause is a proposal to ensure that the provisions of paragraph 5 on employment requirements remain unqualified by reference to national immigration and labour laws. Other proposals include:

- A proposal by one delegation that the chapeau clause should read "Except as explicitly provided for in this article, nothing in this Agreement shall prevent ...".
- a proposal by one delegation that each substantive paragraph be preceded by the qualification "subject to".
- a proposal by one delegation to clarify the relation between the provisions on key personnel and national immigration and labour laws by specifying that measures taken in accordance with such laws should not be applied in a manner which would nullify or impair the benefits of the agreement. A variant of this is proposed in brackets, linking the chapeau to a requirement to respect the object or purpose of the article.

A. TEMPORARY ENTRY AND STAY

Paragraph 1

3. Some delegations wanted to reflect further on the meaning of "confirming documentation" as it is used in paragraph 1 and paragraph 4 a).

4. While several delegations supported including a requirement of a "substantial amount of capital" in this paragraph, others considered it would create uncertainties and could represent an important barrier to certain forms of investment. To assist the Group in its consideration, it might be of interest that Drafting Group 3 has developed a provision on Denial of Benefits in the context of indirect ownership or control using the concept of "substantial business activity" [see DAFPE/MAI/DG3(96)1]. DG3 decided that it was not necessary to define this term.

5. Some delegations do not think it necessary to include "essential" in this paragraph and emphasise the difficulties associated with defining this term.

6. Delegations are considering whether subparagraphs a) and b) should refer to an "enterprise" or more broadly to "investment" .

7. There are alternative texts proposed for subparagraph b). The first alternative is the approach submitted by one delegation. The second alternative includes a prior employment requirement. Some delegations think this requirement can distort the investment process by impacting unfairly on new investors and small/medium enterprises without any corresponding benefit to the "admitting" country.

Furthermore, these delegations believe that it may not correspond to the real needs of an investment and should not be used as a measure of whether an individual is essential to an investment.

8. While there were different views as to the length of a prior employment requirement, if included, several delegations thought it necessary to retain such a requirement if only because there is a corresponding requirement in their national immigration laws. One delegation thought it might be necessary to specify that the prior employment relation must be continuous and should immediately precede entry. Another delegation questioned whether the use of prior employment requirements to avoid circumvention of national immigration laws was effective.

Paragraph 2

9. This paragraph is in brackets pending consideration of its relation to the chapeau clause. An alternative proposal was circulated as a room document.¹

Paragraph 3

10. One delegation proposed to set a minimum length of stay, allowing those countries which can do so to offer longer periods of stay. Others felt that if the provision were limited to essential personnel, the length of stay for any individual would be as long as that individual remained essential to the investment.

Paragraph 4

11. Some delegations believe this issue to represent a de facto barrier to the movement of key personnel and would be willing to grant temporary entry and stay to spouses and minor children. Some countries would go further and grant the right for spouses to work under the MAI. A difficulty would be to agree on what is meant by "spouse" and by "minor" children.

12. Other delegations might consider a best efforts provision as concerns the temporary entry and stay of spouses and minor children but would have strong objections to authorising work permits. They are of the opinion that an MAI provision to grant work permits to spouses to work anywhere in the economy would create a "common labour market for MAI spouses" and give rights to the spouse that go beyond what the agreement grants to the investor. One delegation pointed to the need to ensure subsistence for spouses and children in order to grant temporary entry and stay. Some delegations expressed concern that not authorising work permits for spouses might reduce significantly the effectiveness of the provision.

13. Subparagraph c) has been added to limit authorisations granted under this paragraph to the same terms and conditions applying to the persons granted temporary entry and stay.

¹ Draft Suggestion for Paragraph 2

Subject to paragraph 5, nothing in this Article shall require a Contracting Party to accord temporary entry and stay to a person ineligible under its immigration and labour laws, for reasons of public health, safety, national security or other reasons consistent with the object and purpose of this Article.

Paragraph 5

14. Delegations need to give further consideration to the meaning of the phrase "or other procedures of similar effect" in subparagraph a).

15. Some delegations explained that their countries, for political reasons, would have to continue to impose economic needs tests and numerical restrictions. These countries would have to take a reservation if the MAI were to have a legally binding obligation not to impose economic needs tests or numerical restrictions. An alternative option to subparagraph b) was proposed which would read:

No Contracting Party may:

"b)deny temporary entry and stay under paragraphs 1 and 4 of this article for reasons relating to numerical restrictions in national laws."

Paragraph 6

NATURAL PERSON OF ANOTHER CONTRACTING PARTY

16. There are different views as to whether, for the purposes of these provisions, natural persons covered should be restricted to nationals or permanent residents of another MAI Contracting Party. There was a discussion that for key personnel, nationality should not be a criteria as long as the key personnel is an employee of an MAI investment. Some delegations do not think it necessary to define this term here since it would be covered by the definition of investor elsewhere in the agreement. One delegation clarified that it could not accept the inclusion of permanent residents as concerns the provisions for temporary entry and stay although it agrees with the inclusion of residents for the purpose of the general definition of "investor" in the agreement.

17. One delegation has made a proposal for consideration which would multilateralise their bilateral treaty practice, as follows:

"Investors who are nationals of countries with whom we have certain treaty obligations (including our bilateral investment treaty partners) may, if they meet certain criteria regarding the nature of the investment, obtain visas to our country that permit them, and certain of their key employees who are also citizens of the same country, to enter and remain in our country while they are actively involved with the investment. There are known as "treaty investor" visas.

In the context of the Multilateral Agreement on Investment, it would seem inconsistent with its liberalising goals to require that key personnel of an investor be of the same nationality as the investor in order to qualify for a "treaty investor" visa. One approach we would be prepared to explore would be to permit issuance of a "treaty investor" visa to any key employee of a qualified MAI-country investor who was himself or herself a national of an MAI-country, whether or not an employee has the same nationality as the investor. Thus, assuming that Germany, France and our country all join the MAI, a French key employee of a German company would be eligible for a "treaty investor" visa if the German company were to make a qualifying investment in our country.

We do not propose expanding the criteria for eligibility for a "treaty investor" visa, either in terms of the nature of the investment requires, or in terms of the types of personnel who qualify.

We merely are suggesting that nationality not be a limiting factor, provided that the investor, and the key employee seeking the visa, are both nationals of MAI-member countries. Nevertheless, such a change in the "treaty investor" programme would require an amendment to the legislation that authorises such visas."

ENTERPRISE

18. Most delegations did not think that these provisions should include a definition of the "enterprise" of another Contracting Party since it is already defined in the general definitions of the agreement.

EXECUTIVE, MANAGER, SPECIALIST

19. The Expert Group thought the definition of the categories of executive and manager were generally appropriate, except that there might be some cross-over between the two. The category of "Specialist" will need some further reflection and may need to refer to the possibility of verifying professional qualifications. One delegation would like to include "trainers" in this category.

B. EMPLOYMENT REQUIREMENTS

20. This provision would permit an investor to hire persons without regard to nationality. While the MAI should prevent the application of national employment quotas or labour market (economic needs) tests, it should not be used by a foreign investor to circumvent the application of certain national laws such as anti-discrimination laws. It should also not prevent a Party from ensuring compliance with its laws as concerns the conditions it attaches to the granting of sejour and work permits. However, any administrative practices necessary for purposes of verification should not be used to undermine or nullify the provision.