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Legislating Business Morality: A Look at Efforts by Two International Organizations to Deal with Questionable Behavior by Transnational Corporations

James S. Glascock

NOTES

LEGISLATING BUSINESS MORALITY: A LOOK AT EFFORTS BY TWO INTERNATIONAL ORGANIZATIONS TO DEAL WITH QUESTIONABLE BEHAVIOR BY TRANSNATIONAL CORPORATIONS

I. INTRODUCTION

The news media have been filled in recent years with stories of questionable conduct by transnational corporations (TNCs). Allegations and admissions of bribes and "dubious" payments or "improper" benefits to governmental and political figures and groups have been rife. In response, numerous national bodies have set about the task of investigating and dealing with questionable TNC conduct. In the United States, the Securities and Exchange Commission, the Internal Revenue Service, the State Department, the Defense Department, the Justice Department, the Overseas Private Investment Corporation, the Congress, and the Executive have been active on the problem.

Various international bodies have also investigated and taken steps to deal with questionable TNC conduct. This note focuses on the progress made in this area by two international organizations, the Organization for Economic Cooperation and Development (OECD) and the Organization of American States (OAS). The former recently produced a code of conduct for TNCs; the latter is in the process of producing such a code. By examining the approaches undertaken by these two organizations and noting some deficiencies, criticisms, and suggestions, the author has concluded that, although little progress on creating a workable system of international norms has as yet been made, the efforts of the OECD and the OAS represent a significant first step.

II. THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT

A. *Recent Developments*

The Organization for European Economic Cooperation (OEEC) was created after the Second World War as an agency through which the nations of Western Europe could rebuild their economies with the help of financial and economic assistance from the United States. In 1961 the OEEC was reconstituted as the Organization

for Economic Cooperation and Development (OECD).[1] The purpose of the convention establishing the OECD was to promote policies designed:

> (a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries . . .[3]
> (b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
> (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.[2]

Although the scope of its concerns has expanded to include such matters as raw materials and commodities, fair trade, energy, and environmental problems, the OECD remains primarily devoted to the resolution of difficulties involving international economic relations.

In 1974, in furtherance of OECD objectives and in response to recent developments, various committees and ad hoc working groups at the OECD began considering guidelines for governmental policies and standards of behavior for TNCs. The work was consolidated and given momentum in January 1975, when the OECD established a Committee on International Investment and Multinational Enterprises.[4] After more than a year of drafting and negotiations, the Committee produced a code of conduct[5] which was formally adopted by the OECD Council at a ministerial meeting in June 1976.[6]

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1. Convention on the Organization for Economic Cooperation and Development, *done* Dec. 14, 1960, [1961] 12 U.S.T. 1728, T.I.A.S. No. 4891.

2. *Id.* at 1732, T.I.A.S. No. 4891.

3. Member countries 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. Resolution of the Council Establishing a Committee on International Investment and Multinational Enterprises, *adopted* Jan. 21, 1975, OECD Doc. C(74) 247.

5. Declaration on International Investment and Multinational Enterprises, *adopted* June 21, 1976, Annex and Decisions of Council, OECD Doc. 21 (76) 04/1 (1976) [hereinafter cited as Declaration on International Investment], 75 DEP'T STATE BULL. 83 (1976), 15 INT'L LEGAL MAT. 967 (1976). *See generally* COMM. MKT. REP. (CCH) No. 295 (July 1, 1976).

6. OECD Doc. PRESS/A (76)20 (1976).

B. *Code Provisions*

The OECD code consists of a Declaration to which are annexed "Guidelines for Multinational Enterprises" and three Decisions of the OECD Council. The Guidelines are divided into a preamble and sections on general policies, disclosure of information, competition, financing, taxation, employment and industrial relations, and science and technology. The Guidelines section on general policies is the only portion of the code dealing with questionable payments. It states that TNCs should:

> (7) not render—and they should not be solicited or expected to render—any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office;
> (8) unless legally permissible, not make contributions to candidates for public office or to political parties or other political organizations;
> (9) abstain from any improper involvement in local political activities.[7]

C. *Analysis*

The OECD code represents the first time that the predominantly Western industrialized nations, acting in concert, have expressed an opinion about corporate behavior. According to Paul H. Boeker, Deputy Assistant Secretary of State for International Finance and Development and head of the United States government negotiating team, the OECD "adopted a comprehensive set of policy commitments which attempt to define for the first time a stable environment for investment flows among the industrial countries, based on a codification of mutual responsibilities of governments and private enterprise."[8]

While the language of the code embodies high principles, its effectiveness is quite another matter. The Declaration states that the governments of the OECD member countries "jointly recommend to multinational enterprises operating in their territories the observance of the Guidelines . . . ."[9] The Guidelines "lay down

7. Declaration on International Investment, *supra* note 5, at 14, 75 DEP'T STATE BULL. at 85, 15 INT'L LEGAL MAT. at 972.

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

9. Declaration on International Investment, *supra* note 5, at 7, 75 DEP'T STATE BULL. at 83, 15 INT'L LEGAL MAT. at 968.

standards for the activities of [TNCs] in the different Member countries."[10] However, the Guidelines themselves state that:

> [o]bservance of the guidelines is voluntary and not legally enforceable . . .
> (7) Every State has the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and to the international agreements to which it has subscribed. The entities of a multinational enterprise located in various countries are subject to the laws of these countries.
> . . . .
> (11) Member countries have agreed to establish appropriate review and consultation procedures concerning issues arising in respect of the guidelines . . . .[11]

The review and consultation procedures are qualified by one of the three Decisions of the OECD Council. This states that the Committee on International Investment and Multinational Enterprises shall periodically exchange views on matters related to the Guidelines,[12] but that the Committee "shall not reach conclusions on the conduct of individual enterprises."[13]

In addition to being merely "recommendations" whose observance is "voluntary and not legally enforceable," the subsections on bribery also contain a few loopholes. Contributions by TNCs to candidates for public office or to political parties or to other political organizations are allowed unless the host country outlaws them. The TNC is thus not enjoined from making such contributions; rather, the burden is placed on the host country to take the affirmative step of banning a source of political funds. Furthermore, defining the extent of the ban poses grave difficulties. TNC political contributions are not universally considered to be bribes, or even acknowledged as questionable. The cynic would maintain that a government benefiting from TNC contributions would be unlikely to ban them.

This situation is further complicated by the existence of code provisions on national treatment of TNCs. The Declaration states that:

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10. *Id.* at 12, 75 DEP'T STATE BULL. at 84, 15 INT'L LEGAL MAT. at 970.
11. *Id.* at 12-13, 75 DEP'T STATE BULL. at 84-85, 15 INT'L LEGAL MAT. at 970-71.
12. *Id.* at 19, 75 DEP'T STATE BULL. at 87, 15 INT'L LEGAL MAT. at 977.
13. *Id.*, 75 DEP'T STATE BULL. at 87, 15 INT'L LEGAL MAT. at 978.

> Member countries should . . . accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another Member country . . . treatment under their laws, regulations and administrative practices, consistent with international law and no less favorable than that accorded in like situations to domestic enterprises . . . .[14]

Moreover, the preamble to the Guidelines states that: "the guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; wherever relevant they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the guidelines are relevant to both."[15] For the sake of liberal trade and consistent application of the code, these provisions suggest that a ban on TNC political contributions should be paralleled by a ban on political contributions by domestic corporations. The possibility of such a ban appears remote since politicians are unlikely to forego the support of domestic corporations where such participation is traditional, nor are they likely to expose their country's multinationals to the risks of retaliation that might arise from a ban on TNC contributions.

The first anti-corruption provision in the general policies section of the Guidelines is a prohibition of direct or indirect bribes or other improper benefits to public servants or holders of public office.[16] However, the strength of this provision is vitiated by the operation of the following provision allowing political contributions where legally permissible. Sanctioned political contributions often obtain the same or similar results as bribes or other improper benefits. Thus, the provision allowing political contributions severely restricts the scope of the provision directly addressing the bribery issue.

Under the third anti-corruption provision in the general policies section of the Guidelines,[17] involvement in local political activities is permitted unless such involvement can be characterized as "improper." This rather vague standard does not define, nor create a mechanism for determining, what is "improper." Such pious and general language will not significantly constrain corporate decision makers, especially those who have in the past knowingly engaged in presumably corrupt and "improper" activities.

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14. *Id.* at 7, 75 DEP'T STATE BULL. at 83, 15 INT'L LEGAL MAT. at 968.
15. *Id.* at 12-13, 75 DEP'T STATE BULL. at 85, 15 INT'L LEGAL MAT. at 971.
16. *Id.* at 14, 75 DEP'T STATE BULL. at 85, 15 INT'L LEGAL MAT. at 972.
17. *Id.*

In summary, the anti-corruption provisions of the OECD code seem to have little effectiveness. Not only is the code unenforceable as international law, but the provisions on corruption contain loopholes that weaken their impact. It should also be noted that the code is designed to apply to TNC conduct only within the OECD Member states;[18] TNCs are free to pursue "improper" activities in the Third World.

These deficiencies are attributable to several factors. First, the OECD operates on a principle of unanimity. The OECD convention provides that "decisions shall be taken and recommendations shall be made by mutual agreement of all the Members."[19] If a Member abstains from voting, the decision or recommendation shall not be invalidated, but shall apply only to the voting Members.[20] The effect of this procedural rule is to encourage consensus positions rather than dramatic policy initiatives.

In addition, the OECD outlook favors TNCs and free trade. The OECD as an essentially homogeneous body composed entirely of industrialized nations[21] tends to emphasize the benefits which TNCs can confer on world trade and production. As stated in the Guidelines:

> The common aim of the Member countries is to encourage the positive contributions which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise . . . . The guidelines . . . are designed to assist in the achievement of this common aim and to contribute to improving the foreign investment climate.[22]

This philosophy is at odds with that of the Third World, which perceives the TNC as adversely dominating and exploiting developing economies. Obviously, the OECD attempt at regulating TNC conduct is unlikely to arouse much enthusiasm or admiration in the Third World.

The United States played an ambiguous role in the creation of the OECD code. The predominant American concern has been with safeguarding a liberal climate for international direct invest-

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18. *Id.* at 12, 75 DEP'T STATE BULL. at 84, 15 INT'L LEGAL MAT. at 970.

19. Convention on the Organization for Economic Cooperation and Development, *supra* note 1, 12 U.S.T. at 1734, T.I.A.S. No. 4891.

20. *Id.* at 1734, T.I.A.S. No. 4891. Turkey abstained from approving the code at the June 1976 Council meeting.

21. *See* note 3 *supra.*

22. Declaration on International Investment, *supra* note 5, at 11, 75 DEP'T STATE BULL. at 84, 15 INT'L LEGAL MAT. at 969.

ment. The United States believes that this climate is being eroded by significant economic and political pressures, fed in part by the revelations of questionable activities by American TNCs. The mounting pressures for TNC regulation threaten the benefits the United States derives from its extensive foreign investment.[23]

This climate caused the United States to be an early advocate of an international code for TNCs.[24] American policy, however, has been a mixture of restraint and activism. In most areas, the United States has sought to forestall extensive regulation of TNCs and has worked to encourage compromise of conflicting national treatments within the fundamental context of the free trade concept. Yet, it has also strongly endorsed strict measures to eliminate corporate corruption, perceiving corrupt practices as a burden on international trade and investment.[25] Undoubtedly, an additional, unarticulated consideration is that the corrupt practices of American TNCs may be contrary to American law, whereas the corrupt practices of non-American TNCs may not be contrary to their national law. In the absence of international standards on corruption, then, American TNCs would operate at a competitive disadvantage.

In the OECD, therefore

> the U.S. objective from the beginning has been to set up a voluntary compact between governments articulating reasonable standards of business practice and enterprises indicating on their own that these are standards they do apply and want to apply in the future.
>
> . . . .
>
> The U.S. Government . . . has supported development of OECD guidelines for multinational firms in an effort to sustain an international environment for these firms conducive to their making their full contribution to economic growth in the industrial countries.[26]

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23. Boeker, *supra* note 8, at 76-78; Boeker, *A Code for Multinationals,* Wall St. J., May 28, 1976, at 8, col. 3.

24. *See, e.g.,* Statement of Robert S. Ingersoll, Deputy Sec'y of State, before the Subcomm. on Priorities and Economy in Goverment of the Joint Economic Comm., *reprinted in* 74 DEP'T STATE BULL. 412 (1976); Address of Secretary of State Kissinger read before the Seventh Special Sess. of the United Nations General Assembly, *reprinted in* 73 DEP'T STATE BULL. 425, 432-33 (1975); Address by Secretary of State Kissinger before the A.B.A., 73 DEP'T STATE BULL. 353, 361 (1975); Address by Under Sec'y of State Charles W. Robinson, 73 DEP'T STATE BULL. 886, 890-92 (1975).

25. Statement by Secretary Kissinger before the OECD Council, 75 DEP'T STATE BULL. 73, 76 (1976).

26. Boeker, *supra* note 8, at 83, 85.

The corrupt practices considerations mentioned above, coupled with the fact that 70 percent of American overseas investment is concentrated in the OECD Member countries,[27] led the United States to become an early advocate of the code and to urge that it include strong measures dealing with corporate corruption. The disappointing result is not surprising, given that the OECD's institutional framework virtually rules out any aggressive stance on controversial issues, and that the policy pursued by the United States might at times have appeared contradictory.

How might the OECD code be improved? One commentator has suggested that the OECD prohibit payments to foreign government officials in excess of a designated threshold amount; that agents' fees be limited to a maximum percentage set on a sliding scale in which the percentage of the commission decreases as the size of the contract increases; and that countries give their regulatory agencies investigative authority sufficient to insure that the full details of a questionable transaction will be obtained. In addition, Member states should also be required to undertake investigations of corporate activity at the request of another Member state, and should share with the requesting state the information collected. Enforcement would be through court proceedings.[28]

While these suggestions have merit, it is unlikely that the OECD will be able to agree on any of them in the near future. A simpler and easier alternative would be an increased emphasis on disclosure. The OECD could require that all corporate payments or contributions be listed in the annual report or be placed in the public record in some other fashion in both the home and the host countries. Fear of adverse public reaction at home and/or abroad would thus serve as a device to curtail the most questionable of the payments and practices.

In summary, one might conclude that the OECD provisions on corporate corruption as they presently stand will have little discernable effect on the conduct of international business. They are desirable, however, as an articulation of norms from which future development can occur either within the OECD or in other forums.

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27. *Id.* at 85.

28. Note, *The Regulation of Questionable Foreign Payments*, 8 LAW & POL. INT'L BUS. 1055, 1077-78 (1976).

III. The Organization of American States

A. *Recent Developments*

The Organization of American States (OAS) began to devote serious attention to the emerging problem of TNC regulation in 1974 when the fourth regular session of the General Assembly of the OAS approved Resolution 167 on transnational enterprises.[29] By Resolution 167, the General Assembly sought to marshal all available information in order to better understand the nature of the TNC phenomenon and, if necessary, plan a response. In condensed form, the General Assembly resolved: (1) to obtain a compilation of studies on the nature and legal structure of TNCs, their economic and operational characteristics, and the impact of their activities on the development of Latin American countries; (2) to make any additional studies considered necessary; and (3) to coordinate this work and bring it to the attention of the Member States along with pertinent observations and comments as soon as possible.[30]

In accordance with Resolution 167 and a request by the Permanent Council thereunder,[31] the Inter-American Juridical Committee, the principal juridical organ of the OAS, began examining the subject of TNCs in the Fall of 1974.[32] At its regular session in Rio de Janeiro from February 20 to March 14, 1975, the Committee gave priority consideration to the topic of TNCs and received papers prepared by members.[33] The Committee summarized these studies in its report to the fifth regular session of the General Assembly in May 1975, but refrained from making any recommendations at that time.[34]

At its meeting in July 1975, the Permanent Council unanimously approved Resolution 154 on the behavior of TNCs and the need for a code of conduct.[35] In this resolution, the Council noted "[t]hat news stories have recently come to public light concerning actions constituting manifestly immoral conduct, as well as interference

29. OAS AG/RES. 167 (IV-0/74) OEA/Ser. P/IV. 0.2 (1974).

30. *Id.*

31. OAS CP/doc. 348/74 rev. 1 (1974).

32. Zanotti, *Regional and International Activities,* 7 Law. Am. 124, 126 (1975).

33. *Id.* at 385, 396 (1975). For abstracts of the papers, see *id.* at 686, 695-97 (1975).

34. OAS AG/doc. 512, at 49-59 (1975).

35. *Behavior of Transnational Enterprises Operating in the Region and Need for a Code of Conduct to be Observed by Such Enterprises,* OAS CP/RES. No. 154 (167/75) corr. 1 (July 10, 1975), 14 Int'l Legal Mat. 1326-28, 1603 (1975).

on the part of some transnational enterprises in the domestic affairs of some countries of the hemisphere."[36] The Council stated that:

> [S]uch illegal activities have an adverse effect on the political and economic relations between member states and create an atmosphere prejudicial to social peace, to the public security of such states, and to legitimate trade and investment activities that are important to their development . . . it is necessary for the member states to find definite and effective means of preventing such illegal activities.[37]

Accordingly, in the operative part of Resolution 154 the Permanent Council resolved:

> (1) To request the member states to cooperate in the exchange of information for the purpose of achieving effective control of the activities of transnational enterprises, so that such enterprises conform to the economic and social goals of the host state.
> (2) To make a study of the principles that should govern the activities of transnational enterprises for the purpose of preparing a draft code of conduct which such enterprises should observe. In the preparation of this code, account will be taken of the work being carried out in this regard within the sphere of the United Nations . . . .
> (3) To present a report in order that . . . the matter may be placed on the agenda and submitted to the sixth regular session of the General Assembly . . . .[38]

In a separate section, the Permanent Council also resolved:

> (I) To condemn in the most emphatic terms any act of bribery, illegal payment or offer of payment by any transnational enterprise; any demand for or acceptance of improper payments as well as any act contrary to ethics and legal procedures; and
> (II) To urge the governments of the member states, insofar as necessary, to clarify their national laws with regard to the aforementioned improper or illegal acts.[39]

While not a code of conduct, Resolution 154 offers some interesting comparisons with and contrasts to the OECD code. The anti-corruption language of the separate section of Resolution 154 suffers from a vagueness similar to that of the OECD code—the language contains no guidance as to what is "improper" or "unethi-

36. *Id.*, 14 INT'L LEGAL MAT. at 1327.
37. *Id.*
38. *Id.*, 14 INT'L LEGAL MAT. at 1327-28, 1603.
39. *Id.*, 14 INT'L LEGAL MAT. at 1328, 1603.

cal." Nevertheless, the OAS outlook is broad in that Resolution 154 placed equal blame both on those requesting or accepting improper payments or benefits and on the TNCs providing them. Here again, however, the home countries are not required to police the foreign activities of their TNCs.

Like the OECD code, voluntary measures are apparently envisioned. The resolution speaks in terms of preparing a code of conduct which TNCs *should* observe. The wording is significant, as an earlier version of the Resolution had spoken in terms of preparing a code of conduct which TNCs *must* observe.[40] The change undoubtedly reflects the consensual nature of OAS proceedings.

Both the OECD code[41] and the OAS resolution[42] recognize that TNCs are subject to national jurisdiction. Both organizations recognize that the TNC can play a constructive role in society,[43] and both seek to harmonize national responses.[44]

All of these similarities lead one to conclude that any OAS code along the lines of Resolution 154 would be confined to a voluntary, non-binding statement of principle differing only slightly from the OECD code. Such a conclusion ignores an additional element that influences OAS proceedings. Most of the members of the OAS are developing nations. This means that while there are superficial similarities between the approaches embodied in Resolution 154 and the OECD code, the OAS approach in fact has a different emphasis. The OAS approach is less solicitous of the well-being of TNCs. Protectionism is not weakened in Resolution 154 by any national treatment provisions comparable to those of the OECD code. The OAS resolution urges clarification of national laws, not equal treatment of domestic corporations and TNCs. Moreover, the OAS Permanent Council states that:

> the activities of transnational enterprises should contribute to achievement of the goals of national policies of economic and social development and of the natural resources of the countries (where they operate) . . . transnational enterprises . . . should conform to the development policy of those countries.[45]

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40. *See* 14 INT'L LEGAL MAT. at 1328, 1603.

41. *See* note 11 *supra* and accompanying text.

42. OAS CP/RES. No. 154, *supra* note 35, 14 INT'L LEGAL MAT. at 1327.

43. *See* note 22 *supra* and accompanying text. *See also* OAS CP/RES. No. 154, *supra* note 35, 14 INT'L LEGAL MAT. at 1327.

44. *See* notes 14, 15, & 22 *supra* and accompanying text. *See also* OAS CP/RES. No. 154, *supra* note 35, 14 INT'L LEGAL MAT. at 1328.

45. OAS CP/RES. No. 154, *supra* note 35, 14 INT'L LEGAL MAT. at 1327.

As mild as this language really is, it is also a far cry from the protective, quasi-laissez faire approach of the OECD code. Resolution 154 suggests that only through regulation may the TNC serve as a vehicle for beneficial social development in the host country. Finally, there is a reference to taking account of United Nations activity in preparing an OAS code.[46] Given the voting strength and outlook of the Group of 77, there exists the possibility of relatively militant activity within the United Nations.

From January 12 to February 13, 1976, the Inter-American Juridical Committee of the OAS held a regular meeting during which it aproved a 130 page report entitled, *An Opinion on Transnational Enterprises.*[47] The Committee recommended the establishment of an Inter-American Center for Transnational Enterprises. Among other things, the Center would collect data; analyze and evaluate the contributions of TNCs to the development of OAS member countries; advise the OAS in matters related to TNCs; examine differences among the American states with regard to TNCs; study ways to implement regional cooperation on the problems of TNCs; and coordinate studies and activities with other regions and with the United Nations. The Center could adapt worldwide applications to the regional level, and could make regional matters more compatible with world matters. The Center would also ensure a dynamic and timely treatment of TNCs. With particular reference to the problem of TNC corruption, the member states of the OAS could use the Center as a vehicle to study which cooperative measures would be most helpful in preventing and penalizing acts by TNCs that interfere with the sovereignty of the states.

The OAS report ended with eight conclusions. Those especially relevant to the problem of corporate corruption were as follows:

> 2. Transnational enterprises have responsibilities commensurate with their economic and administrative power and in matters related to infractions or violations of juridical order. The joint and several responsibilities of the enterprise should coincide with the limited responsibility of the corporation through the convergence of two elements, one generic, the existence of the enterprise, and the other specific, the determining action of the parent company affecting the affiliate or of a subsidiary affecting another subsidiary.
> 3. Transnational enterprises are subject to sovereignty and therefore to the laws and decisions of judges and courts and of the competent authorities of the states in which they carry out their opera-

46. *Id.*, 14 INT'L LEGAL MAT. at 1328. *See* text accompanying note 38 *supra.*
47. OAS AG/doc. 651, add. 5 (1976).

tions. They may not claim preference or privilege because of their transnational nature or because of their involvement in foreign interests.

Transnational enterprises must conduct their activities in a manner consistent with government policy on investment, reinvestment, credit, money, taxes, prices, marketing, industrial property, return of invested capital, remittance of profits, and so forth. They are obliged to provide information on their activities without hesitation, reluctance or limitation.

They are absolutely prohibited from becoming involved in political affairs or interfering directly or indirectly with the sovereignty of the states.

Each state may determine which penalties are applicable to transnational enterprises if they violate juridical order.

In addition to such domestic juridical standards that the states may consider necessary or advisable in this matter, they may agree among themselves to prevent and repress excesses and abuses by transnational enterprises.

. . . .

6. International agreement is essential . . . . The states should ensure cooperation and understanding among themselves on transnational enterprises as a priority objective, through the mechanisms of the United Nations and the Organization of American States in both the formulation of general rules and the examination and settlement of disputes.[48]

Both the OAS Resolution and the Committee's report represent a stage of pre-code development. Similar to Resolution 154, the report embodies certain fundamental assumptions not shared by the OECD approach. For example, TNC involvement in political affairs is *absolutely* forbidden. Again, the thrust is away from a "liberal climate for international direct investment" and towards a philosophy of adversarial regulation.

The Inter-American Juridical Committee's *Opinion on Transnational Enterprises* was submitted to the OAS General Assembly during its sixth regular session in Santiago, Chile, from June 4 to 18, 1976. Also submitted was a report by the Permanent Council on Resolution 154.[49] The Council's report stressed the importance of continued surveillance of TNCs by the OAS, with a view to preparing a code of conduct meeting the requirements of Latin American countries while also offering a basis for good inter-American relations.[50]

48. *Id.*
49. OAS AG/doc. 651/76 (1976).
50. *Id.*

In response, the General Assembly passed Resolution 241,[51] requesting the Permanent Council to continue studying the TNC problem, and to concentrate in particular on principles that would serve as a basis for the preparation of a draft code of conduct. Further, the Assembly requested the General Secretariat (under whose aegis the Inter-American Juridical Committee functions) to continue its comparative study of Latin American legislation on the regulation and control of foreign private investment, with special reference to the principles contained therein that might be helpful in the preparation of a code of conduct. Finally, the Assembly requested the member states to cooperate in the exchange of information in order to acquire a better knowledge of the economic, social, and political effects of the operations and practices of TNCs.[52]

B. *Prognosis*

The future of OAS code efforts is unclear. Considerable time has elapsed without production of a code. However, it must be remembered that the subject of TNC regulation is legally, politically, and economically complex. This complexity is magnified by the composition of the OAS, which on this issue pits the interests of the United States against those of its southern neighbors. Under such circumstances, especially where a code of greater specificity than that produced by the OECD appears to be generally desired, progress on reaching an agreement is bound to take time. Furthermore, the OAS is, to some extent, duplicating the efforts of the United Nations in this field.[53] The members of the OAS may come to feel that the process of defining a code is better undertaken by the United Nations, which has greater resources at its disposal.

IV. SUMMARY AND CONCLUSIONS

This paper has dealt with efforts by two international organizations—the Organization for Economic Cooperation and Development and the Organization of American States—to formulate

51. OAS AG/RES. No. 241 (VI-0/76) (1976), OAS General Secretariat, *Transnational Enterprises,* 11 OAS CHRON. 33 (July 1976).

52. *Id.*

53. *See generally* Rubin, *Harmonization of Rules: A Perspective on the U.N. Commission on Transnational Corporations,* 8 LAW & POL. INT'L BUS. 875 (1976); Rubin, *Developments in the Law and Institutions of International Economic Relations: Reflections Concerning the United Nations Commission on Transnational Corporations,* 70 AM. J. INT'L LAW 73 (1976).

standards of business conduct addressed to the problem of TNC corporate corruption. The OECD has produced a code; the OAS is in the process of formulating one.

The OECD code, containing what seems to be strong language condemning corrupt practices by TNCs, consists of recommendations whose observance is voluntary. As it presently stands, therefore, the OECD code is unlikely to lead to a transformation of corporate ethics. Amending the code to provide for greater disclosure might prove beneficial, however.

It is unclear whether the OAS will ever successfully produce a code. More diverse interests operate within the OAS than within the OECD, and these may prevent agreement on standards of conduct. Nevertheless, the steps taken thus far indicate that an OAS code would be less accommodating to the TNC and more specific in nature. An important element in the OAS approach not present in the OECD code is the concept that the TNC should consciously serve national development policy.

Because of their voluntary nature, the OECD and OAS initiatives by themselves will probably not result in radical transformations of business practice. They will, however, carry significant political and moral weight, and thus may exercise some influence on corporate conduct. Without question, an articulation of standards for TNCs is desirable. In an increasingly integrated world, consistency and predictability of treatment and activity is important for TNCs and for home and host countries. The initiatives taken by these organizations help in the effort to resolve uncertainty in the international business community. They serve as expressions of differing concepts of regulation, and are part of a dialogue among nations, international organizations, and institutions. When taken in combination with the activities of the United Nations and its relevant agencies, the International Labor Organization, the International Chamber of Commerce, and other bodies, they represent a movement toward the creation of an international set of norms that may yet come to have the force of law.

James Scott Glascock