

**THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES**  
**And**  
**CENTRE FOR COMMERCIAL LAW STUDIES, QUEEN MARY,**  
**UNIVERSITY OF LONDON**

**LLM**

**MULTINATIONAL ENTERPRISES AND THE LAW**  
**2007-8**

**Professor Peter Muchlinski**  
**Professor Janet Dine**



# Multinational Enterprises and the Law 2007-8

## **1. Basic Information:**

*Pre-requisites and Co-requisite Units:* None.

*The Venue:* IALS, Room: L101

*Time* : Mondays 3pm-5pm

*Length of course:* 21 weeks, 10 weeks of seminars in each of the first and second terms, one seminar in the third term.

*Weekly Contact Hours:* 2 hours per week.

*Course Convenors:* Professor Peter Muchlinski, e-mail [pm29@soas.ac.uk](mailto:pm29@soas.ac.uk) ; Professor Janet Dine [j.m.dine@qmul.ac.uk](mailto:j.m.dine@qmul.ac.uk)

*Websites:* SOAS Blackboard and  
Queen Mary: <http://www.elearning.qmul.ac.uk>  
Username : ns0092 password: mooswymto

## **2. Assessment Requirements and Rules:**

Separate advice will be given for SOAS and QMUL students

## **3. Contents Aims and Objectives:**

### *Contents Outline*

1. Getting to Know MNEs:
2. The Business and Legal Organisation of MNEs I: Major Trends in Business Organisation.
3. The Business and Legal Organisation of MNEs II: Major Trends in Legal Structures and Organisation.
4. Regulating MNEs.
5. Jurisdictional Limits of National Law and the Regulation of MNEs I: The Problem of Extraterritoriality and Prescriptive Jurisdiction; Establishing Personal Jurisdiction over the MNE Network.
6. Jurisdictional Limits of National Law and Regulation II: Enforcing National Laws over the MNE Network and Alternative Approaches to the Jurisdictional Issue.
7. Control over Entry and Establishment of MNEs.
8. Liberalisation of Entry and Establishment.

9. Regulation through Company Law I: Group Liability, Network Liability and Directors Duties.
10. Regulation through Company Law II: Corporate Governance and Disclosure.
11. Regulation through Competition Law.
12. Technology Transfer.
13. Labour Relations.
14. Human Rights and MNEs.
15. Environment and MNEs.
16. The Financing of Foreign Direct Investment by International Financial Institutions
17. Control of Investment Risks under International Law I
18. Control of Investment Risks under International law II.
19. Codification of International Standards, from Customary International Law to Bilateral and Multilateral Investment Agreements.
20. Dispute Settlement and Avoidance: the Contribution of the World Bank and NAFTA.

### ***General Aims***

- (a) To provide a comprehensive, interdisciplinary, study of the business and legal organisation of MNEs and of the regulation of their activities;
- (b) To do so in relation to both the principal commercial and social issues raised by their operations;
- (c) To examine the regulatory environment for international business by dealing with sub-national, national, regional and multilateral policies and rules for the regulation of MNEs;

### ***Learning Outcomes***

Upon the successful completion of this course the student will obtain:

- (a) A detailed grounding in the legal and regulatory problems created by the operations of MNEs;
- (b) A critical understanding of these problems in the light of competing theories and ideologies of economic and social globalisation and its regulation;
- (c) An understanding of the nature and development of MNE organisation and to view this as an evolving and changing process;
- (d) Knowledge of the effects of MNE operations on home and host economies and a capacity to explain the principal regulatory issues that emerge from such operations and how, in practice, these have been dealt with;
- (e) A consciousness of the inter-relationship between different levels of MNE regulation at the sub-national, national, regional and multilateral levels.

#### ***4. Teaching Arrangements and Rationale:***

The course will be seminar based. There will be one two-hour seminar per week. Students will be expected to prepare reading in advance from their set textbook and other selected readings. They will be expected to take an active part in the seminars, answering questions and making regular interventions. Thus the emphasis is on active learning leading to the learning outcomes listed above.

#### ***5. Reading and IT Inputs:***

##### ***Recommended textbooks:***

Peter T Muchlinski, Multinational Enterprises and the Law (Oxford, Oxford University Press, 2<sup>nd</sup> Ed, 2007)

Janet Dine Companies International Trade and Human Rights (Cambridge, Cambridge University Press, 2005)

##### ***Other Sources:***

There are numerous books recommended as further reading for the course (see below).

Articles in the following journals:

*ICSID Review – Foreign Investment Law Journal*  
*Journal of International Business Studies*  
*Journal of World Investment and Trade*  
*Journal of World Trade*  
*Journal of International Economic Law*  
*Transnational Corporations*

Articles from other international law journals are available in the IALS, SOAS and Queen Mary Libraries or on the Internet. Numerous websites available on the Internet will also provide many materials.

#### ***6. Contribution to Programmes:***

This course represents a comprehensive analysis of the major legal problems raised by the operations of multinational enterprises (MNEs), studied in their commercial, economic and political contexts. The course deals with all the main commercial issues created by the cross-border activities of MNEs, with attention also to the social

dimension of MNE action in relation to labour, human rights, environment and corporate social responsibility. MNEs are regarded, for the purposes of this course, as diverse and flexible organisations which range from traditional, hierarchically controlled, groups of affiliates based around a parent company or which operate as looser heterarchical organisations of associated affiliates or co-operating firms in strategic alliances. Thus the course is not based on a single model of *the* MNE but, rather, examines the organisational diversity of MNEs in relation to the principal policy and regulatory questions involved in their operations. Furthermore, the course reflects the regulatory choices open to policy makers (in both home and host countries) in that relevant legal standards and procedures occur both at the sub-national, national, regional and multilateral levels. Thus the material for the course is drawn from national, regional and international sources.

## **7. Reading List:**

### **First some general reading advice:**

#### **Books:**

Apart from the course textbooks also recommended as basic reading are the UNCTAD World Investment Report 2003 and World Investment Report 2007.

Many of the major international investment agreements and instruments to be covered by this course can be found in UNCTAD International Investment Agreements : A Compendium Vols I-III (UN, 1996) Vols.IV-V (UN, 2000) Vol.VI (UN, 2001) Vols.VII-IX (2002) Vol.X (2002) Vols XI-XII (2004) Vols. XIII-XIV (2005) (all available from the UNCTAD IIA website <http://www.unctad.org/ia> ).

#### **Books Suitable for Further Reading:**

##### **(a) Legal Books:**

Another legal text in the area is C. Wallace The Legal Control of Multinational Enterprises (2<sup>nd</sup> ed, 2002 Martinus Nijhoff Publishers) (Referred to as Wallace)

For the public international law aspects of the course another further reading source is M.Sornarajah The International Law on Foreign Investment (Cambridge University Press 2<sup>nd</sup> ed, 2004).

This has been joined by D.Bradlow and A.Escher (eds) Legal Aspects of Foreign Direct Investment (Kluwer Law International, 1999) which not only deals with the major international legal instruments in the field but also contains a number of country specific studies from Asia, Africa, Central and Latin America and Europe.

Some of the more significant contemporary regulatory issues in the field are covered in

S.Picciotto and R.Mayne (Eds) Regulating International Business: Beyond Liberalisation (MacMillan, 1999).

A recent interesting, interdisciplinary, account of international business regulation can be found in J.Braithwaite and P.Drahos Global Business Regulation (Cambridge University Press, 2000) (Referred to as Braithwaite and Drahos).

### **(b) Economic Policy:**

For the economic policy aspects of the course the recommended book is J.H.Dunning Multinational Enterprises and the Global Economy (Addison Wesley, 1993). (Referred to as Dunning. This is now out of print, awaiting a new edition, but available in libraries).

An alternative economic text is R.Caves Multinational Enterprise and Economic Analysis (Cambridge, 2nd Ed, 1996) (Referred to as Caves)

Equally much of the economic learning on MNEs and FDI is summarised in a very accessible form in Geoffrey Jones Multinationals and Global Capitalism: From the Nineteenth to the Twenty First Century (Oxford University Press, 2005) (Referred to as Jones)

In addition the Oxford Handbook of International Business (Alan Rugman and Thomas Brewer Eds, Oxford University Press, 2000) offers an excellent overview of the economic theory and history of MNEs as well as the political and business organisation issues. Chapters of this work will be recommended in the reading list. (Referred to as Oxford Handbook IB)

Another good, but now somewhat dated economic text is N.Hood & S.Young The Economics of Multinational Enterprise (1979 Longmans) (Referred to as Hood and Young)

A useful discussion can be found in C.Pitelis and R.Sugden The Nature of the Transnational Firm (Routledge, 2<sup>nd</sup> Ed 2000) (Referred to as Pitelis and Sugden).

### **(c) Further Background Reading:**

The following books concentrate on the broader business and policy issues underlying the course. They are for your interest, and are not regarded as essential reading, unless referred to later in the course guide as such:

For a solid, descriptive introduction and overview of developing policies on investment at the multilateral level, written from the perspective of a cautious welcome for greater multilateral liberalisation of investment regimes, while protecting against anti-competitive practices by MNEs, see Thomas Brewer and Stephen Young The Multilateral Investment System and Multinational Enterprises (Oxford, 1998).

On "globalisation" a critical analysis can be found in Paul Hirst and Grahame Thompson

Globalisation in Question (Polity Press, 2<sup>nd</sup> Ed 1999). This book shows that the world is far from losing the nation state as a political entity and that it in fact has considerable new responsibilities in co-ordinating multilateral and local economic strategy. For a strong response see David Held et.al. Global Transformations (Polity Press, 1999).

See too on the organisation of the globalising economy Peter Dicken Global Shift: Reshaping the Global Economic Map in the 21<sup>st</sup> Century (4<sup>th</sup> Ed, Sage Publications, 2003). (Referred to as Dicken).

A provocative critique of the new liberal world order for trade and investment is David Korten's book When Corporations Rule the World (1995, Kumarian Press), described by Bishop Desmond Tutu as "a must read book" and given a good review in the Financial Times. It offers a strong indictment of the social and political consequences of globalisation and its attendant ideology that Korten calls "corporate libertarianism". In a similar vein see Naomi Kline No Logo (Flamingo 2000). For a critique from more "establishment" sources see Joseph Stiglitz Globalisation and its Discontents (Allen Lane, 2002).

Paul Krugman Pop Internationalism (MIT Press 1996) a corrective for those who overstate the significance of globalisation and advocate a protectionist reaction to it, as does Korten. Good at putting things into perspective and taking the fear out of liberalisation of trade and investment.

Leslie Sklair Globalization Capitalism and its Alternatives (OUP, 3<sup>rd</sup> Ed, 2002) deals with the emergence of what Sklair calls the "transnational practices" of MNEs and the creation of a new global consumer society, with the attendant development of new "transnational classes". Though the underlying thesis of this book is open to hot debate - (I do not fully agree with all of my former colleague's conclusions!) - it is replete with provocative insights into the nature of the new world that MNEs are helping to forge.

Susan Strange and John Stopford Rival States, Rival Firms (Cambridge UP, 1991) analyses the political relations of MNEs and developing states in the emerging global economy, developing the concept of "tripartite diplomacy" between MNEs and their competitors, and the home and host states in which they operate. It contains an interesting reconsideration of the continuing relevance of "dependency" theories of underdevelopment.

Robert Reich The Work of Nations (Simon and Schuster, 1991) seeks to describe the emergence of new types of international business forms that go beyond the integrated MNE group, and the new agenda of issues facing home and host states that seek to retain and/or attract internationally mobile investment. Professor Reich may be overstating the degree to which the globalisation of the economy has in fact taken place; nonetheless, the views of the former US Secretary of Labour are very thought provoking indeed. A good read even if you do not take the course!

Michael Porter The Competitive Advantage of Nations (Macmillan, 1990) seeks to explain the success of firms from specific home states on the basis of market, political and social conditions in home states. This work builds upon and reconsiders certain themes present in

the "product cycle" theory of MNE growth.

C.Bartlett and S.Ghoshal Managing Across Borders: The Transnational Solution (Century Business, 2<sup>nd</sup> Ed, 1998) describes significant changes in the character of MNE business organisation towards less hierarchical methods of management and their replacement with more loosely associated "networks" of specialist businesses operating both within and outside the boundaries of the traditional MNE, and with a greater geographical spread of decision-making centres than in traditional nationally-centred firms. However, rumours of the death of the hierarchically managed, integrated and nationally-based MNE group are premature. The point is that this emergent theme may one day become dominant.

#### **(d) Some Useful Websites:**

There are as many useful websites for this course as there are issues, interested organisations and home and host countries! I cannot possibly list them all. However, certain websites are of especial significance as sources of information and of documents:

#### **Intergovernmental organisations:**

**WTO:** <http://www.wto.org/wto/index.htm>

**OECD:** <http://www.oecd.org>

**UNCTAD:** <http://www.unctad.org>

**UN Global Compact with Business** <http://www.unglobalcompact.org>

**European Union:** <http://europa.eu.int>

**ILO** <http://www.ilo.org>

**World Bank** <http://www.worldbank.org>

**ICSID** <http://www.worldbank.org/icsid/>

**MIGA** <http://www.miga.org>

**IFC** <http://www.ifc.org>

#### **Non-governmental organisations:**

**Oxfam:** <http://www.oxfam.org>

**World Wide Fund for Nature (WWF):** <http://www.wwfnet.org>

**World Development Movement:** <http://www.oneworld.org/wdm/>

**International Chamber of Commerce:** <http://www.iccwbo.org>

**International Accounting Standards Board** <http://www.iasb.org.uk>

#### **Detailed Reading List:**

This reading list is far more comprehensive than you will need to pass the exam. It serves as an introductory bibliography to the subject, and allows you to trace the main sources that have been used in preparing the course textbooks, as well as more recent updates. Though large, it cannot claim to be exhaustive. If you come across new materials that you feel would



be a useful addition to the readings please let us know. This course has developed over the years through the active input of its students as well as of its teachers, and we will be grateful for your contribution as the latest group to study it!

## **1. Getting to Know MNEs:**

### Basic Reading:

Muchlinski: Ch.1.

### (1) A Preliminary Definition of the MNE:

#### **The first use of the term "multinational" in relation to a corporation:**

This has been attributed to David E. Lilienthal who, in April 1960, gave a paper to the Carnegie Institute of Technology on "Management and Corporations 1985" which was later published under the title "The Multinational Corporation"(MNC). Lilienthal defined MNC's as, "corporations.... which have their home in one country but which operate and live under the laws and customs of other countries as well." [Quoted in D.K.Fieldhouse "The multinational: a critique of a concept" in A.Teichova et.al.(Eds) Multinational Enterprise in Historical Perspective (1986) p.9. at p.10.]

#### **The economist's definition:**

A "multinational enterprise" is any corporation which, "owns (in whole or in part), controls and manages income generating assets in more than one country." [ N.Hood and S.Young The Economics of the Multinational Enterprise (1979) at p.3. J.H.Dunning Multinational Enterprises and the Global Economy pp.3-4]

This definition distinguishes an enterprise that engages in **direct investment**, that is investment which gives the enterprise not only a financial stake in the foreign venture but also managerial control, from one that engages in **portfolio investment**, which gives the investing enterprise only a financial stake in the foreign venture without any managerial control. Thus the MNE is a firm that engages in **direct investment outside its home country**. The term "enterprise" is favoured over "corporation" as it avoids restricting the object of study to incorporated business entities and to corporate groups based on parent/subsidiary relations alone. International production can take numerous legal forms. From an economic perspective the legal form is not crucial to the classification of an enterprise as "multinational".

#### **The United Nations (UN) definition:**

The UN has moved away from this simple formula towards a distinction between "multinational corporations"(MNC) and "transnational corporations"(TNC). See UN Commission on Transnational Corporations Transnational Corporations in World

Development: A Re-Examination (1978 UN Sales No.E.78.II.A.5.) Annex I. at p.158-159.

What economists call "multinationals" are known as "transnationals" in UN parlance. Thus UN practice distinguishes between enterprises owned and controlled by entities or persons from one country but operating across national borders - the "**transnational**" - and those owned and controlled by entities or persons from more than one country - the "**multinational**". See further C.D.Wallace Legal Control of the Multinational Enterprise (1983) at pp.10-13 (see now 2<sup>nd</sup> Ed).

### **The OECD definition:**

According to the OECD Guidelines on Multinational Enterprises, such enterprises:

"usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed."

OECD Guidelines For Multinational Enterprises 27 June 2000 I Concepts and Principles para.3. <http://www.oecd.org/daf/investment/guidelines/mnetext.htm> at p.3. [For the old version of this paragraph see OECD Guidelines 1991 Review (Paris 1992) at p.104; also reproduced in The OECD Guidelines for Multinational Enterprises (Paris 1994, 1997)].

The crucial characteristic of a MNE is, according to this definition, the ability to coordinate activities between enterprises in more than one country. Other factors are not decisive. The definition is, therefore, broad enough to encompass both equity and non-equity based direct investment, regardless of the legal form, or ownership, of the undertakings.

The old version of this definition, which stressed control even more strongly by way of reference to the ability of one company to control the activities of another company located in another country, had been substantially adopted in the final version of the proposed text of the now shelved United Nations Draft Code of Conduct on Transnational Enterprises: See UN Doc E/1990/94 12 June 1990 para.1. at p.5.

### (2) The Distinction Between the MNE and Other Types of Business Enterprise:

Having defined the MNE, the next issue is to show how it differs from uninationals enterprises that share certain of its features.

The first of these is the **multi-location domestic enterprise**.

The second close relation of the MNE is the **domestic firm that exports part of its output**.

The third close relation of the MNE is the **domestic firm that exports part of its factor**

**inputs**, for example, technical know-how and managerial skills.

See Further:

J.H. Dunning International Production and the Multinational Enterprise (Allen & Unwin 1981) p.7

Hood and Young at pp.5-9.

(3) Origins of Concern:

Further Reading:

J. Dunning: "The Multinational Enterprise the Background" in Dunning (ed.) The Multinational Enterprise (1971)

D.K. Fieldhouse: "The Multinational: a critique of a concept" in Teichova et.al ed. Multinational Enterprise in Historical Perspective (1986) p.9

For a 'classical' statement of the concern expressed about MNEs see the Report of the UN Group of Eminent Persons to Study the Role of Multinational Corporations on Development and International Relations (1974) in 13 (1974) ILM p.800

(4) Perspectives from Business History:

Basic Reading:

Dunning: Chs.2, 5.

Jones: Ch 2.

Mira Wilkins "The History of Multinational Enterprise" in Oxford Handbook IB Ch.1.

Further reading:

J. Dunning: "Changes in the Level and Structure of International Production : The Last One Hundred Years" in M. Casson (ed.) The Growth of International Business (1983) Ch.5 p.85-99

P. Hertner J. Jones Multinationals Theory & History (1986)

A.Teichova & al. Multinational Enterprise in Historical Perspective (1986)

Jones Chs. 3-5

There are extensive further readings on the evolution of MNEs from particular countries and regions. References to many of these can be found in the endnotes to chapter 2 of my book.

(5) Perspectives from Economic Theory:

Basic Reading:

**Either:**

Dunning: Chs.3, 4 and John Dunning “The Key Literature on IB Activities 1960-2000” in Oxford Handbook IB Ch.2.

**and/or:**

Hood and Young: Ch. 1 and 2;

**and/or**

Caves Chs.1-3

**and/or**

Jones Ch.1.

For a very useful discussion of the major trends in economic theory concerning the growth of MNEs that is accessible to non-economists see: C.Pitelis and R.Sugden The Nature of the Transnational Firm (2000) especially John Cantwell: "A Survey of Theories of International Production".

Further Reading:

J. Dunning     International Production and the Multinational Enterprise (1981) Ch. 1 and 2;

Explaining International Production (1988) especially: Introduction and Chs.2 and 12.

Alliance Capitalism and Global Business (1997)

M.Casson:     "Introduction" to The Growth of International Business (1983)

F. Hennart     “Theories of Multinational Enterprise” in Oxford Handbook IB Ch.5.

Alan Rugman     “Location, Competitiveness and the Multinational  
and Alain Verbeke     Enterprise” in Oxford Handbook IB Ch.6.

R. Vernon: Sovereignty at Bay (1971); "International Investment and International Trade in the Product Cycle" 80(1966) Q.Jo.Econ. 190; "The Location of Economic Activity" in Dunning (ed.) Economic Analysis and the MNE (1974) p.89; "The Product Cycle Hypothesis in a New International Environment" 41 (1979) Oxford Bull. of Econ. & Stat.p.255

P.Buckley & M.Casson: The Future of the Multinational Enterprise (2nd Ed 1991, reprinted as a 25<sup>th</sup> anniversary edition with new introduction) Ch.2. "A Long-Run Theory of the Multinational Enterprise".

K.Cowling and R.Sugden: Transnational Monopoly Capitalism (1987)

#### (6) The Role of Law in the Evolution of Large Enterprises:

##### Basic reading:

Muchlinski: pp.33-44.

Braithwaite and Drahos: chapters 7 and 9.

##### Further reading:

For developments in US, UK and Europe generally, see

N. Horn J. Kocka: Law and the Formation of the Big Enterprises in the 19th and Early 20th Centuries (1979)

A. Chandler & N. Daems: Managerial Hierarchies (1980)

##### Questions:

1. What is a Multinational Enterprise (MNE)? Does it make any difference if the enterprise is called a "transnational corporation"?
2. Distinguish the MNE from other closely related types of domestic enterprise.
3. Why was the UN Group of Eminent Persons set up to report on the activities of MNCs? What did their Report recommend?
4. Why were the activities of MNEs viewed with increasing suspicion in the early 1970s?
5. In what ways have attitudes to the MNE changed since that time?

6. What are the principal elements of the Doha Declaration as regards investment issues? Do they address adequately the concerns of developing countries? What future directions do they suggest for the development of policy on FDI, given the failure of investment issues at Cancun?
7. What were the principal patterns of MNE investment:
  - (a) prior to 1914;
  - (b) between 1914 and 1939;
  - (c) between 1945 and 1990;
  - (d) since 1990?
8. Why does a MNE evolve? Explain by reference to the theory of:
  - (a) "monopolistic advantages";
  - (b) the "product cycle", distinguishing between the original and revised versions thereof;
  - (c) "transaction costs" or "internalisation".
9. When would a firm serving overseas markets decide to invest in local production in the host country in preference to licensing production to a local company or exporting through direct sales to customers in the host country?
10. Are MNEs the result of attempts by national firms to reduce labour costs by means of locating production in more than one country?
11. What role have legal factors played in the stimulation of MNE growth?

## **2. The Business and Legal Organisation of MNEs I: Major Trends in Business Organisation:**

### Basic Reading:

Muchlinski: pp.45-51

Dunning: Chs.8, 9.

Caves: Ch.3.

Dicken: Chs 2 and 7.

### Further reading:

Westney and Zaheer "The Multinational Enterprise as an Organization" in Oxford Handbook IB Ch.13.

Birkinshaw "Strategy and Management in MNE Subsidiaries" *ibid* Ch.14

Inkpen "Strategic Alliances" *ibid* Ch.15.

D. Channon & M. Jalland: Multinational Strategic Planning (1979) Ch.2

C.Bartlett and S.Ghoshal: Managing Across Borders: The Transnational Solution Part I

A.Chandler Strategy and Structure (1962). See too references in Muchlinski p.82 n.1.

The Economist Survey E-Management 18 November 2000

### Questions:

1. How does Chandler's "strategy and structure" thesis to explain the evolution of complex corporate groups? Can it explain the international business organisation of the MNE?
2. What is "divisionalisation"? How is this approach to business organisation applied in MNEs?
3. Distinguish between the "nationally responsive" and "globally integrated" MNE.
4. What is the distinction between the "hierarchically" and the "heterarchically" organised MNE?
5. What are transnational strategic alliances?
7. Are there any valid generalisations about the locus of certain types of decision-making powers in MNE groups?
8. How has change in information technology affected the management systems and structures of MNEs?

### **3. The Business and Legal Organisation of MNEs II: Major Trends in Legal Structures and Organisation:**

Basic reading:

Muchlinski: pp.51-79

Further Readings:

(a) Contractual Forms of International Business Organisation

**Read either:**

C.Schmitthoff: Export Trade (10<sup>th</sup> Ed 2000) Ch.30.

**and/or:**

Tindall: Multinational Enterprises (1975) Ch. 4

**The Build Operate Transfer Contract:**

UNIDO Guidelines for the Development, Negotiation and Contracting Build Operate Transfer (BOT) Projects (1996)

(b) The Multinational Corporate Group

Wallace: Ch.1.

T. Hadden: The Control of Corporate Groups (IALS 1983) Ch. 2 and Appendices.

C.Schmitthoff: Export Trade (9th ed. 1990) Ch.17.

(c) Joint Ventures

E. Herzfeld: Joint Ventures (3rd Ed 1996)

(d) Informal Transnational Networks

Muchlinski at pp.69-70.



(e) The Issue of Public Ownership: The State Owned MNE:

Muchlinski at pp.70-72.

(f) Supranational Forms of International Business Organisation

See further Muchlinski at pp.72-77 and readings cited in footnotes thereto.

European Company: see Reg. 2157/2001 of 8 October 2001 OJ [2001] L 294/1 and Directive 2001/86/EC of 8 October 2001 OJ [2001] L 294/22.

European Economic Interest Grouping

Andean Multinational Enterprise

Public International Corporation

Questions:

1. To what extent do MNE corporate group structures display specific characteristics associated with the national or regional origin of the parent company?
2. How far does the legal form of the MNE coincide with its business organisation? What problems may result for the effective regulation of MNE groups?
3. In what ways is the joint venture distinct from the usual parent/subsidiary relationship in corporate groups?
4. Are the co-operative operations of MNEs always best served by instituting a formal legal structure?
5. Is the MNE group better seen as a series of contractual relationships between the various affiliates? What are the implications for the regulation of MNEs that result from such an analysis?
6. In what ways might state-owned MNEs create additional problems of regulation to those relating to privately-owned MNEs? Is state ownership a viable long-term strategy for a MNE? When might state ownership be useful?
7. What are the principal aims behind:
  - (a) the EEIG;
  - (b) the European Company.
8. Contrast and compare the ECs supranational entities with that devised by ANCOM.
9. What are the distinguishing features of public international corporations? How do they differ from the publicly- and privately-owned MNE?

#### **4. Regulating MNEs:**

##### Basic Reading:

Muchlinski: Ch.3.

Dine : Chs.1,2.

##### (1) Developing a Regulatory Agenda:

##### Basic reading:

Muchlinski: pp.82-89.

S.Strange: States and Markets (Pinter, 2nd Ed, 1994) Ch.1.

Dunning: Chs.19, 20.

Braithwaite and Drahos pp.3-36.

##### Further Reading:

See readings referred to in endnotes to Muchlinski Ch.3.

##### (i) International Relations Theory and MNE Activity:

- transnational relations analysis
- compare Transnational Relations Analysis with Classical "Balance of Power" Analysis
- the role of dependency theory
- Stopford and Strange's concept of "tripartite diplomacy"
- the role of NGOs
- the nature and effects of "globalisation" see P.Hirst and G.Thompson Globalisation in Question (2<sup>nd</sup> ed,1999); K.Ohmae The Borderless World (Fontana, 1991); D.Held et al Global Transformations (1999) especially chs 1 and 5.

##### (ii) The Economic Effects of MNE Investment:

##### Further Readings:

M. Brech & M. Sharp: Inward Investment: Policy Options for the UK (1984) Ch.3.

Hood & Young: Ch.5.

Dunning: Part 3 "The Impact of MNE Activity"

##### (iii)The Broader Background : Ideological Perspectives on the Effects of MNEs on State Economic Policy:

See Muchlinski pp.90-104. Further readings will be found in the footnotes to this section of the book.

- The Neo-Classical Market Approach
- The Keynesian Orthodoxy
- The Marxist Perspective
- The Role of Nationalism in International Political Economy
- The New International Economic Order
  - the right to self-determination
  - the right to development

UNGA Resolutions on the New International Economic Order: 13 (1974) ILM 715

UN Charter on the Economic Rights and Duties of States: 14 (1975) ILM 251

- The Environmental Perspective

UNTCMD International Environmental Law: Emerging Trends and Implications for Transnational Corporations (1993)

- The Rise of "Global Consumerism"

L.Sklair Globalization: Capitalism and its Alternatives esp.Chs.3, 5.

Note too Braithwaite and Drahos Ch.26. for a consumer oriented policy agenda. See further Y.Gabriel and T.Lang The Unmanageable Consumer (Sage, 2<sup>nd</sup> Ed, 2006).

- International Corporate Social Responsibility

Muchlinski pp.100-104, Dine Ch5. and see further Jennifer Zerk Multinationals and Corporate Social Responsibility (Cambridge University Press, 2006)

## (2) Bargaining Power, Sources and Sites of Regulation

Basic Reading:

### **The lawyers' perspective:**

Muchlinski: pp.104-121.

Muchlinski "Globalisation and Legal Research" 37 International Lawyer 221 (2003)

### **The economists' perspective:**

Dunning: Ch.21

Hood & Young: Ch. 6

### Further Reading:

- Vagts "The Multinational Enterprise: A New Challenge for Transnational Law" 83 Harv. L.R. 739 (1970)  
Wallace: Chs. 2, 5  
S.Rubin: "The International Firm and the National Jurisdiction" 68 AJIL 476 (1974)

On the nature of extraterritoriality conflicts:

- Litvak & Maule: 13 Jo. Conflict Res. p.305 (1969)  
Picciotto: 11 Int.Jo. of Soc. of Law 11 (1983)

### Questions:

1. What are the differences between the "transnational relations" approach to the study of international relations and traditional state-centred approaches to the subject? How does the "transnational relations" approach help in the study of relations between the MNE and nation-states?
2. What are the principal economic issues surrounding the activities of MNEs in host states?
3. Are the activities of MNEs on the whole beneficial or damaging to the economic policy aims of home and host states?
4. Distinguish between the "bargaining" and "dependency" approaches to MNE/host state relations. What are their relative strengths and weaknesses? What are their underlying theories of political economy?
5. Is economic independence from foreign investors possible in the modern world economy? If so at what price?
6. Are we wrong to concentrate on inter-state rather than inter-class relations in the study of the effects of MNEs on the international economy? What function do "environmentalism" and "consumerism" play in developing policy in this area?

7. What are the principal building blocks from which a policy on the regulation of MNEs should be built?
8. What is meant by the trade-off between "welfare" and "efficiency"? How does this relate to the evolution of a policy on the regulation of MNEs?
9. For economists what are the advantages and disadvantages of regulating MNE's :
  - (a) at the international level;
  - (b) at the regional level;
  - (c) at the national level;
  - (d) at the sub-national level?
10. What are the corresponding legal difficulties associated with regulation on these four levels?
11. Does international law act as an ultimate source of standards by which the legality of national policy responses to MNE activity should be judged?
12. What are the principal differences between home country and host country interests in the development of policy towards MNE's?
13. What are "extraterritoriality conflicts"? How do MNEs generate such conflicts?

## **5. Jurisdictional Limits of National Law and the Regulation of MNEs I: The Problem of Extraterritoriality and Prescriptive Jurisdiction; Establishing Personal Jurisdiction over the MNE Network:**

### Basic Reading:

Muchlinski: pp125-60

Dine: Ch 2

Brownlie: Principles of Public International Law (6th ed. 2003) Ch. 15

The cases and statutes cited under the further reading headings below. The leading cases and statutes are marked\*

### Further Reading:

A. D. Neale & M. L. Stephens: International Business and National Jurisdiction (1988).

D.Rosenthal & National Laws and International Commerce:

W.Knighton: The Problem of Extraterritoriality (1982)

Grossfeld & Rogers 32 ICLQ 931 (1983)

### (a) The Legal Bases for the Extraterritorial Regulation of MNEs:

#### (i) The Relevant Principles of State Jurisdiction in Public International Law:

Lotus case (1927) PCIJ ser.A note 10 p.18-19

#### (ii) The Approach of United States Law:

The main principles are summarised in:

\*US Restatement on Foreign Relations Laws (1987) ss 402,403, 414, 415, 441

### **The US "Effects" Doctrine in Antitrust Law:**

See: Dimitriou and Robertson [1995] 8 ECLR 461

\*The Alcoa Case 148 F.2d 416 (2d Cir. 1945)

\*Timberlane Lumberco v Bank of America 549 F 2d 597 (1976); 749 F 2d 1378 (9th Cir. 1984) cert. den. 105 S.Ct. 3514 (1985)

\*Mannington Mills v Congoleum Corp. 595 F 2d 1287 (1979)

- \*Hartford Fire Insurance Co v California US Sup.Ct. 28 June 1993: 113 S.Ct 2891 (1993)
- \*US Department of Justice Antitrust Enforcement Guidelines for International Operations April 1995: 34 ILM 1080 (1995)
- \*International Antitrust Enforcement Act 1994: 34 ILM 494 (1995).
- US-Canada Agreement on the Application of Competition and Deceptive Marketing Practices Laws 1995 35 ILM 309 (1996)
- \*Empagran SA v Hoffman La Roche 542 US 155, S.Ct.2359 (2004)

### **Use of Nationality Principle:**

- \*Fruehauf Case 5 ILM 476 (1966)

The Soviet Gas Pipeline Affair: see "Approach of EC Law" below

### **The Helms Burton Act and Iran Libya Sanctions Act**

- \*The Cuban Liberty and Democratic Solidarity Act 1996 (Helms Burton Act): US Public Law 104-114 12 March 1996: 35 ILM 357 (1996) Presidential Statement Suspending Title III: 36 ILM 216 (1997)

- \*Iran Libya Sanctions Act 1996: US Public Law 104-172 5 August 1996: 35 ILM 1273 (1996)

European Union Reaction:

- EU Demarches Protesting the Helms Burton Act: 35 ILM 397 (1996)

Council Regulation No2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based or resulting therefrom: OJ [1996] L 309/1; 36 ILM 125 (1997)

- EU-US Memorandum of Understanding: 36 ILM 529 (1997)

- Council of Ministers Common Position on Cuba: 36 ILM 213 (1997)

OAS Reaction:

- Inter-American Judicial Committee Opinion Examining the US Helms Burton Act: 35 ILM 1322 (1996)

National Laws Seeking to Combat Helms-Burton:

Cuba: 36 ILM 472 (1997)

Canada: 36 ILM 111 (1997) see to Canada-Cuba Declaration on Co-operation: 36 ILM 210

(1997)  
Mexico 36 ILM 133 (1997)

Academic Analysis and Debate:

Lowenfeld and Clagett 90 AJIL 419-440 (1996)  
Clagett 90 AJIL 641-644 (1996)  
Snyder and Agostini (1996) JWT 37

**The Sarbanes-Oxley Act**

Sarbanes-Oxley Act of 2002 HR 3763 23 January 2002

See further Peter Muchlinski “Enron and Beyond: Multinational Corporate Groups and the Internationalization of Governance and Disclosure Regimes” 37 Conn.LR. 725 at pp.745-51 (2005).

(iv) The Approach of English Law:

Libyan Arab Foreign Bank v Bankers Trust Co. [1988] 1 Lloyds Rep. 259;  
Libyan Arab etc. v Manufacturers Hannover [1988] 2 Lloyds Rep. p.494 [1989] 1 Lloyds Rep. 608  
Arab Bank plc v Merchantile Holdings Ltd [1994] 2 All ER 74 (ChD)

(v) The Approach of EC Law:

EC Comment on US Measures in Soviet Gas Pipe Affair 21 ILM 840 (1982)

(b) Establishing Jurisdiction to Prescribe, Adjudicate and Enforce:

(i) The UK:

\*Multinational Gas & Petrochemical Services Co. v Multinational Gas and Petrochemical Services Ltd [1983] 2 All E.R. 563; [1983] 3 WLR 492 (CA) comment by "W" in 41(1984) MLR p.87.

South India Shipping Corp. v Export Import Bank of Korea [1985] 1 WLR 585 CA [1985]; 2 All ER 219 CA  
Saab v Saudi American Bank [1998] 4 All ER 382 (QBD)  
Smith Kline & French Laboratories Ltd. v Bloch [1983] 2 All ER 72 (CA)  
SNI Aerospatiale v Lee Kui Jak [1987] 3 All ER 510 (PC)



- \*Airbus Industrie GIE v Patel [1998] 2 All ER 257 (HL)
- \*Adams v Cape Industries [1991] 1 All ER 929 (CA)
- \*Connelly v RTZ Corp plc [1996] 1 All ER 500 (CA) reversed [1997] 4 All ER 335 (HL)

### **The Cape Cases:**

- \*Lubbe et.al.v Cape plc CA 30 July 1998 unreported
- \*Group Action Afrika et.al.v Cape plc QBD 30 July 1999 (Buckley J.) [2000] 1 Lloyds Rep. 139 at 141;
- \*Lubbe et al v Cape plc [2000] 1 Lloyds Rep. 139 (CA) House of Lords judgment 20 July 2000 [2000] 2 Lloyds Rep383; [2000] 4 All ER 268.

for analysis see Muchlinski “Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases” 50 ICLQ 1 (2001).

### **The End of Forum Non Conveniens in UK Law (?):**

Owusu v Jackson [2001] 1 QB 68; [2002] ECR I- 5925; before ECJ: Case C-281/02 Judgment of ECJ 1 March 2005 available from ECJ website <http://curia.eu.int>.

(ii) The US:

### **Service of Documents:**

Volkswagenwerk v Schlunk 27 ILM 1092 (1988)  
The St. Gobain Case 636 F.2d 1300 (D.C. cir. 1980) or 20 (1981) ILM p.597  
Rio Properties v Rio International Interlink (US CA 9<sup>th</sup> Cir 20 March 2002) 41 ILM 987 (2002)

### **Business Presence:**

\*International Shoe Co. v Washington 326 US 310 (1945)  
World-Wide Volkswagen v Woodson 444 US 286 (1980)  
 \*Asahi Metal Industry Co. v Superior Court of California 26(1987) ILM p.702; 74 L.Ed. 2d 92 (1987)  
First American Corp v Price Waterhouse (Unrep 2<sup>nd</sup> Cir, 14 July 1998)

### **Forum Non Conveniens:**

Piper Aircraft v Reyno 454 US 235 (1981)  
 \*In Re Union Carbide Gas Plant Disaster At Bhopal India Opinion and Order 12 May 1986 D.Ct. SDNY (Keenan J.) 634 F.Supp. 842 (1986), 25 ILM p.771 (1986); USCA decision: affd as modified 809 F.2d 195 (USCA 2d Cir); 26 ILM 1008 (1987); cert.den. 108 S.Ct 199 (1987).

Comment: see Symposium on Bhopal in 20 Texas Int'l L.J. 267-339 (1985); Indian Law Institute Inconvenient Forum Convenient Catastrophe The Bhopal Case (1986) introduction

by Upendra Baxi;  
Muchlinski: "The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors" 50 MLR 545 (1987).

**FNC in recent human rights and environmental cases:**

Wiwa v Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC USCA 2d Cir. 14 September 2000: 2000 US App.LEXIS 23274.

Aguinda et.al. v Texaco 945 F.Supp. 625 (2001) upheld on appeal 303 F.3d. 470 (USCA 2<sup>nd</sup> Cir. 16 August 2002).

Sarei v Rio Tinto Zinc 221 F. Supp. 2d 1116 (CD Cal 2002) ). The plaintiffs brought a number of claims for violations of human rights and environmental damage against the defendant arising out of the ten year long Bourgainville uprising between 1988-98. The District Court dismissed the claims on the ground that the US Government had expressed a political interest in the case, which bound the court not to proceed with the action. On appeal this finding was reversed (Judge Bybee dissenting): *Sarei v Rio Tinto* No. 02-56256 CV-00-11695-MMM Filed 7 August 2006 (USCA 9<sup>th</sup> Cir).

Flores v Southern Peru Copper 253 F. Supp 2d 510 (SDNY 2002) FCN issue not reviewed in 2<sup>nd</sup> Circuit decision: 343 F. 3d 140 (2d Cir, 2003).

Prebyterian Church of Sudan v Talisman Energy 244 F Supp. 2d 289 (SDNY 2003)

For discussion see S.Joseph Corporations and Transnational Human Rights Litigation (Hart, 2004) Ch.4.

(iii) The EC:

Personal Jurisdiction in Antitrust Cases:

The Dyestuffs Case [1972] CMLR 557

Continental Can Case [1973] 12 CMLR 199

Commercial Solvents Case [1974] 1 CMLR 309

\*Wood Pulp Case [1985] 3 CMLR 474; affd by ECJ [1988] 4 CMLR 901

\*Zinc Producers Case [1985] 2 CMLR 108

Aluminium Imports From Eastern Europe [1987] 2 CMLR 813.

(iv) Argentina:

Draft Code of Private International Law Art. 10:

"Multinational Enterprises, such as conglomerates or holding companies, operating within the jurisdiction of several countries, despite the pluralistic nature of their legal personality, shall be considered economic units, and their activities shall be evaluated in the light of economic realities respecting their subjection to Argentine law."

For full text of Code see 24 ILM p.269 et.seq (1985). For background see Goldschmidt (1972) II Hague Rec. 201.

See too:

Deltec case discussed in Gordon 6 Lawyer of the Americas 320 (1974)  
Deltec Banking Corp v Compania Italo-Argentina de Electricidad SA 171 NYLJ 18 col.1.  
April 3 1974.

Questions:

1. How far does international law accept the right of a state to exercise its jurisdiction extraterritorially?
2. Under what circumstances do the activities of MNEs generate potential conflicts of jurisdiction between the states in which they operate?
3. Why has the US sought to exercise its jurisdiction extraterritorially? How does US law justify this assertion of jurisdiction? Has the US mitigated its claims to extraterritorial jurisdiction in recent years? If so, how has this manifested itself in US law and administrative practice?
4. What is the "effects doctrine" of state jurisdiction? Has the EC adopted such an approach to jurisdictional issues?
5. Is the existence of a parent/subsidiary relationship between the resident and non-resident units of a MNE a sufficient basis for the exercise of extraterritorial jurisdiction?
6. How may the "enterprise entity" theory be used by a state, in which units of a MNE operate, to assert jurisdiction over non-resident units of the MNE? How useful is this theory in determining when the non-resident unit of a MNE should be subjected to the jurisdiction of the regulating state, as compared to approaches based on "lifting the corporate veil" between parent and subsidiary?
7. What role do jurisdictional issues play in controlling liability litigation against MNEs? Is this a satisfactory situation?

## **6. Jurisdictional Limits of National Law and Regulation II: Enforcing National Laws over the MNE Network and Alternative Approaches to the Jurisdictional Issue:**

Basic Reading:

Muchlinski pp.160-76

(1) Disclosure of Evidence in Litigation Involving MNEs:

(i) US Decisions:

### **General Principles:**

\*Third US Restatement on Foreign Relations Law (1987) s.442.  
Societe Internationale v Rogers (Interhandel Case) 357 US 197 (1958)

### **Tax Investigations:**

Marc Rich & Co. v US 707 F.2d. 663 (2nd Cir 1983)  
US v Toyota Corp 569 F. Supp. 1158 (1983)

### **Antitrust:**

\*International Antitrust Enforcement Assistance Act 1994: 34 ILM 494 (1995)

C.D.Wallace “Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment” 5 JIEL 353 (2002).

### **Disclosure of Confidential Bank Records:**

\*Bank of Nova Scotia Case 740 F 2d 817 (11 Cir. 1984) comment: 9 Can.Bus. Law Jo. 497 (1984) [cf. US-UK Cooperation Agreement Concerning the Cayman Is. 26 ILM 536 (1987)]

(ii) English Law:

### **Disclosure of Secret Bank Records:**

\*MacKinnon v Donaldson Lufkin Corp. [1986] 1 All ER 653

### **Disclosure of Internal Corporate Documents:**

\*Lonrho v Shell Petroleum [1980] 2 WLR 367 affd. [1980] 1 WLR 627 (HL)  
Re Mid East Trading Ltd; Lehmans Brothers v Phillips [1998] 1 All ER 577 (CA).

Evidence (Proceedings in Other Jurisdictions) Act 1975 and the Westinghouse Case:

In Re Westinghouse Electric Corp. [1978] 2 WLR 91 (HL); also reported sub nom. Rio Tinto Zinc v Westinghouse [1978] 1 All ER 434 (HL)

### **Protection of Trading Interests Act and the Laker Litigation:**

#### \*Protection of Trading Interests Act 1980

Comment: Marston 14 (1980) JWTL p.461; Lowe 75 AJIL 257 (1981); Lowenfeld 75 AJIL 629 (1981).

\*British Airways Board v Laker Airways Ltd. [1984] 3 All ER 39;

\*Midland Bank v Laker Airways [1986] 1 All ER 526;

#### (iii) Swiss Confidentiality Laws:

SEC v Banca Nella Svizzera Italiana 92 FRD 111 (SDNY 1981)

Swiss Confidentiality: Judicial Assistance in The Santa Fe Case Opinion Swiss Sup.Ct. 22 ILM p.785 (1983) ; Second Case 24 ILM 745 (1985). For the story of how the Santa Fe case was resolved see Terry Dodsworth 'Cutting the Swiss Web' in Financial Times 10.4.86.

Memorandum of Understanding Between US and Switzerland on Co-operation in the Field of Insider Trading: 22(1983) ILM p.1 comment 22(1983) Colum J. Transnat.L. p.303 (see too the Memorandum of Understanding between US and Switzerland in 27 ILM 480 (1988))

The current SEC approach to international cooperation in the 1988 Insider Trading & Securities Fraud Enforcement Act.

P. Haseltine "International Regulation of Securities Markets etc" 36 ICLQ 307 (1987)

Baltic "The Next Step in Insider Trading Regulation: International Cooperative Efforts in the Global Securities Markets" 23 Law & Pol.Int'l.Bus. 167 (1991-1992)

#### (2) International Considerations:

Hague Convention on the Taking of Evidence abroad 1972: 9 ILM 87 (1970); Report on Convention: 24 ILM 1668 (1985); Amram 63 (1969) AJIL 521; US Delegation Report 8 (1969) ILM 785

MMB v Walker 25 (1986) ILM 803 et. seq.

Aerospatiale Case US Sup. Ct. 15 June 1987 26 (1987) ILM 1021 submissions of interested states and amicus briefs: 25 (1986) ILM 1475 et seq.

For a useful analysis of the theoretical issues behind these cases see Oxman 37 U. Miami L. Rev. 733 (1983) and Collins "The Hague Evidence Convention and Discovery: A Serious Misunderstanding?" 35 ICLQ 765 (1986)

The effect of the draft Hague Convention on Civil Jurisdiction and Enforcement of Judgments: <http://www.hcch.net/workprog/jdgm.html>.

(3) The Internet, MNEs and Jurisdiction:

Uta Kohl "Eggs, Jurisdiction and the Internet" 51 ICLQ 555 (2002).

Dow Jones v Gutnick [2002] HCA 56 10 December 2002: 42 ILM 41 (2003).

Questions:

1. Why has the UK retained a territorial approach to jurisdiction? Is the Protection of Trading Interests Act 1980 compatible with this policy on state jurisdiction? How has Re Mid East Trading Ltd; Lehman Brothers v Phillips affected this approach?
2. What are the principal problems relating to the disclosure of information and evidence that may arise in litigation involving MNE's? How can these problems be overcome without resort to the unilateral assertion of extraterritorial jurisdiction by the forum state?
3. How might the draft Hague Convention on Civil Jurisdiction and Judgments affect the development of the law in this area?
4. What effect has the development of the Internet had on issues concerning jurisdiction over the activities of MNEs?

## **7. Control over Entry and Establishment of MNEs:**

### Basic Reading:

Muchlinski: Ch.5.

The statutes mentioned in the further readings below.

### Further Reading:

- (a) Total Exclusion of Foreign Investment and Sectoral Exclusion:

### **Strategic Restrictions on Foreign Takeovers of US Firms:**

The US Omnibus Trade and Competitiveness Act 1988 Public Law 100-418 August 23 1988 102 Stat.1107 s.5021 in 28 ILM 460 (1989). Reinstated by Defense Production Act Extension Amendments Pub.Law. 102-99, 105 Stat. 487 17 August 1991. Implementing Regulations of 21 November 1991: 31 ILM 424 (1992). For analysis see Holmer et.al. 23 Law & Pol.Int'l Bus 593 (1992).

EC Concerns over US FDI policy: 31 ILM 467 (1992)

US President's Statement on FDI policy: 31 ILM 488 (1992)

The recent CNOOC attempt to take over UNOCAL: see “Chinese case puts secretive panel in spotlight” *Financial Times* 4 August 2005 p.22 and “The dragon tucks in: Special Report on Chinese companies abroad” *The Economist* 2 July 2005 p.70-72.

### **Japan:**

Foreign Exchange and Foreign Trade Control Law (Law No.228, December 1, 1949 as amended) Chapter V Arts.26-30; Cabinet Decision Concerning Policy Applications on Inward Direct Investments (Decision of Cabinet Meeting of 26th Day of December 1980) in **Japan: Laws, Ordinances and Other Regulations concerning Foreign Exchange and Foreign Trade** (Chuo Shuppan Kikaku Co. 1990) at (A)-20 to (A)-27 and (A)-206. See too Sakamoto "Japan's outward and inward FDI" The CTC Reporter No.27(Spring 1989) 64 at 67.

- (b) Laws Restricting Foreign Shareholdings in National Companies:

### **Nigeria:**

1977 Nigerian Enterprises Promotion Act see Megwa 21 Col.Jo. Transnat.L 487 (1983); Osunbor 3 ICSID Review p.38 (1988); Beveridge 40 ICLQ 302 (1991). Nigerian Enterprises Promotion Act 1989 (No 54 of 1989) CAP 303 Laws of the Federation

of Nigeria Vol 23. (Rev ed, 1990) Repealed by Nigerian Enterprises Promotion (Repeal) Decree 1995 (No 7 of 1995)

Nigerian Investment Promotion Commission Decree 1996 comment: Littenberg [1995] IFLRev.16-17; Obayomi [1997] JBL 593.

### **India:**

s.29 Foreign Exchange Regulation Act 1973 (as amended in 1993)

See Saxena & Kapoor 13 (1979) JWTL p.170; 14 Syracuse J. Int'l Law & Comm. 519

D.S. Swamy: Multinational Corporations and the World Economy (1980) Ch. 1 & 2

D.Encarnation: Dislodging Multinationals: India's Strategy in Comparative Perspective (1989)

V.Joshi and I.D.M.Little India's Economic Reforms 1991-2001 (Oxford Univ.Press, 1996)

For the reforms of 1991 see: Press Information Bureau Government of India: Press Release of 24 July 1991 "New Industrial Policy Announced" reproduced in UNCTC Foreign Direct Investment and Technology Transfer in India (UN Doc ST/CTC/117, 1992) Annex VII p.128.

see further Singhania [1995] 6 ICCLR Supp.i-iv.

### **Privatisation of State-Owned Companies and Restrictions on Foreign Ownership**

#### **U.K.**

The "Golden Share": See C.Graham and T.Prosser Privatizing Public Enterprises (1991) Ch.5. There is now a review of this policy.

#### **The French Privatisation Programme**

Law Concerning the Privatisation of Nationalised Enterprises 6 August 1986 Art. 10 see 26 ILM 138 8 at 1399 (1987)

comment by Graham and Prosser op.cit.

The 1993 Privatisation programme revived the 20% maximum foreign ownership limit for non-EC purchasers contained in the 1986 law, and the golden share was revived in a more powerful form in that it is of indefinite duration.

#### **EU Reaction**

Case C-58/99 Commission v Italy ECJ 23 May 2000 <http://curia.eu.int>

Cases C-503/99, 483/99, 367/98 Commission v Belgium, France and Portugal ECJ 4 June 2002, Advocate-General's Opinion 3 July 2001, Press Release 49/02 4 June 2002 <http://curia.eu.int> judgments reported in [2002] 2 CMLR 1213-1280.

Case C-463/00 Commission v Spain [2003] 2 CMLR 557.

Case C-98/01 Commission v United Kingdom [2003] 2 CMLR 598.



(d) Restrictions on Modes of Operation: Joint Ventures and Joint Management

**Socialist Countries and the Practice of Joint Ownership Techniques:**

The first to adopt a joint venture law was Hungary in 1972. Yugoslavia, Poland, Romania, and Bulgaria followed during the 1970's. In 1979, the People's Republic of China (PRC) adopted its so-called "open door" policy of attracting foreign capital by means of the new law on Chinese-Foreign Joint Ventures and its accompanying Regulations. During the 1980's Czechoslovakia decided to enact a joint venture law as did Ethiopia, North Korea, Cuba and Vietnam. Most notably, the Soviet Union has changed its policy on Western investment and passed a joint venture law in January 1987, in line with the new policy of restructuring (perestroika) in foreign economic affairs. Only the German Democratic Republic (GDR) resisted the adoption of such laws until the Communist government lost power in 1989. Albania, the last socialist state to pursue a policy of economic autarchy, has recently decided to permit inward investment through joint ventures. [Financial Times 10 May 1991 p.6. "Albania starts to lift barriers in investment drive"].

**Peoples Republic of China:**

(For latest versions of these laws see <http://english.mofcom.gov.cn> )

The Law on Joint Ventures July 1, 1979: 18 (1979) ILM p.1163; as amended April 4 1990: Beijing Review May 7-13 1990 p.27-28 and 2001 see website above.

Regulations for Implementation of Law on Joint Ventures Sept. 20, 1983: 22(1983) ILM 1033

Law on Enterprises Operated Exclusively with Foreign Capital: 12 April 1986 Beijing Review No. 18 May 5 1986 p.16;

Provisions of the State Council Encouraging Foreign Investment: 11.10.86 Beijing Review No. 43 Oct. 27 1986 p.26.

Chinese Co-operative Joint Venture Law: April 1988. Beijing Review June 20-26 1988 p.29.

Company Law 1993: Wong 25 HKLJ 263 (1995); Ong and Baxter "A Comparative Study of Fundamental Elements of Chinese and English Company Law" 48 ICLQ 88 (1999).

Arbitration Law 1995 Part Seven: 34 ILM 1650 at 1661 (1995)

Provisional Regulations on Direction and Guides for Foreign Investment 1995: Li Mei Qin 24 IBL 42-3 (1996)

See further: Jia Wei Chinese Foreign Investment Laws and Policies: Evolution and Transformation (Quorum Books, 1994); Xu Xiangmin and C.Chew 10 BJB&FL 554-9 (1995); Chan and Riley 6 ICCLR Supp.viii-xii (1995)

## Post-Socialist States: Three Case Studies:

### USSR/Russian Federation:

Decree on Joint Enterprises with Western and Developing Countries 26(1987) ILM p.749

Foreign Investment Law 4 July 1991: 31 ILM 397 (1992)

Foreign Investment Law 9 July 1999: 39 ILM 894 (2000)

See further:

World Bank: Foreign Direct Investment in the States of the Former USSR (Washington DC, 1992).

### Poland:

In Poland foreign investment was initially limited to so-called "Polonia" investments by persons of Polish origin resident outside Poland under the Decree of 14 May 1976 of the Polish Council of Ministers, later replaced by Decree No.146 of 1982 on principles for conducting business by foreign legal and physical persons in Poland in the field of small industry. Large scale joint ventures were permitted for the first time under the Law of 23 April 1986 on companies with foreign capital participation. See further: Scriven 14 JWTL 424 (1980); Burzynski & Juergensmeyer 14 Vanderbilt Jo. of Transnat. Law 17 (1981); Greenberg 16 Geo. Washington Jo. of Int. Law & Econ. 377 (1982); Weralski 23 **European Taxation** 144 (1983); Jadach 18 Cornell Int.L.Jo.63. (1985); Mahmassani 3 ICSID Rev-FILJ (1988) p.286. The law was amended at the end of 1988. Law No.325 of 23 December 1988, which came into force on 1 January 1989, dropped a previous condition that Polish partners in a joint venture should hold a majority share and empowers the Polish investment authorities to permit inward direct investments through wholly-owned subsidiaries: **Dziennik Ustaw Polskiej Rzeczypospolitej Ludowej** No 41 of 28 December 1988, English translation in 28 ILM 1518 (1989). See too Gordon "The Polish Foreign Investment Law of 1990" 24 Int'l Law. 335 (1990).

The law currently in force is the Foreign Investment Act 1991 Act of 14 June 1991: **Dziennik Ustaw Rzeczypospolitej Polskiej** [1991] No.60 4 July 1991 item 253, English translation in 30 ILM 871 (1991) which brings Polish practice into line with a free-market economy. It allows unrestricted foreign investment except for certain narrowly-defined areas. It brings foreign investment issues under the control of the Office of Privatisation. This law was amended in 1996. **Inter alia** this removed the protected sectors listed in s.4.of the 1991 law.

### Czech Republic

Commercial Code 1991 Part I, Ch.II, ss 21-26.

Privatisation Law 1991 Law No.92/91

Muchlinski "A Case of Czech Beer: Competition and Competitiveness in the Transitional Economies" 59 MLR 658 (1996)

(e) "Screening" Laws:

Wint "Promoting Transnational Investment: Organising to Service Approved Investors" 2 Transnational Corporations 71 (1993)

**Ghana:**

Investment Code 1985 Law 116 of 13 July 1985, summary in UNCTC Transnational Corporations and World Development (1988) at pp.317-318.

Comment: Laryea 39 ICLQ 197 (1990)

This approach has been superseded in the investment promotion oriented revision of Ghana's foreign investment law:

Investment Promotion Centre Act 1994 Act 478.comment Ubezonu 23 IBL 419 (1995)

**Mexico:**

Foreign Investment Act 1993: 33 ILM 207 (1994)  
analysis Murphy 10 ICSID Rev-FILJ 54 (1995)

**Canada:**

Foreign Investment Review Act 1973-74

This statute was replaced by the Investment Canada Act 1985, which revises screening policy of the earlier statute. Canada is currently debating the introduction of a US style national security review power: see Bill C-59 Investment Canada Amendment Bill June 2005.

Questions:

1. What are the difficulties associated with a policy of complete exclusion of inward direct investment from the host state?
2. Which sectors of the economy of a host state are most often restricted to foreign investors? What is the role of the "national treatment" principle in regulating such restrictions?

3. What are the major objectives of "indigenisation" laws? Have such laws achieved their avowed objectives, and, if not, what has been their effect?
4. Why have socialist states used joint-venture laws as a principal technique for controlling inward investment?
5. What are the most common features of "screening" laws? What kinds of legal problems do they create?

## **8. Liberalisation of Entry and Establishment:**

### Basic Reading:

Muchlinski: Ch.6.

### Further Reading:

- (i) Industry Aids:

### **United Kingdom:**

#### **Regional Aid:**

Industrial Development Act 1982 as amended in 1988 by the Regional Development Grants (Termination) Act see SI 1984/1845.

The underlying policy is discussed in "DTI the Department for Enterprise" (Cm 278 12 January 1988).

Assistance is currently provided through the Selective Finance for Investment in England (SFIE) scheme in England, and by the Regional Selective Assistance (RSA) scheme in Scotland and Wales

The application of assistance to designated Assisted Areas is subject to the regional aid rules of the EC: State Aid Action Plan 'Less and better targeted state aid: a roadmap for state aid reform 2005-2009' (Consultation document), European Commission, 2005 and DTI Review of the Assisted Areas Stage I Identifying Criteria (DTI Consultation Paper 15 February 2006) available at [www.dti.gov.uk](http://www.dti.gov.uk)

The new European Commission guidelines on regional aid were adopted on 21st December 2005. Guidelines on National Regional Aid for 2007-2013 (2006/C 54/08) OJ [2006] C 54/13 In the main, the new Guidelines lower permitted limits on aid (as a percentage of eligible costs) compared with current guidelines. Different aid ceilings will apply in different categories of eligible areas across the Community. The guidelines also reduce the proportion of the EU population covered by areas where regional aid is permissible. They require that Member States submit regional aid maps to the Commission as soon as possible in order for a new map to be operational by 1st January 2007.

#### **Development Agencies:**

Scottish Enterprise, Established under the Enterprise and New Towns (Scotland) Act 1991 (1990 Chapter 35) s.1. available at [http://www.opsi.gov.uk/acts/acts1990/Ukpga\\_19900035\\_en\\_2.htm#mdiv1](http://www.opsi.gov.uk/acts/acts1990/Ukpga_19900035_en_2.htm#mdiv1).

The Welsh Assembly Government's Invest Wales Department, The powers of the Welsh Development Agency were transferred to the Welsh Assembly Government under the

Government of Wales Act 1998 (1998 Chapter 38). See further the Welsh Assembly Government website at <http://new.wales.gov.uk/topics/businessandeconomy/?lang=en>

Invest Northern Ireland Established under the Industrial Development Act (Northern Ireland) 2002 (2002 Chapter 1) available at <http://www.opsi.gov.uk/legislation/northernireland/acts/acts2002/20020001.htm>. See too the Invest Northern Ireland website at <http://www.investni.com/index.htm>.

### Regional Development Agencies Act 1998

#### **Ireland:**

Industrial Development Authority: Guide to Tax and Tax Reliefs in Ireland (Published Annually)

#### **Singapore:**

Aids to "pioneer" industries; see: generally: Hafiz Mirza Multinationals and the Growth of the Singapore Economy (1986)

Singapore International Chamber of Commerce Investors Guide to the Economic Climate of Singapore (Published Annually)

#### (ii) Special Economic Zones:

ESCAP/UNCTC An Evaluation of Export Processing Zones in Selected Asian Countries (1985) UN Doc. ST/ESCAP/395

The ILO has defined EPZs as "industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being re-exported". With developments in information technology, "imported material" would also include "electronic data" today, as well as, call centres located in zones. EPZs have evolved from initial assembly and simple processing activities to include high tech and science parks, finance zones, logistics centres and even tourist resorts. Their physical form now includes not only enclave-type zones but also single-industry zones (such as the jewelry [*sic*] zone in Thailand or the leather zone in Turkey); single-commodity zones (like tea in Zimbabwe); and single-factory (such as the Export Oriented Units in India) or single-company zones (such as in the Dominican Republic)." <http://www.ilo.org/public/english/dialogue/sector/themes/epz.htm> .

See too Michael Likosky *The Silicon Empire: Law Culture and Commerce* (Aldershot, Ashgate, 2005) Ch.4 "Dual Legal orders" tracing the history of policy enclaves and offering a detailed analysis of the EPZ concept. The remainder of the book assesses Malaysia's use of dual legal order strategies, including more recently, EPZ and science

park policies in attracting high technology FDI in the information technology industry.

(iii) Attempts to Control Host State Restrictions on Entry and Establishment at the International Level

See generally: UNCTAD Series on Issues in International Investment Agreements: Scope and Definitions(1999); Admission and Establishment (1999); National Treatment (1999); Fair and Equitable Treatment (1999). All on your CD-Rom.

**Japan-US Policies and Measures on Investment:**

Inward Direct Investment and Buyer Supplier Relationships: 34 ILM 1341 (1995)  
Financial Services: 34 ILM 617 (1995)  
Insurance: 34 ILM 661 (1995)

**OECD:**

Code on the Liberalisation of Current Invisible Operations [OECD/C(61)95] (hereafter Invisibles Code); Code on the Liberalisation of Capital Movements [OECD/C(61)96] (hereafter Capital Movements Code). The Codes are regularly updated by Decisions of the OECD Council to reflect all changes in the positions of Members. The updated Codes are periodically republished. The current editions are Invisibles Code (September 2004) Capital Movements Code (October 2005). Both are available for download at [http://www.oecd.org/document/63/0,2340,en\\_2649\\_34887\\_1826559\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/63/0,2340,en_2649_34887_1826559_1_1_1_1,00.html) For background to the Codes see: OECD OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations User's Guide (Paris, OECD 2003) available for download at [http://www.oecd.org/document/63/0,2340,en\\_2649\\_34887\\_1826559\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/63/0,2340,en_2649_34887_1826559_1_1_1_1,00.html); Forty Years' Experience with the OECD Code of Liberalisation of Capital Movements (Paris, OECD, October 2002) summary and conclusions available for download at the above website reference.

**Free Trade and Customs Areas**

EC Treaty: Arts. 43-48, 199 and see the UK and French privatisations above.

R v HM Treasury ex parte Daily Mail and General Trust plc [1989] 1 All ER 328 (ECJ) comment: Lever 26 CMLR 327 (1989).

Centros Ltd v Erhvervs OG Selskabsstyrelsen [1999] 2 CMLR 551 (ECJ). Analysis Looijstijn-Clearie 49 ILCQ 612 (2000)

Royal Bank of Scotland v Greek State [1999] 2 CMLR 973 (ECJ).

Re Registration in Austria of a Branch of an English Company: S v Companies Registrar Graz (Austrian Oberster Gerichtshof) [2001] 1 CMLR 995

Baars v Inspecteur etc [2002] 1 CMLR 1437.

In Re the “Open Skies Agreement” Commission v United Kingdom [2003] 1 CMLR 143.  
Uberseering BV v Nordic Construction Company Baumanagement GMBH (NCC) [2005] 1 CMLR 1.  
Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd Case C-167/01 [2005] 3 CMLR 937

The issue of reciprocity under the EC Directives on Banking and Insurance.

US-Canada Free Trade Pact: 27 ILM 281 (1988) see esp. Chapter 16 "Investment" Arts.1601-1611 and Annex 1607.3.(amending the application of the Investment Canada Act to US investors).

North American Free Trade Agreement: Part Five: 32 ILM pp.639-670 (1992).

### **The WTO and Investment Issues**

Final Act of the Uruguay Round GATT Doc.MTN/FA 15 December 1993 extracts in 33 ILM 1 (1994) (extracts to be distributed from the General Agreement on Trade in Services (GATS: see 33 ILM 44 (1994)); the Agreement on Trade Related Intellectual Property Measures (TRIPS: see 33 ILM 81 (1994)) and Trade Related Investment Measures (TRIMs: not reproduced in ILM)). Also in CD-Rom Compendium vol.1.

See further Second Protocol to GATS and Decisions on Financial Services 35 ILM 199 (1996)

Telecoms Agreement: 36 ILM 354 (1997)

### **Analysis:**

Footer 43 ICLQ 661 (1994) (on GATS)

A.Lehmann Liberalising Investment Policies (RIIA Discussion Paper No.59 1995)

M.Trebilcock and R.Howse The regulation of International Trade (Routledge, 3rd Ed, 2005) Chs 11-13.

J.Jackson The World Trading System (MIT Press, 2nd Ed, 1997) Ch.12.

### **Dispute Settlement and Market Access Issues**

#### **The WTO Dispute Settlement Understanding:**

Trebilcock and Howse Ch.3.

Jackson Ch.4.

#### **Market Access Issues in Case-Law:**

(All available at [www.wto.org](http://www.wto.org))



The Bananas Case Report of the Panel 22 May 1997 (WT/DS27/R/USA) Appellate Body 22 August 1997: 37 ILM 243 (1998)

Japan – Measures Affecting Consumer Photographic Film and Paper (WT/DS44/R) Panel Report adopted 22 April 1998

Indonesia - Certain Measures Affecting the Automobile Industry (WT/DS 44/R) Panel Report adopted 23 July 1998.

Mexico – Measures Affecting Telecommunications Services (WT/DS 204/R) Panel Report adopted 2 April 2004.

US – Measures Affecting the Cross Border Supply of Gambling and Betting Services (WT/DS 285/AB/R) Appellate Body Report adopted 7 April 2005.

### Questions:

1. What are the characteristics and functions of special economic zones in the regulation of foreign investment?
2. What are the underlying policy justifications for offering investment incentives to foreign investors? Do they work in achieving their objectives? Are such incentives necessary?
3. How far do multilateral arrangements for international economic integration restrict the freedom of states to determine whether to permit the entry and establishment of foreign investors within their territory?
4. Are the investment aspects of the Uruguay Round Final Act no more than an attempt by capital exporting states to weaken the power of capital importing states?
5. Are NAFTA and the EC likely to become highly restrictive of inward investment from outside their respective regions?
6. How can the WTO dispute settlement procedure be used as a means of extending market access for MNEs?
8. What are the main substantive and procedural principles to be drawn out of the recent NAFTA Arbitrations? Do they go too far in limiting state sovereignty over essential regulatory activities?

## **9. Regulation Through Company Law I: Group Liability, Network Liability and Directors Duties:**

### Basic Reading:

Muchlinski: Ch.8.

Janet Dine: The Governance of Corporate Groups (Cambridge University Press, 2000).

### Further Reading:

#### (a) The Limited Liability Corporation and the Corporate Group:

T.Hadden: The Control of Corporate Groups Chs. 1-3

Hofstetter: "Parent Responsibility for Subsidiary Corporations: Evaluating European Trends" 39 ICLQ 576 (1990).

R. Tricker: Corporate Governance (1984) Ch. 7-9

Dobson: "Lifting the Veil in Four Countries: The Law of Argentina, England, France and the US" 35(1986) ICLQ 839

P.I.Blumberg: "The Corporate Entity in an Era of Multinational Corporations" 15 Del.J.Corp.L. 285 (1990), and The Multinational Challenge to Corporation Law (Oxford, 1993).

Sarah Joseph: Corporations and Transnational Human Rights Litigation (Hart, 2004) Ch.7.

Symposium: The Changing Face of Parent and Subsidiary Corporations: Entity vs Enterprise Liability 37 Connecticut LR 605-817 (No 3 Spring 2005)

#### (b) Lifting the "Corporate Veil": Some Selected Approaches:

##### (i) EC Law:

The Dyestuffs Case [1972] CMLR 557 comment Mann 22(1973) ICLQ 35 Acercob 36 MLR 317

Continental Can Case [1973] 12 CMLR 199

Commercial Solvents Case [1974] 1 CMLR 309

Wood Pulp Case [1985] 3 CMLR 474 affd ECJ [1988] 4 CMLR 901

Zinc Producers Case [1985] 2 CMLR 108

##### (ii) US Law:

Lowendahl v Baltimore & Ohio RR 6 NE 2d 56 aff'd 7 NE 2d 704

The Amoco Cadiz [1984] 2 Lloyds Rep. 304

Moffatt v Goodyear Tyre Co. 652 SW 2d 609 (1983) (Texas C.A.)

US v Bestfoods 524 US 51, 141 L. Ed. 2d 43, 118 S. Ct. 1876 (1998).

Larry Bowoto v Chevron Texaco Corp Case No C-99 2506 SI 2004 US Dist LEXIS 4603 (ND Cal, 2004).

Sinaltrainal v Coca Cola 256 F. Supp. 2d 1345 (SD Fla 2003)

(iii) English Law:

Gower: Principles of Modern Company Law (7th ed, 2003) Ch. 8

Multinational Gas Case [1983] 2 All ER 563; [1983] WLR 492

Comment: "W" 47 (1984) MLR p.87

Adams v Cape Industries [1990] Ch.433; [1991] 1 All ER 929.

See further Baughen "Multinationals and the Export of Hazard" 58 MLR 54 (1995).

Yukong Line of Korea v Rendsburg Investment Corp of Liberia (No.2.) [1998] 4 All ER 82 (QBD).

Re Polly Peck International plc [1996] 2 All ER 433 (ChD).

### **The UK Company Law Review and Group Liability:**

Muchlinski "Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review" 23 *Company Lawyer* 168 (2002).

(iv) The Bhopal Case:

Westbrook: 20 *Texas Intl. L.J.* 321 (1985)

Muchlinski: 50 MLR 545 (1987)

Abraham and Abraham: 40 *ICLQ* 334 (1991)

(iv) Australia:

Briggs v James Hardie (1989) 16 *NSWLR* 549 (CA NSW)

CSR v Wren (1997) 44 *NSWLR* 463 (CA NSW)

See further I.Ramsay and D.Noakes "Piercing the Corporate Veil in Australia" 19 *Company and Securities Law Journal* 250 (2001)

### **Specialised Corporate Group Laws:**

German Joint Stock Corporation Act 1965:

Wiedemann "The German Experience with the Law of Affiliated Enterprises" in K.Hopt (ed.): The Legal and Economic Analysis of Multinational Enterprises Vol. II 1982 p.21

Hoffstetter: op.cit above

Lutter: [1985] *JBL* 499

Sargent: 10 Can. Bus. L. Jo. 327 (1985)  
Rene Reich Graefe "Changing Paradigms: The Liability of Corporate Groups in Germany"  
37 Connecticut LR 785 (2005)

The European Company Statute:

See Topic 2.

(c) Liability of Directors to Minority Shareholders and Creditors:

R. Tricker: Corporate Governance (1984) Ch. 13

Hadden: Corporate Groups Ch. 5

Griggs and Lowry "Minority Shareholders Remedies: A Comparative View" [1994] JBL  
463.

(i) US Practice:

Zahn v Transamerica Corporation (1947) 162 F. 2d. 36

Sinclair Oil Corporation v Levien (1971) 280 A. 2d. 717

(ii) UK Practice:

### **Minority Shareholders:**

UK Companies Act 1985 s.517, 459, 425, 428

Scottish Co-operative Wholesale Society Ltd. v Meyer [1959] AC 324

Charterbridge Corporation Ltd. v Lloyds Bank Ltd. [1970] Ch. 62

Multinational Gas and Petrochemical Co. v Multinational Gas and Petrochemical Services Ltd. [1983] 3 WLR 492

Lonrho v Shell Petroleum Co.Ltd. [1980] 2 WLR 367; affd. [1980] 1 WLR 627

Arab Bank plc v Merchantile Holdings [1994] 2 All ER 74

O'Niell v Phillips [1999] 2 All ER 961 (HL)

### **Creditors:**

Insolvency Law and Practice (Cork Committee) Cmnd. 8558 (1982), Ch. 51

UK Insolvency Act 1986 s.213, 214

Re Hydrodan(Corby) Ltd [1994] BCC 161 noted [1994] JBL 609.

Secretary of State for Trade and Industry v Deverell [2000] 2 All ER 365 (CA)

Re Augustus Barnett & Co. [1986] BCLC 170 noted Prentice (1987) 103 LQR 11

Kleinwort Benson v Malaysian Mining Corporation [1988] 1 All ER 714 QBD, reversed  
[1989] 1 All ER 785 (CA)

Carlton Communications plc v Football League [2002] EWHC 1650 (Comm) 1 August  
2002.

## **International Insolvency:**

On the practical problems of international insolvencies see Fletcher 17 Co.Law. 47-50 (1996)

Re Bank of Credit and Commerce International SA (No.10.) [1996] 4 All ER 796 (ChD).  
The ELSI Case (United States v Italy) (1989) ICJ Reports 15.

(iii) New Zealand:

Companies Amendment Act 1980, s.30

(iv) France:

Societe Fruehauf Corp v Massardy: 5 ILM 476 (1966).

### Questions:

1. How far does the multinational corporate group undermine the traditional theory of the limited liability joint-stock company?
2. Should the MNE be regarded as a single "enterprise entity" for the purposes of liability? Should it be regarded as a "contractual network" for liability purposes?
3. In what ways does EC law seek to make the MNE more accountable to those whose interests are affected by its operations?
4. Should the directors of a subsidiary in a MNE group have regard only to the interests of the group even where those interests do not coincide with those of the company in which they are directors?
5. Under what legal conditions can a parent company guarantee the debts of its subsidiary?

## **10. Regulation Through Company Law II: Corporate Governance, and Disclosure.**

### Basic Reading:

Muchlinski: Ch.9.

Peter T. Muchlinski "Enron and Beyond: Multinational Corporate Groups and the Internationalization of Governance and Disclosure Regimes" 37 Connecticut LR 725 (2005)  
UNCTAD *Social Responsibility* UNCTAD Papers on Issues in International Investment Agreements (UN, 2001)

Janet Dine: The Governance of Corporate Groups (Cambridge University Press, 2000)

### Further Reading:

(a) Accountability to Shareholders and Employees:

#### **The Contribution of the EC:**

##### The Draft Fifth Directive on EC Company Law:

see "The Structure of Public Limited Companies: Amended Proposal for a Fifth Directive"  
Bulletin of the European Communities Supplement 6/83.  
Analysis: De Plessis and Dine [1997] JBL 23.

##### The Vredeling Proposal; the European Works Council:

###### *Vredeling:*

EC Commission: Proposal for a Directive on Procedure for Informing and Consulting Employees of Undertakings with Complex structures, in particular Transnational Undertakings (The Vredeling Proposal) 1980: 21 (1982) ILM p.422 revised 1983: see Bull EC Supplement 2/83. For revised text see OJ C 217/3 12.8.83.

###### *The European Works Council:*

Council Directive 94/451 22 September 1994 OJ [1994] 254/64.

#### **The OECD:**

Principles of Corporate Governance (1999, revised 2004)  
<http://www.oecd.org/daf/governance/principles.htm>

(b) Corporate Disclosure:

Muchlinski: pp.359-383.

For the general accounting issues involved see further:

C.Nobes and R.Parker Comparative International Accounting (8th Ed 2004).

Lee H. Radebaugh, Sidney J. Gray, Ervin L. Black International Accounting and Multinational Enterprises (New York, John Wiley, 6<sup>th</sup> Ed, 2006)

*Consolidated Accounts:*

The Seventh Directive on Company Accounts:

OJ [1983] L 193

Implemented into UK law by the Companies Act 1989

International Accounting Standard (IAS) 27 and IAS 39 summary on <http://www.iasc.org.uk>

*Segmental Reporting:*

US Financial Accounting Standard No.14 (December 1976) SFAS 131 Disclosures about Segments of an Enterprise and Related Information (June 1997) available at <http://fasb.org/pdf/fas131.pdf>

International Accounting Standard No.14 summary on <http://www.iasb.org.uk>

*Social Disclosure:*

The Eco-Audit Regulation

EC Council Regulation No.1836/93 OJ [1993] L 168/1. as amended by Regulation (EC) 761/2001 of 19 March 2001 OJ [2001] L 114/1

Value-Added Statements

M.Zubaidur Rahman: 25 International Journal of Accounting 87 (1990)

*The Sarbanes-Oxley Act 2002:*

This legislation represents the US response to the Enron case and other recent cases of corporate fraud. See <http://thomas.loc.gov> or the Library of Congress website.

(c) International Disclosure Provisions:

OECD Guidelines for Multinational Enterprises: III Disclosure  
<http://www.oecd.org/dataoecd/56/36/1922428.pdf> p.4.

UNCTC Conclusions on Accounting and Reporting by Transnational Corporations (UN 2nd Ed 1994)

The work of the International Accounting Standards Board see: <http://www.iasb.org.uk>

Questions:

1. Should MNEs be subjected to disclosure requirements that go beyond those needed for the protection of investors?
2. What are the major problems associated with disclosure by MNEs for the protection of investors?
3. What are the principal provisions of the European Works Council directive and how do they affect MNE operations in Europe?
4. What are the principal methods of accounting relevant to MNEs and how far do they allow for transparency in MNE operations?
5. What are the principal policy reasons behind the EC Eco-audit Regulation? How far does the regulation meet its aims?
6. What is the contribution to date of the IASB to the harmonisation of disclosure standards for MNEs?
7. What are the principal provisions of the Sarbanes Oxley Act and how do they affect the accountability of MNE operations?



## **11. Regulation through Competition Law:**

### (a) The Economic Background:

See the readings under Topic 1 especially the contributions in Pitelis and Sugden.

### (b) Legal Policy:

This section concentrates on the substantive and procedural issues of antitrust law as applied to MNEs. The issue of extraterritoriality is of course essential here. It has already been considered in Topic 7 above. Further references to leading cases on this issue are given here for completeness.

#### Basic Reading:

Muchlinski: Ch.10.

### (c) International Controls:

#### Basic Reading:

UNCTAD: Set of Principles for the Control of Restrictive Business Practices UNCTAD doc. TD/RBP/CONF/10 Annex; UN doc. A/C 2/35/6 of 23 Oct. 1980, Annex. TD/RBP/CONF/10/Rev.1 1981: 19 ILM 813 (1980) summarised in Muchlinski at pp.404-411.

OECD: Guidelines for MNEs IX Competition  
<http://www.oecd.org/dataoecd/56/36/1922428.pdf> p.8.

#### Further Reading:

OECD: Merger cases in the Real World: A Study of Merger Control Procedures (Paris 1994)

G.Bruce Doern and S.Wilkins Comparative Competition Policy (1996) esp.Ch.10 "The Internationalisation of Competition Policy"

A.Kaczorowska "International Competition Law in the Context of Global Capitalism" [2000] ECLR 117.

J.Braithwaite and P.Drahos Global Business Regulation (2000): chs 10 and 26.

Questions:

1. Should the internalisation of markets across borders by MNEs be seen as a threat to competition or as an increase in economic efficiency?
2. In what ways can the MNE act as a restraint on competition in (a) national and (b) international markets?
3. What are the essential features of antitrust regulatory systems?
4. Is competition law being used simply as a means of protecting inefficient national or regional enterprises against foreign takeover?
5. Why is there an increasing incidence of calls for a global approach to antitrust regulation of MNE activities? How far do existing international initiatives go in this direction?

## **12. Technology Transfer:**

### Basic Reading:

Muchlinski: Ch.11.

UNCTAD Transfer of Technology UNCTAD Series on Issues in International Investment Agreements (UN, 2001).

UNCTAD World Investment Report 1999 Ch. VII

### Further Reading:

M.Blakeney Legal Aspects of the Transfer of Technology to Developing Countries (1989)

### (1) National Technology Transfer Laws

#### **Role of Patent Laws:**

Lall: 10 JWTL 1 (1976)

#### **Latin America:**

Correa: 15 JWTL 388 (1981)

Cabanellas: Antitrust and Direct Regulation of International Transfer of Technology Transactions (1984)

ANCOM Countries:

see references below to Andean Foreign Investment Code Decisions 24, 220, 291.

Brazil:

Normative Act 15 of 11 September 1975. Informatics policy (in outline)

#### **China:**

Interim Regulations on the Transfer of Technology: 24 ILM 292 (1985) ;

### Intellectual Property Laws:

Patent Law: 24 ILM 295 (1985).

On subsequent developments see articles in the Beijing Review Vol.34. No.27 July 8-14 1991 pp.37-39 (on trademark law); Vol 34. No.37 Sep.16-22 p.19-21 (on 1991 copyright law); Vol.35. No.28.July 13-19 pp.8-9, Vol.35 No.48 November 30-December 6, 1992 p.14-16 (on 1992 revisions to patent law).

Regulations Controlling Technology Import Contracts: 24 ILM 801 (1985). See too 27 Harv. Intl. LJ 275 (1986).

1988 Rules for Implementation of the Regulations adopted 20 January 1988 Vol.2, 3 China Law and Practice March 28 1988 p.38.

**Nigeria:**

National Office of Industrial Property Act 1979 Decree No.70 24 September 1979

Comment: Osunbor 21 JWTL 13 (1987); Fagbemi 22 JWTL 95 (1988);

**Ghana:**

Technology Transfer Regulations 1992 (LI 1547 9 Sept 1992)

(2) The UNCTAD Code on Technology Transfer:

Draft Code (as at closure of 6<sup>th</sup> Sess. Of UN Conf. on Int. Code of Conduct on Transfer of Technology): TD/CODE TOT/47 20 June 1985.

Consultations of 1992 (TD/CODE TOT/58 22 October 1992).

(3) The TRIPS Agreement:

See UNCTAD Transfer of Technology *op.cit.*

WTO Doha Ministerial Conference Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2 20 November 2001).

Questions:

1. What is "technology"? How does "technology" manifest itself in the activities of MNE's?
2. What are the principal methods for the transfer of technology across borders? When will technology be transferred by way of direct investment rather than by any other method?

3. What is "appropriate technology" in the context of LDC development? Do MNE's have technology that is appropriate in this respect?
4. What are the major restrictions on the use of foreign-owned technology that are commonly found in technology transfer agreements?
5. Outline the principal common features of technology transfer laws. How do such laws differ from:
  - (a) laws controlling the entry and establishment of foreign investors;
  - (b) antitrust laws.
6. Should a cross-border transfer of technology between the affiliates of a MNE be regulated by technology transfer laws? Why are the technology exporting states opposed to the inclusion of such transactions within the ambit of such laws?
7. What were the principal areas of disagreement between the technology-exporting and technology-importing states that prevented the adoption of the UNCTAD Code on Technology Transfer?
8. Assess the role of competition law in the regulation of technology transfer transactions.
9. How has the Final Act of the Uruguay Round Negotiations dealt with technology transfer issues in the TRIPs Agreement?
10. Should pharmaceutical patents be outside the control of the TRIPs Agreement?

### **13. Labour Relations:**

#### Basic Reading:

Muchlinski: Ch.12.

Hepple "New Approaches to International Labour Regulation"

26 ILJ 353 (1997) and "A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct" 20 Comp.Labour Law & Pol'y Journal 347 (1999).

#### Further Reading:

UNCTAD: Employment Series on issues in international investment agreements (UN, 2000)

Deakin and Wilkinson "Rights vs Efficiency? The Economic Case for Transnational Labour Standards" 23 ILJ 289 (1994).

### **The International Environment For Trade Union Rights:**

#### (i) The Vredeling Proposal and European Works Council

see Topic 10 above.

#### (ii) The OECD Guidelines: Employment:

OECD: Guidelines for MNEs V Employment

<http://www.oecd.org/dataoecd/56/36/1922428.pdf>

R. Blanpain: The Badger Case (1977)

The OECD Guidelines for Multinational Enterprises and Labour Relations 1976-79 (1979) and subsequent annual volumes

#### (iii) The ILO:

ILO: Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy: 17 ILM 422 (1978)

ILO: Declaration on Fundamental Principles and Rights at Work 18 June 1998: 37 ILM 1233 (1998).

See further <http://www.ilo.org>

*The Effect of ILO Conventions:*

West German Supreme Court case on importing products made by workers under different employee protection standards than those operating in West Germany: BGH 1 ZR 76/78 9 May 1980 reported in A.H.Hermann Conflicts of National Laws with International Business Activity: Issues of Extraterritoriality (1982)

Appendix I.

Brown and McColgan "UK Employment Law and the ILO: The Spirit of Cooperation?" 21 ILJ 265 (1992)

Barnard "Labour law in Malaysia: A Capitalist device to Exploit Third World Workers" 23 Law and Pol. Int'l Bus. 415 (1991-92)

*The Transnational Contract of Employment:*

Morgenstern & Knapp: 27 ICLQ 769 (1978)

Lawson v Serco Ltd, Botham v Ministry of Defence, Crofts and others v Veta Ltd and others [2006] UKHL 3, [2006] 1 All ER 823 (HL). For analysis see: Thomas Linden "Employment Protection for Employees Working Abroad" 35 ILJ 186 (2006).

Questions:

1. What are the major obstacles to the development of truly transnational collective labour relations?
2. How does law control the extent to which transnational industrial action can be taken?
3. What are the principal measures contained in the ILO Tripartite Declaration? How is compliance with the Declaration monitored?
4. How effective have the OECD Guidelines for Multinational Enterprises been in controlling the industrial relations practices of MNE's?
5. Is the existence of MNE's likely to lead to the international standardisation of employment conditions to be contained in transnational contracts of employment? What are the legal obstacles to the creation of such denationalised contracts?

#### **14. Human Rights and MNEs:**

The oldest expression of the relationship between human rights and the operations of MNEs comes in relation to the observance of fundamental labour rights. However, this issue is growing as NGOs and others assert a general obligation on the part of MNEs to observe human rights, as defined in various international human rights instruments, in the course of their activities.

##### Basic Reading:

Muchlinski: Ch.13

Dine: Ch.4.

David Kinley and Junko Tadaki "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations in International Law" 44 *Va.J.Int'l.L.* 931 (2004)

Amnesty International Human Rights Principles for Companies (1998 AI Index ACT 70/01/98) <http://www.amnesty.org.uk>

UN Sub-Commission for Human Rights UN Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (and Commentary) UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (2003) available from [www.businessandhumanrights.org](http://www.businessandhumanrights.org)

##### Further Reading:

Peter Muchlinski "Human Rights and Multinationals – Is there a Problem?" 77 *International Affairs* 31.

See generally M.Addo (ed) Human Rights Standards and the Responsibilities of Transnational Corporations (Kluwer, 1999)

Upendra Baxi "Voices of Suffering and the Future of Human Rights" 8 *Transnat'l.L.& Contemporary Problems* 126 (1998).

Menno Kamminga "Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC" in P.Alston (ed) The EU and Human Rights (Oxford University Press, 1999) p.553.

International Council on Human Rights Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies (ICHR, Versoix, 2002).

Sarah Joseph Corporations and Transnational Human Rights Litigation (Hart, 2004)

Nicola Jagers Corporate Human Rights Obligations: In Search of Accountability (Intersentia, 2002)

Rory Sullivan (Ed) Business and Human Rights (Greenleaf Publishing, 2003)

Schutter OD (ed.), *Transnational Corporations and Human Rights* (Hart Publishing, Oxford 2006)



(a) Theoretical Issues:

A.Clapham Human Rights in the Private Sphere (Oxford, Clarendon Press, Paperback Edition, 1996) Chs 4 and 5. and Human Rights Obligations of Non-State Actors (Oxford University Press, 2006) Ch.6.

Dine J and Fagan A (eds.), *Human Rights and Capitalism* (Edward Elgar, Cheltenham 2006)

(b) Case Studies:

A.Ramasastri “Secrets and Lies? Swiss Banks and International Human Rights” 31 Vand.Jo.Transnat’l.Law 325 (1998)

D.Bradlow “The World Bank, the IMF and Human Rights” 6 Transna’l Law & Contemporary Problems 47 (1996)

Doe v Unocal 963 F.Supp.880 (US DC CD Cal 1997) noted in 92 AJIL 309 (1998)  
Overturned on appeal in John Doe I v Unocal Corp 2002 US App LEXIS 19263 (9<sup>th</sup> Cir 2002) (case settled in 2004), 41 ILM 1367 (2002). See too US Supreme Court Sosa v Alvarez-Mahain 124 S.Ct.2739 (2004).

The UN Global Compact with Business <http://www.unglobalcompact.org>

Questions:

1. Why is there an interest in making MNEs subject to human rights obligations? How far are MNEs the beneficiaries of human rights obligations?
2. What role have NGOs played in developing this agenda? Are they right to do so?
3. What theoretical obstacles are there to making MNEs liable for abuses and violations of human rights? What theoretical reasons are there for making them so liable?

## **15. Environment and MNEs:**

### Basic Reading:

Muchlinski: Ch.14

UNCTAD Environment Issues Papers Series (2001).

OECD Guidelines on Multinational Enterprises Chapter V “Environment”

<http://www.oecd.org/dataoecd/56/36/1922428.pdf>

### Further Reading:

OECD Economic Globalisation and the Environment (1997)

World Wide Fund for Nature Foreign Investment and the Environment: From Pollution Havens to Sustainable Development (1999)

Peter Utting (Ed) The Greening of Business in Developing Countries (London, Zed Books/UNRISD, 2002)

David Hunter and Steven Porter “International Environmental Law and Foreign Direct Investment” in Bradlow and Escher *op.cit.* p.161.

Harris Gleckman “Transnational Corporations Strategic Responses to Sustainable Development” Green Globe Yearbook 1995 p.93.

David Levy and Peter Newell (Eds) The Business of Global Environmental Governance (MIT Press, 2005).

### Questions:

1. Are MNEs a major threat to the environment or a major saviour?
2. What is “sustainable development”? How can this concept inform the environmental practices of MNEs? What other basic principles inform the approach to MNE operations and environmental responsibility?
3. What are the main obligations placed on MNEs regarding their environmental practices under the Rio Declaration? How did the World Summit on Sustainable Development in 2002 elaborate on these principles?
4. How can self-regulation by MNEs help to achieve environmental protection goals? Is such an approach to regulation sufficient?
5. Outline the main trends in international and regional regulation for MNEs in relation to environmental issues.

## **16. The Financing of Foreign Direct Investment by International Financial Institutions**

### Basic reading

Dine: Ch 3

### Further Reading:

- 1- J. Stiglitz, Globalisation and its discontents, (Allen Lane, London, 2002)
- 2- Oxfam, Global Finance Hurts the Poor (Oxfam America, 2002)
- 3- Darrow Mark, Between Light And Shadow: The World Bank, The International Monetary Fund And International Human Rights Law (Hart, 2006)
- 4- Harrison James, The Human Rights Impact of the World Trade Organisation (Hart, 2007)
- 5- [www.worldbank.org](http://www.worldbank.org)
- 6- [www.imf.org](http://www.imf.org)

### Questions

- 1- In what ways do the International Financial Institutions promote policies which assist multinational enterprises to expand their markets?
- 2- In their interpretation of standards of protection in international investment agreements, have international arbitral decisions arrived at a proper balance between investor rights and the right of the host country to regulate its economy?
- 3- Should International Financial Institutions consider the human rights record of the countries when financing of foreign direct investment?
- 4- What is the role of IMF in financing of foreign direct investment?
- 5- Do you see any changes in near future in the policies of International Financial Institutions in the way they finance foreign direct investment?

## **17. Control of Investment Risks under International Law I:**

### Basic Reading:

Muchlinski: Ch.15.

OECD International Investment Law: A Changing Landscape (Paris, OECD, 2005) ch.2

“Indirect Expropriation” and “The ‘Right to Regulate’ in International Investment Law”;

Vaughan Lowe “Regulation or Expropriation?” 55 CLP 447 (2002)

UNCTAD Taking of Property Series on issues in international investment agreements (UN 2001).

August Reinisch “Expropriation” forthcoming in Muchlinski, Ortino and Schreuer (Eds) The Oxford Handbook of International Investment Law (available on Blackboard)

### Further Reading:

#### (a) Renegotiation and Expropriation Risks:

See the references to academic comment and case-law in Ch.15 of Muchlinski. See too the ICSID and NAFTA case-law in Topic 20.

The articles on regulatory takings in: 11 *NY U Environmental Law Journal* pp.1-316 (No.1 of 2002).

Case Concerning Elettronica Sicula S.p.A (ELSI) United States v Italy (1989) ICJ Reports p.15.

L. Yves Fortier and Stephen L. Drymer “Indirect Expropriation and the Law of International Investment: I Know It When I See It, or *Caveat Investor*” 19 ICSID Rev-FILJ 293 (2004)

Bjorn Kunoy “Developments in Indirect Expropriation Case Law in ICSID Transnational Arbitration” 6 JWI 467 (2005)

Andrew Newcombe “The Boundaries of Regulatory Expropriation in International Law” 20 ICSID Rev-FILJ 1 (2005)

#### (b) Multilateral Investment Guarantee Agency:

See Generally Rowatt 33 Harv.IJL 103 (1992)

Website: <http://www.miga.org>

Convention Establishing Multilateral Investment Guarantee Agency: 24(1985) ILM 1598-1638. Comment Chatterjee 36 ICLQ 76 (1987).

MIGA Operational Regulations 28 ILM 1227 (1988) revised 2002;

MIGA Standard Contract of Guarantee and General Conditions of Guarantee for Equity Investments 28 ILM 1233 (1989).

A detailed analysis of the MIGA Convention can be found in I. Shihata MIGA and Foreign Investment (1988)

Questions:

1. What are the elements of the theory of "internationalisation" of economic development agreements? Should all such agreements be seen as outside the control of host state law and subject only to international law?
2. What is "transnational law"? What is its role in the regulation of economic development agreements between states and foreign investors?
3. What is a "stabilisation clause"? When is such a clause effective in restricting the state's sovereign rights?
4. Why has the renegotiation of long-term investment agreements between the host state and the private foreign investor caused problems in the past? Is this likely to remain a major source of legal conflict?
5. What are the limits to the lawful renegotiation of economic development agreements?
6. Under traditional rules of customary international law, when is it lawful to expropriate property owned by a foreign investor? Are the standards of international law in this area binding on all states?
7. What are the principal measures of compensation for expropriation? Why is there disagreement over the applicable standards? What solutions are there to the resulting conflict of norms?
8. How does MIGA seek to reduce investment risks and the uncertainties surrounding the law on compensation for expropriation?

## **18. Control of Investment Risks under International Law II:**

### Basic Reading:

Muchlinski: ch.16

Grierson Weiler and Laird “Standards of Treatment in International Investment Law: The Move towards Unification” forthcoming in Muchlinski, Ortino and Schreuer (eds) The Oxford Handbook of International Investment Law (available on Blackboard)

### Further Reading:

UNCTAD *National Treatment, Fair and Equitable Treatment, Most-Favoured-Nation Treatment* all in the Series on Issues in International Investment Agreements available for download at [www.unctad.org/ia](http://www.unctad.org/ia)

Peter Muchlinski ““Caveat Investor”? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard” 55 ICLQ 527 (2006).

Selected cases from the list under Topic 20.

### Questions:

1. What are the national treatment, most-favoured-nation (MFN), fair and equitable treatment and full protection and security standards?
2. Under the national treatment and MFN standards how are the relevant comparisons made to determine likeness of circumstances?
3. How far is the fair and equitable treatment standard a standard based in international law?
4. What role does the concept of legitimate expectations play in the development of these standards?
5. How important is investor conduct in determining whether treatment has been fair and equitable?

## **19. Codification of International Standards, from Customary International Law to Bilateral and Multilateral Investment Agreements.**

### Basic Reading:

Muchlinski: Ch.17.

Peter T. Muchlinski “The Rise and Fall of the Multilateral Agreement on Investment: Where Now?” 34 *International Lawyer* 1033 (2000)

### Further Reading:

#### (1) Codes of Conduct:

##### (i) General Codes of Conduct:

#### General Background Reading:

Any one or more of these readings will give you an overview of the legal problems surrounding codes of conduct for MNEs:

Waldman: Regulating International Business (1980)

Wallace: Part V

N. Horn (ed.): Legal Aspects of Codes of Conduct for Multinational Enterprises (1980)

Sanders: 30(1982) A.J. Comp. L. p.241

Vagts: 18 (1981) CMLR p.463

Grosse: 16(1982) JWTL p.414

See generally for background theory on "soft law":

W.Friedmann: The Changing Structure of International Law (1964) Part 3 "Principles and Processes of Legal Change in International Law"

Baxter: "International Law in Her Infinite Variety" 20 ICLQ p.549 (1980)

For the political issues behind the various codes see:

J. Robinson: Multinationals and Political Control (1983) who takes, with hindsight, an overly optimistic view of the power of codes to control MNEs;

G.Hamilton: The Control of Multinationals: What Future for International Codes of Conduct in the 1980's (IRM Multinational Reports No.2.1984) who, with hindsight, takes a justifiably pessimistic view.

### **The UN Code of Conduct on TNCs:**

In July 1992 the draft UN Code of Conduct was shelved.

The most recent version of the Draft Code is contained in UN Doc.E/1990/94 of 12 June 1990.

### **OECD Guidelines on Multinational Enterprises:**

OECD: Guidelines on MNEs of 1976: 15 ILM p.961 (1976):  
OECD: 1979 Review of 1976 Guidelines: 18 ILM p.986 (1979)  
OECD: 1986 Review of Guidelines OEEC (1198/11)  
OECD: 1991 Review of the Guidelines (Paris 1992)  
OECD: Revised Guidelines 27 June 2000 and Commentary:  
<http://www.oecd.org/dataoecd/56/36/1922428.pdf>

OECD: National Treatment for Foreign-Controlled Enterprises (Paris 1993 and 2005)

### **World Bank Guidelines 1992:**

World Bank Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment 21 September 1992 published as Legal Framework for the Treatment of Foreign Direct Investment (Volume II: Guidelines) reproduced 31 ILM 1363 (1992).

The background surveys on which the Guidelines are based: Legal Framework for the Treatment of Foreign Direct Investment (Volume I)(World Bank, 1992) Both volumes are reproduced in the Fall 1992 issue of ICSID Rev-FILJ.

I.F.I.Shihata The Legal Treatment of Foreign Investment: The World Bank Guidelines (1993)



## (ii) Codes of Conduct Covering Specialised Subjects

Alongside the regional and general attempts at codes of conduct on MNE's there are a number of specialised codes, either adopted or under negotiation, dealing with particular issues arising out of the activities of MNE's. These initiatives have occurred mainly in the context of the specialised agencies of the UN.

From within the UN specialised agencies, the major codes that have been adopted to date are: the International Labour Organisation's (ILO) "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" adopted in 1977 [See 17 ILM 422 (1978)]; the United Nations Conference on Trade and Development (UNCTAD) "Principles and Rules for the Control of Restrictive Business Practices" adopted in 1980 [UNCTAD Doc TD/RBP/CONF/10 Annex; UN Doc A/C.2/35/6 of 23 October 1980 Annex and subsequent revisions]; the World Health Organisation's (WHO) "International Code of Marketing of Breast Milk Substitutes" adopted in 1981.[Published by the WHO Geneva 1981].

By contrast, the UNCTAD "Code of Conduct on the Transfer of Technology" became deadlocked having run into major difficulties arising out of disagreements between the capital-exporting and capital-importing countries.

These codes have been considered in the context of their specialised subject matter above.

## (iii) Corporate Codes of Conduct:

UNCTAD World Investment Report 1994 Ch.8; World Investment Report 1999 Ch.12  
Baker "Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?" 24 U.Miami.Inter.Am.L.Rev. 399 (1993).  
Picciotto and Mayne Regulating International Business (1999) several papers in this collection touch on this matter.

## (2) Regional Investment Agreements:

(NAFTA and the EC have already been discussed in Topic 8. Here selected developing country arrangements are covered) See generally UNCTAD Investment Provisions in Economic Integration Agreements (2006)

## **ANCOM:**

### **The Original Andean Investment Code:**

Decision 24 Andean Foreign Investment Code. 16(1977) ILM p.138. For comment on the original investment code of 1970 (reproduced in 11 ILM 126 (1972))

### **The Non-Observance Decision 24:**

Comment in 16(1977) Col. Jo. Transnat. Law p.138 "Chile's Rejection of the Andean Common Market Regulations of Foreign Investment." See Chile Foreign Investment Code of 1985: 25(1986) ILM p.727.

Horton: 17(1982) Tex.ILJ p.39 "Peru and Ancom: A Study in the Disintegration of a Common Market".

Carl & Johnson: 7(1975) Den.J. Int'l L & Poly 151, "Venezuela and the Andean Common Market" see Venezuelan Foreign Investment Law: 26(1987) ILM 760

### **The Repeal of Decision 24:**

Decision 220 Replacing Decision 24 27 ILM 974 (1988)

### **The Repeal of Decision 220:**

Decision 291 March 21 1991 30 ILM 1283 (1991)

### **ASEAN:**

Agreement on Promotion and Protection of Investments:  
27 ILM p.612 (1988)

Framework Agreement on the ASEAN Investment Area 1998  
[http://www.asean.or.id/economic/aem/30/frm\\_aia.htm](http://www.asean.or.id/economic/aem/30/frm_aia.htm)

### **COMESA**

Framework Agreement on a COMESA Investment Area see [www.comesa.int](http://www.comesa.int)

### **(3) Multilateral Investment Agreements:**

#### **See generally:**

EC Commission Towards a Level Playing Field for Foreign Direct Investment: COM (95) 42 Final 1 March 1995.

T.Brewer and S.Young The Multilateral Investment System and Multinational Enterprises (Oxford, 1998).

### **The Energy Charter Treaty:**

Energy Charter Treaty 1994: 33 ILM 360 (1995) especially Part III.

For analysis see generally T.Waelde (Ed) The Energy Charter Treaty: An East/West Gateway for Investment and Trade (Kluwer, 1996) My own views appear as Ch.10 of this collection.

### **The Draft OECD Multilateral Agreement on Investment (MAI):**

MAI Website: <http://www.oecd.org/daf/cmismai>

Final Draft of 24 April 1998 available on this website at the same address adding /negtext.htm

OECD Towards Multilateral Investment Rules (1996)

S.Picciotto and R.Mayne Regulating International Business: Beyond Liberalisation (MacMillan, 1999)

UNCTAD World Investment Report 1999 Ch.IV.

UNCTAD Lessons from the MAI UNCTAD Series on issues in international investment agreements (UN 1999)

D.Henderson The MAI Affair: A Story and its Lessons (RIIA, 1999)

Vandewelde *Michigan Journal of International Law* (Winter 1998) p.373.

Picciotto 19 *Univ.Pa.J.Int'l Econ.L.* 731 (1998)

Fatouros 10 *ICSID Rev-FILJ* 181 (1995)

Engering 5 *Transnational Corporations* 147 (1996)

Kline 2 *Transnational Corporations* 153 (1993).

### (3) Bilateral Investment Treaties:

#### (i) Background:

### **The OECD Draft Convention on the Protection of Foreign Owned Property:**

Boas: "The OECD Draft Convention on Protection of Foreign Property" 1 *CMLR* 265 (1963)

### **"FCN" Treaties :**

Sumitomo Stroji America Inc. v Avagliano 21 (1982) *ILM* p.790 comment: 27 *Harv. Int'l LJ* 193, 86 *Col. LR* 139 (1986)

SEDCO Inc. v National Iranian Oil Cor. & Iran 25(1986) *ILM* 629 sep.op. Judge Brower at 639-641

Kalamazoo Spice Extraction Co. v Provisional Military Govt. of Socialist Ethiopia 729 F 2d 422 *US CA 6 cir.* March 9 1984 23(1984) *ILM* 393: noted 78(1984) *AJIL* p.902

ELSI Case (US v Italy) (1989) *ICJ Reports* 15.

(ii) Bilateral Investment Treaties (BITs):

UNCTAD Bilateral Investment Treaties in the Mid-1990s (1998), ibid Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking (2007)

R.Dolzer and M.Stevens Bilateral Investment Treaties (Martinus Nijhoff, 1995).

Sornarajah: The International law on Foreign Investment (2004) Ch.5.

Salacuse: 24 Int'l Law. 655 (1990).

**UK Practice:**

F.A. Mann: 52 (1981) BYIL p.241 (contains UK-Philippines BIT)

Denza and Brooks: 36 ICLQ 908 (1987)

**US Practice:**

US Model BIT 1994 Revision

K.J.Vandeveldre United States Investment Treaties Policy and Practice (1992)

W.E. Coughlin: "The US Bilateral Investment Treaty: An answer to Performance Requirements" Ch. 8 in B. S. Fisher & J. Turner (ed.) : Regulating the Multinational Enterprise National and International Challenges (1983)

Pattison: "The US Egypt Bilateral Investment Treaty" 16 (1983) Cornell Jo.IL 305

US Model BIT 2004 Revision:

See the US-Paraguay BIT of 25 October 2004: 44 ILM 265 (2005)

**French Practice:**

Juillard: AFDI 1982 p.760.

**Asian African Legal Consultative Committee:**

Draft Model Bilateral Agreements on Promotion and Protection of Investments : 23 ILM 237 (1984)

**Chinese agreements:**

Sweden: 21 ILM 477 (1982);

France and Belgium: 24 ILM 537-565 (1985);

Japan: 28 ILM 575 (1989).

(iii) Bilateral Free Trade Agreements with Investment Provisions:

See for example: New Age Economic Partnership Agreement Between Japan and Singapore 2002 available on [www.mti.gov.sg/public/PDF/CMT/FTA\\_JESPA\\_Agreement.pdf](http://www.mti.gov.sg/public/PDF/CMT/FTA_JESPA_Agreement.pdf) or [www.mofa.go.jp/region/asia-paci/singapore/jespa.html](http://www.mofa.go.jp/region/asia-paci/singapore/jespa.html)

Further examples are collected in UNCTAD International Investment Agreements: A Compendium Vols XI, XII (2003), XIII, XIV (2005) available also from [www.unctad.org/iaa](http://www.unctad.org/iaa) and also in UNCTAD Investment Provisions in Economic Integration Agreements (2006)

Questions:

1. What are the origins of the codification movement of the 1970s?
2. Why are the various codes of conduct not legally binding instruments? Does this matter?
3. How have the OECD countries ensured that the draft UN Code did not result in an "investor control" code?
4. What are the motives behind the 1992 World Bank Guidelines? How do the Guidelines affect the content of international law relating to foreign investors?
5. What are the principal features of the original Andean Investment Code? How does the recent revision of the Andean Code differ from the original? Why was the original Code replaced?
6. What is the value of codes of conduct dealing with specific topics?
7. How far does the story surrounding the codification movement show an acceptance, by capital-importing states, of international minimum standards for the treatment of foreign investors along the lines advocated by the capital-exporting states?
8. How does the Energy Charter treaty attempt to improve the protection of foreign direct investment? How does this development relate to other attempts at the creation of a comprehensive international legal regime for the protection and promotion of foreign direct investment?
9. Why were there moves towards a MAI in the OECD? Why did the negotiations fail?
10. Should the WTO place investment rules on its agenda?
11. What was the aim behind the abovementioned Draft OECD Convention?

12. In what ways does a FCN treaty differ from a BIT? How does it provide a model for a BIT?
13. What are the principal clauses to be found in a BIT?
14. How far does the BIT re-affirm traditional international minimum standards of treatment of foreign investors? Does it, in fact, underline the weakness of those standards by requiring specific consent on the part of the capital-importing state?
15. What is the relationship between BITs and the ICSID Convention procedure for the settlement of investment disputes?
16. Are BITs universally used by all capital-importing states? Trace the underlying motives of states that do enter BITs.
17. What is the relationship between BITs and the requirements of foreign investment insurance schemes offered by the home countries of foreign investors?

## **20.The Emerging System of Multilateral Regulation III: Dispute Settlement and Avoidance: the Contribution of the World Bank and NAFTA:**

### Basic Reading:

Muchlinski: Ch.18.

### Further Reading:

The World Bank Convention for the Settlement of Investment Disputes:

Website: <http://www.worldbank.org/icsid/>

Text of convention: (1965) 4 ILM 524

The leading commentary is Christoph Schreuer The ICSID Convention: A Commentary (Cambridge University Press 2001)

### **Selected Leading Cases:**

(All cases are available either on the ICSID website <http://www.worldbank.org/icsid/cases> or the website run by Andrew Newcombe at the University of Victoria British Columbia <http://ita.law.uvic.ca>. In the absence of a hard copy reference or website reference use either of these sites).

#### (a) ICSID: Jurisdiction Decisions and Awards:

Holiday Inns v Morocco Lalive: 51(1980) BYIL p.123

Soguipeche v Atlantic Triton Co. (CA Rennes) 24 ILM 34 (1985)  
reversed Cour de Cassation 26 ILM 373 (1987)

Guinea v Maritime International Nominees Establishment

24 (1985) ILM 1639 (Belgian Ct); 20 (1981) 666, 669; 21 (1982) ILM 1355;  
22 ILM 86 (1983) (US Courts); 26 (1987) ILM 382 (Swiss Ct.)

AMCO Asia Corp. v Republic of Indonesia 23 (1984) ILM 351

(jurisdiction); 24 (1985) ILM 365 1022 (merits); resubmitted case 27 (1988)  
ILM 1281; 89 ILR (1992) p.55; resubmitted merits: 89 ILR (1992) p.580,  
rectification *ibid* at p.568.

Klockner v Cameroon 1 (1984) J.Int.Arb. 145 (Poulsso); 331 (Niggemann) 3(1986)  
J.Int.Arb. 93 (Thompson)

LETCO v Liberia 26(1987) ILM 647; US enforcement proceedings *ibid*.p.695

SOABI (SEUTIN) v Senegal 30 ILM 1167 (1991); 6 ICSID Rev-FILJ 125 (1991)

Southern Pacific Properties (Middle East) Limited v Egypt 32 ILM 933 (1993) or 8 ICSID  
Rev-FILJ 328, 400 (1993) see comment by Delaume *ibid*. p.231 and Craig *ibid*. p.264.

Asian Agricultural Products Ltd v Sri Lanka 30 ILM 577 (1991).

Vacuum Salt Products Ltd v Ghana 9 ICSID Rev-FILJ 71 (1994).  
AMT v Zaire 36 ILM 1531 (1997)  
Fedax v Venezuela 37 ILM 1378, 1391 (1998)  
Cable Television of Nevis Ltd v St Kitts and Nevis 13 ICSID-FILJ 327 (1998)  
Compania del Desarrollo de Santa Elena SA v Costa Rica 39 ILM 1317 (2000).  
Compania de Aguas del Aconquija v Argentine Republic 40 ILM 426 (2001) decision on annulment 3 July 2002) 41 ILM 1135 (2002).  
Lanco International v Argentine Republic 40 ILM 457 (2001).  
Maffezini v Spain 16 ICSID Rev-FILJ 248 (2001)  
Olguin v Paraguay 18 ICSID Rev-FILJ 130 (2003)  
Genin v Estonia 17 ICSID Rev-FILJ 395 (2002)  
TECMED v Mexico 43 ILM 133 (2004)  
SGS v Pakistan ICSID Case No.ARB/01/13 decision on objections to jurisdiction 6 August 2003 18 ICSID Rev-FILJ 307 (2003).  
SGS v Philippines ICSID Case No.ARB /02/6 decision on objections to jurisdiction 29 January 2004 available at [www.worldbank.org/icsid/cases](http://www.worldbank.org/icsid/cases)  
Azurix v Argentina ICSID Case No.ARB/01/12 decision on jurisdiction 8 December 2003 available at [www.worldbank.org/icsid/cases](http://www.worldbank.org/icsid/cases) or 43 ILM 262 (2004) award of 14 July 2006 <http://ita.law.uvic.ca>  
MTD Equity v Chile 44 ILM 91 (2005)  
Generation Ukraine v Ukraine 44 ILM 404 (2005)  
Tokios Tokelés v Ukraine ICSID Case No.ARB/02/18 decision on jurisdiction 29 April 2004, 20 ICSID Rev-FILJ 205 (2005).  
Siemens AG v Argentina ICSID Case NO.ARB/02/8 award on jurisdiction of 3 August 2004 44 ILM 138 (2005)  
Cammuzzi International SA v Argentina ICSID Case NO.ARB/03/7 decision on jurisdiction 10 June 2005 available at <http://www.asil.org/pdfs/levajd050614.pdf>  
Gas Natural SDG SA v Argentina decision on jurisdiction 17 June 2005 available at <http://ita.law.uvic.ca/documents/GasNaturalSDG-DecisionPreliminaryQuestionJurisdiction.pdf>  
Salini Construttori SPA and others v Jordan ICSID Case NO/ARB/02/13 decision on jurisdiction 29 November 2004 44 ILM 573 (2005) award of 31 January 2006.  
Plama Consortium Limited v Bulgaria ICSID Case No.ARB/03/24 decision on jurisdiction 8 February 2005 44 ILM 721 (2005).  
CMS Gas Transmission Co v Argentina ICSID Case No. ARB/01/8 award of 12 May 2005 44 ILM 1205 (2005).  
Noble Ventures Inc v Romania ICSID Case No.ARB/01/11, award of 12 October 2005, available at [www.asil.org/ilib](http://www.asil.org/ilib)  
Bayindir v Pakistan ICSID Case No Arb/03/29 Decision on Jurisdiction 14 November 2005  
El Paso International Company v Argentina ICSID Case No Arb/03/15 Decision on Jurisdiction 27 April 2006  
Jan de Nul v Egypt ICSID Case No Arb/04/13 Decision on Jurisdiction 16 June 2006  
Pan American Energy LLC v Argentina ICSID Case No Arb/03/13 Decision on Preliminary Objections 27 July 2006



Inceysa Vallisoletana SL v El Salvador ICSID Case No Arb/03/26 Decision on Jurisdiction 2 August 2006

LG&E Energy Corporation v Argentina ICSID Case No Arb/02/1 Decision on Liability 3 October 2006

World Duty Free v Kenya ICSID Case No.ARB/00/7 Award of 6 October 2006

Siag v Egypt ICSID Case No. Arb/05/15 Decision on Jurisdiction, April 11, 2007

(b) NAFTA Chapter 11 Cases:

Azanian et al v United Mexican States 14 ICSID-FILJ 538 (1999); 39 ILM 537 (2000).

Metalclad Corporation v Mexico 40 ILM 36 (2001).

Pope and Talbot v Canada 41 ILM 1347 (2002) (award on damages) award on Merits of 10 April 2001 available on [www.naftalaw.com](http://www.naftalaw.com)

Waste Management Inc v Mexico (Procedure) 40 ILM 56 (2001); Merits: 43 ILM 967 (2004).

Feldman v Mexico 40 ILM 615 (2001).

SD Myers v Government of Canada 40 ILM 1408.

Mondev International Ltd. v. United States of America, Case No. ARB(AF)/99/2 (October 11,2002).

Lowen v United States ICSID Case No. ARB (AF)/98/3 award of 26 June 2003: 42 ILM 811 (2003)

Methanex v US award on jurisdiction and merits 3 August 2005

[www.state.gov/s/1/c5818.htm](http://www.state.gov/s/1/c5818.htm)

International Thunderbird Gaming Corporation v The United Mexican States award of 26 January 2006 available at [www.asil.org/ilib](http://www.asil.org/ilib)

See for further information on new and continuing cases and analysis [www.naftalaw.com](http://www.naftalaw.com)

(c) Selected Ad Hoc Awards:

CME v Czech Republic award of 13 September 2001 and the parallel London award of Lauder v Czech Republic, of 3 September 2001, can be accessed at <http://www.cetv-net.com> . The Stockholm award was challenged by the Czech Republic before the Svea Court of Appeals in Czech Republic v CME Czech Republic BV. The Court of Appeals turned down the Czech challenge and upheld the award, including the approach taken to the calculation of damages based on the market value principle: SVEA Court of Appeals Judgment of 15 May 2003: 42 ILM 919 (2003) see too the Introductory Comment by Thomas Waelde: 42 ILM 915 (2003)

Euriko v Poland award of 19 August 2005 <http://ita.law.uvic.ca>

Saluka Investments BV v Czech Republic award of 17 March 2006 <http://ita.law.uvic.ca> or [www.asil.org/ilib](http://www.asil.org/ilib)

EnCana v Ecuador award of 3 February 2006 <http://ita.law.uvic.ca> or [www.asil.org/ilib](http://www.asil.org/ilib)

## **Analysis:**

Tollefson 27 Yale Jo Int'l L 141 (2002)

Foy and Deane 16 ICSID Review – FILJ 299 (2001)

Schreuer “Fair and Equitable Treatment in Arbitral Practice” 6 JWIT 357 (2005)

Peter Muchlinski ““Caveat Investor”? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard” 55 ICLQ 527 (2006).

Andrew Newcombe

Amazou Asouzu “A Review and Critique of Arbitral Awards on Article 25(2)(b) of the ICSID Convention” 3 JWI 397 (2002).

Christoph Schreuer “Travelling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road” 5 JWIT 231 (2004);

Thomas Waelde “The ‘Umbrella’ Clause in Investment Arbitration – A Comment on the Original Intentions and Recent Cases” 6 JWIT 183 (2005);

## Questions:

1. What are the reasons for the inadequacy of diplomatic protection as a method of resolving international investment disputes?
2. When is ad hoc arbitration between the host state and the foreign investor a useful method of dispute settlement? What are its drawbacks?
3. Describe the principal stages in the making of an application for arbitration before ICSID.
4. What are the essential conditions to be satisfied for ICSID to have jurisdiction over a dispute submitted to it?
5. Does the practice of instituting annulment proceedings under the ICSID Convention undermine the ICSID system as an effective source of dispute settlement?
6. "The choice of law provision in Art.42 of the ICSID Convention subjects the dispute to determination under international law, and not to the law of the host state" Do you agree?
7. Does the ICSID system represent a significant advance over diplomatic protection as a means of protecting the interests of foreign investors? Does it interfere too much with the sovereignty of the host state over investment disputes?
8. What are the main substantive and procedural principles to be drawn out of the recent NAFTA Arbitrations? Do they go too far in limiting state sovereignty over essential regulatory activities?