[Maryland Journal of International Law](http://digitalcommons.law.umaryland.edu/mjil)

Volume 1 | Issue 1 Article 5

Transnational Corporations: Supervision, Regulation, or What?

Seymour J. Rubin

TRANSNATIONAL CORPORATIONS:* SUPERVISION, REGULATION, OR WHAT?

SEYMOUR J. RUBIN**

It has been a commonplace of the 1960's and early 1970's that the multinational enterprise, however defined,[1] has dramatically altered international economic relationships. One sees this alteration in accordance with one's own preoccupations and perceptions, though almost all agree that it has been large and important. Most statesmen and theorists of the developing world find significance in the fact that the gross annual sales of General Motors exceed the gross national product of many nation-states in the world.[2] The combination of size of different sorts, equated with power, and the largely foreign ownership and direction of the majority of multinationals leads to the conclusion that a conflict exists with the policies of the nation-state. For U.S. labor unions, the MNC is a mechanism which has shifted U.S. jobs and technology abroad, in the interest of its own profits and with increasing prejudice to a free and prosperous labor movement.[3] For many in the Congress and the U.S. press, the MNC is a means of imposing private purpose often by improper methods, on United States governmental policy.

An extreme example of the asserted influence of the transnational on governmental policy is the asserted involvement of

*Throughout this article, the terms multinational enterprise (MNE), multinational corporation (MNC), and/or transnational corporation (TNC), are used with varying degrees of frequency. Perhaps this is the author's view of the unimportance, and indeed, the almost scholastic nature of the numerous discussions of definition. What is meant, by whatever term, is a corporation with its ownership and its control centered for the most part in one nation (the "home" nation) and with several operating subsidiaries, owned in whole or in part, but used as parts of an integrated industrial enterprise, in other nations. The term most in current favor, and now adopted in the United Nations, is "transnational corporation." The argument may plausibly be made that "transnational" conveys the meaning better than "multinational," which may connote multi-nation ownership. On the other hand, the term "corporation" seems too narrow, since many enterprises which have similar effects are brought about by agreement rather than stock ownership; and state trading companies are often not corporations.

**Professor of Law, Washington College of Law, American University; Member, Inter-American Juridical Committee; United States Representative, First Session of United Nations Commission on Transnational Corporations, March, 1975. The views expressed in this article are entirely those of the author, and should in no way be taken as necessarily reflecting those of any private, public or intergovernmental organization.

[1] A definition of the multinational corporation acceptable to all will probably never be had, but generally, *see* U.S. TARIFF COMMISSION, IMPLICATIONS OF MULTINATIONAL FIRMS FOR WORLD TRADE AND INVESTMENT AND FOR U.S. TRADE AND LABOR 80-84 (TC Publication No. 537, 1973), UN ECOSOC, MULTINATIONAL CORPORATIONS IN WORLD DEVELOPMENT 1 (1974), and Aharoni, *On the Definition of a Multinational Corporation*, 11 Q.Rev.Econ. 27 (1971).

[2] *E.g.*, General Motors' gross annual sales for 1969 exceeded the combined GNP of Venezuela, Chile and Peru for 1970. For such an exercise in ranking of countries and companies, *see Hearings on Multinational Corporations Before the Subcomm. on Int'l Trade of the Senate Finance Comm.*, 93rd Cong., 1st Sess., at 404 (1973).

[3] U.S. labor unions have voiced concern over the domestic effects of the MNC. *See* U.S. MULTINATIONALS, THE DIMMING OF AMERICA, Report Prepared for the AFL-CIO Maritime Trades Department Executive Board Meeting in Hearings, *supra* note 2, at 445, Testimony of Paul Jennings, Pres., Int'l Union of Electrical Radio and Machine Workers, in *Hearings on a Foreign Economic Policy for the 70's Before the Subcomm. on Foreign Economic Policy of the Joint Economic Comm.*, 91st Cong., 2d Sess., at 813 (1970), and Testimony of I. W. Abel, Pres., Int'l Steelworkers Union in *Hearings on the Trade Reform Act of 1973 Before the House Ways & Means Comm.*, 93rd Cong., 1st Sess., at 1209 (1973). For the contrary view, *see* Tariff Commission Report, *supra* note 1, at 645.

ITT in Chilean politics, and its interface with official American policy. It has been more than suggested that, in that case and perhaps in others, the existence abroad of an American investment is a determinant of policy.[4] Even the guaranteeing by the Overseas Private Investment Corporation (OPIC) of certain types of overseas investments in the developing nations has been thought to involve a predetermination by private interests of overall governmental attitudes.

Attitudes vary, even among those who regard the transnational corporation as a superpower capable of transcending narrow nationalistic policies in the interest of a dispassionate and useful pursuit of global efficiency. Some, like Arnold Toynbee, regard this power as the beneficent instrument of overcoming a nationalism which must be eliminated if the world is to survive.[5] Others, like Ronald Müller, view it as the instrument of imposing and then perpetuating a division of benefits which impoverishes the less developed and widens the disparities between rich and poor in those nations.[6] One may find any of these views, in varying degrees of moderation, expressed in the voluminous literature, and in the resolutions of innumerable international bodies. There is even the skeptical view that the power of the large international corporations may have been somewhat exaggerated.[7]

A substantial part of this abundant literature suggests that some form of international regulation of the multinational is desirable, if not necessary. A plethora of international organizations already have the creature under dissection. These range from the OECD[8] to the Inter-American Juridical Committee of the OAS[9] to the United Nations to the ILO[10] to the United Na-

[4] The alleged involvement of the U.S. government with ITT in Chile occurred on several levels. The full extent of the relationships is not yet known but is one subject of inquiry before the Rockefeller Commission. *See Hearings on the International Telephone and Telegraph Co. and Chile Before the Subcomm. on Multinational Corporations of the Senate Foreign Relations Comm.*, 93rd Cong., 1st Sess., (1973), and A. SAMPSON, THE SOVEREIGN STATE OF ITT (1973).

[5] A. TOYNBEE, THE RELUCTANT DEATH OF SOVEREIGNTY (1971).

[6] *See* Muller, *Poverty is the Product*, FOREIGN POLICY (No. 13, Winter 1973-74) 71, 85-88.

[7] *See* Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, at 791 (1970); Rubin, *Multinational Enterprise and National Sovereignty: A Skeptic's Analysis*, 3 LAW & POL. INT'L BUS. 1 (1971).

[8] *See* OECD, INTERNATIONAL TRADE AND ITS SOCIAL AND ECONOMIC EFFECTS (1973). The OECD is, as of mid-May, 1975, engaged in an intensive effort to draft a code of conduct for TNCs, and related documents, such as the U.S.-sponsored commitment to "national treatment." The relevant documents are as yet "restricted to participants."

[9] *See* General Secretariat of the OAS, Work Accomplished by the Inter-American Juridical Committee during its Regular Meeting Held from Jan. 14 to Feb. 20, 1974, at 120-126, OAS Doc. CJI OEA/Ser. Q/IV.8 CJI-19 (1974). The Permanent Council of the OAS has also approved a report submitted to it, Report by the General Committee on the Study of Resolution AG/RES. 167(IV-O/74) "Transnational Enterprises," OAS Doc. OEA/Ser.G CP/Doc. 348/74 rev. 1 (1974), calling for a "research program" on the effects of MNCs on Latin American economies and on international relations, Summary of the Regular Meeting held by the Permanent Council on September 4, 1974, OAS Doc. OEA/Ser.G CP/SA. 131/74 (1974).

[10] The International Labor Office has undertaken studies on MNCs to provide guidance to governments in social policy formulation and to determine the advisability of "international principles and guidelines in the field of social policy relating to the activities of multina-

tions Commission on International Trade Law (UNCITRAL)[11] to doubtless many others. International conferences of every sort[12] have dealt with the implications of the multinational for the distribution of goods and services among and within nations, the problems of scarcities of food and raw materials, the transfer of technology, and the effects of multinationals on traditional trade theory, and, implicitly, on the relevance of such venerable features of the international landscape as the GATT. Though considerable skepticism has been expressed as to the utility and indeed the likely effects of an international supervisory or regulatory agency, as for example at the 1973 Dusseldorf Conference,[13] the majority view seems to be that some sort of regulation or supervision would be desirable.

At the outset, it is useful to know what is being discussed. Unfortunately, the words often cloud rather than reveal the intention. There is, for example, already much "international" agreement and regulation pursuant to such agreement. However, it is generally confined to nations which are on one side of a rather ill-defined controversy—the developing or capital-importing nations or to those which have the ability, because of special circumstances, to impose their mandate. Thus, the Andean Group has its agreement in Decision 24 of the Andean Private Investment Code,[14] an agreement sufficiently strong that the Group was able to compel Chile to revise laws indicating more receptivity to foreign enterprise than was thought by the Group to be compatible with Decision 24. The OPEC nations have their regulatory pact, for reasons too well-known to require elaboration.[15] In addition, it could probably be argued that there is agreement at the United Nations—and more to come—expressed in a whole series of General Assembly resolutions commencing in the late 1950's on the subject of "permanent sovereignty" over natural

---

tional enterprises . . . ," International Labor Office, 56 OFFICIAL BULLETIN 72 (1973). *See also* Statement of F. Blanchard, ILO Director General, at the Regional Meeting of the American Society of International Law, held at the OECD, Paris, January 7-9, 1975 (unpublished).

[11] UNCITRAL has requested the Secretary General to collect information from member states and produce a report on what measures UNCITRAL should take with regard to MNCs, 28 GAOR Supp. 17, at 24, U.N. Doc. A/9017 (1973) and 29 GAOR Supp. 17, at 20, U.N. Doc. A/9617 (1974).

[12] *E.g.*, Third International Congress on Food, Science and Technology, N.Y. Times, Aug. 11, 1970, at 22, col. 5, 1974 Conference on Food and Energy, Id., May 13, 1974, at 11, col. 1, World Food Conference, Id., Nov. 17, 1974, at 1, col. 8, and the Third UNCTAD Conference, UNCTAD, 3rd Session, Official Records, 1st Comm., Summary Records of the 1st to the 22nd Meetings Held at Santiago, Chile, from Apr. 13 to May 16, 1972, U.N. Doc. TD/III/C.1/SR.1-22 (1972); 2nd Comm., Summary Records of the 1st to the 19th Meetings, U.N. Doc. TD/III/C.2/SR.1-19 (1972); and 3rd Comm., Summary Records of the 1st to the 24th Meetings, U.N. Doc. TD/III/C.3/SR.1-24 (1972).

[13] INTERNATIONAL CONTROL OF INVESTMENT, THE DUSSELDORF CONFERENCE ON MULTINATIONAL CORPORATIONS, 1973 (D. Wallace & H. Ruof eds. 1974).

[14] 10 INT'L LEGAL MAT. 152 (1971). *See* generally, Oliver, *The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L L. 763 (1972).

[15] *See* Statute of the Organization of the Petroleum Exporting Countries, 4 INT'L LEGAL MAT. 1175 (1965).

resources. The General Assembly Resolution on Recommendations Concerning International Respect for the Rights of Peoples and Nations to Self-Determination[16] established a Permanent Sovereignty Commission which proposed a Resolution on Permanent Sovereignty over Natural Resources.[17] The Economic and Social Council adopted a Resolution on Permanent Sovereignty over Natural Resources of Developing Countries in 1973.[18] The Charter of the Economic Rights and Duties of States has now been adopted by the General Assembly in a form acceptable to a majority but not to a small, but vital, minority of its members.[19]

Thus, there is no lack of international agreement among the developing nations in the United Nations and its subsidiary bodies or in separate forums. There is even supervisory machinery, as for example in the Andean Pact nations.[20] Moreover, one might add the work of the EEC or the tentative steps being taken by the OECD to the list of proposed agreements coupled with supervisory agencies.[21] The deficiency, however, is in either agreements or in supervisory mechanisms which would bring together the developed and the developing worlds. The General Assembly may adopt its resolutions, but such accommodation as has occurred seems due more to changes in economic circumstances than adherence to those resolutions.

Certain ambiguities make the task of achieving consensus on meaningful measures easier in form than in substance. A fundamental blurring often occurs in discussion of establishment of some sort of supervisory apparatus and of the rules, standards, or even regulations to be applied in such supervision. Thus, the U.N. Report of the Eminent Persons[22] suggested that an agency[23] be set up within the parameters of the United Nations. At the date of this writing, the U.N. Commission on Transnational Corporations, which resulted, has had its first annual meeting; but the manner in which it will operate, and how it will deal with

---

[16] G.A. Res. 1314, 13 U.N. GAOR Supp. 18, at 27, U.N. Doc. A/4093 (1958).

[17] G.A. Res. 1803, 17 U.N. GAOR Supp. 17, at 15, U.N. Doc. A/5217 (1962).

[18] ECOSOC Res. 1737, 54 U.N. ECOSOC Supp. 1, at 1, U.N. Doc. E/5367 (1973).

[19] 29 U.N. GAOR 3281, U.N. Doc. A/9946 (1974), also in 14 INT'L LEGAL MAT. 251 (1975). The Charter of Economic Rights and Duties of States was approved by 120 votes to 6 votes against (Belgium, Denmark, German Federal Republic, Luxembourg, U.K. and U.S.) with 10 abstentions (Austria, Canada, France, Ireland, Israel, Italy, Japan, The Netherlands, Norway and Spain).

[20] *See* Agreement Establishing the Andean Development Corporation, 8 INT'L LEGAL MAT. 940 (1969) and Agreement on Andean Subregional Integration. *Id.* at 910.

[21] Such an agreement was proposed, for example, in Goldberg and Kindleberger, *Toward a GATT for Investment: A Proposal for Supervision of the International Corporation*, 2 LAW & POL. INT'L BUS. 295 (1970). The article proposes the establishment of a panel of experts which would study the MNC with the aim of formulating regulatory principles. The recently created UN Commission on Transnational Corporations is such an organization, reflecting at least some measure of international agreement. *See infra* notes 23 & 88 and accompanying text.

[22] REPORT OF THE GROUP OF EMINENT PERSONS TO STUDY THE ROLE OF MULTINATIONAL CORPORATIONS ON DEVELOPMENT AND ON INTERNATIONAL RELATIONS, U.N. Doc. E/5500/Rev. 1 ST/ESA/6 (1974), hereinafter cited as Eminent Persons Report.

[23] The Commission on Transnational Corporations was created as an advisory body to the ECOSOC by ECOSOC Res. 1913 (LVII), U.N. Doc. E/RES/1913 (LVII) (1974).

substantive issues, are still far from clear. It has prepared an awesome agenda for the new Information and Research Center which has still to be funded or given a Director. It has given priority to working towards a "Code of Conduct," though the scope of such a Code remains to be defined, as do the methods by which it might be achieved. A distinguished Latin American scholar, Francisco Orrego Vicuna, states that "everything indicates that the tendency is directed toward regional and international forms of control."[24] A wide variety of supervisory or regulatory proposals competes intermittently for attention in forums as various as the Working Group of the meeting of Foreign Ministers of the American Republics or sessions of the American Assembly.

The full extent of proposals for international supervision or regulation is unclear. Indeed, there may be considerable conflict among proponents of such supervision, or of agreements with respect to the conduct of enterprises or states, as to the purposes of such supervision and such agreements. The view was expressed, for example, by a distinguished student of the subject of multinationals that "the managers of most multinational enterprises" would likely "heartily subscribe to (the) suggestion of international agreements . . . In this way they would be assured of equitable treatment. . . ."[25] It is hardly likely that the agreements which these managers would welcome are identical with that "General Agreement on Multinational Corporations" which is stated as an ultimate objective by the United Nations Group of Eminent Persons. This suspicion is supported by the several dissents to the Eminent Persons' report by members of that group, and by the generally unfavorable reception given to the report by managers of multinationals.[26] Thus, the National Association of Manufacturers' press release of June 10, 1974, following on the heels of release of the Eminent Persons' recommendations, features in its opening paragraph the statement that "the U.N. report presents an unbalanced picture of the multinational corporation's role in international development."[27]

The history of attempts to achieve either general—or even limited—agreements, and to establish supervisory, if not regulatory, international mechanisms is one of abject and dismal failure. Neither the capital exporting nor the capital importing

---

[24] Orrego Vicuna, *El Control de la Empresas Multinacionales*, 14 FORO INTERNACIONAL (No. 1, 1973).

[25] Statement of Robert Stobaugh in *Hearings on a Foreign Economic Policy for the 70's Before the Subcomm. on Foreign Economic Policy of the Joint Economic Comm.*, 91st Cong., 2d Sess., at 874 (1970).

[26] *E.g.*, comments by Ryutaro Komiya, J. Irwin Miller & Hans Schaffner, Eminent Persons Report, *supra* note 22, at 118-161.

[27] On this and other comments on the Eminent Persons Report, *see* Jones, *A Panel to Oversee Multinational Companies is Urged*, N.Y. Times, Jun. 10, 1974, at 47, col. 4.

nations (a classification which roughly, but far from exactly, corresponds to that of developed and developing nations) seem willing to accept the proposals of the other, or even of international bodies. The fate of the proposed Charter of the International Trade Organization was at least partially attributable to the unacceptability to either side of its "code of conduct" sections.[28] Private proposals, such as those sponsored some years ago by Messrs. Abs and Shawcross,[29] have fallen on barren soil, as have the various proposals, suggestions, drafts, etc. floated over the course of the years by such organizations as the National Foreign Trade Council or the International Chamber of Commerce, which latter organization has sought to overcome opposition by labeling its product as "principles".[30] The suggestions of the OECD in the mid-1960's had little success.[31] On the other side, numerous resolutions of the United Nations or of its several constituent organs have asserted principles whose acceptability either to multinationals, or to private foreign direct investors, or to capital exporting nations, is not noticeably affected by the majorities attained in favor of such resolutions. On this subject, the history of the years since 1948, when the ITO aborted, has been one of a dialogue of the deaf. The search for broad consensus on an international agreement, dealing generally with the conduct of multinationals, and presumably entrusted for supervision to some agreed international organization, seems likely to produce much the same, but perhaps exacerbated, frustration. For these reasons, the suggestions of Messrs. Goldberg and Kindleberger of a "GATT for Investment",[32] which have obtained much support, are not likely to produce an "Agreement," (the heart of the GATT), which could be administered by even such makeshift if

---

[28] *See* W. Diebold, *The End of the ITO* (Essays in International Finance No. 16, 1952). On the various U.S. responses to the ITO, *see generally*, *Hearings on Membership and Participation by the United States in the ITO before the House Foreign Affairs Comm.*, 81st Cong., 2d Sess. (1950).

[29] The British statesman, Lord Shawcross, and Hermann Abs, former chairman of the *Deutsche Bank*, jointly submitted a draft multilateral convention designed to reaffirm customary rules of international law in the area of nationalization and to provide for arbitration in such situations. Although not itself endorsed, the Abs-Shawcross proposal contributed to the formulation of the 1967 OECD Draft Convention on the Protection of Foreign Property, *infra* note 31. Both men had individually suggested similar international agreements a decade earlier; see Abs, *Free Enterprise and International Protection of Private Interests*, 22 VITAL SPEECHES 530 (1956) and Shawcross, *Private Capital Abroad*, The Times (London), Dec. 8, 1958, at 11, col. 6.

[30] The International Chamber of Commerce, e.g., placed its support squarely behind the 1955 proposal of the 9th Session of the GATT Contracting Parties for the creation of an Organization for Trade Cooperation as an effective institutional replacement for the stillborn ITO — the OTC also failed to achieve ratification, INTERNATIONAL CHAMBER OF COMMERCE, STATEMENTS AND RESOLUTIONS OF THE 16TH CONGRESS (Brochure No. 186, 1957). On the OTC, *see* Bronz, *An International Trade Organization: The Second Attempt*, 69 HARV. L. REV. 440 (1956).

[31] OECD, DRAFT DOUBLE CONVENTION ON TAXES, INCOME AND CAPITAL (1963), also in OECD, DOUBLE TAXATION OF INCOME AND CAPITAL, REVISED TEXTS OF THE 1963 OECD DRAFT CONVENTION AND OF THE COMMENTARY THEREON (1974); OECD, DRAFT CONVENTION ON THE PROTECTION OF FOREIGN PROPERTY (1967), also in 8 INT'L LEGAL MAT. 117 (1968); and OECD, REPORT ON THE ESTABLISHMENT OF A MULTILATERAL INVESTMENT GUARANTEE CORPORATION (1965).

[32] *Supra* note 21.

ingenious device as constructing an organization out of the term "Contracting Parties", as had to be done when the ITO Charter was rejected. Nonetheless, in seeming disregard of this experience, or perhaps on the theory that because something ought to be done it will be done (a dubious proposition), Professor E.V.D. Rostow has suggested, that a multilateral treaty ought be negotiated "capable of accomplishing for the world economy what modern corporation laws have accomplished for national economies."[33] The aim is stated to be "a code of law to govern...activities in accordance with agreed principles, which should protect the interest of both the corporation and of the host countries."[34]

The difficulty may lie in seeking solutions without a sufficiently clear concept of exactly what is the problem to which the solution is to apply. In a field as heavily worked over as is this, it is undoubtedly presumptuous to suggest that there has been a certain neglect of this definitional prerequisite. Yet one cannot help but be struck by the prevalence of reference to "the problem" of "the multinational corporation", or, as current fashion now decrees, the "transnational" enterprise. There tends, for example, to be a blurring of the lines between that old and traditional subject of international discord, protection of foreign direct investment, with its implications of "prompt, adequate and effective" on the one side and the Calvo doctrine on the other—and the related but essentially different issue of the effect of the growth of business enterprises across national boundaries on such matters as allocation of production facilities, or on traditional Ricardian concepts of comparative advantage in international trade.

I.

A few definitional distinctions may contribute to the search for solutions.

—A—

The term "multinational" or "transnational" enterprise brings to the mind of different observers the concept of quite different

[33] Rostow, Nye & Ball, *The Need for International Arrangements*, in GLOBAL COMPANIES, THE POLITICAL ECONOMY OF WORLD BUSINESS 156-173, at 157 & 170 (G. Ball ed. 1975).

[34] *Id.* at 158. It may be noted that whatever have been the accomplishments of modern corporations in the national economy, they have not been based on a national corporate "code of law." Thus, Incorporation Law in the United States, which would bring under one federal corporation statute all large American corporations, is based on precisely the opposite factual analysis — *i.e.*, that American corporations pick and choose (generally lighting on Delaware) among the 50-odd corporations statutes of the United States. It has been doubted that a Federal Incorporation Law would come close to accomplishing the aims of its sponsors. For the pro-Federal incorporation view, *see* CORPORATE POWER IN AMERICA, (Nader & Green eds. 1973); for the contrasting view, *see* Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. Times, Sep. 13, 1970 § VI, at 32; for an excellent analysis of Federal chartering, see Schwartz, *Federal Chartering of Corporations*, 61 GEO. L. J. 71 (1972); for a summary (and the view that neither Federal nor international chartering would accomplish much), *see* Rubin, *Corporations and Society: The Remedy of Federal and International Chartering*, 23 AM.U.L.R. 263 (1973).

entities. Even if one is able to arrive at a widely accepted structural definition (i.e., a multinational is a corporation having at least five separate foreign producing subsidiaries, or is a corporation in which ownership is multinational, or whatever), one is still faced with the fact that the companies which operate across national boundaries, and have domestic economic effects more or less dictated from abroad *do* quite different things. How the different kinds of enterprises operate is basic to rational consideration of the problem of supervision or regulation.

Professor Jack Behrman has suggested some useful if, to this writer's mind, unnecessarily rigid structural definitions. He suggests that the classic form is that of the investment abroad made to serve the needs of the parent company for materials, or to provide it with a foreign market through distribution facilities. The extractive industries such as Kennecott Copper, or a distribution network, such as Toyota automobiles in the United States are illustrations. A second category is that of an industrial or business investment in the host nation designed to serve that nation's market; production of Ford automobiles in England, or establishment of a Sears Roebuck chain of stores, are examples. A third would be the entity which has a global view of the market, and which can, generally for rather special reasons, serve its market from any one of a number of national locations.

It is in this last category that the issues deriving from the vaunted "flexibility" of the multinational arise. One mines copper or bauxite where it is found. There may be problems of proper and fair pricing, or of a host state taking properties from foreign nationals, or altering the contractual arrangements on which foreign nationals have made their initial exploratory expenditures; but, except in the situation of a broad geographic distribution available at a competitive price, or of alternative products at such a price, the foreign investor is immobilized. On the other hand, transistors can be produced anywhere where there is machinery and reasonably trainable labor. The engine for a Ford Pinto can be produced in the United States, England or Germany. If there is a strike in England, the world market may be supplyable from another location.

Relevant supervision will therefore differ. Since 1962 the United Nations has been officially on record that a different regime exists for products extracted than for products manufactured. Just what can be done with asserted permanent sovereignty obviously depends largely on other than U.N. resolutions or other legal considerations. There is no less national sovereignty over a shoe manufacturing plant in Brazil than an iron ore mine in Venezuela, but reason may dictate different kinds of treatment of the foreign investment in the two situations. Neither of these situations is the same as that of a multinational which has the flexibility to produce where it will within limits and where it finds conditions most to its liking.

Such flexibility may nonetheless be more apparent than real. In theory, at least, and in fact in some cases, one may close down a plant and move elsewhere because of what one conceives to be a hostile attitude on the part of government or labor, or because of more advantageous manufacturing conditions, i.e., unfavorable tax laws, or cheaper labor. Certainly the movement of the transistor and other electronic industries out of the United States reflects this ability.[35] However, the majority of producers, multinational or not, are restricted by their circumstances. These circumstances may include the cost of relocation; the lack of a skilled labor force and the expense of training a new one; the immobility of substantial fixed assets; or even loyalties developed over the years. Orders from home offices may be sabotaged as well as zealously obeyed. Restraints exist.

Nevertheless, many manufacturing enterprises have a degree of freedom of choice which those tied to natural resources or national markets may lack. It is such companies which have excited the majority of complaints. Interestingly enough, these come from both sides. The host nations argue that their economies are subject to exploitation for the benefit of the home nation or "its" corporate bodies. At the same time, at least in the United States, influential voices in labor and Congress protest against the export of technology and jobs, against the use of foreign subsidiaries whose profitability is based on underpaid labor as export platforms for re-export back to the United States, and against the establishment of "sister plants" across the Mexican border for assembly and re-import of components back into the United States with duty paid only on value added abroad.[36]

Whatever the merit of these arguments, it seems clear that a subsidiary which has been established abroad to extract ore, or to manufacture for the local market, or to produce a component which could as well be produced a thousand miles away (given equal costs) are three somewhat different kinds of beast. They

---

[35] Interviews with executives of companies in the "radio, television and communications equipment and parts" industry sampled in a Commerce Department study resulted in one company indicating that it established facilities overseas to export to the U.S. due to low labor costs. "The company faced the dilemma of either producing abroad to ship back to the United States or losing the market entirely." Gaston, *Why Industry Invests Abroad, Summary of Findings*, in THE MULTINATIONAL CORPORATION, STUDIES IN U.S. FOREIGN INVESTMENT, VOL. 2 at 56 (1973).

[36] This practice is sanctioned by Item 807.00 of the U.S. Tariff Schedule, 19 U.S.C. § 807. For a discussion of this and other issues concerning Item 807.00, *see* "Comment," *The Approaching Confrontation over Item 807.00 of the Tariff Schedule*, 4 LAW & POL. INT'L. BUS. 628 (1972). According to Stobaugh, *U.S. Multinational Enterprise and the U.S. Economy*, in *supra* note 35, Vol. 1, relocations under Item 807.00 actually prolong the life of the company by allowing savings and maintaining competition.

will have many characteristics in common; but they will also have essential differences. And, in the analysis of possible international supervisory schemes, the differences may loom as important as the similarities.

—B—

The distinction ought also be drawn between issues which are essentially those of ownership, raised by any private foreign investment, and those of operations, which are generally limited to the multinational corporation.

However it is defined, the "multinational enterprise" does not necessarily require direct foreign ownership. Ownership may well carry with it the ability to coordinate transnational operations, and to centralize the decision-making apparatus. But, despite the convenience of ownership in devising a global strategy for an integrated group of productive industries located in several nations, the same result may be achieved by agreement between nominally independent industries. Such agreements may, of course, cut across the national policies reflected in anti-trust or similar laws.[37] But if coordinated transnational activities are the touchstone of multinationalism in industry, the route of agreement is open within these legal limits, and has often been used. A classic case which is generally considered to illustrate the conflicts involved in this area is that of ICI-Dupont, which involved a restrictive business arrangement between two otherwise independent corporations.[38] This case, like the Swiss Watchmakers' Case,[39] is generally cited to suggest the "extraterritorial application" of U.S. anti-trust laws.

Though questions of the conduct of multinationals may thus arise in any case, the ownership of property in a foreign nation brings to the fore the issue of the rights of the multinational, or, indeed, of any foreign owner, in the event of a taking of its property by the government of the nation in which the property is

---

[37] United States courts have imposed liabilities for conduct outside U.S. borders having an impact inside the United States, United States v. Aluminum Company, 148 F.2d 416, at 443 (2nd Cir. 1945), *see also* Steele v. Bulova Watch Co., 344 U.S. 280 (1952) and Pacific Seafarers, Inc. v. Pacific Far East Lines, Inc., 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). However, in the area of private international agreements which conflict with U.S. antitrust laws there are additional considerations relating to substantiality of the domestic effect, international comity, and the ability of U.S. courts to provide remedies, *see* W. Fugate, FOREIGN COMMERCE AND THE ANTITRUST LAWS (2d ed. 1973). Articles 85 and 86 of the Treaty of Rome have been employed by the European Community to strike down, e.g., agreements designed to maintain separate national markets, Grundig-Consten v. E.E.C. Commission, E.E.C. J.O. 3015 (Sep. 29, 1966) upholding E.E.C. Commission Grundig-Consten Decision of Sep. 23, 1964, E.E.C. J.O. 2545 (Oct. 10, 1964), or abuse of dominant position within a substantial part of the Common Market through the acquisition of control of a Dutch company by a German subsidiary of a U.S. MNC, E.E.C. J.O. 25 (Jan. 8, 1972).

[38] United States v. Imperial Chemical Industries, Ltd., 100 F.Supp. 504 (S.D.N.Y. 1951), 105 F.Supp. 215 (1952).

[39] United States v. The Watchmakers of Switzerland Information Center, 1963 Trade Cas. par. 70,600 (S.D.N.Y. 1963).

located. The characteristic controversies here are not those of transfer pricing or of transfer of technology or allocation of the cost of research and development, but those over (i) the right of a state to take property for its own public purposes and (ii) the concomitant asserted right to prompt, adequate and effective compensation. One encounters the issues of "creeping expropriation", or the "social purpose" of the Mexican agrarian expropriations of the 1920's and conflicts between rival concepts of international law, as for example, over the Calvo Doctrine.[40]

Out of this long series of disputes have come the first attempts to produce a code on foreign investment. In view of current interest in codes designed to regulate the conduct of multinational corporations, it is well to recall that the early primeval versions[41] tended to be sponsored by the capital-exporting states, now usually described as "home" states. The concern of these states was primarily that there be no unrequited expropriations. Against such takings they wanted such international protection as they could obtain for their nationals who held overseas investments. They were prepared to give general guarantees of "good conduct" on the part of the investors in return for commitments to something as close to "prompt, adequate and effective" compensation as the host nation could be persuaded to accept. The commitment to fair treatment of the investor, primarily through national and most-favored-nation treatment in the area of expropriation, was to be matched by a somewhat vague concession that the investor should act in a descent manner. Exactly what this latter promise was to mean was far from clear: it obviously meant that nationals of the host nation were not to be denied all managerial opportunity, but it was far from a commitment that affirmative action would be taken to give them such responsibilities. "Just" and "fair" compensation had a rather explicit significance, as confirmed by the exchanges of correspondence between Secretary of State Hull and the Mexican authorities during the 1930s.[42] The commitments of the investors were less specific, partially because attention focused more on property than operational issues.

One of the first attempts to secure a "code" was that of Articles 11 and 12 of the abortive Charter of the International Trade Organization,[43] suggested in 1947 by capital-exporting states, including the United States, as a desirable and necessary addition to a charter to establish a world trade organization. After those articles, which were probably as good as any subsequently writ-

[40] On the exchange of notes concerning compensation for Mexican expropriations, *see* 3 HACKWORTH 655 (1942).
[41] *Supra* notes 28, 29 & 30.
[42] *Supra* note 40.
[43] U.S. DEPARTMENT OF STATE, PUB. NO. 3206, HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION (1948).

ten, proved unacceptable to both capital-exporting and capital-importing countries, several attempts at producing codes were made.[44] Once again, these were on the part of those primarily concerned with protecting the investor. These have already been mentioned above.[45] Their chief result would seem to have been to convince a number of states in the southern hemisphere that, if the content of the codes could be swung 180° around, such codes might be desirable. The Charter of The Economic Rights and Duties of States and, even more, the unfortunately increasing atmosphere of confrontation, are perhaps the result.[46] If this is an accurate provenance, then one may well regret that this Pandora's Box was ever opened.

Foreign ownership, particularly of natural resources, involves psychological and political, as well as obvious economic, issues. Until recently, the investors, especially those from the U.S., have tended to regard the issues as if they were solely economic. To "populist" complaints of foreign domination and of violations of national sovereignty, it has generally been thought sufficient to respond with analyses of the economic benefits of foreign investment, of the transfers of technology which have been achieved and of the contributions of capital and skills which have resulted. The main concession to national resentments has generally been advice to overseas investors that they maintain a low profile, employ local nationals in managerial positions where possible and to otherwise seek to mollify the natives. It is only recently, with the advent of the possibility of substantial new inflows of capital to the U.S. economy, especially in takeover situations, that the U.S., and particularly the Congress, has come to appreciate the depth of emotion felt, for example, by Canadians contemplating the overwhelming presence of U.S. investment in vital sectors of Canadian industry.[47]

There is, clearly, a certain amount of exaggeration in equating foreign ownership with foreign control. Ownership does not necessarily mean control. During World War II, German-owned firms located in the U.S. produced for the U.S. war effort, just as U.S. subsidiaries in Germany provided essential products to the *Wehrmacht.* To cite a possibility which has recently excited much comment, if Arab "petrodollars" were to acquire a substantial interest in Pennsylvania coal mining, it is unlikely that the investors would want managerial control, or, in that unlikely event, would be permitted to exercise their rights of ownership in a manner thought to be prejudicial to U.S. interests. Nevertheless,

[44] *Supra* notes 29 & 30.
[45] *Supra* note 31.
[46] *Supra* note 19.
[47] *See* Comment, *The Canadian Foreign Investment Review Act: Red, White and Grey,* 5 LAW & POL. INT'L BUS. 1018 (1973).

discomfort is felt, primarily in regard to specific industries, such as, for example, acquisition of communications facilities, such as newspapers. The spate of bills now being considered by Congress, especially Senator Inouye's proposal to review the extent of foreign investment in the U.S. in detail, testifies to this discomfort.[48] Understanding of this kind of discomfort abroad is thus beginning to appear in the United States.

The degree of unease is intensified if foreign ownership is concentrated in certain "vital" industries, though Hawaiian concern over Japanese acquisition of local resort and recreation facilities seems extreme.[49] Chairman Burns of the Federal Reserve Board stated that he would not be bothered by foreign investment in Quaker Oats, but "it would concern me" if the oil-producing nations invested in "strategic" industries.[50] Notably, Mr. Burns' definition of "strategic" was not stated; it could be very broad.

Ownership also implies what economists call "rents." These benefits of ownership are usually considered to perform an important economic function in the process of allocating and conserving resources. But with rents goes the problem of unequal income distribution, both within a nation and internationally. One substantial complaint of the developing countries, thus, is that the allocation of "rents," being rooted in history rather than in justice, heavily favors the "old rich" and that it widens disparities among classes as well as among nations. An exacerbating aspect of the dispute is the divergence on a proper allocation between those possessing technology and management and those possessing natural resources, as well as the appropriate relation between prices of raw materials and of manufactured goods. Implicit in all this are such issues as the relative merits of equity versus debt investment: the "perpetual" charge of profit versus the fixed commitment implied in debt financing. The perceived disadvantages which seem to inhere in ownership are largely the source of the impulse toward alternative formulae, such as "fade-out" divestment requirements, which have commended themselves to certain Latin American nations.

---

[48] The Inouye-Culver legislation, the Foreign Investment Study Act of 1974, Pub.L. No. 93-479, 88 Stat. 1450, which entered into force Oct. 26, 1974, is designed to provide information on foreign direct and portfolio investment into the U.S. through studies undertaken by the Departments of Commerce and Treasury. An interim report will be submitted to Congress before the end of 1975. Several pieces of legislation which would establish a major degree of regulation and control of foreign investment have been introduced in the 94th Congress, 1st Session: *e.g.*, S. 329, to provide continuous monitoring of investment into the U.S. by requiring the reporting of acquisitions of stock in U.S. corporations resulting in 5% or greater foreign control, H.R. 411 & H.R. 945, to establish an agency to control or prohibit foreign investment in areas deemed to be vital to U.S. economic security or national defense, or S. 425, to require notification by foreign investors of proposed acquisitions of equity securities of U.S. corporations and to allow the President to block any such acquisition for national security, foreign policy or domestic economic reasons.

[49] Durdin, *Concern of Hawaiians Waning over Investment by Japanese*, N.Y. Times, Mar. 2, 1974, at 43, col. 1.

[50] N.Y. Times, Nov. 28, 1974, at 1, col. 8.

—C—

In an analysis of possible international regulatory or supervisory mechanisms, there might also be scrutiny of what is in fact (to the extent ascertainable) the power of the multinational enterprise. To what extent does it really threaten national sovereignty, or limit the ability of nations to enact and implement programs for their own better economic and social development?[51]

There is little doubt that situations arise in which there is real conflict between the multinationals and nation-states. Statistics abound as to the extent of the business done by multinationals: the gross annual sales volume of some exceeds the gross national product of many nations.[52] Such size suggests, if it does not prove, power. Here it is worth noting that, although the power of multinationals has generally been equated with their ability to take affirmative actions, the effect of *not acting,* of abstaining from doing business in or with a nation-state, is also likely to have its effect. As already noted, there are important limitations on the asserted power of the multinationals and other constraints on their scope of decision. Moreover, in many situations, it is not the multinational which is in conflict with those states who most frequently make the charge, the host states. Often, the conflict is between the host state and the home state. Thus, if U.S. or European community antitrust policy is applied by U.S. or EEC courts in a way which conflicts with the policy of other nations, the matter is one which concerns national policies, and is hardly an example of conflict between the multinational and the nation-state. The ICI-Dupont case is a good example.[53] Another is the directive given to multinationals by the U.S. in early 1969, designed to lead to the remission of foreign earnings to the U.S. in connection with the Foreign Direct Investment controls: a step leading to a possible easing of U.S. balance of payments difficulties, to the likely detriment of the balance of payments of other nations.[54] In such circumstances, the multinational would prefer to receive instructions from *no* state, home or host. It is an instrument of possibly conflicting national policies, not a creator of policy.

In some circumstances, the ability of multinationals to circumvent national policies exists, and is, no doubt, utilized. However,

[51] *See* R. VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (1971) and R. EELLS, GLOBAL CORPORATIONS: THE EMERGING SYSTEM OF WORLD ECONOMIC POWER (1972).

[52] *Supra* note 2.

[53] *Supra* note 38.

[54] *See* Exec. Order 11387, 3 C.F.R. 192 (1974), 12 U.S.C. § 95a (1970), the Foreign Direct Investment Regulations of January 1968. This program has been abandoned by the United States; however, its relatively brief life is a vivid reminder of possibilities not entirely palatable to host nations, developed and developing.

there are likely limitations on this ability. Much depends upon the type of business done by the multinational. A company engaged in extraction must operate where oil or minerals exist, though it may have the flexibility of alternative sources of supply or of alternative products. The range of choice may broaden or narrow. At one time, when tin prices rose, plastics became a threat to tin producers. The new price of oil has removed that possibility. A company which has found itself compelled by the economics of a market situation to manufacture within that market, for whatever reason, is largely without alternatives, if it chooses to remain in business. Even the "true multinational" which produces in many alternative sites and can shift production in whole or in part as its convenience dictates, may find that its freedom to make managerial or production decisions is limited. Capital investment is not easily moved, nor lightly abandoned. Long-term considerations may inhibit short-term advantageous actions. Identification by the managers of local producing units with the interests of the nation within which they live and work may exercise a powerful, if informal, restraint.

Moreover, transnational business enterprises have found in recent years a growing web of regulatory rules in home and host nations alike. For example, one of the traditional MNE-nation-state conflicts has been in the area of transfer pricing. Undoubtedly with some justice, charges of artificial transfer pricing have been made. But the present close scrutiny being given to transfer prices in the United States under § 482 of the Internal Revenue Code, the attention being given by home and host nations to tax avoidance through artificial transfer prices and through taking profits in tax havens rather than in the producing or the consuming nation, and the increasing sophistication of host, or importing, nations have severely constrained the multinationals in this important area.[55] Corporations in the extractive industries are no longer likely to be able to operate with unrestrained freedom to reduce production in certain countries in order to maximize more profitable production elsewhere.

The flexibility of the multinational, and its consequent ability to circumvent the limitations of entirely national enterprises, is not completely gone. If alternative facilities of production are

---

[55] Transfer pricing refers to the prices charged for goods and services within the MNC. The MNC may set transfer prices so as to shift income to low-tax countries or minimize profit in a country in which pressures for price reduction or higher wages are felt. Low transfer prices may be used to minimize the duty base on goods transferred to high-tariff countries, or, in the case of a new subsidiary, to provide startup financing. *See* Shulman, *When the Price is Wrong by Design*, 2 COL. J. WORLD BUS. 69 (1967). Recent studies suggest that transfer pricing is no longer widely used by MNCs operating in Europe and North America; *see* M. BROOKE & H. REMMERS, THE STRATEGY OF MULTINATIONAL ENTERPRISE 176 (1970) and J. ARPAN, INTERNATIONAL INTRACORPORATE PRICING: NON-AMERICAN SYSTEMS AND VIEWS (1972).

available, the multinational may by-pass a troublesome nation and manufacture elsewhere. A strike in Britain may result in transfer of production of the same item to Belgium; if wage rates rise in Japan, transistors may be produced in Taiwan, and so forth. But the scope is steadily being narrowed.

Host nation restraints have, in recent years, been particularly noticeable. The OPEC nations have demonstrated their power over the multinationals as well as their ability to fix prices and production quotas and to maintain an effective cartel. They seem to be about to move downstream toward substantial control over both transport and refining. Venezuela has nationalized other natural resources, such as iron ore.[56] Licensing agreements have been brought under national control. Mexico, Argentina and the Andean Group have measures which affect not only entry but operations and eventual divestment.[57] Affirmative measures have been enacted to supplement these restraints. The Canadian Development Corporation seeks both to acquire control of the operations of substantial Canadian enterprises, such as the Texas Gulf Corporation, and to encourage and favor industrial projects owned by Canadian nationals. The Andean Development Corporation, and favorable tariff treatment for Andean-controlled and owned enterprises, are two kinds of affirmative measures, similar in both their objectives and their effects.

No less significant are the controls being considered and sometimes imposed by the home nations. It still seems unlikely that the web of restrictive legislation encompassed in the Hartke-Burke proposals will be enacted.[58] Especially is this so in the light of the passage of the Trade Reform Act of 1974.[59] The effects of that act are doubtful; but that its intended thrust is in the direction of trade expansion, not restriction, is clear. Nonetheless, the Act makes escape clause actions much easier than was previously the case,[60] and contains many clauses which reflect the concern of the United States with the asserted loss of jobs via establishment of production abroad.[61] Nonetheless,

[56] N.Y. Times, May 31, 1974, at 50, col. 3.

[57] *See supra* note 14; Lacy & Garza, *Mexico — Are the Rules Really Changing?* 7 INT'L LAW. 560 (1973); and "Note," *Argentine Foreign Investment Incentives: Quixotic Nationalism Challenges the Windfall*, 12 VA. J. INT'L LAW 240 (1972).

[58] The Hartke-Burke legislation, most recently, The Foreign Trade and Investment Act of 1973, S. 151, 93rd Cong., 1st Sess., would, *inter alia*, impose substantial controls on U.S. imports, relax injury standards for escape clause relief and eliminate discretionary Presidential authority to grant such quota or tariff relief, allow the President to prohibit transfers of capital out of the U.S. if they would cause a decrease in employment in the U.S., authorize the President to prevent a U.S.-patent holder from licensing or producing abroad, and would substantially increase U.S. taxation of foreign source income. In support of these proposals, *see* Testimony of Sen. Vance Hartke, *Hearings on H.R. 10710 Before the Senate Finance Comm.*, 93rd Cong., 2d Sess., at 1414-1486 (1974); for the opposing view, *see* Testimony of Donald Kendall, App. A, *Hearings on H.R. 6767 Before the House Comm. on Ways and Means*, 93rd Cong., 1st Sess., at 675-684 (1973).

[59] Trade Act of 1974, 88 Stat. 1978.

[60] *Id.*, § 201, 88 Stat. 2011, *repealing* Trade Expansion Act of 1962, § 301, 76 Stat. 883.

[61] Trade Act of 1974, § 283, 88 Stat. 2041.

American labor's denunciation of such provisions as § 807.00 of the United States Tariff Schedule, which is the basis and the rationale of the "border industries," has not resulted in its abolition in the Trade Bill; data seem to indicate that the multinationals with foreign production facilities have increased, not lost, jobs for American labor.[62] But general public and Congressional concern is evident; the decisions of multinationals to go abroad rather than produce at home will have to take this concern, and its possible consequences, into account. Again, the scope of potential investment decisions for the multinational has been narrowed by considerations such as these. At the least, an additional inhibiting factor will have to be factored into the business decision. Other measures have likewise constrained previous freedoms; for example, as the unhappy situation of Compania Swift de la Plata indicates, Argentina will hold the assets of one subsidiary of a multinational responsible for the asserted debts of another unrelated (except by common ownership) subsidiary.

It seems likely, moreover, that the basic circumstances which fostered the growth of the multinational have changed. Though there still exists the factor of the economies of scale and the accompanying efficiencies of the multinational, extrapolation on a straight line of the history of the 1950's and the 1960's seems unlikely. In those years, the chief expansion abroad was that of the American-based multinational. It had the advantage of a world reserve currency, undoubtedly so over-valued as to make acquisitions abroad a bargain in financial or business terms. It broke into the European Common Market at a time when European companies were still too small, too timid, too concerned with cartels rather than expansion, and too unimaginative to take advantage of the opportunities, financial and industrial, which lay before them. Now, and for the period since the end of 1971, this situation has changed. Expansion may continue but not at the bargain rate of the earlier halcyon period. And, at least in the short-term, the world-wide decline of profits of industrial concerns will provide its own set of limitations.[63]

It must also be remembered that statistics with respect to the enormous growth of overseas business, whether American, Japanese, or European-based, show the bulk of the expansion has been from one *developed* nation to another.[64] Entry of the multinational into the *developing* nations was slowing down even

[62] Stobaugh *et al., U.S. Multinational Enterprises and the U.S. Economy*, in THE MULTINATIONAL CORPORATION: STUDIES ON U.S. FOREIGN INVESTMENT, VOL. I 30-31 (U.S. Department of Commerce 1972).

[63] *See* Rubin, *The Multinational Enterprise at Bay*, 68 AM. J. INT'L LAW 475 (1974).

[64] *See* R. VERNON, *supra* note 51, at 19, and Vernon, Multinational Enterprise and National Security (Adelphi Papers No. 74, 1971) in VERNON, THE ECONOMIC AND POLITICAL CONSEQUENCES OF MULTINATIONAL ENTERPRISE: AN ANTHOLOGY 127 (1972).

before the current manifestations of concern. The regulatory suggestions now being considered, in at least some instances, may well be anachronistic before they are enacted.

On all sides, therefore, the multinational faces new constraints and new circumstances. It is against this present situation—not the often asserted and the somewhat anecdotal history of past abuses[65]—that any present program of international supervision or regulation must be judged.

II.

Proposals for regional, national, or international "supervision or regulation" abound.

—A—

A first group of such proposals concerns attempts to regulate the conduct of multinationals. Early essays in this direction were primarily oriented toward protection of the asserted rights of private foreign investors. They range from the provisions of the ITO Charter, to proposals of the private organizations like the National Foreign Trade Council, or the OECD, and they have uniformly foundered. Recent attempts sponsored by capital exporters (the "home" nations) have had more limited objectives. The November, 1974 proposal of Chancellor Helmut Schmidt of the Federal Republic of Germany has thus been the suggestion of "an international standard of behavior to which the multinationals should adhere," to be worked out, at least in the first instance, on a German-American basis. Later, the Chancellor apparently suggested, it could be a model "for adoption and application on a world-wide scale."[66]

Other proposals of this type have been made in the recent past. The International Chamber of Commerce has issued suggested guidelines of conduct for multinationals.[67] The ICC standards, while unexceptional, lack the specificity which would seem necessary to make them meaningful. Chancellor Schmidt's concern was apparently fueled by the "recurring charges (in Germany) that the multinational oil companies used the dislocations of last winter's oil embargo to distribute their sales among various national subsidiaries in a way that enables them to make maximum

[65] It is clear that private foreign investors and/or transnational corporations have been guilty of many abuses of law and property. The recent (March, 1975) revelations of the acts of United Brands in Honduras indicate a course of conduct in which ethics, to say the best, have been subordinated to the supposed dictates of practicality. *See* Editorial, N.Y. Times, Apr. 29, 1975, at 32, col. 1. So also the disclosures of bribes paid by Gulf Oil Corporation, despite the "when in Rome" defense, have demonstrated the relevance of current demands (in the OECD no less than the United Nations) for better, more uniform, and more available information of a technical, financial, and accounting nature. Availability of such information may do more than formal agreements to improve conduct -- on both sides.

[66] Wash. Post, Nov. 28, 1974, at C20, col. 1.

[67] ICC, GUIDELINES FOR INTERNATIONAL INVESTMENT (Brochure No. 272, 1972).

profits while paying minimum taxes."[68] Little, if anything, in the ICC suggestions would affect company decisions of this sort. Another issue lying behind the German suggestions arose from the challenge posed by the American Chamber of Commerce in Germany to proposed legislation which would increase the voice of German labor in corporate decision-making.[69]

"Intervention" is also an issue of intractable complexity. The Inter-American Juridical Committee, for example, has adopted and recommended to the Council of the Organization of American States a "List of Cases of Violation of the Principle of Non-intervention."[70] While that list is directed mainly at governmental rather than corporate acts, it clearly implies the impropriety of attempts by business enterprises to influence national legislation. Precisely how the distinction is to be made between legitimate expressions of concern to a government whose proposed regulations would seriously affect the viability of a business enterprise and those which are an unwarranted interference is not stated. What one side perceives to be an unacceptable intervention may, to the other, be an expression of concern which a producing or distributing company is fully justified in making.

Another exercise in this direction has been underway in Washington, under the aegis of a Working Group of the meeting of Foreign Ministers of the American republics. The origins of this effort lie in the suggestion of Secretary of State Kissinger that a fact-finding mechanism be established, which might, by an impartial process, develop agreed statements of fact in investment or multinational enterprise disputes.[71] That suggestion met a frigid Latin American reception. It was altered to a proposal that "principles of conduct" be drafted.[72] "Principles" were thought to be *something less than enforceable standards—more guidelines* than a code. Nonetheless, the meetings to date have not demon-

---

[68] *Supra* note 66.

[69] The proposed legislation to increase labor co-determination (*Mitbestimmung*), still not enacted, would further expand the voice of labor on West German corporate supervisory boards and boards of management. Firms incorporated in Germany but owned by U.S. MNCs would not receive special treatment. The United States Chamber of Commerce in Germany has suggested that the proposed legislation possibly conflicts with the MFN clause of the Treaty of Friendship, Commerce and Navigation Between the United States and the Federal Republic of Germany, Oct 29, 1954, [1956] 7 U.S.T. 1839, T.I.A.S. No. 3593. On the Chamber of Commerce reaction, *see* N.Y. Times, Oct. 13, 1974, at 17, col. 1, and DER SPIEGEL, Oct. 14, 1974, at 28. On co-determination, *see* Meissel & Fogel, *Co-determination in Germany: Labor's Participation in Management*, 9 INT'L LAW. 182 (1975).

[70] Work Accomplished by the Inter-American Juridical Committee, *supra* note 7, at 3-4 & 135-136.

[71] *See* Statement of Secretary Kissinger at the Conference of Tlatelolco, Mexico City, Feb. 21, 1974: ". . . we might consider the establishment of a working group to examine various procedures for factfinding, conciliation, or the settlement of disputes." *Dept. of State Press Release No. 62*, 70 DEP'T OF STATE BUL. 257, 260 (1974).

[72] Secretary of State Kissinger proposed the adoption of "principles" to the Meeting of the Foreign Ministers of the Americas, April 17 & 18, 1974, in Washington, D.C., and on April 20, 1974 lauded the joint efforts before the OAS General Assembly in Atlanta, Ga.: "Our new dialogue has already been marked by substantial progress . . . — We have established a working group to develop principles for the conduct of transnational enterprises." 70 DEP'T OF STATE BUL. 510-515, 511 (1974).

strated that the task is made the easier by softening the language. The lesson of the ITO charter still seems relevant; principles, codes or guidelines are either so general as to be useless or so specific as to be unacceptable. With the current effort in the same direction in the U.N. Commission on Transnational Corporations, it seems likely that these inter-American discussions will remain suspended.

Finally, the difficulty of negotiating a code acceptable to investor and to host nation is vividly illustrated by the U.N. Charter on the Rights and Duties of States, adopted December 14, 1974, by the General Assembly. In a somewhat unusual action, especially in the light of earlier words of at least guarded praise for the endeavor, the United States and five other nations voted against the Charter in the General Assembly.[73] A crucial point was Article 2 of Chapter II, which would seem to permit expropriation in accordance with national law. In that Chapter, the majority rejected a proposed amendment, which *inter alia* contained a commitment to carry out international obligations.[74] The Charter's approval of producer cartels, but not of consumer nation combinations, was an additional factor behind the U.S. vote.[75] The experience with the Charter on the Rights and Duties of States clearly demonstrates the present problems with drafting any code or similar document which will be acceptable to investors and developing nations alike.

Nevertheless, the first meeting of the United Nations Commission on Transnational Corporations, pursuant to its mandate, gave high priority to the drafting of a code. The Commission was created by ECOSOC Resolution 1913 (LVII) of December 11, 1974, which requested the Commission to develop a program of work including, as a priority item, "preliminary work with the objective of formulating a code of conduct." One of the "areas of concern" put forward by the Group of 77 (actually now 100 developing nations) was "the refusal of transnational corporations to accept the exclusive jurisdiction of domestic law in the question of compensation or nationalization."[76] A considerable amount of debate was on whether such a code would be directed solely to transnational corporations, or would include consideration of host

---

[73] *Supra* note 17.

[74] The amendment also stated a right of a State ". . . to nationalize, expropriate or requisition foreign property *for a public purpose, provided that just compensation in the light of all relevant circumstances shall be paid* [italics added]." It should be noted that Chapter I of the Charter, under the heading of "Fundamentals of International Economic Relations," states that relations shall be governed by several principles, among which is "(j) Fulfillment in good faith of international obligations."

[75] Article 5: "All states have the right to associate in organizations of primary commodity producers in order to develop their national economies . . . . Correspondingly, all states have the duty to respect that right by refraining from applying economic and political measures that would limit it."

[76] *See* U.N. Press Release, ECOSOC/3722 (March 28, 1975).

nation legislation or actions affecting such corporations. Thus, Article 3 (III) of the proposed report of the Commission showed disagreement as to whether such a code was "to be observed by transnational corporations" or was to be described as "dealing with transnational corporations."[77]

It seems more likely that, at least in the next few years, a fully acceptable "Code" may first be worked at between nations of a comparable degree of development. Despite difficulties, thus, there would seem to be little reason why a code limited to OECD members could not be negotiated. Some parts of such a "code" already exist in fact, as in the OECD Code of Liberalization of Capital Movements.

How necessary an investment code is, as between such states, continues to be doubtful. Thus, Canada, in which American investment is enormous by any standards, absolute or relative, has no treaty arrangements with respect to fair treatment with the United States. The absence of a Canadian-U.S. Treaty of Friendship, Commerce and Navigation over the past thirty years has not noticeably cooled American enthusiasm for investing in Canada. Where a code is not necessary, it may perhaps be obtained. But even in such a situation, negotiation of its clauses might well raise issues which had better be left dormant.

The fact would seem to be that the negotiation of investment codes or codes of conduct for or dealing with transnational corporations, is often more troublesome than are the actual investments. The clear outlines of disagreement, for example, between Mexico and the United States have existed on principle at least since the diplomatic exchanges of 1938.[78] Nonetheless, a great deal of United States and other foreign private investment has gone into Mexico since 1938, with generally favorable results on both sides. Perhaps here, as in more exalted matters, "the letter killeth, but the spirit maketh live."

—B—

Other techniques for avoidance of difficulties lie in the possibility of purely national action, especially by the capital-exporting nations. It has been suggested, for example, that some sort of screening mechanism might be used by a capital-exporting country under which it would examine investment proposals, warn investors of possible difficulties, possibly suggest alternative methods of investment, and state its intention to support such an investor with representations to the host nation only in the case of approved investments. Alternatively, no presumption of

[77] U.N. Doc. E/C. 10/L.1/Add. 2 (March 27, 1975).
[78] *Supra* note 40.

governmental support would exist in the case of non-approved investments. The experience of the Overseas Private Investment Corporation (OPIC) is cited in support of this technique.[79] OPIC insures investments abroad only in special cases in which they conform to developmental criteria, however broadly conceived, and when there is some agreement (often an exchange of letters) between the United States and the host country.[80] Investments likely to cause difficulties—for reasons of unreliability of the investor, low probability of success of the enterprise, or lack of developmental contribution, in the opinion of OPIC—are therefore not insured. And if commitment of the investment depends upon securing OPIC insurance, the investment is not made.

It has been suggested by some Congressional critics that OPIC is undesirable, since it makes certain that, in the case of an expropriation which is sooner or later not followed by just compensation, there will be a government-to-government confrontation, and it may lessen the pressure on the investor to work out his own problems.[81] In the screening process, however, much can be done to avoid the likelihood of host government action against the investor. OPIC screening undoubtedly eliminates many investments which might well be the cause of later friction. Continuation of OPIC has seemed to Congress, after full consideration, to be desirable. But the re-authorization of OPIC[82] hardly answers the basic question: whether an investor who has not been approved by some sort of governmental screening apparatus, whether or not he has applied for investment insurance, should be in a category other than that of the investor who has put himself through the meshes of that screen.

The affirmative answer would, of course, reduce cases of confrontation. The cost would be, however, a substantial increase in bureaucratic influence, if not control, over private investment decisions. Moreover, though the criticism that investment insurance automatically involves the government in an essentially private investment decision would not necessarily apply, the process of pre-consultation and clearance would certainly increase the presumption of government involvement in the event of difficulties. And that presumption would be present in all screened cases, even where there would be no bilateral agreement as a pre-condition for investment insurance presupposing an initially kindly view on the part of the host nation. On the other hand, it

---

[79] The suggestion is that of Herbert Salzman, former Executive Vice President of OPIC, which he made in a paper presented to the American Assembly of Columbia University in December, 1974, reprinted as *How to Reduce and Manage the Political Risks of Investment in Less Developed Countries*, in *supra* note 33, pp. 85-110.

[80] OPIC, INCENTIVE HANDBOOK FOR INVESTMENT INSURANCE 5 & 9 (undated).

[81] *See* S. Rep. No. 93-676, 93rd Cong., 2d Sess. (1974).

[82] Overseas Private Investment Corporation Amendments Act of 1974, 88 Stat. 763, *amending* 22 U.S.C. §§ 2191-2200a.

can be argued that, even now, the presumption is that the home government will intervene to protect its investor in case of unfair treatment abroad. The screening process might be such that it would merely shift that presumption of future protection so as to place such a burden upon the investor. Nonetheless, it seems unlikely that the techniques used in the limited case of application for investment insurance, where government officials examine the project and its feasibility, would produce benefits outweighing difficulties if extended on a limited or global basis. That the government of the investor should be "in on the take-offs if it is to be called upon to help in the case of crashes" has a tempting but illusory attraction.

On the capital importing side, there are of course other techniques which would help in avoiding investment disputes. All agree that it would be useful for such nations to state ground rules—letting the investor know in advance what is expected of him. This has largely been done, in such regulations as Decision 24 of the Andean Group,[83] though that applies to existing as well as prospective investment. Where it can be accomplished, the technique is beneficial. Although there has been discontent with application of Mexican rules in this respect and investors on both sides often avoid if not evade such regulations, they seem to work adequately.[84] As in the case of the screening mechanism mentioned above, prospective application would, of course, not affect the vast amount of existing foreign investment.

—C—

Other variations of national or international rule-making exist. It has been often suggested, for example, that an international "charter" for multinational companies—an International Companies Law, under which multinational corporations would be incorporated, would help.[85] It seems unlikely that such a proposal could have anything but limited application. Even within the reasonably homogenous bounds of the European Economic Community, the proposed EC Companies Law has had a long and still uncertain history.[86] It apparently still founders on the

[83] *Supra* note 14.

[84] *Supra* note 57; *see Should Investment Capital Stay Home? A Mexican-U.S. Dialogue* in PROCEEDINGS OF THE 68TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 58-75 (1975).

[85] *See supra* note 21, Ball, *Cosmocorp: The Importance of Being Stateless*, COL. J WORLD BUS. (1967), and Rubin, *The International Firm and National Jurisdiction*, in THE INTERNATIONAL CORPORATION 179 (C. Kindleberger ed. 1970).

[86] EUROPEAN ECONOMIC COMMUNITY COUNCIL, *Proposition de Reglement (CEE) du Counseil Portant Statut de la Societe Anonyme Europeene*, E.E.C. J.O. C124 (Oct. 10. 1970). The EC statute creating the European Company is designed to aid international mergers within the EC and thereby enable European firms to better compete with giant U.S. MNCs. *See* Van Gerven, *Some Recent Developments in Corporate Law within the Common Market*. 6 INT'L LAW. 494 (1972). and Cheris & Fischer *The European Company. Its Promise and Problems*, 6 STAN. J. INT'L STUD. 113 (1971).

principle of *Mitbestimmung*—worker co-determination.[87] Even if it were to overcome that obstacle, it is difficult to see what effect it would have other than to smooth the path of unification via Community-wide companies. To the extent that it had this result, it would be a force in a direction contrary to that desired by the developing nations. They desire not to facilitate the already-substantial ability of the multinational corporation to ignore national boundaries, but to restrict that possibility. Also, the inclusion of the substantive aspects of many regulatory statutes (such as those on antitrust) in a law designed to provide the formal structure for a corporation is hardly feasible.

The Report of the U.N. Group of Eminent Persons, despite the questions of doctrine which it raises and the dissents which it engendered, offers some clue to more useful action. On the one side, it emphasizes the importance of information. On the other, it sets up a Commission, one of the duties of which is the ultimate development of a code of conduct,[88] on which subject something has been said *supra*.

On the first point, it seems useful to obtain so much information as is relevant. Statistics abound, but there are lacunae. If care be exercised to respect the legitimate needs of business confidentiality, if the penchant of all bureaucracies to compile endless files of statistics is not indulged, and if—and here doubts arise—statistical material of any reliability is in fact available from more than a handful of nations, the compilation of the figures may serve a useful and sobering function.

As to the Commission itself, its usefulness depends upon its ability to produce discussion rather than confrontation. The first session demonstrated the possibility of representatives talking at, rather than with, one another, though basic agreement on a work program was attained. It would probably have been useful, even from the viewpoint of the developing nations, if the Commission had been given a larger representation from the capital exporting, the "home" nations. There is a very real mutuality of interest in increasing the contribution of those aggregations of capital and skills called transnational corporations to the development process. This is especially so in a world of growing needs and limited resources, which includes manage-

---

[87] *Mitbestimmung*, *supra* note 69, is only present in the EC on a national level and only in the German Federal Republic and The Netherlands. Other EC members generally do not wish to have *Mitbestimmung* applied to the European Company, while the German government is fearful that without it German firms would use the European Company to evade German labor co-determination requirements.

[88] The Eminent Persons Report recommends that the Commission on Multinational Corporations prepare and submit to the ECOSOC a code of conduct for MNCs. It would be "not compulsory in character" but would "act as an instrument of moral persuasion." *Supra*, note 22, at 54-55.

ment and technology, as well as raw materials. The debate on the words of a code is unfortunately likely to be divisive; what must be perceived is the underlying identity of interest, and a willingness to subordinate rhetoric to realities.

What can be useful would be a center in which calm work on a regular basis can be done. One hopes that the Commission and the Information and Research Center will be this. With a coherent and initially modest work program, much might be accomplished. On a step-by-step basis, specific arrangements on particular and discrete problems could be made. For example, the asserted extensions of law on an extraterritorial basis seem susceptible to reasonable solution. Questions of taxation, and particularly use of tax havens to avoid national taxation, are other issues which have sufficient common interest to make solutions possible. Standards in regard to transfer pricing might be produced. The useful work already done by the Secretariat, particularly the Chudson and Wells report,[89] is an excellent example of the kind of factual study which the Commission might sponsor. The same may be said of the Technical Paper on Taxation.[90] However, to continue and extend this kind of work which produces light rather than heat, it will be necessary to orient the Commission toward consensus, and to emphasize work rather than polemics. A dangerous fact is that, in seeking to regulate—on both sides—dimly known and speculative future dangers, a "code" polarizes. Perhaps at this advanced stage, in the interest of all, the danger can be avoided.

Perhaps the experience of the inter-American system indicates that confrontation can in fact be minimized if not entirely eliminated. In a sense, the inter-American system has lived with the problems of private foreign investment and multinational corporations for a great many years, including disputes, expropriations and settlements, and has managed, in many instances, to allow the work to go on behind a sometimes heavy cloud of words. Neither side will accept the principles of the other: "prompt, adequate and effective compensation" as opposed to "permanent sovereignty over natural resources" coupled with the Calvo Doctrine. But in practice, just as the speeches in the U.N. General Assembly tend to be more extreme than those made in capitols, the reiteration of principles with theological fervor does not seem incompatible with compromise by both sides. The compromises may be somewhat ambiguous, and

---

[89] The Acquisition of Technology from Multinational Corporations by Developing Countries, U.N. Doc. ST/ESA/12 (1974).

[90] The Impact of Multinational Corporations on Development and on International Relations, Technical Papers: Taxation, U.N. Doc. ST/ESA/11 (1974).

achievement of them is sometimes tedious, but, in general, they work.

And various devices can be used to assist in operational cooperation, free of the dogma of either side. Examples are the Development Center of the OECD, and a suggested inter-American informational center, which would possibly provide prospective host countries and prospective investors with a meeting ground.[91]

In view of the obvious interest of Canada in the hemisphere, and the increasing amount of investment from Europe and Japan in Latin America, arrangements within the structure of the Organization of American States will, no less than those of the OECD, be outward looking. It is possible that other regional groupings, in Asia and Africa, may follow suit.

Whatever may be done, it is clear that no simple formula, nor any simplistic viewpoint, will be adequate. Realities impose themselves on decreed solutions. There is a trade-off between regulation and the benefits of the multinationals. The costs of doctrinaire restriction must be paid, in one way or another, whether in trade or investment. Achieving social objectives may require recognition of legitimate costs, just as the multinationals must recognize the importance to host nations of participation as well as the benefits of efficiency. Above all, it must be acknowledged that the relationship of the nation-state and the multinational is a dynamic, not a static, one. Labor costs and efficiencies change both from place to place and as new developments evolve. The American company which established its plant in Japan a few years ago is already relocating, sometimes back to the United States. The United States, a nation which has characteristically opposed controls on foreign investment, has enacted limitations on foreign direct investment, and is in the midst of a national re-examination of the effects of investment into the United States. Solutions which for a time seemed viable have been found wanting; for example, variable exchange rates, which seemed to provide solutions to many issues, are no longer regarded as effective in a world in which much trade is carried on between units of the same enterprise, and forward currency transactions of multinationals, sometimes argued to have accentuated undesirable currency speculations, have given rise to suggestions of an international central bank.[92]

---

[91] S. J. RUBIN, G. B. MEEKER & R. LUDERS, A CENTER FOR CAPITAL MARKET COOPERATION: REPORT OF THE ORGANIZATION OF AMERICAN STATES CAPITAL MARKETS DEVELOPMENT PROGRAM, OAS Doc. OAS/Ser.H./14 (1973).

[92] Rostow, *The Multinational Corporation and the Future of the World Economy*, in *supra* note 33, at 119.

The complications are everywhere and the changes are rapid and persuasive. The only certainty is that no one party is to blame, no nation is blameless, and predictions are risky. Given the importance of the stakes for developed and developing nations alike, what is required in such circumstances is the development of structures within which the painful, but somehow exhilarating, process of searching for solutions can be carried forward.