The Dhaka University Studies Part-F, Vol. 1(1): 101-116, [redacted] 1989

UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS (TNCs) IN THE ASPECT OF PRIVATE INTERNATIONAL LAW

DR. MIZANUR RAHMAN*

1. Introduction:

Transnational corporations (TNCs)[1] continue to occupy a significant role in a number of sectors in most countries. The capacity of such corporations to mobilize financial resources, technology and management expertise, together with the impact of their global operations in various production and service sectors, ensures their continuing importance in the overall development programmes of most countries. At the same time, their activities need to be effectively harmonized with the development goals and objectives of the host country in order that any negative effects of their operations in particular countries can be eliminated or minimized.[2] The harmonization of the activities of such corporations with the objectives and development programmes of host countries, particularly developing countries, necessitates a fairly detailed framework of policies regarding the activities of TNCs.

The idea of regulating the activities of TNCs has been inspired by two main perceptions of the role of TNCs in the world economy: on the one hand, it is recognized that TNCs play a positive role as effective instruments of development in developed and developing countries alike and their role should be strengthened; on the other hand, it has also been recognized that the pervasive role of TNCs in the world economy requires the formulation of guidelines for their conduct. The result has been an effort to establish a balanced code that prescribes standards of corporate conduct and principles for the treatment of TNCs.[3]

*Assistant Professor, Department of Law, Dhaka University.

1. For a legal definition of TNC see : M. Rahman. Legal definition of transnational corporations (TNCs) : A suggestive study.-*Law and International Affairs*, Vol. 12, No. 1, 1989. pp. 1-20
2. UN. CTC. National Legislation and Regulation Relating to Transnational Corporations. ST/CTC/26, New York, 1983, p. 1.
3. UN. CTC. The Uniied Nations Code of Conduct on Transnational Corporations. E. 86. 11. A. 15, New York, 1986, p. 1.

The global code of conduct has several antecedents[4], varying in scope according to geographical application, substantive coverage, and successfulness. These include the International Convention on the Treatment of Foreigners (1920)[5] the Havana Charter of the International Trade Organization (1948)[6], the International Code of Fair Treatment for Foreign Investments (1949)[7], the Abs/Shawcross Convention on Investment Abroad (1959)[8], the International Association for the Promotion and Protection of Private Foreign Investment (1959)[9], the Harvard Conventions on the International Responsibility of States for injuries to alien (1929 & 1961)[10], the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977)[11], the UNCTAD International Code of Conduct on Transfer of Technolgy (1980)[12], and the UNCTAD Principles and Rules for the Control of Restrictive Business Practices 1980)[13]. The latest code to join the long list of international codes of conduct is the Draft United Nations Code of Conduct on transnational corporations (UN Code).[14]: This article is an attempt to review the substantive issues addressed in the

4. For details see : T.M. Ocran. Interregional Codes of Conduct for Transnational Corporations.-*Connecticut Journal of International Law*, Vol. 2, No. 1, 1986.
5. League of Nations. Doc. C. 174 M. 53, 1928 II 14 (1929).
6. For the text of the Havana Charter, see : UN Conferences on Trade & Employment. Final Act & Related Documents. U.N. Doc. E/CONF. 2/78, U.N. Sales No. 1948. 11. D. 4 (1948)
7. I.C.C. Pub. No. 129 (1949)
8. The text is reprinted in : The Proposed Convention to Protect Private Foreign Investment : A Round Table.- *Journal of Public Law*, Vol. 9, pp. 115-124 (1959).
9. A.P.P.I. Res. No. 1 (1959)
10. For a discussion of the conventions see : Sohn & Baxter. Responsibility of States for Injuries to the Economic Interests of Aliens.- *American Journal of International Law*, Vol. 55, 1961, pp. 545-584.
11. ILO. Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1977.
12. Roffe. UNCTAD : Code of Conduct or Tannsfer of Technology.-*Journal of World Trade Law*, Vol. 19, 1935, pp. 669.
13. U.N. Doc. TD/RBP/CONF/10, (1980)
14. 1983 U.N. ESCOR Supp. (No. 7) at 12-27, U.N. Doc. E/1983/17/Rev. 1 (1983). The Draft is reproduced in *International Legal Materials*, Vol. 23, 1984, p. 624.

UN code in the aspect of private international law and to determine the problems which might hinder its implementation, taking into special consideration the demand of the developing countries to effectively control the TNCs.

2. Developing Countries and TNCs : Conflicting Interests

Diverse legal problems emerging out of TNC operations in developing countries precipitate the corresponding necessity of their regulation. Two contradictory factors influence the process of formulation of regulatory measures: the ever increasing demand of the developing countries to regulate and control the TNCs on the one hand, and the inconsistency of existing legal means with complex international economic relations in the sense of their regulation[15]. As a matter of fact, legal means adopted by national legal systems and by international law are directed toward defining the legal status of foreign legal persons in general, and they, of course do not take into account the problems created by the emergence of TNCs. Complex organizational structure of TNCs allows them to manoeuvre in different municipal legal systems and consequently, in some cases, bypass the regulatory measures of the host country. But individual cases of the ineffectiveness of national regulatory measures do not necessarily establish the impossibility of regulating the TNCs in the national level. In our opinion, it seems unfounded to contend that "international character of functioning of TNCs should be accompanied by internationally agreed system of regulation."[16] Such contention accords undue attention to economic aspects of TNCs. It is true that in relation to economic activities TNC is always international, but in its legal essence a TNC is a formation of municipal law and hence, national in character.

3. UN Code of Conduct on TNCs

The call for a comprehensive code of conduct on TNCs was first made during the early 1970s, partly as a consequence of efforts to improve the functioning of the international economic system,

15. W.C. Jenks. A new world of Law ? A Study of the creative imagination in international law. London, 1969, p. 72.
16. V.V. Natalukha. Regulation of Transnational corporations : National and International aspects. Moscow, 1981, p. 2 (in russian)

parly to build on efforts of the international business community to prescribe norms for foreign direct investment It is held that "in relation to TNCs, the 70-s is characterized by efforts to formulate and adopt international codes of conduct."[17] The formulation of the code was made a priority objective of the United Nations Commission on TNCs established under Economic and Social Council resolution 1913 (LVII) of 5 December 1974, which is assisted in its work by the United Nations Centre on TNCs.

The preparation of a draft text of the code was entrusted to an intergovernmental Working Group of the Commission, which began its work in January, 1977. The task of preparing the draft text of the code took longer than had been anticipated, but the intergovernmental Working Group finally submitted its report to the Commission at its eighth session in 1982.[18] Although the Inter-Governmental Working Group had reached tentative agreement on most of the provisions of the code, it was unable to resolve a number of key outstanding issues. The next stage of the negotiations was thus entrusted to a special session of the Commission on TNCs, which began its deliberations in 1983 and is open to the participation of all states. Although the Commission has since then made considerable progress, a number of key issues still remain outstanding.[19]

The provisions of the Draft Code are structured around six main areas or chapters, namely, preamble and objectives; definitions and scope of application; activities and conduct of TNCs; treatment of TNCs; intergovernmental cooperation; and implementation.

Most of the chapters are sub-divided into several sections, each of which deals with particular sets of issues. For instance, the chapter on activities and conduct of TNCs contain three section dealing respectively with general and political issues, economic, financial and social issues, and disclosure of information. The chapter on treatment is also divided into three sections dealing with general treatment of TNCs by the host countries, nationalization and compensation and jurisdiction.

17. The UN Code of Conduct on Transnational Corporations.- *The CTC Reporter*, No. 12, 1982, p. 2.
18. See. U.N. Doc. E/C. 10/1982/6.
19. For views of the most recent rounds of negotiations see : S.K.B. Asante. The Code : the January 1986 reconvened special session.- *The CTC Reporter*, No. 21, 1986, pp. 14-19.

By 1986, most of the provisions of the code have been agreed *ad-referendum,* leaving a few-albeit difficult-issues to be resolved by the Commission. Subsequent sessions of the Commission testify that a sharp difference exists in the opinion of developed western countries on one side and developing countries and socialist countries on the other on such issues as nationalization and compensation, jurisdiction, treatment of the TNCs by the host countries etc, in other words, issues which constitute the core of TNC operations in developing countries.

In view of the fact that however transnational their operations may be, the TNCs operate within the borders of specific countries with individual legal systems which are theoretically able to prescribe and enforce standards of behavior for all business enterprises within their territories, the chapter of the Code on Activities and conduct of transnational corporations offers special interest in the light of private international law. The basic principle underlying this chapter-that of *national sovereignty* with regard to the prescription of laws and policies on foreign investments is now generally accepted and is, in fact, re-stated positively in paragraph 47 of the Draft Code in the part dealing with the treatment of TNCs. This principle is stated implicitly in this part of the Code, particularly in para. 7, which reads :

> "An entity of transnational corporation is subject to the laws, regulations and established administrative practices of the country in which it operates."

Agreement on this basic principle, as a matter of fact, simplified to a great extent the elimination of differences in opinion on the *review and renegotiation of contracts.* It is now stated in para. 11 of the Draft that contracts between Governments and TNCs should be negotiated and implemented in good faith. The provision goes on to state further that such contracts, especially long-term ones, should normally inculde renegotiation clauses. In the absence of such clauses, however, where there has been a fundamental change in the circumstances on which such a contract or agreement was based, TNCs are urged to co-operate, in good faith, with Governments in the review and renegotiation of such contracts.

Of pertinent interest is the section containing standards relating to the economic, financial and social aspects of the activities of

TNCs. The provisions on *ownership and control* (paras. 21-25) are designed to strike a balance between the competing interests of the TNCs and the host country, by requiring the parent entity to give its affiliates sufficient autonomy to enable them to pay due attention to the development needs of the host country.

The basic provisions on *balance of payments and financing* require TNCs to carry out their operations in conformity with the relevant laws, regulations and policy objectives of their host countries, particularly developing countries, and to respond positively to requests for consultations on their activities "with a view to contributing to the alleviation of problems of balance of payments and finance of such countries". (para. 27).

The general thrust of the provision on *transfer pricing*, which is yet to be negotiated, calls for the avoidance of pricing policies that are not based on market prices or on the arm's length principle, in transactions between entities of TNCs. This is in order to prevent the evasion of taxes or exchange control measures of Governments of host countries, through transfer of funds across national boundaries that are disguised as payment for goods and services, but they may not be an accurate reflection of the actual price of such goods or services. That objective is reflected in para. 34 on *taxation*.

The proviston on *restrictive business practices* (para. 35) embodies principles and rules designed to minimize the use of practices that limit competition in national and international markets, and to facilitate the effective regulation or control of such practices by Governments of host countries. This provision has incorporated the UNCTAD Code on Restrictive Business Practices to bring it under the umbrella of the Code of conduct.

In tune with para. 36, TNCs have been bestowed with the responsibility of *transfer of proper technology* to the host countries to accelerate the economic and social development of the latter. The same objectives underline the provisions on *consumer protection* (paras. 37-40) and *environmental protection* (paras. 41-43).

It is true that in the light of the sharp differences between representative governments it is difficult to predict the final provision. For these reasons, an evaluation or critique of the draft code would be

futile. Nevertheless, formulation of uniform attitude of developing countries on these questions would greatly facilitate the process of introducing necessary changes in the provisions and thereby ensure smooth functioning of the code in the future. In consideration of this fact, we will now concentrate on some of the important provisions of the code which call for drastic changes to safeguard the interests of host developing countries. The backdrop for this analysis is the dire necessity of legal regulation of TNCs by the host countries.

4. Main Areas of Difference

A. *Nationalization and Compensation*:

The question of nationalization and compensation is probably the most controversial part of the code. The host states' attachment to the principle of permanent sovereignty over natural resources stands in sharp conflict with the reluctance and even the refusal of TNCs to accept controls by host states over corporate operations. In fact, developing countries generally regard nationalization as a legitimate means of recovering natural resources, transferring ownership of foreign-owned property and redistributing the world wealth.

Although international law recognizes the right of expropriation, traditionalists such as the western capital exporting nations try to limit severely that power. Under the prevailing western view, for example, expropriation is proper under international law only if consummated for a public purpose,[20] nondiscriminatory with respect to aliens, and accompanied by just compensation.[21]

In direct contradiction to the traditionalist stance, the developing countries, supported by the socialist states, assert that national law of the expropriating state determines the conditions relative to nationalization and that only municipal courts have jurisdiction to adjudicate any related claim. Invoking the concept of equal treatment, these states maintain that no alien is entitled to better treatment than a national of a host state and that any preferential

20. The requirement of "public purpose" was first recognized by the Permanent Court of International Justice in 1926 in *German Interests in Polish Upper Silesia (Germany V. Poland)*, 1926 P.C.I.J (Ser. A) No. 7, pp. 21-22.

21. Under this view just compensation is defined as "prompt, adequate, and effective" compensation.

treatment under the rubric of minimum standards of international justice amounts to assigning aliens to a special regime in the state.[22]

The draft code follows a compromise formula keeping aside those fundamental issues in which position of states sharply differs.[23] This problem is not also uniformly resolved in international practice (international law) till today, and lawyers are justified in their doubt that uniform decision on this issue can at all be achieved within the scope of the code.[24]

B. *General treatment of TNCs by host states* :

The problem of general treatment of TNCs by host states has been another point of controversy. Seven articles in the Draft deal with this question but on only one of them (para. 47) consensus could be achieved. Thus, it is now generally accepted that "states have the right to regulate the entry and establishment of transnational corporations including determining the role that such corporations may play in economic and social development and prohibiting or limiting the extent of their presence in specific sectors."[25] But difference of opinion exists as to the concrete standard of treatment of TNCs by the host states. Western states demand "fair, equitable and non-discriminatory treatment in accordance with international law (obligation)".[26] This, however, contradicts the very essence of para. 47 of the code on which consensus already exists. Moreover, nondiscrimination of TNCs by the developing states actually tantamounts to discrimination in favour of TNCs themselves. Such treatment also contradicts municipal laws of many host states which establish different levels of differentiation between alien and national enterprises.[27]

22. see. Dolzer. New Foundations of the Law of Expropriation of Alien Property.-*American Journal of International Law*, Vol. 75, 1981, p. 553.
23. Para. 54 of the Draft Code. E/C. 10/1982/6.
24. M. M. Rodriguez. The Negotiations on the United Nations' Code of Conduct on Transnational Corporations : Some Issues.-*The CTC Reporter*, No. 12, 1982, p. 9.
25. Para. 47 of the Draft Code. E/C. 10/1982/6.
26. Ibid, para. 48
27. M.M. Rodriguez. op. cit. p. 9

C. *Jurisdiction* :

Mutually opposing opinion is also prevalent on questions relating to how the disputes involving a TNC would be settled. In this context, the developing countries maintain that "entities of transnational corporations are subject to the jurisdiction of the countries in which they operate."[28] Possibility of recourse to arbitration or other means of settlement of disputes is also determined by domestic law of individual host states. In contradiction to this attitude, the developed countries of the west contend that "in contracts in which at least one party is an entity of a transnational corporation the parties should be free to choose the applicable law and the form for settlement of disputes, including arbitration....."[29]- It is not difficult to detect the inherent motive in such assertions which *stricto sensu* amounts to withdrawl of such disputes from the jurisdiction of developing host countries in favour of international arbitration or other means of settlement. Such an approach underestimates the role and authority of laws and organs of judiciary of developing countries, and hence has been aptly rejected by them. It is noteworthy that western states demand national treatment of TNCs by developing host countries, whereas for purposes of settlement of disputes reject application of domestic laws of the host states and bend toward international means. This fact alone is sufficient to prove the inconsistency in the western attitude.

The above mentioned differences between the developed and the developing countries bear principle character, and even if some broad compromise formula can be invented, it would render the code voluntary character, at least in the initial stage.[30] Voluntary character of the code, however, can not reduce its importance in its ultimate goal of regulation of TNCs.[31]

---

28. Para. 55 of the Draft Code. E/C. 10/1982/6. Alternative version of this paragraph also exists.

29. Ibid, para. 57.

30. P. Sanders. Implementing international codes of conduct for multinational enterprises.-*American Journal of Comparative Law*, Vol. 30, No. 2, 1982, p. 253.

31. See in detail : K. C. Stephan. Codes of Conduct for Multinational Corporations.-*Business Lawyer*, Vol. 33, No. 3, April, 1978.

5. Inherent weaknesses of the code :

The Draft code in its present form, in our opinion, contains some serious drawbacks, mere presence of which might belate its adoption and hinder its significance. Let us focus on some of them:

Firstly, a very special defect of the code is the part addressed to sovereign states, namely, treatment of TNCs by host states. The sole aim of the code should be restricted to regulation of the activities of TNCs. Whatever concerns individual states, it is well known that their rights and obligations in respect of foreign investment have been formulated in various resolutions of the United Nations.[32] In accordance with contemporary international practice, entry of foreign investment is preceded, as a general rule, by signing of two seperate documents: investment agreement, concluded between the foreign investor and the host state, and investment guarantee agreement, signed by the host state with the home state. Rights and obligations of host states vis-a-vis foreign investor are, as a matter of practice, formulated in this latter agreement.[33] The code, on its part, is supposed to create norms regulating the behavior solely of TNCs in general.

Application of the code both to sovereign states and TNCs might be interpreted as placing them on an equal footing which in turn raises questions concerning international legal subjectivity of TNCs, although the code itself avoids answering this problem.

Secondly, development of international economic relations show that regulation of TNCs by the host states serves the process of realization of full and permanent sovereignty of the developing countries over their natural resources. Regulatory powers of a state include measures like nationalization, and the lawfulness of such steps, the amount and type of compensation etc. are determined in accordance with municipal laws of the concerned host state. This is now recognized to constitute a principle *jus cogens* of international law. By undermining the right of developing host states to nationalize the property of TNCs, the code, as a matter of fact,

32. see for example General Assembly Resolutions 1314 (XIII), 12 December, 1958, 1515 (XV), 15 December 1960, 1803 ((XVII), 14 December 1962.

33. I. Delupis·Finance and Protection of investments in developing countries. London, 1973, pp. 35-36.

questions the validity of these generally accepted principles of international law and thereby adversely affecting the process of unification of investment laws of different states which constitutes one of the fundamental aims of the code.

Thirdly, the question of jurisdiction of host governments in respect of resolution of disputes in which TNC is a party is not satisfactorily decided in the code. The fact that national law of the host state determines the legal status of TNCs is the condition *sine qua non* for the very entry of TNCs into that state. Possibility of recourse to international means of settlement of disputes also depends on the municipal law of the host state since application of *lex voluntatis* is dependent on whether it is permissible under the national law of of the host state. There is also no general rule in international law requiring parties to address to international means of settlement of disputes without first taking shelter of the local means. On the contrary, resort to international means is permitted only after the local means offered by the host state law have been exhausted.[34] But here we might come across a problem of a different category: the TNC has the right and is obliged to resort to local means, which, say for example, do not bring the TNC expected results, e.g the amount of compensation determined by the local court and payable to the TNC is unacceptable to the latter. Can the TNC in such cases look for international means? Aswer to this question can only be negative because in the contrary situation it would tantamount to disrespect and distrust to national courts. It needs not to be stressed that "recognition of developing states as sovereign entities necesserily signifies trust to their legislation and administration of justice."[35]

This now constitutes the generally accepted position of the international community. The developing host states may, however, offer particular concessions by dividing the transactions of a TNC into two categories: national and a-national or international transactions. The effect of national transactions is restricted within the

34. Robert B. Von Mehren & Martin E. Gold. Multinational Corporations : Conflicts and controls.- *Stranford Journal of International Studies*, Vol. 11, 1976, p. 9.

35. P.J.I.M. de Waart. Permanent sovereignty over natural resources as a cornerstone for international economic rights and duties.- *Netherlands International Law Review*, Vol. XXIV, sp-issue, 1/2, 1977, p. 319.

national market and hence do not influence foreign trade or the balance of payment of the host state. The picture is totally different in case of a-national transactions, and *lex valuntatis* can well be applied to determine their proper law.[36] But again, which transactions constitute a-national or international has to be defined in accordance with the host state law.

Fourthly, one of the significant loopholes of the draft code is the absence of provisions establishing obligation of home states (whose nationality a particular TNC possesses) in relation to their TNCs. The code, on the one hand, declares that bilateral agreement between the host state and the home state is one of the ways of achieving the goals of the code, but, on the other hand, absence of provisions concerning home state obligations to a great extent reduces the practical value of the code. This fact has negative impact on the legal nature of the code. The developing countries would like the code to be obligatory in nature, if firstly, it would deal solely with regulation of TNCs, and/or secondly, obligation of the host states would be accompanied by corresponding obligations of the home governments. Under the present circumstances, when the code establishes unilateral obligations of the host states at par with with TNCs. attitude of the developing countries to make the code legally binding cannot remain unaffected and unchanged, not to speak of the code to be "effective, comprehensive, generally accepted and universally adopted."[37]

It seems that the process of formulation of the code followed a wrong path. For more effective regulation of TNCs and meaningfull implementation of the code, provisions concerning host state obligations *vis-a-vis* TNCs should be deleted. By doing so, the code would correspond to the original goals of the code. This would, moreover, underline the subordinate character of TNCs in relation to sovereign states. This of course does not mean that states, both

36. This is the recent practice of some national legal systems. For example, the French Decree of 1981 on International Commercial Arbitration introduces the concept of "truely international contracts". Some lawyers opine that only the so called "technical disputes" could be exempted from the national jurisdiction of the host state. See : Joya Govind. An international legal regime for transnational corporate investment.- *International Studies*, Vol. 19, No. 2, New Delhi, 1980, p. 153.

37. ECOSOC. Res. 1980/60, para. 6 (a).

the host and the home, do not possess certain rights and obligations in relation to TNCs. This type of relations, however, could be formulated and regulated by concluding another international legal document concerning TNCs or foreign private investment in general. This document in turn could serve as the basis of possible bilateral agreements (e.g Investment Guarantee Agreement) between the host and the home state, and also of regional agreements. Only thus, in our opinion, uniformity of measures for regulation of TNCs could be attained.[38]

The idea of such type of international agreements is not new in legal literature. Some specialists opine that such an agreement may be signed in the form of General Agreement on International Corporations-GAIC, like GATT in the sphere of international trade.[39] But of late, the initiators have stepped back from their initial proposition, and international practice developed in the direction of formulation of codes of conduct. However, the UN Code of Conduct on TNCs in its present form contains, as we have discussed above, a number of serious defects which must be removed in order to enable the code to effectively regulate the TNCs.

In our opinion, normative regulation of TNCs should be accompanied by institutional regulation. One UN research accorded the UN Centre on TNCs the role of institutional mechanism.[40] Some theoreticians advocate for establishment of Special International Organ for regulation of TNCs,[41] while others consider this view to be unrealistic.[42] It appears that this problem has been quite satisfactorily decided in the code. It is stipulated that "The United Nations Commission on transnational corporations shall

38. C. Robert O. Kohane et al. The Multinational firm and International Regulation.- *International Organizations*, Vol. 29, No. 1, 1985, p. 1960.
39. P. Goldberg & Ch. Kindleberg. Toward a GATT for Investment : A proposal for supervision of the International Corporation.-*Law and Policy in International Business*, No. 2, 1970, pp. 295-323.
40. U.N. Multinational Corporations in World Development. New York, 1973, p. 93.
41. G. Ball. Cosmocorp : The importance of being stateless.- *Columbia Journal of World Business*, Nov-Dec, 1977, pp. 29-30.
42. G. Ball (ed). The Global Companies. The Political economy of World Business. Englewood, 1975, p. 160.

assume the functions of the international institutional machinery for the implementation of the code..."[43]

6. Conclusion

The prolonged process of formulation of the code testifies to the fact that interests of different groups of states are not only divergent, but also often opposing. Even one and the same principle of law is understood and consequently implemented differently in different legal systems.[44] This accounts for significant difficulty in regulating the TNCs on international level under the aegis of the UN. The draft code in its present form is not only unacceptable to developing countries, but is also without any real perspective. Adoption of the code in its present form, it is concluded, would create additional threat to economic and polittical interests of the developing host countries. For better protection of interests of the developing host countries, it would be expedient to formulate two seperate documents concerning regulation of TNCs: firstly, Code of Conduct establishing legal regime of TNCs in host states, and secondly, Investment Guarantee Agreement establishing rights and obligations of both the host and the home states in relation to TNCs. These two documents taken together could form the basis of a "qualititavely new *lex mercatoria* based on universal consensus".[45] In this case, the principles formulated in the code although voluntary in character, would subsequently attain their legal *status nascendi*.[46]

In accordance with the foregoing analysis, it is submitted that a hierarchy of legal sources regulating TNCs should be constituted which would definitely contribute to the establishment of a uniform regulatory regime. Apparently, the structure of the sources of law regulating TNCs should be constituted on two levels-national and international, wherein they are mutually related not vertically but

43. para. 67 of the Draft Code. op. cit.
44. J.N. Behrman. Conflicting constraints on the Multinational Enterprise. Potentials for resolution. New York, 1974, p. 77.
45. N. Horn, Legal problems of Codes of Conduct for Multinational Enterprises. Kluwer, 1980, p.81.
46. see. W. Wellens. Recent development toward a United Nations Code of Conduct for Transnational Corporations.- *Studia Diplomatica*, Vol. XXXIV, No. 6, Bruxeles, 1981, p. 708.

horizontally. The national level represents the actual regime, whereas the international level is complementary and perspective in the sense that it would help in the long run to unify the national laws in this aspect. Consequently, the structure of the sources of law regulating TNCs may be viewed as follows:

A. National regulation, consisting of
   i. legislation of host countries, and
   ii. legislation of home states.

B. International regulation, mainly for the purpose of
   i. unification of laws concerning TNCs, which might take place in the following main forms:
   a. international treaties (multilateral),
   b. resolution of international organizations,
   c. joint declarations of states adopted in international conferences which are not internalional treaties, etc.

Intermediate place in this structure would be occupied by bilateral agreements signed between host and home states, e.g Investment Guarantee Agreements.

It should also be remembered that regulation of TNCs should proceed in two directions simultaneously-normative and institutional. If the normative direction means creation of norms of behavior which the TNCs are obliged to obey, institutional direction signifies the establishment of certain institutions dealing mainly with questios of violation of law and liability of TNCs, resolution of disputes and conflict situations between host states and TNCs, etc.

It needs mentioning that within this structure international regulation operates on the basis of general norms expressing fundamental principles of functioning of TNCs, whereas national regulation gives concrete expression to these principles i.e it proceeds from individual incidents. This signifies that national regulation realizes the main techno-juridical, controlling function in relation to TNCs. This structure also corresponds to and is consistent with the correlation of international law and municipal law.

Controversy over the Code of Conduct's form and its substantive provisions continues to inhibit the formulation of a final product, despite over a decade of time and energy expended by the Working

Group and other bodies within the United Nations system. The world community has expressed great interest in a code of conduct for TNCs, particularly the developing countries which seek an equilibrium between the promises and the realities of foreign investment on the one hand and a new, just, and non-exploitive economic order on the other. But if the inherent weaknesses of the code, as has been detected in this article, are not set aside, the code will remain a paper-tiger and the expectation of the developing countries of a new international economic order would continue to remain a far cry.