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Multinational Regulation of MNE Labor Relations

I. INTRODUCTION

Recently, multinational business enterprises have taken a powerful position in the world order. Their economic significance has provoked an international debate over the control and regulation of such powerful business enterprises and their activities. A balance is needed to reconcile the interests of Multinational Enterprises¹ (MNE) and the nations affected by MNE activities. Because MNE activities affect trade, development financing, technology, industrialization, agriculture and employment,² virtually every important international organization concerned with international trade and investment has studied the problems and effects of MNEs.³ Two international organizations have issued codes of conduct with regard to MNEs.⁴ Although the business community believes that MNEs are now under control,⁵ and international businesses have generally agreed to abide by local desires,⁶ discussions concerning further regulations continue. The most notable of these discussions

1. A Multinational Enterprise is, for discussion purposes, a company that "extends its business operations under one guiding direction to two or more countries," and that has "influence and power in its own markets." Galbraith, *The Defense of the Multinational Company*, 56 HARV. BUS. REV. 83, 84, 86 (March-April 1978) [hereinafter cited as Galbraith]. The definition is treated in more detail *infra* § V.B, in connection with a discussion of the regulation of the MNE.

2. 1 MULTINATIONAL CORPORATIONS LAW: THE U.N. AND TRANSNATIONAL CORPORATIONS § A, at 1 (K. Simmonds ed. 1980).

3. This includes the United Nations, the International Labor Organization (ILO), the Organization for Economic Cooperation and Development (OECD), the European Economic Communities (EEC) and the Organization of American States (OAS).

4. Annex to the Declaration of 21st June, 1976 by Governments of OECD: Member Countries on International Investment and Multinational Enterprises, O.E.C.D. Doc. 21 (76) 04/1, 75 DEP'T STATE BULL. 83, 83-88 (1976) *reprinted in* 15 INT'L LEG. MAT. 967, 969 [hereinafter cited as OECD Guidelines]; *The International Labor Organization: Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of November 16, 1977*, *reprinted in* 17 INT'L LEG. MAT. 422 (1978) [hereinafter cited as *ILO Tripartite Declaration*].

5. *See Multinationals: EEC Industries Opposed*, EUROPE No. 2931, at 15, Jun. 18, 1980 [hereinafter cited as *EEC Industries Opposed*].

6. *See* Guertin, *A Business View on the Implementation of Codes of Conduct*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 295, 298 (N. Horn ed. 1980), expressing a general support by the business community for codes of conduct and the adherence to local desires implicit in those codes [hereinafter cited as Guertin]. *See also* Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 745 (1970) [hereinafter cited as Vagts].

are being conducted in the United Nations⁷ and in the European Economic Communities.⁸

One area of debate involves employment and industrial relations.⁹ This area is controversial because a MNE, as a provider of jobs, creates a natural tension between itself and local labor organizations. Tension arises from the MNE's desire for cheap labor and from the fact that a MNE's decisions often are made outside the countries affected by such decisions.¹⁰ Workers, on the other hand, want security and a voice in improving living and working conditions.¹¹ Therefore, organized labor has strongly supported regulation of MNEs¹² to protect the interests of labor.¹³

This Comment will explore the regulation of MNEs within one of the most strongly organized labor centers in the world,¹⁴ the European Economic Community (EEC).¹⁵ In the EEC, industrial relations are characterized by a broad base of union membership¹⁶ and a trend towards industrial democracy.¹⁷

7. See generally H. Baade, *Codes of Conduct for Multinational Enterprises: An Introductory Survey*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 407, 416-22 (N. Horn ed. 1980) [hereinafter cited as Baade]. See e.g. TRANSNATIONAL CORPORATIONS: CODE OF CONDUCT FORMULATIONS BY THE CHAIRMAN, U.N. Doc. E/C 10/AC 2/8, reprinted in 1 THE CTC REPORTER NO. 6, at 5 (1979).

8. *Infra* § V.

9. Other areas of MNE conduct that are also the subject of the OECD Guidelines are financial and commercial operations, unfair competition, taxation, licensing and transfer of science and technology. See generally OECD Guidelines, *supra* note 4.

10. See NORTH-SOUTH: A PROGRAM FOR SURVIVAL (Report of the Independent Commission on Int'l Development Issues) 187-90 (W. Brandt ed. 1980) [hereinafter cited as NORTH-SOUTH]. See also Cox, *Labor and the Multinationals*, 54 FOREIGN AFF. 344, 347-48 (1976) [hereinafter cited as Cox]; Baade, *supra* note 7, at 415.

11. See generally Murphy, *Multinational Corporations and Free Coordinated Transnational Bargaining: An Alternative to Protectionism?* 28 LAB. L. J. 619 (1977) [hereinafter cited as Murphy].

12. See generally Pursey, *The Trade Union View on the Implementation of Codes of Conduct*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 277 (N. Horn ed. 1980) [hereinafter cited as Pursey]; see By Giving Support to the OECD Guidelines (a TUAC statement to the OECD committee, Apr. 11, 1978) reprinted in R. BLANPAIN, *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS: 1976-1979*, at 103 (1979) [hereinafter cited as BLANPAIN: TUAC Statement]. TUAC is the Trade Union Advisory Committee to the OECD.

13. Cox, *supra* note 10, at 355.

14. See *id.*, at 356. For a discussion of EEC activities with respect to protection of labor interest *vis-à-vis* MNEs, see Baade, *supra* note 7, at 422-24.

15. Treaty Establishing the European Economic Communities, 295 U.N.T.S. 2 (German). The official English version is reprinted in [1973] Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter cited as EEC Treaty]. At present, the members of the EEC are Belgium, Denmark, France, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, and the United Kingdom. *Id.*

16. Cox, *supra* note 10, at 356.

17. See Malawer, *Labor Law in the Common Market — Worker Participation and Other Recent Developments*, 11 NEW ENG. L. REV. 55 (1975); see generally Note, *Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability to the United States*, 14 HARV. J. LEGIS. 947 (1977) [hereinafter cited as *Employee Codetermination*]; see generally Creighton, *The Bullock Report — The Coming of Age of Democracy* 4 BRIT. J. L. & SOCIETY 1 (1977).

However, even in the EEC, where labor has proposed binding regulations,¹⁸ control of a MNE's industrial relations is difficult.¹⁹ This difficulty results, in large part, from a MNE's ability to make decisions outside of the EEC countries.²⁰

This Comment closely examines an attempt, which European lawmakers are currently making within the EEC regulatory structure to balance a MNE's ability to make decisions with a commensurate responsibility to its workforce,²¹ Proposed legislation, a *Proposal for a Directive on Procedures for Informing and Consulting the Employees of Undertakings with Complex Structures, in Particular Transnational Undertakings*²² (Multinational Directive), is intended to mechanically achieve this balance in two ways: (1) by requiring disclosure of relevant information and (2) by requiring consultation before implementation of any decision having a substantial impact on workers' jobs.²³ Although the proposed Multinational Directive²⁴ is in the earliest stages of the EEC legislative process,²⁵ it is significant. The eventual application of these substantive requirements will create a new balance in the relative bargaining positions of labor and the management of MNEs.

18. *Information on and Evaluation of the Proposal of the EC Commission for a Directive, Decision of the Executive Committee*, (Brussels, Dec. 4, 1980) § 1.1 (press release from European Trade Union Confederation (ETUC) EP/CL 8. 12. 1980) [hereinafter cited as *ETUC Evaluation*].

19. Van Langendonck, *Procedures for Informing and Consulting Workers in Multinational Undertakings — Legal and Practical Aspects in the EEC Member States Together with Greece and Switzerland* 2 (EEC MONOGRAPH V/770/80/EN, 1980) [hereinafter cited as Van Langendonck].

20. See EXPLANATORY MEMORANDUM, PROPOSAL FOR A DIRECTIVE ON PROCEDURES FOR INFORMING AND CONSULTING THE EMPLOYEES OF UNDERTAKINGS WITH COMPLEX STRUCTURES, IN PARTICULAR TRANSNATIONAL UNDERTAKINGS (submitted to the Council by the Commission), COM (80) 423 final, § I(A)(3) reprinted in [1980] BULL. EUR. COMM. (Supp. 3/80) 5 (1980) [hereinafter cited as EXPLANATORY MEMO]. See Van Langendonck, *supra* note 19, at 3.

21. See EXPLANATORY MEMO, *supra* note 20, § I(A)(4), at 2.

22. PROPOSAL FOR A DIRECTIVE ON PROCEDURES FOR INFORMING AND CONSULTING THE EMPLOYEES OF UNDERTAKINGS WITH COMPLEX STRUCTURES, IN PARTICULAR TRANSNATIONAL UNDERTAKINGS, COM (80) 423 final (submitted to the Council by the Commission, Oct. 23, 1980) [hereinafter cited as MULTINATIONAL DIRECTIVE].

23. See Business Brief, *Business/Union Polarization* 715 EUROPEAN REPORT (press release of the European Communities) 3, 4-5 (Sept. 30, 1980) [hereinafter cited as *Business/Union Polarization*].

24. MULTINATIONAL DIRECTIVE, COM (80) 423 final.

25. The European Parliament and the Economic and Social Committee will consider the proposal and then the EEC Commission will hold consultations with those organizations. The Commission expects subsequent clarifications to be necessary. See EXPLANATORY MEMO, *supra* note 20, § I(A)(5).

In the framework of the European Economic Communities, two bodies directly participate in the process of enacting community wide legislation: the Commission and the Council of Ministers. EUROPEAN COMMUNITY: THE FACTS, EUROPEAN COMMUNITY INFORMATION SERVICE (1974) reprinted in F. KIRGIS, INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 608-09 (1977) [hereinafter cited as EC: Facts]. Two other Community institutions, the European Parliament and the Economic and Social Committee, *id.* at 610, are playing important roles in the process of the "Multinational Directive." MULTINATIONAL DIRECTIVE, COM (80) 423 final, Preamble; see EXPLANATORY MEMO, *supra* note 20, § I(A)(5) (foreseeing consultations with these two EEC bodies before final enactment of the Directive).

This Comment begins with a discussion of the status of MNEs in the world economic and legal order. In addition, the author describes the balance of power relationship between labor and the MNE, considering their differing points of view. The substantive provisions of the proposed Multinational Directive — information disclosure and consultation — is discussed in relation to this balance of power.

The author examines the “runaway plant”²⁶ problem as a basis for practical application of the proposal’s requirements. The requirements are par-

The Commission, composed of representatives of each of the member States (two each from France, Italy, Germany and the United Kingdom and one each from Luxembourg, the Netherlands, Belgium, Denmark and Ireland) is responsible for proposing community policy. EC: FACTS, *supra*, at 608-09. It has the power and authority to propose legislative programs and texts for adoption by the Council. EEC Treaty, *supra* note 15, art. 155. It does not have the power to compel any further actions on its proposals. The Commission may also consult with experts from national governments and trade, management, agricultural and labor interest groups. EC: FACTS, *supra*, at 609. These experts will advise the Commission on the practical implications of the policy and also the acceptability of the Commission’s proposals to the governments of the member states. With the assistance of its own specialist departments, the Commission considers the proposals until it reaches its final position which is then submitted to the Council. Lasok & Bridge, *An Introduction to the Law and Institutions of the European Communities*, 104-08 (1973), reprinted in F. KIRGIS, INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 613, 614 (1977).

The Council of Ministers is the body with the power to make decisions. EEC Treaty, *supra* note 15, art. 145. It has the power to vote on proposals submitted by the Commission. EC: FACTS, *supra*, at 609. Under this power the Council may issue directives, which are binding as to the result to be achieved. EEC Treaty, *supra*, note 15, art. 189. To the Member States is left the choice of exact form and method of execution. *Id.* The Directive, addressed to the Member States, Multinational Directive, COM (80) 423 final, art. 19, requires each state to introduce laws, regulations and administrative provisions necessary to comply with the Directive. *Id.* art. 17(1). Although directives are addressed to the States, the European Court of Justice, EEC Treaty, *supra*, note 15, arts. 164-88, 192, (establishing the European Court of Justice as the highest court of the European Communities) has held that individual rights and obligations are created by the binding nature of the directive in conjunction with Article 177 which allows individuals to invoke acts of the Community in national courts. See *Van Duyn v. Home Office*, Case No. 41/74 [1974] E. Comm. Ct. J. Rep. 1337, 1347-48, as excerpted in J. KIRGIS, INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING, 650-51 (1977). Through a system of weighted voting, the Council then may enact the Directive. EEC Treaty, *supra*, note 15, art. 148.

The European Parliament is consulted for its opinion on laws under consideration. EC: FACTS, *supra*, at 610. This consultation allows political and social considerations to be heard in the Parliament. The entire gamut of nationalities, social interests and political convictions that exist in the EEC is represented in the Parliament. REPORT OF THE WORKING PARTY EXAMINING THE PROBLEM OF THE ENLARGEMENT OF THE POWERS OF THE EUROPEAN PARLIAMENT (REPORT VEDEL). [1972] BULL. EUR. COMM. (Supp. 4/72) 32 (1972). The Economic and Social Committee serves a similar function. EC: FACTS, *supra*, at 610; see EEC Treaty, *supra*, note 15, art. 193.

For a more in depth discussion of European Community law and the legislative process, see generally, Schwartz, *Article 235 and Law-making Powers in the European Community*, 27 INT’L & COMP. L.Q. 614 (1978); Steiner, *The Application of European Community Law in National Courts — Problems, Pitfalls and Precepts*, 96 LAW Q. REV. 126 (1980); A. ROBERTSON, EUROPEAN INSTITUTIONS: COOPERATION, INTERGRATION, UNIFICATION 160-205 (2d ed. 1966).

26. “Runaway Plant” describes the situation where the company either transfers or threatens to transfer its operations as a bargaining tactic. See *Lockouts, Shutdowns, Runaway Shops*, [1972] 3 LAB. L. REP. (CCH) ¶ 4090. For example, when an employer, faced with either a union first organizing or a union making what the employer perceives to be a costly demand, threatens to close the plant and move elsewhere unless his position is accepted by the workers, his conduct

ticularly important in the runaway plant context because this tactic tends to create an imbalance in the normal bargaining positions of labor and management. Both labor and MNEs will benefit from a framework that requires closer contacts between labor and the management of MNEs. In theory, the proposed measure will provide security for labor while simultaneously creating a context of understanding of management decisions in the dynamic international economic arena. Finally, the author concludes that the proposed European Legislation if finally enacted will contribute to stability in industrial relations.

II. THE MULTINATIONAL ENTERPRISE

Generally, a multinational enterprise²⁷ is a business undertaking which engages in economically significant activities within two or more countries but which guides and influences those activities from a single decision-making center.²⁸ A MNE is a major institution of the modern, world economic order.²⁹ While oil and food companies have operated in the multinational form since the beginning of this century,³⁰ the scale and sophistication of MNE operations have significantly increased since World War II.³¹ Estimates published in 1980 by the Independent Commission on International Development Issues under the chairmanship of Willy Brandt concluded that MNEs now control between a quarter and a third of all world production.³² In addition, MNEs are currently responsible for over half of world trade.³³ The importance of MNEs lies not in mere size or extendedness³⁴ but in the influence

comes within the parameters of the runaway plant problem. See Note, *Runaway Shop — A Perennial Threat to Organized Labor*, 37 NOTRE DAME LAW. 357, 358-59 (1962) [hereinafter cited as *Runaway Shop*].

27. The definition of a MNE will be more fully discussed in § V.B *infra*. The definition here, though a loose one, is a sufficient working definition for the purpose of a discussion on the problems with MNEs.

28. Galbraith, *supra* note 1, at 84, 86.

29. Cox, *supra* note 10, at 344; see generally Barnett, *The World's Resources — Human Energy*, 56 NEW YORKER 46 (Apr. 7, 1980) [hereinafter cited as Barnett]. Global resources are being managed by multinational corporations. The integration of huge operations developing and processing resources is within the expertise of these multinationals. The ability of MNEs to acquire such size and efficiency has been brought about by the development of two new technologies: (1) the technology for conquering distance (communications and transportation); and (2) the technology for fragmenting the production process into component operations which can be performed at different locations and integrated into a final product (standardized production engineering and management). *Id.* at 46-50.

30. NORTH-SOUTH, *supra* note 10, at 187. See generally Cox, *supra* note 10, at 345-46.

31. NORTH-SOUTH, *supra* note 10, at 187. See also Comment, *Regulation of the Labor Relations of Multinational Enterprises: A Comparative Analysis and a Proposal for NLRA Reform*, 2 B.C. INT'L COMP. L. REV. 371 (1978).

32. NORTH-SOUTH, *supra* note 10, at 187.

33. See Baade, *supra* note 7, at 409. See also Fayerweather, *The Internationalization of Business*, 403 ANNALS 1, 2-3 (Sept. 1972) (tracing the transition of MNEs into significant economic institutions).

34. Cf., Vagts, *supra* note 6, at 747-51. Size does not necessarily lead to high profitability.

and power a MNE wields in its markets.³⁵ MNEs have grown in both influence and power by directly participating in the production, distribution and service sectors of various economies.³⁶ This position is likely to enable MNEs to play a major role in the future of world trade and international direct investment.³⁷

The rapid development of MNEs has generated a great deal of public concern.³⁸ Complaints cover a considerable range of subjects in both labor and non-labor areas. In general, MNEs have been charged with: failing to adjust to the legislation of host countries in specific matters such as investment and labor policies;³⁹ failing to respect the socio-cultural identities of host countries;⁴⁰ and contributing to the support of socially undesirable policies such as apartheid.⁴¹ In the area of labor, concern focuses on the concentration of economic power and on conflicts with labor.⁴² Such complaints became the foundation of public discussion concerning MNEs.⁴³

III. INTERNATIONAL CODES OF CONDUCT

As the 1970's began, "statutory and case law reaction [to the MNE problem was] virtually nonexistent."⁴⁴ At the same time that the legal literature began to consider the challenge of MNEs,⁴⁵ the International Court of Justice discussed the lack of international authority on the subject:

Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding com-

Sometimes profit expectations are disappointed. MNEs depend on the possession of technical innovation and must keep pace with new developments in order to maintain profits. *Id.*

35. See Galbraith, *supra* note 1, at 83, 84, 86.

36. See Baade, *supra* note 7, at 409.

37. See U.N. COMMISSION ON TRANSNATIONAL CORPORATIONS, TRANSNATIONAL CORPORATIONS IN WORLD DEVELOPMENT: A RE-EXAMINATION, U.N. Doc. E/C. 10/38, Mar. 20, 1978. See generally, Barnett, *supra* note 29.

38. Baade, *supra* note 7, at 409. See, e.g., U.N. REPORT OF THE COMMISSION ON TRANSNATIONAL CORPORATIONS, ECOSOC Off. Rec. 61st Sess. Supp. No. 5 (May, 1976); 15 INT'L LEG. MAT. 779, 798-99 (1977) [hereinafter cited as U.N. REPORT], Annex I and II (listing areas of concern on the operations and activities of transnational corporations and governments).

39. U.N. REPORT, *supra* note 38, at 798 (Annex I, § 2).

40. *Id.* at 799, § 21.

41. *Id.* at 798, § 10. Additional areas of concern include: lack of adjustment to local legislation, refusal of MNEs to accept exclusive jurisdiction of domestic law, direct or indirect interference in internal affairs of the host country, role of MNEs in illegal traffic of arms, tendency not to conform to national development policies, failure to adapt imported technology to local conditions, and imposition of restrictive business practices on subsidiaries. *Id.* at 798-99.

42. See *ILO Tripartite Declaration*, *supra* note 4, art. 1.

43. See Baade, *supra* note 7, at 408-14.

44. Vagts, *supra* note 6, at 739.

45. See Baade, *supra* note 7, at 411. MNEs have been identified as a serious challenge for international law. See Vagts, *supra* note 6.

panies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.⁴⁶

In the 1970's, several major international organizations⁴⁷ became engaged in activities concerning the multinational enterprise.⁴⁸ In attempting to impose rules on MNEs governing the conduct of business activities, international organizations appear to favor the use of codes of conduct.⁴⁹ The trend has been to consider detailed proposals for codes of conduct and to formulate such codes for MNEs.⁵⁰ Codes of conduct currently in effect under the authority of the International Labor Organization (ILO)⁵¹ and the Organization for Economic Cooperation and Development (OECD)⁵² are examples of this pat-

46. *Barcelona Traction, Light and Power Company, Ltd.* (Belgium v. Spain), [1970] I.C.J. 3, 46-47.

47. See Baade, *supra* note 7, at 412. See *supra* note 3.

Since the *Barcelona Traction Case*, [1970] I.C.J. at 3, both state practice and scholarly commentary on MNEs has increased. But there is no reliably recorded or accessibly reported body of decisional law concerning MNEs. The scholarly discussion also far outstrips the supply of decisional law. Baade, *supra* note 7, at 413.

48. See generally Baade, *supra* note 7. *Developing and Enforcing Guidelines for Multinational Enterprises*, 1976 PROC. AM. SOC. INT'L L. 16, 16-34 (1976); see e.g., Programme of Action on the Establishment of a New International Economic Order of May 1, 1974, Gen. Ass. Res. 3202, S-7 GAOR, Supp. (No. 1) 5 U.N. Doc. A/9559 (1974) reprinted in 13 INT'L LEG. MAT. 720 (1974); see e.g., OECD Guidelines, *supra* note 4; see e.g., ILO Tripartite Declaration, *supra* note 4; see e.g., Multinational Directive, COM (80) 423 final.

49. See Baade, *supra* note 7, at 412.

50. *Id.*

51. The International Labor Organization is organized by Constitution as an international agency which is integrated with the United Nations. The work of the ILO consists of supervising labor conventions and recommendations. See Constitution of the International Labor Organization (adopted by the ILO General Conference, Oct. 9, 1946) 62 Stat. 3485, T.I.A.S. No. 1868. The Tripartite setup of the ILO consists of representatives of workers, employers and governments. *Id.*

52. The Organization for Economic Cooperation and Development (OECD) includes in its membership the major industrialized nations of Western Europe, North America, and the Far East plus one major developing country (Turkey). 75 DEP'T STATE BULL. 83-88 (1976). The OECD is an instrument for intergovernment cooperation on matters relevant to economic and social policy. Members include: Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, The Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the U.S. See generally, R. BLANPAIN, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS: 1976-1979, at 25 (1979) [hereinafter cited as BLANPAIN].

The code of conduct movement is part of a global attempt to reach and implement a consensus on mechanisms of economic cooperation in practical terms. N. Horn, *Codes of Conduct for MNEs and Transnational Lex Mercatoria: An International Process of Learning and Law Making*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 45, 49 (N. Horn ed. 1980).

Codes provide lists and definitions of issues of concern. They analyze the roles of the various parties (MNEs, government and labor) involved. And they focus attention on areas of conflict. *Id.* at 47.

tern. These codes, which are similar in language,⁵³ present guidelines to MNEs on the conduct of business activities.⁵⁴ The guidelines are designed to protect the economies, workers, consumers, competitors and creditors in host countries from unilateral action emanating from MNE headquarters.⁵⁵ The EEC is structuring a similar regulatory code.⁵⁶

The governmental structure of the EEC is authorized to harmonize European law.⁵⁷ A legislative measure has been introduced within that structure by the EEC Commission⁵⁸ which would place binding regulations on MNE activities in the EEC.⁵⁹ Initially, this measure took the form of a directive which would require member nations of the EEC to give statutory effect to certain regulations governing information disclosure and consultation.⁶⁰ The Commission approved the text of the directive on October 1, 1980, and also recommended that the directive be approved by the European Council.⁶¹

The legal basis for this directive is Article 100 of the EEC Treaty.⁶² Article 100 empowers the Council⁶³ to issue directives to harmonize national laws and regulations.⁶⁴ This process for harmonization is considered appropriate for disclosure and consultation requirements because:

53. See Baade, *supra* note 7, at 421. Compare OECD Guidelines, *supra* note 4 with ILO Tripartite Declaration, *supra* note 4.

54. H. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, in LEGAL PROBLEMS OF CONDUCT FOR MULTINATIONAL ENTERPRISES 3, 7-8 (N. Horn ed. 1980) [hereinafter cited as Baade, *Effects of Codes*].

55. *Id.* at 13.

Notwithstanding the current efforts to bring more controls and regulations to the activities of multinational enterprises, lawmakers and commentators recognize MNEs as playing an important role in the world development. *Id.* The common stated aim of OECD countries is to encourage the positive contributions which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise. OECD Guidelines, *supra* note 4, Introduction, para. 2. "[Such] enterprises can bring substantial benefits to home and host countries by contributing to the efficient utilization of capital, technology and human resources between countries and can thus fulfill an important role in the promotion of economic and social welfare." *Id.*, para. 1.

In its Declaration of Principles, the International Labor Organization also recognized that MNEs can make important contributions to the improvement of living standards, the satisfaction of basic needs and the creation of employment opportunities. ILO Tripartite Declaration, *supra* note 4, art. 1.

56. Multinational Directive, COM (80) 423 final; see § V.A *infra*. Work is also currently taking place in the United Nations, on development of a regulatory code in the Centre on Transnational Corporations. See generally, 1 C.T.C. RPTR. No. 6, at 1 (Apr. 1979).

57. See EEC Treaty, *supra* note 15, art. 100.

58. See note 25 *supra*.

59. Multinational Directive, COM (80) 423 final.

60. *Id.* art. 17.

61. Background Document, *EEC Industrial Relations: Text of Worker and Consultation Proposals*, 718 EUROPEAN REPORT (press release of the European Communities) (Oct. 1, 1980).

62. Multinational Directive, COM (80) 423 final, Preamble. See also EXPLANATORY MEMO, *supra* note 20, § I(B).

63. See note 25 *supra*.

64. EEC Treaty, *supra* note 15, art. 100.

The lack of consistency between information and consultation procedures on one hand and the complex structure of undertakings on the other has a direct effect on the operation of the common market and should therefore be remedied by approximating legislation while maintaining progress within the meaning of Article 117 of the Treaty.⁶⁵

In the report issued with the proposed Multinational Directive,⁶⁶ the Commission stated that the Multinational Directive was modeled after the relevant provisions of the OECD Guidelines⁶⁷ and the ILO Tripartite Declaration.⁶⁸ The EEC Commission has announced its intention to follow the objectives of the OECD and ILO documents⁶⁹ and to participate in the proceedings of these organizations in the field of MNE regulation.⁷⁰

The Multinational Directive will not immediately become law in the EEC for several reasons:⁷¹ the directive is controversial; labor and business groups have diametrically opposing views on the subject;⁷² and although the Commission approved the directive in October 1980,⁷³ it must endure a lengthy gestation period before it becomes effective.⁷⁴

The EEC Commission sent the proposal to the European Parliament⁷⁵ for debate in October 1980.⁷⁶ The members of the Commission expect that the discussion in the Parliament will lead to further developments in the language of the proposed directive.⁷⁷ The directive is viewed as essentially political in

65. EXPLANATORY MEMO, *supra* note 20, § I(B); EEC Treaty, *supra* note 15, art. 117. Article 117 states:

Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.

They believe that such a development will ensue not only from the functioning of the common market, which will favor the harmonization of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation and administrative action.

66. "The same objectives as those enshrined in international instruments that are not legally binding, such as the OECD guidelines and the ILO Tripartite Declaration, will be followed with regard to the activities of transnational firms . . ." EXPLANATORY MEMO, *supra* note 20, § I(A)(4). See Worker Consultation: Mr. Vredling Outlines Scope and Aims, 2991 EUROPE 5 (Oct. 2, 1980), reporting Vice-President Henk Vredling as saying that the directive was partially based on the OECD and ILO "codes of conduct" [hereinafter cited as *Vredling Outlines Scope*].

67. OECD Guidelines, *supra* note 4, Chapter on Employment and Industrial Relations.

68. ILO Tripartite Declaration, *supra* note 4, arts. 24-28, 40-57.

69. EXPLANATORY MEMO, *supra* note 20, Introduction § I(A)(4).

70. *Id.* § I(A)(5).

71. See Internal Market, *Worker Consultation: Commission Proposes Directive to Council*, 716 European Report 2 (Oct. 2, 1980) (press release of the European Communities) [hereinafter cited as *Commission Proposes Directive*].

72. *Id.*

73. *Id.*

74. See Merritt, *Commission Adopts Disclosure Directive*, Financial Times, Oct. 3, 1980, at 2.

75. See note 25 *supra*.

76. See ETUC Evaluation, *supra* note 18, § 4.1.

77. *Commission Proposes Directive*, *supra* note 71, at 2.

nature; consequently, discussions within the Parliament, the political body of the EEC, will have an important bearing on the final version of the directive.⁷⁸ In addition, the Commission sent the directive to the Economic and Social Committee⁷⁹ of the EEC for review.⁸⁰ During this process, the directive may be altered.⁸¹ The Commission will clarify or, if necessary, improve the present draft based on authorized opinions received from Parliament, the Economic and Social Committee or either of the labor and business organizations of the EEC before the Council enacts the directive.⁸²

IV. MNEs AND LABOR

A. *Management of the MNE*

With respect to labor relations, the nature of MNEs presents difficulties. Management of a multinational business enterprise is complex.⁸³ Management of MNEs attempts to develop objectives for the corporation and for all of its subparts through corporate planning, which will work for the benefit of the whole.⁸⁴ Management of MNEs plans alternative courses of action after evaluating external threats to the enterprise on the basis of the organization's strengths and weaknesses.⁸⁵

However, business on an international level requires the enterprise to operate effectively within nations having diverse economic conditions and value systems.⁸⁶ In employing individuals from several nations, a MNE must have a labor policy which is flexible enough to encompass this diversity.⁸⁷ Policies of recruitment, training, compensation and management must fit the needs of the MNE.⁸⁸

Although communication and transportation advancements have greatly improved the managerial capabilities of MNEs,⁸⁹ distance is still a factor in a MNE's ability to manage local operations from a central location.⁹⁰ Many companies give maximum autonomy to local management.⁹¹ The primary

78. *Id.*

79. See note 25 *supra*.

80. See ETUC *Evaluation*, *supra* note 18, § 4.1, at 6.

81. *Vredling Outlines Scope*, *supra* note 66, at 5.

82. *Id.*

83. See J. SCHWENDIMAN, STRATEGIC AND LONG-RANGE PLANNING FOR THE MULTINATIONAL CORPORATION 7 (1973) [hereinafter cited as SCHWENDIMAN].

84. *Id.*

85. *Id.*

86. *Id.* at 5.

87. R. HAYS, C. KORTH & M. ROUDIANI, INTERNATIONAL BUSINESS: AN INTRODUCTION TO THE WORLD OF THE MULTINATIONAL FIRM 295 (1972).

88. *Id.*

89. See Barnett, *supra* note 29, at 50.

90. See SCHWENDIMAN, *supra* note 83, at 5.

91. Barran, *Comment on the Chapter by Mr. Lea: A Businessman's Viewpoint in THE MULTINATIONAL ENTERPRISE* 164, 165 (J. Dunning ed. 1971) [hereinafter cited as Barran].

role of central management is to achieve optimum results for the entire enterprise through coordination and planning.⁹² Under this system, local operations attempt to maximize their profit results⁹³ while central management reconciles local decisions and allocates resources throughout the enterprise.⁹⁴ MNE central management also must consider that legal obligations are imposed on local management by national laws of the country in which the local company operates or is incorporated.⁹⁵ These laws generally hold the managers of the local entity responsible for all decisions concerning that entity.⁹⁶ This system places the responsibility for information disclosure and consultation on local management which must handle this duty in accordance with local laws.⁹⁷ As a result, there is a tendency for negotiations in the context of industrial relations to be conducted at the local level.⁹⁸

Although a vast accumulation of knowledge and experience is available at MNE headquarters,⁹⁹ variations in local conditions are best known to local management.¹⁰⁰ Local managers are in the best position to reach settlements which contribute to the productivity of the entity¹⁰¹ because they can evaluate the needs of particular situations.¹⁰² Central management, on the other hand, must take into account the variety of the MNE's activities and the differences in national legal systems in order to formulate policy.¹⁰³ Thus, central management of a MNE involves solving the problem of organization¹⁰⁴ in order to meet the economic need for goods, services and raw materials.¹⁰⁵

In management's view, the purpose of codes of conduct is both to improve the investment climate and to maximize the contributions which MNEs make to the economic arena.¹⁰⁶ Management maintains that the codes of conduct should not create obstacles to investment by imposing unnecessary controls.¹⁰⁷ This perspective calls for flexibility in the interpretation of codes of conduct¹⁰⁸

92. *Id.*

93. See Vagts, *supra* note 6, at 755-56.

94. Barran, *supra* note 91, at 165.

95. UNION DES INDUSTRIES DE LA COMMUNAUTÉ EUROPÉENNE, PROPOSAL FOR A DIRECTIVE ON EMPLOYEE INFORMATION AND CONSULTATION PROCEDURES IN ENTERPRISES WITH A COMPLEX STRUCTURE, AND IN PARTICULAR, TRANSNATIONAL ENTERPRISES: UNICE POSITION, para. 11 (Feb. 19, 1981) (position paper of UNICE) [hereinafter cited as UNICE POSITION].

96. *Id.*

97. *Id.* para. 13.

98. Barran, *supra* note 91, at 166.

99. *Id.* at 165-66.

100. *Id.* at 166.

101. *Id.*

102. *Id.*; see UNICE POSITION, *supra* note 95, at para. 14.

103. See Guertin, *supra* note 6, at 299.

104. See Clausen, *The Internationalized Corporation: An Executive's View*, 403 ANNALS 12, 15 (Sept. 1972).

105. Guertin, *supra* note 6, at 298.

106. *Id.* at 296.

107. *Id.* at 297.

108. *Id.* at 298.

so that investment considerations may be weighed along with employment considerations.¹⁰⁹ Flexibility is necessary, in any case, in order to formulate enterprise policy which is responsive to variations, from state to state, in labor relations and in employment practices.¹¹⁰

B. *The Concerns of Labor*

As a whole, the world labor force shares a general concern that MNEs are changing the world employment structure¹¹¹ while they are altering the international distribution of economic activities.¹¹² Trade unions view MNEs as holding a much stronger position than labor in the context of industrial relations by virtue of their size, resources and multinational character.¹¹³ The popular impression is that a MNE is a formidable, effective and swift machine.¹¹⁴ By operating in more than one jurisdiction, a MNE can minimize or avoid some of the controls, checks and balances¹¹⁵ that have evolved in the different countries in which it does business.¹¹⁶ Unions fear that because the management of a MNE is able to conceal the actual site of a particular decision, effective control or influence of those decisions is virtually impossible.¹¹⁷

1. Perceived Advantages of MNEs over Labor Organizations

In general, trade unions believe that their bargaining power is reduced because of the remoteness of the MNE central management and the disparity in

109. *Id.* at 300.

110. *See id.* at 298; BLANPAIN, *supra* note 52, at 263; UNICE POSITION, *supra* note 95, para. 3.

111. Cox, *supra* note 10, at 347. The particular concerns of the industrial and the underdeveloped nations are different from each other. *See generally id.*, at 345-51. The underdeveloped nations are concerned with exploitation of cheap labor in their countries with no real long-term benefits to the work force. For a discussion of the problems of the underdeveloped nations, *see generally*, NORTH-SOUTH, *supra* note 10. Industrialization in Third World countries has destroyed jobs in the rural areas without creating equivalent long-term jobs in the factory centers. Barnett, *supra* note 29, at 70. On the other hand, in the industrialized nations, unions are concerned with job security and the loss of bargaining power due to the remoteness of the central management of MNEs. *See* Blake, *Trade Unions and the Challenge of the Multinational Corporation*, 403 ANNALS 34, 37 (Sept. 1972) [hereinafter cited as Blake]; Murphy, *supra* note 11, at 626; Baade, *supra* note 7, at 415.

112. Cox, *supra* note 10, at 345.

113. *See* Blake, *supra* note 111, at 36-37. Professor Vagts attributes the strength of the MNE to the following factors:

(1) the MNE has a structure and orientation which allow it to develop a strategy that is more nearly global in viewpoint than that of any previous business entity — this is, one which pays less heed to national frontiers in pursuit of its objectives; (2) the MNE's emphasis on technology makes it both a formidable competitor or antagonist and a highly desirable guest; and (3) the MNE is a large scale enterprise with many readily available resources and frequently a commanding market position.

Vagts, *supra* note 6, at 756.

114. Vagts, *supra* note 6, at 756.

115. Cox, *supra* note 10, at 353.

116. *Id.* For a treatment of national laws, *see generally* P. MEINHARDT, COMPANY LAW IN EUROPE (1975) [hereinafter cited as MEINHARDT].

117. *See* Blake, *supra* note 111, at 36.

their respective abilities to gather information.¹¹⁸ A MNE has the advantage of a sophisticated and centralized information and decision-making system.¹¹⁹ On the other hand, trade unions usually lack complete information concerning factors which affect employee interests.¹²⁰ The nature of this difference places trade unions in a disadvantageous position.¹²¹ Where the real decision-making authority of a MNE is outside the host country, labor is unable to exert much influence because of vast differences in the organized strength of unions in different countries.¹²² Unions find it difficult to organize any unified action against a MNE.¹²³ While labor may be well-organized and may have a strong bargaining position in one country, differences in ideologies, politics and interests make transnational union cooperation difficult to accomplish.¹²⁴ Furthermore, labor organization is not as amenable to centralized control and decision-making as is a MNE because different interest groups within the union must be satisfied.¹²⁵ Therefore, effective unified action is only likely when the common interest is obvious and immediate.¹²⁶

2. Effect on Use of Traditional Labor Weapons

The size and diversity of MNEs provide them with a position of strength when dealing with labor unions in bargaining situations.¹²⁷ This strength enables MNEs to use such strategies as holding out until the union submits to management's position, shifting production or moving production completely.¹²⁸ These strategies threaten worker security, especially where a MNE can take advantage of a global capability that is beyond the influence of national unions.¹²⁹

118. Baade, *supra* note 7, at 415.

119. See Cox, *supra* note 10, at 354.

120. *Id.*; see Pursey, *supra* note 12, at 279-80. The types of information needed by labor representatives include financial statements, structure, employment figures, statements of transfer-pricing policies, and accounting principles. *Id.*, at 284.

121. See Cox, *supra* note 10, at 354.

122. *Id.* at 353-54.

123. See Blake, *supra* note 111, at 39. See generally Samuel, *Transnational Collective Bargaining: An Idea Whose Time Has Not Yet Come*, 29 LAB. L. J. 619 (1978) [hereinafter cited as Samuel].

124. Cox, *supra* note 10, at 354. A discussion of the legal and social aspects of transnational bargaining is outside of the scope of this article. For a treatment thereof see generally Murphy, *supra* note 11; Blake, *supra* note 111, at 38. See also Leonard, *Coordinated Bargaining with Multinational Firms by American Labor Unions*, 25 LAB. L. J. 746 (1974).

125. See Cox, *supra* note 10, at 354. Conflicts of interests between unions are probably the main obstacle to effective international union collaboration. Roberts & May, *The Response of Multinational Enterprises to International Trade Union Pressures*, 12 BRIT. J. INDUS. REL. 403, 416 (1974) [hereinafter cited as Roberts & May].

126. Roberts & May, *supra* note 125, at 416.

127. See Blake, *supra* note 111, at 36-37.

128. *Id.* at 37.

129. *Id.* See generally BUSINESS INTERNATIONAL CORPORATION, 201 CHECKLISTS: DECISION MAKING IN INTERNATIONAL OPERATIONS 200-01 (1980). See also FIRST NATIONAL CITY BANK, MANAGERS GUIDE TO EMPLOYEE RELATIONS (United Kingdom), reprinted in R. BLANPAIN, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS 1976-1979, at

One of the most important weapons that a union possesses with respect to bargaining with management is the strike.¹³⁰ However, a MNE can hold out better in a strike because profit centers are geographically diversified.¹³¹ MNEs can minimize disruptions by shifting operations among various centers in order to maintain delivery of products and services to the markets affected by any given industrial dispute.¹³² A MNE can evade labor disputes by permanently closing operations in areas where labor conditions are adverse.¹³³ The nature of MNEs gives local union officials the sense that enterprise decisions are made on the basis of international considerations with little attention given to local needs.¹³⁴ These factors undermine the effectiveness of the strike as a weapon by reducing the confidence of local members that their efforts will influence decisions.¹³⁵ Because the relative positions of workers and employers determine wage structures,¹³⁶ the reduction of relative union strength is viewed by labor leaders as critical.¹³⁷

C. *The MNE View of Industrial Relations*

From the perspective of MNE supporters, analysis of the foregoing strategies is quite different. Adversaries of the MNE maintain that due to its international orientation a MNE can hold out in a strike longer than a local enterprise.¹³⁸ However, MNE supporters argue that the supposed advantage of diverse profit centers presumes a singleness of purpose that is not presently a reality.¹³⁹ This latter position views a MNE as a coalition of persons with separate goals and differing capacities to influence corporate policy rather than as a unified body of decision-makers.¹⁴⁰ Persons in charge of specific divi-

175 (1979). This guide demonstrates a generally negative attitude towards unions calling for tactics designed to prevent union organization. *Id.* at 179.

130. Kujawa, *U.S. Labor, Multinational Enterprises and the National Interest: A Proposal for Labor Law Reform*, 10 *LAW & POL'Y INT'L BUS.* 941, 946 (1978). *See also*, Comment, *National Labor Unions v. Multinational Companies: The Dilemma of Unequal Bargaining Power*, 11 *COLUM. J. TRANSNAT'L L.* 124 (1972) [hereinafter cited as *NLUs v. MNCs*].

131. Blake, *supra* note 111, at 36-37.

132. *Id.* at 37.

133. *See NLUs v. MNCs, supra* note 130, at 125.

134. *See Blake, supra* note 111, at 36-37. *See also Pursey, supra* note 12, at 280.

135. *See Vagts, supra* note 6, at 774. In the event of complete transfer of production, MNEs can undermine even government job security. *See id.* It may be particularly hard for local governments to enforce their laws on severance pay or other benefits to be given to severed employees. *Id.* If a MNE fails to comply, enforcement of such requirements could be difficult or impossible, even though some company assets might be left behind. *Id.*

136. Van Langendonck, *supra* note 19, at 88.

137. *See Cox, supra* note 10, at 353.

138. *See Blake, supra* note 111, at 37.

139. *See Vagts, supra* note 6, at 755.

140. *Id.*

sions tend to emphasize the importance of their own operations instead of sacrificing them for the benefit of the larger enterprise.¹⁴¹

While minimizing the effects of labor disruptions by shifting production and by importing items in order to maintain sales in the local market is possible, management sees this as an unacceptable tactic.¹⁴² Use of this tactic for short term advantage could lead to the singling out of the particular MNE by other labor unions and governments who could create economic and legal hardships for the enterprise.¹⁴³ Also, while a MNE generally has the capacity to transfer operations to counter a strike, the benefits of such a strategy are often illusory.¹⁴⁴ The cost of transferring an entire operation is high.¹⁴⁵ Therefore, the use of such a transfer to obtain leverage over labor is impractical and unrealistic.¹⁴⁶ Therefore, most MNE proponents argue that controls other than those already in place are unnecessary.¹⁴⁷

D. *Organized Labor's Attempt to Reconcile Its Perceived Disadvantaged Position*

The existence of the Multinational Directive is due, in large part, to the efforts of organized labor in Europe.¹⁴⁸ Though MNEs, in general, are in the forefront of industry in labor relations, wages and working conditions,¹⁴⁹ the exceptions¹⁵⁰ to this general trend have attracted the attention of the public.¹⁵¹ Before the Multinational Directive was formulated,¹⁵² the International Labor Organization formally expressed the growing concerns of labor about the shortcomings of MNEs:

The advances made by multinational enterprises in organizing their operations beyond the national framework may lead to abuse

141. *Id.*

142. See Gould, *Multinational Corporations and Multinational Unions: Myths, Reality and the Law*, 10 INT'L LAW. 655, 659 (1976). Employers are circumscribed in their ability to respond across national borders because of increased costs of transportation and products, and the lack of product uniformity in many industries. *Id.* at 659-61.

143. See Shearer, *Fact and Fiction Concerning Multinational Labor Relations*, 10 VAND. J. TRANSNAT'L L. 51, 55-56 (1971) [hereinafter cited as Shearer].

144. *Id.*

145. *Id.* at 55.

146. *See id.*

147. See Business Brief, *UNICE: Opposition to Draft Directive on Multinational Employees*, 695 European Report (press release of the European Communities) 5 (June 19, 1980) [hereinafter cited as *UNICE: Opposition*].

148. See ETUC *Evaluation*, *supra* note 18, § 1.1 (strong opposition was presented to the Directive by European representatives of capital).

149. BLANPAIN, *supra* note 52, at 18.

150. See generally *id.* at 123-24, for MNE cases brought before the Committee on International Investment and Multinational Enterprises of the OECD.

151. *Id.* at 18.

152. The ILO Tripartite Declaration was published November 16, 1977, whereas the Multinational Directive was published October 1, 1980. See note 4 *supra*.

of concentrations of economic power and to conflicts with national policy objectives and with the interests of the workers. In addition, the complexity of multinational enterprises and the difficulty of clearly perceiving their diverse structures, operations and policies sometimes give rise to concern either in the home or in the host countries, or in both.¹⁵³

The frequency with which MNEs resort to objectionable tactics¹⁵⁴ is not wholly relevant.¹⁵⁵ Labor's perception of the labor relations tactics employed by MNEs is more important. Labor *believes* that tactics such as shifting or moving production can be utilized. However, this belief has weakened the bargaining position of labor by instilling fear in the rank and file membership that workers will lose their jobs if their representatives bargain too hard.¹⁵⁶

In the absence of formal governmental controls on MNEs, trade unions have employed two counter strategies to restore a balance of power between themselves and MNEs: (1) international coordinated bargaining¹⁵⁷ and (2) political pressures on government organizations to adopt binding international regulations on MNE conduct.¹⁵⁸ Under the first counter strategy, labor attempts to reinforce its collective bargaining position *vis-à-vis* a MNE by supporting union organizations in other nations. Thus, a network of cooperation may be developed between unions dealing with the same MNE.¹⁵⁹ In effecting this coordination, unions have drawn on their experiences in organizing solidarity actions within the same trade or industry.¹⁶⁰ However, the diversity of goals and philosophies among unions¹⁶¹ has made the value of this tactic

153. *ILO Tripartite Declaration*, *supra* note 4, art. 1.

154. *See* § IV.B *supra*.

155. *See* Address by George Ball, Columbia Law School (Feb. 26, 1976) *reprinted in* Conference on the Regulation of Transnational Corporation, The Friedman Series in Int'l Law, Columbia Law School 44, 49 (1976) (available in Harvard Law School Int'l Legal Studies Library).

156. *Id.* *See also* INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS, TRADE UNIONS AND THE TRANSNATIONALS: A HANDBOOK FOR NEGOTIATORS, 32 (IFCTU Twelfth World Congress, 1979) [hereinafter cited as HANDBOOK FOR NEGOTIATORS].

157. *See* Blake, *supra* note 111, at 40; *see* BLANPAIN, *supra* note 52, at 18-20. *But see* Samuel *supra* note 123, at 619 (arguing that transnational collective bargaining is not widespread).

158. *See* Workers' Right of Participation in Multinational Companies, Resolution adopted by the Executive Committee of the European Trade Union Confederation of February 6, 1975, *reprinted in* 23 I.C.F.T.U. ECON. & SOC. BULL. 15 (Jan.-Mar., 1975). *See e.g.*, ICFTU, CHARTER OF TRADE UNION DEMANDS FOR THE LEGISLATIVE CONTROL OF MULTINATIONAL COMPANIES, Oct. 1975, ICFTU Doc. D/1976/0403/13, at 17 (calling for regulations governing recognition of trade unions and collective bargaining, information, access to headquarters and real decision makers, consultation on investment decisions, countering of runaway firms and a legally binding code).

159. Cox, *supra* note 10, at 353-54. *See also* Murphy, *supra* note 11, at 626-27. Unions in different countries could exchange information on working conditions, wages, benefits, contract provisions, production and profit figures, and the nature of management actions. They could also consult with each other on the planning and implementation of joint actions. Blake, *supra* note 111, at 40-41.

160. ICFTU, THE MULTINATIONAL CHALLENGE, ICFTU Doc. D/1971/0403/64, at 24 [hereinafter cited as MULTINATIONAL CHALLENGE].

161. *See* § IV.B.2 *supra*. *See also* Cox, *supra* note 10, at 354.

minimal when used against strong MNE coordinated management planning.¹⁶²

Under the second counter strategy, trade unions pressure governments for MNE controls which would benefit the interests of labor.¹⁶³ In the countries of the EEC where union membership is broad-based,¹⁶⁴ the relationship between unions and political parties is important.¹⁶⁵ This political influence is also exercised with respect to international organizations.¹⁶⁶

The unions' intention under the second strategy is to work for effective public regulation.¹⁶⁷ Basically, labor's position calls for *legally binding* codes of conduct for MNEs.¹⁶⁸ Although several voluntary codes have been enacted,¹⁶⁹ labor's basic view is that continuing malpractice by MNEs will not cease until obligations with legal sanctions become effective.¹⁷⁰ Among the regulations proposed by labor are two key elements which would result in more balanced bargaining between labor and MNEs: information disclosure and consultation.¹⁷¹ Consistent with this strategy, organized labor is particularly interested in the work being conducted in the EEC.¹⁷²

162. See MULTINATIONAL CHALLENGE, *supra* note 160, at 23.

163. Cox, *supra* note 10, at 355.

164. See *id.* at 356.

165. BLANPAIN, *supra* note 52, at 20.

166. For example, the European Trade Union Confederation made the EEC Commission approval of the Multinational Directive, an article of organized labor's faith in the EEC policy-making process. *Business/Union Polarization*, *supra* note 23, at 4.

167. Cox, *supra* note 10, at 359.

168. Tapiola, *The Review of the OECD Guidelines: A Trade Union Evaluation*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES, 291 (N. Horn ed. 1980) [hereinafter cited as Tapiola].

169. See OECD Guidelines, *supra* note 4; ILO Tripartite Declaration, *supra* note 4.

170. BLANPAIN: TUAC Statement, *supra* note 12, at 103.

171. See Tapiola, *supra* note 168, at 291.

Examples of incidents where information might have been helpful include: 1. An MNE with factories in France experienced losses due to a falloff in sales for its heavy construction equipment. The company considered taking steps for obtaining financial backing. The company reduced production, resulting in dismissals of large numbers of employees. Unawareness of the material information behind these decisions, coupled with rumors about major changes caused job insecurity and uncertainty about the company's future. The company refused requests for information about the latest state of accounts. Large-scale dismissals came without the unions being able to assess their justification or negotiate about the need for them. BLANPAIN, *supra* note 52, at 200. 2. In the case of another MNE in the Federal Republic of Germany, the central management decided to close a subsidiary which resulted in the loss of 300 jobs. The trade-unions did not find out about this decision until the matter had been definitely decided. Even the local management opposed the move. In spite of strong union arguments which would justify a decision to keep the plant open, the central management would not reconsider the decision. The union argued that the plant was a new facility and that the closure could not be justified on the grounds of inefficiency or lack of competitive power. Timely information disclosure might have enabled the union to affect the decision before it became final. *Id.* at 204-05. 3. In a MNE plant in Belgium, management continued to assert a bright outlook, even though the unions suspected difficulties because of the plant's outdated technology. Without information, the unions were unable to present a rational solution and the result was a loss of over 300 jobs. *Id.* at 202-03.

172. See ETUC *Evaluation*, *supra* note 18, § 3.1.

V. THE MULTINATIONAL DIRECTIVE

A. *Background of the Multinational Directive*

Early in 1972, the EEC officially recognized, due to the growth of MNEs as a major economic force, the need for policy formulation which would create a balance between: (1) the need of labor for employment security and (2) the need of the MNEs for business independence.¹⁷³ The Commission issued an official document entitled, "Multinational Undertakings Community Regulations."¹⁷⁴ This report stated that an imbalance between multinational enterprises and trade unions required the adoption of legally binding rules.¹⁷⁵ In particular, the report stated that such rules should provide for the preservation of working places.¹⁷⁶ The report rejected a voluntary code because of the Commission's belief that such a code would be effective only against those enterprises willing to comply.¹⁷⁷

A resolution of the European Parliament approved the main features of the Commission's report, including the proposal for a commitment to a legislative program of binding rules.¹⁷⁸ The Parliament agreed to the creation, in Europe, of a trade union counterweight to MNEs.¹⁷⁹ In the EEC, binding rules necessary for such a counterweight can be instituted through the function of a directive.¹⁸⁰ The individual laws of all nations within the EEC are modeled after the text of the directive.¹⁸¹ The result is that the EEC operates as a unit.¹⁸² Thus, laws and regulations in one country could not be circumvented by MNEs going to another country within the Community.¹⁸³

Several EEC countries have legislation that requires local enterprises to bargain with worker representatives, to supply information relevant to the bargaining process and to establish consultation procedures.¹⁸⁴ However,

173. [1972] Eur. Parl. Deb. 88-108 (Apr. 19, 1972) (Mr. Coppé at 89, 92) (German ed.) reprinted in Baade, *supra* note 7, at 407, 424.

174. *Multinational Undertakings and Community Regulations* (Communication from the Commission to the Council, presented on Nov. 8, 1973), [1973] BULL. EUR. COMM., (Supp. 15/73) (1973).

175. *Id.* at 7, 9-12.

176. *Id.*

177. *Id.* at 8.

178. Resolution of the European Parliament of December 12, 1974, 5 O. J. EUR. COMM. (No. C1) 37-39 (1975) (giving an opinion on the communication from the Commission to the Council on Multinational Undertakings).

179. *Id.* § 11.

180. See EEC Treaty, *supra* note 15, art. 189, which states that "[a] directive shall be binding as to the result to be achieved."

181. Multinational Directive, COM (80) 423 final, art. 17; see EEC Treaty, *supra* note 15, art. 189.

182. See Baade, *supra* note 7, at 422.

183. See D. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 178, 188 (3d ed. 1975).

184. See generally MEINHARDT, *supra* note 116; Traub, *Co-determination and the New Austrian Labor Code: A Multi-Channel System of Employee Participation*, 14 INT'L LAW. 613 (1980) [hereinafter cited

these national laws are only applicable to local enterprises or local subsidiaries of MNEs¹⁸⁵ because their jurisdiction is limited by national boundaries.¹⁸⁶ In formulating the Multinational Directive, the European Commission recognized that as firms have become more complex and have expanded to the transnational level, worker representatives have found that access to information with respect to local subsidiaries alone is of insignificant assistance when representing the interests of labor in collective bargaining.¹⁸⁷ The perception that separate national regulations are inadequate has resulted in the Commission's proposal for an international system of compulsory information disclosure and consultation requirements affecting MNEs.¹⁸⁸

The EEC's Multinational Directive¹⁸⁹ aims to ensure that MNEs employ effective procedures to inform and consult with employees of transnational firms operating in the European Community.¹⁹⁰ As proposed, the Directive contains three important and controversial provisions:¹⁹¹ information disclosure; consultation with workers when a MNE is considering decisions having substantial impact on jobs; and a clause for companies controlled from outside the EEC.¹⁹²

B. *Defining the MNE within the Context of Codes of Conduct*

It is necessary to establish a working definition of MNE in the context of labor management relations in order to understand the purpose and application of the Multinational Directive.¹⁹³ A suggested business definition of MNE¹⁹⁴ is "[a] cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management

as Traub]; Vorbrugg, *Labor Participation in German Companies and Its European Context*, 11 INT'L LAW. 249 (1977) [hereinafter cited as Vorbrugg].

185. See EXPLANATORY MEMO, *supra* note 20, § I(A)(3).

186. See *Commission Proposes Directive*, *supra* note 71, at 2; Morgenstern & Knapp, *Multinational Enterprises and the Extraterritorial Application of Labour Law*, 27 INT'L & COMP. L.Q. 769, 786-87 (1978) [hereinafter cited as Morgenstern & Knapp]. However, one way of getting labor law applied extraterritorially is by private international law where the parties in the contract expressly choose the specific law to govern the contract. *Id.* at 774-75.

187. See EXPLANATORY MEMO, *supra* note 20, I(A)(1)(2)(3) & (4).

188. *Id.*

189. COM (80) 423 final (Oct. 23, 1980). The proposal must still go through the EEC legislative process. See § III *supra*.

190. COMMISSION OF THE EUROPEAN COMMUNITIES, INFORMATION MEMO. P-86, at 1 (Oct. 1980) [hereinafter cited as INFORMATION MEMO].

191. *Business/Union Polarization*, *supra* note 23, at 4.

192. Multinational Directive, COM (80) 423 final, arts. 1, 5 & 6.

193. See EXPLANATORY MEMO, *supra* note 20, § II(1) & (2).

194. The term "multinational enterprise" is used interchangeably in most related literature with "transnational corporation" (the official U.N. term), enterprise, firm or company. Fatouros, *The U.N. Code of Conduct on Transnational Corporations: A Critical Discussion of the First Drafting Phase*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL CORPORATIONS, 103 n.1 (N. Horn ed. 1980).

strategy.”¹⁹⁵ This definition excludes firms holding shares for investment only, firms with only one subsidiary, intergovernmental ventures and other less complex structures.¹⁹⁶ Moreover, this definition does not address the relationship between labor and MNEs.¹⁹⁷ A more inclusive definition of a MNE would be a company, or cluster of legal entities,¹⁹⁸ that “extends its business operations under one guiding direction to two or more countries.”¹⁹⁹ The important characteristics are: (1) a central management in one country and (2) macro-economically significant business activities in another country.²⁰⁰ This definition is useful because it contemplates the power relationship between unions and management.²⁰¹ Power is the essence of relations between labor and management.²⁰² Central decision-making alters the power relationship by isolating the decision-makers from any local display of power by employees.²⁰³ The macro-economic character of a MNE shifts power by providing more options to the decision-makers.²⁰⁴

Both the OECD Guidelines²⁰⁵ and the ILO Tripartite Declaration²⁰⁶ consider the importance of central decision-making in their definitions of MNEs. Although each code states that a precise definition is not required to serve their purposes,²⁰⁷ the definitions of a MNE in both codes contain language indicating the significance of central decision-making.²⁰⁸ The OECD Guidelines state that a MNE is arranged so that one entity “[m]ay be able to exercise a significant influence over the activities of the others.”²⁰⁹ The language in the ILO Tripartite Declaration refers to an enterprise that “[o]wns or controls . . . facilities outside the country in which [it] is based.”²¹⁰ The focus of these

195. Vernon, *Economic Sovereignty at Bay*, 47 FOREIGN AFFAIRS 110, 114 (1968).

196. Vagts, *supra* note 6, at 746.

197. Compare, Vagts, *supra* note 6, at 745-46 (this definition is a business concept and does not suggest legal relationships) with BLANPAIN, *supra* note 52, at 17 (central decision making, affecting the balance between labor and management is at the heart of MNEs).

198. Van Langendonck, *supra* note 19, at 88.

199. Galbraith, *supra* note 1, at 83, 84.

200. Baade, *supra* note 7, at 407, 408.

201. See BLANPAIN, *supra* note 52, at 16-17; MULTINATIONAL CHALLENGE, *supra* note 160, at 13-14, 19.

202. See BLANPAIN, *supra* note 52, at 16-17; see R. BLANPAIN, THE BADGER CASE AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, 16-17 (1977) [hereinafter cited as THE BADGER CASE].

203. See BLANPAIN, *supra* note 52, at 17.

204. *Id.*

205. OECD Guidelines, *supra* note 4, Introduction, para. 8.

206. ILO Tripartite Declaration, *supra* note 4, art. 6.

207. *Id.*; OECD Guidelines, *supra* note 4, Introduction, para. 8.

208. THE BADGER CASE, *supra* note 202, at 16; see BLANPAIN, *supra* note 52, at 16.

209. OECD Guidelines, *supra* note 4, Introduction, para. 8.

210. ILO Tripartite Declaration, *supra* note 4, art. 6.

The ILO provision reads:

Multinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based. The degree of autonomy of entities

two codes is significant when looking at the Multinational Directive because the EEC Commission refers to these codes as the starting points of the Directive in the explanatory memorandum which accompanied the draft text.²¹¹

The Directive is designed to facilitate the access to information by labor from all "undertakings"²¹² which are dominant in relation to other subsidiaries²¹³ or establishments.²¹⁴ Article 3 of the Directive defines an undertaking as "dominant," in relation to another undertaking, if it either: (1) holds the majority of votes relating to shares issued by another undertaking²¹⁵ or (2) has the power to designate at least half the members of the administrative, management or supervisory bodies of another undertaking, where those members hold the majority of voting rights.²¹⁶ The Directive recognizes that the above control relationships result in inadequate information disclosure to labor on the local level.²¹⁷ Although the Directive reaches all undertakings,²¹⁸ it is particularly concerned with those undertakings which operate on a transnational basis.²¹⁹

C. Provisions for Reaching Both Community and Non-Community Based Undertakings

The Multinational Directive provides that multinational enterprises must adhere to the requirements of the Directive²²⁰ regardless of whether their decision-making centers²²¹ are located in member or non-member countries.²²² Article 9, paragraph 2 states that "[t]he management of an

within multinational enterprises in relation to each other varies widely from one such enterprise to another, depending on the nature of the links between such entities and their fields of activity and having regard to the great diversity in the form of ownership, in the size, in the nature and location of the operation of the enterprises concerned.

ILO Tripartite Declaration, *supra* note 4, art. 6.

211. EXPLANATORY MEMO, *supra* note 20, § I(A)(4), at 3.

212. *See* Multinational Directive, COM (80) 423 final, art. 1.

213. *Id.* arts. 1, 3.

214. *See id.* art. 9(3). The preamble of the Directive expresses the importance of reaching all dominant undertakings: "Whereas in a common market where national economies are closely interlinked, it is essential, if economic activities are to develop in a harmonious fashion, that [all] undertakings should be subject to the same obligations in relation to Community employees affected by their decisions . . ."

215. *Id.* art. 3(2)(a).

216. *Id.* art. 3(2)(b).

217. *See* EXPLANATORY MEMO, *supra* note 20, §§ I(A)(1), (2) & (3); THE BADGER CASE, *supra* note 20, at 16-17; BLANPAIN, *supra* note 52, at 16-17.

218. *See* EXPLANATORY MEMO, *supra* note 20, §§ I(A)(1) & (2).

219. *See* Multinational Directive, COM (80) 423 final (The official title points out the application to transnational undertakings); *See* EXPLANATORY MEMO, *supra* note 20, § I(A)(4).

220. *See* EXPLANATORY MEMO, *supra* note 20, § II, art. 9.

221. *See* Multinational Directive, COM (80) 423 final, art. 2(C). The decision making center is the place where the management of the undertaking actually performs its functions. *Id.*

222. *Id.* art. 1.

undertaking whose decision-making center is located in a non-member country and which has at least one establishment in one member state shall be subject to the obligations [of] the Directive,"²²³ provided that the establishment employs at least 100 workers.²²⁴

Where an undertaking does not have its decision-making center based in the EEC, the Multinational Directive supplies a means to ensure that the provisions of the Directive are carried out.²²⁵ Article 8 provides that if such an undertaking "[d]oes not ensure the presence within the community of at least one person able to fulfill the requirements as regards disclosure of information and consultation . . . , the management of the subsidiary that employs the largest number of employees within the community shall be responsible for fulfilling the [obligations]."²²⁶ In addition, provisions of Articles 5, 6 and 8 require member states to establish and impose appropriate penalties against undertakings that fail to fulfill the requirements of the Directive.²²⁷

D. *The Directive's Substantive Requirements:
Information Disclosure and Consultation*

The EEC can impose substantive requirements on MNEs and can enforce compliance because it has territorial jurisdiction in all member states and competence to create community-wide legislation.²²⁸ In addition to creating a regulatory apparatus that can be utilized on an international level, the Multinational Directive establishes two requirements designed to balance the negotiating power between labor and the multinational enterprise.²²⁹ First, the Directive requires the management of each dominant undertaking to forward information concerning worker interests²³⁰ to its establishments²³¹ or subsidiaries²³² within the EEC so that these subsidiaries and establishments can communicate the information to their employee representatives.²³³ The information presents a complete picture of the activities and performance of the enter-

223. *Id.* art. 9(2).

224. *Id.* art. 9(1).

225. *Id.* art. 8.

226. *Id.*

227. See EXPLANATORY MEMO, *supra* note 20, § II, art. 6.

228. Baade, *supra* note 7, at 422.

229. Multinational Directive, COM (80) 423 final, art. 5 (requiring disclosure of information to workers), art. 6 (requiring consultation on decisions having substantial effect on worker interests).

230. EXPLANATORY MEMO, *supra* note 20, § II(4). See note 234, *infra*.

231. Multinational Directive, COM (80) 423 final, art. 9.

232. *Id.* art. 5(1).

233. *Id.* art. 5(3).

prise in all of the countries in which it is established,²³⁴ thus creating a constructive atmosphere of industrial relations by making the motives and operations of enterprises more visible.²³⁵

Second, the Directive requires management to consult with the representatives of its employees on any proposed action which might have a substantial effect on the employees' security and economic interests.²³⁶ No later than forty days before deciding on such action, central management must forward the information to local management.²³⁷ In turn, the local management must communicate the information to employee representatives.²³⁸ The representatives may give an official opinion.²³⁹ If, in the representatives' opinion, the proposed decision is likely to have a direct effect on terms of employment or working conditions, the representatives can demand consultations with management.²⁴⁰ The Directive specifically requires management to consult with labor before making the following decisions:

- a) the closure or transfer of an establishment or major parts thereof;
- b) restrictions, extensions or substantial modifications to the activity of the undertaking;
- c) major modifications with regard to organization;
- d) and, the introduction of long-term cooperation with other undertakings or the cessation of such cooperation.²⁴¹

234. INFORMATION MEMO, *supra* note 190, at 2.

Multinational Directive, COM (80) 423 final, Article 5(2) states:

This information shall relate in particular to:

- (a) structure and manning
- (b) the economic and financial situation
- (c) the situation and probable development of the business and of production and sales
- (d) the employment situation and probable trends
- (e) production and investment programmes
- (f) rationalization plans
- (g) manufacturing and working methods, in particular the introduction of new working methods
- (h) all procedures and plans liable to have a substantial effect on employees' interests.

This list was previously presented and approved in Article 120 of the Proposal for a Council Regulation on the Statute for European Companies [1975] BULL. EUR. COMM. (Supp. 4/75) 62 (1975). See EXPLANATORY MEMO, *supra* note 20, § II, art. 5, para. 2.

235. See *Vredling Outlines Scope*, *supra* note 66, at 5; see also Social Matters: *Mr. Vredling to Propose Drawing Up of EEC Regulations*, 2881 EUROPE 7 (Mar. 31, 1980) [hereinafter cited as *Vredling Proposes Regs.*], underlining the fact that multinationals make their decisions at high levels unaffected by national borders, whereas workers' rights are confined within national borders.

236. EXPLANATORY MEMO, *supra* note 20, § II, art. 6; see Multinational Directive, COM (80) 423 final, art. 6(1).

237. Multinational Directive, COM (80) 423 final, art. 6(1).

238. *Id.* art. 6(3).

239. See *id.* art. 6(4).

240. *Id.* art. 6(4).

241. *Id.* art. 6(2).

The Directive requires labor and management to hold all consultations with a view toward reaching agreements on measures planned.²⁴²

1. Information Disclosure

An information disclosure requirement is not a new idea in labor law.²⁴³ Both international and domestic labor law have recognized that meaningful collective bargaining necessitates informed negotiators.²⁴⁴ Information, such as that required under the Multinational Directive encompassing the entire operation of a MNE, is particularly important to employees of the local divisions of a multinational enterprise.²⁴⁵ Information limited to a local operation provides workers with the basis for only partial assessment or perhaps even a mistaken assessment of the situation.²⁴⁶ If the parties met on an informed basis in negotiations, they could often avoid unnecessary conflict and dispute.²⁴⁷

Labor's skeptical perception of MNEs is a significant factor in such disputes. From the labor point of view, MNEs operate from a global strategy which reflects only incidental concern for the impact on employee interests within the countries in which a MNE operates.²⁴⁸ In Western Europe, inaccessibility of MNEs' central management fosters apprehension over potential job loss among workers.²⁴⁹ Disclosure of information by MNEs regarding their entire operations would diminish this apprehension.²⁵⁰ Trade unions maintain that workers need relevant information to bargain effectively, to verify a claim that jobs may be expendable or transferred to other locations, and to find alternative solutions.²⁵¹ However, because a trade union normally does not have the power or the resources to collect information about a MNE

242. *Id.* art. 6(4).

243. See R. GORMAN, BASIC TEXT ON LABOR LAW 409-15 (1976), discussing the employer's duty to disclose information to employee representatives as required by the National Labor Relations Act § 8(a)(5) which provides a duty to bargain in good faith. National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1976).

244. *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967); see *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956); see *ILO Tripartite Declaration*, *supra* note 4, art. 54; see OECD Guidelines, *supra* note 4, Chapter on Employment and Industrial Relations, para. 2(b).

245. INFORMATION MEMO, *supra* note 190, at 1.

246. See *Vredling Outlines Scope*, *supra* note 66, at 5.

247. See Kersten, *TNCs: A Trade Union View*, reprinted in 1 THE CENTRE ON TRANSNATIONAL CORPORATIONS REPORTER No. 6, at 17, 30 (U.N., 1979) [hereinafter cited as Kersten].

248. See Pursey, *supra* note 12, at 280.

249. *Vredling Proposes Regs.*, *supra* note 235, at 7.

250. See Pursey, *supra* note 12, at 280.

251. See EXPLANATORY MEMO, *supra* note 20, § II(4); Compare Blake, *supra* note 111, at 36 (size and nature of MNEs contribute to feelings of reduced union effectiveness), with Shearer, *supra* note 143, at 53 (a MNE creates fears of job loss and weakening of union power).

from outside sources, the unions need a supply of information directly from the MNE itself, as the most efficient and reliable source.²⁵²

In Western Europe, national laws exist which require enterprises to furnish information about local operations to employee representatives.²⁵³ The European approach in this area differs from that of the United States. U.S. law requires MNEs to provide to unions information which is relevant and necessary to collective bargaining, as interpreted by the National Labor Relations Board (NLRB)²⁵⁴ and the courts.²⁵⁵ European nations allow worker participation in decisions affecting the local plant²⁵⁶ through employee representatives,²⁵⁷ work councils²⁵⁸ and supervisory boards.²⁵⁹ National laws require local management to supply information to workers through these structures.²⁶⁰ However, in complying with its obligations to inform worker representatives, local management itself may not have information concerning the decisions made at MNE headquarters.²⁶¹ As the consequences for the employees of a particular establishment of a multinational enterprise depend not only on what happens locally but, to a great extent, on matters occurring in other parts of the enterprise, information possessed by local management may be insufficient.²⁶² Decisions on internal price setting or investment and production among other establishments of the multinational may have significant impact on local employees.²⁶³ Thus, workers argue that disclosure of information by MNEs not only aids them in the protection of their interests but is also consistent with concepts already accepted in national legislation.²⁶⁴

252. See EXPLANATORY MEMO, *supra* note 20, § II(4).

253. See BLANPAIN, *supra* note 52, at 199-200.

254. See N.L.R.A., 29 U.S.C. § 153(a) (1976).

255. *Truitt Mfg. Co.*, 351 U.S., at 152-53; *Acme Industrial Co.*, 385 U.S., at 435-36.

256. See BLANPAIN, *supra* note 52, at 199.

257. See EXPLANATORY MEMO, *supra* note 20, § II(2). See *e.g.*, MEINHARDT, *supra* note 116, § 16 (Austria, Belgium, Germany, Denmark, France, Luxembourg, Norway, the Netherlands). See *e.g.*, Gärde, *Co-determination in Sweden: Functions for Boards with Employee Representatives*, 8 INT'L L. 344 (1974).

258. See EXPLANATORY MEMO, *supra* note 20, § II, art. 7. See *e.g.*, Vorbrugg, *see* note 184, at 250. See *Employee Codetermination*, *supra* note 17, at 949-52, 963. The works council operates on a level closer to the ordinary employee and is more concerned with execution than formulation of management policies. *Id.* at 963.

259. *Employee Codetermination*, *supra* note 17, at 949-58. German law places employee representatives on supervisory boards of companies. *Id.* at 950. See MEINHARDT, *supra* note 116 (countries with supervisory boards are: Austria, Germany and France).

260. See EXPLANATORY MEMO, *supra* note 20, § I(A)(3).

261. See Kujawa, *U.S. Labor, Multinational Enterprises, and the National Interest*, 10 LAW & POL'Y INT'L BUS. 941, 950 (1978). *But see* Shearer, *supra* note 143, at 57 (arguing the company point of view that the local plant is subject to all local labor laws in dealing with workers and unions).

262. BLANPAIN: TUAC Statement, *supra* note 12, at 207.

263. *Id.* at 207.

264. Austria and West Germany are nations with national legislation in this area. See EXPLANATORY MEMO, *supra* note 20, § II(5). *Arbeitsverfassungsgesetz [ArbVg]* § 92 (Austria,

2. The OECD and ILO on Information Disclosure

It is helpful to compare the Multinational Directive with the OECD and ILO codes because the EEC Commission has chosen these codes as the foundation for the Directive's objectives.²⁶⁵ Both the OECD Guidelines and the ILO Tripartite Declaration contain information disclosure provisions. The OECD Guidelines require MNEs to provide labor with information which is needed for "meaningful negotiations."²⁶⁶ According to a report issued by the OECD, the word "meaningful" is a useful operational term to persons experienced in labor relations when applied to the circumstances of each case.²⁶⁷ Paragraph 3 of the Guidelines requires MNEs to provide information on the enterprise as a whole, in accordance with national law.²⁶⁸ Information disclosure is a controversial area of industrial and social policy within OECD member countries. Therefore, the formulators of the Guidelines considered the listing of items to be covered by this provision to be impractical.²⁶⁹

The ILO Tripartite Declaration also states that multinational enterprises should supply worker representatives with information required for meaningful negotiations and for a fair view of the enterprise as a whole.²⁷⁰ As the OECD Guidelines, the ILO Declaration does not define the terms of disclosure in detail.²⁷¹ The declared purpose of the ILO Tripartite Declaration

1976); Law of May 4, 1976 [1976] BGB1 1 1153 (W. Ger.); See generally Van Langendonck, *supra* note 19.

265. EXPLANATORY MEMO, *supra* note 20, § I(A)(4).

266. OECD Guidelines, *supra* note 4, Chapter on Employment and Industrial Relations 2(b). "[Enterprises should] provide to representatives of employees information which is needed for meaningful negotiations on conditions of employment." *Id.*

267. THE REPORT OF THE COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES ON THE REVIEW OF THE 1976 DECLARATION AND DECISIONS ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES ¶¶ 63, 64 as cited in R. BLANPAIN, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS: 1976-79, at 213 (1969) [hereinafter cited as BLANPAIN: IME REPORT].

268. OECD Guidelines, *supra* note 4, Chapter on Employment and Industrial Relations, para. 3. "[Enterprises should] provide to representatives of employees where this accords with local law and practice, information which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole."

269. BLANPAIN, IME REPORT ¶¶ 64, 65, *supra* note 267, at 214.

270. ILO Tripartite Declaration, *supra* note 4, art. 54.

54. Multinational Enterprises should provide workers' representative with information required for meaningful negotiations with the entity involved and where this accords with local law and practices, should also provide information to enable them to obtain a true and fair view of the entity or, where appropriate, of the enterprise as a whole.

Id.

271. This lack of definition may indicate the difficulty in the tripartite structure in reaching agreement on their scope and nature. It also reflects a recognition that a variety of circumstances may arise in practice. Günter, *The Tripartite Declaration of Principles (ILO): Standards and Follow-up*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 155, 163 (N. Horn ed. 1980) [hereinafter cited as Günter].

is to recognize the important role of multinational enterprises in the area of industrial relations²⁷² and to maintain standards for workers at least comparable to those observed by comparable employers in the countries concerned.²⁷³

In preparing the Multinational Directive, the EEC Commission followed the objectives of the ILO and OECD codes of conduct by requiring MNEs to give meaningful information²⁷⁴ to workers directly affected by a MNE's decision.²⁷⁵ However, unlike the ILO and OECD codes, the Multinational Directive explicitly outlines the items of information disclosure.²⁷⁶ The list is the same list as was earlier approved by the European Parliament in the context of a Regulation Establishing a Statute for European Companies.²⁷⁷ The list also corresponds to provisions of national legislation in member states which are the most advanced in the field of industrial relations.²⁷⁸

3. Consultation

Labor-management consultation procedures have been in effect in the European Economic Community in a context outside of the MNE.²⁷⁹ Germany first implemented consultation procedures in the coal and steel industries in an effort to reindustrialize and to restructure that country after World War II.²⁸⁰ Through consultation, the procedures gave labor the opportunity to express its viewpoint and to better understand the company position.²⁸¹ This consultation resulted in better job security, less industrial strife and a more informed perspective on all sides.²⁸² Increased awareness developed a sense of worker participation and confidence in the company.²⁸³ Experience in Germany has shown that labor will support measures deemed to

272. *ILO Tripartite Declaration*, *supra* note 4, art. 1; see Günter, *supra* note 271, at 162-63.

273. *ILO Tripartite Declaration*, *supra* note 4, art. 40.

274. EXPLANATORY MEMO, *supra* note 20, § I(A)(4).

275. *Id.* § II(5)(1).

276. See Multinational Directive, COM (80) 423 final, art. 5(2); see also INFORMATION MEMO, *supra* note 190, at 1.

277. EXPLANATORY MEMO, *supra* note 20, § II(5)(2).

278. *Id.* The Federal Republic of Germany, The Netherlands and Belgium.

279. Directive on the Safeguarding of Employees Rights in the Event of Transfer of Undertakings, 200 O. J. EUR. COMM. (No. L 61) 26, art. 6 (1977). See also Wiedemann, *Codetermination by Workers in German Enterprises*, 28 AM. J. COMP. L. 79-81 (1980).

280. *Employee Codetermination*, *supra* note 17, at 949-52. Allied Occupation Authorities actively promoted employee codetermination in their efforts to restructure German industry which had before and during WWII been a factor in the authoritarian German regime. Industrial leaders, in order to avert the threat of full divestiture of their holdings, were willing to compromise on the issue. *Id.* at 950.

281. *Id.* at 960.

282. *Id.*

283. See Strauss & Rosenstein, *Workers Participation: A Critical View*, 9 INDUS. REL. 197, 200, 212 (1970).

increase profitability.²⁸⁴ Managerial theory has recognized that workers with intimate knowledge of their workplace contribute constructively to operations.²⁸⁵ MNE decisions have a potentially drastic effect on jobs. Therefore, trade unions emphasize the need for consultation with management to discuss their interests before decisions become final.²⁸⁶

The very purpose of the Multinational Directive's consultation requirements is to ensure that management and labor conduct these meaningful discussions on matters having substantial effect on workers' jobs.²⁸⁷ However, consultation also benefits management by preventing serious social repercussions that result from unilateral decisions.²⁸⁸ The Directive states that the parties must hold consultations before a final decision is made.²⁸⁹ Management must inform employee representatives of impending major decisions and of the surrounding facts, in advance of a final decision.²⁹⁰ This rule gives labor the opportunity to express the views of workers on the subject of the decision.²⁹¹ However, the Multinational Directive ensures that these rules do not unduly delay the final decision of the enterprise,²⁹² by requiring that the employees' representatives give an opinion within thirty days.²⁹³ If the representatives agree that the proposed decision is likely to have a direct effect on terms of employment or working conditions, the management of the subsidiary or establishment must hold consultations with them "with a view to reaching agreement on the measures planned in respect of them."²⁹⁴

4. The OECD and ILO on Consultation

A reading of the Multinational Directive alongside the OECD and ILO codes shows that the Directive incorporates a continuing effort to effectively

284. See *id.* at 212; Cf. Vagts, *Reforming the "Modern" Corporation: Perspective From the German*, 80 HARV. L. REV. 23, 52 (1966) (arguing that the supervisory boards on which labor representatives serve often understand little about the company's affairs and thus become a mere rubber stamp for management decisions) [hereinafter cited as Vagts, *Reforming the Modern Corporation*]. The Austrian experience has also shown that labor will aid increased productivity. See Traub, *supra* note 235, at 630.

285. See Lowin, *Participative Decision Making: A Model, Literature Critique and Prescriptions for Research*, 3 ORG. BEHAVIOR AND HUMAN PERFORMANCE 68, 75-76 (1968) (describing the enhancement of worker identification with and confidence in the enterprise and utilization of the workers' knowledge of local conditions).

286. See Pursey, *supra* note 12, at 281-82. Since major decisions which affect workers usually originate or are guided from central headquarters, unions believe that they need to have the right to consult with the central decision makers. *Id.* at 286.

287. Multinational Directive, COM (80) 423 final, art. 6(1).

288. EXPLANATORY MEMO, *supra* note 20, § I(A)(4).

289. Multinational Directive, COM (80) 423 final, art. 6(1).

290. *Id.* art. 6(1)(3).

291. *Id.* art. 6(3).

292. EXPLANATORY MEMO, *supra* note 20, § II(6).

293. Multinational Directive, COM (80) 423 final, art. 6(3).

294. *Id.* art. 6(4). This provision is already in force in all member States under the Directive on the Safeguarding of Employee's Rights in the Event of Transfers, 20 O.J. EUR. COMM. (No. L 61) 26, art. 6(2) (1977) (regarding what arrangements must be made for employees if the plant is transferred away).

prevent drastic social dislocations as a result of unilateral MNE decisions. The OECD Guidelines do not require consultations, *per se*, with labor in decisions affecting the jobs of workers. However, the Guidelines do provide that where the enterprise is considering changes which would have major effects on the economic and social welfare of its employees, it should give reasonable notice of such changes and cooperate with employee representatives in mitigating the adverse effects.²⁹⁵ The Committee on International Investment and Multinational Enterprises²⁹⁶ has stated, in its report on interpretation of the guidelines,²⁹⁷ that:

It seems to the Committee that there is a link between these two notions. The notice given has to be sufficiently timely for the purpose of mitigating action to be prepared and put into effect, otherwise, it would not meet the criterion of 'reasonable.' It would be in conformity with the general intention of the paragraph in the light of the specific circumstances of each case, if management were able to provide such notice *prior*²⁹⁸ to the final decision being taken.²⁹⁹

The ILO Tripartite Declaration also calls for consultation with labor on matters of mutual concern.³⁰⁰ This provision, like the information disclosure provision,³⁰¹ is broad and does not specifically provide for a right to consultation.³⁰² However, when read in conjunction with other provisions of the Declaration, it takes on more meaning. For instance, Article 17³⁰³ requires consultation with workers' organizations in order to keep manpower plans "as far as practicable, in harmony with national social development policies."³⁰⁴

The Tripartite Declaration also suggests that MNEs consider security of employment when planning and making changes in operations³⁰⁵ and endeavor to provide stable employment and social security to their

295. OECD Guidelines, *supra* note 4, Chapter on Employment and Industrial Relations, para. 6.

296. This committee was established by the OECD Council Resolution Establishing a Committee on International Investment and Multinational Enterprises, January 21, 1975, *cited in* BLANPAIN, *supra* note 52, at 31-32. The OECD established this committee for the purpose of strengthening co-operation among member countries of the OECD in the field of international investment and MNEs. *Id.*

297. BLANPAIN: IME REPORT ¶ 67, *supra* note 267, at 216.

298. Emphasis added.

299. Professor Blanpain, in the conclusions he draws after his study of the OECD Guidelines follow-up procedure, states that "'cooperation' means consultation; 'mitigation' includes looking for alternative solutions." BLANPAIN, *supra* note 52, at 272. For union views on the subject see *id.* at 147, 151.

300. *ILO Tripartite Declaration*, *supra* note 4, art. 56.

301. *Id.* art. 54 (quoted note 270 *supra*).

302. Günter, *supra* note 271, at 162, "It is evident that no consensus could be achieved on detailed standards. . . ." *Id.*

303. *ILO Tripartite Declaration*, *supra* note 4, art. 17.

304. *Id.* The Article also applies to national employers' organizations and competent government authorities. *Id.*

305. *ILO Tripartite Declaration*, *supra* note 4, art. 24-28.

employees.³⁰⁶ The ILO Declaration maintains that MNEs should avoid arbitrary dismissal procedures.³⁰⁷ Furthermore, it advises MNEs to provide reasonable notice “[i]n considering changes in operations which would have major employment effects . . . so that the implications may be examined jointly in order to mitigate adverse effects to the greatest possible extent.”³⁰⁸

A reading of the Multinational Directive within the context of the OECD and ILO codes,³⁰⁹ shows that the Directive places emphasis on the practice of disclosure.³¹⁰ Organized labor believes that disclosure is necessary to hold MNEs accountable for their global operations.³¹¹ Accountability would encourage MNE contributions to a balanced international economic and social development.³¹² The interests of labor are protected by the above disclosure and consultation procedures because they provide a system of checks and balances on the economic power of multinational enterprises.³¹³ The requirements of consultation and information disclosure would reduce the possibilities of abuse of this power.³¹⁴ The consultation provision gives labor the opportunity to react to management’s decisions with its own measures.³¹⁵ Together, the information disclosure and consultation requirements³¹⁶ enable labor to fully consider the validity of management’s claims.³¹⁷

This analysis is based on the traditional concept that informed representa-

306. *Id.* art. 25.

307. *Id.* art. 27.

308. *Id.* art. 26. “[T]his is particularly important in the case of the closure of an entity involving collective lay-offs or dismissal.”

309. See EXPLANATORY MEMO, *supra* note 20, § I(A)(4).

310. Accord, *Vredling Outlines Scope*, *supra* note 66, at 5. (report on press conference with Vice-President of the Commission Vredling, who said the principal aim of the Directive was to achieve transparency of multinationals).

311. See Pursey, *supra* note 12, at 283.

312. See Tapiola, *supra* note 168, at 291.

313. See Kersten, *supra* note 247, at 17, 30.

314. *Id.*

315. See *Employee Codetermination*, *supra* note 17, at 960. *But cf.* Vagts, *Reforming the Modern Corporation*, *supra* note 284, at 73-74 (often labor and management actually share compatible objectives in corporate strategies).

316. Multinational Directive, COM (80) 423 final, arts. 5, 6.

317. See *id.* art. 6(1).

[i]t shall be required to forward precise information to the management of each of its subsidiaries within the Community not later than forty days before adopting the decision, giving details of:

- the grounds for the proposed decision
- the legal, economic and social consequences of such decisions for the employees concerned
- the measures planned in respect of these employees.

Id. Cf. INFORMATION MEMO, *supra* note 190, at 2 (clear and complete picture can be supplied where local procedures for consultation and information are inconsistent with the structure of the entity as a whole); cf. *Vredling Proposes Regs.*, *supra* note 235, at 7 (reporting on press conference at which Mr. Vredling said prevention of a deterioration in industrial relations could be accomplished because transparency would prevent decisions being imposed from abroad without employees being in any position to understand the underlying reasons).

tion in collective bargaining strengthens union organizations.³¹⁸ However, although an adequate means of acquiring information is necessary for effective union bargaining with a MNE,³¹⁹ information disclosure alone is insufficient because of the difficulty encountered in identifying the real bargaining position of the MNE.³²⁰ A MNE has production facilities in different countries and thus makes policy while considering global factors. It can juggle its accounting statements by setting artificial prices for transfers between the parent enterprise and/or subsidiaries, and by manipulating dividends, tax payments and capital movements.³²¹ To have an effective bargaining position, labor needs more than raw information about a MNE; it needs to have the opportunity to discuss with and question management about this information.³²² Through such consultation, labor can establish a countervailing power.³²³ This posture would enable labor, as a bargaining partner, to influence MNE decisions.³²⁴ Without consultation, though, the balance of bargaining positions shifts in favor of the MNE.³²⁵ Consultation, by establishing a close observance of MNE activities,³²⁶ would also help ensure that MNEs conform with national economic and social objectives, as required by the OECD Guidelines.³²⁷ Since one major purpose of the Multinational Directive is to ensure harmonious development of activities within the EEC by creating a balanced bargaining position between labor and MNEs,³²⁸ the EEC Commission considers the combination of information disclosure and consultation regulations as important to achievement of this balance.³²⁹

E. *The Binding Nature of the Directive*

The OECD and ILO codes depend exclusively on a company's good will for their implementation. Because the codes are not binding, the EEC Commission claims that they fail to meet their intended objectives.³³⁰ According to the Commission, a legal framework is necessary which would be binding on all

318. See MULTINATIONAL CHALLENGE, *supra* note 160, at 11-12, 40.

319. Pursey, *supra* note 12, at 280.

320. HANDBOOK FOR NEGOTIATORS, *supra* note 156, at 58; see MULTINATIONAL CHALLENGE, *supra* note 160, at 58.

321. MULTINATIONAL CHALLENGE, *supra* note 160, at 57.

322. HANDBOOK FOR NEGOTIATORS, *supra* note 156, at 58.

323. See *id.*; MULTINATIONAL CHALLENGE, *supra* note 160, at 40.

324. See HANDBOOK FOR NEGOTIATORS, *supra* note 156, at 32, 58; MULTINATIONAL CHALLENGE, *supra* note 160, at 40.

325. See MULTINATIONAL CHALLENGE, *supra* note 160, at 19, 58.

326. See MULTINATIONAL CHALLENGE, *supra* note 160, at 59; EXPLANATORY MEMO, *supra* note 20, § I(A)(4).

327. OECD Guidelines, *supra* note 4, General Policies, para. 2.

328. See EXPLANATORY MEMO, *supra* note 20, §§ I(A)(1)-(4).

329. See *id.* §§ I(A)(1)-(4), II(4).

330. *Vredling Outlines Scope*, *supra* note 66, at 5.

331. INFORMATION MEMO, *supra* note 190, at 2.

enterprises operating within the EEC.³³¹ Thus, the Commission suggested its proposal for a Multinational Directive as the ideal means of achieving a Community-wide set of rules which multinational enterprises must follow.³³² The Directive would require member states³³³ to establish "[a]ppropriate penalties [against a MNE] in case of failure to fulfill the obligations laid down" in the Directive.³³⁴ If a MNE did fail to consult with or to provide information to employees prior to making a decision with substantial effect on the interests of employees, the Directive would require states to give the concerned employee representatives "the right of appeal to tribunals or other competent national authorities for measures to be taken to protect their interests."³³⁵

The theory behind the OECD Guidelines is that public pressure would make MNEs adhere to the voluntary guidelines.³³⁶ Unfortunately, the nature of MNEs has made it difficult to discern when a MNE has made a decision or provided complete information.³³⁷ Trade unions argue that MNEs have continued to violate the spirit of the voluntary codes and further, unions feel that the violations will continue unless binding rules and firm government action compel MNEs to adhere to the codes.³³⁸ The Directive makes information available which unions can use to assert pressure on a MNE to respect the requirements set down by law and by declaration.³³⁹ Once all of the information relevant to a decision to transfer operations is available to labor,³⁴⁰ the decision-making process of a MNE, in theory, will be transparent to trade unions.³⁴¹ The formulators of the codes of conduct designed them to har-

332. See EXPLANATORY MEMO, *supra* note 20, § II(6).

333. Business Brief, *Worker Consultation*, 715 European Report 3, 4 (Sept. 30, 1980).

334. Multinational Directive, COM (80) 423 final, arts. 5(6), 6(6).

335. *Id.* art. 6(6).

336. See BLANPAIN, *supra* note 52, at 59-60 (the guidelines are morally binding with a relationship to societal principles of right and wrong).

337. See Van Langendonck, *supra* note 19, at 86-87. See § II *supra*.

338. BLANPAIN: TUAC Statement, *supra* note 12, at 103. TUAC stressed that it considered the OECD Guidelines as a first step which should lead to further international agreements. *Id.*

In an official position paper, (ETUC *Evaluation*, *supra* note 18) the European Trade Union Council (ETUC) called the binding character of the Multinational Directive, the Directive's most important aspect. *Id.* § 3.1. The ETUC position views the Directive as necessary to complement the OECD and ILO Codes of Conduct. *Id.* § 1.2.

339. Cf. EXPLANATORY MEMO, *supra* note 20, § I(A)(4) (this legal framework will constitute a stepping stone to creation of a uniform operating environment); cf. Van Langendonck, *supra* note 19, at 89-90 (arguing for a solution that provides a way for removal of all pretexts for evading national labor laws).

340. See ETUC *Evaluation*, *supra* note 18, §§ 1.3, 2.2. See also *Vredling Outlines Scope*, *supra* note 66, at 5.

341. *Vredling Proposes Regs.*, *supra* note 235, at 7. Cf. Tapiola, *supra* note 168, at 291 (the effectiveness of the Guidelines is stymied by the fact that enterprises can accept or reject the voluntary guidelines at will). See also Pursey, *supra* note 12.

monize the interests of labor with the policies of MNEs.³⁴² Unions need to determine whether a MNE's management is harmonizing these interests. The availability of information makes the determination possible with or without regulations. But binding regulations ensure that trade unions have access to the information.

VI. APPLICATION OF THE EEC DIRECTIVE TO THE RUNAWAY PLANT PROBLEM

Organized labor in Europe considers the Multinational Directive important with respect to labor's ability to bargain effectively with the management of MNEs.³⁴³ One example of the Directive's potential effectiveness is its application to the runaway plant problem.

The "runaway plant" or "shop" has been defined as "an industrial plant moved by its owners from one location to another to escape union labor regulations or state laws."³⁴⁴ Employers use this device either to prevent unionization or to escape bargaining with an established union by permanently shutting down a plant in one location and reopening at a new, usually distant, site.³⁴⁵

342. See *ILO Tripartite Declaration*, *supra* note 4, art. 10.

343. See *ETUC Evaluation*, *supra* note 18, §§ 1.1, 3.1.

344. WEBSTER'S THIRD NEW INT'L DICTIONARY 1979 (P. Gove, ed., 1976).

345. [1972] 3 LAB. L. REP. (CCH) ¶ 4090, *Lockouts, Shutdowns, Runaway Shops*. In the United States, under the National Labor Relations Act (NLRA), (National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3) & (5) (1976)), the "runaway shop" (*See Garwin Corp. v. N.L.R.B.*, 347 F.2d 295, 297 (D.C. Cir. 1967)), is said to be the closing of a plant and the moving of operations in order to deprive the company's employees the rights to organize and bargain collectively. Sections 158(a)(1), (a)(3) and (a)(5) have been used in numerous cases to charge that plant shutdowns taken with an anti-union animus are unfair labor practices. See *e.g.*, *New Madrid Mfg. Co.*, 104 N.L.R.B. 117 (1953); *S. & K. Knee Pants Co.*, 2 N.L.R.B. 940 (1937); *Rome Products Co.*, 77 N.L.R.B. 1217 (1948); *Schieber Millinery Co.*, 26 N.L.R.B. 937 (1940); *Rapid Bindery Inc.*, 127 N.L.R.B. 212 (1960); *N.L.R.B. v. Winchester Electronics Inc.*, 295 F.2d 288 (2d Cir. 1961). Companies also use the runaway shop to discourage collective employee activities in the future. See *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 273 (1965). Companies can also use such plant closures as a threat for bargaining purposes in order to get concessions from the union. See *e.g.*, *Sidelle Fashions Inc.*, 133 N.L.R.B. 547 (1961), *enforced in N.L.R.B. v. Sidelle Fashions Inc.*, 305 F.2d 825 (3d Cir. 1962).

Proponents of labor accept the N.L.R.A. in the U.S. as a tool to be used to protect employee interests in the face of employers' superior economic strength. See generally Comment, *The N.L.R.B.'s Pursuit of the Runaway Shop*, 7 VILL. L. REV. 450, 454 (1962) [hereinafter cited as *NLRB Pursuit*]; Frenkel, *The Runaway Shop*, 12 CLEVELAND-MARSHALL L. REV. 523 (1963); Note, "Runaway Shop" a Perennial Threat to Organized Labor, 37 NOTRE DAME LAW. 357 (1962) [hereinafter cited as *Runaway Shop*]. One of the major policies that Congress intended to implement by passage of the NLRA was to promote: "[the flow of commerce] by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees." NLRA, 29 U.S.C. § 151 (1976).

The NLRA does not place employer interests in a secondary position in relation to union interests. Cf. NLRA, 29 U.S.C. § 151 (1976), (the purpose of the statute is also to ensure that

A. Runaway Plant at the International Level

The multinational nature of the MNE puts it outside the reach of national laws designed to prevent undesirable tactics like the runaway plant.³⁴⁶ Unions must rely on local laws which govern each plant. Therefore, any attempt by labor to balance the power of MNEs with strong collective employee action can be ineffective if these local laws are inapplicable to the central management of a MNE.³⁴⁷

MNE decisions can also affect the social balance within individual nations.³⁴⁸ While laws designed to promote industrial stability operate effectively in the context of industrial relations with local business enterprises, the jobs provided by MNEs remain insecure.³⁴⁹ Such job insecurity affects large numbers of workers and is a menace to local social stability.³⁵⁰ The power of a device such as the runaway plant makes even the threat of its use a potent weapon.³⁵¹ For this reason, both the OECD Guidelines and the ILO Tripartite Declaration³⁵² have declared the threat of plant transfer, in order to force concessions from labor, an unfair method of influencing negotiations.³⁵³

unions do not engage in certain unfair labor practices). Rather the NLRA acknowledges the importance of both interests. NLRA, 29 U.S.C. § 151 (1976). In the circumstances of a plant closure, these opposing interests clash. See *Runaway Shop*, *supra* at 357.

From the point of view of the union, which attempts to bargain for concessions from management and protect the job security of its members, the runaway shop poses a dilemma. *Id.* While the union may use its collective strength to bargain with the employer, the use of that strength may cause the employer to close down the plant and relocate. The effect of this dilemma is to put unions in the position of having to choose between effective economic bargaining power and the job security of the employees. See *NLRB Pursuit*, *supra*, at 452. Even the threat of a runaway shop made by management may interfere with the union's ability to maintain a collective strength. *Id.* See Lea, *Multinational Companies and Trade Union Interests*, in *THE MULTINATIONAL ENTERPRISE* 147, at 152 (J. Dunning ed. 1971).

346. Cox, *supra* note 10, at 353. See Blake, *supra* note 111, at 36-37; Van Langendonck, *supra* note 19, at 3.

347. See Van Langendonck, *supra* note 19, at 3. Articles 41 and 48 of the ILO Tripartite Declaration recognize the rights of workers to organize and bargain collectively pursuant to local laws. See *ILO Tripartite Declaration*, *supra* note 4, arts. 41, 48.

348. See Cox, *supra* note 10, at 348; see EXPLANATORY MEMO, *supra* note 20, § I(A)(4).

349. See Van Langendonck, *supra* note 19, at 3.

350. See Cox, *supra* note 10, at 349-51.

351. The OECD Guidelines have specifically recognized the problem of this threat and include a provision concerning it in the voluntary guidelines. See OECD Guidelines, *supra* note 4, Chapter on Employment and Industrial Relations, art. 8. A MNE should:

[i]n the context of *bona fide* negotiations* with representatives of employees on conditions of employment or while employees are exercising a right to organize, not threaten to utilize a capacity to transfer the whole or part of an operating unit from the country concerned in order to influence unfairly those negotiations or to hinder the exercise of a right to organize. **Bona fide* negotiations may include labour disputes as part of the process of negotiation. . . .

Id.

352. Compare OECD Guidelines, *supra* note 4, Chapter on Employment and Industrial Relations, art. 8, with *ILO Tripartite Declaration*, *supra* note 4, art. 52.

353. See OECD Guidelines, *supra* note 4, Introduction, para. 6; see *ILO Tripartite Declaration*, *supra* note 4, art. 52.

As in the United States,³⁵⁴ unions and government encounter difficulties in determining whether plant transfer is motivated by economic or by anti-union reasons.³⁵⁵ Anti-union motives are rarely the sole reason for plant relocation.³⁵⁶ Enterprises usually relocate plants because of detrimental economic factors at the current location and expectations of better economic conditions at the new site.³⁵⁷ In fact, increases in labor costs may be a major economic factor behind such decisions.³⁵⁸ Modern management uses detailed systems analysis and careful study to decide whether to relocate a plant.³⁵⁹ Therefore, a company is unlikely to make a relocation decision based on only one factor such as anti-unionism.

Management's position is that regulations which restrict plant relocations prevent a company from making economically justified relocations.³⁶⁰ Management often feels that potential conflict with labor laws forces it into a position of being reluctant to make these decisions.³⁶¹ Management argues that unions can impose higher labor costs by increasing wage levels and by blocking implementation of employment practices designed to reduce costs.³⁶² They also see powerful unions as having the ability to cause artificially high wage levels.³⁶³

For several reasons, MNEs are not as mobile as adversaries believe.³⁶⁴ First, production in most industries is dependent on long-term investment.³⁶⁵ Management cannot easily shift such long-term investment without suffering a large loss of investment capital.³⁶⁶ Second, finding large enough production

354. In attempting to formulate a rule, the NLRB has determined that relocations made for economic reasons are valid, while those made for anti-union motives are wrongful. Compare *Schieber Millinery Co.*, 26 N.L.R.B. 937 (1940) (move to thwart unions is runaway) with *Krantz Wire & Mfg. Co.*, 97 N.L.R.B. 977 (1952) (relocation for economic reasons is valid). See generally Note, *The Runaway Shop — An Impediment to Peaceful Union-Management Relations*, 34 TEMPLE L.Q. 139 (1961) [hereinafter cited as *Impediment*]; Note, *The Effect of Relocation or Sale of Industry Upon Labor-Management Relations*, 5 W. RES. L. REV. 84 (1953) [hereinafter cited as *Effect of Relocation*]; *NLRB Pursuit*, *supra* note 345, at 455-57. The NLRB, though, has had difficulty separating the anti-union intention when there was a mixed economic/anti-union motive. See *Mt. Hope Finishing Co. v. N.L.R.B.*, 211 F.2d 365 (4th Cir. 1951) (court refused to enforce board order where company was considering move for economic reasons and finally decided to actually move when union came along).

355. See BLANPAIN: IME REPORT, *supra* note 267, para. 46, at 98; see also BLANPAIN, *supra* note 52, at 204-05.

356. Swift, *Plant Relocation: Catching Up with the Runaway Shop*, 14 B.C. IND. & COMM. L. REV. 1135, 1137 (1973) [hereinafter cited as Swift].

357. *Id.*

358. See *id.*

359. See generally F. MOORE, MANUFACTURING MANAGEMENT, 197-219 (4th ed. 1965).

360. *Id.*, at 170; Swift, *supra* note 356, at 1138.

361. Swift, *supra* note 356, at 1138.

362. *Id.*

363. *Id.*

364. C. BERGSTEIN, T. HORST & T. MORAN, AMERICAN MULTINATIONALS AND AMERICAN INTERESTS, 101 (1978) [hereinafter cited as AMERICAN MULTINATIONALS].

365. *Id.*

366. *Id.*

capacity to justify a plant relocation is very difficult.³⁶⁷ Third, if the production cannot be shifted in a short period of time, a MNE is vulnerable to disruption as the various components of the enterprise are often dependent on each other.³⁶⁸ Fourth, assets which a MNE does not transfer may be lost to the government of the deserted country.³⁶⁹ Fifth, subsidiaries are subject to local laws of the country in which they operate.³⁷⁰ Frequently, these laws require a corporation to make severance payments to dismissed workers. This imposes a large expense on the MNE.³⁷¹ The problems associated with transferring production are thus likely to discourage the occurrence of a runaway plant.³⁷² Losses in investment capital, production lags, lost assets and large expenses for actual transfers suggest that MNE management would not readily consider the idea in its relations with labor.³⁷³ Management is obligated to consider the interests of its investors. It, therefore, must weigh the implications of plant closings for those investors against employment policies.³⁷⁴

The fact that a MNE's use of the illegitimate threat of plant transfer as a method of influencing negotiations is a matter of international concern is evidenced by its specific proscription by the OECD and ILO.³⁷⁵ Because mixed motive situations are much more difficult to detect than illegitimate threats,³⁷⁶ labor has presented as its position in the EEC,³⁷⁷ the OECD³⁷⁸ and the ILO³⁷⁹ that disclosure of information and consultation requirements would enable unions to determine the validity of economic reasons for MNE decisions³⁸⁰ and to offer possible alternative solutions designed to protect their jobs.³⁸¹ Trade unions and their negotiators are skilled at developing solutions for defending the interests of workers while cooperating with management to

367. *Id.*

368. AMERICAN MULTINATIONALS, *supra* note 364, at 100-01.

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *See* Guertin, *supra* note 6, at 300.

375. OECD Guidelines, *supra* note 4, Chapter on Employment and Industrial Relations, art. 8; ILO Tripartite Declaration, *supra* note 4, art. 52.

376. *Cf.*, BLANPAIN, *supra* note 52, at 189 (full judgment of the factual case is necessary for labor to take a position on economic decisions).

377. *See* ETUC Evaluation, *supra* note 18, § 1.1. ETUC is labor's representative organization in the EEC and has published this position paper in support of the Multinational Directive. *Id.*

378. *See* The Need for Meetings with Multinationals at the Decision-making Level (Mar. 30, 1977) (unpublished paper submitted by the International Metalworkers Federation to the Committee on International Investment and Multinational Enterprises) reprinted in R. BLANPAIN, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS: 1976-1979, at 188 (1979) [hereinafter cited as BLANPAIN: Need for Meetings].

379. *See e.g.*, ILO Tripartite Declaration, *supra* note 4, art. 54 (information for a true and fair view of the entity as a whole).

380. *See* BLANPAIN: Need for Meetings, *supra* note 378, at 188-89.

381. *See id.*; *see also* Pursey, *supra* note 12, at 279-83.

solve particular plant level problems.³⁸² Information disclosure affords labor representatives the opportunity to receive a full and fair view of the enterprise as a whole.³⁸³ Consultation procedures enable a presentation of union and management views on employment and social issues within a MNE.³⁸⁴ Discussion and analysis of these issues by both sides facilitates solutions to difficult problems at the plant level while maintaining a concern with employment security.³⁸⁵

B. *The Runaway Plant under the OECD and ILO*

The expressed intention of the EEC Commission to follow the objectives of both the OECD and ILO codes is significant in a consideration of the runaway plant issue.³⁸⁶ Within both the OECD and ILO codes there is language directed at management's use of the threat to transfer as bargaining power.³⁸⁷ In the Chapter on Employment and Industrial Relations,³⁸⁸ the OECD Guidelines state that the enterprise should:

in the context of bona fide negotiations³⁸⁹ with representatives of employees on conditions of employment or while employees are exercising a right to organize, not threaten to utilize a capacity to transfer the whole or part of an operating unit from the country concerned in order to influence unfairly those negotiations or to hinder the exercise of a right to organize.³⁹⁰

The key notion³⁹¹ of this paragraph is the word "unfair."³⁹² A distinction must be made between legitimate information given "on likely consequences for the future of the firm as a going concern of the eventual outcome of such negotiations, and threats which would be an unfair use of the management's negotiating power."³⁹³ However, the provision reserves the legitimate right of

382. See BLANPAIN: Need for Meetings, *supra* note 378, at 188-89.

383. EXPLANATORY MEMO, *supra* note 20, § I(A)(3).

384. BLANPAIN: Need for Meetings, *supra* note 378, at 189-90.

385. See *id.*

386. See EXPLANATORY MEMO, *supra* note 20, § I(A)(4). See § V.E *supra*.

387. OECD Guidelines, *supra* note 4, Chapter on Employment and Industrial Relations, para. 8. For the exact language of the OECD provision, see note 351 *supra*; *ILO Tripartite Declaration*, *supra* note 4, art. 52.

388. OECD Guidelines, *supra* note 4.

389. "Bona fide negotiations may include labour disputes as part of the process of negotiation. Whether or not labour disputes are so included will be determined by the law and prevailing employment practices of particular countries." OECD Guidelines, *supra* note 4, Chapter on Employment and Industrial Relations, art. 8 note.

390. *Id.*

391. BLANPAIN, *supra* note 52, at 228.

392. Unfair: "[a.] marked by injustice, partiality or deception; b. providing an insufficient or inequitable basis for judgment evaluation; c. not according with merit or importance." WEBSTER'S THIRD NEW INT'L DICTIONARY 2494 (P. Gove ed. 1976).

393. BLANPAIN: IME REPORT, *supra* note 267, ¶ 69, at 226.

management³⁹⁴ to point out or to predict potential adverse impacts of employee-concerted activities.³⁹⁵

The ILO Tripartite Declaration contains a provision with wording nearly identical to that of the OECD Guidelines.³⁹⁶ The underlying spirit of the ILO Declaration is to expect MNEs to be model employers in all areas covered by the ILO Declaration.³⁹⁷ Therefore, because information disclosure and consultation procedures would reveal illegitimate motivations in threatened transfers³⁹⁸ and because legally binding procedures would expose the MNE to sanctions,³⁹⁹ the Multinational Directive would help to dispel the perception of the runaway plant as a real problem.⁴⁰⁰

VII. MANAGEMENT REACTION

In part, the management of MNEs are worried about the multitude of uncoordinated efforts aimed at controlling their activities.⁴⁰¹ Management views these efforts as reactions to isolated problems having little or no regard for consistency between requirements.⁴⁰² This inconsistency confuses management about what actions are acceptable and uncertain of what to expect by way of government response to those actions.⁴⁰³

Thus, management generally opposes measures like the Multinational Directive.⁴⁰⁴ The international business community opposes such measures because it feels that misconceptions exist as to how MNEs operate and as to

394. This concept has been extensively developed in U.S. law. See N.L.R.A., 29 U.S.C. § 158(c) (1976) (protecting the expression or dissemination of any views, argument or opinion as free speech, so long as no threat and no promises of benefit are contained therein). See also BLANPAIN, *supra* note 52, at 228.

Unfair labor practice — "an act, whether by employer or employee, in violation of the regulations and prohibitions of a labor relations act." BALLENTINE'S LAW DICTIONARY 1315 (3d ed. 1969). See generally *Employer Free Speech*, 3 LAB. L. RPTR. (CCH) ¶ 5010-5025.

395. Compare N.L.R.B. v. J. Automotive Controls Corp., 406 F.2d 221, 223-24 (10th Cir. 1969) (speech that together with other statements implied syllogism that plant with increased costs must move, i.e., union would increase costs, therefore, union would cause closure, was merely lawful prediction of dire economic consequences from unionization), with *Farmer's Co-operative Co.* 102 N.L.R.B. 144, 144-45 (1953) (employer statement to employee that unionization of company would probably mean less take-home pay, even though couched in the form of an opinion, constituted implied threat of reprisal and was, therefore, a violation).

396. *ILO Tripartite Declaration*, *supra* note 4, art. 32.

397. Günter, *supra* note 271, at 162.

398. See Van Langendonck, *supra* note 19, at 85-86. See *supra* § VI.A.

399. See Multinational Directive, COM (80) 423 final, arts. 5(5) & 6(6).

400. See Van Langendonck, *supra* note 20, at 85-86.

401. R. HELLMAN, *TRANSNATIONAL CONTROL OF MULTINATIONAL CORPORATIONS* 2 (M. Freidberg, trans. 1977) [hereinafter cited as HELLMAN].

402. *Id.* at 2.

403. *Id.*

404. See *EEC Industries Opposed*, *supra* note 3, at 15.

what motivations affect MNE decisions.⁴⁰⁵ Management of MNEs are also concerned with the interests of their investors, such as limiting excess costs and protecting profits.⁴⁰⁶ If they do not protect these interests, management fears that disinvestment in enterprises operating in Europe would result.⁴⁰⁷

The business sector resistance to disclosure and consultation procedures is due to the belief that these procedures are costly and that they might create genuine competitive disadvantages.⁴⁰⁸ Although the Multinational Directive recognizes⁴⁰⁹ the need to prevent the disclosure of secrets,⁴¹⁰ business worries that the Directive lacks a guarantee that would effectively protect company secrets.⁴¹¹ Without such a guarantee, competition with firms in countries outside of the EEC might be hampered.⁴¹²

In general, management of MNEs do not oppose disclosure of information procedures as established in the voluntary codes.⁴¹³ Information disclosure tends to produce a cleansing effect.⁴¹⁴ Management of MNEs feel disclosure will improve the investment climate by resolving the labor and social problems associated with MNEs.⁴¹⁵ However, the management of MNEs desire flexibility in interpretation of codes in order to be able to work within the circumstances of each particular situation.⁴¹⁶

Management proponents have indicated some problem areas concerning information disclosure.⁴¹⁷ Businessmen have pointed out that disclosure of certain kinds of information, such as operating statistics by geographic area, could create competitive disadvantage, especially where a firm has only one or

405. See UNICE POSITION, *supra* note 95, at paras. 10-13. See Barran, *supra* note 91, at 164; see AMERICAN MULTATIONALS, *supra* note 364, at 100-01. With respect to the runaway plant, as discussed in section VI *supra*, business leaders believe there are also many misconceptions. *Id.*

406. Guertin, *supra* note 6, at 300.

407. UNICE POSITION, *supra* note 95, at para. 24. Internal Market, *Worker Participation*, 705 EUROPEAN REPORT 8 (Jul. 25, 1980).

408. UNICE POSITION, *supra* note 95, at paras. 19-24.

409. See Multinational Directive, COM (80) 423 final, art. 15. Although trade secrets ought to be guarded, declaring information to be confidential simply to prevent divulgence of information is unacceptable. Paragraph 2 of Article 15 provides that tribunals or other national bodies should be empowered to settle any disputes relating to the confidentiality of certain information. See EXPLANATORY MEMO, *supra* note 20, § II(5).

410. For example, disclosure of pricing policies could reveal cost elements and profit margins. BLANPAIN, *supra* note 52, at 89.

411. UNICE POSITION, *supra* note 95, at para. 21. See *EEC Industries Opposed*, *supra* note 5, at 15.

412. UNICE POSITION, *supra* note 95, at para. 23.

413. See *id.* at paras. 1-4. See also BLANPAIN, *supra* note 52, at 78.

414. See Vagts, *Disclosure and Multinational Enterprise: The Costs of Illumination*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 315, at 317 (N. Horn ed. 1980) [hereinafter cited as Vagts, *Costs of Illumination*].

415. See BLANPAIN, *supra* note 52, at 21.

416. Guertin, *supra* note 6, at 298.

417. See note 171, *supra*.

a few customers in a particular region.⁴¹⁸ Disclosure of pricing policies would reveal cost element and profit margins which would conflict with the need for business confidentiality.⁴¹⁹ Similarly, a need for confidentiality exists with respect to future plans.⁴²⁰ With competitors operating in areas outside the EEC and, therefore, outside EEC jurisdiction, disclosure rules would create a disadvantage for a MNE because its information would be accessible to competitors which might not be subject to similar requirements.⁴²¹ These disadvantages could force all but the most efficient MNEs out of existence.⁴²² This would result in a negative long range effect for investors and for nations which lose the investment.⁴²³

Currently, the laws of home countries of most MNEs require some form of accounting to shareholders.⁴²⁴ However, there is a diversity of national reporting and disclosure requirements.⁴²⁵ To coordinate information from various parts of the enterprise to supply a labor organization with complete information would be expensive for MNEs.⁴²⁶ Additionally, information which is already compiled for investors might be deficient when considered for other purposes, thus requiring completely new accountings of enterprise operations.⁴²⁷

Balance sheets reflect historic costs, rather than current value.⁴²⁸ Financial reports may show only the status of the enterprise as a whole. This information is useful for investment analysis, but it lacks sufficient employee-related factors to enable union leaders to determine labor's relative value in the particular MNE.⁴²⁹ Thus, disclosure to labor is likely to add new requirements to MNE information systems.⁴³⁰ Depending on the extent to which MNEs already produce the required data,⁴³¹ the cost of gathering, recording and col-

418. BLANPAIN, *supra* note 52, at 89.

419. *Id.*

420. Pursey, *supra* note 12, at 284.

421. See UNICE POSITION, *supra* note 95, at para. 19; see also Vagts, *Costs of Illumination*, *supra* note 414, at 318-19.

422. Knortz, *The Means of Regulating Multinational Corporations* § II, in *THE FUTURE OF THE U.S. MULTINATIONAL CORPORATION* 104, 111 (L. Unterman & C. Swent eds. 1975).

423. UNICE POSITION, *supra* note 95, at paras. 19-24.

424. Vagts, *Costs of Illumination*, *supra* note 414, at 326.

425. *Id.* It should be noted here that the EEC Commission has already issued comprehensive guidelines on accounting with the purpose of harmonizing accounting rules in member states. Fourth Council Directive of July 25, 1978, 21 O.J. EUR. COMM. (No. L 222) 11 (Aug. 14, 1978) (based on Article 54(3)(g) of the Treaty).

426. See Vagts, *Costs of Illumination*, *supra* note 414, at 318; see also UNICE POSITION, *supra* note 95, at para. 22.

427. See Vagts, *Costs of Illumination*, *supra* note 414, at 327.

428. See T. FIFLIS & H. KRIPKE, *ACCOUNTING FOR BUSINESS LAWYERS* 112 (2d ed. 1977).

429. See Vagts, *Costs of Illumination*, *supra* note 414, at 330; see also Kay, *Disclosure and Collective Bargaining*, 1973 J. BUS. L. 26 (1973).

430. See Vagts, *Costs of Illumination*, *supra* note 414, at 318; see also UNICE POSITION, *supra* note 95, at para. 22.

431. Vagts, *Costs of Illumination*, *supra* note 414, at 318.

lating this data will be expensive.⁴³² For example, data collected and produced in one form may not be easily retranslated into another form.⁴³³

The Multinational Directive has attracted a considerable amount of controversy in the EEC.⁴³⁴ Unions support the proposal⁴³⁵ while business has announced its strong opposition.⁴³⁶ The business sector takes the position that existing voluntary codes are sufficient and preferable to enforce legislation.⁴³⁷ The Union of Industries (UNICE) of the EEC has stated that the Directive is unnecessary.⁴³⁸ Although labor has complained that the OECD and ILO codes do not provide workers with sufficient access to management,⁴³⁹ UNICE points out⁴⁴⁰ that the OECD has recently found its guidelines to be operating satisfactorily.⁴⁴¹ Thus, MNEs favor the current voluntary OECD and ILO codes and call for a continued effort to extend awareness of these codes.⁴⁴²

VIII. LABOR AND MANAGEMENT: RECOMMENDATIONS FOR BALANCING THE INTERESTS

In spite of business opposition, the EEC Commission believes that the Multinational Directive will dispel irrational fears of employees by ensuring

432. *Id.*

433. *Id.*

434. *Business/Union Polarization*, *supra* note 23, at 4.

435. *ETUC Evaluation*, *supra* note 18, at § 1.1.

436. UNICE POSITION, *supra* note 95, at para. 5.

437. *See CBI Resists EEC's Disclosure Proposals*, *Financial Times*, Sept. 29, 1980, at 4 (reporting a statement by Martin Morton of the Confederation of British Industry (CBI) Social Affairs Directorate — saying the proposed legislation is “formal and rigid”); The Union of EEC Industries (UNICE) challenges the legal base of the proposed directive. UNICE says that the Commission does not intend to standardize national legislation in this area as authorized by Articles 54(3)(g) and 100 of the EEC Treaty, but to complement this legislation with a system that does not exist in any of the Community's Member States. UNICE: *Opposition*, *supra* note 147, at 5. The Commission chose Article 100 of the EEC Treaty as the legal basis for the Directive because a lack of a consistency between information and consultation procedures “[h]as a direct effect on the Common Market and should therefore be remedied by approximating legislation while maintaining progress within the meaning of Article 117 of the [EEC] Treaty.” EXPLANATORY MEMO, *supra* note 20, § II(B).

438. UNICE POSITION, *supra* note 95, at paras. 7-9.

439. Tapiola, *supra* note 168, at 292; *see HANDBOOK FOR NEGOTIATORS*, *supra* note 156, at 25-27, 34; *see also ETUC Evaluation*, *supra* note 18, at § 1.1.

440. UNICE POSITION, *supra* note 95, at para. 5.

441. *Id.* *See also* PROGRESS REPORT ON SUPPORT FOR THE OECD GUIDELINES (Mar. 20, 1978) (submitted by Business and Industry Advisory Committee of the OECD to the Committee on International Investment and Multinational Enterprises), *reprinted in* R. BLANPAIN: THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOUR RELATIONS, 1976-1979, at 79 (1979) (citing widespread compliance with the Guidelines). But the official IME Report stated that progress has been made by larger MNEs but that observance of the disclosure standards was considerably less widespread among the small and medium MNEs. BLANPAIN: IME REPORT, *supra* note 267, at 98.

442. UNICE POSITION, *supra* note 95, at para. 4.

transparency.⁴⁴³ The experience of worker participation in Germany, Denmark and the Netherlands has shown that the stability created by close contacts between labor and management has actually attracted foreign investment.⁴⁴⁴

Despite an inclination by business to resist the idea of further disclosure, the best interest of business is to accept disclosure as inevitable.⁴⁴⁵ Public opinion in most industrial countries appears to be gathering momentum in favor of more disclosure.⁴⁴⁶ Resistance to public opinion carries the risk that even more excessive demands will be made on MNEs.⁴⁴⁷ A problem is that labor is antagonized by the power of MNEs to transfer production.⁴⁴⁸ Labor believes that MNEs can and do employ the threat of the use of such power to gain advantages in negotiations with labor.⁴⁴⁹ Contact between management and labor with the exchange of information would allow normalization of relations between the two sides. The settlement of differences and disputes⁴⁵⁰ would evolve into a more rational process.⁴⁵¹

One important purpose of the Multinational Directive is to help foster a more stable atmosphere for business investment.⁴⁵² Without losing sight of that purpose, measures should be taken to close the gap between management and labor by alleviating cost and secrecy problems. Built into the Multinational Directive is a provision assuring confidentiality.⁴⁵³ National legislatures will consider this provision in implementing the procedures.⁴⁵⁴ Working together, labor and business would be able to develop a means of assuring confidentiality.⁴⁵⁵ Costs would also be kept down through cooperation.⁴⁵⁶ If MNEs and labor consult with each other, they could ascertain the precise need for information and eliminate costly reporting of unnecessary information.⁴⁵⁷

IX. CONCLUSION

This Comment has examined MNEs and the problems encountered by organized labor in bargaining with MNE management. These problems have developed as a result of MNEs' size and diversity. In Europe, the balance of

443. See *Commission Proposes Directive*, *supra* note 71, at 2.

444. *Commission Approves Workers Rights Draft*, *The Times*, Oct. 3, 1980, at 23. See *Vredling Outlines Scope*, *supra* note 66, at 6.

445. See Vagts, *Costs of Illumination*, *supra* note 414, at 337.

446. BLANPAIN, *supra* note 52, at 214; see *id.* at 316-17, 337.

447. See Vagts, *Costs of Illumination*, *supra* note 414, at 337.

448. AMERICAN MULTINATIONALS, *supra* note 364, at 100-01.

449. *Id.*; see MULTINATIONAL CHALLENGE, *supra* note 160, at 34.

450. See HELLMAN, *supra* note 401, at 112.

451. *Id.*

452. See EXPLANATORY MEMO, *supra* note 20, § I(A)(4).

453. Multinational Directive, COM (80) 423 final, art. 15.

454. *Id.* arts. 15(2), (3).

455. See Pursey, *supra* note 12, at 284.

456. *Id.* at 281.

457. *Id.*

power between unions and MNEs has generated concern among government and labor organizations. Thus, the EEC is considering binding regulations governing MNE labor relations in the form of a proposal for a Multinational Directive. This Directive would balance the interests of MNEs and of labor by requiring MNEs to disclose relevant information and to consult with labor representatives on matters of substantial interest to worker security.

This legislation will contribute to stability in industrial relations. Closer contacts between management and labor will benefit both sides. The runaway plant situation is an application which demonstrates the benefits. Through disclosure and consultation, labor will gain security by removal of fear of unjust job losses. MNEs can expect, through greater understanding between both labor and management, that labor will adjust its demands to be increasingly realistic in the context of the international economic area. The present polarization of views between labor and management supporters can be reconciled. The best interest of business is to be cooperative. The best interest of labor is to help make cooperation inexpensive. Under a rational approach, each side can balance its interests with the interests of the other side. Such an approach will create a more stable atmosphere for business investment in MNEs.

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