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## THE OECD GUIDELINES IN A GLOBALISING WORLD

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**THE OECD GUIDELINES IN A GLOBALISING WORLD**  
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1. More than twenty years ago, on June 21, 1976, the OECD Council adopted a Declaration on International Investment and Multinational Enterprises, an important element of which was a text entitled, Guidelines for Multinational Enterprises.<sup>2</sup> After their adoption, the Guidelines were for a time at the centre of considerable debate and activity. Their structure and formulation influenced in important ways later efforts to establish international standards for multinational enterprises (MNEs). In the years that followed, interest in them gradually diminished. Recently, however, partly as a consequence of the negotiations on a Multilateral Agreement on Investment and the reactions to them, there has been renewed interest in the Guidelines and their possible role in the current environment in the world economy.

2. Such current interest provides an opportunity for a reconsideration of the Guidelines, and the approach they embody, in the light of present conditions and concerns. This is what the present paper will attempt to do. It will start by looking at the principal differences in the overall economic and policy conditions relating to foreign direct investment (FDI) between 1976 and today. It will then proceed to consider some of the ways in which the Guidelines have functioned in the past, with a view to suggesting next the possible manners in which they might operate now, so as to become more directly pertinent to current concerns.

***THE ECONOMIC ENVIRONMENT OF THE GUIDELINES THEN AND NOW***

***The historical background***

3. In 1976, when the OECD Guidelines were adopted, concern was rife over the activities of multinational (or transnational) enterprises (hereinafter, MNEs) and their impact on national economies and societies.<sup>3</sup> While primarily focused on this novel phenomenon, such concern arose against a background of earlier and continuing apprehensions over the security of foreign direct investment (FDI) and debates over the proper limits of host government regulation of FDI (and MNEs.) That background is

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1 A draft of this paper was presented at the Conference on the OECD Guidelines for Multinational Enterprises organized by the OECD in Budapest on November 16-18, 1998. In revising the draft, I have profited from the discussions at the Conference, but have not tried to take full advantage of all the rich matter for reflection that was presented. The paper is written on the author's sole responsibility and states his personal views; it reflects in no way the positions of the OECD or of any member Government.

2 The latest edition is, OECD, *The OECD Guidelines for Multinational Enterprises* (OECD Doc. OCDE/GD(97)40), Paris, OECD 1997 (hereinafter, OECD Guidelines).

3 For some indications of pertinent concerns in the early 'sixties and early 'seventies, see, from the abundant literature on the topic: J.H. Dunning ed., *The Multinational Enterprise* (London, Allen & Unwin 1971); R. Vernon, *Sovereignty at Bay/The Multinational Spread of U.S. Enterprises* (New York, Basic Books 1971); C. Tugendhat, *The Multinationals* (New York, Random House 1972); R.J. Barnet, R. E. Mueller, *Global Reach/The Power of the Multinational Corporations* (New York, Simon & Schuster 1974). The relevant legal bibliography of the period was collected in, A. A. Fatouros, "The Computer and the Mudhut: Notes on Multinational Enterprise in Developing Countries," *Columbia J. Transn'l L.* 10 (1971), pp. 325-363.

only indirectly related to the Guidelines but is nevertheless significant for an understanding of the situation at the time.

4. The years immediately after the Second World War were marked by extensive national and international efforts at economic restructuring. In the market economy states of Western Europe, there was extensive direct governmental intervention in the economy, through the regulation of economic actors and sectors and the operation of state enterprises. Large-scale nationalisations of key industries took place; controls over the entry and operation of foreign-controlled enterprises imposed earlier (in the 1930s and during the War) were largely retained. In Central and Eastern Europe, the advent of Soviet-style socialism brought extensive nationalisations and strict state control of the economy. At the international level, the beginning liberalisation of international trade and investment left for a long time intact the predominance of direct intervention by governments in economic matters.

5. In the decades that followed, the process of decolonization brought to the fore additional problems over the status of foreign property, stemming from the desire of the newly independent countries to assert control over their own economy and resources, particularly in view of the presence in their territory of investments from colonial times. Again, nationalisations and the imposition of controls on foreign firms were common. Although not all countries that were host to foreign investment (or, indeed, active in its regulation) were in fact developing countries, the issue was increasingly perceived in terms of a confrontation between developed and developing countries. At the same time, as international development acquired high priority in international politics and within international organisations, particular emphasis was placed on the possible role of, and benefits from, FDI.<sup>4</sup>

6. By the 1970s, the growing internationalisation of production shifted attention to the rise of the MNE, its role in the world economy and its impact on national economies. In the context of the campaign for a New International Economic Order in the United Nations, efforts were initiated with a view to developing legal principles for the regulation of MNEs. Long debates over the rules to be applied led to the adoption of broad programmatic texts, like the Charter of Economic Rights and Duties of States,<sup>5</sup> and to negotiations concerning the drafting of non-binding "international codes of conduct".<sup>6</sup>

7. Although the North/South dimension occupied a prominent place in the legal and political debate over FDI, concern over the impact of MNE activities was widespread and was shared by many developed country governments. Under the pressure of such concerns, and possibly in order to forestall action in other fora, the members of the OECD undertook to formulate a set of standards for MNE behaviour. The OECD Declaration on International Investment and Multinational Enterprises was thus negotiated and adopted, incorporating separate but interconnected Decisions on the Guidelines for Multinational Enterprises, on

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4 See, e.g., the series of United Nations reports, starting in 1956, and continuing through the 1960s, on "The International Flow of Private Capital"; and cf. United Nations, Department of Economic and Social Affairs, *Foreign Investment in Developing Countries* (New York, 1968).

5 UN General Assembly Resolution 3281 (XXIX), 12 December 1974. For a contemporary analysis, see, R. F. Meagher, *An International Redistribution of Wealth and Power: A Study of the Charter of Economic Rights and Duties of States* (New York, Pergamon 1979).

6 For useful presentations and discussions, see, N. Horn ed., *Legal Problems of Codes of Conduct for Multinational Enterprises* (Antwerp, Kluwer 1980); S. J. Rubin and G. C. Hufbauer eds, *Emerging Standards of International Trade and Investment/Multinational Codes and Corporate Conduct* (Ottawa NJ, Rowman & Allanheld 1983); S. Metaxas, *Entreprises transnationales et codes de conduite/Cadre juridique et questions d'effectivité* (Zurich, Schulthess 1988).

National Treatment, and on International Investment Incentives and Disincentives.<sup>7</sup> These Decisions have been repeatedly amended and supplemented since.

8. At the time the Guidelines were adopted, conditions in the OECD countries were thus marked by certain important characteristics:

- Government intervention in the economy was commonplace, whether through general and indirect measures or through specific measures seeking to "fine-tune" the economy or to affect specific sectors.
- Nationalisation of industries was no longer in the order of the day in OECD countries and there was a clear consensus among them on the modalities that made property takings lawful (mainly the payment of adequate compensation).
- In this environment, the role of trade unions was prominent, in political, ideological as well as economic terms, irrespective of the exact political coloration of the governments in power.
- Awareness of the new phenomenon of the MNE was spreading. It was a panacea for some, a demon for others; but for most people MNEs were synonymous with United States firms -- even though this was not entirely true at the time (and even less later.)
- As a corollary of the preceding, controls on the entry and operation of foreign-controlled companies were widespread, while efforts to ensure non-discriminatory treatment to already established enterprises were gathering strength.

9. As is to be expected, the conditions of the times were reflected in the substantive contents and the manner of operation of the Guidelines. Thus, the possibility of an active direct role of the government in the economy was taken for granted in the entire package of decisions; no attempt was undertaken to impose serious limitations on it, except to the extent that it was sought to establish implicit standards of fairness and explicit standards of non-discrimination.<sup>8</sup> These and other aspects of the contents and operation of the Guidelines will be addressed a little later, as their possible role in current circumstances will be examined.

### ***The current situation***

10. Looking now at conditions today, over twenty years after adoption of the Guidelines, we are faced from the very start with the phenomenon commonly called "globalisation", or, as it might better be

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7 For a recent account by the OECD Secretariat of the genesis of the Guidelines, see, OECD, "Experience with the OECD Guidelines for Multinational Enterprises", (OECD doc. DAF/IME(98)15, 03.11.1998). For earlier discussions of the history and functions of the Guidelines, see, R. Blanpain, *The Badger Case and the OECD Guidelines for Multinational Enterprises* (Deventer, Kluwer 1977); Theo W. Vogelaar, "The OECD Guidelines: Their Philosophy, History, Negotiation, Form, Legal Nature, Follow-Up Procedures and Review," in Norbert Horn ed., *op. cit.* supra note 6, pp. 127-139; Philippe Levy, "The OECD Declaration on International Investment and Multinational Enterprises," in S.J. Rubin and G. C. Hufbauer eds., *op. cit.* supra note 6, pp. 47-62.

8 The elimination of restrictions on capital movements and payments was, of course, addressed in another set of OECD instruments, the OECD Codes of Liberalisation.

called, "global integration."<sup>9</sup> The process is still uneven and asymmetrical, in terms of the countries and regions involved as much as the particular economic sectors and industries. Still, it cannot be gainsaid that it is increasingly bringing national economies closer together; the world economy tends to function, not as an aggregation of discrete national economies, but as a single economic system. The walls around national territories that have historically allowed national economies to function in selective isolation from one another and from the world market, thus lending effectiveness to government measures of intervention in the economy, are now being lowered.<sup>10</sup> FDI is a most important element in this process and MNEs have been its principal architects as well as beneficiaries.

11. In conjunction with this process, as a cause and a result at the same time, pertinent perceptions, attitudes and policies of all parties concerned have radically changed. At the national level, a powerful liberalising trend has set in since the mid-1980s, leading to the decrease, often to the point of elimination, of barriers and controls over the entry of foreign direct investment and the operations of MNEs. The attitude of Governments has generally become much more favourable towards FDI. It is in this wider context that the OECD Governments decided to engage in negotiations over the adoption of a Multilateral Agreement on Investment, something which they had considered before but without proceeding to give effect to their intentions.

12. Prevailing conditions have thus changed substantially:

- The economic role of the state is no longer the same -- it has not actually diminished, but has significantly changed. Governments remain very important for the economy, but they now intervene indirectly, preferably in advance; they seek to influence the economic environment, so as to bring about the kind of business conduct (and other effects) that they desire. Many instruments of direct government regulation of the economy are no longer in use.
- MNEs have multiplied. There are far more of them now,<sup>11</sup> and they are no longer perceived as exclusively American.
- As already noted, controls over FDI have diminished, mainly by national (unilateral) action, sometimes by means of regional agreements and to a very limited extent by international, world-wide arrangements. Non-discriminatory treatment of foreign-controlled enterprises has gained ground and restrictions and controls on the entry of foreign firms have by no means disappeared but they have become less common and less strict. Recent upheavals in the financial markets do not appear to have seriously affected FDI trends, but have made evident the need for co-ordination of supervisory functions at the international level.
- Trade unions are now less powerful and less influential, at both the national and the international levels. A new set of social and political actors has however emerged, the Non-

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9 It is arguable that this term gives a clearer idea of the nature and dynamics of the phenomenon we are talking about. For some further attempts at clarification of terms and facts, see, A.A. Fatouros, "International Law in the Era of Global Integration", in *Melanges Valticos* (forthcoming).

10 As this shorthand description tries to make evident, these are all manifestations of a trend (or a cluster of trends), not a final, fully established situation. While the reality of these trends cannot be contested, it would be improper to treat them as having reached a definite form, which could not be changed or influenced by changes in policies. Cf. the study cited in the preceding note.

11 For recent data, see UNCTAD, *World Investment Report 1999/Trends and Determinants* (New York/Geneva, UN 1998), at 1-54.

Governmental Organisations (NGOs). To the extent that their diversity permits any generalisation, NGOs tend to be more ideological, less subject to bargaining and more political, even though (or perhaps because) they are nominally concerned with matters which have traditionally been in the margins of political or economic action, such as ecology, public health or charity.

### ***THE FUNCTION OF THE GUIDELINES UNDER NEW CONDITIONS***

13. The changed conditions cannot help but affect in important ways the possible roles and effects of the Guidelines. It is necessary to go back once more and look at the manners in which the Guidelines have functioned since their adoption, before attempting to explore some of the ways in which they may function in the near future,

#### ***The role and function of the Guidelines***

14. The adoption of agreed standards of conduct for MNEs constituted an acknowledgement not only that the activities of MNEs have a significant impact on national economies but also that this impact differs, certainly as to its causes and possibly as to its effects, from that of other powerful economic actors. The power and increased capabilities of the MNEs are due, not only to the size of their resources and the importance of the activities in which they engage, but also, perhaps primarily, to their transnational linkages. Their structure and organisation -- the fact that they operate in several countries and in many discrete legal and administrative systems, that they rely on resources and activities in many countries, and are able to shift resources and information among them -- endow them with greater power and with a margin of freedom of action significantly wider than that of enterprises operating in a single country.

15. The Guidelines expressly took these facts into consideration. It was noted in their Introduction that they "take into account the problems which can arise because of the international structure of these enterprises."<sup>12</sup> Even though another fundamental proviso of the Guidelines was that, "wherever relevant they reflect good practice for" both multinational and domestic enterprises,<sup>13</sup> their whole point was to try to address those elements of the interaction between MNEs and the national economies that involve features peculiar to the MNEs.

16. This concern runs through the entire text of the Guidelines, although it is evident, or even explicit, in some provisions more than in others. This is the case, for instance, with the section on disclosure of information and with many of the provisions on general policies and on employment and industrial relations. Other provisions, such as those on competition or the environment, deal with problems that are not peculiar to MNEs, but are common for powerful enterprises, whether domestic or foreign, although in the case of the MNEs, the fact that their power is largely attributable to their transnational linkages cannot be disregarded.

17. It is not assumed in the Guidelines that the MNEs are necessarily going to take undue advantage (whatever "undue" may mean in this context) of their power or their greater freedom of action. In fact,

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12 OECD Guidelines, Introduction, para. 6.

13 OECD Guidelines, Introduction, para. 9. The point that there are no differences in the situation of domestic and multinational enterprises is consistently stressed by the representatives of business, who participate in the application ("follow-up") of the Guidelines through the Business and Industry Advisory Committee (BIAC).

generally speaking, one cannot infer from the text of the Guidelines any kind of unfavourable judgement on the MNEs. To the extent indeed that, by providing an agreed model set of provisions, the Guidelines have served to forestall more "radical" attempts at international regulation, they have been helpful to and possibly even protective of the MNEs in their confrontation with host governments. Nevertheless, their adoption, their very existence, was clearly meant to strengthen the hand of Governments (and trade unions) vis-à-vis the MNEs. In this, the Guidelines resembled the international codes of conduct which were negotiated in the United Nations, shortly afterwards, at the behest of the developing countries.<sup>14</sup> Yet, while the proposed codes of conduct were essentially based on a perception of an unequal conflict between all-powerful enterprises and weak governments, and sought accordingly to ensure that host governments could exercise full control over MNE activities so that national policies would prevail, the OECD Guidelines retained the traditional view of Government as being, in form as in fact, the more powerful of the two. They merely sought therefore to redress an assumed pre-existing balance between the two actors, to the extent it has been affected by the particular capabilities of the MNEs, while avoiding any undue interference with the legitimate interests of the corporations.

18. The interplay between the national and the international context of action, for MNEs as well as for Governments, is in the Guidelines complex and varied. There is a multifaceted interaction with national laws. The Guidelines require, to begin with, conformity with national laws and obedience to national authorities. But they go beyond these obligations, which, after all, existed long before them. They also recommend respect of national policies; they require an attitude of loyalty to host country interests, not merely formal obedience to law and authority. Moreover, and this is a particularly significant element, reflecting in part their international character and their specific objectives, they often complement, rather than merely reaffirm, the host country's laws and policies. They are withal international standards for lawful, loyal and responsible action within national jurisdictions.

19. The "voluntary" character of the Guidelines is intimately linked to these traits. This character may be understood at several levels. To begin with, the Guidelines are not formally binding on the states that have adopted them -- not only because they have not been adopted in legally binding form, but also because they are not addressed to states or governments. Secondly, even for the MNEs, to which they are addressed, the Guidelines are "recommendations." It may be that this is supposed to be a consequence of their international origin, in view of the assumption that international law norms do not normally bind individuals and companies. The validity of that last assumption can, of course, be questioned, today perhaps more easily than in 1976.

20. Moreover, even under traditional doctrine, it would have been possible for the governments concerned to accept binding obligations to the effect that they would issue formally binding domestic legal norms. To the extent that national law might not be sufficient, because of the transnational character of MNE activities, such law could be complemented by international commitments to intergovernmental co-operation in the implementation of the norms. The fact that this path was not taken suggests that the voluntary character of the Guidelines should best be understood as due not to the alleged inability of international law to issue binding rules for private actors, but to a collective unwillingness of the states concerned to adopt binding standards.

21. The complexities of the voluntary character of the Guidelines do not stop here. From the very start, it was intended that the Guidelines should function in contrapuntal conjunction with the provisions of the other Decisions contained in the 1976 Declaration, in particular the decision on national treatment, as well as the Codes of Liberalisation. Those other texts are more traditional in their legal character and impose specific duties on Governments with respect to the admission and treatment of MNEs.

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14 See *supra*, note 6.

22. However, the "voluntary" character of the Guidelines, in a manner that was not perhaps fully foreseen by the governments that adopted them, has in no way deprived them of effectiveness, at least as long as both the Governments in the Committee on International Investment and Multinational Enterprises (CIME) and the trade unions and employers represented in the two advisory committees sought to give them effect. In fact, during the early years, the lack of binding force served to strengthen rather than weaken the effectiveness of the Guidelines.<sup>15</sup> The voluntary character of their prescriptions was understood by OECD (and national) organs charged with the application (or "follow-up") of the Guidelines as allowing greater leeway for interpretation and application. Precisely because the provisions of the Guidelines are not legal rules, imposing formal legal obligations, CIME (and the competent national authorities) were able to construe them according to the perceived needs of a particular case and to expand their effect in the direction of conduct that is deemed "appropriate" rather than "legally required." The lesson from the early years of application of the Guidelines is that the presence of application procedures and institutional machinery are more important than the formal legal character of an instrument, as long as the will to utilise them effectively exists.

23. Another feature of the Guidelines, whose real importance is not quite clear, even after all these years, is the fact that their (voluntary) effect is geographically limited to OECD countries alone. From the very start, their observance was recommended to MNEs operating in the territories of OECD member states.<sup>16</sup> This trait appears to have influenced significantly the actual substance of the Guidelines. Their text, for instance, lacks the references to economic development considerations that were to appear in other similar texts (e.g., the UN-sponsored international codes of conduct, whether proposed or actually adopted), since they were meant to apply to countries that are (more or less) economically developed. It is moreover legitimate to surmise that this text is informed by certain expectations as to actions by MNEs and host governments -- and conditions in host economies and societies -- that are appropriate in the context of OECD countries, but may not be in other cases.

24. The fact that, despite this far-reaching limitation, the Guidelines have been remarkably influential may be attributed to two main factors. On the one hand, their text was well drafted; it is short and practical, it avoids detail as well as doctrinal or even juridical formulas. On the other hand, the MNEs to which they are addressed operate all over the world; in their operations they tend to apply with a degree of consistency certain principles and practices, which may vary only to a degree between one country and another. There is therefore a built-in tendency towards uniformity in MNE operations and to the extent the principles embodied in the Guidelines are accepted by the enterprises for their operations in one set of countries they tend to influence operations in other countries.

### ***Possibilities under current conditions***

25. The changes in the economic and political environment affect the operation of the Guidelines in a number of ways. In the first place, the topics the Guidelines address have not remained the same. From the very start, for instance, the Guidelines placed particular emphasis, in their text as much as in their actual operation, on matters concerning employment. Many of the cases that came before CIME for "clarification" in the early years of application concerned such topics. After the first decade, interest in this

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15 On the complexities of the Guidelines' voluntary character, see, H. Baade, "The Legal Effects of Codes of Conduct for MNEs", in N. Horn ed., *op.cit.* supra note 6, pp. 3-39; A.A. Fatouros, "On the Implementation of International Codes of Conduct: An Analysis of Future Experience," *Am. U. L. Rev.* 30 (1980), pp. 941-972; E. Decaux, "La forme et la force obligatoire des codes de bonne conduite," *Annuaire fr, droit international* 29 (1983), pp. 81-97. And cf. the books cited in note 6.

16 Para. 1 of the 1976 OECD Declaration on International Investment and Multinational Enterprises.

domain seemed to have diminished for a time. More recently, the topic has again come to the fore, because of the high unemployment in many OECD countries as well as the problematic labour conditions prevailing in many developing countries. The recent ILO Declaration on fundamental principles and rights is clear evidence of renewed interest in the topic.<sup>17</sup> One might then expect that labour and employment issues will again be coming up in CIME.

26. Another issue that is acquiring increased importance is that of the environment and its protection. The newest addition to the Guidelines has been a new chapter on the topic adopted in 1991. The heightened interest of NGOs in this topic and their presence and increased role in international fora are bound to lend increased importance to this issue. The same may be true of other issues that were less prominent two decades ago, such as the protection of public health or even human rights. Perhaps more important, NGOs may introduce in economic debate before OECD organs a longer term perspective long absent from classical business approaches.

27. Apart from new issues, however, the changed conditions in the world economy, especially those usually associated with global integration, may cause new departures in the manners in which subjects are approached in the Guidelines and in the criteria and methods employed in their interpretation and application. Perceptions of issues and of their relative importance are changing. Current concerns no longer focus exclusively, or even primarily, on the interaction and actual or potential conflict of interests, aims and objectives between governments and MNEs. Attention has shifted to the modalities of the operation of the market, to which economic actors, including governments, now seek to conform. The basic issue is thus becoming how to restrain MNEs from actions that distort the proper operation of markets.

28. To avoid misunderstandings, it should be stressed that what is involved is not so much a change of objectives as a shift in emphasis. On the one hand, underlying concerns about the proper operation of the market were certainly present at the time of the adoption of the Guidelines. On the other hand, the role of national governments is still pre-eminent; they remain the principal agents in a position to take measures affecting markets, national and international; they are the ones that, jointly or severally, must act to ensure the proper operation of the market, in order to avoid distortions and failures in its functioning. What is relatively new is that their role as promoters of their own national economy is now perceived as co-equal to their task as international actors, who shape the functioning of the world market, even though their actual effectiveness (and one might say, their interest) in the former task continues to be much greater.

29. Without entering into a long disquisition on the concept of a market, one must note at the very least that the world market is not a natural phenomenon, nor "a brooding omnipresence in the sky", but a social construct, a social artefact constructed in different ways over the years primarily by the action of governments, at the national level, to begin with, but nowadays at the international level, as well. The market exists and functions because of national and international law and practice; it is they that set the basic frame of reference: what is permitted, what is forbidden, under what conditions private action (e.g., contracts) becomes binding on those participating in it, when and how legal action in other jurisdiction is "recognised", i.e., given effect.

30. In terms of the Guidelines, a shift from empowering national government action to ensuring the proper operation of the market (mainly through national action, once again), concern over the proper operation of the market rather than conformity with national policies, involves primarily, as already noted, a shift in emphasis rather than a change in objectives. Yet, it cannot be gainsaid that it signifies an important change in the way the Guidelines are to be perceived. Partly because of their own formulation

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17 ILO Declaration on Fundamental Principles and Rights at Work (June 18, 1998), *Int'l Legal Materials* 37 (1998), pp. 1233-1240.

("Enterprises should..."), partly because perceptions have been influenced by subsequent texts and negotiations, involving mainly the international codes of conduct at the United Nations, it is commonplace to see the Guidelines as imposing obligations on investors. Such a perception is not strictly speaking inaccurate; it is true that the Guidelines do impose duties on the MNEs, whatever their particular objective may be. Yet, this kind of approach, reflecting the concerns and debates of the 1970s, does not adequately account for the ways in which the Guidelines can address issues under changed conditions and, perhaps more important, does not adequately express current concerns and approaches. Investors' duties imply corresponding rights, presumably of governments. Today's concern for the proper operation of the market involves, in a way, duties on both sides, both governments and investors. It is to the common interest of both and it is the responsibility of both to ensure that the market is not distorted and that market failures do not occur.

31. If the proper operation of the market is to be a basic criterion for the interpretation and application of the Guidelines, the notion has to be understood in an inclusive manner. It should cover not only and not merely strictly economic concerns and issues but most of what are usually termed social concerns, as well. It is not difficult to understand such a perception of the matter. It is widely accepted by now that an enterprise that harms the environment is at the same time distorting market conditions. Similarly, substandard labour practices or the creation of health hazards causes market distortion. It is neither difficult nor unreasonable to so define the operation of the market as to include such considerations. To the contrary, defining the market in restrictive terms takes away significant elements of the established meaning of the term, and indeed the reality of the market.

32. The basic legal framework for the global market was initially established by more or less parallel unilateral national action, increasingly complemented by joint international action at many levels. For its proper operation it is then necessary that government-induced distortions be avoided -- and this is what international action in the form of multilateral agreements concerning liberalisation is seeking to ensure. Distortions caused by private action must also be eliminated, however; it is indeed such distortions that, not only the Guidelines, but also national laws on the protection of competition and the environment and other such issues, are intended to prevent.

33. The working model the Guidelines and the experience from their application can be valuable in this context. While their past importance should not be exaggerated, the patterns of action and the approaches involved in their application can be profitably considered. The three main elements present in these patterns can still be useful. First, internationally agreed standards and norms; secondly, an international institutional mechanism and related procedures for the interpretation and application of the standards; thirdly, a close interaction between national and international norms and action.

34. The need for standards agreed and established at the international level is evident in view of the international character of MNE activities and growing global integration. National laws and other measures may be ineffective, because of their variety but also because of the jurisdictional constraints on national action. The international standards needed would not constitute exhaustive codes for the behaviour of MNEs or the regulation of the global market. They would have to be selective, addressing particular dimensions of market operation, with a view to avoiding distortions and discouraging market failures. While one of their major functions would be to enhance the effectiveness of national action to these same ends, they would not necessarily, under current conditions, be limited to unilateral national action. They would have to make possible as well joint action at the international level, whether through the co-ordination of national action or through more traditional public international law methods.

35. In terms of substance, it may be argued that the changes in the attitudes and policies of host governments make the kind of prescriptions found in the Guidelines even more useful today than they were in the past. Governments are today by and large less directly interventionist in the economy. They now try

to influence its operation in more indirect and especially less *ad hoc* manners. The effectiveness of such methods may be more likely to be affected by the MNEs' ability to function on a transnational basis. The liberalisation of regulations concerning the entry and operations of foreign-controlled enterprises, combined with the decrease of direct intervention by the government toward domestic as well as foreign enterprises, deprive host governments of many of the instruments that they could utilise in the past to make MNEs and their entities conform to national policies or act in ways that do not impair the proper operation of the market.

36. These considerations may be placed in more concrete context. To the extent, for instance, that MNEs are in a position to engage in anti-competitive practices, without effective controls on the part of the countries in which they operate, the market does not function properly; in such a case, the elimination of other governmental controls or restrictions does not serve to enhance economic efficiency, whether on the national or the international level, but may indeed enhance the market-distorting effects of MNE practices. The pertinent provisions of the Guidelines, to the extent that they supplement or ameliorate national laws on the protection of competition, would then help to avoid economically harmful situations. Similar considerations apply with greater force to the Guidelines' provisions on the protection of the environment.

37. For the effective application of international standards, the presence of an institutional mechanism of some kind appears to be indispensable. Here the experience of the Guidelines is particularly instructive. From the very start, the Guidelines were not a mere text offered to MNEs and Governments so that they may shape their actions in accordance with it; they were endowed with an institutional machinery and a set of procedures for their application<sup>18</sup> and development. These included not only a competent OECD committee, CIME, but also the two Committees representing the social partners, the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC), plus a network of National Contact Points at the level of the member governments' national authorities. The presence of this multilevel complex of institutions and procedures is of decisive importance and was responsible for the effectiveness of the Guidelines over many years.

38. CIME is charged with several tasks, two of which are of particular importance. On the one hand, the periodic review of the "experience with" as well as the provisions of the Guidelines has provided an opportunity for repeated additions and other amendments to the Guidelines, adapting them to changing concerns. On the other hand, the process of "clarification" of the Guidelines through consideration of specific cases has given the Committee a novel responsibility, albeit admittedly an inherently vague and unclear one, which, in the not too distant past, has played an important role in enhancing the importance of the Guidelines. Both these procedures are conducted in close co-operation with the two Advisory Committees. The development of the Guidelines through the process of clarification may indeed be attributed in large part to the willingness of the trade unions to bring specific cases before it.

39. The work produced by CIME may thus be seen (with a little imagination, if not hyperbole) as combining the attributes of judicial (or arbitral) decisions,<sup>19</sup> authorised commentary and amendment (or revision). All this, of course, in the context of the voluntary character of the Guidelines, which makes reference to such modes of decision-making a metaphor rather than an analogy.

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18 From a sociological (or is it psychological?) perspective it is interesting to note that the word "application", and even more so, "implementation", as applied to the Guidelines, were consistently avoided for a long time<sup>in</sup> CIME, as if they were blasphemous. The neutral term "follow-up" was preferred.

19 Such a function was of course expressly exorcised by the related formal texts; see in particular, the Second Revised Decision of the Council (June 1991), which states that "the Committee shall not reach conclusions on the conduct of individual enterprises".

40. Before addressing current needs and possibilities for application procedures and institutions, it may be useful to raise the question of the possible reasons for the apparent drop in OECD activities concerning the Guidelines. As noted earlier, very few cases have been brought up recently for consideration and clarification by CIME. The organisation's promotion activities continue, but, looking at the issue from the outside, it is fair to say that interest in the subject seems to have waned, despite the recent intense concern over private foreign investment issues. A number of possible explanations come to mind, but they need to be carefully considered before being adopted. It may be, for instance, that, at least in the OECD countries, MNEs nowadays refrain from the more egregious types of actions that might have raised questions before CIME. Or it may well be that the changed climate of opinion does not encourage trade unions or governments to take up such cases. The question is important and needs to be closely studied.

41. Coming now to the possibility of a future revival in the application of the Guidelines, it may be suggested that, in the context of current conditions, the existing institutional machinery appears exceedingly heavy. CIME is too big, its procedures are too slow, the likelihood that any particular case can be expeditiously addressed seems small. The machinery thus appears appropriate only for major cases, raising very important questions. Possible ways to lighten up existing institutions and procedures may have to be considered, so that cases that do not raise fundamental issues may also be dealt with. For instance, one can imagine CIME functioning in smaller "chambers" with respect to some of the tasks involved in the application of the Guidelines (e.g., clarifications) while of course retaining the "Plenary" for other procedures (or even for some sort of "appeal".) Combining the equal representation of sovereign states on a committee with flexible and adaptable methods of operation is not an easy task, but international practice has developed a number of ways to accomplish such feats.

42. A related question is the possibility of introducing new participants in the Guidelines process. The presence of business and trade union representatives in CIME has been very useful. Keeping in mind the danger that additional participants might make the entire process more unwieldy, one might also consider possible advantages. It may be that at this stage it would be appropriate to bring in some new and different perspectives. The NGOs, or at least some NGOs, are the obvious candidates. Any such opening, however, would have to be preceded by thorough consideration of possible problems, of the criteria to be applied for the choice of particular organisations, the procedures to be made applicable to them, the limits of their participation, and so on.

43. One may go further and, moving beyond the possible amendment of institutions and procedures, look at the prescriptions themselves, both as to subject matter and as to their formulation and effect. The former issue is obvious and is not inherently difficult; the types of activities in which MNEs engage today, their current methods of operation and other such topics would have to be considered in order to determine whether additional topics should be covered in the Guidelines. The latter issue, however, opens up difficult and controversial arenas. One might imagine a set of prescriptions where the interplay between general and specific rules might be different from that prevalent in the Guidelines. One may even consider variations as to the expected binding force of particular standards, as well: some of the prescriptions may retain their present character, while others may involve recommendations to the states concerned (or even commitments by them) to enact binding rules along the lines suggested by the standards. The interplay between rules of varying binding force is by now commonplace in many legal instruments (as well as in entire legal systems) and there is no reason why it should not be considered in a case such as this one.

44. Even more difficult is the question whether the present apportionment of responsibilities should be retained. As already noted, the Guidelines are addressed to enterprises, although states retain the option of adopting binding rules to the same effect at the national level. Action at the international level, beyond the issuance of clarifications or any additional recommendations, is not envisaged. While the standards are formulated and adopted at the international level, any action in application remains at the national level.

Yet, the proper functioning of a process of global integration (including the proper operation of the markets) may require not only national action, whether or not internationally co-ordinated, but also international action, in the areas affected by MNE activities (e.g., concerning the protection of competition or the environment.) The lack of any possibility of action at the international level leaves the field open, not only to possible market-distorting practices of MNEs but to actions to the same effect by the more powerful among the governments.

45. Speculations of this kind in no way imply a return to earlier conceptions and approaches justifying direct government regulation at the national or the international level. Moreover, the prospect of a multilateral agreement dealing with matters of FDI, at whatever level and in whichever framework, may shed a different light on the consideration of such possibilities. Adoption of the Guidelines, twenty-two years ago, was a major achievement because it signified the successful exercise of legal and institutional imagination by decision-makers. Is it possible to imagine today the adoption of standards and rules involving action at the international level? Obviously, it would not be an easy task to move in such a direction, where substantive difficulties would be compounded by institutional ones. Yet, the ultimate question may be whether present-day decision makers, in seeking to adapt the Guidelines to current conditions and needs, are able to exercise the same kind of legal and institutional imagination that was exercised less than a quarter century ago, when the Guidelines were adopted.