



Negotiating Group on the Multilateral Agreement on Investment (MAI)

KEY PERSONNEL

(Note by the Chairman)

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1. For multinational enterprises the ability to transfer and hire key personnel is an essential element of investment decisions, technology transfers and research and development activities. Different category of personnel may be needed during the investment cycle to identify, establish, develop, manage and maintain, and if necessary, liquidate an investment.

2. To satisfy these different needs, an investor may wish to:

(1) enter the host country himself or bring into the host country key personnel essential to a specific operation of an investment (temporary entry); and/or

(2) employ personnel legally within the host country without regard to the nationality or citizenship of the person concerned (freedom to hire).

3. The present OECD instruments do not directly address key personnel, except to the extent that the Codes provide for the establishment of self-employed intermediaries in the field of banking and financial services and transfers abroad of earnings by persons employed in another country, which is not their country of origin. The survey of OECD country practices by the CIME/CMIT on key personnel [DAFFE/INV/IME(95)24] found that a visa or residence permit granted by the immigration authorities, and a work permit administered by the labour ministry are frequently required for the entry of personnel. These permits, generally issued for short periods and linked to specific jobs, are subject to controls which may take into account various market test criteria and/or quotas.

4. The survey also found that permission to employ persons legally within the country, regardless of their nationality/citizenship, is not always easily obtained. Some countries may, for instance, fix an overall percentage of nationals to be employed and/or require that a number of key positions be attributed to nationals.

a) Definition of key personnel

5. 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.

-- *Should the MAI provide an explicit definition of key personnel?*

-- *Should the definition be linked to the functions necessary for making or developing, managing, maintaining, using, enjoying or disposing of an investment?*

b) Temporary entry

6. Provisions addressing the temporary entry of key personnel can be found in some bilateral and multilateral agreements relating to investment. They might require, as in the Canadian BIT, that "each contracting party shall grant temporary entry to citizens of the other contracting party employed by an

enterprise who seeks to render services to that enterprise.... in a capacity that is managerial or executive". The US BIT includes an additional criterion that such nationals seeking entry and sojourn must "have committed.... a substantial amount of capital or other resources". The German BIT only requires that the parties shall give "sympathetic consideration to applications for the entry and sojourn of persons of either party...." as well as "sympathetic consideration for work permits..".

7. The ECT requires examination in good faith of requests made by investors of one party and key personnel employed by such investors or their investment to enter and remain temporarily in the territory of another party to engage in the activities specified therein. Under the NAFTA, each party agrees to facilitate the temporary entry into its territory of specified categories of non-immigrants who are citizens of NAFTA countries. Specific qualifications are attached to each category, including for "investors", i.e., those entrants seeking to commit a substantial amount of capital in the host country, and their employees.

8. The GATS contains an annex covering both natural persons who are service providers as well as natural persons employed by service providers to the extent there are specific commitments relating to the entry and temporary stay of such natural persons. Natural persons covered by a specific commitment shall be allowed to provide the service in accordance with the terms of that commitment.

9. Provisions on key personnel typically stipulate that entry and sojourn are subject to local immigration laws and regulations relating to the entry of aliens. The ECT and NAFTA provisions on key personnel both recognise that such provisions are subject to the host country's immigration laws, or laws and regulations relating to the entry, stay and work of natural persons. The GATS provides that host country measures regulating the entry and temporary stay of natural persons are permitted.

-- *Should the MAI provide for the temporary entry of key personnel?*

-- *What would be the relationship between these provisions on temporary entry and national immigration and labour law and policies?*

-- *What MAI disciplines should apply - national treatment, MFN, standstill, roll-back, transparency, dispute settlement?*

c) Freedom to hire key personnel

10. The US BIT provides for the freedom to hire top managerial personnel without regard to nationality. This right applies only with respect to persons already in the host country and otherwise eligible to work. The possibility to employ persons regardless of their nationality or citizenship is covered by the ECT, provided they hold a valid permit to enter, stay and work in the area of investment.

11. The Canadian BIT does not permit nationality requirements for senior management positions. Similarly, under the NAFTA, nationality requirements for senior management positions may not be imposed. The existing OECD instruments only impose reporting requirements for corporate organisation measures concerning the nationality of management or director positions in host countries.

-- *Should the MAI provide for the right to hire personnel already in the host country and holding valid sojourn and work permits without regard to nationality?*

-- *Should the MAI contain specific provisions prohibiting nationality requirements for board members and senior management positions such as chief executive officers?*