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THE IMPACT OF 'THE NEW FORMS OF INVESTMENT'
ON THE 'CODES OF CONDUCT'

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ABSTRACT

This paper charts the recent developments in non-equity investment by industrial nations in the developing Third World. Secondly, it gauges the impact of this "new" investment on the "codes of conduct for multinational enterprises," as presently formulated by the Andean Group, the Organization for Economic Co-operation and Development (OECD), the European Economic Community (EEC), and the United Nations (principally, the International Labor Organization and the Economic and Social Council of the UN). And lastly, it assesses the effect these investments will have on the definition of the multinational corporation, the issues of 'ownership versus control' within these collaborative arrangements, and the transfer of technology by the multinational enterprises (MNEs) to the developing countries.

THE NEW FORMS OF INVESTMENT: AN INTRODUCTION

The term "new forms of investment" has been used by Charles Oman of the OECD Development Centre to describe investments "in which the foreign investor does not hold a controlling interest in terms of equity participation, i.e., in purely ownership terms;" more specifically, these forms of investment are: 1) joint international business ventures in which foreign-held equity is no more than fifty percent, and 2) various international contractual arrangements which may involve at least an element of investment from the foreign firm's point of view." [1]

Continuing with Oman's taxonomy of the new forms of investment, we may identify the following types of investment as "new forms:" [2] joint ventures in which the host partner(s) in the developing country holds at least fifty percent of the equity in the project; licensing contracts, in which a (foreign) licensor provides the licensee (local firm) with access to a particular technology or set of technologies or "knowhow;" these include contracts for the training of local personnel or the supply of technical assistance; franchising, which may be regarded as a particular type of licensing or technical assistance agreement, in which the franchisor often provides the locally owned franchisee with a "package" of trademarks, knowhow, local exclusivity, and management assistance, in return for a down payment fee, royalties, and compliance with certain corporate regulations; management contracts in which the foreign company manages a project or enterprise in the developing country; turnkey operations under which the foreign firm is responsible for setting up a complete production unit or infrastructure project in the host country; product-in-hand contracts as turnkey operations in which the (foreign) supplier's responsibilities are fulfilled when the turnkey installation is completely operational with local personnel; production-sharing agreements which call for the foreign company to undertake exploration in specified areas for mineral or petroleum deposits, to undertake production in conjunction with the host country's state company for a specified period of time in return for a pre-determined share of the physical output following cost re-

1 Oman, C., New Forms of International Investment in Developing Countries (Paris: OECD Development Centre, forthcoming, Chapter 1, p. 3); See also, Chudson, W.A., "The Acquisition of Technology from Multinational Corporations by Developing Countries," UNITAR, 1974; and OECD, Recent Investments and Multinational Enterprises, 1981.

2 Oman, C., Op. Cit., Chapter 1, pp. 5-9.

covery by the foreign firm; risk service contracts which may be distinguished from production-sharing contracts because the foreign company's share of output is paid in cash rather than physical production; international subcontracting which normally involves a "principal" based in an industrialized country who places orders with a sub-contractor in a developing country to produce components or assemble finished products with inputs provided by the principal.

The crucial distinction between a "sale" and an "investment" from the viewpoint of the foreign investing firm concerns whether the firm's profit is at least in part derived from the output of the investment project [1]. In other words, whereas an investment implies that the foreign firm gains some degree of access to and control over the value created by the investment project in the host country, such is not the case with a sale. Oman further notes that the difference between a new form of investment and foreign direct investment. Whereas the former implies whole or majority local ownership of the investment operation in the host country (though not necessarily over the invested resources), the latter implies whole or majority foreign ownership of the investment project [2].

In his discussion of the "new forms" Oman is careful to assess the impact of non-equity investment within the overall framework of direct/indirect investment; specifically, his comments on the "new forms" are juxtaposed with current developments in foreign direct investment (FDI) in mind, particularly scholars who might consider FDI obsolescent.

Possibly the most important argument advanced by the obsolescence of FDI school is that the rapid growth of international non-concessional lending indicates a rapid growth of new forms of investment in developing countries, and more radically suggests that traditional FDI is being replaced or superceded by the new forms of investment [3]. Oman finds the data base on which such contentions are made highly insufficient, however, as in the preceding arguments he attempts to evaluate this contention strictly on the basis of available statistics. Accordingly, he distinguishes three broad categories of uses of developing countries' borrowings, the first two of which are not new forms of investment. The first category highlighted are those borrowings used to finance both current expenditures of all types, and those used to increase the borrower's reserves of foreign exchange [4]. Included in this category are loans issued as balance-of-payments financing to cover current-accounts deficits due, as well as those loans made to large local firms, which are unable to borrow further on local capital markets, and so turn to international financing institutions to procure money to cover current

1 Oman, Op. Cit., C. 1, p. 17.

2 Ibid., C. 1, pp. 19-20.

3 The first argument of the "obsolescence of FDI" advocates is the data on trends in the average annual flow of FDI from the DAC countries which are cited as showing that whereas during the 1960s the flow was increasing in real terms, during the 1970s, the trend became one of stagnation and even decline in real terms. The second argument concerns data on trends in the share of locally reinvested earnings in FDI which show this share to be higher in developed countries than the average for developing countries which are cited as indicating the stagnation of FDI in the latter group (Ibid., C. 2, p. 2).

4 Ibid., C. 2, p. 9.

costs due such as wages. A second category of international loans to developing countries are those which appear as "portfolio" investment; in other words borrowing undertaken by foreign-owned subsidiaries where the lender is neither the parent company nor an affiliate of the parent. A final category includes those international bank loans to developing countries used to finance all types of investment activities undertaken by wholly- or majority-owned (private or public) enterprises. In way of summarizing Oman's discussion of these developing country borrowings, it might be noted that he feels that the rapid growth of loans to developing countries are probably as much, if not more a reflection of borrowings which correspond to the first two categories of direct investments, as they are of those undertaken in conjunction with new forms of investment.

While the phenomenal growth of bank lending to developing countries over the last decade does not sustain the obsolescence hypothesis, it cannot similarly support the contention that the new forms are not superceding FDI in the North-South context. For example, this rapid growth of bank lending has been concentrated in many of the more industrialized developing countries, who "now faced with heavy debt-servicing obligations (a problem exacerbated by the rise in real interest rates in recent years), the only alternative to policies of acute austerity in the 1980s, policies which may be politically untenable if not economically unnecessary, are strategies of promoting industrial growth which will in turn sustain both manufactured exports, vital for debt servicing, and domestic accumulation and consumption levels," [1]. Consequently, these heavy borrowers are likely to demonstrate increasing interest in expanding manufactured exports, as well as renewed emphasis on import-substituting industrial growth in terms of capital inputs, rather than on final products as was the case of "classic" import substitution of the 1950s and 1960s. It may be argued that these developing countries, in an effort to minimize the foreign-exchange costs of investment will revert to a greater reliance on traditional FDI as the more cost-effective means of obtaining investment resources from abroad. This "cost-effectiveness" can be defined narrowly to suggest that the foreign exchange outflow from the host economy is more likely to fluctuate in accordance with local conditions than loans in which the interest and principal payments are more rigidly stipulated, [2]. Cost-effectiveness may also be defined more broadly in terms of the monopolistic or oligopolistic advantages of foreign direct investments and the foreign-exchange costs which these may entail for the host economy, [3]. While international financial institutions may resist protectionist pressures because of the importance of exports of manufactured goods in sustaining the debt-servicing payments of bank loans by these developing countries these developing countries may resist financing further development via increased indebtedness because of the rapid increase in real interest rates from the mid-1970s to the end of the decade. Moreover, the prevalent belief among several developing countries that the monopoly rents appropriated by the foreign investor under FDI could be eliminated and/or appropriated by local groups under the new forms of investment was tempered by the quasi-monopolistic powers of the international banking community and the IMF via more stringent lending prac-

1 Oman, C. Op. cit., C.2, p. 14.

2 Ibid., C. 2, pp. 14-15.

3 Ibid., C. 2, p. 17; See also, Frieden, J. "Third World indebted industrialization: international finance and state capitalism in Mexico, Brazil, Algeria and South Korea," Industrial Organization, Summer 1981.

tices, and the greater risks in loan default due to the spread of inter-bank linkages.

A second explanation of the increase in North-South financial flows may be found in the evolution of a new international division of risks and responsibilities among international firms, international lenders, and host-country elites, including the state and public and private businesses and financial institutions. While the "indebted industrialization" model outlined above accents the role of the multinational firm in terms of financing alone, the new division of risks and responsibilities reinforces the tendency for host countries to "unbundle" the traditional FDI "package" of financial capital, disembodied and embodies technology, management and, where relevant, market access, possibly casting the multinational firms into roles as intermediaries for the input (technology and management) and output (international market) elements of the production process in developing countries, [1].

CODES OF CONDUCT: AN INTRODUCTION

In basic terms, the "codes of conduct" represent for the developing countries, a "key factor in a new and 'fairer' world economic order," while to the unions "it is a way of extending to international level what has been attained nationally in the way of labour relations, as it will prevent the single management of a multinational corporation from 'playing off' workers in one country against workers in another country to the detriment of their common interests," [2]. But, of course this synopsis very much oversimplifies subtle differences of opinion among these interest groups, and avoids completely, the principal debate between the industrialized and the industrializing countries.

The intricacies of the legal, political, and economic issues underlying the "codes" will be elaborated below on a case by case basis, beginning with the EEC Draft Code of Principles for Multinational Enterprises and Governments drawn up by the European Parliament, and approved with revisions by the European Commission. The codes which will follow in this analytical review include: the OECD Guidelines for Multinational Enterprises and Labour Relations, the Andean Pact Codes for Foreign Investment, and the United Nations promulgations, issued by the UN General Assembly (the International Code), the ILO (Tripartite Principles), and UNCTAD (both the codes on Restrictive Business Practices and the Transfer of Technology). This list is by no means comprehensive, but is instead intended to be representative of control efforts by both developing and developed countries (as in the UN and OECD codes) and hopefully present a somewhat balanced approach to regional perspectives (as in the EEC and Andean Pact codes).

The EEC Directive

The European Draft Code evolved out of persistent concern by the European Community about the multinational corporation, and its manifestations and implications both within and beyond the European Community. These concerns were first voiced in 1973 during an October symposium organized in Washington, D.C. (USA) between the members

1 Oman, C., Op. cit., C. 2, pp.21-22.

2 Germidis, D., and Schwamm, H., Codes of Conduct Conduct for Multinational Companies: Issues and Positions (Brussels: European Centre for Study and Information on Multinational Corporations, 1977), p. 2.

of the American Congress and members of the European Parliament. This initial concern, couched primarily in terms of distorted prices, damaged competition, and lost quality, was followed by a resolution of February 7, 1974 on competition policy.

The Caborn Report of November 1981 addresses similar concerns about the activities of multinational enterprises in the European Community (OJC 287). The limited interest shown by relevant institutions, and negligible action taken or sanctioned by the Council of Ministers in this regard, however, has led to the formulation of a Draft Directive on "procedures for informing and consulting the employees of undertakings with complex structures, in particular transnational undertakings," [1].

According to Working Document 1324/82/A of the European Parliament, the President of the Council of the European Communities requested by letter of November 4, 1980 that the European Parliament deliver an opinion on the proposal for a directive. On November 17, 1980, the President of the Parliament referred the proposal to the Committee on Social Affairs and Employment and to the Legal Affairs Committee and to the Committee on Economic and Monetary Affairs for their respective opinions. On January 27, 1981, the Committee on Social Affairs and Employment appointed Mr. Spencer rapporteur, sanctioned a visit by Mr. Spencer to the OECD in Paris and the ILO in Geneva to discuss the EEC proposal, and reconvened on September 21, 1981 to discuss a working document prepared by the rapporteur.

The Committee examined the Commission's proposal and the draft report at its meetings on December 4, 1981, January 27, 1982, February 25, 1982 and March 17, 1982. Finally on April 1, 1982, the Committee on Social Affairs and Employment decided by 18 votes to 6 to recommend Parliament to approve the Commission's proposals with some amendments.

On November 17, 1982, the Social Affairs Commissioner Ivor Richards presented a statement to the European Parliament on the considered EC Commission view of the amendments to the Vredeling Proposal approved by the Parliament on October 12, 1982. The Parliament has now voted on this amended version at the December 1982 session, and now Dr. Richards is at work revising the text of the Directive.

Dr. Richards' present statement notes the Commission's opposition to the Parliament's proposal in 5(2)(I) to limit information to the type required under the 7th Directive. The reasons for this reluctance to accept the proposal may be enumerated as follows: first, "the financial nature of information in the consolidated account is not parallel or relevant to social and employment information;" second, this information is "historical rather than 'prospective,'" and lastly, this information "would already be publicly available under the terms of the Directive," [2]. In sum, Dr. Richards felt that the Parliament's suggestion on this Article, and Section would "remove virtually all meaning from the text on information."

On the extremely sensitive issue of confidential or secret information (that is, information which should not be requested from multinationals in light of corporate competitiveness), Dr. Richards ex-

1 European Parliament Working Document 1324/82/B.

2 Commission of the European Communities, COM(82) 758 final, Brussels, 17th November 1982 (Mr. Richard's Statement to the European Parliament, 17 November 1982, Employee Information and Consultation Procedures).

pressed the Commission's feeling that the obligations imposed on workers' representatives in handling this "sensitive" information (Article 15) were insufficient. On the issue of definition, the report comments that "the problem is that the Parliament's text does not give any criterion for judging whether or not a certain piece of information either a business or company secret, or indeed an "industrial or trade secret," [Article 5(3)]. This difficulty is (Richards notes) that the Directive could be fatally weakened if the Decision was left entirely to management with no means of establishing a consensus on what the phrases mean. For this reason, the Commission proposes that the revised directive should specifically permit management to omit from its coverage, in terms of both Articles 5 and 6, 'any information whose disclosure would substantially harm the company's prospects or substantially damage its interests.'

In terms of the second provision on procedure, Dr. Richards reaffirms the Commission's view that management cannot be the only judge of the confidentiality of information; the tribunal procedure provided in Article 15(2) should be retained. The tribunal would serve to review disputed cases, and establish a body of relevant case law--both developments, which in the Commission's opinion, would clarify more authoritatively the distinction between "disclosure" and "confidentiality," [1].

As might be imagined, the European and Business community have reacted strongly to the EEC Directive, not wholly in opposition to the text, but certainly out of an awareness of the potential impact such legislation might have on their activities in and outside of the Western European community.

One of the most vocal proponents of the business community position has been the United Industries of the European Community (UNICE). In the early stages of negotiating the proposal, the U.S. Chamber of Commerce and the U.S. Council followed the lead set by UNICE on the Directive. Although, more recently (since June 1982), these groups have expressed some concern over the rigid stance adopted by UNICE on negotiating the Directive, and have sought, to avoid the active lobbying position utilized by UNICE.

The Council of American Chambers of Commerce-Europe and Mediterranean (EUROMED), has issued a much more lengthy decree on May 18, 1981. This "Memorandum," on a "Proposal for a Council Directive on Procedures for Informing and Consulting the Employees of Undertakings with Complex Structures, In Particular Transnational Undertakings," has formed the basis for a constructive text on the Directive in which the Commission text is compared with an Alternative text, dated Summer 1982. An Ad-Hoc Coordinating U.S. Industry Group is responsible for this second formulation, which was carefully and very quietly negotiated to avoid both public reprisals, and direct pressure on members of the European Parliament (both ramifications of UNICE's earlier attempts to influence policy considerations of the European Parliament on the Directive).

While at present, little documentation exists to illuminate the split between UNICE and the EUROMED Council in their respective approaches to the EC Directive, the two organizations may be differentiated more as a result of their strategy of opposition than in terms of the rationale or ideology underlying these approaches.

In his "Briefing Paper," Wolf Brueckman notes that from 1981 on,

1 The "by-pass" provision [Article 5(4)], as a means of redress was fully endorsed by the Commission, as was the right of member states to adopt direct election and the secret ballot in selecting employee representatives.

UNICE adopted a position of total opposition to the Vredeling Proposal," and pursued efforts to "informally lobby members of the European Parliament," [1]. In this task, UNICE has been assisted by its constituent industry federations.

The EUROMED approach, however, may be characterized by a quiet diplomacy, in which the ad hoc coordinating group considers future action by the American business community on the basis of the most stringent measures available to ensure this failure of the Proposal; and in the event that the Directive passes, would consider adoption of measures in the Proposal which would be most amenable to the business community. In the absence of any available documentation of the ad hoc group's activities following Brueckmann's report of June 1982, it is possible to surmise that EUROMED activity has centered on means of encouraging compromise on the pending legislation (via lobbying, or more probably, inter-governmental dialogue), and secondly, as a matter of recourse, to ways in which the business community might be warmed to the idea of a Directive, and formulating methods of educating respective member companies on the specific provisions of the codes.

Representing European trade union interests, the European Trade Union Confederation (ETUC) has published a document in 1980 entitled, "Information on and evaluation of the Proposal of the EC Commission for a 'Directive on procedures for informing and consulting the employees of undertakings with a complex structure, in particular transnational firms," and it is this document which most accurately, and most recently depicts the issue positions of the membership of the ETUC.

The first suggestion the report makes is that the information requested should relate to both the dominant undertaking and all of its individual subsidiaries. It is interesting to note, that neither the report nor the Directive itself mentions the manner in which these qualitative criteria might be determined; specifically, how these criteria might be measured (for example, how do either trade union organizations or the EC Commission plan to insure the reliability of corporate data, until decisions of employee interest have already been made?). The final issue on the disclosure of information is the ETUC proposition that "the workers must be granted a general right to ask questions which also includes direct applications of the workforce representation body at the level of the multinational decision-making centre," [2]. It seems the ETUC is concerned principally with the stated right of the employees to be directly involved in the negotiating process, and thereby guarantee a direct expression of their interests as might be affected by management decisions (or possibly misconstrued or misrepresented by employees' representatives).

On the "Body representing workforce interests," the ETUC feels that the present formulation of this provision in Articles 7(3) and 13(3) are

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- 1 Brueckmann, W., "Briefing Paper on the Vredeling Proposal," (U.S. Chamber of Commerce, International Division, June 1982).
 - 2 ETUC, "Information on and Evaluation of the Proposal of the EC Commission for a "Directive on Procedures for Informing and Consulting the employees of undertakings with a complex structure, in particular transnational firms," as documented in Hellmann, M.F., "The Positions of the European Trade Union Confederation (ETUC) and of the European Community (EC) with Regard to Multinational Groups of Companies (Brussels: ETUC, March 1981).

too indefinite, [1]. The ETUC interprets this provision as a non-binding element which contradicts the legally binding nature of the Directive. It recommends that the original form of the proposal, requiring such a body, be reinserted into the text. The sole requisite for the establishment of a body is "if the workforce representatives of the majority of the subsidiaries request (such a consultation)," [2].

Regarding the "application" of the Directive (Articles 4, 6, 8, 9, 10, 12, 14), the ETUC believes that the "provisions stipulating that the obligation to provide information and hold consultations also apply to groups of companies whose decision-making centre is located outside the EC...must also always make provision for a legally responsibly person in the Community," [3]. The ETUC notes that the provision for penalties by member states [Articles 5(5), 6(6), 11(5), and 12(6)] allows some flexibility for issuing their own "appropriate penalties," and that such flexibility of interpretation must not "soften" the regulations. The report, however, makes no suggestions about how these regulations, as interpreted by various member states, might be satisfactorily maintained, nor how they might be harmonized as to facilitate even and equitable application.

The Andean Investment Decision

In order to highlight attempts at regional control by developing countries, the Andean Group's "Common System for Treatment of Foreign Capital and on Trademarks, Patents, Licenses and Royalties," (Decision 24) will be examined in terms of its political and economic impact.

In L.K. Mytelka's review of Decision 24, she examines two broad sets of measures which the decree incorporates: first, those governing direct foreign investment; and second, those regulating the transfer of technology. Included in the first group are provisions [4]: which authorize the establishment of national agencies to register and review all direct foreign investment contracts (Articles 5,6); prohibit all new foreign direct investments utilities, insurance, commercial banking and finance, transport, advertising and communications sectors (Articles 41-44); limit the repatriation of profits to 14 percent of registered capital per year (Article 37); oblige all presently established wholly- or majority-owned firms, who might want to secure the benefits of the Cartagena Agreement tariff liberalization in intraregional trade (Articles 27-29), as well as all new foreign firms to divest over a period of 15 years in Colombia, Chile, and Peru, and 20 years in Bolivia and Ecuador (Article 30); limit the access of foreign firms to local credit by prohibiting the receipt of local funds by foreign firms within 3 years of the date of implementation of the System with the sole exception provided to firms who convert to domestic companies via sales of 80 percent of the corporate capital to Andean Group citizens (Article 17); prohibit reinvestment by foreign firms of more than 5 percent of

1 The operative text of the Article reads that such a "body... may be created by means of agreements to be concluded between the management of the dominant undertaking and the employees' representatives, unless provision is made for it by national law."

2 ETUC, *Op. cit.*, p. 24.

3 *Ibid.*, p. 24.

4 Mytelka, L.K., "Regulating Direct Foreign Investment and Technology Transfer in the Andean Group," Journal of Peace Research, No. 2, Vol. XIV, 1977, pp. 155-184).

profits annually without prior review and approval (Article 13); and lastly, bind the members to create a network for the exchange of information relevant to direct foreign investment and technology transfer, including pricing of intermediary products (Articles 6, 48).

Transfer of technology is addressed by Decision 24 in provisions: which establish national agencies for the registration and review of technology transfer contracts (Articles 18); require the identification of the value of each element in the technology package to be imported (Article 19); prohibit restrictive clauses formerly incorporated in technology contracts (Articles 20-25); and provide for the development of a program to promote the generation of appropriate technology in the subregion (Article 23).

The main long-term objectives of the Decision were [1]: to accelerate the industrialization process in the area as a whole; to encourage equitable participation by all Andean Group members in this process; and reduce the subregion's political and economic dependence on industrial centers in the North. It was not intended to impede the flow of direct foreign investment or technology to the region, but instead to regulate it, [2]. It was also designed to strengthen the bargaining position of national firms vis-a-vis their foreign licensors and partners, [3]. As repositories of crucial information on both foreign financing and technology transfer, national governments would be in a better position to grasp conditional agreements and reduce royalty payments and eliminate restrictive contractual clauses via renegotiation. The Decision would also serve to institutionalize procedures for divestment and FDI registration. Unpackaging of technology contracts as encouraged by Decision 24 was meant to reduce the costs of this transfer while enhancing the learning benefits of formulating and implementing contractual terms.

The nascent Decision was less a comprehensive mechanism for reducing domestic dependency on foreign firms than a means of regulating certain external linkages in the interests of "potential national bourgeoisie." The concept of a "potential national bourgeoisie" is propounded by Mytelka because she feels that only in Colombia is there some evidence of competition between local and foreign enterprises. Furthermore, Mytelka notes that "many of the problems encountered in the implementation of Decision 24 at the national level have been due to a lack of administrative preparedness in the member countries," [4].

Administrative complications of implementing Decision 24 were exacerbated by political tensions within member economies. As Francis Armstrong noted in his analysis of the Andean investment code, the Ecuadorean Chambers of Commerce and of Industry in Guayaquil and Quito lobbied against the Decision out of fear that it would obstruct badly needed FDI, [5]. In Colombia, organizations representing the commercial, industrial, and financial sectors petitioned the government not to ratify the Andean Code because of its potentially deleterious effects

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- 1 Wionczek, M.S., Commercio Exterior, June 1971, p. 28).
 - 2 Mytelka, 1977; Guerrero, 1972; Salgado, 1970; and Venezuela, 1975.
 - 3 Mytelka, 1977; Junta, 1970.
 - 4 Mytelka, L.K., Regional Development in a Global Economy: The Multinational Corporation, Technology, and Andean Integration (New Haven: Yale University Press, 1979), p. 64f.
 - 5 Armstrong, Frances, "Political Components and Practical Effects of the Andean Investment Code," Stanford Law Review, July 1975, pp. 1597-1628.

on FDI.

Foreign investors constituted a substantial pressure group on member states not to ratify Decision 24. Probably, the most overt pressure was applied by the Council of Americas--a New York based, private business group whose members controlled some 92 percent of private U.S. investment in Latin America in 1971, [1].

The Council drafted a critical document on the Common System which was sent to the presidents and ministers of the Andean countries, select members of the U.S. Congress and directors of international organizations. The Council document stated that Decision 24: would exacerbate present instability; would discriminate against foreign companies in technology transference operations with both their affiliates and local companies of the Andean Group countries and; would scare off potential investors wary of the relatively short investment period of 15 to 20 years.

Wionczek notes that not all U.S. response to the Decision has been negative. One case is the research of Guy B. Meeker of George Washington University, [2]. According to survey results compiled by Meeker, 90 of the 340 U.S. companies with subsidiary companies in Latin America participated. According to Meeker's study, 78 corporations (86.7 of the companies polled) indicated that participation in mixed companies comprised part of their general investment policy; 71.8 percent expressed willingness to accept minority participation in new companies; and 70 percent said that progressive disinvestment on behalf of local interests would be an acceptable formula, provided the divestment process permitted some participation by the foreign investor.

Francis Armstrong of Stanford University distinguishes the American response to the Decision from reaction by Japanese investors, among others. In the early 1960s, Japanese direct investment was quite small in the Andean countries. In 1972, however, the Peruvian Times (September 29) drew attention to some loans made by the Japanese to the Peruvian Government. Accenting Japanese preference for loans over equity capital, Armstrong recognizes the development of Japanese direct investment in Andean firms. This investment took the form of mixed enterprise (as encouraged and defined by Decision 24). Additional investment by British and German concerns may be witnessed in subsequent Peruvian contracts to produce diesel engines and acrylic fibers, [3].

Even more recently, Dario Robertson, states that the devastating impact of the Decision's regulation of FDI as predicted by analysts has failed to materialize. Accordingly, the predominant share of investment in the Andean Group has been in "those sectors subject to 'special regulations' which effectively exempt resource-extraction firms from the divestiture requirements applicable to all other foreign enterprises," [4].

1 Armstrong, F., Op. cit., p. 1610.

2 Meeker, G.B., "Fade-out joint venture: Can it work for Latin America?," in Inter-American Economic Affairs, Washington, D.C., Spring 1971, pp. 25-42.

3 Armstrong, Op. cit., p. 1621; George Koopman has suggested that the amelioration of U.S. discontent was spurred by Western European and Japanese success in such joint-equity ventures, Koopman, G., "Ten Years Andean Pact: A Reexamination," Intereconomics, May/June 1979, p. 116.

4 Robertson, D., "Economic Integration Under the Andean Pact: U.S. Trade Policy and Development Priorities," a paper prepared for the 1982 APSIA Conference, Woodrow Wilson School of International Relations, Princeton University, March 26-28, 1982, pp. 65-66.

These extraction investments represent well over 50 percent of all FDI in the subregion.

Although somewhat more dated than Robertson's pronouncements above, Lynn Mytelka's work on Regional Development in a Global Economy, is decidedly more comprehensive in its analysis of Decision 24 and its impact on direct foreign investment, [1]. According to her evaluation of the patterns of direct foreign investment pre- and post-Andean Code, the anticipated negative impact of the Decision on the manufacturing sector of the Andean countries did not evolve. In fact, she notes that, "the stock of U.S. direct foreign investment in Andean manufacturing rose during the 1970s and as a percentage of total U.S. direct investment in the Andean region increased from 17.4 percent in 1970 to 36.4 percent in 1976, [2]. In tabulating capital expenditures by majority-owned foreign affiliates of U.S. corporations, Mytelka notes that "as a percentage of total capital expenditure in all third world affiliates, capital expenditures in the Andean countries, excluding Ecuador and Bolivia, rose from 12.8 percent in 1975 to 14.6 percent in 1976 and 17.5 percent in 1977," [3].

The number of foreign affiliates in the Andean region provides an additional measure of the impact of Decision 24 on direct foreign investment. Calculations in this area bear out the minimal impact of the Decision on foreign investment. Of the 762 foreign affiliates in the Andean Market prior to the Decision, only 9.8 percent had been sold, liquidated, nationalized or absorbed by other affiliates by 1975, [4]. New entries to the Andean market more than compensated for this percentage loss. Roughly 813 new foreign affiliates have been documented in the Andean market after the creation of the Andean Group, bringing the net increase of foreign affiliates to 80.1 percent. This increase represents an influx in new foreign affiliates of 52 percent, while comparable figures for Bolivia and Ecuador may be slated at 72.5 and 57.7 percent.

THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

On June 24, 1976, the Council of Ministers of the OECD approved the following Guidelines for multinational enterprises:

- A General Declaration Addressed to the Governments;
- An Annex to the Declaration Relating Guidelines for Multinational Enterprises (consultation procedures);
- A Decision of the Council on National Treatment; and
- A Decision of the Council on International Investment Incentives and Disincentives.

In brief, the General Declaration satisfies the two functions of recognizing the growing importance of international investment and the role of the multinational enterprises in this investment process.

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- 1 For more reserved treatment of the impact of the Andean Investment Code, see Hojman, D.E., "The Andean Pact: Failure of a Model of Economic Integration?", in Journal of Common Market Studies, Vol. XX, No. 2, December 1981, particularly pp. 151-156. On the control of technology transfers, see Correa, Carlos M., "Transfer of Technology in Latin America: A Decade of Control," Journal of World Trade Law, Issue 5, 1981, pp. 388-409.
 - 2 Mytelka, Op. cit., 1979, p. 100.
 - 3 Ibid., p. 101.
 - 4 Ibid., p. 105.

Helga Steeg, Chairman of the OECD Committee on International Investment and Multinational Enterprises (CIME), notes that early negotiations on the Guidelines sought to balance two principal elements: [1]

- what in legal terminology is called "national treatment," i.e., the principle that governments shall not discriminate against foreign firms in relation to national firms; and
- the recommendation to multinationals that they observe certain guidelines in their dealings with governments, groups or individuals in the country in which they operate.

As Blanpain comments, a third element was also addressed in the proposal--a provision on incentives and discentives offered by governments to international direct investment.

Ms. Steeg, the German delegate to CIME, indicated the following as major areas of debate on the guideline proposals: consultative machinery (discussions focused on whether such a provision was not premature, and whether or not business representatives should not participate in the negotiations), disclosure (debate centered on the issue of enterprises publishing information on the company as a whole, with subdivisions mandated for entities in each country or groups of countries), and industrial relations (disagreement was sparked over whether MNEs should bargain multilaterally with trade unions).

Undoubtedly, the Guidelines represent a significant political act of substantial economic (commercial) impact. Not only were internal debates (CIME) extremely influential in shaping the eventual formulation of the document, but so were discussions with other OECD committees such as the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC), representing respectively, business and labor interests. This peripheral advice marks an innovation in negotiations of guidelines, in that it is the first time that advice from both business and labor were formally requested and officially considered.

According to The OECD Observer (1976, No. 2, p. 13), these two committees "agreed on the need for stringent guidelines on bribery and political manipulation which have at times damaged the image of multinational enterprises." Generally stated, the position of the BIAC was to oppose regulations which might discriminate against the multinationals in favor of domestic ones, or otherwise victimize the MNEs via conflicting national policies. The TUAC, on the other hand, sought strict measures on information disclosure to workers' representatives. The trade union committee also wanted workers' rights to be more clearly propounded within the purview of union representation. Specific proposals on employment and industrial relations were also noted, although possibly the most definitive advice provided by the TUAC is its "Proposal for the Introduction of a Reporting System on Short-Term Capital Movements by Multinational Companies," [2].

- 1 Blanpain, The OECD Guidelines for Multinational Enterprises and Labour Relations 1976-1979: Experience and Review (Deventer: Kluwer, 1979), p. 49.
- 2 Charter of Trade Union Demands for the Legislative Control of Multinational Companies, ICFTU Eleventy World Congress, Mexico, 25 October 1975). See Don Guertin in Horn, Supra., note 2, p. 14 (text), p. 304 for BIAC demands; and Blanpain, Op. cit., p. 50 for TUAC interest positions).

The bulk of the Report summary accents, quite naturally, the Guidelines themselves, [1]. The summary announces one addition to the Guideline text to prevent transfer of workers from foreign affiliates to influence negotiations unfairly. The summary also notes the presentation of explanatory comments on the scope and meaning of the Guidelines and recognition of the role of the CIME to provide any necessary clarification in the future. The Ministers recommend that individual enterprises state their acceptance of the Guidelines (many of which have been included in Blanpain's coverage of the 1979 Review). The Ministers further outlined three provisions: first by governments of facilities and arrangements for handling Guideline issues at the national level, second for enterprises, if they so wish, to give views on issues concerning their interests to the IME Committee; and lastly, for exchanges of views between the CIME and advisory bodies to be held upon request of the latter. Finally, member governments are requested to report every two years on experience and developments at the national level.

The principle contribution of the BIAC and the TUAC to the Guideline Review has been to address issues which might provide enterprises and governments with additional insight into the application of the Guidelines. At this initiative, the Review provides several explanatory comments on a broad range of issues which the CIME are to further clarify if necessary. Some of these issues are: the responsibilities of parent companies, disclosure of information, the right of employees to be represented by trade unions and other bona fide organizations, provisions relating to change in operations which have a major effect on employee interests, and access to decision makers.

THE UN CODES--THE ILO TRIPARTITE DECLARATION

As is already recognizable (from the preceding narrative) one of the major concerns over multinational activity is its impact on industrial relations and employment. While the EC Directive has focused mainly on the labor situation in the industrial North, other guidelines have accented employment practices by MNEs in the South. One of these "codes" is the "ILO Tripartite Declaration of Principles Regarding Multinational Enterprises," (hereafter referred to the "Tripartite Declaration").

A. Gladstone at the 1979 European Conference on Labor Law and Industrial Relations dated the genesis of ILO interest in the impact of MNEs on labor, at the 1972 convention of the Governing Body of the ILO, [2]. This meeting brought together 24 'experts,' government advisors, and employees' representatives to discuss the relationship of multinational corporations and social policy.

The working paper which evolved from these discussions was later published as Part I of Multinational Enterprises and Social Policy (Geneva: ILO, 1973) and gave rise to subsequent studies on the inter-

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- 1 The OECD Observer of July 1979 (No. 99, p. 39) presents a "Summary of Results of Review of Declaration and Decisions on International Investment and Multinational Enterprises."
 - 2 Gladstone, A., "Multinational Enterprises, Social Policy and the ILO," in Bulletin of Comparative Labour Law, No. 10, 1979, pp. 53-66.

action of multinational activity and social/cultural impact, [1].

The Tripartite Declaration represents the culmination of these previous efforts to standardize social policy and the role of MNEs while considering the wealth of opinion supplied by government, business and labor. Hans Gunter, ILO Special Advisor on Multinational Enterprises, lists the main factors of the Declaration, several of which are listed as follows, [2]: the principles are non-mandatory; the Declaration applies to all multinational enterprises whether they are public, mixed or private ownership; and whether they are engaged in production, distribution, services or other facilities; the Declaration is a specific instrument which relates only to the ILO areas of competence; as a consequence, where appropriate, reference is made to relevant ILO Conventions and Recommendations (in total 15 Conventions and 19 Recommendations); and lastly, the Declaration encourages a continuous dialogue between the parties concerned with employment and industrial relations matters, a precondition for flexible, situation-specific approaches responding to the great variety of situations found the world over, not the least in the developing countries.

Four major sections of the Declaration, in terms of pertinent content, may be listed: Employment (Paragraphs 13-28), Training (Paragraphs 29-32), Conditions of Work and Life (Paragraphs 33-39), and Industrial Relations (paragraphs 40-58). ILO follow-up machinery, in terms of national and international reporting procedures, may be noted as a supplementary text. The significance of these procedures is certainly no less diminished, even though the Declaration is non-mandatory.

THE UNITED NATIONS CODE OF CONDUCT

According to Arghyrios A. Fatouros, "there is no single, clear authoritative statement of the purposes of the Code of Conduct; the Programme of Action on the Establishment of a New International Economic Order provides a listing of contents, rather than an exposition of purposes, [3].

Nevertheless, the concept of a UN code was initiated in 1974 by the Economic and Social Council (ECOSOC). With the adoption of resolution 1913 (LVII), ECOSOC created the Commission on Transnational Corporations (CTC) whose responsibilities included the preparation of a Code of Conduct on Transnational Corporations.

During the first two sessions of the Commission, broad agreement was found on the high priority of the issue of a code and the need for an 'effective' code, whatever its form or legal status. The second Commission session held in Lima in 1976, established an Intergovernmental Working Group on a Code of Conduct.

The Intergovernmental Working Group submitted its final report containing the draft Code of Conduct on Transnational Corporations, to

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- 1 Social and Labor Practices of Some European Multinationals in the Metal Trades, 1976; Social and Labor Practices of Some U.S.-Based Multinationals in the Metal Trades, 1977; Social and Labor Practices of Multinational Enterprises in the Petroleum Industry, 1977; The Impact of the Transnational Enterprises in the Developing Countries, 1976).
 - 2 Gunter, H., "The ILO Tripartite Declaration," in Horn, N., Legal Problems of Codes of Conduct for Multinational Enterprises (Denter: Kluwer, 1980), pp. 156-157.
 - 3 Ibid., p. 104.

the Commission at its eighth session 30 August-September 10, 1982, [1]. It should be recognized that the entire Code has not been finalized at the time of this writing. On the recommendation of the CTC at its eighth session, ECOSOC decided that the Commission should hold a special session open to all States early in 1983 for the purpose of completing the Code, [2]. Subsequent to this October 1982 communication, the Commission has announced its intention to finalize the Code of Conduct at a meeting of March 1983.

Developing nations' perspectives on the ongoing negotiations on the United Nations Code of Conduct on Transnational Corporations, have been most recently expounded by Miguel Rodriguez-Mendoza, Director de Organismos Internacionales, Instituto de Comercio Exterior, Caracas, Venezuela. Because of their vested interest in coordinating MNE investment with domestic development policies, developing countries have tended to emphasize "a control approach in their internal legislation, as well as in the negotiations on the Code of Conduct," [3]. The principle objective underlying this approach has been to enhance the bargaining power of the less-developed countries relative to the MNEs. The emphasis on controlling the multinational enterprises led the developing nations to oppose codal reference to principles to be observed by Governments. After extensive debate, however, the developing countries accepted a quid pro quo section in the text as mandated by the industrial countries.

In opposition to industrial countries' claims for non-discriminatory or equal treatment for MNCs as well as for domestic enterprises, the developing countries have felt that such clauses would, in practice, discriminate in favor of the MNEs. The developing countries consider the claim for "national treatment" as a claim that the multinationals should be given an international treatment that domestic enterprises could neither ask for, or reasonably expect. It would also run counter to the national rules of many developing countries which establish varying degrees of differentiation between foreign and domestic enterprises," [4].

A third major area of dispute for the developing countries concern the applicability of international rules. On the question of national sovereignty over natural resources, the developing countries consider the relevant provision as a restatement of a jus cogens principle; accordingly, they maintain that no international rules or laws exist which can limit the right of the home country to control its natural resources.

On the application of international rules and obligations States are asked to observe when dealing with MNCs within their territories, Rodriguez-Mendoza's comments are the most insightful. First, he indicates the ambivalent definition of these rules and obligations, noting more specifically that no definition is provided for "international obligations." Possibly this phrase refers to intergovernmental agreements, or possibly to contracts concluded between a host Government and a foreign enterprise. This uncertainty, he claims, has made compromise on the issue by the developing countries an impossibility. Moreover, reference to such a clause would be tantamount to "put on equal footing treaties among States and contracts in which one of the parties is a

1 UN doc. E/C.10/1982/6.

2 ECOSOC Resolution 1982/68 of October 27, 1982.

3 The CTC Reporter, No. 12, Summer 1982, p.8.

4 Ibid., p. 9.

transnational corporation (and) would be equivalent to treating those corporations as subjects of international law, a status which they do not enjoy and which may even be undesirable at this stage," [1].

On the settlement of disputes, the developing countries have supported the rule that "disputes between a State and an entity of a TNC operating within the territory of such State are subject to the jurisdiction of the courts of that State and are to be submitted by the two parties for settlement." Arbitration or other methods of dispute settlement are consequently determined by the national legislation of the country in which the investment/production takes place. Rodriguez-Mendoza feels that selection of an international arbitration mechanism, as advocated by the industrialized nations would be the rule rather than the exception to dispute settlement, and would inevitably damage "the credibility of and confidence in the laws, tribunals and other competent authorities of host, particularly developing, countries."

As an ardent observer and prolific spokesman for business interests in the negotiations of a UN Code of Conduct, Max Weisglas, Economic Adviser to Unilever, has commented that MNEs "are, and of course should be equally subject to the laws of the countries in which they operate, no matter whether these concern taxation, industrial relations, price control, product safety, protection of the environment, or any other matter," [2]. Implying that UN clauses calling for equitable and non-discriminatory treatment of MNEs by host governments would buttress the only 'power' available to MNEs--the power to invest, divest, or reinvest--he argues that a reasonable rate of return by the multinationals may be sufficiently diminished or obliterated by national regulations, or the 'cross-fire of intergovernmental disputes,' [3].

The recommendations, or 'ground rules' that Weisglas notes are essential for the successful formulation and adoption of the code are as follows, [4]:

- the code should be voluntary so as to encourage ratification in all countries of the UN;
- the second principle is that the code should apply to all privately-owned, State-owned and mixed transnational corporations in all countries;
- the third rule is the inclusion of a non-discrimination clause with regard to foreign enterprises as opposed to domestic operations;
- fourth, the Code should contain the recognition by Governments of their responsibility to treat MNEs fairly, equitably and in accordance with international law, as well as, contractual obligations to which they have subscribed;
- lastly, the Code should contain the acknowledgement by Governments of their responsibility to find solutions to conflicts of jurisdiction.

One of the most persistent advocates of trade union views on the implementation of codes of conduct is Stephen K. Pursey of the International Confederation of Free Trade Unions (ICFTU). Probably the most prevalent, and understandably significant demand of the trade unions is a call for adequate and accurate information and consultation agree-

1 The CTC Reporter, p. 9.

2 Ibid., p. 16.

3 Ibid., p. 17.

4 Ibid., p. 18.

ments.

The first issue Persey addresses in this context is the question of whether or not an "arm's length" relationship is sufficient to combat the complexity of the relationships between multinational enterprises on one hand and Governments and the workers on the other, [1]. Accordingly, Persey calls for the development of a practical interpretation of the concept of national sovereignty, which in turn would enable the development of an adequate definition of "'internationalisation,' by establishing for each multinational enterprise a transnational relationship through intergovernmental cooperation and action," [2]. In this context, trade unions have, and continue to support a collective approach to information gathering and dissemination, not as a prerequisite to effective monitoring or control of corporations, but rather to enhance the global effectiveness of the codes of conduct. A second measure to guarantee adequate information on multinational enterprises is a provision that this information must be supplied on MNE activities on a global level. In this way, workers may be notified of corporate decisions which affect their livelihood on a timely basis. And possibly more importantly, trade union organizations on both national and international scale may intelligently participate in consultations over workers' rights and labor relations. Persey, believes that workers' representatives in the host countries should be able to participate in both inward and outward investment review agencies, despite the practical difficulties currently involved for international contact on this scale, [3]. A final issue, he cites in the context of information collection is the objection, inter alia, by MNEs over the formidable costs of producing this information. In order to avoid such claims by MNEs, which might be coupled with similar charges about the cost-effectiveness of staging consultative meetings, Persey recommends these actors "engage in a full discussion so that multinational enterprises will be able to ascertain precisely what the need is for particular information," [4]. Emphasis on publication of materials should be the rule in such reporting issues, so that the basic data on the structure, financial statements, employment, pricing policies, and accounting principles may guide both the Governments and the trade unions in their consultations with the MNEs.

On the issue of the accountability of the multinational enterprise, Persey states that because of the national and international scope of multinational operations, it seems not unreasonable to request compliance by the MNEs to both international machinery, and regulation supervised by governments and trade unions. The debate over whether the code is "voluntary" or "legally-binding" is not the relevant question in the formulation of effective machinery for compliance, according to Persey, but rather allowing practical requirements to establish the parameters of this procedure following implementation of the code. This implementation, Persey has addressed on two levels: first, by providing an eight-point proposal to the UN for implementation of the Code of Conduct internationally; and second, by outlining the role of the sponsoring international institution in implementation of the Code. Without elaborating at-length, the ICFTU's 'Proposal,' we may note at this juncture, that the document accents the appropriate and timely disclosure of

1 Horn, Op. cit., p. 278.

2 Ibid., p. 279.

3 Ibid., p. 280.

4 Ibid., p. 281.

corporate information, Government-MNE-Labor discussions on multinational operations, some form of conciliation and arbitration, and lastly a reporting mechanism for the settlement of disputes via case reviews. In the realm of this second provision, Persey notes that a fundamental aspect of the implementation procedure is the establishment of the right by Government or trade unions to complain to the Commission about the negligent or inadequate reporting procedures of a particular transnational enterprise. In order to properly assess such claims, Persey suggests that the Commission might want to establish a special committee to review and report on complaints of this nature [1]. The benefit of such a system is that many of the problems of extra-territorial application of national legislation are avoided, and even if problems arose over the effective implementation of the report via the parent company to subsidiary (because of conflicting national laws), this system would increase the "transparency" of MNE activities.

The final issue Persey accents concerns the full accountability of MNEs through a global mechanism for Governments and trade unions to discuss the global strategies of the MNEs. It is intended that such a body would not replace national relationships of this nature, but rather complement them. While Persey does not offer a definitive structure for such an organization, he does note that such an arrangement would enhance the bargaining position of developing countries relative to the MNEs, would contribute to the broad dissemination of information on the MNEs and while not advocating international collective bargaining, feels that consultative machinery within the structure of the UN incorporating the trade unions, might be similarly enhanced.

ANALYSIS OF NEW FORMS IN THE CONTEXT OF THE CODES

Definition of the Multinational Enterprise

In the preceding section of this presentation, it should have become clear that the concept of a code has been widely interpreted, and its implications strongly influenced by the objectives of the group proposing them, [2]. Yet, rather than distinguishing the codes strictly along these lines, this portion of the paper will focus on several aspects which the codes have in common, despite distinctions among the treatment of these provisions.

The environment in which MNCs operate may be characterized as a multi-tier system of regimes: national, bilateral or multilateral, regional and international. The regulation of MNCs at the national level is readily apparent in the proliferation of State legislation of restrictive business practices as recorded annually by UNCTAD, from 1980 onwards [3]. Bilateral agreements have taken a variety of forms--the most comprehensive listing of which is an OECD study [4]. Regional and

1 Horn, Op. cit., p. 288.

2 It may be contended that the codes were not really initiated as a serious attempt at controlling the MNEs, but were rather a cautiously designed program of foreign investment incentives--Rodriguez-Mendoza's comments above support this first thesis, while then-U.S. Ambassador to the OECD, Mr. William C. Turner's comments on the Guidelines highlight the "investment package," International Herald Tribune, June 30, 1976.

3 UNCTAD, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (New York: UN, Doc. No. TD/RBP/COMF/10, 2 May 1980).

4 See study by Geiger/OECD, forthcoming.

international mechanisms of considerable variety have been briefly reviewed in the present study, yet additional comment may better reflect the politico-legal environment in which these regulatory systems have evolved.

Theo Vogelaar, Special Adviser to the OECD Committee on Investment and Multinational Enterprise, has outlined briefly the basic complications of control under each of these regimes--observations which paint the backdrop for later defining the multinational enterprise, both in terms of traditional FDI and the "new forms of investment." According to Vogelaar, "national measures, taken by host and home country governments separately appear inadequate," because MNCs have exploited the "jurisdiction gaps and, above all, from differences in the legal, social and fiscal regimes," in which they choose to operate [1]. Bilateral and multilateral agreements may be effective, if conducted among countries of comparable legal and administrative structures, and only attempt to monitor 'limited domains,' (as in the 1976 U.S./German agreement of Cooperation on restrictive business practices). Yet, such control is globally unreasonable because of systemic divergencies [2]. International law, Vogelaar notes, is insufficient in controlling MNE operations in different countries, because of two inadequacies: first, because international law could not provide a legal framework enveloping the international activities of MNEs; and second, its inability to set up mechanisms for dealing with conflicting laws and interests of home and host countries.

On a macroeconomic level, we may observe the legal complications of state responsibility for the activities of MNEs [3]. On a microeconomic level, we may also note the legal complications of parent corporations' responsibility for subsidiaries [4]. Despite Horn's allegation that "responsibility should correspond to actual control and to the allocation of decision-making power" [5], sensitive legal issues such as the financial responsibility of parent corporations for subsidiaries is certainly less explicit, and compliance with codal provisions in this field less assured.

These comments point out the debate over what Jan Tinbergen in the RIO Report of 1976 has called defining the role and function of MNCs at national and international levels [6]. Sketching the MNC as an example of "the structural divergence between the territoriality of the nation-state system and the transterritoriality of the economic order, Wildhaber settles on the following definition: "a corporation may be called transnational if it has a certain minimum size, if it owns or controls production or service plants outside its home state and if it incorporates these plants into a unified corporation strategy," [7].

Based on successive definitions of the multinational enterprise, as formulated by the United Nations, Wildhaber accents the operative portion of the definition as the ownership or control of local production facilities or assets by the foreign enterprise [8]. In the context our

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- 1 Netherlands International Law Review (NILR), Vol. 27, No. 194, 1980, p. 72.
 - 2 Ibid., p. 73.
 - 3 See Brownlie, I., in Horn, Op. cit., p. 43; in particular his reference to Judge Gros' Opinion in the Barcelona Traction Case, I.C.J. Reports, 1970, p. 4, at pp. 268-271).
 - 4 Horn, Op. cit., pp. 67-68.
 - 5 CIME Review Report of 1979, note 6, paragraph 39.
 - 6 NILR, Op. cit., p.73.
 - 7 Ibid., p. 80.
 - 8 Ibid., p. 80.

concern with the new forms of investment, however, it is imperative to note the complications of measuring the exchange of goods or services at a given time. In other words, when ownership/control passes from one firm to another [1]. Accordingly, we might be well advised to substitute one recent definition by Mark Casson of the MNE, for those codal formulations which will be discussed below. Casson defines the MNE as a firm which owns goods or services originating in more than one country, [2]. As such, the MNE is neither bound by the requisite of owning subsidiary operations in another country (the actual facilities) or holdings of mere percentage of ownership shares.

Recalling the definition of an 'undertaking with complex structures, in particular transnational undertakings,' the EC Directive considers an undertaking dominant "in relation to all the undertakings it controls, referred to as subsidiaries," (Article 3, paragraph 1). The second paragraph of Article 3 defines the subsidiary of such a complex undertakings "where the dominant undertaking, either directly or indirectly, a) holds the majority of votes relating to the shares it has issued, or b) has the power to appoint at least half of the members of its administrative, management, or supervisory bodies, where these members hold the majority of the voting rights." Accordingly, the first provision outlines the elements of ownership in the parent-subsidiary relationship, while the second provision similarly outlines the elements of control. Majority ownership or control does not necessarily reflect the significance of corporate involvement for the host country nor, in fact, accurately reflect its role in the overall investment strategy of the MNE. Rather than depict the diversity of international investment schemes, the EC Directive accents only those enterprises with majority ownership or control interests with respect to the activities of subsidiaries. In fact, if such subsidiaries do not exist, then presumably, investment by the foreign enterprise will not be considered by the Directive. Furthermore, in terms of the legal implications of the Directive, the spokesman for the EEC Commission at the close of the debates of April 19, 1977, noted that "an enterprise that has its headquarters in one Community country, and its operating subsidiaries in other Community countries is not, from the perspective of the EEC, multinational at all. It is simply, a "domestic Community enterprise, subject to what is, in effect, domestic legislation, [3].

A second legal issue that might be mentioned in this context is the broad concept of non-state actors as subjects of international law and as objects of regulation.

Baade comments on this "individual responsibility" with respect to multinational corporations by noting that "MNEs are, however, neither states nor public international organizations, and thus are neither general 'natural' or 'artificial' subjects of international law as presently defined," [4]. He goes on to say that:

Even if their procedural role in follow-up proceedings should, in analogy to human-rights com-

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- 1 Dunning, John H., "Non-Equity Forms of Foreign Economic Involvement and the Theory of International Production," University of Reading Discussion Papers in International Investment and Business Studies, No. 50, February 1982.
 - 2 Casson, M.C., "Transaction Costs and the Theory of the Multinational Enterprise," Dalhousie Discussion Papers in International Business, No. 8, 1981.
 - 3 See, Baade, in Horn, p. 428; and Id. at 43, 46 (Vice Commissioner Vredeling for original text).
 - 4 Ibid., p. 8.

plaint mechanisms, suffice to confer upon them 'partial' or ad hoc international subjectivity they would still lack at least on of the essential attributes of full international personality. This is the power to participate directly in the international norm-creating process. It follows that the practice of MNEs in response to the codes of conduct or guidelines, quite irrespective of its motivations, cannot supply the element of opinio necessitatis juris that remains an indispensable prerequisite for the development of customary international law.

Moreover, in consideration of the non-legal nature of codes, such as the OECD Guidelines, Baade cites four cases in which the codes may indirectly influence the legal setting of their implementation, and impact on international public policy. With regard to the former, Baade discusses the role of guidelines as a 'shield' for MNEs from the enforcement of the substantive contents of the guidelines, [1]. The second possibility of the Guidelines as a "sword," or legitimizing function is that "States which have adopted the Code would not be able to attack as inherently unlawful or improper any action by other states taken in accordance with provisions of the Code," [2].

Lastly, the guidelines may be useful as instruments of international public policy: first, as "springboards for legally creative action," [3]; and second, as "standards and data in aid of interpretation," [4].

The Andean Pact Decision 24, defines multinational enterprise in terms of foreign investment percentages, and majority shares of ownership. By accenting exclusively the ownership share of foreign inputs to domestic production, the Decision fails to consider the wealth of control techniques by the foreign participant. As with the EC Community, the Andean Pact Group is considered a legal entity, and investment by a multinational corporation that is majority- or wholly-owned by another corporation headquartered in another Andean country may not be considered foreign investment at all. Review, however, of investments contracts and technology transfer schemes, is vested with national authorities who might view such investment more in terms of its impact on national industries, and domestic development programs, rather than in terms of the impact protectionist policies might have on the supposedly liberal trading framework of the Andean Group.

Point 7 of the Andean Declaration states that the objectives of the Andean Group's "'Common System,' should consider efficient mechanisms and procedures to permit the increasing participation of domestic capital in existing foreign companies, or those which may be established in member countries with the object of arriving at the creation of joint companies in which domestic capital shall have a majority interest and be capable of determining, to a large extent, the basic decisions of

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- 1 See the Case of the S.S. Lotus, PCIJ Ser. A, No. 10, at 18-19, 1927/Baade, in Horn, Op. cit., p. 21.
 - 2 UNCTC, "Transnational Corporations: Certain Modalities for Implementation of a Code of Conduct in Relation to its Possible Legal Nature," (E/C.10/AC.2/9, 22 December 1978).
 - 3 Baade, in Horn, Op. cit., pp. 29-31, particularly the discussion of the contra bonos mores rule.
 - 4 Ibid., pp. 32-37, in particular Baade's commentary on the OECD Review of the Hertz case, and the Speiss v. C. Itoh & Co. case, 469 F.Supp. 1 (S.D. Tex. 1977).

these companies," [1]. To my knowledge, neither the document itself, nor its proponents have formally listed these 'basic decisions;' consequently, whether or not they would cover the investment decisions of the 'new forms' typology is subject to some debate. Yet, these 'joint companies' are defined by a minimum regional domestic capital participation of 51 percent, with 'domestic companies' defined as a minimum regional domestic participation of 80 percent [2].

The OECD Guidelines remark that "a precise legal definition of multinational enterprise is not required for the purposes of the guidelines," (Annex I, paragraph 8). More specifically, without referring to either ownership or control rights in definitional terms, the Guidelines are meant to be addressed to "the various entities within the multinational enterprise (parent companies and/or local entities) according to the actual distribution of responsibilities among them on the understanding that they will cooperate and provide assistance to one another as necessary to facilitate observance of the guidelines," (Annex I, paragraph 8). It is significant to note, however, that characteristics of these entities are indirectly defined via the informational requirements of the Guidelines, and thereby at least by implication define these enterprises. The information required is to be provided "within reasonable time limits, on a regular basis, but at least annually, financial statements and other pertinent information relating to the enterprise as a whole, (Annex I, paragraph 8)."

As we may note from the Guidelines' provisions on information disclosure, the information requested should take into account the "nature and relative size in the economic context of (the MNEs) operations and to requirements of business confidentiality and to cost." These determinations are left to the discretion of the multinationals. Furthermore, in terms of the geographical areas of these operations, the Guidelines (as one case) note that the phrase means "groups of countries or individual countries as each enterprise determines it appropriate in its particular circumstances," (emphasis supplied by author). Theoretically, a listing of operations by majority ownership would satisfy the disclosure requirements noted above, and minor investments by the MNE would remain unreported. As previously mentioned, however, what is considered minor by the MNE may not be either relatively minor in the context of other investments by MNEs, nor insignificant in terms of the overall investment priorities/needs of the host country.

The United Nations Draft Code of Conduct on Transnational Corporations defines, provisionally (in brackets) the term "transnational corporation" as an "enterprise, comprising entities in two or more countries, regardless of the legal form and field or activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others," (Preamble and Objectives, paragraph 1, "Definitions and Scope of Application"). The second version of the bracketed text inserts "an enterprise whether public, private or mixed ownership," for the preceding version of "an enterprise, comprising entities in two or more coun-

1 Comercio Exterior, March 1971, p. 9.

2 Wionczek, M.S., "U.S. Reaction to the Andean Group System for Treatment of Foreign Capital," Comercio Exterior, June 1971, p. 27.

tries." Nevertheless, the comments which follow are pertinent to either version, regardless of final approval at the next session of the UNCTC.

The issue of ownership control is skillfully skirted in this definition of the multinational enterprise by incorporating the phrase "by ownership or otherwise." The legal issue surrounding the definition is similarly avoided via the inclusion of the phrase, "regardless of the legal form and fields of activity of these entities." Yet, two factors remain outstanding to obscure this definition: first, is the necessity of ownership by the foreign corporation of an 'entity' in the host country; and second, is the phrase "may be able to exercise a significant influence over the activities of others." The "new forms of investment" are defined by shared (50/50) or minority ownership, and consequently do not necessitate principal ownership, but merely minority capital participation. Consequently, if the UN Code attempts to control the activities of this subsidiary or "entity," the foreign corporation may not be a fundamental actor in the decision-making process, nor significantly influence the activities of others. The phrase "may be able to" cited above, is presently bracketed text, and may or may not be included in the final version of the Code. Nevertheless, it is worth noting here that in terms of the impact of the new forms of investment, if the phrase is included, reference to the new forms by MNE reporting requirements may not be mandated, because of what MNE managers or accountants may consider "inconsequential" investment by the corporation. Whether or not this investment impacts significantly on the activities of others, MNEs may rightly claim is beyond their determination. For illustration, we may construct a case where investment is made in one industrial sector by the MNE, and yet impacts, however minimally, on the corporate interests of firms in other sectors. Firstly, the MNE can claim that it was unaware of the overall investment climate of the host country, and could not possibly calculate the rough impact of its investment decisions on that environment. And secondly, it may claim that it bears no "responsibility" (to use a phrase from the final sentence of paragraph 1 above) to be informed of how its investment decisions may affect other firms in other industries or lines of business.

Ownership versus Control

Stemming from the definitional issues discussed above, and very much significant for the codal objectives of buttressing the sovereign allocation of natural resources by host governments and the improved bargaining position of LDCs relative to foreign firms, is the concept of ownership and control of foreign investment.

Steve Nyman and Aubrey Silbertson of Oxford University have commented on the 'general view' of ownership control as developed by the managerial school of thought. According to this framework, decision-making is influenced by product, labor and capital markets rather than ownership interests, whether internal or external [1].

In evaluation of these empirical studies, Nyman and Silbertson find

1 Oxford Economic Papers, 1978, p. 77; Models of this type of corporate behavior have been expounded by Berle and Means (1932), Florence (1961), Gordon (1961), Marris (1964), Galbraith (1967), and Larner (1970). These scholars' methods and conclusions have been more recently challenged by Fitch and Oppenheimer (1970), Zeitlin (1974), Scott and Hughes (1976) and Nyman and Silbertson (1978).

the following deficiencies: first, they assume a narrow conception of the nature of ownership, how it should be measured and what its effects are likely to be [1]; second, these studies have accented the impact of ownership within particular industries, neglecting sectoral distinctions; third, such studies are cross-sectional and cannot distinguish between the ways in which managerial aims, as opposed to managerial efficiency, affect rates of profit and growth; fourth, in deceptively linking performance and ownership; and lastly, in failing to consider the variety which ownership patterns can take. Nyman and Silbertson conclude that a historical case-study approach is the most accurate means of evaluating ownership control, and in their own work note that ownership interests control in the majority of large U.K. industrial companies, and the proportion of ownership control may be increasing over time.

More recently, J.H. Dunning (1982) and Oman (forthcoming) have recognized these deficiencies; the former, in terms of highlighting the variety of ownership control patterns via country-, industry- and firm-specific advantages; and the latter in terms of delineating direct and indirect investment programs.

More specifically, Oman examines investment theory in terms of the evolution of the "new forms." He cites several possible hypotheses for why the "new forms" have grown over the past ten to fifteen years; principally: the defensive reaction hypothesis (C. 4, pp. 1-10); the strategic initiative (C. 4, pp. 11-21); and lastly, the changing global investment scenario (C. 4, pp. 21-52).

Two categories of factors are specifically addressed by Oman in this context: first, the evaluation of economic conditions in the major industrialized countries (home countries, considered individually and collectively); and second, the dynamics of i) firm behavior and ii) worldwide inter-firm competition (C. 4, p. 23). The second category of factors most directly accents the interplay of theories of investment and theories of the multinational firm.

Oman notes the consensus among students of the multinational firm that "the growth of FDI must understood as the result above all of so-called market-structure imperfections and the monopolistic advantages possessed by international investors at home and abroad" (C. 4, pp. 36-37). While further noting that the essence of foreign investment (both FDI and the "new forms") is to be understood principally as the internationalization of firms' control over the organization of production and/or distribution, rather than the transfer of financial capital, Oman comments on the striking dirth of theoretical material on the new forms as opposed to FDI (in which internationalization of control is accompanied by an internationalization of ownership rights). In this context, several issues are highlighted by Oman which we will review successively in terms of their bearing on the "new forms of investment." The first of these issues is the degree of control required by firms to appropriate rents from monopolistic advantages in terms of their ownership involvment in the investment project itself. Such involvment Oman distinguishes from "intangible assets," [2].

The second issue is the contention that transaction and enforce-

1 Nyman and Silbertson, Op. cit., p. 92.

2 Oman, Op. cit., C. 4, p. 38; Dunning, Op. cit., 1982; and Buckley, P.J., and Davies, H., "The Place of Licensing in the Theory and Practice of Foreign Operations," University of Reading Discussion Paper No. 47, November 1979).

cement costs in the case of the new forms are significant [1]. In man's commentary of Rugman's thesis, he notes the possibility that the transaction and enforcement costs associated with new forms of investment may be decreasing, or relative to FDI, the costs of transaction and enforcement associated with the latter may in fact be increasing since the 1960s, [2]. In illustration of this point, Oman cites Dunning (1982) as a static case:

Suppose the main ownership advantage of a firm is its superior management facilities. If, in a management contract a firm can fully appropriate the economic rent of this asset (which implies the buyer is willing to pay at least the price which the seller knows it is worth) and it can protect (through the terms of the contract) the dissipation or misuse of the techniques and information provided, then why should it prefer direct investment to a management contract? A similar question may be asked where the ownership advantage is a trademark; it may perfectly possible for a firm to fully exploit its economic rent by way of a franchising agreement. In these instance, it is postulated that control to protect the assets can be written into a contract and that the overall benefits are at least equal to profits on any equity investment (after discounting for risk).

The second principal issue, which Dunning's comment above fully supports, is the role of barriers to market entry in explaining foreign investment. Such barriers to entry may include: technological advantages from patents, economies of scale in production, marketing barriers through vertical integration, product differentiation, brand image, multiproduct economies of scale in advertizing and/or distribution and so forth. In sum, Oman concurs with Rugman, that, as with FDI, the new forms of investment cannot be understood in the absence of monopoly power [3]. Or as Rugman notes, "it is essential to recognize that each MNE is a monopolist in its use of knowledge (or some other firm-specific advantage). Otherwise, the MNE does not need either an internal market (FDI) or a contractual arrangement. When there is no monopoly in knowledge then a regular market suffices," [4].

Possibly the most interesting observation Oman brings out in this context is the potential role of undifferentiated products as barriers to entry. Undifferentiated products, such as "raw materials or 'mature' price-competitive manufacturing industries, firms' pursuit of monopolistic advantages may lead to high concentration through vertical (upstream) integration and/or the establishment of exclusive 'internalized' (downstream) global marketing networks. In both cases economies of global integration, not to mention firms' monopolistic advantages in their home-country markets, may constitute effective barriers to entry such that ownership of production by firms in the host country is not required for appropriation of monopoly rents" [5]. The case of undifferentiated products provides at least one example of how the MNEs might exercise control over the production process (via upstream/

1 Rugman, Alan M., Inside the Multinationals (New York: Columbia University Press, 1981).

2 Oman, Op. cit., C. 4, p. 40; Dunning, Op. cit., p. 14.

3 Ibid., C. 4, p. 42.

4 Rugman, Op. cit., p. 71.

5 Oman, Op. cit., pp. 43-44.

downstream participation), without being directly involved in its management. It might be advisable here to recognize the influence of what Oman has called "interaffiliate agreements," in MNE control over capital and production inputs to developing economies. It is these type of corporate connections, among suppliers of similar or integrated goods that might restrict the degree of flexibility developing governments or local companies might have in selecting unbundled elements of production or technology packages. In fact, this unbundling might result in the reconstitution of a package similar to the original.

In examining the widespread growth of MNES (relative to non-MNEs) in the post-war period, Dunning feels that new ownership advantages and the greater incentive of these MNEs to internalize these existing advantages may explain this trend, [1]. Accordingly, he examines three theoretical approaches to analysing the determinants of these organizational modes of international production: the transactions cost approach of Williamson (1979) and Teece (1981), the appropriability theory of Johnson (1971) and Magee (1981), and the theory of internalization (noted earlier in the work of Rugman, 1981; and developed at length in the work of McManus, 1972; Buckley and Casson, 1976; and Casson, 1979).

In sum, we may note that Dunning finds little difference in these three approaches to MNE activity [2]. Furthermore, he finds them deficient in distinguishing between investment "cases where there is a specific asset of declining value over time which a firm wishes to protect, and those where a main intangible asset is the ability to exploit the economies of integration, and, following this, how far these may be affected by its multinationality, or changes in its multinationality. This distinction is an important one in the sense that in the latter case there is no industry technology cycle (a la Magee) and no reason to suppose that the gains may be eroded over time (except by competitors becoming multinational in their own rights)" [3]. Dunning's own work explains that international production will occur when "it is to the benefit of the firm internalizing its ownership advantages to use these in conjunction with at least some factor endowments in a foreign rather than the home country," [4]. Placing this comment in the context of the full eclectic theory of international production (in which ownership-specific advantages comprise only one leg of the tri-podal concept), Dunning notes that:

The trend, in the last two decade, away from fully internalized international transfer of assets and intermediate products (i.e., between companies of one nationality and 100% owned foreign affiliates), towards partially or fully externalized transfers (i.e., between companies of one nationality and those of another in which they have a partial or zero equity stake is then to be explained by i) the changing nature of ownership advantages and the forward, backward of lateral transactions associated with these, ii) in terms of the changing net benefits of different institutional forms for exploiting ownership advantages, and/or iii) the changing locational advantages of transacting assets and intermediate products with domestic, compared with foreign firms. In turn, these

1 Dunning, Op. cit., 1982, p. 10.

2 Ibid., p. 13.

3 Ibid., pp. 13-14.

4 Ibid., p. 15.

changes will vary according to industry, country and firm specific characteristics and changes in these.

The third and final issue to be discussed in this context stems from Oman's discussion of the dynamics of competition among firms internationally, in particular: Vernon's "product life cycle" hypothesis; theories of oligopolistic interdependence, such as the "follow the leader" and "exchange of threats" strategies as propounded by Knickerbocker; globalization of inter-firm rivalry as advanced by Davidson and Haspelagh; and the global rationalization of operations as in Ford's global production strategy.

Despite the popularity of Vernon's work on the interdependence of firms competing internationally within a given industry, Oman states that this seminal hypothesis fails to comment specifically on the use of new versus traditional forms of foreign investment. Similarly, Knickerbocker's work on investment theory is limited to describing developing countries defensive reaction to inter-firm competition in the context of international oligopoly. Globalization of inter-firm rivalry may be explained first in terms of the increase of international corporations who are seeking to develop or expand their foreign markets. Such an expansion, or more properly diversification, may be seen to result from the economic slowdown in the OECD region as a whole, and more particularly from attempts to reduce specific industry costs, such as may be found in the electronic or textile sectors. While it may be argued that the global rationalization of operations actually discourage the new forms of investment in the context of global oligopolistic competition, Stopford and Wells (1972) have shown that U.S. firms during the 1970s were using relatively high levels of ownership-sharing and licensing in the field of global-product managerial systems.

Oman proposes that the implications of the new forms of investment may be assessed within a framework of two distinct logics of accumulation (national and global), or more practically as one logic, reconciling the interests of the principal foreign and host-country parties [1]. Such an assessment is more fundamentally "the relationship between ownership and control of investment and capital formation in developing countries," [2]. More directly, this central issue may be viewed with regard to the degree to which a partial or complete shift of ownership from foreign investors to host-country partners imply an equivalent shift to the developing countries of effective investment control. This question is phrased in broader terms by Oman as related to the extent which "the new forms of investment contribute to more effective control by the State and/or the local private sector so as to make development planning and/or implementation of industrial policy more feasible than when foreign investment takes the form of traditional FDI?" [3]. Rather than viewing such investment control in terms of a zero-sum proposition, Oman feels that circumstances may more reasonably support a positive- or negative-sum scheme; the former "in

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- 1 Michalet, C.A., "The International Transfer of Technology and the Multinational Enterprise," in Development and Change, V. 7, No. 2, April 1976, particularly pp. 166-170 on 'semi-autonomous affiliates,' and pp. 170-173 on 'rationalized subsidiaries.' For coverage of the role of multinational affiliates in international subcontracting (new form) and the transfer of technology, see Michalet, C.A., "International Sub-Contracting: A State-of-the Art," in Germidis, D., International Subcontracting (Paris: OECD Development Centre, 1980).
 - 2 Oman, Op. cit., C. 5, p. 5.
 - 3 Ibid., C. 5, p. 5.

which increased host-country ownership enhances effective host-country control of local accumulation without significantly reducing foreign investors' control over those variables with which they are most concerned" [1], and the latter, "in the sense that new forms of investment may effectively reduce or restrict foreign investors' control without local elites or host governments being able to take profitable advantage--in private and/or social terms--of the control which they have wrested from foreign investors," [2].

The ways in which advantages are gained or compromised are evaluated in this study in reference to three considerations: the potential increase of multinationalization of small and medium size firms (SMF); the changing division of risks and responsibilities; and implications for host-countries. For our purposes in this paper, simply, to evaluate the impact of the new forms on developing countries' bargaining power, or control over indigenous natural resources, the following observations on these topics prove most relevant.

Potential home country gains that might be identified via multinationalization of SMF are: enhanced bargaining power of host countries as a result of increased international competition among investors/suppliers (resulting also in the diversification of sources and possibly reduced costs of acquisition, [3]; increased competition within host economies; and improved opportunities in the realm of technology transfer and the development of local technological capacity.

These tentative benefits, however, are soundly challenged by Oman's observations that the limited empirical evidence available suggests that the new forms, like FDI, "tend to be dominated by relatively large firms, both established multinationals and relatively large 'newcomers' such as major engineering firms, state enterprises, etc., [3]. Reasons cited for the domination of the new forms by large MNEs are found primarily in the inability of the SMF to compile the requisite managerial resources and information necessary to tabulate and utilize effectively data on: the costs, risks and uncertainties "involved in identifying and evaluating opportunities, locating local partners, adapting to unfamiliar legal, administrative, linguistic and socio-political environments, and formulizing their often highly personalized knowhow so as to be able to transmit it to local partners," [4]. Additionally, these SMFs may lack the advantages of global marketing and financial networks which the MNEs may be able to exploit. Therefore, they may be required to insist on 100 percent or majority ownership to take advantage of the regulation of the diffusion of their firm-specific advan-

1 Oman, C., Op. cit., C. 5, p. 5.

2 See Evans, P., "Multinationals, State-owned corporations, and the transformation of Imperialism: A Brazilian Case Study in Economic Development and Cultural Change, Vol. 26, No. 1, October 1977, particularly his discussion of the 'tri-pe' model of development on pp. 54-64; see also, Leff, N.H., "Industrial Organization and Entrepreneurship in the Developing Countries, Economic Development and Cultural Change, Vol. 26, No. 4, July 1978, pp. 661-675, in particular, pp. 662-666 on 'economic groups,' see also Dolan, M.B., and Tomlin, B.W., "First World-Third World Linkages: external relations and economic development," in International Organization, 31, 1, Winter 1980, pp. 41-63, in particular, pp. 51-56 for an analysis of 'economic linkages' and 'economic growth.'

3 Oman, Op. cit., pp. 11-12.

4 Ibid., pp. 13-14.

tages, in terms of either knowhow or technological data.

THE NEW FORMS, CODES OF CONDUCT AND TECHNOLOGY TRANSFER

The two principal objectives underlying developing countries' support of Codes of Conduct may be couched in terms of interest in "unbundling" the components of technology transfer packages, to reduce the costs of such goods or services; and secondly, to wrest control over selecting and utilizing these resources from the MNEs and placing it with indigenous operators, either firms or governments [1].

While the work of Teece accents only the role of MNEs in terms of foreign direct investment (to the exclusion of the new forms), his comments of the transactions cost of technology transfer are quite useful in examining the complexity and array of issues involved. By distinguishing horizontally integrated multinationals (production of the same line of goods from its plants in each national market) from vertically integrated firms (in which some plants in some countries serve to produce inputs to its plants in other countries), Teece can tabulate the administrative allocation of resources within the firm and determine theoretically the motivations for this allocation. The significance of such allocation of resources is particularly relevant for transactions cost considerations, which attempt to explain which plants in different countries should fall under common ownership and control rather than trade with each other via contracts. With regard to the horizontal MNEs, Teece notes the high costs associated with obtaining the requisite information of technology transfer, as well as the strategic and organizational elements of conducting this transfer [2]. Such issues are further complicated by what Teece calls the "fundamental paradox" of information, meaning that the value of the information is not really known until the information has been purchased. Additionally, this know-how cannot always be 'codified,' meaning that often the information has "an important tacit dimension: individuals often know more than they are able to articulate. When knowledge has a high tacit component, it cannot be transferred in codified form. It is, therefore, extremely difficult to transfer without intimate personal contact, demonstration, and involvement," [3]. Because of the hazards of these 'intangible assets,' Teece concedes that "intrafirm transfer to a foreign subsidiary (which avoids the need for repeated negotiations and attenuates the hazards of opportunism) has advantages over autonomous trading... Accordingly, the existence of firm specific rent yielding assets which are non-tradeable for transactions cost reasons can be seen as providing a driving force for horizontal direct investment," [4]. In terms of horizontal direct investment decisions then, Teece feels that "the frequency of transactions, for any given level of technological complexity, will lower the average governance costs associated with DFI since...there is a certain set up cost associated with establishing a wholly-owned or partially-owned foreign subsidiary. However, once established, the marginal governance cost of additional transfers is quite low," [5].

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- 1 Frank, I., Foreign Enterprises in Developing Countries (Baltimore: Johns Hopkins University Press, 1980), p. 56).
 - 2 Teece, D.J., "A Transactions Cost Theory of the Multinational Enterprise, University of Reading Discussion Paper No. 66, September 1982, pp. 6-7.
 - 3 Ibid., pp. 7-8.
 - 4 Ibid., p. 9.
 - 5 Ibid., p. 17.

In the context of vertically integrated MNEs, Teece notes that "generally, vertical integration will be chosen over market alternatives when the trading relationship requires the development of transaction specific assets," [1]. As such, arms'length contracts, would reduce the exposure of the firm to recontracting hazards of high switching costs [2]. Yet, while recontracting costs may be attenuated, they are often not eliminated because of often insecure property rights in many of the host countries and international contract law is not yet able to guarantee that the initial bargain struck between the foreign investor and the local participants will be perpetuated through the length of the contract [3].

Both Teece (1982) and Magee (1981) offer useful application of the perpetuated through the length of the contract. This risk of expropriation is only of the human and locational considerations which complicate the governance costs associated with foreign markets. As Teece notes, "the governance costs associated with vertical integration, while initially higher because of the set up costs, do not vary with degree of asset specificity because incentives for recontracting do not exist," [4].

As Magee notes, the appropriability theory suggests that multinational corporations are specialists in the production of technology which is less efficient to transmit through markets than within firms; that multinationals produce sophisticated technologies because private returns are higher for these technologies than for simple ones; that the large proportion of skilled labor employed by the multinationals is an outgrowth of the skilled-labor intensity of the production process for both the creation and appropriability of the returns from technology; and that the relative abundance of skilled labor in the developed country dictates that they have a comparative advantage in creating, exporting and capturing private returns on new technologies," [5]. The specific implications of this theory in terms of costs of acquisition may be summarized as follows. As Teece notes, "appropriability investments by MNCs may be low unless the industry is concentrated or some other consideration dictates that entrants pay 'their share' of the appropriability cost. Initially monopolistic or cartelized industries are less plagued by this problem since their collusion on price and other matters provides a useful framework within which to share the costs of private appropriability," [6]. The implications of this observation for the LDCs are quite clear, because LDCs comparative advantage is in products with competitive market structures, they lack both the institutional framework and requisite funding for research and expenditures of this nature, and consequently, the costs of appropriation are very high. A second implication of Magee's theory is that "technology importers should realize that if they try to lower the price they pay to foreigners for their purchases of information, this will increase their welfare but reduce the quantity of technology imported below free trade levels [7]. Thirdly, Magee speculates that the inter-

1 Teece, Op. cit., p. 10.

2 Monteverde and Teece, 1982.

3 Teece, Op. cit., 1982; Sornarajah, 1981.

4 Teece, Op. cit., 1982, p. 22.

5 Magee, S.P., "The Appropriability Theory of Multinational Corporation Behavior," University of Reading Discussion Paper, No. 51, March 1981, p. 3.

6 Teece, Op. cit., 1982, p. 8.

7 For example, to reduce the transfer of technology, Magee, Op. cit., p. 13.

national price discrimination afforded cartelized industries, results in LDCs paying a higher price than purchasers in the more industrialized countries for the same technologies. Two caveats are mentioned by Magee in this context: first, many developing countries do not import technology until late in the technology cycle, that is, when it is virtually free; and second, the transfer costs to these developing countries may be higher than to the industrialized countries, [1].

In Contractors' work on the costs or technology transfer and the regulation of transfer arrangements, we may accent his study of varying optimum product prices desired by the local partners as opposed to foreign firms for the following contract contexts: the general case, in which licensing cum joint venture is employed; licensing only case as in an arms' length relationship, equity-sharing proposition in which no form of licensing is employed; and finally the licensing cum joint venture case, in which royalties are not deductible, [2]. In sum, Contractor determines that the foreign technology supplier will desire to set a lower price for the final product than the local investors (in all cases, except the third). Clearly, such a finding is contrary to the presumption/contention by several developing countries that having a foreign firm in full ownership of a local enterprise will enable it to exact a high price from consumers.

In his work on Foreign Enterprises in Developing Countries (1980), Isaiah Frank presents the results of an extensive survey of ninety multinationals headquartered in the United States, Japan, Australia, and in eight Western European countries. According to this account of MNE policy on foreign investment, "the opinions of multinational corporations on unbundling depend largely on the individual company's philosophy and its subsidiaries' experiences in particular host countries," [3]. My principle interest in the survey results center on how these perceptions, based on actual or presumed estimations of the savings or costs of such unbundling, color the benefits or liabilities that may be associated with unbundling in terms of resource control.

Despite perceptual differences among MNEs of varying geographic regions or industrial sectors, the one issue on which Frank notes almost complete agreement concerns the costs of such unbundling to the host country. In this context, "the multinationals strongly asserted that unbundling is a less efficient and more costly way of acquiring the foreign investment package. They cited several reasons: unbundling may provide short-term gains to the developing country, but would discourage long-term inputs from multinationals; financing is more readily available when foreign investors have equity participation; developing countries lack the managerial and administrative skills necessary to coordinate and effectively utilize all the components of the investment package; and technology that is unbundled may become obsolete before it is operational," [4]. One French company interviewed, however, felt such unbundling may result in lower costs via more effective competition among suppliers (an observation which Oman supports in Chapter Four of

1 Magee, Op. cit., p. 15).

2 Contractor, F.J., "The Regulation of Technology Importation in Developing Countries: Some Implications of Recent Theoretical and Empirical Evidence," University of Reading Discussion Paper No. 69, December 1982, pp. 3-6.

3 Frank, Op. cit., p. 57.

4 Ibid., p. 60.

his text).

Basic cost data is, by itself, insufficient in determining the criteria of such transfer of resources because of the potential reluctance of many foreign firms to meet host-country demands for unbundling. Among the extractive companies Frank interviewed, several maintained that they would not agree to unbundling because of the inefficiencies of "patchwork technology" and a loss of control over quality and performance, [1]. High-technology industries surveyed were generally unwilling or reluctant to unbundle: first, because "technology cannot be sold as a discrete transaction because it is inseparable from other elements of the package, such as management," or compatibility of equipment/parts, [2]; second, there is some question about what technology is being sold, primarily because of ongoing research and development activities in the home country; third, is the element of quality control mentioned above; and last, is the reluctance of firms to encourage participation by their competitors via deferred sales. Manufacturing firms in this study expressed reluctance to unbundle because of insufficient remuneration; the MNEs argued that many developing countries failed to realize the financial burden of research, development, and operational costs of technology imports.

Frank's study also offers some interesting insight to the degree of control such unbundling transfers to the developing host countries (the second objective outlined in the first paragraph of this section). Among the extractive companies polled, Frank comments that unbundling arrangements, such as management contracts, must satisfy the dual criteria of financial profitability for the MNE, and stability of investment via long-term contracting [3]. The implications that may be drawn from this investment scenario are: that not only are the costs of such involvement not likely to be reduced for the developing country (if each element acquired independently is sold at a 'profitable' rate, determined by the MNE or firm supplying it, then the developing country will most likely pay as much or more than the bundled cost originally, unless competition among suppliers is keen, and we assume no collusive pricing arrangements among these sellers), but the degree of control by host countries will be limited possibly by both the length of the contract and potentially rigorous provisions contained therein (such as tie-in arrangements, service contracts, etc.). One way this control may be retained by the MNEs is suggested by Frank's observation that firms outside high-technology fields are willing to unbundle, but only if such action does not necessitate the use of the company's name, brand names, trademarks, etc., unless they can retain operational control.

Admittedly Frank's and Dymaza's reports are of limited value in that they only consider the perceptions and perspectives of the multinational executives from only certain geographic regions (the industrial North). Similarly, while considering broadly the impact of developing country review of technology packages, Usui fails to more concertedly evaluate developing country perceptions and policies in this context.

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- 1 Frank, p. 57; See also Dymaza, W.A., "Regional Strategies of U.S. Multinational Firms that Affect Transfers of Technology to Developing Countries, in OECD's Transfer of Technology by Multinational Corporations, Vol II., 1977, p. 95.
 - 2 Frank, Op. cit., p. 58.
 - 3 Ibid., p. 57/See also Usui, M., "Transnational Enterprises and International Development/A New Focus in the Perspective of Industrial and Technological Cooperation," in OECD, 1977, Op cit., pp. 14-17).

An UNCTAD study (TD/B/AC.11/10/Rev.2) has recently reviewed the criteria employed by several developing countries [1] in assessing imported technology. The first comment that may be gleaned from this UNCTAD study is that most of the countries used roughly the same criteria for considering technology imports, whether or not this technology was constituted in the form of a package [2]. Of the specific replies made by the developing countries, most considered the impact of this technology on its balance of payments. The replies, however, did not explicitly distinguish between long- or short-term impacts. Balance of payments analysis, it might be noted, is a complex method of estimating the full impact of these imports in terms of costs--the costs of acquiring this technology from foreign suppliers, as compared with domestic design and production. In themselves, these estimations are incredibly complicated, and tedious. But, gauged in the overall context of imports and exports, as tabulated by balance of payments statistics, sensitive relationships in the process of technology acquisition or development may be neglected, or improperly manipulated. The contribution that foreign technology was estimated to have on the local industry (established techniques in the host-country) was, however, a consideration made by the developing countries. The third, and final specific criteria cited by the developing countries accented the extent to which local capital and manpower were to be used in the specific investment project. The UNCTAD study, mentions more explicitly several complications in the data supplied [3]:

First, no country indicated the relative importance accorded to different criteria. While it is clear that weighting changes over time, the order of priorities is not explicit, and it is not clear that practical effect is given to the priorities in the development plans when it comes to the question of imported technology. Secondly, and partly because the relative weights are not assigned, there may well be conflicts of objectives and no country has provided information on how such conflicts are resolved. Thirdly, no country appears to have developed a methodology for assessing the impact of foreign technology on the economy.

In final comment on this issue, the Report notes that in many of the countries interviewed, technology policy was formulated and evaluated by several departments within the respective governments, and consequently, inter-departmental conflicts could obstruct the swift and effective assessment of what limited criteria were reviewed. This lack of administrative competence is, it might be mentioned, an issue which was endorsed above by L. Mytelka in the Andean region case [4].

Because of the highly complex nature of cost-benefit calculations in such investment evaluation, Walter A. Chudson recommends its use only in project evaluation, particularly in terms of ranking industrial projects [5]. However, he does list the main factors to be considered by developing countries when considering the alternative means of tech-

1 Argentina, Chile, Colombia, Greece, India, Israel, Madagascar, Malta, Mexico, Pakistan, Peru, Republic of Korea, Singapore, Spain, Turkey, Venezuela and Yugoslavia.

2 UNCTAD (1975), p. 35.

3 *Ibid.*, p. 36.

4 See, Mytelka, *Op. cit.*, 1979, p. 64f. for details.

5 Chudson, *Op. cit.*, p. 24.

main factors to be considered by developing countries when considering the alternative means of technology transfer mechanisms. These may be summarized as follows [1]:

- 1) Profits, royalties or fees paid;
- 2) Conditions imposed by suppliers (for example restrictive business practices, transfer pricing, duration of licence contracts, availability for renegotiation);
- 3) Ability to obtain required inputs of technology, capital, management, export links and the like separately rather than in a "package;"
- 4) National control, sometimes associated with the degree of "unpackaging" obtainable, but having wider connotations, including non-economic objectives;
- 5) External economies obtained from training of local personnel and development of local technological and industrial capacity outside the firm.

While designed to both extend the opportunities available to the developing countries in acquiring technology from commercial transactions, and enhance the bargaining position of the developing countries relative to the multinational corporations, Raymond Vernon notes that "on narrow economic grounds the justification for an unselective rule in favor of such a policy is not strong," [2]. Both industrial and country-specific distinctions should be considered, as well as the relative bargaining power of both home and host countries. While admitting the existence of opportunities for such "unbundling," [3], Vernon maintains that the available evidence "does not support the widely held assumption that breaking open the package would usually lower the cost of acquiring the foreign resources," [4]. One of the reasons Vernon offers in this context is that:

the developing country is obliged to think of typical licensing fees at 3 or 4 percent of gross sales and typical costs of foreign capital at 12 to 14 percent. What this means in foreign payments depends on the source of capital and capital-output ratio; but annual payments of 10 or 15 percent of capital are easy to envisage. By comparison, a representative figure for sums remitted annually by foreign-owned manufacturing subsidiaries in developing countries as service payments to their parents for the use of technology and capital would be on the order of, say, 10 percent of the parent's investment.

In conclusion of this section of the paper, we may note in accor-

1 Chudson, W.A., Op. cit., p. 48.

2 Vernon, R., Multinational Enterprises in Developing Countries: An Analysis of National Goals and National Policies, Development Discussion Paper No. 4, Harvard Institute for International Development, 1975.

3 Vaitos, C., Intercountry Income Distribution and Transnational Enterprises (Oxford: Clarendon Press); and S. Lall's, "Transfer pricing by Multinational Manufacturing Firms," in the Oxford Bulletin of Economics and Statistics, Vol. 35, No. 3, 1973.

4 Vernon, Op. cit., p. 31; Reuber (1973), pp. 94-96, 142-145, and 190-193).

dance with a recent OECD study that the legal construct theoretically provided in the Codes of Conduct, are designed to enable the developing countries to choose between the vast array of technological innovations with the greatest degree of flexibility possible in meeting particular local requirements, as of a "technical kind (questions of climate);" of an "industrial kind (technology transferred);" or of "a financial kind," [1]. Yet, by attempting to distinguish between the 'custom-built' and the 'ready-made' J. Delorme feels they encounter the following practical problems [2]:

- 1) The technical capacity to make basic changes in an industrial process, unless they treat the investment as a pilot plant, with all the extra costs entailed;
- 2) with regard to commercial risks, any modification to a process which has already been completely tested raises the "threshold" (or difference between the technological levels of buyer and seller);
- 3) and with regard to firms' policy (and especially that of multinationals) this requirement clashes with the very organization of the multinational, which is that of a closed domain.

The final point this report makes is that each contract arrangement must be analyzed individually in the context available; only one general rule prevails and that is that "every successful operation in this field depends on bonds of trust between the managements of the two firms and among the other parties involved in the transfer. Furthermore, it involves much hard work by both sides, over a long period (10 years seems to be about the average)--and during that period buyer and seller constantly have to help each other to resolve all kinds of problems which confront them," [3]. These comments serve to highlight both the highly personal nature of technology transfer [4], and the incredibly difficult composition of technology transfer arrangements of any nature. This second issue, accenting implicitly what may be the fatal problems of disparate understandings of technology transfer by the buyer and seller indicate the truly personal nature of contractual arrangements in this field [5].

CONCLUSIONS

Definition of the MNE

While codes such as the OECD Guidelines understandably refrain from defining explicitly the MNE (to extend the breadth of their application), such an approach is nevertheless a definition per se. It becomes relevant to recognize the evolution and possible proliferation of the new forms of investment in several industrial sectors. Even if

1 OECD, North/South Technology Transfer: The Adjustments Ahead (Paris: OECD, 1982), pp. 90-91.

2 Ibid., p. 91.

3 Ibid., p. 91.

4 A point echoed by Teece, Op. cit., 1982, pp. 7-8, and Teece, Op. cit., 1981, pp. 82-84).

5 See this paper's discussion of Oman's distinction between a "sale" and an "investment," p. 2; see also Teece, Op. cit., 1982, pp. 8-9.

not explicitly mentioned in any of the codal texts reviewed herein, it is imperative for both the formulators and the respective member states to keep such types of investment in mind; if not in terms of possible revisions in the codal texts themselves, certainly in terms of the type of contractual arrangements considered by government enforcement units.

Preferably, the codes might adopt a more comprehensive definition of the MNE, which is neither based on majority ownership rights, nor principal control. Inevitably, the impact of the multinationals on the development policies of the developing countries will be substantial, even if not directly from positions of majority ownership or control. An alternative definition [1], has been recommended in this paper for adoption by the respective progenitors of the codes discussed in the present text. It was hoped that such a recommendation might envelope the various types of foreign investment stimulated by the multinational corporations, without watering down or limiting the application of such a definition in the codes in either the short- or long-term. Yet, at this point, it is suggested that the definition offered by Casson may be further improved.

The contribution which Casson's formulation makes to an understanding of the variety of multinational enterprise involvement in a foreign country is in terms of its consideration of ownership of output of goods or services and consequently is not restricted to a determination of majority ownership, or the requisite existence of a subsidiary in the host economy.

Teece's definition of the MNE as "an enterprise which manages and controls production establishments located in at least two countries, where 'production' is used in a general way to encompass service distribution facilities as well," [2]. Teece's formulation is particularly useful in citing the possibility of foreign investment in downstream functions of local production processes.

Ideally, the MNE might be defined as an enterprise which participates in the production processes (mainstream), distribution functions (downstream) or the supply of production inputs as goods, knowledge or services (upstream) in two or more countries. In this way, neither majority ownership nor principal control are considered as prerequisite to a definition of the MNE, and hence bar their inclusion by codal provisions. Similarly, the tripartite involvement by the MNE in the foreign country through upstream, mainstream, or downstream goods or services are broadly referred to here, without mandating involvement in all three areas or some combination thereof.

The Division of Ownership and Control

Closely related to these definitional issues is the division of ownership and control. The foregoing discussion has accented the complications of measuring ownership control simply in terms of ownership shares or holdings. Just as ownership should not be equated with control, the concept of control should not be considered monolithically; control may be divided along principal, and secondary (tertiary and so on) lines. While such a determination may be difficult if not, in some cases, impossible, it would certainly be more applicable to the types of foreign investment by the MNEs. Such a division of the control issue would initially complicate the administrative procedures of the enforcement units of respective countries, and concurrently escalate review

1 See present text, p. 20.

2 Teece, Op. cit., 1982, p. 4.

costs. Yet, in the longer term, regulation of investment technology transfer contracts could be more accurately assessed, and their impact on the development policies of these host-countries could be more precisely mandated. Eventually, such a procedure might diminish the financial costs of technology transfer, and reduce the negative ramifications of foreign investment generally.

Additional empirical research is needed in this area of investment review and regulation. Location of the decision-making centre within the new forms of investments would more clearly outline the various risks and responsibilities of the parties to such collaborative arrangements, and would more accurately pin-point who, how, and when these agreements are made. Oman has noted the importance of individual perceptions in distinguishing "sales" and "investments" [1]. While understandably, such perceptions change from situation to situation, depending on the industry considered, the firm and even the personnel involved in the transaction, it is useful to develop this behavioral understanding of the actors within these new forms of investment. Such an understanding will flesh-out the motivations for participation by the respective parties, the goals and objectives of their involvement and lastly, what the perceived implications this type of international development is to have for both home and host countries, or more specifically for government, labor, and the local and foreign firms.

"Unbundling" the Technology Package

The last major issue for consideration in this context is the impact of "unpackaging" technology as an objective of the codes, and more directly in terms of how this objective is influenced by the new forms of investment.

This report has attempted to sketch summarily the existing empirical research on the cost and implications of "unbundling." The limited evidence available suggests that the cost of reviewing such packages, and guaranteeing compliance by the respective parties to these contracts is quite high, although less so in low technology transfers and with successive transfers over time between the same contractual parties. The new forms of investment certainly complicate this process, via the increased responsibilities of the home country in reviewing packages; in many cases, the new forms of investment are more complex arrangements, because of the potentially high number of participants, and the option for informal arrangements of some magnitude. Not only must the host country review these 'complex' arrangements in the context of selecting the most price-effective and appropriate technology (the first difficult to assess in quantitative fashion, and the second, exacerbated by often indefinite or nebulous criteria for what is appropriate [2]. As one illustration, we might mention the case in which a change in one country's governing regime brings about a change in development priorities (possibly blocking enforcement efforts, or stifling investment incentives); or a second case, in which the same administration re-evaluates its priorities with potential vasculations in the application of such criteria in terms of the selection and evaluation of investment and technology arrangements.

In this context, it should be noted that the presumption that unbundling will result in lower transaction or appropriability costs in

1 Oman, Op. cit., C. 1; see also present text, p. 2.

2 Emmanuel, A., Appropriate or Underdeveloped Technology? (New York: John Wiley & Sons, 1982), pp. 35-60.

the transfer of technology to the host country, or enhance its control over indigenous resources, is neither solidly founded in the available research data, nor in theoretical terms. Contractor's work in this field has been quite formative, although certainly more empirical research in both geographic and industrial sectors is required to develop a more complete understanding of the various costs, and how they might change under different conditions with different participants (firm-specific implications). Just because the decision-making authority for the selection of technology is passed from foreign control to domestic hands, does not imply either greater control over these tangible or intangible assets (because the MNEs might continue to control or chose to increase their control over upstream inputs or downstream facilities), nor a more practical or beneficial application of these contractual arrangements for development priorities of the developing country(s). In the latter case, possibly inadequate training or incompetence might obstruct or obscure this process of selection or review, as might the lack of adequate information or poor communication of these development priorities from the policy makers to the enforcement officials.

The principal recommendations which can be derived from this presentation on transfer of technology include a proper evaluation of the development priorities by the developing countries, and timely and efficient dissemination of these priorities to both the enforcement officials in respective countries, and potential investors. In this way, the bulk of misunderstanding development priorities or specific objectives of the developing countries may be avoided. Moreover, the guidelines themselves, should include a listing (though understandably general) of the types of factors that might be considered in selecting or reviewing investment schemes or technology transfer contracts. Lastly, the developing countries should seriously consider the costs and implications of unbundling technology packages. While Oman has suggested that the costs of this transfer (by implication) might be diminishing, as well as the costs of enforcement, data contained in this paper has suggested that such trends may not be as prevalent as anticipated. This is particularly so if Contractor's finding on the relative costs for technology prices requested by foreign as opposed to local suppliers is borne out in more extensive sectoral research. The costs and implications for unbundling should also be evaluated in terms of the impact of such a policy either for the development of local innovations, or the long-term acquisition of foreign goods [1]. A specific case in which research might be most fruitful is in the Andean Group. Following a decade of controlling investment and technology transfers by foreign entities, the impact of control might be adequately evaluated, both in terms of the role of control for supporting or spurring regional and national development priorities, and secondly, in terms of the relative costs of such review in light of the option of purchasing directly these technology elements. Such a study would expand the work of Mytelka, for example, by considering the impact of control beyond a simple numerical calculation of the amount of investment and the number of firms participating in these investment programs.

1 Magee, Op. cit., 1981.

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