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Steven Lee Smith

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# Badger Revisited: Implications for the Implementation of the Transfer of Technology Code

by  
Steven Lee Smith\*

Negotiations within the United Nations Conference on Trade and Development (UNCTAD) to develop a Transfer of Technology Code<sup>1</sup> are currently stalled over the related issues of the Code's legal nature and mode of implementation. The obstacle posed by these issues, endemic to international regulatory efforts, has proven particularly troublesome for the various codes being formulated in the United Nations to control multinational enterprises (MNEs).<sup>2</sup> The first code of conduct

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\* B.A., 1978, University of Pennsylvania; M. Phil., 1979, Cambridge University; L.L.B., 1981, Cambridge University; J.D., 1983, University of California, Berkeley.

1. The UNCTAD III General Assembly in Santiago de Chile in 1972 launched the codification effort with Resolution 39(III) instructing the Secretary General of UNCTAD to explore the feasibility of international regulation of patented and non-patented technology transfer to developing countries. The resolution can be found in *Guidelines for the Study of the Transfer of Technology to Developing Countries*, Study by the UNCTAD Secretariat, 55-57, U.N. Doc. TD/B/AC. 11/9 (1972). A brief history of the development of the Transfer of Technology Code is discussed in W. FIKENTSCHER, *THE DRAFT INTERNATIONAL CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY* 11-14 (1980). The lack of significant progress on outstanding material points is made apparent from a review of the Code's three most recent drafts. U.N. Doc. TD/CODE TOT/14 of Mar. 9, 1979, U.N. Doc. TD/CODE TOT/25 of May 6, 1980 and U.N. Doc. TD/CODE TOT/33 of Apr. 10, 1981.

2. UNCTAD has proven to be a particularly unfortunate forum for the negotiation of the Transfer of Technology Code. The negotiations are entrusted for the most part to politicians or career diplomats with little or no practical experience in the area who are instructed to adhere to ideologically dogmatic negotiating positions. A highly-charged political atmosphere thus develops which greatly inhibits the compromise essential to the settlement of these outstanding issues. Stanley, *International Codes of Conduct for MNCs: A Skeptical View of the Process*, 30 AM. U.L. REV. 973, 1007 (1981); Blair, *Technology Transfer as an Issue in North/South Negotiations*, 14 VAND. J. TRANSNAT'L L. 301, 303-304 (1981); Krishnamurti, *UNCTAD as a Negotiating Institution*, 15 J. WORLD TRADE L. 3 (1981). That the Conference on Restrictive Business Practices was able to reach agreement on a draft code under the auspices of UNCTAD has been attributed to its "antitrust" orientation, as opposed to the "development outlook of the technology transfer group." Stanley, *supra*, at 997, 998 n.133. See generally Miller & Davidow, *Antitrust at the United Nations: A Tale of Two Codes*, 18 STAN. J. INT'L L. 347 (1982). Furthermore, the Conference on Restrictive Business Practices skirted the issue of the Code's legal nature by avoiding any overt characterization. The Code's voluntary nature can be gleaned from various phrases in the text. See Department of State, Memorandum to Members of the Advisory Committee on International Investment, Technology and Development, May 6, 1980. Moreover, the Restrictive Business Practices Code was adopted as a resolution of the General Assembly which article 10 of the U.N.

for MNEs to overcome these problems was issued in 1976 by the Organization of Economic Cooperation and Development (OECD)<sup>3</sup> in conjunction with its Declaration on International Investment and Multi-National Enterprises (hereinafter "OECD Declaration").<sup>4</sup> The OECD's Guidelines for Multinational Enterprises<sup>5</sup> (hereinafter "Guidelines") are a landmark in the international regulatory process aimed at the control of MNEs, and hence a model for similar regulatory efforts in other fora.<sup>6</sup> In providing for its eventual implementation, the Transfer of Technology Code has borrowed heavily from the mechanism employed by the OECD to promote compliance with the Guidelines. This examination of the OECD's implementation process indicates, however, that such a system may not be capable of functioning effectively as a dispute resolution device for a voluntary code in the transfer of technology context.

A legal instrument's effect "depends upon a complex interaction of factors, especially legal form, substantive content, language and formu-

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Charter defines as "recommendations to states." See Benson, *The U.N. Code on Restrictive Practices*, 30 AM. U.L. REV. 1031, 1033-36 (1981).

3. The OECD was established under a Convention signed in Paris on December 14, 1960 to foster cooperation among the twenty-four member countries on matters concerning economic and social policy. The members of the OECD are Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

4. Organization for Economic Cooperation and Development, Declaration on International Investment and Multinational Enterprises, *adopted* June 21, 1976, Annex and Decisions of Council, OECD Doc. C (76) 99 (1976), *reprinted in* 15 I.L.M. 967 (1976) [hereinafter cited as OECD Declaration]. Turkey did not participate in the Declaration and abstained from voting on the Decisions.

5. Organization for Economic Cooperation and Development, Guidelines for Multinational Enterprises, annexed to OECD Declaration, *supra* note 4 [hereinafter cited as OECD Guidelines].

6. Besides the OECD Guidelines and the UNCTAD Transfer of Technology Code, the three other major codes of conduct for MNEs are the ILO Tripartite Declaration adopted in 1978 by the ILO Governing Body, *see International Labor Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, I.L.O. Doc. GN 204/4/2 (1978), *reprinted in* 17 I.L.M. 423 (1978); the UNCTAD Restrictive Business Practices Code, drafted by the U.N. Conference on Restrictive Business Practices under the auspices of UNCTAD, and adopted in 1980 by resolution of the U.N. General Assembly, *see U.N. Conference on Restrictive Business Practices, 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), adopted by the U.N. General Assembly, G.A. Res. 63, 35 U.N. GAOR Supp. (No. 48) 123, U.N. Doc. A/35/48 (1980); and the U.N. Transnational Corporations Code still being prepared under the auspices of the U.N. Commission on Transnational Corporations, *see U.N. Commission on Transnational Corporations, Draft U.N. Code of Conduct on Transnational Corporations*, U.N. Doc. E/C.10/1982/6 (1982) *reprinted in* 22 I.L.M. 192 (1983). For a report on the current status of the Code of Conduct on Transnational Corporations, *see United Nations Commission on Transnational Corporations: Information Paper on the Negotiations to Complete the Code of Conduct on Transnational Corporations*, U.N. Doc. E/C.10/1983/S/2 (1983) *reprinted in* 22 I.L.M. 177 (1983).

lation, and the institutional and procedural machinery used for implementation.”<sup>7</sup> This Article examines the implementation mechanism of a voluntary code and is premised on the belief that its effectiveness as a means of dispute resolution may obviate the need for a legally binding instrument.<sup>8</sup> The term ‘implementation’ “embraces all action taken to carry out the objectives of the codes or to apply the standards contained in them”<sup>9</sup> and will be used interchangeably with “follow-up,” a term which is often preferred for its lack of connotations of a legal obligation. The term “implementation mechanism” is used to denote both the institutional machinery and the procedures created for the purpose of implementing the code. At times “implementation process” more aptly describes the interaction of the two, and so will be used accordingly.

This Article identifies the essential elements of the OECD mechanism and the conditions necessary to its successful operation. It then demonstrates by their absence in the transfer of technology context the incompatibility of an OECD-type mechanism with the Transfer of Technology Code. The first section therefore examines the OECD Guidelines and follow-up mechanism in an effort to facilitate understanding of the functioning of the mechanism as a dispute resolution device. The second section then evaluates the Badger case and the manner in which the Guidelines were effectively invoked against an American multinational. The third section focuses on the crucial differences between the transfer of technology context and that prevailing in the OECD with respect to implementation of the Guidelines. Finally, the conclusion suggests that while the Transfer of Technology Code’s consultation procedures can do little to help fulfill the Code’s ostensible purpose of restructuring existing relationships between MNEs and developing country recipients of their technology, they will provide a useful framework for the systematic development of an international law on technology transfer. The former task is better left to unilateral measures, a course that will continue to become more attractive as lesser developed countries strengthen their administrative infrastructure and acquire the domestic expertise necessary to regulate MNEs.

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7. Fatouros, *On the Implementation of International Codes of Conduct*, 30 AM. U.L. REV. 941, 948 (1981).

8. See U.N. Commission on Transnational Corporations, *Transnational Corporations: Certain Modalities for Implementation of a Code of Conduct in Relation to its Possible Legal Nature*, Report of the Secretariat, U.N. Doc. E/C.10/AC.2/9 (1978).

9. Fatouros, *supra* note 7, at 943.

## I THE OECD GUIDELINES

In January, 1975, the OECD Council of Ministers formed a Committee on International Investment and Multinational Enterprises (CIME) to construct a regulatory regime governing foreign investment and reflecting the liberal pro-business tenets of the developed countries of the free world.<sup>10</sup> The OECD undertaking was motivated in part by a desire to pre-empt ongoing efforts in other international fora<sup>11</sup> in order to prevent more radical measures from setting the tone for subsequent regulation. By mid-1976, the Commission had produced a regulatory package that the OECD Council at Ministerial Level adopted in June, 1976 in the form of a Declaration of International Investment and Multinational Enterprises.<sup>12</sup> Annexed to the Declaration are international agreements binding on OECD Member States on basic principles of investment policy and the means for their implementation,<sup>13</sup> as well as

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10. Organization for Economic Cooperation and Development, Resolution of the Council Establishing a Committee on International Investment and Multinational Enterprises, *adopted* January 21, 1975, OECD Doc. C (74) 247 (1975).

11. R. WALDMANN, REGULATING INTERNATIONAL BUSINESS THROUGH CODES OF CONDUCT 37 (1980). In 1979, CIME was able to report to the Council that "the results of the OECD's work, being the first to be made public and to be applied, have had an impact on work going on elsewhere, either on specific subjects covered by one of the OECD Guidelines or on the general approach adopted." Organization for Economic Cooperation and Development, Report of the Committee on International Investment and Multinational Enterprises (1979), OECD Doc. C (79) 102, para. 29 (1979) *reprinted in* 18 I.L.M. 986 (1979) [hereinafter cited as CIME 1979 Review Report]. In 1982, after noting the "support which has been found for the OECD Guidelines in other international instruments in existence or under negotiation," CIME reported to the Council its intention to follow closely ongoing negotiations within the United Nations to develop codes of conduct for transnational corporations and for the transfer of technology. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, MID-TERM REPORT OF THE COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES (1982). CIME's 1982 Mid-term Report to the Council stresses the need to increase promotional efforts to publicize the existence of the Guidelines while continuing work on harmonizing disparate national accounting standards among OECD countries.

12. The Council is authorized to take action in only one of three ways: by issuing decisions which are subject to veto by one vote and binding on all participating members; by making non-binding recommendations to members which may be similarly vetoed; or by entering into agreements with members, non-members, and international organizations. Article V, Convention on the Organization for Economic Cooperation and Development, *adopted* Dec. 14, 1960, 12 U.S.T. 1728, 1734, T.I.A.S. No. 4891, 888 U.N.T.S. 179. The declaration form was devised in response to the need for a more flexible instrument. Where the member countries use the declaration form, the act is not an act of the Organization as such, but rather an act of the member governments acting together within the framework of the OECD. Vogelaar, *The OECD Guidelines: Their Philosophy, History, Negotiation, Form, Legal Nature, Follow-up Procedures and Review*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 127, 133 (N. Horn, C. Schmitthoff & R. Buxbaum eds. 1980) [hereinafter cited as LEGAL PROBLEMS].

13. Three Council decisions are annexed to the Declaration and embody inter-governmental agreements on national treatment for foreign investors, Organization for Economic Cooperation and Development, Decision of the Council on National Treatment, OECD Doc. C(76)118 (1976), *reprinted in* 15 I.L.M. 978 (1976), official incentives and disincentives to international direct in-

a recommendation jointly addressed by the OECD Member States to MNEs doing business in their territories.<sup>14</sup> The instrument's symmetry reflects an underlying *quid pro quo*: OECD member countries essentially exchanged a promise to afford national treatment to foreign enterprises in return for the latter's observance of certain standards of behavior.

The Introduction to the Guidelines recognizes that MNEs can substantially benefit both home and host countries through international direct investment which efficiently utilizes their capital, technology, and human resources.<sup>15</sup> It concedes, however, that the organization of MNE operations beyond the national framework is apt to lead to "abuse of concentrations of economic power and to conflicts with national policy objectives."<sup>16</sup> In light of this mixed review, the Declaration is designed to encourage the MNE's contribution to economic and social progress while minimizing and resolving the difficulties that often accompany its operations.<sup>17</sup> In regard to the latter objective, the Guidelines prescribe conditions for good corporate citizenship over a range of issues, including information disclosure, restrictive business practices, financing, taxation, employment and industrial relations, and science and technology. Implicit in this present call for MNE cooperation and sacrifice is the overriding desire to preserve a liberal climate for international direct investment within the OECD.<sup>18</sup> The Guidelines thus represent a tactical adjustment seen as necessary to further a long-standing OECD objective.<sup>19</sup>

Observance of the Guidelines by MNEs operating within the territory of an OECD Member State is expressly voluntary and not legally

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vestment, Organization for Economic Cooperation and Development, Decision of the Council on International Investment Incentives and Disincentives, OECD Doc C (76) 119 (1976), *reprinted in* 15 I.L.M. 980 (1976), and international consultation procedures regarding implementation of the Declaration, Organization for Economic Cooperation and Development, Decision of the Council on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises, OECD Doc. C (76) 117 (1976) *reprinted in* 15 I.L.M. 977 (1976). The Declaration provides for a three year review of the regime in order to improve its effectiveness. OECD Declaration, *supra* note 4, para. V.

14. OECD Guidelines, *supra* note 5, Introduction, para. 6.

15. *Id.* at para. 1.

16. *Id.*

17. *Id.* at para. 2.

18. Boeker, *International Guidelines for Multinational Enterprises*, in PRIVATE INVESTORS ABROAD — PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 75 (1976).

19. According to Paul H. Boeker, then Deputy Assistant Secretary of State for International Finance and Development and chief U.S. negotiator of the OECD's 1976 regulatory initiative, "the U.S. objective, a liberal climate for international direct investment, is unchanged. But the approach required to sustain this objective in the current environment is no longer total *laissez-faire*; rather, it is the creation of multinational structures for cooperation and restraint on unilateral action." *Id.* at 85.

enforceable.<sup>20</sup> Breach of the Guidelines, therefore, will not give rise to a claim for reparation or judicial remedies. Nevertheless, the Guidelines "carry the weight of a joint recommendation by OECD governments addressed to MNEs which represent their firm expectation for MNE behavior."<sup>21</sup> These expectations in turn have an impact on the status of the Guidelines as a source of law<sup>22</sup> which is strongly reinforced by the heavy concentration of MNE activity within OECD member countries.<sup>23</sup> At this early stage in their possible evolution from voluntary rules to binding norms, however, the Guidelines are best understood as statements of international public policy.<sup>24</sup> The consensus is that the Guidelines are thus morally binding in that they represent standards of behavior corresponding to shared societal concepts of right and wrong.<sup>25</sup>

*The Follow-up Procedure of the Guidelines.* The OECD is a strictly intergovernmental organization in which dispute resolution is conducted essentially through collective consultation and cooperation. It has no assembly, and negotiations take place for the most part in secrecy. The decisions and recommendations of the organization require the unanimous vote of the Council. The OECD Convention, in sum, is not flexible enough to allow the Council to be an effective dispute resolution organization. This deficiency is particularly noticeable when social or political conflicts involving a complex mixture of public and

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20. OECD Guidelines, *supra* note 5, Introduction, para. 6.

21. CIME 1979 Review Report, *supra* note 11, at para. 37.

22. Professor Vogelaar, Special Consultant to the OECD Secretary General on matters related to international investment and multinational enterprises, reasons that the adoption of the Guidelines by twenty-three governments of civilized nations of the western world supports their existence as a legal authority which speaks where national or international law is silent. He further contends that in setting forth voluntary rules as a first step to a more solid regime, "the OECD governments have started a classic process of law making" whereby customary international law gradually evolves from "recognized principles and a common concept of what is just and fair behavior." Speech by Theodore Vogelaar (Dec. 13, 1976), *reprinted in part in R. BLANPAIN, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES AND LABOR RELATIONS 1976-1979*, 60 n.26 (1979). It is similarly recognized with respect to the UNCTAD Restrictive Business Practices Code that "principles . . . can have considerable moral and practical force" and "might pass into the general corpus of customary international law." Davidow & Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 AM. J. INT'L L. 247, 255 (1978). For a discussion of the legitimization process regarding voluntary instruments, see Baade, *Legal Effects of Codes of Conduct in LEGAL PROBLEMS*, *supra* note 12, at 3; Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977); Seidl-Hohenveldern, *International Economic 'Soft Law'*, 1979-II RECUEIL DES COURS 173; and Miller & Davidow, *supra* note 2, at 369.

23. OECD member countries are the source of ninety-five percent and the destination of about three-quarters of all MNE activity world-wide.

24. Baade, *supra* note 22, at 6.

25. R. BLANPAIN, *supra* note 22, at 59-60. Nonbinding international agreements that have gained political and moral legitimacy are also referred to as "soft law".

private interests of more than one country are involved. Consequently, the process of dispute resolution is sometimes left to neutral expert committees which provide a forum for debate and consultation on outstanding issues, the ultimate resolution of which is left to the OECD Council.<sup>26</sup>

The follow-up procedures of the Guidelines adhere to the familiar pattern. Since the Declaration was an act of the Member Governments acting collectively and not of the Organization as such,<sup>27</sup> the link to the Organization was established by the Council decision to entrust its implementation to the OECD.<sup>28</sup> Integration of the Declaration into the multilateral structure of the OECD was necessary to secure collective government involvement affecting the overall operation of MNEs among member states. In addition to the Council, the OECD implementation machinery for the Guidelines consists of three separate bodies: CIME, the Business and Industry Advisory Committee (BIAC), and the Trade Union Advisory Committee (TUAC).

CIME is the expert committee responsible for ensuring the livelihood of the Guidelines through a continuous process of clarification and revision via prescribed consultation procedures. BIAC and TUAC are advisory bodies which assist CIME in its work. BIAC was established in March, 1962, and consists of the principal business organizations in the 24 member countries of the OECD.<sup>29</sup> It is responsible for advancing the views of the private sector so that the Committee can benefit from the practical experience of businessmen. In contrast, TUAC was accredited consultative status in 1961 and strives to influence OECD policies and activities for the benefit of organized workers of member countries. In 1977, TUAC claimed a membership of 29 organizations from 19 countries comprising 36,000,000 trade unionists,<sup>30</sup> making it an integral part of the International Trade Union movement. The governing body of TUAC consists of a plenary session where affiliated organizations are represented. The TUAC Secretariat organizes trade union participation in OECD activities, including those involving the OECD Declaration and the Guidelines.<sup>31</sup>

The intergovernmental consultation procedures of the Guidelines aim to provide an effective forum for member governments to exchange views on matters relating to the Guidelines and to receive the views of business and labor organizations through BIAC and TUAC

26. Vogelaar, *supra* note 22, at 136-37.

27. See note 12 *supra*.

28. Vogelaar, *supra* note 12, at 133.

29. A list of BIAC's constituent organizations can be found in R. BLANPAIN, *THE BADGER CASE AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* 33-34 (1977).

30. *Id.* at 34.

31. *Id.* at 31-37.

respectively.<sup>32</sup> CIME is instructed by the Council to hold this exchange of views periodically, or at the request of either a member country or one of the two advisory bodies.<sup>33</sup> During these discussions, CIME is prohibited from drawing conclusions regarding the conduct of individual enterprises,<sup>34</sup> lest it appear as a judicial or quasi-judicial forum.<sup>35</sup> The United States was particularly insistent on this point.<sup>36</sup>

After three years experience with the Guidelines, CIME concluded that the treatment of problems entirely in the abstract and the use of purely hypothetical situations was detrimental to the credibility of the consultation process.<sup>37</sup> As a result, the scope of permissible discussion was broadened and now embraces generic issues arising from specific fact situations concerning alleged noncompliance with the Guidelines and problem areas regarding their application.

CIME, however, thought it would be unfair if issues brought to the Committee's attention subjected an enterprise to allegations of misconduct without the enterprise having an opportunity to state its views.<sup>38</sup> The Council accepted this reasoning and amended its decision on the intergovernmental consultation procedures to allow an individual enterprise whose interests are involved to present its case.<sup>39</sup> Despite the intention of the OECD in designing the follow-up mechanism, the adversarial relationship between BIAC and TUAC and the detached impartiality of CIME impart to the consultation proceedings a judicial air. The changes instituted after the 1979 review give CIME even more of the trappings of a quasi-judicial forum.

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32. CIME 1979 Review Report, *supra* note 11, at para. 80.

33. Organization for Economic Cooperation and Development, Revised Decision of the Council on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises, OECD Doc. C (79) 143 (1979), *reprinted in* 18 I.L.M. 1171 (1979). Paragraph 1 states that the Committee "shall periodically or at the request of a Member country hold an exchange of views on matters related to the Guidelines and the experience gained in their application. The Committee shall be responsible for clarification of the Guidelines. Clarification will be provided as required. The Committee shall periodically report to the Council on these matters." Paragraph 2 requires the Committee to "periodically invite the Business and Industry Advisory Committee to OECD (BIAC) and the Trade Union Advisory Committee to OECD (TUAC) to express their views on matters related to the Guidelines. In addition, exchanges of views with the advisory bodies on these matters may be held upon request by the latter. The Committee shall take account of such views in its reports to the Council."

34. *Id.* at para. 4.

35. CIME 1979 Review Report, *supra* note 11, at para. 84.

36. Then U.S. Secretary of the Treasury William Simon emphasized that "any temptation to turn the consultation procedures into a complaint or quasi-judicial procedure against multinational enterprises must be avoided." Speech by Secretary William Simon, OECD Ministerial Meeting in Paris, (June 22, 1976) *see* R. HELLMANN, *TRANSNATIONAL CONTROL OF MULTINATIONAL CORPORATIONS* 70 (1977).

37. CIME 1979 Review Report, *supra* note 11, at para. 85.

38. *Id.*

39. *Id.*

## II THE BADGER CASE

The Badger case<sup>40</sup> has been called an "historic precedent"<sup>41</sup> in that it was the first time the Guidelines were successfully invoked and their implementation machinery effectively utilized against an MNE operating in an OECD member country. The case arose in January, 1977, when Badger, Inc., an American MNE headquartered in Cambridge, Massachusetts and owned by Raytheon, Inc., ordered the closure of its Belgian subsidiary, Badger Belgium N.V. The subsidiary did not supply adequate notice of the closing to its employees, and its assets were insufficient to satisfy the termination payments to which the employees were entitled under Belgian law. The employees could have drawn upon a fund financed by employer's contributions to satisfy a substantial part of their claims. However, their belief that the U.S. parent had manipulated Badger's income to induce its bankruptcy persuaded them to forego payment from the fund and to insist as a matter of principle that Badger International make good the shortfall.<sup>42</sup> The employees felt that to do otherwise would be to allow a financially robust MNE to rely on the legal technicality of separate incorporation to shift its social and moral obligations to the Belgian community. When Badger International refused to supplement its subsidiary's assets in order to accommodate the staff termination indemnities, the employee's union contacted TUAC with a view to invoking the Guidelines.

The question raised by the Badger case was whether a parent corporation was obliged by virtue of the Guidelines to pay that part of the severance indemnities which its wholly owned and controlled subsidiary could not meet and which it was not required to pay under the law of either the host or home countries. Badger International contended that the obligation under the Guidelines to mitigate the adverse effects caused by the closure of an enterprise applied only to the local entity and not to the multinational as a unit.<sup>43</sup> This position brought directly into question the scope of the Guidelines and the proper interpretation

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40. See generally R. BLANPAIN, *supra* note 29, at 51-132.

41. *Id.* at 52.

42. This belief was largely confirmed when Badger Belgium petitioned the Tribunal de Commerce in Antwerp for a statutory composition, a court-sanctioned agreement whereby the enterprise which has suspended payment avoids bankruptcy by securing from its creditors partial remission of its debts, more time for payment, or both. The Tribunal denied the statutory composition and declared Badger Belgium bankrupt. The Tribunal found that the United States parent had engineered the company's insolvency by allocating contracts to its other subsidiaries. As a result, Badger failed to meet the conditions for a statutory composition prescribed by Belgian law. A.R. 2974/77-F59II (Belgium 1977), see R. BLANPAIN, *supra* note 29, at 129.

43. OECD Guidelines, *supra* note 5, Employment and Industrial Relations, para. 6.

of paragraph 8 of their Introduction. Paragraph 8 states in pertinent part that:

[T]he Guidelines are addressed to the various entities within the multinational enterprise (parent companies and/or local entities) according to the actual distribution of responsibilities among them on the understanding that they will cooperate and provide assistance to one another as necessary to facilitate observance of the Guidelines. The word "enterprise" as used in these Guidelines refers to these various entities in accordance with their responsibilities.<sup>44</sup>

TUAC played an active role in attempting to settle the Badger case outside the OECD framework,<sup>45</sup> and when that failed, in guiding the case through the OECD consultation procedures to a favorable outcome. Despite this shift in tactics, TUAC's objective to effect a negotiated settlement amid mounting pressure on Badger remained constant. Outside the OECD, TUAC's attempt to resolve the dispute involved coordinated activities at the national level among representatives of labor, management, and the Belgian Government, at the bilateral level between the Belgian and U.S. Governments, and at the international level through the involvement of foreign trade unions, the international trade union movement, and Badger International's management.<sup>46</sup> Although efforts at these levels failed to produce a settlement, they nonetheless had a cumulative effect that facilitated resolution of the dispute once resort to the OECD became unavoidable.

At the bilateral level, TUAC appealed directly to the Belgian and U.S. Governments. The Belgian Government's involvement in the case was the key to the employee's success, and will be examined below. As part of its approach to the U.S. Government, TUAC asked the Belgian Prime Minister to try to persuade the U.S. Government to cooperate. TUAC calculated that the Badger case's potential repercussions would be perceived in Washington as jeopardizing American interests in maintaining a liberal investment climate in Europe, and

44. *Id.*, Introduction, para. 8.

45. See generally R. BLANPAIN, *supra* note 29, at 86-100.

46. The Secretary General of TUAC informed the former Badger employees in a letter to their union, the Landelijke Bedienden Centrale (LBC), that if direct appeal to governmental action failed to bring about the desired results, and arbitration and direct negotiation between the unions and Badger's international management proved equally fruitless, recourse would be had to the consultation procedures of the OECD Guidelines. In order to encourage the dispute's favorable outcome through more conventional means, the Secretary General advised LBC to draw the attention of Badger to the grave consequences of submitting the case to the OECD. An adverse ruling there would mean that in the eyes of the OECD governments and the public opinion to which the union members of TUAC would appeal, Badger would be stigmatized as the first corporation to violate the Guidelines. Letter from the General Secretary of TUAC to LBC (January 25, 1977) see R. BLANPAIN, *supra* note 29, at 88-89. TUAC's strategy of coordinated consultations and discussions at both the national and international levels has since become the established way to administer the Guidelines. See Fatouros, *supra* note 7, at 967.

therefore as warranting action. Although the U.S. Government was responsible for encouraging American MNEs to comply with the Guidelines, its earlier insistence on the voluntary nature of the Guidelines foreclosed the possibility of its active intervention. Thus, while the State Department went so far as to suggest that Badger reconsider its position in the light of the Guidelines,<sup>47</sup> in the end the Government "could hardly do more than play an informative role."<sup>48</sup> The U.S. Government had apparently determined that America's broader interest in preserving a tranquil investment environment in Europe was best served by maintaining a low profile in the dispute.

A second course of action attempted to force Badger to settle by focusing trade union pressure on the company's affiliates operating in Europe. TUAC's ties to its constituent unions and to the International Trade union movement ensured the necessary trade union backing outside Belgium. TUAC urged its member unions in Britain and Denmark, where Badger affiliates resided, to intervene on behalf of their fellow workers in Belgium. The Dutch unions, for instance, were asked to adopt the position that Badger, The Hague was implicated in Badger's violation of the Guidelines due to the dependency of the Antwerp affiliate on The Hague office. It followed that Badger, The Hague shared responsibility with the American parent to pay the indemnity owed the dismissed Belgian employees.<sup>49</sup> TUAC also coordinated with the World Confederation of Labor whose representative took the case to the American Embassy in Brussels while its Federation of Non-Manual Workers informed Badger headquarters of the Federation's view on the social obligations of Badger International in regard to the severance pay.<sup>50</sup> In the end, trade union pressure was sufficient to bring about a meeting with Badger's management on February 21, 1977, but it was not enough to compel the multinational to change its position.

Having made little headway in settling the dispute through these conventional means, the unions decided to resort to the OECD consultation procedures. The Secretary General of TUAC introduced the Badger case to CIME in a note of March 24, 1977 that reviewed the facts and the efforts that had been made to effect a solution. The Secretary General emphasized the significance of Badger as a test case for the credibility and future effectiveness of the Guidelines. He noted that "[a]s a result of developments in the Badger case, the Belgian trade

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47. R. BLANPAIN, *supra* note 29, at 92.

48. *Id.* U.S. Under Secretary of State Preeg conveyed a statement to this effect to the TUAC Secretary General in their meeting of Feb. 14, 1977.

49. *Id.* at 90.

50. *Id.* at 92.

unions and political authorities, as well as the employers' organizations and foreign enterprises in Belgium, are confronted with a situation that directly challenges the authority of the OECD and its Member Governments."<sup>51</sup> He warned that the absence of tangible results would be seen by Belgian public opinion "as an attack on the legislation and current practice regarding employment and labor relations in Belgium" and as a loophole in the OECD Guidelines and consultation procedures.<sup>52</sup>

The OECD consultation mechanism was officially triggered by the Belgian Ambassador to the OECD in his request on March 18 for an exchange of views concerning the interpretation of the sections of the Guidelines relevant to the Badger case.<sup>53</sup> At the ensuing CIME meeting of March 31, 1977, the Belgian Government's view that the parent company was under a duty<sup>54</sup> to assist the local entity in observing its obligations was amplified by Professor Dr. M. Eyskens, the Belgian Secretary of State for Regional Economic Development. His presence at the meeting underlined the importance attached to the proceedings by the Belgian government. Following Dr. Eyskens' presentation, the Committee held a discussion in which twelve countries participated. The Committee accepted the Belgian Government's version of the facts and used it as an illustration to facilitate examination and clarification

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51. Note from the Secretary-General of TUAC to the Chairman and Members of CIME (Mar. 24, 1977), *see id.* at 96-97.

52. *Id.* at 97.

53. Memorandum of the Belgian Government to the Secretary General of the OECD (Mar. 18, 1977), *see id.* at 113. The precise question raised at the CIME meeting was whether "[i]t is consistent with the Guidelines that a 100% owned and fully-controlled subsidiary of a foreign company ceases operations:

—without having given to its employees the legally required notice, which must allow the employees to look for a new job;

—without the affiliate disposing of financial means necessary to pay the severance indemnities which are legally due if no term of notice is given, and without the assets to pay indemnification which are legally due in the case of closing down an enterprise?"

*Id.* at 114.

54. While the parent may have had a social or moral obligation to supplement the assets of Badger under the Guidelines, it is a completely different question whether this obligation was imposed by Belgian law. Even the Belgian Secretary of State conceded that Belgian case law was silent on this question. Nevertheless, he stated:

"Belgian case law in dealing with the personal responsibility of board members and shareholders, as well as with the extension of bankruptcy to 'the (real) master of the company', permitted the removal of the limited responsibility of the parent company when it was clear that the legal autonomy of the local entity was only a fiction, which does not correspond to reality, and when there are, in fact, a unity of enterprises, directed by one decision-making center within the same economic activity."

He then emphasized "that the principle of limited responsibility of a legally independent company can only be accepted if this company has the capability to determine its own destiny and to make independent decisions. Limited responsibility cannot be defended when the local entity has no decision-making power whatsoever. . . ." The Secretary felt that this logic was reflected in Belgian case law as well as in legal thinking where he perceived a willingness "to penetrate fictive legal structures to the economic decision-making unity (sic), that is to say, the mother company." *Id.* at 115.

of the Guidelines' text. In view of its mandate, CIME tried not to focus on the merits of the case or pass upon the conduct of the parties to the dispute. The Committee's conclusions were not immediately and formally released as an official opinion.<sup>55</sup> Instead, their dissemination was left largely to the Belgian Government, which moved quickly to press its interpretation of events on the media.<sup>56</sup> A month after the CIME consultation, the conclusions drawn from the debate by the Belgian Government were published in the OECD Observer, the Organization's monthly magazine.<sup>57</sup> It was not until the publication of the 1979 CIME review report to the OECD Council that the official views of the Committee regarding the Badger case were made known. By this time, the outcome of the meeting had already been profusely hailed by the Belgian news media "as a moral condemnation of the Badger company."<sup>58</sup>

CIME's conclusions amounted to an endorsement of the Belgian Government's position, and can be reduced for present purposes to three propositions. First, "[t]o the extent that parent companies actually exercise control over the activities of their subsidiaries they have a responsibility for the observance of the Guidelines by those subsidiaries."<sup>59</sup> Second, "multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant for both."<sup>60</sup> Third, the question of the responsibility of parent companies for certain financial obligations of their subsidiaries "as a matter of good management practice . . . consistent with observance of the Guidelines, could arise in special circumstances," particularly in those "relating to important changes in the operations of a firm and the cooperation as to the mitigation of resulting adverse effects."<sup>61</sup> In other words, the Guidelines may place moral obligations

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55. Moreover, the minutes of the CIME consultations are confidential.

56. The Belgian delegation announced at a press conference held directly after the meeting that CIME had concluded that when all decisions including the closure of subsidiary are made by the parent, the latter is morally responsible for the liabilities of the former. See, e.g., Aboaf, *Firm's Obligations Abroad Mooted at OECD Meeting*, Int'l Herald Tribune, Apr. 1, 1977.

57. Vogelaar, *The Guidelines in Practice*, 86 OECD OBSERVER 7-8 (May 1977).

58. R. BLANPAIN, *supra* note 29 at 117. See also, *OECD's Code of Conduct: No Paper Tiger*, DUN'S REVIEW, Aug., 1977, at 79; *Chasing the Multinationals*, ECONOMIST, June 4, 1977 at 93; *How to Make Business Behave Better*, ECONOMIST, Oct. 8, 1977, at 89.

59. CIME 1979 Review Report, *supra* note 11, at para. 39.

60. *Id.* at para. 40.

61. *Id.* at para. 42. The Committee approached the question of the responsibility of the parent for certain financial obligations of its subsidiary with extreme caution, as the full text of paragraph 42 indicates:

The Committee also considered the question whether good practice in conformity with observance of the Guidelines should, in some instances, lead parent companies to assume certain financial obligations of their subsidiaries. The Committee has found that this question raises difficult and complex problems in view of the principle embodied in national laws of all Member countries of limited legal liability of companies. The Com-

on a parent company that exceed what is strictly required by law.<sup>62</sup> Based on the outcome of the CIME consultation, meetings among representatives of the Belgian Government, Badger's international management, and the unions took place under the chairmanship of Secretary of State Eyskens. The meetings ended in a negotiated settlement favorable to the former Badger employees.<sup>63</sup>

*The Implications of the Badger Case.* An effective code of conduct is "one that has a significant impact, in the direction desired, on the behavior of those with whom it is concerned."<sup>64</sup> A code's impact in turn depends on the amount of damage a transgressor corporation will suffer as a result of noncompliance with its provisions.<sup>65</sup> Judged in this vein, the question of the legal nature of a code is eclipsed by the desirability of designing an implementation mechanism that will maximize its impact. The Badger case highlights those aspects of the OECD follow-up mechanism that were instrumental in raising the cost of non-compliance, thereby altering the decision-making calculus of the American MNE. Viewed in the abstract, the Badger case epitomizes the problems which inevitably arise from the operations of MNEs. An examination of the process by which these problems were resolved illuminates the factors and forces that made the OECD system work and provides support for a few general propositions regarding the regulation of MNEs.

Since the 1950s, MNEs have played an increasingly important role in the global economy as a vehicle for the internationalization of production.<sup>66</sup> However, the immense power wielded by MNEs in the in-

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mitte wishes to underline that the Guidelines, according to their nature described in paragraph 38 above, introduce, where relevant, supplementary standards of non-legal character and thus do not set standards which could be seen as superseding or substituting for national laws governing corporate liability, which are part of the legal basis on which companies operate. For this reason, in the view of the Committee, the behaviour recommended by the Guidelines in this context cannot be seen in a legal framework and does not imply an unqualified principle of a parent company responsibility. Nonetheless, the Committee has noted that parent companies on a voluntary basis have assumed in certain cases such financial responsibility for a subsidiary. The Committee considers generalization in this area difficult, but the question of such responsibility as a matter of good management practice — in light of such factors as e.g. aspects of the relationship between the parent company and the subsidiary and the conduct of the parent company — consistent with observance of the Guidelines, could arise in special circumstances. The question of assumption of responsibility, for example, could be of particular relevance in the circumstances set out in paragraph 6 of the Guidelines on Employment and Industrial Relations relating to important changes in the operations of a firm and the co-operation as to the mitigation of resulting adverse effects.

62. Vogelaar, *supra* note 57, at 8.

63. The settlement reached the front page of the Belgian newspapers. R. BLANPAIN, *supra* note 29, at 126.

64. U.N. Commission on Transnational Corporations, *supra* note 8, at 3.

65. *Id.*

66. Polk, *The World Economy*, 3 COLUM. J. WORLD BUS. 7, 15 (1968).

ternational economic system has engendered the belief that conflict is programmed into the relationship between MNEs and states.<sup>67</sup> The source of this conflict is what Arnold Toynbee saw as "the misfit between the antiquated political set-up of local states and the real, global economic set-up,"<sup>68</sup> epitomized by the MNE. In particular, the MNE's geographic frame of reference is transnational as opposed to national, its time frame short rather than long, and its objective primarily a function of the profit motive instead of a desire to enhance the social and economic welfare of the host state.<sup>69</sup> These disparities, prominent in the Badger case, were magnified by the isolation of Badger and its decision-making process from the countervailing forces of the Belgian Government and trade unions. These forces, confined for the most part in national frameworks, lack the range necessary to effectively control entities of a transnational character. The MNE's geographical scope and its associated ability to evade national controls demonstrated the need for regulation at the global level "by similarly structured and equally powerful bodies."<sup>70</sup> The multilateral structure established to implement the OECD Guidelines institutionalized the intergovernmental cooperation necessary to subject MNEs to regulation at the various points of their activity. Thus, in the Badger case, it was only after the Belgian Government had appealed to the OECD and Badger was faced with the conclusion of the CIME consultation that the company finally capitulated.

The OECD follow-up mechanism can be usefully viewed as an instrument for transferring government power, or ultimately trade union power as in Badger, onto the international plane. Once such a mechanism is in place, the willingness of a government to employ it is a *sine qua non* to effective international regulation.<sup>71</sup> In the Badger case, the Belgian Government's backing at the OECD was the key to labor's success. This support can itself be partially explained by the political implications of labor's complex relationship with multinational business.

The balance of power between host-country labor and the MNE shifts radically depending on whether it is gauged at the national or

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67. R. HELLMANN, *supra* note 36, at 31-36. See also R. BARNETT & R. MILLER, GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS 54-60, 74 (1974); H. STEPHENSON, THE COMING CLASH: THE IMPACT OF MULTINATIONAL CORPORATIONS ON NATIONAL STATES 2 (1973); and Ball, *The Promise of the Multinational Corporation*, FORTUNE 80 (June 1, 1967).

68. Toynbee, *Are Businessmen Creating a New Pax Romana?* FORBES 68 (Apr. 15, 1974).

69. Sauviant & Lanier, *Host-Country Councils: Concept and Legal Aspects*, in LEGAL PROBLEMS, *supra* note 12, at 342, 344.

70. R. HELLMANN, *supra* note 36, at 3.

71. Fatouros, *supra* note 7, at 971.

international level.<sup>72</sup> When the MNE maintains a presence in the host country, trade unions can rely on a panoply of conventional tactics like picketing, slowdowns, and strikes as a means for modifying corporate policies. Should the balance of power between labor and business become skewed in the latter's favor, the government can intervene to correct it, usually through legislation, sometimes more subtly through the withholding or granting of incentives, such as government contracts. Otherwise, government need only oversee the competition between business and labor, leaving the determination of minor adjustments in their relationship to their own interaction. The active role of European governments in labor relations reflects the fact that Labor enjoys far greater political influence in most European countries than does the MNE.<sup>73</sup> Not only is the government politically accountable to the country's trade unions and therefore conscious of their welfare, but the MNE is an alien with little domestic political leverage. Nevertheless, so long as the MNE maintains its business in the country this advantage is partially offset, for the government is constrained both by the possibility of the MNE leaving and by the need to maintain conditions conducive to foreign investment. The former constraint disappears once the MNE has decided to disinvest, though the government may still be sensitive to the possibility of precipitous action undermining business confidence and disrupting investment flows. In the Badger case, such considerations may have been outweighed by the Government's desire to discourage further international disinvestment from Belgium by insisting that companies bear the cost of leaving.<sup>74</sup> Thus,

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72. For a discussion of the European Community's attempt to strengthen the hand of European labor in its dealings with MNEs, see Walker, *The Vredeling Proposal: Cooperation versus Confrontation in European Labor Relations*, 1 INT'L TAX & BUS. LAW. 177 (1983).

73. On the whole, European unions enjoy far greater political power than do their counterparts in the United States. In Belgium, the fact that two out of every three employees is organized, that the link between the major trade unions and the chief political parties is particularly close, and that a significant number of trade union leaders are regularly Members of Parliament or hold government office helps to account for the interest the government takes in labor relations. R. BLANPAIN, *supra* note 29, at 47. See generally Nisser & James, *Trade Union Strategy for the Private Enterprise System in Europe*, PERSONNEL 10 (Sept.-Oct. 1979).

74. In September, 1977, the ECONOMIST concluded that the large American multinationals were maintaining their investments in Europe, "with no enthusiastic expansion," while "some smaller operations are being wound up or sold." Overall statistics showed that net direct investment flows from the U.S. were down on the 1973 and 1974 levels. Though the figures indicate that American investment in Europe was virtually stagnant in 1977, Belgium, with its automatic wage indexation and high social charges, had more reason to worry. Earlier in the spring Westinghouse had begun to divest its holdings in the Belgian heavy electrical industry. A poll among American companies in Belgium was equally foreboding. It showed that "investment projects were shrinking, and that three-quarters of them reckoned it was cheaper to manufacture in America. Over half did not get a satisfactory return on capital" *Over Here: A Survey of American Companies in Europe*, ECONOMIST, Sept. 10, 1977, at 25.

the scope of labor's political influence expanded with the departure of Badger.

Labor's promotion of extensive publicity surrounding the Badger case further restricted the Belgian Government's freedom of action, placing it more firmly in the labor camp. The popular depiction of the case as involving the principled stand of Belgian workers against an opportunistic American multinational no doubt struck a nationalistic chord in the Belgians. With national elections in Belgium looming just two weeks away from the March 31st CIME meeting in which the Badger case was to be discussed, very real political considerations dictated the Belgian Government's energetic prosecution of the Badger case.<sup>75</sup>

The Badger case further illustrates that where the Guidelines' sections on industrial relations are concerned, TUAC and labor become critical components of the OECD implementation process. The cooperation stimulated by TUAC among the trade unions of a number of OECD countries complemented the role of the OECD implementation mechanism in bringing pressure to bear on Badger to cut its losses and settle the case.<sup>76</sup> Together, labor's ability to excite public opinion and TUAC's orchestration of the involvement of trade unions in other countries created a situation demanding the serious attention of Member Governments at the OECD consultation. Labor's success with the OECD Guidelines may thus be attributed in large measure to its capacity to catalyze the intergovernmental cooperation necessary for MNE regulation.

The degree of intergovernmental cooperation elicited by the Badger case stems from a second source. Once the AFL-CIO had prevailed upon the U.S. State Department not to veto examination of the Badger dispute at the CIME consultation,<sup>77</sup> the case proceeded to discussion in

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75. Secretary of State Eysken's contribution to the successful outcome of the Badger case paid off handsomely. In the April 17th elections, he received more preference votes than ever attained in the Leuven region.

76. TUAC's efforts in this regard are not aimed at establishing a multilateral structure to act as a countervailing power to MNEs. In essence, the barriers that prevent transnational bargaining obstruct the international trade union movement in its other dealings with MNEs as well. The failure of the international trade union movement can be attributed to its ideological diversity, organizational conflicts and financial weakness, as well as to the conflict of interest between its constituent national unions. See Woodcock, *Labor and Multinationals*, in *MULTINATIONALS, UNIONS, AND LABOR RELATIONS IN INDUSTRIALIZED COUNTRIES* 21, 26-27 (R. Banks & J. Stieber eds. 1977) and Weinberg, *Multinationals and Unions as Innovators and Change Agents*, in *id.* at 97. The diminished capacity of labor to act as an effective counterweight to MNE has led to the proposal of establishing Host-Country Councils at the seat of the headquarters of important MNEs in order to gain access to its decision-making process and thereby affect rather than simply react to policy. See Sauvant and Lanier, *Host-Country Councils: Concept and Legal Aspects*, in *LEGAL PROBLEMS*, *supra* note 12, at 342.

77. R. BLANPAIN, *supra* note 29, at 127-28.

a forum of countries sharing similar concerns about American foreign investment. Reference has already been made to the fact that most European governments are more closely attuned to the concerns of national trade unions than is the U.S. Government. Additionally, in the vast majority of OECD countries' sensitivity to the country's role as host to American multinational business tends to overshadow its role as a home of MNEs.<sup>78</sup> Since seventy-five percent of U.S. foreign investment is within OECD countries, the U.S. has a vital interest in maintaining an open investment system among them.<sup>79</sup> U.S. support of the OECD's investment regime exemplifies the postwar American policy of promoting liberal investment conditions abroad initially to facilitate and then to protect the operation of U.S. MNEs.<sup>80</sup> European anxiety in the 1960s and early 1970s over the predominance of U.S. multinationals in Europe, which found its most extreme expression in the "American Challenge" thesis advanced by Servan-Schreiber,<sup>81</sup> has lingered in the form of a more critical attitude toward the qualitative impacts of foreign investment.<sup>82</sup> With the severe economic downturn of the late 1970s, concern in Europe shifted from the challenge of foreign investors dominating the domestic economy to the problem of how to forestall massive disinvestment.<sup>83</sup> Historically, then, OECD countries have harbored similar concerns regarding U.S. multinationals, many of which were brought to the fore by the Badger case. Consequently, the Belgian Government's appeal to the OECD over the conduct of an American MNE was bound to be met by a receptive audience.

Finally, the Badger case illustrates that, with respect to voluntary codes of conduct for MNEs, public opinion can be the ultimate sanction.<sup>84</sup> A number of related factors help to explain this result. Businessmen recognize that the OECD Guidelines "appeal to the self-

78. The dominance of U.S. multinationals is, of course, waning as multinationals based in Europe and Japan continue to develop as formidable competitors in global markets. See Franko, *Multinationals: The End of U.S. Dominance*, HARV. BUS. REV. 93 (Nov.-Dec. 1978).

79. Katz, *International Direct Investment*, in PRIVATE INVESTORS ABROAD — PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 171, 173-74 (1977). See also Hansell, *United States Efforts to Create a Stable International Investment Climate*, in *id.* at 201 (1978).

80. Tyson & Zysman, *American Industry in International Competition*, in AMERICAN INDUSTRY IN INTERNATIONAL COMPETITION 1, at 8 (L. Tyson & J. Zysman eds. 1983).

81. J.J. SERVAN-SCHREIBER, *THE AMERICAN CHALLENGE* (R. Steel trans. 1968).

82. Katz, *supra* note 79, at 174.

83. Kauzlarich, *The Review of the 1976 OECD Declaration on International Investment and Multinational Enterprises*, 30 AM. U.L. REV. 1009, 1012 (1981).

84. Despite the profound skepticism of advocates of binding codes of conduct, others foresaw the role of public opinion in enforcing voluntary codes. See, e.g., Report of the Group of Eminent Persons, *The Impact of Multinational Corporations on Development and on International Relations*, 33-34 U.N. Doc. D/5500/Rev. 1, SP/ESA/6 (1973); Commission on Transnational Corporations, *Transnational Corporations: Issues Involved in the Formulation of a Code of Conduct* 34, para. 149 U.N. Doc. E/C.10/17 (1976).

interests of MNEs by calling upon their assistance in order to safeguard the liberalism of commerce, trade and investment."<sup>85</sup> They are also aware that the very existence of a code of conduct tends to heighten public expectations, and therefore those of government. As a result, multinationals have become extremely sensitive to publicity of their code transgressions.<sup>86</sup> The emergence of "social audits" by MNEs to publicize the beneficial effects of their operations reflects a growing sense of corporate social responsibility in the face of improved public understanding. Many in business believe that managing corporate affairs in a manner that disappoints public expectations will only invite more severe governmental constraints.<sup>87</sup> There is particular concern that "if a business does not demonstrate that it is able to participate and to respond voluntarily to the OECD Guidelines, the next stage will be additional regulation of the kind that is not voluntary."<sup>88</sup> The request of the Belgian Government for an exchange of views in CIME regarding the Badger case played on this fear by warning that "in the absence of energetic action, the OECD Guidelines would be set aside and other organizations might have the intention to draft a more effective and credible code of conduct."<sup>89</sup> Not surprisingly, there is evidence that other MNEs pressured Badger to settle the Belgian case in order not to provide the U.N. additional reason to create more onerous corporate obligations.<sup>90</sup> Over and above the more immediate concerns of business, it is in the interest of the United States in its effort to maintain a stable environment for investment flows among developed countries that the image of American MNEs not be tarnished by code violations. The State Department, in exhorting U.S. business to abide by the

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85. Vogelaar, *supra* note 12, at 128.

86. See Coombe, *Multinational Codes of Conduct and Corporate Accountability: New Opportunities for Corporate Counsel*, 36 BUS. LAW. 11 (1980). Coombe adds that "increased corporate disclosure is likely to address public uncertainty regarding the corporate decision-making process and would have a healthy internal effect upon that process by causing management to approach corporate policy decisions with the realization that many will become publicly available; accordingly, more corporate decisions will be arrived at with heightened management appreciation of potential public impact." *Id.* at 24.

87. *Id.* at 23.

88. A spokesman for Caterpillar Tractor voiced this view at the Workshop on the OECD Investment Declaration and Guidelines held on Mar. 16, 1977 in Washington, D.C. The proceedings of the Workshop may be found in THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: A BUSINESS APPRAISAL 205 (P. Coolidge, G. Spina & D. Wallace eds. 1977) [hereinafter cited as BUSINESS APPRAISAL].

89. Memorandum of the Belgian Government to the Secretary General of the OECD (Mar. 18, 1977) *see* R. BLANPAIN, *supra* note 29, at 113.

90. *Id.* at 128, *citing* Despiegelaere, *Aantal multinationals wil spoedige regeling Badger*, *De Standaard*, Mar. 21, 1977.

Guidelines, recognizes the effect of public perceptions on this overriding objective.<sup>91</sup>

Although the Guidelines' implementation mechanism proved to be a viable system in the Badger case, it is not without shortcomings. Kari Tapiola, General Secretary of TUAC, points out that all the cases discussed by CIME pursuant to the follow-up procedures in the first three years of the Guideline's existence pertained to the section on industrial relations. Since then, there has been very little activity in those sections where the initiative lies with the governments. Were it not for the compliance monitoring activities of TUAC in collaboration with local labor movements, Tapiola contends that "the whole exercise might have withered away."<sup>92</sup> Despite such criticism, however, the suggestion is frequently advanced that a consultative procedure similar to that utilized by the OECD would be appropriate in other contexts as well,<sup>93</sup> a view apparently embraced by the drafters of the Transfer of Technology Code. At this stage, the drafters envision the creation of a committee to implement the code by providing "a forum and modalities for consultations, discussion and exchange of views between States on matters related to the Code, in particular its application and its greater harmonization, and the experience gained in its operation."<sup>94</sup> That the follow-up mechanism of the Transfer of Technology Code is patterned after the consultation procedures of the Guidelines is further evidenced by a provision that precludes the Committee from "becoming involved when parties to a specific transfer of technology are in dispute" or from acting as a tribunal or passing judgment on their conduct.<sup>95</sup> The committee, which would meet at least once a year, is additionally charged with the task of undertaking and considering studies and research related to transfers of technology, disseminating information on matters concerning the Code, and making reports and recommendations to States and organizing symposia and workshops regarding the code's implementation and application.<sup>96</sup>

91. See, e.g., Remarks of Paul Boeker, Deputy Assistant Secretary of State for Finance and Development in BUSINESS APPRAISAL, *supra* note 88, at 39.

92. Tapiola, *The Review of the OECD Guidelines: A Trade Union Evaluation*, in LEGAL PROBLEMS, *supra* note 12, at 291, 293.

93. See, e.g., Guertin, *A Business View on the Implementation of Codes of Conduct*, in LEGAL PROBLEMS, *supra* note 12, at 295, 301; Blair, *A Business View on the Implementation of Codes of Conduct*, in *id.* at 311, 313-314; Coombe, *supra* note 86, at 16; Davidow & Chiles, *supra* note 22, at 271; and K. GREWLICH, TRANSNATIONAL ENTERPRISES IN A NEW INTERNATIONAL SYSTEM 195-97 (1980).

94. U.N. Conference on an International Code of Conduct on the Transfer of Technology, U.N. Doc. TD/CODE TOT/33 (1981) para. 8.2.1(a). [hereinafter cited as TOT Code].

95. *Id.* at para. 8.2.2.

96. *Id.* at para. 8.2.1(a)-(g).

### III APPLYING THE OECD EXPERIENCE TO THE TRANSFER OF TECHNOLOGY CONTEXT

The question whether an OECD-type implementation mechanism would be suitable for a voluntary Transfer of Technology Code can be answered with reference to the deficiencies in any attempted analogy between the contexts of the two codes. The preceding analysis of the Badger case underscored many properties of an effectively functioning follow-up mechanism that defy re-creation in the context of the Transfer of Technology Code. A number of deficiencies, in particular, stand out.

*UNCTAD and the OECD.* To begin with, the negotiating context within UNCTAD differs markedly from that which prevails within the OECD. This difference stems from the contrasting nature of the two organizations. As stressed earlier, the OECD comprises the western industrialized democracies and Japan whose economic interdependence necessitates a high degree of cooperation in international economic affairs. Though hardly homogenous, the OECD was not hampered in its codification effort by widely divergent views on international economic development and the desirability of foreign direct investment. UNCTAD, on the other hand, knows no such harmony of purpose among its membership. Founded in 1964 as an organ of the General Assembly of the United Nations,<sup>97</sup> UNCTAD owes its existence to the developing countries' lack of faith in the free trade principles that unite the developed countries within OECD and the General Agreement on Tariffs and Trade (GATT).<sup>98</sup> Its principal function is to transform international trade into an instrument for Third World development. The three main factions within UNCTAD, however, differ over the relationship of international trade and economic development. The Group B countries, corresponding roughly in membership to the OECD, and the Group of 77, or activist Third World countries, occupy the polar extremes in the North-South dialogue over redistribution of world wealth in favor of the Third World. Straddling the two extremes are the socialist countries within UNCTAD that comprise Group D.<sup>99</sup>

97. G.A. Res. 1995 (XIX), 19 U.N. GAOR Supp. (No. 15) 1, U.N. Doc. A/5815 (1964). See Cordovez, *The Making of UNCTAD: Institutional Background and Legislative History*, 1 J. WORLD TRADE L. 243 (1967).

98. See J. SPERO, *THE POLITICS OF INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1981). For a discussion of the challenge to the principles of free trade posed by the developmental state epitomized by Japan, see Cohen & Zysman, *The Mercantilist Challenge to the Liberal International Economic Order*, 1 INT'L TAX & BUS. LAW. 1 (1983).

99. See generally W. FIKENTSCHER, *supra* note 1, at 1-11.

The Group of 77 rejects the western concept of the international economic order, thus creating an ideological tension between the two groups that precludes the consensus necessary to create a viable code. The rival outlooks of the two camps within UNCTAD reflect fundamental differences of economic principle. The Group B countries believe that foreign direct investment contributes to Third World development by enhancing each country's specific comparative advantages.<sup>100</sup> The Group of 77 does not deny that there are benefits that flow from foreign direct investment, but contends that their share of these benefits is not enough. More fundamentally, the Group of 77 is unhappy with the present international division of labor, arguing that it must be radically altered and new comparative advantages secured for the developing world. By taking advantage of the "potential future comparative advantages that could be developed if the international economy were restructured so that the comparative disadvantages that produced the present system of exploitation were remedied," the Group of 77 believes a more equitable and productive division of labor can evolve.<sup>101</sup>

It follows that with respect to technology transfers, the Group B countries believe that Third World development will be stimulated by the creation of an investment climate that will increase the flow of technology to developing countries. The Group of 77, on the other hand, feels that creating the conditions for increasing the transfer of technology, without more, would only exacerbate the present imbalance in the economic power relationship between the developed and the developing world. More particularly, it sees the Transfer of Technology Code as a device to help redress the imbalance of power that currently distorts technology transfer transactions to developing countries. The Code will do this by exacting certain terms and promises while "curbing restrictive, unreasonably and unfair business practices in this area and by strengthening legal and administrative procedures governing those transactions."<sup>102</sup>

The adversarial relationship between developing countries and MNEs, the intensity of which is diminished in the OECD negotiating context, poses a further obstacle to the useful employment of consultation procedures with the Transfer of Technology Code. Since the vast majority of MNEs are based in OECD countries, these countries are

100. K. GREWLICH, *supra* note 93, at 62-3.

101. Feinrider, *UNCTAD Transfer of Technology Code Negotiations: West and East Against the Third World*, 30 BUFFALO L. REV. 753, 760 (1981).

102. Sauvart & Lanier, *supra* note 69, at 347. The inequality of bargaining power and economic force in the transfer of technology context is demonstrated by the multitude of restrictive clauses that are frequently imposed on developing country entities in contracts for the transfer of technology. A list of these clauses can be found in TOT Code, *supra* note 94, at ch. 4, sec. B.

essentially regulating the progeny of their own economic development with the OECD Guidelines. The MNE, however, stands in a fundamentally different relation to the developing countries which tend to view it as a powerful alien with unchecked control over their economic development. The inability of Third World governments to regulate effectively the activities of MNEs within their territory fosters a feeling of vulnerability. Moreover, the technological and economic capabilities of MNEs dwarf those of the Third World entities with which they deal. This disparity works particular hardship in the supplier/recipient relationship of technology transfer transactions where "the weak position of developing countries is more exposed to the strong quasi-monopolistic power of the transnational corporations of the developed countries."<sup>103</sup>

The OECD follow-up mechanism was basically designed to foster agreement between those of like mind. In the transfer of technology context, a dispute between the MNE and the developing host country would invariably be viewed against the backdrop of North-South antagonism. Furthermore, in order to accommodate the views of both the developed and the developing countries in a single instrument, it is necessary to couch disputed provisions in general terms.<sup>104</sup> As the subject of actual dispute, the provision will inevitably accommodate two equally valid but incompatible interpretations. As long as the UNCTAD conferences fail to reconcile the divergent views of the North and South regarding fundamental issues of Third World development, recourse to intergovernmental consultation in order to achieve harmony in the interpretation of disputed terms is unlikely to succeed. A consultation procedure simply cannot be expected to yield in the transfer of technology context the broad consensus that is necessary for it to function effectively.

Another major difficulty with utilizing consultation procedures in the transfer of technology context is the absence of a sufficiently power-

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103. International Code of Conduct on the Transfer of Technology, Report of the UNCTAD Secretariat, U.N. Doc. TD/B/C.6/AC.1/2 Supp. 1 (1975).

104. See TOT CODE, *supra* note 94, at para. 1.2. For example, the Code defines transfer of technology as the "transfer of systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service and does not extend to the transactions involving the mere sale or mere lease of goods." *Id.* A list of technology transfer transactions is provided in *id.*, para. 1.3. The precise scope of the Code and the transactions to which it applies is still to be determined. *Id.*, para. 1.4.

The Group of 77's efforts to conciliate the Group B countries despite its voting power within UNCTAD reflects the fact that the organization's impact on international economic issues hinges on the creation of consensus based on mutual concessions. See Zamora, *Voting in International Economic Organizations*, 74 AM. J. INT'L L. 566, 580-581 (1980). However, agreement achieved through artful equivocation in the drafting of legal instruments gives rise to the appearance of consensus where it does not actually exist.

ful interest group on the national level to aid in monitoring compliance with the Code. Insofar as the industrial relations provisions of the OECD Guidelines are concerned, local labor combines with TUAC to monitor MNE compliance with the Guidelines. The Badger case demonstrates that when an MNE violates the industrial relations provisions of the Guidelines, labor is instrumental in stimulating government action. Violation of the Transfer of Technology Code will not cause such immediate and noticeable dislocation. Nor will it tangibly effect a powerful, well-organized voter constituency capable of exciting the appropriate governmental response.<sup>105</sup> Without such an independent interest group, each government will enjoy undisturbed the prerogative of deciding whether or not to enforce the Code.

A further drawback is that MNEs will not be the primary object of compliance and monitoring efforts for the Transfer of Technology Code. Provided the country has some form of technology screening process,<sup>106</sup> licensing contracts in violation of the Code can be detected and then modified or invalidated. But such unilateral action on the part of the receiving state can be undertaken regardless of the existence of a Transfer of Technology Code. One of the reasons developing countries prefer a multilateral solution over a patchwork of national solutions derives from their desire for standardized rules of behavior in order to minimize the competition among them for technology. Assuming that technology will flow along the path of least resistance, a recipient state lax in enforcing compliance with the Code will attract technology that, all else being equal, might otherwise have gone to neighboring countries. Application of the Code's restrictions by its neighbors will thereafter be perceived as a barrier to the transfer of technology and thus self-defeating. This tendency on the part of developing countries to lure foreign investment and technology at the expense of their efforts to encourage MNE compliance with the Code may prove the undoing of any implementation process based on inter-governmental consultation. The experience of the Andean Common Market regarding its foreign investment regime<sup>107</sup> bears this contention out. The Andean Common Market's plight "can be traced directly to

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105. Buxbaum, *The Politico-Legal Context of the Purpose and Effect of Codification: The Example of Technology Transfer Negotiations*, in LEGAL PROBLEMS, *supra* note 12, at 89, 91.

106. See, e.g., Mexico's Law on the Control and Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks (Feb. 11, 1982), translated in 80 PAT. & T.M. REV. 300 (1982). See also Delgado, *Mexico: Commentary on the Amended Technology Law*, *id.* at 295. For a list of states having transfer of technology laws, see Miller, *An Economic Appraisal of the Proposed Code of Conduct for Technology*, 36 AUSSENWIRTSCHAFT 121, 127 (1981).

107. Decision 24 of the Commission of the Cartagena Accord, Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties, adopted Dec. 31, 1971, [1971] Registro Oficial No. 264 at 1 (Ecuador), translated in 11 I.L.M. 126 (1972).

incompatible economic policies among the member states and to an economic imbalance within the community that spurs protectionism."<sup>108</sup> Since these centrifugal forces will only grow with the size and diversity of the community of nations to which an instrument will apply, the disintegration of the Andean Common Market does not augur well for the effective implementation of the Transfer of Technology Code.

#### IV CONCLUSION

The Badger case demonstrates that a follow-up mechanism based on consultation procedures can be an effective mode of implementation for a voluntary code. Violation of the Guidelines triggered a complex interaction of forces on both the national and international levels which ultimately led to Badger's censure in a forum of like-minded countries, the effect of which the company could not evade. Providing any eventual Transfer of Technology Code is a voluntary instrument, the consultation process presently envisioned to assist in its implementation will be incapable of facilitating dispute resolution. While a consultation process may help concentrate discussion on outstanding issues of technology transfer regulation and therefore spur the development of the underlying law, it is unlikely to marshal the pressures needed to promote compliance with the Code. Thus, an important component of the implementation function will be utterly lacking, with grave consequences for the effectiveness of a Transfer of Technology instrument. The dilemma created by the developing countries' espousal of a universal code and the unlikelihood of their enforcing it suggests that regulation of technology transfer is best left for now to individual countries. A valuable contribution to effective regulation of MNEs can be made by UNCTAD through the development of a model code which each country could then alter, adopt, and apply in accordance with its own development program. With the steady elimination of the structural weaknesses that attend underdevelopment, notably the lack of trained personnel and adequate domestic institutions to select and rationally employ appropriate technology, developing countries will gain the confidence necessary for self-reliant national solutions. It is only after this extensive groundwork is complete that a Transfer of Technology Code will have a stable basis upon which to become a valuable contribution to the development of international business regulation.

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108. Horton, *Peru and ANCOM: A Study in the Disintegration of a Common Market*, 17 TEXAS INT'L L.J. 39, at 61 (1982).