UNITED
NATIONS

E

Economic and Social Council

Distr.
GENERAL

E/C.10/1992/8
18 February 1992

ORIGINAL: ENGLISH

COMMISSION ON TRANSNATIONAL CORPORATIONS
Eighteenth session
23-24 January and 8-15 April 1992
Item 6 of the provisional agenda*

INTERNATIONAL ARRANGEMENTS AND AGREEMENTS RELATING TO TRANSNATIONAL CORPORATIONS

International framework for transnational corporations

Report of the Secretary-General

SUMMARY

The present report focuses on the impact of recent policy changes affecting foreign direct investment on the elaboration of international principles and standards. A review of some of the changes that have taken place in recent years leads to the preliminary finding that those and other factors - principal among them the increasing globalization of the world economy - increase the need for an international framework for foreign direct investment. The report summarizes the background and evolution of the international framework for transnational corporations up to the present time. It takes stock of the international principles and standards that have been elaborated during the second half of this century and evaluates, in the light of current State practice, the extent to which these norms have remained relevant. The report finds that many of these principles are still valid. But the manner in which some of these standards are being used and applied by Governments and transnational corporations in the pursuance of their current policy objectives reflects the new circumstances. Still on several issues which remain important for the functioning of the transnational corporation in today's economic conditions, consensus has not yet been reached. At the same

* E/C.10/1992/1/Add.1.

time, the close interrelations between investment, trade and finance have emphasized the significance of certain aspects such as the right of establishment and commercial presence. These issues and new ones arising on the international agenda, which are also discussed briefly in the report, give new perspectives to traditional standards and are an important part of the emerging international framework for foreign direct investment.

CONTENTS

INTRODUCTION

1. At its seventeenth session, the Commission on Transnational Corporations requested the Centre on Transnational Corporations to prepare a report on the work on the draft code of conduct on transnational corporations and on other related international arrangements and agreements (bilateral, regional and multilateral). The present report, prepared in response to that request, considers whether recent developments in international economic relations have affected the need for an international framework of principles and standards on foreign direct investment, and discusses the extent to which the present international framework is adequate to meet the challenges posed by these developments. In section I the report reviews the main themes relating to foreign direct investment which have attracted the attention of policy makers in international forums in recent years. Section II provides an overview of the background and evolution of the international framework from the 1940s through the 1980s. Section III takes stock of the international norms and standards that have been elaborated during the second half of this century and assesses to what extent those norms are validated by recent State practice. Since the emerging international framework may also have to deal with a number of new issues - which might not be fully covered under the existing framework - sections IV and V look at some of the new issues arising in the area of foreign direct investment and the responses that have been proposed to deal with them. These issues complete the overall outline of what could be described as the emerging international framework for foreign direct investment and transnational corporations of the 1990s.

I. A CHANGING POLICY ENVIRONMENT FOR TRANSNATIONAL CORPORATIONS

2. One of the main tasks assigned to the Commission on Transnational Corporations is to examine how transnational corporations work, how they interact with States and other public and private entities and international bodies, and to seek generally accepted standards for both their activities and the treatment of them by Governments. Although an agreed global set of standards has not yet emerged from these efforts, the work of the Commission and of the United Nations Centre on Transnational Corporations has significantly contributed to a broad consensus on most of the matters at issue.

3. In this field, as in some others, theory is sometimes slow to recognize standards established by practice. New relationships now exist - and seem likely to persist - between the Governments of developing countries and foreign direct investment.

4. One such new relationship relates to the format of foreign direct investment which has in several respects become increasingly diversified over the years: the importance of non-equity investment has become evident, while mutual funds (especially open-end mutual funds) afford small individual investors the opportunity to invest in developing as well as developed economies.

5. The structures of transnational corporations have also changed in response to changing world circumstances. The spread of transnational mergers and acquisitions as well as corporate alliances has resulted in many transnational corporations having their operations and - perhaps more importantly for present purposes - their decision-making centres distributed over the world. The unitary transnational corporation, with headquarters and ownership in one country, controlling mainly through equity ownership a number of producing or distributing facilities in other countries, is rapidly yielding to the transnational corporation that has ownership and control interests in several countries.

6. Intensified competition among transnational corporations makes factors such as supplies, markets, skills of workers, or transportation facilities determine where production and distribution will be most effective and will, therefore, take place. As a result, the home base of a transnational corporation, in terms of production facilities, is more likely to be a scattered collection of sites than a single place attached to the "nationality" of the corporation. These changes have a number of important consequences in the legal as well as economic environment for standards and norms.

7. Changes in the distribution and concentration of foreign direct investment among countries have also altered traditional classifications of countries as "home" and "host" of transnational corporations. Not only has the previous economic predominance of one country vanished, but many developed countries (and some developing countries) are increasingly becoming "home" as well as "host" countries. As a result, traditional divisions of "home" and "host" countries tend to lose some significance in terms of identifying with issues relating to treatment or behaviour of transnational corporations and suggest a more balanced approach to foreign direct investment issues.

8. In parallel with these changes, the policy environment for foreign direct investment has also changed dramatically in recent years, mainly in response to changing economic conditions. Many countries which in the past limited foreign equity investment and imposed other restrictions on the control and operations of transnational corporations have liberalized their investment regimes and provided supplementary protection guarantees to foreign investors in order to attract additional flows of foreign capital and technology.

9. Nationalization and expropriation was for a time considered a likely method for bringing natural resources and basic aspects of a country's infrastructure under national ownership and control. But in the 1980s there was a substantial decrease in the incidence of nationalizations, and they are even less likely to occur in the 1990s. This may be so in part because nationalization has not proven to be economically profitable to the host country; and privatization, not nationalization, is now the preferred policy in developing as well as in developed countries. These efforts are part of broader trends aimed at giving greater weight to the operation of market forces in the world economy.

10. Liberalization of regulation of foreign direct investment has spread also to specific sectors, notably to a number of service industries which traditionally included some of the most heavily regulated business activities. In particular, the liberalization of the financial markets has revolutionized business operations worldwide. A direct consequence of these policy changes has been a significant improvement in the overall investment climate of most countries.

11. Another equally important result of these policy trends has been the increasing transnationalization of the world economy. The process of global economic integration has been enhanced by a number of important developments in central and Eastern Europe, now moving in the direction of economic reform. At the same time parallel movements towards closer regional economic integration are affecting the strategies of both Governments and transnational corporations regarding transnational investment and operations considerably.

12. All these and many other factors reflect not only changing perceptions of investors and Governments and the impact of market forces but also new challenges for which an international framework is necessary.

13. To some extent, these challenges are those perceived during the period of the 1950s, 1960s and 1970s; to a considerable extent, they are new challenges - if only because many of the issues previously regarded as vital now have much lesser significance in relations between transnational corporations and Governments. Indeed, in the 1980s, international discourse and practice with respect to foreign direct investment and transnational corporation activity has undergone a vast and dramatic change from the conventional and accepted doctrinal format of the discussion that ran from the 1940s through the 1970s. This change in approaches and basic perceptions necessitates an evaluation of the international framework for foreign investment that began to be formed during those years.

14. For a useful analysis of the international framework it is essential to take stock of current theory and practice, based on both internationally agreed documents and concepts and principles that have been generally recognized or accepted on the basis of what has become uncontested practice. Thus, a realistic analysis of the current international framework on foreign direct investment would include:

(a) International agreements signed or endorsed by States;

(b) Voluntary standards elaborated or accepted by the subjects to whom they are addressed;

(c) State practice, particularly as it relates to the application of international norms and the implementation of international commitments.

15. It has been a subject of long debate whether customary international law is created by such expressions of will as General Assembly resolutions or whether such resolutions reflect, even if they do not create, international

law. With respect to binding agreements, the question has been raised as to whether the large and growing number of bilateral and regional agreements which contain clauses protective of foreign investment plus the increased membership in multilateral mechanisms, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and the Multilateral Investment Guarantee Agency (MIGA), are accurate indicators of the status of international norms. Words, of course, have significance. Actions in implementation of these words - or possibly in refutation of them - may also carry significance. Acceptance and observance of voluntary standards may be just as important an indicator of the will of the international community on the status of international law.

II. FORMATION AND EVOLUTION OF THE INTERNATIONAL FRAMEWORK

16. International standards to govern the activities of transnational corporations and the treatment to be accorded them by national States have been a subject of debate for many years in a number of forums. Initially, expressed international concern had been mainly that of the industrialized nations on behalf of private investment. For example, articles 11 and 12 of the abortive Havana Charter were an attempt to include protection of private foreign investment into what had until then been a proposal focused on international trade, though in some ways those articles anticipated the later calls for standards of good conduct on the part of the investor. 1/ The Abs/Shawcross draft agreement which attracted much support from developed countries was addressed almost entirely to protecting the rights of private foreign investment, both as to ownership and as to freedom from "undue" restraints on operations of transnational corporations. 2/ Similarly, the 1967 draft convention on the protection of private foreign investment, proposed by the Organisation for Economic Cooperation and Development (OECD) was an explicit effort to write protection of private foreign investment into an international agreement. 3/

17. Two basic positions, held separately by developed and developing countries, emerged during the period under review. The Western developed nations supported the view that transnational corporations, with their capacity to channel capital, technology, skills and other vital resources across national borders, could play a key role in world economic development. Consequently, foreign direct investment needed to be protected and facilitated. The developing countries, on the other hand, stressed the need for transnational corporations to adhere to the development objectives of host countries and to conduct their operations in a manner consistent with the public interest. These countries, concerned about the ability inherent in the transnational nature of the transnational corporation to avoid national jurisdiction, urged that such corporations had to be brought under some form of national and international control and supervision.

18. The efforts of the developing countries to shape a more equitable international economic order led to the elaboration of a number of new concepts and principles, notably the principle of permanent sovereignty over

natural resources and the notion of development as a legitimate expectation of nations and peoples, which brought important practical consequences for investment relations. Not surprisingly, one of the main preoccupations of the home countries of transnational corporations at the multilateral level was the adoption of generally agreed concepts and standards for the protection of investors in the two aspects most directly affected by those principles - namely, State contracts, and nationalization and expropriation. Government positions on these issues, including those within the Western developed countries, were still too distant to permit binding commitments at the multilateral or regional level. Thus, even the OECD draft convention on the protection of private investment (1967) failed. Still, there was an important achievement during this period with the adoption of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States under the auspices of the World Bank. 4/

19. Another significant step was the adoption in 1962 by the General Assembly of resolution 1803 (XVII) affirming "the right of peoples and nations to permanent sovereignty over their natural wealth and resources". That resolution is still regarded as an authoritative statement by the United Nations of the principles of international law applying to foreign investment.

20. In parallel with these efforts, the developed countries initiated action progressively to liberalize existing obstacles to the free flow of capital and foreign direct investment among these nations. Such actions materialized in the adoption of the OECD Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisible Operations (1961). 5/

21. Some of the legal issues on the treatment of foreign investment between developed and developing nations (roughly corresponding with capital-exporting and capital-importing countries) were dealt with on a bilateral basis with the conclusion of bilateral investment treaties (which were introduced in the 1960s). These treaties prescribed general standards of treatment for foreign investors and some specific protection rules on expropriation, transfer of payments and settlement of disputes, on a reciprocal basis. The question of entry and establishment for foreign investors was left to the domain of national law, except in the context of the OECD liberalization codes, where these issues were first brought into the international discourse, and later in the context of regional integration agreements, such as the European Communities (EC).

22. During the 1970s concern about the economic impact of transnational corporations - their ability to shift production from country to country, to the advantage of the corporation but not necessarily of the nations involved - were compounded by reports of interference in political affairs of nations, of corruption and illicit payments, and the like. At the same time, efforts on the part of transnational corporations and their home countries to obtain better protection for foreign investors and concerns over excessive regulation or over criteria for corporate conduct which imposed excessive costs on transnational corporation operations remained a strong part of the total picture.

23. The adoption of decision 24 of the Cartagena Agreement in 1970 marked the beginning of a series of efforts to align the activities of transnational corporations with the development needs and objectives of host countries. Shortly thereafter, in 1976, the members of OECD adopted the Guidelines for Multinational Enterprises which prescribed standards of corporate conduct but also included norms on national treatment, incentives and disincentives and intergovernmental consultations.

24. At the multilateral level, a number of instruments were initiated (and some concluded) dealing with specific aspects of the activities of transnational corporations - namely, employment and labour relations, restrictive business practices, illicit payments and transfer of technology. Parallel to these were the efforts to establish a comprehensive and global framework for foreign direct investment and transnational corporations, which began in the Commission on Transnational Corporations in 1977. As is well known, the formulation of standards for the behaviour of transnational corporations in host countries encountered little difficulty, and by 1981 most provisions dealing with the activities of transnational corporations had been drafted. These provisions shared the common goal of maximizing the contributions of the corporations to the economic and social development of the countries in which they operate and of minimizing their potential negative effects.

25. The elaboration of these instruments led to the definition or clarification of a number of international standards for the activities of transnational corporations rooted in the overall notion of the sovereign discretion of each State over foreign investment policy within its jurisdiction. Thus, a number of standards for transnational corporation behaviour, such as non-interference in internal affairs of host countries and adherence to development objectives and policies of host countries, were formulated during this period. While the differences in political and economic priorities did not facilitate common approaches at the multilateral level, the formulation of general standards laid the ground for the adoption of more specific provisions in such areas as disclosure of information, environmental and consumer protection, restrictive business practices, the avoidance of corrupt practices and transfer pricing, parent/affiliate relations and labour relations.

26. In the 1980s much of what seemed self-evident in the 1970s changed and new circumstances appeared which contributed to shape the international legal/economic landscape. Developing countries began to change their approaches and policies towards foreign investment and to take advantage of the possible contributions of foreign direct investment to economic development through the transfer of capital, technology, know-how and access to markets. This change was facilitated by a number of pressing practical considerations, since the drying up of the external financing by commercial banks led to severe capital shortages by these countries, which made earlier objections to the terms required by foreign investors less significant as a basis for economic policy.

27. In international forums the new attitude resulted in the capital-exporting countries' taking the opportunity to place renewed emphasis on their traditional concerns regarding the promotion and protection of investment and to raise these concerns in the context of trade negotiations. At the same time, efforts continued to formulate standards for transnational corporation behaviour in specific areas such as consumer and environmental protection or disclosure of information.

28. These developments also influenced the negotiations of the Third and Fourth Lomé Conventions between a group of African, Caribbean and Pacific States (ACP) and the European Communities, in 1984 and 1989, respectively. 6/ A draft Euro/Arab convention on the reciprocal promotion and protection of investment was also negotiated during that period. In Latin America, decision 24 was superseded by decision 220 and, more recently, by decision 291, which abolished the previous restrictions on foreign investments in the Andean region. Following the success of the European integration arrangements, other regions began to establish their own free trade zones which facilitated intraregional investment (i.e., the Caribbean Common Market (CARICOM) and the Preferential Trade Area of Eastern and Southern African States (PTA). Meanwhile, developed market economies continued their policy of concluding bilateral investment treaties for the promotion and protection of foreign investment. A number of countries, notably in Central and Eastern Europe and in Latin America, began to sign bilateral treaties during this period.

29. At the multilateral level, the adoption of the Multilateral Investment Guarantee Agency (MIGA) to provide insurance coverage for non-commercial risks to investors in developing countries represented another successful move to facilitate and protect foreign investment. It complemented similar national programmes in capital-exporting countries (e.g., Overseas Private Investment Corporation).

30. Since 1981, the negotiations on the draft code of conduct on transnational corporations focused mainly on the provisions dealing with the treatment of these firms by Governments. Through long and difficult negotiations, an understanding was reached on the formulation of standards on issues such as fair and equitable treatment, transparency of national regulations and confidentiality of information. In other matters, such as the applicability of international law to foreign investment, compensation for expropriation, transfer of payments, settlement of disputes, conflicts of jurisdiction and conflicting requirements, the negotiations helped to clarify the concepts and issues involved in the formulation of these principles.

31. Efforts to specify the responsibilities of transnational corporations during this period led to the adoption of a number of instruments on consumer and environmental protection while international standards on accounting and reporting were established as a result of the work of international working groups of experts in the United Nations, OECD, and other institutions.

III. PRESENT INTERNATIONAL FRAMEWORK: SYNOPSIS AND EVALUATION

32. It would be premature to attempt to characterize the 1990s in terms of attitudes and approaches to economic issues in general, and to foreign direct investment in particular. Many of the geopolitical and economic changes that have taken place so far have been the result of the economic policies and theories put in operation during the previous decade, but the magnitude of these changes and their consequences are still not clear. While waiting for the full picture to emerge, a pragmatic approach to economic issues is beginning to dominate the international dialogue.

33. From the viewpoint of the international framework addressing the role of foreign direct investment and transnational corporations in economic development, this means basically that, while some basic controls remain, foreign investment is now invited and encouraged; and privatization of State enterprises is seen as the best path to development. Since natural resources and public utilities passed into the public domain in the 1970s, the question of nationalization and expropriation has lost some of its political significance in State/foreign investor relations.

34. These developments and changes do not necessarily mean that fundamental issues no longer require - or would not benefit from - internationally agreed norms and standards. Indeed, as illustrated below, the closer interweaving of the economies of the world have increased the need for internationally agreed standards. The question is no longer whether international norms should exist but whether the international framework as it exists today is sufficient - or, indeed, adequate - to ensure stable, reliable and mutually beneficial foreign investment relations in the new economic and political landscape.

A. Settled issues

35. With respect to conventional issues involving foreign direct investment/transnational corporations and host Governments, most of the basic principles which were already settled in previous decades remain unchallenged.

36. These include, first, a number of general concepts relating to the operations of transnational corporations, deriving from the basic principles of State sovereignty and jurisdiction, most of which are well established by international law and practice. Their significance for the framework on transnational corporations stems from the transnational nature of the structure and operations of these enterprises and the role of the State in the present system of international law. Among these are:

(a) Observance of local laws and regulations. It is a settled principle of international law that transnational corporations are subject to the laws of the country in which they operate. The principle is a direct consequence of the conventional and customary rules of public international law on State sovereignty and jurisdiction;

(b) Permanent sovereignty of nations over their natural wealth and resources. The concept of permanent sovereignty is qualified by the State's obligation to respect international law and international agreements subscribed by it;

(c) The right of every State to prescribe the conditions under which transnational corporations enter and operate within its national jurisdiction. The sovereign right to regulate entry of foreign investment still persists. However, recent State practice points to undeniable liberalization of the conditions for entry;

(d) Adherence to the economic and social goals and objectives of the host country. This standard is found expressly or by implication in all framework instruments dealing with foreign direct investment/State relations. It is a voluntary standard that goes beyond the strictly legal requirements to cover situations where transnational corporations are called upon to conduct their business operations in a manner which is not damaging or inconsistent with the general policy objectives and priorities of the host countries;

(e) Abstention from corrupt practices in international business transactions. The duty of avoidance of corrupt practices applies equally to government officials and business enterprises, and to intermediaries;

(f) Non-interference in internal political affairs of the host country. The duty of non-interference extended to foreign corporations and individuals is now accepted as one of the international standards applying to foreign investment.

37. What has perhaps changed is the manner in which these standards are being used, interpreted and applied by Governments and transnational corporations in the pursuance of their current policy objectives. Thus, for example, while the principle that States have sovereign discretion to determine the entry and establishment of foreign investment has remained unchallenged, many Governments are now using their discretionary powers conferred under this principle increasingly to liberalize previous restrictions on the entry of foreign investment. The new governmental approaches to traditional principles are also reflected in proposed conventions, agreements or understandings. Similarly, the issue of permanent sovereignty over natural resources - once a major source of controversy - has become fairly settled as a result of the State's practice, reflected in many successful and mutually beneficial contractual arrangements with foreign investors.

38. It is therefore expected that such norms and standards, when written in new articles of proposed international instruments or understandings, will reflect the perceptions and approaches that States and enterprises now bring to the international negotiating table. It is also expected that, when applied today, such norms will equally reflect the new circumstances.

39. Secondly, the international framework includes a host of specialized standards. Indeed, as a result of years of investigation, international discussion and agreements, a network also exists of standard-setting

understandings on matters such as accounting principles, reporting of corporate structures and operations, criteria for consumer protection, fair trade practices (mainly in the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices), transfer pricing, standards for labour and working conditions, health and safety conditions; in short, in areas which are susceptible of definition, and in which a measure of regulation in the public interest is generally recognized as necessary. Standards are in place in specific areas such as restrictive business practices, transfer pricing, consumer and environmental protection etc. These standards and principles reflect the modicum of regulation akin to what exists in domestic legislation of many countries for the functioning of a market economy in a democratic society.

40. Thirdly, with respect to the treatment of transnational corporations by host countries, a number of standards have been established through conventional instruments and/or international and national practice. Among these are:

(a) Fair and equitable treatment. This principle would include certain concepts such as non-discrimination, and non-arbitrariness in the application of the law;

(b) Minimum protection under the law. It contains in substance the notion of due process as well as some of the principles that are now considered part of fundamental human rights;

(c) Expropriation and nationalization. There is general consensus that a State may not expropriate the property of an alien, except for a public purpose, in a non-discriminatory manner, upon payment of compensation.

B. Issues on which consensus is still to be achieved

41. There are still unresolved issues. For example, aspects of theory and practice involving extraterritoriality continue to be troublesome. So do issues relating to national treatment or the application of some rules of international law. But the blurring of distinctions between home and host countries and perceptions deriving from observed practice may alter the format of the debate.

1. Applicability of international law to foreign investment

42. It should be noted that while there are still a number of countries which continue to object in multilateral forums to the applicability of minimum international standards of customary international law to foreign investors within their jurisdiction, in practice these countries afford similar levels of protection under their national constitutions. These and other principles, which in the past were highly controversial (i.e., recourse to international dispute settlement mechanisms), are now largely being settled through practice, as reflected in new agreements entered into by the countries that opposed them. 7/

2. Compensation for expropriation

43. The diverse positions on the standard of nationalization on expropriation, reflecting doctrinal differences, are seen in the current practice of States to be yielding to reconciliation either through pragmatic approaches being arrived at in specific cases or by incorporating agreed provisions in bilateral investment treaties. In these treaties it is not uncommon to elaborate on the formula used for determining the standard of compensation.

3. Extraterritoriality

44. In the most common sense of the word, extraterritoriality relates to the reach of national law beyond territorial borders. In the present international economic/legal climate, the reach of law and regulation beyond the borders of one country into another is a means of dealing with conduct which both States reprehend. Where that is not the case, and where one country resists the intrusion of the standards of another into its economy, conflict is likely to arise in the North/North dimension, as in the debate over the Soviet "pipeline" case, which pitted United States policy against that of the European Communities, and sought to invalidate contracts already made with the former Soviet Union. Another typical case was that born of antitrust, or restrictive, business practice doctrine, where the United States applied a theory of antitrust which was more strict than that of other nations, and asserted, via the "effects" doctrine of jurisdiction, its authority to regulate activities outside of its borders.

45. It is likely that with the end of the cold war, trends toward consensus on policy in several important areas could make extraterritoriality for security reasons play a minor role in the so-called "trading with the enemy" issues. In other areas, however, extraterritoriality in a sense may prove more, rather than less, important. The extensive network of international economic relations, which is characteristic of the present situation, and the importance of transnational corporations - many of which have a large share within their own systems of international (in the sense of intracorporate) trade - are likely to lead to extensions of national jurisdiction in administration of harmonized regulation of security practices. Extraterritoriality is also likely to be a highly visible factor in the financial services industry. The Bank of Credit and Commerce International case has demonstrated the importance of international linkages and the possible effects if regulation in one country is weak enough to make the consequences of fraud come home to depositors and investors in another country.

46. Although diversity still exists in some areas of importance to States and investors alike (taxation, for example), it has been largely mitigated by the development of doctrine by jurisprudence, including principles of comity which provide guidelines for polite inter-State conduct in regard to assertions of jurisdictional power. At the regional level, the work of OECD has helped in the avoidance of conflicts by adopting an approach of moderation and restraint.

47. To a certain extent, extraterritoriality may contribute to the resolution of issues which are of general, multinational concern but in which the locale of the relevant parties is scattered among several jurisdictions or difficult to locate. Extraterritoriality may indeed be at least a partial solution for cooperative control of undesirable corporate activities - such as securities manipulation - which cross or evade State boundaries. In consequence, it may be a useful methodology, rather than a feared tactic. Thus, this "violation" of sovereignty may be an avenue of cooperation towards a mutually advantageous goal, rather than a cause of friction.

4. National treatment

48. National treatment - that is, according to non-nationals operating in a foreign country, treatment at least equal to that given to that country's own nationals - has been and continues to be an unsettled issue, though in this area, the practice of countries has been considerably narrowed. Commitments to national treatment are customary in treaties of friendship, commerce and navigation, as well as in bilateral investment treaties. Even in these instruments, exceptions to national treatment tend to be broad and far-reaching.

49. National treatment was one of the major subjects addressed when OECD, in 1976, adopted the Declaration on International Investment and Multinational Enterprises. Today, OECD is discussing the "national treatment" instrument with a view to strengthening and expanding its provisions. Within the OECD region, it is current practice to accord national treatment to investment that has entered the country, though some exceptions still remain in operation, mostly on grounds of national security. If more effective work is to be done in this area, however, there should be recognition of the special issues that arise in a federal system. A format could be provided that would be acceptable (and as close to binding as possible) at both the federal and the State, or provincial, levels. Thus, an agreement on national treatment may be achieved in the near future which would reflect the standards contained in the treaties of friendship, commerce and navigation and on bilateral investment treaties.

50. In the developing world, attainment of consensus on this standard may require a broadening of exceptions to national treatment, at least until these countries narrow the economic gap that separates them from the industrialized nations. One aspect of any effective step towards national treatment would be a commitment to transparency of local laws, regulations and administrative practices.

5. Reciprocity: a related issue

51. Although reciprocity has been much discussed in the context of the Uruguay Round of trade negotiations, it would not appear to be a major issue in relation to foreign investment (but it could provide useful protection for individuals). There is, of course, a factual imbalance between major capital exporters and small-nation importers of capital. The apparent disparity and the actual imbalance of relevance of a provision of national treatment, for example, has not impeded the adoption of bilateral investment treaties. Reciprocity may not be a difficult concession on the part of a capital-exporting nation.

52. In relation to trade, reciprocity has come to be part of the "level playing field" vocabulary. Its relevance to investment issues is mainly in situations in which certain industries are closed off to foreign investment. These are situations which to a considerable extent are handled in bilateral agreements, such as the said bilateral investment treaties, where reciprocity means basically that standards of protection and treatment of investors apply both ways. As an investment issue, reciprocity mainly comes into play in situations in which a foreign investment requires services from abroad or fresh infusion of capital. In that context, it should be considered an aspect of the national treatment standard.

C. Emerging standards: right of entry and establishment

53. The nexus between trade, finance and investment in the international arena has been brought to prominence in the negotiations on trade in services in the Uruguay Round of trade negotiations. In those negotiations, typically "investment-related" issues such as right of establishment have arisen in the context of "trade-related" investment discussions (including trade and investment in services, and intellectual property protection).

54. Difficulties in this field are illustrated by the fact that the right of entry is not generally regarded as an aspect of national treatment. In bilateral investment treaties, for example, different restrictions may be imposed upon the admission of investment - which is usually left to the domain of national law - and upon the application of the national treatment standard, which are normally specified in the treaty or in protocols thereof.

55. The provisions in the draft code of conduct on transnational corporations - still under negotiation in the Commission on Transnational Corporations - reflects general understanding in this area. They declare the right of a State to regulate the entry and establishment of transnational corporations, 8/ while stating that transnational corporations should receive fair and equitable treatment in the countries in which they operate. A similar statement is also found in the OECD Guidelines for Multinational Enterprises. 9/ These understandings basically restate the existing commitment level, not only between developed and developing countries but also among the members of OECD, all of which are developed countries.

56. In this area also traditional attitudes have changed dramatically in the past decade, as have the practices of States. This is mainly illustrated by the new investment regimes now in operation in most countries which have virtually abolished most of the previous restrictions on entry and establishment of foreign investment. The trend is most apparent in developing and Central and Eastern European countries since many of the previous investment laws of those countries imposed severe limitations on the entry and establishment of foreign enterprises. The changes are also symbolized by the number of free trade agreements being adopted in many regions of the world, in which right of entry and establishment is a central feature.

57. While the Uruguay Round completes its work, at the regional level (other than the regional free-trade zones) within the OECD countries, further work is proceeding in this area. The June 1991 OECD ministerial meeting recommended pursuing the goal of liberalizing investment policies, including the right of establishment. This may involve a number of understandings concerning the instrument on national treatment and its amendments; the Code of Liberalisation of Capital Movements; and the Code of Liberalisation of Current Invisible Operations, which have been considerably expanded in recent years to cover most transactions in services.

58. In order best to understand and appreciate the current status of State practice with regard to the scope of the right of entry and establishment it would be useful to undertake a comparative analysis of the scope and coverage of various international instruments imposing commitments on entry and establishment, such as the above-named OECD instruments, the EEC/European Free Trade Association (EFTA) agreement, other free trade agreements and other bilateral and regional instruments. Such a study would also help assess the extent to which the disciplines proposed in the Uruguay Round with respect to right of establishment are already in operation under the existing network of bilateral, regional or interregional commitments applying to broad geographical areas.

IV. THE TREND TOWARDS REGIONALIZATION

59. Regional and global movements towards economic integration affect greatly the existing and future modalities of foreign direct investment. Most of the issues discussed above arise by virtue of the existence of State boundaries. Concepts of "home" and "host" State jurisdiction, of extraterritoriality, of national treatment or of right of establishment may lose some of their significance in a world in which certain aspects of national sovereignty are being surrendered to regional economic institutions.

60. As indicated in the section above, concurrently with the negotiations of the Uruguay Round, which have brought several issues relevant not only to international trade but also to private foreign investment to the foreground of international discussion, many States have commenced (or in some cases concluded) regional free trade agreements or framework agreements for free trade agreements. The United States has such agreements in operation with

Israel and Canada, and has recently concluded framework trade and investment agreements with 11 Latin American countries. It is currently negotiating an agreement that would include the United States, Canada and Mexico and has proposed an arrangement which would include all of the Americas.

61. Meanwhile, the European Community has a target goal of 1 January 1993 for establishing the single European market. Moreover, while the agreements reached by the European Council at Maastricht in December 1991 are too new to be analysed here, they clearly represent a significant step towards European unification. The breakdown of the Soviet Union has led to the creation of the Commonwealth of Independent States, a cooperation agreement providing, among other things, for common currency and close cooperation on economic policies. The southern cone of Latin America has done preliminary work for a free trade arrangement between Argentina, Bolivia, Chile and Uruguay (MERCOSUR). Southeast Asia is considering similar arrangements, with Japan as a participant and the United States having indicated its desire to be a part of a larger economic community including all the Pacific Rim countries. The Central American Common Market, long dormant, has come to life. The Caribbean Common Market (CARICOM) has decided to negotiate as a community on trade matters.

62. In Africa, the impetus is much the same. Integration efforts are being pursued through such subregional bodies as the Economic Community of West African States (ECOWAS), the Preferential Trade Area of Eastern and Southern African States (PTA) and other initiatives which are seen as building-blocks of a much discussed and much needed economic union which would embrace the entire continent. A treaty for such a union was signed by member States for the Organization of African Unity in Nigeria, in June 1991.

63. These developments will inevitably be reflected in investment policy, with a number of significant potential consequences, some of which are discussed below.

A. Building blocks or stumbling blocks?

64. A possibility exists that these essentially regional arrangements may disrupt - at least partially - the global approach to investment and trade issues, exemplified in the Uruguay Round of trade negotiations. The experience of the 40-plus years since the signature of the General Agreement on Tariffs and Trade (GATT), is relevant for an analysis of the type of difficulties that may arise in a world which is trying to reconcile globalization and regionalization. In particular, the extent to which a standard of most-favoured-nation treatment remains useful, given the broad exceptions permitted for groups of States belonging to a regional free-trade or economic union, is significant for both trade and investment.

65. Other critical aspects of the treatment of foreign investors likely to be affected by the existence of regional integration schemes are questions of establishment and commercial presence and of national treatment (or, to be

more precise, "regional" treatment). Even in cases where such standards of treatment are granted to countries outside the group (i.e., as between the members of EC and EFTA), a variety of requirements such as quality control, environmental regulations, intra-merger regulation and so on, discriminating between investment within and outside the group, could act as de facto distortions resulting in significant differences in the treatment of outside investors. Similarly, the trend towards the convergence of fiscal, financial and social policies within regional groups could have a different effect in the business performance of foreign investors from within or outside the area.

66. It may be that the world may break up into regional economic blocs. That prospect seems unlikely, though there will clearly be a degree of economic (and social and political) integration on a regional (or bilateral) basis. As experience with EC and the several external arrangements made by the Community indicates, these regional agreements could lead to enhancement rather than limitation of foreign investment. They could facilitate trade and investment between the regional group and other countries (i.e., some developing and Central and Eastern European countries) for which the regional group may be the main source of capital, trade or technology. Thus, the existence of a common approach for doing business (e.g., EC and PTA company law charters), common external tariffs, common fiscal incentives, and complementarity of use of natural and other resources among member countries, which are among the common features found in many regional agreements among developing countries, could facilitate the flow of foreign investment to developing regions.

B. Comity

67. Another consequence likely to arise in this type of situation is that States may be inclined to follow the rule of comity - that is, acceptance as an act of mutual self-interest of the law of another State. To the extent that States feel that they are required to follow another State's law, principles of private international law or conflicts of law apply. Comity represents a more salutary, but often no less effective, step. In either case, conflicts, some of which lay at the root of transnational corporation difficulties, are reduced. Harmonization, partial or more extensive, is often also the result.

C. Harmonization

68. An immediate and beneficial consequence has been the movement towards harmonization of the laws affecting trade and investment in the nations forming part of these regional agreements. Substantial, if not total, harmonization of law in these cases is necessary if the free trade agreements are to be effective. Differences in local laws can also be resolved by way of international agreement. But such agreement which would seek to unify two separate sets of principles in a document may be difficult to adhere to, except for very specialized issues.

69. Where a free trade or common market agreement provides for common approaches and institutions (i.e., a common court to interpret the common law), difficulties in reaching agreement on specific legislation diminish. The member States of the EC have for years attempted to adopt a statute for a European company. With the realization of the 1992 single common market, the chances of that statute's being adopted might increase, just as competition policy in the European Community has now been harmonized under the twin impetuses of a common market and common institutions for interpretation and enforcement.

70. Harmonization of law between members and non-members of free trade agreements or regional common markets is compelled by the need to maintain competitiveness in international investment and trade. Harmonization of accounting standards and of securities, banking, insurance and telecommunications regulations is of the utmost importance. International, or transborder, investment is dependent in large measure on a common understanding of accounting terms and common standards of care and due diligence. In many instances, full understanding of accounting standards may contribute significantly to enhanced competitiveness. Profit-and-loss statements cannot be rationally compared in the absence of harmonized accounting rules. Comparability is often complicated by the fact that foreign direct investment now takes a variety of forms (i.e., equity, debt with equity types of control, franchise or licensing agreements with control features etc.). The ability of the several States in which these transnational corporation activities take place to ascertain transnational corporation relationships and the relevance of such relationships to the allocation of costs and profits demand a degree of disclosure and harmonization of accounting standards greater than what has been traditional.

71. Similarly, a "level playing field" demands harmonization of competition policy. At various times in the present century, enterprises in various countries have been accused of waging unfair competition, mainly by gaps in legislation or by different theories and approaches being taken by Governments. A significant step in this regard was reached with the bilateral antitrust cooperation agreement adopted between the United States and the EC recently. 10/ In addition to coordinating antitrust implementation and enforcement activities, the Agreement contemplates ad hoc consultations in order to resolve specific issues and regular meetings in order to exchange information and views on antitrust policy.

D. Export of law

72. The expression "export of law" is not an established term. It has been coined to explain one of the modalities by which harmonization of law often takes place today. A single State or a group of States may harmonize its laws with those of another State or group as part of their joining in a common regional scheme or free trade area. In most instances, however, this process takes place by way of extension of the standards already in place in one State or group to another State or group. The recent agreement between the EC and

EFTA provides a good example of the many aspects of economic regulation that are being harmonized between these two groups as a result of the establishment of the European economic space. Many of these standards already applied within one group and have simply been extended to the countries members of the other group.

73. In some instances, the extension of the law already in place in another country might lead to a significant improvement of local standards in such areas as environmental and consumer protection, restrictive business practices, corrupt practices and so on. Some countries might find it easier to introduce certain standards as part of the overall package provided by the joining in a common market or free trade agreement than to adopt them under other circumstances.

74. A single State may also harmonize regulations by exporting its own law by way of extraterritorial decrees. To some extent, this has been done in the past in the financial field, given a sufficient amount of economic and financial power to impose standards. An important aspect of this type of harmonization occurs to a substantial extent in the field of securities trading. The enormous importance of several markets for the issuance and trading of corporate (and other) securities has meant that corporations have been forced to adopt standards approved by such markets as condition of access. Neither of the major stock exchange sites would accept trading in securities issued by entities that do not adhere to certain essential standards of accounting.

E. Uniform law and model law

75. As already indicated, in many specialized fields, harmonization, in greater or lesser degree, is achieved via international agreement. The technique of a uniform law is perhaps most effective but at the same time more difficult to achieve. On the way to a uniform law, there are such steps as the adoption of common practices or even common terms; INCOTERMS, an attempt to eliminate misunderstandings based on terminology in international commercial transactions, is one example that comes to mind. Clearly, as commercial practice is increasingly internationalized, harmonization of practice becomes inevitable. Similarly, States often draw on agreed privisions of international codes (i.e., the Set of ... Principles and Rules for the Control of Restrictive Business Practices, and the code of conduct on transnational corporations) as models for their own laws. This is so because the use of models facilitates the task of drafting a new law and, more importantly, because national laws that reflect internationally agreed provisions are more likely to meet the expectations of foreign investors and home countries. 11/

76. In all the above, the current trade negotiations in the Uruguay Round, as well as the stream of bilateral and regional trade agreements, also play both a causal and a consequential role. Investment and trade are intimately interwoven. Unless investment is able to proceed easily across national

boundaries and is assured of equitable treatment once within the foreign borders, trade - certainly trade in services - cannot flourish. Successful conclusion of the Uruguay Round will contribute significantly to the harmonization of national investment and trade regimes, which in turn will facilitate a symbiotic flow of productive investment across national boundaries. The efficiency of world trade and production depends on the adoption of global standards in both sectors.

V. NEW ISSUES

77. The basic issues that underlay international activity from the 1940s to the 1980s were, on the one side, protection of the foreign investor and, on the other side, control of their activities. These issues became all the more important with the increasing role and significance of the transnational corporation in the world economy. Transnational corporations are no less significant in both trade and investment today than they were when the Panel of Eminent Persons first met or when OECD took the step of formulating standards for such corporations. Issues of sovereignty and supervision of transnational corporation activities are, however, still of importance.

78. But the scenario has vastly changed. The enormous turnabout in the prevailing economic climate in Eastern Europe and in many developing countries has given a new perspective to traditional issues and defined other important ones. Increased - if not new - emphasis is now placed on many of these criteria.

A. Privatization and competition

79. The current wave of privatization in many developed and developing countries, and the massive privatization measures being adopted as a result of the political and economic transition in Central and Eastern Europe are the direct result of the prevailing dominance of the market economy. To be effective, however, privatization requires certain standards to be in place. In a few situations of large and more or less financially self-sufficient economies, privatization may take place within the limits of a single economy. But in most cases it involves foreign investment and participation. This is particularly so when privatization is used to deal with large economic units, many functioning in areas of close interest to the general public - i.e., transport, communications, and power distribution. State control of such enterprises has convincingly been demonstrated to be inefficient and costly. Hence, privatization gives priority to these enterprises.

80. But to privatize does not eliminate the public interest in these sectors of the national economy. In most of the industrialized nations, a public regulatory body supervises the activities of public utilities, whether privately or publicly owned. Such a regulatory body is likely to have authority with respect to issuance of licences required to expand business or to enter into new business activities. It may also have authority in relation to pricing policy.

81. While the tendency is to reduce such supervision to the extent possible, it is seldom eliminated when competition cannot be relied upon to regulate. In a number of privatization instances, especially in economies newly entering a private enterprise regime, such competition does not exist. In such cases the newly privatized enterprises may be heavily dependent on external expertise and financing. The need in these situations for the extension of present accords dealing with restrictive business practices is evident.

82. From the viewpoint of the privatizing nation, the expected benefits may, in the absence of some such standards or rules, be illusory. Safeguards should be provided to ensure that privatization takes place at a fair evaluation; in some cases, the managers of State enterprises have been said to form groups to take over the enterprises themselves, at a valuation set by themselves. In other cases, the interests of labour as well as of consumers have not always been taken fully into account.

83. In any case, the success of a private enterprise economy depends to a large extent on the existence of competition within that society. Since the world economy is moving towards a private enterprise system, it would appear to be important to strengthen the internationally agreed norms protective of competition. Competition policy has been important in the development of the industrialized nations. For decades, the United States has had measures intended to preserve or to enforce competition. The Treaty of Rome includes major provisions on competition and on the prohibition of not only anti-competitive agreements but also undesirable concentrations of economic power within a single firm. These are principles which are generally useful - if not essential - within all market economies. They would appear to be especially relevant to the circumstances of States that have recently moved to become market economies and which have utilized privatization of State enterprises as a means of so doing.

B. Securities, banking and insurance supervision

84. The need for adequate measures of securities regulation and supervision has been emphasized by recent events. Even without such abuses of securities trading manipulation, the need for supervision would still be clear. Despite extensive regulation in certain countries, the liberalization of the world financial markets has made the international securities market particularly vulnerable to manipulation and abuses. Without adequate mechanisms for supervision, the consequences of such practices for the public and private sectors could be devastating.

85. Similarly, the recent failure of some transnational banks suggests that the international framework for transnational banking is deficient. Questions have been raised regarding prudent supervision, adequacy of regulations and enforcement procedures and auditing requirements. Most conspicuous is the lack of mechanisms to deal with the effects of the closure or failure of a transnational bank. National regulatory frameworks aim to protect depositors, shareholders and creditors of banks from the imprudent or irregular or

fraudulent actions of bank managements. They also have mechanisms which are set in motion to deal with the effects of a closure or failure of a bank. The recent failures of savings and loans associations and commercial banks in the United States, the United Kingdom and Finland offer good examples of the rescue packages which were set in motion by regulators to maintain public confidence in the banking system.

86. These national arrangements do not have counterparts at the international level. Quite the contrary, the vigorous implementation of such measures at the national level may impede similar fair solutions being effected at the international level. In devising or improving international mechanisms for dealing with and supervising closures and failures of transnational banks, account would have to be taken of the new trends and developments in international banking. In particular, the increasing deregulation of the international financial markets would be an important aspect to be taken into account.

87. Insurance is another area in which internationalization is evident. For the same reasons, it is necessary for supervision to be exercised on an international basis, to ensure the security of those seeking insurance protection. With the services sector entering into the realm of trade negotiations, and with countries pressing to open their doors to foreign insurance companies, it becomes essential that adequate protections be available, particularly in certain types of insurance, such as life or health insurance, which could affect large sections of the population - and the most vulnerable ones. The international nature of the insurance industry and the presence of major insurance and reinsurance firms suggests - if it does not compel - a measure of international study of standards applicable to transnational aspects of insurance, and the adoption of them.

C. Transfer pricing

88. The practice of transfer pricing is not new, but it has become more significant as a result of recent developments. Indeed, as a large and increasing part of world trade becomes intra-transnational corporation trade, the need for international mechanisms effectively to address this issue assumes greater importance. Many States have adopted measures to prevent the establishment of artificial transfer pricing (i.e., prices other than those used in arms-length transactions). Since these measures generally involve comparison with prices set independently, they are particularly difficult to enforce when the transactions take place within the context of a transnational corporation which may or may not record them impartially. Thus, the strengthening of international cooperation in this area through the adoption of instruments and mechanisms designed to prevent such practices could have a significant net effect on the effectiveness of national fiscal policies.

D. Corrupt practices in international transactions

89. As indicated above, the basic principles that underlie the issue of corrupt practices were well established in previous decades. The problem of corrupt practices, however, has not receded in recent years, but in many respects, it has been aggravated by the complexity of current economic exchanges. To some extent, certain aspects of artificial transfer pricing, restrictive business practices, bank failure and securities trading manipulation could be regarded as illicit practices, or as some of the problems that add new dimensions to the topic. In a more narrow sense, the subject of corrupt practices - e.g., bribery of public officials - in international business transactions has been an issue before the Economic and Social Council for many years. An international agreement on illicit payments is near completion but for the issue of extraterritorial enforcement. Present sentiment seems to lie in the direction of the revival of the proposed convention or at least of the adoption of some practical mechanisms that would help prevent corrupt practices. By means of a number of studies and activities, the Centre is currently looking into ways and means of putting such ideas into operation.

E. Environment and investment

90. Concern over the relationship between environment and economic development is not new. It has, however, acquired in recent years a sense of urgency beyond that of any other period. Despite the fact that environmental concerns spurred adoption in OECD years ago of the principle that the "polluter pays", a number of environmental disasters have not been avoided.

91. Since transnational corporations are a major factor in international trade and production, it is evident that environmental standards applicable to their operations are a feature of discussion in these forums. A great deal of work has been done in this area by a number of international institutions. The Centre, in particular, has sponsored a series of studies and a symposium with major participation on the part of transnational corporations, which resulted in the adoption of a set of Criteria for Sustainable Development Management and a set of recommendations for Agenda 21, to be addressed by the United Nations Conference on Environment and Development.

VI. CONCLUSION: A POSSIBLE OUTLINE FOR THE EMERGING INTERNATIONAL FRAMEWORK FOR THE 1990s

92. It is clear that the world economic environment has undergone significant changes from the conventional and theoretical format of the discussion that ran from the 1940s through the 1970s. One of the most significant changes relates to the increasing globalization of the world economy. Transnational corporations have played a significant role in that process which, in turn, has shaped the new structures and strategies of the global transnational corporation. The close interrelations of the present commercial world and

the way in which business and investment are being conducted do not diminish, but rather increase, the need for a global and comprehensive framework on foreign direct investment which effectively responds to the present challenges.

93. Many of the basic principles and standards that were elaborated during the formative period of an international investment regime are still relevant and valid. What has perhaps changed is the manner in which some of these standards are being used, interpreted and applied by Governments and transnational corporations in the pursuance of their current policy objectives. It is therefore expected that such principles and standards, when written in new articles of proposed international instruments or understandings, will reflect the perceptions and approaches that States and enterprises now bring to the negotiating table. It is also expected that when applied today, such principles and standards will equally reflect the new circumstances.

94. Still, seen from the perspective of the functioning transnational corporation in today's world economic conditions and relations, several specific issues have remained important in the international agenda of negotiations. Many of these issues have been the subject of the work of regional institutions. These include aspects of theory and practice involving extraterritoriality, issues of national treatment or the application of some rules of international law. But the intermingling of home and host countries and perceptions deriving from observed practice may alter the format of the debate.

95. The nexus between trade, finance and investment in the international arena emphasized in the Uruguay Round, and in the commitments undertaken in the context of regional economic integration schemes have brought to prominence typically "investment related" issues such as the right of establishment and of commercial presence. These issues would be essential aspects of the emerging overall framework.

96. But as recent developments in OECD appear to confirm, these trends and the variety of instruments originating from the intensified normative activity that is now taking place within and between regional institutions enhances the need for the elaboration of a comprehensive, balanced and universal international framework that addresses the various issues, principles and standards affecting foreign direct investment and transnational corporation activity.

97. A global framework that meets these characteristics would thus integrate and consolidate what has been achieved so far and would address also the new issues arising in the international agenda. These issues would give new perspectives to traditional standards, while defining new ones, and would complete the overall outline of the emerging international framework for foreign direct investment of the 1990s.

Notes

1/ United Nations Conference on Trade and Development, Final Act and Related Documents (United Nations publication, Sales No. 1948.II.D.1). See also International Law Quarterly (Summer, 1948), pp. 283-345.

2/ The draft convention was prepared at the initiative of a group of private international lawyers and businessmen known as the International Association for the Promotion and Protection of Private Foreign Investments, with headquarters in Geneva. It takes its name from its principal authors, Dr. Hermann Abs and Lord Shawcross.

3/ The text of the draft convention is reproduced in International Legal Materials, vol. 1 (1968), p. 120.

4/ The text of the Convention has been published by the International Centre for Settlement of Investment Disputes as document ICSID/2.

5/ See Code of Liberalisation of Capital Movements and Code of Liberalization of Current Invisible Operations (Paris, Organisation for Economic Cooperation and Development, 1990).

6/ The complete text of the Third ACP/EEC Convention (signed at Lomé on 8 December 1984) is reproduced in The Courier, No. 89 (January/February 1985). The complete text of the Fourth ACP/EEC Lomé Convention (signed at Lomé on 15 December 1989) is reproduced in The Courier, No. 120 (March/April 1990).

7/ See, for example, the recent bilateral investment treaties signed by Argentina, Venezuela, and Bolivia, among other Latin American countries.

8/ See the most recent text of the draft code E/1990/94, annex, paras. 48 and 49.

9/ OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts (Paris, Organisation for Economic Cooperation and Development, 1992), annex I. Guidelines for Multinational Enterprises, para. 7.

10/ Agreement between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws (September 1991).

11/ On the legitimation effects of codes of conduct, see, for example, Debra L. Miller and Joel Davidow, "Anti-trust at the United Nations: a tale of two codes", Stanford Journal of International Law, vol. 18 (1982), pp. 347-375.
