



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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I. INTRODUCTION

1. The Group discussed possible disciplines concerning temporary entry, stay and employment of investors and other key personnel, freedom to hire persons already in the country with valid sejour and work permits, and nationality requirements for boards of directors.

2. There is consensus that the MAI should contain provisions dealing with key personnel and that such provisions should not interfere with the normal application of national immigration laws or labour laws on key personnel. In addition, it has been suggested that MAI provisions should be "subject to" national laws and regulations relating to the entry, stay, and work of natural persons. The nature of the provisions (legally-binding obligations, best efforts commitments, or a combination of the two) will depend on the scope of the provisions --categories of persons covered and conditions applying thereto-- and the need to take account of national immigration and labour laws. The Group agreed to work on the basis of developing a binding MAI obligation and to look at the category of persons that could benefit from the provisions and under what conditions. Other options include the possibility of a best efforts approach, either in lieu of a binding obligation, or supplementary to it, depending on the category of persons.

3. The MAI will be a top-down agreement so the obligations or commitments will apply to all Parties. Generally, measures which do not conform to obligations would be listed as reservations; measures which are contrary to non-binding commitments would be notified for transparency purposes. Whether this will also apply to key personnel provisions remains to be decided. The Group agreed that the MAI should take account of existing commitments in other international agreements¹, and where appropriate, go beyond those commitments. These provisions might provide useful guidance but some of them address broader trade-related concerns. For the purposes of the MAI, there should be a clear link to investment.

II. TEMPORARY ENTRY, STAY AND WORK

1. Investors

4. The Group considered whether investors (i.e., natural persons²) should be permitted to enter and stay, and if so, the applicable criteria and conditions. Generally, investors would seek to enter the territory of a host country to ensure the establishment, development, administration or management of an investment or to advise on its operation. The movement of investors may be particularly important for the identification of investment projects. Concerns that a broad definition of investment might allow the setting up of letter-box companies or the entry of persons with no substantial investment interests could be

1 The overall relationship to other international agreements, in particular the GATS, and the implications for MFN commitments will be examined by the Negotiating Group in September.

2 One delegation has stated that they would be prepared to consider extension of the right of entry under the key personnel provisions of the MAI to nationals of any MAI party regardless of whether they are the same nationality of the investor. This question might need further consideration by the Group.

addressed by requiring that an investor make a "substantial"³ investment⁴, or by providing for a denial of benefits provision⁵. Some delegations thought that there should be no additional criteria than that which is provided by the definition of investor in the agreement.

5. Provided that the agreed conditions are met, the MAI could confer a recognisable status of "investor" that would be entitled to benefit from an application process that facilitates their temporary entry, stay, and where applicable work, in MAI countries. This could mean that authorities agree to restrict the application of certain requirements such as labour market (economic needs) tests, or entry quotas. Immigration authorities would not be prevented from applying administrative formalities to verify or ensure the validity of the status requested.

2. Executives, Managers, and Specialists

6. In addition to the investor, the MAI provisions could apply to other persons usually referred to as "key personnel"⁶. The Group agreed it would be difficult to arrive at agreed precise definitions of this term. However, certain categories could be identified, perhaps with criteria such as linkage to the functions to be carried out with respect to the investment.

- Not all delegations agree on the categories which could be covered, however, they agreed to consider whether the key personnel provisions could apply to:

Executives (those with policy and decision-making responsibilities),

Senior managerial personnel (directors and supervisors)

Specialists (highly qualified experts in a given field)

- provided, in each case, that the person's presence in the host country is essential to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposition of an investment. Some delegations would limit these investment activities to establishment, operation and liquidation.

7. The provision would be intended to allow an investor, or its investment, to bring in these categories of persons if the conditions set out in the MAI are met. These conditions could include, for example, the requirement that the work permit be directly related and limited to a specified job or that the application by the individual is supported by the requesting entity which would certify that the applicant falls into one of the permitted categories. The MAI Party could apply administrative formalities to verify or ensure the validity of this status.

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

4 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.

5 Drafting Group 3 is currently examining whether a denial of benefits provision is a satisfactory solution to the issue of letter-box companies.

6 See footnote 2, above.

3. Intra-group (company) transferees

8. If it is necessary to further specify what key personnel could be granted the right of entry, stay and work, the provision could impose a requirement that these persons be "intra-company transferees". Most OECD countries have made specific commitments with regard to the temporary entry of intra-company transferees in their country schedules in the GATS. One delegation, [DAFFE/MAI/RD(96)3], has made a specific proposal to facilitate the intra-group transfer of key personnel according to which the MAI would develop rules to facilitate the transfer of intra-group personnel by lessening the restrictions imposed by immigration laws and regulations. However, a number of delegations do not agree that the MAI should distinguish between intra-group transferees and other categories of key personnel.

9. If the MAI were to have a provision on intra-group transfers, it would be necessary to identify the category of persons that could be covered. If limited to executives, managers, and specialists with prior employment in the company, this approach would be more restrictive than the preceding one. However, it could also be extended to other personnel on the grounds that there is an existing employment relationship with the company. It would also be necessary to specify the conditions to be met before the provision on temporary entry for intra-company transferees could apply. These conditions need further consideration but 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. A few delegations think that this condition might be very difficult to implement.
- 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.

10. The MAI provision would operate to allow authorities to facilitate entry and work permits for the identified categories of persons, 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 would be permitted to verify the authenticity of the status requested.

4. Spouses and minor children

11. There are different views whether the MAI should include 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). Some delegations said that key personnel provisions could be of little value if entry visas could be denied to spouses or dependent children. Others caution that such provisions might give rise to international law problems.

5. Length of stay

12. There are different views as to whether the MAI provisions 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, or a maximum of period of, for example,

4 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, the MAI could provide for automatic renewals of permits provided that certain formalities necessary to verify continued eligibility are permitted.

III. FREEDOM TO HIRE

13. The Group considered the objectives of a freedom to hire provision in the MAI. Such a provision would be aimed at covering natural persons already in the country who are holding valid resident/sejour and work permits and some delegations think it should also specify that employment must conform to the terms, conditions, and limitations of the relevant permits. The provision would 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.

14. If the application of national treatment is not considered sufficient to deal with nationality requirements that might be imposed by a Party, delegates will need to consider what kind of provision should be included in the MAI. This might depend on the categories of persons which are intended to be covered; either top personnel such as executives, managers and specialists or other persons lawfully in the country and holding valid sejour and work permits.

15. While the MAI 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. 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.

IV. NATIONALITY REQUIREMENTS FOR BOARDS OF DIRECTORS

16. Some countries maintain nationality requirements for boards of directors. If it is agreed that these requirements should not be permitted under the MAI, this could be done implicitly through the application of the national treatment obligation (perhaps with an interpretative note to that effect), or in a specific provision. This issue will need further consideration.