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# INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES

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Review of the 1976 Declaration  
and Decisions



**ORGANISATION  
FOR ECONOMIC CO-OPERATION  
AND DEVELOPMENT**

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**INVESTISSEMENT INTERNATIONAL  
ET ENTREPRISES MULTINATIONALES**

**Réexamen de la Déclaration  
et des Décisions de 1976**

REVIEW OF  
THE 1976 DECLARATION AND DECISIONS

on

GUIDELINES FOR  
MULTINATIONAL ENTERPRISES

NATIONAL TREATMENT

INTERNATIONAL INVESTMENT  
INCENTIVES AND DISINCENTIVES

CONSULTATION PROCEDURES

**ORGANISATION  
FOR ECONOMIC CO-OPERATION  
AND DEVELOPMENT**

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## **FOREWORD**

In 1976 when adopting the Declaration and Decisions on International Investment and Multinational Enterprises, OECD Governments took a significant initial step toward strengthening international co-operation in an important and complex area. The resulting instruments, which are interrelated, dealt respectively with Guidelines for Multinational Enterprises, National Treatment for firms under foreign control and co-operation in matters relating to the use of international investment incentives and disincentives. As agreed in 1976, these instruments were reviewed at the meeting of the OECD Council at Ministerial level which took place on 13th-14th June 1979. This review was carried out on the basis of the report of the OECD Committee on International Investment and Multinational Enterprises, which reflected on the first three years of experience with the 1976 instruments.

The Ministers concluded that the review has demonstrated the effectiveness of the 1976 instruments. These instruments have provided a sound basis for co-operation between governments, multinational enterprises and their employees and have become an important factor contributing to a favourable investment climate.

Recognising the interest of informing business, labour and the general public on these matters, the Ministers decided that the results of this review should be published. This publication thus includes the relevant portion of the Communiqué of the 1979 meeting of the OECD Council at Ministerial level, the specific actions taken by the Council at that time and the above-mentioned review report of the OECD's Committee on International Investment and Multinational Enterprises.

**SECTION OF THE COMMUNIQUE OF THE  
COUNCIL MEETING AT MINISTERIAL LEVEL  
ON 13th AND 14th JUNE 1979  
RELATING TO INTERNATIONAL INVESTMENT  
AND MULTINATIONAL ENTERPRISES**

The Ministers undertook the Review foreseen in the 1976 agreements on International Investment and Multinational Enterprises<sup>1</sup>. They noted with satisfaction that the three related instruments approved in 1976, dealing respectively with guidelines for multinational enterprises, national treatment for enterprises under foreign control and with incentives and disincentives for investment, have demonstrated their effectiveness as a framework for strengthened international co-operation in matters related to international investment and multinational enterprises not only for the Member governments but also for the business community and the labour organisations.

Ministers affirmed the continued commitment of their governments to the 1976 Declaration. They agreed to steps designed to further strengthen the effectiveness of their co-operation in future. In this connection, as regards the guidelines for multinational enterprises, where one addition is being introduced, the follow-up procedures at national and international levels are to be strengthened and developed further through additional arrangements for consultations with business and labour and for reporting. Ministers also approved new work to be undertaken on the use of investment incentives and disincentives and the international repercussions on other countries of such measures.

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1. Except the Turkish Government, which had not participated in the 1976 Declaration and abstained from the Decisions.

**CONCLUSIONS AND DECISIONS BY THE OECD  
COUNCIL MEETING AT MINISTERIAL LEVEL  
ON THE REVIEW OF THE 1976 DECLARATION  
AND DECISIONS ON INTERNATIONAL INVESTMENT  
AND MULTINATIONAL ENTERPRISES**

(13th June 1979)

“THE COUNCIL

- a) noted the introductory statements by the Secretary-General and the Chairman of the Committee on International Investment and Multinational Enterprises, Mr. von Dewitz, and the statements made in the course of the discussion by representatives of Member countries ;
- b) noted that the Governments of OECD countries<sup>1</sup> on the occasion of the meeting of the Council at Ministerial level have re-affirmed their 1976 Declaration on International Investment and Multinational Enterprises and have decided to review the Declaration again at the latest in . . . . . years;
- c) noted the revised version adopted by OECD governments of Paragraph 8 of the chapter on Employment and Industrial Relations of the Guidelines for Multinational Enterprises which reads as follows:

“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,

8. . . . .  
8. in the context of bona fide negotiations<sup>2</sup> with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to utilise a capacity to transfer the whole or part of an operating unit from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise;  
.....”

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1. Except the Turkish Government, which had not participated in the Declaration.

2. “Bona fide negotiations may include labour disputes as part of the process of negotiation. Whether or not labour disputes are so included will be determined by the law and prevailing employment practices of particular countries”.

- d) endorsed the Conclusions and Recommendations of the Report of the Committee on International Investment and Multinational Enterprises on the Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises [C (79)102(Final)];
- e) adopted the draft Revised Decision of the Council on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises as set out in Appendix I to [C (79)102(Final)]<sup>3</sup>;
- f) adopted the draft Revised Decision of the Council on National Treatment as set out in Appendix II to [C (79)102(Final)]<sup>3</sup>;
- g) adopted the draft Revised Decision of the Council on International Investment Incentives and Disincentives as set out in Appendix III to [C (79)102(Final)]<sup>3</sup>;
- h) invited the Secretary-General, for the next phase of the OECD activities on international investment and multinational enterprises, to propose, in consultation with the Committee on International Investment and Multinational Enterprises and in the light of the proposals for future work given in the Committee's Report to the Council, new terms of reference for the Committee, before the end of 1979;
- i) instructed the Committee on International Investment and Multinational Enterprises to submit by 30th June, 1982, a mid-term report on its work relating to the application of the Declaration and Decisions on International Investment and Multinational Enterprises;
- j) decided that this entry in its Minutes, the texts of the 1976 Declaration on International Investment and Multinational Enterprises, the Revised Decisions referred to in paragraphs e), f) and g) above, as well as the Report by the Committee, should be published."

<sup>3</sup> The Turkish Government abstained from the Decisions.

## APPENDIX I

# **REVISED DECISION OF THE COUNCIL ON INTER-GOVERNMENTAL CONSULTATION PROCEDURES ON THE GUIDELINES FOR MULTINATIONAL ENTERPRISES**

### THE COUNCIL,

Having regard to the Convention on the Organisation for Economic Co-operation and Development of 14th December, 1960 and, in particular, to Articles 2*d*), 3 and 5 *a*) thereof;

Having regard to the Resolution of the Council of 22nd December, 1976 on the Terms of Reference of the Committee on International Investment and Multinational Enterprises and, in particular to paragraph 2 thereof [C(76)209(Final)];

Taking note of the Declaration by the Governments of OECD Member countries of 21st June, 1976 in which they jointly recommend to multinational enterprises the observance of guidelines for multinational enterprises;

Having regard to the Decision of the Council of 21st June, 1976 on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises [C(76) 117];

Recognising the desirability of setting forth procedures by which consultations may take place on matters related to these guidelines;

Considering the Report on the Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises [C(79) 102(Final)];

On the proposal of the Committee on International Investment and Multinational Enterprises;

### DECIDES:

1. The Committee on International Investment and Multinational Enterprises (hereinafter called "the Committee") shall periodically or at the request of a Member country hold an exchange of views on matters related to the Guidelines and the experience gained in their application. The Committee shall be

responsible for clarification of the Guidelines. Clarification will be provided as required. The Committee shall periodically report to the Council on these matters.

2. The Committee shall periodically invite the Business and Industry Advisory Committee to OECD (BIAC) and the Trade Union Advisory Committee to OECD (TUAC) to express their views on matters related to the Guidelines. In addition, exchanges of views with the advisory bodies on these matters may be held upon request by the latter. The Committee shall take account of such views in its reports to the Council.

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

4. The Committee shall not reach conclusions on the conduct of individual enterprises.

5. Member countries may request that consultations be held in the Committee on any problem arising from the fact that multinational enterprises are made subject to conflicting requirements. Governments concerned will co-operate in good faith with a view to resolving such problems, either within the Committee or through other mutually acceptable arrangements.

6. This Decision shall be reviewed at the latest in five years. The Committee shall make proposals for this purpose as appropriate.

7. This Decision replaces Decision [C(76) 117].

## APPENDIX II

### REVISED DECISION OF THE COUNCIL ON NATIONAL TREATMENT

THE COUNCIL,

Having regard to the Convention on the Organisation for Economic Co-operation and Development of 14th December, 1960 and, in particular, to Articles 2 *c*), 2 *d*), 3 and 5 *a*) thereof;

Having regard to the Resolution of the Council of 22nd December, 1976 on the Terms of Reference of the Committee on International Investment and Multinational Enterprises and, in particular, to paragraph 2 thereof [C (76)209(Final)];

Taking note of the Declaration by the Governments of OECD Member countries of 21st June, 1976 on National Treatment;

Having regard to the Decision of the Council of 21st, June, 1976 on National Treatment [C (76) 118];

Considering that it is appropriate to establish within the Organisation suitable procedures for reviewing laws, regulations and administrative practices (hereinafter referred to as "measures") which depart from "National Treatment";

Considering the Report on the Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises [C (79) 102(Final)];

On the proposal of the Committee on International Investment and Multinational Enterprises;

DECIDES:

1. Measures taken by a Member country constituting exceptions to "National Treatment" (including measures restricting new investment by "Foreign-Controlled Enterprises" already established in their territory) in effect on 21st June, 1976 shall be notified to the Organisation within 60 days after that date.
2. Measures taken by a Member country constituting new exceptions to "National Treatment" (including measures restricting new investment by "Foreign-Controlled Enterprises" already established in their territory) taken

after 21st June, 1976 shall be notified to the Organisation within 30 days of their introduction together with the specific reasons therefor and the proposed duration thereof.

3. Measures introduced by a territorial subdivision of a Member country, pursuant to its independent powers, which constitute exceptions to "National Treatment", shall be notified to the Organisation by the Member country concerned, insofar as it has knowledge thereof, within 30 days of the responsible officials of the Member country obtaining such knowledge.

4. The Committee on International Investment and Multinational Enterprises (hereinafter called "the Committee") shall periodically review the application of "National Treatment" (including exceptions thereto) with a view to extending such application of "National Treatment". The Committee shall make proposals as and when necessary in this connection.

5. The Committee may periodically invite the Business and Industry Advisory Committee to OECD (BIAC) and the Trade Union Advisory Committee to OECD (TUAC) to express their views on matters related to National Treatment and shall take account of such views in its periodic reports to the Council.

6. The Committee shall act as a forum for consultations, at the request of a Member country, in respect of any matter related to this instrument and its implementation, including exceptions to "National Treatment" and their application.

7. Member countries shall provide to the Committee, upon its request, all relevant information concerning measures pertaining to the application of "National Treatment" and exceptions thereto.

8. This Decision shall be reviewed at the latest in five years. The Committee shall make proposals for this purpose as appropriate.

9. This Decision shall replace Decision [C(76) 118].

### APPENDIX III

## **REVISED DECISION OF THE COUNCIL ON INTERNATIONAL INVESTMENT INCENTIVES AND DISINCENTIVES**

#### THE COUNCIL,

Having regard to the Convention on the Organisation for Economic Co-operation and Development of 14th December, 1960 and, in particular, Articles 2 *c*), 2 *d*), 2 *e*), 3 and 5 *a*) thereof;

Having regard to the Resolution of the Council of 22nd December, 1976 on the Terms of Reference of the Committee on International Investment and Multinational Enterprises and, in particular, paragraph 2 thereof [C(76) 209(Final)];

Taking note of the Declaration by the Governments of OECD Member countries of 21st June, 1976 on International Investment Incentives and Disincentives;

Having regard to the Decision of the Council of 21st June, 1976 on International Investment Incentives and Disincentives [C(76) 119];

Considering the Report on the Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises [C(79) 102(Final)];

On the proposal of the Committee on International Investment and Multinational Enterprises;

#### DECIDES:

1. Consultations will take place in the framework of the Committee on International Investment and Multinational Enterprises at the request of a Member country which considers that its interests may be adversely affected by the impact on its flow of international direct investments of measures taken by another Member country specifically designed to provide incentives or disincentives for international direct investment. Having full regard to the national economic objectives of the measures and without prejudice to policies designed to redress regional imbalances, the purpose of the consultations will be to examine the possibility of reducing such effects to a minimum.

2. Member countries shall supply, under the consultation procedures, all permissible information relating to any measures being the subject of the consultation.
3. The Committee may periodically invite the Business and Industry Advisory Committee to OECD (BIAC) and the Trade Union Advisory Committee to OECD (TUAC) to express their views on matters relating to international investment incentives and disincentives and shall take account of these views in its periodic reports to the Council.
4. This Decision shall be reviewed at the latest in five years. The Committee on International Investment and Multinational Enterprises shall make proposals for this purpose as appropriate.
5. This Decision shall replace Decision [C(76) 119].

# REPORT BY THE COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES

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## **INTRODUCTION AND SUMMARY**

### **I. PURPOSE OF THE 1976 DECLARATION**

1. In June 1976, at the meeting of the OECD Council at Ministerial level, the Ministers, acting on behalf of their governments, adopted a Declaration on International Investment and Multinational Enterprises.<sup>1</sup> In this Declaration, the governments of OECD Member countries stated, *inter alia*, "that international investment has assumed increased importance in the world economy and has considerably contributed to the development of their countries"; "that multinational enterprises play an important role in this investment process"; and "that co-operation by Member countries can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic and social progress, and minimise and resolve difficulties which may arise from their various operations".

2. The aim of the Declaration was to promote strengthening of co-operation among Member countries in the area of international investment and multinational enterprises through interrelated instruments (dealing respectively with Guidelines for Multinational Enterprises, National Treatment for firms under foreign control and International Investment Incentives and Disincentives) which together were seen as constructing a balanced framework within which the OECD countries would organise their co-operation and consultation on issues relating to international investment and multinational enterprises. It was further foreseen that continuing endeavours within the OECD might lead to the conclusion of additional international arrangements and agreements in this field.

3. In viewing the pioneering approach taken in the 1976 Declaration and the accompanying Council Decisions, it was decided that within an initial period of experience of three years the Committee on International Investment and Multinational Enterprises (hereinafter called "the IME Committee") – which is the body in OECD responsible for carrying out, *inter alia*, the tasks assigned to it in the Declaration and Decisions – should make proposals and otherwise assist the Council in undertaking a review of these texts and instruments with a view to improving the effectiveness of international economic co-operation among Member countries. This Report to the Council presents the results of the IME Committee's work on the Review, which is based on the experience of the Committee and of the Member governments with the instruments and upon frequent exchanges of views it has held with the business community and labour

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1. Except the Turkish Government, which did not participate in the 1976 Declaration and abstained from the Decisions.

organisations which are represented in the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC). The Report is being published as a contribution to improved public understanding of current issues of international importance in the field of international investment and multinational enterprises and of the common approach to their solution being followed by OECD Member countries.

4. Since 1976, the issues relating to international investment and multinational enterprises which were identified in the Ministerial Declaration have retained their importance. Overall economic growth for the OECD group of countries remains relatively weak, and most of the economies of Member countries are still experiencing below normal productivity gains, sizeable under-utilisation of productive capacities, high levels of unemployment, and rates of inflation generally remaining at unacceptable levels and, in some cases, threatening to get higher. Direct investment is not buoyant, and enterprises remain inhibited by continuing uncertainties in the economic environment. The climate of slow growth exacerbates the problems associated with the modernisation and adaptation of production structures to new technologies and market conditions. While the above conditions relate to total direct investment, domestic as well as international, they underline the continued economic importance of achieving and sustaining a favourable climate for international direct investment by encouraging the positive contributions of such investment and minimising or resolving the difficulties which may arise, which was a basic objective of the 1976 Declaration and Decisions.

5. This Report contains a review of the Organisation's experience since 1976 with the three instruments, together with proposals for their follow-up on a continuing basis and for a broadening of international co-operation in matters relating to international investment. In presenting this Report to the OECD Council meeting at Ministerial level in June 1979, the IME Committee wishes to record its view that those instruments are a positive factor in maintaining conditions favourable to the development of such investment and increasing the basis of mutual confidence between multinational enterprises and States.

6. This Report, which does not attempt to deal exhaustively with all aspects of the issues considered by the IME Committee since 1976, discusses in turn the Guidelines for Multinational Enterprises and the related Intergovernmental Consultation Procedures, the National Treatment instruments, and the International Investment Incentives and Disincentives instruments and a related programme of future work on investment policy issues. Each chapter sets out, in a concluding section, the proposals of the IME Committee for further strengthening international co-operation in the areas covered by each of the instruments.

## II. MAIN CONCLUSIONS

### *a) The Guidelines*

7. The basic conclusion to which the review of experience with the Guidelines for Multinational Enterprises presented in Chapter I leads is that the Guidelines offer an efficient and realistic framework for further encouragement of the contribution which multinational enterprises can make to economic and

social progress and for the reduction and resolution of the difficulties to which the operations of multinational enterprises may give rise. Member governments have indicated that on the basis of available information there is a general willingness on the part of MNEs to observe the Guidelines. Even so, more time and continued efforts by governments and by business are needed for the Guidelines to become more widely known and for their contents to become an increasing part of day-to-day management practice. The Committee considers that experience to date has underlined the value of the Guidelines and that their further promotion would be best served by providing enterprises with a stable framework. For these reasons, the Committee proposes that only one change be made to the Guidelines at this time in order to cover an issue that was not foreseen when the Guidelines were drafted.

8. The main thrust of the IME Committee's proposals is directed at the further strengthening of the use made of the Guidelines – what is termed in this Report the “follow-up” of the 1976 Declaration. On the basis of its experience in dealing with issues arising under the Guidelines which have been put forward by governments and the advisory bodies, the Committee has realised the need for providing explanatory comments as to the scope and meaning of the texts of the Guidelines. The comments included in Chapter I of this Report, which should not be considered as modifying the Guidelines, have the purpose of explaining in more detail the meaning of the existing provisions in order to provide guidance to the parties concerned when using the Guidelines. Among the issues addressed by these comments are the following (the relevant paragraph numbers of Chapter I are noted in brackets): the responsibilities of parent companies [41-42], general policy objectives of Member countries with respect to multinational enterprises [43-45], disclosure of information [46-50], restrictive business practices [51-55], transfer pricing [58], the right of employees to be represented by trade unions and other bona fide organisations of employees [60-62], provision of information to employees [63-65], provisions relating to changes in operations which have major effects upon the livelihood of employees [66-67], unfair influence in bona fide negotiations with employees [68-70], access to decision makers [71-72], and research and development activities [73-74].

9. With the aim of further promoting reference to, and use of, the Guidelines, the Committee makes a number of additional proposals for the future follow-up procedures. It is, indeed, important that the Guidelines should be seen as setting a framework for a continuing follow-up process under the aegis of the IME Committee, to which other bodies of the OECD have a contribution to make. In this connection, great importance attaches to the active and sustained support by multinational enterprises both individually and through their organisations at the national and international levels. Enterprises are recommended to state publicly, preferably in their annual reports, their acceptance of the Guidelines. Furthermore, enterprises are invited to include in their subsequent annual reports brief statements on their experience with the Guidelines, which may contain mention of steps taken with respect to their observance as well as any difficulties experienced in this respect. Also, Member governments will provide appropriate facilities and arrangements for handling matters and problems arising with regard to the Guidelines.

10. Acknowledging the great benefit which has been derived from the frequent contacts of both a formal and an informal nature which the Committee and its Working Groups have held with the two advisory bodies, BIAC and

TUAC, the Committee stresses its intention that such contacts be continued and that it will take a positive attitude to requests by these advisory bodies for holding an exchange of views on any matter related to the Guidelines. Consequently, it is proposing that the Decision on Intergovernmental Consultation Procedures be amended to provide explicitly that exchanges of views with the advisory bodies on these matters also may be held upon request by the latter. In addition, the Committee is proposing that this Decision be amended to state that an individual enterprise, if it so wishes, will be given the opportunity to express its views either orally or in writing on issues concerning the Guidelines involving its interests.

11. With respect to specific matters arising under the Guidelines the Committee urges that such matters first be raised, discussed, and, if possible, resolved at the national level and, when appropriate, such efforts be pursued at the bilateral level. Where issues related to the Guidelines are identified by governments and/or one of the advisory bodies the matter may be raised with the Committee. The Committee is proposing that the above mentioned Decision be further amended to state specifically that the Committee shall be responsible for clarification of the Guidelines. The Committee notes its intention to respond in a timely manner to further requests for clarifications. Where such responses are possible, they will be given to the interested parties, as appropriate, through informal contacts or in the context of formal consultations with the advisory bodies as well as in the periodic reports of the Committee to the Council.

12. In addition, the Committee is making several proposals with respect to reporting. Member governments will report to the Organisation every two years on their experience and pertinent developments at the national level in all matters related to the Guidelines. At the international level, in addition to the next formal review of the 1976 Declaration and Decisions, which is envisaged to take place within five years, it is proposed that in 1982 the Committee make and recommend for publication a mid-term report to the Council on its experience with the application of the Guidelines as derived from the intergovernmental consultation procedures, reporting by Member governments and related work by other bodies within the Organisation, and on the continued follow-up of the other elements of the Declaration and Decisions. As noted above, this Report to the Council would constitute a vehicle (as is the case with the present Review Report) for providing additional information and explanations for the enterprises, employees and other parties in using the Guidelines.

#### *b) National Treatment*

13. The IME Committee's review of the instruments on National Treatment for foreign-controlled enterprises, which is the subject of Chapter II, shows that progress has been made in strengthening international co-operation in this important aspect of the international investment climate. In particular, Member governments have co-operated in reporting measures which exist in their countries which constitute exceptions to National Treatment and in explaining the nature of such exceptions and how they are applied in practice. As a result of the work completed to date by the Committee, a notably greater degree of transparency with respect to exceptions to National Treatment has been achieved, particularly those exceptions which are formalised in the laws and regulations of Member countries.

14. Much still remains to be done, however, to further improve transparency where certain types of exceptions are concerned, especially those which rely upon administrative practices. It is in these areas that the IME Committee intends to concentrate its work in the next phase. But the Committee has been encouraged to note that, as far as the information available to it shows, no new exceptions to the principle of National Treatment have been put in place since 1976, and certain exceptions in some countries have been reduced in scope or abolished. The process of focusing the attention of national administrations upon questions of National Treatment which has resulted from the Committee's activities with respect to this instrument should be beneficial in that it may lead to fresh consideration of the justification and the need for certain exceptions. The association, through periodic consultation, of business and labour, represented by BIAC and TUAC, with this work is being provided for in the future; and this should make a valuable contribution to the Committee's work in this area.

15. The Committee notes that no country has availed itself, since 1976, of the possibility for formal consultations on a matter related to this instrument but believes the existence of such a facility in the Decision provides an important safeguard for Member countries.

16. The Committee concludes this chapter of its Review by re-affirming, in accordance with the 1976 Decision, that the process of examination and discussion of National Treatment questions will be carried out with a view to extending the application of National Treatment.

*c) International Investment Incentives and Disincentives and the medium-term work programme on investment policy issues*

17. Chapter III reviews the International Investment Incentives and Disincentives instruments. The part of the 1976 Declaration relating to incentives and disincentives is an integral part of a balanced programme for strengthening co-operation between Member countries, notably by the recognition thus given to the need for countries to give due weight to the interests of other countries which might be affected by incentive and disincentive measures applied by a Member country to international investments and to make such measures as transparent as possible. The Decision accompanying this part of the Declaration provided for consultations at the request of a Member country which considered its interests may be adversely affected by the impact on its flow of international direct investments of such measures taken by another Member country. As was the case for the National Treatment consultation facility, the IME Committee notes that no country has availed itself of this possibility since 1976 but believes that the existence of this facility provides an important safeguard for Member countries for problems which might arise in this area.

18. The Committee feels the need to carry international co-operation further in this area. It would be detrimental to international co-operation and to the efficient allocation of economic resources available for investment if there were increasing conflicts due to an excessive use of incentives and disincentives to influence international investment decisions.

19. The Committee accordingly underlines the importance of the provisions relating to international investment incentives and disincentives in the

1976 Declaration, and recommends a flexible and pragmatic approach in applying the procedures of the respective Decision to resolve any difficulties which may develop. In addition, provision is being made for periodic exchanges of views with BIAC and TUAC on matters relating to such measures, and these should prove very useful for the future work of the Committee in this area.

20. In the second part of Chapter III the IME Committee proposes a programme of work in the area of incentives and disincentives with regard to international direct investment. More specifically, it is intended that the IME Committee will undertake, as a first step, an analytical study of the effects of governmental incentives and disincentives on the international investment process. This analysis should provide indications of the impact of such measures on international direct investment flows and of the effects of competition between governments in the area of incentives and disincentives for direct investments.

21. Chapter III concludes by citing the other areas which have tentatively been identified as elements of the Committee's medium-term work programme on policy issues for international co-operation in the area of international direct investment. These areas are as follows: analysis of the effects on home and host country economies of international direct investments; comparison of the scope of, and the experience of Member governments with, bilateral investment treaties; the implications of recent trends in limited-equity and non-equity forms of international direct investments; and periodical analytical studies of recent trends in international direct investment flows.

### **III. SUMMARY OF PROVISIONS FOR REPORTING AND THE NEXT REVIEW OF THE 1976 DECLARATION AND DECISIONS**

22. The Committee proposes that the next formal review of the Declaration and Decisions on International Investment and Multinational Enterprises by the Ministerial Council be held within five years. The Committee also proposes that it make and recommend for publication a mid-term progress report to the Council in 1982, this report covering the experience of the Committee and the Member governments in carrying out the proposals contained in the 1979 Review Report and, more generally, the further implementation of the 1976 instruments. With respect to the Guidelines, Member governments will submit to the OECD every two years reports on experience at the national level in all matters related to the Guidelines. These reports will provide an important source of information in this area for the Committee's mid-term report to the Council and its subsequent Review Report to the Ministerial Council.

CHAPTER I

**THE GUIDELINES FOR MULTINATIONAL  
ENTERPRISES**

**I. GENERAL ORIENTATION OF THE REVIEW**

23. A convenient starting point for a review of the Guidelines is the statement in paragraph 6 of their introductory part which remains the basis for the exercise. Paragraph 6 states that: "the Guidelines 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."

24. There appears to be a general willingness on the part of multinational enterprises to apply the Guidelines and, although the present Review is taking place a relatively short time since these instruments were adopted, a process of acceptance and use of the Guidelines is under way. A full assessment of the extent to which the behaviour of multinational enterprises is in accord with that recommended by the Guidelines will call for a longer period of experience. Meanwhile, an increased and continuing effort is needed to bring the Guidelines to the attention of the large number of multinational enterprises operating in OECD Member countries, to explain their role and purpose and to encourage their integration into management thinking and practice. Users of the Guidelines should be able to benefit from a stable framework for the future. Consequently, except in one instance where an addition to the Guidelines appeared to be desirable in the light of special circumstances not foreseen at the time of the drafting of the Guidelines, no changes in the text are proposed in this report. This fact should also be of value in reinforcing the credibility of the Guidelines.

25. Given the above considerations, the major emphasis of this Review of the Guidelines is on improving their implementation at both the national and international levels. There is, first, a need for increased promotional and educational efforts to increase the awareness, understanding, acceptance and use

of the Guidelines by the enterprises to whom they are directed as well as by their employees and the general public. Second, there is the need to ensure that there are appropriate facilities and procedures at the national and, in particular, the international levels to handle matters and issues that may arise as the Guidelines are applied within the Member countries. Recommendations directed at improving implementation in both these areas are developed in the following sections.

26. The fact that the Guidelines must at one and the same time be of practical relevance in the specific contexts in which each enterprise operates and yet retain an overall applicability for the OECD area with its diversity of legal systems and national practices leads inevitably to a formulation in fairly general terms of the principles contained in each of the Guidelines. Experience at the national and international levels has revealed the existence of areas of uncertainty as to the meaning of certain provisions of the Guidelines which is due in part to the general wording utilised. After considering these areas of uncertainty, the Committee has decided it would be useful to seek to develop explanatory comments in response to some of the questions which have been raised. These comments, which are to be found in Section IV, should not be considered as modifying the Guidelines. Their purpose is to explain in more detail the meaning of the existing provisions in order to provide guidance to the parties concerned when using the Guidelines.

## **II. RELATIONSHIP BETWEEN THE GUIDELINES AND NEGOTIATIONS IN OTHER INTERNATIONAL FORA**

27. While addressed to enterprises operating in Member countries – where most of the parent companies of MNEs are located – the Guidelines have a *de facto* influence extending beyond the OECD area. As stated in *paragraph 3* of the Introduction to the Guidelines, Member countries are aware of the interests of non-Member countries in this regard and confirm their willingness to contribute in co-operative efforts with these countries in all matters dealt with in the OECD Ministerial Declaration on International Investment and Multinational Enterprises. Member countries continue to support and to participate actively in negotiations on related issues in other international fora.

28. Since 1976, other international organisations have taken up various issues related to the activities of MNEs. The Governing Body of the International Labour Organisation has agreed to a Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. In the framework of the United Nations, a Code of Conduct relating to the activities of MNEs is being negotiated whilst, as part of the UNCTAD negotiations, an international Code of Conduct for the transfer of technology and multilateral principles and rules concerning restrictive business practices are envisaged. In ECOSOC work is underway on an international agreement to prevent corrupt practices in connection with international commercial transactions.

29. There is clearly a link between these negotiations in other international bodies and the OECD Guidelines, although there is no necessary symmetry between them. Thus, the results of the OECD's work, being the first to be made

public and to be applied, have had an impact on work going on elsewhere, either on specific subjects covered by one of the OECD Guidelines or on the general approach adopted. At the same time, the context of negotiations in other fora differs from that which prevails inside the group of OECD countries so that each set of international negotiations has its own specificity.

30. The ILO Tripartite Declaration, which OECD Member countries as well as business and trade union representatives have supported, has a different geographical scope than the Guidelines. Also, while the OECD Guidelines cover all major aspects of corporate behaviour, the ILO Declaration sets out principles only in the fields of employment, training, conditions of work and industrial relations which governments, employers and workers, as well as multinational enterprises, are recommended to observe. Wherever these principles refer to the behaviour expected from enterprises, they parallel the OECD Guidelines and do not conflict with them. They can, therefore, be of use in relation to the OECD Guidelines to the extent that they are of a greater degree of elaboration. It must, however, be borne in mind that the responsibilities for the follow-up procedures of the OECD Guidelines and of the ILO Declaration are institutionally separate.

### **III. ACTION BY MEMBER GOVERNMENTS AND BY BUSINESS AND LABOUR REPRESENTATIVES**

31. The Member governments took steps after 1976 to promote better knowledge and understanding of the Guidelines<sup>2</sup>. Some promotional efforts reported to the Organisation include dissemination of the Guidelines in national languages, speeches by government officials, letters to representatives of individual companies and to business and labour organisations and acts or resolutions of parliamentary bodies. Beyond these initial efforts, a few governments have undertaken – either on their own behalf or jointly with business organisations – surveys of MNE adherence to the Guidelines and for this purpose have sent questionnaires to a representative number of multinational enterprises operating on their territory.

32. In many Member countries special arrangements have been made either by setting up new mechanisms or adapting already existing procedures, such as inter-ministerial groups or advisory committees, for exchanging views on a regular basis with the parties concerned on matters related to the Guidelines and other parts of the 1976 instruments. Some governments have reported that they take into account the Guidelines when determining their policies. The Guidelines have also been used on occasions as points of reference at the national or bilateral level with respect to the activities of multinational enterprises.

33. Business and labour organisations have also been active in promoting the Guidelines. Acting through BIAC and in statements issued at the national level, business organisations in Member countries have expressed their support of the 1976 instruments and recommended that their constituent enterprises observe the Guidelines. The business community has made considerable efforts

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2. A more detailed description of promotional action by Member governments is given in Annex I.

to disseminate and to promote the Guidelines and to identify and to seek to resolve problems which may arise in their application through the organisation of seminars and workshops and through the elaboration of comments and annotations on different chapters of the Guidelines. BIAC has established a special Committee on Multinational Enterprises to co-operate in the work of the OECD Committee on International Investment and Multinational Enterprises and its Working Groups. This Committee has carried out an enquiry among a number of firms operating in OECD countries on the extent to which the Guidelines on disclosure of information is being implemented and on the problems met with in using it.

34. Labour organisations, through TUAC, considered the Guidelines in 1976 as an initial important step taken by the OECD Member governments and they subsequently have undertaken a major effort to distribute and promote the Guidelines widely to employee representatives at the national and local level, who in turn have referred to the Guidelines on a number of occasions in negotiations with multinational enterprises. TUAC has set up a Working Group on Multinational Enterprises which is co-ordinating TUAC work on matters related to the Guidelines, in particular, preparing for the exchanges of views between TUAC and the Committee and its Working Group on the Guidelines and considering and, where necessary, passing on to the Committee questions and problems encountered in the application of the Guidelines, especially with respect to the chapter on Employment and Industrial Relations.

#### **IV. REVIEW OF EACH CHAPTER OF THE GUIDELINES**

35. Proceeding chapter by chapter, the Report does not intend to deal exhaustively with all points in the Guidelines. Rather, stress is given to those aspects which have given rise to questions and where the Committee was able to gather experience through its consultation procedures and from the information provided by governments and the advisory bodies, BIAC and TUAC. Where relevant, the work of other OECD Committees is also taken into account. The resulting emphasis on certain chapters should not obscure the fact that the Member governments view the Guidelines as a comprehensive set of standards of good practice for firms which should be seen as a balanced whole.

##### *Introductory part (paragraphs 1-11)*

36. As stated in Section I of the 1976 Declaration, these introductory considerations and understandings form an integral part of the Guidelines and are necessary for a proper comprehension of the nature of the whole exercise. Some points in this regard merit underlining now that the exercise has entered the operational phase.

37. *Paragraph 6* of the Introduction is central to the understanding of the purpose and the nature of the Guidelines. These Guidelines take into account the problems which can arise because of the international structure of multinational enterprises by laying down standards for the activities of these enterprises and, where relevant, of national enterprises in the different Member countries. They constitute, together with the other parts of the 1976 Declaration, a key element of a favourable investment climate by providing a stronger

basis of mutual confidence between enterprises and States. While observance of the Guidelines is voluntary and not legally enforceable, they carry the weight of a joint recommendation by OECD governments addressed to MNEs which represent their firm expectation for MNE behaviour. The Guidelines received the support of organisations representing the business community, and a considerable number of major enterprises have publicly stated their acceptance. The Guidelines are also being used as a point of reference by workers' organisations. The follow-up action provided in the Decision on Intergovernmental Consultation Procedures on the Guidelines is designed to enhance their effectiveness, and Section V of this chapter sets out further recommendations in this regard.

38. As is stated in *paragraph 7* of the Introduction to the Guidelines, every State retains the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and the international agreements to which it has subscribed. Multinational enterprises are subject to the laws of these countries, and the Guidelines are no substitute for national laws. Their role, rather, is to introduce, where relevant, supplementary standards of behaviour of a non-legal character, in particular with respect to the international scope of operations of these enterprises.

39. *Paragraph 8* deals with two aspects of importance to the application of the Guidelines as a whole. First, it reflects the understanding of the Committee of what is meant by the term "multinational enterprise". *Paragraph 8* is couched in non-legal language and the experience of the Committee has demonstrated the merits of such a flexible approach with an enumeration of some guiding criteria rather than a precise definition which would fit less well the diversity of situations found in the real world. The Guidelines are addressed to entities which can be considered as "enterprises" (private, state, 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." These criteria cover a broad range of multinational activities and arrangements, which can be based on equity participation according to the traditional approach to international direct investment, but the same result could be achieved by other means not necessarily including an equity capital element. Second, *paragraph 8* notes that the various entities, which include parent companies, local subsidiaries, as well as intermediary levels of the organisations, are expected to co-operate and to provide assistance to one another as necessary to facilitate the observance of the Guidelines, taking into account the degree of autonomy or of dependence of each entity in practice. To the extent that parent companies actually exercise control over the activities of their subsidiaries they have a responsibility for the observance of the Guidelines by those subsidiaries.

40. It should be noted that in applying the Guidelines, it is not necessary in every instance to seek to determine whether or not the nature of contractual links of a non-equity character between separate entities leads to the conclusion that such entities viewed collectively constitute an MNE within the meaning of the Guidelines. *Paragraph 9* of the Introduction clearly states that the Guidelines, wherever relevant, "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 for both".

41. While arising out of the text of *paragraph 8*, the question as to what extent observance of the Guidelines implies responsibilities for the parent companies and/or for the subsidiaries, respectively, is important to the Guidelines as a whole. Considering, first, non-financial responsibilities, the Committee noted that one area in the Guidelines where the parent company clearly is being addressed directly concerns the chapter on Disclosure of Information, which refers to the publication of "a sufficient body of factual information on the structure, activities and policies of the enterprises as a whole" that is, information which must be gathered and prepared by the parent company. In other areas such as competition and taxation, where it may be important for the specific purposes of the relevant chapters of the Guidelines to obtain a full picture of the operations of the enterprise as a whole, enterprises, including parent companies, should co-operate with national authorities, inter alia, by providing information. The chapter on Employment and Industrial Relations, particularly in its paragraphs 3, 6 and 9, also raises matters germane to the criteria for assessing the respective degrees of responsibility of parents and subsidiaries for facilitating observance of the Guidelines, which are considered at more length in relation to that particular chapter.

42. The Committee also considered the question whether good practice in conformity with observance of the Guidelines should, in some instances, lead parent companies to assume certain financial obligations of their subsidiaries. The Committee has found that this question raises difficult and complex problems in view of the principle embodied in national laws of all Member countries of limited legal liability of companies. The Committee wishes to underline that the Guidelines, according to their nature described in paragraph 38 above, introduce, where relevant, supplementary standards of non-legal character and thus do not set standards which could be seen as superseding or substituting for national laws governing corporate liability, which are part of the legal basis on which companies operate. For this reason, in the view of the Committee, the behaviour recommended by the Guidelines in this context cannot be seen in a legal framework and does not imply an unqualified principle of parent company responsibility. Nonetheless, the Committee has noted that parent companies on a voluntary basis have assumed in certain cases such financial responsibility for a subsidiary. The Committee considers generalization in this area difficult, but the question of such responsibility as a matter of good management practice – in light of such factors as e.g. aspects of the relationship between the parent company and the subsidiary and the conduct of the parent company – consistent with observance of the Guidelines, could arise in special circumstances. The question of assumption of responsibility, for example, could be of particular relevance in the circumstances set out in paragraph 6 of the Guidelines on Employment and Industrial Relations relating to important changes in the operations of a firm and the co-operation as to the mitigation of resulting adverse effects.

#### *General policies*

43. *Paragraphs 1 and 2* of this chapter of the Guidelines recommend MNEs "to take fully into account the established general policy objectives of the Member countries in which they operate" and, in particular, "to give due consideration to those countries' aims and priorities". Paragraph 2 identifies a number of areas of aims and priorities. Specific cases have shown that these

provisions are of particular relevance when a local subsidiary of an MNE is to be closed down. In this context a prudent company would be well advised to seek any necessary clarification of government policies through advance consultations with the government concerned. In the view of the Committee, paragraphs 1 and 2 of this chapter of the Guidelines do not affect the right of the enterprise to reach decisions with respect to cutting back or terminating operations in a given plant. But they indicate certain considerations which should be given due weight in making such a decision. If a firm does proceed in this manner, then it clearly follows that the nature of the final decision will be influenced by the considerations set out in paragraphs 1 and 2 whilst respecting the firm's own judgement.

44. If MNEs are to take fully into account Member countries' policy objectives and aims as stated in paragraphs 1 and 2, it is understood that governments make such aims and objectives as clear, stable and understandable to management as possible. Where host countries' national legislation or the general framework of their policies may affect disinvestment, *paragraph 7* of the Introduction of the Guidelines is of relevance. Although the right of each state to prescribe the conditions under which multinational enterprises operate within its jurisdiction remains unaffected, such laws, regulations and policies are subject to international law and international agreements and should respect contractual obligations to which a country has subscribed. It also means that these laws, regulations and policies will be consistent with Member country responsibilities to treat enterprises equitably.

45. The question has been raised whether *paragraphs 4 and 5* of the General Policies chapter have special relevance in cases where the decision to close down a subsidiary and to transfer its activities abroad concerns a subsidiary that can be considered still to be a profitable one. Consideration of this question demonstrated to the Committee how difficult it can be in practice to decide whether a particular entity is profitable or not. Accounting data differ according to differences in valuation and the accounting standards that are adopted and widely diverging estimates can be made, in particular, of the future profitability of the subsidiary. When there is clear evidence of the profitability of a subsidiary, this calls for special consideration by a company when it is contemplating the closure of that subsidiary, although other factors may be of importance and this cannot restrict the right of the company to reach its decision. Paragraphs 4 and 5, read together, can be understood to be in favour of a certain degree of integration of the component entities of an MNE into the economic context of the countries in which they operate. On the other hand, the insertion of the words "consistent with the need for specialisation and sound commercial practices" in paragraph 5 was intended to provide for giving due consideration to the interests of an MNE as a whole, as well as the situation of any of its entities. The Guidelines do not call for the freezing of the existing structures of multinational enterprises nor do they infringe the freedom of MNEs to take decisions to divest in the furtherance of global strategies judged to be in the best interests of the firm as a whole. But this freedom is circumscribed according to national law and contractual obligations entered into by firms and affected by paragraphs 1 and 2 of the chapter on General Policies as described above.

## *Disclosure of information*

46. "The complexity of these multinational enterprises and the difficulty of clearly perceiving their diverse structures, operations and policies sometimes give rise to concern" (paragraph 1 of Introduction to the Guidelines). The purpose of the chapter on Disclosure of Information was to give greater transparency to the activities of MNEs through the publication of a greater volume of information, "presented in a form suited to improve public understanding". In the opinion of the business community also, as conveyed to the Committee notably by BIAC, this is an area where management should make best efforts to show results. Here again, however, it must be recognised that the time which has elapsed since the summer of 1976 when the Guidelines were made public is fairly short – in fact, two accounting years – for implementing any changes needed to bring the practice of companies into line with the chapter on disclosure.

47. On the basis of information available to the Committee, it can be seen that progress has been achieved by a number of large companies whose annual or other published reports reflect all or most of the disclosure standards of the Guidelines. However, the observance of these disclosure standards to date appears to be considerably less widespread among the medium and smaller sized MNEs, which may be due to their relative size in the economic context of their operations and to cost. Even among the larger firms there are considerable differences according to the home country of the parent, reflecting historical differences in prevailing practices. Thus, the Committee believes that significant further efforts will be needed to encourage wide observance of the recommended standards.

48. In its discussions with BIAC and through the reports it received from Member governments, the Committee noted a number of concerns some enterprises expressed with respect to this chapter, some of which reflect difficulties of adjustments while others reveal problems of a more conceptual nature. The following comments refer to the problem areas that have been identified:

- a) Some enterprises considered that the disclosure of certain types of information (cf. operating results by geographical area) may result in competitive disadvantages, especially for firms which have only one or a few customers in a particular country or region. In this regard, the Guidelines on disclosure contain a certain number of qualifications which make allowances for the specific situations of companies in the context of their operations. These qualifications, however, are not intended, other than in very exceptional circumstances, as complete or permanent exemptions from certain disclosure standards and should be invoked only for valid reasons.
- b) Reference was also made by enterprises to cost and time factors involved in changing or supplementing existing reporting practices, in particular, for smaller companies with limited international experience. As cost and the relative size of the company are specifically mentioned as qualifications in the chapter on Disclosure of Information, the Guidelines provide the necessary degree of flexibility for the adjustment of reporting practices over a reasonable period of time.

- c) Certain enterprises also referred to the diversity of national reporting and accounting requirements with respect to the items contained in the disclosure Guidelines. The recommendations in the chapter, as explicitly stated in the text, were intended to supplement, where necessary, the disclosure and reporting requirements laid down by national law to increase public understanding "on the structure, activities and the policies of the enterprises as a whole". National requirements which are less comprehensive should not prevent MNEs from taking action under the Guidelines. Given the present absence of internationally-agreed accounting standards, such reports concerning the enterprises as a whole will usually follow the accounting principles generally accepted in the country in which the parent company or a controlling entity at the intermediary levels is domiciled. For the use of such information it is important, according to item (ix) of the chapter on Disclosure of Information, that companies state the accounting principles which have been used.
- d) Problems were also raised with respect to segmentation of information. In particular, a number of firms expressed doubts as to whether disclosure by "geographical area" was always the most appropriate method of segmentation. These problems of geographical breakdown should, however, not be exaggerated. As explained in the footnote to the text, the Guidelines leave some degree of flexibility for companies to determine the most appropriate geographical breakdown. This may be an issue where the interests of some users of the published data differ in some cases from those of the enterprises, which may find a line of business approach more useful for internal purposes. It has to be emphasized, however, that the Guidelines reflect the value Member governments place on geographical segmentation of information.

49. The Committee is presently exploring the ways and means of improving comparability or achieving harmonisation of the accounting concepts referred to in the Disclosure of Information Guidelines. For this purpose, inter alia, an ad hoc technical Working Group on Accounting Standards has been set up and is conducting a survey on the accounting requirements, standards and practices in Member countries which are of particular relevance to the Guidelines so as to be in a position to advise the Committee, by the autumn of 1979, on the feasibility of OECD undertaking further work in this area.

50. Meanwhile, the Committee is aware that the standards laid down by the OECD for disclosure go beyond actual practice in most Member countries and that adjustment to these standards in some cases presents difficulties and costs. Nevertheless, the Committee believes these standards are reasonable and are sufficiently flexible. It confirms the importance which Member countries attach to the objectives of this chapter of the Guidelines and reiterates its view that companies which have not yet taken steps to observe the disclosure Guidelines, making due allowances for adjustment difficulties, should make every effort to reflect in their next annual published accounts the Disclosure of Information Guidelines. It invites governments and the business community to undertake further promotional and educational efforts so as to enhance the effectiveness of the Guidelines in this area and, in recognition of the fundamental importance of this chapter of the Guidelines, intends to pay continuing attention to this matter.

## *Competition*

51. The restrictive business practices of multinational enterprises do not differ in form from those operated by purely national enterprises but may have a more significant impact on trade and competition due to the fact that multinational enterprises generally tend to wield greater market power, that they play a relatively greater role in the process of national and international concentration and that the restrictive business practices they engage in have more often an international character.

52. The text of the chapter on Competition of the Guidelines reflects the major areas of concern shared by Member governments where MNEs are involved and represents a common approach to competition problems by countries in the OECD area. Already this chapter of the Guidelines has proved to be useful to several governments which have referred to it when dealing with international cartels or with problems related to securing information on restrictive business practices of MNEs.

53. It is recognised that Guidelines dealing with complex legal and economic concepts, such as abuse of a dominant position, adverse effects on competition and unreasonably differentiated pricing policies, are not sufficient in themselves to provide precise rules for business executives to follow in specific circumstances. Under the national law of various countries, these concepts have been given meaning through interpretation by the competent tribunals. This is why supporting action by Member governments at national level is needed, together with complementary arrangements and agreements for inter-governmental co-operation.

54. Thus, the Committee of Experts on Restrictive Business Practices, in its report on Restrictive Business Practices of Multinational Enterprises published in 1977, has put forward proposals for follow-up action at the national and international levels. Most of these proposals are incorporated in the Recommendation of the OECD Council of 20th July, 1978 which is annexed to the present report (Annex II). This Recommendation invites governments, inter alia, to adopt new or to supplement existing measures on restrictive business practices with particular emphasis on those areas covered by the competition Guidelines.

55. The Committee of Experts on Restrictive Business Practices is at present engaged in a study of the obstacles to, and jurisdictional issues involved in, the collection of information abroad necessary for the control of restrictive business practices (including those obstacles and issues related to the effects doctrine where it is applied) and of forms of international co-operation, in this connection. The IME Committee welcomes this initiative, which should lead to a greater degree of inter-governmental co-operation in an important area of direct relevance to OECD activities concerning MNEs.

## *Financing*

56. No particular issues in the area covered by the chapter on Financing have been brought to the attention of the Committee. It should be noted, however, that an ad hoc Working Party (subsequently dissolved) examined the rôle of multinational enterprises in short-term capital movements and reported to the

Committee in autumn 1976. The principal conclusion of the Group was that a common reporting system on such capital movements did not appear feasible at that time. Nevertheless, the Committee does note that in recent years significant short-term capital flows have been experienced which have no doubt included among their diverse components flows generated by MNEs. This issue merits continuing attention and it is under consideration in other fora.

### *Taxation*

57. This Guideline, notably the recommendation in its first paragraph relating to supplying national tax authorities in one country, upon request, with relevant information concerning the operations of related entities in other countries, has been welcomed by national tax authorities as a useful supplement to the means they already have at their disposal for securing information on activities of MNEs abroad.

58. The OECD Committee on Fiscal Affairs has just completed a comprehensive report on the subject of the determination of transfer prices between associated enterprises. In carrying out its work, the Committee on Fiscal Affairs held consultations with both BIAC and TUAC. The main objective of the report is to set out as far as possible the considerations to be taken into account and to describe, where possible, generally agreed practices in determining such prices for tax purposes. In its report, the Committee expresses the hope that "the report will not only help tax officials to approach more effectively the problems presented to them by the transfer prices of multinational enterprises but will also help the enterprises themselves by indicating ways in which mutually satisfactory solutions may be found to those tax problems." The OECD Council has approved the report for publication together with a Recommendation which states, inter alia, that governments of Member countries are recommended "that their tax administrations take into account, when reviewing and, if necessary, adjusting transfer prices between associated enterprises for the purposes of determining taxable profits, the considerations and methods set out in the Report referred to above for arriving at arm's length prices when goods, technology, trademarks and services are provided or supplied, or loans granted, between associated enterprises". The Committee on International Investment and Multinational Enterprises shares the expectation of the Committee on Fiscal Affairs that the report will be of help to MNEs and recommends it to their attention.

### *Employment and Industrial Relations*

59. To date, this is the chapter of the Guidelines to which the Committee has devoted most time. This fact is a reflection both of the importance and complexity of the subject matter covered by the Employment and Industrial Relations Guidelines and of the wishes of some governments and of trade unions (represented by TUAC) to seek further clarification of the precise scope and intent of these Guidelines.

*i) Right of employees to be represented by trade unions and other bona fide organisations of employees (paragraphs 1 and 2)<sup>3</sup>.*

60. Paragraph 1 provides that MNEs should "respect the right of their employees to be represented by trade unions and other bona fide organisations of employees". The conditions under which these rights are exercised are a matter of national laws, regulations and practices. Thus it was agreed during the drafting of the Guidelines that they would not seek to indicate what organisations in a specific sense should represent employees for collective bargaining or what criteria should be used for the selection of such organisations. It remains, however, that paragraph 1 does provide expressly for management engaging in constructive negotiations with employee representatives on employment conditions and the provision of paragraph 2 adds that enterprises are expected to co-operate with representatives of employees for the specific purposes stated in paragraphs 1 and 2. Thus, the thrust of these provisions of the Guidelines is towards having management adopt a positive approach towards the activities of trade unions and other bona fide organisations of employees of all categories and, in particular, an open attitude towards organisational activities within the framework of national rules and practices.

61. While not explicitly addressing the issue, the Guidelines imply that the management of MNEs should adopt a co-operative attitude towards the participation of employees in international meetings for consultation and exchanges of views among themselves provided that the functioning of the operations of the enterprises and the normal procedures which govern relationships with representatives of the employees and their organisations are not thereby prejudiced.

62. The Committee has not considered the question of the conduct of collective bargaining at an international level, for which there are no real examples, although there has been some development of trade union efforts to co-ordinate approaches to multinational enterprises on a cross-country basis. The question has been raised, however, whether the Employment and Industrial Relations Guideline could put obstacles in the way of recognition by the management of an MNE, in agreement with the national trade unions it has recognised and consistent with national laws and practices, of an International Trade Secretariat as a "bona fide organisation of employees" referred to in paragraph 1 of the Guidelines. It is the Committee's view that no such obstacle exists or was intended in the Guidelines.

*ii) Provision of information to employees (paragraphs 2 and 3)*

63. Provision of information to employees is usually dealt with under national systems of labour relations or, more recently, by legislation and is an area where national diversity is great. Given this diversity, the Guidelines, nevertheless, make some very relevant recommendations in this area.

64. Attention is drawn, in particular, in this connection to paragraph 2 *b)* which calls for the provision to employees of "information which is needed for meaningful negotiations on conditions of employment". The word "meaningful" has to be applied, of course, to the circumstances of each case; but it is a term

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3. Unless otherwise stated, paragraphs cited in this section refer to the chapter of the Guidelines on Employment and Industrial Relations.

which will be of operational value to persons experienced in labour relations. Again, paragraph 3 speaks of the provision of information, where this accords to local law and practice, enabling representatives of employees to obtain "a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole". A list of items which would be covered by this wording would not be practicable as it would differ from one country to another. This is particularly the case where information on future plans of the enterprise is concerned. As is known, this is still a very controversial area of industrial and social policy in a number of OECD Member countries. Consequently, recourse has to be made to the Introduction to the Guidelines referring to the framework of national laws, regulations and practices. Within such a framework, however, and subject to legitimate interests of business confidentiality, management is encouraged by this paragraph to adopt an open and co-operative attitude to the provision of information to employees relevant to the objective of this paragraph, which could include information on future plans.

65. Reference is made to paragraph 8 of the Introduction to the Guidelines in which the responsibilities of the various entities within a multinational enterprises are described. If an entity in a given country is not able to provide information to the employees in accordance with paragraphs 2 *b*) and 3, the other entities of the enterprise are expected to co-operate and assist one another as necessary to facilitate observance of the Guidelines. Since representatives of employees may experience difficulties in obtaining such information at the national level, this provision of the Guidelines introduces a useful supplementary standard in this respect.

*iii) Changes in operations (paragraph 6)*

66. The management decisions, to which the term "changes in their operations", in paragraph 6 refers, would cover, in addition to the closure of an entity, which is specifically mentioned in the text, other measures "which would have major effects upon the livelihood of employees". The key notions in this paragraph of the Guidelines are the "reasonable notice" to be given of such changes and actions by management and co-operation with employee representatives and appropriate governmental authorities "so as to mitigate to the maximum extent practicable adverse effects".

67. It has seemed to the Committee that there is a link between these two notions. The notice given has to be sufficiently timely for the purpose of mitigating action to be prepared and put into effect: otherwise, it would not meet the criterion of "reasonable". It would be in conformity with the general intention of this paragraph, in the light of the specific circumstances of each case, if management were able to provide such notice prior to the final decision being taken.

*iv) Unfair influence in bona fide negotiations with employees (paragraph 8)*

68. Paragraph 8 refers to threats "to utilise a capacity to transfer the whole or part of an operating unit from the country concerned in order to influence unfairly bona fide negotiations with representatives of employees". The

Committee recalled that this paragraph as drafted was meant to cover only operations involving existing plant and equipment. Nevertheless, future investments, such as replacement of equipment or the introduction of new technology may be crucial to the survival of the enterprises in the medium and long-term and thus may be of interest in this context.

69. An important issue with respect to paragraph 8 is the distinction between legitimate provision of information and threats designed to influence unfairly negotiations with employees. It was recognised that the term "unfair" was the key notion in this context. A distinction should be made between information given to employees on the likely consequences for the future of the firm as a going concern of the eventual outcome of such negotiations and threats which would be an unfair use of the management's negotiating power. If certain demands in the view of management have serious implications on the economic viability of this enterprise, it would be appropriate to point this out to employee representatives in the course of negotiations. Yet, management in such instances should be prepared to provide information in order to support this claim.

70. The Committee also considered the question whether the transfer of employees from a foreign affiliate in order to influence unfairly bona fide negotiations with employee representatives on conditions of employment would be contrary to standards set out in the Employment and Industrial Relations chapter and more particularly to paragraph 8. In the view of the Committee, such behaviour, while not specifically mentioned in the Guidelines, certainly would not be in conformity with the general spirit and approach underlying the drafting of the Employment and Industrial Relations chapter. Accordingly, it is recommended that enterprises should definitely avoid recourse to such practices in the future. The Committee, therefore, proposes that this recommendation, which does not imply a major change of the Guidelines, should be made explicit in the text of paragraph 8 by the following addition (amended language in italics):

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

.....  
8. in the context of bona fide negotiations<sup>4</sup> with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to utilise a capacity to transfer the whole or part of an operating unit from the country concerned *nor transfer employees from the enterprises' component entities in other countries* in order to influence unfairly those negotiations or to hinder the exercise of right to organise.  
..... "

v) *Access to decision makers* (paragraph 9)

71. When negotiations or collective bargaining are proceeding in the context of any parent subsidiary relationship, there is clearly a possibility that the subsidiary may not be fully empowered to negotiate and to conclude an

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4. "Bona fide negotiations may include labour disputes as part of the process of negotiation. Whether or not labour disputes are so included will be determined by the law and prevailing employment practices of particular countries."

agreement. There may be special problems in the case of a subsidiary which is situated in one country whilst the parent company is situated in another. The purpose of the text of paragraph 9 was to lay stress on the access of employee representatives to management representatives "who are authorised to take decisions on the matters under negotiation". This is the key consideration and the management of an MNE should see that it is observed in the circumstances of each case.

72. There is also paragraph 8 of the Introduction to the Guidelines which is germane to the matter discussed under paragraph 9 of the Employment and Industrial Relations Guidelines. This text recalls that "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." Parent companies, therefore, are expected to take the necessary organisational steps to enable their subsidiaries to observe the Guidelines, inter alia, by providing them with adequate and timely information and ensuring that their representatives who carry out negotiations at the national or local level have sufficient authority to take decisions on the matters under negotiation.

### *Science and technology*

73. To date the several issues under this chapter which have been brought to the Committee's attention have related to research and development activities undertaken outside the country of the parent company of a multinational group – which it is widely feared in host countries will remain the poor relation in the overall research and development activities of the group unless positive action is taken by top management to spread such activities more widely geographically – and to the diffusion of technologies. It is the intent of paragraph 1 of this chapter that, within the limits of economic feasibility and other relevant circumstances, MNEs should consider seriously the steps they can take to distribute their research and development activities more widely among the countries in which they operate and thereby contribute to the innovative capacity of host countries. These matters are, of course, also of considerable importance to home countries and indeed in some Member countries trade unions have expressed concern about the potential domestic effects of transfers of proprietary technology from home to host countries. Paragraphs 2 and 3 of the same chapter of the Guideline urge MNEs to encourage a rapid diffusion of the results of their research and development activities on reasonable terms and conditions.

74. Aside from the consideration in this Committee of issues arising under the Science and Technology chapter of the Guidelines, the Organisation's work in this area is centred in the Science and Technological Policy Committee's ad hoc Policy Group on Multinational Enterprises which is studying the effects of MNEs on the national scientific and technological potential of countries in which they operate. Of particular note are three case studies nearing completion by that Group which examine these effects in three industrial sectors, namely, pharmaceuticals, computers and food processing.

## V. FOLLOW-UP PROCEDURES FOR THE GUIDELINES

### *The national level*

75. The effectiveness of the Guidelines, that is, the extent to which they are known, understood and accepted by multinational enterprises and integrated into management thinking and practices depends crucially upon action taken at the national level. Effective follow-up procedures can be of various kinds. While significant efforts in this regard have been made since 1976, this Review has revealed a need to strengthen such efforts.

76. It is recommended that governments, the business community and worker's organisations undertake further promotional and educational activities to make more widely known the content of the Guidelines and the manner in which they are to be implemented. A special effort in this regard is required with enterprises which are partly or wholly state-owned. Further promotional action is also needed with regard to those areas where awareness and understanding of the Guidelines may not yet be sufficiently advanced such as smaller enterprises and the service sector.

77. The Committee welcomes the fact that a number of individual multinational enterprises have stated publicly that they support and subscribe to the Guidelines. Such statements can have an important reinforcing effect on obtaining wider recognition and acceptance of the Guidelines. Consequently it is recommended to all enterprises concerned that they indicate publicly their acceptance of the Guidelines, preferably in their annual reports. Furthermore, enterprises are invited to include in their subsequent annual reports brief statements on their experience with the Guidelines, which may contain mention of steps taken with respect to their observance as well as any difficulties experienced in this respect. Such statements would be particularly useful with respect to the chapter on Disclosure of Information.

78. Member governments will henceforth submit every two years reports to OECD on experience and pertinent developments at the national level in all matters related to the Guidelines. These reports will enable the Committee on International Investment and Multinational Enterprises to assess the extent of acceptance and observance of the Guidelines, the action taken within OECD Member countries by governments, business and labour organisations, and the companies themselves to give effect to them, and the areas where problems are being encountered.

79. Member governments which have not already done so will provide facilities for handling enquiries and for discussions with the parties concerned on matters relating to the Guidelines. They intend to inform the business community, employee organisations and other interested parties of the appropriate contact point(s) within the government for enquiries on matters related to the Guidelines. The Committee believes that such facilities, existing examples of which are listed in Annex I, could usefully contribute to the solution of problems relating to the Guidelines which may arise and that, in any event, as a general principle such prior contacts and discussions at the national level should take place before matters are raised at the international level.

### *The international level*

80. The intergovernmental consultation procedures provided by the 1976 Decision have the objective of ensuring that an effective forum exists in which Member governments may exchange views on all matters related to the Guidelines and the experience gained in their application and receive periodically the views on these matters of business and labour organisations through the two advisory bodies, BIAC and TUAC. The Committee is of the opinion that these procedures have generally worked well during the initial three-year period but that this experience should be put to use to introduce certain improvements during the next phase.

81. The Committee wishes to acknowledge the great benefit it has derived from the frequent contacts it has had with the two advisory bodies, BIAC and TUAC. Paragraph 2 of the 1976 Decision on Intergovernmental Consultation Procedures reflects the important role BIAC and TUAC are expected to play in the application of the Guidelines. Accordingly, these bodies were provided with the opportunity to express directly to the Committee their views on matters related to the Guidelines. In the understanding of the Committee, the presentation of such views is not limited to periodic consultations; rather, BIAC and TUAC may communicate their views to the Committee at any time.

82. The Committee and its Working Group on the Guidelines have been fortunate in finding a general willingness on the part of BIAC and TUAC to take a pragmatic and informal approach to the discussion of matters of common interest. As a result, in addition to the periodic consultations between the Committee and the two advisory bodies as are provided for in the 1976 Decision, which up to now have been held once a year, a new approach has evolved, based upon more frequent exchanges of views of an informal character between the Working Group on the Guidelines and the two advisory bodies and upon contacts between the secretariats of the OECD and of these bodies. These contacts have proved to be valuable in clarifying issues and in instituting the practice of informal exchanges of views on matters of common interest. Some important results of these contacts are reflected, *inter alia*, in the explanatory material included in this report on certain questions which have arisen with respect to the scope and meaning of some parts of the Guidelines. The discussions of the Committee on substantive issues relating to the follow-up of the Guidelines have also benefitted from these informal contacts, and the Committee expects that they will become a permanent feature of its procedures. The Committee and its Working Group on the Guidelines will take a positive attitude to requests by the advisory bodies for holding an exchange of views on any matter related to the Guidelines. The following amendment to paragraph 2 of the 1976 Decision on Intergovernmental Consultation Procedures on the Guidelines is accordingly proposed to make this understanding more explicit (amended language in italics):

"2. The Committee shall periodically invite the Business and Industry Advisory Committee to OECD (BIAC) and the Trade Union Advisory Committee to OECD (TUAC) to express their views on matters related to the Guidelines. *In addition, exchanges of views with the advisory bodies on these matters may be held upon request by the latter.* The Committee shall take account of such views in its reports to the Council."

83. The Committee has had exchanges of views on a number of cases submitted by governments and the advisory bodies, relating either to alleged non-conformity with provisions of the Guidelines or illustrating problem areas regarding their application. These submissions have proved to be useful in permitting the Committee to gain experience with the Guidelines. The possibility of making such submissions should continue to be open to the advisory bodies as well as to governments but an attempt should be made first to settle the questions involved at the national level and, when appropriate, such efforts should be pursued at the bilateral level, i.e. involving the governments concerned. Where issues related to the Guidelines are identified by governments and/or one of the advisory bodies, the matter may be raised with the Committee. In that event, the government (s) and the parties concerned should be informed in advance of the issues and the points involved.

84. In connection with such submissions, the Committee feels it important to reaffirm the principle set out in paragraph 3 of the 1976 Decision, which states that "the Committee shall not reach conclusions on the conduct of individual enterprises". There were good reasons for this restriction in 1976, in particular that the Committee was not seen as a judicial or quasi-judicial forum, and those reasons still remain valid today. The Committee, therefore, has avoided drawing any conclusions as to the conformity or non-conformity of a certain behaviour with the Guidelines but has used the details of the specific cases as illustration of issues arising under the Guidelines. This approach has proved to be useful for the purpose of clarifying the meaning of the Guidelines in the light of specific problems and resulted in the explanatory comments included in the present report.

85. An important element in the Committee's work as described in paragraph 84 is the identification of issues relating to the application of the Guidelines. It would be detrimental to the credibility of the exercise if the Committee were to content itself with discussing only problems in the abstract, using for that purpose purely hypothetical situations. At the same time, in avoiding purely hypothetical discussions, it would be unfair if issues brought to the Committee's attention contained allegations regarding enterprise behaviour concerning the Guidelines without the enterprise, which is subject to such allegations, being informed when matters of interest to it are likely to be discussed and of the possibility open to it to state its views. In order to get a complete and fair understanding of circumstances relevant to the application of the Guidelines, the Committee welcomes the presentation of views by an enterprise concerned. It will not request an enterprise to make such a presentation but enterprises who wish to present their views without the necessity of government sponsorship may do so. Such views could be communicated through BIAC, government delegations or directly to the Committee itself. Accordingly, the following amendment of paragraph 3 and a new paragraph 4 of the Decision on Intergovernmental Consultation Procedures on the Guidelines are proposed:

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

4. The Committee shall not reach conclusions on the conduct of individual enterprises."

86. Earlier in this report the Committee underlined the importance to the credibility of the Guidelines of its being able to provide clarification where this is found to be needed in the light of specific situations. In proposing that its report should be published, the Committee intends that the explanatory comments it has developed on issues which have been raised over the past three years will be made available to those directly concerned and to the general public. For the future, the Committee intends to respond in a timely manner to further requests for clarifications. Where such responses are possible, they will be given to the interested parties, as appropriate, through informal contacts or in the context of formal consultations as well as in the periodic reports of the Committee to the Council. In order to reflect the Committee's role in clarifying the Guidelines, the following addition to paragraph 1 of the Decision on Intergovernmental Consultation Procedures on the Guidelines is proposed after the first sentence of this paragraph:

"The Committee shall be responsible for clarification of the Guidelines. Clarification will be provided as required."

87. The Committee recognises the desirability of keeping the interested parties and the general public informed of its activities on matters relating to the Guidelines as well as on the other parts of the 1976 Declaration. One possible vehicle for providing this information, as well as reporting on any further explanatory comments on the Guidelines which the Committee may find it necessary to develop, could be the periodic reports by the Committee to the Council called for in the Decision on Intergovernmental Consultation Procedures. The Committee intends to submit a report to the Council in 1982 with the recommendation that it should be published.

88. The Committee recommends that it would be appropriate for the next formal review of the Guidelines and the related Decision to be undertaken within five years. This provision of a five-year review period, which is somewhat longer than the initial three-year review period, would have the advantage of providing a stable framework for the implementation of the Guidelines and would allow adequate time for the follow-up procedures set out in this section to develop. As is noted in the following chapters, the Committee recommends that the review of other elements of the 1976 Declaration and the other two related Decisions should also be held at the same time. It should be understood, however, that this provision does not preclude the possibility of the Organisation subsequently deciding, on the basis of future developments, to review and/or make certain modifications to these instruments before the end of the five-year period should this prove necessary<sup>5</sup>.

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5. The timetable set out above will involve the following action by governments and by the Committee.

September 1981	Follow-up reports by governments
June 1982	Mid-term report by the IME Committee to Council at permanent delegation level
September 1983	Follow-up reports by governments dealing also, as required, with matters related to the next review
June 1984	Follow-up and report by the IME Committee for the Review by Ministerial Council of the Declaration and Decisions on International Investment and Multinational Enterprises

## CHAPTER II

# NATIONAL TREATMENT

### I. NATIONAL TREATMENT IN THE CONTEXT OF INTERNATIONAL ECONOMIC CO-OPERATION

89. The 1976 Declaration, as stated in its introductory considerations, provides a framework for co-operation and consultation within OECD on issues relating to international investment and multinational enterprises through inter-related instruments. National Treatment is a major element of this balanced approach. It reflects the consensus of Member countries that foreign-controlled enterprises, which are subject to the laws of the countries in which they have activities and are expected to act consistently with declared government policies and priorities as well as with the standards laid down in the Guidelines, should (with certain limited qualifications) be treated as nationals in like situations. The importance of National Treatment extends beyond the OECD area, and it is one of the elements which contribute to a favourable climate for direct foreign investment in any country.

90. Within the OECD, although they are of a different legal nature, the National Treatment instruments (the 1976 Decision and the relevant section of the Declaration) and the Code of Liberalisation of Capital Movements are complementary instruments with respect to the treatment of international investment. They form part of a generally liberal approach towards international investment which the Organisation has followed since its inception. The International Investment Incentives and Disincentives instruments are another element of this overall approach. In the OECD Code of Liberalisation of Capital Movements, Member countries adhering to that instrument<sup>6</sup> have undertaken, *inter alia*, to liberalise the entry of direct investment<sup>7</sup> subject to the qualifications contained in the Code and reservations lodged or derogations taken with respect to this item. The reservations and derogations lodged by countries are periodically examined by the Committee for

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6 All Member countries except Canada adhere to the Code of Liberalisation of Capital Movements.

7 The Code uses the concept of inward direct investment, which is defined as follows: "investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof (by means of) creation or extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership of an existing enterprise, participation in a new or existing enterprise, or a long term loan (five years or longer)".

Invisible Transactions. The legally binding commitment for liberalisation of direct investment contained in the Code refers to transactions and transfers between residents and non-residents but does not refer to the treatment of a foreign-controlled enterprise *after* its establishment. The 1976 Declaration, while not dealing with "the right of Member countries to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises", states the Member governments should accord "National Treatment" to the operations of these foreign-controlled enterprises *once established in the host country*, consistent with the Member country's needs to maintain public order to protect their essential security interests and to fulfil commitments relating to international peace and security. National Treatment is defined in the Declaration as "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".

## II. EXPERIENCE WITH THE APPLICATION OF THE INSTRUMENTS ON NATIONAL TREATMENT

91. In paragraph 1 of the Decision on National Treatment, Member countries agreed to notify the Organisation of measures (laws, regulations and administrative practices) in effect at the date of the Decision which constitute exceptions to National Treatment, and in paragraph 2 they agreed to notify the Organisation of any measures constituting new exceptions which are taken after this date. Paragraph 3 calls for notification also of such measures taken by a territorial sub-division of a Member country, insofar as it has knowledge thereof. According to paragraph 4 of this Decision, it is the task of the Committee periodically to review the application of National Treatment (including the exceptions thereto) with a view to extending such application of National Treatment. In addition, the Committee is to serve as a forum for consultations, at the request of a Member country, with respect to any matter related to this instrument.

92. The Committee considers the transparency and predictability of Government measures an important element for a favourable investment climate. Therefore, countries applying exceptions to National Treatment should state as clearly as possible the policies they pursue and the criteria they apply. In cases of policy changes in the light of evolving circumstances they should have proper regard to the rights of investors established at the time.

93. On the basis of notifications submitted by Member countries the Committee has conducted a survey on exceptions to National Treatment. After initial discussions on the results of this survey, the Committee considered that further in-depth studies of the different categories of exceptions were needed and for this purpose established at its April 1978 session a Working Group on National Treatment. Throughout the work of the Committee and its Working Group in this area, Member governments have participated in an open and constructive manner. It was the first task of the Working Group to establish a final version of the survey as an interim report of the Committee on exceptions to National Treatment in effect in Member countries. This task was accomplished

at the Group's first meeting and in September 1978 the OECD Council approved the derestriction of the report, which has subsequently been widely circulated and placed on sale by the Organisation<sup>8</sup>.

94. Another important task of the Group was to pursue the areas where uncertainties with respect to the coverage of the National Treatment instruments or gaps in information on exceptions had appeared. In the progress of this work the Group was able to provide clarifications on some outstanding conceptual issues and to achieve a greater degree of transparency of measures applied in Member countries which are relevant to National Treatment. Some of the results of this work are reflected in the comments below on the different categories of exceptions to National Treatment.

95. In its work the Group benefitted from related activities of other Committees of the Organisation, in particular, the Committee on Fiscal Affairs and the Committee for Invisible Transactions. The latter is responsible for dealing with matters relating to the above-mentioned Code of Liberalisation of Capital Movements. Its periodic "special sessions", which gather together experts from capitals to discuss policies and practices applied by Member countries with respect to foreign direct investment, are of particular relevance to the IME Committee's work. The 1978 Special Session proved to be particularly useful as it highlighted not only matters relevant to the Member countries' obligations under the Code but also a wide range of policies and measures, as well as economic and social preoccupations which may affect international investment (cf. control of economic concentration, employment aspects, investment incentives). Some of these considerations are clearly relevant for assessing Member countries' policies or concerns in the area of National Treatment.

96. On the basis of the information presently available to the IME Committee it appears that no new exceptions to National Treatment have been put in place since the instruments have been adopted. In fact, certain Member governments have broadened their application of National Treatment.

97. In paragraph 5 of the Decision on National Treatment provision is made for the IME Committee to act as a forum for consultations "at the request of a Member country, in respect of any matter related to this instrument and its implementation, including exceptions to National Treatment and their application". To date no requests for such consultation have been received by the Committee. However, there were adequate opportunities for Member countries to discuss issues relating to existing exceptions to National Treatment in the on-going work of the Committee and its Working Group on National Treatment. Also most governments may have preferred to look first towards the use of bilateral channels to resolve international investment issues of a bilateral nature. Nevertheless, the Committee considers that the presence in this instrument of the alternative of a multilateral channel for consultations on issues related to National Treatment is a desirable safeguard which should be maintained.

<sup>8</sup> National Treatment for Foreign-Controlled Enterprises established in OECD countries, OECD 1978

### III. REVIEW OF THE DIFFERENT CATEGORIES OF EXCEPTIONS TO NATIONAL TREATMENT

98. The following comments are based on the Committee's interim report on exceptions to National Treatment in effect in Member countries and the further results of the analysis by the Working Group on National Treatment. These comments must be of a preliminary nature as certain gaps remain in the information available to the Committee, particularly in the area of administrative practices, and the Committee has not yet assessed the economic impact of the different types of exceptions.

#### *Tax obligations*

99. This is a complex area where there already exists a considerable network of bilateral tax treaties among Member countries and where Member countries have agreed on certain guidelines as set out in the OECD Model Double Taxation Convention on Income and Capital, a revised edition of which has recently been issued. Avoidance of discrimination is an important feature of international co-operation in this field. Article 24, paragraph 6, of the Model Convention states that "Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected". Non-discrimination provisions in tax treaties and the Declaration on National Treatment seem to work towards the same purpose in the area of taxation. The Declaration cannot supersede treaty obligations. However, as a general and non-binding instrument it is clearly of relevance for taxation of foreign investment in the absence of specific treaty provisions.

100. Thus far the Committee's information in the tax area is mainly on legislation and it foresees a need to obtain further information with respect to administrative practices in this area. While, on the basis of available information, most Member countries do not seem to apply less favourable tax treatment to foreign-controlled enterprises, some problems raising concern came to the attention of the Committee. In examining these matters, the Committee has benefitted from the advice of the Committee on Fiscal Affairs. With respect to the first possible problem area in this category, the use of different rules for the taxation of branches of foreign enterprises, the Committee noted that such measures are generally based on residence, not on nationality. There were different views as to whether such measures constituted exceptions to National Treatment as foreign-controlled firms incorporated as subsidiaries would receive the same treatment as domestic enterprises. It was remarked, in this context, that to the extent that foreign investors can freely determine the form of business establishment and the tax consequences of such a choice are clearly determined, no serious problems of discrimination would arise. Noting on the other hand the economic importance of branch operations by foreign enterprises, in particular, in the fields of banking and insurance, the Committee considers that this matter should be kept under review and that tax measures which involve the

differential treatment of foreign-controlled branches as compared with branches of national enterprises should continue to be reported in the general interests of transparency.

101. Another area of concern expressed by some Member countries was with respect to the denial of tax credits to foreign share-holders under the imputation systems applied in several Member countries, as they believe this imposes an additional burden to foreign investors. It was remarked that any such discriminatory effects were not the intention of these systems and could be mitigated or eliminated in the context of bilateral treaties. The Committee considers that within the framework of the National Treatment instruments further examination of the effects of such measures would be desirable.

#### *Government aids or subsidies*

102. This category includes any discriminatory aspects of the granting of official incentives, such as subsidies, credits on preferential terms, tax rebates, etc. to enterprises. Official incentives are frequently used by governments to further their policy objectives in such areas as employment, structural adjustment, demand management, regional development and promotion of scientific and technological capabilities. The notifications to the Organisation by the Member governments indicate that, in principle, they generally do not distinguish between foreign-controlled and national enterprises in the granting of such aids. A number of exceptions to National Treatment in this area were notified, however, and there remain considerable gaps in the information available, particularly with respect to administrative practices.

103. On the basis of the information presently available to the Committee, it is unclear whether foreign-controlled enterprises do encounter significant discrimination with respect to official aids and subsidies. The Committee feels that further efforts towards transparency are needed, in particular, with regard to practices in the following areas (of varying degrees of importance): aids granted to domestic enterprises with partial or full public ownership (but not public monopolies); and incentives and aids granted for the promotion of research and development, shipbuilding and film production.

#### *Access to local bank credits and capital markets*

104. Relatively few exceptions were notified in this area. These measures appear to have a common aim, namely to induce foreign-controlled enterprises to cover part of their internal financing requirements by borrowing from the parent company, in order to increase foreign exchange receipts of the host country. The tightness of restrictions in local financing varies, in general, with the balance-of-payments position of the host country. How severe the burden created by the resulting discrimination is for the foreign-controlled firm depends on the relative terms and conditions for borrowing in the host country and abroad, on exchange rate expectations, and on the firm's ability to borrow in the various markets, which may in part be a function of the firm's size.

105. It is the initial impression of the Committee that, with the possible exception of smaller-sized firms, most foreign-controlled firms rarely find that the restrictions on financing notified under this category present them with

significant problems. In one particular area, however, the Committee feels that further clarification is needed, namely the special regulations addressed to foreign-controlled financial institutions (in particular, banks and insurance companies).

#### *Government purchasing and public contracts*

106. The Committee noted that discriminatory regulations or practices in the areas of government purchasing or the granting of public contracts could have a potentially significant impact on foreign-controlled enterprises. Examination of government practices in this area raises complex problems involving matters related to, inter alia, international trade, industrial policy and national security, as well as international investment. As to the coverage of the National Treatment instrument in this regard, it is important to distinguish between restrictions concerning only *imported* products or services and those affecting also domestically-produced products or services offered by foreign-controlled enterprises established in the country in question (which appear to be far less numerous than the former). Only the latter type of measures would come within the scope of the National Treatment instruments.

107. Particular attention was given to government contracts related to defence and the criteria applied in this field. While some countries explicitly exclude foreign or foreign-controlled firms from all or certain sensitive categories of such contracts, others do not explicitly refer to criteria of nationality or ownership but impose security requirements or other conditions which domestic firms may be more able to meet.

108. The Committee considers that further work is needed in the field of government purchasing and contracts in order to improve its understanding of the measures and practices that are applied and to close remaining gaps of information, in particular, with respect to requirements affecting the service industries. There are in addition other related areas which merit a closer look, such as possibly discriminatory purchasing practices which may be laid down for domestic enterprises as conditions for the granting of government aids or preferential treatment. Where appropriate, the Committee's activities in these areas should be carried out in co-ordination with the Trade Committee and should take account of the results of the Multilateral Trade Negotiations in this regard.

#### *Investment by established foreign-controlled enterprises*

109. During the drafting of the National Treatment instruments the question arose as to whether investments made by foreign enterprises after their establishment in the host country should be considered as part of the operations of the enterprises covered by National Treatment or as representing the entry of new investment from non-resident sources and thereby coming under the Code of Liberalisation of Capital Movements. This question has been resolved by the Decision on National Treatment which states that exceptions under this instrument include measures restricting new investment by "foreign-controlled enterprises" already established in Member countries. Thus, the critical distinction is between the initial investment (covered by the Code) and

subsequent investments by foreign-controlled enterprises already established in the host country (covered by the National Treatment instruments). It should be added that, while one can distinguish between these two different types of investments, many countries apply the same measures to both initial inward investment and subsequent investments by foreign-controlled enterprises. In such cases these measures would fall under both the Code and the National Treatment instruments.

110. Almost all Member countries have notified exceptions in this category concerning investment by foreign-controlled enterprises. Most of the measures mentioned refer to specific industries and areas of activities where countries want to avoid or limit foreign ownership or control as such. Sectoral exceptions are most commonly used in fields relating to public utilities and public services. Such areas are, in general, closely regulated by governments in order to assure the normal functioning of certain basic activities of predominant national interest (e.g. transports, telecommunications, broadcasting, energy generation). In this respect the picture of sectors open to investment by foreign-controlled enterprises may be incomplete, as public monopolies are not covered by the notifications. Such monopolies are not considered to constitute exceptions to National Treatment. Other sectors like mining and manufacturing industries, banking and insurance are of more significant importance to international investment. In these fields relatively few countries have reported exceptions, and those reported are of varying degrees of intensity.

111. In addition, a number of Member countries have notified exceptions under this category which can be termed general controls. Such measures are closely connected with the general policy of these countries vis-à-vis foreign investment. While two countries stated in broad terms that all investment by foreign-controlled enterprises is subject to prior authorisation, five submissions referred to controls on investments which involved extensions into non-related areas of activities and eight countries reported regulations concerning takeover or acquisition of control of domestic enterprises.

112. The impact of these measures on foreign investment depends largely on administrative practices taken by virtue of enabling legislation. The Committee believes, therefore, that it is important for a favourable investment climate that countries using such general controls state as clearly as possible the policies they pursue and the criteria they apply.

113. The Committee recognises the valuable efforts taken by some Member countries with a view to increasing transparency of screening criteria and authorisation procedures for foreign investment. It is hoped that future periodic reviews of this important area of general investment controls will contribute to closing remaining gaps in information and to improving the understanding of the nature and the impact of the measures which are applied.

#### *Internal regulations and practices*

114. Under this category the Committee considered measures which are directed at foreign-controlled and domestic enterprises alike but by their nature or their application may have different effects on foreign-controlled and domestic enterprises. The de facto discrimination which may result from the issuance and application of formally even-handed laws and regulations represents a

difficult aspect of the application of the principle of National Treatment. An example mentioned in a number of notifications referred to nationality requirements providing for a majority participation of nationals of the host country in the management and/or the board of directors of an enterprise. Many Delegations doubted whether such requirements constitute exceptions to National Treatment, but it was agreed that they should be reported, nevertheless, in the general interest of transparency and that further consideration should be given to this issue. Another issue brought forward for further consideration refers to the application of price controls when these imply special burdens affecting solely foreign-controlled enterprises, although many delegations also doubted whether such measures constitute exceptions to National Treatment.

#### **IV. PERSPECTIVES OF FUTURE WORK**

115. The Committee's work relating to the application of the National Treatment instruments, which has as its ultimate objective the extension of National Treatment, has in its first phase resulted in a considerable improvement in the transparency of laws and regulations and (to a lesser extent) of administrative practices which constitute exceptions to National Treatment in effect in Member countries. On the basis of the existing notifications and the work of the Committee to date, it appears that while some important exceptions exist, a generally favourable attitude towards foreign investment and equitable treatment of foreign-controlled enterprises seems to be prevailing in the OECD area. This conclusion must be regarded as preliminary, however, for in some areas, particularly with respect to administrative practices, important gaps in the information available to the Organisation still remain. For this reason the Committee and its Working Group on National Treatment must undertake a continuing effort to complete and update the questions which remain open as to the coverage of the instrument. In the subsequent phase of its work, the Committee will seek to evaluate the relative economic importance of the different categories of exceptions to National Treatment in effect in order to focus its attention on the most significant measures. In this phase, as in the current one, the close co-operation of all the Member countries will be an essential ingredient.

116. The Committee underlines the importance of an open attitude of Member governments to providing information on a continuing basis on policies and practices which may constitute exceptions. In this regard, together with more extensive information on exceptions which were in effect in 1976 and notification of any new exceptions, it would be desirable for Member countries to advise the Organisation of any actions taken to widen the scope of the application of National Treatment, i.e. relaxations in discriminatory treatment, so as to provide a clear picture of the current situation.

117. The previously mentioned "special sessions" on foreign direct investment which have been held periodically by the Committee for Invisible Transactions have proved to be a useful means for Member governments to increase their mutual understanding of the policies, practices and recent experiences of Member countries with respect to foreign direct investment. While these sessions are aimed at providing information relevant to the application of the Code of Liberalisation of Capital Movements, the discussions

do not consider the legal application of that instrument but rather focus on the broader economic content of the measures and practical problems which may have been encountered, and, unlike the regular meetings of the Committee for Invisible Transactions, all Member countries participate in these sessions. As policies and measures relating to inward and outward investment (the main concern of the Committee for Invisible Transactions) and those affecting subsequent investment by foreign-controlled enterprises (which are of relevance to the National Treatment instruments) are closely interrelated, the Committee proposes that in the future periodic "special sessions" on foreign direct investment should be held jointly by the IMF Committee and the Committee for Invisible Transactions. This arrangement would promote co-ordination and avoid duplication of effort in the foreign direct investment area as the two Committees carry out their respective responsibilities in this area.

118. The Committee considers that the comments and advice of the advisory bodies representing the business community and labour organisations would make a valuable contribution to its work on the application of the National Treatment instruments. Representatives of BIAC recommended that the collection of information from individual enterprises on their experiences with respect to exceptions to National Treatment be left to the national federations of BIAC which would pass the information, in suitably aggregated form, to national governments who will in turn pass it on to the Committee. The Committee recommends that the Decision on National Treatment be amended to provide specifically for exchanges of views with BIAC and TUAC by adding the following new paragraph after paragraph 4:

"5. The Committee may periodically invite the Business and Industry Advisory Committee to OECD (BIAC) and the Trade Union Advisory Committee to OECD (TUAC) to express their views on matters related to National Treatment and shall take account of such views in its periodic reports to the Council."

The paragraphs following this new paragraph 5 in the Decision would have to be renumbered and the final paragraph would have to be revised to take account of the Committee's proposal to hold the next review of the Declaration and Decisions within five years.

119. Each phase of the above work programme is important in its own right. At the same time, they all are necessary steps towards the objectives of the instruments. It is intended that this process will lead ultimately to an extension of the application of National Treatment in the OECD Member countries.

CHAPTER III

**INTERNATIONAL INVESTMENT INCENTIVES  
AND DISINCENTIVES AND THE FUTURE  
WORK PROGRAMME ON POLICY ISSUES  
RELATED TO INTERNATIONAL INVESTMENT**

**A. THE REVIEW OF THE INCENTIVES AND  
DISINCENTIVES INSTRUMENTS**

**I. GENERAL FRAMEWORK OF THE REVIEW OF THE  
INCENTIVES/DISINCENTIVES INSTRUMENTS**

120. The 1976 instruments on incentives and disincentives for international investment (hereafter called the Incentive/Disincentives instruments) consist of a Declaration and a Decision which, together, are aimed at strengthening co-operation between Member countries in the field of international direct investment. The instruments consist of three main elements: a commitment by Member countries "to give due weight to the interests of (other) Member countries affected by specific laws, regulations and administrative practices in this field (hereafter called "measures") providing official incentives and disincentives to international direct investment"; a commitment by Member countries "to 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"; and provision (in the Decision) for consultations in the framework of the IME Committee "at the request of a Member country which considers that its interests may be adversely affected by the impact on its flow of international direct investments of measures taken by another Member country specifically designed to provide incentives or disincentives for international direct investment".

121. Incentive and disincentive measures are used by Member governments to influence the nature, location and size of direct investment for a variety of policy purposes such as industrial, regional, technology, employment and trade policies. Often these incentive and disincentive measures are part of the overall economic policies of Member countries. The 1976 instruments do not embrace the whole range of such measures. As demonstrated by the text cited above, they only cover incentives and disincentives showing a specific link to international investment (i.e. inward and outward direct investment), excluding

those of a general or purely domestic nature. It is the main purpose of the instruments to provide governments with the possibility of having recourse to an international consultation procedure if their interests are adversely affected by the impact of incentives and disincentives on their flows of international investment.

122. The Committee believes that the review of the instruments has to be seen in the context of recent changes in economic conditions and the actual situation in the OECD area. There has been a prolonged period of relatively weak economic growth in the OECD economies, taken as a whole, and this has been associated with excess capacity, high unemployment and inadequate overall levels of fixed capital formation. In such a context, there is a growing risk of increased competition in the use of investment incentives by governments at all levels to attract investment. Consequently, the need today for closer co-operation in this area to avoid harmful effects on other countries is perceived by all Member governments.

## II. EXPERIENCE WITH THE INSTRUMENTS

123. Thus far, no Member country has requested consultations under the 1976 instruments, so the Committee has had no experience with their application to specific problems. But the Committee has given some consideration to the sort of conditions under which the instruments might be applied.

124. One issue which has been the subject of discussion in the Committee is that of how best to achieve transparency with respect to international investment incentive and disincentive measures applied by Member countries. The Declaration does ask Member countries to make their incentives and disincentives for international direct investment as transparent as possible, but there is no explicit requirement, in the absence of a specific request for consultations (in contrast to the Decision on National Treatment), for notification by Member countries to the Organisation of such measures and for explanation of their purposes and modus operandi. As the Committee considers that, in any event, it would be difficult to draw up an exhaustive list of measures qualifying as international investment incentives and disincentives in the sense of the 1976 instruments, the question of achieving greater transparency through, for example, a formal notification requirement would present definitional difficulties.

125. The Committee stresses the need for governments at the national level to make their practices in this area as transparent as possible. It was also considered that efforts within the Committee to increase transparency, if they were to be undertaken, should focus on selected areas where specific problems arise and should be accompanied by analytical efforts with respect to government policies, their objectives and effects in the area of investment incentives and disincentives with regard to international direct investment. Clearly, a co-operative attitude of governments towards providing relevant information is a prerequisite for the purpose of carrying out the medium-term work programme on incentives and disincentives as proposed in Section B below.

126. Despite the fact that no Member country has decided to avail itself of the consultation mechanism embodied in the Decision on International Investment Incentives and Disincentives, some countries have advised the Committee that there have been instances where requests for consultations might have been made. That such requests were not forthcoming was a consequence either of the view that bilateral government-to-government channels were more likely to be effective or of the manner in which the grounds for calling for consultations under the 1976 Decision have to be justified – in particular, the reference to measures “specifically designed to provide incentives or disincentives for international investment”. Indeed, the Committee’s initial enquiries into the types of measures that are actually used in the practice of governments showed that few investment incentive measures would qualify under this definition for the reason that practically all of them are, at least in principle, equally available to domestic investors.

127. It may well be that bilateral channels will remain the preference of Member countries to resolve conflicts which may arise in the area of international investment incentives and disincentives. But the Committee, nevertheless, takes the view that the alternative of recourse to a multilateral procedure, as was intended in 1976, is a valuable one and should be maintained. Its usefulness could be increased if the Committee were able to offer a forum for discussions for specific instances of concern raised either informally or as a formal request for consultations where Member countries, collectively or individually, consider themselves adversely affected by incentive or disincentive measures taken by another Member country. Such a way of proceeding would be consistent with the basic purpose of the instrument and more generally with the objectives of the Organisation, which are to promote international co-operation among Member countries and to seek to resolve difficulties which may arise.

128. The Committee noted further that its understanding of the role played by investment incentives and disincentives in the international investment process could be improved through periodic exchanges of views on the subject with the two advisory bodies, BIAC and TUAC. It welcomed, therefore, the indications from these two advisory bodies that they would be willing to join in such exchanges of views in the future. The Committee proposes that the Decision on International Investment Incentives and Disincentives be amended to provide for such exchanges of views, and specifically that the following paragraph be inserted after paragraph 2 of the Decision:

“3. The Committee may periodically invite the Business and Industry Advisory Committee to OECD (BIAC) and the Trade Union Advisory Committee to OECD (TUAC) to express their views on matters relating to international investment incentives and disincentives and shall take account of these views in its periodic reports to the Council.”

The old paragraph 3 would become paragraph 4 and would be revised to take account of the Committee’s recommendation to hold its next review of the Declaration and Decisions within five years.

### III. CONCLUSIONS

129. In view of the above considerations, the Committee concluded that it would intend to proceed in the manner set out in paragraph 127. The Committee wishes to underline the importance of the 1976 Declaration calling on Member countries to give due weight to the interests of other affected countries when applying incentives or disincentives to international direct investment. In addition, it reiterated the commitment to assure transparency of the measures applied. For this purpose, Member countries are willing to co-operate with each other and to provide, through bilateral channels or to the Organisation, the information which may be needed for the effective application of the instruments.

#### B. FUTURE WORK PROGRAMME ON INVESTMENT INCENTIVES AND DISINCENTIVES

130. In reviewing the Incentives/Disincentives instruments, the Committee was conscious of the present economic context for investment which is recalled in paragraph 122 above. It would be detrimental to international co-operation and to the efficient allocation of economic resources available for investment if there were increasing conflicts due to an excessive use of incentives and disincentives to influence international investment decisions. The Committee therefore proposes that, in addition to the approach towards the application of the Incentive/Disincentive instruments, which is set out in the preceding paragraphs, it should undertake a medium-term work programme of an analytical nature in the area of incentives and disincentives with regard to international direct investment.

131. This proposed work would focus initially on examining the effects of government investment incentives and disincentives on the international investment process so as to achieve a better understanding of the determining factors at work in this process. This analysis should provide indications of the impact of such measures on international direct investment flows and of the effects of competition between governments in the area of incentives and disincentives for direct investment. For this task, it will be necessary to establish a conceptual framework for carrying out an objective analysis.

132. The Committee believes, as a general consideration, that this work should concentrate on those types of investment incentive and disincentive policy measures (not only of a financial nature) which appear to be the most relevant to the international investment process rather than to aim at an all-inclusive analysis of the large number of policy measures which might be considered to fall within the scope of incentives and disincentives applied to international investments. Nevertheless, the work should cover incentive and disincentive measures applied by both home and host governments and by all levels of government (local, state and provincial, as well as national). Further, it should include not only measures designed to influence new international direct investments but also those designed to influence international investment decisions of firms already established in a Member country, with respect either to further investments or to possible disinvestments. Finally, the study should

consider the disincentive and incentive effects of pre-conditions applied to international direct investments, that is, their possible impact on the international investment process.

133. The Committee would co-ordinate its work with other activities being carried out in the Organisation as regards, notably, the interrelation between international investment incentive and disincentive policy issues and other policy areas (industrial policy, international trade, science and technology, development of energy resources, balance-of-payments concerns, international capital movements, work undertaken or envisaged with respect to positive adjustment and increased investment in developing countries).

134. This study reflects the recognition by Member countries of the need to strengthen co-operation among themselves on issues relating to international direct investment. At this time, it is neither feasible nor desirable to seek to predict the results of this analysis, in particular, whether any actual or potential problem areas of international importance concerning the use and effects of incentives and disincentives with regard to international direct investment will be identified, and thus whether the results will suggest the need for further work in the Organisation of a more operational nature in this area.

### **C. FUTURE WORK PROGRAMME ON OTHER POLICY ISSUES RELATING TO INTERNATIONAL INVESTMENT**

135. The analytical work on investment incentives and disincentives would constitute a part of the Committee's broad approach to policy issues for international co-operation in the area of international direct investment. The following other subjects have been tentatively identified as meriting the Committee's attention over the next several years within this work programme: analysis of the effects on home and host country economies of international direct investments; comparison of the scope of, and the experience of Member governments with, bilateral investment treaties; the implications of recent trends in limited-equity and non-equity forms of international direct investments; and periodical analytical studies of recent trends in international direct investment flows.

## ANNEX I

# **SURVEY OF MEASURES TAKEN BY MEMBER GOVERNMENTS TO PROMOTE THE GUIDELINES**

1. This survey has been prepared on the basis of reports by Member countries on promotional action taken since the adoption of the Guidelines. The promotional efforts reported to the Organisation can be classified into four main categories: dissemination of the Guidelines, promotion in private circles, discussions between officials and the interested parties, and use of the Guidelines in the context of national policies.

### *2. Dissemination of the Guidelines*

In most countries, the Guidelines have been widely distributed to all ministries and public organisations concerned. The Declaration of 1976 has been brought to the knowledge of the general public by means of official press releases or press briefings in Australia, Canada, Denmark, Japan, Norway, Sweden, Germany and the United States and/or through its insertion in official publications. In the United Kingdom, the Guidelines were published in a white paper with a foreword by the Secretary of State for Industry. In Portugal, the Declaration and the Decisions were published in the Official Gazette. In the United States, the Declaration and Secretary Kissinger's statement before the OECD Council were published in the July 1976 edition of the Department of State Bulletin. In Switzerland, the Declaration was published in the Official Gazette as an annex to the 7th Report of the Federal Council on Foreign Economic Policy, submitted to Parliament in August 1976. In Sweden, the Government notified the Declaration and Decisions by means of an ordinance published in the Swedish Book of Statutes. In Australia, the 1977 Report of the Foreign Investment Review Board as well as the government's revised foreign investment policy issued in 1978 drew attention to the Guidelines and issued the Declaration in full as an attachment.

### *3. Promotion of the Guidelines in private circles*

In all Member countries, the Guidelines have been extensively distributed to the business community, labour unions, professional federations, chambers of commerce, individual companies (for instance in Japan, 5 000 private enterprises received the Guidelines from the Government which distributed ten thousand

pamphlets explaining the Guidelines in detail), either in the OECD version (English or French) or translated into a foreign language (Danish, Dutch, Finnish, German, Japanese, Norwegian and Swedish). The booklet was often accompanied by an official foreword requesting the parties to bring the contents of the Guidelines to the attention of those of its members which are multinational enterprises and urged their observance of the Guidelines or stressing the need for the enterprises to comply with the Guidelines. Finally, some Member countries sent letters to individual enterprises informing them of the Declaration and commending the Guidelines to them. In the United States, such a letter, jointly written by the Secretaries of State, Treasury and Commerce, has been sent to more than 800 chief executive officers of major U.S. corporations. In Germany, the Federal Minister of Economics sent a communication to the business organisations and unions concerned. This communication was also published. In Austria, the same addressees received a letter from the Federal Minister of Trade, Commerce and Industry. In the United Kingdom, the Secretary of State for Trade has written to the Heads of the major City institutions, such as the Stock Exchange.

Some Member countries have taken steps to bring the Guidelines to the attention of their enterprises operating abroad through official or non-official channels. In Denmark, the Declaration has been distributed to all embassies and missions abroad. In Italy, the Declaration and Decisions have been sent to all members (more than 5 000) of the Italian Section of the International Chamber of Commerce. In Japan, the Government has taken necessary steps to communicate the instruments to the embassies in the countries where Japanese companies are operating. The United States Ambassador to the OECD undertook an intensive programme to brief United States businessmen in OECD countries.

#### 4. *Discussions with the interested parties*

Among the Member countries which have arrangements for regular discussions with the interested parties on matters relating to the Guidelines may be mentioned the following: the Canadian Government has had exchanges of views from time to time with the Canadian business and labour communities on the application of the 1976 instruments. In the United States, the Department of State has a Public Advisory Committee on Transnational Enterprises in which issues arising under the instruments are discussed. In Sweden, Norway and Finland, Interministerial Groups with the participation of business and labour organisations have been established to co-ordinate the participation of each of these countries in the OECD work on Multinational Enterprises; representatives of MNEs operating in Norway and Sweden have been invited to participate in these discussions. In Australia, the Foreign Investment Review Board held discussions about the Guidelines with some of the major organisations representing foreign enterprises in Australia. In the Netherlands, an interministerial group discusses regularly with business and labour organisations all relevant matters with respect to the 1976 instruments. In Germany, officials hold regular exchanges of views with the business community on the same matters. In Switzerland, regular contacts were established between the federal authorities and the interested parties in the course of the negotiations on the 1976 instruments; these contacts have been pursued with respect to the application of the instruments. In Austria, the Federal Minister for Trade, Commerce and

Industry has made contact with the Federal Chamber of Trade and Industry and Employees and workers' organisations with a view to providing the OECD in due course with information on the Austrian experience in applying the Guidelines. In the United Kingdom, the Divisions of the Department of Industry responsible for individual sectors of industry are discussing the Guidelines with companies in the normal course of their dealings with them. In Japan, Government officials have also held meetings and conferences to provide further clarifications of the Guidelines and to answer any questions which groups or individuals may have.

#### 5. *Use of the Guidelines in the context of national policies*

Some Member governments have used one or more of the Guidelines in the context of national policies. The American and the Swedish Governments have referred to the Guidelines on competition policy when dealing with restrictive business practices involving activities of multinational companies in other countries. The Netherlands Government has on various occasions stated that it takes into account the relevant Guidelines when determining its policies. The Australian Government has incorporated the Guidelines as an integral part of its policy on inward foreign investment, has indicated publicly that it wishes foreign interests operating in Australia to observe them, and uses them as points of reference in the examination of applications submitted to the Government under its foreign investment policy.

ANNEX II  
**RECOMMENDATION OF THE COUNCIL**

**CONCERNING ACTION AGAINST RESTRICTIVE BUSINESS  
PRACTICES AFFECTING INTERNATIONAL TRADE  
INCLUDING  
THOSE INVOLVING MULTINATIONAL  
ENTERPRISES**

(Adopted by the Council at its 469th Meeting on 20th July, 1978)  
[The Representative for Turkey abstained]

The Council,

Having regard to Article 5 *b*) of the Convention on the Organisation for Economic Co-operation and Development of 14th December, 1960;

Having regard to the Declaration on International Investment and Multinational Enterprises adopted by the Governments of OECD Member countries on 21st June, 1976;

Having regard to the Report of the Committee of Experts on Restrictive Business Practices of 10th February, 1977 on the restrictive business practices of multinational enterprises [RBP(77)I – MNE];

Considering that restrictive business practices may have harmful effects on international trade whether they emanate from purely national or from multinational enterprises;

Considering that the restrictive business practices of multinational enterprises do not differ in form from those operated by purely national enterprises but that they may have a more significant impact on trade and competition due to the fact that multinational enterprises generally tend to wield greater market power, that they play a relatively greater role in the process of national and international concentration and that the restrictive business practices they engage in have more often an international character;

Recognising that, in the present state of international law and of the laws on restrictive business practices of Member countries, control of practices affecting international trade, including those involving multinational enterprises, raises many difficulties, especially in assembling necessary information held outside the jurisdiction of the country applying its law, in serving process and in enforcing decisions in relation to enterprises located abroad;

Recognising that the solution to these difficulties cannot at present be found in an international convention establishing control of restrictive business practices affecting international trade owing mainly to the still differing attitudes adopted by countries towards restrictive business practices and in particular to their varying national legislations in this field:

Considering, however, that the difficulties in controlling restrictive business practices affecting international trade, including those involving multinational enterprises, may be alleviated by simultaneous efforts in the fields of national legislation on restrictive business practices and of international co-operation, particularly within the OECD framework, it being understood that such co-operation should not in any way be construed to affect the legal positions of Member countries, in particular with regard to such questions of sovereignty and extraterritorial application of laws concerning restrictive business practices as may arise:

I. RECOMMENDS the Governments of Member countries to consider the following action:

(1) To adopt new or supplement existing measures on restrictive business practices so as to prohibit or control effectively such practices, particularly:

- a) actions adversely affecting competition in the relevant market by abusing a dominant position of market power by means of, for example:
  - anti-competitive acquisitions;
  - predatory behaviour toward competitors;
  - unreasonable refusal to deal;
  - anti-competitive abuse of industrial property rights;
  - discriminatory (i.e. unreasonably differentiated) pricing and using such pricing transactions between affiliated enterprises as a means of affecting adversely competition outside these enterprises;
- b) cartels or other restrictive agreements which without justification adversely affect or eliminate competition;

(2) to develop, consistent with established rules of international law and taking international comity into account appropriate national rules to facilitate investigation and discovery by their respective competition authorities of relevant information within the control of an enterprise under investigation, where such information is located outside their respective national territories and when its provision is not contrary to the law or established policies of the country where the information is located;

(3) to 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;

**(4) to facilitate, through conclusion of or adherence to bilateral or multilateral agreements or understandings, mutual administrative or judicial aid in the field of restrictive business practices;**

**(5) whilst vigorously enforcing their legislation on restrictive business practices, to make use as far as possible of the OECD procedures on co-operation between Member countries in the field of restrictive business practices affecting international trade so as to facilitate consultation and resolution of problems.**

**II. INSTRUCTS the Committee of Experts on Restrictive Business Practices to keep under review this Recommendation and to report to the Council when appropriate.**