

F. Taxation

Other than noting that multinationals should do good and avoid evil in dealing with tax authorities of host countries,¹⁴⁷ the Taxation guides are unremarkable except for the reappearance of concern with transfer pricing. Even this is abbreviated.

Enterprises are told that they should refrain from using "facilities available to them, *such as transfer pricing which does not conform to an arm's length standard*, for modifying *in ways contrary to national laws* the tax base on which members of the group are assessed."¹⁴⁸ This, of course, illustrates one legitimate concern of governments with transfer prices and may illuminate the point of the Disclosure guide as to publication of transfer pricing policies.¹⁴⁹

There is no point in elaborating upon the thought that countries engaged in attracting capital funds can frustrate themselves by over-concentration on enterprises' transfer pricing if other objectives, such as host country employment rates, are served. It goes without saying that a fictitious arm's-length standard for intra-enterprise transfer pricing may destroy much of a management's justification for starting, maintaining, or expanding a facility in a given country. Tax authorities' proper concern with disguise of profit export by transfer pricing has little to do with impact on a multinational's competitors. In the competitive context, if vertical integration of functions is deemed to be against public policy, it would seem more sensible to attack it head-on rather than to snap at transfer pricing. If integration of function is not anti-social, neither is transfer pricing on a basis most favorable to a total enterprise (which, most certainly, allocates capital funds among profit centers without sole concentration on arm's-length standards) so long as fair taxation is not frustrated. There can be other proper bases for government concern with transfer pricing which might well be treated within the Financing guide.¹⁵⁰ As to taxation procedures, a host country's fair share of locally generated revenues could easily be computed by techniques such as reference to a constructive arm's-length price without literally requiring that such prices be affected. Techniques, such as third-country pricing in the antidumping scheme, are readily available.

147. Guidelines, *supra* note 3, Taxation at para. 1.

148. *Id.* at para. 2 (emphasis added).

149. Guidelines, *supra* note 3, Disclosure, at para. viii.

150. For example, generally applicable currency exchange restrictions or consensual restraints on capital repatriation.

G. *Employment & Industrial Relations*

Employment and Industrial Relations guides (IR) are nine in number. On an explicit level, they promote organized collective bargaining,¹⁵¹ equal employment opportunity,¹⁵² and systematic upgrading of host country work forces.¹⁵³ These seem reasonable enough. Indeed, as to what Americans are prone to think of as fair labor standards, the guides are surprisingly relaxed as they call only for observance of standards "not less favourable than those observed by comparable employers in the host country."¹⁵⁴

More difficult concepts are found in connection with data supply,¹⁵⁵ shop-wide lay-offs or dismissals,¹⁵⁶ and negotiation protocol.¹⁵⁷ When it "accords with local law and practice," enterprises should give sufficient information to employees' representatives to permit them "to obtain a *true and fair view* of the performance of the entity or, *where appropriate, the enterprise as a whole.*"¹⁵⁸ Enterprises should also conduct "meaningful negotiations" concerning employment conditions.¹⁵⁹ How a multinational can assure itself as to whether employee representatives have achieved a "true and fair view" presents a question similar to that involved in what is implicit in fostering "public understanding" pursuant to the Disclosure guides.¹⁶⁰ However, unlike the Disclosure burden, under which management might have to address the lowest common denominator of the normal population in each host country, employees' representatives are a fairly easily assessed, often sophisticated, audience. In operating terms, it would seem that management must judge as to whether union representatives had achieved a "true and fair view" until such time as a legally competent third party or other force rules otherwise. However, industrial relations experts might well wonder why data as to the "enterprise as a whole" would be relevant, or its supply "appropriate" unless to provide justification for either compensation demands by

151. Guidelines, *supra* note 3, IR, at paras. 1-2, 9.

152. *Id.* at para. 7.

153. *Id.* at para. 5.

154. Guidelines, *supra* note 3, IR, at para. 4.

155. *Id.* at paras. 2(b) & 3.

156. *Id.* at para. 6. See text accompanying notes 174-228 *infra* (the Badger Case).

157. *Id.* at paras. 8 & 9. See text accompanying notes 174-228 *infra* (the Badger Case).

158. *Id.* at para. 3 (emphasis added).

159. *Id.* at para. 2(b).

160. See text accompanying notes 106-12 *supra*.

reference to total profitability vis-à-vis host country standards, or demands concerning transfer of work to one host from another.

While the lengthy notice periods and lavish lay-off benefits available in some nations are not among the explicit "shoulds," the guides call for not only "reasonable notice" to employees' representatives and the "relevant" authorities "where appropriate" when changes "would have major effects" but also mitigation of "adverse effects" to the maximum extent practicable.¹⁶¹ Positive law was not intended to be displaced as to what constitutes "reasonable notice" and "maximum . . . practicable" mitigation. What, then, of the United States which lacks national legislation or philosophy as to minimum separation allowances in the private sector? Is the executive desirous of promoting a federal common law of minimum separation benefits? To what experience shall entities in the United States refer for precedent? That of Japan? France? This seems a curious area to which the U.S. executive agreed since the United States lags well behind various OECD members in this manifestation of paternalism.

Finally, as to IR, enterprises either engaged in collective bargaining negotiations or whose employees are being organized should "not threaten . . . to transfer the whole or part of an operating unit from the country" in order to unfairly pressure employees.¹⁶² Thus, the run-away shop is proscribed only by reference to nation-hopping. Presumably, then, a threat to move from the southeast corner of a host nation to its northwest corner is not offensive unless in terms of domestic law.

H. Science & Technology

In the Science and Technology section (Technology), licensing or other technology transfer "on reasonable terms and conditions" is encouraged.¹⁶³ Multinationals are also urged to complement host countries' plans, contribute to the growth of the hosts' scientific capacity, and encourage an innovative capacity. In addition, multinationals are encouraged to adopt practices conducive to "rapid diffusion of technologies" with "due regard to the protection of industrial and intellectual property rights."¹⁶⁴ As noted earlier,¹⁶⁵ not only the Competi-

161. Guidelines, *supra* note 3, IR, at para. 6.

162. *Id.* at para. 8.

163. Guidelines, *supra* note 3, Technology, at para. 3.

164. *Id.* at para. 1.

165. See note 142 *supra*.

tion guides but also initiatives taken in fora such as UNCTAD figure prominently in the ultimate meaning of the Technology guides.

III. IMPLEMENTATION OF OECD GUIDELINES

By definition, the Guidelines are not law in and of themselves. On an explicit level, they are recommendations to multinationals active in OECD territories.¹⁶⁶ Observation is "not legally enforceable."¹⁶⁷ Yet, the avowed purpose is to "lay down standards" geared to assuring that multinationals' operations "are in harmony with the national policies of . . . countries where they operate."¹⁶⁸ These standards are said to "reflect good practice for" all enterprises, whether domestic or multinational.¹⁶⁹

As noted earlier, individual nations can adopt all or part of the Guidelines as domestic law. Adoption of *all* would be a dubious exercise for multinationals' base countries unless assured of sufficient reciprocity as to avoid prejudice to national interests. Nations recognizing such potential for prejudice, but nevertheless convinced of the need for binding rules in particulars modeled on the OECD Guidelines, could initiate movement toward a negotiated convention. Whether this will come to pass, or whether portions of the Guidelines will become customary international law (or merely sink from sight in the wake of the U.N.), is beyond the scope of this effort. What can be developed about enforcement of the Guidelines stems from the first known¹⁷⁰ IME "consultation" about a multinational and the potential for selective enforcement of the Guidelines within the U.S. under current federal law.

A. Use of IME Consultation Procedure

Treatment of the IME Consultation procedure necessarily focuses on the only case known to have been handled at the request of a member nation: The Badger Case.¹⁷¹ An extensive but necessarily abridged fact statement is requisite since there is no official report of it. The author places heavy reliance on the book *The Badger Case*

166. *Declaration*, at para. I.

167. See Guidelines, *supra* note 50.

168. Guidelines, (uncaptioned) preamble, at para. 6.

169. *Id.* at para. 9.

170. See note 34 *supra*.

171. On March 18, 1977, the Belgian Ambassador to OECD addressed the OECD Secretary General with a request for *inter alia* an exchange of views concerning interpretation of the Guidelines in the context of the bankruptcy of Badger (Belgian) N.V., a subsidiary of an American multinational, and subsequent labor union demands that the parent enterprise supplement the bankrupt's assets in order to make maximum severance pay awards to affected employees of the bankrupt. BLANPAEN, note 32 *supra*, at para. 125.

by Professor Dr. R. Blanpain of Leuven¹⁷² and a release by the Badger Company, Inc.¹⁷³ Neither Professor Blanpain nor Badger is responsible for the author's choice, interpretation, or presentation of data.

1. The Badger Case

The Badger Company, Inc., (Badger-USA) is headquartered in the United States. It is a subsidiary of the Raytheon Company, also based in the United States. Easily recognized as an electronics firm, Raytheon has diversified in recent years into areas of home appliances, publishing, and geophysical exploration.¹⁷⁴ Badger-USA markets design, engineering, and construction services on a worldwide basis. It claims particular expertise in chemical process engineering.¹⁷⁵

In mid-1976 Badger-USA recognized that a Belgian subsidiary was not carrying its weight. An unsuccessful effort was made to sell it but, ultimately, the decision was to close-down. Badger (Belgium) N.V. (Badger-Belgium) had done well enough from its opening in 1965 until 1972 but thereafter required heavy work transfers from other constituents of the broad Badger enterprise. This proved increasingly difficult due to high Belgian wage scales and the importance to Badger of government procurement, which often carries with it an obligation to work in the client's country. Badger-Belgium paid no dividends in its over ten year history. Whether it transferred funds to parent or sibling activities by way of management fees is unknown to the author.

As part of the closing, Badger-Belgium sought the benefits of a concordat *judiciare* from the Commercial Court sitting in Antwerp. Such a concordat resembles an arrangement or judicially-approved composition of creditors in the American practice. Entitlement to it is conditioned on the petitioner being *unfortunate* and *in good faith*. The court denied the petition,¹⁷⁶ indicating in its opinion that the necessary misfortune must result from forces external to petitioner's control and that (in context of Badger-Belgium's ownership and role) work allocation decisions of the controlling "multinational" could not be regarded as sufficiently impersonal to be an external force. Formal bankruptcy followed.¹⁷⁷

172. See BLANPAIN, *supra* note 31.

173. See note 32 *supra*.

174. *Value Line* at 1027 (Aug. 18, 1978).

175. Badger Briefs, *Chemical Week* at 6 & 7 (Oct. 25, 1978) (advertisement); Raytheon Annual Reports (1975 and 1977) (relevant portion reprinted in BLANPAIN, note 32 *supra*, at 62).

176. BLANPAIN, *supra* note 31, at para. 77.

177. *Id.*

Employees in Belgium are entitled to liberal separation allowances. The parent company estimated that assets available for such allowances "represented an average . . . of 8 months per employee."¹⁷⁸ Bankruptcy, as opposed to a concordat, effectively eliminated the potential of immediate advances against the allowances and, presumably, greatly increased the cost of administration.

Badger-Belgium's mode of organization afforded limited liability for shareholders. Despite this, Belgian unions demanded that the foreign parent make a capital contribution of 100 million Belgian francs earmarked for separated employees. This would have doubled the amount the company said was available. Badger-USA resisted, contending that there were no similar endeavors to put aside the limited liability principle when shareholders were other than foreign multinationals. The employees' union threatened not only litigation but also "maximum publicity." There were direct addresses to the American embassies in Belgium and Holland, including references to harm to be sustained by the "so far good reputation of other American [multinationals] . . . in the Benelux." A lawsuit against Badger-Belgium directors as well as other Badger entities was prepared.

Belgium has an officially administered indemnification fund to which employees victimized by employer bankruptcy can turn for payment of mandated separation allowances up to a maximum of 750,000 Belgian francs per employee. The fund is financed by employer contributions. The unions opposed completion of the bankruptcy proceeding, a condition precedent to employee access to the indemnity. Their avowed theory was that it was impermissible for a multinational to shift its social and legal obligations to the people of Belgium. Badger-USA was not slow to identify the discrimination against multinational shareholders implicit in the union position.

The unions asked TUAC's Secretary-General to submit the entire matter to the "commission . . . to guard . . . observance of the Guidelines."¹⁷⁹ American diplomatic personnel received union delegations. The Belgian premier promised official contact with Badger and direct contact with the U.S. Ambassador concerning "dangers" for Belgian social relations. The matter was discussed in legislative councils.

TUAC's Secretary-General is alleged to have replied¹⁸⁰ to the effect that the IR guides were "implicated" and that the multinational

178. Release, Badger Comments on Closure of Badger (Belgium) N.V. (Aug. 1978) (Release, The Badger Co.).

179. BLANPAIN, *supra* note 32, at para. 86. See also note 34 *supra*.

180. *Id.* at para. 96.

owed a duty to supplement funds to a degree to meet its Belgian subsidiary's obligations. He noted, however, that there was room for governmental action. Also attributed to him were the interesting thoughts that, due to initiatives of the U.S. and United Kingdom governments to obtain respect for the Guidelines,¹⁸¹ any objection by Badger would be too late and that the U.S. had a *special responsibility* to assure compliance. The Secretary-General is also said to have suggested that the IR guides contemplated the appropriateness of direct negotiation between the Belgian unions and top (or intermediate) management of the Badger Company. The Guidelines were described as the product of compromise to be *strictly* applied.¹⁸² Various other innuendoes and observations are attributed to TUAC's Secretary-General. One is that, if *rapid* settlement were not achieved, reference to IME would be made. Another is that such reference would not be necessary since the various governments would pressure Badger-Raytheon into line.¹⁸³

The author hastens to say that he does not regard such expressions as inappropriate. TUAC is organized labor's forum.¹⁸⁴

Union initiatives and activities were numerous.¹⁸⁵ Suffice it to say that members of the U.S. State Department met with various groups including, apparently, Badger management, AFL-CIO representatives, and TUAC's Secretary-General. The official U.S. position was that it could be little more than an interlocutor.¹⁸⁶ Representatives of the

181. This probably refers to the exhortatory letter dated August 19, 1976, from Secretaries Kissinger, Simon and Richardson to more than 800 chief executives of U.S. corporations. The text of the letter was announced in Release No. 402, U.S. Dep't of State, *supra* note 36. A comparable White Paper, International Investment, Guidelines for Multinational Enterprises, was presented to Parliament by the Secretary of State for Industry by Command of Her Majesty (June 1976) (Command No. 6525). A Badger London office was thought to be the European decision center. The fact that 800 addressees does not exhaust American companies affected by the Guidelines seems self-evident. It goes without saying that the author does not charge TUAC with knowledge of the extent of the American effort which, being less than fully broadcast, cannot be said to set up any sort of ethical estoppel against non-addressees. This should not be taken as a concession, however, that the Secretaries' letter addressed to the more than 800 chief executives sets up such an estoppel against their companies.

182. BLANPAIN, note 32 *supra*, at para. 97.

183. "[S]ubmitting . . . the case to OECD would have grave consequences. . . . [R]epresentatives of twenty-four governments . . . would draw adequate conclusions Badger . . . would not risk the negative effects of 'bad' publicity . . . [which] . . . would be the more damaging as its case would be the first to violate the Guidelines." *Id.* at para. 96.

184. The facts that TUAC is an advocate and that its adoption of the Belgian unions' cause is entirely understandable do not translate into popular understanding of its role. By reason of this, it may prove that the force of TUAC's words will be even more significant, in given contexts, than the same words uttered on behalf of a well-recognized national union.

185. See BLANPAIN, *supra* note 31, at paras. 98-107.

186. *Id.* at para. 104. In a contemporary speech, Deputy Assistant Secretary of State for Economic & Business Affairs Paul Boeker said that the U.S. viewed the

parent Badger met with the Belgian unions and maintained the view that Badger was observing all obligations.¹⁸⁷ This the unions found unacceptable.

According to Professor Blanpain, the unions then decided to go to IME.¹⁸⁸ Note that the pertinent OECD Decision contemplates that IME-sponsored exchanges of views are to occur at its instance or that of a member country.¹⁸⁹ Unlike ILO, neither OECD nor IME are tripartite in any formal sense. Belgium obliged its unions (which is neither surprising nor impeachable).¹⁹⁰

On March 24, 1977, TUAC addressed a note to IME concerning a meeting scheduled for March 30th.¹⁹¹ The note first made reference to "cases" involving Massey Ferguson, Black & Decker, Philips, Bendix, Siemens, Warner-Lambert, Litton Industries, ITT, and Citicorp "for purposes of information and illustration;" it then devoted approximately 1200 words of main text to "factual information" concerning the "*Test case of the effectiveness of the Guidelines.*"¹⁹² These words betrayed some spirit of enlightened advocacy while, seemingly, retaining fairness.¹⁹³ The bankrupt was painted as a mere department of a larger enterprise. (Apparently, the parent would disagree only to the extent of insisting that Antwerp had been too long subsidized by the balance of the enterprise.)¹⁹⁴ TUAC, noting that the parent "took advantage" of limited liability, said "[s]uch behaviour would be inconceivable on the part of Belgian domestic enterprises" and "directly

consultation mechanism "as a forum for the discussion of generic issues rather than as a complaint mechanism." WORKSHOPS, *supra* note 26, at 18.

187. BLANPAIN, *supra* note 31, at para. 106.

188. This is most interesting since the relevant Decision contemplates that member countries, *not* national unions or even TUAC or BIAC, are competent to initiate an "exchange of views." *Declaration, Decision on Inter-governmental Consultation Procedures*, *supra* note 3, at para. 1. Of course, it is obvious that either BIAC or TUAC can address matters of concern when invited to "express their views." *Id.* at para. 2.

189. *Id.* at para. 3.

190. On March 18, 1977, the Belgian Ambassador to OECD requested that the Badger Case be placed on the agenda for an IME meeting scheduled for March 31, 1977. An annex to the request presented a summary of the matter. BLANPAIN, *supra* note 31, at para. 125. Two of three Belgian employees are union members. It is quite common for Belgian labor leaders to hold government office and governments, understandably, are not insensitive to union desires. *Id.* at paras. 49-51. Contemporaneously with the union decision to go to IME, they also decided to notify the Director of the U.N. Centre on Transnational Enterprises. *Id.* at para. 107.

191. BLANPAIN, *supra* note 31, at para. 108.

192. *Id.* While the author regards such citation by name as extraordinarily significant to the entire evolution as well as to the cited companies, it is obvious that certain enterprises do not take IME consultations too seriously. For example, Litton Industries' Secretary had "no knowledge of the subject." Letter from G. W. Fenimore to John Maher (Nov. 29, 1978) (available at the Delaware Law School Library).

193. BLANPAIN, *supra* note 31, at paras. 95-98.

194. See Release, The Badger Co., *supra* note 178. See also BLANPAIN, *supra* note 31, at para. 122.

challenges the authority of the OECD and its Members Governments."¹⁹⁵

Despite this rhetoric, there was no citation to other situations where shareholders of bankrupted Belgian companies had been held responsible for debts, employee or otherwise, beyond net worth. By the same token, there was no explanation as to why shareholders in multinational enterprises—which presumably contribute ratably to the employee indemnity fund—should be less entitled to refer disappointed former employees to that fund.

At the formal IME meeting on March 31, 1977, discussion was confined to general principles and "Badger" was mentioned only sporadically.¹⁹⁶ Belgium was represented by a newly seated Secretary of State for Economic Regional Affairs¹⁹⁷ who had let it be known that he would test the credibility of OECD's membership.¹⁹⁸ His approach was to solicit an exchange of views on the proposition that multinationals must supplement resources of failed local entities to whatever extent is necessary to pay all legal obligations to former employees of the failed entity.¹⁹⁹ He maintained that this was not inconsistent with the National Treatment obligation to avoid discrimination against multinationals.²⁰⁰ Referring to the Anglo-American concept of "piercing the corporate veil," he said that Belgian law would permit much the same result when the subsidiary lacks real decision-making power.²⁰¹ This should have opened the Belgian case at IME to the question as to why—if this is so—there is need for recourse to IME?

Accounts of the meeting vary. The Belgian delegation characterized the outcome as a clear hint for multinational Badger and noted that the way to further negotiation was open.²⁰² When it was

195. BLANPAIN, *supra* note 31, at para. 108 (emphasis added). The TUAC memorandum does not seem to elaborate on the obvious facts that national law provided the limited liability feature and that, if dissatisfied with this capital-attraction mechanism, the Belgian government can terminate limited liability as an organizational lure or further restrict its availability.

196. BLANPAIN, *supra* note 31, at para. 126.

197. Professor Dr. Mark Eyskens (also of Leuven) succeeded Minister L. Dhooze on Oct. 15, 1976. *Id.* at para. 113. Unlike Professor Blanpain, who is identified with the Rechtsfaculteit, Professor Eyskens' affiliation is with the Business School of the University of Leuven. He became Secretary of State for Budget later in 1977. It should be noted that Professor Blanpain is not only a member of the Belgian delegation to OECD (letter from R. Blanpain to John Maher (Nov. 7, 1978) (available at the Delaware Law School Library)) but also participated in various negotiations and consultations concerning Badger. BLANPAIN, *supra* note 31, at para. 122.

198. BLANPAIN, *supra* note 31, at para. 126.

199. *Id.* at para. 127.

200. *Id.* at para. 130.

201. *Id.* at para. 131.

202. *Id.* at para. 136.

closed is left unstated. In point of fact, Badger agreed in April 1977 to increase the failed subsidiary's assets by as much as 20 million Belgian francs but stresses that it did so by reason of negotiations reopened before the IME meeting.²⁰³ Unfortunately for the "benefited" employees, the state of the bankruptcy precluded their receipt of funds until May 1978.²⁰⁴ It is to be hoped that they have not lost their rights to indemnity from the employer-supported fund. The Belgian media hailed the IME meeting as supporting meaningful guidelines and as morally condemning the Badger enterprise.²⁰⁵ OECD's report for 1977 seems to indicate that the meeting provided only food for thought.²⁰⁶ BIAC's report for the same year would not even inform the unaware that there had been a Badger Case.²⁰⁷

2. Implications of Badger

Obviously, more funds were made available, at least theoretically, to the affected Badger employees. The qualification is necessary because the author does not know the extent to which the estate was subject to attrition by reason of court costs, attorneys' fees, and the like, implicit in prolonging the proceedings to accommodate the unions. There were substantial overhead implications for Badger-USA, the unions, and the governments. One suspects that the attritional values were such that all were losers except to the extent that a valuable precedent was established.

Badger's summation does not concede that the IME consultation had any effect on the outcome.²⁰⁸ The Belgian government view is to the effect that the Guidelines were vindicated.²⁰⁹ Professor Blanpain, who seems to write objectively although he was part of the process, has some interesting thoughts. He believes that the Badger Case showed that the two principally involved governments did their utmost to achieve respect for the Guidelines.²¹⁰ Implicit in this is that the OECD effort gained credibility for the Guidelines among both OECD and other nations. Noting that cooperation is easier among nations having "common political, economic and social views and structures," he implies that the evolving U.N. codes will have more difficulty "where this community of interests is not always as apparent

203. See Release, The Badger Co., *supra* note 178, at 2.

204. *Id.* at 3.

205. BLANPAIN, *supra* note 31, at para. 137.

206. Report, Activities of OECD in 1977, at 25 (1978).

207. Annual Report of Activities—1977 (BIAC).

208. See Release, The Badger Co., *supra* note 178.

209. See BLANPAIN, *supra* note 31, at paras. 136-37.

210. BLANPAIN, *supra* note 31, at para. 152.

as in the OECD.”²¹¹ In that context, he asks what will emerge from “the box of Pandora” if the OECD Guidelines fail to impress multinationals.²¹² On a less lofty level, he suggests that Badger-USA was induced to negotiate meaningfully in recognition of the fact that damage to its image would adversely affect commercial opportunities.²¹³

Looking to the consultation procedure, Professor Blanpain suggests that issue-definition would be facilitated if cited multinationals were invited by IME to participate or were otherwise involved in preparation of the discussion-in-principle to which IME is currently committed.²¹⁴ In this connection, he notes that BIAC could play an important role but that it seemed to avoid the opportunity afforded by the Badger case. Presumably, he thinks it most unfortunate that BIAC left IME to deal only with facts and arguments adduced by TUAC or interested governments. If this is correct, the author can only agree with Professor Blanpain. Although lacking personal knowledge of the individual structures of BIAC’s constituency outside of the U.S., the author suggests that BIAC’s reticence is predicated on the lack of a truly representative role.

Is it believable that the U.S. Chamber or NAM really speaks *for* American commerce and industry or, rather, do they speak *to* respectable portions of the private sector(s)? . Could the same be true in other major OECD nations save, possibly, for Japan? If BIAC is the sum of essentially non-representative groups, can it ever present anything but the least common denominator? Alternatively, labor organizations—with particular emphasis on the European experience—come much closer to perceiving and striving toward common goals on some consistent basis. Thus, while rational administration of IME’s multifaceted role would be fostered by hard-nosed BIAC participation balancing TUAC’s effective advocacy, it just may not be possible—particularly when many U.S. enterprises are leery of truly effective collaboration by reason of real and imagined dangers of antitrust prosecution.

Assessing the OECD Guidelines, Professor Schwamm of the University of Geneva’s Graduate Institute of European Studies notes that they represent “a new awareness by the industrialized countries that if they are to defend the existence and ensure the survival of liberalism, the ‘unacceptable face of capitalism’ must be renounced, and the activi-

211. *Id.*

212. *Id.* at para. 154.

213. *Id.* The author unkindly infers that this is a diplomatic way to refer to willingness to settle.

214. *Id.* at para. 158.

ties of the MNEs in particular regulated.”²¹⁵ In terms of this awareness, the Guidelines *inter alia* “carry a considerable weight of moral persuasion which will prompt governments, trade unions (see Badger case in Belgium) and the public to condemn activities contrary to the recommendations; and encourage governments to enforce national regulations in conformity with the recommendations (which is precisely what certain NMEs seem to fear).”²¹⁶

Despite the official²¹⁷ and popular²¹⁸ Belgian readings given the IME exposure to Badger, TUAC President Bache-Vongbjerg felt obligated, at the 1978 IME consultation, to ask, *inter alia*: “Does not paragraph 9 of the Guideline on Employment and Industrial Relations apply in the case of the closure of a subsidiary by a mother company?”²¹⁹ This was said in context of his belief that “in many countries . . . nothing has much changed”²²⁰ by reason of which pressure toward “more binding” rules must continue.²²¹

In 1978, Chairman Wagner of BIAC recognized that success of the Guidelines is dependent on the “extent to which they become integral in management thinking and practice throughout Groups of companies [A]cceptance . . . at all levels is the *important goal*.”²²² He relied on public statements of various companies to show a spread of support which “suggests . . . the standards *which are proposed* . . . are in general *felt* to be reasonable, practicable and fair.”²²³ The closest to a comment on Badger is that parents lack “liability . . . in any legal sense” for debts of subsidiaries “[i]n the absence of specific legal provisions.”²²⁴ After this glossy reciprocal to TUAC’s 1977 expression of dismay that Badger-USA would rely on limited liability, Chairman Wagner continued:

However, there have been parent companies which have assumed liability in given situations on an ad hoc basis and without prejudice on an ex gratia basis for claims of employees. These cases are exceptional because of the risk of suits brought by shareholders for alleged dissipation of shareholders’ funds by the making of payments for which there is

215. SCHWAMM & GERMIDIS, *supra* note 8, at 37.

216. *Id.* at para. 38.

217. See BLANPAIN, *supra* note 31, at para. 136.

218. *See id.* at para. 137.

219. OECD Doc. IME/M (78) 1 (MNE), Annex 1 to Add. 1 at para. (vi) (April 11, 1978).

220. *Id.* at 12.

221. *Id.*

222. OECD Doc. IME/M (78) 1 (MNE), Annex 3 to Add. 1, at 19 (April 11, 1978) (emphasis added).

223. *Id.* at 20 (emphasis added).

224. *Id.* at 23.

no legal obligation . . . [i]n some jurisdictions, notably that of the USA, this risk can be substantial.²²⁵

In sum, BIAC regards the Guidelines as not only voluntary but in the proselytizing stage. Do the elders of BIAC seriously expect TUAC, which is politically well-connected in most OECD countries, to accept the need for prolonged indoctrination within, at least, major enterprises? Although not biased in favor of labor, the author has reservations about U.S. adhesion to the Guidelines. He believes that—to the extent BIAC and its American correspondent collaborated *ab initio*—lip service is a dangerous game.

However, it is safe to conclude that all immediately concerned regard the Guidelines as not legally binding save as given countries should adopt them. Conventional wisdom would have it that the Guidelines are no threat to enterprises based or operating in the U.S.A. Such wisdom, as is so often the case, may have a short life.

B. OECD Guidelines and U.S. Policy

Although the Guidelines are presented as nothing other than recommendations jointly addressed by member countries to multinational enterprises “operating in their territories,”²²⁶ they do “lay down standards for the activities of these enterprises in the different Member countries.”²²⁷ Expression of these standards “should help to ensure that the operations of these enterprises are in harmony with the national policies of the countries where they operate.”²²⁸ Thus, although lacking effect *ex proprio vigore* as domestic law of any given member state, the Guidelines are expressive of what member states “collectively consider to be high standards of good business practice for” multinationals²²⁹ which standards coalesce with host nations’ policies.

As remarked earlier, the then Secretaries of State, Treasury and Commerce jointly addressed “more than 800 chief executives of major U.S. corporations” shortly after the OECD *Declaration*.²³⁰ Noting that maintenance of “an open and stable environment for international investment . . . depends on strengthening mutual expectations of governments and enterprises regarding responsible policies and practices,”²³¹ they expressed the view that American objectives of assuring

225. *Id.* (emphasis added).

226. *Declaration*, *supra* note 3, at para. 1.

227. Guidelines, *supra* note 3, (uncaptioned) preamble, at para. 6.

228. *Id.*

229. Boeker, *A Code for Multinationals*, Wall St. J., May 28, 1976 at 8, col. 3.

230. Release No. 402, U.S. Dep’t of State, *supra* note 26.

231. Letter from Secretaries Kissinger, Simon & Richardson to Corporate Executives (Aug. 19, 1976) as attached to State Dep’t Release No. 402, *supra* note 26.

that the Guidelines and the "Declaration would be fair and balanced" had been achieved.²³² Shortly before the *Declaration*, a principal American functionary published an exhortation entitled "A Code for Multinationals."²³³ In it, he maintained that there would be "no arm-twisting from Washington"²³⁴ but characterized the Guidelines as "a set of standards which should be the ones that U.S. based multinationals can indicate with confidence that they do follow, and intend to follow, in their operations."²³⁵ Ten months later, the same gentleman described the federal government as having "fully endorsed these Guidelines and commended them to business as reasonable and fair business standards for multinational and domestic firms alike."²³⁶ This somewhat echoes the preamble to the Guidelines which states that "multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the guidelines are relevant to both."²³⁷

Several American firms endorsed the Guidelines or, at least, noted their own substantial conformance.²³⁸ The author has not attempted to determine how many firms have so expressed themselves, or to what degree their protestations reflect reality but it is interesting to speculate whether or not such expressions are sufficiently symptomatic of wide acceptance as to permit argument that the Guidelines have become standards of care for corporate management. Doubting that they have progressed so far, the author suggests that repetition of unchallenged praise for the Guidelines could cause them to evolve into such standards. Note that USA-BIAC, supposedly representative of the two major U.S. trade associations, has already styled the Guidelines as embodying "*standards of good conduct.*"²³⁹ However, the

232. *Id.*

233. See Boeker, *supra* note 229. Mr. Boeker served as Deputy Assistant Secretary of State for Economic and Business Affairs.

234. *Id.* Expressions of executive functionaries are not binding on independent agencies such as the FTC. See, e.g., Lecture by Bell, U. of Kansas (Jan. 25, 1979) (available at the Delaware Law School Library) in which the Attorney-General of the U.S. notes the institutional independence of the FTC, *inter alia*.

235. Boeker, *supra* note 229.

236. WORKSHOP, *supra* note 26, at 16.

237. Guidelines, *supra* note 3, (uncaptioned) preamble, at para. 9.

238. E.g., Borden, Inc.; Caterpillar Tractor Co.; Exxon Corp.; First National Bank of Boston; Ford Motor Co.; General Motors Corp.; and Philip Morris International. Citicorp's 1977 report stated that it "welcomed the *Declaration* both for its assurances of nondiscriminatory treatment and for its delineation of 'General Policies' that spell out good business practices. Indeed, these practices . . . closely parallel directives under which Citibankers have long operated." U.S. Corporate Response, *supra* note 26, at 8. Of parenthetical interest, Citibank had the dubious privilege of being among the first cited as offending the Guidelines and the only one accused of having a "world wide anti-union policy." BLANPAIN, *supra* note 31, at 94 and Annex VI.

239. A Review of the Declaration on International Investment and Multinational Enterprises, at 16 (1976) (published by USA-BIAC) (emphasis added).

author's current concern is more with domestic U.S. regulatory implications.

Concentration on the U.S. policy significance of the Guidelines as well as various parties' characterization of the guides as fair, reasonable and responsible has a point. Members of the federal executive establishment have given assurance that they will not engage in arm-twisting. The FTC, however, is *not* part of that establishment. Thus, although the *Antitrust Guide For International Operations* commends attention to the Guidelines,²⁴⁰ there is and can be no assurance that compliance with either U.S. antitrust norms as perceived by the Justice Department or the Competition portion of the Guidelines will insulate an enterprise from allegations of having violated those terms in the view of another agency. For example, the Justice Department is not a noted supporter of the Robinson-Patman Act.²⁴¹ Although much of the act is beyond the department's reach, it is explicitly within that of the FTC.²⁴² More importantly, the jurisdiction of the FTC as to commercial practices is far broader than either "antitrust" or the Justice Department's normal reach and the Guidelines' thrust is, by definition, far broader than competition policy. The Commission is competent not only to ban the unfair but to study operation of the economy²⁴³ and to exact routine reports from, at least, corporate participants in the economy.²⁴⁴

The author does not suggest that the FTC would deliberately embarrass American foreign policy. Neither would he be surprised if FTC decisions were made without ascertaining that policy. As the Commission's power is currently construed,²⁴⁵ however, it has the

240. *ANTITRUST GUIDE*, *supra* note 68, at n.16.

241. 15 U.S.C. §§ 13-13b (1976).

242. 15 U.S.C. § 21a (1976). As indicated earlier, the Guidelines' approach to commercial discrimination in sales is not coincident with Robinson-Patman. See text accompanying notes 123-25 *supra*. But the FTC has not been constrained by the language of Robinson-Patman. *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962); *American News Co. v. FTC*, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); *La Peyre v. FTC*, 366 F.2d 117 (5th Cir. 1966). The Commission's ability to rise above jurisdictional problems attendant upon particularized statutory schemes is not limited to price discrimination. See, e.g., *Fashion Originators Guild v. FTC*, 312 U.S. 457 (1941); *In re Beatrice Foods Co.*, 17 F.T.C. 473 (1965); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 395 (1953). Neither is it limited to antitrust. *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 244-45 (1972).

243. 15 U.S.C.A. § 46 (Supp. 1978).

244. 15 U.S.C.A. § 46(b) (Supp. 1978).

245. Use of the word "currently" is calculated since the author is not at all confident that the Supreme Court, as presently constituted, will endorse the extraordinary liberality of decisions which, in effect, freed the FTC from focus on a Congressionally-defined standard when measuring the unfair. Decisions such as *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (using rule 10b-5 as the predicate for a private damage action) evidence renewed interest in such constitutional niceties as standards of legislative delegation, *id.* at 211, and suggest that it is time to confront the egregious exercise of FTC power à la *S & H* with the logic of *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 535 (1935), also known as the "Chicken Case."

warrant to apply self-generated norms which determine unfairness by reference to shifting perceptions of policy, ethics and morality.²⁴⁶ In this context, and before considering some of the particulars in the FTC armory, it is appropriate to note that the Commission is currently chaired by a person who believes

[A]ntitrust cases have not focused with enough frequency or intensity on the most important questions . . . to bring the structure and behavior of major industries and, indeed, of the economy itself more into line with the nation's democratic, political and social ideals Antitrust has been preoccupied with, if not entirely overtaken by, the narrow economic objective of allocative efficiency *Competition policy must sometimes choose between greater efficiency, . . . and other social objectives*²⁴⁷

Apart from enforcement powers oriented to eliminating unfair practices as they affect commerce,²⁴⁸ the FTC also has power "to investigate from time to time the *organization, business, conduct, practices, and management* of any" person within FTC jurisdiction and the relation of such entity to individuals, associations, and other corporations.²⁴⁹ This power is supplemented by the power to make enterprises indulge in self-examination as to such subjects in order to render "annual or special" reports responding to lines of questions propounded by the FTC.²⁵⁰ Neither power is constrained by a need for the FTC to relate its inquiries to subjects concerning which it has prosecutorial or rule-making power. Save for trade secrets and customer lists, the FTC can publicize the product of these forays.²⁵¹ In addition, the FTC has power to investigate "trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States."²⁵² The FTC has the power to report *directly* to Congress concerning domestic²⁵³ and foreign²⁵⁴ commerce.

Turning to enforcement from these broad-ranging powers to study particularized aspects of the economy and to compel collaboration in

246. *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 244-45 n.5.

247. M. Pertschek, *New Directions for the F.T.C.*, speech given at the 11th New England Antitrust Conference, No. 340 *ANTITRUST & TRADE REG. REP.* (BNA) (Nov. 24, 1977) (emphasis added).

248. 15 U.S.C.A. § 45 (Supp. 1978).

249. 15 U.S.C.A. § 46(a) (Supp. 1978) (emphasis added).

250. 15 U.S.C.A. § 46(b) (Supp. 1978).

251. 15 U.S.C. § 46(f) (1976).

252. 15 U.S.C.A. § 46(h) (Supp. 1978).

253. *See* 15 U.S.C. § 46(f) (1976).

254. *See* 15 U.S.C.A. § 46(h) (Supp. 1978).

such studies, the essence of the FTC's power lies in its ability to institute proceedings and, upon appropriate findings, issue "cease and desist" orders²⁵⁵ against "[u]nfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce."²⁵⁶ While the FTC has explicit jurisdiction to enforce various other acts,²⁵⁷ judicial construction of its essential power²⁵⁸ and recent legislation²⁵⁹ invite thought as to whether the particularized statutory schemes are meaningful except to the extent they provide private causes of action,²⁶⁰ empower more specialized agencies to regulate specific industries,²⁶¹ or afford immunities.²⁶²

In *S & H*,²⁶³ the Supreme Court held that FTC, exercising its essential enforcement power,²⁶⁴ "does not arrogate excessive power to itself if, in measuring a practice against the elusive but congressionally mandated standard of fairness, it, like a court of equity, considers public values."²⁶⁵ Unfortunately, the Court failed to elaborate "public values," save by an expository footnote reference,²⁶⁶ to the Commission's avowed predicates for a rule about cigarette advertising (which was not the stuff of *S & H*). In that rulemaking, the FTC enumerated bench-marks for recognizing an *unfair practice* which neither violates public law nor is deceptive:

'(1) [W]hether the practice, without necessarily having been previously considered unlawful, *offends public policy* as it has been established by statutes, the common law, or *otherwise*—whether, in other words, it is within the penumbra of some . . . established concept of unfairness; (2) whether it is *immoral, unethical, oppressive*, or unscrupulous; (3)

255. 15 U.S.C.A. § 45 (b) (Supp. 1978).

256. 15 U.S.C.A. § 45 (a) (Supp. 1978).

257. *E.g.*, the Clayton Act, 15 U.S.C. § 21 (a) (1976); Fur Products Labeling Act, *id.* § 69; Textile Fibers Products Identification Act, *id.* § 70; Wool Products Labeling Act, *id.* § 68; Webb-Pomerene Act, *id.* §§ 61-65; Lanham Trade-Mark Act, *id.* § 1064.

258. See text accompanying notes 263-92 *infra*.

259. Act of Jan. 4, 1975, Pub. L. No. 93-637, 88 Stat. 2193, 2201, which, *inter alia*, confirmed FTC power to promulgate substantive trade regulation rules. 15 U.S.C. §§ 57a(a)-(b) (1976). See generally Maher, *Two Little Words and FTC Goes Local*, 80 DICK. L. REV. 193 (Winter 1976). It is difficult to perceive a substantial difference between this rule-making power and that declared unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 535 (1935). *Schechter* did involve a penal proceeding whereas the FTC Act does not.

260. See, *e.g.*, 15 U.S.C. §§ 15 & 15a (1976).

261. See, *e.g.*, 15 U.S.C. § 21 (a) (1976).

262. See, *e.g.*, guaranty provisions of the Textile Fiber Products Identification Act, 15 U.S.C. § 70h (1976).

263. 405 U.S. 233 (1972).

264. See text accompanying notes 255-56 *supra*.

265. *FTC v. Sperry & Hutchinson*, 405 U.S. at 244.

266. *Id.* at 244-45 n.5.

whether it causes *substantial injury* to consumers (or competitors or other businessmen,'²⁶⁷

What was the context in which this approach to unfairness was utilized in *S & H*? *S & H* is a famous trading stamp company. As one of its marketing techniques, *S & H* retained ownership of the stamps of which the use was sold to retailers for their subsequent delivery to customers as a premium for patronage. *S & H*'s purpose was to minimize commercial trading in its stamps lest such traffic prejudice attractiveness to its retailer-customers. Frequent enlistment of courts' injunctive powers against unauthorized handling of the stamps, and threats of such action, lent credence to *S & H*'s posture.²⁶⁸

Defining the nebulous *unfairness* standard is a thankless if not impossible task. Just what may be within the "penumbra" of some "established concept of unfairness" resists formulation. Looking to the pre-*S & H* role of "unfair or deceptive acts or practices," the Commission had a long record of dealing with questionable promotions aimed at consumers and competitors. Targets included trading on the gambling instinct²⁶⁹ and fictitious pricing.²⁷⁰ Later, the FTC took the position that a marketer's failure to have proof of a data base providing a reasonable basis for affirmative product claims is an unfair practice in and of itself.²⁷¹ Beneficiaries of FTC vigilance include the "unthinking and credulous . . . as well as the more sophisticated and intelligent."²⁷² Undeniably, Trade Commission initiatives addressed in this paragraph were undertaken in the name of what is now termed consumer protection and were within the FTC's jurisdiction to address unfair trade practices. But, *S & H* teaches that this jurisdiction is not limited to consumer protection.

The decision also teaches that the FTC can recognize that which offends public policy by reference to established concepts of unfairness *without* limitation as to source. What better source than the fair and

267. *Id.* citing Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (1964) (emphasis added).

268. *Id.* at 238.

269. *Gillman v. FTC*, 290 F.2d 666 (8th Cir. 1961) (punchboards); *Wren Sales Co. v. FTC*, 296 F.2d 456 (7th Cir. 1961) (lotteries); *Deer v. FTC*, 152 F.2d 65 (2d Cir. 1945) (bingo). Of course, these predate entry of various of the states into the lottery business and one wonders if, absent prohibitory statutes, it would now be so easy to divine a policy against gambling. Consider, *e.g.*, that the Interior Department runs a lottery incident to sale of rights for oil and gas exploration.

270. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Helbros Watch Co. v. FTC*, 310 F.2d 868 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963).

271. *In re Pfizer, Inc.*, 81 F.T.C. 23 (1972).

272. *A.P.W. Paper Co. v. FTC*, 149 F.2d 424, 426 (2d Cir. 1945), *aff'd*, 328 U.S. 193 (1946).

balanced²⁷³ OECD *Declaration* which explicitly states the *national policies*²⁷⁴ of member nations including the United States? Particularly so when persons purporting to be representative of American commerce and industry are effusive in their endorsements.²⁷⁵

Would the FTC get involved with other than the Competition guides? It is involved with a disclosure scheme quite distinct from that of the SEC.²⁷⁶ This scheme, by definition, is not limited to companies having publicly-traded securities. FTC is also concerned with technology transfers or, at least, the terms and conditions attending them. While it is inconceivable to traditionalists that the FTC would invade the province of the NLRB, what (other than appropriations) is to stop it, tempted by harsh facts, from going where NLRB cannot?

One need not reach so far to conceive of the OECD Guidelines as a springboard for FTC social action. Even before *S & H*, the FTC had successfully defined policy by analogy to federal statutes. This process allowed the Commission to attack practices or persons not enumerated in fairly particularized statutes. Thus, although the merger and acquisition strictures of section 7 of the Clayton Act looked to corporate conduct, the Commission applied them to unincorporated associations.²⁷⁷ Section 2(a) of the Clayton Act, embodying the principal thrust of the Robinson-Patman Act's address to price discrimination in sales, has been applied by analogy to discriminatory equipment rentals.²⁷⁸ The list is long. Section 2(d) bans sellers' discriminatory merchandising support to buyers but buyers are not prohibited from soliciting or receiving such support. The Trade Commission has successfully prosecuted such buyers;²⁷⁹ note particularly that Congress had prohibited buyers' *knowing receipt* of price discriminations.²⁸⁰ Congress forbade sellers' imposition of exclusive dealing arrangements on buyers²⁸¹ and the FTC extended this prohibition to impositions by principals on agents and buyers on sellers.²⁸²

Thus, the FTC has been a fruitful producer of rules against restraints on competitive efforts. In *Brown Shoe*,²⁸³ which predates

273. See Boeker, *supra* note 229.

274. See Release No. 402, U.S. Dep't of State, *supra* note 26.

275. U.S. Corporate Response, *supra* note 26.

276. Line-of-Business Reporting, *supra* note 82.

277. *In re Beatrice Foods Co.*, 67 F.T.C. 473 (1965).

278. *La Peyre v. FTC*, 366 F.2d 117 (5th Cir. 1966).

279. See note 242 *supra*.

280. 15 U.S.C. § 13(f) (1976).

281. *Id.* at § 14 (1976).

282. *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 395, 397 (1953).

283. *FTC v. Brown Shoe Co.*, 384 U.S. 316.

S & H, the Supreme Court sustained FTC condemnation of a wholesaler's practice of securing commitments from some of its customers to deal primarily in particular product lines featured by the wholesaler and not to handle directly conflicting lines although the customers were free to buy non-conflicting lines of the same generic product from the wholesaler's competitors. In consideration for this promise, the wholesaler provided various "free" or steeply discounted management services and insurance. Although the lower tribunals were in disagreement as to whether tying, exclusive dealing or nothing at all anticompetitive was involved, the Supreme Court did not get enmeshed in parochial characterization. "[O]ur cases hold that the Commission has power under § 5 to arrest trade restraints *in their incipency without proof* that they amount to an outright violation of . . . the antitrust laws."²⁸⁴ The FTC's ability to progress toward social goals perceived by any given majority of commissioners has not been limited to the antitrusts of analogy and incipency.²⁸⁵ To the degree that *Brown Shoe* left the Commission constrained, *S & H* substantially liberated it.

What better evidence of national policy than U.S. adherence to the OECD *Declaration* and Guidelines? What better testimony that the Guidelines constitute standards of conduct²⁸⁶ equally applicable to domestic and international commercial operations?²⁸⁷ And, if FTC need not be troubled by niggling details in statutes,²⁸⁸ why need it be constrained by, say, the Guidelines' concentration on intra-enterprise price discrimination *by the dominant*?²⁸⁹ After all, might not such discrimination be an incipient stage of dominance? What of the failure of privately-held companies subject to the FTC line-of-business reporting²⁹⁰ to supplement such reporting with advices geared to "public understanding?"²⁹¹

While it might be amusing to conjure what standards the FTC might ordain to foster disclosure programs oriented to "public under-

284. *Id.* at 322 (emphasis added).

285. *See, e.g., In re Lamite West, Inc.*, 76 F.T.C. 1039 (1969), in which the Commission proceeded against a distribution of *wooden* leis as flammables albeit its only explicit authority concerning flammables was tied to fabrics, which authority was removed by the Consumer Product Safety Act, Pub. L. No. 92-573, §30, 86 Stat. 1231 (1972). Of course, §§5(a) & (b) of the F.T.C. Act, 15 U.S.C. §§45 (a) (b) (1976), were the vehicle.

286. Guidelines, *supra* note 3, (uncaptioned) preamble, at para. 6.

287. *Id.* at para. 9.

288. *E.g.*, prosecution of *Brown Shoe Co.* under §3 of the Clayton Act, 15 U.S.C. §14 (1976), would have required proof of reasonably probable adverse competitive effect, *Standard Fashion Co. v. Margrane-Houston Co.*, 258 U.S. 346 (1922), whereas proceedings against lesser threats under §5 of the F.T.C. Act, 15 U.S.C. §45 (1976), do not.

289. Guidelines, *supra* note 3, Competition, at 1(e).

290. *See* Line-of-Business Reporting, *supra* note 82.

291. Guidelines, *supra* note 3, Disclosure, introductory paragraph (unnumbered).

standing,"²⁹² limitations of time and space dictate attention to the United Nations' somewhat fragmented approach to multinationals.

IV. THE NEW ORDER?

The Programme of Action on the Establishment of a New International Economic Order adopted by the U.N. General Assembly assigns objectives for a code of conduct for "transnational corporations."²⁹³ They would *negate* "interference in the internal affairs of the countries where they operate and . . . collaboration with racist regimes and colonial administration" as well as "restrictive business practices." They would *affirm* conformity to "national development plans and objectives of developing countries;"²⁹⁴ assistance, transfer of technology and management skills to developing countries on equitable and favourable terms; regulation of profits repatriation; and reinvestment of profits in developing countries. It is in context of this that the Commission and Centre on Transnational Corporations operate.

Also part of the context is the Report of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations which *inter alia* noted host countries' concern with the

undesireable [sic] effects . . . [multinationals] . . . *may* have on domestic employment and the balance of payments, . . . the capacity of such corporations to alter the normal play of competition[,] . . . ownership and control of key economic sectors by foreign enterprises, the excessive cost to the domestic economy which their operations *may* entail, . . . [and possible encroachment on] political sovereignty and their possible adverse influence on socio-cultural values.²⁹⁵

This report recommended formation of what became the Commission on Transnational Corporations within the broad structure of the U.N. Economic Social Council.²⁹⁶

The Commission's labors are oriented to addressing issues originally grouped as follows: political issues; corrupt practices; information; and economic and commercial issues.²⁹⁷ Political issues embrace

292. See text accompanying notes 106-12 *supra*.

293. G.A. Res. 3202, U.N. Doc. A/RES/3202 (S-VI) (1974).

294. Material Relevant, *supra* note 7, at para. 16.

295. Impact of Multinational Corporations, *supra* note 24, at 26 (emphasis supplied).

296. E.S.C. Res. 1913, U.N. Doc. E/RES/1913 (LVII) (1974).

297. See Material Relevant, *supra* note 7, at para. 56.

interference with national politics²⁹⁸ and intergovernmental relations.²⁹⁹ Corrupt practices focus on bribery.³⁰⁰ Information addresses a presumed need for greater data disclosures by multinationals.³⁰¹ Economic and commercial issues are divided into nine areas: ownership and control; balance of payments and financing; transfer pricing; taxation; competition and restrictive practices; transfers of technology; employment and labor; consumer protection; and environmental protection.³⁰² Obviously, the OECD Guidelines are modest in comparison although it is quite active with consumer and environmental issues. Also within the Commission's ambit are Principles of Government Policy and Issues of Jurisdiction including the consequences of nationalization.³⁰³

Incident to all of this is the unhappy task of defining a transnational corporation subject to the ultimate code³⁰⁴ which burden OECD so wisely avoided by a rule-of-reason focus on "enterprises."³⁰⁵ Formally socialist nations amusingly propose to exclude state-owned enterprises from coverage "since they do not create negative effects."³⁰⁶ Other delegations are of the opinion that multinationals based in developing countries should also be excluded.³⁰⁷

A. U.N. Commission on Transnational Corporations

The Commission³⁰⁸ or, perhaps more properly, the Centre has labored mightily to produce reasoned and ordered discussion of the issues. One suspects that this is not easy since the votes are on the side of those who may think that Eden is achieved by fiat.

298. *Id.* at paras. 58-67.

299. *Id.* at paras. 68-73.

300. *Id.* at paras. 74-80.

301. *Id.* at paras. 227-41.

302. *Id.* at paras. 81-226.

303. *Id.* at paras. 242-78.

304. Issues Involved, *supra* note 19, at paras. 46-49.

305. Guidelines, *supra* note 3, (uncaptioned) preamble, at para. 8.

306. Commission on Transnational Corporations, Report on the Fourth Session, U.N. Doc. E/1978/52, E/C. 10/43, at para. 13' (1978).

307. *Id.* If this proposal should be successful, imagine the rush of *technical* headquarters activities to the new havens. One supposes that the Group of 77 is not so crass.

308. As of September 1978, the Commission membership consisted of: Algeria, Benin, Gabon, Ghana, Ivory Coast, Kenya, Madagascar, Nigeria, Tunisia, Uganda, Zaire, Zambia, Fiji, India, Indonesia, Iran, Iraq, Japan, Kuwait, Pakistan, Thailand, Argentina, Brazil, Colombia, Cuba, Jamaica, Mexico, Panama, Peru, Surinam, Venezuela, German Democratic Republic, Romania, Ukrainian SSR, USSR, Yugoslavia, Canada, France, Italy, Netherlands, Spain, Sweden, Switzerland, U.K., U.S.A., and West Germany.

One technique, oriented to settling some issues, has been a statement of "common elements" as to which there is no or little dispute.³⁰⁹ Another has been to recognize that other U.N. groups have undertaken narrower assignments which fall within areas of the Commission's interest and, accordingly, to defer Commission work on such areas until the other groups' labors are done. This is notably true of industrial relations and technology transfers as to which deference is being afforded ILO and UNCTAD respectively. Another technique has been the use of specialized working groups. Thus, there is a Group of Experts on Tax Treaties, an ad hoc Working Group on Corrupt Practices, and a third ad hoc Group of Experts on Restrictive Business Practices. A voluminous literature of Transnational Corporations according to "experts" is building at a remarkable pace.³¹⁰ How these "experts" are identified and recruited is unknown to the author who has had at least one recent experience which induced skepticism and even fear of a sort.³¹¹

Within the economic and commercial issues, it would appear that "employment and labor" is closest to a finished product. In January, 1979, the Secretariat (presumably unknowingly) took a page out of the book of the drafter of SEC rule 10b-5:³¹² "Transnational corporations should adhere to the principles in the field of (a) Employment . . . ; (b) Training; (c) Conditions of work and life . . . ; (d) Industrial Relations, . . . set out in the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labor Office."³¹³

At this time, it would be pointless to present the incredibly numerous proposals and positions at issue. Thus, only some of the "common elements" and leading issues will be noted in addition to certain achievements of the Centre. One of the most interesting of

309. See, e.g., Working Paper No. 1 of the Commission on Transnational Corporations for the Fourth Session of the Intergovernmental Working Group on a Code of Conduct, Preface (March 24, 1978) (available at the Delaware Law School Library) [hereinafter cited as Working Paper No. 1].

310. See U.N.-Centre on Transnational Corporations: Sales Documents Relating to Transnational Corporations (Oct. 1978) and UNCTAD Secretariat List of Documents Relating to Restrictive Business Practices (Dec. 1978) (available at the Delaware Law School Library).

311. At a recent symposium concerning transnational regulation of enterprise, one of the panelists, introduced as an American law professor and a consultant to the U.N.'s Transnational Centre, was sufficiently confused by a fellow panelist's use of a common colloquialism to be forced to ask "what is a C.E.O.?" Now, the author does not charge all with knowledge of this usage for chief executive officer, but he submits that it is hardly such an "inside" usage as likely to be obscure to an expert.

312. *Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793, 922 (1967) (comments of Milton Freedman).

313. Working Paper No. 4 of the Commission on Transnational Corporations for the Sixth Session of Intergovernmental Working Group on a Code of Conduct, at III(B)7 (Jan. 8, 1978) (available at the Delaware Law School Library).

those achievements is a study entitled *Transnational Corporations in World Development: A Re-examination*,³¹⁴ which deserves a place on the shelf of anyone involved with a large enterprise's planning function.

1. Corrupt Practices

The Draft International Agreement to Prevent and Eliminate Illicit Payments in International Commercial Transactions [hereinafter called "Draft Agreement"] was presented to the Economic & Social Council in July 1978.³¹⁵ There were various reservations including a criticism that the draft was overly slanted toward improper conduct of public officials as opposed to "transnational and other corporations."³¹⁶ The focus in the Draft Agreement is on payments in connection with "international commercial transactions" to or on behalf of such an official. Contracting states undertake to criminalize such an event and, *to the degree they have extradition treaties*, to treat such crimes as extraditable.³¹⁷ African delegates favor like criminalization of tax and royalty payments to "illegal minority regimes in southern Africa."³¹⁸

Without present need for detailed analysis of the Draft Agreement, which obviously needs considerable refinement, it does not seem to present concepts offensive to American companies. Indeed, if anything, it is inadequate to American puritanism.

For example, the principal prohibitions read that on

offering; promising or giving of any . . . benefit . . . to a public official, either directly or indirectly, with the intention of inducing such official to performance of his duties in connection with an international commercial transaction . . . [and] . . . soliciting, demanding, accepting or receiving, directly or indirectly, by a public officer of any . . . benefit, as consideration for performing or refraining from . . . performance of his duties in connection with an international commercial transaction.³¹⁹

Thus, prosecution of a payer would entail the heavy burden of proving intent. The recipient is even more insulated since only those payments linked "as consideration" to official favors occasion characterization as violations. Such focus on a contractual nicety might mean, particularly in systems more literal than our own, that the same quantum of evidence would support conviction of only the payer and

314. U.N. Doc. E/C. 10/38 (1978).

315. Draft Agreement, *supra* note 74.

316. *Id.* at para. 21.

317. Draft Agreement, *supra* note 74, arts. 1, 2 & 11, at 5, 9.

318. See Draft Agreement, *supra* note 74, at para. 3.

319. Draft Agreement, *supra* note 74, at 5 (emphasis added).

not the payee. How much simpler it would be to condemn public officials' "receipt" or even the less rigorous "knowing receipt" of such benefits as are prohibited in the original analysis. It would seem that, even in the midst of attempts at international reform, some government representatives may be more attentive to protection of their kind vis-à-vis standards to be imposed on others.

2. Economic & Commercial

As indicated earlier,³²⁰ financing is linked to balance of payments, transfer pricing is given an independent dignity, and consumer protection is among the items of paramount concern. To minimize speculation and grappling with what may prove to be spectres, the Centre's common elements will be the principal subject for discussion at this time.

a. *Ownership and Control*

Some of the common elements as to control suggest a management nightmare if they were susceptible of literal application in that several seem to be paired with a "Catch 22." Multinationals are enjoined to "allocate decision making among their entities" to facilitate economic and social development of host countries³²¹ but "various entities" of multinationals are to cooperate "to help meet effectively" requirements of diverse host countries.³²² Multinationals should not only accommodate host countries' policies concerning "local equity participation"³²³ but also "ensure that the control shared with local partners" through either equity participation or other contractual arrangement "can be effectively exercised."³²⁴ How the latter can be arranged is understandably unstated. It would seem that, even if multinationals resorted to a mechanism calculated to insure investor sophistication such as that provided in SEC rule 146 for safe-harbored private offers,³²⁵ MNEs could not achieve the objectives of such an insurance burden. What would be demanded is very different from avoiding interference with local investors' say-so. Just how does one "ensure" that a local partner will be attentive to its own best interests and not be distracted by other opportunities?

Two of the control elements really address staffing in equal opportunity terms. As such, they are not as threatening. Multinationals

320. See Material Relevant, *supra* note 302.

321. Formulations by the Chairman, at para. 17 (1978).

322. *Id.* at para. 18.

323. *Id.* at para. 19.

324. *Id.* at para. 20.

325. 17 CFR 230.146 (1977).

are to "give priority to the employment and promotion of nationals of host countries" in order not only to enhance indigenous personnel's participation in local management³²⁶ but also "at all levels of . . . the transnational corporation as a whole."³²⁷ These objectives seem praiseworthy although it is hoped that the draftsmen don't foresee burdening multinationals with a quota system such as that thought by some to afflict the U.N. Secretariat.

b. *Balance of Payments and Financing*

In essence, the financing elements commend respect to host countries' balance of payment plans and exigencies. No effort is made to distinguish between trade and payment balances. Multinationals are urged to promote diversification of exports from, and use of resources available in, host countries with particular emphasis on the developing ones.³²⁸ Repatriation of capital or extraction of profits from host countries is to be "responsive to requests" by host governments³²⁹ experiencing "serious" balance of payment problems. Apparently, such "requests" need not be uniform and nondiscriminatory. There is no index as to whether "responsive" is to be understood as "sensitive" or "yielding" or as to whether "serious" equates with "abnormal." Cash or other liquidity management is not to involve advances or deferrals of intra-enterprise payments contrary to generally accepted practice if currency instability would be fostered thereby.³³⁰ Intra-enterprise activities should not oppose hosts' "established development objectives" by restricting multinational affiliates' transfer of goods, services or funds with adverse effect on the hosts' balance of payments.³³¹ Note, in this connection, that the adverse effect is not described as "substantial" and is not in context of the unusual. Thus occurs the absurdity that any restraint on an "entity" which would preclude an inflow to a given host would be violative.

The possibility of multinationals' use of a host's capital markets for medium or long-term financing is also addressed. Essentially, the message seems to be, "Don't soak up local capital on such favorable terms that local outfits might have to compete or be squeezed."³³²

326. See Formulations by the Chairman, *supra* note 86, at para. 21.

327. *Id.* at para. 22.

328. *Id.* at para. 23.

329. *Id.* at para. 24.

330. *Id.* at para. 25.

331. *Id.* at para. 26.

332. *Id.* at para. 27.

c. Transfer Pricing

Without endorsing the second³³³ and third³³⁴ elements as to transfer pricing, it is possible to comment that the Centre on Transnational Corporation is more organized in its approach than was OECD. Multinationals are told to avoid "pricing principles, which, contrary to national legislation and policies," would modify entities' tax bases, "avoid exchange controls, or adversely affect competition, technological development or employment and social conditions" in host countries.³³⁵ Note that, despite the caption (which parallels the Centre's structure), transfer pricing is *not* the exclusive focus at this point. The questions why it is necessary to mix competitive principles with the other considerations and why it is necessary to address hosts' policies, as well as legislation, are left unanswered.

Explicitly focusing on intra-enterprise pricing, one element commends multinationals' pricing policies "based on international market prices" or, in their absence, on "the arm's-length principle."³³⁶ Why this is necessary for taxation purposes, when appropriate allocation formulae are easily developed, is left unstated. That such a rule might be mandatory for exchange control purposes cannot be challenged. But, that it could disserve an integrated competitive effort (and thereby injure employment and other social values in a host country) should be obvious. It is to be hoped that the Centre, and advocates such as the Group of 77, have not been mixing allegations with conclusions. It really would be shameful if good intentions were the road to a hell of rendering various operations in various lesser developed countries uneconomic because of the need for a multinational to avoid sibling discounts in a multifaceted enterprise. Another transfer pricing element interfaces, on an explicit level, with the disclosure elements to be developed.³³⁷ However, the objective is disclosure "to the public" rather than orientation to "public understanding" as per OECD.³³⁸

d. Taxation

Subject to receipt of the work product of other U.N. groups,³³⁹ MNEs would be told to refrain from using their structures and opera-

333. *Id.* at para. 30.

334. *Id.* at para. 31.

335. *Id.* at para. 29.

336. *Id.* at para. 30.

337. *Id.* at para. 31.

338. *See, e.g.*, Guidelines, Disclosure, *supra* note 3, at (uncaptioned) preface.

339. Working Paper No. 1, *supra* note 309, at para. 100b.

tions to evade taxes by using "transfer pricing principles, [intra-enterprise] payments and royalties and fees and other similar . . . transactions beyond accepted . . . practice for domestic enterprises in comparable situations."³⁴⁰ Otherwise, the burden is to obey the law and be cooperative with officials "subject" to safeguards for confidentiality. While these taxation elements appeared in a March 1978 Working Paper³⁴¹ of the Centre, they were not repeated in a December 1979 outline prepared by the same office.³⁴² Rather, explicit deference was accorded to "relevant work in other bodies."³⁴³

One of these bodies, presumably, is the Group of Experts on Tax Treaties Relevant to the Formulation of a Code of Conduct (Taxation Group of Experts) which has roots³⁴⁴ older than both the Commission and Centre on Transnationals. In January 1979, the Centre summarized the work of the Taxation Group of Experts and announced preparation of a *Manual for the Negotiation of Bilateral Tax Treaties Between Developed and Developing Countries* scheduled for near-term final review.³⁴⁵ The author has not seen the manual but infers that it addresses, on the one hand, minimization of exposure to double taxation³⁴⁶ and, on the other, reduction of tax evasion and avoidance.³⁴⁷ While the caption seems to equate evasion and avoidance, the summary does not do so, exactly.³⁴⁸ Unfortunately, the rhetoric used permits the inference that the draftsmen see little difference between the two: "[A.]voidance occurs when taxpayers escape payment of taxes simply because they are able to take advantage of loopholes in the tax laws or, where doubts exist as to the interpretation of the law, take the benefit of the doubt in their own favour."³⁴⁹ That nations having unintended loopholes can close them is, and always has been, obvious. Indeed, continued existence of a loophole suggests a policy favoring its existence. As to taking advantage of a legitimate doubt,

340. *Id.* at para. 101.

341. See Working Paper No. 1, *supra* note 309, at paras. 100-04.

342. See Formulations by the Chairman, *supra* note 86, at para. 32.

343. *Id.* at n.3.

344. See E.S.C. Res. 1273, U.N. Doc. E/RES/1273 (XLIII) (1967); E.S.C. Res. 1765, U.N. Doc. E/RES/1765 (LIV) (1973).

345. Commission on Transnational Corporations, Note of the Secretariat on Transnational Corporations: The Work of a Group of Experts on Tax Treaties Relevant to the Formulation of a Code of Conduct, at para. 6, U.N. Doc. E/C.10/AC.2/10 (1979) [hereinafter cited as Tax Treaties].

346. *Id.* at paras. 7-12.

347. *Id.* at paras. 13-20.

348. *Id.* para. 13.

349. *Id.*

what can be said save that there may be a clash of philosophies which is unlikely to be resolved by a supranational rule.³⁵⁰

Apparently, the Taxation Group of Experts settled on an arm's-length principle of *allocation* to handle tax difficulties asserted to arise in connection with intra-enterprise transfer pricing.³⁵¹ To the extent this is correct (and the author has no quarrel with it), it would seem that the sole legitimate governmental reason for seeking to ban intra-enterprise price discrimination would be to accommodate exchange controls of limited duration.

e. *Competition & Restrictive Business Practices*

While no common elements are known, and the Centre has deferred to "relevant work in other bodies" as recently as December 1978,³⁵² it is interesting to remark upon not only the predicates initially before the Commission but also those before one of the "other bodies"—UNCTAD. Initial concern was focused on economic and political implications of dominating a sector of a host's economy but was not uncaring about how dominance was achieved.³⁵³ While there was sentiment for precluding takeovers of host country enterprises absent *full consent of existing shareholders*, there was a hedged recognition of something akin to the fabled American "failing company" defense to a prosecution under section 7 of the Clayton Act.³⁵⁴ The hedge had to do with threatened destruction of capital within the host country.³⁵⁵ This notion is curious and probably has its origins in a lesser developed country since developing nations are most desirous of capital investment and are not insensitive to nationalization as a way of getting rid of an unpleasant (successful) presence. The third world's influence can be felt in expressions of fear that minimization of competition will inflate prices to them³⁵⁶ and other factors, such as use of exclusive licenses, will diminish their export opportunities.³⁵⁷ UNCTAD's continuing interest was mentioned.³⁵⁸

350. Even the injunction to render unto "Caesar the things that are Caesar's," Matt. 22:21, admits of an identification process. Note that the alleged speaker of these words was a member of a captive nation governed from afar by an empire which sought to impose its values on diverse cultures.

351. Tax Treaties, *supra* note 345, at paras. 16-17.

352. *Id.* at para. 33.

353. Issues Involved, *supra* note 19, at para. 103.

354. 15 U.S.C. § 18 (1976).

355. Issues Involved, *supra* note 19, at para. 104.

356. *Id.* at para. 105.

357. *Id.* at para. 106.

358. *Id.* at paras. 105 & 106.

A more dispassionate note was sounded, perhaps by the Centre, as the disparate national philosophies were acknowledged.³⁵⁹ This was followed by a suggestion that advice to local governments concerning restrictive practices, as well as public disclosures, might do much to curb actual abuse.³⁶⁰ These thoughts were expressed in 1976. Subsequent expressions from the Commission structure have been sparing, especially on a public level.³⁶¹ However, UNCTAD has not been so quiet. Various of its sub-groups have produced a (draft) model code on restrictive practices for developing countries,³⁶² a study of the role of MNEs vis-à-vis developing countries' trade,³⁶³ and a formulation of principles and rules for control of restrictive business practices.³⁶⁴ Apparently, the thrust is toward a multilateral agreement. Outstanding issues include coverage of transactions among entities of a multinational enterprise, subjection of state-controlled enterprises to the same regime as their competitors from the private section, and privileged status for MNEs based in developing countries.³⁶⁵

Although UNCTAD's deck is stacked in favor of developing countries, it may be that the ultimate product will not be shocking. After all, UNCTAD is the "godfather" of numerous International Commodity Agreements,³⁶⁶ which is another way to say cartel agreements. However, this is obviously no message for free enterprise to relax, as a single U.N. body fosters market-rigging by raw material suppliers while it demands the benefits of competition from the consumers and fabricators of such materials.

f. *Transfer of Technology*

Here, too, UNCTAD has the laboring oar. Its objective is to reorient multinationals to increased processing of raw materials in developing countries.³⁶⁷ To this end, national enterprises of developing

359. *Id.* at para. 107.

360. *Id.*

361. *See, e.g.,* Commission on Transnational Corporations, Report on Its First Session, Intergovernmental Working Group on the Code of Conduct, at 3, U.N. Doc. E/C. 10/31 (1977).

362. *See* Report by the Secretariat on the First Draft of a Model Law or Laws on Restrictive Business Practices to Assist Developing Countries in Devising Appropriate Legislation, U.N. Doc. TD/B/C. 2/AC. 6/16 (1978).

363. *See* Report by the Secretariat on Transnational Corporation and Expansion of Trade in Manufacturers and Semi-Manufacturers: The Role of Transnational Corporations in the Marketing and Distributing of Exports and Imports of Developing Countries, U.N. Doc. TD/B/C. 2/197 (1978).

364. *See Restrictive Business Practices*, 1 CTC REPORTER, No. 5, at 27 (Sept. 1978) (periodical prepared by the U.N. Centre on Transnational Corporations).

365. *Id.*

366. *See* Rhyne, Mutuc & Mayhew, *Law-Making Activities of the United Nations Conference on Trade & Development*, WORLD A. OF LAW., 18-39 (1976).

367. *See* T.D. Res. 97, U.N. Doc. TD/RES/97 (IV) (1976).

countries are to have an increased voice in multinationals' activities.³⁶⁸ An International Code on the Transfer of Technology is among the targets.³⁶⁹ A draft text is in existence.³⁷⁰ Real-world issues will focus on not only implementation, which is a matter common to all such efforts, but also the restraints which may be imposed by licensors upon licensees and performance guaranties. Implicit in this reorientation process is an effort by the Group of 77 to modify MNEs based in the developed nonsocialist nations into guarantors of commercial decisions and success by licensees in developing countries. This burden is not likely to be freely assumed by technologically-oriented MNEs. Similarly, the industrialized base countries are not likely to become enthusiastic about compulsory licensing for export at the cost of their own payments and trade balances. This is particularly so when they lack a domestic compulsory licensing scheme. This, too, is one of the areas concerning which the Centre awaits "other bodies."³⁷¹

g. Employment & Labor

On January 8, 1979, the Centre fudged the need for common elements by what amounted to an incorporation by reference of the ILO's Tripartite Declaration.³⁷² This, presumably, was out of respect for an ILO wish "to insist" that its text, if used by the Commission, not be "altered nor reproduced in parts only."³⁷³ Since the United States has withdrawn from ILO, this may be an attempt to preclude the U.S. from manipulation save at the cost of rejoining. The Tripartite Declaration³⁷⁴ seems to have much in common with the OECD IR guides.³⁷⁵ Indeed, this is sufficiently true that the Tripartite Declaration may prove difficult for the U.S.S.R. and its clients to accept, particularly in light of the western view of the Helsinki agreements.³⁷⁶ For example, it urges adoption of earlier ILO-sponsored conventions

368. *Id.* at para. 9(b).

369. See T.D. Res. 89, U.N. Doc. TD/RES/89 (IV) (1976).

370. See *International Code of Conduct on the Transfer of Technology*, 1 CTC REPORTER, No. 5, at 26 (Sept. 1978) (periodical prepared by the U.N. Centre on Transnational Corporations).

371. Tax Treaties, *supra* note 345, at paras. 16-17.

372. See text accompanying notes 8 & 312-13 *supra*.

373. Letter of Transmittal to the U.N. Secretary-General Regarding the ILO Tripartite Declaration Adopted Nov. 16, 1977, at 2. U.N. Doc. E/C. 10 A/C. 2/3, Annex II (1977) [hereinafter cited as Tripartite Declaration].

374. *Id.*

375. See text accompanying notes 150-61 *supra*.

376. See generally Nimetz, *The Potential of the Helsinki Dialogue*, Current Policy No. 29 (Dep't of State, Aug. 1978). The U.S. recently indicated support for "incorporation of the tripartite declaration into a future U.N. code of conduct." DEP'T STATE BULL. at 33 (Jan. 1979).

concerning freedom of association and protection of the right to organize as well as application of the right to bargain collectively.³⁷⁷ Various other particulars may be troublesome to some of the third world nations.

ILO continues to promote "freely-chosen employment."³⁷⁸ Before starting operations in a host country, multinationals should consult not only the government but also national employers and workers' organizations to assure conformance with "national social development policies."³⁷⁹ Just how the Antitrust Division, the public pronouncements of which center on competition and technology issues,³⁸⁰ would react to this clearance with local enterprise is unknown. While deference to needs perceived by host countries is not offensive to U.S. anti-trust philosophy, it would seem that clearance with local commercial talent would provide a convenient base from which to proceed—rather quickly—to market or resource allocation.

It is understandable that priority is to be accorded development and advancement of hosts' nationals.³⁸¹ Unfortunately, multinationals are to be oriented to "technologies which generate employment" when investing in developing countries. While such countries have an understandable interest in fullest possible employment, one would infer from their technological positions at UNCTAD that they comprehend that productivity is not unrelated to balance of trade problems. Otherwise, the Tripartite Declaration appears unremarkable (which is not a denigration but a tribute to careful negotiation), except for the prospective pitfalls of collective bargaining³⁸² and "consultations"³⁸³ at top levels of the enterprise. Also, it is interesting, in context of Badger, that there is a provision that "governments, in co-operation with multinational as well as national enterprises, should provide some form of income protection for workers whose employment has been terminated."³⁸⁴

377. Tripartite Declaration, *supra* note 373, at para. 9.

378. Tripartite Declaration, *supra* note 373, at para. 13.

379. *Id.*

380. See, e.g., J. Davidow, International Antitrust Codes and Multinational Enterprises (remarks made to the ABA National Institute on Worldwide Challenges to U.S. Transnational Businesses, Dec. 16, 1978) (available at the Delaware Law School Library).

381. Tripartite Declaration, *supra* note 373, at para. 18.

382. *Id.* at para. 51.

383. *Id.* at para. 56.

384. *Id.* at para. 28.

h. *Consumer Protection*

Consumer protection is untouched by the OECD Guidelines. The Centre's emphasis is understandably on safety although quality-cutting is also treated. The emphasis is on *disclosure*. Host countries are to be advised of dangerous features of products or services; prohibitions or other regulatory measures of other nations against such products or services; and products experiments in host countries.³⁸⁵

i. *Environmental Protection*

The thrust of the Centre's elements as to environmental concerns is quite comparable to consumer protection. Not just protection but improvement of the environment is urged. Disclosure of potentially harmful effects of products or processes, and other countries' regulatory postures toward comparable subjects, are expected.³⁸⁶

3. Disclosure of Information.

Although it is obvious that the Centre has not been inattentive to the OECD Guidelines,³⁸⁷ it has not fallen prey to the need to foster "public understanding." To be sure, data are to be presented "to the public" in "clear and comprehensible form but it need be aimed only at an *improvement* of public understanding."³⁸⁸ There is a call for presentation of data "in a consolidated form"³⁸⁹ which may offend France and others which follow its lead.³⁹⁰ Unfortunately, the Centre has gone a bit beyond OECD by calling for a break-down by geographical area, country of operation and major line of business as appropriate. However, there is a recognition that tailoring of data may be accomplished by reference to effects on competitive positions.³⁹¹ The magic word "request" would determine what data, unrequired by law, are to be given host governments.³⁹² That a given request could be grossly improper need not be developed. Data held in countries, other than the requesting host, are subject to production for purposes of giving a host a true and fair view of the operations of the [MNE]

385. See generally Tax Treaties, *supra* note 345, at paras. 36-39.

386. *Id.* at paras. 40-42.

387. See text accompanying notes 336-38.

388. Tax Treaties, *supra* note 345, at para. 43.

389. *Id.*

390. French companies are not required to publish consolidated accounts. However, the Ordre des Experts Comptables et des Comptables Agrées appears to be fostering consolidated reporting. FINANCIAL TIMES WORLD BUSINESS WEEKLY, Dec. 12, 1978, at 16.

391. Tax Treaties, *supra* note 345, at para. 43.

392. *Id.* at para. 44.

as a whole. However, this is explicitly subjected to the laws of such "other" countries.³⁹³ Thus, there is incentive for the United States and others to emulate, say, Canada's proscription against cooperation with American antitrust prosecutions.

B. *Implementation*

The question as to how a U.N. Code would be implemented is very much alive. In a political context, no "mandatory" code could be rammed through the ultimate U.N. deliberative bodies. Recognizing that the rich men's club lacks votes, it is nevertheless foreseeable that the ultimate formal effort will be to commend a convention for multi-lateral subscription subject to the usual reservations. Obviously, a sensible mandate must provide for sanctions of some sort³⁹⁴ but, regardless, publicity is a powerful weapon. Even so, the Centre apparently sees an opportunity for life after formulation of a code. This inference is based on the Centre's recognition that:

To assist in the implementation of the Code of Conduct, it may be useful to deal with problems of application and interpretation . . . in a context which is not that of administrative service, settlement of disputes or revision of the Code. An independent panel of experts may be established, which would deal with problems and situations which have not crystallized into disputes.³⁹⁵

The Centre suggests that the panel device would be useful whether or not the code is binding.³⁹⁶ Either way, it might be useful for generation of light in avoidance of heat.³⁹⁷ Panelists would ordinarily be appointed for defined tenures³⁹⁸ which, hopefully, would provide consistency. There is precedent for such panels.³⁹⁹ Spheres of authority would include construction and interpretation, fact finding, and what amounts to mediation.⁴⁰⁰ However, suasion would be present due to the sobering thought that the panel's work could be made public.⁴⁰¹ Obviously, existence of panels, or a mechanism for creating and servicing, would imply need for a secretariat of some sort.

393. *Id.*

394. The Centre seems equivocal. *Id.* at paras. 87-91.

395. *Id.* at para. 67.

396. *Id.* at para. 68.

397. *Id.*

398. *Id.* at para. 69.

399. *Id.* at para. 67, n.11. However, it should be noted that explicit reference to IME as being "competent to interpret the [OECD] Guidelines" is suspect in a technical sense. *Id.*

400. *Id.* at para. 70.

401. *Id.* at para. 73.

V. CONCLUSIONS

The author has deliberately avoided addressing issues such as national treatment (i.e., non-discrimination against "foreign" enterprise) and nationalization on the theory that an overview of particularized strictures on multinational operation is more timely. Both national treatment and nationalization are part of the same evolution although some proponents of the newest New Order may not be overly sensitive to them. As suggested earlier, the author fears that managers of American enterprise and their counsellors are not sufficiently aware of what may be bargained away in the interests of momentary perceptions of the good and the beautiful or supposed diplomatic pragmatism. The latter refers to convictions, sometimes expressed and sometimes implicit, that the name of the game is voluminous but inoffensive talk in the hope that the oppositions' goals will change or be forgotten. Such pragmatism has costs which may be acceptable if they are measured. But, to the degree such costs are accepted as a nibble here and a nibble there without measurement against defined objectives or at least breakeven points, they can cumulate to a backbreaking point. The fact that much of the U.N. progress is achieved within a quiet and presumably dispassionate bureaucracy is not encouraging even if one presupposes broad competency and good faith. The ultimate question has to do with camels and tents.

Neither counsel nor client should presuppose either good faith or competency on the part of either political negotiants or the "experts" upon whom they may rely. It is patent that transfer pricing, reasonability of technology licensing, appointment of exclusive representatives, development and acquisition strategies, and the like are too important to be left to the best-intentioned diplomat who may be subject to trading-off by reference to not only a narrowly unsophisticated perception of national interest but (and more threateningly) a perception of what is important by reason of peer pressure in a transnational caste of diplomats and international civil servants. That which is implicit in a disclosure guideline is best appreciated by those who have experience with comparable schemes. Obviously the State Department has procured advice from such quarters. However, there also must be input from those who lack experience with such overhead-building or, although potentially subject to supranational guides, have limited margins. Undoubtedly, organizations such as USA-BIAC have and use competencies of a high order. Yet, it would be shameful if enterprise blessings for the costs and constraints implicit in the New Order were to be sought and accepted from only those enterprises which are best

able to absorb costs and to maintain ongoing rapport with host governments.

To the degree there is to be a show-down within the U.N., American enterprises cannot now be assured of even a common OECD front on many issues. However, a strong free-world labor movement is highly visible. It does not appear at all suicidal or otherwise dedicated to export of its jobs. It possesses and proudly wears the mantle of the working man. Could it be that the AFL-CIO would prove to be the most effective spokesman available to American enterprise at large in the context of supranationally-fostered regulation? If the OECD exercise has taught anything, it is that organized labor is capable of seizing upon objectives and being decisive about their attainment.

Within OECD countries, there are militant spokesmen for the newest New Order who decry, in U.N. publications, defects of the presumed capitalist bloc or system.⁴⁰² No other blocs seem to be under such withering fire. Anomalously, these spokesmen cry out for an end to cut-throat competition in favor of an intentionally planned economy. This, of course, ignores third world demands for competition among enterprises based in developed countries. These advocates of a push toward supranational regulation, as a step toward world-wide planning, predict that MNEs will cooperate in the progression to rigorous regulation because they "prefer to make sacrifices rather than perish." This, in a sense, may be true. However, cost-benefit analyses are appropriate even to decisions to surrender. They are likewise appropriate to decisions to fight for elbow room. In either case, intelligent decisions cannot be made unless professionals make clients aware of what is afoot. The potential for FTC adoption of selected OECD guides demands informed review of the Guidelines and it takes little effort, for those involved in preventative law, to go beyond and to look to what is brewing at First Avenue and 42nd Street in Manhattan. It is not entirely unrelated to the recent effort, at UNESCO, to discipline the free media characteristic of the industrial democra-

402. See, e.g., de Bernis, *Codes of Conduct Compared*, U.N. Dev. F., March 1978, at 4. Professor de Bernis describes the OECD guides as "perfunctory and limiting" and suffering from "brevity and ambiguity." It is not just scope for flexibility to which he objects. The OECD work is found unresponsive to crises allegedly fostered by OECD nations' insensitivity to Third World balance of payments problems and demands for added development assistance. He teaches that the current U.N. "discussion on codes of conduct is much more than . . . technical. What is at stake is the shape of the international economic order that will eventually emerge from the crisis." His explicit concern for "balance of payments equilibrium" ignores that the only sure equilibrium is at point zero. Fears that investment flows to developing countries would be retarded rather than promoted has dismissed with words worthy of a Habsburg Queen of France: MNEs will sacrifice rather than perish.

cies.⁴⁰³ Of course, it would not be sporting to note that the 3rd Reich's New Order had difficulties with the free media and became one of the modern pioneers of official disinformation.⁴⁰⁴

403. See, e.g., Somavia, *An End to Slanted News*, U.N. Dev. F., Jan.-Feb. 1978, at 10; Rubin, *Getting It In! The Third World and U.S. Media*, U.N. Dev. F., July 1978, at 7; Aggarwala, *A Press for the People*, U.N. Dev. F., Oct. 1978, at 5. See also *Third World v. Fourth Estate*, TIME, Nov. 20, 1978, at 64.

404. In terms of upbeat U.N. media approaches, see Clairmonte, *The Seven Smoking Sisters*, U.N. Dev. F., Nov.-Dec. 1978, at 8, in which appears the following gem: "Several tobacco conglomerates, as with *most* other corporations, have received a bonus from the pay-off complex by computing their profits on the basis of total costs . . . simply inflated to include bribes," (Emphasis supplied).