

1995

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### Recommended Citation

Rubin, Seymour J. "Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development." *American University International Law Review* 10, no. 4 (1995): 1275-1289.

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TRANSNATIONAL CORPORATIONS AND  
INTERNATIONAL CODES OF CONDUCT: A STUDY  
OF THE RELATIONSHIP BETWEEN  
INTERNATIONAL LEGAL COOPERATION AND  
ECONOMIC DEVELOPMENT\*

Seymour J. Rubin\*\*

INTRODUCTION

Some fourteen years ago, I wrote a rather pretentious article titled "Transnational Corporations and International Codes of Conduct" with the probably even more grandiose subtitle "A Study of the Relationship between International Legal Cooperation and Economic Development." With the decision to republish that essay, the editors of *The American University Journal of International Law and Policy* have given me the opportunity to "update" that piece. So much—and in some respects, so little—has occurred in this long interval, that the privilege of later reflection cannot be disregarded. I have not been asked to rewrite that article, nor would I wish to do so, but a brief comment seems to be in order.

What seemed in the early 1980s to be a flood of meetings, conferences, and assorted punditry has in the interlude been dwarfed into a trickle. The visible evidence lies in a twenty-volume library on the subject issued under the auspices of the United Nations Center on Transnational

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Corporations (UNCTC)—one of the all too few United Nations (U.N.) entities whose absorption into a larger body one can rationally regret. The subject continues to be of importance and not only because it still gives employment to scholars, diplomats, economists, business school professors, and, perhaps above all, lawyers. It also, especially these days, has engaged those interested in health and environmental causes, as well as industrialists and merchants.

Most of the passion, however, of the earlier writings has faded. The debate of the 1960s, 70s, and even early 80s was one of "true believers." Views on the merits ("the transnational corporation is the engine of progress") or the demerits ("poverty is the product") of the transnational corporation (TNC) were held with religious fervor and certainty, and led to evangelical prescriptions. This was the age of the "new international economic order." Thus, the first (1977) sessions of the UNCTC turned consideration of a sensible and moderate Group of Eminent Persons report into a forum for a shouting match. The shouting took place, in the main, between the representatives of industrialized nations (with their labor union leaders in vocal dissent) and, on the other side, the representatives of the developing nations, urged on by members of what was then the "Soviet bloc."

With the collapse of the Soviet Union and the triumph of "market" economies in the vast majority of nation-states,<sup>1</sup> the fire has gone out of this controversy. Problems with broadly worded general principles, chiefly where doctrine with respect to sovereignty confronts the asserted preeminence of the still "rule of law", prevents agreement on a U.N. Code. In a world, however, in which broad and doctrinal expropriations are a distant memory (most "natural resources" have long-since been nationalized), and where the former left wing states are both privatizing and competing to attract foreign private and public investment, and in which a web of bilateral investment treaties cover the globe,<sup>2</sup> the original *raison d'etre* of the codes seems obsolete.

The reality is otherwise. Transnational corporations and the issues surrounding their treatment and conduct continue as a worthy theme of

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1. By the early 1990s, at least 83 countries were involved in some form of privatization. See Anna Gelpern & Malcolm Harrison, *Ideology, Practice, and Performance in Privatization; A Case Study of Argentina*, 33 HARV. INT'L L.J. 240, 240 (1992).

2. See generally Jesawald W. Salacuse, *Bit by Bit: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW 655 (1990) (documenting the growth in bilateral investment treaties).

serious international discussion. Thus, the following holds true:

a) Privatization and the triumph of the market do not by any means diminish issues of transnationality. If, for example, TNC's in the past were less than solicitous of the aspirations of developing states to build viable self-sustaining and competitive economies, it can hardly be taken for granted that the newly-adopted enthusiasm for privatization will be accompanied by universal adherence to better business and ethical standards.<sup>3</sup>

b) In the days ahead, TNC's will have greater, not lesser, influence, not only on domestic, but alas on international economies. This effect is a concomitant of the lessening of governmental control or supervision, and the integration efforts in many regions of the world.<sup>4</sup>

c) Regional and even global integration brings with it new challenges. These are greater in the present age of electronic communication. For example, transborder issues must be addressed to ensure honesty as well as efficiency in the transborder securities market which now exists.<sup>5</sup> Similarly, issues of transnational insolvency—reflecting the enormous growth of transnational industry, including protection of and trade in services—need to be faced, and national policies either harmonized or reflected in international agreements.<sup>6</sup>

If the traditional issues—sovereignty, nationalization, standards of compensation, regulation of business conduct—have been somewhat reduced in intensity by the events and trends of the 1990s, they have not been eliminated. They have been replaced by issues from those of the environment to those of trade and investment. Most regional trade

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3. See Edith Brown Weiss, *Notes from the President*, NEWS BULL. AM. SOC'Y INT'L L. (Nov. 1994) (noting that TNC's are crucial in developing transnational practices and norms, in influencing government actions, in proposing alternative resolutions to important issues and in implementing international business and economic norms).

4. See David Trubek et al., *The Future of the Legal Profession: Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 409 (1994) (arguing that the combined importance of TNC's in the world economy and the growth of privatization emphasizes a need to develop "market institutions, including legal structures, to facilitate economic interaction").

5. See James D. Cox, *Rethinking U.S. Securities Laws in the Shadow of International Regulatory Compensation*, 55 LAW & CONTEMP. PROBS. 157, 158-59 (1992) (discussing the pro's and con's of securities regulation harmonization).

6. See generally Donald T. Trautman et al., *Four Models for International Bankruptcy*, 41 AM. J. COMP. L. 573 (1993) (discussing the problems associated with the differences among reorganization systems when they affect the cases of debtors with assets in more than one country).

agreements now address these and other issues. The growth of transnational enterprise and of economic and social integration will guarantee an important role for an international organ of consultation and norm-formulation. The relationship between international legal cooperation and economic development remains important.

### I. CORPORATIONS AND NATION-STATES: A TENSE INTERACTION

The relationship between corporations and governments has often been uneasy. Seldom is there general agreement that "what is good for General Motors is good for the United States." Indeed, it is appropriate to recall, as already stated, that corporations historically were created only by a special and guarded act of the sovereign. General and permissive incorporation laws came late to the United States. Increasing industrialization, however, made it obvious that the corporation form of doing business was a highly useful social and economic tool. The corporation permitted the capital of many persons to be brought together, to guarantee to each investor that he would put at risk only an agreed and limited amount of capital, that such capital would be centrally managed, and that the entity would survive the death of the natural persons who contributed either their capital or skills. The corporation thus responded to the needs of society and hence its growth. Over the last few decades, nearly the same set of considerations has dominated the exponential growth of the "transnational corporation," an entity whose operations extend beyond national frontiers.<sup>7</sup> TNC's have proliferated because they are useful in a world in which efficiency often demands an outlook that transcends national boundaries.

Even in the national arena, the corporation has sometimes exacerbated fears. The aggregation of economic power that the device permits often has been viewed as being powerful and not always responsive to popular concepts of the "best interests" of the general public. Separation of investment and of management carries with it at least some possibilities of abuse. The interests, for example, of labor and of consumers, and the likelihood that corporate interests will not always coincide with the public interest, have thus led to suggestion for reform of the institution of the corporation and to a myriad of regulatory measures. One aspect of this reformist sentiment has been the recurrent crusade in the United

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7. Much of this and the following paragraphs owe a great deal to A. BERLE, *THE 20TH CENTURY CAPITALIST REVOLUTION* (1954).

States for a federal incorporation law, in the belief that national standards are appropriate for entities that have country-wide operations. That proposal has come to the fore at intervals since its incorporation in the Democratic Party platform of 1908, yet it has never prospered. An analogous concept lies behind much of the present emphasis on international regulation, as well as the proposals for a European Countries "Companies Law."

Though no federal general incorporation law exists in the United States, there are many statutes and regulations that are applicable to corporate conduct on a nationwide scale and which, if consolidated, could well be called a corporate code of conduct. For example, the laws that regulate the offering of securities by corporations<sup>8</sup> and their sale to the public determine what a corporation may do to raise capital, and what it must do to give information to its shareholders<sup>9</sup> and to government. State legislation often exists concurrently.<sup>10</sup> Moreover, labor laws prohibit unfair labor practices; antitrust laws control mergers that may conflict with the public interest; and other regulations affect such diverse areas as standards of accountancy and protection of the environment.

In spite of this legislation, other public interest concerns arise. One source of these concerns is that a corporation may be perceived as not conferring benefits or costs equally on all regions of even a single country. The economic and political repercussions of uneven distribution of natural resources, or other factors of comparative advantage, are evident in many nations: in the United States, as industry moves out of the Northeast to the so-called Sunbelt; in Britain, where Scottish nationalism is fortified by oil discoveries; and in Canada, where separatism is fed not merely by linguistic and perceived cultural differences, but also by questions of who should profit from resources found in different parts of the nation.

An entirely domestic corporation may thus find itself caught up in such regional conflicts, and may be seen as serving the interest more of

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8. See Securities Act of 1933, 15 U.S.C. § 77 (1976) (regulating the public offering of securities by requiring the issuer to make full disclosure of all material facts in order to provide the public with adequate information regarding securities).

9. See Securities Exchange Act of 1934, 15 U.S.C. § 78 (1976). The Act applies to trading in securities that are already issued and are outstanding by imposing disclosure requirements on publicly-held corporations and by prohibiting fraud in connection with the purchase or sale of securities.

10. State securities laws, commonly called "Blue Sky Laws," establish various requirements for the registration of brokers/dealers, registration of securities to be offered or traded in the state, and sanctions against fraudulent activities.

“foreigners” than of the natives of the resource-rich region in which it operates. Consequently, tensions can be considerable. If the corporation is transnational the tensions are greatly magnified, because the corporation is perceived as being one that owes its allegiance not merely to another group within the same country, but to persons in another nation. Benefits of TNC's are seen as remaining principally in one country, with the costs—or the lack of benefits—in another. Further, when the corporation is an entity that is foreign-owned and foreign-controlled, the suspicion that regulation might bring a better order tends to harden into conviction. That conviction is likely to become an article of faith when the corporation has its headquarters in a developed nation, while maintaining many or most of its operations in developing countries.<sup>11</sup> Moreover, the likely disparity in the standards of living between the two countries powerfully exacerbates the human tendency to put more of the blame on a foreign concern than on one's own shortcomings or on the dictates of economics.

An additional factor brings transnational corporations under suspicion—the possibility that they may act as conduits for the policies of a foreign state.<sup>12</sup> Though in most cases the corporation will be unwilling to play such a role, that hardly matters. What does matter, for example, is that the home government may seek to impose its antitrust laws on host states. In addition, policies such as those embodied in the “trading with the enemy” concept, which are concerned with embargo policies of one country, might be imposed on subsidiaries in other countries. Corporations also may be asked to follow policies with respect to repatriation of earnings that respond more to the needs of the home than of the host country. This results in a feeling of “dependency” that may or may not have undesirable economic aspects but that certainly is psychologically unsettling.

Developing countries generally believe that an unjust international economic order exists and that a transfer of resources is necessary to correct the inequities. The developing countries also are aware of the

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11. Cf. Seymour Rubin, *Corporations and Society: The Remedy of Federal and International Incorporation*, 23 AM. U. L. REV. 263, 267 (1973).

12. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (extraterritorial application of antitrust law); *United States v. Imperial Chemicals Indus., Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951) (liability), supplemented by 105 F. Supp. 215 (S.D.N.Y. 1952) (remedies); *Societe Fruehauf v. Massardy* [1965] J.C.P. II No. 14, 247 (Cour d'appel, Paris). See generally Seymour Rubin, *Multinational Enterprise and National Sovereignty: A Skeptic's Analysis*, 3 LAW & POL'Y INT'L BUS. 1, 10 (1971) [hereinafter *A Skeptic's Analysis*].

important role that TNC's play in the present international economic system.<sup>13</sup> Hence the call for regulation. Such regulation would seek to achieve several objectives such as rectification of past injustices; enhancement of the contribution which it is conceded that TNC's could, and on occasion do, make to the development of the countries in which they operate; and the creation of a balanced and equitable world economic order basically in accordance with the spirit of the several U.N. resolutions that set out a program for achievement of a "new international economic order."<sup>14</sup>

Both the interdependence of nations and the major role of TNC's in international trade and investment are salient features of the international economic landscape. The role of TNC's has been emphasized, and perhaps overly so. Although both proponents and critics agree on the importance of the TNC, there is no consensus on the *effects* of that importance. Some writers, such as Arnold Toynbee, regard the transnationalism of the TNC as a beneficial means of overcoming nationalism, which they believe must be eliminated if the world is to survive.<sup>15</sup> Many have regarded the TNC as a threat to national sovereignty, an attitude reflected, for example, in several Canadian reports,<sup>16</sup> as well as in the opinions of representatives of the developing countries. Others have perceived the TNC as an instrument of division that perpetuates an inequitable allocation of benefits that impoverishes the less developed countries. Thus, the TNC may be regarded as widening disparities not only between nations, but also between economic classes within a nation while simultaneously destroying indigenous cultural patterns. Skeptics have argued that sovereign states have become actors in a world situation in which they have limited power and freedom of choice.<sup>17</sup>

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13. See CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975), reprinted in 14 I.L.M. 251 (1975); see also *Reflections*, *infra* note 19; U.N. Commission on Transnational Corporations, *Transnational Corporations: Issues Involved in the Formulation of a Code of Conduct*, U.N. Doc. E/C.10/1976/17 (1976).

14. For a dramatic and generally exaggerated exposition of the ill aspects of the TNC, see R. BARNET & R. MULLER, *GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS* (1974). Contrast this with the considerably rosier attitude of Robert Ball, *The Promise of the Multinational Corporation*, *FORTUNE*, Jan. 1, 1967.

15. See, e.g., A. TOYNBEE, *THE RELUCTANT DEATH OF NATIONAL SOVEREIGNTY* (1971).

16. See, e.g., GOVERNMENT OF CANADA, *FOREIGN DIRECT INVESTMENT IN CANADA* (1972) [hereinafter *Gray Report*].

17. *A Sceptic's Analysis*, *supra* note 12. See generally *Report of the Group of*



Almost all nations agree on the desirability, if not the necessity, of some form of international regulation of TNC's. Although there was wide divergence in the attitudes toward TNC's among the members of the Group of Eminent Persons established by the Secretary General of the United Nations, they suggested in a 1974 report that the U.N. Commission on Transnational Corporations be established. In 1974, the U.N. General Assembly created both the Commission and the Information and Research Center on Transnational Corporations.<sup>18</sup> The Commission, composed of forty-eight U.N. members, held its first annual meeting in the spring of 1975. The Information and Research Center began operations in time to present a set of documents to the second Commission meeting in 1976.<sup>19</sup>

In the work program of the Commission, preparation of a code has always been a priority. The resolution establishing the Commission assigned several other tasks to it, including the preparation of a comprehensive information system and the creation of a program of technical assistance to developing countries, generally aimed at enhancing their negotiating capacities. The Commission also was directed to work on a definition of TNC's.<sup>20</sup> Work on the information system, including possible harmonization of accounting and reporting standards, has been mainly in the hands of the Center, although some of the work on the information system has been delegated to a special group set up to analyze questions of accounting. The Commission itself has devoted much time to discussing these matters.

Certain matters are thus far clear. Corporations themselves are impor-

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*Eminent Persons, The Impact of Multinational Corporations on Development and on International Relations*, U.N. Doc. E/5500/Rev. 1, ST/ESA/6 (1974) [hereinafter *Eminent Persons' Report*]; *United Nations, Multinational Corporations in World Development*, Annex II, U.N. Doc. ST/ESA/190, U.N. Sales No. E.73.11.A.11 (1973).

18. The Commission was established pursuant to ECOSOC Res. 1913, U.N. ESCOR, 57th Sess., Supp. No. 1A, at 31, U.N. Doc. E/5570/Add. 1 (1974). The Information and Research Center was established by ECOSOC Res. 1908, U.N. ESCOR, 57th Sess., Supp. No. 1, at 13, U.N. Doc. E/5570 (1974).

19. For a general overview of the background and work of the U.N. Commission on Transnational Corporations, see Seymour Rubin, *Reflections Concerning the U.N. Commission on TNCs*, 70 AM. J. INT'L L. 73 (1976) [hereinafter *Reflections*].

20. This writer has elsewhere suggested that definitions, to be useful in analyzing and possibly solving problems, should describe functions rather than formal structure. E.g., Seymour Rubin, *The International Firm and the National Jurisdiction*, in THE INTERNATIONAL CORPORATION: A SYMPOSIUM (C. Kindleberger ed., 1970) [hereinafter INTERNATIONAL FIRM]; Seymour Rubin, *International Rules for Transnational Corporations*, 1 J. INT'L TRADE L. 1, 10 (1975).

tant economic actors on both the national and international scenes. Their international importance has increased enormously in recent years, just as international trade, commerce, and investment have increased.<sup>21</sup> Moreover, great benefits have been realized as a result of their activities. The concerns of developing nations regarding the "more equitable" distribution of resources and wealth are also great. TNC's often are as concerned with issues of fair treatment—especially in light of numerous expropriations (most prominently in the extractive industries), stability, and an appropriate investment climate—as governments are concerned with excesses or lack of responsiveness by TNC's to the national objectives of the host countries. Perceiving the advantages in a compact, businesses and governments, host and home alike, agree on the desirability of a "code of conduct." It was with little difficulty, therefore, that the U.N. Commission on Transnational Corporations was able to agree at its Second Session to give priority to the preparation of such a code.<sup>22</sup>

The content, form, and nature of such a code, however, is very far from being agreed upon even after five years of discussion and negotiation. Some of the difficulties were foreseen from the outset; some have been overcome; and some have developed out of the negotiation process itself and out of a perceived need for acceptable definitions. The code, whether it emerges as a consensual document or not, is likely to have a significant effect on corporate-state relations.<sup>23</sup>

## II. PROSPECTS FOR A U.N. CODE OF CONDUCT

The writing of a code of conduct will not be on a *tabula rasa*. Indeed, any code that is produced by the U.N. Commission on Transna-

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21. See generally C. Kindleberger, *The Multinational Corporation in a World of Militant Developing Countries*, in GLOBAL COMPANIES, THE POLITICAL ECONOMY OF WORLD BUSINESS 70 (G. Ball ed., 1975); R. BARNET & R. MULLER, *supra* note 14; INTERNATIONAL FIRM, *supra* note 20; R. VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (1971).

22. Actually, the formulation of a code of conduct for transnational corporations has been given a high priority by the Commission since its initial session. *Commission on Transnational Corporations, Report on the First Session*, U.N. ESCOR, 59th Sess., Supp. No. 12, at ¶ 9, U.N. Doc. E/5655, E/C.10/1975/6 (1975).

23. During the First Session, for example, views differed on whether the code should take on a moral tone, should be obligatory and contain penalties for nonobservance, and whether the code should be addressed solely to TNC's or should also contain "general principles guiding the policies of governments." See generally *id.* ¶¶ 41-50.

tional Corporations obviously will reflect to some degree the considerable array of existing "regulatory" agreements or works in progress. Indeed, some part of the U.N. Commission Code will be based on work in other fora. It is likely that the provisions of the ILO Tripartite Declaration on social standards, the work of ECOSOC on illicit payments, and the work already accomplished on restrictive business practices or transfer of technology will provide a basis for code provisions in those areas, or will be incorporated by reference in a code.<sup>24</sup>

It seems evident that at least one of the basic issues that has divided the Commission from the outset—namely, the mandatory or voluntary nature of the code—has largely been decided in other fora. If a code dealing with a relatively narrow range of issues, such as those of restrictive business practices (on which many nations already have national or regional binding legislation) cannot be made "mandatory," there seems little possibility that a code of the sort being negotiated in the Commission will be put into treaty form. Hence, formal national commitments to matters as ill-defined as the broad commitment to "respect for sociocultural objectives, values and traditions" of countries in which TNC's operate, or those subjects to varying interpretation as "adherence to economic goals and development objectives" would go unenacted.<sup>25</sup> Indeed, the 1980 edition of the CTC Reporter alludes to the possibility that the Commission and ECOSOC might decide to convene an international conference to deal with final adoption of a code. The Reporter then notes that "[s]uch conferences are called, of course, not only for the adoption of treaties, but also for the adoption of recommendations or non-formally binding instruments."<sup>26</sup> In the latter category, the CTC

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24. One such existing set of regulatory principles that has been generally taken as a broad statement of the position of countries of the Third World regarding TNC's are the principles relating to the conduct of transnational companies put forward at the third preparatory meeting of the Working Group on Transnational Enterprises of the American Republics. Included in these ten principles were such guidelines as: TNC's should be subject to the laws of host countries and the exclusive jurisdiction of their courts; they should not serve as a policy instrument of a foreign state; TNC's should contribute to the development of the host country; they should refrain from restrictive business practices; and finally, TNC's should respect the cultural identity of the host country. Those principles have received support from the Group of 77. *Reflections*, *supra* note 19.

25. *U.N. Commission on Transnational Corporations, Work Related to the Formulation of a Code of Conduct: Report of the Intergovernmental Working Group on a Code of Conduct on its Eighth, Ninth and Tenth Sessions*, U.N. Doc. E/C.10/1980/62, at 12 (1980).

26. 1 CTC REP. (No. 8) 4 (1980).

Reporter includes the results of the UNCTAD conferences on restrictive business practices (already concluded with a non-binding instrument) and on transfer of technology.<sup>27</sup>

It does not follow, however, that a "voluntary" code would be ineffective. Frequently, references have been made in informal conversations during meetings of the Intergovernmental Working Group on the code, as well as the sessions of the Commission, to the possibility of a "zebra" code—one in which some provisions would be adopted as binding international agreements, while others would be voluntary. But in view of the position of many delegations that each part of the code is and must be dependent on all other parts,<sup>28</sup> and the confirmation of that position by consensus at the 1980 Commission meeting, this seems an unlikely solution. It is of course possible that some provisions will be more precatory in nature than others. The more likely prospect would seem to be that certain areas, addressed only in general terms in the code, might be developed further in specialized meetings into standards that could be the subject of collateral and perhaps binding agreements.

In any case, the legal effect of a multilaterally accepted code of conduct is a matter of some debate.<sup>29</sup> It has been suggested that even unilateral declarations can create international "law." The effect of General Assembly resolutions is similarly controverted, though the majority—or at least more traditional—view is that obligations under the U.N. Charter require Security Council action. Even codes explicitly declared to be "voluntary," such as the OECD Guidelines, may establish norms of conduct that would probably be observed—perhaps as much as if they were formally "mandatory." On the other hand, codes explicitly worded to create non-binding obligations may be considered interpretive of other explicitly binding agreements.<sup>30</sup>

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27. *Id.*

28. This position is seen in the statements of the head of the United States delegation to the First through the Sixth Sessions of the U.N. Commission on TNC's, who indicated that this proposition has been accepted. See *U.N. Commission on Transnational Corporations, Transnational Corporations: Issues Involved in the Formulation of a Code of Conduct*, U.N. Doc. E/C.10/1976/17 (1976).

29. See Hans W. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, in 22 *GER. Y.B. INT'L L.* 11 (1979).

30. *Id.* at 40 (pointing out that the "modalities" paper of the U.N. Center on Transnational Corporations states that even a code adopted explicitly in non-binding form can become "a 'source' of law for national authorities as well as for the transnational corporations themselves."); see *U.N. Commission on Transnational Corporations, Certain Modalities for Implementation of a Code of Conduct in Relation to its*

Moreover, making a non-binding code "effective" may blur the distinction between a voluntary and a mandatory code. Most international fora, including the U.N. Commission on Transnational Corporations, would agree that a code should be effective, and that it should be reviewed from time to time. There already has been considerable discussion as to whether the reviewing mechanisms of the OECD Guidelines, that are explicitly voluntary and not designed to judge the conduct of any individual corporation, have imported considerable compulsion into those Guidelines.<sup>31</sup> A generally accepted set of standards may eventually have as significant effect as a more formal commitment. Indeed, because a formally adopted commitment is likely to be narrowly worded, the looser standards may be more effective in influencing conduct. In any case, review of the effectiveness of such standards may ensure that they do have the intended effects. Already it seems clear that the conduct of corporations—in the field of public disclosure, for example, and in the area of labor relations—has been affected significantly by the existing understandings already mentioned, and by the continuing negotiations and complementary discussions in board rooms and in international organizations.

This ongoing debate indicates that the code negotiations have had and will have effects, almost without regard to the eventual attainment of a formal code. This is a comforting consideration, because attainment of a universally accepted and comprehensive code still faces many hurdles. The Sixth Session of the U.N. Commission on Transnational Corporations, on the final day of its 1980 session, adopted a resolution<sup>32</sup> that was designed to provide guidance to the Working Group in its preparation of a code that would be presented at the Seventh Session of the

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*Possible Legal Nature*, U.N. Doc. E/C.10/AC.2/1978/9, at 8 (1978).

31. For a general discussion of this point in the context of a well-known case before the OECD, see R. BLANPAIN, *THE BADGER CASE AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (1977). The OECD Guidelines have also evoked a statement in the "authorized" summary of that case, to the effect that parts of the Guidelines "though voluntary in origin, may . . . pass into the general corpus of customary international law *even for those multinational enterprises which have never accepted them*" (emphasis added). The summary, prepared by Dr. T.W. Vogelaar of the OECD Secretariat, caused some consternation and controversy in at least some governments of the OECD.

32. U.N. Commission on Transnational Corporations, *Progress Made Towards the Establishment of the New International Economic Order and Obstacles That Impede It: The Role of Transnational Corporations (Draft Resolution II)*, 66 U.N. ESCOR, 6th Sess., Supp. No. 10, at 5, U.N. Doc. E/C.10/1980/75 (1980).

Commission. The resolution affirms the priority status of work on the code, and maintains that it will be "an essential contribution in the accomplishment of the goals of the new international development strategy and the new international economic order."<sup>33</sup> It also affirms that the code should be "effective, comprehensive, generally accepted and universally adopted."<sup>34</sup> This may prove difficult to achieve, particularly in light of the broad, difficult, and sometimes differently viewed concepts contained in other items listed for the guidance of the Working Group. The purposes of the code are to associate TNC's effectively within the new international order; to reaffirm principles of respect for national sovereignty, established policies of countries in which TNC's operate, and for the right of the host countries to regulate and monitor TNC activities; to foster TNC contributions to developmental goals; to prohibit subversion or "interference in the internal affairs of countries and other inadmissible activities"; to deal effectively with activities of TNC's in South Africa and Namibia; to include "provisions relating to the treatment of transnational corporations, jurisdiction and other related matters"; to provide appropriate complementary provisions; and to be considered as an integrated whole. Some of these desiderata are viewed quite differently by various members of the Commission. Most of the industrialized countries, for example, would understand "treatment" to mean "fair treatment," but how that concept would be defined by the developing countries, especially by the Socialist or Communist countries, is another matter. Furthermore, reasonable defense of rights guaranteed by international law as conceived by one nation may be "interference" to another. Other difficulties abound.

The overarching difficulty is to achieve agreement in broad terms on matters of *principle*. Many negotiations over the course of the years have demonstrated that countries, even those with widely divergent social and economic systems, can come to agreement on *specific* issues even though the results often are not completely satisfactory to either side. Agreements generally are reached at least partially because both sides are looking for a solution to enable them to get on with business, not for a victory for the principles of either side. The proliferation of international investment and international trade, a large part of which the TNC's control, is evidence that the agreements—whatever may be the disputes between the parties—are at least a *modus vivendi*. For example, the dispute between the United States and Mexico that arose out of the

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33. *Id.* at 11.

34. *Id.*

oil and agrarian expropriations of the 1930's has never been resolved in principle. Both sides stand on their original and flatly opposed theories of international law. Yet American investment in Mexico has grown—to the apparent satisfaction of both countries—and Mexico is the third largest trading partner of the United States.

The basic problem of agreement on a code of conduct then is precisely that it deals with principles, not with specific and identifiable cases. The foreseeable consequences of establishing these principles, however, are largely unknown, if not unascertainable. One cannot reasonably predict just what factual situation will arise, or just how the general principle will be applied to it. Nevertheless, imagination tends to emphasize the worst case scenario. The necessary vagueness of the language, which in many diplomatic settlements is intended, understood, and a useful aspect of a settlement, becomes a hazard of indefinable dimensions.<sup>35</sup> Despite the guidance of the resolution adopted at the Sixth Session, difficulties remain in attaining a code that will be generally accepted, universally adopted, and uniformly interpreted.

If methods of interpretation, review, and possibly resolution of differences can be reconciled, there is reasonable hope that a code in draft form can be offered to the 1982 session of the Commission.<sup>36</sup> A considerable amount of progress has been made, though it has been slow and has been made on the easier issues. Moreover, there has been a measure of success in other fora—the ILO, the OECD, and UNCTAD, for example. Corporate practice actually has tended to conform to the standards being enunciated and without undue harm. Much discussion has had the effect of taking at least some of the mystery and fear out of the concepts. In addition, it is widely perceived that failure would have a major and negative effect at a time when real and not merely verbal cooperation is essential to the welfare of all. Achievement of a generally acceptable code would not do a great deal to satisfy demands for a mas-

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35. These issues have been dealt with at some length earlier. See *Reflections*, *supra* note 19. The article discussed the differences that are likely to complicate the future progress of the U.N. Commission on Transnational Corporations in making proposals on a code of conduct. The controversial areas include the language to be used in the Commission's report; identification of areas of concern; scope and nature of information-gathering functions; technical cooperation; and the definition of a TNC.

36. Following the initial publication of this essay, a draft of the Code was presented to the Commission. *U.N. Commission on Transnational Corporations, Draft United Nations Code of Conduct on Transnational Corporations: Report to the Special Session*, U.N. ESCOR, Annex II, at 12-27, U.N. Doc. E/1983/17/Rev.1 (1983), reprinted in 23 I.L.M. 626 (1984).

sive transfer of resources from North to South, for such a transfer of resources is not within the legal or economic power of privately owned corporations. A code, however, would be at least one perceptible indicia of cooperation.

Thus, although both content and timing remain largely undefined, reasons exist on all sides to make a strenuous effort to achieve a code. All have recognized that a code need not be engraved in stone, and instead that it may be an evolving set of understandings of varying nature. Further, all recognize that, whatever may be the economic significance of code provisions, achievement or nonachievement of a code will have substantial psychological and political implications. A code may or may not have important beneficial effects, but failure in this effort has very grave risks. Not the least of these risks, from the point of view of the industrialized countries and the TNC's themselves, would be the possibility that an unsuccessful code would nevertheless be adopted as a resolution of the U.N. General Assembly. Although the majority opinion is that such a resolution would have no binding effect, it would provide a precedent for enactment of national or regional legislation. Moreover, it would constitute a mandate to a U.N. Secretariat—in this case, the U.N. Center on Transnational Corporations—which would then have both the authority and the resources for preparation of a series of reports, research studies, and other activities designed to implement such a resolution. This is a possibility that must be borne in mind by those who feel that the code exercise itself is unrealistic—or worse.

The hope—and if realism prevails, the expectations—thus must be that a code will be achieved. It may not be a thing of logical harmony and beauty, but it will be at least something more than a finger in the dike.