



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.3 on “Special Topics”

KEY PERSONNEL

(Note by the Chairman)

KEY PERSONNEL

(Note by the Chairman)

Introduction

1. The ability to transfer and hire key personnel is an essential element for investors to invest and expand activities, to transfer technologies as well as to develop research activities abroad. As needs in personnel may change during the investment cycle, different categories of persons may be considered key by an investor or by the investments of such investor.
2. At its January 1996 meeting, the Negotiating Group recognised the need for a provision in the MAI on key personnel, based on a fairly broad definition, linked to functions. The two main issues to be addressed were the temporary entry of personnel and the freedom to hire key persons already in the country holding a valid resident and working permit. While provisions in existing international agreements on investment should serve as a starting point, stronger disciplines could be envisaged, wherever possible, in the MAI [DAFFE/MAI/M(96)1].
3. This note addresses the various issues raised with regard to key personnel as concerns both temporary entry and the freedom to hire. Draft texts for consideration by experts are included at the end of each section based on the assumption that the MAI will provide for legally binding obligations on key personnel. The draft proposals do not prejudge solutions to outstanding issues under discussion elsewhere, nor do they prejudge the nature and scope of the reservations that the Contracting Parties may formulate to the obligations on key personnel. Consistency of terminology with other MAI provisions will also need to be ensured.

I. Definition of Key Personnel

4. The first issue to consider is the categories of natural persons which are to be covered by this provision. Bilateral, regional or multilateral investment agreements that contain specific provisions on key personnel approach this issue in different ways. Key personnel are sometimes defined to include an investor and personnel operating in a managerial, or supervisory capacity, and personnel with technical skills essential to the investment's establishment or operation. Alternatively, an agreement might refer to nationals of the other party to enter and remain in its territory in order to establish, develop, administer or advise on the operation of an investment.

Temporary entry

5. To fully cover the needs arising in the framework of an investment, the MAI needs to provide for three categories of persons who should be granted temporary entry into the host country of an investment:

- the investor (natural person);
- intra-company transferees; and
- skilled persons in no prior employed relation.

Under the NAFTA and the ECT, these three categories of persons are granted temporary entry.

Freedom to hire

6. There is convergence of views that the MAI should also include provisions relating to the hiring of persons legally residing in the host country of a Party. Accordingly, a further category of persons relating to those who are already in the country and holding valid resident and working permits would have to be covered:

- any person lawfully within a Party's territory holding a valid permit of sojourn and work.

Criteria

7. Drafting Group 2 has defined the concepts of National Treatment, Most Favoured Nation Treatment, and Transparency in the context of the different stages of the investment cycle, notably establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, sale, and or other disposition [DAFFE/MAI/DG2(96)2]. The MAI provisions on key personnel could be linked to the activities connected with these different stages.

8. Experts are invited to comment on the inclusion of the following elements in a definition of key personnel:

"Key personnel" could include:

- *any investor,*
- *intra-company transferee,*
- *skilled person of another Party, or*
- *any person lawfully within a Party's territory holding a valid permit of sojourn and work, who is engaged in activities connected with an investment.*¹

¹ The investment activities referred to would be those identified for the purpose of applying national treatment, MFN, and investment protection obligations.

II. Application of national laws

Temporary entry

9. Investment agreements containing provisions on temporary entry of key persons refer to the host countries' immigration and labour laws. The ECT indicates that the examination of an application for temporary entry is "subject to laws and regulations relating to the entry, stay and work of natural persons". In the case of NAFTA, business persons have to qualify under "applicable measures relating to public health and safety and national security". GATS does not prevent a Member from "applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders."

10. Experts may wish to consider the following draft provision:

Consistent with its labour and immigration laws and regulations, a Party shall grant entry and temporary stay to key personnel to engage in activities connected with an investment.

Freedom to hire

11. Natural persons already in the host country may hold different types of permits providing for sojourn and work in a country. Some persons may have obtained access to a country in the framework of a prior request by another investor for the temporary entry of key personnel; other persons may have established in a country under other provisions, on a more permanent basis. The ECT which contains a "freedom to hire" provision requires that the employment of key persons "conforms to the terms, conditions and time limits of the permission granted to such key persons". An exception to this could be made for the hiring of top managerial personnel without restrictions as to length of time (see section iii, below), nor as to nationality, as is provided for in United States' BITs.

12. Experts may wish to consider the following draft provisions:

A Party shall permit an investor of another Party, and an investment of an investor, to employ key personnel without regard to nationality or citizenship provided that the employment concerned conforms to the terms, conditions and time limits of the permission granted to such key personnel.

A Party shall permit an investor of another Party, and an investment of an investor, to hire top managerial personnel of their choice, regardless of nationality or citizenship.

Controls

13. While recognising that provisions on key personnel should be consistent with countries' immigration and labour laws, delegations expressed concern that such reference could be used in a discriminatory way to delay or deny permits of sojourn and work to key personnel. In particular, it was proposed to restrict the discriminatory use of labour certificate tests (e.g., salary level requirements, proof of efforts to recruit nationals, unavailability of local personnel) and/or quotas. It was also suggested that reference be made either to a best efforts clause (e.g. ECT) or that measures not be applied in "a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment" (e.g. GATS).

14. Experts may consider the following proposal:

*Parties shall not invoke labour and immigration laws to evade their obligations under the Agreement.*²

15. In addition, Experts may also consider whether the MAI could provide that:

A Party in granting entry under the above provision, shall not impose, in a discriminatory manner, restrictions such as labour certification tests, or other procedures of similar effect, numerical restrictions, or the use of unreasonable administrative fees.

III. Minimum periods of stay

16. Provisions on key personnel generally make no particular reference to minimum or maximum length of sojourn. Further consideration may however be given for the need, under the MAI, to provide for minimum periods of stay and possibly for an obligation pertaining to the renewal of permits for limited time periods. This may in particular be necessary if national provisions are silent with regard to the attribution of work and sojourn permits for certain categories of key personnel.

IV. Other issues

Nationality requirements for Board of Directors

17. Nationality requirements for board of directors could be a case of de facto discrimination since such restrictions would particularly affect foreign companies. Existing OECD instruments impose reporting requirements for corporate organisation measures concerning the nationality of management or members of boards of directors. The NAFTA (Article 1107) permits a Party to require nationality, or residency, conditions for a majority of the board of directors, provided that this requirement does not materially impair the ability of the investor to exercise control over its investment. Experts could consider whether the MAI could go further and prohibit a Party from imposing any nationality conditions for board of directors.

Other persons

18. Experts may wish to address the question whether spouses and children of natural persons falling under the definition of key personnel, should be granted temporary entry in accordance with the MAI.

² This follows the formulation in the draft General Exceptions article contained in Drafting Group 2's report to the Negotiation Group.