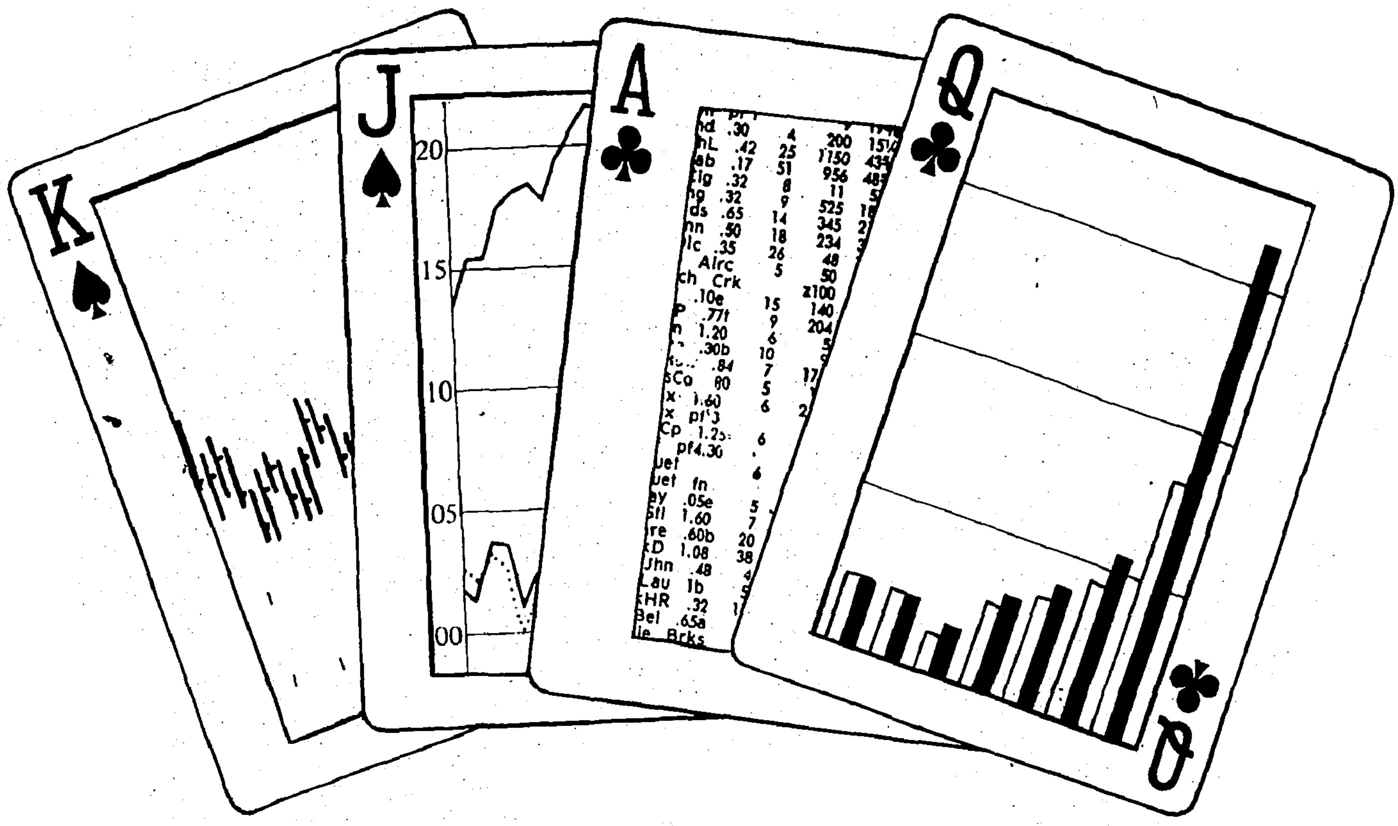

Rules of the Game for MNCs

Luis Escobar

The multinational corporation, which has been active, powerful and highly evident for some time, is coming under ever more careful scrutiny. The multinational corporation (MNC) and transnational investment are very big business. The size creates problems of its own. But when business gets as big as the MNCs, it is not only business; it extends its influence into other realms of our social life. It is not surprising, then, that there has been increasing pressure for some kind of international rules or regulations.

In January of last year, for example, the Institute for International and Foreign Trade Law of Georgetown University, in collaboration with its sister institute of Germany, organized a very well-attended conference in Düsseldorf on International Organization for Investment. Before and after that conference there was active debate on the subject, but for some time the papers discussed there will probably be the most quoted reference material on the matter. (The papers and conclusions are to be published by Praeger.)

Among ongoing activities concerning regulatory policies for the MNCs the most important is probably that being done by the "Group of Eminent Persons"—a group appointed by the Secretary-General of the U.N. following a resolution by the U.N. Economic and Social Council in July, 1972—"to study the role of multinational corporations and their impact on the process of development, especially that of developing countries, and also their implications for international relations; to formulate conclusions which may possibly be used by governments in making their sovereign decisions regarding national policy in this respect, and to submit recommendations for appropriate international action." The report, prepared by the Department of Economic and Social Affairs of the U.N. Secretariat to facilitate the deliberations of the Group, constitutes a good survey of the subject.

Seymour Rubin, summarizing the Düsseldorf Conference, said that "there was consensus against any major attempt at an international organization which would oversee the MNC. But there was wide agreement that more ought to be done on the side of gathering and exchanging information, a presumably safe enough subject."

It is interesting to note that at Düsseldorf opposition to the idea of international control of investment came from all sides, from representatives of both developed and less developed countries, and also from representatives of the MNCs themselves. As Mr. Rubin said, "The LDCs would seem to fear that the international agency would seek to restrain their activities in regard to the foreign-based MNCs"; and the businessmen seem to be worried "that any international agency would rather fetter than free the MNC."

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This view, however, is not unanimous today. I have been interested in reading the presentation prepared for the CRIA meeting by Carl A. Gerstacker of Dow Chemical. He says that he believes "the multinational companies would welcome standard international rules to work by, together with a code of international standards governing their proper treatment by the host nations—some internationally approved method of governing the relationships between the nation-states and the MNCs and settling their disputes in an impartial court. In my opinion the need for such a set of international rules of the game is becoming clear."

W. Michael Blumenthal of Bendix Corporation, in *Business Week* magazine (August 18, 1973), argued for "a GATT for investments":

> Some businessmen have been critical of GATT rules because of their relative ineffectiveness in certain situations. No one, however, has seriously advocated scrapping law and order in trade matters, or going back to a world in which every nation is free to do as it pleases. Paradoxically, this is precisely today's situation as regards transnational investment. Although such investment has become much more important than exports alone, there is no predictability as to national behavior, no firm assurance against arbitrary actions, no real inhibitions against competitive discriminatory moves by individual nations. In sum, there is no accepted system of law and order in the growing international investment world.

At Düsseldorf this GATT-for-investment idea was considered to be neither feasible nor desirable at present.

Similar opinions were expressed by other business leaders in the hearings before the Group of Eminent Persons in the United Nations: Emilio Collado, Executive Vice President of Exxon Corporation; Irving S. Shapiro of Du Pont de Nemours Co.; and Jacques G. Maisonrouge, President of IBM World Trade Corporation, who favored the idea of pursuing the proposal of a code of conduct, or at least "a multinational company register."

As for the governments of developed countries, I personally do not have a clear impression of what their reactions would be to a concrete proposal to organize some sort of international control of investment. I suspect that they would not be enthusiastic, since such control might interfere with negotiations on policy questions in which international agreement is extremely difficult—for example, in the monetary and trade fields. But I also think that they recognize that something should be done.

What are the principal reasons for pursuing international regulation of MNCs? Excluding the cases of ideological hostility to private foreign investment (which sometimes goes with aversion to private investment in general), one can say that, in the host countries, most opposition flows from the fact that, occasionally, the interests of the host countries do not coincide with those of the MNCs.

National governments may think that MNCs are effectively outside their control, that they cannot count on them as they could on domestically controlled firms to meet certain social and economic goals, much less to meet defense, security or general political goals. In addition, the growing importance of MNCs in the economies of both developed and less developed countries is a matter of concern. According to some estimates, the volume of business done by MNCs will continue expanding at an annual rate higher than that of world GNP.

Rainer Hellman, a German journalist who has specialized in the European Common Market, said at Düsseldorf that "the fear is widespread that some two hundred and three hundred gigantic MNCs will control, in ten or fifteen years, more than half of the world's industrial production and that they will make their decisions without much respect for regional or national interests." George S. Ball considers the MNC "the greatest challenge to the nation-state in the Western world since the decline of the temporal power of the Catholic Church in the fifteenth century."

But advocates of international regulation of MNCs are also found among different pressure groups in home countries, particularly in the USA, and these include, very significantly, business leaders. However, the two most active pressure groups are probably the labor movement and the intellectual community, the former emphasizing the employment question in the home country (and promoting legislation to deal with it) and the latter, apparently, mainly concerned with the ethical question of the social responsibility of the MNC operating in the less developed countries.

Hellman sees some countervailing powers to the MNC, i.e., the nation-states which want to defend their sovereignty and adopt a number of national regulations; the regional organizations (like the European Community and the Andean Group); and the vigorously developing international labor movement, which is starting its multinational counterorganizations. He argues, therefore, that the real and effective countervailing power to the growing MNC will not be international organizations, for such organizations are already in operation. But at least between Europe and North America he favors a permanent system of consultations by MNCs on mutual problems of direct investment: interest rates, fiscal aspects, transfer pricing and antitrust surveillance.

In fact, at Düsseldorf many speakers favored a system of increased consultation, believing such procedures better than a possible new international regulatory agency for MNCs. As Professor Rubin puts it: "Better consultation may result in some progress toward agreements . . . . there is no forum in which the problems, even those of a regional nature, are systematically examined. It would seem sensible *now* to establish such a forum, or perhaps such forums, without attempting to formulate GATT-like rules."

I myself agree with the "consultation approach." We need a forum—or a series of forums—where consultations could take place. The purposes would be, first, to discuss and agree on the facts and, second, to agree, if possible, on interpretations and the policy implications emanating from those facts. In something more than arbitrary order I would present the following ideas as personal, intelligible, partial and practical.

1. I do not believe that the world is going to be able to control investments internationally.

2. If any "control" is going to be exercised, it will be done nationally. In fact, there are now national controls on private foreign investments ranging from simple registration requirements to sophisticated sets of rules to screen foreign investment, and these controls affect different sectors of activities, ownership requirements and the like. A regional group, the Andean Countries, for example, can agree on a foreign investment code, but the code is nationally implemented. This tendency toward stricter national controls and scrutiny can be clearly detected in home countries as well, including—and perhaps most conspicuously—the United States of America.

3. What can be aimed at internationally, it seems to me, is to "monitor" investment. We need a monitoring device and information center, a reference bureau dealing with all aspects of the activities of MNCs, a true data bank on the matter. We need, in short, an *international organization* to facilitate the *national control* of foreign investments. This international organization would do research, would provide information, training facilities and, in addition, should be able to provide, on request, advice to governments or private business on their prospective or present international activities. Some of these activities are already in an embryonic stage.

4. Let us call this international organization simply "The Office." The Office would be established on the basis of several related convictions:

a. Private foreign investment is needed to speed up the rate of economic growth of LDCs, but the foreign investors must adjust their activities to the true needs and priorities of the host countries, having due respect for their sovereignty and national goals. In this process, private foreign investors have the right to fair compensation and fair treatment as true partners in the development process.

b. It would, however, be recognized that occasionally the interests of the parties involved will not coincide. The interests of the MNCs may, in fact, be incompatible with those of the host countries.

c. It would also be recognized that, left alone, negotiations between MNCs and LDCs do not always result in the kind of balance conducive to a smooth, friendly and dynamic partnership. The most obvious reasons for the imbalance are the impressive financial power of the MNCs compared with that of many LDCs and the relative lack of information, organization and, on occasion, expertise that LDCs would need to deal with the highly sophisticated management of the MNCs.

The Office would have no powers other than that of persuasion if and when its advice is asked for. Also, its influence would depend largely upon its publications, which would enjoy the prestige of being supported by the best information center in the world. The Office would deal with private foreign investment in a broad sense, with questions of interest to both developed and developing countries having both socialist and market economies. This means that it would be interested in investments made in LDCs and in industrialized countries (e.g., U.S. investments in Latin America and U.S. investments in Europe and Canada); that it would also follow the investments in a socialist country made by an MNC based in a market-oriented economy.

From the foregoing description it can readily be seen that I am suggesting an Office organized very much like a research institution with a well-developed information center. Obviously the information function would be fed by the research activities. Training would also be an important task, and, as I have suggested, the Office would have an advisory department to give services upon request to both governments and private foreign investors.

The International Center for the Settlement of Investment Disputes (ICSID—an affiliate of the World Bank) is conducting today one of the basic research projects that needs to be done. It is compiling all the legislation enacted by the member countries of ICSID on private foreign investment. This, of course, will provide a beginning for a comparative analysis of the actual characteristics (legal, financial, economic) of investments made. This work will, in turn, provide information which is necessary if we are to harmonize local differences in the treatment of MNCs (local legislation, antitrust, pricing, profit repatriation, taxation and national business practices).

It is essential, in my opinion, that the Office from its inception gain the confidence of both developed and less developed countries, and this can be accomplished *only* if it is regarded as an independent center *and* if it is managed by a truly competent and well-balanced international staff. Otherwise the Office would be considered simply as an additional instrument of the rich countries or as an empty forum for LDCs with no impact on the problems with which we want to deal. The image of the Office at its inception, and its organization and management, will in itself be its first contribution toward a better dialogue and understanding between MNCs and host countries.

Since there are a number of institutions which are at present performing one or another of these tasks, obviously the first step is to determine who is doing what and suggest possibilities of coordination or the absorption of the related efforts. The "Group of Eminent Persons" will probably undertake this job. The Group might also explore possible contributions from regional banks and regional economic organizations and, of course, the possibilities of utilizing ICSID (with or without amendment of the convention which created it). They could also make suggestions on procedural questions concerning the best way to go about organizing such an enterprise. Finally, since the financing of this Office would be crucial for its activities and for necessary independence, the group should also explore this very important aspect of the question.

An International Center, or a series of international centers, similar to what I have described, is not incompatible with proposals which have been put forward for international action in some specific areas. For example, Anthony Solomon, former U.S. Assistant Secretary of State for Economic Affairs, writing on international control of investment in the trade sector, said: "Increasingly we hear the view that the GATT presupposes a model of international trade which has been substantially altered by the MNC, that a large and increasing percentage of trade now is intra-company trade and not trade between independent exporters and importers." After analyzing the statistical evidence, Mr. Solomon reached the conclusion that available data does not support that statement. The forms through which competition may be lessened as a result of the growth of the MNC are classified by Solomon in the following categories:

1. takeovers of existing firms
2. allocations of noncompetitive marketing areas among subsidiaries
3. limitation on use of technology
4. international pricing behavior, particularly in the oligopoly-characterized industries where multinational companies tend to thrive.

Solomon suggests that "a beginning for some form of international surveillance in the trade area could be made in the transnational takeover activities when they result, or threaten to result, in the lessening of competition." In this connection it is also interesting to note that the European Community, if my understanding is correct, has taken some decisions concerning rules of competition which will certainly affect MNCs.

Nicholas de B. Katzenbach, among others, has suggested that areas worth exploring for international agreement include the "harmonization of tax systems as they affect corporations doing business in a number of countries; efforts to apply national laws to foreign subsidiaries of national corporations; balance of payments and inter-company transfers." In some of these areas the European Community has already taken some action.

Jack Berhman has suggested an Organization of International Industrial Integration (OIII) "to deal with the creation of joint projects and industrial policies; it would be a central coordinating body where rules could be formulated by members applicable to the various situations that would arise. It is within these objectives and under these rules that guidelines for the Multinational Enterprise would be developed. . . ."

Two observations are in order at this stage of the discussion: first, that decisions are being taken and implemented at the national and regional levels; second, that the international community seems to be moving in the direction of seriously discussing the establishment of an international regulatory agency for MNCs. The precise nature and jurisdiction of such an agency, or agencies, is still conceived in widely different ways by different authors. More light, much needed light, must be thrown on this subject as the discussion is continued and refined. But all the interested parties should have clearly in their minds that in the meantime host countries, home governments, regional groups, the multinational corporations themselves (which have already approved Guidelines for International Investment in the International Chamber of Commerce in Paris in 1972), organized labor and international organizations are already acting. They will continue adopting resolutions which, in one way or another, will affect the flows of capital from developed to LDCs, the flow of private foreign investment in general and, in particular, the operations of MNCs. Obviously the sooner the international community moves in harmony on these questions the better for all the interested parties.