THE JURIDICAL REGULATION OF TRANSNATIONAL ENTERPRISES

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Problems regarding multinational companies have been growing in both complexity and world interest. The study of the political, social, economic and cultural aspects of multinational companies has been undertaken by various international forums. The United Nations Organization, through its General Assembly[1] and several specialized agencies, such as the Economic and Social Council[2] (ECOSOC) and the International Labor Organization,[3] has published important papers and reports on this matter. Within the regional scope, the Organization of American States[4] (OAS) and the European Economic Community[5] (EEC) have approached the problem from a different perspective. The Organization for Economic Cooperation and Development,[6] the

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1. The United Nations General Assembly, through resolution 2928 of November 1972, requested governments and international organizations to supply all possible information concerning the legal problems presented by the different kinds of multinational enterprises and the implications thereof for the unification and harmonization of international trade law. G.A. Res. 2928, 27 U.N. GAOR, Supp. (No. 30) 114, U.N. Doc. A/8730 (1972).

2. U.N. Department of Economic and Social Affairs, The Impact of Multinational Corporations on the Development Process and on International Relations, U.N. Doc. E/5500/Rev. 1., ST/ESA/6. (1974). The Multinational Corporations in World Development, U.N. Doc. ST-ECA/190 (1973).

3. International Labor Organization, The Multinational Enterprises and the Social Policy, New Series No. 79 (1973).

4. Organization of American States, El Marco Jurídico de las Empresas Transnacionales, OEA/SER. K/XXI., CIDIP/2, (1973); Organization of American States, La Estrategia de las Corporaciones Internacionales y el Sistema Jurídico de los Estados: La Experiencia Latinoamericana, CIDIP/4, (1974); Organization of American States, Estudio Comparativo de las Legislaciones Latinoamericanas Sobre Regulación y Control de la Inversión Privada Extranjera, OEA/SER.G. CP/Int. 680/75 (1975).

5. European Economic Council, Proposed Statute for the European Company, 3 European Comm. Bull. No. 8 (Supp. 1970). European Economic Council, Multinational Undertaking and Community Regulations, 6 European Comm. Bull., (Supp. S15/73 1973).

6. Organization for Economic Cooperation and Development (OECD), Investing in Developing Countries, No. 27655 (1970) and No. 30755 (1972); Organization for Economic Cooperation and Development (OECD), Guide On Restrictive Business Practices, Vol. 6, No. 31885 (1973).

United Nations Conference for Trade and Development[7] and the Instituto para la Integración de la América Latina,[8] also have tackled this particular subject. Each of the foregoing studies, however, has approached the subject of multinational companies with a specialized focus. Not only the reports submitted by these international agencies, but also essays rendered by other institutes of scientific research, highlight the advantages and disadvantages of transnational investment from an economic, political or labor point of view. The social impact of such transnational investments is emphasized, but an analysis of the matter within a legal framework is avoided or barely touched upon.

One could conclude logically that the jurists are lagging behind the politicians and economists and, consequently, lawyers have not made a significant contribution in this field. Such an assertation is understandable for legal minds have abstained from participating in this debate due to a lack of solid grounds. The jurist, in fact, has felt as though he were moving in quick sand. In order to avoid this quagmire, a new compass is necessary which will enable the jurist to analyze the recent phenomena, which clearly are beyond traditional legal frameworks regarding the treatment of foreign investment. Thus, if we assume that we are stepping on unexplored terrain when we tackle the problems, any attempt to suggest adequate solutions in this murkey area constitutes a worthwhile endeavor.

The law, by its very essence, is a dynamic discipline and, as it evolves, it endeavors to capture socio-economic phenomena which are changing continually in both time and space. Realistically, then, our initial attempts to insert a legal analysis into this area may be incomplete. The theme is so new and complex that only the utmost perseverance at the domestic and international levels will yield an adequate perspective. Nevertheless, it is hoped that these initial attempts will spark further efforts of more depth and substance.

Since the end of the Second World War, transnational enterprises (TNEs) have experienced a spectacular performance in the foreign

7. United Nations Conference in Trade and Development, (UCTAD), Private Foreign Investment in its Relationship to Development, TD/134 (1971).

8. Instituto para la Integración de la America Latina (INTAL) El Regimen Legal de las Sociedades Anónimas en los Países de ALALC (1971); Estudio de la Legislación Aplicable a las Empresas de Capital Multinacional en Areas de Integración Económica. Serie Estudios No. 3 (1971). Las Inversiones Multinacionales en el Desarrollo y la Integración de América Latina (1968). El Tema de la Empresa Multinacional en una Perspectiva Latinoamericana, con Referencia Especial a los Problemas Organizativos y jurídicos de este tipo de empresas. 32/DT.1. (1972). Empresas Multinacionales Latinoamericanas. Estudio de los Aspectos Jurídicos de la Asociación Internacional de Empresas en América Latina. INV-8/DT.1/Rev. 3 (1973).

investment field. According to statistics assembled in an essay prepared by the United Nations,[9] by 1972, the total direct foreign investment in the world exceeded 165 thousand million United States dollars. Of this total investment, approximately sixty percent belonged to United States owned enterprises and the balance belonged correspondingly to Great Britain, France, West Germany, Switzerland and Japan. It is interesting to note that only two hundred companies were controlling seventy-five percent of all sales and international trade and that these same companies also were in direct control of eighty-two percent of all foreign branches and subsidiaries. The foregoing facts should give us adequate notice that, unless this trend is oriented sufficiently, the growth of these modern "goliaths" will be out of control within the next few years.

The main problem stems from the fact that the TNE transcends the traditional legal framework regarding the treatment of foreign investments. This type of conglomerate has fewer attachments to any given State and maintains various corporate headquarters while engaging in corporate activities within mutiple countries. Moreover, the stockholdings in these conglomerates are of a multinational character. It is not surprising, then, that the classical notions of private international law can no longer accommodate TNEs, for they are not the typical foreign corporation doing business abroad, nor are they analogous to a foreign business branch licensed in accordance with the local regulations of the host country. Hence, from a national and international point of view, the traditional legal treatment of foreign investment has become inadequate if not wholly obsolete. This new juridical phenomenon presents itself in such an unconventional manner that not one stable precedent has been set, nor can a rule be established, for measuring future cases. The complexity of the situation is furthered when one considers a series of inherent problems that must be faced concurrently. Some of those problems are the transfer of technology, antitrust policies, restrictive commercial practices, the impact of the balance of payments, and undue interference in internal political matters.

In any event, when attempting to define a new legal framework for TNEs, the question arises as to when and where the foreign company becomes a transnational entity. When does the imbalance take place to such a degree that domestic law is no longer applicable?

9. U.N. Department of Economic and Social Affairs, The Multinational Corporation in World Development, ST/ECA/190 (1973). This document was a basic instrument for the report to be submitted by the Group of Eminent Persons to ECOSOC.

What elements would denote a company as a transnational company? It could be that the volume of annual sales, the number of countries in which business is transacted, or the origin of the investment would provide guidelines to determine the moment at which a foreign company becomes a TNE. Assuming that some of these guidelines would help to identify a TNE, the appointing of a supranational entity to classify it still would be necessary; yet, any definition would contain subjective evaluations, gray area cases and periodical readjustments.

In spite of these seemingly insurmountable hurdles, the jurist should strive to define and confine the features of TNEs. If not, all that can be accomplished is mere speculation purely on theoretical grounds. This article shall outline various possibilities aimed at establishing a legal framework for TNEs. The author shall attempt to focus the juridical impact according to the viewpoint of scope and the use of a proper legal instrument. The scope viewpoint will concentrate on the space or territorial sphere of application, while the view point regarding the use of a proper legal instrument will focus on the methodology to be implemented. Reference to territorial scope may be domestic, bilateral or multilateral. Reference to the proper legal implementation could range from national legislation to an effective international treaty. To clarify these premises, the following schematic outline is offered:

TERRITORIAL SCOPE	PROPER LEGAL METHOD
I. Internal	A. National legislation of host country.
	B. National legislation of home country.
II. Bilateral	A. Agreement between host country and home country.
	B. Agreement between host country and TNE.
III. Multilateral[10]	A. Uniform law.
	B. Model or draft law.
	C. Code of conduct.
	D. International treaty.

In addition to the formal adoption of any of the foregoing patterns, the control of TNEs could be implemented through the creation of a center for research and information to provide administrative services

10. Within the multilateral approach the alternatives of universal, regional, and subregional scope can be distinguished.

in this field, or the creation of a commission on TNEs established within the framework of an international organization.

I. THE INTERNAL SCOPE

A. National Legislation of Host Country

The legal treatment of foreign investment traditionally has been regulated by national law. Until recently, such national regulations had been oriented to govern the typical and traditional patterns concerning the status of aliens and their right to do business abroad as individuals or as corporate entities. The treatment afforded these aliens varied according to the domestic climate. Some countries granted a recognized minimum standard, while others provided the aliens equal treatment with nationals and still others afforded similar status to foreigners, but subjected them to restrictions regarding certain segments of their economic activity. These restrictions were usually concerned with natural resources or the rendering of services deemed to be of social interest.

In recent years, however, a change in national law can be detected. The legal status of foreigners does not seem to be of paramount concern; it is the economic repercussions of their activity as private investors that now matters most. The former policy of using direct foreign investment as a vehicle for development, particularly in the less developed countries, has now been supplemented or substituted by more profound objectives regarding social responsibilities. This trend is exemplified in the Exposition des Motifs of the new Mexican Law Regulating Foreign Investment when it states that:

> Foreign investment has been contributing during recent years to our development, to supplementing domestic savings and, thus, to contributing to the gradual increase of the gross national product. However, our economic objectives are now subject to a different policy that not only aims to increase our production or to reach industrialization at any price. Our nation has decided to endeavor to achieve a balanced growth of the economic, social and cultural aspects of its development and not to yield to the seduction of fictitious mirages which may only lead to new forms of foreign dependence.[11]

11. The Exposition of Motives of the FIL (*Exposición de Motivos de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extrajera*), Dec. 27, 1972. *See* Law to Promote Mexican Investment and to Regulate Foreign Investment, (*Ley Para Promover La Inversión Mexicana y Regular la Inversión Extranjera*) in Official Daily of Mexico (*Diario Oficial*) Mar. 9, 1973. The law became effective on May 9, 1973.

A similar philosophy is the basis of recent legislation enacted by Agentina,[12] Brazil,[13] Paraguay,[14] Uruguay[15] and the countries of the Andean Group.[16] In spite of the newness of this legislative policy regarding direct private investment, none of the national laws that the author has consulted deals with the *specific* regulation of TNEs. One must assume that the TNE is but one of the entities defined by such legislations under the terms of "foreign investor", "foreign capital", or "foreign enterprise".

The primary question, then, is whether the internal domestic law of the host country is sufficient to cope with the complexity of problems surrounding TNEs. An essay prepared by the Legal Department of the Organization of American States (OAS),[17] points out that the greatest obstacle to unilateral control under the host country's legislation is the fact that the TNE, by its very structure, can evade various aspects of control merely by acting outside the scope of national boundaries.

In spite of the disadvantages outlined above, it must be admitted that the most effective legal control of TNEs is within the local jurisdiction of the investment recipient country. Perhaps what is needed is a more sophisticated level of legislation that would cover the control of direct foreign investment by host countries; yet, even if such

12. Law No. 20557 on Foreign Establishments (*Ley Número 20557 sobre Radicaciones Extranjeras*) in Official Daily of Argentina (*Diario Oficial*), Nov. 29, 1973; Decree No. 413, in Official Daily of Argentina (*Diario Oficial*) Feb. 5, 1974.

13. Law No. 4131 as amended by Law No. 4390 and Decree No. 55762 (*Ley Número 4131 reformada con la Ley Número 4390 y Decreto No. 55762*), in Official Daily of Brazil (*Diario Oficial*) Sept. 3, 1962, Aug. 29, 1964, Feb. 18, 1965.

14. Law No. 216 Capital Investment for the Socioeconomic Development of the Country (*Ley Número 216, Inversiones para el Desarrollo Económico y Social*) in Official Daily of Paraguay (*Diario Oficial*) Nov. 9, 1970.

15. Law No. 14179, Norms for the Application of the Law on Foreign Investments (*Ley Número 14179, Normas para la Aplicación de la Ley de Inversiones Extranjeras*) in Official Daily of Uruguay (*Diario Oficial*) Mar. 28, 1974. Decree No. 808/74 embodies in one text all legal provisions including the amendment introduced by Law No. 14244 Regulating Foreign Investments in Uruguay. (*Ley Número 14244, Reglamento para Inversiones Extranjeras*) in Official Daily of Uruguay (*Diario Oficial*) Oct. 10, 1974.

16. Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties, Decision 24 (*Régimen Común de Tratamiento a los Capitales Extranjeros y Sobre Marcas, Patentes, Licencias y Regalías Decisíon 24*), *signed* Dec. 31, 1970; 11 INT'L LEGAL MATERIALS 152 (1972). The text of Decision 24 incorporates the amendments introduced by Decision 37 (June 24, 1971), Decision 37-A (July 17, 1971) and Decision 70 (Feb. 13, 1973) of the Cartagena Agreement, *infra* note 28.

17. Organization of American States, The Legal Framework of the Transnational Enterprises (*El Marco Jurídico de las Empresas Transnacionales*) 45, OEA/SER. K/XXI. CIDIP/2, (1973).

legislation could be enacted into national law, the question remains as to whether it could be applied extraterritorially. One solution might be available through the interplay of conflict rules, whereby the courts of one nation could apply the substantive law of the other nation. However, this alternative requires some form of international agreement and this aspect shall be considered further *infra*.

B. National Legislation of Home Country

The unilateral control of TNEs may be two-fold. On the one hand, national law is applied and controls the conduct of *foreign companies* doing business within the political limits of the country. On the other hand, national law also governs the activities of *its own companies* doing business abroad. It must be assumed that this latter type of control can only be exercised through a State's long-arm powers, which are used to enforce its own law by subjecting the parent corporation and, indirectly its subsidiaries and affiliates abroad, to various measures of disciplinary action.

The basic problem of this type of extra-territorial legal power is that it may clash with the sovereign rights of the host country. Examples of these frictions are seen in the repeated attempts to apply United States antitrust law to acts abroad and in the enforcement of such restrictive measures by subjecting foreign countries to economic embargo pursuant to United States public policy. In most of these cases, the long-arm statute of the home country touches the sensitive area of national sovereignity and, yet, the broad principle of home control may be desirable. Consider the hearings and investigations conducted by the sub-Committee on Multinational Corporations within the United States Senate. Information and corruptive practices of some TNEs are disclosed and this could lead to a more effective domestic control and could impede the TNE from actions which could embarrass their own government and tarnish its image in world trade competition.

Similarly, the United States Securities and Exchange Commission recently has adopted severe measures aimed at curbing improper contributions and pay-offs to foreign officials. This enables the ordinary citizen to gain some concrete knowledge of the extent to which United States multinational companies are involved in government corruption within developing countries. The Securities and Exchange Commission has the discretion[18] to conduct investigations into possible violations of the Securities and Exchange Act and to bring actions to enjoin

18. Securities Exchange Act of 1934, § 21, 15 U.S.C. § 78a (1934).

such violations. In addition, provisions contained in the United States Internal Revenue Code[19] provide a deterrent to illicit foreign practices, in that any business deduction for payments made to officials or employees of foreign countries is denied.

The foregoing is indicative of a positive trend because the great majority of TNEs have their home headquarters in the United States and, thus, are subject to compliance with United States domestic law. Transgression of such law exposes the TNE to the possibility of world-wide scandal which makes the desireability of unilateral legal control sound even more convincing.

II. THE BILATERAL SCOPE

A. Agreement Between Host Country and Home Country

This course of action may occur through the cooperative efforts of the foreign country where the TNE conducts a portion of its operations and the home-nation of the TNE. Such cooperation may result in a bilateral agreement which could be an adequate instrument to solve some of the problems where unilateral action does not suffice. Hence, matters affecting double taxation, dual nationality of corporations, problems arising out of the operation of airlines and other craft in both countries, could be covered by a bilateral treaty. The treaty also could provide such mechanisms for solving possible disputes between the two countries, as arbitration forums, buffer safeguards and enforcement of money judgments or arbitral awards.

Regardless of the possible benefits of this bilateral system, it would not be the best answer to the problems regarding TNEs. In the first place, TNEs operating in several countries would have to abide by a different treaty in each country. Because every host country has singular peculiarities, the negotiating of conditions for a different treaty in every case could prove troublesome indeed for the home country. Concessions based on most-favored-nation clauses, the adoption of paternalistic attitudes toward less developed countries, and the possibility of agreements that do not reflect arms length negotiations are but a few of the obstacles that must be considered. Additionally, it is entirely possible that recipient nations would be suspicious of the undue influence that TNEs could exert upon their own government which would subrogate the high principles of the State to the private interests of the enterprise.

In summary, it is submitted that the bilateral approach as an

19. I.R.C. § 162(c).

alternative avenue for the control of TNEs could be effective only if entered into by countries that are experiencing similar stages of economic development. In other words, both countries should be either "exporters" of TNEs or belong to the less developed world.

B. Agreement Between Host Country and TNE

Before embarking on an evaluation of this method, one principle should be established. TNEs or multinational corporations are not recognized as "persons" under international law and, thus, they lack *jus standi* in international courts. Nevertheless, the fact remains that many TNEs do negotiate and enter into agreements with the governments of the countries wherein they plan to invest. Several developing countries are of the opinion that their economies need foreign capital and that they should open their doors to transnational conglomerates. Their bargaining power *vis a vis* these giants is commensurate with their own resources, native technology and managerial expertise. It is obvious, then, that the less developed the host country, the weaker is its negotiating position. Therefore, it should not be surprising that third-world countries accept the terms and conditions imposed by the TNE. After all, the TNE has the power and means to develop untouched natural resources, to create badly needed jobs, and to improve, at least temporarily, the image of local government. Some of these terms are agreed upon in bilateral conventions or "treaties" and have not been an unusual occurrance even when socialistic countries of Eastern Europe have dealt with Western industrial giants in the automotive field.

Legal advisors of TNEs feel that many of the problems attributed to them could be avoided if a clear understanding of the rules of the game were established at the inception of the agreement. Pursuant to this school of thought, matters involving jurisdiction, taxation, licensing, transfer pricing, expropriation and other sensitive areas could be dealt with by an agreement between the government of the host country and the top management of the TNE. Notwithstanding these arguments, developing states should refrain from entering into this type of agreement for it may grant TNEs direct access to international courts, including arbitration courts. In addition, the foregoing situation would place TNEs in an advantageous position over national enterprises. The TNEs' claims could be heard eventually by international tribunals because of the bilateral agreements entered into by the states of host and home countries. Such claims, however, could not be heard

by international tribunals as the exercise of a contractual right demanded by a private corporation.

III. THE MULTILATERAL APPROACH

A. The Scope

The Report of the Group of Eminent Persons[20] to study the Role of Multinational Corporations on Development and on International Relations addressed to the Secretary General of the Economic and Social Counsel, states that the group considers the conclusion of a general agreement on the subject of TNEs an appropiate long term objective. Such an agreement would have the force of an international treaty and would contain the necessary provisions for machinery and sanctions. The group further advised that the need for such an agreement had been perceived as early as 1948 in the drafting of the Havana Charter for an International Trade Organization.

The Group of Eminent Persons admitted, however, that it is still premature to propose serious negotiations on such an agreement and for the machinery necessary to implement its mandatory enforcement. The Report emphazised that, while the primary responsibility for taking action rests with individual governments, national measures will be ineffective and frustrated unless they are accompanied by cooperative action at the international level. Therefore, the Group recommended:

> that a commission on multinational corporations should be established under the Economic and Social Council, composed of individuals with a profound understanding of the issues and problems involved.[21]

This alternative of subjecting the control of multinational corporations to International Law, even if one concedes that it is premature at the present stage, offers distinctive advantages. The apparent failure of the General Agreement on Tariffs and Trade (GATT) to prevent restrictive practices in international trade, linked with the TNEs resistance to be permanently tied to their home countries in order that they may enjoy a convenient "statelessness" which allows them more freedom of action, constitutes valid reasons for advocating supranational supervision. Moreover, the fact that TNEs are subject to various laws, such as those of the country where the parent company is domiciled and those laws governing the business of each subsidiary and affiliate, could be an additional argument for international regula-

20. 13 INT'L. LEGAL MATERIALS 833 (1974).
21. *Id.* at 831.

tion of TNEs. The fact remains that, in spite of an interplay of multiple national laws, the TNE *as a whole* is not subject to the control of any specific legislation. Therefore, some sort of multilateral action would seem appropiate and could be made at the different levels of universal agreement, regional agreement, or sub-regional agreement.

1. *Universal agreement.* Regarding universal or quasi-universal agreements concerning the legal regulation of TNEs, such should be negotiated under the auspices of the United Nations using the information and materials assembled by the Commission on Transnational Corporations. Obviously, the Commission should rely on information provided by the Information and Research Centre, and not overlook the work of other specialized agencies within the United Nations, in addition to information gathered from other scientific organizations and forums of international prestige. It should be pointed out that, in the Charter of Economic Rights and Duties of States, it is provided that the state has the right

> to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform to its economic and social policies.[22]

The Charter also provides that TNE's should not interfere in the internal affairs of the host country and that every state should, taking fully into account its sovereign rights, cooperate with other states in the exercise of such privilege.[23]

The guidelines established by the Charter constitute a landmark in the progressive codification of international law. The negative votes and the abstentions of some of the industrialized countries when the final text of this instrument was voted at the General Assembly of the United Nations, should be construed as a defense against other provisions contained in the Charter and not as a rejection of the right of the state to supervise the activities of the TNE within its jurisdiction. It seems that the objections of the industrialized countries were directed primarily against the text of sub-section (c), which dealt with the duty of the state, in cases of expropriation, to pay the aggrieved party an "appropriate" compensation. The Charter provides that such compensation shall be paid in accordance with national law and not necessarily pursuant to the traditional concepts of international law.

22. Charter of Economic Rights and Duties of States (CERDS), G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974).

23. *Id.* ch. II, art. 2, § 2(b).

Therefore, it is hoped that when minor amendments are introduced to this instrument for the purpose of eliminating the remaining misunderstandings, the charter will be unanimously approved by all members of the United Nations and every state's right to regulate and oversee the activities of TNEs within its national jurisdiction will be accepted automatically.

2. *Regional agreement.* Experience already observed at a regional level may prove useful in establishing multilateral control of TNEs. Countries within a particular area have adopted certain mechanisms for the purpose of self defense. The coincidental interests of the economies of certain countries have resulted in uniform trends toward the safeguarding of regional areas against the challenge of multinational entities.

The best example of regional control is found in the European Economic Communities (EEC) where some of the provisions contained in the Treaty of Rome,[24] particularly those regulating the rules on competition, were implemented through the organization. According to the Treaty, when the activity of one or more enterprises affects trade between member states, or when it restricts competition, or when any company abuses a dominant position within the common market, the commission is empowered to take the appropriate action to correct such activity. The European communities have met these problems by adopting antitrust policies and other mechanisms aimed at protecting free competition and trade.

However, during the last ten years the governing bodies of the EEC have become acutely aware of the growing presence of non-European enterprises within the community and a new plan is taking shape. Measures have been adopted to strengthen the competitive capabilities of regional enterprises. Pursuant to this new policy, the EEC has been initiating the mergers of European companies even if such mergers may appear to conflict with articles 85 and 86 of the Treaty of Rome and even though the mergers sometimes occur with extra-regional entities. The sponsoring of holding companies and the formal structuring of the European company also can be viewed as mechanisms of self defense adopted by the community.

Other examples of regional economic integration are the Latin American Free Trade Association (LAFTA) and the Central American Common Market (CACM). These two systems form the foundation for

24. Treaty of Rome, *done* Mar. 25, 1957, art. 85, 86, 298 U.N.T.S. 3, 68, 69.

the creation of the Latin American Common Market. However, neither the Montevideo Treaty,[25] nor the Tegucigalpa Treaty,[26] contain any specific reference to the legal treatment of direct foreign investment within free trade areas. In the Declaration of Punta del Este,[27] the Presidents of Latin America recognized that foreign private enterprise should fulfill an important function in achieving the objectives of Latin American integration. Aside from the worthwhile research and efforts conducted by the *Instituto para la Integración de América Latina* (INTAL), the only positive contribution in the area of integration is found in the legal instruments supporting the Andean Pact, that is the Cartagena Agreement and the decisions adopted by its commission thus far.[28]

3. *Sub-regional agreement*. Pursuant to the provisions of articles 27 and 28 of the Cartagena Agreement,[29] the commission approved two important decisions, numbered twenty-four and forty-six, which established a common system for the treatment of foreign capital and a uniform system to govern multinational enterprises. Decision twenty-four[30] has as its fundamental objective the strengthen-

25. Treaty Establishing a Free Trade Area and Instituting the Latin American Free Trade Association, *signed* at Montevideo, Uruguay, Feb. 18, 1960, 1 INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, INSTRUMENTS OF ECONOMIC INTEGRATION IN LATIN AMERICA AND THE CARIBBEAN 3 (1975).

26. Multilateral Treaty of Free Trade and Central American Economic Integration, *signed* at Tegucigalpa, Honduras, June 10, 1958, 2 INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, INSTRUMENTS OF ECONOMIC INTEGRATION IN LATIN AMERICA AND THE CARIBBEAN 365 (1975).

27. Declaration of the Presidents of America, *signed* at Punta del Este, Uruguay, Apr. 14, 1967, 1 INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, INSTRUMENTS OF ECONOMIC INTEGRATION IN LATIN AMERICA AND THE CARIBBEAN 165 (1975).

28. Agreement on Andean Subregional Integration, Cartagena Agreement, *signed* at Bogotá, Colombia, May 26, 1969, 1 INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, INSTRUMENTS OF ECONOMIC INTEGRATION IN LATIN AMERICA AND THE CARIBBEAN 175 (1975); 8 INT'L LEGAL MATERIALS 910 (1969). This Agreement was originally signed by Bolivia, Colombia, Chile, Ecuador, and Perú. Venezuela acceded to it in the Final Act of The Negotiations Between The Commission of The Cartagena Agreement And The Government of Venezuela For The Adherence of That Country to The Agreement, *done* at Lima, Perú, Feb. 13, 1973, 1 INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, INSTRUMENTS OF ECONOMIC INTEGRATION IN LATIN AMERICA AND THE CARIBBEAN 219 (1975); 12 INT'L LEGAL MATERIALS 344 (1973).

29. *Id.*

30. Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses and Royalties, Decision 24, (*Régimen Común de Tratamiento a los Capitales Extranjeros y Sobre Marcas, Patentes, Licencias y Regalías, Decisión 24, signed* Dec. 31, 1970, 1 INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, INSTRUMENTS OF ECONOMIC INTEGRATION IN LATIN AMERICA AND THE CARIBBEAN 296 (1975); 11 INT'L LEGAL MATERIALS 126 (1972).

ing of national enterprises and the regulation of foreign investment activities within the countries of the sub-region, in such a manner that they may contribute toward the goals of national development. The common regime defines what could be construed as a "foreign investor", "foreign enterprise" and "mixed enterprise", but it does not contain any specific reference to TNEs. One must assume that the concept of TNE is embodied within the more generic concept of "foreign enterprise".[31]

Decision forty-six[32] does not contain the definition of "multinational enterprise". Nevertheless, one may infer through the provisions set forth in chapters two, three and four, that such enterprises are envisaged as vehicles for organizing sub-regional investors and oriented to foster projects for specific industries and to develop infrastructural resources. They should be established in the form of stock companies, and their bylaws should comply with the legislation of the country where the principal domicile exists.

Notwithstanding the semantic resemblance, multinational enterprises within the context of the Cartagena Agreement are not to be confused with TNEs. They are, in fact, counterparts. Some of these enterprises are already operating within the country members of the Andean Pact, and other "Latin American multinationals" outside of the Andean countries, have started to spread. A typical example is the *Empresa Multinacional Naviera del Caribe*, which is presently operating under the auspices of the governments of Mexico and several Caribbean nations.

B. The Method

1. *Uniform Law*. One alternative within the methodology of multilateral control would be to unify the substantive law governing TNEs. Such a unification should aim for the attainment of a uniform set of substantive rules in the field; an exercise which may prove more difficult than assembling a cohesive code of conflict rules.

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31. *Id*. art. 1, of the Common Regime defines foreign enterprise as follows:
An enterprise whose capital in the hands of national investors to less than 51% or, if that percentage is higher, it is not reflected, in the opinion of the proper national authority, in the technical, financial, administrative, and commercial management of the enterprise.

32. Uniform Regime on Multinational Enterprises and Regulations of the Treatment Applicable to Sub-regional Capital, Decision 46 of the Commission, Dec. 18, 1971, as amended, 1 INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, INSTRUMENTS OF ECONOMIC INTEGRATION IN LATIN AMERICA AND THE CARIBBEAN 326 (1975), 11 INT'L LEGAL MATERIALS 357 (1972).

Nevertheless, when pursuing this technique, the contracting parties must endeavor to reach a consensus on material issues for a uniform law is the ultimate goal. Legal uniformity normally is the result of lengthy negotiations carried out at a plenipontentiary conference. The final text, in such a situation, follows the orthodox course of multilateral agreements regarding signatures, ratification, effectiveness and accession by other states. The ultimate purpose of uniformity is achieved when each of the contracting parties incorporates the uniform text into their national legislation through their local constitutional procedures. This should be done without altering the intrinsic contents of the unified law unless, of course, the convention had been ratified subject to certain reservations imposed by internal public policy.

The unification and harmonization of the rules governing TNEs may prove to be a more hazardous process than attempts to unify other fields of international law. The significant success reached in such matters regarding the international sale of goods, maritime transportation and commercial arbitration is well known, but attempts at unification of norms relating to transnational conduct is a task surrounded by complex conceptual issues as well as deep emotional feelings.

The International Institute for the Unification of Private Law (UNIDROIT) has expended worthwhile efforts in this direction. The fact that UNIDROIT has made recommendations to the International Chamber of Commerce (ICC) in connection with the unification or harmonization of laws governing business associations is common knowledge. Such recommendations enabled the ICC to publish a practical guide describing the best method for incorporating companies with multinational purposes. Notwithstanding their efforts, it is only recently that UNIDROIT has been one of the forums where the issue of TNEs has been discussed.

The United Nations Commission on International Trade Law (UNCITRAL) has included the subject of TNEs on its pending agenda. During the work session in Geneva, in April of 1973, a resolution was adopted which sought the collaboration of the United Nations' General Secretary for the purpose of gathering relevant information on the juridical problems affecting TNEs and to determine the best method for the unification and harmonization of international commercial law.[33] The author is unaware as to whether the Secretary General of the

33. G.A. Res. 205, 21 U.N. GAOR Supp. (No. 16) 99, U.N. Doc. A/6316 (1967).

United Nations has received answers to the questionnaire posed to each of the member states and if any such answers have been referred to UNCITRAL for further action.

It seems, however, that some of the initiatives taken by several specialized agencies of the United Nations, prior to ECOSOC Resolution 1913,[34] which established the Commission on Transnational Corporations, will now be held in abeyance. This is so at least until recommendations are made by the commission which is now *the* official forum within the United Nations for comprehensive consideration of issues relating to TNEs.

2. *Model or draft law.* Some decades ago, under the auspices of institutes of scientific research, or universities of renowned prestige, it was vogue to prepare "model laws" or "draft conventions". Although these drafts and models rarely materialized into international instruments, they did establish guidelines of progressive thought pertaining to different fields of law. These drafts actually stated the better principles upon which future multilateral law should rest.

Unlike uniform law, model or draft law is not designed for eventual adoption as a domestic rule of law. Rather, it carries scientific or doctrinaire persuasion and, therefore, may or may not be followed. Each state decides whether to integrate it into its domestic legislation or whether to adopt alternatives within the suggested model.

International and regional organizations, such as the United Nations and the Organization of American States, could outline basic guidelines regulating foreign investment within their member countries highlighting the philosophy or rationale supporting the rules. Such ideal guidelines would be inspirational for those governments that are confronting the problems of foreign capital, but are, nevertheless, still lagging in the task of enacting proper regulations.

3. *Code of conduct.* For some time there has been much talk within the various international forums regarding a "code of conduct". That such a code should contain a set of rules governing the behavior of TNEs is agreed upon, but no agreement as to the binding nature of such a code has been reached. The less developed countries, who are the recipients of investments made by the industrialized nations, would like to see those rules made mandatory, while

34. ECOSOC Res. 1913, 57 U.N. ESCOR (Supp. 1A) 3, U.N. Doc. E/5570/add. 1 (1975).

the latter agree only to regard the code as a self-imposed set of principles or ethical guidelines.

The Report of Eminent Persons points out that the term "code" itself is full of ambiguity. A code may represent the consolidation into one document those laws, decrees and rules which are already adopted and enforced. Mere "declaration of principles", however, that simply states the moral guidelines to which TNEs should subject themselves voluntarily, does not seem an adequate answer. The problems involved are too varied and complex to be solved entirely by self-discipline. A middle-ground that lies somewhere between an instrument of a compulsory character and a set of rules of mere ethical persuasion should be sought.

Such a compromise could be found if a proper forum, such as the Commission on Transnational Corporations of the ECOSOC, evolved a set of recommendations, which would represent the basis for a code of conduct in this matter. The commission received and studied lists submitted by the less developed countries and, also, by the industrialized nations. These lists reflected the countries' concerns in this area of TNEs. The commission was required under ECOSOC Resolution 1913 to submit a detailed program of work concerning transnational corporations to the council in the summer of 1976. The commission met twice, once in March of 1975 and once in March of 1976. Its first task of designing a program to be submitted to the ECOSOC has been properly concluded.

Other forums also are working on a code of conduct. The Organization for Economic Cooperation and Development (OECD) has agreed on the text for a conduct code.[35] The document spells out rules for corporate behavior on issues ranging from bribery to restrictive business practices and disclosure of information. In the western hemisphere, the working group, which was established in 1974 as a result of the "new dialogue", submitted an *aide memoire*[36] which contains ten guidelines for insuring the "good conduct" of TNEs. The commandments stress, *inter alia*, the obligation of consortiums to

35. The twenty-four member countries of the Organization for Economic Cooperation and Development (OECD) agreed on the text by declaration on June 21, 1976. N.Y. Times, June 22, 1976, § I, at 49, col. 6. Excerpts from the text on the Code of Conduct were published in the N.Y. Times, May 27, 1976, § I, at 6, col. 1.

36. BANCO NACIONAL DE COMERCIO, S.A., COMERCIO EXTERIOR DE MEXICO, Vol. XXV, No. 4, Apr. 1975, at 376. For the English text of the 10 guidelines for conduct as prepared by the Working Group (Latin American), see Organization of American States, Opinion of the Inter-American Juridical Committee on Transnational Enterprises, OEA/Ser. G./ CP/Inf. 829/76, at 17 (1976).

submit to the exclusive jurisdiction of the courts within the host country, noninterference in the host country's internal affairs, compliance with the objectives of national development, disclosure of pertinent information about activities, avoidance of all kinds of restrictive practices, and respect accorded to the social and cultural identity of the host country.

The Permanent Council of the Organization of American States has recently adopted its own resolution. This resolution takes into account the work being done in the Inter-American Juridical Committee (IJC) which stresses continued endeavors toward the formulation of a code of conduct to be observed by TNEs. In a more recent opinion,[37] the IJC concluded that the American states should cooperate among themselves regarding TNEs. Such cooperation should be regarded as a priority objective, in both the formulation of general rules and the examination and settlement of disputes.

The feasibility of adopting a code of conduct, that would unify the criteria of all groups concerned on a short term basis, is not foreseeable. The areas of concern and the nature of the instrument are viewed from entirely different angles. Hopefully, however, these divergencies gradually shall vanish and, in the near future, a consensus or compromise shall be reached among the nations of the world.

4. *International treaty*. The negotiation of a general agreement on TNEs, although ambitious, is not entirely unrealistic. Various international treaties exist that deal with foreign commercial companies at universal and regional levels. International codification has covered such legal aspects as recognizing corporations, doing business abroad, *jus standi* in domestic courts, and requirements concerning licensing and local registration.

Thus, harmonization of the law in this area also can be accomplished through a multilateral convention. Moreover, as a technical devise, a treaty possibly could be the optimum solution to this problem. Professor Eugene V. Rostow believes that

> the successful negotiation of an international treaty which could facilitate a massive movement of capital and of business from the industrialized to the developing nations, through "multinational" companies, is among the most urgent tasks of diplomacy.[38]

37. OEA/Ser. G./CP/Inf. 829/76, at 124 (1976).

38. Rubin, *Reflections Concerning the United Nations Commission on Transnational Enterprises*, 70 AM. J. INT'L L. 73 (1976).

Although the attainment of universal or quasi-universal agreement on this matter may take a long time, it is not unlikely that states within a regional area that have common attitudes toward foreign investment, and similar economic objectives, could agree on an international treaty concerning the treatment to be accorded TNEs. The method to be pursued, however, is a matter of time and space.

IV. MECHANISM TO IMPLEMENT INTERNATIONAL CONTROL OF TNE'S

A. International Commission

When the Group of Eminent Persons submitted its report to the ECOSOC, no international machinery dealing with the activities of TNEs existed. After examining the functions and responsibilities vested in the United Nations[39] the group concluded that ECOSOC was the appropriate body to consider the subject. Thus, the group recommended "that a commission on multinational corporations should be established" under the auspices of the council.

On December 5, 1974, ECOSOC decided in Resolution 1913[40] to establish an inter-governmental commission on transnational corporations. The commission was charged with advising and assisting the council in dealing with issues relating to TNEs. The commission is composed of forty-eight members selected from "all states" or "on [a] broad and fair geographic basis." The geographic distribution is reflected in the following manner: Africa, 12 members; Asia, 11; Latin America, 10; the Socialist States of Eastern Europe, 5; Western Europe and others, which includes the United States, Canada, and Australia, 10. Commission members are elected for a three year term.

The Resolution requested that the commission submit to ECOSOC at its sixtieth session,

> a detailed draft programme of work on the full range of issues relating to transnational corporations, including a statement of its proposed priorities within the framework of the following guidelines: the development of a comprehensive information system; preliminary work with the objective of formulating a code of conduct; the undertaking of studies, especially case studies, on the political economic and social impact of the operation and practices of transnational corporations which seem most urgent; and the definition of TNEs. The draft programme should be without preju-

39. U.N. CHARTER, ch. 9, 10.

40. ECOSOC Res. 1913, 57 U.N. ESCOR, (Supp. 1A) 3, U.N. Doc. E/5570/add. 1 (1975).

dice to the work undertaken within the UN system in related fields.[41]

B. Information and Research Centre

Following another recommendation made by the Group of Eminent Persons, ECOSOC established an Information and Research Centre.[42] (IRC) The IRC was charged with the task of developing a comprehensive information system on the activities of TNEs. This was to be done by gathering available information from governments and other sources. After an analysis of such information, it should be disseminated to the Commission on Transnational Corporations. The IRC also should conduct research on the political, legal, economic and social aspects of TNEs with the aim of strengthening the capacity of host countries, particularly developing countries, to deal with transnational corporations. Other duties were assigned to the IRC by the commission and among those duties was the charge to conduct "a comparative study of existing international codes of conduct" and of "existing national and regional legislation and regulations enacted with the purpose of regulating the operations and activities of TNEs."[43]

V. PERSPECTIVE AND CONCLUSIONS

During the last several years debate on the issue of TNE's has gained considerable momentum. Governments of home countries, who first refused to assign the role of villain to TNEs, now are anxious to keep them "at bay" regarding irregular practices. Disclosures of political interference, questionable payments to foreign officials and involvement in corruption have been emerging as surely as the evils of Pandora's box. One scandal after another has kept the TNEs in the headlines as well as in the minds of statesmen and the "man on the street". The general consensus seems to be that "something ought to be done" to regulate the conduct of TNEs.

Yet, the TNE, *per se*, cannot be labeled as good or bad, saint or demon. If properly controlled, it can function as an effective vehicle for development, but if uncontrolled, it has the potential of becoming a subversive instrument of domination and greed. Fortunately, mutilateral and national action currently is under way with the purpose

41. *Id.*
42. ECOSOC Res. 1908, 57 U.N. ESCOR, (Supp. 1) 13, U.N. Doc. E/5570 (1974).
43. Commission on Transnational Corporation, 57 U.N. ESCOR, (Supp. 12, U.N. Doc. E/5655, E/C.10/6., para. 11 (1975).

subjecting lucrative private interests to the higher objectives of international cooperation and justly shared development.

To conclude, the TNE should be subject to legal regulation and juridical control can be exercised following diverse scope and methodology. It would seem that national legislation of the host country is presently the most effective method for controlling TNEs. However, one must not overlook the home country's own laws as an effective deterrent to irregular practices. International regulation, at universal, regional and sub-regional levels, while still a long-term objective, affords distinctive advantages over domestic legislation.

The unification and harmonization of laws pertaining to TNEs should be reached gradually by utilizing the efforts presently conducted within various international forums. In spite of disagreements regarding the mandatory nature of the code of conduct to govern these consortiums, partial agreement is being reached on restrained general guidelines and within limited areas. The work undertaken by the Commission on Transnational Corporations and the Information and Research Centre of the ECOSOC is laying the foundation and initial structure of a more complete framework to be achieved in future years.