

SUPRANATIONAL REGIMES FOR MULTINATIONALS: THE NEW ORDER WITH A NEW FACE?

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I. INTRODUCTION

A. The Drive for Supranational Regulation of Multinationals

FOR THOSE CONCERNED with burdens on American participation in international commerce and for those who profess fear about supposedly antisocial activities of multinational enterprises,¹ 1976 was peculiarly significant. During that year a series of diplomatic and quasi-diplomatic events occurred that may effect serious consequences for many enterprises, some of which do not begin to approach the scale of the most popularly targeted multinationals. The importance of these events is as yet unappreciated by many who routinely counsel the very enterprises upon whose freedom of action these events impinge.

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1. The phenomena of not only single enterprises having extraction facilities, plants, warehouses, offices, and/or investments in several nations but also the relative degrees of sophistication of those who write about such enterprises have given rise to the use of several descriptives including "multinational corporation" and "transnational corporation." These misnomers ignore the fact that the enterprises in question are usually multi-corporate, consisting of a parent corporation (or other business organization including some instances of sole proprietorships) with a number of wholly or partially owned subsidiaries arranged in tiers of direct or indirect ownership dictated by considerations such as taxation and intra-enterprise assignment of operating responsibilities. For convenience, the author sometimes uses the terms "multinationals" or "MNEs" to refer to enterprises operating in more than one nation. The author believes that multinationals are not peculiar to this century. All that is new is the greater number of them and increased speed of communications.

In June 1976 the Organisation for Economic Co-operation and Development (OECD)² adopted its *Declaration on International Investment and Multinational Enterprises (Declaration)*³ as the "initial phase" of a long-term program.⁴ This *Declaration* not only disclosed OECD member nations' undertakings against invidious discrimination favoring domestic as opposed to foreign investment,⁵ but also published the *Guidelines for Multinational Enterprises (Guidelines)*.⁶

OECD's *Declaration* occurred only three months after the United Nations' Commission on Transnational Corporations ordained that its

2. On Dec. 14, 1960, Canada and the United States joined 18 essentially European states in the Convention on the Organisation for Economic Co-Operation and Development (OECD). Pursuant to the Convention, OECD succeeded the Organisation for European Economic Cooperation which had been the principal administrator of the Marshall Plan for Europe's rehabilitation from the effects of World War II. U.S. membership was effective as of Nov. 20, 1961. 12 U.S.T. 1728. Australia, Austria, Belgium, Canada, Denmark, Finland, West Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States comprise the current full membership. Yugoslavia and the Commission of the European Common Market maintain regular relationships other than full membership with OECD.

These member nations are not uncommonly referred to as the "industrial democracies" and sometimes denigrated as the "rich men's club." That Portugal, Spain or Turkey would graciously accede to this politicized shibboleth is dubious as is the concept that other nations are excluded from the club by reference to wealth alone. For example, it is quite arguable that various members of the Warsaw Pact and OPEC are well qualified if wealth is the criterion.

Within OECD, the principal policy role is enjoyed by the Council which includes representatives of all member states. The Council meets at least annually. Interim questions are remitted to an Executive Committee of thirteen elected by the Council. Administration is in the hands of a secretariat headed by a Secretary-General. The Council has established a considerable array of standing committees which routinely address specialized matters of mutual interest to OECD members. In January 1975, the Council established a Committee on International Investment & Multinational Enterprises (IME) which became, in effect, a clearinghouse for formulating what became the *Guidelines for Multinational Enterprises* discussed at greater length in this article.

3. OECD Press Release A(76)20 of June 21, 1976 (available at the Delaware Law School Library). Included in the Press Release are the *Declaration*, to which the *Guidelines for Multinational Enterprises (Guidelines)* are annexed, plus three inter-related Conciliar Decisions (Decisions) treating: Inter-Governmental Consultation Procedures on the *Guidelines for Multinational Enterprises* (procedures concerning members' experience with the *Guidelines*); National Treatment (i.e., members' avoidance of invidious discrimination against foreign investment and in favor of domestic enterprise); and International Investment Incentives and Disincentives. IME was assigned a clearinghouse role under all three Decisions. Turkey abstained from the *Declaration* and Decisions. The Inter-Governmental Consultation procedure contemplates that IME will interface with the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC) for the purpose of eliciting their views on matters related to the *Guidelines*.

IME is pre-dated by BIAC and TUAC which are independent of, but enjoy status as officially recognized consultants to, OECD. Founded in 1948 to accommodate the European labor movements' involvement with Marshall Plan administration, TUAC was accredited by OECD in 1961. BIAC, with roots pre-dating OECD, was recognized in 1961. BIAC and TUAC are, at least theoretically, representative of numerous national-level "management" and "labor" groups within member countries. They also maintain liaisons with such groups in certain non-member countries such as, e.g., HISTRADRUT of Israel.

4. *Guidelines*, (uncaptioned) preamble, *supra* note 3, at para. 5.

5. *Declaration*, Decision on National Treatment, *supra* note 3.

6. See note 3 *supra*.

"highest priority" was on production of a "final text of a draft" of a Code of Conduct for Transnational Corporations targeted for plenary consideration in the spring of 1978.⁷ Only weeks before the OECD *Declaration*, an International Labor Organization group proposed design of a Tripartite Declaration of Principles Regarding Multinational Enterprises and Social Policy (Tripartite Declaration).⁸ Days before the OECD *Declaration*, the United Nations Conference on Trade and Development (UNCTAD) called for action on national and supranational levels to reorient multinationals to increased processing of raw materials in developing countries;⁹ increased participation of developing countries' national enterprises in the activities of multinationals;¹⁰ formulation of "specific rules" concerning multinationals' restrictive practices;¹¹ rapid formulation by an UNCTAD group of a Code of Conduct on the Transfer of Technology which, *inter alia*, would facilitate technology flows to developing countries in terms favorable to them;¹² and fullest cooperation in the effort to produce the Code of Conduct for Transnational Corporations.¹³ Some months after the OECD *Declaration*, the U.N. Economic and Social Council (ECOSOC) organized a so-called *ad hoc* Intergovernmental Working Group to look into abolition of "corrupt practices."¹⁴ All of these U.N. efforts are in the name of the "New International Economic Order" proclaimed by General Assembly Resolution 3281.¹⁵

On an explicit level, the OECD's Guidelines and the ILO's Tripartite Declaration invite, rather than command, compliance by multi-

7. Commission on Transnational Corporations, Report of the Secretariat on Material Relevant to the Formulation of a Code of Conduct, at para. 1, U.N. Doc. E/C.10/18/Corr.1 (1977) [hereinafter cited as Material Relevant].

8. H. SCHWAMM & D. GERMIDIS, CODES OF CONDUCT FOR MULTINATIONAL COMPANIES—ISSUES AND POSITIONS 27 (1977) (published by the European Centre for Study and Information on Multinational Corporations) [hereinafter cited as SCHWAMM & GERMIDIS]. At its 204th Session, on Nov. 16, 1977, the Governing Body of the International Labor Office approved a Tripartite Declaration. See notes 372-84 and accompanying text *infra*.

9. Transnational Corporations and Expansion of Trade in Manufactures and Semi-Manufactures, UNCTAD Res. 97 (IV), para. 1(a) (May 31, 1976) (U.N. Conference on Trade & Development, Fourth Session, Nairobi) [hereinafter cited as UNCTAD Res. 97].

10. *Id.* at para. 1(b).

11. *Id.* at para. 1(c).

12. International Code of Conduct on Transfer of Technology, UNCTAD Res. 89 (IV) (May 30, 1976) (U.N. Conference on Trade & Development, Fourth Session, Nairobi) [hereinafter cited as UNCTAD Res. 89].

13. UNCTAD Res. 97, *supra* note 9, at paras. 2-3.

14. E.S.C. Res. 2041 Supp. (No. 1), U.N. Doc. E/RES/5889 (LXI) (1976).

15. Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. Doc. A/RES/3281 (XXIX) (1975). See also the Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, U.N. Doc. A/RES/3202 (S-VI) (1974).

nationals,¹⁶ and a review of experiences with the Guidelines is scheduled for 1979.¹⁷ The Commission on Transnational Corporations missed its 1978 target; but work continues on narrowing political issues,¹⁸ not the least of which relates to proposals to mandate application of whatever code is adopted.¹⁹ A mandatory approach was also proposed for the UNCTAD Technology Code.²⁰ Parenthetically, the European Parliament²¹ has taken note of a somewhat unofficially produced

16. As to the Guidelines, see *OECD Declaration*, pt. I, and *OECD Guidelines*, (uncaptioned) preamble, at para. 6. As to the ILO Tripartite Declaration, see Letter of Transmittal to the U.N. Secretary-General Regarding the ILO Tripartite Declaration adopted Nov. 16, 1977. U.N. Doc. E/C. 10/AC. 2/3, Annex II (1977) (available at the Delaware Law School Library).

17. *Declaration*, *supra* note 3, at para. V.

18. Letter from Elinor G. Constable, Director, Office of Investment Affairs, U.S. Dep't of State to John A. Maher (Nov. 28, 1978) (available at the Delaware Law School Library). The U.N. Development Forum published a signed article in its March 1978 issue in which the author purported to compare the OECD Guidelines with a draft of the U.N. Code of Conduct for Transnational Corporations but the comparison was, in reality, an ideological attack on the Guidelines. Since no usual resource provided a copy of such a draft, the author requested that the State Department provide a copy of the supposed U.N. draft. The response was that no such draft existed.

Presumably with its eye on the clock, the U.N. Centre on Transnational Corporations has used the technique of developing outlines which state "common elements" upon which it believes there is a tendency toward general agreement and which also identify areas of likely dispute. See, e.g., Working Paper No. 1 Add. 1-4 of the Commission on Transnational Corporations for the Fourth Session of the Intergovernmental Working Group on a Code of Conduct (March 24, 1978) (available at the Delaware Law School Library). Thus, existence of competing drafts is discouraged. It should be noted that the U.N. Centre on Transnational Corporations is servicing not only the Intergovernmental Working Group on a Code of Conduct but also an *ad hoc* Intergovernmental Working Group on the Problem of Corrupt Practices which was established by E.S.C. Res. 2041, *supra* note 14. This *ad hoc* Group has produced a draft International Agreement to Prevent and Eliminate Illicit Payments in International Commercial Transactions. Report on the Fourth, Fifth and Resumed Fifth Sessions, *ad hoc* Intergovernmental Working Group on the Problem of Corrupt Practices, U.N. Doc. E/1978/115 (1978) (available at the Delaware Law School Library). Designed for bi- or multilateral adoption, this draft should prove to be a significant factor in deliberations about the more generalized Code of Conduct and, indeed, caused suspension of the Code Group's examination of corrupt practices. Working Paper No. 1 for the Fourth Session, *supra* at para. 59.

19. Commission on Transnational Corporations, Report on Its First Session, Intergovernmental Working Group on the Code of Conduct, at 6, U.N. Doc. E/C. 10/31 (1977). See also Report of the Secretariat, Transnational Corporations: Issues Involved in the Formulation of a Code of Conduct, at paras. 145-70, U.N. Doc. E/C. 10/17 (1976) [hereinafter cited as *Issues Involved*]; and Commission on Transnational Corporations, Report of the Secretariat on Certain Modalities for Implementation of a Code in Relation to Its Possible Legal Nature, U.N. Doc. E/C. 10/AC. 2/9 (1978).

20. Manila Declaration and Program of Action of the Group of 77, U.N. Doc. TD/195 Add. 1 (1976). The Group of 77 is a combination of various of the lesser developed countries which consult with an eye to presenting a common front as to various issues raised in continuing and *ad hoc* U.N. fora. A hint of its attitudes can be gleaned from the Economic Declaration of the Fifth Summit Conference of Non-Aligned Countries (Colombo 1976) which called for "effective control of the activities of transnational corporations in conformity with the development objectives of developing countries." Material Relevant, *supra* note 7, at para. 35.

21. "European Parliament" is a colloquism for the Assembly constituted pursuant to Articles 137-144 of the Treaty for the Establishment of the European Economic Community (European Common Market), familiarly known as the Treaty of Rome. See *infra* note 113. The Assembly has three roles but its power, vis-à-vis the

"working document" which proposed a United States-European Community Code of Principles on Multinational Enterprises and Governments and which would bind all enterprises based or operating in signatory nations.²²

Obviously, whether to solicit or to mandate multinationals' compliance with any given set of supranationally-designed standards is a great issue. Decision for a mandate must introduce other issues as to modes of enforcement. A decision for voluntariness, however, will not foreclose the potential for nations' adopting some or all of the standards in otherwise voluntary supranational codes. Indeed, as discussed later in connection with the OECD Guidelines, it is quite conceivable that existing administrative agencies are now capable of domestically applying certain supranationally-defined standards which their governments have adopted.²³

Validity of the unremitting allegations concerning antisocial attitudes and effects attributed to multinational enterprises ("MNEs") is *not* the subject of this article. Quite without reference to supportability of these generalized indictments,²⁴ constancy and intensity of repetition have contributed to a new reality: there is movement in the direction of subjecting many vital aspects of international business to supranationally-designed controls. It is to this reality, and to the further reality that these regimes affect enterprises of much smaller scale than colossi such as ITT or Exxon, that this article is primarily

Council and Commission, is circumscribed and only indirectly exercisable. It *advises* concerning Conciliar initiatives which are essentially legislative or otherwise of substantial political significance. The Assembly *supervises* the Commission; but the former's power lies in the duty of the Commission to respond to inquiries by Parliament or its members, and Parliament's ability to compel resignation of the Commission. The Parliament has a budgetary role through what amounts to an item veto of budgets prepared by the Council. In addition, the Parliament is among those empowered to invoke the jurisdiction of the Community's Court of Justice concerning failures of the Council or Commission to act in accordance with the Treaty.

Assembly members have been selected by member states but a shift to popular suffrage is occurring in 1979.

22. SCHWAMM & GERMIDIS, *supra* note 8, at 40-41.

23. See, e.g., text accompanying notes 226-92 *infra*.

24. There is a vast and growing literature concerning multinationals, much of which the author finds to be analytically unrewarding. Efforts which he thinks are of merit include: R. BARNET & R. MULLER, *GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS* (1974); C. BERNSTEIN, T. HORST & T. MORAN, *AMERICAN MULTINATIONALS AND AMERICAN INTERESTS* (1978); Report to the Secretary-General by the Group of Eminent Persons to Study the Role of Multinationals in Development and on International Relations, *The Impact of Multinational Corporations on Development and on International Relations*, U.N. Doc. E/5500/REV. 1/ST/ESA/6 (1974) [hereinafter cited as *Impact of Multinational Corporations*]; Report, *Penetration of Multinational Enterprises in Manufacturing Industry in Member Countries* (OECD) (1977); Solomon, *Multinational Corporations and the Emerging World Order*, *CORP. COUNSEL'S ANNUAL* 1065 (1977); R. VERNON, *SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES* (1971); D. WALLACE, *INTERNATIONAL REGULATION OF MULTINATIONAL CORPORATIONS* (1976).

addressed. Also addressed is a suggestion that the text and context of the OECD Guidelines permit—possibly, invite—argument that the standards of industrial and commercial conduct contained therein are expressions of national policy and currently enforceable within the United States by the Federal Trade Commission (FTC).²⁵

The author's thesis is quite simple: counsellors to enterprises actually or potentially engaged in even a *modicum* of international commerce ignore the new supranational realities at the clients' peril. He confesses biases to the effect that, despite various (and benign) propaganda efforts,²⁶ many such counsellors either have not become fully aware of the actual and emerging supranational regimes or tend to dismiss them in terms of current relevance.²⁷ Ignoring or minimizing these realities not only undercuts clients' long-range planning but may expose them to near-term embarrassments. This article presents a starting point for those who desire to equip their enterprise clientele for operating with reference to existing and rapidly evolving supranational standards for business operations.

Since the OECD Guidelines have undoubted existence and are scheduled for review in 1979,²⁸ they invite not only initial but more comprehensive attention than do other various U.N. efforts. Despite the labeling of the Guidelines as voluntary, there are ominous over-

25. See text accompanying notes 226-92 *infra*.

26. Release No. 402, U.S. Dep't of State (Aug. 30, 1976) (available at the Delaware Law School Library); WORKSHOP ON THE OECD INVESTMENT DECLARATION AND GUIDELINES, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: A BUSINESS APPRAISAL (P. Coolidge, G. Spina & D. Wallace, Jr. eds. 1977) (published by the Geo. U. Inst. for Int'l & Foreign Trade L.) [hereinafter cited as WORKSHOP]; U.S. Corporate Response to OECD Guidelines: Examples of Voluntary Cooperation (1978) (published by the USA-BIAC Committee on International Investment and Multinational Enterprise) [hereinafter cited as U.S. Corporate Response].

27. See, e.g., *Annual Meeting of the Section of Antitrust Law of the A.B.A.*, 46 ANTITRUST L.J. 602-971 (1977) and more specifically Rahl, *Antitrust and International Transactions—Recent Developments*, *id.* at 965, where Professor Rahl mentioned "ongoing work in OECD and UNCTAD" along with other subjects in a single sentence. *Id.* Such dismissals are understandable. Through the years there have been many starts but few finishes concerning supranational cooperation in aid of investment flows calculated to foster development and against restrictive practices. Those who have risen to too many occasions can be excused if their sensitivities are blunted.

Three leading efforts are instructive. As long ago as 1948, the Havana Charter for the International Trade Organization was heralded, but it died in Congress. In 1960 a Group of Experts appointed by the Executive Secretary of the Trade (GATT), all of whom were from countries now in OECD, recognized that national regulation to constrain enterprises' international-restrictive practices was generally inadequate. However, with experts from four countries dissenting, the majority of experts concluded that there was neither sufficient experience to permit drafting standards of business practice nor feasible enforcement mechanisms. Since 1967 OECD has fostered collaboration among member states with an eye to enforcement of their respective national laws concerning restrictive practices. Recommendation of the Council concerning . . . Restrictive Practices Affecting International Trade (Oct. 5, 1967).

28. See note 18 *supra*.

tones for enterprises which, in planning or operating, ignore them. These overtones are generated by several factors such as: use of concepts strange to American regulatory schemes;²⁹ potential for propaganda or coercive use of even voluntary guides by those not favorably disposed toward specific enterprises; potential for individual nations' adoption of parts of the Guidelines as domestic law without correlative adoption of guarantees against invidiously discriminatory treatment of foreign enterprises; potential for domestic U.S. enforcement by the FTC of selected portions of the Guidelines seen by that agency as expressing national policy;³⁰ and the indubitable fact that, within U.N. fora, the Guidelines will be regarded or styled as the OECD members' initial bargaining position. There already has been a well-publicized attempt, abetted by a member state having a government with a strong labor identification, to have the OECD intervene in a local dispute concerning employees' severance benefits attendant upon dissolution of a subsidiary of an American-based multinational.³¹ Although the attempt *may* have been unsuccessful,³² it is discussed more fully later in this text³³ as illustrative of the voluntary Guidelines' coercive potential. There *may* have been similar attempts which, for one reason or another, have not yet been publicized.³⁴

B. OECD Declaration of June 21, 1976

In explicit terms, the OECD *Declaration* proceeds on two levels. On the one hand, it is the OECD member nations' acceptance of mini-

29. See, e.g., text accompanying notes 109-12 and 123-27 *infra*.

30. See text accompanying notes 226-92 *infra*.

31. R. BLANPAIN, *THE BADGER CASE* (1977) (published in the Netherlands by Kluwer-Deventer) [hereinafter cited as BLANPAIN]. See text accompanying notes 174-225 *infra*.

32. Written comments of August 1978 on the closure of Badger (Belgium) N.V. as graciously provided by Benjamin T. Wright, Esq., Senior Vice President, Secretary and General Counsel, The Badger Co., Inc., (Nov. 15, 1978) (available at the Delaware Law School Library).

33. See text accompanying notes 174-225 *infra*.

34. In his Report concerning 1977, the OECD Secretary-General noted that two member nationals presented "cases raising questions as to" the coverage and meaning of the Guidelines. Report, Activities of OECD in 1977, at 25 (1978) (emphasis added). Presumably, the Badger case referred to at notes 31 and 32 *supra* and notes 174-225 *infra* is one of these. However, the BIAC Annual Report for 1977 complains of TUAC's presentation of "a series of cases . . . of which *only one* had been formally presented to . . . [IME] . . . by a Member Government." Annual Report of Activities—1977 (BIAC), at 8 (1978) (emphasis added). What causes the discrepancy? It is well known that, in processing the Badger complaint, TUAC cited other alleged violators of the spirit of the Guidelines. BLANPAIN, *supra* note 31, at 94. Is it possible that a complaint was advanced *in camera* by a nation other than that involved in the Badger case? Although the author is a member of the disclosure culture, he can conceive that there could be good and sufficient reason for a member state to advance a complaint *in camera* in order to ease a good faith address to the principles concerned without publicity pressures.

imum standards for fair treatment of international investors.³⁵ On the other hand, it is an itemization of what they consider to be minimum standards of business conduct.³⁶ Included among the latter are both particular and specific guides as to competition policy; public disclosure of enterprise, financial and other data; industrial relations; conduct of financial operations; respect for domestic taxation; and diffusion of technological data. As noted earlier, these guides are explicitly characterized as not mandatory, and voluntary compliance is solicited.³⁷

In implicit terms, the *Declaration* also proceeds on at least two other levels. On one level, its promulgation was an obvious effort of the rich men's club to avoid or soften proposed U.N. codes. Highly politicized stages have been set for consideration of these codes.³⁸ Included in this OECD strategy is a linkage between duties and rights of multinationals.³⁹ Only the future can measure success of this ploy which, to some minds, had the dubious virtue of defining the OECD nations' first concession in a larger arena. On another level, the *Declaration* set the stage for member nations' individual exertion of considerable leverage on multinationals which are thought to be thwarting a national purpose as perceived *at any given time*.⁴⁰ This, of course, impacts on voluntariness as do characterization of the Guidelines as an "initial phase"⁴¹ and scheduling a review "within three years" of subjects embraced by the *Declaration* "with a view to im-

35. *Declaration*, *supra* note 3, pt. II.

36. Guidelines, *supra* note 3, (uncaptioned) preamble, at paras. 6 & 9.

37. *Declaration*, *supra* note 3, pt. I; Guidelines, *supra* note 3, (uncaptioned) preamble, at para. 6.

38. Impact of Multinational Corporations, *supra* note 24; *Getting the Measure of the Transnationals*, U.N. Dev. F., May 1977, at 4; de Bernis, *Codes of Conduct Compared*, U.N. Dev. F., March 1978, at 4. Note that the U.S. was one of six nations to vote against the Charter of Economic Rights and Duties, G.A. Res. 3281, *supra* note 15. A U.S. spokesman said that the Charter would discourage development capital flows and was inconsistent with a market economy because of governmental interventions in matters such as commodity cartels and indexing. SCHWAMM & GERARDIS, *supra* note 8, at 7. At least one writer, unfavorably disposed to the OECD Guidelines and (apparently) the societal approaches of OECD members, has suggested in an U.N. organ that "at stake is the shape of the international economic order that will eventually emerge from the crisis." de Bernis, *supra*.

39. The *Declaration* provides that member nationals "should, . . . , accord to enterprises operating in their territories and owned or controlled . . . by nationals of another Member . . . 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 (. . . 'National Treatment')." *Declaration*, *supra* note 3, pt. II.1. One of the three Conciliar Decisions announced with the *Declaration* provides for periodic IME review of National Treatment application and Conciliar review in 1979. Decision of the Council on National Treatment, *supra* note 3, at paras. 4 & 7. IME is to act as a "forum for consultations" as to any matter concerning National Treatment. *Id.* at para. 5.

40. *Declaration*, Decision on Inter-Governmental Consultation Procedures, *supra* note 3, at paras. 1 & 3 (emphasis added).

41. Guidelines, *supra* note 3, (uncaptioned) preamble, at para. 5.

proving the effectiveness" of cooperation among member states.⁴² Note that the OECD Convention contemplates decisions "binding on all the Members."⁴³

It seems safe to say that neither the *Declaration* nor its annexed Guidelines for Multinational Enterprises have become topics of popular or widespread conversation or even awareness. Yet, at this stage, they afford real potential for constraining decisions by enterprises engaged in trade, finance or other forms of international commerce primarily involving the OECD nations. As suggested earlier, these possibilities exist at several levels. Most obvious are implications for any multinational which finds the legal norms of its base country (such as the U.S.) in opposition to or at least different from those in the Guidelines. Indeed, in this context, there has been progress from threatening potential to disturbing actuality.⁴⁴ Less obvious but no less deserving of attention are the concessions to which our government may be tempted in OECD and United Nations' realpolitik attendant upon continuing machinations within ILO, UNCTAD, and the Commission for Transnational Corporations.⁴⁵ Finally, and perhaps obvious only to the author, is the possibility that U.S. adhesion to the Guidelines has unintentionally expanded the practical scope of FTC power.⁴⁶

II. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Statement of the Guidelines is divided into eight parts. The first, uncaptioned, amounts to a preamble. The other seven are: General Policies; Disclosure of Information; Competition; Financing; Taxation; Employment and Industrial Relations; and Science and Technology.

A. Preamble

Noting the importance of multinationals to the world economy, as well as their capacity to benefit both home and host countries, the

42. *Declaration*, *supra* note 3, part V.

43. Convention on the Organisation for Economic Co-Operation and Development, *see* note 2 *supra*, art. 5(a). Decisions "shall be made by mutual agreement of all Members," but "no decision shall be binding on any Member until it has complied with . . . its own constitutional procedures." *Id.* at art. 6.

44. *See supra* notes 31 & 32 and text accompanying notes 174-225 *infra*.

45. On July 1, 1978, the General Assembly of the Organization of American States reiterated a need for *guidelines of conduct* for "Transnational Enterprises" in order to serve "good Inter-American relations and . . . assist the effort being made in the United Nations." O.A.S. Doc. AG/RES. 349 (VII-o/78).

46. Proceeding under §5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. §45(a)(1) (1976), the FTC is *currently* empowered to prohibit any unfair practice, using "public values" to recognize that which is unfair. *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 244 (1972). *See* text accompanying notes 263-92 *infra*.

preamble quickly focuses on the spectral predicates for the Guidelines. "[A]dvances made by multinational enterprises in organizing their operations beyond the national framework *may* lead to abuse of concentrations of power and to conflicts with national policy objectives. In addition, [their] complexity . . . and *the difficulty of perceiving their diverse structures*, operations and policies *sometimes give rise to concern.*"⁴⁷ Thus, not only encouragement of multinationals' "positive contributions" but minimization and resolution of "difficulties to which their various operations *may* give rise" were explicit motivations.⁴⁸ To further these aims, the OECD nations⁴⁹ promised not only to cooperate among themselves⁵⁰ but to give "full support to efforts . . . in cooperation with non-Member countries."⁵¹

Recognizing that each state can prescribe the conditions under which multinationals operate within its jurisdiction "subject to international law,"⁵² the preamble nevertheless described the Guidelines as "standards for . . . activities of . . . [multinationals] . . . in the different Member countries."⁵³ These standards are not intended to cause discrimination between multinational and domestic enterprises since "wherever relevant *they reflect good practice for all.* Accordingly multinational and domestic enterprises are subject to the same expectations with respect to their conduct wherever the guidelines are relevant to both."⁵⁴ Linked to the description of the Guidelines as "standards" is the assurance that "[o]bservance is voluntary and not legally enforceable."⁵⁵

Yet it was contemplated that there would be enforcement, of a sort distinct from integration of some or all of the Guidelines as domestic law. Use of "appropriate dispute settlement mechanisms, including arbitration," is encouraged to resolve "problems arising between enterprises and Member countries."⁵⁶ This, however, is not explicitly linked to disputes, as to compliance with the Guidelines. There is a commitment for member states to set up consultation procedures concerning "issues . . . in respect of the guidelines."⁵⁷

47. Guidelines, *supra* note 3, (uncaptioned) preamble, at para. 1 (emphasis added). Note that concentration of power is addressed in terms of its abuse. This, of course, is more akin to Common Market antitrust than the more ideologic American approach.

48. *Id.* at para. 2 (emphasis added).

49. Turkey abstaining. See note 2 *supra*.

50. Guidelines, *supra* note 3, (uncaptioned) preamble, at para. 2.

51. *Id.* at para. 3.

52. *Id.* at para. 7.

53. *Id.* at para. 6.

54. *Id.* at para. 9 (emphasis added).

55. *Id.* at para. 6.

56. *Id.* at para. 10.

57. *Id.* at para. 11.

One of the three Decisions announced contemporaneously with the *Declaration* provides such a procedure,⁵⁸ for which IME is a clearinghouse. Enterprises may be invited to express "views" to IME.⁵⁹ There are no explicit constraints as to a record or publicity if such invitation is extended, accepted or rejected.⁶⁰

Thus, considerable power for suasion, in terms of both publicity and overhead-building, lies in IME's ability to issue such bids. This is so even though they are not orders in a legal sense and IME cannot reach official conclusions as to the conduct of an invitee or any other enterprise.⁶¹ Lack of a similar stricture against judging others' conduct dictates the technical, but politically questionable, conclusion that IME could decide that a union's complaint was advanced improvidently.

Before proceeding to "General Policies" and the more particularized guides, OECD's approach to identifying its exhortees must be noted. Government-owned multinationals are not excused from observing the Guidelines.⁶² A "rule of reason" approach is taken to recognizing multinational enterprises on a case-by-case basis.⁶³ Moreover, the guides address an entity, whether parent or subsidiary, within the enterprise by reference to its own distribution of commercial responsibilities.⁶⁴

58. Periodically or at a Member country's request, IME is to "hold an exchange of views on matters related to the" Guidelines and experience with them and to render periodic reports to the Council. Also periodically, TUAC and BIAC's views are to be solicited and taken "account of" in reports to the Council. At the instance of a Member, IME may give individual enterprises opportunity to express views but there is no mandate to report or "take account of such views" in reports to the Council. On the other hand, IME is prohibited from reaching "conclusions on the conduct of individual enterprises." *Declaration, Decision, on Intergovernmental Consultation Procedures, supra* note 3.

59. *Id.*

60. Fairness dictates remarking that the author's limited experience with OECD personnel indicates that they are very close-mouthed. This conscionability, of course, is not a guaranty for all time to come.

61. *See* note 58 *supra*.

62. Among issues concerning the commission are some nations' insistence that neither government-owned enterprises nor those based in developing countries should be subject to the same restraints as the profit-oriented private sector. Issues Involved, *supra* note 19, at para. 49; Report on the Fourth Session, U.N. Commission on Transnational Corporations, U.N. Doc. E/1978/52, E/C. 10/43 at para. 123 (1978).

In this connection it is interesting to note the U.S.S.R.'s continuing calculated reintroduction of the profit motive as an incentive to efficiency. Fourteen of the All-Union Foreign Trade Associations had been reorganized as All-Union Profit-and-Loss Trade Associations by the end of 1978. The balance will be converted during 1979. P. Smirnov, *Changes in the Legal Status of Soviet FTOs*, 4 JOURNAL OF THE US-USSR TRADE & ECONOMIC COUNCIL, 23-25 (Nov.-Dec. 1978), P. Smirnov, *Reorganized FTOs*, 5 JOURNAL OF THE US-USSR TRADE & ECONOMIC COUNCIL, 28-29 (Mar.-Apr. 1979).

63. Guidelines, *supra* note 3, (uncaptioned) preamble, para. 8.

64. *Id.* This "rule of reason" approach is in accord with socioeconomic reality and avoids a drafting nightmare (into which the U.N. Commission on Transnational Corporations stumbled but from which it can retreat). However, the case-by-case approach can be used in order to give attention to enterprises which are insignificant economically when contrasted with the colossal multinationals of fact and fancy.

B. *General Policies*

After saying that multinationals should be sensitive to host countries' "general policy objectives,"⁶⁵ as well as otherwise do good and avoid evil, the General Policies tell enterprises that they should not only observe "legal obligations" about data dissemination but they should also furnish their affiliates with such "supplementary information . . . relevant to [their] activities" as they require to meet requests by the authorities of countries in which such affiliates are located.⁶⁶ There is neither an explicit index as to relevance nor a qualification as to propriety of such "requests" under local law. Another general policy contemplates that such affiliates should be free to develop their activities and exploit competitive advantages "*in both foreign and domestic markets.*"⁶⁷ This suggests that activities of enterprise siblings in countries foreign to the host will always be relevant whenever such activities either correspond to or complement operations within the host country.

This "free competition" imperative would appear to deny the discretion of a remote parent to decide by sole reference to the parent's welfare which of its affiliates, equally competent but based in different member nations, is to exploit a third-country opportunity. Indeed, construed strictly, it might command either uncoordinated and ultimately overhead-wasting intra-enterprise competition at the whim of resident officers of a profit center which is located in a country other than that of its parent's base or the equally uneconomic sharing by affiliates of "opportunities." Surely, the puritanical United States would not yet go so far as a matter of explicit policy definition exclusive, of course, of the Guidelines.⁶⁸ To be sure, section 1 of the Sherman Act deals with intra-enterprise conspiracy involving two or more natural or juridical persons.⁶⁹ However, current U.S. antitrust policy apparently is not to disturb such combinations which are innocent of third party involvement.⁷⁰

65. Guidelines, *supra* note 3, General Policies, at para. (1).

66. *Id.* at para. (3). Note that the shopping list of some at the U.N. calls for development and disclosure of "social accounting." BUSINESS WEEK, June 26, 1978, at 136.

67. *Id.* at para. (5) (emphasis added).

68. See, e.g., U.S. DEP'T OF JUST., ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, Case A: A Multinational Corporation, at 10 (Jan. 26, 1977) [hereinafter cited as ANTITRUST GUIDE]; see, e.g., OPGUIDE Case A: A Multinational Operation.

69. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); Sherman Act, Pub. L. No. 94-145 § 2, 89 Stat. 801 (1975).

70. See note 68 *supra*.

Also of note in the General Policies are an equal employment opportunity provision of sorts⁷¹ and proscriptions of bribes "or other improper benefit, direct or indirect, to any public servant or holder of public office."⁷² No index is given as to what constitutes an "improper benefit" and one presumably must continue to look to the law of host states.⁷³ In the context of the internationally-famed furor in the United States about under-the-table payments by American companies in connection with development of foreign markets, it is noteworthy that the General Policies omit reference to payments, "improper" or not, by either enterprises or governments to non-governmental persons.⁷⁴ The General Policies also address political contributions and other involvement in political activity but do so by references, respectively, to what is "legally permissible"⁷⁵ and "improper."⁷⁶ These seemingly must be understood in the context of member nations in which multinationals might authorize contributions or in which they are present or active.

C. Disclosure of Information (Disclosure)

To the degree that the Disclosure guides are implemented as domestic law of any OECD member, there may be some rude shocks in store for not only "reporting companies" under the Securities Ex-

71. Personal qualifications as opposed to nationality are to be considered in "filling responsible posts" in host countries but only "subject to particular national requirements in this respect." Guidelines, *supra* note 3, General Policies, para. (6).

72. *Id.* at para. (7).

73. Unless, of course, the law of the base country, or that of a country in which an affiliated potential giver of benefits is located, presumes to specify what is improper in or (in the good old imperial spirit) for third countries. Consider U.S. multinationals' experience with, on one hand, their government's command that their foreign affiliates boycott various nations during the Cold War and, on the other, the Arab economic war on Israel. In any event, it would seem that sophisticated base and host countries should recognize that "their" multinationals must address the elements implicit in whatever may be prohibited, tolerated or even encouraged in other nations in which such enterprises contemplate doing business.

The author offers no apology for ignoring the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213 (S. 305), 91 Stat. 1494 (1977).

74. The author has no evidence as to whether this omission was intentional. However, well-publicized circumstances of the time would make it hard to accept the omission as unthinking. Note that there is pressure at the U.N. to embrace such payments. Material Relevant, *supra* note 7, at paras. 74-80; Commission to Transnational Corporations, Report on Its First Session, Intergovernmental Working Group on the Code of Conduct, at para. III.A.7, U.N. Doc. E/C. 10/31 (1977). See also Report on the Fourth, Fifth and Resumed Fifth Sessions, *ad hoc* Intergovernmental Working Group on the Problem of Corrupt Practices, Draft Agreement, U.N. Doc. E/1978/115 (1978) [hereinafter cited Draft Agreement] (available at the Delaware Law School Library).

75. Guidelines, *supra* note 3, General Policies, at para. (8).

76. *Id.* at para. (6).

change Act of 1934⁷⁷ but also many other companies, whether or not they are American and whether or not their stock is publicly-traded.⁷⁸

Lest one too quickly discount the possibility of, for example, FTC invoking the OECD Disclosure guides because of a supposed SEC preeminence, let two things be remembered. OECD's Disclosure guides favor fostering "public understanding."⁷⁹ SEC's disclosure rules are for the benefits of investors⁸⁰ and shareholders,⁸¹ whereas FTC's active concern for the "public interest" is reflected by its line-of-business reporting program without regard to whether a company is publicly-held.⁸² That earmarked by OECD for publication, at least annually and "in a form suited to improve public understanding," is described rather generally as "factual information on the structure, activities and policies of the enterprise *as a whole*" subject, fortunately, to confidentiality and cost considerations.⁸³

Such publication is to be "as a supplement, in so far [sic] as is necessary for this purpose, to information to be disclosed under the national law of the individual countries in which they operate."⁸⁴ Note that this standard for data dissemination is *not* limited to OECD countries. Does the opacity as to supplementation provisions mean that, if a given country does not ordinarily require public disclosure of data, no publication pursuant to the Guidelines would be required? Surely, it would have been most curious for representatives of nations such as the United States or the United Kingdom⁸⁵ to accede to a

77. *E.g.*, 15 U.S.C. §§ 77e-g (1976).

78. *E.g.*, various apologists seem to assume that the Disclosure guides burden only enterprises which are already required, by local law, to observe a disclosure routine. A Review of the Guidelines . . . : Disclosure of Information at 15-16, 21 (1976) (published by USA-BIAC) [hereinafter cited as Guidelines Review]; Workshops, *supra* note 26, at 55-105. The Disclosure guides do not distinguish between enterprises by reference to ultimate ownership. There are enterprises including substantial multinationals which are not, in the American colloquial, "public." Further, there are nations including OECD countries which require routine reporting by privately-held enterprises. The guides do not focus, on an explicit level, on *routine* reporting. There are numerous jurisdictions within the U.S.A. which require, as a condition to exemptions from registration of securities offerings, filings of rather revealing data. Such filings are available to the public.

79. Guidelines, *supra* note 3, Disclosure (uncaptioned) preface.

80. 15 U.S.C. § 77e-g (1976).

81. *E.g.*, §§ 13-14 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m-n (1976) [hereinafter cited as the 1934 Act].

82. *See, e.g.*, FTC Resolution of Aug. 2, 1974, requiring Annual Line of Business Reports from Corporations.

83. *See* Guidelines, note 79 *supra* (emphasis added).

84. *Id.*

85. The United Kingdom imposes a prospectus requirement for "going public" and requires periodic financial reporting by not only publicly-held companies but also by certain closely-held ones. The Companies Act, 1948, 11 & 12 Geo. 6, c. 38, as amended, §§ 37-46, 126-27. *See also* Aktiengesetz, §§ 177-78 (W. Ger.); [1965] Bundesgesetzblatt [BGBl] 1965, III, 4121 (W. Ger.); Law of March 23, 1967 [1967] French Decret sur les Sociétés Commerciales 67-236, arts. 293-99.

standard whereby enterprises doing business within such nations would have to publish data of potential value as commercial intelligence when competitors who are based and operating in nations which have not been absorbed into the disclosure culture, are free from such a burden. If such cession proves to have been the case, it surely represents a generous gesture to competitors who lack presences in disclosure-requiring member nations.

One hopes that such discrimination is not the case and that the reference to supplementation is but awkward phrasing incident to multilingual negotiation and is intended to minimize the need for redundant publications on the part of those already obligated, by base or host countries, to report routinely.⁸⁶ In any case, either interpretation would appear to affect closely-held and other "non-public" entities in countries which ordinarily require public reporting. If the purpose was to require disclosures *only* as a supplement to ordinarily required routine public reporting, it would appear that a revision of the language is very much in order. However, if one admits the possibility that the point of OECD disclosure standards is to equip labor unions with intelligence, such revision may be difficult. If the objective of the supplementation reference was ameliorating, rather than limiting, it would seem that all private multinationals having an OECD presence should effect appropriate disclosures in all countries in which they operate lest, otherwise, such enterprises offend national policy of the OECD members with which they are ordinarily involved.

Passing from the general to the particular, the Disclosure guides contemplate *inter alia* identification of parents and "main affiliates," including the parents' percentage of ownership in such affiliates and intervening tiers of control,⁸⁷ plus congeries of operating and financial data.⁸⁸ The potential of this data requirement makes the burden borne by reporting companies under the 1934 Act⁸⁹ seem considerably lighter than heretofore perceived. Others, however, consider that added burdens implicit in the Disclosure guides are not too burdensome⁹⁰ but they ignore privately-held enterprises.

After calling for publication by geographic areas and principal activities per area in which a parent and its main affiliates operate,⁹¹

86. Such hope is prejudiced by a U.N. working group's adoption of a similar formula. Transnational Corporations: Code of Conduct; Formulations by the Chairman, Intergovernmental Working Group on a Code of Conduct, Sixth Session, U.N. Doc. E/C.10/AC.2/8 (1978) [hereinafter cited as "Formulations by the Chairman"].

87. Guidelines, *supra* note 3, Disclosure, at para. (i).

88. *Id.* at paras. (ii)-(ix).

89. *E.g.*, S.E.C. Act, 17 C.F.R. §249.310 (1976); For the form mentioned by the Act, *see* [1978] 3 FED. SEC. L. REP. (CCH), Form 10-K, Items 1, 4, ¶31,103.

90. Guidelines Review, *supra* note 78; Workshops, *supra* note 26, at 55-103.

91. Guidelines, *supra* note 3; Disclosure, para. (ii).

the Disclosure guides solicit information on operating results and sales by geographic area plus sales by major lines of business for the multinational as a whole;⁹² "significant new capital investment by geographic area and, as far as practicable, by major lines of business for the [multinational] as a whole;"⁹³ a cash flow statement for the entire enterprise;⁹⁴ research and development expenditures for the entire organization;⁹⁵ and accounting policies, including principles of consolidation, used in compiling such financial data.⁹⁶ In addition, disclosures concerning intra-enterprise transfer pricing policies⁹⁷ and the number of employees per geographic area⁹⁸ are requested. The significance of disclosing transfer pricing policies will become clearer when discussing the Competition and Taxation guides at later points.⁹⁹

Before further consideration of the Disclosure guides, as well as those relating to Competition, the meaning of "geographic areas" demands attention. Therein lies at least some relief for truly far-flung multinationals (although the writer suspects that such surcease will be relatively short-term when host countries refine the disclosure guides in the course of integrating them as domestic law applicable to multinationals).

By way of footnote, OECD reporting companies are advised that "geographic areas" are such "groups of countries or individual countries as each enterprise determines . . . appropriate in its particular circumstances."¹⁰⁰ Lest this be taken as a blank check for grouping by hemispheres or other maxi-gloss, discriminatory factors are suggested on a non-exclusive basis.¹⁰¹ They are somewhat circular by reason of an initial reference to significance of operations carried out "in individual countries or areas." This colors succeeding references to competitiveness; geographic proximity; economic affinity; similarities in business environments; and "nature, scale and degree of inter-

92. *Id.* at para. (iii).

93. *Id.* at para. (iv) (emphasis added).

94. *Id.* at para. (v).

95. *Id.* at para. (vii).

96. *Id.* at para. (ix). It is outside the purview of this article to comment on current debates concerning development of internationally compatible accounting principles and practices. See, e.g., The U.N. May Audit Business, *Business Week*, June 26, 1978, at 98. Even within the developed countries, there are dramatic differences. For example, French companies are not required to publish consolidated accounts although there is a trend to do so. *Financial Times World Business Weekly*, Dec. 18, 1978, at 16.

97. *Id.* at para. (viii).

98. *Id.* at para. (vi).

99. See text accompanying notes 123-29 & 148 *infra*.

100. Guidelines, *supra* note 3, Disclosure, at para. (ii) n.X. The footnote is quite specifically limited to geographics for "the purposes of" the Disclosure guides.

101. "[T]he factors . . . would include . . ." *Id.*

relationship of [an enterprise's] operations in the various countries." ¹⁰² Thus, from a general management viewpoint, the area concept presents, at least, opportunity for reasonable gloss and, at worst, scope for debate.

However, no such aid appears in connection with defining "principal activities" and "major lines of business." Presumably, until host countries are heard from, a rule of reason would apply under which multinationals might well gauge whether, for example, marketing sawn logs and rayon fibers can be grossed-up as the "cellulosics" line of business.¹⁰³ This, of course, is a game familiar to reporting companies under the 1934 Act and the much newer FTC "lines of business" reporting. While and to the extent that host countries are silent as to amplification of the Disclosure guides, it would seem that well-disposed managements can be flexible. However, they would do well to adapt such disclosures are mandated by their base country and others in which their enterprises have a substantial presence. Publications could be designed to be responsive to OECD Disclosure guides with minimal "new" exposure of data potentially useful to competitors *or others* to whom such data represents marketing or negotiating or other leverage. Thus, in very broad terms, a U.S. company normally reporting under the 1934 Act would seem well advised to adapt or, if possible, adopt item 1(c)(1) of its 10K for purposes of OECD reporting.¹⁰⁴ As for privately-held U.S. enterprises, in the context of entity presences in OECD countries which demand reporting and pressure to comply with the Disclosure guides, little can be said except that a new overhead commitment must be considered.

Apart from value as commercial intelligence, various data adduced "to improve public understanding" in line with the OECD guides will have obvious value to host governments and, in free countries, labor unions. Such data revelations, capable of being used in ways anti-thetical to free trading, would have their most meaningful effect on those international traders with scattered extraction, refining, manufacturing and/or distribution locations. On the most innocent level, it could create a maximization of employment of human and natural resources in a given host country at the implicit expense of their countries in which a target multinational has or could have a comparable facility.

102. *Id.* (emphasis added).

103. For example, can forest management in Sweden, truck-farming in California, and operating bean elevators in Michigan be grossed as the "agri-business"?

104. Note, however, that Item (1)(d) of the 10K contemplates that disclosures concerning volume and relative profitability of certain foreign operations may be impracticable, S.E.C. Act, *supra* note 89. So, too, does General Instruction E to S.E.C. form S-1, Registration Statement under the Securities Act of 1933, 17 CFR § 239.11 (1976) [hereinafter cited as the 1933 Act]; For the form mentioned by the Act, see [1979] 2 FED. SEC. L. REP. (CCH), Form S-1, Registration Statement, General Instructions, para. E, ¶ 7122.

On a more malign level, a given host country might seek to injure another by pressuring a target multinational to unnaturally curtail employment or other resource exploitation in the other. It is interesting that proposals advanced in other fora seem to anticipate the latter by demanding that transnationals' entities not serve as instruments of foreign policy.¹⁰⁵ Of course, neither manifestation would be novel. But, one might ask why the United States should assist in institutionalizing the process? In any event, apart from such assists to coercion, a not-so-free international market can be more exposed to unnatural rigging of the price mechanism, to the ultimate harm of not just target countries but all concerned with international inflationary pressures.

One of the classic problems in the continuing American disclosure experiments has been the audience to be addressed. In the cause of serving the "average investor" or some such conception of those who may be making decisions to buy, sell, hold or vote securities, the SEC has concerned itself with not only content but also arrangement of data in prospecti¹⁰⁶ and in proxy soliciting materials.¹⁰⁷ What marks the capacity of such a person has been, if anything, more troublesome than determining the common law's reasonable man whose stereotype, after all, can be found somewhere on the omnibus line serving Clapham.¹⁰⁸ Be that as it may, the American experience has been to burden the investor with such a wealth of material as to blunt the discriminatory faculties of almost all save "professionals" and one sometimes wonders if even they are not at sea.

What then of the OECD directive to publish operating and financial data "in a form suited to *improve public understanding?*"¹⁰⁹ At the risk of sounding arrogant and parochial, surely this addresses a level of receptivity in some nations which is a bit less sophisticated as to things financial than even the average North American investor. Conceding *arguendo* that the objective is praiseworthy, and success

105. Working Paper No. 1, Add. 3 of the Commission on Transnational Corporations for the Fourth Session of the Intergovernmental Working Group on a Code of Conduct, at paras. 173-75 (March 24, 1978) (available at the Delaware Law School Library). Of course, a little schizophrenia is involved since the Group of 77 would have all transnationals pressure the "illegal" south African regimes. Report on the Fourth Session, Commission on Transnational Corporations, *supra* note 62, at paras. 46-57.

106. See, e.g., *In re Universal Camera*, 19 S.E.C. 648 (1945); [1979] 2 FED. SEC. L. REP. (CCH), Form S-1, *supra* note 104, at para. D, ¶ 7122. 2 FED. SEC. L. REP. (CCH), Form S-1, General Instructions, C, Documents Comprising Registration Statement, SEC Guides, ¶ 8003.

107. 17 C.F.R. § 240.14a-3(b) (1976).

108. *Hall v. Brooklands Auto Racing Club* [1933] 1 K.B. 205, 224.

109. See Guidelines, *supra* note 79 (emphasis added).

would greatly serve the ideals of free trade in their defense against men on white horses, how does one go about meeting the challenge of improving *public understanding* in the many sharply different cultures touched by international commerce and, more particularly, its financial aspects? Recall that the standard is for all, not just OECD, countries in which multinationals operate.¹¹⁰ Obviously, none of the current crop of multinationals is up to the task.¹¹¹ Whatever compliance is possible must be via a marriage of the illustrating arts and ultimately obfuscatory explicit data exposures. Clearly, the "public understanding" standard is window dressing. The working representatives of most, if not all, of the member nations should have known that the goal is impossible of achievement by governments, let alone enterprises, with this or any near-term foreseeable generation.¹¹² Thus, the necessary inference is that the real use of such data will be by member nations, their trade unions, and cartels of which either or both approve as well as by non-members who are astute enough to gather the free intelligence.

Before passing to the Competition guides, allow the author a very personal note. He believes that the United States' accession to the Disclosure guides, as written, was improvident. Being familiar with and even accepting (albeit without proof) lore that OECD adopted the Guidelines in order to head off a more radical expression by collegia dominated by the "third-world," he continues to believe that seeming to commit one's own and mostly unsubsidized gladiators to tell all—when many of their frequently subsidized opponents have no or little such burden—is charmingly but dangerously idealistic. To those who say that multinationals unburdened by compliance with the Guidelines could develop data about OECD-based enterprises anyway, he says "fine" and suggests that such non-OECD competitors be allowed to continue to suffer the attrition of whatever overhead is devoted to intelligence collection and processing rather than being given processed data for evaluation. As things stand and as various OECD enterprises are charged—*as surely they will be*—with having breached the Disclosure guides, all that will have been achieved is further unnecessary degradation of the image of those who play by free-market rules. By definition, nations which tolerate such outrageous conduct will share in the unnecessary degradation.

110. See Guidelines, *supra* note 84.

111. The author solicits the forgiveness of ITT and IBM.

112. Perhaps the negotiants foresee a favorable peduncle in the Teilhard de Chardin mode? See, e.g., T. DE CHARDIN, *THE PHENOMENON OF MAN* (1959).

D. *Competition*

With some exceptions, the Competition guides will not disorient those familiar with the European Common Market experience and, more particularly, with articles 85 and 86 of the Treaty of Rome.¹¹³ However, there has been considerable tinkering, presumably in the name of uniformity, and not only does a concept relatively strange to Americans appear¹¹⁴ but some heretofore peculiarly American judicial formulations appear in unfamiliar contexts.

All multinationals are addressed by three of the Competition guides while another is addressed to those who enjoy "a dominant position of market power."¹¹⁵ Two of the four principal guides advocate certain conduct¹¹⁶ while the other two indicate conduct from which addressee should refrain.¹¹⁷

Looking to the first Competition guide, addressed to those who enjoy some measure of dominance, it states that they should

1. refrain from actions *which would adversely affect competition . . . by abusing a dominant position of market power, by means of, for example,*

- (a) anti-competitive acquisitions,
- (b) predatory behavior toward competitors,
- (c) unreasonable refusal to deal,
- (d) anti-competitive abuse of industrial property rights,
- (e) discriminatory (i.e. unreasonably differentiated) pricing *and using such pricing transactions between affiliated enterprises as a means of affecting competition outside these enterprises.*¹¹⁸

Thus, the focus is neither on dominance per se nor on fears that dominance will occur but rather on its abuse. This, of course, has more in common with article 86 of the Treaty of Rome¹¹⁹ than it does with

113. EUROPEAN COMMUNITY TREATIES 71-133 (Sweet & Maxwell eds. 1972).

114. See text accompanying note 118 *infra*, particularly pt. (e) (intra-enterprise pricing).

115. Guidelines, *supra* note 3, Competition, at para. 1.

116. *Id.* at paras. 2 & 4.

117. *Id.* at paras. 1 & 3.

118. *Id.* at para. 2 (emphasis added).

119. Improper exploitation by one or more concerns *of a dominant position* within the Common market or within a substantial part of it

shall be prohibited as incompatible with the . . . Market in so far [sic] as it may affect trade between Member States. Such abuse may, in particular, consist of:

much of American antitrust and, as such, should alleviate some concerns of American-based multinationals. However, American practitioners well know there is potential for mischief in definition of relevant market by formulation of extraordinarily finite product or geographic markets.¹²⁰ It is fortunate that this has not been the approach under the Rome Treaty.

The Guidelines, however, are different. One of the great differences is the focus of the Competition guides on markets without explicit limitation to OECD countries. Another is the role played, courtesy of the OECD Decision on Intergovernmental Consultation Procedures, by the Trade Union Advisory Committee (TUAC) and the Business and Industry Advisory Committee (BIAC) correspondents in member states.¹²¹ Taken together, those differences present a potential for publicly characterizing an enterprise as violating, for example, the Competition guide as to discriminatory pricing when, although the enterprise is not internationally dominant in a field, it can be portrayed as dominating a narrow product line in any given country. This, in and of itself, is a proper concern for image-conscious managements. American practitioners would do well to consult Common Market experience under article 86 of the Treaty of Rome¹²² for guidance as to what constitutes sufficient dominance as to admit charges of its abuse.

The OECD address to pricing is troublesome. To be sure, article 85(1)(d) of the Rome Treaty addresses agreements which, *inter alia*, "apply dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage" which has some similarity to the secondary-line focus of the Robinson-Patman Act.¹²³ The treaty language is *not* limited to pricing activities of the dominant and, unlike Robinson-Patman, the treaty contemplates

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- (a) . . . imposing any unfair purchase or selling prices or any other unfair trading conditions;
 - (b) . . . limiting production, markets or technical development *to the prejudice of consumers*;
 - (c) . . . applying *dissimilar conditions* to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (d) . . . [subject of] . . . the conclusion of contracts . . . to acceptance . . . of supplementary obligations which . . . have no connection with the subject of such contract.

(emphasis added)

120. See, e.g., *United States v. Pabst Brewing Co.*, 284 U.S. 546, 549 (1966) (failure of government to establish exact market boundaries not adequate ground for dismissal of Clayton Act § 7 case).

121. *Declaration, Decision on Inter-governmental Consultation Procedures*, *supra* note 3.

122. See Treaty of Rome, *supra* note 119.

123. 15 U.S.C. § 13(a) (1976).

proof of competitive injury flowing from commercial discriminations other than price.¹²⁴ However, the OECD Competition guide (1)(e) seemingly has two thrusts. Unless reference to competitive effects in (1)(e) is entirely redundant, one thrust is at discriminatory pricing per se. The other is at "such pricing . . . between . . . [affiliates] . . . as a means of affecting adversely competition outside these enterprises." Limiting the competitive injury test to intra-enterprise pricing may have been the product of poor draftsmanship but this speculation does not permit construing the reference to injury so as to include discriminatory pricing between non-affiliates.

Apart from this perhaps unintended and curable per se approach to arm's-length price discriminations, the focus on intra-enterprise pricing is unfortunate even though it may be politically responsive to international demands.¹²⁵ For example, the capacity of a multinational to secure raw or intermediate materials may be the leading consideration in plant situs or design. To managements desiring to avoid collisions with OECD and other emerging approaches to intra-enterprise transfer pricing, the real message may be to scale their capital investment decisions concerning production of intermediate and raw materials to their own needs in terms of ultimate products. This, by definition, would place an artificial restraint on the pricing mechanism for such raw or intermediate materials. Managements would tend to avoid the incremental cost incentives of marketing internally-produced intermediate or raw materials in excess of their needs in favor of concentrating on principal product lines which consume such materials.

This concentration on intra-enterprise pricing interfaces with the Disclosure of Information¹²⁶ and Taxation¹²⁷ guides. They are *not* limited, however, to enterprises enjoying some sort of dominance.

For enterprises operating and marketing in the United States, the OECD's approach to intra-enterprise pricing has another unfortunate nuance. Is there a signal to the FTC that the U.S. executive function disapproves of "discriminatory" intra-enterprise pricing in at least some instances? In the past, the FTC has indicated at least unease with internal transfer pricing in the context of competition between integrated and unintegrated enterprises. If the essentially irrational fears underlying such disquiet persist or are revived, and the surrealogic of

124. Unlike §2a of the Robinson-Patman Act, which prohibits certain price discriminations by sellers in necessary context of adverse effects on competition, §§2(d) and (e) address discriminatory merchandising allowances and services without explicit reference to competitive effects. 15 U.S.C. §13(d) & (e) (1976).

125. See, e.g., Material Relevant, *supra* note 7, at paras. 137-44.

126. Guidelines, *supra* note 3, Disclosure, at para. viii.

127. Guidelines, *supra* note 3, Taxation, at para. 2.

*FTC v. Brown Shoe Co.*¹²⁸ and *FTC v. Sperry & Hutchinson Co. (S & H)*¹²⁹ decisions survive the current Supreme Court, the Commission need not be overly sensitive to such analytically-demanding OECD niceties such as proof of dominance or anti-competitive purpose.

Before commenting on the other Competition guides, two other facets of OECD's address to the dominant enterprises deserve mention. First is the contrast between OECD's sole concentration on competitive impact as opposed to the Treaty of Rome's concern for prejudice to consumers resulting from artificial constraints on production, markets or development.¹³⁰ Second is the failure of the OECD to focus explicitly on territorial confinement or unilaterally-imposed production quotas. Of course, OECD's message to dominant enterprises cites acquisitions, predatory behavior, refusals to deal, and price discrimination as non-exclusive examples.¹³¹

The three remaining Competition guides address all multinationals, whether dominant or not. Two are essentially substantive¹³² while the last must be styled politico-legal.¹³³

In terms of substance, multinationals are told that they should "refrain from participating in or otherwise *purposely strengthening* . . . *cartels or restrictive agreements* which adversely affect or eliminate competition and *which are not generally or specifically accepted under applicable national or international legislation.*"¹³⁴ It would seem, in terms of affected OECD members alone, that there could be substantially different viewpoints as to which cartels are accepted, what constitutes accepting legislation, and the degree to which admitted legislation is applicable. Note that acceptance need not be that of OECD or any of its members. It seems that the anti-cartel guide has not changed a thing except, of course, to provide two more opportunities for mischief without reciprocal benefit: an "out" nation can attack at least the *image* of an OECD-related multinational engaged in a cartel which was approved or even instigated administratively by

128. 384 U.S. 316 (1966). See notes 283-84 *infra* and accompanying text. The author acknowledges his bias against tampering with intra-enterprise transfer pricing for *competitive* reasons, but observes that any polity may have a rational interest in scrutinizing intra-enterprise transfers as vehicles to evade taxation, currency control restrictions, dividend controls, and the like.

129. 405 U.S. 233 (1972). See text accompanying notes 263-68 *infra*.

130. Treaty of Rome, *supra* note 113, at Art. 86(b).

131. See text accompanying note 118 *supra*.

132. Guidelines, *supra* note 3, Competition, at paras. 2-3.

133. *Id.* at para. 4.

134. *Id.* at para. 3 (emphasis added).

an OECD base or host nation; multinationals' cooperation with OPEC or other officially-sanctioned cartels is rhetorically legitimized.

The remaining substantive Competition guide is couched in affirmative terms. It indicates that multinationals "should . . . allow purchasers, distributors, and licensees freedom to resell, export, purchase and develop their operations consistent with law, trade conditions, the need for specialisation and sound commercial practice."¹³⁵ This seems to tie in with the American perception of the "rule of reason" as to trade restraints (other than those heretofore judicially categorized as offensive *per se* to the Sherman Act).¹³⁶ But, does this guidance to avoid use of restrictions on purchasers, distributors, and licensee's "resale" and "export" constitute a red flag for patent and other technology licensors or trademark owners?

The reference to consistency with law¹³⁷ implies that monopolies such as patents or other privileges conferred by domestic and third-country law are to be respected. Explicit treatment of "anti-competitive abuse of industrial property rights" as a practice to be avoided by dominant enterprises,¹³⁸ would suggest that the OECD directive for all to avoid use of restrictions on "purchasers, distributors and licensees"¹³⁹ is leavened when the transaction in question is limited to use of know-how or practice under a patent unaccompanied by, for example, the licensee's necessary purchase of raw materials or equipment from a *dominant* licensor.

But the reference to restriction on freedoms to resell and export is troublesome. What of "exclusives" given to parties in third countries? What of statutes which ban import of trademarked goods absent consent of the proprietor who might well be the licensor? An orientation to licensees' "freedom to . . . develop their operations"¹⁴⁰ is a big enough gap in American parlance through which to drive that pro-

135. *Id.* at para. 2.

136. Since *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 97 S. Ct. 2549 (1977), it seems that *per se* offenses are limited to agreed price-stabilization; horizontally-arranged market allocations (including production quotas; product, territory, and customer allocations; etc.); concerted refusals to deal; and certain tying arrangements. The logic of the *Schwinn* decision undercuts the *per se* characterization of vertically-imposed resale price maintenance but the holding does not address that point.

Lest a misleading impression be left, inapplicability of *per se* characterization does not assure enterprises of even-handed administration of the "rule of reason." The FTC has judicial leave to enjoin practices in their incipiency which, if full-blown, *might* be offensive to the antitrust laws. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-22 (1966). Its presumed sensitivity is such that it need not focus on expressions of statutory antitrust policy. *FTC v. Sperry & Hutchinson*, 405 U.S. 233 (1972).

137. Guidelines, *supra* note 3, Competition, at para. 2.

138. *Id.* at para. 1(d).

139. *Id.* at para. 2.

140. *Id.*

verbial truck. Fortunately, one of the Technology guides stresses that enterprises should license industrial property rights "on reasonable terms and conditions."¹⁴¹ This suggests but does not mandate that, apart from abuses of market dominance, familiar use and resale restrictions are tolerable to the degree they are otherwise within policy limits of the licensee's intended country of use. This is a very sensitive area in terms of lesser-developed countries' demands.¹⁴²

The last Competition guide is more politico-legal than substantive. It commends readiness "to consult and cooperate . . . with competent authorities of countries whose interests are directly affected in regard to competition issues or investigations."¹⁴³ Once again, the focus is not limited to OECD countries. Cooperation is to entail "provision of information in accordance with safeguards normally applicable in this field."¹⁴⁴ How to gauge that which is normal is left unstated. Thus, possible reference points include not only custom and law in a multinational's base country and other "affected" countries but also (not very conceivably) some unstated norm of multinationals or enterprises generally. Surely, an "affected" country's authorities would have a tendency to regard their own socio-political environment and legal system as indicative of such a norm *unless* there were strong reason to do otherwise. For example, one countervailing reason could be the availability of more sweeping investigatory or discovery techniques in another country having a nexus with the transactions in question. In any event, numerous lines of debate are imaginable.¹⁴⁵

E. *Financing*

The entire Financing guideline is a truism. Enterprises, in managing their activities, should *consider* host countries' "established objectives . . . regarding balance of payments and credit policies."¹⁴⁶ "How" is left unstated. Whether the focus was intended to be on payments, as opposed to trade balances, is unclear.

141. Guidelines, *supra* note 3, Science & Technology, at para. 3.

142. UNCTAD is well along the road to a code purporting to govern technology licensing. See text accompanying notes 367-71 *infra*.

143. Guidelines, *supra* note 3, Competition, at para. 4.

144. *Id.*

145. Witness, *e.g.*, assertion by some companies subject to United States jurisdiction that they are precluded by Canadian law from production of documents maintained by Canadian subsidiaries. This is one guide to which accession of OECD countries other than the United States is surprising. A sweeping approach to compulsory data production in "antitrust" and FTC matters has been widely commented upon and resented.

146. Guidelines, *supra* note 3, Financing.