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

**Expert Group No.4 on “Institutional Matters”**

**ASSOCIATING THE OECD GUIDELINES FOR  
MULTINATIONAL ENTERPRISES WITH THE MAI**

**(Note by the Chairman)**

## ASSOCIATING THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES WITH THE MAI

(Note by the Chairman)

1. A large majority of the Negotiating Group, at its meeting of 11-13 September<sup>1</sup>, was in favour of associating the OECD Guidelines with the MAI without changing their legal nature.<sup>2</sup> The Chairman noted that this could be done, for example, by a reference in the preamble and by annexing the text of the Guidelines to the text of the MAI.<sup>3</sup> Some delegations also expressed the view that certain parts of the Guidelines should be revised, but that any major review of the Guidelines could only occur after the conclusion of the MAI.

2. This paper sets out two approaches to associating the Guidelines with the MAI without changing their legal nature:

- a). Pure MAI Approach. Guidelines based on the present OECD text would be adopted by the signatories of the MAI Final Act and annexed to the final act, with language making clear that the Guidelines are not legally binding; the preamble of the MAI would affirm the support of MAI Contracting Parties for the Guidelines; and a MAI annex would (i) give the Parties Group a Guidelines follow-up mandate, (ii) replicate the procedural arrangements in the Second Revised Decision on the Guidelines and (iii) specify that the Annex and the Guidelines are subject to modification by the Parties Group.
- b). Mixed MAI/OECD Approach. The Guidelines would remain a Declaration within the OECD framework; the text would be included as an ‘informational’ annex to the MAI Final Act, with language making clear that the Guidelines are not legally binding and are subject to modification within the OECD framework<sup>4</sup>; the MAI preamble would affirm the support of MAI Contracting Parties for the OECD Guidelines; and the Final Act would contain a provision by which signatories encourage acceptance of a standing invitation the OECD Council would extend to MAI parties, not OECD members, to become full participants in the OECD Guidelines work.

The Group may also wish to consider other approaches, for example the proposals from BIAC and TUAC. In the BIAC proposal<sup>5</sup>, the ‘‘association’’ between the Guidelines and the MAI is significantly looser than the approaches above. The TUAC proposal<sup>6</sup> is broadly in line with the mixed approach.

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<sup>1</sup> DAFFE/MAI/M(96)5

<sup>2</sup> The Negotiating Group had available part II of the Chairman’s note, *The MAI and the OECD Instruments*, DAFFE/MAI(96)23; a note by one delegation, *The Arguments for Incorporating the guidelines for Multinational Enterprises in the Multilateral Agreement on Investment*, DAFFE/MAI/RD(96)31; and a note from TUAC, DAFFE/MAI/RD(96)36. In December, TUAC submitted an additional paper, DAFFE/MAI/RD(96)49, and BIAC submitted a position paper, DAFFE/MAI/RD(96)54.

<sup>3</sup> The Chairman also invited the Secretariat to prepare a legal analysis of the modalities and implications of associating the Guidelines with the MAI without changing their non-binding status. The Secretariat’s legal analysis is reflected in this Chairman’s note, rather than presented in a separate note by the Secretariat

<sup>4</sup> See paragraph 14 for a discussion of the possible complications arising if some MAI parties do not join the OECD Guidelines work and paragraph 11 for the related problem under the pure MAI option were some OECD members not to become party to the MAI.

<sup>5</sup> DAFFE/MAI/RD(96)54

<sup>6</sup> DAFFE/MAI/RD(96)49

### Considerations Applicable to Both Approaches

3. The form of their adoption, a declaration, and the text make clear that the Guidelines are intended to be only non-binding recommendations. Part I of the Declaration states that Governments of OECD Member countries “jointly recommend” them to multinational enterprises “having regard to the considerations and understandings which introduce the guidelines and are an integral part of them;” paragraph 6 of the introduction states that “observance of the guidelines is voluntary and not legally enforceable;” and the chapeau of the guidelines states that they are “set forth...with the understanding the 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.” These elements of language would be preserved under either approach.

4. Legal advice from the OECD Secretariat is that nothing in the way the Guidelines would be associated with the MAI under either option would change their non-binding nature. A preamble does not itself set out binding requirements, so there is no risk that a preambular reference or affirmation of support by Parties would transform the Guidelines’ non-enforceable recommendations into legal requirements. Nor would inclusion of the Guidelines text in the MAI Final Act imply that the text comprised legal requirements. Final Acts, which are basically a record of the conclusion of a conference adopting a treaty text, have come to include a variety of other materials which are generally not legally binding, including resolutions and declarations.<sup>7 8</sup>

5. Concern has been expressed that making the Guidelines part of the MAI text, or context, could lead to MAI obligations being modified by elements of the Guidelines or made subject to a legal precondition that the enterprise comply with the Guidelines.<sup>9</sup> OECD legal advice is that the concern is unfounded. Treaties are to be interpreted “in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of their object and purpose.” The wording, object and purpose of the MAI are not likely to be susceptible to the suggested contextual distortion, particularly by Guidelines which specify that they are non-legal and non-enforceable and that the Declaring countries will respect their treaty and contractual commitments. This note and the other records of the MAI negotiations would help demonstrate that any such interpretation of the Guidelines’ association with the MAI was wrong.<sup>10</sup> Nevertheless, to remove the issue politically, language has been included in both options making clear that the association of the Guidelines with the MAI does not affect its interpretation or application. This language addresses interpretation and application of the MAI not only in the context of dispute settlement, as requested by BIAC, but even when a Contracting Party is considering what measures it may take consistently with the MAI.

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<sup>7</sup> In fact, the traditional legally non-binding character of final acts was the reason that the results of the Helsinki Conference on Security and Co-operation in Europe were designated “Final Act”: the participants wanted to conclude a wide range of sweeping undertakings which it would have been difficult to negotiate and approve as legal commitments. The Final Act format underlined the political nature of the Helsinki Accord undertakings.

<sup>8</sup> Alternatively, the text of the Guidelines could, as TUAC requests, be included in an informational annex or protocol to the MAI itself, without changing the nature of the commitments or requiring formal treaty amendment procedures for changing the Guidelines. However, a lengthy non-binding element is unusual in treaties.

<sup>9</sup> BIAC has expressed the concern that making the Guidelines part of the interpretive context of the MAI “will raise questions of how such a reference is to affect interpretations of the MAI” and that “not only will this jeopardize the non-binding nature of the Guidelines, but could also be taken as an excuse for a host country to abrogate its MAI obligations.”

<sup>10</sup> They would constitute part of the preparatory work of the MAI to which recourse may be had, in accordance with Article 32 of the Vienna Convention, when applying the primary rules of interpretation alone “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable.”

6. Associated with the Guidelines is the legally binding Second Revised Decision on the Guidelines on Multinational Enterprises, which provides for national contact points, consultations in the CIME, the role of BIAC and TUAC, clarifications, and review. Under either the pure MAI or mixed MAI/OECD option, these elements could be preserved, *mutatis mutandis*, as binding elements. Under the pure MAI approach, these elements would, by virtue of the MAI itself, be binding on all Contracting Parties. Under the mixed MAI/OECD approach, they would remain binding on OECD Members pursuant to the OECD Convention and would become binding on non-members who agree to participate in the OECD work, through their participation agreement with the Organisation.

7. Both options would associate the Guidelines as clarified by the CIME. In the pure MAI option, the Final Act Declaration on Guidelines states in its preamble that it is based on the OECD Guidelines as clarified by CIME. In the mixed option, the Final Act annex containing the OECD Guidelines explicitly refers to the clarifications.

8. Whether or not to make acceptance of the Guidelines automatic for acceding countries is an issue to be considered with respect to the two approaches. While the general view of delegations to date has been that accession should not be subject to conditions other than willingness and ability to fulfil MAI obligations, which the Guidelines do not constitute, making acceptance of the non-binding Guidelines automatic for all Parties would arguably be more in keeping with the rationale for associating the Guidelines with the MAI, in particular to bring in their environmental and labour aspects. Acceptance of the Guidelines has not been an issue with non-member participants in the CIME. But the Group will also need to consider arguments pointing the other way. A preambular affirmation of support for the Guidelines may pose an obstacle for some non-OECD countries. While they could seek to accede to the MAI with an understanding that they did not participate in that preambular statement, some might prefer to accede without such an understanding, given the non-binding nature of the preamble, thus devaluing the Guidelines by inducing their “acceptance” by countries who will show little respect for them.

### **Considerations Related to the Pure MAI Approach**

9. Under this approach, only the origins of the Guidelines would be OECD; they would take on a life independent of the OECD and their future would become a MAI Parties Group responsibility. This approach would require technical redrafting of the Guidelines (e.g., to recast references to OECD Members), their adoption by the Final Act signatories, and providing in the MAI preamble for their acceptance by acceding parties. It would also require providing for the Parties Group to play the CIME role in Guidelines work and replicating other elements of the Second Revised Decision -- which could be done in a MAI annex.

10. Under the pure approach, we would need to decide what voting rule should apply to proposed decisions by the Parties Group concerning the Guidelines. In the OECD, consensus is required.

11. As with other aspects of the MAI which take up OECD instruments in whole or in part in part, there could be complications for future Guidelines work if not all OECD members were to become MAI parties. Consideration would need to be given to continuing parallel OECD Guidelines work, developing joint OECD - Parties Group work, or arranging to include those OECD countries as non-party participants in this aspect of the Parties Group Work.

## Considerations Related to the Mixed MAI/OECD Approach

12. This approach would associate the Guidelines with the MAI as a declaration of OECD member countries -- non-Members which become MAI parties would affirm support for OECD Guidelines. The co-operative follow-up would utilise an OECD body, its mandate, and established methods for non-member participation.<sup>11</sup> Participation in follow-up would be voluntary, since it would seem more in keeping with the free-standing character of the MAI if acceding countries were encouraged to participate in an OECD subsidiary body, rather than required to do so. This approach would require less new and or redrafted text than the pure MAI approach.

13. Under the standard process for non-Member participation in OECD subsidiary bodies, the non-member accepts the Recommendations, Decisions, and Declarations which form the basis of the subsidiary body's work "with the same rights and responsibilities" as OECD Member countries and becomes a full participant in that part of the subsidiary body's work. Accordingly, Recommendations and Declarations are non-binding for all countries concerned, while Decisions are binding. The non-Member participant also agrees to pay its share of the relevant expenses of the subsidiary body.

14. A potential complication, counterpart to that of the pure MAI approach mentioned in paragraph 11, would arise if some of the MAI parties which accept the preambular affirmation of support for the Guidelines do not become participants in the OECD Guidelines work. Those countries could, in some fashion, publicly affirm support for future amendments or clarifications, but there is a possibility that they would fail to do so and progressively weaken the association of the MAI with the Guidelines as they evolve in OECD.

## 15. Questions

- a) *Are delegates content to narrow the options to the 'pure' and 'mixed' approaches, or do they wish to consider others, for example BIAC's and TUAC's? Which approach do delegates prefer?*
  - (i) *Under the pure MAI approach, what voting rule would apply to the Parties' Group's decisions?*
  - (ii) *Are delegates concerned about the complications in paragraphs 11 and 14 or can they be ignored in practice?*
- b) *Do delegates agree that, under both the pure and mixed approaches, the guidelines could not be used contextually in dispute settlement? Is the specific language in the Declaration (pure MAI option) and the introduction to the Guidelines Annex (mixed MAI/OECD option) that the Guidelines do not affect MAI interpretation and application adequate politically to deal with the concerns about MAI misinterpretation, or should there also be a specific dispute settlement disclaimer along the lines proposed by BIAC?*
- c) *Do delegates accept the approach of having the MAI text automatically affirm acceptance for all parties acceding without a contrary understanding? Alternatively, should acceptance be made clearly optional (e.g., by noting the Guidelines and inviting their acceptance), or should it be required of all MAI parties as a condition of accession?*

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<sup>11</sup> However, for this MAI participant option, unlike the normal OECD process, the Secretariat would "negotiate" the acceptance/participation agreement based on a standing Council invitation to MAI parties, without a case by case committee and Council decision. If desired, the OECD could put the Guidelines work into a separate Working Party of the CIME, to avoid making all MAI Parties full participants in a part of the parent committee.

## ILLUSTRATIVE TEXTS

### I. Pure MAI Option

[In the following texts, material drawn from the existing OECD Declaration and the Second Revised Decision is used without change where appropriate. Deletions are not shown. Replacements and new passages are shown in bold.]

#### 1. Final Act:

##### DECLARATION ON GUIDELINES FOR MULTINATIONAL ENTERPRISES

###### THE SIGNATORIES OF THE FINAL ACT:

CONSIDERING :

- That international investment has assumed increased importance in the world economy and has considerably contributed to development, that multinational enterprises play an important role in this investment process;
- **That inter-related instruments in the OECD Declaration on International Investment and Multinational Enterprises of 21 June 1976, as amended, including Guidelines for Multinational Enterprises, have provided the OECD a valuable framework for considering issues relating to international investment and multinational enterprise; and**
- **That Guidelines for Multinational Enterprises, based initially on the OECD Guidelines as clarified by its Committee on International Investment and Multinational Enterprise, should be part of the framework for considering issues of investment and multilateral enterprise by the Parties to the MAI;**

DECLARE:

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 the understanding which introduce the Guidelines and are an integral part of them.

**That the association of the Guidelines with the MAI does not affect the interpretation or application of the provisions of the MAI concerning the treatment owed investors or investments.**

##### GUIDELINES FOR MULTINATIONAL ENTERPRISES

[The text of Annex I of the OECD Declaration would be set out unchanged, except for the following modifications in the introduction: Throughout the text, “member countries”, “OECD countries” and “Members of the Organisation” would be replaced by “**Participants in this Declaration**”; and “countries that are not Members of the Organisation” would be replaced by “**countries not participating in this Declaration**”; Paragraphs 4 and 5, which refer to inter-related elements of the OECD programme of co-operation of the 1976 Declaration, would be deleted.

#### 2. MAI Preamble

**Affirming their support for the Guidelines for Multinational Enterprises set out in Annex \_ of the Final Act of the Conference on the Multilateral Agreement on Investment, which contain joint recommendations to multinational enterprise to help assure that their operations are in harmony with national policies of the countries in which they operate, including, in particular, recommendations concerning labour and environmental practices, and emphasising that implementation of these voluntary Guidelines will promote mutual confidence between the enterprises and the host countries and contribute to a favourable climate for investment;**

**3. MAI Annex on Procedures**

**PROCEDURES FOR CO-OPERATION  
REGARDING THE GUIDELINES FOR MULTINATIONAL ENTERPRISES**

**THE CONTRACTING PARTIES,**

Taking note of the Declaration set out in the Final Act of the MAI and affirmed in the preamble of this Agreement, by which Contracting Parties jointly recommend to multinational enterprises the observance of Guidelines for Multinational Enterprises;

Desiring to set forth procedures by which consultations **and co-operation** may take place on matters related to these Guidelines;

Recognising that, while bilateral and multilateral co-operation should be strengthened when multinational enterprises are made subject to conflicting requirements, effective co-operation on problems arising therefrom may best be pursued in most circumstances on a bilateral level, although there may be cases where the multilateral approach would be more effective;

**DECIDE:**

**1. The Parties Group of the MAI shall serve as a forum for consultation and co-operation among Participants on matters related to the Guidelines. It shall periodically or at the request of a Participant:**

- a) hold an exchange of views on matters related to the Guidelines and the experience gained in their application;
- b) provide clarification of the Guidelines as required; and
- c) **review and, as appropriate, amend the Guidelines and this procedural decision.**

**2. The Parties Group shall periodically invite the Business and Industry Advisory Committee and the Trade Union Advisory Committee, representative of those sectors in the countries participating in the Declaration, to express their views on matters related to the Guidelines. In addition, exchanges of views with the advisory bodies on these matters may be held upon request by the latter.**

**3. If it so wishes, an individual enterprise will be given the opportunity to express its views either orally or in writing on issues concerning the Guidelines involving its interests.**

**4. The Parties Group shall not reach conclusions on the conduct of individual enterprises.**

**5. Governments of countries participating** in the Guidelines shall set up National Contact points for undertaking promotional activities, handling enquiries and for discussions with the parties concerned on all matters related to the Guidelines so that they can contribute to the solution of problems which may arise in this connection. the business community, employee organisations and other interested parties shall be informed of the availability of such facilities.

**6.** National contact Points in different countries shall co-operate, if such need arises, on any matter related to the Guidelines relevant to their activities. As a general procedure, discussions at the national level should be initiated before contacts with other National contact Points are undertaken.

## II. Mixed MAI/OECD Option

### 1. Final Act, Main text:

x. Signatories note the affirmation of support in the preamble of the MAI concerning the Guidelines for Multinational Enterprise jointly recommended by member countries of the Organisation for Economic Co-operation and Development, the text of which is set out in Annex\_ of this Final Act, and the invitation issued by the Council of the OECD to MAI Contracting Parties not members of the Organisation to join in the Guidelines work of the Organisation. Considering the inter-relationship of investment and multinational enterprise, they urge that all MAI Contracting Parties do so, in order to promote broad co-operation on the related issues.

### 2. Final Act, Annex:

The following text, referred to in paragraph x of this Final Act and in the preamble of the Agreement, is a non-binding joint recommendation of voluntary guidelines by the Governments participating in it to multinational enterprises operating in their territory. The Guidelines are an OECD instrument subject to modification by the within the OECD framework. The association of the Guidelines with the MAI cannot be deemed to bear on the latter's interpretation or application.

The text is part of the OECD Declaration on International Investment and Multinational Enterprises, of 21 June 1976 - C(76)99(Final), as amended. Background and official clarifications are found in the publication "OECD Guidelines for Multinational Enterprises", OECD 1994, ISBN 92-64-54109-8.

### OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

[The text of the preamble ("CONSIDERING"), the part I declaration of the Guidelines, and the entire Annex I would be set out verbatim]

### 3. MAI Preamble:

Affirming their support for the OECD Guidelines for Multinational Enterprises, set out in Annex \_ of the Final Act of the Conference on the Multilateral Agreement on Investment, which contain joint recommendations to multinational enterprise to help assure that their operations are in harmony with national policies of the countries in which they operate, including, in particular, recommendations concerning labour and environmental practices, and emphasising that implementation of these voluntary Guidelines will promote mutual confidence between the enterprises and the host countries and contribute to a favourable climate for investment;