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Multinational Corporations and International Law. Impact on International Relations. A code of conduct

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MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW. IMPACT ON INTERNATIONAL RELATIONS, A CODE OF CONDUCT

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I. INTRODUCTION

Historically and juridically the single corporate enterprise has been the creature of single legal systems. However, in recent years corporate entities have been commonly established by the joint action of different national interests, sometimes public and sometimes private. Also, for several decades now and in increasing numbers, corporations of one national jurisdiction have exhibited complex adaptability in responding to the conditions of trade and investment setting up networks of subsidiary and affiliated interests across national boundaries.

This has been possible because of several characteristic attributes of corporations, common to most contemporary legal systems, which have permitted them to form various labyrinthine interconnections, mainly to facilitate their economic activities, with the relatively sophisticated means permitted by municipal legal systems. These are:

— the corporation's emergence as a dominant method of conducting commercial transactions within existing legal systems.
— the principle which permits corporations to own shares in other corporations wherever situated.
— the principle which allows the shares of local corporations, created or having their principle place of business in the domiciliary jurisdiction, to be owned by corporations and individuals located outside the jurisdiction.
— control being exercised by managers and/or specialized owners instead of the generalized ownership.
— control being exercised by economic means instead of the normal legal ones due to the lack of a proper international legal system able to make them juridical.
— limited liability.

This has enabled local corporations to spread their legal and functional operation into nations beyond their State of incorporation or principle place of business [1]. Although there is a certain degree of similarity in the laws in different States which permits corporations to establish business and legal connections in all of them, there are frequently differences that make international relations, both private and public, suffer badly. Consequently the growth and proliferation of the multinational enterprise system [2] has brought a demand for accommodation between frequently differing national laws, as well as for the creation of a set of international rules which would regulate their activities across national boundaries.

It has been suggested [3] that there are three possible legal frameworks within which the activities of MNCs could be regulated. They have been called:

1) Unilateral option: continuing action under national laws in order to solve problems as they arise. Generally these are measures taken by the host governments in order to change the management outlook of the subsidiaries to make them more sensitive to local problems and aspirations.

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1. See, "The Nationality of International Corporations under Civil Law and Treaty", 74 Harvard Law Review (1961), p. 1439.
Kronstein, "The Nationality of International Entreprises", 52 Columbia Law Review (1952), p. 983.
Martinelli-Somaini, "The Nationality of Multinational Corporations" in "Multinational Corporations and Labour Unions" (Nijmegen).
2. In this paper the term Multinational Corporation, MNC, is used, as it is the most common terminology used by scholars, management, journalists, shareholders, etc. See, p. 316, and fn. 318.
3. See I. A. Litiusk and C. J. Maule, 5 JWTL, p. 642.

2) Bilateral option: Suitable for dealing with parent-host country problems, unique or peculiar to the two countries [4]. The main difficulty for this approach is the different bargaining position of host and parent country when the terms of a bilateral agreement are negotiated [5].

3) Multilateral opinion: 3.1. Harmonization of national laws through some kind of international action, conferences, meetings ...
3.2. International legislation through treaties or international organization action. This is probably the best when host governments of small countries lack the necessary strength to negotiate as equals with home countries.

The first option and harmonization imply a solution based on national law. Only in the latter does international action provide the forum for subsequent national legislation adopted according to what has been achieved in the international plane, but neither of them are a genuine international law solution [6].

It is not submitted that any of these options are the only correct answer to the questions posed by MNCs activities nor that all of them at a time would by the solution. These are problems of lege ferenda and are not dealt with in this paper. Typical municipal problems will require, evidently, municipal law solutions but truly international conflicts will demand international law rules. MNCs are an issue for municipal and international communities. This paper deals with their impact upon international relations and consequently international law solutions.

This paper examines the third option, the international law solution to the problem, and discusses its implications, the state of international law in respect of MNCs, present developments and how the problem is being treated. The two first options will also be discussed, but marginally and only so far as relevant to the third option [7].

The dominant concern of the current studies has been with economic and organizational aspects of te MNCs rather than the legal. MNC's activities and their legal engineering tend not to be reflected in appellate court

4. I. e. in the U.S.A.-Canada context.

5. Tax treaties are a good example. See Y. I. Hadari "Tax Treaties and their role in the Financial Planning of the Multinational Enterprise". 20 AJCL (1972) p. 111-145.

6. When one talks of a genuine international law solution one thinks of the problems posed by MNCs in the international plane, which require regulations wider than and different to that provided by municipal law systems. For municipal law regulations of MNCs see "National Legislation and Regulations relating to Transnational Corporations". UN doc. E/C.10/8 and E/C.10/8 Add. 1; "Investment Laws of the World", ICSID, Oceana.

7. References to international law in this context exclude private international law, which forms part of national legislation and is covered by the two first

decisions and writings of contemporary scholars [8]. Nevertheless, explicit emergence of international legal problems of corporations in literature and even in litigation is increasing every day. Some examples are USA and EEC measures to enforce their antitrust and securities regulation laws upon foreign interests [9], European company law harmonization and the establishment of "European Type" companies in the EEC [10].

As Jessup has written "the function of international law is to provide a legal basis for the management of international relations, embracing private as well as governmental interests" [11]. However, inasmuch as the activities of MNCs are not properly regulated by any one legal system but still influence international relations this function is not being fulfilled.

The traditional notion of past centuries that international law was limited to inter-state relations has undergone vital changes in this century. In the area of MNC activities there is a complex interaction between governmental and private interests. The task is to identify the combined public-private law elements of international corporate problems and to aid deliberations toward their just resolution.

This means that if one is going to deal with the relationships between MNCs and Public International Law, the traditional concept of international law —that which regulates inter-state relations and whose only subjects with legal personality are states, and circumstantially some International Organizations [12]— is no longer valid. This poses the problem of the terminology to be used.

The mixture of governmental and private interests in the problems inherent in MNC activities precludes making a distinction between those interests and having a different legal approach to each of them. MNC activities must be treated as a single matter or subject, and if there is to be a body of international law regulating them, it must cover more than States

8. As H. G. Angelo says "A further deterrent of legal research and publication about MNC transactions is the sheer physical difficulty in research and assembly of relevant and authentic materials for citation", 135 Recueil des Cours (1968-III), p. 448.

9. See, Haight "International Law and Extraterritorial Application of the Antitrust Laws", 63 YALE Law Journal (1964), p. 639. Fatouros "Multinational Enterprise and Extraterritoriality" 1 Journal of Contemporary Business (1972) p. 33. Ellis "The Extraterritorial effect of the Community anti-trust legislation outside the Member-States" CML Rev.)1965), p. 132. Re Cartel in Aniline Dyes, CMLR (1969) p. 46. Restatement (second) of Foreign Relations Law of the United States (1965), 18(b) "According to principles of international law governing extraterritorial jurisdiction, a nation may adjudicate under its own law controversies that arise from external conduct producing a significant effect inside its territory".

10. See, Sanders "the European Company" Journal of Business Law (April 1968), p. 184. Statute for the European Company, Bull. E.C. Supplement 4/75.

11. Jessup, "A modern Law of Nations" (1948), p. 15.

12. Reparation for Injuries Case, I.C.J. 1949.

and their relations; it must also cover private interests and private law subjects. It could be called appropriately Transnational Law [13].

Transnational Law would be different to Public International Law from which MNCs scape at present. It would comprehend all relevant laws and rules regulating MNCs. International, insofar as it is not part of municipal law, it would be a separate body of law transending the legal frameworks of municipal law, conflicts and public international law. If this is accepted, MNCs would have legal personality recognized by Transnational law, they would be legal persons as far as this system is concerned. The MNC as such, as an entity rather than a number of smaller parts which are recognized as legal persons by other systems of law, would also be subject to law as a legal person.

Thus, this paper essentially will be confined to the subject of Transnational law. It tries to ascertain whether this structure of norms exists or could be developed. This is most important because municipal law, private international law have not been able to deal properly with the problems raised by MNCs, at least at international level.

The paper does not attempt to deal with each particular problem the MNC poses to international relations and therefore to Transnational Law [14]. Problems have increased every year with the increasing activities of MNCs and legal solutions vary with time and place. The concern of this paper is the structure of Transnational Law or of the developing framework within which these solutions may be found. The paper endeavours to ascertain what structure there is, to what extent it is structure of international law, whether it is appropriate, what form is appropriate to resolve problems created by MNC activities and how the legal processes of Transnational Law may be activated. The concern is not for the substantive rules constituting the body of law but its structure or form [15].

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13. See Lazar, "Transnational Economic and Monetary Law", Vol. I, p. 103, "No developed body of economic or monetary law exists on the transnational plane and recourse must be had not only to the principles of public international law, but also to those of the applicable domestic legal systems, its rules of conflict of law and those of a further domestic system which is indicated".

14. See, infra p. 30.

15. For particular problems and how they are regulated nowadas see, for example:

— U.N. Doc. E/C.10/12 and E/C.10/12 Add. 1.

— De Visscher, "La Protection Diplomatique des Personnes Morales", 102 Rec. des Cours 339 (1961).
Spofford, C. M., "Third Party Judgement and International Economic Transactions" 113 Rec. des Cours, 121 (1964-III).

— Feliciano, F. P., "Legal Problems of Private International Business Enterprises: An Introduction to the International Law of Private Business Assoc. and Economic Development" 118 Rec. des Cours, 213 (1966-III).

— P. Lillich, "The Protection of Foreign Investments" 67 AJIL (1973).

Given this approach, does the MNC merely increase the size of the problems posed by other participants on the international economic scene, or is there a difference in their nature? [16]. If the problems posed by the MNC are of a different "quality" or nature than those known in international relations and, consequently, to international law, traditional structures and rules of international law will be unlikely to lead to satisfactory solutions. Does that mean that these problems are so large and/or so individual and different in character as to be amenable only to fiat or negotiation and not to a body of rules which could be described as law?

The first important point is that the MNC, as a real entity, is not recognized by International Law at present: Negotiation between parties to a dispute is always available but it is difficult to solve international problems and disputes, where a legal solution is desired, with a tool unable to recognize the most basic fact: the MNC being a single entity. Legal recognition of the MNC as an entity which exists in the international economic plane possibly could be effected through some adjustments of national legal systems. This would help to solve problems of municipal law, but in order to get a genuine international set of rules regulating MNC activities an international legal personality should be admitted with a special body of supranational law.

However, the present legal frameworks touching MNC operations have no ready niche for such institutions. The orthodox legal frameworks only recognize as "international corporations" those entities which are formed within traditional international law itself, by treaty [17], generally intergovernmental joint ventures, often between member-states of the European Communities. Not included in this are private commercial enterprises in spite of the fact that they are economic international personalities that string together corporations created by the laws of different parent and host countries. As far as each particular legal system is concerned each corporate unit of the MNC remains an independent legal person.

Tensions between those legal persons, the individual corporations, and their economic interdependence are inevitable. Parent countries tend to extend their authority over foreign subsidiaries and treat them as mere extensions of the parent company. Host countries find it hard to ignore foreign control over their corporations and to treat foreign corporations fairly on parity with locally controlled firms.

If International Law is unable to recognize the MNC as a legal person, problems derived from their activities will hardly be solved. An examina-

16. See Detlev F. Vagts, "The Multinational Enterprises: a new challenge for Transnational Law", Harvard Law Review. Vol. 83/1, p. 740.

17. See "Corporations formed pursuant to Treaty", 76 Harvard Law Review. (1963) 1421-1449.

tion of case law shows that it has revolved around the peripheral question of assigning nationality to corporations for purposes of deciding what country is entitled to prosecute an international claim on its behalf [18]; legal action in brought through States and by States. An examination of States' practice shows only certain advances, via bilateral treaties, in protecting local subsidiaries against flagrant departures from treatment given to local corporations and against the most obvious types of expropiation.

As Detlev F. Vagts says "A review of the law of MNCs reveals serious defects:

— it is divided along lines, perhaps useful in breaking down other problems, that fragment the MNE situation in an unhelpful way.
— it is basically obsolete, coping with problems presented in reported cases of past decades while MNE managers and attorneys assiduously strive to keep new issues from exploding into litigation (a proposition rather less true of tax law than other branches).
— the cases that do arise are so rare and idiosyncratic that they do not provide the regularity and comparability needed for the growth of a normal body of law.
— the understanding of lawyers as to the characteristics of the MNE is often unsophisticated and erroneous, for there has been no merger between law and economics" [19].

In short then, the main defect of the present law governing MNCs is that it is a body of rules unable to recognize the fact of the MNC being an economic entity in world affairs, and recognizes nothing but different separate legal entities which are only components of the MNC. Sociologically and economically this separate "parts" are unified and that is recognized, dealt with and studied as such. Legally, except for some exception [20], the MNC does not exist. A structure of international legal rules able to recognize this fact and regulate it is needed.

This raises the question of what the law of MNCs is going to be. Should it be general principles of law, customary law, legal rules established by treaty, codes of conduct, or guidelines? There are differences, indeed big differences, in each case. We will see below what States are doing to solve the problem and this will lead us to consider "guidelines" and "codes of conduct" as part of the transnational Law referred to above: a structure

18. See Visscher, "La Protection Diplomatique des Personned Morales", 102 Recueil des Cours (1961), p. 394.
19. See supra (18).
20. See below the analysis of current structures of MNCs and international legal recognition. See supra note (17).

where MNC's activities have been dysfunctional up to now but where, hopefully, they will become eufunctional.

What do we understand by "Multinational Corporation"? The terminology varies greatly as the definitions when set out in detail. This paper attempts to analyze the legal characteristics of MNCs, based upon economic and sociological data, in order to have a proper legal definition.

II. DEFINITION

If one defines [21] the multinational corporation as one which operates in an number of different countries, and derives a major proportion of its revenue from outside its own country, then we should search its origins in the distant past [22].

International corporations have gone through various distinctive eras (commercial, banking, exploitative, manufacturing and the technological-managerial era) and have specialised in function depending on their motives for foreign investments:

— raw material seekers
— efficiency seekers
— market seekers
— knowledge seekers
— diversification seekers.

International by their scope, action or interest these different types of corporations do have things in common, mainly through their international character. To study the multinational corporations one must establish clearly what is understood by a "Multinational Corporation", what are the essential features of all these different corporations, undertakings, that make them "multinational" and therefore subject to all the attendant problems.

Firms or corporations operating out of their home country have existed since the 13th century —the Italian merchants established representation offices all over Europe— but there are differences between those bodies or the Rothschild Bank in the early nineteenth century and our contemporary multinationals.

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21. For bibliography on definitions see Yitzhak Hadari: "Tax Treaties and their Role in the Financial Planning of the Multinational Entreprises", 20 ACLJ (1972), p. 111, note 1.

22. For an historic description of the development of the kind of company described, see Bohdam Hawrtyshyn: "The Internationalization of Firms", 5 JWTL (1971), p. 72.

It is not the "field" in which they operate —banking, raw materials, knowledge, high technology— which makes them different but the way they operate, some common features.

The main common features which make corporations operating out of their home countries "multinationals" and some problems that this imports are as follows:

— the MNC is becoming an increasingly significant factor in world international affairs. The corporations function as a source of pressures and as transformers of the international political environment. An example is when MNC's affiliates in host countries are obliged to conform to home country laws such as anti-trust laws, balance of payments guidelines, export regulations and other policies of extraterritorial application of laws [23].

— The MNC not only introduces home country policies to foreign countries but also transforms the international environment, both through unilateral actions and pressure brought to bear on individual governments in order to have its own group interests implemented. The means may be by intra-company trade, transfer of prices or direct political pressure [24].

— The MNC makes decisions on the basis of multinational alternatives within a world-wide perspective [25].

— The MNCs have not been constituted by the exclusive application of one national law. Their members and directors may represent several national sovereignities; their legal personality is not based, or not entirely based, on the decision of a national authority or the application of a national law; their operations are governed, at least partially, by rules that do not stem from a single, or even from several, national laws [26].

— The MNC operates simultaneously within different national jurisdictions but under the corporate control of the parent company [27].

— The organizational pattern varies. Foreign affiliates of the parent company may be branch plants, subsidiaries, joint ventures, management contract arrangements, licensees, franchise holders. Their establishment, and therefore their nature, must take account of the

23. See for a detailed examination of this problem: I. A. Lituak and C. J. Maule, "Conflict Resolution and Extraterritoriality", 13/3 Journal of Conflict Resolution (Sept. 1968) p. 305-319.
24. See D. Havowits "From Yalta to Vietnam" (Harmondsworth, Penguin 1967).
25. See supra note (21).
26. See Barthold Goldman, 3 JWTL, p. 500.
27. See I. A. Lituak and C. J. Maule, "The Multinational Corporations, some Economic and Political-Legal Implications", 5 JWTL, p. 636.

different laws and policies of the host country towards direct foreign investment there.

— MNCs no longer distinguish between domestic and international business. Domestic business is subordinated and integrated into a global strategy [28].

— ethnocentric bias (parent-country oriented) of parent management in conflict wit hthe polycentric outlook (host-country oriented) given by local management of foreign subsidiaries [29].

— the implications for employment stability and labour policy. International unions are the only labour organizations able to cope with MNCs strength.

— "Multinational are evolving in the direction of becoming supranational institutions. Their management, rising above the petty parochialism inherent in the obsolescent nation State, can exercise corporate statesmanship at global level" [30].

— More than fifty percent of their operations are outside their nation of origin.

— the large scale of overseas investments under an integrated management organization.

— the MNC today has a structure and orientation which allows it to develop a strategy that is more nearly global in its outlook than that of any earlier business entity.

Most of these features are economic and sociological. The term "multinational corporations" is difficult to define in juridical terms. No authoritative legal definition exists and most of the existing definitions are business definitions [31].

The term "multinational" is not exclusive. "Multinational", "plurinational", "transnational" and other terms have been used, some times interchangeably. As there are degrees of "multinationalism" some people prefer the terms "international "or "transnational" to describe enterprises with operations in several countries, reserving "multinational" for companies that are truly global in ownership and management. However because it is the most widely accepted term, "multinational" is the term used in this paper.

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28. See supra note (27), p. 635.

29. See H. W. Perlmutter, "The Tortous Evolution of the Multinational Corporation", Columbia Journal of World Business (1969), p. 9-18.

30. Detlev F. Vagts, "The Multinational Enterprise: A new challenge for transnational law". 83/1. Harvard Law Review, p. 745.

31. Historically, the private enterprise operating in many countries appears to have been first called a "multinational corporation" in 1947 by Sigmund Timberg who used the phrase as an alternative synonym for what he called the "international combine". — Business Week, 20 April 1963, "Multinational Companies", p. 3.

In the absence of a supranational jurisdiction governing MNC's, or international agreements establishing relevant norms and common corporate terminology, disparities in identification and definition between legal systems are both inevitable and more complex than within a single jurisdiction.

Nevertheless, this does not cloud the vital characteristic identifying multinational corporations as such. It is a vertical link of control through ownership of subsidiary, affiliated or associated entities by one or more foreign parent companies. The entities are legally distinct but economically dependent business units subject to one unified direction [32].

Regarded in other ways, primarily economic and functional, the aggregation of separate legal entities described may be considered to be a single international corporation when some criteria, of those above, are met [33].

If we accept that economically the MNC is an entity but present law is unable to recognise and deal with the fact because there is no supranational jurisdiction, a legal structure able to deal with it is necessary. The first problem is clear. One has to deal with MNCs without a proper legal framework and universally accepted laws. This paper considers whether a supranational legal structure is being built and a transnational law is being developed or whether MNCs will continue to act internationally as independent units without any universal law being applied to them as such rather than only to their corporate elements within particular municipal systems of law.

We now consider the different types of Multinational Corporations which operate in the international scene. One must try to identfy the major types of MNC affiars, but should remember that new corporate forms and tech-

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32. Other definitions:
— "enterprises which own or control production or service facilities outside the country in which the y are based. Such enterprises are not always incorporated or private; they can also be co-operative or state-owned entities" — definition used by the Group of Eminent Persons in "The Impact of Mult. Corporations on World Development and on International Relations". UN. Doc. E. 5500. Add. 1, p. 25.
— "A precise legal definition of multinational entreprises is not required for the purposes of the guidelines. These usually comprise companies of other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge and resources with the others" — OECD Guidelines for Mult. Enterprises, annex to the Declaration of 21st June 1976 by Governments of OECD Member Countries.
— "A certain number of corporations which have not been constituted by the exclusive application of one national law; whose members and directors represent several national sovereignities; whose legal personality is not based, or at any rate not entirely, on the decision of a national authority or the application of a national law; whose operations, finally, are governed, at least partially, by rules that do not stem from a single, or even from several, national laws". Berthold Goldman in 3 JWTL, p. 500.

33. In short: diversity of countries of operation, centralization of the top decision-making process, global outlook on production, marketing and management.

niques are always invented by governments and private enterprise to meet local and foreign needs as well as the requisites of expanding technology and international finance [34].

III. REPRESENTATIVE TYPES AND STRUCTURES OF MULTINATIONAL CORPORATIONS

A. International Organizations { Universal Plane / Regional Plane.

B. { Public International Corporations / International Companies / Intergovernmental Corporations of Private Law / Multinational Public Enterprises.

C. Single Governmental Multinational Corporations

D. Mixed Governmental - Private Multinational Corporations

E. Private Multinational Corporate Corporations.

A. International Organizations

We will exclude from our study those universal and regional public international organizations formed between Nation-States to carry out fundamental public functions, as their primary purpose is not the conduct of enterpreneurial activities. In earlier decades, international lawyers used to call them "public international corporations". They have international legal personality [35] and fit into the present traditional international law which regulates them.

B. Public International Corporations

Since modern economic and social needs frequently transcend national territorial jurisdictions, joint governmental action appears through enterprises operating across national boundaries. These corporations, formed by two or more governments, enter into a wide range of activities, scarcely distinguishable most of the time from the normal domain of private en-

34. Here, the classification of Angelo, H. G. is used. See 125 Recueil des Cours (1968-III) p. 470-506.

35. See supra note (12) and Brownlie "Principles of Public International Law", p. 656.

terprise except for the fact that unlike private corporations which acquire their legal personality from municipal law [36], they are created by agreements between States and acquire their personality and much of their governing law from these agreements.

Friedman called them "international public corporation" [37]. Others have called them "international companies" [38], "common enterprises" [39] and "intergovernmental corporations of private law" [40].

But the definition which seems most popular is that of the "multinational public enterprise". It seems more appropriate because, although these corporate institutions operate mainly in private law, they can be subject to both public international law and various systems of private law.

With an increase in the number of contracts between these governmental entities and private companies, as well as with each other and with governments directly, a separate set of norms governing such transactions, instrument establishing such entities, could be created. Nations establishing these entities frequently use reference to general principles of law or general principles of cooperation in order ot detach these international companies from national law, thereby creating an independent international business law [41]. This implies the attribution of international legal personality, at least in the proposed international business law [42].

Participation in commercial, private afairs, leads toward the blending of public and private law [43], both in international and national legal systems [44].

These government-created entities have rights and duties of varying na-

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36. Some of these entities, acting largely in a public law sphere and having as shareholders only gobernments of foreign States, are perhaps properly characterised as "international organizations". They are a transitional category of corporation between classified types A. — and B. — above. E.g., the International Finance Corporation (IFC) — see Calon, "The International Company. Elements of General Theory", 88 Clunet, p. 695, 711-713 (1961) — or the European Investment Bank, established by article 129 of the European Economic Community Treaty — see Sweet & Maxwell's "European Community Treaties" — London 1971.

37. Friedman, W., "International Public Corporation", 6 Modern Law Rev. (1943) p. 185 and "International Public Corporations as Agencies of Reconstruction", World Unity Booklets No. 2, London 1964.

38. Kahn, "International Companies", 3 Journal of World Trade Law (1969) p. 498.

39. Sereni, "International Economic Institutions and the Municipal Law of States", 96 Rec. des Cours (1959), p. 133.

40. Friedman, W., "The Changing Structure of International Law" (1964), p. 219.

41. Angelo, H. G., op. cit., p. 592.

42. For a discussion on the legal personality of these firms and international law see "Corporations Formed Pursuant to Treaty", 76 Harvard Law Review (1962-1963), p. 1434.

43. A unique private law-public law technique is established by provisions of the European Treaty, ch. V, where the Council of Ministers is "empowered" to take decisions establishing "joint entreprises" which enjoy the widest legal competency under the national law of each Euratom Member State.

44. McDougal, "International Law, Power and Policy: A Contemporary Conception", 82 Rec. des Cours (1953), p. 137.

ture and degree under Public International Law, Private International Law and Municipal Law.

As far as they will interlock more and more with private corporations, legal rules regulating their activities will move towards the system of Transnational Law, described earlier and not unlike systems envisaged by scholars like Jessup, Schwarzenberger, Friedman and others.

Using Friedman's terminology, these entities and their activities pertain to the new "law of coperation" better than to the traditional law of "coexistence". The label international law served very well when the only subjects of that law were States, "but the subjects now include multinational organizations and perhaps transnational private associations as well as individuals" [45].

Some examples are the Company running the Basel-Mulhouse Airport [46], the International Moselle Company [47], Eurofima [48], Eurochimique [49] and many others [50].

C. Single Governmental Multinational Corporations

These are entities established by a government within its own national jurisdiction, they are not multi or internationally owned but transnational in operation. Government owns all or a controlling portion of its shares and the company engages in entrepreneural activity in other nations in its own corporate name or through the establishment of subsidiary, wholly-owned enterprises.

Some examples are BOAC, Aerolineas Argentinas and numerous governmental corporations in extractive industries.

In so far as these activities are carried out across national boundaries they are functionally, although with difference in legal status and consequences, very closed to the strictly privately owned enterprises. Moreover, as management of these corporations is generally fairly independent of governmental control in their day-to-day activities, in the economic sense they

45. Arthur Selwyn Miller, "International Transnational Law" 65 Columbia Law Review, (1965), p. 837-838.

46. Created by the Voverniments of France and Switzerland.

47. It administers certain aspects of the use of the Moselle River between Germany and France. An English Translation of the Convention appears in 85 Clunet, (1968) p. 265-273.

48. Created to provide rolling stock for European railroads between Austria, Belgium, Denmark, F. R. of Germany, France, Italy, Luxembourg, Norway, Netherlands, Portugal, Spain, Sweden and Yugoslavia. See 378 U.N.T.S. (1965), p. 159.

49. Model of regional multinational public entity created for the control of chemical-ratiation activities in Europe. See Convention on the Constitution of Eurochinique in 1st Report of the Steering Committee for Nuclear Energy to the OEEC Council, OEEC Doc. No. C (57) 204 (1957).

50. For a list see Angelo, op. cit., quoting Fliger, "Multinational Public Enterprises", Internat. Bank for Reconstruction and Development. (Sept. 1967).

are real multinational corporations, although legal considerations make it necessary to distinguish them from the privately owned entities [51].

D. Mixed Governmental-Private Multinational Corporations

The assimilation to private companies is, in this case, even closer than in wholly owned governmental corporations. Enterprises where States join with private entities to carry out international and multinational economic activities do generally have more private interests than wholly-owned governmental corporations.

This type of corporation is very useful in those countries where national Governments neither want to allow exclusive private interests in certain economic activities nor are prepared to act on their own. In fact, over one third of the development ventures in underdeveloped countries have been carried out by joint public-private investment and operation [52]. These corporations can be found also in fully developed countries and this is the technique used by State-owned entities of eastern European countries which cooperate with predominantly private-owned western companies [53].

Although these entities have varying degrees of public origin, ownership and status, the dominante trend is to regard them as private entities. In fact they use private law techniques. This doesn't mean that complex problems of jurisdiction, governing personal law, tax law, etc., will not arise.

Some of these entities were set up in earlier decades (e. g. the Anglo-Iranian Oil Company) [54] but the majority are more recent thant the World War. Some examples are the Scandinavian Airlines system [55], KLM Royal Dutch Airlines [56], British Petroleum, Lamco [57], Intelstat [58] and the Company operating the Tunnel under Mont-Blanc [59].

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51. P. J. Kincaid, "Sovereign Immunity of Foreign State-Owned Corporations" 10 JWTL (1976) p. 110; C. N. Schmitthoff, "The Claim of Sovereign Inmunity in the Law of International Trade" 7 ICLQ (1952) p. 452; G. R. Delaume, "Three Perspectives on Sovereign Inmunity" 71 AJIL (1977) p. 399.

52. Friedman and Kalmanoff, "Joint International Business Ventures" (1961) p. 38.

53. Feld, W. J., "Utility of the EEC experience for Eastern Europe". Semaine de Bruges 1969. Bruges Week, College of Europe, Bruges, Belgium.

54. Anglo-Iranian Oil Company Case, ICJ Rep. 1952.

55. Multinational entity created by three parent companies (Swedish 3/7th, Danish 2/7th, Noregian 2/7th) but not registered in any of the three countries and thus lacking formal nationality. The consortium, nevertheless, has been accepted as a party in several civil litigations.

56. The Government of Netherlands owns 50.5 percent.

57. For the structure and organization of this Liberian Joint Venture see H. G. Angelo, op. cit., p. 480.

58. Intelstat is a partnership among 14 governments creating a consortium which possesses an identity distinct from that of the member countries and tied to COMSAT, a private USA corporation which supplies 61 % of the capital.

59. Convention between Italy and France, March 14 1953, 284 U.N.T.S. pp. 228-228b.

E. Private Multinational Corporations

For the first time the public element brought by Governments' participation in multinational entities is lacking. These are a collection of separate legal entities, normally, though not ineluctably, in corporate form, established under the private law of the national jurisdictions of the countries where they operate. The form in which the separate components of these corporations operate in each country varies according to their function and the legal framework provided by the municipal law system. The most common forms are branches, controlled subsidiaries, affiliates, joint ventures and offices of information and representation [60].

The relationships between these MNC components are marked by the basic economic structure of vertical ownership [61] of all the corporate entities subject to respective individual national laws. These economic links permit the management of the whole system by a single parent-country dominated or oriented corporate parent entity.

It is clear that the juridical basis of these MNCs, except when public corporations formed by treaty are involved [62], is the national laws of the States in which the parent and subsidiary, affiliated and like corporations are established. It is a basis which is insufficient because the real essence of the MNC, the economic unity and control, escapes control [63].

Do all these types of corporations which operate in the international plane correspond to the concept of the MNC? If one considers the international regulations of the MNC, should the rules and institutions to be established apply only to the last type described, the strictly privately owned MNC, or should they apply also to other types where public interests play their role through government participation?

The answer is not easy; States do not agree on the issue [64] nor has traditional international law considered these types of MNC's on an equal footing [65]. Thus there is not a general set of rules to apply equally to all of them.

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60. For some typical multinational structural arragements see Angelo, H. G., op. cit., p. 496, 500 and 502 or Litvak, I. A. and Maule, C. J., "The Multinational Firm and Conflicting National Interest" 3 JWTL (1969) p. 311-317.

61. Horizontal links tend to create "cartels" and similar instead of MNC.

62. See supra note (36).

63. A. A. Fatouros, "Problèmes et méthodes d'une reglamentation des enterprises multinationales" 101 Clunet (1974) p. 495.

64. USA opinion when commeting on the report of a Group of Eminent Persons to the ECOSOC. "The Government criticizes the fact that the Report did not cover the activities of State-owned enterprises and made inadequate reference to international obligations of States". U.N. doc. E/3585/Add.5 See n. (174).

65. Consider the problems which raises the doctrine of sovereign immunity. See supra (51).

It is worth considering some evolutionary trends of MNCs [66]:

— The non-national, independent entity being a neutral, specialised agency free from home country ties. It would not have a "country" of incorporation although the incorporation of the whole entity as one is envisaged. Now, when there is not an international sytem of incorporation available, the tendency is for MNC's to be incorporated in places like Luxembourg, the Bermudas os the Seychelles where home country influence is irrelevant.

— The internationally regulated MNC. The creation of this model requires an international agency representing nation States which would control the activities of the MNC. A likely development is of MNCs being singled out for special reporting requirements administered by an international agency [67].

— The partially internationally regulated MNC: This is already the case in a number of areas. Overseas operations of MNC's obtain some protection through bilateral "Treaties of Friendship, Commerce and Navigation" [68], although they tend to be concluded only with rather developed countries. With less developed countries loathe to sign such treaties, one promising development has been the negotiation of bilateral agreements between the US and underdeveloped countries prior to the grant of investment guaranties, or some multilateral agreements like the Lomé Convention between the EEC and the ACP states [69] or even more general agreements like the GATT and the IMF [70].

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66. See Detlev F. Vagts, op. cit., p. 787.

67. A report made by the Group of Eminent Persons, appointed in 1973 by the Economic and Social Council to study the impact of MNCs on development and international relations (U.N. doc. E.5500 add.1), noted a serious lack of both financial and non-financial information in usable form. Consequently the "Commission on Transnational Corporations" of the Economic and Social Council established an Expert Group on International Standards of Accouting and Reporting. The Group used a series of studies prepared by the Centre on Transnational Corporations (U.N. doc. E/C.10/AC.1/2 to 4) and finally adopted the report in July 1977: "International Standards of Accounting and Reporting for Transnational Corporations" (U.N. doc. E/C.10/33).

The application of the standard is intented to be voluntary in the first instance but an international agreement among governments is envisaged as the only way to make mandatory the application of all the relevant standards to both multinational and national companies and in order to have a proper centre of harmonized information.

The OECD Guidelines for Multinational Corporations contain instructions for the disclosure of information. Undertakings should "within reasonable time limits, on a regular basis but at least annually, (publish) financial statements and other pertinent information relating to the enterprise as a whole, comprising in particular...".

68. See p. 326 and p. 346.

69. See K. R. Simmonds, "The Lime Convention and the New International Economic Order" 13 **E.M.L. Rev.** (1976), p. 315 334. See i p. 31.

70. See Lazar, "Transnational Economic and Monetary Law" Part I, Books 2 and 3 (Oceana).

What is really interesting about this trend is not the actual areas increasingly being regulated but the fact that there is being created a more general structure which embraces all these "partial" regulations and creates general rules of international law applicable to the generality of MNC's.

As to which kind of MNCs these trends apply, in the two first cases, corporations with government participation are not likely to be included. In the third one, nothing, except some problems related to sovereignity, prevents MNC's with public sharing from being regulated by international rules common to both public, mixed and private MNC's.

In fact, the third trend applies also to possible developments in the direction pointed out in the first and second trends, insofar as it is more probable to have real autonomous entities, without links to any particular home-country, when international law will have developed a comprehensive body of rules able to sustain these entities as purely international.

In general terms, exclusively private-owned MNC's have been the main cause of international concern, for their activities are the ones which have provoked more troubles and made a greater impact in international relations. International society's reaction must, therefore, apply principally to these corporations but nothing prevents as a secondary effect the extension of the rules to the other types, mostly when they act and carry out activities similar or equal to those conducted by private MNCs.

In conclusion, when talking about MNCs here the reference is to private-owned MNCs and publicly owned corporations if their activities or the problems they present are similar.

IV. INTERNATIONAL DOCUMENTS RELATING TO MULTINATIONAL CORPORATIONS [71]

As a first effort to provide rules for the regulation of MNCs in the field of international investment, the Charter of the International Trade Organization, best known as the Havana Charter, was signed in 1948 but never put into effect [72]. This and other attempts reflect the failure of the international community to implement a universal convention for the regulation of MNCs or of foreign investment.

Effective regulation requires effective sanctions and a feasible, practical enforcement procedure. However, it has been a general characteristic of

71. See U.N. doc. E/C.10/9/add. 1.

72. United Nations Conference in Trade and Employment held at Havana, Havana, Cuba, from 21 November 1947 to 24 March 1948. First Act and Related Documents (United Nations publication, Sales no. 148. II. D. 4).

international law that it lacks the sanctions normally available in municipal law jurisdictions. It is this issue or problem that should be borne in mind when studying codes of conduct, guidelines and other international instruments, which have been developed for MNCs.

There have been a number of treaty and non-treaty international instruments of a universal nature which have been adopted by several international bodies such as the General Asembly, other U.N. organs and international private organizations.

The Havana Charter covered various issues of international economic relations and economic development, and, in Articles 12 and 46-54, foreign investment and restrictive business practices, all subjects closely related to MNCs. The Charter recognized foreign investment as valuable for developing countries and the right of host countries to control it. Capital-importing countries undertook to "provide reasonable security for existing and future investment" and to avoid "unreasonable and unjustifiable actions" against the interests of the investor. Host countries [73] had the right to control foreign investments through screening, restrictions on the ownership of firms and any "other reasonable requirements".

In 1947 the Economic and Social Council of the United Nations requested its sub-Commission on Economic Development to commence a study regarding the need for an international code relating to foreign investment [74]. As the Havana Charter there was no follow up.

In 1952, Resolution 626 (VII) of the General Assembly proclaimed the principle of permanent sovereignty over natural resources. The next year the Economic and Social Council considered restrictive business practices. In 1954 the General Assembly encouraged foreign private investment by Resolution 824 (IX). By the 1950's proposals for an Investment Statute were made in the Council of Europe.

As well as public organizations, private organizations like the "German Society to Advance the Protection of Foreign Investments" and the "Parliamentary Group for World Government" of the United Kingdom were dealing with the problem in these first years [75].

During these years concern was mainly for foreign investment and sovereignty over natural resources. MNCs, as the particular international entities through which these issues would be manifested, were not yet recog-

73. For national legislations on MNCs see "National Legislation and Regulations relating to Transnational Corporations". Commission on Transnational Corporations, Economic and Social Council. E/C.10/8/Add. 1.

74. Official Record of the Economic and Social Council; document E/225.

75. See A. A. Fatouros, "An International code to protect private investment-proposals and perspectives". University of Toronto Law Journal; Vol. XIV, 1961.

nised as the main power factor. State-owned colonial companies were yet very recent [76].

A. United Nations Instruments

During the following years the United Nations General Assembly continues raising issues related to foreign investments [77] and MNCs through the principle of permanent national sovereignty over natural resources [78] or subjects such as the financing of economic development and transfer of technology [79]. Of particular importance are the U.N. Conferences on Trade and Development [80] as well as the Resolution on a Charter of the Economic Rights and Duties of States [81].

The 1962 Declartion of the General Assembly on Permanent Sovereignty over Natural Resources points directly to MNCs when dealing with foreign capital working on natural resources "in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities". Paragraph 3 refers to foreign capital and its earnings which "shall be governed by the terms thereof, by the national legislation in force and by international law".

The International Development Strategy for the Second United Nations Development Decade, para.50. referring to foreign investment reads as follows [82]:

> «Developing countries will adopt appropriate measures for inviting, stimulating and making effective use of foreign private capital, taking into account the areas in which such capital should be sought and bearing in mind the importance for its attraction of conditions conducive to sustained investment. Developed countries, on their part, will consider adopting further measures to encourage the flow of private capital to developing countries. Foreign private investment in developing countries should be undertaken in a manner consistent with the development objectives and priorities established in their national plans. Foreign private investors in developing countries should endeavour to provide for an increase in the local share in management and administration, em-

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76. Resolution 1721 (L III) of the Economic and Social Council was the first U.N. Resolution focusing on MNCs. It requested a group of eminent persons to submit recommendations regarding appropriate international action.
77. See Economic and Social Council Resolutions 1359 (XLV), 1451 (XLVII).
78. See U.N. General Assembly Resolutions 523 (VI), 626 (VII), 1803 (XVII), 2158 (XXI), 2386 (XXIII), 3175 (XXVIII).
79. International Development Strategy for the Second U.N. Development Decade, General Assembly Resolution 2626 (XXV).
80. See UNCTAD Conferences 26 (II), 33 (II), 73 (III), 39 (III), 45 (III).
81. See Resolution 3281 (XXIX) of 12 December 1974 and in particular Art. 2 of the Charter. Text in 69 ASIL (1975), p. 484.
82. See note 79.

ployment and training of local labour, including personnel at the managerial and technical levels, participation of local capital and reinvestment of profits. Efforts will be made to foster better unnderstanding of the rights and obligations of both host and capital exporting countries, as well as of individual investors».

The UNCTAD resolution 56 (III) (May 1972) «affirms the sovereign right of developing countries to take necessary measures... in accordance with national developement needs..., limit repatriation of profits». «Expresses its concern at the total amount of the financial outflow... excessive utilization of local financial resources... disrupt competition...». «Recognizes that private foreign investment, subject to national decisions and priorities, must facilitate the mobilization of internal resources, generate inflows and avoid outflows of foreign capital, incorporate adequate technology, and enhance savings and national investment». «...developed countries to take the necessary steps to reserve the tendency for an outflow of capital from developing countries...».

The UNCTAD resolution 73 (III) deals with restrictive business practices including the "possibility of drawing up guidelines for the consideration of Governments of developed and developing countries...".

Paragraph 4 of General Assembly Resolution 3201 (S-VI) —1974— announcing the establishment of a new International Economic Order established the desirability of "regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate, on the basis of the full sovereignty of those countries".

The Programme of Action on the Establishment of a new International Economic Order, General Assembly Resolution 3202 (S-VI), dealt also with MNCs and proposed the formulation of a code of conduct [83]. General Assembly Resolution 3362 (S-VII), in the section on transfer of real resources (para.II-9), invites United Nations bodies and other intergovernmental agencies, as well as the World Bank, to "examine ways and means of increasing the flow of public and private resources to developing countries... and to provide investment in private and public enterprises in the developing countries...".

The Charter of the Economics Rights and Duties of States adopted by the General Assembly in 1974 [84] and the negotiations that failed to make it a binding instrument are of particular interest. It is worth nothing the differences between the approved Art. 2 and that proposed by the industrialized countries.

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83. See Section V under the heading "Regulation and control over the activities of transnational corporations".
84. See supra note 81.

Article II:

1. — Every State has and shall freely exercise full permanent sovereignty including possession, use and disposal, over all its wealth, natural resources and economic activities.

2. — Each State has the right:

a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;

b) To regulate and supervise the activities of transnational corporations within its jurisdiction and take measures to insure that such activities with its economic and social policies... .

c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought... .

The United States proposed text of Article II which was supported by 13 other industrialized nations is:

1. — Every State has permanent sovereignty overs its natural wealth and resources and has the inalienable right fully and freely to dispose of them.

2. — Each State has the right:

a) to enact legislation and promulgate rules and regulations, consistent with its development objectives, to govern the entry and activities within its territory or foreign enterprises.

b) to enter freely into undertakings relating to the import of foreign capital which shall be observed in good faith.

c) to regulate and supervise the activities of transnational corporations within its jurisdiction and take measures to insure that such activities will comply fully with its laws, rules and re-

gulations and conform with its economic and social policies. Every State shall ensure that transnational corporations enjoy within its national jurisdiction the same rights and fulfill the same obligations as any other foreign person... ,

d) 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.

e) to requisite that its national jurisdiction be exhausted in any case where the treatment of foreign investment or compensation is in controversy, unless otherwise agreed by the parties.

f) to settle disputes where so agreed by the parties concerned through negotiation, good offices, inquiry, fact-finding, conciliation, mediation, arbitration, or judicial settlement...;

3. — States taking measures in the exercise of the foregoing rights shall fulfill in god faith their international obligations [86].

The Second General Conference of UNIDO, Lima Declartion of 26 March 1975, in paragraph 58, referring to measures to be adopted by developing countries mentions "...the establishment and strengthening of machinery and institutions to regulate and supervise foreign investment and promote the transfer of technology, "and for developed countries (para.59 g)" to encourage their enterprises to participate in investment projects within the framework of the development plans... in accordance with the laws and regulations of the developing countries concerned". Finally, para.58 h "promote co-operation with the Governments of the developing countries, as appropriate, in order that the activities of the transnational corporations of developed countries in developing countries are in conformity with the economic and social aims of the developing countries..." [87].

Of all the documents cited above, the Intergovernmental Working Group on the Code of Conduct, preparing for the U.N. a code of conduct for MNCs, considered worthy to mention in the Preamble and Objectives of the proposed code the following documents [87]:

1) Declaration and Programme of Action for the Establishment of a New International Economic Order. General Assembly Resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974; in particular relevant provisions on MNCs.

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85. See Browner and Tepe. "The Charter of Economic Rights and Duties of States: A Reflection or a Reflection of International Law?". International Lawyer (1975), p. 295.

86. Note that there is no reference to international law.

87. U.N. Doc. E/C.10/31.

2) Relevant parts of the Charter of Economic Rights and Duties of States. General Assembly Resolutions 3281 (XXIX) of 12 Dec. 1974.
3) Relevant parts of the Lima Declaration and plan of Action on Industrial Development and Co-operation adopted by the Second General Conference of UNIDO, 26 March 1975.
4) General Assembly Resolution 1803 (XVII) on permanent sovereignty over natural resources.

Two further documents elaborated in the U.N. should be mentioned because of their importance and influence in the present process of elaborating a Code of Conduct for Multinational Corporations by the ECOSOC. They are "Multinational Corporations in World Development" [88] and "The Impact of Multinational Corporations on Development and on International Relations" [89].

B. Multi-regional Instruments

During recent years there has been a growing number of international instruments, general in their scope but dealing with problems of or closely relating to MNCs.

Among the multi-regional treaties the Convention of the OECD [90] and the Lomé Convention have direct relevance to the activities of MNCs.

The signatories of the former, signed in Paris on 14 December 1960 by 20 of the most developed countries, have agreed to take co-ordinated action in the pursuit of policies fulfilling their aims. These policies include (Art. 2) the liberalization of capital movements and contribution to the economic development of member and non-member countries by appropriate means (i. e. flow of capital and technical assistance) [91].

The OECD organs have drafted a number of conventions as well as making decisions and recommendations related to MNCs. The Committee on International Investments and Multinational Enterprises of the OECD (IME) has prepared guidelines for multinational enterprises and procedures for intergovernmental consultations on issues relating to the activity of these enterprises. The result is the Declaration of 21st June 1976 by Govern-

88. U.N. Doc. ST/ECA/190
89. U.N. Doc. E/550 Add. 1.
90. Almost all Multinational Corporations are located in one of the 24 Member Countries of OECD. In the OECD countries about 75 per cent of all international investment is concentrated, as well as the Member Countries account for over two thirds of the world's gross product and 3/4 of its trade.
91. See for example the Draft Convention on the Protection of Foreign Property 1967, OECD Public. No. 23(68), Paris 1967; the Code of Liberalization of Capital Movements. 1961, OECD/C(61)96; Committee on Restrictive Business Practices, Recommendations for Co-operation, OECD/C(67) 50 Final, 10 Oct. 1967.

ments of OECD Member Countries on International Investment and Multinational enterprises [92].

The Lomé Convention is one of the most comprehensive multilateral and multisectorial economic and social international instruments between developed and developing countries (EEC and ACP States). It covers the following general subject areas: trade co-operation, export earnings from commodities, industrial co-operation, financial and technical co-operation and establishment, services, payments and capital movements [93].

At the Fourth Summit Conference of the Non-aligned Countries held in Algiers (September 1973) an action programme for economic co-operation was adopted [94]. The document produced is of a very different kind from the Lomé Convention, at least in substance. The latter was an agreement between developed and developing countries. The former is a unilateral programme by the developing countries. Both kinds of documents are important aids in assessing the attitudes and postures of different countries, local and international bodies, in relation to MNCs and specially are useful in comparing the relative bargaining power of bodies and identifying consensus among them. Most of the conclusions reached at this conference are clearly against the developed countries' interests. They are an intent to change both legal and economic orders, to deprive MNCs of their almost absolute powers and freedom ands as a consequence to make developed countries less powerful and influential [95]. The Conference approved "the adoption of common rules in respect of multinational/transnational companies" and the unrestricted application of the principle of national sovereignty over natural resources as well as the decision to integrate joint action in order to bring about quantitative and qualitative changes in the world economic order [96].

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92. The Turkish Government did not participate in the Declaration and abstained from the Decisions. See infra p. 337.

93. Of particular relevance for MNCs are Arts. 26.62 and 61. See Sweet & Maxwell EEC Encyclopedia, part. B. The Convention provides for the principle of non-discrimination (Art. 62) for nationals, companies or firms — but very loosely ("...however, if for a given activity, an ACP State or a Member State is unable to provide such treatment, the Member States or the ACP States, as the case may be, shall not be bound...").

94. Report of the Economic and Social Council: letter dated 22 Nov. 1973 from the Permanent Representative of Algeria to the United Nations (A. 9330).

95. The Conference recommend that "steps be taken by non-aligned countries for joint action on transnational corporations, within the framework of a global strategy designed to modify qualitatively and quantitatively the system of economic and financial relations which subordinates developing countries to industrialized countries.

96. Other declaratory non-treaty instruments addressed to problems of MNCs: "The Declaration and Principles of the Action Programme of Lima" at the Second Ministerial Meeting of the Group of 77 (Nov. 1971 — UNCTAD TD/143) and the "Georgetown Declaration", issued at the Conference of Foreign Ministers of Non-Aliged Countries held in Georgetown, Guyana, (August 1972) — NAC/FM/CONF. 1/21.

In August 1975 the Ministers of Foreign Affairs of Non-Aligned Countries held another Conference in Lima; and concluded and the report prepared on MNCs should be submitted to their Governments, so that "they may possibly be inspired by it in the framework of their national policies in this field" [97].

The problem was thus reduced once again to an internal muncipal question. Cuba tried to internationalize the issue: she proposed an international centre of the non-aligned countries on MNCs.

Finally, the International Labour Organization must not be overlooked. There has been concern in the Organization for problems related to MNCs, the international division of labour, transfer of labour force and associated matters [98].

The General Agreement on Tariffs and Trade (GATT) and the International Monetary Fund (IMF) are documents most important for MNCs. Nevertheless they are not the direct concern of this paper although they indirectly affect MNCs in a very substantial way.

C. Regional Instruments

MNCs may operate in multinational structures comprised of a large number of countries, in "structures" of only two or three countries (large or small and possibly quite diverse), or within "regional structures". Within regions, treaties and other types of international instruments have been adopted by members countries showing that although there may be a similar level of economic development between members, the very existence of MNCs makes it necessary to provide adequate regulations. Moreover, the fact that regional instruments often tend to achieve some degree of economic integration among regional members makes foreign investment and MNC activities two most important issues.

The Treaty of Rome establishing the European Economic Community [99]

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97. See U.N. Doc. A/10 217, "Development and international economic co-operation", letter from the Permanent Representative of Peru to the U.N.

98. See-ILO, "Declaration of Principles and Programme of Action adopted by the Tripartite World Conference on Employment Income Distribution and Social Progress and the International Division of Labour", (WEC/CN/E. 1). June 1976.
— ILO, "Multinational Enterprises and Social Policy" (Geneve, 1973).

99. The Commission in preparing a report on Multinational Corporations which is due to appear during the Spring 1976. Bibliography on the issue appeared in the Bulletin on Documentation 8/16.
See also — "Multinational Undertakings and Community Regulations" (Communication of the Commission to the EEC Council. Supplement 15/73, Bull. E.C.
— "Resolution du Conseil, du 10 fevrier 1975, relative aux mesures à prendre par la Communauté dans le domaine de la lutte contre la fraude et l'évasion fiscales internationales" (J. O.-35, 14 fevrier 1975).

and the Agreements on Andean Subregional Integration [100] are two of the most advanced instruments of this nature. A number of other regional agreements aiming at establishing a free area, common market or customs union have been concluded in recent years [101]. Harmonization of general economic, monetary and fiscal policies and regulations undoubtedly will, when fully implemented, affect MNCs and their operations in these areas [102].

Finally one may consider the Final Act of the Conference on Security and Co-operation in Europe, adopted at Helsinki on 1 August 1975, as a non-treaty regional instrument relevant to MNCs. "The growing world-wide economic interdependence calls for increasing common and effective efforts towards the solution of major world economic problems..." [103].

D. Bilateral Treaties

Treaties of Friendship, Commerce and Navigation do frequently deal indirectly with MNCs when they provide rules for standards of treatment for foreign companies.

If one were able to collect all these treaties, and take a sample representative of economic standards and opinions throughout the world and its different economic regions, one could deduce from them standards of international law.

Treaties, although directly binding on the signatories, are not binding on MNCs. However, Articles or rules, in treaties, may often bear directly on MNCs activities although MNCs may not be referred to. Thus MNCs may be compelled to comply with certain requirements by a government party to a treaty or an MNC may even be able to get a government to enforce a treaty obligation to obtain benefits for it. These rules and standards are consequently of great significance for activities and undertaking of MNCs.

A general trend of international law may be perceived by the examination of Articles in Treaties.

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100. See-September 1977 Journal of Common Market Studies: "Multinational Corporations and the Andrean Pact".
— C. T. Oliver, "The Andean Foreign Investment Code: a new phase in the quest for normative order as to direct foreign investment" 66 AJIL (1972), p. 763.

101. Examples are the Economic Community of West African States (ECOWASS, Central African Economic and Customs Union (UDEAC), the East African Community (EAC), The Caribbean Community (CARICOM), the Standing Consultative Committee of the Magreb Countries, Association of South East Asian Nations (ASEAN).

102. For other Regional Organizations and their main instrument and organs related to MNCs; see U.N. doc. E/C. 10/9/Add. 1, pag. 17-23.

103. See Preamble and section entitled "Co-operation in the field of economic, of science and technology and of the environment".

For example:

> «Property of nationals and companies of either Party shall not be taken within the territories of the other party, except for the public benefit and in accordance with due process of law, nor shall it be taken without just compensation. Such compensation shall represent the equivalent of the property taken...» [104].
>
> «Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for public benefit, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken...» [105].
>
> «The dwellings, offices, warehouses, factories, and other premises of nationals and companies of either Party located within the territories of the other Party shall not be subject to unlawful entry of molestation» [106].
>
> «The dwellings, offices, warehouses, factories, shops and all other premises owned, leased or occupied by nationals and companies of one Contracting Party in any territory of the other shall be respected...» [107].

These examples show how different countries agree on the same provisions which if repeated and generally accepted may become rules of general Public International Law with direct effect on MNCs.

E. Non-Governmental Instruments

There have been several initiatives to "regulate" MNCs during the recent years by private organizations (mainly business organizations), individual corporations and some labour organizations. Their proposals refer generally to "codes of conduct" or "guidelines". Again, the problem is to determine the legal meaning of "codes" or "guidelines".

One of the best known of these initiatives is the decision adopted by the Council of the International Chamber of Commerce (ICC), published in 1972 with the title "Guidelines for Investment" [108]. A very important aspect of it is that the document sets forth guidelines for the three parties involved, the MNC —investor—, the MNCs home country and the Go-

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104. Art. V (4) of the Treaty of Friendship, Commerce and Navgiation between the United States of America and the Federal Republic of Germany, October 29, 1954.

105. Art. VII (3) of the Treaty of Friendship, Commerce and Navigation between the U.S.A. and Greece, August 3, 1951.

106. Art. VI (2) of the Treaty of Friendship, Commerce and Navigation between the U.S.A. and Kingdom of Denmark, October 1, 1951.

107. Art. 9 of the Treaty of Commerce, Establishment and Navigation between the United Kingdom of Great Britain and Northern Ireland and Japan, November 14, 1962.

108. "Guidelines for International Investment", Internat. Chamber of Commerce. Paris, December 1972.

vernment of the host country. The guidelines cover the areas where the behaviour of MNCs is interest to all three parties [109]: investment policies, ownership and management, finance, fiscal policies, labour policies, technology and commercial policies.

Reference is not made to international law in the first section of the document when it refers to the Inverstors, but it is taken into account in Section 2(b): referring to the Government of the MNCs home Country when that Government "should seek to enter into binding obligations under international law with other governments either on a bilateral or multilateral basis, in respect of the reciprocal treatment to be accorded to the property rights, and interest of its nationals". And in section 3(f) reference to the Government of the host Country is in the same terms.

It is no accident that international law is intended to be excluded from the Guidelines in the relations between the multinational and the host Country [110].

It is also interesting to refer to the introduction of the ICC Guidelines where it stated: "It is hoped that these guidelines will be helpful to the United Nations and other intergovernmental organizations in their efforts to promote constructive discussions on the relationships between international investors, the governments of host countries and the investors' governments". No reference is made to possible truly international legal rules, nor to mere "international rules". The only reference is to mere discussions.

Labour and other organizations are also contemplating the preparation of guidelines and there is great concern among them on the role and increasing power of MNCs in the labour framework [111].

In fact they have been collaborating "with the U.N. Economic and Social Council, Commission on Transnational Corporations, in the preparation of a draft of a code of conduct, as requested by the Secretariat" [112].

In 1972 the Economic and Social Council asked the Secretary-General to appoint a "group of eminent persons" to study the role of MNCs in developing conutries. The group was formed by 20 members of nineteen nationalities [113]. The report emerging in May 1974 was in general unfavou-

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108. See also - Economic and Social Council; centre of Transnational Corporations. "Issues involved in the formulation of a code of conduct". U.N. Doc. E/C. 10/17.

110. See para.2 (e): "Should, in appropriate cases and where the foreign investor so wishes be prepared to enter into contractual arrangements with the investor concerned". And see para.2 (d) on the principle of non-discrimination.

111. See "Multinational Corporations and Labour Unions (Nijmegen) and International Confederation of Free Trade Unions: "Charter of Trade Unions Demands for the Legislative Control of Multinational Companies (ICFTU document 11 GA/9).

112. See Note by the Secretariat "possible methods of work related to the drafting of a Code of Conduct". E/C. 10/10. para.18.

113. See U.N. Doc. 5500, E. 5500/Add. 1, E. 5500/Add. 2.

rable towards multinational enterprises as their goals were seen as opposed to those of host governments in developing countries. However, four of the eminent persons who made the report did not subscribe to this basic premise and made their position clear in comments appended to the main report [114].

With this in mind it was decided to call a meeting of academics, businessmen and international civil servants to exchange views and opinions. A Conference was held in Geneva, under the auspices of the Graduate Institute of International Studies, l'Institut Universitaire d'Etudes Europeennes and the Center for Education in International Management [115].

Eric Gabus, manager of Nestle Alimentaria, S.A., said "Treaties should then set the rules of conduct relating to transnational activities; and States, if they desire, should harmonize their legislation accordingly, since all international action is finally resolved on national territory. The MNC is on this point ready to submit to any code of good conduct which might be worked out between States. It would, however, be illusory to over-estimate the scope of this type of international action" [116].

Later he defined, as an aim of the external relations which MNCs should attempt to develop, the saring of economic power; he said: "it is a question of redistributing, by the opening of a new style of relations, economic power between industrial societies (strong in their experience and knowhow) and the developing countries". Another goal would be "to find a style of relations which does not yet exist in the recently-formed international trade-unions".

The Commission on Transnational Corporations at its second session (March 1976) [117], assigned highest priority to the formulation of a code of conduct. It recommended that an Intergovernmental Working Group should finalize a draft code of conduct for the fourth session (Spring 1978). To assist this work group, the Commission would prepare, inter alia [118], a paper containing the views of non-governmental interests [119].

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114. United Nations, Department of Economic and Social Affairs "The Impact of Multinational Corporations on Development and on International Relations" (New York, 1974).

115. See for a report of the Conference "the Multinational Enterprise in a Hostile World". Gerard and Victoria Curzon, London, 1977.

116. Statement submitted at the Conference. See supra nore 115.

117. See U.N. Doc. E/5782, Chap. I, para.16-17. Official Records of the Economic and Social Council.

118. See U.N. Doc. "Transnational Corporations: Issues involved in the formulation of a code of conduct" (E/C. 10/17).

"Transnational Corporations: Material Relevant to the formulation of a code of conduct" (E/C. 10/18) and

"Transnational Corporations: views and proposals of States on a Code of Conduct" (E/ C. 10/19).

119. See U.N. Doc. "Transnational Corporations: views and proposals of non-governmental interest on a code of conduct" (E/C. 10/30).

These non-governmental interests would be those represented by international trade unions, business and consumer groups. The criterion used by the Commission in order to choose which organizations should be contacted was their status with the Economic and Social Council (i. e.: consultative status, categories I and II and consultation with ILO). A number of national trade unions and employers' organizations were also consulted when not affiliated to international organizations.

By the end of 1976, 11 employers' organizations had answered the request as well as 4 labour organizations and three classified as "others" [120]. The replies received were mostly favourable to the idea of a code of conduct which they though could be effective and workable. Most thought national legislation the best vehicle to achieve this, but there were differences of opinion as to the legal nature of the proposed code, its means of implementation, coverage and some other points. In general, reports of business groups were less favourable than those of labour groups to a fully effective and binding code or guidelines of conduct. But what is most interesting for us is whether there was some kind of consensus on the legal nature this code should have and if not what the alternatives are.

According to the International Confederation of Free Trade Unions (ICFTU) [121] national legislation needs to be complemented by, and sometimes needs the precedent of, international agreements fully equiped with machinery for supervision and enforcement; but effective implementation of the rule of law for MNCs will always depend on the effectiveness of national legislation. Although international legislation lacks and will lack this effectiveness, international rules are very convenient, as the World Federation of Trade Unions (WFTU) stresses, because they provide a reference

120. a) Business: Association of British Chambers of Commerce (BCC), Business and Industry Advisory Committee to OECD (BIAC), Chamber of Commerce of the USA (USCC), Internat. Chamber of Commerce (ICC), Internat. Christian Union of Business Executives (UNIAPAC), Internat. Organizat. of Employers (IOE), National Association of Manufacturers of the USA (NAM), National Foreign Trade Council Inc. (NFTC), Union Centrale des Associations Patronales Suisses (UCAPS), Union des Industries de la Communauté Europeenne (UNICE), Western European Metal Employers Organization (WEM).

b) Labor: International Confederation of Free Trade Unions (ICFTU), Trade Union International of Workers in Commerce (TUIWC), World Federation of Teachers' Unions, World Federation by Trade Unions (WTFU).

c) Others: European League of Economic Co-operation (ELEC), International Co-operative Alliance (ICA), International Organisation for Standardization (ISO).

121. Based on its "Charter of Trade Union Demands for the Legislative Control of Multinational Corporations" adopted at its 11th World Congress (Mexico 1975). See Bulletin of Comparative Labour Relations, No. 7 (1976).

document for Governments to more easily make and implement national legislation.

As several business groups have pointed out (ICC, IOE, NFTC, WEM) [122] an International Code should be flexible so as to be responsive to differences in national laws, types of MNCs and changes with the effluxion of time. A proliferation of codes should also be avoided (BIAC, ICC, USCC, IDE, ELEC, WE) [123] because conflicting international guidelines would be counter-productive. OECD guidelines [124] are accepted by business circles and recommended as a reference for a U.N. code of conduct.

As to the addressees of the Code there is not unanimity whether it should be addressed to both MNCs and Governments or just to MNCs.

Business and employers' organizations reflect the view that a code should be of a voluntary nature, non-mandatory and flexible; trade union organizations call for a binding code. The ICFTU stresses that a voluntary code could only be accepted as a first step towards binding resolutions and the optimal solutions should be a multilateral treaty under U.N. auspices. This code, opines WFTU, should not be a charter of "rights" and "duties" on MNCs but a list of obligations for States in order to control MNCs, a reference document, of which, principles should be respected by national legislation and regional agreements.

On the other hand, a binding code is seen as unacceptable and impractical for both home host countries "since an international treaty necessarily involves surrender of sovereignty and restriction of legislative discretion" (ICC, UNICE, NAM) [125]. At the moment, only the pressure of international opinion expressed through a voluntary code can provide an instrument of obligation from which, over a period of time, some parts could be included in bilateral investment contracts and international agreements "with an eventual possible evolution in the direction of an international convention" (ICA).

It is generally felt that a code should be implemented nationally by domestic law, whether a general multilateral treaty (as proposed by ICFTU) or an "instrument of moral persuasion" (ELFC, BCC, IOE, NAM) [126].

For the BBC the application of domestic law could be best complemented by a specialized agency with full investigate powers which had the ability to issue decisions and directives that might form the basis of action. The ICC is proposed as an organization that could do the job.

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122. Supra, note 120.
123. Supra, note 120.
124. OECD: "Declaration on International Investment and Multinational Enterprises". Press Release A/76/20, dated 21 June 1976.
125. See, supra No. 120.
126. Ccc, supra No. 120.

Opinions were also on the question of settlement of disputes. Machinery would be necessary and it was thought that as far as possible existing international machinery should be used. The ICFTU also made the interesting suggestion of a tripartite committee. Both existing international machinery and tripartite committees would be used to deal with intergovernmental conflicts between governments and corporations.

It should be noted that this implies an international judicial or arbitral body where States and MNCs would equally have locus standi.

The opinions of other organizations are more realistic and conservative. UNICE believes that an international body with legal force would not be acceptable to most countries because of the implied loss of sovereignty.

Other opinions of non-governmental organizations can be of interest and stress different point; some of which are:

— "... all enterprises whose activity is largely transnational have an international responsibility..." [127]: statement submitted by the Federation for the Respect of Man and Humanity, a non-governmental organization in category II consultative status to the ECOSOC.

— The World Confederation of Labour stated that "it is therefore appropriate, within the framework of public international law, to establish standards and create means of control bearing on the activities of the Multinational Corporations" [128] and:

— "Regulations promulgated by the U.N. or Governmental will be effective only: — if there is adequate political will and sufficiently concerted action among countries, both in the elaboration and in the effective supervision of the application of such measures on the national level.

— if Governments undertake to support the creation in the U.N. of the instruments of elaboration and effective supervision which are best suited to meet the situation" [129].

— "...need to build some form of countervailling power to that of the MNC...Political action with a view to the introduction of appropriate legislation is also required. In the first instance such legislation will of course be national in its scope, but steps should be taken at the same time to generalize and co-ordinate it at the international level...without such interantional action...the activities of these companies will be to direct multinational investment into

127. U.N. E/N 60/2.
128. U.N. E/N 60/6.
129. U.N. E/N 60/25.

those countries which impose the least controls...National legislation in many cases needs to be complemented, and some times even preceded, by international agreements with machinery for supervision and, if need be, enforcement". The International Confederation of Free Trade Unions [130].

— Unanimous Declaration of works at the World Employment Conference (Geneve, 4-17 June 1976) on the steps which should be taken both at the national and international level to control multinational corporations:
"Under these circumstances, the three international trade union federations asked that, on the international and national levels, steps should be taken to strengthen control of multinational enterprises. This control should be exerted by the countries in which they operated...The existing Conventions of the ILO ought to be applied, in particular Nos. 87 on trade union liberties, 98 on collective bargaining, 100 on equal remuneration, 122 on employment, 135 on representation of workers, 140 on paid education leave and 143 on migrant workers..." [131].

— The International Organizations of Employers [132] stated:
"As to the form and content of such a code, the International Organization of Employers strongly believes that it should be voluntary in its application and should not discriminate between national and multinational enterprises. It should apply equally to multinational enterprises of public, mixed or private ownership...it should be the responsibility of governments to treat enterprise equitably and in accordance with international law and agreements as well as contractual obligations" [133].

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130. U.N. E/N 60/36.
131. See Doc. W.E.C./C.W./F. 1 or U.N. E/N 60/71.
132. U.N. E/N 60/53.
133. For other statements of interest see:
— The International Chamber of Commerce submitted two reports to the ECOSOC. See U.N./N. 60/28.
"Private International Investment and the Balance of Payments" (doc. No. 111/252/Rev.).
"Multinational Enterprises: International Tax Consequences of Internal Pricing Policies" (doc. No. 180/148).
— Statement submitted by the International Organization of Consumers Unions. U.N. E/N 60/53.
— Statement submitted by the International Council on Social Welfare. U.N. E/N 60/21.

F. Governmental Instruments

Finally, as it is important to consider the opinions of States on the international regulation of MNCs, the following brief summary of some opinions is given [136].

The opinions are about the code of conduct the U.N. is preparing so, apparently, other possible ways to regulate MNCs in the international scene are not actively envisaged. Even so, the opinions are valuable because they are not only about the hypothetical code of conduct but also about international law, international standards, the legal status of MNCs and binding force of international instruments. Some of the opinions are:

Chile: with regard to the scope of a code of conduct regarding MNCs, the Government of Chile considers that it should cover a broad range of subjects and that it should be addressed exclusively to the corporations. Any recommendations deriving from the code that might affect the obligations of Governments should be of a strictly voluntary nature. The application of a code should be through national legislation. The code could be a resolution of the General Assembly or the Economic and Social Council of the U.N. Although Governments would not be formally bound, there would be a moral and political obligation to implement the code. The rules should not be binding but rather general prescriptions of acceptable conduct, it being up to the national authorities to implement the code.

Ecuador: The Government of Ecuador States that the code ought to be addressed to MNCs only and not to States.

Finland: The Government of Finland is of the view that the code of conduct dealing with MNCs should not have formal binding force.

Germany, Federal Republic of: Regarding the nature and machinery of a code, the Federal Government favours a volluntary one. Since MNCs are non-legal entities under international law, recommendations addressed to them could be made binding only if they are trans-

136. We have chosen, as representative, the views and proposals of States on a code of conduct, submitted to the Secretariat in response to a petition by the ECOSOC. See Report of the Secretariat, U.N. E/C 10/19. The full texts of the replies are available for consultation at the Centre on Transnational Corporations (ECOSOC). Other opinions, see infra, p. 48.

formed into national law. A legally-binding code would require sufficiently concrete rules and a harmonization of national legislation which, given the divergent views of Member States, appears to be unlikely. A legally non-binding code would not necessarily lack binding force if its provisions were formulated in a concrete manner and a consultation procedure were established. In addition, public opinion, supported by trade unions and consumer organizations, would play a significant role in ensuring observance by transnational corporations of such a code.

Jamaica: Such a code should be mandatory for MNCs. The implementation of a code, given the diversity of countries participating in its formulation, should be achieved through a declaration of principles and objectives adopted by Governments. In other cases provisions could approximate international law.

Japan: The Government of Japan supports the view that the code should basically cover MNC activities, but considers it should also contain some provisions covering Governments policies (e. g. nationalization, taxation, anti-corruption). The code should comprise voluntary guidelines and not be legally binding.

Netherlands: At this stage the Government of Netherlands feels unable to give a definitive answer to the question of the code's legal nature. Whether it is mandatory or voluntary is less important than its actual contents. The forms in which a voluntary code might be presented —international declaration or resolution, recommendation by a "conference" or by the General Assembly of the U.N.— do not have important differences. All Governments who vote in favour of any international recommendation have the moral duty to observe its regulatory provisions.

To supervise compliance with the code, observance by national Governments, monitoring functions of international machinery (U.N. Centre on TNC and intergovernmental consultation) and, where appropriate, observation by tripartite machinery (ILO) should be combined.

U.K.: The effectiveness of the code is based on general acceptability and on achieving a just balance between the interests of all parties involved. The Government of the U.K. believes that it would not be practicable to attempt to prepare a mandatory code, given the existing differences in laws, policies and objectives among States. Thus, the first task of the Commission should be to draw up guidelines, not legally binding, covering the responsibilities both of Governments and corporations. The moral force of voluntary guidelines, endorsed by all member States, should not be under-estimated. However, in certain areas such as disclosure of information and accounting, further arrangements, or even binding agreements, could be envisaged for the subsequent stages of the work of the Commission.

U.S.A.: The U.S.A. Government perceives a consensus among developed and developing countries regarding the activities of MNCs. The consensus on a general voluntary code would not preclude the negotiation of binding arrangements on certain specific issues.

Switzerland: Regarding the legal nature of the code, the Swiss Government believes that the final choice should be dictated by practical considerations. Therefore the question is to find the formula best able to induce all parties concerned to observe those elements necessary for the implementation of the code. Even if provisions of a code do not have a mandatory character, they can be effective as long as a broadly-based political will exist to adopt the code. Its impact is a function of the number of Governments which subscribe to the code. For all these reasons, the Government of Switzerland feels that a non-binding code is appropriate.

Canada: It is recommended that a voluntary code embodying broad principles be initially adopted. These principles could evolve over a continuing period towards a more specific and mandatory approach as experience and conditions dictate.

Denmark: Regarding the nature of the code, it is noted that, at this preliminary stage, the value of the code depends on the number of States acceding to it. To achieve the widest possible adherence it seems advisable to aim largely at recommendations, while carefully considering whether parts of the code could be given legally binding force.

Egypt: The Government of Egypt is of the view that the code of conduct, following the model of GATT, should be in the form of an international convention, open to signature of States. It should contain mandatory and specific provisions to be internationally applied. MNCs should be bound by the code.

France: A code of conduct should be voluntary, evolutionary and universal. An international treaty having binding force could not achieve broad acceptance; therefore the code should be an instrument in the form of recommendations, including principles of conduct addressed both to States and to MNCs.

Honduras: The Government of Honduras states that the code of conduct, seen as an international legal instrument, raises delicate questions. An instrument of this nature should have a legal form that promotes strict obedience. To be effectively implemented, the provisions of the code should be incorporated in an international convention.

India: With respect to the nature and form of the code of conduct, which should be in two parts, the Government of India takes the view that one part should be voluntary and addressed to MNCs as well as to Governments and that the other part should be mandatory and addressed only to MNCs in the private sector. The code would contain a set of Fundamental Principles, mandatory only for MNCs, which Governments would be requested to implement through national legislation and regulations. The provisions in the code other than the Fundamental Principles could be voluntary or mandatory to the extent that host and for home Governments may prescribe them through their national laws and regulations.

Italy: It is recommended that the code contain guidelines in the form of a limited number of basic rules. For these guidelines to be effective, a moral invitation addressed to the corporations to behave in a certain way clearly will not suffice. Instead the guidelines should be directed to the States themselves which would undertake to enact legislation of their own to regulate the conduct of MNCs operating under their jurisdiction. If international legislation containing only guidelines is addressed directly to MNCs, not only might it be ineffective, but it might also create problems of jurisdiction.

Philippines: To achieve greater specificness, effectiveness, and suitability, a universal code should be supplemented by regional agree-

ments on specific issues. A multilateral convention would be most desirable. An international institution should be entrusted with the task of revising and monitoring the code and interpreting its provisions in case of conflicting interpretation.

Sweden: The code, a first step in an evolutionary process, should be seen as an expression of political will of member countries to deal with the concerns raised by the operations of MNCs.

USSR and German Democratic Republic: Do not state what they think about the legal nature of the code.

V. THE BADGER CASE [135]

On January 14th, 1977 some 250 employees of Badger Belgium (N.V.) [136] located in Antwerp received a registered letter summarily terminating their individual labour contract. The same letter also contained the term of notice the employees were entitled to, according to Badger's calculations, as well as the information that the company did not know the exact amount of assets available for paying compensation for terminating the contract without respecting the term of notice. The company, so the letter read further, would, however, do its utmost to pay a reasonable sum to its employees when they left the company.

This sum was not paid since Badger Belgium NV was declared bankrupt by the Commercial Court of Antwerp, which appointed a receiver.

The parent company, the Badger Co. Inc., with headquarters in Cambridge, Massachusets, U.S.A., refused to pay the debts of its Belgium affiliate. It based its refusal on grounds of the theory of the limited responsibility of the Belgian corporation.

The problem was simply that the assets of Badger Belgium (N.V.), declared bankrupt, were not sufficient to discharge the liabilities of this affiliate.

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135. This chapter has been prepared almost entirely upon the basis of Professor Blanpain's book: "The Badger Case", 1977, Kluwer.

136. A Belgian affiliate company that, although legally set up as an independant company incorporated with limited liability, was completely integrated in the Badger group. 940 of the 1000 Badger Belgium's shares were held by the parent company Badger Company Inc. and 60 by private persons, who were acting obviously for the parent company. The Antwerp office was directed by Badger in the Hague, a Dutch associated company which received instructions from the head office in the USA.

The Commercial Court of Antwerp rejected the request of Badger Belgium for the benefit of a "concordat judiciaire" [137]. In Belgian law this benefit can only be granted when the petitioner is "unfortunate" and "in good faith" but the Court considered that the petitions were not in this category [138] and therefore dismissed the petition and declared the company bankrupt on February 14th.

On January 19th, the former Badger Belgium employees and the unions sent a memorandum to the Badger Company and the American Ambassadors in Belgium and the Netherlands stating that they considered the Badger Company Inc. responsible for creating the state of bankruptcy. In consequence, on February 14th 1977, in the civil court of Antwerp they sued Badger BNV, Badger BV the Hague, the Badger Company Inc. and Raytheon [139] for the payment of 270.904.085 Belgian francs.

On February 15th, LBC [140] informed the employees' lawyers, in agreement with the employees who initiated the lawsuit, to suspend the case until the result of the IME [141] committe meeting of March 30th was known. The union felt, on TUAC's [142] advice, that the legal action could harm possible negotiations at an international level. The lawsuit was droped finally as part of a package deal made on the occasion of the final negotiations of April 20-21st. 1977.

Under Belgium law, in a normal bankruptcy, when assets are insufficient to pay, a Fund created within the framework of the State Employment Agency has the task of paying the difference subject to certain limits. In this case it would have been sufficient to pay a large part of the employees claims but LBC and BBTK [143] stated that was it unacceptable that an MNC could shift its social and legal obligations on to the Belgian community. The MNC must fulfil its social obligations.

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137. Scheme of arrangement between an insolvent company and its creditors by which the creditors agree to accept a part payment so that bankrupt can be avoided.

138. "Considering... that the head office in the U.S.A., for the determination whether petitions is unfortunate or not, in the frame of a "Multinational", to which petitioner belongs, cannot be considered as a third party; that the instructions given by the head office cannot be considered as external events... declares —Badger Belgium— to be ex-officio in state of bankruptcy".

139. The Badger Company Inc. is itself part of Raytheon, which itself controls other 18 companies.

140. Landelijke Bedienden Centrale (LBC). The Flemish Christian Union for white collars, part of the Confederation of Christian Trade Unions (ACV-CSC). 140 employees of Badger were members of LBC, some 60 of BBTK (see infra n. 9), a socialist union, and other 10 of liberal unions.

141. The OECD Committe on International Investment and Multinational Enterprises.

142. Trade Union Advisory Committe to OECD.

143. Bond van Bedienden, Technici en Kaders. Socialist white collar worker' Trade Union.

This being so, international action was taken under the leadership of the trade union movement, thereby involving in the affair the Belgian regional and central government, the American State Department, the American Embassies in Belgium and the Netherlands, trade-unions of Belgium, the Netherlands, the United Kingdom and the USA., employers' organizations and, of course, the USA parent company and its affiliates in the UK, the Netherlands and Belgium.

The internationalization of the affair was an attempt to put pressure on the parent company by several means, the strongest being by making reference to the basing discussions on the OECD Guidelines for Multinational Enterprises of 21st June 1976.

There was a clear solution to the problem under municipal law, but the real issue was that neither municipal law nor international law were instruments able to cope with the economic facts and structures that created the problem: a single economic entity which could avoid responsibility for its acts through the devices of juridical technicalities and municipal law system (that of Belgium) recognising a dependant economic entity only as an independant legal person.

So, the insufficiency of municipal law to cope with the real problem being recognized, internationalization was necessary. The best means available in order to achieve a quasi-juridical solution, always better than a mere circumstantial agreement, were the OECD guidelines.

These are part of the Declaration on International Investment and Multinational Enterprises, made by OECD Member-States on June 21, 1976 [144]. The Declaration contains:

— A recommendation to multinational enterprises operating in their territories to observe the Guidelines [145].
— The principle of national treatment for firms owned or controlled by nationals of another Member country. These firms should respect the laws and administrative practices of the Member Countries consistant with international law and no less favourable than that accorded in like situations to domestic enterprises.
— A statement on International Investment Incentives and Disincentives.
— Consultation procedures [146].
— A statement on the Review of the Declaration [147].

144. The Government of Turkey did not participate in the Declaration and abstaines from the Decisions.

145. The Guidelines are contained in Annex I to the declaration.

146. Consultation in conformity with the Decisions of the Council relating to Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises, on National Treatment and on International Investment Incentives and Disincentives. These Decisions are in Annex I to the Declaration of 21st June 1976.

147. This will be done within three years with a view "to improving the ef-

As the preamble to the Guidelines states in paragraph 6: "the guidelines...are recommendations jointly addressed by Member Countries to multinational enterprises operating in their territories. These guidelines, which take into account the problems which can arise because of the international structures of these enterprises, lay down standards for the activities of these enterprises in the different Member countries. Observance of the guidelines is voluntary and not legally enforceable. However, they should help to ensure that the operations of these enterprises are in harmony with national policies of the countries where they operate and to strengthen the basis of mutual confidence between enterprises and States".

Even though the standards laid down are not legally enforceable it does not mean that the guidelines lack any legal or juridical value or content. "Voluntary" is here used as opposed to "legally enforceable" but it does not automatically exclude any binding character of the guidelines provided that "binding" does not imply "enforceable". The observance of the standards is sanctioned by public opinion and action Governments may undertake, and this means that observance is no longer purely "voluntary".

The Guidelines are addressed to multinational companies operating in the OECD countries, with the exception of Turkey, independly of whether their headquarters are located in an OECD member country or not.

The concept of "multinational corporation" is not defined in the Guidelines. Paragraph 8 of the preamble states, "a precise legal definition of multinational enterprises is not required for the purpose of the guidelines" and only an approximate description of what must be understood as a multinational is given: "These usually comprise companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities or others and, in particular, to share knowledge and resources with the others".

The Guidelines, continues para.8, are" addressed to the various entities within the multinational enterprises (parent companies and/or local entities) according to the actual distribution or responsibilities among them".

The preamble makes clear that the aim of the rules and standards provided is not to introduce differences in the treatment of multinationals and domestic enterprises respectively. The use of international disputes settlement mechanisms, including arbitration, should be encouraged and member-countries agree "to establish appropriate review and consultation procedures concerning issues arising in respect of the guidelines".

Finally, "when multinational enterprises are made subject to conflicting requirements by Member countries, the governments concerned will co-ope-

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fectiveness of international economic co-operation among Member countries on issues relating to international investment and multinational enterprises".

rate in good faith with a view to resolving such problems either within the Committee on International Investment and Multinational Enterprises established by the OECD Council on 21st January 1975 or through other mutually acceptable arrangements" [148].

The role of the Committe on International Investment and Multinationals Enterprises was extended by a Council decision of 22nd December 1976. There are three main activities:

— further developing and strengthening co-operation among Member-States
— exchange of views on all matters related to the Guidelines and experience gained from their application. The Committee considers the views of the BIAC and the TUAC [149] and may even invite individual enterprises to express their views
— maintain contact and co-operation with other international organizations working in the same field, such as UNCTAD and ILO and the United Nations' Information and Research Centre on Multinational Corporations.

The IME Committee is also competent to interpret the Guidelines.

As we have seen, a pure municipal law solution to the problem set by Badger Belgium NV's closure was not necessarily a solution considered reasonable or just in the international context. Tijl Declercq [150] expressed very clearly the main issues in several questions asked to the Secretary of State for Regional Economy, Professor M. Eyskens:

1. Does the Secretary of State find it acceptable that Badger Belgium NV closes its doors and shifts the burden of its social obligations to the Belgium community?
2. What steps were, and are, being taken to prevent such situations in the future?
3. Complaints were introduced at the American Embassy and OECD. What initiatives did the Secretary of State take to support those actions?
4. Is the Secretary of State of the opinion that the existing legal prescriptions offer sufficient guarantees or do they have to be made more effective?

148. Para. 11, preamble to the Guidelines. Also, note the decision of the Council on Inter-governmental consultation procedures on the Guidelines for Multinational Enterprises, annex to the Declaration of 21st June 1976 on International Investment and Multinational Enterprises.

149. Business and Industry Advisory Committee to OECD. Trade Unions Advisory Committee.

150. Christian Democratic Representative from Antwerp.

5. Is it possible to adopt a legacy binding Belgian code of good conduct for multinational enterprises? [131].

The Belgian Government was thus involved in the question. The problem was being dealt by Badger management and trade unions, both at local and international level, in Belgian municipal law courts, by diplomatic means and pressure was being put on the Belgian Government to introduce the case before the OECD IME committee.

Other measures were also taken, all of them to achieve the same result of the American parent Company paying the social obligations of its Belgian affiliate. There was pressure on other American multinationals to bring their influence to bear on Badger headquarters and to advise companies receiving aid from the Belgian Government not to use the services of Badger.

But the definitive manoeuvre was to be the introduction of the case before the IME Committee, because it meant that the pressures, negotiations and influences described above should be institutionalized or at least formalized and publicised in the discussion to be held before the Committee. When Secretary of State Eyskens introduced the case on February 23rd a new dimension was given to it: it was the first test for the OECD guidelines and their effectiveness.

The discussion of the Badger Case by the OECD IME Committee presented one formal difficulty: para.3 of the "Decision of the Council on intergovernmental consultation procedures on the guidelines for multinational enterprises" states categorically that "the Committee shall not reach conclusions on the conduct of individual enterprises".

The State Department of the United States seemed to be inclined towards the employers' point of view that no individual cases should be discussed at the IME meeting. If it had opposed discussion of the problem at the IME, international pressures over Badger may have been overcome. However, the contrary was achieved and the American State Department acquiesced, thanks to the pressure exerted by the AFL-CIO [132] at the request of other international trade union organizations.

The case was to be examined by the IME Committee twice in 2 days. A discussion was to be held on March 30th introduced by a note from the Secretary-General of the TUAC [133] to the OECD Committee, under the normal and periodical exchange of views between labor organizations and the Committee.

In the note the Secretary-General presented a number of cases for information and illustration of the Committee discussions of the scope of the

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131. Quoted from Professor Dr. Blanpain: "The Badger Case" p. 107. Kluwer.
132. American Federation of Labor - Congress of Industrial Organizations.
133. Ver página siete 142.

Guidelines and general policies of Member-States. The Badger Case is treated separately in view of the Belgian Government's note of February 26th introducing discussion of the issue for March (the next case). The TUAC limited itself to submitting factual information of trade unions and employees directly involved and to stressing the immediate and grave implications for the credibility of the Guidelines.

The Committee listened politely on March 30th to the TUAC assertions and not much discussion was provoked.

The real discussion was to be held the next day, when the Committee was convened at the request of the Belgian Government. In the meantime, on the afternoon of March 30th, BIAC presented a statement to the Committee, but without any discussion of the individual cases or related principles presented by TUAC. It was a document of very general nature.

As previously stated, a first and basic fact is that the Committee is in no sense a Tribunal and therefore has no mandate to reach conclusions on the conduct of individual enterprises. Thus the Badger Case was to be discussed only indirectly at the OECD. The issue put before the Committee by the Belgian Government centered on the meaning of a paragraph in the Employment and Industrial Relations section of the Guidelines [154]. The discussion was held because the IME Committee had been given a mandate by the Organization's Council to survey general experience gathered in applying the Guidelines up till then, and this is what was going to be done although the Badger case was always the real issue desired to be resolved [155].

The main question was whether a parent company exercising considerable influence should have responsibility for its subsidiary giving reasonable notice of a future shutdown and responsibility for mitigating the adverse effects of this shutdown. The Committee did not focus directly on the merits of the Badger Case but accepted the facts as put forward by the Belgian Government and used them as an illustration of the principles under discussion.

The exchange of views held in the Committee concerning the interpretation of the Guidelines was to help the Belgian Government to define its position regarding the Badger Case, and the report of the exchange of views was to be sent to the OECD Council.

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154. Para. 6: "Enterprises should... in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees, and... to the relevant government authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects".

155. Decision of the Council on inter-governmental consultation: "The Committee on International Investment and Multinational Enterprises shall periodically or at the request of a Member country hold an exchange of views on matters related to the guidelines and the experience gained in their application. The Committee shall periodically report to the Council on these matters".

Professor Eyskens presented his Government's point of view about the Guidelines illustrating the case with some actual facts [156]. After this introduction a constructive discussion followed with the participation of twelve countries. Points raised were:

— the importance of the Guidelines and their credibility.
— the nature of the Guidelines, and the relationship between normal obligations for MNC's and their legal obligation under municipal law which might be contradictory.
— the role of the IME committee; the possibility of discussing and judging individual cases.
— the responsibility of the parent company for the liabilities of a 100 % integrated and controlled subsidiary. This evidently constituted the core of debates and involved interpretation of paragraph 8 of the phe preamble to the Guidelines.
— the meaning of paragraph 6 of the Employment and Industrial Relations Section of the Guidelines.
— the necessity for co-operation between Member Countries on Investment and other MNC issues.

The news media regarded the outcome of the IME meeting as a moral condemnation of the Badger company. The general consensus was that, although nobody wanted to abrogate the principle of limited liability for certain companies, there are some characteristic cases of misbehaviour which demand a kind of moral responsibility beyond a company's strict liability at law.

It was concluded that the OECD Guidelines were meaningful and useful and that they survived their first test as Governments had taken them seriously.

On April 5th 1977, a series of tripartite meetings took place which lead finally to a negotiated settlement [157] of the Badger dispute.

VI. THE NEED FOR A LEGAL FRAMEWORK

Four major sources of friction and hostility towards MNC's are generally considered. First, there is friction based upon ideological issues [158] or "upon ignorance or misunderstanding of the general public interest" as others pre-

156. The debate was of general principles and the name of Badger was only mentioned once.

157. Badger Co. Inc. made the necessary contributions to Badger Belgium N.V's capital for the purpose of paying all responsibilities caused by the shutdown of that firm.

158. See Curzon and Curzon, "The Multinational Enterprise in a hostile world", p. 13.

fer to say [159]. Second, there is friction arising from disparities between the laws and practices of the States [160]. Third, there is friction which arised from the interpretation of investment agreements. Fourth, the friction which always causes economic imbalance and subsequent abuses.

Patrick M. Boarman and Hans Schollhammer [161] indicate as the major causes of problems between MNC's and national governments disparities in

1) financial accounting practices.
2) corporate income taxation.
3) rules of competition.
4) international flows of funds.
5) conventions of investment behaviour.

A solution of this friction in the world would lead to a certain degree of uniformity which would mean, among other things, a common code of competition and an international code of investment. This could be reached separately or by means of general code of conduct. However, the latter is likely to be actively considered as the concern of different bodies is increasing. The OECD has voiced its opinion [162] as have other bodies [163].

Later on we will discuss what a general code of conduct implies, its nature and role it plays in international society's reaction to MNC's activities.

In respect of the code of competition the main issues to be solved would be the "extraterritorial" application of law by some countries [164] and modern export monopolies and cartels (eg: OPEC) [165].

But the issue on which there is more doctrinal consensus is the need for an international code of investment. It is useful to deal with it because

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159. Patrick M. Boarman and Hans Schollhammer, "The Multinational Corporations and Governments". New York.

160. Commission on Transnational Corporations (U.N.E./C. 10/2) in its draft programme of work on the full range of issues relating to transnational corporations: "Certain legal issues, in particular, are closely intertwined with political issues".

161. See supra (159).

162. See OECD "OECD work on Multinational Enterprises".

163. U.N., Department of Economic and Social Affairs, "Multinational Corporations in World Development" (New York, 1973): "The degree of uncertainty that exists regarding the way in which the power of the multinational corporations may be exercised and what the reactions and consequences are likely to be is no longer acceptable".

164. Note the Sherman Act and the problems it has caused. In this respect also the Commission on Transnational Corporations, see supra note (160): "...legal issues raised by operations of transnational corporations include the extraterritorial application of national legislation and conflits of jurisdiction". See supra note 9.

165. Although "export monopolies and cartels" are not MNC's, their existence and the problems they pose are closely interrelated to those of MNC's and should be covered by a code of competition.

it will be the core of any future comprehensive code of conduct related to MNC. Thus, the issues which arise out of its examination are also applicable to a more general code of conduct.

Foreign direct investment means international production, a form of international economic involvement which necessarily implies relations between States (host and home State of the MNC) and between States and private legal persons. This leads to international friction and disagreements.

The situation created is almost parallel to that created by trade. Trade means international relationships and independence, and, through GATT and the IMF, multinational machinery was created in order to establish more systematized world trade. Since foreign direct investment has similar effects in the international order of those of trade it is in the interest of States to create some machinery to control the international economic involvement, especially given that foreign production is now greater than total exports. "...in the mid fifties and sixties, the growth of foreign production outpaced that of trade in total. In the case of the leading international direct investor (the U.S.A.), foreign production is four times as great and, in the case of the second largest (the U.K.) it is more than twice as great as their respective total exports" [166].

The U.N. has pointed out that "a negotiating machinery and set of rules concerning the investment and other activities of MNC's are yet lacking" [167]. The report of the U.N. study group on MNC's [168] observes that as there are organizations such as GATT and UNCTAD which help to create orderly conditions for trade there should also exist some kind of similar institutions to regulate international investment [169]. The group proposed a "General Agreement on Multinational Enterprises" [170]. This would have to have the agreement of national governments to be effective.

There would be no difficulty in respect of an international instrument reducing arbitrary action in the field of international investment but what should be really questioned is the purpose of liberalizing world investment, generally attached to this proposed code. That is a matter to be decided by the States that would participate in the negotiation of the code and not

166. John H. Dunning, "The Future of the Multinational Enterprise" Lloyds Bank Review.

167. U.N., Department of Economic and Social Affairs, "Multinational Corporations in World Development" (New York, 1973).

168. Report of the Group of Eminent Persons on the Role of Multinational Corporations in World Development and International Relations (U.N. doc. E. 5500/Add. 1).

169. See Goldberg and Kindleberger "Towards a GATT for Investment: A Proposal for supervision of the International Corporation", 2 Law and Policy in International Business, 295. See Business Week, August 18, 1973, p. 12.

170. John H. Dunning, see supra note (166), proposes a "General Agreement on International Production" as more appropriate, so as to avoid focusing attention on particular institutions which are only part of the problem.

a requirement established "a priori" as an essential component of the code's substance.

One must consider that the international economic order is changing nowadays. GATT and its purposes are no longer the only "truth" and international law is primarily made by the will of States, especially in public international economic law where the place for customary law is very reduced and where consent is the primary source of international obligations.

It is most interesting that the report [171] proposes, as the "initial" means to achieve international harmonization, voluntary agreements or codes of conduct [172], where MNC's should pay an important role, and bilateral treaties. Over the years a more comprehensive mechanism would be achieved. It is noteworthy that it is recommended that MNC's should play an important role.

International Economic Law is produced by treaty, agreements, arrangements and codes of practice or conduct. International Organizations and their decisions can only operate effectively within a structure of accepted norms and those norms must be acceptable internationally before forming a basis for any rule of law. States are very jealous of their sovereignty and this in part may be why there has been divided opinion on the question of what should be the nature of the legal framework where MNC's should operate [173].

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171. See supra note (168).

172. The Group of Eminent Persons discussed extensively the notion and usefulness of a code of conduct. "...it should comprise a set of recommendations... approved by the Economic and Social Council... not compulsory in character, a code could act as an instrument of moral persuasion, strengthened by the authority of international organizations and the support of public opinion... addressed to both transnational corporations and Governments". U.N., doc. E/5500 Add. 1.

173. U.N. doc. E/5595 and E/5595/Add. 1, 2, 3, 4, 5, 6. Views of States on the report of the Group of Eminent Persons: "According to that Government (USSR), the confirmation of such a provision (banning of political activities of MNC's) by the United Nations would contribute to the establishment of international legal norms on the basis of which developing countries could take measures to protect their political and economic independence".

Canada: "...more useful to establish norms of international practice and to encourage States and multinational enterprise to coordinate behaviour on these separate aspects long before beginning work on a general treaty".

Federal Republic of Germany: "...stable relations based on mutual trust".

U. K.: "...a set of recommendations representing a code of conduct".

Japan: "...to consider, however, the desirability of a binding general agreement is premature".

U.S.A.: "The International Community can play a valuable role in achieving such a balance of interest (between MNC's and Gvts.) by developing information, providing a forum for discussions, offering appropriate technical assistance and by promoting understanding between Gvts. and MNC's which will increase the stability of expectations of each other's behaviour... International action should be supportive of host Gvts. efforts rather than regulative in nature".

Spain: "The legal framework for MNC's can be viewed in the following two ways: first, by accepting that standards of international law exist in

However, decisions of International Organizations and their regulations have no international binding force if not in accordance with accepted rules or principles. Hence, any international body formed to regulate foreign investment must fall within such an internationally acceptable framework. The role to be played by any international regulating body, and in particular if an UN organization, should not be undervalued [174]. Its task could be that of "regulating" foreign investment in the sense that GATT and the IMF have regulated trade and monetary matters, of providing technical aid and a forum for multilateral discussions. Although it could propose new laws for discussion it could not be, it is submitted, a law-making body, at least in the traditional sense law is understood.

The Group of Eminent Persons proposed the establishment of a permanent Commission on Multinational Enterprises, dependent on the Economic and Social Council, with technical advisory services. This Commission has been, since created, in charge of the preparation and drafting of a code of conduct for Multinational Corporations.

A question very closely interrelated to that of the legal framework where MNC's activities should develope is that of interpretation and settlement of disputes. As there is no international judiciary body with powers of enforcement and execution [175], and parties to a dispute are generally reluctant to accept a home or host country settlement, resort to international arbitration has been the most commonly used solution to the problem. MNC's have tried and are likely to continue trying to avoid national courts for a judicial solution to their disputes with host governments, for fear of judgements biased towards national interests.

But international arbitration is not a solution without problems for parties to international agreements. It is very easy for a State to refuse to submit a problem to an arbitrator which -or who is a non-governmental body or institution and an international agency as, for example, the International Chamber of Commerce.

The International Centre for the Settlement of Investment Disputes (ICSID), an autonomous agency for the World Bank, has been suggested as a

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this field, as is suggested by the developed countries; the developing countries, however, argue that no agreement exists "inter alia" in the area of "international obligations" relating to compensation, since they have not contributed to the creation of this international law. Secondly, by creating a new system of international law... which would eventually lead to the establishment of a standard of international law". For other opinions, see supra Chapter III, Governmental Instruments.

174. See H. G. Schermers, "The Namibia Decree in National Courts", 26 ICLQ, (1977) p. 81.

175. See C. H. Schreuer, "The implementation of international judicial decisions by domestic courts". 24 ICLQ (1975) p. 153.

"potentially important institution" [176] to play the role of an "official" agency for the international settlement of investment disputes. However, if a host Government refuses to bring a dispute before an official arbitration agency [177] when submission to it is a term of the contract, there is little gained by having this "official" arbitration agency. The general principle of law establishing the sanctity of contract is no longer an unquestionable statement and, in these cases, public international opinion no longer acts as a sanction and therefore as a "iuris vis" to enforce a particular rule or principle of law [178]. Additionally, for many new States, the principle of sanctity of contracts and many other traditional principles of law are irrelevant as they are no longer the infrastructure on which international relations have operated [179]. The traditional legal rules have changed and with them has gone international customary law which means nothing in front of the present overwhelming primacy of consensual law and treaty provisions.

This problem of interpretation and settling of disputes must be solved, therefore, through new agreements and treaties.

Interpretation and settlement of disputes are some of the general problems involved in the efforts to control multinational corporations' activities with proper legal instruments. There are many more and each one with a proposed solution [180].

Our concern is not each one of this particular problems but their global incidence in international relations and the reaction produced in the juridical plane; an intent to produce a comprehensice regulation of all MNC's activities. Nevertheless, a brief enumeration of the major points of interest involved in MNC's transactions will give a better picture of the problems involved.

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176. See supra note (150) and "Convention on the Settlement of Investment Disputes between States and Nationals of Other States", 575 U.N.T.S. 159.

177. Home Governments are less reluctant to subcit to arbitration than host Governments: "...sufficient legal protection, including the international arbitration of disputes and adequate safeguardn in the event of edpratiation" - Federal Republic of Germany opinion on the report of the Group of Eminent Persons. U.N. doc. E/5386/Add. 1.

178. This is another problem for intrenational arbitration because in case of reference to international law, given the present relativeness of its rules the outcome will be always challenged.

179. See opinion by Spain in note (173).

180. For example "The need for a multilateral agreement among the nations and the creation of an international tax court is heard more and more today. The MNE does not have a legal right to submit its case to a body which is authorized to determine the final allocation o fits income among the relevant countries. The best solution to the international tax problems would be to found a multinational agreement setting up an international body which would conduct a legal hearing and would lead to the taxation of the MNE in each jurisdiction on the portion of its overall profit deemed to be earned there... It seems that the tax problem would be resolved only as one part of a general multilateral agreement". Footnote at p. 144 or 20 AJCL, 1972. "Tax treaties and their role in the financial planning of the Multinational Enterprises".

— respect for national sovereignty and observances of municipal law.
— adherence to economic goals and development objectives of host and parent countries.
— adherence to socio-cultural objectives and values.
— respect for human rights and fundamental freedoms.
— non-interference in intergovernmental relations.
— non-interference in internal political affairs.
— abstention from corrupt practices.
— ownership and control.
— balance of payments and financing.
— transfer pricing.
— taxation.
— competition and restrictive business practices.
— transfer of technology.
— employment.
— consumer protection.
— environment protection.
— disclosure of information.
— nationalization and compensation.
— jurisdiction [181].

All this could form the content of a future code of conduct for MNC's, but, as said above, it is the legal nature of this code or other international law mechanisms what this paper tries to ascertain and not the issues involved in each particular point.

VII. THE INTERNATIONAL LAW PROBLEM

When corporate dealings cross jurisdictional boundaries, companies are subjected to multiple consequences in as many law systems as have significant contacts with the transactions.

It is not only the parent or holding company of the MNC which must consider laws and jurisdictions other than those of their home State but also affiliates, subsidiaries and associated because they may find themselves concerned with the law of the State of domicile of "sister" companies as well as of parental or associated corporations.

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181. This is the content of the future code of conduct of MNC's being prepared at the U.N. See "Transnational Corporations: Issues involved in the formulation of a code of conduct", U.N. doc. E/C. 10/17.

This multiple subjection to diverse authorities raises numerous substantive and practical problems for the lawyer [182].

"The multinational enterprise system in an unheralded but important way is building a 'lex mercatoria' for the conduct of many fundamental inter-relationships of the world's trade and production" [183]. Multinational corporations solve transnational legal problems quite often in a practical and improvised way. Governments also deal with the same problems in a very practical way, mainly when situations escape municipal jurisdictions and involve transnational issues. The point is whether this practical conduct and approach has created an adequate or coherent system of rules available for future action.

International society has also reacted to the transnational activities of MNC's and there is a conscious desire to regulate them.

As indicated, our concern is whether a coherent system of stable and generalized rules has been, or is in the process of being, created by the "practice" of MNC's, governments and by international society reacting to the threat posed by MNC's or whether a consensus in business practices continues to be the primary force ruling over transnational corporate transactions and, if so, whether that will continue to be the case.

Most MNC activities are actually regulated by some law, at least in part. All municipal action falls under the corresponding municipal legal system, but, as noted above, municipal law systems only regulate a part of an MNC and consequently only part of its activities. There remain transnational activities which involve several jurisdictions, which are unable to be regulated by any municipal system [184].

Sometimes Public International Law bears upon the substance of these corporate transactions [185] but generally International Law, in the traditional sense, does not concern itself with transactions of private or semi-private entities [186].

Once one accepts that some multinational activities of MNC's lack any kind of legal regulation, the MNC operating therefore in a jurisdictional vacuum, there are three main questions to be solved:

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182. Angelo, op. cit., p. 507: "The law profession should match economics and management in charting the course for multinational corporations".

183. Angelo, op. cit., p. 507.

184. eg: price transferring, financia speculation, intervention in internal political and economic affairs.

185. eg: —general principles of public international law, or transactions made by MNC's covered by Treaty.

186. As an example of this lack of involvement one may cite the principle that no rule of public international law exists requiring States to recognize the existence of corporations established in other jurisdictions or requiring States to allow foreign firms to acquire share ownership in domestic companies; two principles basic for the development and existence of MNC.

1) Is it possible to accept an MNC as a single entity, perhaps as a legal person on an international basis, or must it continue to be seen juridically only through its constituent parts denying recognition of the whole entity?
2) Accepting that MNC's as entities do exist and function continuously, do the practices of MNC's and States together with international society's reaction towards MNC activities constitute a coherent, systematic set of rules, already a "legal framework"?
3) Does this set of rules constitute the beginning of or the basis for a conscious process of legal planning which will make MNC activity subject to legal regulation?

These questions themselves raise further questions or factors in two different areas:

a) Factual.
b) Theoretical.

a) *Factual*:

— Are MNC's entities real economic and sociological units, or does the name merely cover a group of independent firms or corporations with a more or less loose relationship which only enables one to refer to the constituent elements when considering their regulation by law?:
— What are MNC's exactly? How does one define their structure and nature?
— Which rules are applicable to MNC's in their local and transnational transactions? Are those norms sufficient? Is international society reacting and trying to control their activities by developing new rules?

b) *Theoretical*:

— Do MNC's merely increase the size of problems which would be present internationally anyway, or do they provoke a qualitative change? The answer to this must be that there is a qualitative change if one denies that traditional international public law is capable of coping with the problem. If that is so, a new system of legal rules or norms is required.
— Depending on how one defines "law", any new "rules" which regulate MNC activities could be considered law.

As stated earlier it is submitted that there is no legal system covering MNC activities which recognises MNC's for what they really are. They are economic entities with real economic unity and the necessary consequence should be that the law recognizes this. However, it does not do so; the ever necessary merger between economics and law has not taken place.

Municipal law is concerned with municipal problems, and recognition of municipal entities operating in the territory naturally follows. But this is not sufficient, and the Badger Case is a good example why. Badger, Multinational Corporation, as such escaped Belgian law because that was only concerned with Badger Belgium (N.V.) and unconcerned with the parent American company and its "de facto" links and control of the Belgian subsidiary. Consequently, under municipal law the principle of limited liability should have been applied and only the assets of Badger Belgium (N.V.) used to discharge the company's liabilities. To do this would have been to avoid and mask the parent company's "responsibility" as part (and head) of the one entity.

This was a case where trade unions and Government action filled the lacunae in municipal law and resorted to, among other things, international pressure through the OECD IME Committee. This would not have been necessary had municipal law been able to contemplate MNC activities in accordance with economic reality.

The Badger Case is an example of the need for a legal system to recognize the fact that the MNC is a comprehensive entity. If this is so for municipal law systems it is vital for an international legal system. Whether MNC's should be recognised as single entities is both necessary and inevitable. Another problem is whether they should be considered the subject or the object of the rules which regulate them [87]. Having admitted the need for recognition of MNC's as single entities by any set of legal rules concerned with them, the next question is whether they can be considered legal persons or mere objects in law. This is a problem that must be answered by each "legal system" which may regulate their activities. Howe-

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187. Paragraph 6 of the preamble to the OECD guidelines states that "The guidelines set out below are recommendations jointly addressed by Member countries to multinational enterprises operating in their territories". The body of the Guidelines is addressed, in mandatory terms, to MNC's entities: "Enterprises should:...". As many MNC's have subsequently approved the guidelines, in general, this emphasises the fact that the guidelines have given them more objective recognition as entities and that this could develop into a recognition of them as legal personalities, at least so far as the Guidelines are concerned. "If the instrument (a code of conduct) embodying a legally non-binding code were to be addressed solely to the transnational corporations through a declaration or resolution, without expressly requiring tStates to guage" - U.N. doc. E/C. 10/18. para. 382. For the opinions of States as to whether a Code should be addressed to MNC's to States or to both see "Transnational Corporations: views and proposals of States on a code of conduct". U.N. doc. E/C. 10/19 and E/C. 10/14 Add. 1.

ver, it is probable that any legal system which is to effectively regulate MNC's must accord them legal personality in due course [188].

What is the structure and nature of the different types of MNC? The question is relevant because there are obvious differences between a wholly governmental-owned corporation and a private one, between one which engages in public affairs and one which performs strictly private business only. Proper differentiation between types of MNC becomes an issue when the content of the rules of a legal system is considered; but it should have no bearing on the question of whether MNC's are subject to the laws of a particular legal system. Whether a legal system itself discriminates between certain types of MNC is a question of lege ferenda [189].

As MNC's engage in multiple transactions across national boundaries, amalgam of numerous municipal laws, regulations and customary norms, international rules (general principles, customary law and international instruments) and various agreements may apply to any MNC international transaction. The need to harmonize this conglomerate of public and private norms, private law, public law and transnational law is obvious.

So far, MNC's have managed quite well within this intricate conglomerate of norms. Conventional agreements are always available when law and/or norms of general and compulsory application are not available. Yet there is a lack of juridical security which causes problems for both states and MNC's.

It is clear that a Government and an MNC can always enter a contract and establish a set of norms to govern their relationship. But it is when interpretation of the contract differs and when enforcement by resort to third party settlement of disputes is not possible that problems arise.

Thus effective regulation of MNC activities has become a necessity for both Governments and MNC's. If achieved it would enable MNC's to operate more securely and efficiently as well as enabling other industrial and service enterprises, handicapped until now, to grow to magnitudes required to meet the needs of international production and marketing [190].

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188. See C. Stocker, "Equality and Discrimination in International Economic Law: The Multinational Enterprise" 1977 Yearbook of World Affairs, p. 218.

189. *I.a.*: paragraph 8 of the Preamble to the OECD Guidelines states: "These usually comprise companies or other entities whose ownership is private, state or mixed...".

U.N. doc. E/C. 10/17 para. 49: "Another question raised in the Commission on Transnational Corporations was whether State-owned corporations should be excluded. The code could cover all corporations owning or controlling production or service facilities abroad, whether privately-owned, of mixed public-private ownership, or fully owned by Government, or it could be restricted to only one or two of this types. See supra, p. 338.

190. Angelo, op. cit., p. 751.

Of the three alternatives presented at the beginning of this paper [191] to solve the situation —unilateral, bilateral and multilateral options (all of them valid to solve some kind of problem)— only the multilateral option provides the possibility of a comprehensive solution. International society is actually reacting to the threat posed by MNC's and new forms of control are developing, i. e. codes of conduct and guidelines. National legislation is excluded from consideration at this point as it could only provide a satisfactory answer to the problem if there was harmonisation of relevant municipal laws of all States, something unachievable in practice. Also we will not say anything about details of municipal law regulating corporate activities [192].

What "legal framework" does present international law, is reaction provided to cope with MNC activities?

One must establish what is understood as international law. If the traditional sense is adopted, one is talking about treaties, custom and general principles [193]. Now, generally, Public International Law, understood in this traditional sense, is not concerned with transactions of private entities, even if not private and publically owned. The basic law of the company or the transactions depends on a conventional set of rules or some municipal law. Public International Law does not normally prescribe the content of the norms applicable in each situation, and is only concerned indirectly with MNC's when questions such as that of State immunity [194], extraterritorial jurisdiction [195], a State's right to protect its nationals natural or legal persons [196] arise, all questions which involve some kind of conflict between States. If one considers customary rules of Public International Law bearing directly upon MNC's problematical, one can see that the impact upon corporate interests is generally manifested in procedural matters: whether or not a State has jurisdiction to prescribe rules over corporate interests, whether those interests are enforceable, whether local remedies must be or have been exhausted before diplomatic protection is enforced, whether sovereign immunity should be respected, all cases very similar to those considered above and always with a dominant procedural character.

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191. See supra, p. 320.

192. For a report see U.N. doc. E/C. 10/8: "National Legislation and Regulations relating to Transnational Corporations".

193. See the Statute of the International Court of Justice, art. 38.

194. Banco National de Cuba V. Sabbatini, 376 U.S. 389 (1964), Baccus S.R.L. V. Servicio National del Trigo 3 W.L.R. (1956), p. 948. "Sovereign Immunity of Foreign State-Owned Corporations" P.S. Kincaid, 10 J.W.T.L., (1967) p. 110. Schmitthoff, "The Claim of Sovereign Immunity in the Law of International Trade" ICLQ (1958), p. 452.

195. Lotus Case, PCIJ, Ser. A, No. 10 (1927).

196. Barcelona Traction Case, ICJ Reports 1970. Friedman "Social Conflict and the Protection of Foreign Investment" Proc. Am. Soc. Int'l Law (1963), p. 156

Customary material related to substantive rights or duties or individuals is found in the form of "international standards" [197]. But these standards do not provide, in case of conflict, definite rules or norms to be applied to a particular transaction. They reflect the general practice of States and MNC's, but frequently differ, sometimes being compatible and at other times incompatible. There is invariable disputes as to their existence and content.

The most effective means of having substantive private interests protected by Public International Law is through the use of treaties between States. Pacta sunt servanda, a general principle of public international law, protects, once more indirectly, private interests, binding States to commitments made between them. The most clear example of these kinds of treaties are the "Treaties of Friendship, Commerce and Navigation" [198]. They superimpose a complex set of rules over the simple and fracmentary structure made of customary rules and general principles and provide for some substantive regulations.

But all these norms, treaties, standards, customs and general principles, are insufficient to properly regulate MNC's activities in an orderly way internationally. Public International Law is devoted to inter-State relations and only when these are concerned with private interests, although indirectly, are regulated. MNC's take advantage of this legal vacuum with a host of private arrangements and contracts which, although able to be based upon basic principles of international law, provide exclusively the whole set of rules which are going to regulate a particular transaction. This regulation is based only in the parties will.

This is not a proper juridical solution or the most adequate way to deal with the problems of regulating MNC's. Both States and MNC's are powerful entities, and this lack of proper lawful norms, substituted by private arrangements, can not guarantee anything but the prevalence of the most powerful [199].

If Public International Law, in the traditional sense, is not sufficient to cope with MNC problems because most of the matters to be regulated are out of its scope, this is more so if one takes into account that even the validity of International Law, at least in its present content, is dubitable.

If there were universal acceptance of those few norms now applicable to MNC's further development of the present system could make it a va-

197. See Schwarzenberger, "The Frontiers of International Law", p. 210.

198. See Walker, "Provisions on Companies in United States Commercial Treaties", 50 AJIL 1956, p. 373. They deal with establishment, ownership of property, conduct of trade, recognition of Commerical Status, right of access to courts and administrative tribunals and other matters related to the protection of private interests than the signatory States themselves.

199. It is unnecessary to point to all the problems caused by some MNC's abuses in developing countries, or abuses by some States on the rights of MNC's.

luable instrument to deal with MNC's activities. But what has happened is that this system —of these norms— is actually rejected by most of the new States which have recently joined international society. New States reject traditional Public International Law. They see the present law as a solidification of the status quo, a staus quo frequently not acceptable to them [200]. "Law tends to sustain the prevailing order, preferring old injustices to new solutions; the legal process makes minor concessions to pacify discontented groups in society, but concentrates its energy upon the maintenance of an atmosphere favourable to elite groups" [201]. This is rejected by the "old" States: "It is necessary to point out that a new State is born into a world of law...Indeed, it is a State in as much as the terms is meaningful to a lawyer, only because of a law that lays down the attributes of statehood...in asserting the faculties of statehood, the new State is accepting the structure and the system of western international law, and it may not, without offending all juristic doctrine, pick and choose the acceptable institutions, if only because its next-door neighbour, also a new State, will claim a like privilege" [202].

Thus, International Law has been altered by horizontal innovations, new States acceding to the international arena, and by vertical ones, new subjects of law, international organizations, individuals and MNC's. The problem of MNC's is only a part of a more general problem, but a very significant one.

It is a qualitative change in the kind of problems that must be faced by International Law, and not just a mere increase in the number and size of the problems. Incapability to deal with MNC activities and rejection by new States of traditional law force us to accept this qualitative change.

Hence, the multilateral options we have been considering implies an international law solution, but one that is not based exclusively upon present custom, treaties and general principles. It is necessary to have a more comprehensive concept of International Law, a concept capable of including guidelines, codes of conduct and practices of international organizations [203].

Law must be a response to events in the social process, and it, in turn, conditions this process. New participants in the contemporary international scene, whether new States, international organizations, individuals and MNC's,

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200. See for example Seidl-Hohenveldern "Communist Theories and Confiscation and Expropiation. Critical Comments", 7 AJCL, 54, (1958). The standard which is most frequently discussed is the treatment of foreign property.

201. P. P. Falk. 10 AJCL (1961), p. 397.

202. D. P. O'Connell, "Independence and Problems of State succession" ed. W. V. O'Brien, "The new States in International Law and Diplomacy".

203. What is in issue is the concept of law. When the concept is determined it will be clear if guidelines and/or codes of conduct are included.

make a considerable impact in the public international order. If the international "law of coexistence" has been governing inter-State relations, a "law of co-operation" is necessary in order to cope with the new problems [204]. The scope of International Law changes with respect to its subject matter, its parties and subjects and, with it, so does the content and formal structure of International Law. MNC activities demand a legal response by international society to regulate their activities properly. This is being done with guidelines and codes of conduct.

Measures adopted at national or regional level have limited effects. Even if the adoption of measures at national level were widespread, governments would find that this approach has political, economic and institutional limitations. The need for an international instrument is made obvious by the existence of convicting national interests and the lack of a central control over MNC's global operations.

VIII. GUIDELINES AND CODES OF CONDUCT

In Chapter III of this paper the most relevant international instruments referring to MNC's have been described. They indicate the concern of international society for the problem, most of them pointing to a final main objective: regulation of MNC's.

There are two major movements to regulate MNC's. One is the OECD guidelines, already described in Chapter IV. The other is the Code of Conduct being prepared under the auspices of the UN by the Commission on Transnational Corporations, responsible to the Economic and Social Council [205].

The Code will reflect all the evolutionary trends of international society reflected in most of the documents cited in Chapter III. The U.N. Commission has also consulted States and non-governmental organizations, and some of their opinions have been listed above. All these international instruments, the future Code and the OECD guidelines constitute a body of international rules which is beginning to bear upon MNC behaviour. This may not be an orthodox way to achieve the lawful regulation of a problem but the fact is that some of these rules and guidelines are beginning to be effective. This will obviously help in the future to obtain a more

204. See W. Friedman, "The changing structure of international law". London, Stevens, 1964.

205. The Code was due to be completed in Spring 1978. Now it seems that it could be ready by the Spring of 1979. see "Multinationals and the New Order", Financial Times, 7/8/78.

permanent set of rules by way of treaty and harmonization of municipal laws where the latter would otherwise conflict [206].

From the Badger case we have learned that the OECD guidelines can have a major influence in reality. They are voluntary in nature [207]. Governments cannot compel MNC's to conform to them, they can merely stress the importance of compliance and exercise persuasion to this end. This pressure, added to international public opinion and pressure from other MNC's, often will likely be sufficient to convince an MNC to change its course of action if not in compliance.

Although the guidelines are not legally enforceable [208], this doesn't mean that they lack any legal character at all. Public opinion is a sanction and can be sufficient sometimes to make an MNC comply with something, even beyond that strictly required by law. Furthermore, these guidelines though voluntary in origin, may "in the course of time —and when they have been frequently applied— pass into the general corpus of customary international law, even for those multinational enterprises which have never accepted them" [209].

The second major movement mentioned is the Code of Conduct for MNC's being prepared at the U.N. The scope of this Code will be comprehensive, its intent being to cover all the major issues that MNC's present [210].

One of the major issues is the legal nature of the Code. The view has been expressed that it should be mandatory, leaving MNC's no choice but to comply with its provisions. On the other hand, an instrument regarded as "voluntary" is not automatically an instrument without any kind of compulsion. Compulsion can exist, indirect and diffuse as in the OECD guidelines, but nevertheless with effect.

Effectiveness of an international legal instrument not only depends on its legal binding force but also on the language of its provisions, its content, the consensus it represents and its support by the major powers. There are three major factors which determine the effectiveness of an international instrument:

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206. It is not an isolated fact in international relations. Member States of the European Communities have moved towards some degree of harmonization in Company Law, employee participation, due to some draft Regulations and Directives which although lack any proper legal force have influenced national Governments and Parliaments. There is also a compulsay set of rules dealing with other items of Companies Law.

207. "Observance of the guidelines is voluntary and not legally enforceable". Para. 6 of the Preamble to the Guidelines.

208. On the problem of Sanctions, see Friedmann, supra note . In the international "law of co-operation" he does find effective international sanctions in the exclusion from access to benefits of co-operative international organization.

209. Theodore Vogelaar, "The Guidelines in practice" OECD Observer, no. 86, May 1977.

210. See, "Issues involved in the formulation of a Code of Conduct", U.N. doc. E/C. 10/17.

— its formal legal character [211].
— the precision of its language.
— the machinery for its implementation.

The presence of any one or two of them will not necessarily ensure the effectiveness. Moreover, a legally binding instrument may lose its effectiveness by a combination of vague language, cumbersome supervision and non-existent enforcement machinery. An instrument not binding at law may be rendered relatively effective by the solemnity with which it is adopted and by the presence of substantial institutional machinery.

The OECD Guidelines are not a legally binding instrument but their effectiveness has been shown in their first test: the Badger Case. This leads us to two further considerations:

1: the Guidelines have worked within a very special framework, the OECD. All Member States [212] have a similar status. All 24 are more developed countries, almost all MNC's are located in one of them and three quarters of all international investment is concentrated within them. It is obvious that this makes it easier to achieve effectiveness through an instrument that is not legally binding. Whether this would also be possible with U.N. members, where differences between States are more exagerated, is a difficult question.

2: the voluntary character of an international instrument is not so much a matter of principle as of juridical necessity: "...in our democracies the power to bind citizens and corporations is reserved to Parliaments who may act, of course, by ratifying and giving effect to international treaties or conventions. In the case of a mandatory code covering items like disclosure of information, taxation, company law, social and anti-trust laws, providing for separate obligations for multinational enterprises as distinct from others, the legislative work involved would be a tremendous, life-time undertaking requiring utmost care and precision. In addition, questions of uniform interpretation, non-discriminatory implementation and comparable enforcement would arise. In the present state of our diffused world of

211. This could be: — an international multilateral convention.
— a declaration of principles adopted at a Conference by the participating States.
— resolution of an organ of an international organization (eg: General Assembly, ECOSOC).
Only the first has binding force, but effectiveness may be better achieved using one or both of the other two.

212. The Members are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States. Limited Participants are the Commission of the EEC and Yugoslavia.

146 countries, yet even amongst the 24 OECD's parallel orientated, free, countries, any attempt to establish a binding code is, I am afraid, dommed to remain illusory" [213].

MNC's activities have provoked a reaction on the part of international society. Their activities have not been able to be regulated in an ordered way by the traditional means (by municipal and public international law) thereby avoiding unnecessary abuses and damages. The conduct of business by these MNC's firms has been through voluntary agreements between the interested parties without regard to any superior legal order and with frequent reference and use of "convenient" municipal law systems.

Only on rare occasions has resort been made to Public International Law, and this has happened only when States' interests were at stake or procedural questions had to be solved.

Some adverse behaviour of MNC's has proved dysfunctional internationally and new States have rejected the status quo. This factor, added to the above considerations, has emphasised the need for a trully international solution, and a lawful regulation of MNC's. Hence, guidelines and codes of conduct are seen as the only possible juridical means of lawfully regulating MNC activities, although this does not mean that there could be no other possible solutions.

Municipal law, including Private International Law, Treaties, International Custom, General Principles of law, guidelines, international resolutions and declarations —that is, the developing Trasnational Law [214]— bear upon MNC's. But real co-ordination and joint international action can only be achieved using a qualitatively different legal framework: guidelines and/or codes of conduct upon which each country can base its international behaviour and internal regulations in order to have MNC activities better regulated for the benefit of international society.

In summary, MNC activities require regulation through a proper legal framework. National regulation is obviously indispensable and necessary; as a last resort, effective regulation will depend on municipal law. But MNC's mainly pose an international problem and an international framework is necessary to obtain the desirable nexus and uniformity between different municipal law systems to adequately achieve all-encompassing regulation of MNC activities.

An international framework able to satisfy these criteria is developing in both an institutional and a conventional form. International measures of co-ordination and regulation must serve as a "toile de fond" to which future international and municipal laws may be added.

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213. Speech by Mr. Theodore Vogelaar, Special Consultant to OECD's Secretary General quoted from "The Badger Case", Prof. Dr. Blamplain, Kluwer.

214. See Lalive, supra note 13.

It is submitted that this legal framework could only be developed with different kinds of legal tools to those provided by traditional international law which to date have proved insufficient. Added to that, the fact that newly created States, usually less developed economically, reject traditional "western" law and its principles, makes it necessary to resort to a new international legal framework based upon the consensus of developed and developing countries and forged with new tools such as guidelines or codes of conduct.

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LIST OF ABREVIATIONS

ACP	African, Caribbean and Pacific
AFL-CIO	American Federation of Labour. Congress of Industrial Organizations.
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
ASEAN	Association of South East Asian Nations
ASIL	American Society of International Law
BBTK	Bond van Bedienden, Technici en Kaders. Socialist white collar Workers
BCC	British Chambers of Commerce
BIAC	Business and Industry Advisory Committee to OECD
CARICOM	Caribbean Community
CML Rev	Common Market Law Review
EAC	East African Community
ECOSOC	Economic and Social Council
ECOWASS	Economic Community of West Asian States
EEC	European Economic Community
ELEC	European League of Economics Cooperation
GATT	General Agreement on Tariffs and Trade
HLR	Harvard Law Review
HR	Hague Recueil
ICA	International Cooperative Alliance
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quaterly
ICFTU	International Confederation of Free Trade Unions
ICSID	International Centre for the Settlement of Investment Disputes

IFC	International Finance Corporation
ILO	International Labour Organization
IME	Committee on International Investment and Multinational Enterprises (OCDE)
IMF	International Monetary Fund
IOE	International Organization of Employers
ISO	International Organization for Standardization
JWTL	Journal of World Trade Law
LBC	Landelijke Bedienden Centrale. Christian Union for White-Collar
MNC	Multinational Corporation
MNE	Multinational Enterprise
NAM	National Associations of Manufacturers of the USA
NFTC	National Foreign Trade Council Inc.
NV	Naamboze Vennootschap (limited liability company)
OECD	Organization for Economic Cooperation and Development
OEEC	Organization for European Economic Cooperation
OPEC	Organization of Petrol Exporting Countries
PCIJ	Permanet Court of International Justice
TUAC	Trade Union Advisory Committee to OECD
TUIWC	Trade Unions International of Workers in Commerce
UDEAC	Central African Economic and Customs Union
UCAPS	Union Centrale des Associations Patronales Suisses
UN	United Nations
UN Doc	United Nations Documents
UNCTAD	United Nations Conference on Trade and Development
UNICE	Union des Industries de la Communauté Europeenne
UNIDO	United Nations Industrial Development Organization
UNTS	United Nations Treaty Series
USA	United States of America
USCC	United States Chamber o Commerce
WEM	Western European Metal Employers Organization
WLR	Weekly Law Reports