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International Codes and Guidelines for Multinational Enterprises: Update and Selected Issues

It is well known that over the past decade there have been moves from many quarters to establish international codes and guidelines to regulate internationally the operations of multinational enterprises (MNEs). The major organizations involved in such efforts are the United Nations, including the Secretariat (Economic and Social Council and the U.N. Commission on Transnational Corporations) and U.N.-related agencies (United Nations Conference on Trade and Development and the International Labour Office); the Organisation for Economic Co-operation and Development; and the International Chamber of Commerce. The concentrated efforts by such international bodies as these to devise operable international instruments are clear evidence of the universal concern in this regard.

The intent of the present article is, after a general review of the current status of the major codes and guidelines, to consider the merits of divergent views on their legal character, the balance of rights and obligations established by the actual formulation of the provisions, and some observations on achieving the commonly held and expressed intent of eliminating abuses and preserving benefits of MNE activity through such international instruments as are currently in operation or under formulation. The article ends with an evaluation of what MNE-related regulations should accomplish and an appraisal of what are properly national functions and what are more suitably international functions in accomplishing those ends.

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A. Overview of Major Current Efforts at International Codes and Guidelines

Of signal importance regarding the major international efforts at regulating MNE activity is that each group is fully cognizant of the others' work, and while a certain amount of overlap and parallel effort is inevitable, there is, for the most part, an attempt to avoid duplication. Evidence of this mutual awareness is recorded in the preamble to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy¹ of the International Labour Office (ILO Declaration) which expressly acknowledges having been "informed of the activities of other international bodies, in particular the U.N. Commission on Transnational Corporations and the . . . OECD".² The two particular endeavors thus singled out by the ILO preamble still represent the two major guideline 'packages' receiving the greatest attention by the international community in current MNE/home/host dialogue.

1. *The United Nations family 'package' and related efforts*

The earliest U.N.-initiated studies began in the International Labour Office (ILO), a "specialized agency" (or "related agency") within the U.N. family. Specialized agencies have an independent status, and ILO studies on the impact of MNEs began well in advance of those by the U.N. Secretariat. These studies culminated in the ILO Declaration which was adopted in November 1977. The ILO Declaration deals strictly with those aspects of MNE conduct that relate to social policy in general and labour relations in particular, and already appears in its entirety as an Annex to a U.N. ECOSOC document concerning the U.N. Code of Conduct,³ thus indicating the close interaction of the two. This close association is further underlined by the decision that the following text, formulated during discussions on the U.N. draft Code, was to be incorporated in one of the substantive introductory sections of the U.N. Code:

For the purposes of this Code, the principles set out in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office, should apply in the field of employment, training, conditions of work and life and industrial relations.⁴

¹International Labor Organization, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, reprinted in *INTERNATIONAL LEGAL MATERIALS*, Vol. XVII, No. 2, March 1978, [hereinafter cited as ILO Declaration].

²*Ibid.*, at 423.

³United Nations, ECOSOC, "Transnational Corporations: Texts Relevant to an Annotated Outline Suggested by the Chairman of the Intergovernmental Working Group on the Code of Conduct", Report of the Secretariat of the Commission on Transnational Corporations, Intergovernmental Working Group of the Whole on the Code of Conduct, Third Session, New York, 6-10 February 1978, U.N. Document No. E/C.10/AC.2/3 (January 26, 1978), Annex II.

⁴"United Nations Commission on Transnational Corporations: Draft U.N. Code of Conduct on Transnational Corporations", U.N. Document E/C.10/1982/6 of June 5, 1982, Annex, note 1 [hereinafter cited as U.N. Draft Code].

Direct reference to the ILO Declaration is also made in paragraph 46 of the Code.

While the U.N. Code, not yet in its definitive form, may indeed make such references to the ILO Declaration, the drafters of the Code are effectively precluded—for practical purposes—from actually incorporating the lengthy Declaration into its text, due to the ILO's request in its letter of transmittal to the U.N. that the Declaration "neither be altered nor reproduced in parts only".⁵

The U.N. Code of Conduct itself⁶ is being formulated by a specially appointed Intergovernmental Working Group on a Code of Conduct as an undertaking of the U.N. Commission on Transnational Corporations,⁷ itself a subsidiary organ ("advisory body") of ECOSOC, and with the substantive support of the U.N. Centre on Transnational Corporations which functions as Secretariat to the Commission. The "Completion of the Formulation of the Code of Conduct on Transnational Corporations",⁸ resulting from a special session of the Commission on Transnational Corporations in March and May of this year, reflects the current status of the Code which remains in draft form. This "final draft", after consideration by ECOSOC, will be transmitted to the U.N. General Assembly at its thirty-eighth session in September for consideration and appropriate action. There are some major outstanding issues in the various parts of the Code, notable among which is the issue of compensation for expropriations and nationalizations manifesting the unresolved divergence of views among delegations.

The United Nations Conference on Trade and Development (UNCTAD), classified as a "subsidiary organ" of the U.N. but with "autonomous" functions, has established an Intergovernmental Group which has already gone some way in drafting a code of conduct on the transfer of technology (ToT).⁹ The latest stages of these negotiations are being carried

⁵"Letter of transmittal by the ILO Deputy Director-General to the Secretary-General of the United Nations regarding the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy", November 16, 1977, reprinted in Commission on Transnational Corporations, "Texts Relevant to an Annotated Outline", Annex II (Doc. E/C.10/AC.2/3, January 26, 1978, at 2).

⁶U.N. Draft Code, op. cit., *supra* note 4.

⁷Established by unanimous U.N. ECOSOC resolution 1913 (LVII) (E/RES/1913 (LVII)) of December 5, 1974. See also "Auf dem Weg zu einem Verhaltenskodex für Multis: Tagung der Uno-Kommission für transnationale Gesellschaften", *Neue Zürcher Zeitung*, May 30, 1979, at 10.

⁸"United Nations Commission on Transnational Corporations: Information Paper on the Negotiations to Complete the Code of Conduct on Transnational Corporations", Commission on Transnational Corporations, Special Session, 7-18 March and 9-10 May 1983, U.N. document E/C.10/1983/S/2 of January 4, 1983.

⁹See "Draft international code of conduct on the transfer of technology: Present position", prepared by the Legal Policies Section of the Technology Division, UNCTAD, Geneva, *The CTC Reporter*, No. 12, Summer 1982, pp. 32-34; also "UNCTAD V Ends Session in Manila, UNCTAD Information Unit, UNCTAD Document No. TAD/INF/1079 of June 5, 1979, at 2,14. See also UNCTAD Document No. TD/L.173 and subsequent related documents.

on by an Interim Committee which has been meeting several times a year since March 1982.

Some fundamental points of disaccord within the UNCTAD group continue to delay completion of the ToT code.¹⁰ Among the issues still lacking consensus are several of considerable significance—namely, scope of application, applicable law and settlement of disputes, and restrictive practices. Despite some potential overlap with the U.N. draft Code,¹¹ the Intergovernmental Working Group plans to incorporate the UNCTAD ToT code into the Code of Conduct in one manner or another. It has not yet been decided whether such incorporation should follow the ILO formula mentioned above, or whether another mode of reference should be adopted. Two alternative proposals have been drafted: one contains “minimal substantive provisions in the area concerned in addition to a special reference incorporating the provisions of the particular instrument in question”, and the other providing only that the “relevant provisions of the said instrument should apply for the purposes of the Code.”¹²

Incorporated in like manner (when that manner is determined) into the U.N. Code will be the UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted by U.N. General Assembly resolution 35/63 of 5 December 1980,¹³ as well as the ECOSOC international agreement on illicit payments,¹⁴ still under consideration. The UNCTAD Set of Principles and Rules was elaborated by the United Nations Conference on Restrictive Business Practices convened¹⁵ under the auspices of UNCTAD, and was based on the work of the Third *Ad Hoc* Group of Experts on Restrictive Trade Practices. It has been remarked¹⁶ that although the Principles and Rules are described as “multilaterally agreed”, they were adopted without vote, and still contain some wide areas of disagreement between representatives of the major economic groups involved. One of the main stated objectives is the “creation, encouragement and protection of competition”;¹⁷ other objectives include “control of the concentration of capital and wealth, promotion of social welfare and consumer interests, and benefits to the

¹⁰UNCTAD Document No. TAD/INF/1079, op. cit., *supra* note 9, (unnumbered) para. 1, at 2; (unnumbered) paras. 1-5, at 14.

¹¹*Ibid.*, (unnumbered) para. 9, at 13.

¹²United Nations, op. cit., *supra* note 8, para. 55.

¹³UNCTAD Document No. TD/RBP/CONF/10, Annex; U.N. document A/C.2/35/6 of 23 October 1980.

¹⁴United Nations Economic and Social Council, *Report of the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices in International Commercial Transactions*, Sixty-third Session, Agenda item 17: Transnational Corporations, U.N. document E/6006 of 5 July 1977. See also *infra* notes 21-23.

¹⁵Convened by resolution 33/153 of December 20, 1978.

¹⁶Gill, “*The UNCTAD Restrictive Business Practices Code: A Code for Competition?*”, 13 INTERNATIONAL LAWYER (1979), at 607.

¹⁷Krishnamurti, “*The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*”, THE CTC REPORTER, No. 11, Spring 1982, at 33.

trade and development of developing countries.”¹⁸ Some regard the Principles and Rules, however, as less of a code for competitive practices than as a tactical step on the part of the developing countries to restrain competition from foreign private international business and to aid in the campaign for the New International Economic Order.¹⁹ The formulators themselves have no hesitation in declaring the importance of the Principles and Rules to the realization of one of the objectives of the New International Economic Order or in discussing the demands of the developing countries for preferential treatment and increased bargaining power.²⁰ A realization of the aims of the instrument will depend to some extent on its implementation which has been entrusted to a Committee on Restrictive Business Practices set up within UNCTAD, with comprehensive terms of reference. Moreover, governments have agreed to submit annual reports on related issues and on their own compliance with the Principles and Rules. The latter will also be reviewed for possibilities of improvement by a United Nations Conference at the end of five years (1985).

As regards the ECOSOC international agreement on illicit payments also referred to above as destined for some manner of incorporation into the U.N. draft Code, specific action is in abeyance pending a decision by either the U.N. General Assembly or ECOSOC that further action be pursued. A Committee on an International Agreement on Illicit Payments was established by a 1978 decision of ECOSOC.²¹ By 1979 the Committee had met in two sessions and submitted a report²² to ECOSOC which in turn formulated two draft resolutions and transmitted them to the General Assembly together with the Committee’s report. Since the General Assembly, on consideration of the draft resolutions, agreed to take no action on them at that time,²³ further progress has been delayed.

Taking into account all these various efforts and achievements among the sundry members of the U.N. family, they may safely be said, on the whole, to represent a unified effort.

The International Chamber of Commerce—the first to produce guidelines, which appeared in 1972 as the ICC Guidelines for International Investment (ICC Guidelines)—has kept close watch on the formation of the U.N. Code and has had an appreciable influence upon it. In fact, this ‘input’ function into the U.N. Code is one of the stated purposes of the ICC Guidelines,²⁴ and the ICC has consequently submitted its views periodi-

¹⁸*Ibid.*

¹⁹U.N. General Assembly resolution 3201 (S-VI) [1974].

²⁰See Krishnamurti, *op. cit.*, *supra* note 17, at 33.

²¹See *Official Records of the Economic and Social Council*, 1978 Supplement No. 1 (E/1978/78), resolution 1978/71.

²²“Report of the Committee on an International Agreement of Illicit Payments on its first and second sessions” (E/1979/104).

²³U.N. document A/34/635/Add.3, para. 9.

²⁴International Chamber of Commerce, *Guidelines for International Investment*, ICC Publications, Paris, 1974, [hereinafter cited as ICC Guidelines], (unnumbered) paras. 5, 9, at 7, 8.

cally to the United Nations throughout the course of the latter's work on the Code.

The EEC and other regional and international bodies have also expressly been supplying input into the U.N. Code formulations. The EEC has an advantage over the international organizations in that, within the limits of its legislative and enforcement jurisdiction, it has the authority to enact legally binding codes and to enforce compliance.²⁵ The EEC however has, up to now, as regards actual codes for MNEs, confined itself to activities of a recommendatory nature directed at the U.N. formulations, rather than utilizing its greater legal competence to initiate a separate effort at codifying MNE controls. Moreover, the EEC policy toward MNEs, once an entity is allowed entry into the community, is one of nondiscrimination. Legislative initiatives, most of those affecting MNEs being in the form of "directives", will most likely have an effect on MNE operations, but are not specifically directed at such enterprises. Hence, the EEC will undoubtedly leave MNE code-drafting to those bodies already engaged in these activities.

2. *The OECD 'Package'*

The one international organization which most clearly stands out as independent from the United Nations group and related efforts is the Organisation for Economic Co-operation and Development (OECD), which adopted, in June 1976, its Declaration and Decisions on International Investment and Multinational Enterprises,²⁶ along with four other instruments relating to the Declaration. Three of these related instruments are "Decisions" (on intergovernmental consultation procedures; on national treatment; and on international investment incentives and disincentives),²⁷ and the other is the "Guidelines for Multinational Enterprises" (OECD Guidelines), formally an Annex to the Declaration.²⁸

Interestingly enough, this "integrated package", comprised of the five MNE-related instruments, comprehends three distinct legal categories²⁹

²⁵See e.g. Bowett, *The Law of International Institutions* (London: Stevens, 3d ed., 1975), at 185-189.

²⁶Organisation for Economic Co-operation and Development (OECD), *Declaration by the Governments of OECD Member Countries and Decisions of the OECD Council on International Investment and Multinational Enterprises*, Paris, [1976], [hereinafter cited as OECD Declaration].

²⁷Organisation for Economic Co-operation and Development, "Decisions of the Council on Inter-Governmental Consultation Procedures on the Guidelines for Multinationals"; "Decision of the Council on National Treatment"; and "Decision of the Council on International Investment Incentives and Disincentives", in *Idem*.

²⁸Organisation for Economic Co-operation and Development, "Guidelines for Multinational Enterprises" [hereinafter cited as OECD Guidelines], Annex, OECD Declaration, loc. cit., *supra* note 26.

²⁹See Baade, "Codes of Conduct for Multinational Enterprises: An Introductory Survey", background paper for the International Symposium on Legal Problems of Codes of Conduct for Multinational Enterprises, sponsored by the Zentrum für interdisziplinäre Forschung der Universität Bielefeld, July 16-18, 1979, at 38-39. Published as Hans W. Baade, *Codes of Conduct for Multinational Enterprises: An Introductory Survey*, in: Norbert Horn and E.R. Lanier

represented in (1) the Decisions, which, according to the OECD Convention,³⁰ are legally binding on all participating members (Article 5); (2) the Declaration, which, along with some member-state "considerations and understandings" prefacing the Guidelines, is not legally binding by virtue of the OECD treaty itself, but could be considered to be so in any aspect in which it expresses in convenient and systematic form some existing rule of general international law, or could become so by incorporation into a treaty duly ratified by OECD member states; and (3) the Guidelines, which are expressly stated within their own framework to be "not legally enforceable" (paragraph 6).

In 1979, OECD Ministers reviewed the Declaration and Decisions and reaffirmed their Governments' commitment to the 1976 Declaration, while at the same time making substantive and explanatory additions to the Guidelines. In 1982, a Mid-Term-Report³¹ was drawn up on the 1976 Declaration and Decisions and related work. For the most part, the issues were limited to clarifying the text of the Guidelines, relating to matters on both the national and international levels. The next full review of the instruments is scheduled for 1984.

B. Nature of International Codes and Guidelines

1. *Legal aspects*

A. NON-LEGALLY-BINDING CHARACTER

The most pertinent common feature of all the codes and guidelines is their non-legally-binding character. Those which do not expressly state their non-legally-binding nature clearly acknowledge it. The two exceptions are those codes still in the drafting stage, namely, the draft U.N. Code, for which, even after exhaustive discussions by the Intergovernmental Working Group, the question has been deferred to the concluding phase of the negotiations and is still outstanding;³² and the yet-to-be-completed UNCTAD code on the transfer of technology,³³ for which a mandate in the

(eds.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Frankfurt: Kluwer, 1980), Vol I [hereinafter cited as "Codes of Conduct"].

³⁰Convention on the Organisation for Economic Co-operation and Development of December 14, 1960.

³¹See Fahri, "The OECD and TNCs: Recent Activities", THE CTC REPORTER, No. 14, Winter 1983, at 55.

³²United Nations, op. cit., *supra* note 8, para. 26.

³³Draft International Code of Conduct on the Transfer of Technology, United Nations document TD/CODE TOT/25 of June 2, 1980. It has been suggested that the UNCTAD code, if promulgated, could have certain model-law implications for those countries which have no law on the subject, or that such countries insist, administratively, that technology transfers to their country be in accordance with the code. (See Davidow, "The UNCTAD Restrictive Business Practices Code", *International Lawyer*, (1979), at 603.) See also Fikentscher, *The Draft International Code of Conduct on the Transfer of Technology*, published by the Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law, Munich (Weinheim: Chemie, 1980).

preamble reserves the questions of legal character and implementation for later consideration.

There are two basic positions regarding this issue. One is known as the "maximalist position", and favours legally binding, internationally enforceable rules of conduct for MNEs. This position is adhered to generally by the international trade union movement and the developing nations. The other is the so-called "minimalist position", and promotes the notion of voluntary rather than legally enforceable guidelines. This position is predictably advocated by the international business community and generally by highly capital-intensive industrialized nations.³⁴ Between these two poles is what has been termed a "zebra code", i.e., an instrument composed of both binding and nonbinding rules,³⁵ containing both "shall" and "should" clauses.³⁶ Such an instrument, it has been suggested, may find its way into customary international law, or even already be considered as a restatement thereof in certain of its provisions, particularly those addressed to states and phrased in legal terms.³⁷ This is still, however, somewhat speculative, so we shall concentrate here on the two major positions—"minimalist" and "maximalist"—mentioned above. What are the prospects for the two positions?

B. PROSPECTS FOR THE "MINIMALIST POSITION"

To support the institution of a universally applicable, legally binding international control system is to ignore the fact that not all governments on the one hand, nor all corporations on the other hand, share identical aims or interests, or even identical concerns. The acknowledgement of a fundamental divergency of political ideologies and economic policies is essential for an understanding of the nature and function of present or prospective international guidelines.

These disparities are universally recognized and need little elaboration, other than perhaps to point out that the problem lies not so much in differing long-range economic objectives between the developing and industrialized world, as in their immediate objectives, or, perhaps more significantly, simply in the fact that economic, political and sociological consequences arising out of business transactions among the developed nations, where considerable equilibrium exists between incoming and outgoing direct investment, are significantly different from those arising out of economic activities between the developed and the developing nations. It is generally recognized that these two categories of investment activity require separate

³⁴See Baade, "Codes of Conduct", op. cit., *supra* note 29, at 56.

³⁵See e.g. Baade, "The Legal Effects of Codes of Conduct for Multinational Enterprises", 22 GERMAN YEARBOOK OF INTERNATIONAL LAW (1979), at 11 *et seq.* [hereinafter cited as "Legal Effects of Codes"].

³⁶See e.g., the Convention on a Code for Liner Conferences drafted under the auspices of UNCTAD, United Nations General Assembly resolution 3035 (XXVII), December 19, 1972.

³⁷See Baade, "Legal Effects of Codes", op. cit., *supra* note 35, at 24.

treatment. An ICC spokesman, addressing the United Nations, summed up the situation thus:

Any 'Code of Conduct for transnational corporations' should not be binding, since the diversity of national situations makes it impossible to apply uniform rules to all countries.³⁸

It is this very lack of uniformity of interests and intrinsic incompatibility of existing economic systems, along with the divergent levels or stages of industrialization and development (a) between different economic regions, (b) between individual states within those regions, and (c) even internal to the individual state itself at various stages in its development, that are perhaps the greatest and most obvious obstacles to any legally binding, globally applicable international regulatory agreement.

Separate consideration of these distinctions both between economic systems and different stages of development is no new notion. It was to be seen in the UNCTAD V meeting in 1979 where participants were divided into distinct regional or economic groupings;³⁹ it was to be seen in the non-governmental Düsseldorf Conference on Multinational Corporations where one panel discussed problems of investment control between developed nations while another simultaneously considered relations between developed and less-developed nations; it is to be seen in UNCTAD resolution 21 (II)⁴⁰ and in U.N. General Assembly resolution 2626 (XXV),⁴¹ paragraph 32, where the notion of nonreciprocal preferential arrangements for developing countries⁴² is advanced—as it is throughout the EC Lomé Convention, and in the GATT Tokyo Round⁴³ and UNCTAD V Session⁴⁴—to make special provision for the least developed and developing countries in an attempt, over the long term, to narrow the development gap between them and the developed states.

It is not only differing stages of economic development, but also fundamentally differing ideologies among nations and groups of nations which

³⁸"Multinationals: ICC Speaks to UN Session in Peru", *ICC Bulletin*, International Chamber of Commerce, Paris, March 1976, at 3.

³⁹These groupings consisted of an "African Group", an "Asian Group", a "Latin American Group", a "Group B" (representing the western market-economy nations), a "Group D" (representing the soviet-bloc, state-run economies), and China.

⁴⁰United Nations Conference on Trade and Development, resolution 21(II), March 26, 1968 (*Proceedings of the United Nations Conference on Trade and Development, Second Session*, Vol. I and Corr. 1 & 3 and Add. 1 & 2, Report and Annexes, [United Nations publication, Sales No. E 68 II, D 14]), at 38.

⁴¹United Nations G.A. resolution 2626 (XXV), November 11, 1970.

⁴²In para. 56(5), a further distinction is made by granting special measures in favour of the "least developed" among the developing nations, reflecting the earlier UNCTAD resolution 21(II) and its related documents.

⁴³General Agreement on Tariffs and Trade, Document No. MTN/FR/W/20/Rev. 2. ("Different and more favourable treatment for developing countries, reciprocity by developing countries in trade negotiations, and their progressive fuller participation in GATT".)

⁴⁴United Nations Conference on Trade and Development, "Provisional Agenda for the Fifth Session of the United Nations Conference on Trade and Development", UNCTAD Document TD/220, April 12, 1979, [hereinafter cited as UNCTAD V Provisional Agenda], at 4.

further serve to frustrate a meeting of the minds. Clearly, state-run economies are based upon a substantially different set of principles than are economies founded and run on a free-enterprise principle. In Eastern Europe, for example, the MNE can operate as such only in three states: Yugoslavia, Rumania and Hungary⁴⁵ (and only within certain specified limitations). The USSR itself, along with other communist-bloc countries,⁴⁶ has made ever-increasing use of the joint-venture—in partnership with state or private capital—as a means of entering the world market; yet even this limited entry by the Soviets into a wider economic system through the joint venture was publicly reproached as “revisionist” in a Press Release at the United Nations in 1975—by the People’s Republic of China, which significantly labelled such associations as “Moscow-brand ‘transnational corporations’”.⁴⁷ Interestingly enough, China has since adopted its own law on joint ventures: “The Law of the People’s Republic of China on Joint Ventures Using Chinese and Foreign Investment”,⁴⁸ and has ceased attacking Soviet economic policy as “revisionist”. An interesting notion has been expounded by one author who writes:

In one respect the enterprises within each Communist country can be viewed as one giant conglomerate enterprise directed at the top by political-economic unity of command. In Russia it could be called the USSR enterprise. And it is multinational in that its joint activities dovetail with other Communist country enterprises and, increasingly with Japan, Arab, African and other national enterprises.⁴⁹

This, of course, is one rather novel interpretation, but is indeed intriguing.

Realistically, given the general Communist view, any reconciliation between the state-run-economy concept and that of the industrialized western free-economy states leading to a uniform approach to international regulation is even more illusory than an agreement aspiring to solve the

⁴⁵Hellmann, “*Countervailing Powers to the Multinational Corporation*”, in WALLACE, ed., *INTERNATIONAL CONTROL OF INVESTMENT: THE DÜSSELDORF CONFERENCE ON MULTINATIONAL CORPORATIONS* (New York: Praeger Publishers, 1974), at 59. *But see* Machowski, “*Multinationale Unternehmen sozialistischer Länder*”, *Neue Zürcher Zeitung*, May 15, 1979, at 10.

⁴⁶*See e.g.* the Bulgarian Law on Joint Ventures of 25 March 1980 (English translation), published in 19 *International Legal Materials* (1980), pp. 992-1002.

⁴⁷Press Release, People’s Republic of China, United Nations, September 9, 1975. It will be interesting to witness the further development of the Chinese attitude in these matters in view of the recent policy changes by the Chinese Government.

⁴⁸The Law of the People’s Republic of China on Joint Ventures Using Chinese and Foreign Investment, adopted by the Second Session of the Fifth National People’s Congress on July 1, 1979. Reproduced in 13 *International Legal Materials*, (1979), from the *Beijing Review*, No. 29 (July 20, 1979), at 24-26. The *Beijing Review* text of the Law was also distributed in Press Release No. 79/001 by the Embassy of the People’s Republic of China at Washington, D.C. *See also* “Gesetzentwürfe in chinesischen Volkskongress”, *Frankfurter Allgemeine Zeitung*, June 28, 1979, at 3. *See also* Torkert, “*China’s Joint Venture Law: A Preliminary Analysis*”, 12 *VAND. J. TRANS. L.* (1979), pp. 819-895.

⁴⁹TINDALL, *MULTINATIONAL ENTERPRISES: LEGAL AND MANAGEMENT STRUCTURES AND INTERRELATIONSHIPS WITH OWNERSHIP, CONTROL, ANTITRUST, LABOR, TAXATION AND DISCLOSURE*, (Dobbs Ferry, N.Y.: Oceana, 1975), at 238.

investment problems of both the developed and developing states under identical provisions.

This economic and socio-ideological division has been further aggravated by the existence of a certain resistance on the part of the developing world and Soviet bloc against international law in general, which they are inclined to see as a tool of the industrialized nations which they correctly see as having interests different to their own. Evidence of this can be seen in the outcome and conclusions of the Düsseldorf Conference mentioned above where, ironically enough, both economic sectors arrived at similar conclusions (negatively disposed toward international controls) but for entirely different reasons. A Report on the Conference contains the observation that:

. . . the less developed nations would seem to fear that the international agency would seek to restrain their actions in regard to the foreign-based MNEs. And this attitude neatly balances the worry of business that any international agency would rather fetter than free the MNE.⁵⁰

It has been largely subsequent to the Düsseldorf Conference that the developing world, led by international labour, has begun to adhere most strongly to the "maximalist" position, since many of the codes and guidelines which have appeared during that period have clearly favoured their interests. It could be argued that those parties favouring the "minimalist position" (non-legally-binding controls) are, themselves, doing so out of self-interest, but they have the advantage that the above facts regarding disunity among economic and ideological systems lend strong support to their position.

Those developing states most concerned about the loss of sovereignty have at least had the insight, as evidenced by the excerpt above from the Report of the Düsseldorf Conference, not to lose sight of the fact that—as EEC member-states have already experienced—a certain loss of sovereignty is necessarily involved in the application of any binding agreement enforced by an international or even by a regional body. Those states have rightly realized that international regulations can be as much of a compromise of sovereignty—or more so—as the commercial activities of foreign multinationals, which at least are subject to host-state regulation.

The fact remains that, for the present, at least, there exists no legally binding agreement. Moreover, the general consensus, as reflected in the results of both governmental and nongovernmental congresses, symposia and other international convocations, as well as in the relevant legal literature and academic evaluations and assessments, is that actual universally applicable and legally enforceable international codes are simply not feasible in the present economic and political environment—an environment which shows no immediate promise of becoming more amenable to uni-

⁵⁰Rubin, "Report on the Düsseldorf Conference on International Controls on Foreign Investment", 7 INTERNATIONAL LAWYER (1973), at 826-827.

form treatment. Hence, for the time being and the foreseeable future, the "minimalist" position prevails.

C. PROSPECTS FOR THE "MAXIMALIST POSITION"

The "maximalists", aware that there is little hope of a general international treaty to give the codes legal stature, are looking to other possible sources of international law to enhance the juridical status of their position. This has led to the promotion, almost exclusively by those interests adhering to the maximalist position, of the view that the U.N. Code, at least, and certainly the Charter of Economic Rights and Duties of States, may already be considered—or may over a (perhaps short) period of time come to be considered—customary international law.⁵¹

Predictably there is resistance to this view on the part of most industrialized states which tend repeatedly to refer to the voluntary nature of the Code. Further, with regard to the Economic Charter, as a U.N. General Assembly resolution, there would be strong objection on the part of the same nations, on account of the "one-state-one-vote" principle in the U.N. General Assembly, to construing resolutions by that body as any sort of "international legislation".⁵²

A most cogent and compelling argument regarding the customary international law question as regards U.N. resolutions was elaborated in the 1977 Arbitral Award of Dupuy in the *Texaco and Calasiatic v. Libya* case⁵³ before the International Court of Justice, in the context of the compensation question in expropriation cases. In his reasoning, Dupuy supported the customary international law nature of the 1962 U.N. resolution on permanent sovereignty over natural resources, which contains an international law reference in its compensation clause, while rejecting any international legal status of later resolutions, such as the Declaration on the Establishment of a New International Economic Order⁵⁴ and the Charter of Economic Rights and Duties of States,⁵⁵ which "as a practical matter rule out

⁵¹For some contemporary views on the complexities of proving a "rule" has become custom, see generally, D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (Ithaca: Cornell University Press (1971), esp. pp. 41-44, 233-236, 246-263, 269-274; THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* (Leiden: Sijthoff, 1972), esp. Chapter Four.

⁵²See e.g. Tomuschat, "Die Charta der wirtschaftlichen Rechte und Pflichten der Staaten. Zur Gestaltungskraft von Deklarationen der UN-Generalversammlung." "The Charter of Economic Rights and Duties of States. A New Legal Order of World Economy?" (Summary), in Mosler, ed., 36 *Völkerrecht als Rechtsordnung, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1976), at 491. For further comment on the resolutions and declarations of the United Nations General Assembly as a "legislative" activity, see Thirlway, op. cit., *supra* note 51, at 61-79.

⁵³*Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. The Government of the Libyan Arab Republic* (Award on the Merits, 19 January 1977), 53 *INTERNATIONAL LAW REPORTS*, at 389 *et seq.* (translated from the original French).

⁵⁴U.N. General Assembly resolution 3201 (S-VI), op. cit., *supra* note 1.

⁵⁵United Nations, *Official Records of the General Assembly: 29th Session* (1974), Vol. I: *Resolutions* (Supp. No. 31 (A/9631), United Nations, New York, 1975 hereinafter cited as United Nations Charter of Economic Rights and Duties of States.

any recourse to international law and . . . confer an exclusive and unlimited competence upon the legislation and courts of the host country.”⁵⁶ He makes this distinction on the basis of an examination of the circumstances under which the resolutions were adopted and an analysis of the provisions and principles which they embody. It is thus noted that the majority vote which favoured the text of the 1962 resolution evidenced the assent of a great many states, representing all geographic areas and all economic systems,⁵⁷ and that this broad consensus was felt to be directly attributable to the inclusion in the text of two references to international law, in particular in the field of nationalization.⁵⁸

This could not be said of the later resolutions, which were supported by a majority of U.N. member states, none of which were those industrialized market-economy states which engage in the largest amount of foreign direct investment activity.⁵⁹ These later resolutions were characterized by serious disagreements between representatives of different economic and political sectors, and since the absence of any intrinsically binding force of U.N. General Assembly resolutions implies that a general consensus by member states is a prerequisite to establishing any possible “customary” legally binding nature, it is clear that a majority vote, unmitigated by reservations such as those made by a large number of industrialized states in connection with some of the above amendments, must be representative of all political and economic groups. Moreover, it must be emphasized that even a majority vote representative of all political and economic groups does not of course *create* international law, though it may represent a codification or proclamation of rules recognized by the community of nations. In other words, it may confirm a custom “by formulating it and specifying its scope.”⁶⁰ Or as expressed by Ambassador Castañeda, who was Chairman of the Working Group preparing the Charter of Economic Rights and Duties of States, such resolutions “do not create the law; they have a declaratory nature of noting what does exist.”⁶¹

Hence, while the 1962 resolution 1803 (XVII) seemed to Dupuy to reflect the state of customary law existing in this field,⁶² he could not regard the Charter, and other relevant resolutions relating compensation to the municipal law standard, as anything other than “a *de lege ferenda* formulation,

⁵⁶*Ibid.*, para. 82, at 485.

⁵⁷*Ibid.*, para. 84, at 487. This resolution was passed in the General Assembly by 87 votes to 2, with 12 abstentions. It should be noted that the two negative votes were those of developed countries, viz. France and South Africa, and that the abstentions were on the part of Soviet bloc countries. However, as there is exclusively state ownership in the Soviet bloc in any case, nationalization with compensation is not an issue for that group.

⁵⁸*Ibid.*, para. 84, at 488.

⁵⁹*Ibid.*, para. 86, at 491.

⁶⁰*Ibid.*, para. 86, at 491.

⁶¹*Ibid.*, para. 87, at 491.

⁶²*Ibid.*, para. 87, at 492.

which even appears *contra legem* in the eyes of many developed countries."⁶³

While the developing states have favoured the exclusion of an international law standard as regards the compensation issue, they have at the same time generally favoured, from the drafters' earliest sessions, the view that the Charter of Economic Rights and Duties of States should be a legal instrument with binding force. There are those⁶⁴ who see as inconsistent a position which, on the one hand, advocates a new regime of binding rules of international law applicable to the conduct of multinational enterprises, while on the other hand insisting that only the national law of the host state shall apply to expropriation, with no reference to international law standards. The question arises as to whether it is acceptable to exclude international law from one aspect of an issue while invoking it in related aspects of the same issue.

This only serves to underline the complexity and controversial nature of the question of custom as it relates to U.N. resolutions in general, and those at issue here in particular.

Whatever the case, the fact that U.N. General Assembly resolutions lack any intrinsically binding force implies that a general consensus by member states is a basic prerequisite to even contemplating any customary international legal nature of such resolutions. And *should* a resolution become custom, it is, in any case, not binding on dissenting states. The MNEs themselves, by compliance with the codes or guidelines, are clearly incapable of thereby transforming them into customary international law, owing to their lack of full international legal personality.⁶⁵ Given these facts, and given the fact that 'custom' can become international law only in the absence of protest, reservations expressed by a number of highly industrialized states to the Charter of Economic Rights and Duties of States, as well as constant references to its voluntary nature, would be difficult to ignore as a form of protest ('persistent objection') to the provisions of such documents ever becoming a source of international law.

The prospects for the "maximalist position" look doubtful, either by way of general international treaty or customary international law; but this debate is likely to continue.

D. GENERAL PROSPECTS

It may well be that by the time a workable consensus has been reached and an international control system—of whatever character—has been

⁶³*Ibid.*, para. 88, at 493.

⁶⁴*Inter alia*, Komiya, "Report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations", United Nations Publication E/5500/Rev.1:ST/ESA/6, New York, 1979, at 122; Seidl-Hohenveldern, "The United Nations and Transnational Corporations", in SIMMONDS, ed., *LEGAL PROBLEMS OF MULTINATIONAL CORPORATIONS*, (London: British Institute of International and Comparative Law, 1977), at 55.

⁶⁵See Baade, "Legal Effects of Codes", *op. cit.*, *supra* note 35, at 20, 22.

developed to where it can be effectively applied and enforced, that the 'threat' which generated it will have substantially diminished, or even ceased to be a 'threat', as a natural consequence of the ever-changing global economic landscape which is already displaying signs, in certain sectors, of a distinct shift in direction.⁶⁶ There is, for example, an increasing tendency toward contractual arrangements⁶⁷ as opposed to the traditional forms of investment up to now characteristic of the MNE. This may already be an indication of the legal effect of an ever-tightening clampdown, through regulatory legislation, on MNE direct-investment activity.

To sum up, the real obstruction to universally applicable international legal controls is the general disparity between the various business and government interests globally represented, where cultural, political, economic and ideological differences all combine to make harmony of purpose among nations or economic groupings, in this regard, virtually unattainable in a form which is to have a perceptible practical impact.

2. Nonlegal Aspects

A. NON-LEGALLY-BINDING NATURE AS A POSSIBLE ASSET

Within code/guidelines discussions reigns the further debate as to whether, in actual practice, the fact that such instruments are *not* legally binding does not perhaps render them more effective than if they were legally binding. A typical argument for this point of view is the benefit of the greater flexibility and specificity resulting from the nonnecessity of the international consensus required for a legally enforceable instrument. While nonlegal aspects of the codes are not central to our treatment here, a distorted picture could result if it were not pointed out that international codes and guidelines, despite their lack of legal enforceability, have not been without discernable and sometimes concrete effect.

⁶⁶See e.g. "Auslandsinvestitionen in Amerika gestiegen", *Frankfurter Allgemeine Zeitung*, 29 August 1980, at 12; "Foreign direct investment in Germany DM 66.8 b ende 1978", *Europe Agence internationale d'information pour la presse*, Luxembourg, 4 February 1981, at 17; "The new wave: Foreign capital investment in the United States—a survey", *The Economist*, 25 October 1980; "Deutsche Auslandsinvestitionen bzw. ausländische Investitionen in der Bundesrepublik Deutschland", *Archiv der Gegenwart*, 9 August 1980; CCH *Common Market Reporter: Doing Business in Europe*, para. 40,033 [New Developments, 1980]; "Verstärkte Kapitalausfuhr aus Japan: Direktinvestitionen im Ausland auf Rekordhöhe", *Neue Zürcher Zeitung*, 6 September 1979, at 17; "Japan is Building Economic Empire in American West", *International Herald Tribune*, 3 August 1978, at 1 *et seq.*; "Japanese Beachhead in California", *The New York Times*, Sunday edition, 21 August 1977, Section 3, at 1; "Look out—the British are coming", *The Sunday Telegraph*, 27 February 1977, at 25; "Beecham expanding in North America", *Financial Times*, 9 March 1978 (Financial and Company News section).

⁶⁷That contractual arrangements are increasingly being resorted to as a solution to the growing restrictions on MNE foreign direct investment was stressed by George C. Kern, Jr., in private discussion, on the occasion of the June 1979 Cologne Conference on "The U.S. Antitrust Laws/Die U.S.-Antitrust-Gesetze," presented by the Practising Law Institute of New York in co-operation with the German-American Lawyers Association, Bonn, the American Chamber of Commerce in Germany, Frankfurt am Main, and the Studienvereinigung Kartellrecht E.V., Wiesbaden.

B. TANGIBLE NONLEGAL EFFECTS

Of particular interest in this connection are two instances in which host governments have brought before the OECD Committee on International Investment and Multinational Enterprise (CIME), for "clarification", cases involving MNEs where the judgments handed down by local courts were considered by those governments to be unacceptable and in conflict with the 'letter' or at least the 'spirit' of the Guidelines.

In each case, specific action was consequently taken against the MNEs in question—action which had not, in either case, been a part of the final judgment in the respective national courts. One of these cases was the *Badger* case,⁶⁸ brought by the Belgian government, and the other was the *Hertz* case,⁶⁹ brought by the Danish government, both introduced on March 30, 1977. The *Badger* case involved the issue of co-responsibility of the parent company and its subsidiaries; the *Hertz* case involved the transfer of company personnel across national borders during a labour dispute. We shall avoid entering into the detailed facts of these domestic cases,⁷⁰ since at the stage at which they reached the international level their handling was extra-legal. And while even the nonlegal aspects are interesting and worthy of mention, the essential point to be brought out here is that these cases, called to the attention of the CIME by host governments, are illustrations of issues arising under voluntary Guidelines which produced concrete and favourable results for those host states introducing the complaints. The Committee strictly limits itself to considering and clarifying the issues only, i.e. the general principles on which a debate was based, without any pretense of acting as a 'semi-court'. The Committee seeks no deviation from the practice of settling actual *cases*, at the national or bilateral level, in domestic courts. It carefully avoids any references to 'fact-finding'; it debates 'issues' rather than 'cases'; and it aims at 'clarification' rather than 'interpretation'.

While a number of other cases have been brought before the CIME, all introduced by one of its advisory bodies, namely the Trade Union Advisory Committee (TUAC), the *Hertz* and *Badger* cases are of particular interest in that they were the first two cases brought before the Committee by governments.

Of course OECD's CIME brings to mind also ICC's commercial arbitration service for conflicts arising in the course of international trade, as well as the World Bank's International Center for the Settlement of Industrial Disputes (ICSID), as international efforts to settle trade and investment

⁶⁸The *Badger* case, Written Question No. 323/77 of June 29, 1977 (Mr. Van der Hek), and the Answer of the Commission, dated September 14, 1977, *Official Journal* 1977 C. 246/17 and 18.

⁶⁹The *Hertz* case, EC doc. 424/76, November 15, 1976; European Parliament, Resolution of November 16, 1976, *Official Journal* 1976 C. 293/12; Debates, same date, at 46-51.

⁷⁰For a more detailed handling of the *Badger* and *Hertz* cases, see BLANPAIN, *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS: 1976-1979. EXPERIENCE AND REVIEW*, (Deventer: Kluwer, 1979).

conflicts; but we must not deviate from the central issue here, which is not arbitration but MNE regulation, or control, and the nature of international codes and guidelines.

3. Addressees

Every bit as significant for the effectiveness—legal or extralegal—of the codes is the matter of to whom they are addressed. International codes or regulations—however well elaborated—are of little impact when the recommendations are not directed at parties with the will and capacity to carry them out effectively. Of prime importance, then, is that any international directives be addressed to the appropriate party. This may, in fact, vary according to the particular intent of any given set of guidelines.

It is noteworthy that, while the host state is the party most directly affected by the foreign investment, most of the code provisions are directed either at the home state (ICC Guidelines: "The Investor's Country Should. . ."; ILO: "Governments of home countries should. . ."), or at the MNEs themselves (OECD: "Enterprises should. . ., should refrain from. . ."; ICC: "The Investor Should. . ."; ILO: "multinational enterprises should. . ."; U.N.: "Transnational corporations should/shall. . ., should/shall not. . ."). ICC and the ILO have included directives to the host as well (ICC: "The Host Country's Government Should. . ."; ILO: "Both host and home country governments should. . ."), addressing some provisions to two or to all three parties concerned (ILO: "All parties concerned . . . should. . .", "Governments, multinational as well as national enterprises should. . .").

Each major set of guidelines is constructed differently, reflecting the slightly different natures or objectives. The OECD Guidelines address only MNEs, and expressly state that they are to be regarded as "recommendations jointly addressed by Member countries to multinational enterprises operating in their territories", and that "[o]bservation of the guidelines is voluntary and not legally enforceable".⁷¹

The ICC divides its "Principles" into three separate categories: (1) those addressed to "The Investor", (2) those addressed to "The Investor's Country's Government", and (3) those addressed to "The Host Country's Government". These guidelines are also expressly stated not to be a "rigid code of conduct".⁷²

The U.N. Code Formulations make it clear in the Preface⁷³ that the treatment of principles and/or issues are divided into two groups, those related to the activities of MNEs, and those relating to their treatment. This would seem to imply that the addressees would be the MNEs on the one

⁷¹OECD Guidelines, *op. cit.*, *supra* note 28, para. 6, at 12.

⁷²See Baade, "Codes of Conduct", *op. cit.*, *supra* note 29, at 53.

⁷³United Nations (ECOSOC), "Transnational Corporations: Code of Conduct; Formulations by the Chairman", U.N. document E/C.10/AC.2/8, December 13, 1978 [hereinafter cited as United Nations Code of Conduct: Formulations].

hand, and host states on the other. On examination of the text of the Code formulations, one finds that paragraphs 6 through 46⁷⁴ are specifically addressed to MNEs ("transnational corporations"); paragraphs 47-57 contain generally worded rights and responsibilities of host states and certain guidelines on jurisdiction and dispute settlement; only paragraphs 59-66 directly address states, and none of these paragraphs contain the "should/shall" formula used in addressing the MNEs. The alternative formulations read: "States agree to/should. . .", or "States agree that. . .", and even these are not necessarily host states. As mentioned earlier, the legal nature of the Code has yet to be determined.

The ILO Declaration does not divide its provisions according to addressee, but rather to subject matter. Consequently the addressees, representing government, employer and labour, are scattered throughout. The subject headings are helpful, but it could perhaps be of greater utility to any of the parties consulting the Declaration, if the various addressees were likewise grouped together, to facilitate reference. The Declaration, as previously mentioned, is recognized to be nonmandatory.

Let us consider what relative effects can be expected from directives addressed to the various parties concerned.

A. DIRECTIVES TO HOME GOVERNMENTS

First, in the present context, directives addressed to home governments concerning their multinational enterprises abroad can easily lead to greater exercise of extraterritorial jurisdiction or simply to further penetration of foreign influence into host territory. This would surely aggravate rather than alleviate many of the present concerns.

Secondly, if an international directive provides that the home state do the regulating, the home state must apply uniform regulatory measures to every type of firm, from extractive industries to high technotronics, unless a system of exceptions is to be implemented; and then the question arises as to who determines those exceptions, the international body issuing the directives to the home states or the home states themselves, in which case international uniformity is immediately sacrificed and subjectivity reenters.

Moreover, and even more importantly if the home state is directed to do the regulating, no differentiation can be made between various recipient (host) states. Unless, again, some elaborate system of exceptions were worked out relating to stage of economic development, balance of payments, GNP, or other criteria for assessing need for preferential treatment—criteria which fluctuate, in any case, even within a single state at different times. And even if the international regulations were to be tripartite, in the sense that recognition of the substantial differences between industrial, developing, and state-run economies were reflected in the regulations governing them, this would still fail to deal with the fact that the

⁷⁴With the exception of the several not yet formulated.

national interests even within each group also vary considerably from one nation state to another (witness the frequent lack of unanimity within regional 'common markets'⁷⁵).

Such issues as what constitutes a 'key sector', or what particular technological, managerial, or other needs might be served by conditional entry requirements, or what constitutes the 'national interest', and similar issues, can only properly be determined by the individual nation-state hosting the investment (in conformity with international law), and not by the home state constrained to uniformly apply some internationally decreed standard, which it must then exert extraterritorially on its MNEs operating abroad.

B. DIRECTIVES TO MNEs

International directives addressed to the MNEs are unquestionably useful in the form of guidelines for good corporate citizenship as binding codes, however, they would be less than optimal for several reasons. First, the multinational enterprises themselves are hit by national regulations from both home and host governments. An international code aspiring to further regulate the multinationals directly, rather than through governments, would only add to the multitude of regulations, often conflicting, which already confront them, further aggravating international commercial relations.

An international code could indeed contribute to the avoidance of overlapping or conflicting legislative jurisdiction to alleviate the unenviable position of the MNE being subject to more than one jurisdiction when multiple jurisdiction means conflicting and mutually incompatible directives; but international directives addressed to MNEs can clearly do nothing to ameliorate such conditions, as the MNEs themselves are powerless as regards jurisdictional questions, being neither general 'natural' nor 'artificial' subjects of international law as currently understood,⁷⁶ nor possessing "the power to participate directly in the norm-creating process."⁷⁷

Further, addressing directives to the MNEs fails to take full account of the semantic and definitional deficiencies. The difficulties of definition of a multinational enterprise are well-known and no universally accepted legal definition of MNEs exists as yet. It is clear, then, that provisions aimed at "multinational enterprises" may fall short of their mark if it remains unclear as to just which enterprises fall under the category of "multinational".

The OECD Guidelines state specifically that "a precise legal definition is

⁷⁵See, *inter alia*, Vagts, "The Host Country Faces the Multinational Enterprise", 53 B. U.L. REV., (1973), at 276; "Chile Formally Quits Andean Market Pact", *International Herald Tribune*, November 1, 1976; Torem and Craig, "Developments in the Control of Foreign Investment in France", 70 MICH. L. REV., (1971), at 300-311.

⁷⁶See generally Baade, "Individual Responsibility", in: Black and Falk, eds., *The Future of the International Legal Order*, Vol. 4: *The Structure of the International Environment*, (Princeton, N.J.: Princeton University Press, 1970 [Vol. 4, 1972] pp. 290-327.

⁷⁷Baade, "Legal Effects of Codes", *op. cit.*, *supra* note 35, at 16.

not required for the purpose of the guidelines".⁷⁸ This is true only due to the totally voluntary nature of these particular Guidelines, and their "soft-law" character. In contrast to this, and reflecting the legal aspirations of the U.N. Code, is the statement that "[t]he need to define transnational corporations as well as some other fundamental concepts for the purposes of a code is recognized".⁷⁹ If a code is to be binding, a legal—or at least authoritative—definition is clearly called for, in order to identify the entities to be covered.⁸⁰

But even a precise definition does not provide an adequate solution. Provided a legal definition were arrived at—and one such definition was indeed formulated independently by the Institut de Droit International at its Oslo Session in 1977⁸¹—an enterprise operating internationally and wishing to avoid certain provisions of the Code could, if it were in its interest, so modify its operations as to fall just outside of the legal definition and thus outside of the reach of the regulations. Such a move is unlikely with a large and well established multinational concern, but an enterprise just hovering on the borderline of becoming "multinational" by definition, could be tempted in this direction.

C. DIRECTIVES TO HOST GOVERNMENTS

This leads us to another significant question, namely, how important is it that a multinational firm be distinguished from a national firm for the purpose of regulation? It has been suggested that: "The so-called tensions between nation-states and multinational corporations are not very often different from those confronting government and business in the normal course of their mutual relations."⁸²

It is true that certain control provisions could only relate to enterprises with a foreign control-center. Such provisions would include the protection of national security and key-sector areas. But are not many of the abuses which are named as MNE abuses just as apt to be perpetrated by a powerful domestic firm?

⁷⁸OECD Guidelines, op. cit., *supra* note 28, para. 7, at 12.

⁷⁹U.N. document E/C.10/AC.2/3, January 26, 1978, para. 24, at 10. For full title of document, see *supra* note 3.

⁸⁰See e.g. United Nations, *Transnational Corporations: Issues Involved in the Formulation of a Code of Conduct*, U.N. document E/C.10/18, para. 46.

⁸¹Les entreprises formées d'un centre de décision localisé dans un pays et de centres d'activité, dotés ou non de personnalité juridique propre, situés dans un ou plusieurs autres pays, devraient être considérées comme constituant, en droit, des entreprises multinationales.

Institut de Droit International, "Résolutions adoptées par l'Institut à la Session d'Oslo, 30 août—8 septembre 1977: III. Les entreprises multinationales" (Deuxième Commission), (the French text is authoritative), as reproduced in *Institut de Droit International: Annuaire*, Vol. 57, Tome II, pp. 338-342, Sect. I, at 341.

⁸²Rogers, "Multinational Corporations: A European View", in BLAKE, ed., 403 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE (1972), at 65.

A small MNE (and there *are* small MNEs, unless the definition one selects includes a certain minimum size standard, which is not a very realistic criterion for establishing multinationality) is not likely to receive much criticism. It is generally a powerful MNE which becomes subject to attack. Is not a large and powerful domestic firm equally prone to exert undue pressures on its own government, lobby for its particular interests, which are not necessarily those of its government, or otherwise abuse the consumer by unfair competition and restrictive business practices? In the opinion of the present writer, it is the abuses themselves which should be attacked, whatever entity commits them, national or multinational;⁸³ and the host state would seem in the best position to assess those activities which are 'abusive' in the context of its own individual economy. Moreover, the very words "national interest" and "foreign enterprise" lose substantial significance outside of the national context.

If some potential abuses are exclusive to multinational activity, then of course a law may be enacted to curb that abuse, but that law should be enacted by the host state where the abuse is likely to occur. There would appear to be no need to specify that the law is to be applied exclusively to multinational firms, as then the definitional problem arises. The law should simply be directed against the abuse. Firms which by their very legal structure are incapable of perpetrating the abuse will simply lie outside the applicability of the particular law.

Special care must of course be taken here, in conformity with the national treatment principle of international law, that the law is not of a discriminatory nature, and that, if it affects solely foreign enterprises, it is only in those allowed areas of the public interest and national security. There is clearly the danger, even so, that the 'public interest' can be stretched beyond all reasonable limits, as is not infrequently seen in, for example, some cases relating to expropriation.

In short, it should not be "the multinational enterprise" which is under attack, but rather those results of operations—of MNEs or of strictly national enterprises—which have deleterious effects on the political, economic, cultural and/or natural environments. It is in the context of functioning national legal systems where this will hopefully be—and appears to be in the process of being—partially, if not substantially, achieved.

Consequently, it is the opinion of the present writer that any MNE-control regulations⁸⁴ in international codes, where the intent is any more than one of "guidance" in the strictest sense of the word, should consist mainly of directives to host governments to the end of harmonizing and rationalizing national legislation for controlling any abuses of power in corporate

⁸³Two international codes reflect this view: the OECD Guidelines (op. cit., *supra* note 29, para. 9.) and the ILO Declaration (op. cit., *supra* note 1, para. 11).

⁸⁴As distinct from control limitations on the powers of host states in dealing with MNEs as aliens, which should also be included in any regulations regarding MNEs. See also *infra* note 105 and accompanying text.

activity; and where this involves a foreign multinational enterprise, the control is best applied at its point of impact, its point of actual operations, namely, the host state. For if the aim is to be served of making the MNE both efficiently productive and economically and technologically beneficial to the host state, surely a 'conflicting patchwork' of national controls will not serve this goal.⁸⁵ What is needed is a legal framework of effective national laws harmonized at least to an extent that companies can more easily initiate and conduct transnational operations⁸⁶ without the uncertainty and complexities of conflicting laws, and with the more stable environment for long-range and beneficial corporate planning that such a framework would provide.⁸⁷

Finally, the fact that the current trend is toward polycentric (host-country oriented)⁸⁸ management is another strong argument in favour of control being exercised by the host, in its capacity as not only the seat of operations, but, increasingly, the seat of management.

International guidelines addressed to the host states, then, (and it must not be forgotten that most industrialized host states are at the same time home states, but here we are concentrating on their capacity as host) would place the control at the locus of the potentially abusive act. Moreover, the enforcement and/or punitive machinery relating to the abuse—or at least to the local party to the abuse in cases where two or more different national units of a multinational enterprise are involved—would also be at the locus of the illegal act or abuse.

Support for this view from an international body is supplied by a Resolution of the Institut de Droit International at its Oslo Session in 1977,⁸⁹ in which it was stipulated that for those enterprises which conform to the Resolution's 'legal' definition of "entreprises multinationales",⁹⁰ "[i]l convient que soit progressivement élaboré un régime juridique . . . qu'il devrait en particulier sauvegarder la souveraineté et l'indépendance économique des États. . ."⁹¹ While the recommendation that such judicial regime be implemented through international agreements,⁹² and that a study on the introduction of an international registration of multinational enterprises be

⁸⁵See e.g. Tindall, *op. cit.*, *supra* note 49, at 191-192.

⁸⁶See TUGENDHAT, *THE MULTINATIONALS* (New York: Random House, 1972), at 91-92.

⁸⁷See Tindall, *op. cit.*, *supra* note 49, at 228-229.

⁸⁸See Perlmutter, "Some Architectural Problems of the Multinational Firm," 3 Q. J. AISEC INT. (1967), cited in *Yearbook of International Organizations*, 1968-1969, at 140; cf. also Perlmutter, "The Tortuous Evolution of Multinational Corporations", 3 COL. J. WORLD BUS. (1969) and Perlmutter, "L'entreprise internationale—trois conceptions", 23 REV. ÉCON. SOC. (1965), at 151 *et seq.*

⁸⁹Institut de Droit International, "Résolutions adoptées par l'Institut à la Session d'Oslo, 30 août—8 septembre 1977: III. Less entreprises multinationales" (Deuxième Commission), (the French text is authoritative), as reproduced in *Institut de Droit International: Annuaire*, Vol. 57, Tome II, pp. 338-342.

⁹⁰*Ibid.*, Sect. I. (See *supra* note 81).

⁹¹*Ibid.*, Sect. II.

⁹²*Ibid.*, Sect. III: 1(a).

undertaken,⁹³ the emphasis remains on safeguarding the sovereignty and economic independence of states.⁹⁴

Further, the resolution provides that:

1. Pour la détermination de la loi applicable à la constitution, à l'organisation, au fonctionnement et à l'activité des divers éléments composant l'entreprise multinationale, il doit être fait respectivement application des systèmes de solution de conflits de chaque for saisi. En ce qui concerne les activités des entreprises multinationales, il serait souhaitable que ces systèmes fussent progressivement harmonisés de manière à tenir compte, d'abord du pays où s'accomplissent ces activités, et en outre des pays ou celles-ci produisent des effets directs et immédiats.

2. Il est souhaitable que soit envisagée une harmonisation internationale progressive des règles de droit matériel relatives aux activités des entreprises multinationales, et que soient poursuivis les travaux d'élaboration de 'Codes de conduite' pour ces entreprises.⁹⁵

Hence, while promoting "codes of conduct" for multinational enterprises, the general thrust of the resolution appears to be toward a "progressive international harmonization" within the choice of law system of each forum, wherein will be determined the law applicable as concerns MNE activities, "preserving the sovereignty and economic independence of states", rather than toward an actual globally applicable international regulatory agreement.

And finally, while recommending that international agreements be concluded for allocation of jurisdiction in matters of restrictive business practices in order to avoid overlapping jurisdiction or jurisdictional gaps, actual legislative, executive and judicial jurisdiction (to regulate, control and penalize in cases where the effects of such practices are of "an intentional character, or at least foreseeable, substantial, direct and immediate"), are to be based—at least in every case concerning restrictive business practices—on the locus where the delict is performed ("fondée en tout cas sur le lieu où ces pratiques sont accomplies") and where its "direct and immediate effects" are felt.⁹⁶

While considering the host as addressee, it would be well to make at least a passing comment on host-state limitations. No international code can achieve the aims sought unless it represents a reasonable balance of advantages and responsibilities for governments and corporations alike.⁹⁷ Without continually recalling to mind that the present discussion has been focused upon control techniques exercised over the activities of multinational enterprises, one could easily develop the notion that a sort of 'cops and robbers' situation exists, where the 'good guys' are the regulating gov-

⁹³*Ibid.*, Sect. III: 2(a).

⁹⁴*Ibid.*, Sect. II.

⁹⁵*Ibid.*, Sect. IV: 1,2.

⁹⁶*Ibid.*, Sects. V, VI.

⁹⁷See Jenks, "*Multinational Entities in the Law of Nations*", in JESSUP, *TRANSNATIONAL LAW IN A CHANGING SOCIETY*; Essays, Friedmann, ed. (New York: Columbia University Press, 1972), at 81-82.

ernments and the 'bad guys' are invariably the MNEs.⁹⁸ A very timely and useful study could be made concurrently on the extent to which the host states or other regulators should be limited or restrained from executing and exercising undue, excessive or unjustified 'controls' over the MNEs. In other words, who is to control the controllers?⁹⁹

Here, we are led into another realm of discussion entirely—that of protection of the foreign MNE investment against host-state coercive action which is not in conformity with the rules of international law. The delimitations of the present article have committed us to a consideration only of control *over* the MNE, and do not expand to include limitations on that control. If mention of the other side of the coin is totally neglected, however, an incomplete and deceptive impression could result.

We would do well to state here the aim of 'controls', which is generally agreed to be to minimize the detrimental effects and maximize the beneficial effects of MNE activity. This aim is a feature of every major 'code', 'guideline', and 'declaration' on international MNE controls drafted in recent years.¹⁰⁰ The second element of this aim will not be achieved if all 'controls' relating to the MNE are unidirectional and end up by strangling such enterprises to the point where their beneficial contribution to economic rationalization and development are sacrificed.

Apropos, a 200-page report, with a further 200-page annex, has recently been published in Brussels,¹⁰¹ revealing that multinationals are far more circumscribed by national, regional, and international regulations than they were even a few years previous. The report details the plethora of both international and purely EEC controls that have gradually and imperceptibly begun to restrict the freedom of action of the MNEs. Citing, *inter alia*, the EEC's fourth directive, requiring standards of disclosure on MNEs' subsidiaries; its seventh directive, aimed at demanding consolidated accounts from the MNEs; and its ninth directive creating a new legal basis for group liability of MNEs, the report warns that "it is the array of powers that the EEC Commission either possesses now or plans to acquire that stands out as the most formidable weapon multinationals have to face if they operate inside the Common Market."¹⁰²

As observed in a review of the report: "In effect, the multinational corporation is being tied down by strands of regulation, just as Gulliver was immobilised by the Lilliputians."¹⁰³

⁹⁸ See e.g. "Multinationals: Bad guys do good" (ILO studies resulting in support for MNEs), *The Economist*, November 22, 1975, at 81.

⁹⁹ See e.g. Schaffner, *Die Multinationalen—Ausbeuter oder Triebkraft der Weltwirtschaft?* (Zürich, Edition Interfrom, 1974), at 23.

¹⁰⁰ See *infra* notes 10-11 and accompanying text.

¹⁰¹ "Multinationals in the 1980s—trends in European regulation and international control", Agence Européenne d'informations, Brussels, 1980.

¹⁰² "The EEC creeps up on the multinationals" (Merritt), *The Financial Times*, London, October 5, 1979, at 12, reviewing the Brussels report (*Idem*).

¹⁰³ *Idem*.

A similar type of metaphor was used by Thomas Enders, the then U.S. Assistant Secretary of State, before members of Congress and the European Parliament, when he remarked that: "the danger is that uncoordinated or excessive national and international regulation—particularly if aimed at potential rather than actual abuses—runs the risk of killing the goose which lays the golden egg."¹⁰⁴

In considering international controls as a subject in themselves, one would really have to contemplate to what extent such controls should be seen as additional regulations on the MNE, already controlled from every side nationally; and conversely, to what extent they should be used to protect the interests of the multinational enterprises themselves¹⁰⁵ and to ease the many and various complexities confronting an enterprise doing business internationally.

C. Function of International Codes and Guidelines

A certain amount of caution must be exercised in attempting to appraise what are properly national functions and what are more suitably international functions in regulating the MNE,¹⁰⁶ since the multinational enterprise has been perceived as a political as well as an economic phenomenon, and legal 'answers' and categorizations cannot be expected to eliminate all the political repercussions stemming from MNE activity. Some evaluation as to the function of MNE-related controls can nonetheless be made.

1. *Protection of Beneficial Free-Flow of Private Investment Capital and Maintenance of Proper Balance of Benefits to MNE and Host Respectively*

Control on the national level simply means that the regulation of private enterprise should be a function of the individual nation-state in an exercise of its national sovereignty in accordance with generally recognized principles of international law and in the interests of preserving the free movement of private investment capital which has, up to now, (notwithstanding some well-publicized instances of abuse) been largely responsible for positive economic development and technological advancement on a global

¹⁰⁴Statement of Thomas O. Enders, Assistant Secretary of State, at a public hearing on the multinational corporation held jointly by members of Congress and the European Parliament, September 17, 1974, as cited in Sparkman, "The MNC and Foreign Investment", 27 MERCER L. REV. (1976) at 385.

¹⁰⁵Little rationalized protection for MNEs exists, outside of foreign investment insurance schemes and access to certain international arbitral tribunals such as IBRD's International Center for the Settlement of Investment Disputes (ICSID). One notable effort at such protection is the Council-of-Europe-approved OECD Draft Convention on the Protection of Foreign Property, 1967 (Organisation for Economic Co-operation and Development, Draft Convention on the Protection of Foreign Property and Resolution of the Council on the Draft Convention, OECD Publication No. 23081 (November 1967).

¹⁰⁶M. BROOKE & H. REMMERS, *THE MULTINATIONAL COMPANY IN EUROPE, SOME KEY PROBLEMS* (London: Longman, 1972), at 109.

basis. As assumed up by one legal writer, "[t]he free flow of capital and technology, as well as the free exchange of goods, is believed to result in a more efficient allocation of the world's resources and an improvement in world economic welfare."¹⁰⁷

Another legal writer goes so far as to state that "the advancement of aggregate global well-being *depends*, at least in part, upon an abundant flow of private foreign capital, which in turn depends upon stability of normative expectations. . ." [emphasis supplied],¹⁰⁸ while at the same time admitting that "it cannot be assumed that all such wealth will contribute to global well-being. Arguably only that foreign wealth which from economic, ecological, and other relevant points of view produces a net benefit to host countries is going to assist in this way. The fact remains, however, that worldwide economic growth cannot do without private foreign trade and investment."¹⁰⁹

This is not uniquely an industrialized nation point of view. From the Düsseldorf Conference,¹¹⁰ where the developing world was also represented, the following conclusion emerged:

It was universally acknowledged (at the Conference) that foreign investment is still vital to the process of development and structural transformation in the developing world in order to provide capital, particularly high-risk capital as in natural resource exploration, to provide technology and to give access to the knowledge of international markets.¹¹¹

In sum, "[t]he free play of economic forces will, apart from a few exceptional cases, make the economic welfare of the whole world greater in the long run than any alternate arrangement of resources".¹¹²

Hence, one function of regulations should be to protect the beneficial free-flow of private investment capital, and to maintain a proper balance between the benefits to the enterprise and those to the host state, cutting down on known abuses, through national legislation.

As remarked earlier, needs will vary not only from general economic sector to general economic sector, i.e. regionally, and not only from state to state within one economic sector or region, i.e. nationally, but also within one particular state at different stages in its political and economic development. For example, certain sectors of the economy are liable to close and reopen to foreign investors as the host state concerned experiences various temporary political or economic crises.¹¹³ These regional and national dis-

¹⁰⁷Ellis, "United States Multinational Corporations: The Impact of Foreign Direct Investment on United States Foreign Relations," 11 SAN DIEGO L. REV. (1973), at 3.

¹⁰⁸Weston, "Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'", 16 VIRG. J. INT. L. (1975), at 124.

¹⁰⁹*Ibid.*, at 127.

¹¹⁰*See supra*, Section B(1)(b).

¹¹¹Stern, in Wallace, loc. cit., *supra* note 45.

¹¹²Robinson, *The Structure of Competitive Industry* (Cambridge: James Nisbet and Co. & Cambridge University Press, 1958), at 141.

¹¹³BROOKE AND REMMERS, *THE INTERNATIONAL FIRM: A STUDY OF MANAGEMENT ACROSS FRONTIERS—TRADE AND INVESTMENT* (London: Pitman, 1977), at 60. A case in point would

crepancies and internal fluctuations can be reflected in regional and municipal legislation in a way that would be impossible under an international system, and this freedom must be maintained for the sake not only of national economic well-being, but also of the healthy international flow of capital worldwide.

2. *Harmonization of National Laws in Certain Key Areas*

A second function of international 'codes' or 'guidelines' should be one that we have spoken of throughout and that needs little further elaboration here—that of harmonizing national laws in the key areas of control over foreign direct investment, with allowance for diversities in regional and national needs and objectives. Some key areas for such harmonization would be, for example, certain aspects of antitrust legislation and its extra-territorial reach,¹¹⁴ laws regarding illicit payments and other corrupt business practices,¹¹⁵ and certain standards such as compensation in constructive takings of alien property; while areas left more to domestic prerogative would include controls on entry, key sector exclusions, reasonable tax incentives and disincentives, and other means of ensuring and safeguarding internal economic well-being and national security.

3. *Coverage of Those Areas Inadequately Provided for under Municipal Law*

A third function of any international guidelines should be to cover those areas for which existing municipal systems are unable to provide adequately, either because such areas are beyond their jurisdictional mandate or because they are powerless to provide effective harmonization efforts for unifying their own transborder commercial transactions with those of other nation-states. Among these might figure even some of those areas mentioned in the above paragraph, in cases where no laws yet exist to be 'harmonized' or where national standards are so diverse as to preclude any internationally recognizable norm—for example directives regarding compensation standards or illicit payments.

Some international support for binding codes or multilateral treaties in the area of corrupt practices can already be observed in association with

be the U.K. automobile manufacturing firm British Leyland's negotiations with Japanese car manufacturers to produce Japanese cars in the U.K. This would have been unthinkable ten years earlier.

¹¹⁴See e.g. OECD Report of the Committee of Experts on Restrictive Business Practices: "Restrictive Business Practices of Multinational Enterprises", OECD, Paris, 1977, at 58. Bilateral and multilateral agreements such as that between Germany and the United States in anti-trust matters could also be a positive means of harmonization as well as having the binding force of the international law of treaties.

¹¹⁵See *infra* notes 116-118 and accompanying text.

certain of the code formulations;¹¹⁶ and the U.N. Economic and Social Council is, itself, working on the elaboration of an international agreement on illicit payments.¹¹⁷ Yet it is largely illusory to issue a guideline instructing multinational enterprises not to make illicit payments, when the MNE is operating in a host state where government officials openly or clandestinely exact such payments, or in host states where such payments would constitute the traditional and accepted way of conducting business. The MNEs would be the first to benefit from controls in this area. Such control cannot emanate from MNEs but must be exercised rather by governments, which have the power to penalize any breaches of the law. Unfortunately, in some countries it is the government that encourages these practices.

It is not even sufficient that home governments make such payments illegal for their own multinationals operating abroad, unless all home governments enact—and enforce—such legislation. This is where the importance of harmonization of laws becomes particularly apparent. To date, for example, only the United States has made it a criminal offense for its enterprises to offer illicit payments in their business transactions abroad.¹¹⁸ Since no European or other nations have followed suit, U.S. firms have been put at an obvious and costly competitive disadvantage *vis-à-vis* other foreign investors who continue to do business according to the means customarily expected of them in states which turn a blind eye to, or actively indulge in, such practices.

So here again, while an international code would be useful for promoting a uniform international standard, it is to the host governments that international directives should be issued to the effect that no illicit payments are to be either exacted or accepted from foreign investors.

Illicit payments is indeed one area in which a general treaty could alleviate some of the difficulties. Other areas might include accounting procedures and some aspects of restrictive business practices touching on extraterritoriality questions. Even so, if the provisions are not adequately enforced on the national level, nearest the source of the difficulties, or if they merely duplicate what is already covered by municipal legislation, international solutions will be no improvement on national ones.

4. *Overall Function*

The overall function of international as well as of national control legislation, as concerns the MNE, then, should be—to use the wording of the

¹¹⁶See e.g. International Chamber of Commerce, "Extortion and Bribery in Business Transactions", Report adopted by the 131st Session of the Council of the ICC, November 29, 1977, Part II, Recommendations to Governments, Sect. I.

¹¹⁷United Nations Economic and Social Council, *Report of the Committee on an International Agreement on Illicit Payments on its First and Second Sessions* (January 29-February 9 and May 7-18, 1979), U.N. document E/1979/104 of May 25, 1979.

¹¹⁸United States Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 95th Cong. (December 19, 1977) [S. 305].

OECD Guidelines—to “encourage the positive contributions which multinational enterprises can make to economic and social progress and to minimise and resolve the difficulties to which their various operations may give rise.”¹¹⁹

This statement, moderately rephrased in both the U.N. Code¹²⁰ and ILO Declaration,¹²¹ expresses the general recognition that along with whatever difficulties may arise from MNE operations, there is also a positive contribution resulting from these activities.¹²² It should then be up to the individual state, in whose interest it is, after all, that any abuses arising out of MNE or other corporate activity be curbed and that any benefits arising therefrom be put to suitable advantage, to determine how best to accomplish its goals, in conformity with international law and taking into consideration all relevant international guidelines. Outside of directives aimed at a general harmonization of national laws, a code of conduct or international set of guidelines should fulfill only that function which cannot better be filled on the national level. It should complement and direct, not replace or override, national regulations. The task of “international” MNE regulation then, in sum, is to maximize the benefits to the largest possible extent, and to minimize the difficulties to the greatest possible degree, by retaining to the individual states their sovereign powers and rights to protect their national interests, while allowing multinational business enterprises to manage their operations in a way that will maximize overall effectiveness in conformity with, and consistent with, their duties as responsible ‘corporate citizens’ and as responsible subjects of both municipal and international law.

¹¹⁹OECD Guidelines, op. cit., *supra* note 28, para. 2, at 11. Cf. OECD Declaration, op. cit., *supra* note 26, Secretary-General’s Foreword to the Declaration (unnumbered) para. 1, at 5.

¹²⁰United Nations Code of Conduct: Formulations, op. cit., *supra* note 73, para. 57, at 13. See also U.N. Draft Code, op. cit., *supra* note 4, para. 60.

¹²¹ILO Declaration, op. cit., *supra* note 1, Preface (unnumbered) para. 4, and para. 2.

¹²²The adherence to this statement on the part of the ILO would not appear to be merely for propaganda purposes, as evidenced by the published results of ILO studies carried out on the operations of MNEs, which resulted in some positive findings. (See, *supra* note 98.)

