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Palitha B. Kohona

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1. Introduction

The OECD[1] Declaration on International Investment and Multinational Enterprises of 1976[2] was largely a response to pressures exerted by various groups to bring the activities of multinational enterprises under a greater degree of regulation for the benefit of the many interested parties, including such enterprises. These pressures were generated by groups amongst whom were those who sought greater control over multinational enterprises which dominated certain wide areas of economic activity, by national governments which sought to achieve economic and political objectives by doing so, by those who resented the enormous powers that multinationals wielded internationally and nationally, by those who believed that there was something intrinsically abhorrent in the concentration of political and economic power in the hands of small groups and other such parties. Consequently, different interest groups from diverse backgrounds for disparate reasons united in the task of seeking a greater degree of regulation over multinationals. At one point it was possible to discern a degree of collaboration among a motley group of less developed countries which sought to control the economic activities of multinationals and to harness their resources for the benefit of the former, of other countries which sought to control them in order to curb their economic and, hence, their political power, of groups in developed and developing countries who were motivated by considerations of economic nationalism and of groups that sought goals of social and political justice and viewed multinationals as an essential impediment to the realisation of such objectives.

However, despite the existence of numerous groups that sought to control multinationals, it is to be emphasised that the activities of multinationals were not without ardent defenders. The multinationals themselves, the governments of countries in which they are based, proponents of private enterprise and such other interested parties, who were to be found mainly in the developed countries, belonged to this very influential category. Their objective was to protect the interests of multinational enterprises and create a better environment for the expansion of their activities.

The sentiments of the developing countries on this matter were clearly articulated in the Charter of Economic Rights and Duties of States.[3] Chapter 2 of the Charter stated:

> Economic Rights and Duties of States:
> Article 1. Every State has the sovereign and

> inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.
>
> Article 2.(1) Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal over all its wealth, natural resources and economic activities.
>
> (2) Each State has the Right:
>
> (a) To 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 ....
>
> (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies ....
>
> (c) To nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent ....

These sentiments express a general desire on the part of developing countries to acquire a degree of control over their natural resources and over organisations (multinationals included) which are involved in the development and exploitation of these resources.

Largely in response to the above pressures exerted by the groups that sought to control multinationals, the United Nations Committee on Trade and Development established a committee to formulate appropriate codes of conduct for multinationals. (An International Code of Conduct on the Transfer of Technology[4] and The Set of Multilaterally Agreed Equitable Principles and Rules for the control of Restrictive Business Practices[5] were its achievements.) Despite its task being made extremely difficult by the almost irreconcilable differences that existed among the various countries represented in this Committee, it has completed its functions to a large extent. This is a major achievement for the Committee. The Non-Alligned Countries indicated their position at the Lima Sessions of the United Nations Commission on Transnational Corporations.[6]

The Andean Common Market adopted "The Common Regime of Treatment of Foreign Capital and of Trade-marks, Patents, Licences and Royalties," amending and codifying Decision 24 of the Andean Pact Commission of 31 December 1970.[7] The Organisation of American States proposed "Behaviour of TNEs Operating in the Region and Need for a Code of Conduct to be Observed by Such Enterprises."[8] The European Parliament adopted the draft proposal for a "Draft Code of Principles for Multinational Enterprises and Governments."[9]

Similarly, the Governing Body of the International Labor Organisation has agreed to a "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy."[10] Within the framework of the United Nations, a Code of Conduct for Multinational Enterprises is being negotiated. The United Nations Economic and Social Council is working on an international agreement to prevent corrupt practices in connection with international commercial transactions.

As is indicated by the above endeavours of a variety of international organisations, numerous efforts have been undertaken internationally over the last decade with the objective of introducing some degree of regulation over the activities of multinational enterprises and these efforts have encompassed the different aspects of their operations.

2. The Need for International Action

It would seem that there is a general acknowledgment that since multinational enterprises operate on a global basis, and since their operations span numerous national boundaries, any effort to regulate their activities, if it is to be done effectively, will have to be undertaken primarily on an international basis, for it will be necessary to involve all interested States in such a venture. (This explains the reasons for the involvement of international organisations like the UNCTAD, the ILO, the ECOSOC and the OECD in this matter.) Once States have agreed internationally to a particular regulatory regime, it will be necessary to require them to give effect to such commitments internationally as well as within their national boundaries. This is essential if the regulation that is sought to be achieved is to be fully effective. It is also necessary to ensure that the rules which are agreed upon on an international basis are enforced with regard to multinational enterprises (who are subject to municipal jurisdictions) in a broadly similar manner in the different countries.

Internationally binding norms could be created in a number of ways. One of the most popular as well as effective methods is through the conclusion of an appropriate treaty.[11] In addition, it is now accepted that international norms may be created for their member states by international organisations. (The nature of such norms will depend on the constitutional instruments of these organisations). The methods employed by them for this purpose include decisions made by the

appropriate organs in the prescribed forms, codes of conduct sponsored by them, treaties drafted by them and duly ratified by the parties, etc.[12]

However, certain initial difficulties are required to be overcome before such internationally binding norms can be created and effectively implemented. Firstly, it is necessary to ensure that the norms are created not only in compliance with accepted procedures (which might include lengthy investigations, studies, debates, negotiations, adherence to stated voting procedures, etc.) but also in a manner that would ensure effective implementation by the states-parties concerned.

At present there is no universally accepted method for making norms for international persons in a manner that would ensure effective implementation. This is due to the fact that sovereign States (who are generally the subjects of international norms) are still in a position to avoid complying with any norm due to the absence of effective international enforcement procedures. Compliance with international norms is still largely left to the voluntary actions of the parties themselves. (This is not to say that there are no legal and non-legal measures that might be adopted to achieve this end at least to some extent.)

The most effective means for ensuring due compliance with international norms of conduct would appear to be to enact such norms with the consent (acquiescence) of the relevant countries themselves. This procedure normally involves prolonged negotiations and consultations among the interested states-parties in a variety of committees, sub-committees and other such fora where numerous trade-offs are obtained and compromises secured in order to achieve formulae that are acceptable to all the relevant parties. A formula that is acceptable to all such parties could normally be expected to be voluntarily implemented (though not necessarily) by them. Thus, giving such norms a degree of actual effectiveness. (This method is widely used by international organisations.) However, even after a commonly acceptable formula has been devised, it might still have to be given an acknowledged legal form, like being expressed in the shape of a decision or being included in a treaty or code. The latter may have to be formally ratified.

Secondly, a State which has agreed to be bound by such an international norm will be required to give effect to its international obligations within its municipal legal system with the assistance of its internal legislative, administrative and judicial organs. This is very important in the case of norms which are designed to have an effect on internal laws, customs and practices and on the lives of individuals, for unless this is done, the norm in question might very well become ineffective internationally as well. Giving effect to such a rule of conduct in the internal legal system is normally not an easy task as internal legislatures, which are responsible for making municipal laws, are not necessarily controlled by the executives who were responsible for negotiating the international accords. It is conceivable that they would

be under the influence of the various national pressure groups which may or may not be sympathetic to the accords arrived at internationally. It will also be necessary to contend with administrative and judicial officials who are ultimately responsible for enforcing internal laws and who could be expected to be governed by their own prejudices and pre-conceptions based on idelogy, history, culture, economic and social factors and other such influences.

Hence, when an international rule of conduct is formulated, it might be necessary to take the requisite precautions to ensure that it will be eventually implemented by municipal authorities. This might necessitate the draftsmen to ensure that when such a norm is formulated, it be reflective, not only of the wishes of the relevant states-parties, but, sometimes, also of the significant pressure groups within countries as well. (In the case of a norm on multinationals this might include pressure groups representing the multinationals themselves, environmentalists, groups representing the right of free enterprise, groups seeking greater economic justice, etc.) If these requirements are not met, a norm of conduct painstakingly formulated and adopted might end up being ineffective, both internationally and within municipal legal systems.

3. The OECD Declaration

The OECD, whose membership consists of a selective group of twenty-four developed countries[13] and whose economic policies and performance affect not only Member countries but also most nations participating in the international economic system,[14] proceeded to conclude its own set of Guidelines[15] for the relevant states-parties and the multinationals. These consist of a Declaration[16] with an Annex attached to it and three Decisions[17] (of the OECD Council) which are treated as complementary and interconnected.

It was stated in the 1979 OECD Review of the 1976 Declaration and Decisions[18] that,

> The aim of the Declaration was to promote strengthening of co-operation among Member countries in the area of international investment and multinational enterprises through inter-related instruments (dealing respectively, with Guidelines for Multinational Enterprises, National Treatment for firms under foreign control and International Investment Incentives and Disincentives) which together were seen as constructing a balanced framework within which the OECD countries would organise their co-operation and consultation on issues relating to international investment and multinational enterprises. It was further foreseen that continuing

> endeavours within the OECD might lead to the conclusion of additional international arrangements and agreements in this field.[19]

Broadly speaking, it could be said that on the one hand, the OECD Declaration[20] sought to introduce some form of regulation for multinationals and, on the other, it hoped to create a better environment for them to engage in their activities.

4. The Implementation of the Declaration and the Decisions Internationally

The OECD Declaration presents a number of difficulties in its implementation - both internationally and internally. It is significant that the Declaration and its Annex,[21] which are the main instruments, contain very few mandatory provisions and they rely primarily on general principles and exhortations to States and enterprises. This characteristic poses some serious questions relating to the binding nature and effect of the Declaration.

Furthermore, the Guidelines state in Article 6 that the "observance of the guidelines is voluntary and not legally enforceable." Thus, from the outset we are faced with a statement which has the effect of depriving the Declaration of the effectiveness that some of the parties who sought a greater degree of control over multinationals would have wished to have conferred on it.

However, it might still be argued that the very fact that the OECD decided to formulate the Declaration was indicative of a genuine desire among the Member countries (perhaps, even with the concurrence of the multinationals themselves) to introduce some form of regulation and to create a better environment for the multinational enterprises and the host countries - even though initially their efforts were to lack legal force. In actual practice, the inclination appears to have been to give effect to the Declaration as far as possible.

The 1979 Review of the Declaration concludes in paragraph 7:

> The basic conclusion to which the review of experience with the Guidelines for Multinational Enterprises presented in Chapter I leads is that the Guidelines offer an efficient and realistic framework for further encouragement of the contribution which multinational enterprises can make to economic and social progress and for the reduction and resolution of the difficulties to which the operations of multinational enterprises may give rise. Member governments have indicated that on the basis of available information there is a general willingness

> on the part of MNEs to observe the Guidelines. Even so, more time and continued efforts by governments and by business are needed for the Guidelines to become more widely known and for their contents to become an increasing part of day-to-day management practice. The Committee considers that experience to date has underlined the value of the Guidelines and that their further promotion would be best served by providing enterprises with a stable framework. For these reasons, the Committee proposes that only one change be made to the Guidelines at this time in order to cover an issue that was not foreseen when the Guidelines were drafted.[22]

In addition to the Declaration itself, at present there are three Decisions of the Council of the OECD (in their currently revised form) which are parallel instruments to the Declaration.[23] It is possible to state that they occupy a different legal position to the Declaration. Under Article 5 of the OECD Convention, the Organisation may make decisions which, except as otherwise provided, shall be binding on all Members. (Thus, prima facie, they would be different in their effect to the provisions contained in the Declaration.) Therefore, it may be said that the Decisions of the Council at least will have a binding quality. They are also important in that they deal with certain matters which are of great significance to the Member countries - i.e., among other matters, they require the Committee on International Investment and Multinational Enterprises to be responsible for holding exchanges of views relating to the principles contained in the Declaration on a regular basis, require Member countries to notify the Organisation of measures constituting exceptions to "National Treatment" relating to "Foreign-Controlled Enterprises" and require consultations to take place in the Committee where a Member country complains that its interest may be adversely affected by the impact on its flow of international direct investment by measures taken by another Member. It will be seen that these decisions are also important in another respect in that they might be instrumental in conferring an added significance to the Committee on International Investment and Multinational Enterprises and might enable it to evolve as a useful institution serving the objectives of the Declaration. Furthermore, the decisions continue to emphasise the stress that has already been placed on consultations and co-operation in the Declaration itself as a means of achieving the objective of regulating multinationals. However, despite its lack of extensive legal force at present, it is quite possible that the Declaration, in due course, might acquire a status that would confer on it a greater degree of legality.

5. The Effect of International Pressure on the Implementation of the Declaration

One of the factors that has been utilised to lend force and effect to the Declaration is international pressure. It may be said that there is

a high degree of moral pressure on the members of the OECD and on multinationals to abide by the principles contained in the Declaration. After all, the Declaration was accepted voluntarily by the Members (and was adopted with the acquiescence of all the Members except Turkey which abstained) after extensive investigations, consultations and negotiations in response to widespread pressure generated within the Member countries and in the international community. It was also the result of extensive trade-offs and concessions. The Declaration has created certain expectations, both in the international community and among interested pressure groups within countries, and the non-observance of the principles contained therein could diminish the faith that might exist in the minds of the relevant parties. It would also generate adverse publicity for the OECD and its Members. Hence, it could be argued that today there exists a high degree of moral pressure on States and on multinationals to abide by the principles contained in the Declaration and this factor could be significant in interested parties' giving full effect to them. (In recent times moral pressure has on occasion been used effectively to compel members of the international community to adopt or not to adopt certain courses of action. An example would be the pressure that was exerted on the U.S.A. to withdraw from its involvement in Vietnam.)

Paragraph 37 of the 1979 Review provides:

> While observance of the Guidelines is voluntary and not legally enforceable, they carry the weight of a joint recommendation by OECD governments addressed to MNEs which represent their firm expectation for MNE behavior. The Guidelines received the support of organisations representing the business community, and a considerable number of major enterprises have publicly stated their acceptance. The Guidelines are also being used as a point of reference by workers' organisations.[24]

Paragraph 24 states:

> There appears to be a general willingness on the part of multinational enteprises to apply the Guidelines and, although the present Review is taking place a relatively short time since these instruments were adopted, a process of acceptance and use of the Guidelines is under way.[25]

6. Further Means of Giving Effect to the Declaration

Furthermore, when one considers the other likely ways in which the Declaration could gain effectiveness, it is possible to compare it

broadly to a resolution adopted by an international organisation and compare its effectiveness to that of a resolution, for most resolutions suffer from the same disadvantages that the Declaration suffers from with regard to implementation. Unlike treaties or decisions properly adopted by such organisations, resolutions, prima facie, could not be said to possess an extensive degree of legal force.

It is very likely that resolutions are not the result of detailed and scholarly examination and they may have been prompted by purely political or emotive factors. (There is also no guarantee of the timeliness or the practicability of resolutions passed by such organisations). However, there is a tendency, in recent times, to be very careful in the drafting of resolutions and to accommodate the widest possible spectrum of opinion in them.

Referring to resolutions of the General Assembly, in the South-West Africa Case, Judge Lauterpacht observed that they are generally not of a legal character and therefore do not create legal obligations. However, he proceeded to qualify his position by stating:

> In some matters - such as the election of the Secretary-General, election of the members of the Economic and Social Council and some members of the Trusteeship Council, the adoption of rules of procedure, admission to, suspension from and termination of membership, and approval of the budget and the apportionment of expenses - the full legal effects of the Resolutions of the General Assembly are undeniable.[26]

To this list Johnson adds (inter alia) the following matters which could be given legal effect through the medium of resolutions:

> Responsibilities for the discharge of the economic and social functions of the United Nations under Articles 60 and 66 of the Charter and the approval of agreements between the Economic and Social Council and the specialised agencies.[27]

It might also be argued that some resolutions of the General Assembly, which have been passed unanimously, are at least indicative of currently prevailing international custom. Some of the more significant resolutions of this category are the ones on outer-space, the sea bed, expenses incurred by the U.N. and the definition of aggression.[28] It is possible to state that a resolution carries some effect when it is addressed to the internal organs or office bearers of an organisation, when a previous agreement among the parties had determined that a particular resolution would be binding on them and where a resolution is detailed, carefully considered and unanimously adopted, for in the latter

event it might acquire a de facto effect although it might initially not possess a de jure effect. Although, basically, a declaration might lack a formal legal effect, it is possible in some cases for it to acquire a de facto legal effect.

Broadly speaking, it could be said of the Declarations of the U.N. General Assembly that,

> [d]eclarations are solemn resolutions of the General Assembly which in most cases has only the power to make recommendations but not decisions (except on some matters like the United Nations' household). In view of the greater solemnity and significance of a "declaration", it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States. In conclusion, it may be said that in United Nations practice, a "declaration" is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected.[29]

Declarations will usually have a greater influence, even if they are not legally binding. Their solemnity indicates a stronger desire of the organisation to see them observed. Non-observance will lead to almost the same political reproaches as non-observance of binding decisions. Declarations usually influence the further development of the law, both customary and codified. In this respect it is noted that the Universal Declaration of Human Rights has had a great impact on many national constitutions, e.g. Rwanda and Somalia.[30] It has sometimes even been pleaded before national courts. The Court of Appeal of Milan stated that "The Universal Declaration of Human Rights is a source of international law since its provisions constitute generally recognized rules of international law."[31] It has been referred to in later declarations of the U.N. as if it were binding law.[32]

Likewise, the Declaration on the Granting of Independence to Colonial Countries and Peoples has been referred to in more than one hundred subsequent resolutions. To supervise the implementation of this Declaration, the General Assembly of the U.N. created a special committee (the Special Committee of 24).[33]

Following are some of the significant U.N. Declarations which have been recited in other declarations and resolutions and which have had a widespread impact: Universal Declaration of Human Rights; Declaration on the Granting of Independence to Colonial Countries and Peoples; Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and the Protection of their Independence and Sovereignty;

Declaration on Social Progress and Development; Declaration of Principles Governing the Sea-Bed and the Ocean Floor; Declaration of the Indian Ocean as a Zone of Peace; Declaration on the Rights of Mentally Retarded Persons; Declaration on the Protection of Women and Children in Emergency and Armed Conflict; Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind.

In the light of the above discussion, it could be argued that where a declaration has been adopted unanimously, the relevant states-parties might proceed to give effect to its provisions voluntarily, even though they are not legally bound to do so. This might, in addition to abiding by its requirements internationally, even include adopting requisite municipal legislation and administrative measures to give effect to the declaration within the relevant States. With regard to the OECD Declaration, it could be said that there has been a general acceptance of the principles contained in it (partly manifested by its unanimous adoption) by the relevant states-parties, and a higher degree of pressure, internationally and domestically, on states to enforce and further strengthen them, will act as a compelling factor on such states to implement its provisions to a greater extent.

The provisions of the Declaration relating to national treatment are of immediate interest. These provisions require foreign-controlled enterprises to be afforded treatment no less favourable than that accorded in like situations to domestic enterprises. States are also expected to endeavour to ensure that even their national subdivisions treat foreign-controlled enterprises likewise. If the Declaration acquires a de facto force, Member countries will be required to make a strenuous attempt to give effect to these provisions. National treatment of foreign-controlled enterprises is an extremely sensitive issue at present as various countries beset by extensive economic pressures, have resorted to different degrees of economic nationalism in recent times and have subjected foreign-controlled enterprises to a variety of special requirements. These requirements might relate to taxation, official aids and subsidies, real-estate matters, access to bank credit and the capital market, government purchasing, exploitation of mineral resources, civil aviation, banking and finance, media, agriculture, fishing, etc.[34] If the principles contained in the Declaration acquire a de facto force, it could be expected that in due course suitable national measures will have to be adopted to ensure that the relevant domestic laws and regulations accord with the principles contained in the Declaration.

A trend in this direction is discernible from the 1979 Review of the Decision on National Treatment for Foreign Controlled Enterprises. With relation to tax obligations, fifteen Member countries indicated that they did not apply any less favourable treatment to foreign-controlled enterprises. Seven countries indicated that they still had provisions requiring differential treatment of foreign-controlled branches, special taxes on the transfer of real estate and special rules for non-nationals

on tax evasion; e.g., Canada and New Zealand levied special taxes on the transfer of real estate to non-residents and foreign-controlled enterprises. With regard to official aids and subsidies, thirteen countries indicated that there were no special requirements relating to foreign-controlled enterprises. However, nine countries continued to have discriminatory practices in this area. Most such exceptions referred to grants or loans on preferential terms in specific sectors such as agriculture, fisheries, films and shipbuilding. With regard to access to bank credits and the capital market, fourteen Member countries did not have any discriminatory practices. The others had different varieties of practices which discriminated against foreign-controlled enterprises; e.g., in Ireland, U.K. and Finland the government retained a broad discretionary power to impose restrictions in this area. In the area of government purchasing and public contracts, thirteen countries did not have any more restrictions. The others continued to have discriminatory practices relating to a number of matters. Austria, France, Netherlands, Switzerland and the United States positively discriminated against foreign-controlled enterprises in the area of defence. With regard to investment, only Ireland and Luxembourg had no exceptions.

The 1979 Review of the Guidelines states at paragraph 110:

> Sectoral exceptions are most commonly used in fields relating to public utilities and public services. Such areas are, in general, closely regulated by governments in order to assure the normal functioning of certain basic activities of predominant national interest (cf., transports, telecommunications, broadcasting, energy generation). In this respect the picture of sectors open to investment by foreign-controlled enterprises may be incomplete, as public monopolies are not covered by the notifications .... Other sectors like mining and manufacturing industries, banking and insurance are of more significant importance to international investment. In these fields relatively few countries have reported exceptions, and those reported are of varying degrees of intensity.[35]

In retrospect, it might be asserted that despite their lack of legal force, the provisions of the Declaration (at least in some areas) are being given effect in actual fact by the Member countries. This might be the result of the states concerned complying with the moral pressure to which they are being subjected. It could also be that they are voluntarily giving effect to certain principles to which they agreed by common accord. However, what is significant is that a serious effort is being made to give effect to the accords entered into by the Members (except Turkey) of the OECD.

An important means by which a declaration (or resolution) might acquire the force of international law is by the relevant provisions becoming part of international custom. This is not an uncommon feature in international law. However, this process generally takes a long period of time and might require extensive judicial and academic analysis before the relevant principles crystallise. This phenomenon has occurred in other areas of international significance. The developments under the Universal Postal Union and the International Maritime Consultative Organisation Agreements are good examples.

Under the U.P.U. Convention, the principle of inviolability and secrecy of correspondence has evolved although it has not been incorporated in the provisions of the Convention. It has remained an extra-treaty principle. In 1919, the U.P.U. Congress in Buenos Aires adopted the resolution that, "[s]ubject to exceptions provided in Article 46, no item of correspondence, open or closed, can be submitted to any control or seized." Further, the universal acceptance of the principle of free access to foreign harbours and the non-discriminatory treatment of vessels in such harbours has been described as a commonly accepted usage that has developed under the I.M.C.O. Constitution.[36]

On the other hand, it is also possible that a declaration or resolution evidences currently prevailing custom. Although it cannot be asserted with certainty that the Declaration and the Guidelines are representative of current practice, there is every likelihood of their becoming evidence of practices that might evolve into firm rules of conduct in the future.

However, a significant stumbling block to the development of international custom on the basis of the above Declaration is that it consists mainly of recommendations - recommendations to states and to enterprises. A recommendation involves advice as to the best course or choice. It imposes no definite obligations. This will hinder the evolution of definite rights, duties and obligations and could very well operate to deprive the principles contained in the Declaration of legal force even in the future.

7. The Need for International Institutions

It is normal practice for States who are party to international accords to establish international institutions to oversee their due implementation. This is because international agreements elaborately drafted and meticulously executed might still not be adequate to deal with all the questions relating to and arising from the accords already arrived at, might still contain gaps and might be inadequate to meet unanticipated contingencies. Hence the need to create international organisations that possess some form of policy and norm-making power, a competency to supervise and execute the norms that already exist and the ability to adjudicate disputes that might arise relating to the accords

that have been arrived at.

It is noted that the OECD has not sought to establish an international organisation which will be responsible for performing functions of the above nature in relation to the Declaration. Of course, it is possible to argue that a Declaration does not require an institutional framework to ensure its implementation. However, this is a shortcoming, perhaps deliberate, and will, no doubt, inhibit the evolution of the principles contained in the Declaration and the development of further guidelines and also prevent the growth of an authority that would oversee the due implementation of the above principles.

The Declaration mildly hints that organs of this nature might be created in the future. The preamble refers to the possibility of further international arrangements and agreements in this field and one could perhaps expect further more elaborate steps to be taken in the future. (And such steps could include the creation of international institutions that ensure the due implementation of the accords arrived at.) Article 4 of the Guidelines also recommends the full use of the bodies established under the OECD.

Since the adoption of the Declaration, the OECD Council has been resorted to for the purpose of enacting three decisions which have been subsequently revised and which have had a significant impact on the Declaration. This might indicate a possible way in which institutions relating to the Declaration and the Declaration itself might evolve. The OECD Council itself might be relied upon for this purpose. However, this might not be completely satisfactory as the OECD Council is required to deal with a wide array of other matters already.

Furthermore, reference is made in the Revised Decision of the Council on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises[37] to the need to hold exchanges of views on matters related to the Guidelines by the Committee on International Investment and Multinational Enterprises. This Committee might be a useful instrument for the purpose of developing a future institutional structure relating to the Declaration. This is significant due to the stress placed in the Decision on holding regular exchanges of views. These exchanges could relate to further principles to be adopted, to their due application or to the resolution of disputes relating to the principles that have already been adopted or are sought to be adopted by the various Member countries. It is possible that with the passage of time, the Committee would wield more authority in the above areas.

On the other hand, if in due course the principles contained in the Declaration acquire the force of law (by becoming part of international custom or through some other means), it might become more expedient to establish a proper institutional structure for the purpose of ensuring their due implementation. This is a development which could very well occur in the future.

8. Resolution of Disputes

It is noted that the Declaration pays great attention to the resolution of disputes. It has made a number of references to methods that could be employed for the purpose. The preamble states, "Considering that, while continuing endeavours within the OECD may lead to further international arrangements and agreements in this field, it seems appropriate at this stage to intensify their co-operation and consultation on issues relating to international investment and multinational enterprises through inter-related instruments each of which deals with a different aspect of the matter and together constitute a framework within which the OECD will consider these issues."[38] This points to a way in which disputes might be resolved, i.e. through further co-operation and consultation and through the conclusion of further accords. (These are methods which are commonly used for the resolution of international disputes.) The great advantage of co-operation and consultation is that States who disagree with each other on the interpretation of a provision in an international accord, or the realisation of a common objective, could utilise these methods to explore each other's views in an easy atmosphere with the view to achieving a mutually acceptable solution before the dispute crystallized and reached a stage when a solution would be more difficult to achieve. These methods also enable them to continue the search for a solution away from a critical public gaze. They enable parties to arrive at solutions that are generally acceptable to all interested parties, avoid premature public criticism and desist from harmful public posturing. It could be said that a wide resort to co-operation and consultation could enable disputes to be resolved amicably and would also result in the gradual evolution of the principles contained in the Declaration. Furthermore, this would help to ensure that the solutions reached are implemented by the parties concerned.

The need to conduct consultations for the resolution of disputes relating to the Declaration or the Decisions might even give rise to a need for an institution which would facilitate such consultations. Such an institution could also provide the wide range of back-up facilities (a secretariat, research facilities, expert assistance, etc.) that are generally required for the purpose.

It is possible that the parties to the Declaration are acknowledging through the preamble that the principles contained in the Declaration might evolve into internationally binding norms of conduct in the future and, hence, adequate opportunities are required to be left for the interested states-parties to contribute to this evolution through consultations and negotiations.

It is also interesting that the above provision acknowledges that further international arrangements and agreements might be made in this field.

In this connection, it is noted that the Committee on International Investment and Multinational Enterprises observed in the 1979 Review:

> With respect to specific matters arising under the Guidelines the Committee urges that such matters first be raised, discussed, and, if possible, resolved at the national level and, when appropriate, such efforts be pursued at the bilateral level. Where issues related to the Guidelines are identified by governments and/or one of the advisory bodies, the matter may be raised with the Committee. The Committee is proposing that the above mentioned Decision be further amended to state specifically that the Committee shall be responsible for clarification of the Guidelines. The Committee notes its intention to respond in a timely manner to further requests for clarification. Where such responses are possible, they will be given to the interested parties, as appropriate, through informal contacts or in the context of formal consultations with the advisory bodies as well as in the periodic Reports of the Committee to the Council.[39]

This indicates a possible way in which the institutional structure under the Declaration could evolve.

Article IV of the Declaration states that "they [the governments of OECD Member countries] are prepared to consult one another on the above matters in conformity with Decisions of the Council relating to Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises, on National Treatment and on International Investment Incentives and Disincentives." Article 4 of the Guidelines states that "within the Organisation, the programme of co-operation to attain these ends will be a continuing, pragmatic and balanced one."

The above attitude manifested in the Declaration and the Guidelines is further emphasised in Article 11 of the Guidelines which states that

> Member countries have agreed to establish appropriate review and consultation procedures concerning issues arising in respect of the guidelines. When multinational enterprises are made subject to conflicting requirements by Member countries, the governments concerned will co-operate in good faith with a view to resolving such problems either within the Committee for International Investment and Multinational Enterprises established by the OECD Council on 21 January 1975 or through other mutually acceptable arrangements.[40]

The importance of co-operation and consultation is stressed in the three Decisions adopted by the OECD Council. The Committee on International Investment and Multinational Enterprises is not only required to hold regular exchanges of views, it is empowered even to invite the Business and Industry Advisory Committee and the Trade Union Advisory Committee to express their views. It could even give an individual enterprise the opportunity to state its sentiments. However, it is significant that the Committee itself is prohibited from expressing its judgment.

The Committee is also empowered to hold consultations relating to complaints on the question of "National Treatment" and on the complaint of a Member that its interests are being adversely affected by the impact on the flow of international direct investments by measures taken by another Member country specifically designed to provide incentives or disincentives for international direct investment.

These provisions seem further to strengthen the view that despite the absence of strictly binding norms of conduct, a clear-cut institutional framework and a definite dispute resolving organ, the OECD has opted to stress the importance of co-operation and consultation for the purpose of achieving its objectives and resolving disputes in relation to the Declaration.

It is also interesting to note that from the beginning, reference was made to the possibility of relying on the Committee for International Investment and Multinational Enterprises of the OECD for the purpose of resolving disputes. The procedure adopted by this Committee is not very clear. However, it makes detailed studies, provides opportunities for interested parties to express their views and generally helps them to arrive at solutions that are acceptable to the parties. Thus, the final result of its functions would also be similar to arriving at a solution through a process of co-operation and consultations.

The 1979 Review observed in paragraph 13:

> The IME Committee's review of the instruments on National Treatment for foreign-controlled enterprises, which is the subject of Chapter II, shows that progress has been made in strengthening international co-operation in this important aspect of the international investment climate. In particular, Member governments have co-operated in reporting measures which exist in their countries which constitute exceptions to National Treatment and in explaining the nature of such exceptions and how they are applied in practice. As a result of the work completed to date by the Committee, a notably greater degree of transparency with respect to exceptions to National Treatment has been achieved, particularly those exceptions which are formalised in the laws and regulations of Member countries.[41]

It also observed in paragraph 15:

> [t]he Committee notes that no country has availed itself, since 1976, of the possibility for formal consultations on a matter related to this instrument but believes the existence of such a facility in the Decision provides an important safeguard for Member countries."[42]

Despite the fact that no Member country sought consultations on a matter that was adversely affecting the inflow of international direct investment (as provided for by the relevant decision in 1976), the Revised Decision of the Council on International Investment Incentives and Disincentives also provided for the above Committee to be the forum for any necessary consultations. Article 1 states,

> Consultations will take place in the framework of the Committee on International Investment and Multinational Enterprises at the request of a Member country which considers that its interests may be adversely affected by the impact on its flow of international direct investments of measures taken by another Member country specifically designed to provide incentives or disincentives for international direct investment. Having full regard to the national economic objectives of the measures and without prejudice to policies designed to redress regional imbalances, the purpose of the consultations will be to examine the possibility of reducing such effects to a minimum.[43]

Similarly, no country made use of paragraph 5 of the Decision on National Treatment which provided for the Committee to act as a forum for consultations "at the request of a Member country, in respect of any matter related to this instrument and its implementation, including exceptions to National Treatment and their application." The revised Decision provides in Article 6: "The Committee shall act as a forum for consultations, at the request of a Member country, in respect of any matter related to this instrument and its implementation, including exceptions to 'National Treatment' and their application."[44] A similar provision is to be found in Article 1 of the Revised Decision on Inter-governmental Consultation Procedures on the Guidelines for Multinational Enterprises.[45]

It would appear from the above that in the area of dispute resolution there is evidence of the gradual evolution of the IME Committee as a body which would specialise in resolving conflicts. The Committee still is imperfect in a number of respects. However, it is possible that in time its authority will grow despite the fact that it has not been used extensively by the parties up to now.

The Guidelines make provision for the use of existing machinery within the OECD for the purpose of achieving the objects of the Organisation. Article 4 states that, "[w]ithin the Organisation, the program of co-operation to attain these ends will be a continuing, pragmatic and balanced one. It comes within the general aims of the convention on the Organisation for Economic Co-operation and Development (OECD) and makes full use of the various specialised bodies of the Organisation, whose terms of reference already cover many aspects of the role of multinational enterprises ...." This provision enables parties to rely on existing machinery within the Organisation for the purpose of resolving differences and to co-operate for the purpose of attaining the ends of the Declaration. The Article goes on to state:

> In these bodies, work is being carried out on the identification of issues, the improvement of relevant qualitative and statistical information and the elaboration of proposals for action designed to strengthen inter-governmental co-operation. In some of these areas procedures already exist through which issues related to the operations of multinational enterprises can be taken up. This work could result in the conclusion of further and complementary agreements and arrangements between governments.[46]

The OECD has established a number of committees which are extensively involved in work that is relevant to the realisation of the objectives of the Declaration. (This is in addition to the Secretariat which is also involved in such work.) There are the Economic Policy Committee, Economic and Development Review Committee, Committee for Energy Policy, Development Assistance Committee, Technical Co-operation Committee, Trade Committee, Manpower and Social Affairs Committee, Environment Committee, Committee for Scientific and Technological Policy, Industry Committee, Nuclear Energy Agency and other such organs.

The Guidelines also provide in Article 10 for the use of existing international dispute settlement mechanisms, including arbitration, as a means of facilitating the resolution of problems arising between enterprises and Member countries.

It would thus appear from the examination of the above provisions that though there is an absence of specific provisions setting up a major dispute settlement organ for the purpose of dealing with disputes relating to the Declaration and the attendant instruments, there are a number of provisions which deal with the question of dispute resolution. Despite the obvious handicap posed by the absence of definite commitments, rights and obligations in the Declaration, it (perhaps in the expectation that one day developments lending substance to its provisions might occur) does provide for the utilisation of some already popular methods for the resolution of disputes, namely, co-operation and consultation, use of existing machinery, conclusion of additional accords

and the use of existing international dispute settlement machinery. Co-operation and consultation, which are methods that are extensively relied upon by nations for the settlement of disputes today, are particularly suited for resolving disputes under the Declaration due to its very elementary nature and due to the need to secure mutually acceptable solutions to any problem if such solutions are to be implemented at all.

9. Preliminary Conclusions

With regard to the international implementation of the provisions of the Declaration, it is now possible to make certain general comments. Due to the fact that the Declaration and its attendant instruments consist mainly of recommendations (with all the inherent shortcomings that are associated with recommendations) and due to the fact that they have been largely deprived of legal effect, it will be difficult to give them a high degree of effectiveness in the immediate future. However, there is every possibility that with the passage of time, due to the factors discussed above, the principles expressed in the Declaration will take a more concrete form and will constitute international rights, duties and obligations relating to the subject matter. As the Review of 1979 concluded, already there are indications of a growth in this direction. Similarly, even though today there are no specific institutions of any significance for the realisation of the objectives of the Declaration, it is possible that, with the evolution of the principles contained in the Declaration, such institutions will be developed in the future. It is noted that in relation to the resolution of disputes and disagreements there already exists an elementary framework which could be resorted to and improved upon. If in time the principles contained in the Declaration take a more concrete form, this framework might evolve into something more significant, or new institutions may have to be created to cater to the new needs.

10. Implementation within Member-States

The next question of significance associated with the realisation of the objectives of the Declaration relates to the implementation of its provisions within the municipal legal systems of the Member countries of the OECD. It is usually necessary to take appropriate steps to ensure that the international obligations which States enter into are duly given effect within the municipal legal systems of countries. This is specifically significant in the case of obligations (like some of the obligations contained in the Declaration) of an economic nature due to the extensive impact that they tend to have on a variety of internal laws, regulations, customs and practices, on the lives and livelihood of individual persons and on legal persons. This becomes important also for the reason that multinationals are organised and operate both internationally and within countries. It is to be remembered that

internal administrative and judicial authorities which are the instrumentalities through which laws and regulations have to be given effect within a country, will normally give effect only to norms that are recognised as legally binding by a particular municipal legal system. An internal legal system will contain its own specific requirements which need to be satisfied before a norm is accepted as binding by the internal administrative and legal authorities.

The Review of 1979 observes in paragraph 53:

> It is recognised that guidelines dealing with complex legal and economic concepts, such as abuse of a dominant position, adverse effects on competition and unreasonably differentiated pricing policies, are not sufficient in themselves to provide precise rules for business executives to follow in specific circumstances. Under the national law of various countries, these concepts have been given meaning through interpretation by the competent tribunals. This is why supporting action by Member governments at national level is needed, together with complementary arrangements and agreements for inter-governmental co-operation.[47]

If an international norm is to become part of a municipal legal system, it will have to be introduced into it in accordance with the procedures specified for the making of norms of conduct within such a municipal legal system. These procedures might include complying with constitutional and other legal requirements relating to ratification and acceptance, acceptance by Parliament, publication in a specified medium, enactment of specific legislation, enactment of specific regulations and other similar measures.

11. The Introduction of International Norms into Municipal Jurisdictions

Different countries adopt different means for the introduction of international norms of conduct into their national legal systems. Under Article 6 of Clause 2 of the Constitution of the U.S.A., treaties are required to be made by and with the advice and consent of the Senate. (Once this is done such treaties normally acquire the status of municipal law,[48] and become, along with the Constitution and Acts of Congress, "The Supreme Law of the Land.")

In Britain and in most Commonwealth countries international norms become part of the municipal legal system only if such norms are specifically introduced by legislation.[49]

In France Article 53 of the Constitution provides: "Peace treaties, commercial treaties, treaties and agreements relating to international

organisations, those that imply a commitment for finances of the State, those that modify provisions of a legal nature, those that relate to the status of persons, those that call for the cession, exchange or addition of territories may be ratified or approved only by a law." In fact, French courts have tended to recognize only those agreements which have been published in the form of presidential decrees.[50]

In view of the above, if the provisions of the Declaration are to be properly introduced into the municipal legal systems of Member countries and duly given effect, the above requirements will have to be complied with; i.e., they will have to be introduced in accordance with the constitutional and other legal requirements.

A very serious problem in implementing the above Declaration within Member countries stems from its very nature. Since the guidelines consist only of recommendations, they lack substance and hence would be difficult to be introduced into the national legal systems with great effectiveness. (It is always easier to introduce specific provisions.) Furthermore, due to the fact that the Guidelines are imprecise and broadly drafted, they would be subjected to various interpretations by the national authorities who are seeking to introduce them. The consequences of this would be that even if these Guidelines are implemented within Member countries, they would tend to be introduced and then implemented in different ways and there would be little consistency among the countries that are seeking to implement them.

Where a principle contained in the Declaration is presented to an appropriate internal organ for the purpose of its being accepted in the proper manner in accordance with the prescribed constitutional and legal requirements (in order to confer on it the force of law), it is likely that numerous internal pressure groups will strive to leave their imprint on it. Thus, there will be the groups representing the multinationals who will seek to ensure that the principle that is adopted by the internal organ will be reflective if their interests, while consumer or public interest groups will strive to ensure that their interests are reflected in the norms that are adopted. There will also be groups representing the lobbies which seek to protect national business interests. Thus, the norms that will eventually be adopted might be reflective of the interests of domestic pressure groups rather than of the objectives which were sought to be achieved by the draftsman of the Declaration. The imprecise nature of the recommendations will result in such norms' (when they are adopted into the municipal legal system) being particularly reflective of the interests of the dominant domestic pressure groups. (This is particularly true of the way in which the Decision on National Treatment of Foreign-Controlled Enterprises has been implemented in different Member countries. It is seen that the same matter is not regulated in an identical manner in the different countries.)

The above state of affairs has caused the provisions of the Declaration to be implemented in a variety of ways with varying effects.

12. Need to Comply with Internal Legal Requirements

It is also noted that the Declaration takes cognisance of the internal requirements of Member countries when they give effect to it. Article II(1) refers to the need to be conscious of a Member country's needs to maintain public order, to protect essential security interests and to fulfil commitments relating to international peace and security in according national treatment to multinational enterprises. Thus, the obligation to accord national treatment to such enterprises is subject to certain internal requirements of Member countries.

It appears that it is compatible with the Declaration to accord a higher priority to the above considerations in implementing its provisions within a Member country. According to the Interim Report of the Committee on Exceptions to National Treatment[51] most OECD countries maintain exceptions in areas related to defence, operation of flag vessels, air and maritime transportation, aircraft and aeronautics, radio and T.V. broadcasting, banking and insurance, mining and oil explorations, hydro power and nuclear energy, real estate and ports.

13. Impact of Contradictory Domestic Laws

This also brings up another very important question. This relates to the problem raised by the existence of contradictory domestic laws, regulations, etc. in a Member country that is seeking to implement the Declaration internally by having it accepted in the appropriate manner by the legislature.

In some countries, e.g., the U.S.A., the constitution is supreme and if the provisions that are introduced happen to contravene the Constitution, the latter would prevail. In the case of other laws, the principle which operates is that "the latter in time prevails." Therefore, when a provision of the Declaration is sought to be introduced into a domestic jurisdiction of this nature, care should be taken to ensure that it does not contravene constitutional provisions and if it does contravene other legislative provisions, to ensure that it is clearly and unambiguously to prevail.

In the British Commonwealth international obligations of this nature have to be specifically introduced into national jurisdictions and the later in time prevails (except where a constitution provision states otherwise).

It is very likely that there would already be extensive provisions in the domestic laws of Member countries which have a bearing on matters covered by the Declaration. There could be laws dealing with foreign investments, takeovers, taxation, import and export control, exchange control, ownership of property, labour laws, quarantine, environmental considerations, etc. These laws might in some instances conflict with

the provisions of the Declaration, e.g., the Australian provisions on the ownership of certain sectors of the economy.[52] These local laws are enforced by the domestic administrative and judicial organs; and, if they are to enforce the provisions of the Declaration, not only will it be necessary for such provisions to be introduced into the municipal legal system in such a manner as to confer on them the quality of law, but also they should not conflict with the Constitution. Furthermore, when such provisions are introduced, they should clearly override existing national laws on the matter sought to be legislated upon.

14. Needs of Other Member Countries

The provisions contained in the Declaration seem to indicate that Member countries have also acknowledged the need to be sensitive to the interests of each other in the implementation of its provisions. This might also mean that they are required to be careful about not enacting laws which are in obvious conflict with the laws of other Member countries. Article III(2) of the Declaration states, "that they thus recognise the need to give due weight to the interests of Member countries affected by specific laws, regulations and administrative practices in this field (hereinafter called 'measures') providing official incentives and disincentives to international direct investment." If this provision is adhered to, it is possible to envisage an evolution which would result in the harmonising of the laws of the different States in this particular area. This will also be conducive to introducing a degree of harmony in the relevant areas of economic activity.

Article III(3) goes on to stress the need to make such internal measures as transparent as possible. This, in addition to facilitating their examination and appreciation by enterprises, also enables other Member countries to be aware of their existence and to avoid contradicting them consciously or unwittingly.

15. Effect of the Principles Relating to International Custom

Another way in which the provisions of the Declaration might be given effect within municipal jurisdictions is through their becoming part of international custom. (This, as was pointed out earlier, is a slow and uncertain process.) This is because most municipal legal systems recognise international custom and give effect to it in the most appropriate manner. There is also a general presumption that municipal laws are not intended to contradict international custom.[53] Where an international custom exists and where it is not directly in conflict with statute law, internal administrative and judicial organs tend to apply such a custom within municipal legal systems in a sympathetic manner.

A further aid to the internal implementation of international norms is their adoption by internal bodies -- particularly the professional

bodies. Thus the adoption of the principles expressed in the provisions of the Declaration by the legal fraternity, (or by the accountants' body) as appropriate standards, will go a long way towards their eventual enforcement through the instrumentalities of the internal legal system, for international standards which are acceded to by the internal professional bodies will generally find ready acceptance by the members of such bodies.

16. The Actual Practices of Governments

From the actual performance of individual governments, it will appear that extensive efforts have been made by them to give effect to the provisions of the Declaration and the Decisions within their municipal legal systems.

Paragraph 79 of the 1979 Review states, in relation to publicizing the provisions of the Declaration:

> Member governments which have not already done so will provide facilities for handling enquiries and for discussions with the parties concerned on matters relating to the Guidelines. They intend to inform the business community, employee organisations and other interested parties of the appropriate contact point(s) within the government for enquiries on matters related to the Guidelines. The Committee believes that such facilities, existing examples of which are listed in Annex I, could usefully contribute to the solution of problems relating to the Guidelines which may arise and that, in any event, as a general principle such prior contacts and discussions at the national level should take place before matters are raised at the international level.[54]

In most countries, the Guidelines have been widely distributed to all ministries and public organisations concerned. The Declaration of 1976 has been brought to the knowledge of the general public in Australia, Canada, Denmark, Japan, Norway, Sweden, Germany and the United States (by means of official press releases or press briefings and/or through its insertion in official publications). In the United Kingdom, the Guidelines were published in a white paper with a foreword by the Secretary of State for Industry. In Portugal, the Declaration and the Decisions were published in the Official Gazette. In the United States, the Declaration and Secretary Kissinger's statement before the OECD Council were published in the July 1976 edition of the Department of State Bulletin. In Switzerland, the Declaration was published in the Official Gazette as an annex to the 7th Report of the Federal Council on Foreign Economic Policy and submitted to Parliament in August 1976. In Sweden, the Government notified the public of the Declaration and

Decisions by means of an ordinance published in the Swedish Book of Statutes. In Australia, the 1977 Report of the Foreign Investment Review Board as well as the government's revised foreign investment policy issued in 1978 drew attention to the Guidelines and issued the Declaration in full as an attachment.

In all Member countries, the Guidelines have been extensively distributed to the business community, labour unions, professional federations, chambers of commerce and individual companies (for instance in Japan 5,000 private enterprises received the Guidelines from the Government, which distributed ten thousand pamphlets explaining the Guidelines in detail). They have been made available either in the OECD version (English or French) or translated into a foreign language (Danish, Dutch, Finnish, German, Japanese, Norwegian and Swedish). The booklet was often accompanied by an official foreword requesting the parties to bring the contents of the Guidelines to the attention of those of its members which are multinational enterprises and urging their observance of the Guidelines or stressing the need for the enterprises to comply with the Guidelines. Finally, some Member countries sent letters to individual enterprises informing them of the Declaration and commending the Guidelines to them. In the United States such a letter, jointly written by the Secretaries of State, Treasury and Commerce, has been sent to more than 800 chief executive officers of major U.S. corporations. In Germany, the Federal Minister of Economics sent a communication to the business organisations and unions concerned. This communication was also published. In Austria, the same addressees received a letter from the Federal Minister of Trade, Commerce and Industry. In the United Kingdom, the Secretary of State for Trade has written to the heads of the major City institutions, such as the Stock Exchange.

Some Member countries have taken steps to bring the Guidelines to the attention of their enterprises operating abroad through official or non-official channels. In Denmark, the Declaration has been distributed to all embassies and missions abroad. In Italy, the Declaration and Decisions have been sent to all members (more than 5,000) of the Italian Section of the International Chamber of Commerce. In Japan, the Government has taken necessary steps to communicate the instruments to the embassies in the countries where Japanese companies are operating. The United States Ambassador to the OECD undertook an intensive programme to brief United States businessmen in OECD countries.

Among the Member countries which have arrangements for regular discussions with the interested parties on matters relating to the Guidelines may be mentioned the following: the Canadian Government has had exchanges of views from time to time with the Canadian business and labour communities on the application of the 1976 instruments. In the United States, the Department of State has a Public Advisory Committee on Transnational Enterprises by which issues arising under the instruments are discussed. In Sweden, Norway and Finland, interministerial groups

with the participation of business and labour organisations have been established to co-ordinate the participation of each of these countries in the OECD work on multinational enterprises; representatives of MNEs operating in Norway and Sweden have been invited to participate in these discussions. In Australia, the Foreign Investment Review Board held discussions about the Guidelines with some of the major organisations representing foreign enterprises in Australia. In the Netherlands, an interministerial group discusses regularly with business and labour organisations all relevant matters with respect to the 1976 instruments. In Germany, officials hold regular exchanges of views with the business community on the same matters. In Switzerland, regular contacts were established between the federal authorities and the interested parties in the course of the negotiations on the 1976 instruments; these contacts have been pursued with respect to the application of the instruments. In Austria, the Federal Minister for Trade, Commerce and Industry has made contact with the Federal Chamber of Trade and Industry and employees' and workers' organisations with a view to providing the OECD in due course with information on the Austrian experience in applying the Guidelines. In the United Kingdom, the Divisions of the Department of Industry responsible for individual sectors of industry are discussing the Guidelines with companies in the normal course of their dealings with them. In Japan, Government officials have also held meetings and conferences to provide further clarifications of the Guidelines and to answer any questions which groups or individuals may have.

Some Member governments have used one or more of the Guidelines in the context of national policies. The American and the Swedish Governments have referred to the Guidelines on competition policy when dealing with restrictive business practices involving activities of multinational companies in other countries. The Netherlands Government has on various occasions stated that it takes into account the relevant Guidelines when determining its policies. The Australian Government has incorporated the Guidelines as an integral part of its policy on inward foreign investment, has indicated publicly that it wishes foreign interests operating in Australia to observe them and uses them as points of reference in the examination of applications submitted to the Government under its foreign investment policy.

17. Conclusions

In conclusion, it may be said that the implementation of the Declaration within municipal legal systems could pose difficult problems due to the very nature of the Declaration -- its lack of certainty and substance and the absence of too many definite rights and obligations. Substance and certainty could be lent to it by enacting legislation and adopting administrative measures (as appropriate) to enforce the basic principles contained in them. This method, of course, runs the risk of the Declarations being given effect in a variety of different ways within Member countries. (This has happened already.) The introduction of the

Declaration in this manner into municipal legal systems will also require the involvement of the administrative and judicial organs of the State to an extensive degree in this process.

It has been seen that extensive administrative measures have already been taken to give effect to the provisions of the Declaration. The enthusiasm that has been displayed up to now augurs well for the success of the Declaration and the Guidelines. A continuation of this process could result in these being given effect in a more substantive manner within the municipal legal systems of Member countries.

The successful implementation of the Declaration both internationally and internally is an encouraging portent for the success of other interational economic agreements as well. If the objectives of the Declaration, despite all its shortcomings, are capable of being satisfactorily fulfilled, many of the other agreements should pose less of a problem. At a time when countries are seeking to give effect to numerous international economic agreements which have the objective of regulating vast areas of economic activity, not only affecting nations in their international relations, but also numerous individual persons within countries, such an outcome would be welcomed by the world community as it could possibly hasten the advent of an orderly rule - oriented international economic regulatory system.

FOOTNOTES

* LL.B. (Hons.) (Cey.); LL.M. (A.N.U.); Ph.D. (Cambridge).

1. Organisation for Economic Co-operation and Development. See for the text of the Convention, OECD, OECD History - Aims - Structures (1971).

2. See, The OECD Declaration on International Investment and Multinational Enterprises, OECD Press Release [A(76) 20 of June 21, 1976], reprinted in 15 Int'l Leg. Mat. 967 (1976); see also R. Blanpain, The Badger Case 133 (1977). The Declaration was adopted by the OECD in June 1976. It is accompanied by an Annex which contains the Guidelines for Multinational Enterprises, reprinted in 15 Int'l Leg. Mat. 969 (1976) [hereinafter cited as Guidelines] and three revised Decisions of the OECD Council of 13 June 1979, reprinted in 15 Int'l Leg. Mat. 977 (1976). Turkey did not participate in the 1976 Declaration and abstained from the Decisions.

3. U.N.G.A. Res. 3281 (XXIX) (1974); reprinted in 14 Int'l Leg. Mat. 251 (1975).

4. Draft Code, U.N. Doc. TD/CODE TOT/25 of June 2, 1980, reprinted in 19 Int'l Leg. Mat. 773 (1980).

5. Adopted by the General Assembly on 22 April 1980; U.N. Doc. TN/RBP/CONF/10/Rev. 1 (1980), reprinted in 19 Int'l Leg. Mat. 813 (1980).

6. Report of the Commission on Transnational Corporations, UNESCO Official Records, 61st Sess., Supplement No. 5 (May 1976) reprinted in 15 Int'l Leg. Mat. 779 (1976).

7. Codified Text of the Andean Foreign Investment Code of November 30, 1976, reprinted in 16 Int'l Leg. Mat. 138 (1977).

8. O.A.S. Doc. OEA/Ser. G, CP/RES. 154 (167/75), (1975) reprinted in 14 Int'l Leg. Mat. 1326 (1975).

9. These, though adopted by the European Parliament in 1977, have not been actively pushed by the E.E.C.

10. International Labour Organisation, Geneva, adopted on November 16, 1977, reprinted in 17 Int'l Leg. Mat. 423 (1978).

11. See McWhinney, The International Law Making Process and the New International Economic Order, 14 Can. Y.B. Int'l L. 57 (1976); Sinclair, Vienna Convention on the Law of Treaties, 19 Int'l &

Comp. L.Q. 47 (1970); Brandon, Analysis of the Terms "Treaty" and "International Agreement" for Purposes of Registration Under Article 102 of the United Nations Charter, 47 Am. J. Int'l L. 49 (1953); Jones, International Agreements Other Than International Treaties - Modern Developments, 21 Brit. Y.B. Int'l L. 111 (1944); Morgenstern, International Legislation at the Crossroads, 49 Brit. Y.B. Int'l L. 101 (1978). See, for detailed judicial discussion of this subject, Koowarta v. Bjelke-Petersen 56 Austl. L.J. 625 (1982).

12. Jenks, Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organisations, in Cambridge Essays in International Law 48 (1976); Jenks, Some Structural Dilemmas in World Organisation, 3 Ga. J. Int'l & Comp. L. 1 (1978); Glynn, EEC - EFTA - COMECON - CAC - CAFTA, in International Manual on the European Economic Community 1 (K. Junckerstorff ed. 1963); D. Bowett, The Law of International Institutions (3rd ed. 1975); Sinha, Identifying a Principle of International Law Today, 11 Can. Y.B. Int'l L. 106 (1973).

13. The membership of the OECD is acquired as a result of a unanimous decision of the OECD Council to invite any government to assume membership. See Art. 16, OECD Convention, supra note 1.

14. The major multinational enterprises have their origins in the Member countries of the OECD. See, R. Blanpain, The Badger Case 24 (1977).

15. See, supra note 2.

16. Id.

17. Decision of the Council on Intergovernmental Consultation Procedures on the Guidelines for Multinational Enterprises [(C(79) 102 (Final))], reprinted in 15 Int'l Leg. Mat. 977 (1976); Decision of the Council on National Treatment [(C(79) 102 (Final))], reprinted in 15 Int'l Leg. Mat. 978 (1976); Decision of the Council on International Investment Incentives and Disincentives [(C(79) 102 (Final))], reprinted in 15 Int'l Leg. Mat. 980 (1976). The original three decisions of the Council of 1976 were slightly revised in 1979. See for the texts, 18 Int'l Leg. Mat. 1171 (1979).

18. OECD, International Investment and Multinational Enterprises, Review of the 1976 Declaration and Decisions, (1979); OECD Document, [C(79) 102 (Final)] of June 5, 1979, reprinted in 18 Int'l Leg. Mat. 986 (1979), [hereinafter cited as 1979 Review]. The review of the 1976 Declaration and Decisions was carried out by the OECD Council at Ministerial level on the basis of a report of the OECD Committee on International Investment and Multinational Enterprises.

19. 1979 Review, supra note 18, at para. 2.

20. Turkey did not participate in the 1976 Declaration and abstained from the three Decisions. It did likewise with regard to the revised decisions of 1979.

21. The Annex to the Declaration contains the Guidelines.

22. 1979 Review, supra note 1, at para. 7.

23. Supra, note 17; These Decisions may also be indicative of the gradually evolving aspects of the Declaration.

24. See 1979 Review, supra note 18, at para. 37.

25. 1979 Review, supra note 18, at para. 24.

26. Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa (1955), I.C.J. Rep. 67, 115. See also South West Africa Cases (Second Phase), [1966] I.C.J. Rep. 6, 291-93 (Tanka, J., dissenting); Sloan, The Binding Force of a "Recommendation" of the General Assembly of the United Nations, 25 Brit. Y.B. Int'l L. 1, 31 (1948).

27. Johnson, The Effect of the Resolutions of the General Assembly of the United Nations, 32 Brit. Y.B. Int'l L. 97, 101 (1955-1956).

28. Ibid. But see H. Kelsen, Law of Nations 99 (1951): "In the field of economic and social cooperation the organisation acting through the General Assembly and the Economic and Social Council, has only the power to make recommendations which are legally not binding upon the members." See, Sinha, Identifying a Principle of International Law Today, 11 Can. Y.B. Int'l Law 353 (1972-73). See, for a detailed discussion, Sohn, The Shaping of International Law, 8 Ga. J. Int'l & Comp. L. 1, 16 (1978). See also, Falk, On the Quasi-Legislative Competence of the General Assembly 60 Am. J. Int'l L. 782 (1966). The Iranian nationalisation laws of 1951 were held by the District Court of Tokyo to coincide with the recommendations adopted by the General Assembly concerning the exporpriation of natural resources, i.e., G.A. Res. 626, 7 U.N. GAOR Supp. (No. 20) at 18, U.N. Doc. A/2361 (1952); Anglo-Iranian Oil Company v. Idemitsu Kosan Kabushiki Kaisha, 20 I.L.R. 305, 309 (1953). See also D'Amato, On Consensus, 8 Can. Y.B. Int'l Law 104 (1970), where it is argued that consensus is law and not merely evidence of law.

29. Use of the Terms "Declaration" and "Recommendation", United Nations Economic and Social Council, Commission on Human Rights, 18th Sess., U.N. Doc. E/CN.4/L.610 (1962).

30. Skubiszewski, Resolutions of International Organisations and Municipal Law, 2 Pol. Y.B. Int'l L. 91 (1968-69).

31. Guarantee of Political Asylum, Article 5 of the Convention, Corte d'Appello di Milano, reported in, 7 Y.B. Eur. Conv. on Human Rights 536 (1964).

32. Th. C. Van Bouen, Rechten Van de Mens op Nieuwe Paden, 7-8, Public Lecture, Amsterdam, 1968. Such reference was also made in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination (General Assembly Resolution 1904 (XVIII)) and in the International Convention on the Elimination of All Forms of Racial Discrimination (Annex to General Assembly Resolution 2106 (XX), 1965 Y.B. on Human Rights 389 (United Nations); reprinted in 5 Int'l Leg. Mat. 352 (1966); See also, Schwelb, An Instance of Enforcing the Universal Declaration of Human Rights - Action by the Security Council, 22 Int'l Comp. L.Q. 161 (1973); E. Schwelb, Human Rights and the International Community: The Roots and Growth of the Universal Declaration of Human Rights, 1948-1963 (1964).

33. Bleicher, The Legal Significance of Re-Citation of General Assembly Resolutions, 63 Am. J. Int'l L. 444, 474 (1969).

34. See the restrictions mentioned in, Australia's Foreign Investment Policy: A Guide for Investors 7 (1982).

35. 1979 Review, supra note 18, at para. 110.

36. See C. Alexandrowicz, Law Making Functions of the Specialized Agencies of the United Nations ch. VIII (1973).

37. The Decision of 1976 was slightly revised in 1979, see note 17.

38. See Preamble to the Declaration, supra note 2.

39. 1979 Review, supra note 18, at para. 11.

40. Art. 11, Guidelines, supra note 2.

41. 1979 Review, supra note 18, at para. 13.

42. 1979 Review, supra note 18, at para. 15.

43. Art. 1, [C(79) 102 (Final)], supra note 17.

44. Art. 6, [C(79) 102 (Final)], supra note 17.

45. Art. 1, [C(79) 102 (Final)], supra note 17.

46. Art. 4, Guidelines, supra note 2.

47. 1979 Review, supra note 18, at para. 53.

48. The La Ninfa, 75 F. 513 (1896); Kinsella v. Krueger, 351 U.S. 470 (1955); Geofroy v. Riggs, 133 U.S. 258 (1889).

49. See A. McNair, Law of Treaties ch. 7 (1961); R. v. Secretary of State, Ex parte Thakrar [1974[Q.B. 684, 701 per Lord Denning; McWhirter v. A.G. [1972] Comm. Mkt. L.R. 882, 886 per Lord Denning, 887 per Lord Philmore: A.G. Can. v. A.G. Ont. [1937] 1 D.L.R. 673, 678, 679 per Lord Atkin.

50. Re Government Commissioner with the Commission for the Distribution of Compensation for Czechoslovak Nationalisations, Revue Fratique de Droit administratif, 28 I.L.R. 438 (1960, No. 16); X. v. Y., 42 I.L.R. 266 (1961); (Recueil Dalloz, 1961, 489).

51. O.E.C.D., National Treatment for Foreign-Controlled Enterprises Established in O.E.C.D. Countries (1978).

52. Australia's Foreign Investment Policy: A Guide to Investors 7 (1982).

53. See discussions in Seidi-Hohenveldern, Transformation of International Law Into Municipal Law, 12 Int'l & Comp. L.Q. 88 (1963). McDougal, The Impact of International Law Upon National Law: A Policy Oriented Perspective, 4 S.D.L. Rev. 25 (1959).

54. 1979 Review, supra note 18, at para. 79.