

RESTRICTED

MTN.GNS/W/99

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Special Distribution

RESTRICTIVE BUSINESS PRACTICES AND TRADE IN SERVICES

Note by the Secretariat

1. This note has been prepared in response to the request by the Group of Negotiations on Services at the meetings of 26 February-2 March and 26-30 March 1990 that the secretariat prepare a note covering multilateral conventions or codes on restrictive business practices in the OECD, UNCTAD and elsewhere (MTN.GNS/31, paragraphs 62 and 63 and MTN.GNS/32, paragraphs 78 and 79).

I. Multilateral Efforts to Deal with Restrictive Business Practices

2. Restrictive business practices (RBPs) have received attention at the inter-governmental level in the United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Co-operation and Development (OECD), the United Nations Commission on Transnational Corporations (UNCTC), and the General Agreement on Tariffs and Trade (GATT). Restrictive business practices were also on the agenda for negotiations of the draft Havana Charter for an International Trade Organization (ITO) in the late forties where an entire chapter (Chapter V) was devoted to the matters relating to them.

3. Article 53 of Chapter V of the Havana Charter refers explicitly "to certain services, such as transportation, telecommunications, insurance and the commercial services of banks" and recognizes that those services, "are substantial elements of international trade and that any restrictive business practices by enterprises engaged in these activities in international trade may have harmful effects similar to those indicated in paragraph 1 of Article 46."<sup>1</sup> The latter paragraph refers to business practices, on the part of private or public commercial enterprises, which restrain competition, limit access to markets, or foster monopolistic control. It is noted that such practices might have harmful effects on the expansion of production or trade, and interfere with the achievement of any other objectives of the Charter. The Havana Charter aimed at finding satisfactory remedies to situations due to harmful effects of restrictive business practices. This was to be done by encouraging transparency, consultation and conciliation between the governments concerned. As the ITO did not come into being, the RBP provisions of the draft Havana Charter never entered into force. While many provisions of the Havana Charter were

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<sup>1</sup> See Article 53 of the Havana Charter which is reproduced in Annex 1.

incorporated into the text of the GATT, this was not the case for restrictive business practices provisions. In the view of certain governments, this constituted an omission in the GATT system, and in 1954, suggestions were made to bring matters relating to RBPs under GATT.<sup>2</sup>

4. In November 1958, the GATT CONTRACTING PARTIES recognized that the activities of international cartels and trusts might hamper the expansion of world trade and the economic development in individual countries, and thereby interfere with the objectives of GATT. A group of experts was appointed by the CONTRACTING PARTIES to study and make recommendations in this respect.<sup>3</sup> There emerged important differences of opinion among the experts concerning the nature of the GATT action which could be appropriate to deal with restrictive business practices. In the absence of agreement, no substantive provisions relating to restrictive business practices were incorporated into the GATT. An agreement reached in 1960 provided only for ad hoc notification and consultation procedures for dealing with conflicts of interest between contracting parties on restrictive business practices.<sup>4</sup> The procedures have never been invoked.

5. During the 1950s, there were efforts to deal with restrictive business practices at the United Nations Economic and Social Council (ECOSOC). The Ad hoc Committee on Restrictive Business Practices to the ECOSOC proposed an international code largely based on the provisions of Chapter V of the Havana Charter. The proposal did not obtain sufficient support from member countries for it to enter into force.

6. Since the second UNCTAD Conference in New Delhi, 1969, matters relating to restrictive business practices have been on the UNCTAD agenda. At UNCTAD IV (Nairobi 1976) it was agreed that restrictive business practices could adversely affect international trade and economic development (particularly that of developing countries), and that action should be taken at the international level. This action included negotiations which had as their objective the formulation of a set of principles and rules for the control of restrictive business practices.<sup>5</sup> The subsequent UNCTAD work culminated in the adoption by the United Nations General Assembly of Resolution 35/63 (December 1980) which incorporated the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (hereafter referred to as the U.N. Principles and Rules).<sup>6</sup>

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<sup>2</sup>L/283, L/261/Add.1,41.

<sup>3</sup>BISD, 7th Supp. p.29.

<sup>4</sup>BISD, 9th Supplement, p.170-179

<sup>5</sup>UNCTAD, 1985, The History of UNCTAD 1964-1984, New York, United Nations, ix-294p.

<sup>6</sup>TD/RBP/CONF/10/Rev.1. Note also that the U.N. Principles and Rules are reproduced in Annex 2.

7. The U.N. Principles and Rules place a moral obligation on governments to introduce and strengthen legislation in the area of restrictive business practices and to ensure that their enterprises, be they private or State owned, abide by the code; the principles and rules are not legally binding. They contain a number of desired norms of behaviour addressed to firms, and provisions addressed to governments. The U.N. Principles and Rules explicitly state that they are applicable to all transactions in both goods and services. The institutional machinery of the U.N. Principles and Rules is provided by the Intergovernmental Group of Experts on Restrictive Business Practices which meet under the auspices of UNCTAD. The group is currently involved in the preparation of the Second United Nations Conference to Review all Aspects of the U.N. Principles and Rules scheduled to take place on 26 November-7 December 1990. The Conference is expected to review matters relating to transparency and the consultation mechanism of the U.N. Principles and Rules, and to pay particular attention to restrictive business practices adversely affecting the interests of developing countries.

8. A series of recommendations concerning restrictive business practices affecting international trade were also adopted by the Organization for Economic Co-operation and Development (OECD) in 1967, 1973, 1979 and 1986. The recommendations specified notification and consultation procedures to be followed by the OECD member countries in seeking mutually acceptable solutions to RBP problems. While the 1986 recommendation repealed and superseded previous recommendations, it reiterated the main provisions of the three earlier recommendations and added new guiding principles.

9. Restrictive business practices are also covered by the OECD Guidelines for Multilateral Enterprises (hereafter referred to as the OECD Guidelines) which is an annex to the 1976 Declaration on International Investment and Multinational Enterprises.<sup>9</sup> The Declaration was reviewed by the OECD Council in May 1984. Observance of the OECD 1986 Recommendation and of the OECD Guidelines is voluntary and not legally enforceable. Both the Recommendations and Guidelines apply to operations of multinational enterprises and cover trade in both goods and services.

10. There is no precise legal definition of what constitutes multinational enterprises in the OECD 1986 Recommendations or the Guidelines. The Guidelines only specify that the term "multinational enterprise" usually comprises "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" (paragraph 8). The OECD has established consultation and conciliation procedures whereby national governments can meet to reconcile

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<sup>7</sup> See Annex 2, Section B, paragraph 5.

<sup>8</sup> See the text of the OECD 1986 Recommendation in Annex 5.

<sup>9</sup> Text of the 1976 Declaration is reproduced in Annex 3. Text of the Guidelines for Multilateral Enterprises is reproduced in Annex 4.

conflicts created by the extra-territorial application of national anti-trust policies. The OECD Council Recommendation (1979) concerning co-operation on restrictive business practices stipulated that the OECD Guidelines and the U.N. Principles and Rules remained appropriate instruments for such co-operation.

1. The U.N. Commission on Transnational Corporations (UNCTC) has attempted to develop a United Nations Code of Conduct on Transnational Corporations containing provisions on restrictive business practices and reinforcing the U.N. Principles and Rules. While it has not been possible to reach agreement on a final document, a recent report by the UNCTC notes that "many of the "concluded provisions" of the proposed Code are markedly relevant to trade issues, especially in the area of trade in services" and that "many of the issues involved in the Uruguay Round of multilateral trade negotiations have been for years under negotiation in the Code exercise, and that some degree of consensus has been reached on them."<sup>10</sup>

2. Similarly, an international Code of Conduct on Transfer of Technology has been under negotiation for some time under UNCTAD auspices. The proposed Code lists, inter alia, the restrictive practices that should be eliminated or controlled with respect to the transfer of technology. Failure to reach agreement on a number of points have not permitted the adoption of the Code.<sup>11</sup>

3. In summary, there are three basic multilateral instruments dealing with restrictive business practices: (i) the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the U.N. Principles and Rules), (ii) the OECD Guidelines for Multilateral Enterprises (the OECD Guidelines), and (iii) the OECD Revised Recommendation of the Council of 21 May 1986 concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade (the OECD 1986 Recommendation). All three documents contain provisions which apply to restrictive business practices and trade in services. The U.N. Principles and Rules apply to members of the United Nations. The OECD Guidelines and Recommendations apply only to OECD countries. The U.N. Principles and Rules, the OECD Guidelines and the OECD Recommendation put the emphasis on voluntary action and a pragmatic, rather than an overly legalistic approach, with an emphasis on procedures for consultation and further clarification of problems.

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<sup>10</sup> UNCTC, 1990, The New Code Environment, Paper 7, Workshop for GNS Negotiators on the Activities of Transnational Corporations in Services, 11-12 November 1989, Montreux, Switzerland, pp.46-49.

<sup>11</sup> UNCTC, 1990, Key Concepts in International Investment Arrangements and Their Relevance to Negotiations on International Transactions in Services, UNCTC Current Studies, No.13, Series A, United Nations, New York, pp.23-24.

## II. Definitions and Restrictive Business Practices

4. In most general terms, restrictive business practices cover a wide range of practices engaged in by enterprises with a view to gaining a dominant market position through the restraint of competition. The precise definition of restrictive business practices varies depending on the purpose at hand. For the purpose of government action the emphasis is on the injurious effect of the practice.

5. Domestic restrictive business practices legislation frequently consists of: (i) rules governing the behaviour of enterprises in the market place and aiming to strengthen competition; and (ii) rules to discourage the degree of industrial concentration that a policy of laissez-faire would produce. Multilateral action in the area of restrictive business practices is essentially based on the application of national legislation by the national authorities. The emphasis is on procedures which would (i) improve transparency, (ii) strengthen co-operation between national authorities by encouraging consultation and conciliation, and (iii) provide guidelines as to what domestic policies with respect to restrictive business practices should be.

6. The U.N. Principles and Rules define restrictive business practices to be "acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact."<sup>12</sup> Dominant position of market power is defined to be "a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services".<sup>13</sup>

7. The OECD Guidelines enjoin enterprises to "refrain from actions which adversely affect competition in the relevant market by abusing a dominant position and market power, by means of, for example: (a) anti-competitive acquisitions; (b) predatory behaviour toward competition; (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".<sup>14</sup> The Guidelines also call upon enterprises to "allow purchasers, distributors and licensees freedom to resell, export, purchase and develop their operations consistent with law, trade conditions, the need for

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<sup>12</sup> See Annex 2, Section B, paragraph 1.

<sup>13</sup> See Annex 2, Section B, paragraph 2.

<sup>14</sup> See Annex 4, "Competition", paragraph 1.

specialization and sound commercial practice". Enterprises are further asked "to 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."<sup>15</sup>

### III. Transparency

8. Provisions on transparency in the various arrangements refer to: (i) transparency of restrictive business practices, (ii) transparency of restrictive business practices policies and their effects, (iii) transparency of restrictive business practices investigations or legal proceedings of interest to other countries, (iv) transparency of settlements reached through consultations or conciliations, (v) transparency of the observance of multilateral commitments, (vi) exchange, analysis and dissemination of restrictive business practices-related information on international level and finally (vii) safeguards confidentiality.

9. The OECD Guidelines stipulate that enterprises should provide information to 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."<sup>16</sup> The OECD Recommendation requires that an OECD member country undertaking an investigation of restrictive business practices or legal proceedings will notify any country whose substantial interests are involved. It also recommends that, subject to appropriate safeguards, the competent authorities of one Member country should allow the disclosure of information to the competent authorities of Member countries by other parties concerned, unless such disclosure would be contrary to significant national interests.<sup>17</sup> The OECD Recommendation stipulates that notifications should be made, if possible in advance, and in any event, at a time that would facilitate comments or consultations.<sup>18</sup> It also specifies the circumstances in which a notification of an investigation or proceeding should be made, describes procedures for notifications and includes provisions<sup>19</sup> on collection of information from persons or enterprises located abroad<sup>20</sup> and obligations or exceptions of confidentiality.

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<sup>15</sup> See Annex 4, "Competition", paragraph 3.

<sup>16</sup> See Annex 4, "Competition", paragraph 4.

<sup>17</sup> See Annex 5, Section A, paragraph 2.

<sup>18</sup> See Annex 5, Section A, paragraph 1(a)

<sup>19</sup> See Annex 5, Appendix, paragraphs 2-4.

<sup>20</sup> See Annex 5, Appendix, paragraph 7 and Recommendation of the Council (also Annex 5), Section A, paragraph 2.

10. The U.N. Principles and Rules stipulate that the States should institute appropriate procedures for (i) obtaining<sup>21</sup> information from enterprises, including transnational corporations<sup>21</sup> (ii) promote<sup>22</sup> exchange of relevant information at the regional and sub-regional level<sup>22</sup> and supply the relevant<sup>23</sup> information to other States, particularly developing countries.<sup>23</sup> It also contains a technical assistance provision with respect to systems for the control of restrictive business practices,<sup>24</sup> and a confidentiality clause with respect to legitimate business secrets.<sup>25</sup>

11. Transparency is further reinforced through (i) supplying the Secretary-General of UNCTAD with appropriate information on steps taken by governments to meet their commitments to the U.N. Principles and Rules and changes in the domestic restrictive business practices policies<sup>26</sup> as well as (ii) preparation of an UNCTAD publication,<sup>27</sup> and other relevant studies, documentation and reports.<sup>28</sup> A particularly important rôle in that respect is assumed by the Intergovernmental Group of Experts on Restrictive Business Practices.<sup>29</sup>

#### IV. Consultation and Co-operation

12. Consultation and co-operation are the basis of the existing restrictive business practices codes. Provisions referring to them concern (i) consultation and co-operation between governments and (ii) consultation and co-operation between a government and enterprises.

13. The OECD Guidelines require that enterprises should be ready to consult and co-operate with competent authorities of countries whose interests are directly affected in regard to competition issues or investigations. The OECD Recommendation stipulates that if an OECD member country finds that its interests are seriously affected by a restrictive business practice of an enterprise located in another OECD member country, it may enter into consultation with the other country and adopt appropriate remedial action. Moreover, if a country considers that investigations or proceedings conducted by another OECD country substantially affects its interests, it may enter into a new kind of consultations during which the various possibilities for meeting the objectives of the investigation or the requirements of legal proceedings will be examined. The OECD countries

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<sup>21</sup> See Annex 2, Section E, paragraph 6 and Section D, paragraph 2.

<sup>22</sup> See Annex 2, Section E, paragraph 7.

<sup>23</sup> See Annex 2, Section E, paragraph 9.

<sup>24</sup> See Annex 2, Section E, paragraph 8.

<sup>25</sup> See Annex 2, Section E, paragraph 5 and Section D, paragraph 2.

<sup>26</sup> See Annex 2, Section F, paragraph 2.

<sup>27</sup> See Annex 2, Section F, paragraph 3.

<sup>28</sup> See Annex 2, Section G, paragraph 3.

<sup>29</sup> See Annex 2, Section G.

engaging in consultations will endeavour to find a mutually acceptable solution. In the event that no such solution can be found, the countries concerned may submit the case to the OECD Committee of Experts on Restrictive Business Practices with a view to conciliation.<sup>30</sup> The Recommendation establishes detailed procedural requirements concerning consultations and conciliation.<sup>31</sup>

14. The U.N. Principles and Rules also rely on consultation as means of finding mutually acceptable solutions concerning restrictive business practices.<sup>32</sup> UNCTAD may be requested to provide necessary conference facilities for such consultations. The U.N. Principles and Rules stipulate that enterprises "should consult and co-operate with competent authorities of countries directly affected in controlling restrictive business practices adversely affecting the interests of those countries."<sup>33</sup>

#### V. Trade Liberalization

15. One of the declared objectives of the U.N. Principles and Rules is to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries.<sup>34</sup> The U.N. Principles and Rules stipulate that "States should seek appropriate remedial or preventive measures to prevent and/or control the use of restrictive business practices within their competence when it comes to the attention of States that such practices adversely affect international trade, and particularly the trade and development of the developing countries."<sup>35</sup>

16. Also the OECD Recommendation requires that countries should "co-operate in developing or applying mutually satisfactory and beneficial measures for dealing with restrictive business practices in international trade".<sup>36</sup> In the terms of the OECD Recommendation the co-operation essentially means exchange of information, consultation and "sympathetic consideration" as well as conciliation. The U.N. Principles and Rules additionally mention other forms of mutually reinforcing action on "national, regional and international level".<sup>37</sup> This includes work aimed at achieving common approaches in national policies relating to restrictive business practices.<sup>38</sup>

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<sup>30</sup> See Annex 5, Section B, paragraph 7.

<sup>31</sup> See Annex 5, Appendix, paragraphs 5-6.

<sup>32</sup> See Annex 2, Section F, paragraph 4(a).

<sup>33</sup> See Annex 2, Section D, paragraph 2.

<sup>34</sup> See Annex 2, Section A, paragraph 1.

<sup>35</sup> See Annex 2, Section E, paragraph 4.

<sup>36</sup> See Annex 5, Section A, paragraph 2.

<sup>37</sup> See Annex 2, Section C, paragraph 1 and Section F.

<sup>38</sup> See Annex 2, Section F, paragraph 1.



## VI. Treatment of Developing Countries

17. The U.N. Principles and Rules stipulate that States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs<sup>39</sup> of developing countries, in particular of the least developed countries. The purpose is to promote infant industries and encourage arrangements among developing countries. More specifically the U.N. Principles and Rules require that States should particularly seek remedial or preventive measures in response to restrictive business<sup>40</sup> practices adversely affecting international trade of developing countries<sup>41</sup> and encourage access to information on restrictive business practices related matters<sup>42</sup> as well as technical assistance to States wishing to develop systems for the control of restrictive business practices. An active rôle with respect to technical assistance to developing countries in the area of restrictive business practices is requested from UNCTAD. This includes assistance in devising<sup>43</sup> domestic restrictive business practices legislation in developing countries<sup>43</sup> and training.

## VII. Guidelines on Domestic Policies

18. One of the objectives of the U.N. Principles and Rules is to facilitate the adoption and strengthening of laws and policies in the area<sup>44</sup> of restrictive business practices at the national and regional level. The U.N. Principles and Rules stipulate that "States should, at the national level or through regional groupings, adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices, including those of transnational corporations."<sup>45</sup> The U.N. Principles and Rules note that legislation or regulations applicable to restrictive business<sup>46</sup> practices should be clearly defined and publicly and readily available<sup>46</sup> and that the treatment of enterprises should be fair, equitable, on the same basis<sup>47</sup> all enterprises, and in accordance with established procedures of law.

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<sup>39</sup> See Annex 2, Section C, paragraph 7.

<sup>40</sup> See Annex 2, Section E, paragraph 4.

<sup>41</sup> See Annex 2, Section E, paragraph 9.

<sup>42</sup> See Annex 2, Section E, paragraph 8.

<sup>43</sup> See Annex 2, Section F, paragraphs 5 and 6(a).

<sup>44</sup> See Annex 2, Section A, paragraph 5.

<sup>45</sup> See Annex 2, Section E, paragraph 1.

<sup>46</sup> See Annex 2, Section C, paragraph 6.

<sup>47</sup> See Annex 2, Section E, paragraph 3.

ANNEXES

- Annex 1            Article 53 of the Havana Charter (p.11).
- Annex 2            The U.N. Principles and Rules: Set of Multilaterally Agreed  
Equitable Principles and Rules for the Control of  
Restrictive Business Practices (pp.12-22).
- Annex 3            OECD 1976 Declaration: Declaration on International  
Investment and Multinational Enterprises (21st June 1976)  
(pp.23-25).
- Annex 4            OECD Guidelines: Annex to the Declaration of 21st June 1976  
by Governments of OECD Member Countries on International  
Investment and Multinational Enterprises, as amended in 1979  
and 1984 (pp.26-33).
- Annex 5            OECD (1986) Recommendation: Revised Recommendation of the  
Council concerning co-operation between Member Countries on  
Restrictive Business Practices affecting International Trade  
(21st May 1986) (pp.34-40).

ANNEX 1

HAVANA CHARTER

Article 53

Special procedures with respect to services

1. The Members recognize that certain services, such as transportation, telecommunications, insurance and the commercial services of banks, are substantial elements of international trade and that any restrictive business practices by enterprises engaged in these activities in international trade may have harmful effects similar to those indicated in paragraph 1 of Article 46. Such practices shall be dealt with in accordance with the following paragraphs of this Article.

2. If any Member considers that there exist restrictive business practices in relation to a service referred to in paragraph 1 which have or are about to have such harmful effects, and that its interests are thereby seriously prejudiced, the Member may submit a written statement explaining the situation to the Member or Members whose private or public enterprises are engaged in the services in question. The Member or Members concerned shall give sympathetic consideration to the statement and to such proposals as may be made and shall afford adequate opportunities for consultation, with a view to effecting a satisfactory adjustment.

3. If no adjustment can be effected in accordance with the provisions of paragraph 2, and if the matter is referred to the Organization, it shall be transferred to the appropriate inter-governmental organization, if one exists, with such observations as the Organization may wish to make. If no such inter-governmental organization exists, and if members so request, the Organization may, in accordance with the provisions of paragraph 1(c) of Article 72, make recommendations for, and promote international agreement on, measures designed to remedy the particular situation so far as it comes within the scope of this Charter.

4. The Organization shall, in accordance with paragraph 1 of Article 87, co-operate with other inter-governmental organizations in connection with restrictive business practices affecting any field coming within the scope of this Charter and those organizations shall be entitled to consult the Organization, to seek advice, and to ask that a study of a particular problem be made.

ANNEX 2

THE SET OF MULTILATERALLY AGREED EQUITABLE  
PRINCIPLES AND RULES FOR THE CONTROL  
OF RESTRICTIVE BUSINESS PRACTICES<sup>1</sup>

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<sup>1</sup>The Set of Principles and Rules was adopted by the United Nations Conference on Restrictive Business Practices as an annex to its resolution of 22 April 1980 (see section II above).

The United Nations Conference on Restrictive Business Practices,

Recognizing that restrictive business practices can adversely affect international trade, particularly that of developing countries, and the economic development of these countries,

Affirming that a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices can contribute to attaining the objective in the establishment of a new international economic order to eliminate restrictive business practices adversely affecting international trade and thereby contribute to development and improvement of international economic relations on a just and equitable basis,

Recognizing also the need to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries,

Considering the possible adverse impact of restrictive business practices, including among others those resulting from the increased activities of transnational corporations, on the trade and development of developing countries,

Convinced of the need for action to be taken by countries in a mutually reinforcing manner at the national, regional and international levels to eliminate or effectively deal with restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries, and the economic development of these countries,

Convinced also of the benefits to be derived from a universally applicable set of multilaterally agreed equitable principles and rules for the control of restrictive business practices and that all countries should encourage their enterprises to follow in all respects the provisions of such a set of multilaterally agreed equitable principles and rules,

Convinced further that the adoption of such a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices will thereby facilitate the adoption and strengthening of laws and policies in the area of restrictive business practices at the national and regional levels and thus lead to improved conditions and attain greater efficiency and participation in international trade and development, particularly that of developing countries, and to protect and promote social welfare in general, and in particular the interests of consumers in both developed and developing countries,

Affirming also the need to eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries,

Affirming further the need that measures adopted by States for the control of restrictive business practices should be applied fairly, equitably, on the same basis to all enterprises and in accordance with established procedures of law; and for States to take into account the principles and objectives of the Set of Multilaterally Agreed Equitable Principles and Rules,

Hereby agrees on the following Set of Principles and Rules for the control of restrictive business practices, which take the form of recommendations:

A. Objectives

Taking into account the interests of all countries, particularly those of developing countries, the Set of Multilaterally Agreed Equitable Principles and Rules are framed in order to achieve the following objectives:

1. To ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries.
2. To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:
  - (a) the creation, encouragement and protection of competition;
  - (b) control of the concentration of capital and/or economic power;
  - (c) encouragement of innovation.
3. To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries.
4. To eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries.
5. To provide a Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels.

B. Definitions and scope of application

For the purpose of this Set of Multilaterally Agreed Equitable Principles and Rules:

(i) Definitions

1. "Restrictive business practices" means acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises, have the same impact.
2. "Dominant position of market power" refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.
3. "Enterprises" means firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, private or State, which are engaged in commercial activities, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them.

(ii) Scope of application

4. The Set of Principles and Rules applies to restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of these countries. It applies irrespective of whether such practices involve enterprises in one or more countries.
5. The "principles and rules for enterprises, including transnational corporations" apply to all transactions in goods and services.
6. The "principles and rules for enterprises, including transnational corporations" are addressed to all enterprises.
7. The provisions of the Set of Principles and Rules shall be universally applicable to all countries and enterprises regardless of the parties involved in the transactions, acts or behaviour.
8. Any reference to "States" or "Governments" shall be construed as including any regional groupings of States, to the extent that they have competence in the area of restrictive business practices.

9. The Set of Principles and Rules shall not apply to intergovernmental agreements, nor to restrictive business practices directly caused by such agreements.

C. Multilaterally agreed equitable principles for the control of restrictive business practices

In line with the objectives set forth, the following principles are to apply:

(i) General principles

1. Appropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with, restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of these countries.
2. Collaboration between Governments at bilateral and multilateral levels should be established and, where such collaboration has been established, it should be improved to facilitate the control of restrictive business practices.
3. Appropriate mechanisms should be devised at the international level and/or the use of existing international machinery improved to facilitate exchange and dissemination of information among Governments with respect to restrictive business practices.
4. Appropriate means should be devised to facilitate the holding of multilateral consultations with regard to policy issues relating to the control of restrictive business practices.
5. The provisions of the Set of Principles and Rules should not be construed as justifying conduct by enterprises which is unlawful under applicable national or regional legislation.

(ii) Relevant factors in the application of the Set of Principles and Rules

6. In order to ensure the fair and equitable application of the Set of Principles and Rules, States, while bearing in mind the need to ensure the comprehensive application of the Set of Principles and Rules, should take due account of the extent to which the conduct of enterprises, whether or not created or controlled by States, is accepted under applicable legislation or regulations, bearing in mind that such laws and regulations should be clearly defined and publicly and readily available, or is required by States.

(iii) Preferential or differential treatment for developing countries

7. In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in



particular of the least developed countries, for the purposes especially of developing countries in:

- (a) promoting the establishment or development of domestic industries and the economic development of other sectors of the economy; and
- (b) encouraging their economic development through regional or global arrangements among developing countries.

D. Principles and rules for enterprises, including transnational corporations

1. Enterprises should conform to the restrictive business practices laws, and the provisions concerning restrictive business practices in other laws, of the countries in which they operate, and, in the event of proceedings under these laws, should be subject to the competence of the courts and relevant administrative bodies therein.
2. Enterprises should consult and co-operate with competent authorities of countries directly affected in controlling restrictive business practices adversely affecting the interests of those countries. In this regard, enterprises should also provide information, in particular details of restrictive arrangements, required for this purpose, including that which may be located in foreign countries, to the extent that in the latter event such production or disclosure is not prevented by applicable law or established public policy. Whenever the provision of information is on a voluntary basis, its provision should be in accordance with safeguards normally applicable in this field.
3. Enterprises, except when dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other, engaged on the market in rival or potentially rival activities, should refrain from practices such as the following when, through formal, informal, written or unwritten agreements or arrangements, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:
  - (a) agreements fixing prices, including as to exports and imports;
  - (b) collusive tendering;
  - (c) market or customer allocation arrangements;
  - (d) allocation by quota as to sales and production;
  - (e) collective action to enforce arrangements, e.g. by concerted refusals to deal;

- (f) concerted refusal of supplies to potential importers;
  - (g) collective denial of access to an arrangement, or association, which is crucial to competition.
4. Enterprises should refrain from the following acts or behaviour in a relevant market when, through an abuse or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:
- (a) predatory behaviour towards competitors, such as using below-cost pricing to eliminate competitors;
  - (b) discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;
  - (c) mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature;
  - (d) fixing the prices at which goods exported can be resold in importing countries;
- (a) appropriate in the light of the organizational, managerial and legal relationship among the enterprises concerned, such as in the context of relations within an economic entity and not having restrictive effects outside the related enterprises;
  - (b) appropriate in light of special conditions or economic circumstances in the relevant market such as exceptional conditions of supply and demand or the size of the market;
  - (c) of types which are usually treated as acceptable under pertinent national or regional laws and regulations for the control of restrictive business practices;
  - (d) consistent with the purposes and objectives of these principles and rules.

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\* Whether acts or behaviour are abusive or not should be examined in terms of their purpose and effects in the actual situation, in particular with reference to whether they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, and to whether they are:

- (e) restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence and where the purpose of such restrictions is to maintain artificially high prices;
- (f) when not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:
  - (i) partial or complete refusals to deal on the enterprise's customary commercial terms;
  - (ii) making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;
  - (iii) imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;
  - (iv) making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee.

E. Principles and rules for States at national, regional and subregional levels

1. States should, at the national level or through regional groupings, adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices, including those of transnational corporations.
2. States should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position or market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on their trade or economic development, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact.
3. States, in their control of restrictive business practices, should ensure treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law. The laws and regulations should be publicly and readily available.

4. States should seek appropriate remedial or preventive measures to prevent and/or control the use of restrictive business practices within their competence when it comes to the attention of States that such practices adversely affect international trade, and particularly the trade and development of the developing countries.
5. Where, for the purposes of the control of restrictive business practices, a State obtains information from enterprises containing legitimate business secrets, it should accord such information reasonable safeguards normally applicable in this field, particularly to protect its confidentiality.
6. States should institute or improve procedures for obtaining information from enterprises including transnational corporations, necessary for their effective control of restrictive business practices, including in this respect details of restrictive agreements, understandings and other arrangements.
7. States should establish appropriate mechanisms at the regional and subregional levels to promote exchange of information on restrictive business practices and on the application of national laws and policies in this area, and to assist each other to their mutual advantage regarding control of restrictive business practices at the regional and subregional levels.
8. States with greater expertise in the operation of systems for the control of restrictive business practices should, on request, share their experience with, or otherwise provide technical assistance to, other States wishing to develop or improve such systems.
9. States should, on request, or at their own initiative when the need comes to their attention, supply to other States, particularly developing countries, publicly available information, and, to the extent consistent with their laws and established public policy, other information necessary to the receiving interested State for its effective control of restrictive business practices.

F. International Measures

Collaboration at the international level should aim at eliminating or effectively dealing with restrictive business practices, including those of transnational corporations, through strengthening and improving controls over restrictive business practices adversely affecting international trade, particularly that of developing countries, and the economic development of these countries. In this regard, action should include:

1. Work aimed at achieving common approaches in national policies relating to restrictive business practices compatible with the Set of Principles and Rules.
2. Communication annually to the Secretary-General of UNCTAD of appropriate information on steps taken by States and regional groupings to meet their commitment to the Set of Principles and

Rules, and information on the adoption, development and application of legislation, regulations and policies concerning restrictive business practices.

3. Continued publication annually by UNCTAD of a report on developments in restrictive business practices legislation and on restrictive business practices adversely affecting international trade, particularly the trade and development of developing countries, based upon publicly available information and as far as possible other information, particularly on the basis of requests addressed to all member States or provided at their own initiative and, where appropriate, to the United Nations Centre on Transnational Corporations and other competent international organizations.
4. Consultations:
  - (a) Where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for such a consultation.
  - (b) States should accord full consideration to requests for consultations and, upon agreement as to the subject of and the procedures for such a consultation, the consultation should take place at an appropriate time.
  - (c) If the States involved so agree, a joint report on the consultations and their results should be prepared by the States involved and, if they so wish, with the assistance of the UNCTAD Secretariat, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices.
5. Continued work within UNCTAD on the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation. States should provide necessary information and experience to UNCTAD in this connection.
6. Implementation within or facilitation by UNCTAD, and other relevant organizations of the United Nations system in conjunction with UNCTAD, of technical assistance, advisory and training programmes on restrictive business practices, particularly for developing countries:
  - (a) Experts should be provided to assist developing countries, at their request, in formulating or improving restrictive business practices legislation and procedures;

- (b) seminars, training programmes or courses should be held, primarily in developing countries, to train officials involved or likely to be involved in administering restrictive business practices legislation and, in this connection, advantage should be taken, inter alia, of the experience and knowledge of administrative authorities, especially in developed countries, in detecting the use of restrictive business practices;
  - (c) a handbook on restrictive business practices legislation should be compiled;
  - (d) relevant books, documents, manuals and any other information on matters related to restrictive business practices should be collected and made available, particularly to developing countries;
  - (e) exchange of personnel between restrictive business practices authorities should be arranged and facilitated;
  - (f) international conferences on restrictive business practices legislation and policy should be arranged;
  - (g) seminars for an exchange of views on restrictive business practices among persons in the public and private sectors should be arranged.
7. International organizations and financing programmes, in particular the United Nations Development Programme, should be called upon to provide resources through appropriate channels and modalities for the financing of activities set out in paragraph 6 above. Furthermore, all countries are invited, in particular the developed countries, to make voluntary financial and other contributions for the above-mentioned activities.
- G. International institutional machinery
- (i) Institutional arrangements
    - 1. An Intergovernmental Group of Experts on Restrictive Business Practices operating within the framework of a Committee of UNCTAD will provide the institutional machinery.
    - 2. States which have accepted the Set of Principles and Rules should take appropriate steps at the national or regional levels to meet their commitment to the Set of Principles and Rules.
  - (ii) Functions of the Intergovernmental Group
    - 3. The Intergovernmental Group shall have the following functions:
      - (a) To provide a forum and modalities for multilateral consultations, discussion and exchange of views between States on matters related to the Set of Principles and Rules, in particular its operation and the experience arising therefrom;

- (b) to undertake and disseminate periodically studies and research on restrictive business practices related to the provisions of the Set of Principles and Rules, with a view to increasing exchange of experience and giving greater effect to the Set of Principles and Rules;
  - (c) to invite and consider relevant studies, documentation and reports from relevant organizations of the United Nations system;
  - (d) to study matters relating to the Set of Principles and Rules and which might be characterized by data covering business transactions and other relevant information obtained upon request addressed to all States;
  - (e) to collect and disseminate information on matters relating to the Set of Principles and Rules to the overall attainment of its goals and to the appropriate steps States have taken at the national or regional levels to promote an effective Set of Principles and Rules, including its objectives and principles;
  - (f) to make appropriate reports and recommendations to States on matters within its competence, including the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules;
  - (g) to submit reports at least once a year on its work.
4. In the performance of its functions, neither the Intergovernmental Group nor its subsidiary organs shall act like a tribunal or otherwise pass judgement on the activities or conduct of individual governments or of individual enterprises in connection with a specific business transaction. The Intergovernmental Group or its subsidiary organs should avoid becoming involved when enterprises to a specific business transaction are in dispute.
5. The Intergovernmental Group shall establish such procedures as may be necessary to deal with issues related to confidentiality.
- (iii) Review procedure
6. Subject to the approval of the General Assembly, five years after the adoption of the Set of Principles and Rules, a United Nations Conference shall be convened by the Secretary-General of the United Nations under the auspices of UNCTAD for the purpose of reviewing all the aspects of the Set of Principles and Rules. Towards this end, the Intergovernmental Group shall make proposals to the Conference for the improvement and further development of the Set of Principles and Rules.

ANNEX 3

DECLARATION ON INTERNATIONAL INVESTMENT  
AND MULTINATIONAL ENTERPRISES

(21 June 1976)

THE GOVERNMENTS OF OECD MEMBER COUNTRIES

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 rôle 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 minimize 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 issues 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 in the Annex hereto having regard to the considerations and understandings which introduce the Guidelines and are an integral part of them;

National  
Treatment

- II. 1. That Member countries should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfil commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another Member country



(hereinafter referred to as "Foreign-Controlled Enterprises") treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises (hereinafter referred to as "National Treatment");

2. That Member countries will consider applying "National Treatment" in respect of countries other than Member countries;
3. That Member countries will endeavour to ensure that their territorial sub-divisions apply "National Treatment";
4. That this Declaration does not deal with the right of Member countries to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises;

International  
Investment  
Incentives and  
Disincentives

- III. 1. that they recognise the need to strengthen their co-operation in the field of international direct investment;
2. that they thus recognize the need to give due weight to the interests of Member countries affected by specific laws, regulations and administrative practices in this field (hereinafter called "measures") providing official incentives and disincentives to international direct investment;
3. That Member countries will endeavour to make such measures as transparent as possible, so that their importance and purpose can be ascertained and that information on them can be readily available;

Consultation  
Procedures

- IV. That they are prepared to consult one another on the above matters in conformity with the Decisions of the Council on the Guidelines for Multinational Enterprises, on National Treatment and on International Investment Incentives and Disincentives;

Review

- V. That they will review the above matters within three years<sup>1</sup> with a view to improving the effectiveness of international economic co-operation among Member countries on issues relating to international investment and multinational enterprises.

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<sup>1</sup>A first review was undertaken in 1979. The present review took place in the OECD Council meeting at Ministerial level on 17 and 18 May 1984. It was decided to review the Declaration again at the latest in six years.

ANNEX 4

ANNEX TO THE DECLARATION OF 21 JUNE 1976 BY GOVERNMENTS  
OF OECD MEMBER COUNTRIES ON INTERNATIONAL INVESTMENT AND  
MULTINATIONAL ENTERPRISES, AS AMENDED IN 1979 AND 1984

GUIDELINES FOR MULTINATIONAL ENTERPRISES

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 utilization of capital, technology and human resources between countries and can thus fulfil an important rôle in the promotion of economic and social welfare. But the advances made by multinational enterprises in organizing 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 minimize 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 Organization, 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 minimizing and resolving the problems which may arise in connection with their activities.
4. Within the Organization, 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 Organization for Economic Co-operation and Development (OECD) and makes full use of the various specialized bodies of the Organization, whose terms of reference already cover many aspects of the rôle 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 intergovernmental 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 degree 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>1</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 specialization 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 organizations;
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:

- (i) 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;
- (ii) the geographical areas<sup>2</sup> where operations are carried out and the principal activities carried on therein by the parent company and the main affiliates;
- (iii) the operating results and sales by geographical area and the sales in the major lines of business for the enterprise as a whole;
- (iv) significant new capital investment by geographical area and, as far as practicable, by major lines of business for the enterprise as a whole;
- (v) a statement of the sources and uses of funds by the enterprise as a whole;
- (vi) the average number of employees in each geographical area;

- (vii) research and development expenditure for the enterprise as a whole;
- (viii) the policies followed in respect of intra-group pricing;
- (ix) 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 specialization 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. Provision 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 organizations of employees, and engage in constructive negotiations, either individually or through employers' associations, with such employee organizations 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 or 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, utilize, 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>3</sup> with representatives of employees on conditions of employment, or while employees are exercising a right to organize, not threaten to utilize 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 organize<sup>4</sup>;
9. Enable authorized representatives of their employees to conduct negotiations on collective bargaining or labour management relations issues with representatives or management who are authorized to take decisions on the matters under negotiation.

#### 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 licences for the use of industrial property rights or when otherwise transferring technology, do so on reasonable terms and conditions.

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<sup>1</sup>This paragraph includes the additional provision adopted by the OECD Governments at the meeting of the OECD Council at ministerial level on 17 and 18 May 1984.

<sup>2</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 operations carried out in individual countries or areas as well as the effects on its competitiveness, 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>3</sup>Bone 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>4</sup>This paragraph includes the additional provision adopted by OECD Governments at the meeting of the OECD Council at ministerial level on 13 and 14 June 1979.

ANNEX 5

REVISED RECOMMENDATION OF THE COUNCIL

Concerning Co-operation between Member countries on  
Restrictive Business Practices Affecting International Trade

(adopted by the council at its 643rd Meeting on 21 May 1986

THE COUNCIL,

Having regard to Article 5(b) of the Convention on the Organization for Economic Co-operation and Development of 14 December 1960;

Having regard to the Recommendation of the Council of 25 September 1979, concerning Co-operation between Member countries on Restrictive Business Practices Affecting International Trade [C(79)154(Final)] which repealed and superseded the Recommendations of the Council of 5 October 1967 and of 3 July 1973 on the same subject;

Having regard to the request made by the Council meeting at ministerial level in May 1982 to the Committee of Experts on Restrictive Business Practices to undertake a review of the 1979 Council Recommendation [C/M(82)12 Part 1 (Final), items 114 and 115, paragraph 12(a)];

Having regard to the report by the Committee of Experts on Restrictive Business Practices on the operation of the 1979 Council Recommendation during the period 1980 to mid-1985 [RBP(86)2(1st Revision), Part A];

Having regard to the report by the Committee of Experts on Restrictive Business Practices on international co-operation in the collection of information for purposes of competition law enforcement and, in particular, the suggestions for action contained in that report (paragraphs 173 to 179);

Recognizing that restrictive business practices may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Member countries such as the control of inflation;

Recognizing that the unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective spheres of sovereignty of the countries concerned;

Recognizing the need for Member countries to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation in the field of restrictive business practices;

Recognizing that restrictive business practices investigations and proceedings by one Member country may, in certain cases, affect important interests of other Member countries;

Considering therefore that Member countries should co-operate in the implementation of their respective national legislation in order to combat the harmful effects of restrictive business practices;

Considering also that closer co-operation between Member countries is needed to deal effectively with restrictive business practices operated by enterprises situated in Member countries when they affect the interests of one or more other Member countries and have a harmful effect on international trade;

Considering moreover that closer co-operation between Member countries in the form of notification, exchange of information, co-ordination of action, consultation and conciliation, on a fully voluntary basis, should be encouraged, it being understood that such co-operation should not, in any way, be construed to affect the legal positions of Member countries with regard to questions of sovereignty, and in particular, the extra-territorial application of laws concerning restrictive business practices, as may arise.

Recognizing the desirability of setting forth procedures by which the Committee can act as a forum for exchanges of views, consultations and conciliation on matters related to restrictive business practices affecting international trade;

Considering that if Member countries find it appropriate to enter into bilateral arrangements for co-operation in the enforcement of national competition laws, they should take into account the present Recommendation and Guiding Principles.

I. RECOMMENDS to the Governments to Member countries that in so far as their laws permit:

A. Notification, exchange of information and co-ordination of action

1. (a) When a Member country undertakes under its restrictive business practices laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations; such advance notification would enable the proceeding Member country while retaining full freedom of ultimate decision to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws to deal with the restrictive business practices;
- (b) Where two or more Member countries proceed against a restrictive business practice in international trade, they should endeavour to co-ordinate their action in so far as appropriate and practicable;

2. Through consultations or otherwise, the Member countries should co-operate in developing or applying mutually satisfactory and beneficial measures for dealing with restrictive business practices in international trade. In this connection, they should supply each other with such relevant information on restrictive business practices as their legitimate interests permit them to disclose; and should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such co-operation or disclosure would be contrary to significant national interests.

B. Consultation and conciliation

3. (a) A Member country which considers that a restrictive business practice investigation or proceeding being conducted by another Member country may affect its important interests should transmit its views on the matter to or request consultation with the other Member country;
- (b) Without prejudice to the continuation of its action under its restrictive business practices law and to its full freedom of ultimate decision the Member country so addressed should give full and sympathetic consideration to the views expressed by the requesting country, and in particular to any suggestions as to alternative means of fulfilling the needs or objectives of the restrictive business practice investigation or proceeding;
4. (a) A Member country which considers that one or more enterprises situated in one or more other Member countries are or have been engaged in restrictive business practices of whatever origin that are substantially and adversely affecting its interests, may request consultation with such other Member country or countries recognizing that entering into such consultations is without prejudice to any action under its restrictive business practices law and to the full freedom of ultimate decision of the Member countries concerned;
- (b) Any Member country so addressed should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting country and, in particular, to the nature of the restrictive business practices in question, the enterprises involved and the alleged harmful effects on the interests of the requesting country;
- (c) The Member country addressed which agrees that enterprises situated in its territory are engaged in restrictive business practices harmful to the interests of the

requesting country should attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on restrictive business practices or administrative measures, on a voluntary basis and considering its legitimate interests;

5. Without prejudice to any of their rights, the Member countries involved in consultations under paragraphs 3 and 4 above should endeavour to find a mutually acceptable solution in the light of the respective interests involved;

6. In the event of a satisfactory conclusion to the consultations under paragraphs 3 and 4 above, the requesting country, in agreement with, and in the form accepted by, the Member country or countries addressed, should inform the Committee of Experts on Restrictive Business Practices of the nature of the restrictive business practices in question and of the settlement reached;

7. in the event that no satisfactory conclusion can be reached, the Member countries concerned, if they so agree, should consider having recourse to the good offices of the Committee of Experts on Restrictive Business Practices with a view to conciliation. If the Member countries concerned agree to the use of another means of settlement, they should, if they consider it appropriate, inform the Committee of such features of the settlement as they feel they can disclose.

II. RECOMMENDS that Member countries take into account the guiding principles set out in the Appendix to this Recommendation.

III. INSTRUCTS the Committee of Experts on Restrictive Business Practices

1. To examine periodically the progress made in the implementation of the present Recommendation and to serve periodically or at the request of a Member country as a forum for exchanges of views on matters related to the Recommendation on the understanding that it will not reach conclusions on the conduct of individual enterprises or governments;
2. To consider the reports submitted by Member countries in accordance with paragraph 6 of Section I above;
3. To consider the requests for conciliation submitted by Member countries in accordance with paragraph 7 of Section I above and to assist, by offering advice or by any other means, in the settlement of the matter between the Member countries concerned;
4. To report to the Council as appropriate on the application of the present Recommendation.

IV. DECIDES that this Recommendation and its Appendix cancel and replace the Recommendation of the Council of 25 September 1979 [C(79)154(Final)].

APPENDIX

GUIDING PRINCIPLES FOR NOTIFICATIONS, EXCHANGES OF INFORMATION,  
CONSULTATIONS AND CONCILIATION ON RESTRICTIVE BUSINESS PRACTICES  
AFFECTING INTERNATIONAL TRADE

Purpose

1. The purpose of these principles is to clarify the procedures laid down in the Recommendation and thereby to strengthen co-operation and to minimize conflicts in the enforcement of competition laws.

Notification

2. The circumstances in which a notification of an investigation or proceeding should be made include:

- (a) When it is proposed that, through a written request, information will be sought from the territory of another Member country or countries;
- (b) When it concerns a practice carried out wholly or in part in the territory of another Member country or countries, whether the practice is purely private or whether it is required, encouraged or approved by the government or governments of another country or countries;
- (c) When the investigation or proceeding previously notified, may reasonably be expected to lead to a prosecution or other enforcement action which may affect an important interest of another Member country or countries;
- (d) In any other situation where the investigation of proceeding may involve important interests of another Member country or countries.

Procedure for notifying

- 3. (a) Under the Recommendation notification should be "if possible in advance". However there may be cases, for example relating to certain kinds of mergers, where advance notification could prejudice the investigative action or proceeding. In such a case notification and, when requested, consultation should take place as soon as possible and in sufficient time to enable the views of the other member country to be taken into account. Before any formal legal or administrative action is taken, the notifying country should ensure, to the fullest extent possible in the circumstances, that it would not prejudice this process.
- (b) Notification of an investigation or proceeding should be made in writing through the channels requested by each country as indicated in a list to be established and periodically updated by the Committee of Experts on Restrictive Business Practices.

- (c) The content of the notification should be sufficiently detailed to permit an initial evaluation by the notified country of the likelihood of any effects on its national interests. It should include, if possible, the names of the persons or enterprises concerned, the activities under investigation, the character of the investigation or procedure and the legal provisions concerned.

Collection of information from persons or enterprises located abroad

- 4. (a) Member countries should use moderation and self-restraint and take into account the substantive laws and procedural rules in the foreign forum when exercising their investigatory powers with a view to obtaining information located abroad.
- (b) Before seeking information located abroad, Member countries should consider whether adequate information is conveniently available from sources within their national territory.
- (c) Any requests for information located abroad should be framed in terms that are as specific as possible.

Consultations between Member countries

- 5. (a) The country notifying an investigation or proceeding should conduct its investigation or proceeding, to the extent possible under legal and practical time constraints, in a manner that would allow the notified country to request informal consultants or to submit its views on the investigation or proceeding.
- (b) Requests for consultation under paragraphs 3 and 4 of the Recommendation should be made as soon as possible after notification and explanation of the national interests affected should be provided in sufficient detail to enable full consideration to be given to them.
- (c) The notified Member country should, where appropriate, consider taking remedial action under its own legislation in response to a notification.
- (d) All countries involved in consultations should give full consideration to the interests raised and to the views expressed during the consultations so as to avoid or minimize possible conflict.

Conciliation

- 6. (a) If they agree to the use of the Committee's good offices for the purpose of conciliation in accordance with paragraph 7, Member countries should inform the Chairman of the Committee and the secretariat with a view to invoking conciliation.



- (b) The secretariat should continue to compile a list of persons willing to act as conciliators.
- (c) The procedure for conciliation should be determined by the Chairman of the Committee in agreement with the Member countries concerned.
- (d) Any conclusions drawn as a result of the conciliation are not binding on the Member countries concerned and the proceedings of the conciliation will be kept confidential unless the Member countries concerned agree otherwise.

#### Confidentiality

7. When engaging in notification, consultation or any other form of co-operation under this Recommendation, the degree to which a Member country discloses information to another Member country may be subject to and dependent upon the assurances of confidentiality given by the other Member country. When supplying information, Member countries should indicate the degree to which and the length of time during which the information should be treated as confidential. At the request of the country providing information, the receiving country should consider the information exchanged to be confidential and that it will not be disclosed unless the country providing the information agrees to its disclosure or disclosure is compelled by law. Member countries receiving such information should take all reasonable steps to ensure observance of the confidentiality requested.