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**Negotiating Group on the Multilateral Agreement on Investment (MAI)**

**THE MULTILATERAL AGREEMENT ON INVESTMENT**

**(Report by the Chairman to the Negotiating Group)**

## THE MULTILATERAL AGREEMENT ON INVESTMENT

### (Report by the Chairman to the Negotiating Group)

#### *Introduction*

1. This report contains elements of a Multilateral Agreement on Investment proposed by the Chairman of the Negotiating Group. It is not intended as a comprehensive Chairman's text and does not replace the Consolidated Text which remains the official basis for negotiation. Its purpose is to provide an overview of the status of negotiations and, where appropriate, to put forward proposals (attached as annexes) with a view to carrying the discussions further.
2. Most of the attached texts have previously been submitted to the Negotiating Group such as the seven point package of proposals on labour and environment [DAFFE/MAI(98)10], the proposals on scope and application and the treatment of investors and investments [DAFFE/MAI(98)15], the proposals on special topics, financial matters, and institutional matters [DAFFE/MAI(98)16], and the proposals on general exceptions [DAFFE/MAI/RD(97)41]. Other proposals result from discussions at expert level. The Negotiating Group had an opportunity to have a first discussion on some of the proposals.
3. These proposals do not include provisions on measures taken by regional economic integration organisations, measures to protect cultural identity, intellectual property, and country specific exceptions, nor on issues relating to extraterritoriality. The treatment of these matters in the MAI still needs considerable further thought. Texts relating to taxation, dispute settlement and the relationship to other international agreements are not included here but are available in the Consolidated Text.
4. The following commentary describes the proposals by comparison with the Consolidated Text and highlights some of the issues that delegations have indicated as requiring further work. Lack of identification of specific issues should not be construed as implying that all or some delegations could accept the proposals as they are now.

#### *Preamble [Annex 1]*

5. The proposals on the preamble were submitted to, and briefly discussed by, the Negotiating Group at its meeting on 14-16 April 1998 [DAFFE/MAI(98)15]. The proposals contain two paragraphs addressing labour and environment matters drawn from the Chairman's proposals [DAFFE/MAI(98)10] which was accepted by most delegations as a basis for future work and is now annexed to the Consolidated Text. This text also includes a paragraph based on the OECD Guidelines concerning the right of States to prescribe the conditions under which enterprises operate in their jurisdiction.

#### *Definitions, Scope and Application [Annex 2]*

6. The proposals by the Chairman on definitions, scope and application were submitted to the Negotiating Group for consideration at its meeting on 14-16 April 1998 [DAFFE/MAI(98)15]. They are aimed at resolving the outstanding questions in this area, including the scope of the definition of investment, the extent of obligations, the protection of existing investment, and the denial of benefits clause. As work proceeds, additional definitions may be necessary.

7. A new scope article includes the previous text of the geographical scope provisions with the deletion of the reference to the UN Law of the Sea Convention and a disclaimer (paragraph 2) to deal with the concerns of some delegations arising out of the geographical scope. There is also a proposal, found in the annex to the Consolidated Text, to circumscribe the substantive scope of application of the MAI by defining the meaning of governmental measures.

8. In the definition of “Investment”, the asset list follows an overall definition in paragraph b), building on the footnote in the Consolidated Text. The definition excludes assets not held in a business context or which are the result of current commercial cross-border transactions in goods or services. At the same time, it makes clear that all assets of an enterprise are part of the investment and its value, even when the asset is itself not held as an investment. This is important for investor protection provisions such as expropriation.

9. The proposal clarifies that “indirect” ownership or control in the definition of investment does not include an investment by an investor established in a non-MAI Party, but owned or controlled by a MAI Party investor. A number of delegations would prefer to cover this form of “indirect” ownership as well.

10. The proposal recognises that further work is required on the treatment of intellectual property rights, including literary and artistic works, with respect to the definition of investment and other provisions including national treatment, MFN treatment and expropriation. A number of other questions still need to be resolved, including the extension of the denial of benefits clause, the treatment of public debt, application to overseas territories, and the granting of authorisations for the prospection, exploitation and production of minerals.

### *Treatment of Investors and Investments [Annex 3]*

11. The texts on the treatment of investors and investments in the Consolidated Text date from the early phases of the negotiations. The proposals by the Chairman were submitted to the Negotiating Group for consideration at its meeting on 14-16 April 1998 [DAFFE/MAI(98)15]. They mainly reflect elements of the Chairman’s proposal on labour and environment [DAFFE/MAI(98)10] as these relate to the articles on general treatment, national treatment and MFN, and the right to regulate. The proposed article on expropriation and compensation, including an interpretative note, are also from the Chairman’s proposals on labour and environment but is meant to respond to a more general concern that the exercise of normal, non-discriminatory regulatory powers would not amount to expropriation under the MAI.

12. The article on information transfer and data processing (paragraph 1) clarifies the concepts relating to the transfer or processing of information. The content of a previous subparagraph a) has been merged into the chapeau and subparagraph b) is part of the commentary at the bottom of the page.

13. There remain a number of outstanding questions including with regard to “in like circumstances”, the meaning of national treatment in the case of a state or province, information transfer and data processing, and subrogation.

### *Not lowering measures [annex 4]*

14. The proposal for an article on not lowering measures and the accompanying interpretative note is taken from the Chairman's proposal on labour and environment [DAFFE/MAI(98)10]. The proposal is for a binding provision limited to domestic measures and the circumstances of a particular investment. Some delegations need to consider the binding character of the proposed obligation, and further consideration needs to be given to the implications of binding language for dispute settlement procedures. Some delegations wish to consider the possibility of a more general provision on not lowering standards as well as additional ideas that would ensure that the MAI includes meaningful provisions on a range of issues related to labour and environment. It is still being considered whether the labour provisions should refer to domestic, or international core, labour standards. A few delegations oppose any provision on labour matters in the MAI.

### *Special Topics [annex 5]*

15. The proposals on special topics were submitted to the Negotiating Group in April 1998 [DAFFE/MAI(98)16] but have not been discussed. They are based on lengthy discussion by an expert group on special topics and in informal consultations. They have been put forward by the Chairman in an attempt to provide a basis for further consideration of these matters. A number of questions still need to be addressed, including demonopolisation and the treatment of exceptions with respect to privatisation.

#### **-- Temporary entry, stay and work of investors and key personnel**

16. The reference to the one year prior employment requirement, in brackets in the Consolidated Text, has been deleted from paragraph 1(a)(ii). Interpretative Note 2 clarifies that requirements of this kind are permitted under the chapeau of the article. The definition of "natural persons of another Contracting Party" includes permanent residents. The interpretative notes reproduce agreed understandings in the previous text [see Consolidated text DAF/MAI(98)7/REV1, section III]. Interpretative note 2 reproduces an understanding proposed by the Technical Group on Country Specific Exceptions [DAFFE/MAI/EX(98)26, paragraph 17].

#### **-- Employment Requirements**

17. Interpretative Note 7 makes clear that the article does not preclude a Contracting Party from requiring an investor or investment to comply with measures aimed at rectifying a discriminatory pattern of employment.

#### **-- Performance Requirements**

18. The phrase "Except as provided in paragraph 2 through 4" has been added to clarify that the prohibitions listed in paragraph 1 are not absolute in all cases, particularly when linked to the receipt or continued receipt of an advantage. The amended phrase "whether or not of another Contracting Party" also makes it clearer that these prohibitions applies to all investors. The second tiret of subparagraph (f) refers to all applicable provisions on intellectual property rights. The interpretative notes reproduce the understandings recorded in footnotes 22, 24, 25, 26, 29 of the Consolidated Text [DAFFE/MAI(98)7/REV1, section III].

19. In paragraph 3 (a), the second and third tirets may require further technical discussions, taking into account in particular the proposal made by one delegation [see Consolidated Text DAF/MAI(98)7/REV1, section III, footnote 16.]

20. Paragraph 4 reproduces one of the Chairman proposals concerning Labour and Environment [DAFFE/MAI(98)10] with the addition of the reference to paragraph 1(f) covering technology transfer.

#### **-- Privatisation**

21. There are no proposals for provisions on special share/voucher arrangements on the basis that any discriminatory measure in this area would need to be covered by a country specific exception. Interpretative Note 13 reproduces the understanding recorded in footnote 53 of the text in the Consolidated Text [DAFFE/MAI/(98)7/REV1, section III.]

#### **-- Monopolies**

22. The proposed article draws extensively on the proposals in the Consolidated Text [DAFFE/MAI(98)7/REV 1, section III] with a few drafting changes. The “best endeavour” provision for the designation of a publicly-owned monopoly (old paragraph 2) has been deleted. Paragraph 2 is based on a proposal found in DAF/MAI/ST/RD(98)7.

23. Paragraph 4 of the Monopoly article in the Consolidated text [DAFFE/MAI(98)7/REV 1, section III] has been deleted since this is one of the outstanding issues that still need to be addressed under special topics, (see paragraph 15 above).

24. Concerning the new paragraph 4 of the Monopoly article, it is recognised that a solution would need to be found to the practical problem a Contracting Party may encounter with respect to the notification of every single monopoly designated at a subnational level of authority.

25. Interpretative Note 14 confirms the application of the article to monopolies designated by subnational authorities. Interpretative Note 15 allows some simplification of the drafting of paragraph 3(c).

#### **-- Concessions**

26. Paragraph 1 is based on the language of Paragraph 3 of the Privatisation article. Paragraph 2 draws on the bracketed definition in the Consolidated Text [DAFFE/MAI/(98)7/REV1, section III].

#### **-- Entities with delegated governmental authority**

27. The definition of “Delegation” has been redrafted for the sake of clarity and added to the definitions article.

#### **-- Investment Incentives**

28. This proposal draws on a proposal in the Consolidated Text and the instrument on Incentives and Disincentives to International Investment contained in the OECD Declaration on International Investment and Multinational Enterprises. The desirability of future work on this subject needs further discussion.

#### ***Financial Matters [annex 6]***

29. The proposals by the Chairman on financial matters were distributed to delegations for their consideration in April 1998 [DAFFE/MAI(98)16] and draw extensively on the work of the Expert Group

on Financial Matters. The proposals were not discussed by the Negotiating Group. They include, inter alia, a prudential measures provision, a temporary safeguard provision and a proposed article on transactions in pursuit of monetary and exchange rate policies.

30. The question of special provisions for the determination of certain financial matters in dispute settlement is still under consideration and some delegations have noted the need for further analysis of the MAI's relationship to the GATS

***Taxation [no texts included]***

31. A text on taxation has been developed by the chairman of the informal consultations, based on discussions with investment and taxation experts, and is included in the Consolidated Text. Further consideration needs to be given to the interpretative note regarding dispute settlement for taxation matters.

***Dispute Settlement [no texts included]***

32. The Dispute Settlement chapter has been prepared by the Chairman of the Expert Group on Dispute Settlement on the basis of the discussions in the group and is included in the Consolidated Text. Further work is needed on dispute settlement. In particular different options remain open in the field of multilateral consultations, the scope of investor-state dispute settlement, the establishment of an appeal mechanism in the MAI, damages in state-state arbitration, the response to non-compliance with an arbitral award in state-state dispute settlement, and prior unconditional consent to investor-state dispute settlement.

***General Exceptions [annex 7]***

33. The text in the annex to this report reproduces the Chairman's proposal [DAFFE/MAI/(RD(97)41] in the Consolidated Text. These provisions are still under discussion, in particular the treatment of measures taken to protect public order and the disciplines that might apply to the invocation of exceptions. Some countries have also proposed that measures taken to protect cultural interests should be covered by a general exception clause of this type. Other countries believe that these concerns should be covered by country specific exceptions.

***Regional Economic Integration organisations [no texts included]***

34. A clause relating to measures taken by regional economic integration organisations (REIO) has been put forward by one delegation and is contained in the annex to the Consolidated Text. It is under consideration by the Negotiating Group.

***Country Specific Exceptions [no texts included]***

35. Country specific exceptions could be lodged to certain obligations of the MAI with some countries supporting the possibility of lodging exceptions against all of the MAI obligations. In most cases, Contracting Parties would list any existing non-conforming measure ("grandfathering"), and the introduction of more restrictive measures would not be permitted ("standstill"). Exceptions recorded in this way would be subject also to a ratchet mechanism which would automatically lock in future liberalisation.

36. Most delegations have noted the need to retain flexibility to take some exceptions that would not be bound by the standstill/ratchet mechanism. Various proposals are being examined to accommodate, for

example, activities where the GATS or other international agreements play a role, or where there are national sensitivities such as subsidies, health, social services, aboriginal and minority affairs. In considering proposed exceptions, delegations would be guided by the need to preserve the quality of the agreement and to achieve a satisfactory balance of rights and obligations among the Parties. Specific disciplines to circumscribe such exceptions are being considered. It is a widely shared view that the dispute settlement mechanism would apply to disputes arising over whether a particular measure is covered by an exception.

37. The MAI has also been designed as an instrument for the progressive liberalisation of investment regimes. Proposals are being examined, including periodic sectoral and horizontal reviews by the Parties Group and a provision for future rounds of negotiations.

#### ***Institutional Matters [annex 8]***

38. The proposals by the Chairman on institutional matters were distributed to delegations [DAFFE/MAI(98)16] for their consideration. This text proposes a voting rule for both the Preparatory Group and the Parties Group which provides for consensus voting but failing consensus, decisions on certain matters could be taken by a three-quarters majority. However, views are divided on the possibility of departing from a full consensus voting rule. There is also further work to be done on a possible non-derogation clause in the MAI to clarify the relationship between the MAI and other treaties, including bilateral treaties.

39. The article on signature shows a consequential amendment due to the new formulation of the Preparatory Group. The proposal puts forward the rule for entry into force as three-quarters. There is also a proposed paragraph on non-Members taken from the proposals of the experts on institutional matters to ensure that particular circumstances of non-Members will be taken into account during the process of adhering to the MAI. It is proposed to include this paragraph in the Final Act.

#### ***The OECD Guidelines for Multinational Enterprises [annex 9]***

40. The full text of the Guidelines are attached in the annex. It is understood that the Guidelines will be reviewed by the Committee on International Investment and Multinational Enterprises (CIME) and that any resulting changes will be incorporated in the text as necessary.

#### ***Conflicting Requirements and Secondary Investment Boycotts [no texts included]***

41. The annex to the Consolidated Texts contains draft articles proposed by two delegations on conflicting requirements and secondary investment boycotts. These articles, and the treatment of these issues in the MAI, are still under consideration in the context of a broader consideration of particular issues relating to extra-territoriality.

Annex 1

**PREAMBLE**

The Contracting Parties to this Agreement,

**CONSIDERING** that international investment has assumed great importance in the world economy and has considerably contributed to the development of their countries;

**RECOGNISING** that agreement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, the creation of employment opportunities and the improvement of living standards;

**EMPHASISING** that fair, transparent and predictable investment regimes complement and benefit the world trading system;

**DESIRING** to strengthen their ties of friendship and to promote greater economic co-operation between them;

**WISHING** that this Agreement enhances international co-operation with respect to investment and the development of world-wide rules on international investment in the framework of the world trading system as embodied in the World Trade Organization;

**WISHING** to establish a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures;

\* **RECOGNISING** that investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable, when accompanied by appropriate environmental and labour policies;

\* **RE-AFFIRMING** their commitment to the Rio Declaration on Environment and Development, and Agenda 21 and the Programme for its Further Implementation, including the principles of the polluter pays and the precautionary approach; and resolving to implement this Agreement in a manner consistent with sustainable development and with environmental protection and conservation;

\* **RENEWING** their commitment to the Copenhagen Declaration of the World Summit on Social Development and the observance of internationally recognised core labour standards, i.e., freedom of association, the right to organise and bargain collectively, prohibition of forced labour, the elimination of exploitative forms of child labour, and non-discrimination in employment, and noting that the International Labour Organisation is the competent body to set and deal with core labour standards world-wide;

**RECOGNISING** that every State has the right to prescribe the conditions under which enterprises operate within its jurisdiction, subject to international law and to the international agreements to which it has subscribed;

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\* Text as contained in Chairman's proposed package on Labour and Environment.



**EXPRESSING** their support for the OECD Guidelines for Multinational Enterprises and emphasising that implementation of the Guidelines, which are non-binding and which are observed on a voluntary basis, will promote mutual confidence between enterprises and host countries and contribute to a favourable climate for investment;

**AFFIRMING** their decision to create an Agreement open to adherence by all countries;

**HAVE AGREED AS FOLLOWS:**

Annex 2

**DEFINITIONS, SCOPE AND APPLICATION**

**Article 1**

**Definitions**

For purposes of this agreement,

(a) “investor” means:

(i) a natural person having the nationality of, or who is permanently residing in, a Contracting Party in accordance with its applicable law; or

(ii) a legal person or any other entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organisation,

(b) “Investment” means an asset, owned or controlled, directly or indirectly, by an investor, that has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk in the conduct of a business activity, including:

(i) an enterprise (being a legal person or any other entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation);

(ii) shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;

(iii) bonds, debentures, loans and other forms of debt, and rights derived therefrom;

(iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;

(v) claims to money and claims to performance;

(vi) intellectual property rights;<sup>1</sup>

(vii) rights conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits;

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1. Further work is required on the treatment of intellectual property rights, including literary and artistic works, with respect to the definition of investment and other provisions including national treatment, MFN treatment and expropriation.

(viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges..

This does not include an asset that has the characteristics of a current commercial cross-border transaction in goods or services. However, all assets owned or controlled by an enterprise constitute part of the investment and its value, regardless of whether the asset itself is independently an investment.

(c) “Indirect” ownership or control does not include an investment by an investor established in a non-MAI Party, but owned or controlled by a MAI Party investor.

(d) “Delegation” means a legislative grant, or government order, directive, or other act transferring government authority to a non-governmental entity or authorising the exercise of governmental authority by such an entity.

## **Article 2**

### **Scope**

1. This Agreement shall apply in:
  - (a) the land territory, internal waters, or the territorial sea of a Contracting Party, or, in the case of a Contracting Party which is an archipelagic state, its archipelagic waters; or
  - (b) the maritime areas beyond the territorial sea with respect to which a Contracting Party exercises sovereign rights or jurisdiction in accordance with international law.
2. Nothing in this agreement shall prejudice the positions of the Parties with respect to:
  - a) issues related to the delimitation of maritime zones, or
  - b) which of them is entitled to exercise sovereignty, sovereign rights or jurisdiction within a particular geographic area, or with respect to a particular activity, within a particular geographic area.

## **Article 3**

### **Application to Overseas Territories**

1. A Contracting Party may at any time declare in writing to the Depositary that this Agreement shall apply to all or to one or more of the territories for the international relations of which it is responsible. Such declaration, made prior to or upon ratification, accession or acceptance, shall take effect upon entry into force of this Agreement for that State. A subsequent declaration shall take effect with respect to the territory or territories concerned on the ninetieth day following receipt of the declaration by the Depositary.

2. A Contracting Party may at any time declare in writing to the Depositary, that this Agreement shall cease to apply to all or to one or more of the territories for the international relations of which it is responsible. Such declaration shall take effect upon the expiry of one year from the date of receipt of the declaration by the Depositary, with the same effect regarding existing investment as withdrawal of a Contracting Party.

## **Article 4**

### **Extent of Obligations**

The Contracting Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of the Agreement, including their observance, except as otherwise provided in the Agreement, by all levels of governments.

## **Article 5**

### **Protecting Existing Investments**

This Agreement shall apply to events occurring after the entry into force of the Agreement with respect to investments made before or after entry into force.

## **Article 6**

### **Denial of Benefits**

Subject to prior notification to and consultation with the Contracting Party of the investor, a Contracting Party may deny the benefits of the Agreement to an investor and to its investments if an investor of a non-Party owns or controls the investor and that investor has no substantial business activities in the territory of the Contracting Party under whose law it is constituted or organised.

Annex 3

**TREATMENT OF INVESTORS AND INVESTMENTS**

**Article 1**

**General Treatment\***

Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security. Such treatment shall also apply to the operation, management, maintenance, use, enjoyment or disposal of such investments. In no such case shall a Contracting Party accord treatment less favourable than that required by international law.<sup>2</sup>

**Article 2**

**National Treatment and Most Favoured Nation Treatment\***

1. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords in like circumstances<sup>3</sup> to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.

2. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords in like circumstances to investors of any other Contracting Party or of a non-Contracting Party, and to the investments of investors of any other Contracting Party or of a non-Contracting Party, with respect to the establishment, acquisition,

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\* Text as contained in Chairman's proposed package on Labour and Environment.

2. Text as contained in Chairman's proposed package on Labour and Environment: "Interpretative Note: This Article on General Treatment, and the Article on Expropriation and Compensation, are intended to incorporate into the MAI existing international legal norms. The reference in Article -- to expropriation or nationalisation and "measures tantamount to expropriation or nationalisation" reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments. Nor would such normal and non-discriminatory government activity contravene the standards of this Article."

3. Text as contained in Chairman's proposed package on Labour and Environment: "Interpretative Note: National Treatment and most favoured nation treatment are relative standards requiring a comparison between treatment of a foreign investor and investments and treatment of domestic or third country investors and investments. Governments may have legitimate policy reasons to accord differential treatment to different types of investments. Similarly, governments may have legitimate policy reasons to accord differential treatment as between domestic and foreign investors and their investments in certain circumstances, for example where needed to secure compliance with domestic laws that are not inconsistent with national treatment and most favoured nation treatment. The fact that a measure applied by a government has a different effect on an investment or investor of another Party would not in itself render the measure inconsistent with national treatment and most favoured nation treatment. The objective of "in like circumstances" is to permit the consideration of all relevant circumstances, including those relating to a foreign investor and its investments, in deciding to which domestic or third country investors and investments they should appropriately be compared."

expansion, operation, management, maintenance, use, enjoyment, and sale or other disposition of investments.

3. Each Contracting Party shall accord to investors of another Contracting Party and to their investments the better of the treatment required by Paragraphs 1 and 2 of this Article, whichever is the more favourable to those investors or investments.

4. The treatment accorded by a Contracting Party under Paragraph 1 means, with respect to a state or province, treatment no less favourable than the most favourable treatment accorded in like circumstances by that state or province to investors, and to investments of investors, of the Contracting Party of which it forms a part.

### **Article 3**

#### **Right to Regulate\***

A Contracting Party may adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns, provided such measures are consistent with this agreement.

### **Article 4**

#### **Transparency**

1. Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the operation of the Agreement. Where a Contracting Party establishes policies which are not expressed in laws or regulations or by other means listed in this paragraph but which may affect the operation of the Agreement, that Contracting Party shall promptly publish them or otherwise make them publicly available<sup>4</sup>.

2. Each Contracting Party shall promptly respond to specific questions from and, upon request, provide information to other Contracting Parties on matters referred to in Paragraph 1.

3. Nothing in this Agreement shall prevent a Contracting Party from requiring an investor of another Contracting Party, or its investment, to provide routine information concerning that investment solely for information or statistical purposes. Nothing in this Agreement requires a Contracting Party to furnish or allow access to:

a) information related to the financial affairs and accounts of individual customers of particular investors or investments, or

b) any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary

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\* Text as contained in Chairman's proposed package on Labour and Environment.

4. For the purpose of this article, it is understood that the transparency obligations regarding policies apply only to the governments of the Contracting Parties which apply them.

to its laws, policies or practices protecting confidentiality or prejudice legitimate commercial interests of particular enterprises.

## Article 5

### Expropriation and Compensation<sup>5</sup>

1. \* A Contracting Party shall not expropriate or nationalise an investment in its territory of an investor of another Contracting Party or take any measure tantamount to expropriation or nationalisation except:

- a) for a purpose which is in the public interest,
- b) on a non-discriminatory basis,
- c) in accordance with due process of law, and
- d) accompanied by payment of prompt, adequate and effective compensation in accordance with paragraphs 2 to 5 below.

2. Compensation shall be paid without delay<sup>6</sup>.

3. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.

4. Compensation shall be fully realisable and freely transferable.

5. Compensation shall include interest at a commercial rate established on a market basis for the currency of payment from the date of expropriation until the date of actual payment.

6. Due process of law includes, in particular, the right of an investor of a Contracting Party which claims to be affected by expropriation by another Contracting Party to prompt review of its case, including the valuation of its investment and the payment of compensation in accordance with the provisions of this article, by a judicial authority or another competent and independent authority of the latter Contracting Party.

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5. Text as contained in Chairman's proposed package on Labour and Environment: "Interpretative Note: This Article is intended to incorporate into the MAI existing international legal norms. The reference to expropriation or nationalisation and "measures tantamount to expropriation or nationalisation" reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments. It is understood that default by a sovereign state subject to rescheduling arrangements undertaken in accordance with international law and practices is not expropriation within the meaning of this Article."

\* Text as contained in Chairman's proposed package on Labour and Environment.

6. "Interpretative Note: In case of undue delay in the payment of compensation on the part of a Contracting Party, any exchange rate loss arising from this delay should be borne by the host country."

## **Article 6**

### **Protection from Strife**

1. An investor of a Contracting Party which has suffered losses relating to its investment in the territory of another Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third State, whichever is most favourable to the investor.

2. Notwithstanding paragraph 1, an investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the territory of another Contracting Party resulting from

- (a) requisitioning of its investment or part thereof by the latter's forces or authorities, or
- (b) destruction of its investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

shall be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Article [4], paragraphs 1 to 5.

## **Article 7**

### **Transfers**

1. Each Contracting Party shall ensure that all payments relating to an investment in its territory of an investor of another Contracting Party may be freely transferred into and out of its territory without delay. Such transfers shall include, in particular, though not exclusively :

- a) the initial capital and additional amounts to maintain or increase an investment ;
- b) profits, interest, dividends, capital gains, royalties, fees and returns in kind;
- c) payments made under a contract including a loan agreement;
- d) proceeds from the sale or liquidation of all or any part of an investment ;
- e) payments of compensation under Articles [4] (Expropriation) and [5] (Protection from Strife)
- f) payments arising out of the settlement of a dispute;
- g) earnings and other remuneration of personnel engaged from abroad in connection with an investment.



2. Each Contracting Party shall further ensure that such transfers may be made in a freely convertible currency. Freely convertible currency means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.

3. Each Contracting Party shall also further ensure that such transfers may be made at the market rate of exchange prevailing on the date of transfer.

4. In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate for conversion of currencies into Special Drawing Rights.

5. Notwithstanding paragraph 1(b) above, a Contracting Party may restrict the transfer of a return in kind in circumstances where the Contracting Party is permitted under the GATT 1994 to restrict or prohibit the exportation or the sale for export of the product constituting the return in kind. Nevertheless, a Contracting Party shall ensure that transfers of returns in kind may be effected as authorised or specified in an investment agreement, investment authorisation, or other written agreement between the Contracting Party and an investor or investment of another Contracting Party.

6. Notwithstanding paragraphs 1 to 5 above, a Contracting Party may delay or prevent a transfer through the equitable, non-discriminatory and good faith application of measures:

(a) to protect the rights of creditors,

(b) relating to or ensuring compliance with laws and regulations

(i) on the issuing, trading and dealing in securities, futures and derivatives,

(ii) concerning reports or records of transfers, or

(c) in connection with criminal offences and orders or judgements in administrative and adjudicatory proceedings;

provided that such measures and their application shall not be used as a means of avoiding the Contracting Party's obligations under this Agreement.

## **Article 8**

### **Information Transfer and Data Processing**

1. No Contracting Party shall take measures that prevent transfers of information, into or out of its territory, or the processing of information outside the territory of a Contracting Party, including transfers of data by electronic means, where such transfer of information or processing of information is necessary for the conduct of the ordinary business of an investment<sup>7</sup>.
  
2. Nothing in paragraph 1 restricts the right of a Contracting Party to:
  - a) require compliance with any record keeping and reporting requirements; or
  - b) protect privacy, including the protection of personal data, intellectual and industrial property, and the confidentiality of individual records and accounts, so long as such right is not used to circumvent the provisions of the Agreement.

## **Article 9**

### **Subrogation**

If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance given in respect of an investment of an investor in the territory of another Contracting Party, the latter Contracting Party shall recognise the assignment of any right or claim of such investor to the former Contracting Party or its designated agency and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right and claim to the same extent as its predecessor in title.

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7. This includes intra-corporate transfers and transfers associated with the purchase or sale by an enterprise located in a Contracting Party that is the investment of an investor of another Contracting Party of: i) data processing services or ii) information, including information provided to or by third parties.

Annex 4

**NOT LOWERING MEASURES**

"A Contracting Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its domestic health, safety, environmental, or labour measures, as an encouragement to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of an investment of an investor.\*"

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\* "Interpretative Note: The Parties recognise that governments must have the flexibility to adjust their overall health, safety, environmental or labour standards over time for public policy reasons other than attracting foreign investment."

Annex 5

**Article 1**

**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 work<sup>8</sup> 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 enterprise in the territory of the former Contracting Party to which the investor has committed, or is in the process of committing, a substantial amount of capital, or

(ii) an employee employed<sup>9</sup> by an enterprise or by an investor<sup>10</sup> referred to in (i) above, 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 Article;<sup>11</sup>

(b) (i) Each 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 subparagraph (a) above. The spouse and minor children shall be admitted for the period of the stay of that person.

(ii) Each contracting Party is encouraged 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 subparagraph (a) above.

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<sup>12</sup>.

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8. Interpretative Note: To obtain an "authorisation to work" in order to carry out particular activities a natural person may be required to meet specific professional qualifications. Any applicable professional qualification criteria are outside the scope of this Article.

9. Interpretative Note: Specific periods of prior employment, for example one year, are allowed by the chapeau of paragraph 1. Such prior employment requirement can cover inter alia, the duration of employment by the same investor in one of its enterprises, namely the parent company or one of its affiliates.

10. Interpretative Note: National authorities may impose on investors some requirements under domestic immigration laws regulations and procedures given the content of the chapeau of paragraph 1.

11. Interpretative Note: National authorities may periodically verify continued eligibility under this paragraph.

12. Interpretative Note: Numerical restrictions are restrictions on the maximum number of natural persons who can enter, stay or work in the Contracting Party.

3. For the purposes of this Article<sup>13</sup>:

*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;

*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.

## **Article 2**

### **Nationality Requirements for Executives, Managers and Members of Boards of Directors**

No Contracting Party may require that an enterprise of that Contracting Party that is an investment of an investor of another Contracting Party appoint as executives, managers and members of boards of directors individuals of any particular nationality.

## **Article 3**

### **Employment Requirements<sup>14</sup>**

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.

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13. The definitions in this paragraph also apply in the Article on the Nationality Requirements for Executives, Managers and Members of Boards of Directors.

14. Interpretative Note: This article does not interfere with domestic anti-discrimination and labour laws and accordingly does not preclude a Contracting Party from requiring an investor or investment to comply with measures to rectify a discriminatory pattern of employment.

## Article 4

### Performance Requirements

1<sup>15</sup>. Except as provided in paragraphs 2 through 4 below, a Contracting Party shall not, in connection with the establishment, acquisition, expansion, management, operation, maintenance, use, enjoyment, sale or other disposition of an investment of an investor, whether or not of another Contracting Party, impose, enforce or maintain any of the following requirements, or enforce any commitment or undertaking:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer technology, a production process or other proprietary knowledge to a natural or legal person in its territory, except when the requirement
  - (i) is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws, or
  - (ii) concerns the transfer of intellectual property and is undertaken in a manner not inconsistent with the applicable articles of international conventions on intellectual property rights;
- (g) to locate its headquarters for a specific region or the world market in the territory of that Contracting Party;<sup>16</sup>
- (h) to supply one or more of the goods that it produces or the services that it provides to a specific region or the world market exclusively from the territory of that Contracting Party;
- (i) to achieve a given level or value of research and development in its territory;

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15. Interpretative Note: For the avoidance of doubt, nothing in paragraphs 1(a), 1(b), 1(c), 1(d) and 1(e) shall be construed to prevent a Contracting Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Contracting Party or of a non-Contracting Party, on compliance with a requirement, commitment or undertaking to locate production, provide particular services, train or employ personnel, construct or expand particular facilities, or carry out research and development in its territory.

16. Interpretative Note: The prohibition applies to head offices or headquarters and not to the establishment of other offices.

- (j) to hire a given level of nationals<sup>17</sup>;
- (k) to establish a joint venture with domestic participation;<sup>18</sup> or
- (l) to achieve a minimum level of domestic equity participation other than nominal qualifying shares for directors or incorporators of corporations.<sup>19</sup>

2. A Contracting Party is not precluded by paragraph 1 from conditioning the receipt or continued receipt of an advantage, in connection with an investment of an investor whether or not of another Contracting Party, on compliance with any of the requirements, commitments or undertakings set forth in paragraphs 1(f) through 1(l).

3. (a) Paragraphs 1(a), 1(b) and 1(c) do not apply to:

- (i) qualification requirements for goods or services with respect to export promotion and foreign aid programmes;
- (ii) advantages related to the production, processing and trade of agricultural and processed agricultural products; or
- (iii) advantages related to trade in services;

b) Paragraphs 1(b), 1(c), 1(f), and 1(h) do not apply to procurement by a Contracting Party or an entity that is owned or controlled by a Contracting Party.

c) Paragraphs 1(b) and 1(c) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

\* 4. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b), 1(c) and 1(f) shall be construed to prevent any Contracting Party from adopting or maintaining measures, including environmental measures:

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17. Interpretative Note: Nothing in this paragraph shall be construed as interfering with programmes targeted at disadvantaged regions/persons or other equally legitimate employment policy programmes.

18. Interpretative Note: Paragraph (k) includes joint ventures even if not covered by paragraph 1(1) because they do not involve equity participation. It allows, however, joint venture requirements not involving a requirement of domestic participation which may be motivated by an economic concern to spread risk.

Interpretative Note: Paragraphs (k) and (l) do not prevent a Contracting Party from establishing a joint venture in which it is the domestic participant itself.

19. Interpretative Note: The phrase “other than nominal qualifying shares for directors or incorporators of corporations” clarifies that this performance requirement will not be breached merely because members of boards of directors and those persons who establish a corporation (incorporators) may be required by domestic law, as a condition of that position, to hold a small equity participation in the corporation.

\* Paragraph 4 reproduces the text submitted in the context of the Chairman’s Proposals on labour and environment [DAFFE/MAI(98)10] with the addition of the reference to paragraph 1(f) covering technology transfer.

- (a) necessary to secure compliance with measures that are not inconsistent with the provisions of this Agreement;
- (b) necessary to protect human, animal or plant life or health; or
- (c) necessary for the conservation of living or non-living exhaustible natural resources.

## **Article 5**

### **Privatisation**

1. The obligation on a Contracting Party to accord National Treatment and MFN treatment as defined in article XX (NT/MFN) applies to:
  - a) all kinds of privatisation, irrespective of the method of privatisation (whether by public offering, direct sale or other method); and
  - b) subsequent transactions involving a privatised asset.
2. Nothing in this Agreement shall be construed as imposing an obligation on a Contracting Party to privatise.
3. Each Contracting Party or its designated agency shall promptly publish or otherwise make publicly available the essential features and procedures for participation in each prospective privatisation<sup>20</sup>.
4. For the purposes of this Article, "*privatisation*" means the sale by a Contracting Party, in part or in full, of its equity interests in any entity or other disposal having substantially the same effect but does not cover transactions between different levels or entities of the same Contracting Party or transactions in the normal conduct of business.

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20. Interpretative Note: This paragraph does not place any obligation on a Contracting Party to take actions that could prejudice respect for, or compliance with, the requirements of securities and exchange laws. The application of the Transparency Article YY is confirmed. It is also confirmed that the obligations to accord National Treatment and MFN Treatment prohibit discrimination against investors and investments of other Contracting Parties with respect to all arrangements for making public information about a privatisation operation. It is also understood that there can be variance in the methods used to make information available, including in the case of small scale privatisations.



## Article 6

### Monopolies

1. Without prejudice to Article ...(Expropriation and Compensation), nothing in this Agreement shall be construed to prevent a Contracting Party from maintaining, designating or eliminating a monopoly.
2. Each Contracting Party shall accord non-discriminatory treatment when designating a monopoly, except when such a monopoly is granted to a publicly-owned investor through a non-competitive procedure.
3. Each Contracting Party shall ensure that any publicly-owned or privately-owned monopoly that it maintains or designates<sup>21</sup>:
  - a) provides non-discriminatory treatment to investments of investors of another Contracting Party in its supply of the monopoly good or service in the relevant market;
  - b) provides non-discriminatory treatment to investments of investors of another Contracting Party in its purchase of the monopoly good or service in the relevant market. This paragraph does not apply to procurement by governmental agencies of goods or services for government purposes and not for commercial resale or with a view to use in the production of goods or services for commercial sale; and
  - c) does not abuse its monopoly position, in a non-monopolised market in its territory, to engage, either directly or indirectly<sup>22</sup> in anticompetitive practices that adversely affect an investor or an investment by an investor of another Contracting Party, including through the discriminatory provision of the monopoly good or service, cross-subsidisation or predatory conduct.
4. Each Contracting Party shall notify to the Parties Group any existing designated monopoly within 60 days after the entry into force of the Agreement and shall notify any new designation or elimination of a monopoly within 60 days after its designation or elimination.
5. For purposes of this Article:
  - (a) “Designate” means to establish or authorise, or to expand the scope of a monopoly;
  - (b) “Monopoly” means any person or entity designated by a Contracting Party as the sole supplier or buyer of a good or service in a relevant market in the territory of a Contracting Party but does not include a person or entity that has an exclusive intellectual property right

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21. Interpretative Note: Like other obligations of this Agreement, this Article applies to all levels of government. Accordingly, paragraph 3 refers to monopolies maintained or designated by national and subnational governments.

22. Interpretative Note: The obligations of paragraph 3(c) include dealings of a parent company with its subsidiaries and other enterprises with common ownership.

solely by reason of such right or the exercise of such right, or an entity charged with the collective management of intellectual property rights<sup>23</sup>;

- (c) “Relevant market” means the geographic and product market for a good or service in the territory of the Contracting Party;
- (d) “Non-discriminatory treatment” means the treatment set out in the Article ... on National Treatment and Most Favoured National Treatment of this Agreement.

## **Article 7**

### **Concessions**

1. Each Contracting Party or its designated agency shall promptly publish or otherwise make publicly available the essential features and procedures for applying for a concession.
2. For the purposes of this Article, *concession* means the delegation by a Contracting Party to an entity other than a public or para-public authority, of the right to extract natural resources or to provide public services or facilities, such as the operation of infrastructures.

## **Article 8**

### **Entities with Delegated Governmental Authority**

Each Contracting Party shall ensure that any entity to which it has delegated a regulatory, administrative or other governmental authority acts in a manner that is not inconsistent with the Contracting Party’s obligations under this Agreement wherever such entity exercises that delegated authority.

## **Article 9**

### **Investment Incentives**

1. The obligation on a Contracting Party to accord National Treatment and MFN Treatment as defined in Articles ... and the obligations in Article ...(Transparency) apply to the granting of investment incentives.
2. Any Contracting Party which considers that its investors or their investments are adversely affected by an investment incentive adopted by another Contracting Party and having a distorting effect on the flow of capital or investment decisions, may request consultations with that Contracting Party.
3. In order to further avoid and minimise such adverse or distorting effects and to avoid undue competition between Contracting Parties to attract or retain investments, the Contracting Parties shall enter into negotiations with a view to establishing additional MAI disciplines within three years after the coming into force of this Agreement. These negotiations shall recognise the role of investment incentives

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23. Interpretative Note: Concessions and authorisations involve government designations, but do not necessarily convey monopoly rights.

with regard to the aims of policies, such as regional, structural, social, environmental or R&D policies of the Contracting Parties, and other work of a similar nature undertaken in other fora. These negotiations shall, in particular, address the issues of positive discrimination, transparency, standstill and rollback.

4. For the purpose of this Article, “*investment incentive*” means the grant of a specific advantage arising from public expenditure in connection with the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposition of an investment of an investor, whether or not of another Contracting Party.

**FINANCIAL MATTERS<sup>24</sup>**

**Article 1**

**Transactions in Pursuit of Monetary and Exchange Rate Policies**

1. Articles XX (National Treatment), YY (Most Favoured Nation Treatment) and ZZ (Transparency) do not apply to transactions carried out in pursuit of monetary or exchange rate policies by a central bank or monetary authority of a Contracting Party.

2. Where such transactions do not conform with Articles XX (National Treatment), YY (Most Favoured Nation Treatment) and ZZ (Transparency), they shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement.

**Article 2**

**Temporary Safeguard**

1. A Contracting Party may adopt or maintain measures inconsistent with its obligations under Article, paragraph 1 (National Treatment) relating to cross-border capital transactions<sup>\*\*</sup>, or Article ..... (Transfers)

- (a) in the event of serious balance-of-payments and external financial difficulties or threat thereof; or
- (b) where, in exceptional circumstances, movements of capital cause, or threaten to cause, serious difficulties for macroeconomic management, in particular monetary and exchange rate policies.

2. Measures referred to in paragraph 1:

- (a) shall be consistent with the Articles of Agreement of the International Monetary Fund ("Fund");
- (b) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
- (c) shall be temporary and shall be eliminated as soon as conditions permit.

3. (a) Measures referred to in paragraph 1 shall be promptly notified to the Parties Group and the Fund, including any changes in such measures.

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24. With respect to Articles 3 to 8, the inclusion of text specific to financial services shall be without prejudice to the interpretation of the obligations of the MAI with respect to other sectors.

\*\* It is understood that such measures may not discriminate between resident entities owned or controlled by investors of other Contracting Parties and resident entities controlled by local investors.

- (b) Measures referred to in paragraph 1 and any changes therein shall be subject to review and approval or disapproval within six months of their adoption and every six months thereafter until their elimination.
  - (c) These reviews shall address the compliance of any measure with paragraph 2, in particular the elimination of measures in accordance with paragraph 2 (c).
4. Measures referred to in paragraph 1 and any changes therein that are approved by the International Monetary Fund in the exercise of its jurisdiction shall be considered as consistent with this Article.
5. With regard to measures referred to in paragraph 1, and any changes therein, not falling within paragraph 4:
- (a) The Parties Group shall consider the implications of the measures adopted under this Article for the obligations of the Contracting Party concerned under this Agreement.
  - (b) The Parties Group shall request an assessment by the Fund of the conditions mentioned under paragraph 1 and of the consistency of any measures with paragraph 2. Any such assessment by the Fund shall be accepted by the Parties Group.
  - (c) Unless the Fund determines that the measure is either consistent or inconsistent with the provisions of this Article, the Parties Group may either approve or disapprove the measure. The Parties Group shall establish procedures for this purpose.
6. The Contracting Parties shall seek agreement with the Fund regarding the role of the Fund in the review procedures established under this Article.
7. Measures referred to in paragraph 1 and any changes therein that are approved by the Fund in the exercise of its jurisdiction or determined to be consistent with this Article by the Fund or the Parties Group cannot be subject to dispute settlement.\*
8. If a dispute arises under this Article or under Article ..... (obligations under the Articles of Agreement of the Fund) a Dispute Settlement Panel shall request an assessment by the Fund of the consistency of the measures with its Articles of Agreement, of the conditions mentioned under paragraph 1 and of the consistency of any measures as applied with paragraph 2. Any such assessment by the Fund shall be accepted by the Panel.

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\* Interpretative Note: The dispute settlement provisions would apply if the measure as actually applied differed from that approved or determined to be consistent with this Article.

## **Article 3**

### **Prudential Measures**

1. Notwithstanding any other provisions of the Agreement, a Contracting Party shall not be prevented from taking prudential measures with respect to financial services, including measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by an enterprise providing financial services, or to ensure the integrity and stability of its financial system.
2. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement.

## **Article 4**

### **Authorisation Procedures**

1. Each Contracting Party's regulatory authorities shall make available to interested persons their requirements for completing applications relating to an investment in, or the operations of, a financial services enterprise.
2. On the request of an applicant, the regulatory authority shall inform the applicant of the status of its application. If such authority requires additional information from the applicant, it shall notify the applicant without undue delay.
3. A regulatory authority shall make an administrative decision on a completed application of an investor in a financial services enterprise or a financial services enterprise that is an investment of an investor of another Contracting Party within 180 days, and shall promptly notify the applicant of the decision. An application shall not be considered complete until all relevant hearings are held and all necessary information is received. Where it is not practicable for a decision to be made within 180 days, the regulatory authority shall notify the applicant without undue delay and shall endeavour to make the decision within a reasonable time thereafter.

## **Article 5**

### **Recognition Arrangements**

1. A Contracting Party may recognise prudential measures of any other Contracting Party or non-Contracting Party in determining how the Contracting Party's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonisation or otherwise, may be based on an agreement or arrangement with the other Contracting Party or non-Contracting Party concerned or may be accorded autonomously.
2. A Contracting Party that is a party to such an agreement or arrangement referred to in paragraph 1, whether future or existing, shall afford adequate opportunity for other interested Contracting Parties to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties

to the agreement or arrangement. Where a Contracting Party accords recognition autonomously, it shall afford adequate opportunity for any other Contracting Party to demonstrate that such circumstances exist.

## **Article 6**

### **Membership of Self-Regulatory Bodies and Associations**

When membership or participation in, or access to, any self-regulatory body, securities or futures exchange or market, clearing agency, or any other organisation or association is required by a Contracting Party in order for investments of investors of any other Contracting Party in a financial services enterprise established in the territory of the Contracting Party to provide financial services on an equal basis with financial services enterprises of the Contracting Party, or when the Contracting Party provides directly or indirectly such entities, privileges or advantages in providing financial services, the Contracting Party shall ensure that such entities accord national treatment to such investments.

## **Article 7**

### **Payments and Clearing Systems/Lender of Last Resort**

1. Under terms and conditions that accord national treatment, each Contracting Party shall grant to financial services enterprises that are investments of investors of any other Contracting Party established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business.

2. The provisions of this Agreement are not intended to confer access to the Contracting Party's lender of last resort facilities.

## **Article 8**

### **Definition of Financial Services**

Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

#### *Insurance and insurance-related services*

- (i) Direct insurance (including co-insurance):
  - (A) life
  - (B) non-life
- (ii) Reinsurance and retrocession;
- (iii) Insurance intermediation, such as brokerage and agency;
- (iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

*Banking and other financial services (excluding insurance)*

- (v) Acceptance of deposits and other repayable funds from the public;
- (vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;
- (vii) Financial leasing;
- (viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
- (ix) Guarantees and commitments;
- (x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
  - (A) money market instruments (including cheques, bills, certificates of deposits);
  - (B) foreign exchange;
  - (C) derivative products including, but not limited to, futures and options;
  - (D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
  - (E) transferable securities;
  - (F) other negotiable instruments and financial assets, including bullion.
- (xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
- (xii) Money broking;
- (xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
- (xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
- (xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;
- (xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.



## GENERAL EXCEPTIONS

1. This Article shall not apply to Article IV, 2 and 3 (Expropriation and compensation and protection from strife).
2. Nothing in this Agreement shall be construed:
  - a. to prevent any Contracting Party from taking any action which it considers necessary for the protection of its essential security interests:
    - (i) taken in time of war, or armed conflict, or other emergency in international relations;
    - (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons of mass destruction;
    - (iii) relating to the production of arms and ammunition;
  - b. to require any Contracting Party to furnish or allow access to any information the disclosure of which it considers contrary to its essential security interests;
  - c. to prevent any Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
3. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Contracting Parties, or a disguised investment restriction, nothing in this Agreement shall be construed to prevent any Contracting Party from taking any measure necessary for the maintenance of public order.<sup>25</sup>
4. Actions or measures taken pursuant to this Article shall be notified to the Parties Group.
5. If a Contracting Party (the "requesting Party") has reason to believe that actions or measures taken by another Contracting Party (the "other Party") under this article have been taken solely for economic reasons, or that such actions or measures are not in proportion to the interest being protected, it may request consultations with that other Party in accordance with Article V, B.1 (State-State Consultation Procedures). That other Party shall provide information to the requesting Party regarding the actions or measures taken and the reasons therefor.

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25. The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

## **INSTITUTIONAL MATTERS**

### **Article 1**

#### **The Parties Group**

1. There shall be a Parties Group comprised of the Contracting Parties.
2. The Parties Group shall facilitate the operation of this Agreement. To this end, it shall:
  - (a) carry out the functions assigned to it under this Agreement;
  - (b) at the request of a Contracting Party, clarify, outside the context of Dispute Settlement, the interpretation or application of this Agreement;
  - (c) consider any matter that may affect the operation of this Agreement; and
  - (d) take such other actions as it deems necessary to fulfil its mandate.
3. In carrying out the functions specified in paragraph 2, the Parties Group may consult governmental and non-governmental organisations or persons.
4. The Parties Group shall elect a Chair, who shall serve in a personal capacity. Meetings shall be held at intervals to be determined by the Parties Group. The Parties Group shall establish its rules and procedures.
5. Except as provided below, the Parties Group shall make decisions by consensus. A Contracting Party may abstain and express a differing view without barring consensus. Such decisions may include a decision to adopt a different voting rule for a particular question or category of questions.
6. Where a decision cannot be made by consensus, the decision shall be made by a majority comprising three quarters of the Contracting Parties which are in attendance and voting.
7. Paragraph 6 shall not apply to the following decisions which shall be taken only by consensus:
  - (a) decisions or recommendations concerning the interpretation and application of the Agreement;
  - (b) decisions concerning an amendment to the Agreement.
8. The Parties Group shall be assisted by a Secretariat.
9. Parties Group and Secretariat costs shall be borne by the Contracting Parties as approved and apportioned by the Parties Group.
10. Where the European Community exercises its right to vote, it shall have a number of votes equal to the number of its Member States which are Contracting Parties to this Agreement. The number of votes

of the European Community and its Member States shall in no case exceed the number of the Member States of the European Community which are Contracting Parties to this Agreement.

## **Article 2**

### **Signature**

This Agreement shall be open for signature at the Depositary, until [date], by Signatories of the Final Act and thereafter until entry into force by any State, or separate customs territory which possesses full autonomy on the matters covered by this Agreement, which is willing and able to take on its obligations on terms agreed between it and the Signatories of this Agreement<sup>26</sup>

## **Article 3**

### **Acceptance and Entry into Force**

1. Not later than [date], the Signatories to this Agreement will meet to determine the date for entry into force and related matters<sup>27</sup>. Decisions shall be made by a three quarters majority of the Signatories.
2. This Agreement shall enter into force on the date determined by the Signatories to this Agreement in accordance with paragraph 1 for the Signatories that have accepted this Agreement as of that date. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the deposit of its instrument of acceptance.

## **Article 4**

### **Accession**

1. This Agreement shall be open for accession by any State, regional economic integration organisation<sup>28</sup>, and any separate customs territory which possesses full autonomy in the conduct of matters covered by this agreement, which is willing and able to undertake its obligations on terms agreed between it and the Contracting Parties acting through the Parties Group.
2. Decisions on accession shall be taken by the Parties Group.
3. Accession shall take effect on the thirtieth day following the deposit of the instruments of accession with the Depositary.

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<sup>26</sup> Under this formulation, all signatories of the Agreement must agree the terms of a new signatory

<sup>27</sup> Interpretative note: "Related matters" includes such matters as whether there is a critical mass to proceed with entry into force of the Agreement, but not changes to the Agreement..

<sup>28</sup> A definition of this term will need to be agreed

## **Article 5**

### **Non-Applicability**

This Agreement shall not apply as between any Contracting Party and any acceding Party if, at the time of accession, the Contracting Party does not consent to such application.

## **Article 6**

### **Review**

The Parties Group may review this Agreement as and when it determines.

## **Article 7**

### **Amendment**

Any Contracting Party may propose to the Parties Group an amendment to this Agreement. Any amendment adopted by the Parties Group shall enter into force on the deposit of an instrument of ratification by all of the Contracting Parties, or at such later date as may be specified by the Parties Group at the time of adoption of the amendment.

## **Article 8**

### **Withdrawal**

1. At any time after five years from the date on which this Agreement has entered into force for a Contracting Party, that Contracting Party may give written notice to the Depositary of its withdrawal from this Agreement.
2. Any such withdrawal shall take effect on the expiry of six months from the date of the receipt of the notice by the Depositary, or on such later date as may be specified in the notice of withdrawal. If a Contracting Party withdraws, the Agreement shall remain in force for the remaining Contracting Parties.
3. The provisions of this Agreement shall continue to apply for a period of fifteen years from the date of notification of withdrawal to an investment existing at that date.

## **Article 9**

### **Depositary**

The [.....] shall be the Depositary of this Agreement.

## **Article 10**

### **Status of Annexes**

The Annexes to this Agreement are an integral part of the Agreement.

## **Article 11**

### **Authentic Texts**

The English and French texts of this Agreement are equally authentic.

## **ELEMENTS OF A FINAL ACT**

### **Article 1**

#### **Acceptance And Entry Into Force**

1. The Signatories to this Final Act agree to submit the Agreement for the consideration of their respective competent authorities with a view to seeking approval of the Agreement in accordance with their procedures.
2. The Signatories to this Final Act agree on the desirability of acceptance of the Agreement by all signatories with a view to its entry into force by [date] or as early as possible thereafter.

### **Article 2**

#### **The Preparatory Group**

1. The Signatories to the Final Act and the Signatories to the Agreement shall meet in a Preparatory Group. A Signatory to the Final Act shall cease to be eligible to attend these meetings if it fails to become a Signatory to the Agreement by the closing date for signature of the Agreement.
2. In the Preparatory Group, the participating Signatories shall:
  - (a) prepare for entry into force of the Agreement and the establishment of the Parties Group;
  - (b) conduct discussions with non-signatories to the Final Act; and
  - (c) conduct negotiations with interested non-signatories to the Final Act with a view to their becoming signatories to the Agreement.
3. The participating Signatories shall elect a Chair, who shall serve in a personal capacity. Meetings shall be held at intervals to be determined by participating Signatories under rules and procedures they shall determine.
4. The Preparatory Group shall be assisted by a Secretariat.
5. Except as provided below, the Preparatory Group shall make decisions by consensus. A Signatory of the Agreement may abstain and express a differing view without barring consensus. Such decisions may include a decision to adopt a different voting rule for a particular question or category of questions.
6. However, when a decision cannot be made by consensus, the decision shall be made by a majority comprising three quarters of the Signatories of the Agreement which are in attendance and which vote on the decision.
7. Where the European Community exercises its right to vote, it shall have a number of votes equal to the number of its Member States which are Contracting Parties to this Agreement. The number of votes of the European Community and its Member States shall in no case exceed the number of the Member States of the European Community which are Contracting Parties to this Agreement.

### **Article 3**

#### **Non Members**

In reviewing applications for adherence to the MAI, the Parties will give full consideration to the particular circumstances of each applicant, including the possible need for country specific exceptions to accommodate the applicant's development interests. Where appropriate, the Parties will consider requests for such exceptions in the context of the applicant's overall reform of its domestic investment regime, including the possibility of time-limited exceptions where a transitional period is necessary to implement such reform.

## Annex 9

### **THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES**

1. This Annex sets out the text of the OECD Guidelines for Multinational Enterprises as they may be amended from time to time by the OECD. Amendments will be notified to the Parties by the Depositary.
2. The Guidelines for Multinational Enterprises are a joint recommendation by participating Governments to multinational enterprises operating in their territory. Their purpose is to help multinational enterprises ensure that their operations are in harmony with the national policies of the countries in which they operate. The Guidelines include recommendations on general policies, disclosure of information, competition, financing, taxation, employment and industrial relations, environmental protection and science and technology. The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises of 21 June 1976 as amended. Background and official clarifications are found in the publication “The OECD Guidelines for Multinational Enterprises”.



**DECLARATION ON INTERNATIONAL INVESTMENT  
AND MULTINATIONAL ENTERPRISES**

(21 June 1976)

THE GOVERNMENTS OF OECD MEMBER COUNTRIES<sup>1</sup>

CONSIDERING:

- That international investment has assumed increased importance in the world economy and has considerably contributed to the development of their countries;
- That multinational enterprises play an important role in this investment process;
- That co-operation by Member countries can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic and social progress, and minimise and resolve difficulties which may arise from their various operations;
- That, while continuing endeavours within the OECD may lead to further international arrangements and agreements in this field, it seems appropriate at this stage to intensify their co-operation and consultation on issue relating to international investment and multinational enterprises through inter-related instruments each of which deals with a different aspect of the matter and together constitute a framework within which the OECD will consider these issues;

DECLARE:

Guidelines for  
Multinational  
Enterprises

- I. That they jointly recommend to multinational enterprises operating in their territories the observance of the Guidelines as set forth [below] having regard to the considerations and understandings which introduce the Guidelines and are an integral part of them;

## GUIDELINES FOR MULTINATIONAL ENTERPRISES<sup>2</sup>

1. Multinational enterprises now play an important part in the economies of Member countries and in international economic relations, which is of increasing interest to governments. Through international direct investment, such enterprises can bring substantial benefits to home and host countries by contributing to the efficient utilisation of capital, technology and human resources between countries and can thus fulfil an important role in the promotion of economic and social welfare. But the advances made by multinational enterprises in organising their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy objectives. In addition, the complexity of these multinational enterprises and the difficulty of clearly perceiving their diverse structures, operations and policies sometimes give rise to concern.
2. The common aim of the Member countries is to encourage the positive contributions which multinational enterprises can make to economic and social progress and to minimise and resolve the difficulties to which their various operations may give rise. In view of the transnational structure of such enterprises, this aim will be furthered by co-operation among the OECD countries where the headquarters of most of the multinational enterprises are established and which are the location of a substantial part of their operations. The Guidelines set out hereafter are designed to assist in the achievement of this common aim and to contribute to improving the foreign investment climate.
3. Since the operations of multinational enterprises extend throughout the world, including countries that are not Members of the Organisation, international co-operation in this field should extend to all States. Member countries will give their full support to efforts undertaken in co-operation with non-member countries, and in particular with developing countries, with a view to improving the welfare and living standards of all people both by encouraging the positive contributions which multinational enterprises can make and by minimising and resolving the problems which may arise in connection with their activities.
4. Within the Organisation, the programme of co-operation to attain these ends will be a continuing, pragmatic and balanced one. It comes within the general aims of the Convention on the Organisation for Economic Co-operation and Development (OECD) and makes full use of the various specialised bodies of the Organisation, whose terms of reference already cover many aspects of the role of multinational enterprises, notably in matters of international trade and payments, competition, taxation, manpower, industrial development, science and technology. In these bodies, work is being carried out on the identification of issues, the improvement of relevant qualitative and statistical information and the elaboration of proposals for action designed to strengthen inter-governmental co-operation. In some of these areas procedures already exist through which issues related to the operations of multinational enterprises can be taken up. This work could result in the conclusion of further and complementary agreements and arrangements between governments.
5. The initial phase of the co-operation programme is composed of a Declaration and three Decisions promulgated simultaneously as they are complementary and inter-connected, in respect of Guidelines for multinational enterprises, National Treatment for foreign-controlled enterprises and international investment incentives and disincentives.
6. The Guidelines set out below are recommendations jointly addressed by Member countries to multinational enterprises operating in their territories. These Guidelines, which take into account the problems which can arise because of the international structure of these enterprises, lay down standards for the activities of these enterprises in the different Member countries. Observance of the Guidelines is

voluntary and not legally enforceable. However, they should help to ensure that the operations of these enterprises are in harmony with national policies of the countries where they operate and to strengthen the basis of mutual confidence between enterprises and States.

7. Every State has the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and to the international agreements to which it has subscribed. The entities of a multinational enterprise located in various countries are subject to the laws of these countries.

8. A precise legal definition of multinational enterprises is not required for the purposes of the Guidelines. These usually comprise companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge and resources with the others. The degrees of autonomy of each entity in relation to the others varies widely from one multinational enterprise to another, depending on the nature of the links between such entities and the fields of activity concerned. For these reasons, the Guidelines are addressed to the various entities within the multinational enterprise (parent companies and/or local entities) according to the actual distribution of responsibilities among them on the understanding that they will co-operate and provide assistance to one another as necessary to facilitate observance of the Guidelines. The word "enterprise" as used in these Guidelines refers to these various entities in accordance with their responsibilities.

9. The Guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; wherever relevant they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both.

10. The use of appropriate international dispute settlement mechanisms, including arbitration, should be encouraged as a means of facilitating the resolution of problems arising between enterprises and Member countries.

11. Member countries have agreed to establish appropriate review and consultation procedures concerning issues arising in respect of the Guidelines. When multinational enterprises are made subject to conflicting requirements by Member countries, the governments concerned will co-operate in good faith with a view to resolving such problems either within the Committee on International Investment and Multinational Enterprises established by the OECD Council on 21 January 1975 or through other mutually acceptable arrangements.

Having regard to the foregoing considerations, the Member countries set forth the following Guidelines for multinational enterprises with the understanding that Member countries will fulfil their responsibilities to treat enterprises equitably and in accordance with international law and international agreements as well as contractual obligations to which they have subscribed.

## GENERAL POLICIES

Enterprises should:

1. Take fully into account established general policy objectives of the Member countries in which they operate;
2. In particular, give due consideration to those countries' aims and priorities with regard to economic and social progress, including industrial and regional development, the protection of the environment and consumer interests, the creation of employment opportunities, the promotion of innovation and the transfer of technology<sup>3</sup>;
3. While observing their legal obligations concerning information, supply their entities with supplementary information the latter may need in order to meet requests by the authorities of the countries in which those entities are located for information relevant to the activities of those entities, taking into account legitimate requirements of business confidentiality;
4. Favour close co-operation with the local community and business interests;
5. Allow their component entities freedom to develop their activities and to exploit their competitive advantage in domestic and foreign markets, consistent with the need for specialisation and sound commercial practice;
6. When filling responsible posts in each country of operation, take due account of individual qualifications without discrimination as to nationality, subject to particular national requirements in this respect;
7. Not render and they should not be solicited or expected to render any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office;
8. Unless legally permissible, not make contributions to candidates for public office or to political parties or other political organisations;
9. Abstain from any improper involvement in local political activities.

## DISCLOSURE OF INFORMATION

Enterprises should, having due regard to their nature and relative size in the economic context of their operations and to requirements of business confidentiality and to cost, publish in a form suited to improve public understanding a sufficient body of factual information on the structure, activities and policies of the enterprise as a whole, as a supplement, in so far as necessary for this purpose, to information to be disclosed under the national law of the individual countries in which they operate. To this end, they should publish within reasonable time limits, on a regular basis, but at least annually, financial statements and other pertinent information relating to the enterprise as a whole, comprising in particular:

- a) The structure of the enterprise, showing the name and location of the parent company, its main affiliates, its percentage ownership, direct and indirect, in these affiliates, including shareholdings between them;

- b)* The geographical areas<sup>4</sup> where operations are carried out and the principal activities carried on therein by the parent company and the main affiliates;
- c)* The operating results and sales by geographical area and the sales in the major line of business for the enterprise as a whole;
- d)* Significant new capital investment by geographical area and, as far as practicable, by major lines of business for the enterprise as a whole;
- e)* A statement of the sources and uses of funds by the enterprise as a whole;
- f)* The average number of employees in each geographical area;
- g)* Research and development expenditure for the enterprise as a whole;
- h)* The policies followed in respect of intra-group pricing;
- i)* The accounting policies, including those on consolidation, observed in compiling the published information.

## COMPETITION

Enterprises should, while conforming to official competition rules and established policies of the countries in which they operate:

1. Refrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of market power, by means of, for example:
  - a)* Anti-competitive acquisitions;
  - b)* Predatory behaviour toward competitors;
  - c)* Unreasonable refusal to deal;
  - d)* Anti-competitive abuse of industrial property rights;
  - e)* Discriminatory (i.e. unreasonably differentiated) pricing and using such pricing transactions between affiliated enterprises as a means of affecting adversely competition outside these enterprises;
2. Allow purchasers, distributors and licensees freedom to resell, export, purchase and develop their operations consistent with law, trade conditions, the need for specialisation and sound commercial practice;
3. Refrain from participating in or otherwise purposely strengthening the restrictive effects of international or domestic cartels or restrictive agreements which adversely affect or eliminate competition and which are not generally or specifically accepted under applicable national or international legislation;

4. Be ready to consult and co-operate, including the provision of information, with competent authorities of countries whose interests are directly affected in regard to competition issues or investigations. Provisions of information should be in accordance with safeguards normally applicable in this field.

## FINANCING

Enterprises should, in managing the financial and commercial operations of their activities, and especially their liquid foreign assets and liabilities, take into consideration the established objectives of the countries in which they operate regarding balance of payments and credit policies.

## TAXATION

Enterprises should:

1. Upon request of the taxation authorities of the countries in which they operate provide, in accordance with the safeguards and relevant procedures of the national laws of these countries, the information necessary to determine correctly the taxes to be assessed in connection with their operations, including relevant information concerning their operations in other countries;
2. Refrain from making use of the particular facilities available to them, such as transfer pricing which does not conform to an arm's length standard, for modifying in ways contrary to national laws the tax base on which members of the group are assessed.

## EMPLOYMENT AND INDUSTRIAL RELATIONS

Enterprises should, within the framework of law, regulations and prevailing labour relations and employment practices, in each of the countries in which they operate:

1. Respect the right of their employees to be represented by trade unions and other bona fide organisations of employees, and engage in constructive negotiations, either individually or through employers' associations, with such employee organisations with a view to reaching agreements on employment conditions, which should include provisions for dealing with disputes arising over the interpretation of such agreements, and for ensuring mutually respected rights and responsibilities;
2.
  - a) Provide such facilities to representatives of the employees as may be necessary to assist in the development of effective collective agreements;
  - b) Provide to representatives of employees information which is needed for meaningful negotiations on conditions of employment;
3. Provide to representatives of employees where this accords with local law and practice, information which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole;

4. Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country;
5. In their operations, to the greatest extent practicable, utilise, train and prepare for upgrading members of the local labour force in co-operation with representatives of their employees and, where appropriate, the relevant governmental authorities;
6. In considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees, and where appropriate to the relevant governmental authorities and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects;
7. Implement their employment policies including hiring, discharge, pay, promotion and training without discrimination unless selectivity in respect of employee characteristics is in furtherance of established governmental policies which specifically promote greater equality of employment opportunity;
8. In the context of bona fide negotiations<sup>5</sup> with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to utilise a capacity to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise;<sup>6</sup>
9. Enable authorised representatives of their employees to conduct negotiations on collective bargaining or labour management relations issues with representatives of management who are authorised to take decisions on the matters under negotiation.

## ENVIRONMENTAL PROTECTION<sup>7</sup>

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and recalling the provisions of paragraph 9 of the Introduction to the Guidelines that, *inter alia*, multinational and domestic enterprises are subject to the same expectations in respect of their conduct whenever the Guidelines are relevant to both, take due account of the need to protect the environment and avoid creating environmentally related health problems. In particular, enterprises, whether multinational or domestic, should:

1. Assess, and take into account in decision making, foreseeable environmental and environmentally related health consequences of their activities, including siting decisions, impact on indigenous natural resources and foreseeable environmental and environmentally related health risks of products as well as from the generation, transport and disposal of waste;
2. Co-operate with competent authorities, *inter alia*, by providing adequate and timely information regarding the potential impacts on the environment and environmentally related health aspects of all their activities and by providing the relevant expertise available in the enterprise as a whole;
3. Take appropriate measures in their operations to minimise the risk of accidents and damage to health and the environment, and to co-operate in mitigating adverse effects, in particular:

- a) by selecting and adopting those technologies and practices which are compatible with these objectives;
- b) by introducing a system of environmental protection at the level of the enterprise as a whole including, where appropriate, the use of environmental auditing;
- c) by enabling their component entities to be adequately equipped, especially by providing them with adequate knowledge and assistance;
- d) by implementing education and training programmes for their employees;
- e) by preparing contingency plans; and
- f) by supporting, in an appropriate manner, public information and community awareness programmes.

## SCIENCE AND TECHNOLOGY

Enterprises should:

1. Endeavour to ensure that their activities fit satisfactorily into the scientific and technological policies and plans of the countries in which they operate, and contribute to the development of national scientific and technological capacities, including as far as appropriate the establishment and improvement in host countries of their capacity to innovate;
2. To the fullest extent practicable, adopt in the course of their business activities practices which permit the rapid diffusion of technologies with due regard to the protection of industrial and intellectual property rights;
3. When granting licenses for the use of industrial property rights or when otherwise transferring technology, do so on reasonable terms and conditions.



## Notes and References

- <sup>1</sup> On matters falling within its competence, the European Economic Community is associated with the section on National Treatment.
- <sup>2</sup> The Guidelines were reviewed in 1979, 1984 and 1991. These reviews resulted in modification of the General Policies chapter (paragraph 2); the Disclosure of Information chapter [sub-paragraph *b*]; a clarification and modification of the Employment and Industrial Relations chapter (paragraph 8); and the addition of a new chapter on the Environment.
- <sup>3</sup> This paragraph includes the additional provision concerning consumer interests, adopted by the OECD Governments at the meeting of the OECD Council at Ministerial level on 17 and 18 May 1984.
- <sup>4\*</sup> For the purposes of the Guideline on Disclosure of Information, the term "geographical area" means groups of countries or individual countries as each enterprise determines is appropriate in its particular circumstances. While no single method of grouping is appropriate for all enterprises or for all purposes, the factors to be considered by an enterprise would include the significance of geographic proximity, economic affinity, similarities in business environments and the nature, scale and degree of interrelationship of the enterprises' operations in the various countries.
- <sup>5\*</sup> Bona fide negotiations may include labour disputes as part of the process of negotiation. Whether or not labour disputes are so included will be determined by the law and prevailing employment practices of particular countries.
- <sup>6</sup> This paragraph includes the additional provision, concerning transfer of employees, adopted by OECD Governments at the meeting of the OECD Council at Ministerial level on 13 and 14 June 1979.
- <sup>7</sup> This chapter was added at the meeting of the OECD Council at Ministerial level on 4 and 5 June 1991.

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\* These texts are integral parts of the negotiated instruments.