

# *Fordham International Law Journal*

---

*Volume 7, Issue 3*

1983

*Article 2*

---

## Host State Treatment of Transnational Corporations: Formulation of a Standard for the United Nations Code of Conduct on Transnational Corporations

Rosanne M. Thomas\*

\*

Copyright ©1983 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# Host State Treatment of Transnational Corporations: Formulation of a Standard for the United Nations Code of Conduct on Transnational Corporations

Rosanne M. Thomas

## **Abstract**

This Note examines the need for guidelines regulating TNC activity, and the importance of formulating a principle of host state treatment that will fulfill the objectives of the Draft Code. The three views on host state treatment and the support each view finds in international law are analyzed. From this analysis, it is concluded that only the LDC view, modified to require host states to clearly state developmental plans, is based on principles that are recognized by and compatible with the interests of all three blocs.

# HOST STATE TREATMENT OF TRANSNATIONAL CORPORATIONS: FORMULATION OF A STANDARD FOR THE UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS

## INTRODUCTION

The United Nations Code of Conduct on Transnational Corporations (Draft Code) has been negotiated under the auspices of the United Nations Commission on Transnational Corporations (CTC) since 1977.<sup>1</sup> The creation of rules governing host state treatment of

---

1. Draft United Nations Code of Conduct on Transnational Corporations, U.N. Doc. E/C.10/1982/6 annex (1982) [hereinafter cited as Draft Code]. E.S.C. Res. 1721, 53 U.N. ESCOR Supp. (No. 1) at 3, U.N. Doc. E/5209 (1972), requested the Secretary General to appoint a Group of Eminent Persons to study the role of transnational corporations in world society. For the report by that Group, see *Multinational Corporations in World Development*, U.N. Doc. ST/ECA/190 (1973) [hereinafter cited as *World Development*].

For an analysis of the recommendations for international action proposed by the Group, see *The Impact of Multinational Corporations on Development and International Relations*, U.N. Doc. E/5500/Rev.1, ST/ESA/6 (1974) [hereinafter cited as *Impact*]. For state response to the report of the Group of Eminent Persons, see *The Impact of Transnational Corporations on the Development Process and on International Relations*, U.N. Doc. E/5595 (1974) (views of states on the report of the Group of Eminent Persons) [hereinafter cited as *Views of States*].

The UN Commission on Transnational Corporations is a subsidiary organ of the Economic and Social Council, established unanimously by E.S.C. Res. 1913, 57 U.N. ESCOR Supp. (No. 1A) at 3, U.N. Doc. E/5570/Add.1 (1974). The Commission assists the Economic and Social Council in fulfilling its responsibilities in the field of transnational corporations by “[c]onducting inquiries on the activities of transnational corporations, making studies, preparing reports and organizing panels for facilitating discussions among relevant groups.” E.S.C. Res. 1913, *supra*, at 3, para. 3(d).

At its first substantive session in 1975, the Commission gave top priority to the formation of a Code to be observed in dealing with transnational corporations (TNC’s). Commission on Transnational Corporations, Report of the First Session, U.N. Doc. E/C.10/6 para. 9, at 2 (1975). It solicited lists of areas of concern and issues to be considered in Code negotiations. See *Issues Involved in the Formulation of a Code of Conduct*, U.N. Doc. E/C.10/17 (1976) [hereinafter cited as *Issues Involved*]; Commission on Transnational Corporations, Report of the Second Session, U.N. Doc. E/C.10/16 annex 1-4 (1976) [hereinafter cited as *Report on the Second Session*]. The Intergovernmental Working Group on a Code of Conduct was established in 1977 by the UN Commission on Transnational Corporations in accordance with paragraph 1(d) of E.S.C Res. 1913, *supra*, para. 1(d).

In May of 1983, the Intergovernmental Working Group on a Code of Conduct adopted a report containing negotiated texts of all substantive parts of the Code. See Draft Code, *supra*.

The Draft Code is composed of six main parts. Part one, when completed, will contain the preamble and objectives, Draft Code, *supra*, at 2; part two, the provisions on definitions and scope of application, *id.* paras. 1-5; part three, the provisions on the activities of the TNC’s, *id.* paras. 6-46; part four outlines the treatment TNC’s are to receive from host governments, *id.* paras. 47-58; part five addresses intergovernmental cooperation, *id.* paras. 59-65; part six outlines national and international implementation of the Code, *id.* paras. 66-

71. See also Transnational Corporations in World Development, U.N. Doc. ST/CTC/46 para. 345, at 110 (1983) [hereinafter cited as Third Survey] (the Third Survey is an in depth study on all major aspects of TNC activity and impact in world society, issued by the UN Centre on Transnational Corporations).

Among the provisions which have been fully agreed upon are: Adherence to socio-cultural values, Draft Code, *supra*, para. 12; ownership and control, *id.* paras. 21-25; balance of payments, *id.* paras. 26-32; environmental protection, *id.* paras. 41-43. Approximately five or six major areas remain in dispute. Completion of the Formulation of the Code of Conduct on Transnational Corporations, U.N. Doc. E/C.10/1983/S/2 para. 24, at 9 (1983).

Host state treatment of TNC's is a major area of conflict still outstanding in formulating the Code. See *infra* notes 25-53 and accompanying text. A host state is defined as "the recipient nation of any foreign direct investment." C. WALLACE, LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE 10 (1982). Other major areas of conflict still outstanding are:

1. The Legal Nature of the Code: Many delegations feel the Code should be mandatory or legally binding and therefore should take the form of a convention, treaty or other legally binding agreement. Third Survey, *supra*, para. 354, at 112. Others feel the Code should be voluntary and nonmandatory, containing broad principles or guidelines, but not legally enforceable rules. *Id.*

2. The Preamble and Objectives: While many delegations feel principles of sovereignty, noninterference with internal affairs and states' rights to regulate TNC's must be emphasized in this section, other delegations feel reference to these principles must be balanced by a reference to international law. *Id.* para. 357, at 113.

3. Definitions and Scope: The disagreement in this area centers around whether state-owned enterprises which otherwise fit the definition of TNC's should be considered as being within the scope of the Code. *Id.* paras. 360-61, at 113-14.

4. Activities of TNC's: Some delegations insist that all references to host state economic goals and development objectives be qualified by the term "declared" or "established." *Id.* para. 365, at 114-15. Others insist that emphasis be placed on TNC respect for national sovereignty. *Id.* para. 364, at 114.

5. Noncollaboration with Racist Minority Regimes: While most delegations feel the Code should explicitly require TNC's to reduce their business activities in South Africa, others feel that political issues should be resolved by other UN bodies. *Id.* paras. 368-69, at 115-16.

6. Implementation: Most delegations favor giving the Commission on Transnational Corporations the function of interpreting Code provisions in the light of actual situations. Some delegations are opposed to this proposal, reasoning that it would amount to granting quasi-judicial powers in the Commission, inappropriate in a voluntary Code. *Id.* para. 391, at 121.

7. Treatment of TNC's: Other than the extent of preference or discrimination permissible, the problems in this area revolve around nationalization and jurisdiction. In regard to nationalization, some delegations feel adequate compensation should be paid to TNC's and disputes relating to compensation should be settled in accordance with domestic law. *Id.* para. 383, at 119. Others insist on "prompt, adequate and effective compensation," and dispute resolution according to international law. *Id.* para. 383, at 119. In regard to jurisdiction, some delegations feel a general statement of the principle that TNC's are subject to the jurisdiction of the host states should suffice. *Id.* para. 386, at 120. Others feel it is important that the language be clarified to avoid the implication that the Code supports concurrent jurisdiction. *Id.* para. 386, at 120.

For selected documents and reports of the Commission on Transnational Corporations, see Transnational Corporations: Certain Modalities for Implementation of a Code of Conduct in Relation to its Possible Legal Nature, U.N. Doc. E/C.10/AC.2/9 (1978); Transnational Corporations: Views and Proposals of States on a Code of Conduct, U.N. Doc. E/C.10/

transnational corporations,<sup>2</sup> (TNC's), i.e. discriminatory treatment of transnational corporations by the governments of the states in which they operate, has been a major area of disagreement in formulating the Draft Code.<sup>3</sup>

19/Add.1 (1977) [hereinafter cited as Views and Proposals]; Transnational Corporations: Views and Proposals of Non-Governmental Interests on a Code of Conduct, U.N. Doc. E/C.10/20 (1976); Transnational Corporations: Material Relevant to the Formulation of a Code of Conduct, U.N. Doc. E/C.10/18 (1976) [hereinafter cited as Material Relevant]; Issues Involved, *supra*.

2. "Transnational corporation" is the terminology adopted by the UN to refer to commercial enterprises whose operations and activities span national boundaries. C. WALLACE, *supra* note 1, at 11.

For a discussion of the distinction between "transnational" and "multinational," see J. KUUSI, THE HOST STATE AND THE TRANSNATIONAL CORPORATION: AN ANALYSIS OF LEGAL RELATIONSHIPS 25-26 (1979); C. WALLACE, *supra* note 1, at 10-13; Seidl-Hohenveldern, *The United Nations and Transnational Corporations*, in LEGAL PROBLEMS OF MULTINATIONAL CORPORATIONS 43, 44-49 (K. Simmonds ed. 1977). The literature on multinational enterprises generally employs the two terms interchangeably. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 749 n.1 (1983).

Within the scope of this note, three terms will be used to distinguish the standards of treatment advocated by the three major blocs. "National treatment" is used to refer to the Developed Country position. See *infra* notes 27-34 and accompanying text. "Qualified national treatment" is used to refer to the Lesser Developed Country position. See *infra* notes 35-44 and accompanying text. The term "exclusively municipal treatment" is used to refer to the Socialist position. See *infra* notes 45-53 and accompanying text.

3. See Draft Code, *supra* note 1, paras. 48-50. The paragraphs which relate to national treatment are presently drafted as follows. Paragraphs and clauses of the Draft Code which are not agreed upon are designated in italics.

48. Transnational corporations should receive *fair and equitable and non-discriminatory* treatment under [or] in accordance with the laws, regulations and administrative practices of the countries in which they operate *as well as intergovernmental obligations to which the Governments of these countries have freely subscribed* [or] *consistent with their international obligations* [or] *consistent with international law*.

49. Consistent with *national constitutional systems and national needs to protect essential/national economic interests*, maintain public order and to protect national security, and with due regard to *provisions of agreements among countries, particularly developing countries*, entities of transnational corporations should be given by the countries in which they operate *the treatment* [or] *treatment no less favourable than that* [or] *appropriate treatment*[.] accorded to domestic enterprises under their laws, regulations and administrative practices *when the circumstances in which they operate are similar/identical* [or] *in like situations*. *Transnational corporations should not claim preferential treatment or the incentives and concessions granted to domestic enterprises of the countries in which they operate.* [or] *Such treatment should not necessarily include extension to entities of transnational corporations of incentives and concessions granted to domestic enterprises in order to promote self-reliant development or protect essential economic interests.*

50. *Endeavouring to assure the clarity and stability of national policies, laws, regulations and administrative practices is of acknowledged importance. Laws, regulations and other measures affecting transnational corporations should be publicly and readily available. Changes in them should be made with proper regard to*

Host state treatment of TNC's has been approached differently by each of the three major political blocs involved in negotiating the Draft Code.<sup>4</sup> The Developed Countries (DC's), Lesser Developed Countries (LDC's) and Socialist States have each advocated standards of treatment consistent with domestic objectives.<sup>5</sup> The effectiveness of the Code will depend upon which approach to host state treatment is adopted.

This Note examines the need for guidelines regulating TNC activity, and the importance of formulating a principle of host state treatment that will fulfill the objectives of the Draft Code.<sup>6</sup> The three views on host state treatment and the support each view finds in international law are analyzed.<sup>7</sup> From this analysis, it is concluded that only the LDC view, modified to require host states to clearly state developmental plans, is based on principles that are recognized by and compatible with the interests of all three blocs.<sup>8</sup>

### I. THE NEED FOR TNC REGULATION AND THE UNITED NATIONS' RESPONSE

Sharp increases in world trade, capital requirements and the movement of long-term capital across international boundaries have accounted for the tremendous growth of many TNC's in the past twenty-five years.<sup>9</sup> Generally, TNC's provide host states with

*the legitimate rights and interests of all concerned parties, including transnational corporations.*

*Id.* (footnotes omitted).

4. See *infra* notes 27-53 and accompanying text.

5. Third Survey, *supra* note 1, paras. 375-78, at 117-18. The three viewpoints which have emerged on this issue are typical of the positions generally taken within the UN when economic issues are discussed. R. HELLMAN, *TRANSNATIONAL CONTROL OF MULTINATIONAL CORPORATIONS* 68 (1977). Basically, the DC position is held by the Western industrialized nations with market oriented economies, within the Organization of Economic Cooperation and Development. *Id.* The LDC position is held by the more than 100 countries of the UN Group of 77 developing countries, which are at different degrees of economic development. *Id.* The Socialist position is held by the Eastern European Socialist countries, which have centrally planned economies. *Id.*

The first two blocs have regularly taken opposing stands on issues relating to TNC's. *Id.* The Socialist bloc nations generally support the LDC position while at the same time trying to advance their own ideological positions. *Id.* This is typical of the division of views in regard to national treatment. See *infra* notes 27-53 and accompanying text.

6. See *infra* notes 9-24 and accompanying text.

7. See *infra* notes 25-115 and accompanying text.

8. See *infra* notes 116-76 and accompanying text.

9. World Development, *supra* note 1, at 1. For a discussion of post-1945 growth and development of TNC's, see J. KUUSI, *supra* note 2, at 18-24. By the end of the 1960's, two-

capital, technology and other resources essential for the development of domestic industries.<sup>10</sup> The capacity of TNC's to develop new technology and skills quickly, and to use their productive and managerial skills to translate resources into specific output, has been outstanding.<sup>11</sup>

A TNC's presence, however, often exerts considerable influence on a host state, both economically<sup>12</sup> and socially.<sup>13</sup> Economically, the TNC is able to direct the development of the host state's natural resources by controlling the capital and technology necessary to develop key industries.<sup>14</sup> By threatening to withdraw this capital and technology, thereby causing the host state to lose both development and employment, the TNC can exert powerful economic influence.<sup>15</sup> Socially, the presence of the TNC in a nonindus-

thirds of overall direct investment asset value and income flows, and about three-quarters of the receipts of new capital inflows were accounted for by the DC's. *Id.* at 20. The remaining one-third of overall direct investment went to the LDC's, representing nearly 50% of all private capital movements to these areas. *Id.*

10. J. KUUSI, *supra* note 2, at 37. "Dynamic international firms transferred [to LDC's] by their investments not only urgently needed capital, but technology, know-how and managerial skills, stimulated local habits of saving and investment and provided training at different levels." *Id.* TNC investment can be beneficial to the host state in that it "brings to those societies most in need of them capital, technology and management and marketing skills." C.F. BERGSTEN, T. HORST & T. MORAN, *AMERICAN MULTINATIONALS AND AMERICAN INTERESTS* 355 (1978) [hereinafter cited as C.F. BERGSTEN].

11. World Development, *supra* note 1, at 2. "The multinational corporations have developed distinct advantages which can be put to the service of world development. Their ability to tap financial, physical and human resources around the world and to combine them in economically feasible and commercially profitable activities . . . have proven to be outstanding." *Id.*

12. Gordon, *The Impact of the Multinational Corporation in the Third World*, in *LEGAL PROBLEMS OF MULTINATIONAL CORPORATIONS* 21, 30-35 (K. Simmonds ed. 1977). The economic effect of TNC's on host states are usually direct and involve such areas as technology transfers, transfer pricing, use of joint ventures, acquisition policies and control of local credit. *Id.*

13. *See id.* at 24-30. "The principal problem for the [LDC] is that the cultural effect of [TNC's] is often ancillary to economic activity, and it is therefore more difficult to control directly than where cultural effect is the primary result of the activities of the [TNC]." *Id.* at 29.

14. R. HELLMAN, *supra* note 5, at 13. Traditionally, the resources of the LDC's have been "exploited almost exclusively by multinational corporations and [have] served as the basis of their worldwide business network. . . . The country owning the raw materials had only limited possibilities to protect its own interests." *Id.* Another author describes the dependency which has arisen in terms of "an increase in the influence and power of private foreign investment and of the [TNC which] has concentrated economic power in the hands of a few." Parmar, *Self-Reliant Development in an "Interdependent" World*, in *BEYOND DEPENDENCY* 3, 10 (G. Erb & V. Kallab ed. 1975). *See supra* notes 10-11 and accompanying text.

15. Apter, *Charters, Cartels and Multinationals—Some Colonial and Imperial Questions*, in *THE MULTINATIONAL CORPORATIONS AND SOCIAL CHANGE* 1, 16 (D. Apter & L.

trialized host state often results in the creation of distorted consumer demands that dramatically affect the cultural and social foundations of the host state.<sup>16</sup>

LDC's, while recognizing their need for TNC investment, perceive unregulated TNC activity as a subtle threat to sovereignty.<sup>17</sup>

Goodman eds. 1976). Apter states that "so powerful have the multinational corporations become that effects of [TNC] decision-making jeopardizes the ability of governments to make decisive national policy. As a predominantly private enterprise . . . it is capable of a great many alternative strategies and shifting lines of product differentiation." *Id.* One of the prime characteristics which enables TNC's to exert economic influence is "its flexibility in moving funds, material and personnel in and out of countries, all within one organizational framework with the privacy and speed that it affords." Vagts, *The Host Country Faces the Multinational Enterprise*, 53 B.U.L. REV. 261, 265 (1973).

16. See Gordon, *supra* note 12, at 24-30. "The multinationals' activities in creating consumer demand in the Third World may lead to distorted consumption patterns by persons who do not have the education or economic resources to make intelligent choices." *Id.* at 26. "[A]dvertising may tend to denigrate local customs. . . . [T]he issue that local authorities confront is not so much the particular question of cultural dependency as it is the general question of whether to protect the local population from certain values of which they disapprove." C.F. BERGSTEN, *supra* note 10, at 367.

17. See R. HELLMAN, *supra* note 5, at 32. TNC's will generally exercise power indirectly by use of their influence based on the economic impact of their activities, and their personal political contacts. This is particularly true in the LDC's, where the TNC can rely on influencing the ruling class to their advantage. *Id.* at 33. See also World Development, *supra* note 1, at 47 ("Often it is not the divergency in explicit objectives but the subtle impact of the multinational corporation on the process and pattern of development that is the source of tensions and conflicts.").

There are several reasons why TNC's are able to use this indirect power. Unlike governments, TNC's are not directly accountable for their policies and actions to a broadly established electorate. *Id.* at 2. Unlike national firms, they are not subject to control and regulation by a single authority which can aim to ensure maximum harmony between their operations and public interest. *Id.* Instead, TNC's tend to pursue the interest of their top management and equitable owners, located in the home state, opting for private objectives of profit rather than social welfare goals. *Id.* at 42.

While these problems are not unique to TNC's, they are complicated by the nature of the TNC.

While conflicts arising out of divergencies between the private objectives of a profit-making firm and the social welfare goals pursued by a government can apply to domestic as well as national corporations, there is an important difference in the capacity of governments to resolve such conflicts. Those of a purely domestic nature can be settled by the "pouvoir superieur souverain" of the government through its policies and regulatory machinery. Given the nature of the multinational corporation, however, conflicts between governments and such corporations assume greater and more complex proportions.

*Id.* at 43.

While the supremacy of state sovereignty is recognized, there is a discrepancy between having this right and having the ability to enforce this right. See R. HELLMAN, *supra* note 5, at 32. "However sacred and inviolable national sovereignty may be from the political point of view, few national boundaries correspond to economic demarcation lines and few states are self-contained economic entities." World Development, *supra* note 1, at 3.



They have attempted to monitor TNC activity through domestic legislation<sup>18</sup> and nationalization.<sup>19</sup> Legislative attempts to maintain host state control while promoting TNC investment have generally failed because TNC's have been able to shift operations to other developing countries willing to create more favorable investment climates.<sup>20</sup> Nationalization of a TNC, while giving the LDC control over the TNC's plant and technology, may result in loss of distribution and marketing networks necessary for successful operation of the industry.<sup>21</sup> The consequences of TNC growth and the inability of individual host states to effectively regulate TNC's,<sup>22</sup> made clear the need for an international mechanism to regulate TNC operation while still promoting the developmental aspirations of the host state.<sup>23</sup>

18. For a comparative study of national and regional regulations of TNC's, see National Legislation and Regulations Relating to Transnational Corporations, U.N. Doc. ST/CTC/6 (1978); U.N. Doc. ST/CTC/6/Add.1 (1980). The national legislation surveyed displays great variation in approaches, objectives, comprehensiveness and in the extent of regulation, control and discrimination to which it subjects foreign direct investment. See U.N. Doc. ST/CTC/6, at 6 (1978). See *infra* note 20 and accompanying text (this legislation has not generally proven effective).

19. More dramatic attempts by host states to regulate TNC activities have taken the form of host state nationalization of TNC operations. See R. HELLMAN, *supra* note 5, at 14; C. WALLACE, *supra* note 1, at 249-57; *infra* note 21 and accompanying text (nationalization has not proven an optimum solution).

20. See R. HELLMAN, *supra* note 5, at 4. "Because of their economic power and the fact that they operate simultaneously in several countries, [TNC's] have the possibility to bypass certain regulations . . . or even to impose their will on political decision makers." *Id.* States have continuously had difficulty in drafting legislation which would both promote the possible benefits of TNC's yet still minimize the negative aspects. Third Survey, *supra* note 1, para. 334, at 106. "Host countries could neither threaten nor bargain effectively. When one did attract foreign companies to set up local operations, it was not in a position to place stringent requirements on corporate behavior." C.F. BERGSTEN, *supra* note 10, at 371.

21. See Apter, *supra* note 15, at 24-25. "To nationalize the part of the organization operating in a particular country is not to nationalize the network. [Extensive nationalization] . . . is [a] very awkward [solution] leading to inefficiencies, bureaucracy, and a different set of social overhead costs." *Id.* at 24. See also R. HELLMAN, *supra* note 5, at 14 (disadvantages of nationalization include the loss of the high management, financing and marketing skills which a TNC provides). If a government tries to subordinate a TNC completely to its national objectives, it runs the risk of making the enterprise unprofitable, thus changing it into a burden on the nation's budget. *Id.* at 30.

22. See *supra* notes 9-21 and accompanying text.

23. See World Development, *supra* note 1, at 43-44. "[N]o single national jurisdiction can cope adequately with the global phenomenon of the multinational corporation, nor is there an international authority or machinery adequately equipped to alleviate the tensions that stem from the relationship between multinational corporations and nation states." *Id.* National regulatory regimes are incapable of dealing with all the problems posed by the TNC unless such regimes are supplemented by international mechanisms. *Informal Proposals To*

The CTC was established in 1974 to explore the role of TNC's in world society and to establish an enforcement mechanism that would ensure effective accommodation of these concerns on a world-wide basis.<sup>24</sup>

---

*Resolve Differences*, U.N. CHRON., May 1983, at 65 (opening statement to the Special Session of the Commission on Transnational Corporations by S. Yolah, UN Undersecretary for International Economic and Social Affairs).

Beginning in the second half of the 1970's, a variety of international codes of conduct and guidelines prescribing norms for the TNC's were proposed. Third Survey, *supra* note 1, para. 339, at 107. None of these codes is designed to be as universal and comprehensive as the Draft Code. *See infra* note 24. For background on the reasons for the proliferation of TNC guidelines and a discussion of various guidelines, see Vagts, *Multinational Corporations and International Guidelines*, 18 COMMON MKT. L. REV. 463, 464-68 (1981). Some of these instruments are attempts to establish comprehensive frameworks dealing with a wide variety of issues relating to TNC operations. *See, e.g.*, Int'l Labor Org., Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977), *reprinted in* 17 I.L.M. 423 (1978); Org. of Economic Cooperation and Dev., *International Investment and Multinational Enterprises* (1976) [hereinafter cited as OECD Guidelines].

Others are limited to specified subjects or specific regional concerns. *See, e.g.*, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/CONF/10 (1980), *reprinted in* 19 I.L.M. 813 (1980); Draft International Code of Conduct on the Transfer of Technology, U.N. Doc. TD/CODE TOT/25 (1980), *reprinted in* 19 I.L.M. 773 (1980); Ad Hoc Intergovernmental Working Group on Corrupt Practices: Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions: Concepts and Issues Related to the Formulation of an International Agreement, U.N. Doc. E/AC.6/4/3 (1977); Int'l Chamber of Com., Pub. No. 272, *Guidelines for International Investment* (1972) [hereinafter cited as ICC Guidelines].

24. The purposes of the Code are set forth in E.S.C. Res. 1980/60, 67 U.N. ESCOR Supp. (No. 1A) at 18, U.N. Doc. E/1980/80/Add.1 (1980). According to the resolution, the Code will:

- (a) Be effective, comprehensive, generally accepted and universally adopted;
- (b) Associate effectively the activities of *transnational corporations* with efforts to establish the new international economic order and their capabilities *with the developmental objectives* of the developing countries;
- (c) Reflect the principle of *respect* by transnational corporations *for the national sovereignty*, laws and regulations of the countries in which they operate, and for the established policies of those countries and the right of States to regulate and accordingly to monitor the activities of transnational corporations;
- (d) Encourage the contribution that transnational corporations can make *towards* the achievement of *developmental goals* and the established objectives of the countries in which they operate, particularly the developing countries.

*Id.* para. 6 (emphasis added).

The Code is unique in four ways. First, it is the first code to deal comprehensively with a wide range of issues associated with the activities of TNC's. *The United Nations Code of Conduct in Transnational Corporations*, CTC REP., Summer 1982, U.N. Sales No.E.82.II.A.14, at 2. Second, it is to be a universal instrument supported by and applicable in all states. *Id.* Third, its process of adoption will have taken into account the variety of interests involved. *Id.* Lastly, irrespective of its legal nature, it is designed to be effective, inter alia, by instituting implementation mechanisms for follow up action at both the national and international levels. *Id.*

## II. THE NATURE OF THE HOST STATE TREATMENT CONFLICT

As the CTC attempted to formulate a code of conduct, a controversy arose over provisions on host state treatment of TNC's.<sup>25</sup> Because of the impact host state treatment has on both host state economies and TNC operations, the DC's, LDC's and Socialist States have all found it important to adopt differing views that reflect their own objectives.<sup>26</sup>

### A. *Developed Country Position: National Treatment*

In seeking to improve the investment climate in host states, the DC's maintain that "national treatment" should be given to TNC operations.<sup>27</sup> The principle of "national treatment" calls for treatment that is "no less favorable" than that given to the host state's domestic corporations.<sup>28</sup> The DC's recognize that the host state may require TNC's to observe established entry requirements before they will be allowed to operate.<sup>29</sup> After operations commence how-

25. See Third Survey, *supra* note 1, paras. 375-79, at 117-18; Issues Involved, *supra* note 1, paras. 134-36, at 31-32; Report on the Second Session, *supra* note 1, annex. 1, paras. 1, 13; *id.* annex 2, paras. 2(1), 2(11-13).

26. See *infra* notes 27-53 and accompanying text.

27. Third Survey, *supra* note 1, para. 376, at 117-18. National treatment refers generally to a state's responsibility "to treat the property of aliens in substantially the same manner in which they treat the property of their own nationals." Fatouros, *International Law and the Third World*, 50 VA. L. REV. 783, 807-08 (1964). The principle has varying interpretations. *Id.* See Issues Involved, *supra* note 1, paras. 134-35, at 31-32. "According to one interpretation, national treatment requires that no alien should be treated better than a national, but must in all cases be treated the same manner. According to another, it requires that aliens should not be treated less favorably than nationals." *Id.* para. 134, at 31-32.

28. Third Survey, *supra* note 1, para. 376, at 117-18. The DC view is drawn primarily from the OECD Guidelines, *supra* note 23. Third Survey, *supra* note 1, para. 376, at 117-18. For the provisions of the OECD Guidelines dealing with national treatment, see *infra* note 58 and accompanying text.

29. See OECD Guidelines, *supra* note 23, art. 2(4). For the relevant provision, see *infra* note 58 and accompanying text. This right on the part of the host state is generally agreed to by all parties. The Draft Code provision on this issue reads as follows:

States have the right to regulate the entry and establishment of transnational corporations including determining the role that such corporations may play in economic and social development and prohibiting or limiting the extent of their presence in specific sectors.

Draft Code, *supra* note 1, para. 47.

ever, "national treatment" requires the host state to treat it no less favorably than its national corporations.<sup>30</sup>

### 1. Motivations

Endeavoring to protect their TNC's, the DC's advocate reciprocal treatment in international commercial exchange.<sup>31</sup> The principle of reciprocal treatment encourages states to enact legislation generally beneficial to investment.<sup>32</sup> Thus, reciprocal treatment has traditionally maximized developmental benefits and promoted cooperation among states.<sup>33</sup> The principle of reciprocity encourages application of common standards of commercial practice and thereby promotes the stability in expectations that is necessary to maximize cooperation between the TNC's and host governments.<sup>34</sup>

#### B. *Lesser Developed Country Position: Qualified National Treatment*

The LDC's support a "qualified national treatment" that allows a host state to regulate TNC's in conformity with national

30. Third Survey, *supra* note 1, para. 376, at 117-18. See also OECD Guidelines, *supra* note 23, art. 2(1). Under the DC view, the host state at all times remains free to give TNC's more favorable treatment than its own domestic corporations receive. See Third Survey, *supra* note 1, para. 379, at 118; Materials Relevant, *supra* note 1, para. 246, at 73; Issues Involved, *supra* note 1, para. 134, at 31-32.

31. See R. HELLMAN, *supra* note 5, at 74. National treatment among the industrialized countries is based on the principle of reciprocity. *Id.* Reciprocity as a basis for national treatment guarantees security and economic rights to TNC's. See N. FATEMI, G. WILLIAMS & T. DE SAINT-PHALLE, *MULTINATIONAL CORPORATIONS: PROBLEMS AND PROSPECTS* 215 (2d ed. 1976). Reciprocity is usually achieved among DC's through treaties of Friendship, Commerce and Navigation. C. WALLACE, *supra* note 1, at 94; see *infra* notes 66-70 and accompanying text.

32. See R. HELLMAN, *supra* note 5, at 74.

33. H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 626-27 (2d ed. 1976) [hereinafter cited as H. STEINER]. Reciprocity legislation takes the form of statutes which provide that "nationals of foreign countries can assert certain rights in this country only if the foreign country accords the same rights or privileges to United States citizens." *Id.* The ultimate aim is frequently to persuade foreign states to change their policies towards the nationals of the country enacting the reciprocity legislation. *Id.* at 627.

34. This emphasis on maximization of cooperation was expressed in the United States response to the Report of the Group of Eminent Persons. "The international community can play a valuable role in achieving [a legitimate] . . . balance of interests [between governments and corporations] . . . by promoting understanding between Governments and multinational corporations which will increase the stability of expectations of each other's behaviour." *The Impact of Transnational Corporations on the Development Process and on International Relations*, U.N. Doc. E/5595/Add.5 para. 1 (1974).

objectives and priorities.<sup>35</sup> The LDC position makes no reference to treatment in conformity with international law or in accordance with "established" objectives.<sup>36</sup> Therefore, each LDC would be allowed to determine its own "national priorities and objectives" and to treat TNC's according to its own sovereign determination without any threat of outside interference.<sup>37</sup> "Qualified national treatment" gives the LDC the freedom to evaluate its situation on a functional basis, with the option of either preferring or discriminating against the TNC based on this evaluation.<sup>38</sup>

### 1. Motivations

Since the LDC's are primarily importers of capital, they are motivated by a desire to ensure the compatibility of TNC activities with their developmental plans and economic objectives.<sup>39</sup> The

---

35. Third Survey, *supra* note 1, para. 378, at 118. The LDC view is primarily drawn from the Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974) [hereinafter cited as CERDS]. For the relevant provisions of the Charter of Economic Rights and Duties of States (CERDS), see *infra* notes 88-90 and accompanying text.

36. CERDS, *supra* note 35, art. 2(a). See also Third Survey, *supra* note 1, para. 377, at 118. The LDC's have been unwilling to accept the DC assertion that host state treatment of TNC's should make reference to principles of international law or "established" developmental plans. Rodriguez-Mendoza, *Reflections on the Code: The Negotiations on the United Nations Code of Conduct on Transnational Corporations: Some Issues*, CTC REP., Summer 1982, at 9, U.N. Sales No. E.82.II.A.14.

37. See Third Survey, *supra* note 1, para. 377, at 118. It has been recognized that "[p]erhaps the most important element of self-reliance in [LDC's] . . . is the formulation of concepts and policies of development based on their own socio-economic realities rather than on ideas inherited from the North." Parmar, *supra* note 14, at 8. The LDC emphasis on absolute sovereignty in determining host state actions toward the TNC was apparent from the onset of Code negotiations when the LDC's expressed opposition to inclusion in the Code of any principles to be observed by host governments in treatment of TNC's. See Rodriguez-Mendoza, *supra* note 36, at 8.

38. Third Survey, *supra* note 1, para. 379, at 118. This is phrased in terms of LDC's desiring "that the treatment accorded to transnational corporations would *not necessarily* include extension to them of incentives given to domestic enterprises." *Id.* (emphasis added). The implication is that the host state may prefer or discriminate against the TNC depending upon its national economic priorities.

39. Third Survey, *supra* note 1, at 377, at 118. See Report on the Second Session, *supra* note 1, annex 1, para 13; *id.* annex 4, para. F. For instance, the delegations from a group of South American States insist on economic integration as a basic principle of the Code. "The [TNC] shall be subject to the national policies, objectives and priorities for development, and should contribute positively . . . [toward] carrying them out." *Id.* The LDC's insist on inclusion of a developmental clause whereby "national treatment would be given to TNC's only if it is compatible with and does not prejudice the country's economic goals and development plans." Rodriguez-Mendoza, *supra* note 36, at 9.

LDC's take a pragmatic rather than an ideological approach to host state treatment of TNC's. Their primary concern is with increased development, not with underlying political or economic philosophy.<sup>40</sup>

Since the LDC's generally do not have the technology and resources possessed by the TNC,<sup>41</sup> the LDC position is that nondiscriminatory treatment of foreign and domestic enterprises would in effect amount to discrimination in favor of the TNC.<sup>42</sup> Moreover, equal treatment of foreign and domestic corporations would encourage the short-term benefits provided by foreign capital investment at the expense of long-term development of host state domestic industries.<sup>43</sup> Thus, adoption of "national treatment," as advocated by the DC's, would undermine LDC efforts to strengthen their own enterprises in promotion of autonomous and self-reliant development.<sup>44</sup>

### C. Socialist State Position: Exclusively Municipal Treatment

In the view of the Socialist States, states have the right to regulate TNC's in accordance with their own municipal laws.<sup>45</sup>

40. Third Survey, *supra* note 1, para. 377, at 118; Rodríguez-Mendoza, *supra* note 36, at 9.

41. See C.F. BERGSTEN, *supra* note 10, at 370. The skills of the TNC can be duplicated at the local level only with great loss in efficiency, if at all. *Id.*

42. Rodríguez-Mendoza, *supra* note 36, at 9; see also Third Survey, *supra* note 1, para. 377, at 118 (citing Rodríguez-Mendoza).

The LDC's feel that the DC reliance on reciprocity is irrelevant to them. R. HELLMAN, *supra* note 5, at 74-75; Rodríguez-Mendoza, *supra* note 36, at 8. See also Goldsmith & Sonderkotter, *Equality and Discrimination in International Economic Law (V)*, 1975 Y.B. WORLD AFF. 265, 277. "[R]eciprocity between those who are unequal in economic strength is a contradiction in economic terms." *Id.* (quoting S.S. Ramphal, Foreign Minister of Guyana).

43. Third Survey, *supra* note 1, para. 377, at 118. See also Views and Proposals, *supra* note 1, at 7-8; Report on the Second Session, *supra* note 1, annex 1, para. 13; *id.* annex 4, para. 11; D. WALLACE, INTERNATIONAL REGULATION OF MULTINATIONAL CORPORATIONS 66-67 (1976).

44. Third Survey, *supra* note 1, para. 377, at 118. See Rodríguez-Mendoza, *supra* note 36, at 9. The LDC's assert that such "a principle would conflict with efforts being made to strengthen their own enterprises in order to promote autonomous and self-reliant development." Third Survey, *supra* note 1, para. 377, at 118.

45. See Third Survey, *supra* note 1, para. 378, at 118. See also Fatouros, *supra* note 27, at 808; Tunkin, *The Problem of State Responsibility in the International Law Commission*, 1960 SOVIET Y.B. INT'L L., 92, 103-04 (English summary); Vitkov, *Nationalization and International Law*, 1960 SOVIET Y.B. INT'L L., 58, 78 (English summary); *infra* notes 102-05 and accompanying text (discussing Socialist reliance on municipal law in regulating TNC's).

According to this view, equality of treatment should never mean equal treatment with nationals of the host state.<sup>46</sup> In a socialist state, TNC's enjoy a less privileged status than national corporations,<sup>47</sup> and are not eligible for the investment incentives granted by socialist governments to domestic enterprises.<sup>48</sup>

### 1. Motivations

The Socialist view is motivated by a desire to protect the particular ideological principles underlying their political and economic systems.<sup>49</sup> Since the means of production are state-owned in a socialist state,<sup>50</sup> the Socialist States' "exclusively municipal treatment" formulation is an attempt to effectuate their political ideology and economic philosophy.<sup>51</sup> Economic activities of TNC's are conceivable only within the framework of national planning or in the context of regional planning by the Council for Mutual Economic Assistance (COMECON), and within these frameworks the interests of the State are always considered supreme.<sup>52</sup> Therefore, the Socialist States consider equal treatment of TNC's and state-owned enterprises to be impermissible.<sup>53</sup>

46. Siqueiros, *The Juridical Regulation of Transnational Enterprises*, in *NEW DIRECTIONS IN INTERNATIONAL TRADE LAW* 281, 286-87 (International Institute for the Unification of Private Law ed. 1977). See also C. WALLACE, *supra* note 1, at 97; Seidl-Hohenveldern, *supra* note 2, at 54 (both discussing the implication of the Siqueiros Report). Siqueiros states that "the most effective legal control of the [transnational enterprise] lies in the local jurisdiction of the investment recipient country." Siqueiros, *supra*, at 286.

47. See C. WALLACE, *supra* note 1, at 97; Seidl-Hohenveldern, *supra* note 2, at 54.

48. See C. WALLACE, *supra* note 1, at 97-98; Seidl-Hohenveldern, *supra* note 2, at 54. "According to Siqueiros, 'equality of treatment' should never consist [of] . . . equal treatment with nationals of the host State. Foreigners, especially [TNC's], should enjoy a less privileged status, but all foreigners ought to be treated alike." *Id.*

49. Third Survey, *supra* note 1, para. 378, at 118. See Heininger, *Negotiations Have Reached a Crucial Stage*, CTC REP., Summer 1982, at 12, 13, U.N. Sales No. E.82.II.A.14.

50. Ledyakh & Maltsev, *Human Rights in the Present Ideological Struggle*, in *SOCIALISM AND HUMAN RIGHTS* 169, 173 (M. Goncharuk ed. 1979). "By its abolition of private ownership of the means of production socialism put an end to the ideological worship of the right of capitalist private property." *Id.*

51. See *infra* notes 108-15 and accompanying text.

52. R. HELLMAN, *supra* note 5, at 76. The Council for Mutual Economic Assistance (COMECON) was established in 1949 to coordinate economic cooperation between the socialist countries. It was set up with a "view to defending . . . the People's Democracies from world imperialism." V.S. SHEVTSOV, *NATIONAL SOVEREIGNTY AND THE SOVIET STATE* 156-57 (1974).

53. See Ledyakh & Maltsev, *supra* note 50, at 173. "[L]egislation in socialist countries bars . . . any activity that conflicts with the interests of society and the state . . ." *Id.* The socialists express the supremacy of the State's interests in terms of a reliance on state sov-

### III. SUPPORT IN INTERNATIONAL LAW

The three positions on host state treatment of TNC's find support in differing international instruments, customary practice, principles of law and ideological considerations.<sup>54</sup>

#### A. *International Legal Support for the Developed Country Position*

The DC position is supported by a number of international instruments and agreements.<sup>55</sup> In particular, the OECD Guidelines<sup>56</sup> contain a number of provisions on national treatment that eliminate discrimination between national and multinational enterprises.<sup>57</sup> The principal article provides:

That Member countries should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfill commitments relating to international peace and security, accord to . . . [Foreign Controlled Enterprises] treatment under their laws . . . consistent with international law and no less favourable than that accorded in like situations to domestic enterprises . . . .<sup>58</sup>

To the DC's, the OECD Guidelines reflect the model formulation of host state treatment for inclusion in the UN Code.<sup>59</sup>

eighty. See, e.g., *Informal Proposals to Resolve Differences*, U.N. CHRON., May 1983, at 66. The USSR and China both stated in the general debate at the Special Session that the Code must require strict observance of and respect for host state sovereignty on the part of the TNC. *Id.*

54. See *infra* notes 55-115 and accompanying text.

55. See *infra* notes 56-75 and accompanying text.

56. OECD Guidelines, *supra* note 23.

57. *Id.* For the primary provisions relating to national treatment, see *infra* note 58 and accompanying text.

58. OECD Guidelines, *supra* note 23, art. 2(1). The OECD Guidelines also provide:

2. [T]hat Member countries will consider applying "National Treatment" in respect of countries other than Member countries;

3. that Member countries will endeavor to ensure that their territorial subdivisions apply "National Treatment";

4. that this Declaration does not deal with the right of Member countries to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises.

*Id.* arts. 2(2)-(4). For an analysis of the OECD provisions on national treatment, see Org. of Economic Cooperation and Dev., *National Treatment for Foreign-Controlled Enterprises Established in OECD Countries* (1978).

59. Third Survey, *supra* note 1, para. 376, at 117-18.



In addition, a number of articles in the Treaty Establishing the European Economic Community<sup>60</sup> (EEC Treaty) sustain nondiscriminatory, equal treatment of foreign corporations.<sup>61</sup> Article 7 of the EEC Treaty contains a broad anti-discrimination rule prohibiting "any discrimination on the grounds of nationality."<sup>62</sup> More specifically, article 52 of the EEC Treaty calls for "freedom of establishment of nationals of a Member State in the territory of another Member State."<sup>63</sup> The Treaty provides that "freedom of establishment shall include the right to . . . set up and manage enterprises and, in particular, companies . . . under the conditions laid down by the law of the country of establishment for its own nationals."<sup>64</sup> This grant of "freedom of establishment" ensures foreign corporations equal treatment with their domestic counterparts, and therefore further supports the DC position.<sup>65</sup>

Other legal instruments in which national treatment is extended are the treaties of Friendship, Commerce and Navigation (FCN Treaties).<sup>66</sup> The United States, for example, has FCN Treaties with several nations,<sup>67</sup> and the reciprocal guarantees of national treatment therein apply with the force of law.<sup>68</sup>

Typically, the FCN Treaties provide that "companies of either Contracting Party shall be accorded national treatment with respect to engaging in all types of . . . [business activities] within the

---

60. Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.

61. *See id.* arts. 7, 48(2), 49, 52, 65, 67(1).

62. *Id.* art. 7. Article 7 states: "Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited." *Id.*

63. *Id.* art. 52.

64. *Id.*

65. According to the construction of article 52, "[t]he right of establishment dealt with in Article 52 . . . embraces all sectors of economic life: industry, commerce, finance, agriculture, public works, crafts, and the professions." 2 THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY § 52.05 (1981).

66. *See* C. WALLACE, *supra* note 1, at 92.

67. *See, e.g.*, Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, 14 U.S.T. 1284, T.I.A.S. No. 5432; Treaty of Friendship, Commerce and Navigation, July 14, 1956, United States-Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593 [hereinafter cited as West Germany Treaty]; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, 63 Stat. 2255, T.I.A.S. No. 1965 [hereinafter cited as Italy Treaty].

68. This is known as the principle of *pacta sunt servanda*. According to the International Law Commission: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." *Draft Articles on the Law of Treaties*, [1966] 2 Y.B. INT'L L. COMM'N 177, 180.

territories of the other Party.”<sup>69</sup> National treatment is defined as “treatment accorded within the territories of a Contracting Party upon terms no less favourable than the treatment accorded therein, in like situations, to . . . companies . . . of such Party.”<sup>70</sup> Such a formulation, again, reflects the basic precepts of the DC position.

The DC’s also stress the importance of customary international law.<sup>71</sup> They emphasize that from the earliest international capital movements, state practice has established a customary rule of international law guarding the sanctity of private property and protecting property rights of foreigners.<sup>72</sup> In the DC view, equality of treatment, nondiscrimination and reciprocity have long been a part of customary international law,<sup>73</sup> and support many of the most significant treaty relationships in the contemporary world.<sup>74</sup> Many

69. Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, art. VI.1, 14 U.S.T. 251, T.I.A.S. No. 5306 [hereinafter cited as Luxembourg Treaty]. Similar provisions are found in the West Germany Treaty, *supra* note 67, art. VI, and the Italy Treaty, *supra* note 67, art. V(4).

70. Luxembourg Treaty, *supra* note 69, art. XV.1.

71. The international community has long recognized custom as a primary means of forming international law. See I.C.J. STAT. art. 38 para. 1(b). Where “customary international law is built up by the common practice of States . . . it is probably true to say that consent is latent in the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law.” Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, 1953 BRIT. Y.B. INT’L L. 1, 68. The United States has recognized customary international law as part of its municipal law administrable by United States courts. See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

72. J. KUUSI, *supra* note 2, at 36. “As private capital movements abroad increased during the latter half of the nineteenth century, a rule of international law for the protection of the property rights of aliens . . . was gradually established.” *Id.* This standard is still viable today, and justified, in the DC view, in that it promotes movements of capital to LDC’s, which are urgently in need of external capital. *Id.* at 37.

73. See J. KUUSI, *supra* note 2, at 36; Fatouras, *supra* note 27, at 807. “Part of the classical approach of international law, including protection of property, is nondiscrimination, which is sometimes described as a requirement . . . for ‘national treatment’ . . . .” D. WALLACE, *supra* note 43, at 112. According to the DC’s, “[n]ondiscrimination should be a basic rule.” *Id.* To permit discrimination, even when the reasons are appealing, encroaches on an open economic system. *Id.* at 114.

74. H. STEINER, *supra* note 33, at 627. See, e.g., Agreement Between the Government of the United States of America and the Government of Canada on Reciprocal Fishing Privileges in Certain Areas Off Their Coasts, Apr. 24, 1970, United States-Canada, 21 U.S.T. 1283, T.I.A.S. No. 6879 (fisheries convention); Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *opened for signature* Aug. 15, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (nuclear test ban treaty); West Germany treaty, *supra* note 67.

DC theorists view reciprocity as a consideration that is fundamental to DC political and legal action.<sup>75</sup>

Looking to municipal law, the DC's draw upon equality of treatment and reciprocity as general principles of law common to all civilized nations.<sup>76</sup> According to the DC's, the widespread acceptance of these principles supports the conclusion that both have become general principles of international law.<sup>77</sup> For example, the Company laws of a number of states prohibit corporate discrimination against foreign shareholders.<sup>78</sup> The United States, in particular, accords national treatment to all foreign enterprises, giving them the same legal standing as their domestic counterparts.<sup>79</sup> The United States Trade Act of 1974,<sup>80</sup> in promotion of "the development of an open, nondiscriminatory, and fair world economic system,"<sup>81</sup> contains provisions relating to both nondiscriminatory<sup>82</sup> and reciprocal treatment.<sup>83</sup> Among the purposes of this Act are "to strengthen economic relations between the [United States] and foreign countries through open and *nondiscriminatory* world trade [and] to establish fairness and equity in international trade rela-

75. See H. STEINER, *supra* note 33, at 627-28. Steiner and Vagts explain this underlying reliance:

For many contemporary theorists of international law and relations . . . reciprocity and the related concepts of accommodation and comity form the very cornerstone of the subject matter. Forbearance by a nation from exertion of its full power in an effort to encourage others to a comparable attitude of restraint, the principle that one should do to others as one would have done to oneself, are fundamental considerations in many areas of political and legal action.

*Id.*

76. See *infra* notes 77-84 and accompanying text.

77. See C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 280 (1968). The principles by which a nation regulates the property rights of aliens are international law principles. *Id.* "The treatment due to the alien corresponds to an international standard or common level adopted in civilized countries . . ." *Id.* at n.85.

78. C. WALLACE, *supra* note 1, at 92. For instance, the United Kingdom, Ireland, France, Belgium, Netherlands, West Germany, Austria and Israel all have company laws prohibiting corporate discrimination against foreign shareholders. Schmitthoff, *The Multinational Enterprise in the United Kingdom*, in *NATIONALISM AND THE MULTINATIONAL ENTERPRISE* 22, 26 (H. Hahlo, J. Smith & R. Wright eds. 1973). See C. WALLACE, *supra* note 1, at 92.

79. C. WALLACE, *supra* note 1, at 92.

80. 19 U.S.C. §§ 2101-2487 (1976).

81. H.R. REP. NO. 10,710, 93d Cong., 2d Sess. (1975), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186.

82. 19 U.S.C. § 2434 (1976).

83. *Id.* § 2136.

tions."<sup>84</sup> Equality of treatment and reciprocity thus being integral to DC treaty, custom and municipal law, support the DC position that national treatment of TNC's is required.

B. *International Legal Support for the Lesser  
Developed Country Position*

The LDC's have not agreed to any international legal instrument that embodies the principle of national treatment as formulated by the DC's.<sup>85</sup> While the LDC's generally recognize that unreasonable and discriminatory measures should be avoided, this recognition is qualified.<sup>86</sup> The host government may discriminate by according "special treatment to any enterprise or enterprises, whether domestic or foreign owned, in the interest of the economy."<sup>87</sup>

The LDC position finds support in the UN Charter of Economic Rights and Duties of States<sup>88</sup> (CERDS). Article 2 of CERDS grants each state the right "[t]o regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities."<sup>89</sup> This formulation, making specific refer-

84. *Id.* § 2102 (emphasis added).

85. Third Survey, *supra* note 1, para. 377, at 118.

86. *Id.* para. 378, at 118. The LDC's have "insisted that the various proposed provisions on national treatment should be qualified by terms taking into account their peculiar developmental concerns." *Id.* While national treatment is recognized by the LDC's, they seek a "clause whereby national treatment would be given to transnational corporations only if compatible with and not prejudicial to the country's economic goals and development plans." *Id.*

87. ICC Guidelines, *supra* note 23, art. I.3.d. This formulation of permissible host state conduct by the International Chamber of Commerce (ICC) reflects the ICC's belief that "if international investment is to make its optimum contribution to economic and social progress alongside a strong and efficient domestic private sector, it is essential that mutual understanding between private international investors and governments on basic issues affecting their relationship be promoted." *Id.* at 6-7.

88. CERDS, *supra* note 35. CERDS was adopted by the UN General Assembly in 1974 for the fundamental purpose of promoting "the establishment of the new international economic order based on equity, sovereign equality, interdependence, common interest and co-operation among all States." [1974] U.N.Y.B. 383, U.N. Sales No. E.76.I.1. For an analysis of CERDS, see Laing, *International Economic Law and Public Order in the Age of Equality*, 12 LAW & POL'Y INT'L BUS. 727 (1980); Note, *Charter on Economic Rights and Duties of States: A Solution to the Development Aid Problem?*, 4 GA. J. INT'L & COMP. L. 441 (1974).

89. CERDS, *supra* note 35, art. 2.

ence to national objectives and priorities, reflects the position on host state treatment that the LDC's wish to include in the UN Code.<sup>90</sup> In addition, the UN Declaration on the Establishment of a New International Economic Order<sup>91</sup> (DENIEO) and the Lomé Convention of the European Community<sup>92</sup> contain similar concessions of nonreciprocal, preferential treatment for domestic corporations in LDC's.<sup>93</sup> For instance, one of the principles on which DENIEO is founded is full respect for "[p]referential and nonreciprocal treatment for developing countries, wherever feasible, in all fields of international economic cooperation."<sup>94</sup> The LDC's "qualified national treatment" thus recognizes the desire of the LDC's to regulate TNC's when harmful to developmental aspirations, while reserving the right to grant preferential treatment to TNC's when desirable for economic development.<sup>95</sup>

The LDC's maintain that the controlling general principle of international law is a state's right to safeguard its own interests.<sup>96</sup> This principle encompasses the right to exercise exclusive sovereignty over natural resources<sup>97</sup> and to preserve national economic

90. See *supra* notes 35-38 and accompanying text.

91. The UN New International Economic Order was established by G.A. Res. 3201, S-6 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974). Its purpose was to correct inequalities, redress existing injustices, eliminate the gap between developed and developing countries and ensure economic and social development. [1974] U.N.Y.B. 306, U.N. Sales No. E.76.I.1. For an analysis of the impact of the establishment of the New International Economic Order, see Horn, *Normative Problems of a New International Economic Order*, 16 J. WORLD TRADE L. 338 (1982).

92. Lomé Convention, *reprinted in* 14 I.L.M. 595 (1975). In force as of April 1, 1976, the Lomé Convention was signed by 66 states. Forty-six were the original African, Caribbean and Pacific (ACP) countries, 11 were new ACP members and nine were the members of the European Economic Community. E. FREY-WOUTERS, *THE EUROPEAN COMMUNITY AND THE THIRD WORLD: THE LOMÉ CONVENTION AND ITS IMPACT I* (1980). The Lomé Convention establishes a new model for relations between developed and developing states, compatible with the aspirations of the international community towards a more just and balanced economic order. Lomé Convention, *supra*, tit. I, art. 1.

93. See Lomé Convention, *supra* note 92, tit. I, chap. 1, art. 7. "In view of their present developmental needs, the ACP States shall not be required . . . to assume . . . obligations corresponding to the commitments entered into by the Community in respect of imports of the products originating in the ACP States . . ." *Id.*

94. G.A. Res. 3201, S-6 U.N. GAOR Supp. (No. 1) art. 4(n), at 4, U.N. Doc. A/9559 (1974).

95. Material Relevant, *supra* note 1, para. 253, at 75.

96. R. HELLMAN, *supra* note 5, at 29. The principle of permanent sovereignty over natural resources is generally recognized by the international community. See *infra* note 144 and accompanying text.

97. World Development, *supra* note 1, at 46.

independence.<sup>98</sup> While these principles are essential to every state, they are of particular importance to the LDC's. In view of their relative political and economic immaturity, promotion of sovereignty and economic independence is seen as essential to their development.<sup>99</sup> In the LDC view, these principles should override any considerations of national treatment.<sup>100</sup>

### C. *International Legal Support for the Socialist States' Position*

The Socialist position does not rely on international law because Socialist States have not agreed to an international instrument recognizing any policy on host state treatment.<sup>101</sup> They advocate "exclusively municipal treatment," contending that the nature of property relations within a state are strictly the province of the domestic government and not international law.<sup>102</sup> Intervention by international bodies in the state's domestic affairs is not, and never has been, recognized by international law.<sup>103</sup> Because municipal

98. R. HELLMAN, *supra* note 5, at 29.

99. J. KUUSI, *supra* note 2, at 28. "Sovereignty and the dignity of statehood are cherished by the newly independent countries and transnationals when exercising their influence in these countries may be regarded as agents of neo-colonialism." *Id.* Host states have come to realize that their right of state sovereignty gives them an exclusive right to develop their resources to their own advantage. See T. MORAN, *MULTINATIONAL CORPORATIONS AND THE POLITICS OF DEPENDENCE* 153-224 (1974). This awakening has been described in terms of a host country "learning curve." *Id.* at 162-69. As the host country becomes more adept at dealing with the TNC's, "the rhetorical dream of 'recovering control of the natural wealth' and 'restoring sovereignty over national development' comes at last within reach." *Id.* at 167.

100. See *supra* notes 39-44 and accompanying text.

101. The international instrument containing the position closest to the Socialist view is the Andean Foreign Investment Code, Ancom Decision, *reprinted in* 16 I.L.M. 138 (1977). The Declaration to this Code states: "The treatment given to foreign capital may not discriminate against national investors." *Id.* para. 4. "Member Countries shall not grant to foreign investment any treatment more favorable than that granted to national investors." *Id.* para. 50.

The Andean Foreign Investment Code was prepared by the Andean Group, which consists of five Latin American countries. H. STEINER, *supra* note 33, at 455. For a discussion of this Code, see Furnish, *The Andean Common Market's Common Regime for Foreign Investments*, 5 VAND. J. TRANS'L L. 313 (1972); Oliver, *The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment*, 66 AM. J. INT'L L. 763 (1972).

102. Vitkov, *supra* note 45, at 78. "International law does not consider the nature of property rights nor does it regulate property relations within a state." *Id.* Consequently, the Socialists feel that any determinations of the property rights of aliens, namely the operations of a TNC, should not be subject to inquiry by international law. See *id.* See also Third Survey, *supra* note 1, para. 378, at 118.

103. Vitkov, *supra* note 45, at 78. The Soviets feel that determinations of aliens' property rights "cannot become a subject for discussion by another state." *Id.*

law regulates all matters connected with the acquisition, transfer or loss of ownership rights, the Socialist States contend that this issue should be resolved exclusively according to the municipal laws of each state.<sup>104</sup>

The implication of the Socialist position is clearly that host governments may discriminate.<sup>105</sup> Municipal law espouses principles that subject foreign property to local laws, regulations and orders.<sup>106</sup> "Since no general statement as to 'equality of treatment' or nondiscrimination is included in these principles, the 'local laws, regulations and orders' may well be directed solely against aliens or against a single category of aliens."<sup>107</sup>

The Socialist States' position is supported by their political and economic ideology.<sup>108</sup> By definition, industry and means of production are state-owned in a socialist society and represent the interests of all citizens of the state.<sup>109</sup> Promotion of state-owned enterprises is essential in furthering the interests of the state and its citizens.<sup>110</sup>

This strong reliance on ideology permits the Socialist States to refute national treatment as a principle of international law.<sup>111</sup> Like the LDC's, the Socialist States deny that any custom of international law has developed from the practice of the DC's.<sup>112</sup>

104. *Id.* "Under international law states are sovereign, therefore only municipal and not international law can regulate all matters connected with the acquisition, transfer and loss of ownership rights . . ." *Id.*

105. Fatouros, *supra* note 27, at 808. The Soviet doctrine of equality of treatment "is understood in a negative rather than a positive sense. That is to say, while 'foreigners cannot enjoy greater rights than the citizens of the country concerned,' they may enjoy less." *Id.* (quoting Yevgenyev, *The Subject of International Law*, in *INTERNATIONAL LAW* 89, 132 (Kozhevnikov ed. 1957)).

106. Fatouros, *supra* note 27, at 809.

107. *Id.*

108. See Third Survey, *supra* note 1, para. 378, at 118. See also *supra* notes 45-53 and accompanying text (discussing motivations for the Socialist States' position).

109. See J. HILDEBRAND, *THE SOCIOLOGY OF SOVIET LAW* 19, 43 (1972); Patyulin, *State and Individual: Constitutional Principles of Relationship*, in *SOCIALISM AND HUMAN RIGHTS* 56, 57-58 (M. Goncharuk ed. 1979). "[T]he relationship between the state of the whole people and its citizens (socio-economic and cultural rights, political rights and freedoms, and personal freedoms) . . . reflect the actual status of the individual in Soviet society . . ." *Id.*

110. See Kuritsyn, *Human Rights in the Soviet Union*, in *SOCIALISM AND HUMAN RIGHTS* 29, 40 (M. Goncharuk ed. 1979). Essential to assuring the individuals rights and freedoms is "the fundamental transformation of the economy, the establishment of public, socialist ownership of the main means of production." *Id.* at 34; Patyulin, *supra* note 109, at 62-63.

111. See Tunkin, *supra* note 45, at 102-03.

112. Tunkin, *Coexistence and International Law*, [1958] 3 *RECUEIL DES COURS* 1, 21-23. The basis of customary international law is agreement between states on the particular practice. See Working Paper on Article 24 of the Statute of the International Law Commission, U.N. Doc. A/CN.4/16, para. 11 (1950) (working paper prepared by M. Hudson)

Rather, the Socialist States contend that formulations of international law developed by the DC's primarily to protect their own interests, have no application in present day international law or in host state regulation of TNC's.<sup>113</sup> They maintain that the practice of equality of rights between nationals and aliens developed as a reaction to the privileged status enjoyed by aliens in colonial and dependent countries and, therefore has no relevance in modern economic exchange.<sup>114</sup> In the Socialist view, the doctrine of national treatment was never a generally recognized principle of international law.<sup>115</sup>

#### IV. ANALYSIS

##### A. *General Principles of Law Must Be Relied Upon in Formulating a Provision on Host State Treatment For the Code*

The UN Code of Conduct must look to the sources of international law in formulating a position on host state treatment of TNC's which will be recognized by all parties as legitimate and authoritative.<sup>116</sup> The principal sources of international law are

[hereinafter cited as Hudson]. Socialists contend that there is no such agreed practice of national treatment. See Tunkin, *supra* note 45, at 102.

Custom must arise through the agreement and practice of states with differing political systems and ideological backgrounds. See C. DE VISSCHER, *supra* note 77, at 161. "What gives international custom its special value . . . is the fact that, developing by spontaneous practice, it reflects a deeply felt community of law." *Id.* National treatment does not have this broad quality. See *infra* notes 121-22 and accompanying text.

113. Tunkin, *supra* note 45, at 101. National treatment, in the Socialist view, reflects "the desire of the rulers of the main capitalist Powers to take advantage of international law to protect their foreign investments and the privileges enjoyed by their nationals." *Id.*

114. *Id.* at 102-03. The Socialists feel equality between the rights of aliens and nationals "is colonial in nature. Imperialist states, citing this doctrine which they themselves created, demanded a privileged status for their nationals and property abroad." *Id.*

115. *Id.* at 103. According to the Socialist States, the DC view would conflict with the purposes of present day international law. *Id.* at 101. Tunkin, a leading Soviet jurist on international law, expresses the main purposes and principles of international law as being "principles of respect for state sovereignty, noninterference in internal affairs, equality of states, [and] good neighborly fulfillment of international obligations." G.I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 86 (1974).

116. Article 13 of the UN Charter recognizes the importance of UN action in "encouraging the progressive development of international law and its codification." U.N. CHARTER art. 13. While General Assembly action is not legally binding, "particular declarations express agreed law based either on the Charter or on general international law" and are generally drawn from and consistent with international law. Schachter, *The Evolving International Law of Development*, 15 *COLUM. J. TRANSNAT'L L.* 1, 4 (1976). For a discussion of the UN



treaty, custom and generally recognized principles of municipal law.<sup>117</sup>

Because there is no legal instrument of universal scope in which host state treatment of TNC's is universally prescribed, treaties are not a useful source in formulating a universal principle.<sup>118</sup> LDC instruments that espouse national treatment of TNC's usually qualify the principle of equality inherent in national treatment to the extent that it is no longer a useful standard.<sup>119</sup> Even in DC instruments that espouse unreserved application of national treatment, qualifications, such as protocols to FCN Treaties, often constitute "significant curtailment[s], if not *de facto* denial[s], of the principle which the treaty has otherwise sought to achieve."<sup>120</sup>

Custom does not prove to be a useful source in this instance because international law requires consistent practice, across the political spectrum, in establishing a rule of customary international law.<sup>121</sup> Neither the LDC's nor the Socialist States practice unre-

---

Charter as a source of international law in the context of self-determination, see Note, *Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute*, 6 *FORDHAM INT'L L.J.* 443, 446-54 (1983).

117. I.C.J. STAT. art. 38. Article 38 reads, in pertinent part:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations.

*Id.*

118. Issues Involved, *supra* note 1, para. 135, at 32. "There seems to be no international legal instrument of more or less universal scope in which the principle of national treatment is prescribed." *Id.* See *supra* notes 55-75, 87-95, 101-02 and accompanying text.

119. See *supra* notes 87-95 and accompanying text. While all parties agree to a qualification of national treatment in the interests of public order and protection of national security, other overriding qualifications include references to national constitutional systems, national economic interests or provisions of international agreements. Third Survey, *supra* note 1, para. 379, at 118.

120. C. WALLACE, *supra* note 1, at 93. For example, in the Luxembourg Treaty, *supra* note 69, Luxembourg reserves to itself the privilege of rejecting United States citizens seeking "to exercise gainful activities" unless "appropriate authorizations for access to and exercise of such activities have been granted." *Id.* protocol, para. 4. Such a qualification undermines the grant of national treatment established in the Luxembourg Treaty and can be construed as compromising the spirit of the treaty. C. WALLACE, *supra* note 1, at 93.

121. See Hudson, *supra* note 112, para. 11. Among the elements required for the emergence of a rule of customary international law are: "(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations; (b) continuation or repetition of the practice over a considerable period of time." *Id.*

served application of national treatment, therefore, the requisite practice is not established. Even if national treatment is considered a custom of international law established through the practice of the DC's, both the LDC's and the Socialist States refuse to be bound by a custom of international law which their practice did not help formulate.<sup>122</sup>

Therefore, the basis on which to assess the international legality of each position on host state treatment of TNC's must be general principles of law common to the various blocs.<sup>123</sup> To be recognized as bonafide under international law, the principles should fulfill two criteria. First, the principles should be in conformity with the purposes of international law in the area of TNC regulation.<sup>124</sup> International law emphasizes dual purposes in regard to TNC regulation. The emphasis is placed on optimum development of world resources, consistent with maximum benefits to the region where the resources are located.<sup>125</sup> Second, the principles should be broadly recognized as legitimate and should be compatible with differing state systems.<sup>126</sup>

122. R.P. ANAND, *NEW STATES AND INTERNATIONAL LAW* 63-64 (1972). The LDC's frequently observe that customary international law was created mainly by European states and their North American offshoots. *Id.* Much of this law, in their view, was meant to serve the limited interests of the European states and not the interests of the rest of the world. *Id.*

123. "Where neither international convention nor accepted custom . . . furnishes a satisfactory rule of law, the law must be deduced from the general principles of law recognized by civilized nations." C. JENKS, *THE COMMON LAW OF MANKIND* 106 (1958).

124. See Fatouros, *supra* note 27, at 809-10. When there is an irreconcilable conflict among points of view, it is necessary to look at the objectives sought by the international law rules in the field. *Id.* at 809. The conformance of a principle of international law and the necessity of adaptation of principles to changing world order is essential to effective international legal standards. C. JENKS, *supra* note 123, at 412-15. "It has been, and is likely to remain, even more true of international law than of the common law that the 'felt necessities of the time . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed.'" *Id.* at 413 (quoting O.W. HOLMES, *THE COMMON LAW* 1 (1881)).

125. Fatouros, *supra* note 27, at 810. UN General Assembly Resolutions have repeatedly placed a double emphasis on "international cooperation for the economic development of developing countries" and on "economic independence" and "permanent sovereignty over natural resources." See *infra* note 144.

126. See Hudson, *supra* note 112, para. 11; Kartashkin, *International Regulation of Fundamental Human Rights*, in *SOCIALISM AND HUMAN RIGHTS* 153, 157-58 (M. Concharuk ed. 1979). The legitimacy of a law within a particular legal system depends upon the underlying ideology and political philosophy of the social system. J. HILDEBRAND, *supra* note 109, at 35. "If any real meaning is to be given to the words 'general' or 'universal' . . . the correct test would seem to be that . . . before taking over a principle from private law [it

B. *Only the LDC Position Meets the Dual Criteria of a Bonafide Principle of International Law*

1. First Criterion: Conformity with the Purposes of International Law

The LDC position on host state treatment of TNC's is the only position that meets the first criterion of a bonafide general principle of international law.<sup>127</sup> It strikes an appropriate balance of both enhancing benefits to the resource-holder and promoting development of world resources.<sup>128</sup> The LDC position enhances benefits to the host state in that it permits the host government to tailor its treatment of the TNC, through either preference or discrimination, in order to best promote host state economic priorities.<sup>129</sup> Because the LDC position permits host states to grant preferential treatment to TNC's, it also promotes the development of world resources. Host states will still encourage TNC investment and the superior capabilities of the TNC in developing resources will still be utilized to promote optimum world development.<sup>130</sup>

Neither the Socialist nor the DC position would fulfill this first criteria. Adoption of the DC position would maximize TNC investment and thereby encourage optimum development of world resources. However, the DC position would minimize the benefits to the host state in that host states would not be permitted to adapt their treatment of TNC's to best suit their economic priorities.<sup>131</sup>

---

must be] recognized in substance by all the main systems of law, and that [the principle] will not be doing violence to the fundamental concepts of any of those systems." H. GUTTERIDGE, *COMPARATIVE LAW* 65 (1946).

127. See *infra* notes 128-35 and accompanying text.

128. See Fatouros, *supra* note 27, at 804. The LDC position reflects both a desire "to develop their economies in order to provide a higher standard of living for their people" and a recognition that only through cooperation with the TNC will the means to develop their resources be provided. *Id.*

129. See *supra* notes 35-38 and accompanying text. As has been emphasized, the LDC's continuously stress conformance with their economic objectives, placing the exact nature of the treatment given secondary to this paramount objective. *Id.*

130. There is little question that TNC's represent the most efficient means of developing world resources. See *supra* notes 10-11 and accompanying text. The LDC's recognize this, as well as that encouraging TNC investment can promote benefits to their state. Fatouros, *supra* note 27, at 804.

131. See Fatouros, *supra* note 27, at 810. The DC view "would encourage the investment of Western private capital in the developing countries, and thus promote the develop-

The Socialist view would promote the interests of the host state at the expense of discouraging TNC investment. It would therefore discourage the optimum development of world resources which TNC investment brings.<sup>132</sup>

Therefore, the balance struck by the LDC position is best suited to accomplish the purposes of international law in the area of TNC regulation. It is also best suited to accomplish the purposes of the UN Code of Conduct. The LDC position recognizes the TNC's responsibility to integrate its activities into the developmental objectives of the host state.<sup>133</sup> The LDC view "[r]eflect[s] the principle of respect by transnational corporations for national sovereignty, laws and regulations" of the host state.<sup>134</sup> Yet it still "[e]ncourage[s] the contribution that transnational corporations can make towards the achievement of developmental goals and the established objectives of the [host state]."<sup>135</sup>

## 2. Second Criterion: Broadly Recognized and Compatible

In assessing the three positions in terms of the second criterion, it is apparent that only the LDC position is based on principles which are both broadly recognized and compatible with all three systems.<sup>136</sup>

### a. Broadly Recognized

While both the DC and Socialist positions are rational byproducts of the political, economic and social systems of each bloc, neither the principles relied upon by the DC's nor the Socialists are broadly recognized by the other blocs.<sup>137</sup> The DC's assert that freedom to own property is an essential part of economic freedom

ment of their natural resources. At the same time . . . it limits the freedom of these countries to take the measures they may later deem necessary for their economic development." *Id.*

132. *See id.* The Socialist view "would give the host countries greater flexibility, but it would provide too little security and certainty to the prospective foreign investors." *Id.*

133. *See* E.S.C. Res. 1980/60, *supra* note 24, para. 6(b). This integration is inherent in conformance with developmental plans and objectives. *See supra* notes 12-21 and accompanying text.

134. E.S.C. Res. 1980/60, *supra* note 24, para. 6(c).

135. *Id.* para. 6(d).

136. *See infra* notes 137-54 and accompanying text.

137. *See infra* notes 138-42 and accompanying text.

and that restrictions on economic freedom inevitably affect freedom in general.<sup>138</sup> It is therefore crucial to the DC's to secure "national treatment" of TNC's, thereby preventing discriminatory restrictions on TNC activities.<sup>139</sup> The Socialist States, however, maintain that state ownership of the means of production and promotion of state interests are the means of guaranteeing freedom of the individual.<sup>140</sup> This justifies their view that treatment of TNC's must be discriminatory.<sup>141</sup> Each position is founded in a political and economic philosophy that is neither recognized by, nor compatible with the political and economic philosophy of the other.<sup>142</sup>

The principles underlying the LDC view, however, are broadly recognized by all three blocs. "Qualified national treatment," is thus compatible with both the DC and the Socialist systems.<sup>143</sup> The principles of state sovereignty and economic independence are fundamental precepts of international law and have been recognized and affirmed repeatedly in UN resolutions.<sup>144</sup> All three blocs recognize both these principles as being inherent in effective international relations.<sup>145</sup>

138. See M. FRIEDMAN & R. FRIEDMAN, *FREE TO CHOOSE* 67 (1980); A GUTMAN, *LIBERAL EQUALITY* 37-40 (1980).

139. See *supra* notes 45-53 and accompanying text.

140. See Kuritsyn, *supra* note 110, at 35. "Concentration of the basic means of production in the hands of the state provided it with the opportunity not only of proclaiming the individual's rights and freedoms, but of assuring them materially, politically and organisationally." *Id.*

141. See *supra* notes 27-34 and accompanying text.

142. See Ledyakh & Maltsev, *supra* note 50, at 169. Socialism and capitalism are diametrically opposed social systems. Socialism reconstructs the social order so as to disregard all existing principles of a capitalist regime. *Id.*; J. HILDEBRAND, *supra* note 109, at 36.

143. See *infra* notes 144-45 and accompanying text.

144. World Development, *supra* note 1, at 46. For UN resolutions which affirm a state's right to sovereignty and economic independence, see, e.g., G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974); G.A. Res. 3201, S-6 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974); G.A. Res. 3016, 27 U.N. GAOR Supp. (No. 30) at 48, U.N. Doc. A/8730 (1972); G.A. Res. 2692, 25 U.N. GAOR Supp. (No. 28) at 63, U.N. Doc. A/8028 (1970); G.A. Res. 2158, 21 U.N. GAOR Supp. (No. 16) at 29, U.N. Doc. A/6316 (1966); G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962); G.A. Res. 1515, 15 U.N. GAOR Supp. (No. 16) at 9, U.N. Doc. A/4684 (1960); G.A. Res. 1314, 13 U.N. GAOR Supp. (No. 18) at 27, U.N. Doc. A/4090 (1958); G.A. Res. 626, 7 U.N. GAOR Supp. (No. 20) at 18, U.N. Doc. A/2361 (1952).

145. See World Development, *supra* note 1, at 46. "The principle of permanent sovereignty over natural resources [is] generally accepted by the international community . . . ."

## b. Compatible with All Systems

The LDC view is potentially compatible with the Socialist and DC systems. The LDC view accommodates the Socialist concern with guarding their political and social systems from capitalist influence because, in practice, implementation of the LDC and Socialist positions would produce similar results.<sup>146</sup> Whether the standard is treatment in accordance with a state's self-determined and amorphous developmental goals or in accordance with a state's municipal law, the host government still retains the ability to treat TNC's solely according to its domestic objectives. Socialist States will be free to formulate their national objectives so as to maintain the control over TNC's that is compatible with their political and economic infrastructures.

Accommodation of the concerns of the DC's, which are primarily manifested by the TNC's concerns, is not as easily accomplished. The TNC's concern with being subject to host developmental plans and objectives is that often the host state fails or refuses to make these plans clearly known, or changes these plans abruptly.<sup>147</sup> The TNC's seek reliable criteria to use in making investment decisions and a degree of certainty of investment after these decisions are made.<sup>148</sup> They fear that nationalization by the host state, which has often resulted from abrupt changes in developmental plans, will cause loss of their investment and capital.<sup>149</sup>

*Id.* Sovereignty is considered a fundamental attribute of a state, vital to the unfolding of interstate relations. G. ELIAN, *THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES* 9 (1979).

146. See Fatouros, *supra* note 27, at 808. The Socialist position is not always clearly distinguishable from the LDC position. *Id.* The primary difference lies in the Socialists' emphasis on advancing their own ideological position. See R. HELLMAN, *supra* note 5, at 68.

147. See Issues Involved, *supra* note 1, para. 73, at 20. "[C]ases in which relationships between multinational corporations and host Governments have deteriorated sharply over time are often those in which clarity was lacking in host country policies . . ." Impact, *supra* note 1, at 40.

148. See R. HELLMAN, *supra* note 5, at 35. TNC's generally endeavor to avoid conflicts and try to create a friendly atmosphere of cooperation with the host state. It is not in their interest to get involved in political confrontations. They are, by nature, profit-oriented organizations. *Id.*; Rubin, *Multinational Enterprise and National Sovereignty: A Skeptic's Analysis*, 3 *LAW & POL'Y INT'L BUS.* 1, 8 (1971).

149. For an analysis of Chilean nationalization of copper and its effect on Anaconda and Kennecott, two TNC's operating in Chile, see T. MORAN, *supra* note 99, at 119-52.

The means of accommodating these concerns on the part of the TNC are, however, already within the provisions of the Draft Code. Paragraph 50 of the Draft Code provides:

Endeavouring to assure the clarity and stability of national policies, laws, regulations and administrative practices is of acknowledged importance. Laws, regulations and other measures affecting transnational corporations should be publicly and readily available. Changes in them should be made with proper regard to the legitimate rights and interests of all concerned parties, including transnational corporations.<sup>150</sup>

Adoption of Paragraph 50 would effectively require host states to clearly *state* and *implement* their developmental plans and objectives. Such a requirement would thereby provide the TNC with adequate information on which to base its investment decisions.<sup>151</sup> In addition, adoption of paragraph 50 would require governmental measures affecting TNC's to be clarified and publicly available to the TNC.<sup>152</sup> Finally it would require changes in regulations to be made with regard to the rights and interests of TNC's.<sup>153</sup> Thus, the

---

150. Draft Code, *supra* note 1, para. 50. The paragraph is one of several fully disputed paragraphs proposed by the DC's to specifically accommodate their concerns with the LDC position. See Third Survey, *supra* note 1, para. 373, at 117.

151. Requiring host state policies to be clearly established has been advocated by a number of authorities. In evaluating this proposal, the Group of Eminent Persons stated: "When [national] plan objectives are clearly stated and concrete measures are put into effect, multinational corporations may in fact be responsive to them." World Development, *supra* note 1, at 47. See R. HELLMAN, *supra* note 5, at 35; D. WALLACE, *supra* note 43, at 75.

152. Draft Code, *supra* note 1, para 50.

153. *Id.* In order for this clause of paragraph 50 to have any substantive meaning for the TNC, there must be an international recognition that TNC's have "legitimate rights and interests" which must be regarded. The implication of the paragraph is that such a recognition will be afforded. *Cf. id.* However, since the content of these rights and interests goes to the core of the guarantee of certainty which the clause endeavors to grant, it is crucial that these rights be clarified.

These rights are granted to the TNC through the substantive provisions of the Code dictating host state treatment of TNC's and the DC's have indicated clearly that the Code will not be acceptable to them unless such provisions are included. Rubin, *For a Balanced Code*, CTC Rep., Summer 1982, at 11, U.N. Sales No. E.82.II.A.14. Included in the rights the Code grants or potentially grants to TNC's are: the right to good faith negotiations and implementation of contracts with host governments, Draft Code, *supra* note 1, para. 11; the right to safeguards and confidentiality in disclosure of business information to the host government, *id.* para. 51; the right to unrestricted transfer of personnel between entities of the TNC, *id.* para. 52; the right to unrestricted transfer of income from invested capital and repatriation of capital on termination of investment, *id.* para. 53.

adoption of paragraph 50 would allow host states to retain the right to regulate TNC's in accordance with developmental objectives, while still assuring the TNC a degree of certainty in investment planning.<sup>154</sup>

*C. Effective Implementation Will Require Host States to Take Additional Measures in Conjunction with Adoption of the Code.*

The adoption of paragraph 50 could raise concerns on the part of the LDC's. In order to strengthen the stated developmental plans required by adoption of paragraph 50, and protect themselves against abuse of such a policy by the TNC, host states, in conjunction with adoption of the Code of Conduct, should take concerted action to yield an organized system of development.<sup>155</sup>

Traditionally, host states have encouraged foreign direct investment by offering generous incentives to attract TNC's.<sup>156</sup> This practice often led to host states bidding against each other for TNC investment.<sup>157</sup> The problem with adoption of paragraph 50 is that it effectively requires the host state to adhere to the terms initially agreed upon with the TNC.<sup>158</sup> It is foreseeable that the host states, in efforts to attract the TNC's, will formulate developmental plans with terms highly favorable to TNC's, and then by virtue of the Code provision, be required to adhere to them to their own detriment.<sup>159</sup>

Though still a major source of debate itself at this point in negotiations, paragraph 54 of the Draft Code could provide the TNC with a valuable right to full compensation in the event of host state nationalization. While the nature of the disagreement is beyond the scope of this Note, it will suffice to say that any provision adopted that makes reference to international law standards and fair market value compensation, would provide TNC's with a valuable safeguard against arbitrary host state action. *See id.* para. 54.

154. *See* Issues Involved, *supra* note 1, para. 73, at 20. TNC adherence to clearly enunciated objectives "would enhance the integration of TNC activities in the host country's economy and promote greater harmony in the relations between TNC's and Governments." *Id.*

155. *See infra* notes 160-67 and accompanying text.

156. World Development, *supra* note 1, at 44.

157. *Id.* *See* Apter, *supra* note 15, at 5. In encouraging TNC investment, LDC's "tend to offer special conditions to attract multinationals, ensure them high return on investments, favorable and controlled supply of labor, tax rebates, and other fiscal advantages." *Id.* at 27. *See also* D. WALLACE, *supra* note 43, at 74.

158. *See supra* notes 150-54 and accompanying text.

159. *See* D. WALLACE, *supra* note 43, at 74-75. The problem arises because "[n]ations are not usually prepared to accept an optimal allocation of resources if they can obtain more



To solve this problem, international organizations among holders of similar resources should be formed to prescribe uniform standards for formulating developmental plans.<sup>160</sup> Formation of international organizations would reduce the ability of TNC's to use disparity in host state developmental objectives to their advantage at the expense of the resource-holding states.<sup>161</sup>

The formation of international organizations would enable host states offering the same resources to TNC's to present a unified front and not be harmed by bidding against each other for TNC investment.<sup>162</sup> Such international organizations can be a fundamental way for the LDC's to protect their sovereignty and enhance their economic independence.<sup>163</sup> International organizations set up to defend the interest of raw material producing countries emphasize the necessity of strengthening host state economic independence and defending the host state's right to permanent sovereignty over natural resources.<sup>164</sup> Rather than sacrificing any degree of sovereignty and economic independence, cooperation among like resource-holders will lead to maximum long-term benefits to all parties.<sup>165</sup> The community of interests inherent in similar

---

for themselves instead." *Id.* at 62-63. Paragraph 50 has the potential to bind the states competing for TNC investment into highly detrimental terms of agreement with the TNC.

160. A resource grouping would be the most effective way of combatting the problem of bidding wars. See *supra* notes 157-59. Grouping by stage of development would be too subjective and amorphous. Grouping by region, which would correspond with resource groupings in many situations, seems a less direct way of confronting the problem to be resolved. See G. ELIAN, *supra* note 145, at 76-77.

161. See *infra* notes 162-67 and accompanying text.

162. The effect of such agreements would be to increase the bargaining power of the LDC vis-a-vis the TNC. "The greater the power of the host country in relation to the multinational corporation and the more independent its leading class is from their influence, the better both sides will be able to accomplish their respective tasks. Force and adequate counterforce are the best guarantees for a well-balanced relationship." R. HELLMAN, *supra* note 5, at 36. When governments harmonize their policies, they present a united front against a TNC deciding which country to invest in and thereby eliminate the "bidding wars" which generally serve to benefit only the TNC. Apter, *supra* note 15, at 2-3.

163. See G. ELIAN, *supra* note 145, at 76.

164. *Id.* "Such associations 'represent a response to the improper and disproportionate power of the multinational corporations.'" *Id.* (quoting statement by the Prime Minister of Jamaica on May 29, 1974).

165. *Id.* at 77. "If as part of the efforts made for *their own development* the States which boast the same categories of resources carry on a policy of close cooperation on the basis of full sovereignty and equal rights in their relationships with industrialized States, they constitute an appreciable joint force." *Id.* (emphasis added). United, they may formulate conditions of TNC investment to best serve their own development. *Id.*

resource-holders will promote the formation of such associations.<sup>166</sup> The realization that long-term benefits to all states will be promoted and the bargaining power of all states vis-a-vis TNC's will be increased, provides host states with an incentive to form such associations.<sup>167</sup>

International organizations among identical resource-holders would allow developmental plans to be formulated to accommodate the specifics of development of each resource, and insure the protection of host state developmental aspirations that the Code attempts to guarantee.<sup>168</sup> These organizations should be formed under the framework of the UN with the Code of Conduct serving as the base point of permissible standards.<sup>169</sup> Specific equity requirements and percentages of repatriation and local management could be tailored to encourage TNC development while still assuring benefits to the resource-holding state.<sup>170</sup> International organiza-

166. *Id.*

167. *Id.* at 76-77. The problem inherent in such associations is the possibility that one resource-holder will consider its own short-term interests above the collective guarantees of the organization's stated terms. See C.F. BERGSTEN, *supra* note 10, at 140-41. Such a state is engaging in "short-term risk-taking," rather than the promotion of long-term objectives and is, in essence, undermining its own sovereignty rather than protecting it. *Id.* at 141-42; Apter, *supra* note 15, at 2-3. A TNC would be wary of investing in such a state because such investment would run the risk of uncertainty which a TNC seeks to avoid. See Impact, *supra* note 1, at 40.

168. See G. ELIAN, *supra* note 145, at 77. When associations of states are set up on the basis of common resource, a community of interest is derived "not only from the existence of certain raw materials in certain developing countries, but also from the necessity of their own development in specific ways which are demanded by the presence of the same types of resources in other Member States." *Id.* A number of such international organizations have been formed in recent years to strengthen the sovereignty of host states over natural resources. *Id.* at 76. Among the most important raw materials groupings of this kind are: the Organization of Petroleum Exporting Countries (OPEC), the Association of Iron Ore Exporting Countries (AIOEC), the International Bauxite Association (IBA), and the Council of Copper Exporting Countries (CIPEC). *Id.* at 69, 75-76.

169. *Id.* at 80. "The necessary enhancement of the United Nations' role in the world, the increase in the prestige of such meetings held within the United Nations and [the] rallying . . . of States to discuss such important world problems would thus all be positive consequences of organizing these meetings under the UN aegis." *Id.* The decisions adopted within such a framework would have greater universality and authority and would therefore serve as sources of inspiration for the elaboration of new principles of international law. *Id.*

170. See Issues Involved, *supra* note 1, para. 136, at 32. From the onset of Code negotiations, states recognized the viability of provisions dealing with specific aspects of developmental plans, such as repatriation, remittance and conditions of divestment. *Id.*

tions would be consistent with the UN's desire for a "practical economic solution" to international exchange and cooperation, wherein states "can cooperate to reconcile their conflicting interests, harmonize their policies for their mutual benefit, and achieve a greater measure of international distributive justice."<sup>171</sup> When such organizations are formed under the aegis of the UN and provide for conformity with the precepts of the Code of Conduct, they will permit effective functioning of the Code and achievement of the principal purposes of the Code.

### CONCLUSION

The three positions on host state treatment of TNC's in the UN Code of Conduct are based on particular considerations unique to each bloc.<sup>172</sup> Only the LDC position is founded in principles which have universal application to all blocs.<sup>173</sup>

A legitimate and effective Code of Conduct for TNC's will be achieved by adopting the LDC position of "qualified national treatment," but further requiring national plans and objectives to be clearly established.<sup>174</sup> This would give the TNC investment security and would thereby be only a limited investment disincentive. International organizations establishing uniform developmental plans among identical resource-holders would protect the host states against many of the abuses that a TNC's ability to select the most favorable investment climate can present.<sup>175</sup> Such an arrangement

---

The developmental plans as formulated by the international organizations would have to be amenable to some change. The final sentence of paragraph 50 of the Draft Code, *supra* note 1, para. 50, would provide for this. Significant changes in market conditions, supply, demand and world economic conditions would be factors warranting adaptation of stated terms. Any change, however, would have to be clearly necessitated and specifically stated so as to accommodate the TNC's concern for certainty. *See supra* notes 147-49 and accompanying text. The factors justifying changes in developmental plans, such as significant changes in market conditions, are factors which all corporations must adapt to as inherent risks of investment.

171. World Development, *supra* note 1, at 3.

172. *See supra* notes 25-53 and accompanying text.

173. *See supra* notes 127-54 and accompanying text.

174. *See supra* notes 147-54 and accompanying text.

175. *See supra* notes 155-67 and accompanying text.

would promote the development of a balanced economic world order and enhance achievement of the purposes of the UN Code of Conduct.<sup>176</sup>

*Rosanne M. Thomas*

---

176. *See supra* notes 168-71 and accompanying text.