Indeed, the choice of certain (non-binding) regulation instruments, such as the codes of conduct, meets – at the time when the *opinio iuris* is still magmatic – the need not to prescribe a standard and compulsory pattern of behaviour, but rather to funnel spontaneous demands for regulation emanating from the various actors concerned. In this perspective, one cannot but share the view according to which legally binding instruments would have not helped to get an agreement but, on the contrary, they would have crystallised the disagreement[77], thus dooming the entire legal process.

Through the drawing of the codes of conduct, then, it is not illusory to imagine the transubstantiation of the "soft law" into "hard law". To this end, the control and clarification mechanisms and State (and non-State actors) practice as well are undoubtedly the dynamic factors which lead to the crystallisation of the PIL relevant rules in the field of TNC's activities.

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[77] D. CARREAU, T. FLORY, P. JUILLARD, *op.cit.* (note 7), p. 410.

Keeping this in mind, we would be tempted to overcome the affirmation according to which actual techniques are not suitable to establish the empire of the law in the international economic relations and thus to the TNC[75]. In fact, one shan't have to underestimate the coagulation of these clarifications with a view to the birth of customary international law rules. The former accomplishes the mid-wife task in the formation of the applicable law, on the ground of the recommendations contained in the numerous codes. Thence, the latter's mainly programmatory character: recommendations, likely to submitted to the "living" interpretation by the various actors involved, which will eventually lead to the consolidation of PIL rules.

Conclusions

At the light of the aforesaid, it's not too bold to affirm that normative attempts in the matter of TNC's activities, carry out the primary function of the law that is the regulation of a changing reality. The efforts made to regulate these social transnational phenomena respond to the need to seize the reality in a constant state of flux[76]: the ductility of the legal techniques is ultimately the true stake of these normative efforts.

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[75] See : D. CARREAU, T. FLORY, P. JUILLARD, *op.cit.* (note 7), pp. 43-44.

[76] Cf. Rudolf von JHERING, *Der Zweck im Recht*, 4th ed., Leipzig, 1904, esp. vol. I, pp. 339 et seq.

Likewise, the ILO's Governing Body set up in 1981 a Tripartite Commission on the TNC, empowered, as the CIME, to make clarifications and interpretations of the provisions inserted in the Declaration[71]. In the same vein, the "Code on Business Restrictive Practices" provided for the constitution of an Intergovernmental Group of Experts, i.e. "a forum for multilateral consultations, discussions and exchange of views between States on matters related to the Set of Principles and Rules"[72]. As it is for the CIME and the Guidelines, the sole intergovernmental dimension is, yet, envisaged in the clarification and interpretation process.

In this regard, the codes of conduct, though optional as for their application, represent a valuable means of normative production by approximation, to the extent that the control procedures allow for the rules contained therein to crystallise[73] vis-à-vis of a changing social reality. Hence, the auto-regulation for the purposes of the implementation of the codes of conduct and the latters' non-binding character ultimately reflect the lack of a clear *opinio iuris* in this subject matter; at most, we can speak, as the ICJ affirmed in another branch of PIL, of a "nascent *opinio iuris*"[74]. Thence, the instrumental role played by the aforementioned procedures as to the determination of the *opinio iuris* in this field of law, that is the ascertainment of the *status conscientiae* of the different concerned actors.

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[71] The Commission tripartite composition reflects ILO's peculiar structure.
[72] P. SANDERS, *op.cit.* (note 66), p. 288.
[73] We borrow this term from the fortunate affirmation of the ICJ in the aforementioned *North Shelf Continental Cases*, by which she meant a means of emergence (others would say 'hardening') of customary international law rules whereas "the ... law was only in the formative stage, and State practice lacked uniformity [...] this emerging customary law became 'crystallised in the adoption of the ...'" (§ 61, p. 39).
[74] Threat or Use of Nuclear Weapons, advisory opinion of 8 July 1996: *I.C.J. Reports 1996*, § 73, p. 255.

States and TNC as well (thence their "monitoring function"), allow for the clarification of the content and the reach of the recommendations and thus for their authoritative interpretation.

To this end, the OECD Guidelines have established the C.I.M.E. (acronym for "Committee on International Investment and Multinational Enterprises") comprised of governmental representatives, yet assisted by trade unions delegates coming from the concerned *milieux d'affaires*, the purpose of which is to "clarify" the principles contained in the Guidelines. In fact, through annual reports (that economic actors and States alike are invited to submit to the Committee), and thanks to the disputes which are brought to the Committee (in view of their amicable resolution)[(70)], the latter will be able to establish what is meant by a "practice of good conduct". Indeed, States have opted for an intergovernmental consultative procedure (other non-State actors can take part to it as "witness") instead of a jurisdictional means of dispute settlement. This choice was not only motivated by the non-binding character of the codes, but also because the "clarification process" is instrumental in view of the accurate determination of the meaning and reach of the recommendations contained therein. In fact, even though States and other actors are not bound to make observations on the clarifications issued thereby, it is indubitable that a solution for the dispute settlement will emerge. Besides, all the actors concerned cannot but benefit, on a reputation level, if they abide by the clarification; hence, at the end of the day, they will be awarded of a "certificate of good conduct".

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(70) "The Committee shall not reach conclusions on the conduct of individual enterprises", *Second Revised Decision of the Council on the Guidelines for Multinational Enterprises*, adopted by the Council of the OECD (18.05.1984). It is in other respects significant that this same decision (which replaces the former one, dating back to 1976) provides, in its art. 11, its own substitution within a six-year period. This shows the full awareness of the changing reality which characterizes the regulation of the TNC.

One ought to stress that States have, till now, generally avoided translating into legal binding instruments the entire set of rules contained in the codes of conduct. They have in fact opted for more flexible implementation procedures, so as that the global evolution of the municipal legal systems goes hand to hand with the general perspectives of effectiveness that such texts may yield within the International Community. This notwithstanding, it has been envisaged that domestic judges may apply directly in the municipal order the codes of conduct, without awaiting further indications from their own Governments[68]. Sometimes, however, the adoption of the codes of conduct can eventually suggest to the States to establish international legally binding instruments (vis-à-vis the TNC) whose content is borrowed from the same recommendations issued contained in the Codes. In this regard, Article 66 lit. d) of the UNO Code appears meaningful; in accordance with this provision, "[States should] take into account the objectives of the Code as reflected in its provisions when introducing, implementing and reviewing laws, regulations and administrative practices on matters dealt with in the Code"[69].

III.4. The mechanisms of control and interpretation established by the Codes and their role in the implementation process

This last sub-section is devoted to the institutional character of the Codes, in other words the "machinery to supervise" their respect and interpretation. We are dealing with procedures which, in addition to monitor the respect of the Codes by the

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[68] See, in this regard, the judicial internal practice of certain States parties to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, signed at The Hague (14 November 1970).

[69] *International Legal Materials*, 1984, p. 639. In the same vein and by analogy, see: Section E § 1 and Section F § 5 of the Code on Business Restrictive Practices.

We are then faced to rules which, at the commencement, wear an experimental character, since it exists among the different affected actors (directly and indirectly empowered of the law-making function) a conflict as to the priority of the values and interests which have to be protected by the law. This will persist until a "general, constant and uniform"[65] practice in the matter will not clearly emerge. At the light of the aforesaid, one cannot but share the following interpretation: "In my opinion it would go too far to directly qualify norm-setting provisions of the Code as international customary law. On the other hand it would also go too far to say that they could never lead to the creation of international customary law"[66]. As for the possibilities of State action for the purposes of the implementation of the Codes, States can essentially act through two different means. First, they can promote (or even incentivise) the spontaneous implementation process by the TNC; second, they can directly apply the rules contained in the codes by way of their incorporation into municipal law. In this respect, the codes of conduct suggest these two ways; hence, every State (and International Organisation) is legitimised to choose any of the two with a view of safeguarding its interests on a case-by-case basis[67].

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[65] As the ICJ has authoritatively termed the three features of the practice proving the *opinio iuris* within the customary law process, in the *North Sea Continental Shelf Cases...op.cit.* (note 35), §§ 73 and 77, pp. 43 and 45.

[66] P. SANDERS, "Codes of conduct and sources of law", in *Le droit des relations économiques internationales. Etudes offertes à Berthold Goldman*, Paris, 1983, p. 295.

[67] In this respect, cf. Art. 12 (2) of the Charter of Economic Rights and Duties of States is by all means more stringent, to the extent that it invites the State to co-operate within relevant International Organisations for the purposes of its application. Such a provision can be hardly considered as illustrating Developed countries' *opinio iuris*, given the latter's manifest opposition. Besides, Australia, notwithstanding it had voted for the resolution, made a point for formulating a reservation as to the operational character of the provision in question (see *supra* note 39).

ensure their intrinsically evolutive character (rightly considered as "living instruments")[62], monitoring and supervision mechanisms have been established, thus yielding a continuous clarification (interpretation) of the substantive rules contained therein [see *infra* III.4].

Moreover, doctrine has from time to time considered the codes of conduct as "soft law" ("programmatory" law), as opposed to "hard law" (legally binding instruments *per se*), while stressing that often the former is but the first step towards the emergence of the latter. In other words, there would be a sort of ascending curb of normativity[63]. We cannot but say that the formula "soft law" – persistently chosen by some authors – is unfortunate, since, as it has been authoritatively held, "law can only be qualified as hard. Any law which is not hard is simply not law at all or not is yet"[64].

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[62] The wording is admittedly borrowed from the European Court of Human Rights glossary; indeed, the latter's consolidated case-law has henceforth considered the European Convention of Human Rights (of which she is the organ) as " 'a living instrument which... must be interpreted in the light of present-day conditions'; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3, 'the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field (See TYRER V UNITED KINGDOM 2 EHRR 1, para 31.)", *Soering v. Royaume-Uni*, 7 July 1989, n° 14038/88, § 102. In this respect, see: G. DISTEFANO, « L'interprétation évolutive », *Revue générale de droit international public*, vol. 115 (2/2011).

[63] In the subject matter of "soft law" relating to the codes of conduct, see: I. SEIDL-HOHENVELDERN, "International Economic 'Soft Law'", *Recueil des Cours de l'Académie de droit international*, vol. 163 (1979-II), pp. 198 et seq.

[64] G. ARANGIO-RUIZ, "Intervention", in "Le développement de la réglementation international en matière de protection de l'environnement. Elaboration et modification, nature juridique: contenu et contrôle", in *La protection de l'environnement et le droit international*, Colloque (Académie de droit international de La Haye), 1973, p. 540. See, in general: *Change and Stability in International Law-Making*, ed. by A. CASSESE, J.H.H. WEILER, Berlin/New York, 1988, pp. 76, 88 et seq.

practice"[60]. In other terms, a sort of "self-constraint", an auto-regulation having regard to the recommendations formulated in the codes of conduct. However, in the actual practice, the entrepreneurs have been reticent to formally adhere to these rules, through declarations of acceptation[61]. Nevertheless, the lack of acceptation does not forcefully mean that TNC's activities are inconsistent with the Codes' recommendations. In this respect, one ought not to forget that international organisations representing the entrepreneurs have generally expressed their consent to the adoption of the Codes thus yielding "legitimate expectations" from the other actors concerned.

III.3. State and Interstate perspectives as to the implementation of the Codes of conduct

The choice at the time of the adoption of the Codes, to entrust their implementation to a process of *spontaneous* application has been one of the mains reasons leading to the non-binding character of these instruments. Other grounds have been alleged in order not to make recourse to an international treaty. Firstly, the codes of conduct have been drafted with the declared intent to make them immediately operative, whereas the ratification process (indispensable for such kind of treaty) would have lengthened in time the application of the rules. Secondly, the non-binding character of the TNC allows, in some respects, to better adapt them to the inevitably evolving needs of the different groups of interest. By the way, in order to

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[60] *International Investment and Multinational Entreprises. Mid-Term Report on the 1976 Declaration and Decisions*, OECD, Paris, 1982, p. 57.

[61] In this respect, one shall not necessarily imply, from these acceptations, any legal consequence from the fact that the rules (inserted in the codes) are not legally binding *ipso iure* (i.e. solely because they are enveloped in a non legally binding instrument per se) and from the fact that it is uneasy to determine in which legal system – be it municipal or international – the other actors could benefit of the legal effects flowing out from these acceptations.

for the paramount role the States play in the regulation of the social and economic dynamics[58]. This flows from the actual legal status of the TNC, according to which they are not vested with international personality. Thus, on one side the direct reference to the TNC, made by most of the codes of conduct, aims at (re-)direct their activities by taking into account the International Community's interests, on the other side, one shan't forget that States do (still?) enjoy the *exclusive* and *entire* control of what is going on the territories of which they are sovereign[59]. This entails that one must always refers to the actual (and concerned) State behaviour in order to define the boundaries within which TNC can give its direct and autonomous contribution to the implementation of the codes of conduct.

However, most of the time, it's the International Organisations themselves which solicit the TNC to adhere formally to the codes of conduct, for instance through an explicit referral in the latters' annual reports or consolidated balance sheets. The rationale behind this solicitation has to be sought in the promotion the progressive integration of the rules (contained in the codes) "into management thinking and

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[58] See, in this respect, § 41 of the UNO Code (*International Legal Materials*, 1984, p. 633) which recommends the TNC to operate "*in accordance with national laws*, regulations, administrative practice and policies relating to the preservation of the environment of the countries in which they operate and *with due regard to the relevant international standards*" (emphasis added). By analogy, entrepreneurs have accepted that TNC "can only view codes within the context of exiting legal frameworks. An MNE cannot therefore respond to the provisions of a code outside the framework of the laws of governments of the countries in which it operates", J. GUERTIN "A Business View on the Implementation of Codes of Conduct", in *Legal Problems of Codes of Conduct for Multinational Entreprises*, ed. by N. Horn, New York, 1980, p. 297.

[59] The *Island of Palmas Case* Paradigm (*supra* note 10, *op.cit.*, p. 838) is by all means valid nowadays, and it couldn't be otherwise given the actual structure of the international legal order.

paramount role (due to the structure of contemporary international legal order) in the exercise of normative function, both on the municipal and international level. In this regard, it appears meaningful that the codes of conduct "recommend" the TNC to abide by the rules laid down *infra* or (even) *praeter legem*, so that the regulation in force on the municipal level will be complied with (*infra* III.3). Moreover, the direct reference to the TNC as titular of international duties takes place without bringing prejudice to the autonomy of every subsidiary or branch linked to the TNC. Thus, on one hand the operational independence each subsidiary enjoys in the host-State was preserved, whilst on the other it was reinforced, when needed, in order for the host-State to improve its control over it. The need to make the TNC participate in the implementation process of the codes of conduct is stressed by most among them. For instance, paragraph 1 of the introductory chapter of the OECD Guidelines confers to the TNC "an important role in the promotion of economic and social welfare". The reference is even more precise in the Preamble to the Draft of the Framework Code UNO, which emphasise one of the goals pursued by the Code, namely "to associate effectively the activities of transnational corporations with the efforts to establish the new international economic order and their capabilities with the developmental objectives of developing countries"[57].

A further obstacle was represented by the fear to employ highly strict formulations towards an actor, the TNC, characterized by changing features in time as well as in space (as we will see later on ...).

The implementation of the codes of conduct by these economic actors remains always limited *infra* or *praeter legem*,

[57] unctc.unctad.org/data/ec101983s5b.pdf

III.2. The TNC's role in the implementation of the codes of conduct

A rapid perusal of the different provisions of the codes hitherto drafted (or adopted) will show that the recommendations contained therein are aimed both at the States and at the TNC. Hence, it is instrumental to examine the latter's role in the implementation of the codes. From the very start, one ought to observe that the decision to insert recommendations aiming directly at the TNC was initially hindered by the DC and the socialist countries as well. According to these States, there were grounds for adopting, instead, a regulation reinforcing the powers of control on the TNC vested with the host-State.

While sharing this legitimate concern, other States considered that if the TNC were not to enjoy an active role, it would have been harder, not to say impossible, to envisage an actual and effective implementation of the codes of conduct. This demand had already drawn the attention from the "Group of Eminent Persons" the Final Report of which had affirmed that the host-State control over TNC "should not imply that the corporations themselves have no responsibility for regulating their own conduct"[55], thus envisaging the need that the TNC "must be directed towards and constrained from certain types of activities, if they are to serve well the social purposes of development"[56].

Therefore, States as well as the concerned International Organisations eventually fell together on the opportunity to extend the reach of the Codes' rules and recommendations to the TNC, provided that this wouldn't jeopardize States'

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[55] *The Impact of Multinational ...op.cit.* (note 11), p. 31. Quite obviously, one ought to underline that the term "responsibility" is not be meant in its technical signification, but solely as to refer to the need to make the TNC participate in the implementation process.

[56] *Loc.cit.*

involved with a view to "foster better understanding of the rights and obligations of both host and capital-exporting countries, as well as of individual investors"[51].

Hence, these codes of conducts seem to embrace a balanced approach, i.e. taking into account divergent interests and thus abandoning the "interventionist" approach heralded by some GA resolutions from 1962 onward ((see *supra* II.2)). Contrariwise, this new fresh attitude carried a more peaceful stance in the subject matter of the TNC's interests (viz. devoid of ideological bias), even though these codes of conduct require the TNC, while operating in the host-State, to respect the latter's social and cultural identity and to promote its economic development[52]. The three following sub-sections will deal with the topics related to the application of the codes of conduct, notably on their effectiveness as to ensure (or merely promote) the respect of the rules contained therein, while reminding, at the same time, that "observance of the [OECD] Guidelines is voluntary and not legally enforceable"[53], and "they reflect good practice for all"[54].

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[51] Resolution 2626 (XXV) adopted – without a vote – the 24 October 1970 (International Development Strategy for the Second United Nations Development Decade), § 50 ; in the same vein : *Transnational Corporations in World Development. Third Survey*, 1983, UN doc. ST/CT/46, pp. 20 et seq.

[52] See, in this respect, articles 12, 15-17 of the UN Draft Code.

[53] Guidelines for Multinational Entreprises, *International Legal Materials*, 1976, pp. 967 et seq. (see § 6) ; cf., exactly the same wording, : *Tripartite Declaration on Multinational Entreprises and Social Policy*, adopted by the ILO's Governing Body, the 30 November 1977), http://www.ilo.org/empent/WorkingUnits/lang--en/WCMS_DOC_ENT_DPT_MLT_EN/index.htm.

[54] *OECD Guidelines...op.cit.* (note 53).

adopted in 1978 its *Guidelines*. In fact, its content was the output of a careful compromise among DC that the latter didn't want by all means put aside when it came to the negotiation on the universal codes of conduct. Instead, this does not mean that the attitude of different groups of States (or of interests) has never varied during the drafting of these texts, since the need to widen the participation of the States required a larger consensus thus pushing the States to a less dogmatic and stiff stance. This flexible approach, in other respects inevitable, has deeply inspired the different codes of conduct adopted on the universal level.

In this regard, their minimum common denominator rests on the fact that, on one hand they mirror a radical different set of interests than that prevailing in the OECD's Guidelines; on the other hand, they take into account the existence of the latter. Indeed, it can hardly be found a stronger coherence as that existing between the different codes of conduct thereafter adopted, not only having regard to the legal nature of the recommendations, but to their content too. This consistence among the codes was instrumental as to the establishment of the NIEO for the titulars of the norms contained therein were to adopt a uniform behaviour.

As far as the role of the TNC – in the international economic relations – is concerned, their "objective" appreciation, already embodied in the OECD's Guidelines, ended to prevail on the universal level too (after the stiffening inducted by the aforementioned GA resolutions since 1962). This approach underlined their *positive* contribution, for the purposes of the overall economic development, while at the same time attenuating their negative effects, especially when they would try to abuse of their *transnational* nature. This direction was by the way already prefigured by the paramount GA resolution 2626 (XXV) which put the emphasis on the need to handle the interdependent character of the international economy through a common effort of the different actors

pertaining to the TNC, GA ended up to adopt a "Set of Multilateral Agreed Equitable Rules and Principles on Restrictive Business Practice" (drawn up within the UNCTAD), through resolution 35/63. This "code", adopted under the strong thrust from the DC, encompassed exclusively the questions related to the TNC's activities. In fact, in order to fill in the lack of regulation of other, yet essential aspects, the Governing Body of the ILO had approved in 1977 the "Tripartite Declaration of principles concerning multinational enterprises and social policy (MNE Declaration)", nowadays at its third edition (2000).

Hence, it blatantly appeared that TNC's regulation couldn't be carried but through multilateral techniques of negotiation(50).

PART III: THE "CODES" OF CONDUCT RELATING TO THE TNC: A SKETCH

This final section is devoted to the problematic of the adoption of some of the codes of conduct, of their application, of their common characteristics; last but not the least, we will briefly examine the mechanisms of control of their application and interpretation that these code set up in order to ensure their respect. Incidentally, we will not omit to get a glance at the curb of "normativity" of these international instruments.

III.1. The adoption of the codes of conduct

From the outset, one shall observe that the margins of negotiations for universal codes of conduct appeared to be quite narrow (within the UNO, ILO and the code of conduct in matter of restrictive business practices) when the OECD

(50) "[La] nature transnationale des sociétés visées rend insuffisantes les seules interventions individuelles des Etats. Pour faire échec aux pratiques commerciales restrictives, à l'évasion fiscale, aux présentations comptables abusives que leur implantation plurinationale facilite, des règles internationales uniformes s'imposent", A. PELLET, *Droit international du développement*, Paris, 1978, p. 38.

problem related to the TNC's activities in South Africa and Namibia (the former being at that time under coercitive measures from the UNO Security Council). From then onward (1992), the UN Commission on Transnational Corporations held numerous special sessions and informal consultations as well, without nonetheless reaching any agreement. In 1992, an "agreement to disagree" was eventually concluded, as no consensus seemed materially impossible to coagulate: the tombstone on this UN effort was definitely laid on its draft code. In fact, as far as the NIEO is concerned, the G 77 Group hadn't either really succeeded to transform its programmatory proposals into binding law rule, GA resolution 41/128 (4 December 1986) having clearly failed to this end. Moreover, and on the institutional level, DC countries failed to introduce in the international economic system a universal framework of control of the TNC's activities. Hence, at the end of the day, this last failure has been even more crying than the first one, on the normative level.

The stiff positions assumed by the different actors softened after the de-icing of the International Community, i.e. with the end of the Cold War. The Commission, freed from some of her dogmatic stances, took a more positive attitude towards TNC's activities in the DC and towards the market economy system as well. The Commission acknowledged the beneficial aspects of TNC's activities and investments in DC in terms of job creation and thus of its wealth increase. As the result of general UN restructuration, the GA decided (resolution 49/130 of 19 December 1994) that the Commission would become a subsidiary organ of the Trade and Development Board (TDB) and that consequently its name would change in "Commission on International Investment and Transnational Corporations". Finally, in 1996, in view of UNCTAD's on-going streamlining process, TDB suppressed the Commission and its tasks were scattered among UN bodies.

Failing a framework-code embracing *all* the questions

of the United Nations on TNC resolved, during her first session, to draft a code of conduct. To this end, an "Intergovernmental Working Group" was established, comprising 48 States in addition to several International Organisations and NGOs likely to be interested by this problematic. At the commencement, the representativeness of the different interests at stake was equitable. The optimism was high (the time-limit for the completion of the code was initially fixed for the year 1978!), whereas it was only in 1983 that the first draft came out. It comprised 71 articles, two-third of which had been finally agreed on. One provision on which no agreement was found was the one embodying the very definition of a TNC[49]. In fact, three were the main reasons for this delay (and the relatively low pace of work): a) the legal nature of the future Code (see *infra* Part III); b) whether the Code should exclusively regulate TNC's activities or whether it should also include the treatment ensured to them by the host-State (here again the two approaches collide); c) whether the Code were the appropriate tool in order to cope with the

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responsibility multilaterally agreed by governments. Adhering governments - representing all regions of the world and accounting for 85% of foreign direct investment – are committed to encouraging enterprises operating in their territory to observe a set of widely recognised principles and standards for responsible business conduct wherever they operate. The most recent revision of the Guidelines was completed in June 2000", http://www.oecd.org/document/18/0,3343,en_2649_34889_2397532_1_1_1_1,00.html.

[49] According to Article 1, a TNC is "an enterprise comprising entities of two or more countries, regardless of the legal form [be it then private or public] and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular to share knowledge, resources and responsibilities with the others", Draft United Nations Code of Conduct on Transnational Corporations, *International Legal Materials*, 1984, p. 626 [adopted 21 May 1983].

law existing in the field"[43], unlike the two others which are considered as being "nothing more than a *de lege ferenda* in the eyes of the States which have adopted them; [moreover] as far as the others are concerned, [their] rejection implies that they consider them as being *contra legem*"[44]. Therefore, these resolutions can *at most* be considered as *de lege ferenda*, in other words "programmatory law".

Now, these programmatory[45] (rather than *de lege lata*) proposals originating from the GA will eventually give the kick-off to the establishment, within the UNO, of the aforementioned "Group of Eminent Persons", which will draft the landmark Report on the TNC[46]. Besides, ECOSOC established, through resolution 1913 (LVII) of 5 December 1974, a Commission on Transnational Corporations as a forum within the UN system for the comprehensive and in-depth consideration of issues relating to TNC. Without further delay (1976), this commission came up, in its turn, with a Report on the subject-matter ("Research on Transnational Corporations")[47]. However, it was the OECD that was the first to take the step towards the regulation of the TNC's activities, by the adoption of the "Guidelines for Multinational Entreprises"[48]. Meanwhile, the aforementioned Commission

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[43] *Ibid.*, § 87, p. 492.
[44] *Ibid.*, § 87, p. 491.
[45] For the exact meaning of this nowadays widely spread term, see: R.-J. DUPUY, "Declaratory Law and Programmatory Law: from Revolutionary Custom to "Soft Law"", in *Declarations on Principles*, Leiden, 1977, pp. 247 et seq.
[46] UN Department of Economic and Social Affairs, Multinational Corporations in World Development, E.73.II.A.11 ST/ECA/190 and Corr.1. (1973).
[47] E/C10/12/Add.1
[48] Text in: *International Legal Materials*, 1976, pp. 967 et seq. According to the OECD herself: "The OECD Guidelines for Multinational Enterprises are the most comprehensive instrument in existence today for corporate

"specially affected States" [39]. On the path of the ICJ leading case *North Sea Continental Shelf*, sole arbitrator in the *Texaco-Calasiatic Case* scrutinized these three resolutions for the purpose of ascertaining the relevant international customary law rules. In doing so the Tribunal laid down two criteria, one extrinsic (context) and the other intrinsic (text) "i.e., the examination of voting conditions and the analysis of the provisions concerned"[40]. With respect to resolution 1803, the Tribunal, through the lens of these two criteria concluded that "the principles stated [herein] were ... assented to by *a great many States representing not only all geographical areas but also all economic systems*"[41]. On the contrary, the conditions under which the two other ulterior resolutions were adopted are radically different; indeed, they "show unambiguously that there was no general consensus of the States with respect to the most important [and different compared to resolution 1903] provisions"[42]. Hence, by taking into account the two criteria – the circumstances and the analysis of the text – it seemed to the Tribunal that Resolution 1803 "reflect the state of customary

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[39] See *supra* note 35.

[40] Texaco and Calasiatic v. Libyan Arab Republic, Award on the Merits (19/01/1977), translation from the original French text, *International Law Reports*, vol. 53, § 83, p. 487 ((emphasis added)). The two aforementioned criteria belong henceforth to the legal tools at the disposal of the interpreter as the ICJ had already affirmed, as for the legal effect of United Nations Security Council resolutions (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, § 114), as for the legal nature of a "joint communiqué" (Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgement of 19 September 1978: *I.C.J. Reports 1978*, § 107) and finally as for the legal nature of a treaty taking the shape of a "procès-verbal" (Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar *v.* Bahrain), Judgement of 1 July 1994 (Jurisdiction and Admissibility): *I.C.J. Reports 1994*, § 23).

[41] *Ibid.*, § 83, p. 487 (emphasis added). Cf. *supra* note 35.

[42] *Ibid.*, § 85, p. 489.

Ressources", that enunciates "the inalienable right" of every State to freely "dispose of its wealth and its natural resources" as well as to "nationalize, expropriate and requisition" provided, inter alia, that "an appropriate compensation" is paid to the owner. Thereafter, in addition to the resolution 3201 (S-VI) ("Declaration on the Establishment of a New International Economic Order", 1974)[37], it's the resolution 3281 (XIX) "Charter of Economic Rights and Duties of States", wherein, for the first time ever, reference is made to the TNC in the following terms:

"To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph;"[38]

To be more accurate, already in the "Programme of Action on the Establishment of a New International Economic Order", enshrined in resolution 3202 (S-VI), chapter V, under the heading "Regulation and control over the activities of transnational corporations", the idea of a regulation of the TNC by way of "codes of conduct" is clearly stressed.

Unlike resolution 1803 (XVII), the two most recent resolutions do not admittedly reflect the status of international customary law in this field, since they have been adopted, notably in some of their crucial points, without the concourse of a very *widespread* and *representative participation*" of the

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[37] See : A. MAHIOU, « La Déclaration concernant l'instauration d'un Nouvel ordre économique international », 2010, United Nations Audiovisual Library of International Law, http://untreaty.un.org/cod/avl/pdf/ha/ga_3201/ga_3201_f.pdf

[38] § 2 lit. b).

II.2. The efforts towards the international regulation within international organisations (universal and regional): the time period since 1962

United Nations Organisation ((hereinafter UNO)) along with some of its specialized agencies, instantly became the "sound box" of DC's demands in matter ot TNC's regulation. The antagonism with Developed countries took place in the very legal techniques as well as on the field of the modalities of negotiations. Whilst the DC wish a global (and not sectorial) regulation, i.e. covering all the questions relevant to the TNC's activities in their entirety on the universal (and not regional) level [preferably within international arenas, such as the UNO and the UNCTAD[36]], as well as codes of conduct legally binding; the Developed countries, on the contrary, would stand on one hand for a sectoral, regional and flexible (as for TNC's activities) international regulation, and on the other for a strict discipline (as for the protection of investments made by the TNC), be that on a bilateral or on a plurilateral basis.

Quite obviously, DC strived to get the most, in the view of *bargaining power*, of their freshly acquired majority inside the UN GA, while the Developed countries opted by far for much more restricted negotiation frameworks. We will try hereafter to briefly the historical development of these negotiations.

From the onset, we ought to mention some GA resolutions that represent in a way the *manifesto* of the DC in respect of the international economic relations and more specifically here in the subject-matter of the TNC's purported regulation. Through the impetus of the Latin American States: resolution 1803 (XVII) "Permanent Sovereignty over Natural

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every of these different communities, those States which have special interests shall have to adhere to the practice proving the *opinio iuris* and ultimately the international customary law rule.

[36] United Nations Conference on Trade and Development, a subsidiary organ of the UN GA.

institutional machinery, organs, norms and – sort of Aristotelian final cause – goals are needed; these elements must be in a certain was separate from other existing legal orders. Now, as far as we are concerned, such requirements are far to be met.

Hence, this attempt to international regulation was doomed since it did take into account only an aspect of the problematic, that is the treatment to be granted to the TNC by the host-State, thus favouring the former's interests while bringing prejudice to the latter's legitimate legal interests[34]. These legitimate interests (notably DC's) will be mainly upheld in the institutional forum – both universal and regional – and they will be dealt with in the next chapters[35].

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organisations internationales", *Recueil des Cours de l'Académie de droit internaitonal*, vol. 167 (1969-II), pp. 36-38 ; likewise : T. PERASSI, *loc.cit.* ; A. SINAGRA, *op.cit.* (note 26), p. 352. On the concept of legal order as opposed to mere « normative system », from the perspective of public international law, see: G. DISTEFANO, « La sentence arbitrale du 17 décembre 1999 sur la délimitation des frontières maritimes entre l'Erythrée et le Yémen: Quelques observations complémentaires", *Annuaire français de droit international*, vol. 46 (2000), pp. 272-284.

[34] It must be noted, en passant, that for once developed countries, by pursuing 'their" TNC's interests, have advocated for a revolutionary change of public international law paradigm.

[35] "A wider consensus is needed which cannot be based on the interests of one category of States alone", G. ABI-SAAB, *op.cit.* (note 21), p. 121. In one of her landmark judgements, the ICJ authoritatively held that in order for a general customary international law rule to emerge, "a very *widespread* and *representative participation*" is required "provided it included that of States whose interests were *specially affected*" (North Sea Continental Shelf Cases (Germany/Netherlands/Denmark), Judgement of 20 February 1969 (Merits): *I.C.J. Reports 1969*, § 73, p. 43 [emphasis added]. Hence, three conditions have to be met: a) quantitative, i.e. "widespread", not then the unanimity is required, yet a large [in the French text] adherence suffices; b) qualitatively, i.e. "representative", meaning that all the different sections or sub-communities [be they from the geographical, ideological, religious, economic, political, etc. criterion] have to take part in the law-making process; c) effectiveness, i.e. "specially affected", that is within

is not at all towards any of them. Certainly there are situations when the process of the birth of a new subject is still on-going and its legal nature is not (yet) clearly established, but once the entity has surpassed its nascent stage, then it exists for *all* the subjects of the international legal order; it cannot be otherwise. The latter cannot admit – and by the way has never admitted – consolidated international legal personality *à la carte*, i.e. having regard to a single international law subject or to some of them only[31].

All in all, the aforementioned attempts purporting the international regulation of the TNC by way of internationalizing the contracts and the attribution of the international personality to the former fall short to convince the majority of the international legal literature as well as the very large majority of international tribunals.

Finally, another doctrinal strand calls for the concept of "Transnational Law", in other words for the existence of a tier legal order, i.e. *lex mercatoria*. In this respect, most of the authorities are far from adhering to such an assertion. And for good reasons since "as long as 'transnational law" is considered as nothing but a collection of rules belonging to different legal systems, it does not alter the legal conditions of their application"[32]. Furthermore, one cannot be but reticent to admit a true legal order while a real "societas" (with organs, procedures and other real institutional machinery) is definitely lacking[33]. Indeed, for a legal order to exist a social group,

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[31] See, with regard of this problematic, G. DISTEFANO, "Observations éparses sur les caractères de la personnalité juridique internationale", *Annuaire français de droit international*, vol. 53 (2007), pp. 105-128; *id.*, "The Position of Individual in Public International Law through the Lens of Diplomatic Protection: the Principle and its Transfiguration", *Handbook on Human Rights and Humanitarian Law*, Cheltenham, (to be published in 2011).

[32] G. ABI-SAAB, *op.cit.* (note 21), p. 105.

[33] See : G. BALLADORE-PALLIERI, "Le droit international des

and to which it is anchored. Contrariwise, the legal literature that maintains the self-pretending international character of these contracts, continues to forge ahead by sustaining TNC's international subjectivity[27]. In fact, even if one shall have to concede that the *lex contractus* pertains to public international law, this wouldn't by all means entail that, *ipso iure*, the entity concerned is *upgraded* to international legal personality. In the same vein, it is not enough for some international law rules to address to individuals so that the latter are qualified as subjects of the international order[28]. Neither can be accepted the view, advocated by some authors who sustain a limited and *ad hoc* TNC's international legal personality. This doctrinal stand seems to elude the problem instead of solving it[29]. Others have even gone farther in affirming that any international legal subject would be empowered to confer international subjectivity to any other entity whatsoever, such as a TNC[30]. These assertions are completely inconsistent with legal logics, State practice and international case-law as well; international legal personality can be only *erga omnes*: either an entity is a subject of international law vis-à-vis every other subjects or it

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[27] Cf. P. JESSUP, *A Modern Law of Nations*, New York, 1946, p. 139; S. SCHWEBEL, "International Protection of Contractual Arrangements", in *Proceedings of the American Society of International Law*, 1959, pp. 260-280.

[28] See: R. QUADRI, *Diritto internazional pubblico*, 5th ed., Naples, 1968, pp. 42, 400-405; Anglo-Iranian Oil Case (United Kingdom v. Iran), Judgement of 22 July 1952 (Preliminary Objections): *I.C.J. Reports* 1952, p. 112; Case concerning filleting within the Gulf of St. Lawrence between Canada and France, Decision of 17 July 1986, *Reports of International Arbitral Awards*, vol. XIX, § 26, pp. 240-241 ; Jurisdiction of the Courts of Dantzig, Advisory Opinion of 3 March 1928 : *P.C.I.J. Reports* B 15, pp. 17-18.

[29] See : W. FRIEDMANN, *The Changing Structure of International Law*, London, 1964, pp. 232-233.

[30] See the (exceedingly) bold affirmations of G. SCHWARZENBERGER, *International Law*, London, 1957, p. 146. *Contra*: T. PERASSI, *loc.cit.* (note 25); R. QUADRI, *Loc.cit.* (note 28).

c) of the ICJ's Statute, then it must be necessarily be found in any legal system whatsoever. Therefore, this argument is not by all means relevant to prove the international character of the agreement[25]. Furthermore, the same conclusion applies to a similar claim under which since the contract refers – as for the substantive law applying to it – to international law, then it becomes – for its content – an international agreement. Here too this assertion must be refuted; contracting parties are free to choose – yet within certain reasonable limits – the applicable law ("*corpus iuris*") to the contract, but this choice doesn't change the legal nature of the contract and especially the legal order to which it is anchored and within which it deploys its legal effects. For instance, two individuals – or two TNC – are able to choose international law as the applicable law for their contract, yet this does not *upgrade* its legal nature, not to speak of the asserted contracting parties' legal subjectivity.

By way of consequence, the *ratio iuris* of the application of international law to relations between a State and a TNC rests, on one hand, on a municipal law norm, by virtue of which the *renvoi* to another set of rules is made (following the example of the rule of *renvoi* in international private law), the so-called "choice of law"[26]. On the other hand, it does exist a norm of general international law that enshrines the freedom of the parties to choose the applicable law – i.e. as the *corpus iuris* – (and not the legal order, thus the institutional character of the Law) governing their contract. This norm hardly engenders the internationality of the agreement, it merely states the freedom of the parties to choose the *content* of the applicable law, but not to the legal order within which it deploys its legal effects

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[25] See: G. ABI-SAAB, *op.cit.* (note 21) and more generally, T. PERASSI, *Lezioni di diritto internazionale. Parte prima*, Padova, 1961, pp. 182-183.
[26] See : G. ABI-SAAB, *op.cit.* (note 21), p. 108; A. SINAGRA, "Natura e contenuto della internazionalità dei contratti", in *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago*, vol. IV, Milan, 1988, pp. 350, 353.

related to contracts[22]; this doctrinal approach would then imply the obsolescence of the traditional view according to which this kind of contracts is regulated exclusively by the municipal law of the host-State[23].

However, we cannot follow to the last consequences the argument under which the fact that these contracts are binding by virtue of the principle *pacta sunt servanda* implicates necessarily that they are international agreement anchored *ipso iure* to the international legal order[24]. Indeed, it does not suffice at all to say that if a contract is governed by a rule, the content of which is identical to a rule existent in international law, then it becomes an international agreement. Since the principle *pacta sunt servanda* is a "general principle of law recognized by civilized nations" as stated in Article 38 § 1 lit.

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[22] Generally speaking the "so-called development contracts", such as: investment contracts (concession contracts, joint-venture and so forth), service-contracts (loan-contracts, formation, technical assistance, sale).

[23] Cf. A. VERDROSS, B. SIMMA, *Universelles Völkerrecht. Theorie und Praxis*, 3rd ed., Berlin, 1984, pp. 265-267.

[24] See, for instance, Case concerning the Payment of Various Serbian Loans Issued in France (France v. Kingdom of Serbia, Slovenes and Croats), Judgement of 12th July 1929: *PCIJ Reports* A/20-21, p. 41: "Any contract which is not a contract between States in their capacity *as subjects of international law* is based on the municipal law of some country" [emphasis added]. The hypothesis here under consideration of the PCIJ is that referring to States acting not as subjects of international law. Yet, by analogy, we can say likewise in respect of contracts between TNC and States (whether the latter act as subjects of international law or not). In this regard, see Diverted Cargoes Case (Greece/UK), arbitral award delivered the 10 June 1955, *Reports of International Arbitral Awards*, vol. XII, p. 70: "...l'Accord du 11 février 1942 est un accord international d'ordre financier intervenu entre deux Etats en tant que sujets du droit international et se rapporte directement aux conséquences d'une guerre menée en commun par eux contre une tierce puissance; qu'à ce titre *il est incontestablement régi par le droit international* et non par le droit interne de l'un quelconque des Etats en cause [...] *qu'ainsi le litige né des divergences d'interprétation relatives à l'exécution d'un tel accord doit être tranché sur la base du droit international*" ((emphasis added)).

to promote a wide array of declarations and resolutions enshrining its demands toward a future regulation of the TNC. The normative negotiation can henceforth commence.

II.1. The approach and the normative proposals aiming at the internationalization of contracts and ultimately at the affirmation of the TNC's asserted international legal personality

Vast and innumerable efforts have been made – especially by the legal literature – in order to shield TNC from the jurisdiction of the host-State[21], and eventually to sustain the former's claim to the international legal personality. Having regard to this approach, two main arguments are generally alleged to allow the TNC to benefit from the highest protection available of their interests and economic goals, especially vis-à-vis the host-State. We ought to remind in this connection that we deal here exclusively with a particular aspect pertaining to the international regulation, namely the treatment that has to be ensured by the host-State towards the TNC.

The first argument can be termed "(The) International Agreement Doctrine", according to which (investments or establishment) contracts concluded between the TNC and the host-State ought to be qualified out-rightly as international agreements between subjects of public international law, since they are governed by the same "general principles of law" (as for Art. 38§ 1 lit. c) of the ICJ's Statute) which regulate the law of Treaties: i.e. *pacta sunt servanda*, *bona fide*, etc. These would be general principles of law considered to be as the fundamental principles underpinning the municipal law rules

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[21] Seen from this perspective, indeed, the topic related to the TNC finds its concrete expression in the "conflicts of jurisdiction between the national State of the parent and those of the subsidiaries", G. ABI-SAAB, "The International Law of Multinational Corporations: A Critique of American Legal Doctrines", *Annales d'Etudes Internationales*, vol. 2 (1971), p. 98.

that has to be guaranteed by the host-State to the TNC; if the former does not abide by its obligations, then its international responsibility would be engaged – vis-à-vis the home-State – through the mechanism of diplomatic protection. For several reasons that pertain among others to the development of public international law at that time (i.e. the characteristics of the International Community), this means of regulation was unanimously considered as apt to solve the problems arousing out of the TNC's commercial and economic activities. The International Court of Justice [hereinafter ICJ] herself adhered to this approach as it is shown in its judgements in the Anglo-Iranian Oil Company[19] and Barcelona Traction[20].

Likewise, UN General Assembly Resolutions reflect the need to encourage and promote international investments; for instance, resolution 626 (VII – 21st December 1952), which, in spite the abstention of most of Western Countries, is clearly eloquent in this regard. In fact, if on one hand it is therein affirmed, indeed for the first time, State's permanent sovereignty over its natural resources, on the other this resolution stresses "the need for maintaining the flow of capital in conditions of security, mutual confidence and economic co-operation among nations" (§ 1). Hence, it underlines ultimately the capital role of foreign investments (and thus of the TNC) that are consequently considered as the true conveyor belt of the international economic system. However, the principle of economic sovereignty pops up for the first time thus paving the road to the imminent collision between the two approaches that will eventually take place later on. These two approaches will wage battle on different grounds: the North will make recourse to the doctrinal weapon, whilst the South – having just acquired the required majority within the UN General Assembly – will avail itself of this institutional forum in order

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[19] *Infra* note 28.

[20] See *International Court of Justice Reports*, 1962 (preliminary objections) and *supra* note 9.

legal nature (binding or not) of the instruments adopted and, ultimately, of the latter's implementation. Generally speaking, as for the legal techniques and implementation, one notices an alternation between the two approaches reflecting by the way two different periods.

II.1 *The period until 1962*[17]

This timeline, which can be labelled as "classic", is in keeping with the traditional pattern according to which general principles on State responsibility do regulate States behaviour vis-à-vis entities that do not possess international legal responsibility, such as precisely TNC. The mechanism through which TNC's interests (dare we to call them "international rights"?) are secured is the well-known institution of diplomatic protection[18]. This approach implies a partial scope in the regulation of the subject matter, namely the treatment

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[17] It goes without saying that this timeline, as any other, conceals a part of fiction. Therefore, the date selected – viz. 1962 – shall have not to be considered as clear-cut.

[18] See in this respect, the aforementioned case of the *Barcelona Traction* (note 5): "The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required on order that a right of diplomatic protection should exist. Indeed, it has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat (*siege social*) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the "genuine connection" has found general acceptance" (§ 70, p. 43). The Hague Court did not veer from her *jurisprudence* in the 1989 ELSI Case (United States / Italy), Judgement of the Chamber (20 July 1989): *I.C.J. Reports* 1989, §§ 109-111, pp. 65-67.

expropriate) and its obligations towards the TNC; the power, vested with the host-State, to renegotiate previous investment / establishment contracts. These different concerns, expressed by the corresponding actors involved, will have an impact on the international regulation as well as on the grasping of the notion of TNC [see *infra* Part III]. In fact, TNC can be either considered as a whole entity (from the standpoint of the DC) or as a cluster of societies, spread worldwide, yet related one to another by tenuous links, in such a way that they do not constitute a whole entity (from the standpoint of Developed countries and TNC themselves).

Indeed, as we have just observed, if on one side the TNC get the most from the globalisation of their interests and goals, on the other it dreads above all that the host-State, by aiming at one of its subsidiaries, calls the TNC as a whole into question, notably as to the engagement of its overall responsibility. These different concerns and demands, from here and there, will by all means have an impact on the content (and even the legal forms) of the international regulation.

PART TWO: THE ATTEMPTS TOWARDS INTERNATIONAL REGULATION FROM AN HISTORICAL PERSPECTIVE

Under this section we will look into the "legal translation" of the conflicting interests, i.e. the "bargaining power" between the different actors involved directly and indirectly in the legal process aimed at the international regulation of the TNC. In this regard, normative negotiation takes place within the larger context of legal techniques employed for that purpose, of the

social priorities, etc.[16] Lest to forget: the question pertaining to the extra-territorial application of municipal laws, the non-discriminatory treatment vis-à-vis the local enterprises, the expropriation and nationalisation (as well as their modalities), the renegotiation of investment contracts concluded between the host-State and the TNC, not to mention the old-fashioned (and highly contested) "Calvo Clause"...

In sum, the actors involved in the negotiation aiming at the purported regulation are: the DC, the Developed countries and, formally only indirectly, the TNC. The distribution of the interests pursued by the aforementioned mirrors the difference of approaches. Very schematically, the regulation shall have to strike a balance between TNC's interests, at the expense of the DC's, and, on the other, the latter's need to preserve its own by way of the treatment it has to guarantee to the former. In fact, they are the two faces of the same medal, and, as it often happens in Law, there are elements of cooperation and conflict.

As for the former question, one ought to ask how and to what extent TNC can jeopardize or erode host-State sovereignty; conversely, how and to what extent TNC's goals converge or diverge from the host-State social and economic development priorities.

On the contrary, having regard to the second question, reference will be made to the rights and prerogatives of the TNC in the quest of their economic and commercial objectives, vis-à-vis the host-State, i.e. the latter's right to nationalize (and

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[16] Cf. A. MARTINELLI, « The Political and Social Impact of Transnational Corporations », in *The New International Economy*, ed. by Makler, Martinelli, Smelser), London, 1982, pp. 79-101; *Report of the Group of the Eminent Persons, op.cit.* (note 6) ; G.A.D. Mac DOUGAL, "The Benefits and Costs of Private Investment from Abroad: A Theoretical Approach", *Economic Record*, 03/1960; G.M MEIER, "Private Foreign Investment", in *Leading Issues in Economic Development*, ed. by G.M. MEIER, New York, 1978, pp. 370-394; *Multinational Corporations in World Development*, ECOSOC, UN Doc. ST/ECA/190, pp. 15-30.

international economic relations. In fact, even though TNC's activities are eventually focused on the Developed countries ("North") [14], it's their establishment in the DC that ultimately represented the real stake of the international regulation[15].

The bones of contention engendered by the sheer presence of a TNC (or alternatively one of its subsidiaries) on a DC's territory can be briefly sketched as such: the compliance, by the TNC, with the sovereignty and municipal order of the DC; the interference (or even intervention) of the TNC on the in the latter's politics (or at least in its economic policy); differences between the TNC's mere economic interests and the DC's wider development priorities; it is sometimes observed that the TNC can accelerate the DC's account unbalances, thus overwhelming the latter's finances and ultimately prompting the flight of capital towards more benign places; the (modalities of) transfer of technology, sometimes vital to the DC's global development; the TNC's at times ill-fated impact on the local economy (i.e.: unemployment, labour relationship between the TNC and local workforce, the consolidations of monopolies or cartels, the crowding-out of local entrepreneurs in the economic sectors concerned by the TNC's direct and indirect activities; restrictive commercial practices); foreign investments in some of the DC's economic sectors that are secondary in the perspective of the latter's overall development, thus disrupting its hierarchy of economic and

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[14] Cf. *Transnational Corporation in World Development. Third Survey*, 1983, UN doc. ST/CT/46, pp. 25-32.

[15] Indeed, the problems arising out of the establishment of a TNC (or one of its subsidiaries) on the territory of a DC are not exactly the same as those in a Developed country, for the different degree of economic and social development. However, some of the general questions can likewise be envisaged vis-à-vis of the TNC's establishment in the Developed countries, hence the need to formulate legal provisions that are sometimes merely programmatory [see *infra* Part III].

From time to time, the term "multinational" is used instead of "transnational"[12], we do nevertheless opt for the latter since it clearly depicts the image of an entity which spans States' boundaries, trespassing their legal powers of constraint which flow ultimately from State sovereignty. Be that as it may, we do not think that a precise definition is really needed[13], if we have clearly in mind of what we are talking about. That is to say an entity which is attracted by the primary sector(s) of the economic activity of a foreign State (extraction, agriculture, light manufactory businesses, etc.), wherever the marginal ratio of the capital yield is high (i.e. where workforce is relatively more abundant – and sufficiently skilled – than the available capital). Once having that in mind, what would be then the stakes of the normative regulation of the TNC's activities on the international plane? We will now review, on an historical perspective, the different attempts that have been made within the international organizations (regional or universal) since 1973.

I.2. *TNC and international economic relations*

Before analyzing the stakes which the international regulation has given rise to, we ought to remind the context within which the debate falls. The relations between DC and the TNC operating in the latter's territory, took place in the larger question around the antagonism between the North and South and, at large, in the context of the arrangement of the

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pays déterminé et qui exercent leurs activités dans un ou plusieurs autres pays, par l'intermédiaire de succursales ou de filiales qu'elles coordonnent", quoted in D. CARREAU, T. FLORY, P. JUILLARD, *op.cit.* (note 7), p. 46. See, for a systematic bibliography in this regard, *International Lawyer*, vol. 11, pp. 69 et seq. See *infra* note 49.

[12] Some authors consider this terminological debate as being relevant from the perspective of the regulation of these entities (in this vein: M. FLORY, *Droit international du développement*, Paris, 1977).

[13] Even though the ICJ had used the noun « multinational » in the aforementioned case (note 9).

powers and eventually deeply influenced interstate relations.

Nevertheless, within this context (mainly interstate), their regulation didn't pose any insuperable problem. Quite often, their activities were carried alongside States' interests and foreign policy, or even, in some cases, they were mere *commercial arms* of the latter's colonial expansion(10). However, since the "explosion" of the International Community, through the decolonization, new needs, as to the legal regulation of these ancient phenomena, had to be met. Indeed, the booming of the TNC – and the demand of their regulation – can be traced back no earlier than 1950s, when they started to shake up world trade and finance. But, what is really meant by the acronym "TNC"? No legal understanding of the latter can be attempted regardless of the economic context in which they operate; it has in fact become ineluctable, for their survival, to expand their horizons, to multiply their interests, to take advantage from their investments wherever the ratio of profits is higher, rapidly shifting from a country to another as soon as the conditions vary. In this respect, it is not hard to assume that a TNC is by all means the most accomplished form of investment efficiency. It is not then without surprise that the legal definition – upon which the regulation will take place – won't but record this factual evidence. Accordingly, a TNC is "an enterprise, regardless of where it is incorporated or not, which owns or controls production or service facilities outside the country"(11)

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(10) See, for instance, the East India Company and the British colonial expansion, or, the "East African Trading Company" and the latter's penetration in this part of the continent. As for the institutional links – under PIL – between these companies and *their* States, see: *The Island of Palmas case* (United States / Netherlands), arbitral award of 4th of April 1928, *Reports of International Arbitral Awards*, vol. II, pp. 855-856.

(11) *The Impact of Multinational Corporations on Development and on International Relations*, *op.cit.* (note 6), p. 25. In the same vein, French Economic and Social Council: "les sociétés dont le siège social est dans un

Developed Countries, TNC as well as the numerous international arenas). In this connection, we will endeavour to highlight the stake of the negotiation leading eventually to the regulation. In the second part, we will sketch an output of the normative negotiations from an historical perspective (especially under the prism of the NIEO). The third part will be mainly devoted to the principal legal instruments of regulation, that is to say the "Code of conduct"; in this context, we will examine the "feasibility" and "normative efficacy" of such a means[(9)].

PART ONE: THE EMERGENCE OF A NOVEL PHENOMENON IN THE INTERNATIONAL LEGAL ORDER. THE STAKE OF ITS REGULATION

I.1. : *Attempt to define a TNC*

It is beyond any doubt that international trade has always existed since the appearance of organised human societies. In this respect, and less anciently, one has to remind that the forerunners of TNC can be identified in the Italian Maritime Republics from the 10th Century onward (Amalfi, Pisa, Genoa and Venice), as well in the powerful banking families as the Medici or Fugger that actually controlled the European financial markets and economies (not to mention the discovery of the New World and the Imperial elections ...). Accordingly, even in the past *transnational* entities exercised enormous

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(9) The normative shortage was underlined by the ICJ herself in the aforementioned case (note 5): "Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests" (*op.cit.*, § 89, pp. 46-47).

TNC[6]. This awareness implied that the regulation of the latter in public international law couldn't be carried out without an in-depth reflection on the law-making techniques used to this end. Thence, the relative slowness, after all predictable, of the works on the "Codes of conduct" that went on theretofore under the aegis of the UN and some of its specialized agencies. As a matter of fact, the debate was not only on the content of the rules (i.e. the substantive law) related to the TNC regulation, but also on the legal nature and scope of these instruments, that were quite unusual at that time[7].

In this short study, we are not willing to scrutinize the numerous topics linked to the rise of TNC – such as for instance the protection of foreign investments at large – yet we will limit ourselves to focus on some of them, under the sole angle of PIL, with a specific emphasis on what is known as the NIEO (i.e.: New International Economic Order) which roared, with alternate fortune, from the 1970's onward till its collapse at the twilight of the XX Century[8]. It will be shown hereby how different attempts in various international multilateral arenas tried to strike a balance between divergent interests aiming at a fair and equitable regulation.

At the outset, we will examine the irruption of this topic in the international agenda (in other words the awareness of the international community); the positions and conflicting demands from the different relevant actors involved (DC,

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[6] *The Impact of Multinational Corporations on Development and on International Relations*, UN Publications, 1974.

[7] See, in this respect: D. CARREAU, T. FLORY, P. JUILLARD, *Droit international économique*, 2nd ed., Paris, 1980, pp. 43-44.

[8] Accordingly, the question of the « corporate veil » (and its lifting), of international investments at large, of the applicable law to the diplomatic protection of corporations will not be analysed here. Incidentally, some of them will pop up here and there to the extent that they are instrumental to our main focus.

capacity to regulate satisfactorily and efficiently the conflict of legal interests arising within the boundaries of its sovereignty. Hence, the need for an international regulation of the TNC's activities has been felt, especially in the developing countries [hereinafter DC], in order to establish a set of rules as well as a modicum of institutional framework of control. In fact, weak States have traditionally been at the forefront of this claim since they are the first to suffer from the *institutional vacuum* that the TNC had created within the State's municipal order[5].

It is undisputed that these new entities on the international legal scene do represent an objective factor that accelerate and strengthen the global interdependence. Accordingly, TNC's conflicts with States, in the territory of which they operate and invest, are ultimately shifted on the international level, where by the way negotiations are conducted and solutions looked for.

However, international negotiations haven't proved – till now – to be really satisfactory, due to the difficulty to conciliate States' different interests, as well as because it appeared at once that the solution couldn't be found in the traditional interstate scheme, for this time a new actor was involved the strength of which has to be somehow taken into account. This unusual situation was clearly underlined by the "Group of Eminent Persons", appointed by the UN Secretary-General in 1973, the task of which was to formulate proposals to this effect. Indeed, its 20 "wise" members agreed on a set of recommendations which illustrated the effort to cope, by novel means, with the fundamental problems arisen, in the international legal order, by the rise and activities of the

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[5] The lack (or at least the scarceness) of PIL rules pertaining to the TNC's activities was ascertained by the ICJ in the famous *Barcelona case* (*I.C.J. Reports* 1970, § 50, p. 38). As for the doctrine, see: F. FRANCIONI, "International Codes of Conduct for Multinational Entreprises: An Alternative Approach", *Italian Yearbook of International Law*, 1977, pp. 160-165.

premises. On one hand, the sphere of legal international interests was narrowly limited to mere States'; on the other, the rare questions that fell out from the latter were still regulated at the very top of the State's authority. In other words, the specific historical development of contemporary public international law did not favour the rise of other legal persons vested with the power of regulation.

Yet, States are nowadays faced to their increasingly constant incapacity to regulate – due the growing economic interdependence – of some social phenomena that hitherto pertained mostly to their national jurisdiction[(2)], be it called "globalization" or whatsoever[(3)]. At the same time, the principal economic actors of this planetary market, viz. the transnational corporations [hereinafter: TNC], have esteemed useful to acquire an international dimension allowing them to plan and to manage on a global level, thus disconnecting them not only from their home-State, but also from the host-state (i.e. the one on which they are making their investment). Furthermore, it often happens that the latter's GNP is exceeded by a single TNC operating in its territory[(4)]. This sheer fact has engendered the rise of a non-state actor, the TNC, which has, according to certain authors, undermined the State's traditional

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(2) Cf. C. W. JENKS, "Interdependence as the Basic Concept of Contemporary International Law", in *Mélanges offerts à Henri Rolin. Problèmes de droit des gens*, Paris, 1964, pp. 164 et seq.; M. GIULIANO, *La cooperazione degli Stati e il commercio internazionale*, Milano, 1978, pp. 1 et seq.; C. EAGLETON, *International Government*, Revised Edition, New York, 1948, pp. 22 et seq. The latter considers international cooperation as being one the main characteristics of the today international community.

(3) Shall one have to remind that international law is by its essence « global » since it addresses worldwide international legal relations?

(4) Cf. W- M. CORDEN, *The NIEO Proposal: A Cool Look*, Thames Essay n° 21, London, 1979; W. WELLS, "The Multinational Business Entreprise: What Kind of International Organisation?", in *International Relations and World Politics*, Cambridge, 1971, pp. 113-121.

The Regulation of Transnational Corporations. Some Observations from the Standpoint of Public International Law: The "Mirage" of the "New International Economic Order (NIEO)"

Submitted By

Giovanni Distefano

Introduction

If one attempts to define the international legal order, the tentative conclusion cannot be but a Community of States which exercise their normative power on a foot of formal sovereign equality among them (Article 2 § 1 of the United Nations Charter). Hence, the law which is applicable within this legal system, i.e. public international law [hereinafter PIL], aims mainly to regulate interstate relations. This assertion remains valid even if, as it is true, public international law recognizes other entities, most of them ultimately created by States themselves, as legal subjects.

This State-centered construction – which a popular (and inaccurate) vulgate has labelled "Westphalian System"[(1)] – is sustained by an empirical observation and forms the paradigm of the international legal order well before 1648. Likewise, the dynamics of the international society rests on two structural

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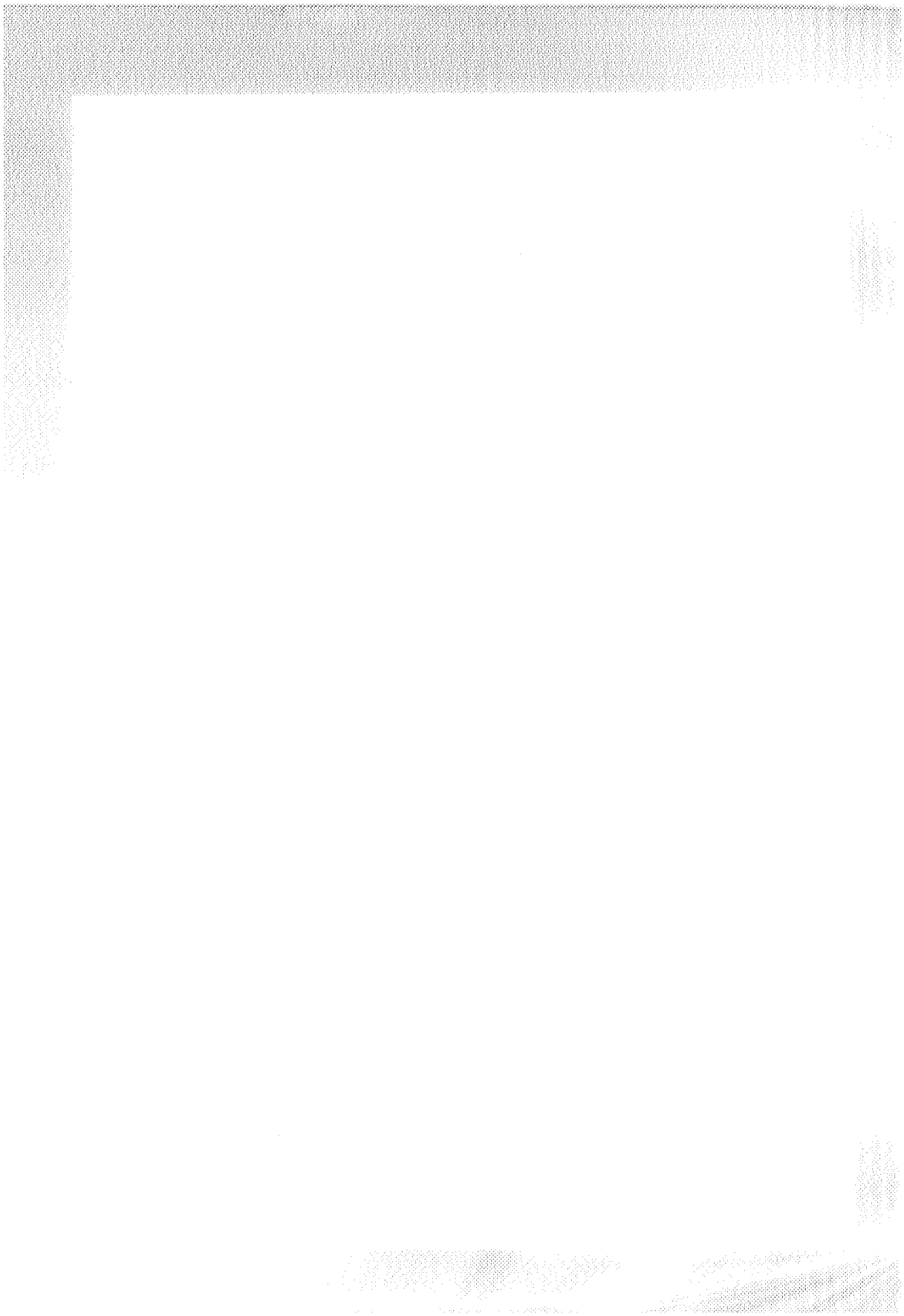
(1) In fact, on one side such a system had emerged well before 1648 – at least since the XII Century – whilst, on the other side, even after the Westphalia's Peace Treaties there still remained relics of the previous system.



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