



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Informal Consultations on “Special Topics”

**DRAFT ARTICLE ON TEMPORARY STAY AND WORK OF INVESTORS
AND KEY PERSONNEL**

(Report to the Negotiating Group)

Report to the Negotiating Group

Draft Article on temporary stay and work of investors and key personnel

1. On 24-25 February 1997, delegations held informal consultations on key personnel. Considerable progress was made in the development of an article on temporary entry, stay and work of investors and key personnel. The attached text reflects the outcome of the consultations, which focussed on policy issues. Some work may still be required to address technical drafting issues.
2. Three key issues remain outstanding, and will require guidance from the Negotiating Group:
 - whether there should be an anti-abuse clause, its precise wording, as well as its specific placement in the key personnel article or elsewhere in the Agreement, is to be decided;
 - whether, as a condition for temporary entry, stay and work under the article, there should be a prior employment requirement of not less than one year, for key personnel employed by the investor; and
 - whether MAI disciplines on temporary entry, stay and work of investors and key personnel should apply to both citizens and permanent residents of MAI Contracting Parties, or only to citizens of MAI countries.

Co-ordinator

Proposed Text

A. Temporary entry, stay, and work of investors and key personnel

1. Subject to the application of Contracting Parties' national laws, regulations and procedures affecting the entry, stay and work of natural persons:

(a) Each Contracting Party shall grant temporary entry, stay and authorisation to work¹ and provide any necessary confirming documentation to a natural person of another Contracting Party who is:

(i) an investor who seeks to establish, develop, administer or provide advice or essential technical services to the operation of an enterprise² to which the investor has committed, or is in the process of committing, a substantial amount of capital, or

(ii) an employee employed by an enterprise referred to in (i) above, or by an investor, [for a period of not less than one year,] in a capacity of executive, manager or specialist and who is essential to the enterprise;

so long as that person continues to meet the requirements of this Article³:

(b) (i) Contracting Party shall grant temporary entry and stay and provide any necessary confirming documentation to the spouse and minor children of a natural person who has been granted temporary entry, stay and authorisation to work in accordance with this Article. The spouse and minor children shall be admitted for the period of the stay of that person.

(ii) Each Contracting Party is encouraged⁴ to grant authorisation to work to the spouse of the person who has been granted temporary entry, stay, and authorisation to work in accordance with this Article.

[The national laws, regulations and procedures referred to above shall not be invoked by a Contracting Party as a means of evading its obligations under this Article⁵.]

2. No Contracting Party may deny entry and stay as provided for by this Article, or authorisation to work as provided for by paragraph 1(a) of this Article, for reasons relating to labour market or other economic needs tests or numerical restrictions in national laws, regulations, and procedures.

1 Interpretative note: "In order of an "authorisation to work" to be granted, a natural person may have to meet specific professional qualifications related to the particular activities to be performed. Professional qualification criteria that may be applicable are outside the scope of this Article."

2 Enterprise under this Article would have the same meaning as under the definition of Investment.

3 Interpretative note: "It is understood that the national authorities may periodically verify continued eligibility under this paragraph".

4 Some countries prefer "shall endeavour" and may need to refer to capitals before agreeing to deletion.

5 Whether there should be an anti-abuse clause, its precise wording, as well as its specific placement, here or elsewhere in the Agreement, is to be decided.

3. For the purposes of this Article:

[**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;]⁶

Executive means a natural person who primarily directs the management of an enterprise 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 may be required to possess specific or proprietary knowledge of the enterprise's product, service, research equipment, techniques, or management.

B. Employment Requirements⁷

[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.]

⁶ Several delegations have concerns with extending the benefits of the MAI Key Personnel provisions to permanent residents of another Contracting Party. This issue arises in two cases: (i) "investor" as currently defined and (ii) "executive", "manager", "specialist".

⁷ These texts were not discussed by EG3 or in the informal consultations but some delegations noted that they might need to be addressed somewhere in the Agreement.