



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.3 on “Special Topics”

KEY PERSONNEL

(Note by the Chairman)

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1. The Expert Group met on 28-30 May 1996 and considered the note by the Chairman [DAFFE/MAI/EG3(96)1] and a contribution from Sweden [DAFFE/MAI/RD(96)3]. The Group discussed possible provisions concerning temporary entry, stay and employment of key personnel, including investors, freedom to hire persons already in the country with valid sejour and work permits, and nationality requirements for board of directors. This note reflects the comments by delegations and proposes an approach for the consideration of these issues.
2. There is consensus that the MAI should contain a provision dealing with key personnel. The relation between the MAI provisions and national immigration and labour laws will depend on the nature of the MAI obligation.
3. The Group agreed that the MAI should consolidate existing commitments in other international agreements, and if possible, go beyond those commitments. Some of these provisions might provide useful guidance but should be adapted to meet the needs of the MAI, i.e. there should be a clear link to investment. Concern was also expressed that in going beyond existing commitments, in particular those relating to key personnel in the GATS, account be taken of MFN provisions which might result in an unintended extension of benefits to non-Members of the MAI.
4. The MAI will be a top-down agreement; the obligations or commitments will apply to all Parties. The nature of the obligation, whether legally-binding or a best efforts commitment, will depend on the scope of the provision itself. The broader the provision, the more likely that binding obligations might come into conflict with national immigration and labour laws. The Group agreed to work on the basis of developing a binding obligation, looking at what could be brought under that obligation. This does not preclude the possibility of a best efforts approach, either in lieu of a binding obligation, or supplementary to it.

TEMPORARY ENTRY, STAY AND WORK

5. Delegates could consider the development of a core obligation which would be legally binding and which would provide for the right to enter, stay and work. Sweden, [DAFFE/MAI/RD(96)3], has made a specific proposal to facilitate the intra-group transfer of key personnel by lessening the restrictions imposed by immigration laws and regulations. Most OECD countries have made specific commitments with regard to the temporary entry of intra-company transferees in their country schedules in the GATS. Such an approach in the MAI would mean that authorities would automatically issue entry and work permits without the application of labour market (economic needs) tests, entry quotas, or other restrictions so long as the conditions laid down in the MAI were met. Parties with non-conforming measures would be obliged to list them as reservations in accordance with the relevant MAI provisions.
6. The central questions to be addressed are: who should be granted this right, under what conditions, and for how long.

Who should be covered by this provision?

7. The Group thought that it would be difficult to arrive at agreed precise definitions of key personnel. Rather, certain categories could be identified, perhaps with criteria such as linkage to the functions to be carried out with respect to the investment.

-- Should the MAI obligation apply to:

Executives (those with policy and decision-making responsibilities, provided that they are essential to the establishment and operation of an investment)

Senior managerial personnel (directors and supervisors, provided that they are essential to the establishment and operation of an investment)

Specialists (those with advanced knowledge or special qualifications in a given field, provided that they are essential to the establishment and operation of an investment)

-- Could the obligation be extended to persons without any prior relationship to the company concerned?

There are different views whether this category of persons should be treated differently from intra-company transferees. Should the MAI develop a best efforts commitment for this category if they cannot be covered by a legally binding obligation?

8. In addition to the core obligation on intra-company transferees, the Group could consider whether investors should also be permitted to enter and stay in order to establish, develop, administer or advise on the operation of an investment. The MAI could develop a separate provision on the movement of investors or this question could be considered as part of the overall treatment of investors under the MAI. If a separate provision is preferred, the nature of the provision as well as the criteria, such as how to define the investor, will have also to be decided (see below, paragraph 11).

9. The Expert Group noted that further consideration should be given to the inclusion of a provision granting temporary entry to spouses and minor children, including the granting of a work permit to spouses, of key personnel who have been granted temporary entry under the MAI (particularly intra-company transferees).

What conditions should apply?

10. The MAI could specify certain conditions in order for the obligation on temporary entry for intra-company transferees to apply. These conditions could include:

- that the individual be already employed in the international group (intra-company transferee). Some countries would like to add a minimum prior employment requirement such as one year.
- that the work permit be directly related and limited to a specified job in a specific entity of the group. This could imply certain administrative formalities in order to verify that this condition is still met throughout the full period of the permit to enter and stay.

- the application by the individual must be supported by the international group which would certify that the applicant falls into one of the permitted categories of key personnel under the MAI.

11. As concerns investors, some delegations suggested that there should be no additional criteria than that which is provided by the definition of investor in the agreement itself. Others thought that there should be a requirement of making a "substantial"¹ investment².

Length of stay

12. There are different views as to whether the MAI obligation on temporary entry and stay should include a limitation in time. Some delegations think that this is necessary to avoid an open-ended obligation and propose minimum periods between 2 and 5 years. Others are of the opinion that the length of stay should extend for as long as the person is engaged in the same capacity and continues to meet all the conditions for the initial permission to enter and stay. In such a case, delegates might consider whether the MAI could provide for automatic renewals of permits provided that certain formalities necessary to verify continued eligibility are permitted by the host country.

FREEDOM TO HIRE

13. The Group considered the objectives of a freedom to hire provision in the MAI. Such a provision should be aimed at covering natural persons already in the country who are holding valid resident/sejour and work permits. It should permit an investor to hire persons without regard to nationality. Some delegations think that this provision is not necessary since the obligation would be part of the national treatment obligations of the agreement. Other delegations caution that such a provision might be needed particularly in the case of accession by non-Member countries which might impose mandatory requirements regarding employment of local labour force. While this provision 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.

14. If these concerns are not fully satisfied by the application of national treatment, do delegates think that a provision on the freedom to hire should be a legally binding obligation or a best efforts commitment? Should the obligation be limited to top managerial personnel or should it also cover any person lawfully in the country and holding valid sejour and work permit?

- Should the MAI condition the application of the provision to the requirement that the employment conforms to the terms, conditions and time limits of the permission granted to such persons?
- If freedom to hire is a best efforts commitment, should this be qualified so that any administrative practices which might apply should not be used to undermine or nullify the commitment?

¹ It being understood that "substantial" has different meanings depending on the sector concerned.

² The relation between the definition of investment for the purposes of key personnel provisions and certain types of capital market transactions are still under consideration.

NATIONALITY REQUIREMENTS FOR BOARD OF DIRECTORS

15. There were different views whether this issue should be treated as part of a key personnel provision or whether it should be examined in the context of disciplines on corporate practices. It was agreed that the concern being addressed here was aimed at nationality requirements which are imposed by governments. Some countries maintain national requirements for board of directors. Some delegations remarked that the national treatment obligation in the MAI would apply to *de jure* and *de facto* discrimination and that therefore requirements of this kind would be in contradiction of the MAI. Parties with non-conforming measures of this kind would be obliged to list them as reservations in accordance with the relevant MAI provisions.