TRANSNATIONAL CORPORATIONS AND DEVELOPING PUBLIC INTERNATIONAL LAW

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In recent years the international community has been developing various international codes of conduct, many of which will contain rules governing the behavior of transnational corporations (TNCs). Most of these rules are being developed with little or no direct TNC participation. Professor Charney argues that because TNCs represent major, independent centers of influence, failure to include them in the codes of conduct negotiations may result in rules that do not accurately reflect the realities of TNC interests and power. If the international community later seeks to convert these rules into legal norms, TNC resistance will probably place costly strains on both the rules and the entire international legal system. Professor Charney concludes that the international community should permit TNCs and other interested power groups to participate directly in the development of international norms applicable to their interests. But he cautions that it would be unwise to give TNCs complete international legal personality because this, too, might place undue strains on the international legal system.

I. INTRODUCTION

Currently, one of the most significant developments in public international law is the apparent creation of law applicable to transnational corporations (TNC).¹ Although public international law has

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1. W. FELD, MULTINATIONAL CORPORATIONS AND U.N. POLITICS, THE QUEST FOR CODES OF CONDUCT 1, 17-19 (1980); W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 8, 171, 190-91, 374-75 (1964); Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279 (1963); Sornaryah, *The Myth of International Contract Law*, 15 J. WORLD TRADE L. 187, 198-206 (1981). Judge Jessup has characterized this movement as "Transnational Law," thus blurring the distinction between public international law, private international law, and domestic law. See P. JESSUP, TRANSNATIONAL LAW 2, 15, 106-11 (1956); see also Escobar, *Should there be an International Regulatory Agency for MNCs?*, in THE NATION-STATE AND TRANSNATIONAL CORPORATIONS IN CONFLICT, WITH SPECIAL REFERENCE TO LATIN AMERICA 134, 135-37 (J. Gunnemann ed. 1975); Friedmann, 57 AM. J. INT'L L. at 281; McDougal, *International Law, Power and Policy, A Contemporary Conception*, 82 RECUEIL DES COURS 137, 184 (1954).

Detlev F. Vagts presents three alternatives for dealing with the problem of TNC regulation:

1. allow autonomous development of TNCs outside of the incorporation of any single state, allowing each state to do its own regulatory job;

addressed international economic issues for some time, recently, in light of expanded TNC activity and increased third world leverage in international affairs, greater attention has been focused on the establishment of rules to govern TNC behavior. These developments are partly explained as an effort by the third world to increase its international power vis-a-vis the power of both the TNCs and the western developed world, with whom the TNCs are generally aligned, but there are also additional factors encouraging them. First, because one country usually cannot unilaterally regulate TNC power and behavior, even the western, developed countries have an interest in these developments. Second, TNCs themselves recognize the benefits of a uniform regulatory scheme that would avoid many of the difficulties produced by varying national requirements. Although these new rules will be aimed at TNCs, international practice has largely precluded TNCs from directly participating in *this* rule-making process. It is the purpose of this article to explore what role, if any, TNCs and other non-governmental interest groups ought to play in this process.

A. *The Status Quo.*

Currently, this process includes negotiations and consultations that have taken place in the United Nations and the other international organizations and that have focused on the production of written codes of

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2. create an international regulatory agency to control TNC activities consisting of representatives of nation-states;
 3. continue the present system of partial international regulation but make it more uniform as nations pursue a more integrated international economy under GATT, IMF, etc.

See Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 787-91 (1970). For documentation of national and international efforts to regulate TNCs, see Rubin, *Developments in the Law and Institutions of International Economic Relations, The Multinational Enterprise at Bay*, 68 AM. J. INT'L L. 475, 479-87 (1974).

The literature on multinational enterprises employs the terms Transnational Corporations (TNC) and Multinational Entities (MNE) interchangeably. The term TNC is used here because it conveys more clearly this article's focus on business enterprises.

There are numerous definitions of TNCs. W. FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS, A STUDY OF BUSINESS, LABOR, AND POLITICAL GROUPS* 22-23 (1972). For the purposes of this article the following definition will be used:

[A] number of affiliated business establishments which function simultaneously in different countries, are joined together by ties of common ownership or control, and are responsible to a common management strategy. From the headquarters company (and country) flow direction and control, and from the affiliates (branches, subsidiaries and joint enterprises) products, revenues, and information. Management may be organized in either monocentric or polycentric fashion. In the former case, top management is centered in one headquarters company; in the latter case, management has been divided into geographic zones and a separate headquarters company has been established for each zone.

Id. at 23.

TNC conduct.² Although the treatment accorded TNC representatives varies considerably among these organizations, with one exception the only formal participants in the development of these standards have been nation-state representatives. In the International Labor Organization (ILO)—the exception to the rule—business and labor representatives serve on national delegations and have the right to speak and

2. Some of the codes now in place or under negotiation are the following:

The Organization for Economic Cooperation and Development (OECD) "Guidelines for Multinational Enterprises," 15 INT'L L. MATERIALS 969 (1976), was recommended to the members of the OECD by the Declaration on International Investment and Multinational Enterprises on June 21, 1976. The OECD Council of Ministers issued a series of decisions on related subjects concurrent with the approval of the guidelines. In 1979, a review of the guidelines and decisions was completed and the OECD Council, meeting at the ministerial level, endorsed the Report by the Committee on International Investment and Multinational Enterprises on June 13, 1979.

The International Labor Organization's (ILO) "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" was adopted by the ILO on November 16, 1977, at the 204th Session of the ILO in Geneva. See 17 INT'L L. MATERIALS 423-30 (1978).

The United Nations (UN) Code of Conduct for Transnational Corporations is currently under negotiation. It is before the UN Commission on TNCs but is actually being negotiated in the Intergovernmental Working Group on a Code of Conduct. See *Work Related to the Formulation of a Code of Conduct*, Report of the Intergovernmental Working Group on a Code of Conduct on its Fourteenth Session, Rapporteur, Ms. L. Zanabria, to the Commission on TNCs, 7th Sess., August 31 - September 14, 1981, U.N. Doc. E/C.10/79, (June 26, 1981) [hereinafter cited as Report of the Intergovernmental Working Group].

The negotiations on an International Code of Conduct on Transfer of Technology (TOT) remain on the agenda of the United Nations Conference on Trade and Development (UNCTAD). See *Draft International Code of Conduct on the Transfer of Technology*, U.N. Doc. TD/CODE TOT25, (June 2, 1980), reprinted in 19 INT'L L. MATERIALS 773 (1980).

The United Nations Conference on Restrictive Business Practices has adopted "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices," U.N. Doc. TD/RBP/CONF/10, (May 2, 1980), reprinted in 19 INT'L L. MATERIALS 813 (1980). The United Nations General Assembly adopted these rules at its thirty-fifth session in Resolution 35/63 of December 5, 1980. See 35 U.N. GAOR Supp. (No. 48) at 123, U.N. Doc. A/35/48 (1981).

The United Nations has also expended efforts to develop a Code of Conduct on Corrupt Practices. See *Ad Hoc Intergovernmental Working Group on Corrupt Practices: Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions: Concept and Issues Related to the Formulation of an International Agreement*, U.N. Doc. No. E/AC.64/3 (Jan. 20, 1977).

In a related development, a business group, the Council of the International Chamber of Commerce (ICC), adopted in 1972 the "Guidelines for International Investment." See *ICC Guidelines for International Investment*, ICC Pub. No. 272 (1972).

The Andean Foreign Investment Code, adopted by the Commission of the Cartagena Agreement is reprinted in 16 INT'L L. MATERIALS 138 (1977). Additional provisions to the Code are found in 21 INT'L L. MATERIALS 542 (1982). For information on the Andean Foreign Investment Code, see Naom, *Transnational Enterprises under the Pacto Andino and National Laws of Latin America*, in *LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES* (N. Horn ed. 1980). For general information on the historical development of codes from 1972-80, see Baade, *Codes of Conduct for Multinational Enterprises: An Introductory Survey*, in *LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES* 407 (N. Horn ed. 1980),

vote independently of the delegation's government members.³ In contrast, the UN generally limits business and labor representatives to observer status with, perhaps, a limited right to be present and to speak at formal sessions.⁴ Because TNCs cannot represent themselves in most international organizations, their activities have been limited to lobbying individual nation-state representatives.⁵

3. Article 3(3) of the Constitution of the International Labor Organization, 62 Stat. 3485, TIAS No. 1868, 4 Bevans 188, 15 U.N.T.S. 35, states: "The Members undertake to nominate non-Government delegates and advisers chosen in agreement with the industrial and labor organizations, if such organizations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries." This tripartite system of representation requires that all three groups be represented in every ILO activity. For a history of the ILO's tripartite system, see Beguin, *ILO and the Tripartite System*, 523 INT'L CONCILIATION 405 (1959). See also W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 244-45 (1964); E. HAAS, *BEYOND THE NATION STATE, FUNCTIONALISM AND THE INTERNATIONAL ORGANIZATION* 194-95, 208-09 (1964).

4. At the UNCTAD negotiations on these questions there is virtually no non-state participation other than through the UNCTAD secretariat and national delegations. The Commission on TNCs has been more liberal. It has established a 15-member expert group that observes all plenary meetings of the Commission and the Intergovernmental Working Group. Business, labor, and academia are represented in that expert group as individuals and are permitted to speak at the formal meeting; however, they are precluded from participating at the informal negotiating sessions on the TNC Code.

In addition, among the non-governmental organizations (NGOs) accredited to the International Working Group are business and labor organizations, including the International Chamber of Commerce, the International Confederation of Free Trade Unions, the International Organization of Consumers Unions, and the International Organization of Employers. See Report of the Intergovernmental Working Group, *supra* note 2, at 3. These NGOs are also permitted to observe plenary meetings and to make oral and written presentations. See also *infra* note 78.

On the other hand, formal consultations with structured business and labor groups are a regular procedure at the Organization for Economic Cooperation and Development (OECD). The OECD consults with business and labor groups through two organizations structured specifically for that purpose: the Business Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC). BIAC and TUAC have national chapters in each of the OECD member countries. The BIAC and TUAC organizational structures generally parallel the OECD organization's committee structure. Formal consultations between the OECD committees and the comparable BIAC and TUAC committees are a regular part of the OECD process. At those meetings BIAC and TUAC present their respective positions on OECD agenda items. But the actual OECD negotiations take place without BIAC and TUAC participation.

The Tokyo round of the General Agreement on Tariffs and Trade (GATT) is also relevant to this subject. At the Tokyo round, business representatives were excluded from direct participation. The United States, on the other hand, at least had a highly formalized structure for consulting with the private sector at home through the GATT advisory committee system. See 19 U.S.C. § 2155 (1976). It requires active, two-way consultation between the private sector and the government representative to the round. Over 1000 advisors from the private sector ultimately participated in this advisory committee system, although in the primary GATT negotiations no individual participated as a member of the private sector. Private sector participation has been more direct in some limited commodity discussions such as in the textile negotiations.

5. TNCs lobby by exerting political and social pressure on members of their national government at home and in the corridors at the international negotiations from which they have been excluded. Some observers have suggested that business representatives ought to increase substantially their lobbying efforts in order to protect the relevant business interests. See Coombe, *Mul-*

Not only are TNCs currently insulated from the international negotiating process, but, when the codes are implemented, it is likely that their participation will be limited to domestic forums. Although a method for implementing these codes has not been firmly established, the current approach has been to pass resolutions in the sponsoring organizations, which call upon the individual nation-states to implement the codes through domestic law and other less coercive means.⁶ At first glance, this approach falls short of directly imposing international legal obligations on nation-states or on the TNCs. If executed on a world-wide scale, however, the combined effect of the resolutions, the uniform legal rules adopted by individual nation-states, and the practice of the international community could ultimately generate public international law without the participation of its target, the TNCs.⁷

inational Codes of Conduct and Corporate Accountability: New Opportunities for Corporate Counsel, 36 BUS. LAW. 11, 27-29 (1980).

6. See *supra* note 2. One example from the United States involves the "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices." In the fall of 1981 the U.S. Department of State and U.S. Department of Justice sent a letter to a large number of U.S. businesses endorsing the Restrictive Business Practices rules "as representing a multilaterally-agreed set of voluntary guidelines in the antitrust field." The letter was signed by the Assistant Secretary for Economic and Business Affairs of the U.S. Department of State, the Legal Adviser of the U.S. Department of State, and the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice. See also W. FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 1, at 107-08; Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, in *LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES* 4, 4 (N. Horn ed. 1980); Davidow & Chiles, *The United States and the Issue of Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 AM. J. INT'L L. (1978); Fatouros, *On the Implementation of International Codes of Conduct: An Analysis of Future Experience*, 30 AM. U.L. REV. 941, 949, 958, 960-68 (1981); Horn, *International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives*, 30 AM. U.L. REV. 923, 929 (1981); Roffe, *UNCTAD: Code of Conduct for the Transfer of Technology, Progress and Issues Under Negotiation*, 14 J. WORLD TRADE L. 160 (1980); Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between Legal Cooperation and Economic Development*, 30 AM. U.L. REV. 903, 916-19 (1981); Stanley, *International Codes of Conduct for MNC's: A Skeptical View of the Process*, 30 AM. U.L. REV. 973, 976 (1981).

7. By adopting these rules, the international organizations would articulate a normative concept. State actions leading to the evolution of a general principle of law may follow as a result of actions by nations to adopt these rules as domestic law. State practice leading to the evolution of customary international law may result from international efforts of states to encourage all states to enforce these rules against TNCs within their jurisdiction. See, e.g., J. BRIERLY, *THE LAW OF NATIONS* 59-63 (6th ed. 1963); I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-12, 14-20 (3d ed. 1979); W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 170-76, 188-210. A more fluid policy-oriented perspective would find these authoritative statements of influential participants in the international system as creative of community policy that will guide international actors. See Reisman, *International Lawmaking: A Process of Communication*, 75 PROC. AM. SOC'Y INT'L L. 101, 119-20 (1981). See generally M. McDougal & W. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* (1981).

These existing voluntary codes already influence TNC activities despite the absence of implementing treaties. Rubin, *supra* note 6, at 918, 920. The first successful test of the OECD Guidelines occurred in the *Badger* case. See Horn, *supra* note 6, at 931-32. Although the codes are not

This treatment of TNCs is quite consistent with the traditional theory of public international law. According to that theory, the only subjects of international law are nation-states. All other entities, particularly individuals and business organizations, interact with international law indirectly through their national governments.⁸ Many academicians and theorists disagree with these traditional premises; they argue either that the premises have never been correct⁹ or that the recent developments that have changed the international legal system have made them no longer correct.¹⁰ Certainly, due to the increasing

legally enforceable, they often express the consensus of the member nations and, in so doing, they might have legal effects and become part of public international law. *Id.* at 936-37; R. WALDMANN, REGULATING INTERNATIONAL BUSINESS THROUGH CODES OF CONDUCT 21 (1980); Baade, *supra* note 6, at 7, 9, 14 & n.57; Vogelaar, *Multinational Enterprises: The Guidelines in Practice*, 86 OECD OBSERVER 7 (1977). See Fatouros, *supra* note 6, at 951, 961-72; Horn, *Codes of Conduct for Multinational Enterprises and Transnational Lex Mercatoria: An International Process of Learning and Law-Making*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 45 (N. Horn ed. 1980); Stanley, *supra* note 6, at 977-78. For a survey of international activities directed at TNCs that are likely to develop into new law, see Baade, *supra* note 2.

Some members of the business community have acknowledged the likelihood that these codes will evolve into mandatory standards. Coombe, *supra* note 5, at 31. Organized labor has used existing codes as tactical tools. Stanley, *supra* note 6, at 1002.

8. P. JESSUP, THE USE OF INTERNATIONAL LAW, THE THOMAS M. COOLEY LECTURES 20-21 (1959); T. WALKER, A HISTORY OF THE LAW OF NATIONS 330-32 (1899); H. WHEATON, ELEMENTS OF INTERNATIONAL LAW 25-74 (1936). See G. SCHWARZENBERGER, POWER POLITICS, A STUDY OF WORLD SOCIETY 131 (3d ed. 1964).

Many contemporary academicians agree that TNCs should interact with international law through nation-states and that nation-states should regulate TNCs. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 2 (Tent. Draft No. 2, 1981); Rubin, *Multinational Enterprise and National Sovereignty: A Skeptic's Analysis*, 3 LAW & POL. INT'L BUS. 1, 14 (1971); Vagts, *supra* note 1, at 740-43.

9. McDougal and Leighton contend that the proposition that public international law deals with relations among states is a "nineteenth century canard." McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusion Versus Rational Action*, 59 YALE L.J. 60, 74 (1949). Emphasis upon relations between states, to the exclusion of individuals, is, in fact, of relatively recent origin, a product of nineteenth century positivism. 1 D. O'CONNELL, INTERNATIONAL LAW 106-11 (2d ed. 1970); C. OKEKE, CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW, AN EXAMINATION OF THE NEW ENTITIES OF INTERNATIONAL LAW AND THEIR TREATY-MAKING CAPACITY 68-69 (1974); Idelson, *A Law of Nations and the Individual*, 30 GROTIUS SOC'Y 50, 53-54 (1945); Lissitzyn, *Territorial Entities Other than Independent States in the Law of Treaties*, 3 RECUEIL DES COURS 5 (1968). Perhaps the oldest example of the applicability of international law to a non-state is the Catholic Church. J. LADOR-LEDERER, INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS AND ECONOMIC ENTITIES 29 (1963).

10. See, e.g., P. JESSUP, A MODERN LAW OF NATIONS 15-16 (1968); W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW, *supra* note 1, at 162. Jessup argues that although the state was traditionally the sole subject of international law and the individual had to rely on the state in international legal relations, this has substantially broken down and will continue to do so. See P. JESSUP, *supra* at 15-16; see also RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES at 2 (Tent. Draft No. 2, 1981); C. OKEKE, *supra* note 9, at 2-3; Spofford, *Third Party Judgment and International Economic Transactions*, 3 RECUEIL DES COURS 116, 191 (1964).

international importance of TNCs, international law either has or will become relevant to their behavior.

B. *Why Change is Needed.*

The failure to allow direct TNC participation in the development of potential international law imposes unnecessary costs on the international legal system. Because the proposed codes do not resolve the underlying political and economic issues, they merely convert these controversies into *legal* issues. Failing to bring the major international actors into this process does little to advance relevant interests and imposes unnecessary risks on the inherently frail international legal system. Expanding the role that TNCs and other major interest groups play in the process of developing and implementing these rules might be one way to avoid these negative results.

The hazards of making international rules for TNCs without their direct participation are illustrated by the recent Deep Seabed negotiations at the Third United Nations Conference on the Law of the Sea (UNCLOS III).¹¹ The exclusion of those TNCs involved in the deep seabed mining industry from direct participation in these negotiations forced them to rely on national governments for representation. Business representatives who wanted to participate in the negotiations had to be associated with a government delegation. This severely limited their participation. The result after over ten years of negotiation is an accord that fails to fully reflect the reality of deep seabed mining. By effectively excluding TNCs from the Deep Seabed negotiations, the international community limited its own access to relevant industry information, prevented many in the industry from developing an understanding of the interests of the participating nations and the realities of the negotiations, and allowed the TNCs to avoid committing themselves to the conference's compromises.¹² These effects, in turn, have given TNCs free rein to apply pressure to undermine the negotia-

11. For a comprehensive series of articles on the UNCLOS III negotiations, see Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AM. J. INT'L L. 1 (1974); *The Third United Nations Conference on the Law of the Sea: the 1974 Caracas Session*, 69 AM. J. INT'L L. 1 (1975);—*The 1975 Geneva Session*, 69 AM. J. INT'L L. 763 (1975); and Oxman, *The Third United Nations Conference on Law of the Sea: the 1976 New York Session*, 71 AM. J. INT'L L. 247 (1977);—*the 1977 New York Session*, 72 AM. J. INT'L L. 57 (1978);—*The Seventh Session (1978)*, 73 AM. J. INT'L L. 1 (1979);—*The Eighth Session (1979)*, 74 AM. J. INT'L L. 1 (1980);—*The Ninth Session (1980)*, 75 AM. J. INT'L L. 211 (1981);—*The Tenth Session (1981)*, 75 AM. J. INT'L L. 1 (1982).

12. There were, of course, private discussions between company representatives and national governments. Presumably, informal understandings were reached on specific negotiating objectives to be undertaken by the state. They did not necessarily involve commitments of industry to the international community on these matters.

tions¹³ and thereby to oppose their governments' adoption of the entire Third Law of the Sea Convention. Thus, if UNCLOS III participants wanted to develop an *effective* international agreement at an early date they hurt their chances by excluding interested TNCs from direct participation.

Precluding such TNC participation in the law-making process not only impairs the opportunity to effectively implement the rules, it also lessens the chances of maintaining their long-term viability. In theory, then, participation by TNCs and other power groups would make this rule-making process more realistic and its ultimate product more acceptable to all parties. In turn, the likelihood that the codes could be successfully implemented would also increase. On the other hand, such

13. The most tangible result of TNC efforts to undermine the treaty has been the passage in several countries of domestic legislation on deep seabed mining. On June 28, 1980, President Carter signed into law the Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1401 (Supp. V 1981). France, the Federal Republic of Germany, Japan, the United Kingdom, and the Union of Soviet Socialist Republics have all recently adopted their own deep seabed mining laws. See Act of Interim Regulation of Deep Seabed Mining, Bundesgesetzblatt, Teil I. [BGBL] 9080, No. 50, at 1457 (1980) (Federal Republic of Germany), 20 INT'L L. MATERIALS 393 (March 1981); Act to Amend the Act of Interim Regulation of Deep Seabed Mining of February 12, 1982, BGBL No. 5, at 136 (1982), 21 INT'L L. MATERIALS 832 (1982); Deep Sea Mining Act (Temporary Provisions), 1981, (United Kingdom), 20 INT'L L. MATERIALS 1217 (1981); Edict on Provisional Measures to Regulate Soviet Enterprises for the Exploration and Exploitation of Mineral Resources (April 17, 1982) (USSR), reprinted in *Izvestia*, Apr. 18, 1982 at 1, 21 INT'L L. MATERIALS 551 (1982); Law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, Law No. 81-1135 of Dec. 23, 1981, 1981 Journal Officiel de la Republique Francaise 3499 (France), 21 INT'L L. MATERIALS 808 (1982); Law on Interim Measures for Deep Seabed Mining (July 16, 1982), Enforcement of the Regulations for the Law on Interim Measures for Deep Seabed Mining, Official Register of the Ministry of International Trade and Industry, No. 9770 (July 26, 1982).

On July 9, 1982, the United States announced that it would not sign the UNCLOS III Convention on the Law of the Sea. See *New York Times*, July 10, 1982, at 1, col. 2. The United States refused to sign the treaty in part because a number of deep seabed mining consortia claimed that they could not carry out commercial mining under the Treaty. See *Hearings on U.S. Foreign Policy and the Law of the Sea Before the House Foreign Affairs Comm.*, 97th Cong., 2d Sess. 84 (1982) (statement of James L. Malone, Assistant Secretary of State for Ocean and International Environmental and Scientific Affairs). The few concessions that the United States offered in the last round of talks, in March 1982, brought cries of "sellout" from representatives of the mining industry. Some members of private industry lobbied actively in Washington against contemplated proposals for accommodation and obtained a hearing at high levels in the White House. Ratiner, *The Law of the Sea: A Crossroads for American Foreign Policy*, 60 FOREIGN AFF. 1006, 1013 (1982).

TNCs took an active role in shaping the United States legislation with respect to deep seabed mining. See, e.g., *Deep Seabed Hard Mineral Resources Act: Hearings on H.R. 3350 Before the Comm. on International Relations and its Subcomm. on International Organizations and International Economic Policy and Trade*, 95th Cong., 2d Sess. 61-106 (1978) (statements of Marne A. Dubs, Alfred P. Statham, Northcutt Ely, Esq., and Philip Hawkins); *Deep Seabed Hard Minerals Act: Joint Hearings on S. 713 Before the Comm. on Commerce, Comm. on Foreign Relations, and the Comm. on Armed Services*, 94th Cong., 2d Sess. 104-39 (1976) (statements of Northcutt Ely, Esq., Jack Flipse, Marne A. Dubs, and C. G. Welling); See also *Washington Post*, Aug. 14, 1977 at 1, col. 1.

participation would raise a number of substantive and procedural issues, an example of which is the need to avoid giving undue leverage to TNCs and other international actors vis-a-vis states and nongovernmental organizations. The purpose of this article is to explore these issues from the perspective of public international legal theory and, to a lesser extent, from pragmatic political and procedural points of view.

II. THE SYSTEM OF PUBLIC INTERNATIONAL LAW

A. *International Law as Law.*

Any examination of these issues must first consider the elementary and fragile structure of the international legal system. It sits on the fringes of those systems traditionally classified as systems of law¹⁴ and is considered, at best, to be a rudimentary legal system that lacks the basic elements identified by positivists and found in all nation-state domestic legal systems.¹⁵ Despite the presence of a body of international law, the international legal system's ability to procure conformance is less than that found in the more advanced domestic legal systems. One reason for this is that domestic legal systems benefit from the nationalism of their subjects. Not only does the international arena not benefit from such national allegiance, it suffers because national sovereignty encourages the subjects of international law to give that allegiance to state interests rather than to those of the international community.¹⁶ Moreover, in the absence of a single sovereign to issue commands, disseminate propaganda, or impose sanctions, no effective institution exists to encourage allegiance to international law. Finally, the absence of a comprehensive system for a third-party determination of violations provides greater opportunities for would-be violators to break the law and for disputes to develop among its subjects.¹⁷ Thus, without a sov-

14. J. BRIERLY, *supra* note 7, at 55-56; 1 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 1 (1940); H.L.A. HART, *THE CONCEPT OF LAW* 222-25 (1961); H. MORGANTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 231-33, 236-37 (rev. 5th ed. 1978).

15. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 133-34, 201 (1954); 2 C. WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* 5-19 (J. Drake trans. 1934). See 2 C. BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI LIBRI DUO* 20-67 (T. Frank trans. 1930).

16. I. CLAUDE, *SWORDS INTO PLOWSHARES* 441-43 (2d ed. 1961). Many scholars have recognized the significance of loyalty to the effectiveness of law. H. LASKI, *STUDIES IN THE PROBLEMS OF SOVEREIGNTY* 16, 272-73, 274 (1919); R. WEST, *INTERNATIONAL LAW AND PSYCHOLOGY, TWO STUDIES: THE INTRUSION OF ORDER, CONSCIENCE AND SOCIETY* 240-41 (1974). Laski stated: "[T]hat state will be the stronger which thus binds to itself its members by the strength of a moral purpose validated." H. LASKI, *supra* at 19. Others such as Hobbes, Rousseau, and Hegel pointed to other factors as predominant. *Id.* at 33; see W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 21, 246, 378.

17. West says: "Individual, group, or nation state, we cannot judge our own cause. And if we try to do so we shall be reduced again and again to fighting for a supposed 'right' against a

ereign to issue commands, a court system to determine violations, or a police force to punish violators, international law is law only because there are known norms of behavior that its subjects *choose* to follow in most circumstances.

This structure of the international legal system has had a direct impact on its substantive law. Because voluntary allegiance to its norms is much more important to the international legal system than to domestic systems, international law has maximized this allegiance by placing great emphasis on describing the actual patterns of national behavior as normative rules and by limiting its attempts to impose new norms of behavior on the international community.¹⁸ Because the international community has traditionally been small and homogeneous, the law it has generated has reflected its desires and interests.¹⁹ This conclusion is accurate despite the recent, frequent changes in public

supposed 'wrong,' for one set of illusions against another." R. WEST, *supra* note 15, at 240; *see also id.* at 250.

Schwarzenberger lauds the auto-enforcement of international law because it assures that the system will be flexible enough to take into account changing power relationships. G. SCHWARZENBERGER, *supra* note 8, at 199-201.

18. Dunn has pointed out the significance of the relationship of the community to the rules of international law:

The times in which international law has achieved its greatest successes have been those in which it has been in obvious harmony with the system of values held by the most important classes in the leading nations of the world. In the early days, international law got a foothold because it incorporated the moral values of Christianity. . . . It likewise managed to survive in the eighteenth and nineteenth centuries because it served directly the values held by the commercial and industrial classes. . . .

Dunn, *The International Rights of Individuals*, 35 AM. SOC. INT'L L. 14, 17 (1941); *see also* C. OKEKE, *supra* note 9, at 217; G. SCHWARZENBERGER, *supra* note 8, at 30-31, 211, 274; McDougal, *supra* note 1, at 183. Brierly wrote:

'The legal order,' as Professor Pound has recently written, 'must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles, we must seek principles of change no less than principles of stability'. . . . The suggestion may be hazarded that international law has in great part neglected one side of this twofold function; it has aimed at stabilizing without sufficiently providing for the growth of international society; it has attempted to maintain existing values, but rarely to create new ones.

J. BRIERLY, *supra* note 7, at 72. From a broader perspective, Laski wrote:

The will of the State obtains pre-eminence over the wills of other groups exactly to the point where it is interpreted with sufficient wisdom to obtain general acceptance, and no further. . . . Should it venture into dangerous places it pays the penalty of its audacity. . . . There is no sanction for law other than the consent of the human mind. It is sheer illusion to imagine that the authority of the State has any other safeguard than the wills of its members.

H. LASKI, *supra* note 15, at 14.

Waltz distinguishes between domestic and international political structures on the basis that the domestic political structure is hierarchic and the structure of the international system is anarchic. K. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 114-15 (1979).

19. J. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 40-41 (1944); W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 214-15, 278-79; G. SCHWARZENBERGER, *supra* note 8, at 206, 209.

international law. The increasing prominence of treaties, general principles of law, and resolutions of international organizations continues to make community consent to new international norms an important element in the process of law development.

Of course, both the codification of customary international practice and the creation of new norms present risks to the international legal system. Hans Kelsen identified two limitations on any legal system: the "superior" and "inferior" limits. The "superior limit" is reached when the law conforms so completely to the behavior of its subjects that it effectively disappears because it has no normative value. At the "inferior limit," violations are so rampant that, again, lacking any normative value, the law vanishes.²⁰ In the international legal system, norms have traditionally approached the "superior limit." Nevertheless, current efforts to dramatically change these norms, particularly in the economic arena, may push the system to the "inferior limit."

B. *Nation-State Preeminence.*

The traditionally preeminent position of the nation-state has played an important role in keeping the international legal system viable. From its inception, international law focused upon the sovereign territorial entity, giving natural persons and other entities a peripheral role.²¹ The birth of modern international law at the signing of the

20. H. Kelsen, *GENERAL THEORY OF LAW AND STATE* 120 (1945); H. Kelsen, *ALLGEMEINE STAATSLERE* 18-19 (1925). Marek describes Kelsen's position as follows:

To the obvious question concerning the actual extent of that necessary margin of law-breaking, Kelsen replies with the theory of the "superior" and "inferior" limit. Should a legal system not be observed at all, or be observed only to an insignificant degree, then the "inferior limit" of effectiveness would be passed: there would in fact be no more law. But it would meet with exactly the same fate in the case of its total and absolute observance; should legal norms entirely correspond to existing reality to the extent of excluding the possibility of their violation, then the "superior limit" would be passed: the normative character of the law would disappear in favor of causality, and law itself with it It is not the existence of illegal acts which forms the supreme challenge to international law, but the possibility of their giving rise to legal titles on equal footing with lawful acts.

K. MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 554 (2d ed. 1968).

21. In the Greek city-state system, it was very important that new colonies be duly constituted by the proper procedures. 2 C. PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 117-18 (1911). The rules and principles of war applied only to civilized sovereign states. *Id.* at 195. Supreme allegiance was expected to be directed to the state. 1 *id.* at 42; 2 *id.* at 91. The right to send ambassadors was a right inherent only in sovereign powers. 1 *id.* at 309. The same was true in Roman times. 1 *id.* at 101-11, 379. This was particularly true with respect to the Barbarians who were not given the same status as free states. 1 *id.* at 230-31; 2 *id.* at 195-96; see also P. POTTER, *THIS WORLD OF NATIONS, FOUNDATIONS, INSTITUTIONS AND PRACTICES* 22 (1929).

During medieval times this distinction between natural persons and the sovereign territorial entity appears to have broken down through the development of the concept of relative sover-

Treaty of Westphalia was the product of a power struggle pitting the nascent state system against the Church and the Holy Roman Emperor.²² Public international law was developed in order to legitimate and support the new system.²³ Since that time, national governments have held most of the political, economic, and military power, thereby making them the natural foci of international law.²⁴

In the Twentieth Century, particularly after World War II, the nation-state's fallibility has become increasingly apparent. Indeed, the role of intergovernmental organizations in international affairs has expanded substantially as a result of the international community's need to attain the goals that nation-states could not reach alone.²⁵ Such or-

eignty; various semi-sovereigns were accorded status as individuals. G. SCHWARZENBERGER, *supra* note 8, at 86-87.

22. Briery wrote:

[T]he fundamental rights of states were born of the needs of a cause, rather than of reflection on the nature of the juridical relations of states. They were invented because the post-Renaissance prince, himself a successful rebel against claims of pope and emperor, sought in a new juridical order a system to consecrate his hard won independence. The new political order . . . had to be justified and so strengthened by a theory which would show that it and it alone was consistent with a rightly ordered universe.

J. BRIERY, *supra* note 19, at 4-5; *see also id.* at 30-31; W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 4, 20-21. For a history of these developments, *see* T. WALKER, *supra* note 8, at 64, 67-68, 84, 90, 125-27, 141-43, 146, 150-52, 203; *see also* J. BRIERY, *supra* note 19, at 3; G. SCHWARZENBERGER, *supra* note 8, at 101. *Contra* C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 7-8 (P. Corbett trans. 1968). In De Visscher's opinion, to date public international law from the establishment of the nation-state, i.e., the Treaty of Westphalia, is to tie public international law to its subjects—equal sovereign states. He argues that the establishment of the nation-state was merely a redistribution of power.

23. *See* J. BRIERY, *supra* note 7, at 7.

24. W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 21, 213-14 (1964). Schwarzenberger goes so far as to say that there are only two world powers today—the United States and the U.S.S.R. According to Schwarzenberger, France, the United Kingdom, and China are major powers with only regional significance. G. SCHWARZENBERGER, *supra* note 8, at 118-20. He states that the smaller powers can only survive under the umbrella of the more powerful states. *Id.* at 102-08. Even the Catholic Church is subservient to the nation-state. *Id.* at 131.

In contrast, Galtung views even the nonterritorial actors as becoming the foci of decision-making in world affairs. Galtung, *Nonterritorial Actors and the Problem of Peace*, in *ON THE CREATION OF A JUST WORLD ORDER* 151 (S. Mendlovitz ed. 1975). Timberg, in his well-regarded article, *International Combines and National Sovereigns*, 95 U. PA. L. REV. 575 (1947), takes a similar view, arguing that international combines (TNCs) have wrested the essence of sovereignty from the nation-state. *Id.* at 578.

25. Support can be found for the premise that the nation-state system is poorly equipped to handle the current changes in the international sphere. *See* J. LADOR-LEDERER, *supra* note 9, at 379; H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 80 (1927); C. OKEKE, *supra* note 9, at 68; Friedmann, *The Changing Dimensions of International Law*, 62 COLUM. L. REV. 1146, 1156 (1962). Laski wrote in 1932 that the sovereign nation-state was a creation to meet the world of the nineteenth century and is ill-suited for the twentieth century with changes wrought by modern science and economic interdependence. H. LASKI, *NATIONALISM AND THE FUTURE OF CIVILIZATION* 26 (1932); *see also id.* at 54. Perhaps the strongest modern advocate for the demise of the nation-state system is Richard Falk, who calls for a system of

ganizations have even been accorded formal international legal personality for certain purposes.²⁶ While these entities are still largely controlled by nation-states, they also have international significance as separate corporate bodies.²⁷

To a substantially lesser degree, the international roles of natural persons, nongovernmental organizations, and TNCs have also been

nonterritorial central guidance because "[t]he interaction of territorial sovereign states is increasingly at variance with the *functional logic* of planning, guidance and budgeting that are needed for a planet that has less and less surplus capacity and is more often faced with the realities of scarcity." Falk, *The Future of World Order*, in *JUS ET SOCIETAS, ESSAYS IN TRIBUTE TO WOLFGANG FREIDMANN* 38, 57 (G. Wilner ed. 1979); see also J. SCHNEIDER, *TREATY-MAKING POWER OF INTERNATIONAL ORGANIZATIONS* 141-42 (1959).

Feld lists six nongovernmental entities having international impact today: multinational enterprises; labor organizations; nongovernmental organizations established to pursue transnational objectives; nongovernmental organizations established as political parties; guerilla and liberation organizations; and large foundations. W. FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS, A STUDY OF BUSINESS, LABOR, AND POLITICAL GROUPS* 4-6 (1972); see also *id.* at 3, 148. Jessup has defined the international community as follows: "The 'international community' should now be used as a term descriptive of a large number of political entities enjoying varying degrees of political independence and of economic self-sufficiency, plus various collectivities or organizations in which those entities are grouped for certain purposes." P. JESSUP, *supra* note 8, at 24; see also *id.* at 21; McDougal, *supra* note 1, at 174.

26. See *Reparation for Injuries Suffered in the Service of the United Nations* 1949 I.C.J. 174; W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 218-19 (1964); C. OKEKE, *supra* note 9, at 181-216. There are a number of theories used to explain the origins of the international legal personality of international organizations. These include: 1) personality expressly or impliedly conferred by the agreement of the states that created the organization; 2) personality derived from the voting structure, composition and powers of the organization; 3) personality derived from specific rights and duties of the international organization which necessarily provide for international legal personality; 4) personality derived from inherent legal personality based on the existence of the international organization and general international law. See *id.* at 183-84. Perhaps the most dramatic evidence of the international legal personality of international organizations has been the virtual explosion of the number of treaties entered into by international organizations since 1945. See *id.* at 192; see also First Report on the Question of Treaties Concluded between States and International Organizations or Between Two or More International Organizations, Report of Professor Reuter, Special Rapporteur, made at the 24th Session of the International Law Commission, U.N. Doc. A/CN.4/258 1972; S. ROSENNE, *THE LAW OF TREATIES, A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* 44 (1970). The international legal personality of international organizations, however, is broader than that of mere treaty-making power. See D. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 299-308, 323, 353-54 (3d ed. 1975). International organizations have an expanding role to play in the development of international legal norms. See *id.* at 308-09. The Soviets, however, have been more reticent about the international legal personality of international organizations and particularly their role in developing new norms of international law. See G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 327-36 (W. Butler trans. 1974); C. OKEKE, *supra* note 9, at 185-88.

27. See *supra* note 26; RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 219, at 81 (Tent. Draft No. 2, 1981); see also Galtung, *supra* note 24, at 158; GRIEVES, *SUPRANATIONALISM AND INTERNATIONAL ADJUDICATION* 8-9 (1969); McNemar, *The Future Role of International Institutions*, in 4 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 448-49, 459-62 (1972). See generally W. FELD, *supra* note 25, at 3.

recognized.²⁸ However, the reluctance of nation-states to accept their

28. As to individuals, see RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101, at 21 (Tent. Draft No. 1, 1980); H. WHEATON, *supra* note 8, at 26-27; McDougal & Leighton, *supra* note 9, at 83-84. C. NORGAARD, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW* (1962), reviews the areas where individuals interact directly with international law and procedure. Norgaard finds areas where individuals are only the subjects of duties or rights and others where they also have a procedural duty or right. These procedural rights and duties of individuals are, however, limited in number and in kind. He considers the right of petition under set procedures to be a procedural qualification. *See id.* at 82-303; *see also* P. JESSUP, *supra* note 10, at 17-18; H. Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 96-114 (1952); H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 38 (1950). Individuals have been given the right to appear before international tribunals. *See id.* at 18, 32; W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 40, 241 (1964); S. KAECKENBEECK, *THE INTERNATIONAL EXPERIMENT OF UPPER SILESIA* 78 (1942). International organizations have been afforded personality for some purposes. Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 1970 BRIT. Y.B. INT'L L. 111, 123; 1949 I.C.J. 174; RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §219, at 1 (Tent. Draft No. 2, 1981); H. WHEATON, *supra* note 8, at 26-27; McDougal & Leighton, *supra* note 9, at 83-84.

It has been suggested that the role of individuals in international law be expanded. *See* J. BRIERLY, *supra* note 7, at 52-53; P. JESSUP, *supra* note 10, at 121; McDougal, *supra* note 1, at 161-62; Sohn & Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 578 (1961); Spofford, *supra* note 10. In natural law theory the individual is the only subject of law. *See* McDougal & Leighton, *supra* note 9, at 83. There are also those who have argued that individuals are not subjects of international law either because they could not be as a matter of doctrine or because they had not satisfied the dual test which requires them to possess rights or duties under substantive law and to participate in the procedural enforcement system. *See* the authors referred to in C. NORGAARD, *supra*, at 35-41.

For a full review of the activities of non-governmental organizations (NGO) on the international plane as of 1963, *see* J. LADOR-LEDERER, *supra* note 9; *see also* W. FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 25, at 175-76, 235. National liberation groups and other state-preparing NGOs have also been accorded some international legal personality. *See* J. LADOR-LEDERER, *supra* note 9, at 117-18, 123, 141; C. OKEKE, *supra* note 9, at 109-27. Observer status at the U.N. has been granted to African national liberation movements recognized by the Organization of African Unity. *See* G.A. Res. 3280, 29 U.N. GAOR Supp. (No. 31) at 5, U.N. Doc. A/9631 (1974); G.A. Res. 31/30, 31 U.N. GAOR Supp. (No. 39) at 118, U.N. Doc. A/31/39 (1976). Such observer status has also been granted to the Palestine Liberation Organization. G.A. Res. 3237, 29 U.N. GAOR Supp. (No. 31) at 4, U.N. Doc. A/9631 (1974). *See* Kassim, *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law*, 9 DEN. J. INT'L L. & POL. 1 (1980). Under Article 71 of the Charter of the United Nations hundreds of NGOs enjoy consultative status with the Economic and Social Council. The same has been true for exiled or refugee governments many of which obtain legal personality. *See* H. BLIX, *TREATY MAKING POWER* 187 (1960); W. FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 25, at 230-33; H. Kelsen, *supra* note 20, at 288-89. Component states of federal unions have also had certain international legal personality. Lissitzyn, *supra* note 9, at 25; *see* C. OKEKE, *supra* note 9, at 43-62.

Feld argues that "[b]y being able to induce value-allocating action and reaction of governments and [intergovernmental organizations] in international system[s], nongovernmental entities clearly deserve actor status, but this status is qualitatively different for those of national governments, since they cannot 'authoritatively' allocate values but depend on governments for this." W. FELD, *supra* note 25, at 247-48. Of course, Timberg, *supra* note 24, disagrees with this characterization of the limited power of non-governmental entities.

participation has limited it to very few areas.²⁹ Regardless of the degree of participation, these developments have made it clear that there is no systemic reason why non-state entities may not participate in the international legal system.³⁰

III. THE PARTICIPATION OF TNCs IN THE PUBLIC INTERNATIONAL LEGAL SYSTEM

A. *Current Perspectives on TNC Participation.*

There is evidence that TNCs have had international legal personality and have participated in the international legal system for some time.³¹ Examples of such participation include application of public international law to contracts with state entities³² and participation in

29. W. FRIEDMANN, *The Changing Structure of International Law*, *supra* note 1, at 234-35; G. SCHWARZENBERGER, *supra* note 8, at 136-37.

30. "Gradually a consensus of opinion is evolving to the effect that although it is States which are the normal subjects of international law, there is nothing in international law which is fundamentally opposed to individuals and other legal persons becoming subjects of international rights and duties, i.e., subjects of international law." H. LAUTERPACHT, *supra* note 25, at 79; *accord* France v. United States of America, 1952 I.C.J. 176; E. NWOGUGU, *LEGAL PROBLEMS FOR INVESTMENTS IN DEVELOPING COUNTRIES* 30, 249-50 (1965); C. OKEKE, *supra* note 9, at 220; Dunn, *supra* note 18, at 18. Member states of federal states may also have international legal personality for some purposes. 1 OPPENHEIM'S INTERNATIONAL LAW 167-68 (7th ed. H. Lauterpacht ed. 1948).

In theory, the communist view is that states are not subjects of international law and that the true subjects are the workers. Of course, the Soviet Union has substantially compromised its position on the matter. W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 328-29; J. LADOR-LEDERER, *supra* note 9, at 168; C. OKEKE, *supra* note 9, at 16.

Although all subjects of international law are theoretically equal, the state subjects of international law do not possess equal capacity. Thus, it is no great step to add non-states as subjects of that law. B. BROMS, *THE DOCTRINE OF EQUALITY OF STATES AS APPLIED IN INTERNATIONAL ORGANIZATIONS* 21-74, 117 (1959); W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 31-32. Jessup has argued strongly for a change in the doctrine of equality of states. P. JESSUP, *supra* note 8, at 24; P. JESSUP, *supra* note 10, at 27-28.

31. P. JESSUP, *supra* note 1, at 3; Miller, *The Global Corporation and American Constitutionalism: Some Political Consequences of Economic Power*, 6 J. INT'L L. & ECON. 235, 238-39 (1971); *see also* W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 174-75, 375; Gläzer, *A Functional Approach to the International Finance Corporation*, 57 COLUM. L. REV. 1089 (1957); Mann, *The Proper Law of Contracts Concluded by International Persons*, 1959 BRIT. Y.B. INT'L L. 34. Corporations established by groups of states, such as Eurofima, Eurochemic, the Mont Blanc Tunnel Company, and the Mozelle Canal Company have participated in the international legal system. W. FRIEDMANN, *supra* note 1, at 183; W. FRIEDMANN, *supra* note 25, at 1159-60. In addition the Dutch East India Company and the British East India Company historically acted as if they were international legal persons. They "had the power to make war and peace and to conclude treaties on which their states relied as basis of rights." P. JESSUP, *supra* note 10, at 22. The Hudson Bay Company's activities in North America are discussed in Katz, *The Company that Rules the North*, GEO 11 (June 1981).

32. *See* The Lena Goldfields Arbitration, 1929-30 ANN. DIG. PUB. INT'L L. CASES (Nos. 1, 258) (H. Lauterpacht ed.); P. JESSUP, *supra* note 10, at 33, 139-40; 1 G. SCHWARZENBERGER, *INTERNATIONAL LAW* 215 (1945); Mann, *supra* note 31, at 21, 43; McNair, *The General Principles of*

dispute settlement forums established either by treaty or intergovernmental organizations.³³ Some principles of public international law have become so widely accepted that they have been viewed as binding on the TNCs' international activities.³⁴ Finally, TNCs advise international organizations when their interests are at stake³⁵ and it is clear

Law Recognized by Civilized Nations, 1957 BRIT. Y.B. INT'L L. 1, 1; The Abu Dhabi Arbitration, 1 INT'L & COMP. L.Q. 247-51 (1952). On the other hand, the Permanent Court of International Justice stated in the *Serbian Loans Case*, 1929 P.C.I.J. Ser. A. Nos. 20/21, at 41, that "[a]ny contract which is not a contract between States in their capacity as subjects of internal law is based on the municipal law of some country." Mann, *supra* note 31, at 47-48, argues that there has been a progressive development of international law since the *Serbian Loans* decision.

33. See *The Lena Goldfields Arbitration*, *supra* note 32; H. CATTAN, *THE LAW OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA* 143 (1967); J. LADOR-LEDERER, *supra* note 9, at 355-56, 370; C. OKEKE, *supra* note 9, at 211-12; Spofford, *supra* note 10, at 177-81 (a review of situations in which non-state entities have had access by treaty to international adjudications often against nation-states).

Both the European Economic Community and the European Coal and Steel Community have provisions in their charters which in effect grant standing in their dispute-settlement tribunals to private corporations. See *Treaty of the European Economic Community*, March 25, 1957, art. 173, 298 U.N.T.S. 11; 2 Common Market Rep. [CCH] ¶ 4636.03 1976; *Treaty of the European Coal and Steel Community*, April 18, 1951, arts. 33, 48, 261 U.N.T.S. 143; W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 224-25, 375; E. NWOGUGU, *supra* note 30, at 240. The UNCTRAL Rules on International Commercial Arbitration, 1967 Y.B. Int'l Trade L. 157 (United Nations), were developed for this purpose. See Tunc, *The Need for Universal Unification of the Law of International Sales*, in *INTERNATIONAL ECONOMICS AND TRADE LAW* 127 (C. Schmitthoff & K. Simmonds eds. 1976).

The International Centre for the Settlement of Investment Disputes was established specifically for the purpose of resolving investment disputes between industrial organizations and states. See *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, reprinted in 4 INT'L L. MATERIALS 532 (1965); Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development Through the Multinational Corporation*, 9 VAND. J. TRANS. L. 793 (1976).

34. W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 181-82. Spofford, *supra* note 10, at 207-09, argues that "[t]he principle *pacta sunt servanda* which had its first application as a rule governing princes in their diplomatic relations is thus now a maxim of the international market place of the greatest consequence to [those] engaged in economic transactions." Many commercial contracts specify public international law as the source of law that governs the contract. Mann, *supra* note 31, at 48-52.

35. See, e.g., *Summary of Hearings Before the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations*, U.N. Department of Economic and Social Affairs, U.N. Doc. No. ST/ESA/15 (1954). In 1972, Congress approved legislation enabling Advisory Committees to be created by statute, the President, or an agency, in order to provide means of collecting expert opinion and ideas for officers and agencies in the executive branch. See *Federal Advisory Committee Act*, Pub. L. No. 92-463, §§ 2, 3, 9(a), 86 Stat. 770, 770, 773-74 (1972). Unless otherwise specifically provided by statute or Presidential directive, advisory committees are to be used solely for advisory purposes. See *id.* § 9(b), 86 Stat. at 774. Executives of TNCs have often served on such advisory committees, e.g., the Law of the Sea Advisory Committee and the advisory committee for the Tokyo Round of GATT negotiations. See *supra* note 4.

that they play a direct role in influencing national behavior on relevant international matters.³⁶

Some commentators have suggested ignoring the fiction of "juridical actors." They argue that since the real actors are those natural persons who have both a stake in and the power to affect the decisions,³⁷ it is immaterial what fictional entity has formal international personality. On the basis of this analysis, many TNCs, or at least their leaders, have always been and will continue to be participants in the international legal system.

While this view is helpful in some cases, it is often necessary to distinguish the personalities of organizations such as TNCs and state entities from those of their human representatives and constituents. Because TNCs are corporate personalities and have substantial power at their disposal, decisions about whether they should participate in the law-making process and be held accountable for violations of the law are significant. For example, the TNC's influence upon and accountability to rules of international law appear to be a function of the extent to which it may *directly* participate in the international legal process.³⁸

36. See Ray, *Corporations and American Foreign Relations*, 403 ANNALS 80, 86-91 (1972).

37. See H. Kelsen, *supra* note 20, at 97-98, 342-43; J. LADOR-LEDERER, *supra* note 9, at 21. Kelsen stated:

The State, as a subject of international law, is in fact simply a juristic person. . . . Thus when international law obligates and authorizes States . . . it means that international law obligates and authorizes those human individuals who are State organs. But international law regulates the behavior of these individuals indirectly, through the medium of the national legal order When international law imposes upon a State [an] obligation. . . it is determined only what ought to be done in the name of one State and what may be done in the name of the other; but it is not determined who . . . has to fulfill the obligation stipulated by international law.

H. Kelsen, *supra* note 20, at 342-43; see Duguit, *Traite de Droit Constitutionnel* 319 (2d ed. 1921); W. FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 1, at 9; H. KRABBE, *THE MODERN IDEA OF THE STATE* 243 (1922); C. NORGAARD, *supra* note 28, at 72-77; G. SCHELLE, *MANUEL DE DROIT INTERNATIONAL PUBLIC* 509-12 (3d ed. 1948); Dunn, *supra* note 18, at 15; McDougal, *supra* note 1, at 161-62, 174-80; McDougal & Leighton, *supra* note 9, at 82-83. C. OKEKE, *supra* note 9, at 17 observes:

Even . . . the founders of modern international law such as Vitoria, Suarez and Grotius . . . proceeded . . . upon the hypothesis that "the individual is the ultimate unit of all law, international and municipal, in the double sense that the obligations of international law are ultimately addressed to him and that the development, the well-being and the dignity of the individual human being are a matter of direct concern to international law."

Id. (quoting Lauterpacht, *The Grotian Tradition in International Law*, 1946 BRIT. Y.B. INT'L L. 27).

38. J. BRIERLY, *supra* note 7, at 50.

The group dynamics of organizations create their own behavioral patterns among human participants. See *infra* note 60. Consequently, the juridical entity often acquires a personality that is distinct from the participating individuals. Thus if TNCs are going to have their interests faithfully represented, TNCs ought to be recognized as distinct entities within a legal system.

There are practical differences between direct participation in a legal system and indirect participation via an intermediary, such as a national government. Part of the difference lies in imperfections in the communication process. Thus, the nation-state may dilute legal commands

In an effort to limit that influence, states continue to regard the nation-state government as the main (if not sole) participant in the international legal system and to exclude, or at least to severely limit, the non-state entities' role.³⁹ This resistance to TNC participation is motivated not merely by a nostalgic desire to return to the days when the state was "sovereign," but by the nation-states' belief that a power struggle is taking place between themselves and the TNCs.⁴⁰ It is well-documented that there are a number of TNCs that are economically more powerful than all but the largest nation-states.⁴¹ Furthermore, the nonterritorial and globe-circling activities of these TNCs make them less subject to the will of individual nation-states and enable them to play states off against each other. TNC involvement, particularly with

applicable to the TNC and may likewise alter the desires of the TNC when communicating with the international community. The international system is particularly susceptible to these imperfections in communication because of the amorphous structure of the international legal system, the complex interests of nation-state governments, and the relations between nation-state governments and TNCs. A second practical difference between direct and indirect participation is the element of commitment to the rules. As is pointed out *infra* at note 74 and accompanying text, direct participation usually breeds commitment; exclusion usually does not.

39. The exceptional case of the ILO was primarily the result of extreme pressure placed on western, developed governments by the labor union movement and advancing socialist politics. It was thought that the creation of the tripartite system to develop international labor legislation would deflect the pressures on national governments. Beguin, *supra* note 3, at 407-08.

40. W. FRIEDMANN, *supra* note 1, at 21, 366; see Baade, *supra* note 6, at 4; Falk, *supra* note 25, at 41-47; Fatouros, *supra* note 6, at 947. Rubin believes the nation-states' fears are ill-founded, being based only on statistical evidence of TNC power. Rubin, *supra* note 1, at 475. Certainly, many believe that it is desirable and appropriate to use the International Legal System in the struggle between the state and the TNC. For example, Marxism recognizes that a primary function of law is its use as a tool in the struggle between classes. K. MARX, GRUNDRISSE 96, 769-70 (1969). The positions of the third world and socialist countries at the code negotiations often reflect these policies.

41. A chart in "The Multinational Corporation and the World Economy" prepared by the Senate Committee on Finance found that of all nation-states and corporations, the largest 99 economic entities included 40 corporations. See *Multinational Corporations: Hearings Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 93rd Cong., 1st Sess. 393 app.A, 404 (1973). General Motors was the largest corporation, placing 23rd on the list. See *id.* Two similar earlier studies were the War/Peace Report (Oct. 1968) and Arosala & Vayrynen at the Tampere Peace Research Institute, discussed in Galtung, *supra* note 24, at 162-63. Timberg, *supra* note 24, at 578, argued that the biggest private corporations have "to a large extent, wrested the substance of sovereignty from the so-called sovereign state." W. Feld, in *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 1, at 4, found that TNCs "often possess considerably greater material resources than many nation-states which enable them under certain conditions to exert more powerful influences in the international sphere than the governments of many middle-sized and small states." After comparing General Motors to Switzerland, he observed: "[a]lthough the power of states rests on other elements than productive capacities and financial resources inasmuch as military prowess as well as political assets and skills make up a significant part of a country's overall capabilities in the international arena, the figures given demonstrate the potential power of MNEs in world affairs." *Id.*; see also W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 28, 222; Rubin, *supra* note 6, at 915; Vagts, *supra* note 1, at 747-51.

third world governments, has often resulted in substantial TNC influence on host governments,⁴² and that influence has not always served those governments' best interests.

Some maintain that TNC activities are actually just a new form of western colonialism⁴³ while others view the TNC as a more benign force that is ultimately subject to state control even without major new international initiatives.⁴⁴ Regardless of which view is correct, the international community is moving toward greater international regulation of international business⁴⁵ without allowing direct business participation.

Currently, TNC directors appear to agree with many national governments that TNCs ought not to participate directly in the international legal system—a position evidenced by the fact that TNCs have not overtly sought broad international legal personality. In fact, when George Ball proposed that the major TNCs should be subject to international rather than national incorporation, the business community

42. See J. BEHRMAN, NATIONAL INTERESTS AND THE MULTINATIONAL ENTERPRISE (1970); cf. D. GOULET, THE UNCERTAIN PROMISE-VALUE CONFLICTS IN TECHNOLOGY TRANSFER 200-04 (1977); H. Perlmutter, *Attitudinal Patterns in Joint Decision Making in Multinational Firms—Nation State Relationships*, in INTERNATIONAL DECISION MAKING 201, 218-19 (M. Tuite, R. Chisholm & M. Radnor eds. 1972); Vagts, *supra* note 1, at 756-76; Waltz, *The Myth of Interdependence*, and Vernon, *Future of the Multinational Enterprise*, in THE INTERNATIONAL CORPORATION 205, 373, 389-400 (C. Kindleberger ed. 1970). The events that led up to *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), exemplify the impact that TNC power can have on weak states. In the third world, TNCs have attracted labor unions and in so doing angered ruling national elites. See W. FELD, NONGOVERNMENTAL FORCES AND WORLD POLITICS, *supra* note 1, at 5, 156-57, 165. As nations have recognized this problem, they have attempted to resist the TNC influence.

It is possible that TNC influence in domestic affairs of developing countries will decline. See W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW, *supra* note 1, at 228-29; Nye, *Two Views of World Order*, in GLOBAL COMPANIES, THE POLITICAL ECONOMY OF WORLD BUSINESS, 165-66 (G. Ball ed. 1975). With their limited power, TNCs are sometimes able to affect government decisions, but such behavior presents risks to TNCs. See Rubin, *supra* note 1, at 478.

43. See L. SOLOMON, MULTINATIONAL CORPORATIONS AND THE EMERGING WORLD ORDER 4 (1978); THE NATION-STATE AND TRANSNATIONAL CORPORATIONS IN CONFLICT xxi (J. Gunemann ed. 1975). The leaders of the major TNCs come from the western developed countries and often reflect the interests and biases of their native lands even in their business decisions. Theoretically, the government of the country in which the TNC is incorporated or the government of the country to which the leadership owes its nationality could dictate the behavior of the TNC and its leaders. See W. FELD, NONGOVERNMENTAL FORCES AND WORLD POLITICS, *supra* note 1, at 23, 92-94, 99; Rubin, *supra* note 1, at 477-78.

Other non-governmental organizations (NGOs) present a similar risk particularly to the third world. Their activities appear to benefit a group of small, highly-developed nations that have taken a particular interest in NGOs. See W. FELD, NONGOVERNMENTAL FORCES AND WORLD POLITICS, *supra* note 1, at 182-86, 196; cf. *id.* at 16-17; J. LADOR-LEDERER, *supra* note 9, at 378; Galtung, *supra* note 24, at 165. The United States' and other developed nations' policy of interdependence often enhances TNC power vis-a-vis developing countries. Cf. W. FELD, NONGOVERNMENTAL FORCES AND WORLD POLITICS, *supra* note 1 at 16-17.

44. See Rubin, *supra* note 8, at 14; Rubin, *supra* note 1, at 475, 478.

45. See Rubin, *supra* note 1, at 479-87; Rubin, *supra* note 6, at 914.

was unenthusiastic.⁴⁶ As one might expect, such a response was a function of the nation-states' fear of power loss and the business leaders' resistance to change.

TNCs benefit from their international nonstatus. Nonstatus immunizes them from direct accountability to international legal norms and permits them to use sympathetic national governments to parry outside efforts to mold their behavior. TNCs also enjoy some immunity from third world derision at the U.N. General Assembly and other multinational forums because national governments are willing to insulate them from these and other international pressures. Broad international legal personality would destroy these defenses. On the other hand, TNCs are eager to influence international decision making. They are willing participants to the extent that they can obtain *specific* international legal personality without loss of the benefits that the lack of *general* personality provides.⁴⁷ In the future, it will become increasingly difficult for them to have it both ways.⁴⁸

46. In addition to the TNC's lack of interest, other groups such as academia and interest groups were similarly unenthusiastic. *Proposals for an International Charter*, in GLOBAL COMPANIES, *supra* note 42, at 170-71. *But see Business Opinion, One Slice of the Pie*, TIME, Nov. 24, 1967, at 95. Ball's proposal is criticized in Rubin, *supra* note 8, at 33-34.

47. An example is many TNCs' desire to obtain standing to bring legal claims before the dispute settlement systems to be established within the context of the deep seabed regime of the Third United Nations Convention on the Law of the Sea. See Article 187, U.N. Doc. A/Conf.62/122 (Oct. 7, 1982).

48. Regardless of the reasons, TNC interests often conflict with the apparent interests of nation-states, and nation-states acting alone are often incapable of controlling the TNCs. See R. BARNETT & R. MULLER, GLOBAL REACH (1974); R. VERNON, SOVEREIGNTY AT BAY 3, 230, 249 (1971); D. WALLACE, INTERNATIONAL REGULATION OF MULTINATIONAL CORPORATIONS (1976); Baade, *supra* note 2, at 409; Fatouros, *supra* note 6, at 951; Rubin, *supra* note 8, at 30-31; Timberg, *supra* note 24 at 576. The conflict is particularly apparent in developing countries. See W. FELD, MULTINATIONAL CORPORATIONS AND UN POLITICS, *supra* note 1, at 1-2, 6-15; The Impact of Multinational Corporations on the Development Process and on International Relations, Report of the Group of Eminent Persons to Study the Role of Multinational Corporations in Development and in International Relations, U.N. Doc. E/5500/Add. 1 (1974); Vagts, *supra* note 1, at 756-58, 776-88; Goldberg & Kindleberger, *Toward a GATT for Investment: A Proposal for Supervision of the International Corporation*, 2 LAW & POL. INT'L BUS. 295, 296 (1970).

Christopher Layne makes a strong argument for the opposite conclusion. See Layne, *The Multinational Enterprise in the International Political System: A Theoretical Consideration*, 13 N.Y.U. J. INT'L LAW & POL. 27 (1980). He claims that the anarchical structure of the international political system makes it necessary for nation-states to act only in their self-interest and that they will always dominate the behavior of TNCs. See *id.* at 46, 53-55, 58. It is indisputable that under the present system nation-states must act in their self-interest and will attempt to turn TNCs' behavior to their benefit. But TNCs have transnational mobility not shared by nation-states and their economic interests often diverge from the theoretical interests of particular nation-states. "The most honest corporate manager acting rationally within a transnational perspective is bound to have conflicts of interest with the most reasonable of statesmen whose rationality (and democratic responsibility) is bounded by national frontiers." Nye, *supra* note 42, at 165. As a consequence, the TNC will inevitably utilize its mobility and economic power to selectively mold

B. *Current Arguments For and Against TNC Participation.*

There are strong arguments for expanding the role of TNCs in the international legal system. Nation-states aside, TNCs are the most powerful actors in the world today and to not recognize that power would be unrealistic.⁴⁹ The international economy depends heavily on the services they provide and they have far greater influence and economic power than unorganized human beings⁵⁰ or most other nongov-

national behavior to reflect TNC interests or to avoid particular nation-state efforts to regulate TNC behavior.

Thus, the TNC represents a new dimension in international politics. The desire to regain control over international decision-making motivates many states, rich and poor, to establish norms of behavior that directly or indirectly limit a TNC's ability to play nation-states against each other. In turn, TNCs have an interest in the development of uniform international rules that would discourage nation-states from expropriating TNC property. They also have an interest in establishing rules of uniform treatment that would reduce the cost and difficulty of maintaining transnational operations. Rostow has argued that there is a need for international coordination on such subjects as provision of remedies for fraud, supervision of the Euromarket and other unregulated pools of fraud, control of monopolies and restrictive business practices, and transfer of technology and know-how. See Rostow, *The Need for Treaty*, in *GLOBAL COMPANIES*, *supra* note 42, at 158. Consequently, nation-states and TNCs alike have an interest in creating some international norms to govern TNC interaction with nation-states.

Governments of the largest western, developed states, although sympathetic toward many of the TNCs' economic objectives, nevertheless continue to favor state domination of the international legal process. The United States' guidelines for private sector representatives on U.S. delegations to international negotiations illustrate the United States' preference for continued state domination of the international legal process:

No government official shall permit private sector representatives to speak for the U.S. Government at any meeting with foreign government officials. However, the head of delegation may authorize a private sector representative to explain a technical or factual point, if, in the judgment of the head of delegation, (1) this will advance U.S. objectives at the conference or negotiation; and (2) the private sector representative is best able to speak on the point under discussion.

Participation of Private Sector Representatives on U.S. Delegations, Final Guidelines, 44 Fed. Reg. 17,846, 17,848 (1979). See R. BARNETT & R. MULLER, *supra*, at 75-77; K. MARX, GRUNDRISSE 96, 769-70 (1969). G. SCHWARZENBERGER, *supra* note 8, at 202, observes that customary international law serves the function of maintaining the aristocracy of states by excluding non-states. He sees public international law as a method of applying refined pressure on society in order to legitimize the power relationship. *Id.* at 199-200, 229. Codes regulating TNCs may also be regarded as the means by which nation-states retain control. Baade, *supra* note 6, at 4; Fatouros, *supra* note 6, at 947; Stanley, *supra* note 6, at 986-93.

49. Vagts, *supra* note 1; see W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 374-75; Rubin, *supra* note 6, at 915; Rubin, *supra* note 1, at 475. Layne takes the contrary view, that the TNC is not an international actor because it is ultimately subject to the control of the nation-state. See Layne, *supra* note 48.

50. Friedmann, *supra* note 25, at 1156, observed:

In international law the differences between the individual and the private corporation are fundamental. The former is one of several thousand million persons, subject to the authority and control of a state and of economic, social, or political groupings of a national or international character. The latter is a collectivity that, in terms of economic, organizational, and political power, often surpasses many of the smaller states.

.See also Sabine & Shepard, *Introduction to H. KRABBE*, *supra* note 37, at XLII; see also Maitland, *Introduction to O. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE* (1900).

ernmental organizations.⁵¹ In fact, even the influence of intergovernmental organizations, which depends on the continued financial and political support of nation-state sponsors, cannot be compared to the power of many TNCs.⁵² This argument for increased TNC participation is further supported by the conclusion, reached earlier in this article, that the continued viability of the international legal system depends upon the close conformity of public international law to international realities.⁵³

Of course, some TNCs act on the international plane more than others. See W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 233; McDougal, *supra* note 1, at 249. Many TNCs deserve only ad hoc personality rather than broad status comparable to international organizations. See W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 223; McDougal, *supra* note 1, at 249-53.

51. Although non-governmental organizations (NGOs) do succeed in bringing about some global changes, such changes are usually undramatic, diffuse, and slow. See W. FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 1, at 208-09. Quantitative figures that might measure the significance and influence of NGOs do not adequately describe NGOs' impact on intergovernmental organizations. See *id.* at 187-91, 196, 201, 204-07, 214, 227-29.

McDougal, on the other hand, considers transnational pressure groups and political parties to be effective participants in the world power process, with enormous potential for influencing international decisions. See McDougal, *supra* note 1, at 237-44. The larger philanthropic foundations may wield equivalent power. See Bell, *The Ford Foundation as a Transnational Actor*, 25 INT'L ORG. 465 (1971); see also C. OKEKE, *supra* note 9, at 206 (International Committee of the Red Cross and the World Council of Churches).

52. See Emerson & Claude, *The Soviet Union and the United Nations: An Essay in Interpretation*, 6 INT'L ORG. 1 (1952); Rothwell, *International Organizations and World Politics*, 3 INT'L ORG. 605 (1949); Sohn, *The Impact of the United Nations on International Law*, 46 AM. SOC. INT'L L. 104 (1949). But see McDougal, *supra* note 1, at 228. One Soviet scholar thinks the role of international organizations should be restricted to the desires of the sponsoring nations. See G. TUNKIN, *supra* note 26, at 357, 362. Meron, in *THE UNITED NATIONS SECRETARIAT: THE RULES AND PRACTICE* (1977), reveals the tension between theoretical autonomy of the United Nations organization and the actual political pressures brought to bear by member governments.

53. See *supra* text accompanying notes 13-30.

The evolution of international law has been overwhelmingly dependent upon the progressive adoption and modification of rules in response to changed international conditions . . . [i]f, as is an indubitable fact of modern international practice, corporations play an increasingly important and frequent part in international transactions to which states are parties, it is for the science of international law to interpret this phenomenon against the broader background of modern international economic activities.

Friedmann, *supra* note 25, at 1155-56.

Lauterpacht contends that the definition of international legal personality has dramatically expanded to include international organizations and individuals because international law has expanded beyond issues of war. For international law to stay viable, the personality of its subjects has had to expand; this, in turn, represents a challenge to the sovereignty of nation states. See Lauterpacht, *The Subjects of the Law of Nations*, 64 LAW Q. REV. 97, 117-19 (1948); see also W. FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 1, at 247.

Although Laski focused on the domestic law of the state, his observations have importance to the international legal system. Laski believed that unless the legal system reflects an equilibrium between ideas and the interests of those with power, the effectiveness of the legal system and the state would be in question. See H. LASKI, *AUTHORITY IN THE MODERN STATE* 38, 40, 75-77, 80, 120-22 (1919). Barker called this system "polyarchism." Barker, *The Discredited State*, 5 POL. Q. 101, 120 (1915).

Formerly, because nation-states held most of the power within that system, international norms essentially mirrored nation-state interests and activities. Georg Schwarzenberger argued that this situation has not changed despite the rise in the power of TNCs. He asserted that the real measure of power in the international arena is military and political power, with economic power a distant third.⁵⁴ A similar view is that TNC leaders are highly nationalistic,⁵⁵ with both management and employees owing primary allegiance to their state of nationality rather than to the business entity.⁵⁶ Accordingly, Seymour Rubin argues that TNCs are more an extension of a limited group of dominant states than an independent international force.⁵⁷ If these analyses are correct, the TNC does not threaten the power of the nation-state. If, however, international power has shifted away from nation-states toward TNCs, then a legal system that focuses only on the former would be unrealistic and ineffective.⁵⁸

There is good reason to believe that international power has shifted, making the TNC a real and relatively independent international force challenging the nation-state.⁵⁹ TNCs are more than the

54. Schwarzenberger, *supra* note 8, at 129, argues that economic interests do not control political decisions; instead political and military power determine a country's sphere of influence and dominate its choice of national policy. If economic interests coincide with political and military interests the combined power is very strong. Schwarzenberger discounts the significance of public opinion. He argues that although the true motivation for national positions is power politics, international and domestic public opinion mandate public relations posturing. Such public relations posturing may result in some altruistic deeds, but these deeds are insignificant compared to the national investment in self-serving policies. *See id.* at 150.

Even Jessup acknowledges the state-centered orientation of international relations: "The inescapable fact is that the world is today organized on the basis of the coexistence of states, and that fundamental changes will take place only through state action, whether affirmative or negative." P. JESSUP, *supra* note 10, at 17.

55. *See* W. FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 1, at 107. (Few, if any, TNCs have a geocentric outlook; such an outlook is slow to develop. Therefore, TNC decision-making will continue to be ethnocentric for some time.). *But see* Timberg, *supra* note 24.

56. "[F]unctionalist forces are inherently weak and rarely are able to overcome ideologically and emotionally inspired counterforces such as pervasive nationalism, strong ethnocentric orientation, and powerful political ideologies." W. FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 1, at 107.

57. *See* Rubin, *supra* note 1, at 477-78. Prior to the rise of OPEC the major oil companies maintained primary allegiance to their stated nationality in their relationships with the Arabian oil producers. *See* W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 25. Although leaders of TNCs describe themselves as apolitical, they often stress their domestic contact and tone down the nature of their global orientation. W. FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 1, at 37, 103.

58. *See* Fatouros, *supra* note 6, at 951.

59. It is not within the scope of this article to prove or disprove the validity of those views. It would appear, however, that Rubin's emphasis on patriotism and national identity over and above the economic power interests of TNC executives is hard to reconcile with TNC behavior (unless,

sum of the individuals who staff them; their corporate existence cannot be disregarded.⁶⁰ In many instances, their interests do diverge from those of their host state and state of incorporation⁶¹ and, often, they

of course, one is of the view that TNC interests and actions are congruent with national interest). Similarly, the economic clout of many of the large TNCs is difficult to ignore. Nevertheless, neither of these commentators have denied that TNCs represent important centers of power. The channeling of that power through the nation-state most certainly generates tension between the government and the TNC. As a consequence of that tension, the community of nations has moved to develop international codes of conduct for TNCs. By placing the conflict in a process that will develop international norms, the community has recognized the transnational importance and power of TNCs. Such an admission and the use of international norm-setting processes would appear to require the consequential acceptance of a duty to provide a participatory role for the target entities. See R. EELLS, *GLOBAL CORPORATIONS: THE EMERGING SYSTEM OF WORLD ECONOMIC POWER* 223-29 (1972); Miller, *supra* note 31, at 238; Timberg, *supra* note 24.

60. The translator's introduction to H. KRABBE, *supra* note 37, at XLII-XLIII, states:

Now collective or corporate units such as these are certainly not mere numbers of individuals standing in quasi-contractual relations to one another. The group itself has ends which it pursues with more or less consistency; it has a settled policy which no individual can modify at will. Its collective character is as fixed as the character of an individual. . . . Their effectiveness depends upon the social bonds that unite their members and upon the need of human nature for group-life such as they afford. The state cannot make them; it cannot always destroy them. It may recognize them, but in so doing it merely recognizes something which exists as a fact and which is in no sense produced by recognition.

See *supra* note 33.

TNCs based in the U.S. are moving towards internationalized management as an assertion of independence from the United States. These TNCs do not consider themselves American and do not act in their home state's interest. *Multinational Corporations: Hearings*, *supra* note 41, at 451-52 app.B.

61. See generally Timberg, *supra* note 24. W. Feld, in *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 1, at 21-22, lists five problem areas in the relationship between the TNCs and the third world countries: (1) balance of payments problems, (2) impact on employment, (3) transfer of technology, (4) transfer pricing and taxes, and (5) TNC and host country policies. Friedmann summed up this conflict when he observed: "The heart of the international controversy is the conflict between the state's predominant concern and responsibility for the country and people over which its sovereignty extends, and the interests of the foreign investor in the reasonable protection of his investment and economic expectations." Friedmann, *The Uses of General Principles in the Development of International Law*, *supra* note 1, at 291. W. Feld, in *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 1, sees the conflict in terms of pressure by the TNC to develop greater economic integration of countries in a global and regional sense. States resist this integration, seeking independence instead of interdependence. See generally *id.* at 78-80, 84, 105-06, 108. Other commentators emphasize the conflicting loyalties that employees of TNCs frequently develop. See generally H. STEPHENSON, *THE COMING CLASH, THE IMPACT OF MULTINATIONAL CORPORATIONS ON NATIONAL STATES* (1972).

The failure of the United States embargo on grain sales to the USSR during the Carter Administration is a classic case in point. According to Robert Paarlberg, the embargo failed to affect the Soviet grain market for three reasons, one of which was the United States' difficulty in maintaining control over volume and direction of its food exports. Without a government grain marketing board, powerful producer and trade groups have traditionally resisted government restrictions on overseas sales. Paarlberg, *Lessons of the Grain Embargo*, 59 FOREIGN AFF. 144, 145 (1980). Grain producers and big export firms were initially satisfied with the government's provisions to keep farm prices up, but support began to falter as farm prices did not keep pace with production costs. *Id.* at 147-48.

behave as independent actors in the international arena by making other alliances. The fact that some of the largest TNCs have developed internal offices that serve the same functions as governmental foreign ministries and intelligence bureaus further illustrates their independent international perspective.⁶²

There are also arguments that address the problems of TNC participation. First, granting TNCs direct participation in the international legal system could create a void if it resulted in a weakening of state regulation of TNCs without a corresponding strengthening of international regulation. Such a void could essentially remove many constraints on the TNCs and give them more freedom to expand their economic and political influence world-wide. Also, actors with contrary interests, such as national governments, labor, and, arguably, the general public, may suffer.⁶³

Second, international law is incapable of resolving the most difficult political, military, and economic issues facing the international community; only the nation-state and its domestic legal system has been able to do so successfully. This argument against greater TNC participation recognizes that the nation-state is currently the only possible juridical entity with enough power to keep TNC activities from

62. W. Feld, in *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 1, at 59 reports:

Some large corporations such as Royal Dutch-Shell or Standard Oil of New Jersey have set up large-scale organizations resembling the foreign ministries of national governments. These organizations engage in carefully coordinated information and intelligence gathering operations through a network of representatives in the major capitals of the world. At the same time, these representatives are used to present their companies' viewpoints on pertinent issues to the national governments in whose countries they are stationed and seek to influence national decisionmakers in the direction desired by the corporation management. Periodically, these representatives are called back to headquarters to discuss "foreign policy" problems and to receive new instructions.

International consortia and joint lobbying efforts at the regional, international, and vertical levels by major TNCs further illustrate TNCs' independent perspectives. *See id.* at 4-5, 60; *see also* Miller, *The Corporation as a Private Government in the World Community*, 46 VA. L. REV. 1539, 1549-57 (1960).

63. Vagts suggests that TNCs are not ready for full international personality because they are effective organizations only within limited goals and objectives. Vagts, *supra* note 1, at 786. Friedmann wrote:

It would be as dangerous to uncritically accord subjectivity to a private corporation in international law as it would be to deny its factual participation in the evolution of public international law. . . . Clearly, any strengthening of the role of the private corporation in public or 'quasi-public' international legal processes must be accompanied by a corresponding measure of public regulation. Friedmann, *supra* note 25, at 1158-59. He refers to Timberg's study, *supra* note 24.

Feld believes that the spreading influence of the nongovernmental entity is unlikely to lead to the demise of the state because national, political and administrative elites will seek to preserve their power and influence against any threats from nongovernmental entities. W. FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 1, at 248. In addition, individuals will look to the state for protection from perceived alien threats of the big nongovernmental organizations.

prejudicing other human interests and that, if TNCs acquire significant international legal personality and thereby become free from state control, the distribution of world power might shift in ways many consider to be undesirable.⁶⁴

Finally, exchanging the state's predominant position in the international legal system for TNC participation might cripple international law and relations. Historians attribute the anarchy of Western Europe's dark and early middle ages to its surfeit of sovereigns and semi-sovereigns. The lack of a unifying force or limited power group made uniform rules impossible to establish and fueled the anarchy that lasted until the Renaissance.⁶⁵ In keeping with the adage about history repeating itself, too many participants in the international legal system—nation-states, TNCs, and other non-state entities—could result today in the same anarchy that plagued pre-Renaissance Europe.⁶⁶

64. See *supra* note 63. See generally Falk, *supra* note 25, at 38.

65. Potter wrote:

The chaos which followed the collapse of Roman power lasted for nearly fifteen centuries. Attempts to replace a unity dictated by Rome with unity imposed by the Papacy and by various pretended successors to the Roman political empire—the empire of Charlemagne, the Holy Roman Empire of the Hohenstaufen and the Hapsburgs, and later the Napoleonic attempt—failed of ultimate success. The multiplication of states or nations founded by Germanic invaders, and of feudal states both small and large which grew up in all parts of Europe, rendered the development of systematic and stable international relations impossible. There were carried on during all these centuries a great many activities which resembled Greek and Roman diplomatic activities and which faintly anticipated the diplomatic activities of modern times . . . [b]ut the aggregate results were hardly more impressive in the end than had been the results of the Greek interstate practice. . . . [In 1815] the world of nations was still in a condition for which the term anarchy is hardly too strong.

P. POTTER, *supra* note 21, at 24-25. "[N]ot until the period of the Renaissance did the states of Europe begin to acquire a sufficiently normal size and independence to generate a system of true international law." *Id.* at 91. See also C. DE VISSCHER, *supra* note 22, at 3; and T. WALKER, *supra* note 8, at 84.

Hedley Bull described Western Christendom in the middle ages as a system where "no ruler or state was sovereign in the sense of being supreme over a given territory and a given segment of the Christian population; each had to share authority with vassals beneath, and with the Pope and (in Germany and Italy) the Holy Roman Emperor above." H. BULL, *THE ANARCHICAL SOCIETY* 254 (1977).

66. Bull wrote,

If modern states were to come to share their authority over their citizens, and their ability to command their loyalties, on the one hand, with regional and world authorities, and on the other hand with sub-state or sub-national authorities, to such an extent that the concept of sovereignty ceased to be applicable, then a neo-medieval form of universal political order might be said to have emerged.

H. BULL, *supra* note 65, at 254-55. He added that "if it were anything like the precedent of Western Christendom, it would contain more ubiquitous and continuous violence and insecurity than does the modern state system." *Id.* at 255.

At the present time, the world is experiencing an expansion of the number of nation-states and perhaps international actors. The number of international actors, however, has fluctuated over the history of mankind. See W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 31, 214; Lissitzyn, *supra* note 9, at 87; G. SCHWARZENBERGER, *supra* note 8, at 100-01. Some observers view the expansion of the number of international actors with

IV. POSSIBLE FUTURE TNC PARTICIPATION IN THE PROCESS OF NORM DEVELOPMENT

The foregoing discussion suggests that the international community may face a dilemma. On the one hand, the influence of international law on community behavior may diminish substantially if nation-states continue to use it to maintain their control over powerful TNCs. On the other hand, if international law recognizes a major role for TNCs, either TNC domination or anarchy might ultimately replace the nation-state system. Although neither approach necessarily leads to either extreme, there are compromises that are more likely to lead to desirable outcomes. The remainder of this article will consider whether there are desirable alternatives to the current trend toward TNC regulation without direct participation.

A. *Can There Be a Compromise?—Some Problems and Possible Solutions.*

1. *International Legal Personality.* Any analysis of the question of TNC participation ought to consider whether a TNC is capable of having an international legal personality. Unfortunately, there is little agreement among scholars on the essential elements of legal personality. If the definition focuses on rights and duties under public international law, the TNCs must have substantive and procedural rights and duties to be properly labeled legal persons.⁶⁷ Yet, many scholars recog-

alarm, predicting chaos unless the nation-state system is reinforced. See Herz, *The Territorial State Revisited: Reflections on the Future of the Nation-State*, in *INTERNATIONAL POLITICS AND FOREIGN POLICY, A READER IN RESEARCH AND THEORY* 76, 78 (J. Rosenau ed. 1969). Schwarzenberger, however, cautions against historical analyses of prior international systems. G. SCHWARZENBERGER, *supra* note 8, at 6-7.

67. C. OKEKE, *supra* note 9, at 1-2, states: "any subject of law must be capable of having certain rights and duties under the given legal system, any differences in the degree of capacity notwithstanding." See generally T. HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 82-90 (13th ed. 1924). Okeke argues that three essential elements must be present for an entity to be a subject of a legal system: it must (1) possess duties and responsibility for violating those duties, (2) be capable of benefiting from legal rights as a direct legal claimant and not as a mere beneficiary, and (3) be able to enter into contractual or other legal relations with other subjects of the system, in some capacity. See C. OKEKE, *supra* note 9, at 19. The fact that these rights and duties must address the entity directly and not indirectly is stressed by J. SPIROPOLOUS, *L'INDIVIDU EN DROIT INTERNATIONAL* 32 (1928). See also H. Kelsen, *GENERAL THEORY OF LAW AND STATE*, *supra* note 20, at 342-43. Soviet jurists, such as G. I. Tunkin, consider active participation in the international law-creating process an important aspect of legal personality. See C. OKEKE, *supra* note 9, at 12-13 (citing G. TUNKIN, *OSNOVY SOVREMENOGO MEZHDUNARODNOGO PRAVA* (1956)).

C. NORGAAARD, *supra* note 28, at 27-33, defines a subject of law as a person who is "subject of rights and proceedings" and/or "subject of duties and responsibilities." *Id.* at 33. Thus, he divides the roles along substantive and procedural lines. Lissitzyn takes a more flexible approach, stating that the term "personality" is merely a shorthand symbol which denotes that an entity is

nize varying degrees of legal personality.⁶⁸

Despite their disagreement on the *elements* of legal personality, many scholars do recognize its two broad sets of attributes: substantive rights and duties and procedural rights and duties. The attributes or combinations of attributes the international legal system may give to or acknowledge in TNCs colors the way TNCs are treated. The options appear to be:

1. to deny TNCs any rights or duties in the international legal system, thus affording TNCs no international legal role;

2. to provide effective formal and informal avenues for TNC participation in the development and enforcement of laws relevant to their interests, thus giving TNCs limited procedural rights;

3. to recognize the role of TNCs in specific substantive areas of public international law by providing them with certain acknowledged rights and duties within the system, thus giving TNCs limited substantive rights and duties;

4. to accord TNCs full participation rights in the international legal system and subject them to equivalent obligations as states, thus giving them what may amount to full international legal personality.

Neither the first nor the fourth option is realistic. The first fails to recognize the TNCs' current importance in the international community and may place an undue strain on international relations and law. The fourth alternative credits TNCs with more international power, in-

endowed by international law with *some* legal capacities, but does not tell us what particular capacities it has." *Id.*

68. With reference to the personality of international organizations, Friedmann endorsed the view that entities might have different degrees of personality in international law. W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, *supra* note 1, at 218. He suggested that private corporations could have limited personality in the development of legal standards that affect them. *See id.* at 223-24; *see also* C. OKEKE *supra* note 9, at 18; McDougal, *supra* note 1, at 251-52. Ijalaye claims that TNCs are now selective subjects of public international law and that their contracts are subject to that law. *See* D. IJALAYE, *THE EXTENSION OF CORPORATE PERSONALITY IN INTERNATIONAL LAW* 221-23 (1978). He believes international law should selectively govern certain contracts between businesses and states depending on the contract's subject matter and importance. *See id.*

The development of "transnational law" has blurred the distinction between public international law and private international law by recognizing the international character of the law applicable to international business activities. P. JESSUP, *supra* note 1, at 2, 15, 106-11.

In response to such developments, some people have advocated establishing a third legal order apart from national or international law that would deal with commercial activities and the activities of nonstates in the international sphere. *See* A. ROSS, *LAEREBOG I FOLKERET ZUDG AGHENHAREN* 32 (4th ed. 1961), *cited in* C. NORGAARD, *supra* note 28, at 305. Unfortunately, a third legal system would present difficult problems.

Public international law does not lend itself to division into two parts; it is a continuum of developing law. Thus, all legal rules that are not national law ought to be considered to be international law. *Id.* at 307-08.

fluence, and significance than they presently deserve. Many in the international community would actively and strongly resist such an approach because it, too, diverges substantially from reality. The second and third approaches, however, are flexible options that might result in a more realistic treatment of TNCs and permit the legal system to gradually conform to that reality.⁶⁹ These alternatives can best be explored by focusing on the problems encountered in the development of international legal norms.

2. *Norm Development Problems.* Nation-states have sought to maintain exclusive control over the development of international legal norms that increasingly address TNC behavior. While some may debate whether TNCs have an international legal duty to follow international norms, few will deny that compliance is a key to successful multinational business operations in many countries. TNCs also face significant pressure from domestic laws or political-economic decisions to follow international norms even though their role in the norm development process is limited to lobbying individual nation-states.

The quasi-legislative negotiation processes, which are aimed at producing international agreements, resolutions, and, ultimately, legal norms, are the primary sources of the body of law that may be made applicable to TNCs.⁷⁰ In those forums, representatives of the third world and socialist countries have generally sought to minimize TNC interests, favoring instead their own economic and political power vis-a-vis the western, developed countries.⁷¹ Although the western, developed world and its allies have, in turn, tried to protect the TNCs, they, too, limit TNC power and influence. Consequently, these forums are unlikely to produce constructive interaction between TNCs and the participating states. Once a resolution or convention is adopted, the struggle will begin over whether the new instrument contains new international legal norms. This legal dispute may rage for some time in the absence of a single international body that possesses the authority to decide whether a new resolution or convention embodies binding legal principles. As a result of this and the independent power of many TNCs, some TNCs may wage protracted campaigns against these norms. Such campaigns compound the difficulty of resolving underlying issues, impugn the integrity of the international legal system, and generate substantial uncertainty about critical matters of concern.

As mentioned earlier, the development of international TNC codes has merely tended to convert festering disputes in the political

69. The distinction between these alternatives is based more in legal theory than in fact.

70. See *supra* notes 2 & 6.

71. Fatouros, *supra* note 6, at 347; Stanley, *supra* note 6, at 986-93.

and economic arenas into legal disputes.⁷² By failing to resolve most of these disputes before formulating normative concepts, the TNCs will be motivated to use their power and transnationality to frustrate attempts to enforce these norms. Their likely success will prejudice the credibility of the law-making process.

The international legal system has three alternative responses to these problems. It may:

1. continue to convert essentially political and economic issues into legal questions, thereby allowing some international entities to increase their leverage by characterizing their position as that required by law;
2. defer the development of new norms applicable to TNCs until the international community can resolve at least the most difficult political and economic issues it faces; or
3. adjust the norm development process so that the international community can promptly resolve at least some of the political and economic issues created by TNCs.

The third world and the socialist countries have sought to guide the international community toward the first option despite the fact that the United States and many other western, developed countries favor the second. Despite the progress of the Code negotiations in the 1970s, the second approach may ultimately prevail; indeed, the marked slowdown of some negotiations indicates a movement in that direction. This impasse might be broken, however, if the third approach becomes more promising. For example, if that approach allowed an adjustment to the current process, it could avoid the many costs inherent in the first two choices and might win broad support. Permitting greater TNC participation in the current process would be such an adjustment and may facilitate resolution of underlying disputes and minimize conflict over the implementation of the resulting norms.⁷³

As mentioned earlier, a few international forums have allowed such TNC participation and have not suffered as a result. An example is the International Labor Organization (ILO), whose relative success can be attributed, in part, to the participation of both business and labor representatives. Despite the ILO's political difficulties, the large number of international agreements it has brought into force demon-

72. See *supra* section I(b); Stanley, *supra* note 6, at 1006.

73. It would be practically impossible to implement either alternative through the customary law-making process. Such changes are not easily presented for consideration, adopted, or implemented without a legislative forum. Nevertheless, existing multilateral forums that entertain written proposals offer some hope for addressing and resolving the conflicts between the TNCs and nation-states that have given rise to the current efforts to develop TNC codes.

strates its success.⁷⁴ The Organization for Economic Cooperation and Development (OECD) is another intergovernmental organization that can attribute part of its success to frequent consultation with business and labor groups.⁷⁵

74. See Shotwell, *Introduction in Beguin*, *supra* note 4 at 401; International Labor Office, International Labor Conventions, Chart of Ratifications (Jan. 1, 1980). These ILO Conventions have been fairly well observed. Henkin, *The Internationalization of Human Rights*, 6 PROC. OF THE GEN. EDUC. SEMINAR 6 (1977). The ILO tripartite system requires that the Conference delegation from each state party be comprised of two governed representatives, one labor representative, and one employers' representative. Government members of the Conference choose these representatives in consultation with the country's industrial organization, if such an organization exists. The employer and the labor representatives, however, are theoretically free to take independent positions from their government's position. Each individual representative has one vote. But the government sector maintains a substantial blocking vote because a two-thirds vote is required for the most important decisions of the Conference. Once a Convention is adopted by a two-thirds majority each member state must submit the Convention to its home parliament for consideration, regardless of the views of the government representatives. The Governing Body, which is responsible for fixing the agenda of the Conference, is also a tripartite body. Voting positions on ILO Committees are generally distributed in equal shares between the three sectors.

The ILO's system has received unusually high marks from observers and critics. The tripartite system and the genuine participation of nongovernmental business and labor representatives are viewed by many as a key element in the relative success of the ILO. The ILO has had a major influence on the development of labor laws in many countries and has assured a free and independent flow of information and ideas. It is at the forefront of effective efforts to implement human rights laws, and of the development of codes of conduct for international business. Commentators have also cited the ILO as an example of nonstate participation in the creation of international law. See Constitution of the International Labour Organization, Part XIII of the Treaty of Versailles, June 28, 1919, 225 Parry's T.S. 188, 373, art. 1.4 [hereinafter cited as *ILO Constitution*]; G. JOHNSTON, *THE INTERNATIONAL LABOUR ORGANIZATION* 25-29 (1970); see also ILO CONST. arts. 3.7, 19, 389-390; C. JENKS, *SOCIAL JUSTICE IN THE LAW OF NATIONS: THE ILO IMPACT AFTER FIFTY YEARS* 69-70 (1970); G. JOHNSTON, *THE INTERNATIONAL LABOUR ORGANIZATION* 32, 45, 273 (1970); Hanami, *Influence of ILO Standards on Law and Practice in Japan*, 120 INT'L LAB. REV. 765 (1981); *Implementation of ILO Conventions: The Czechoslovak Case*, REV. INT'L COMM. OF JURISTS 26 (June 1979); Jenks, *The Significance for International Law of the Tripartite Character of the International Labour Organization*, 23 GROTIUS SOC'Y 45, 47-49 (1936); Lafita, *Influence of International Labour Conventions on Labour Law and Social Change in Spain*, 118 INT'L LAB. REV. 443 (1979); Muruchkov, *International Labour Conventions and Bulgarian Legislation*, 118 INT'L LAB. REV. 205 (1979); Pouyot, *The ILO's Freedom of Association Standards and Machinery: A Summing Up*, 121 INT'L LAB. REV. 287 (1982); Stoermann, *ILO Activities in the Field of Multinational Enterprises*, 10 J. INT'L L. & ECON. 347 (1975); Van der Kooy, *What is the Substance of Tripartism in the ILO?*, 8 NETH. Y.B. INT'L L. 73 (1977); Werners, *New Dimensions to Tripartism in the International Labour Organization*, 22 NETH. INT'L REV. 323, 325-27 (1977); Wolf, *ILO Experience in the Implementation of Human Rights*, 10 J. INT'L L. & ECON. 599 (1975). Cf. E. HAAS, *BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* 283-91 (1964). The ILO has broadened the definition of "freedom of association" and also considers such freedom a part of human rights. See A. ALCOCK, *HISTORY OF THE INTERNATIONAL LABOR ORGANIZATION* 252-83 (1971); G. JOHNSTON, *supra*, at 150-62; Wolf, *supra*, at 607-08. For a discussion on work on codes relating to international business, see Stoermann, *supra*, at 347-53. See also *supra* note 2 and accompanying text; see, e.g., Jenks, *supra*, at 77-81.

75. The Business Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC), have served effectively as conduits of information and ideas between industry and the OECD. See, e.g., the Report by the Committee on International Investment and

The description throughout this article of the pitfalls of TNC exclusion and the benefits of TNC participation illustrates that substantial business participation in the development of relevant international rules is both possible and desirable. Recognizing this, however, is the smallest part of the current problem; the largest part is obtaining international acceptance of such TNC participation at the forums that are now focusing on TNC conduct. Historically, these forums, such as the United Nations, have permitted only the most limited non-state involvement. Therefore, to assure effective participation, TNCs must clear four hurdles:

1. Currently, the third world nations insist upon expanding the nation-state's role and power in order to combat the remnants of colonialism and the real power of the developed countries. The TNC is seen both as an extension of the power of the western, developed countries and as a new type of colonialism.

2. The socialist countries also regard TNCs as extensions of western power and, therefore, resist expanding their international law role. Even a parallel expansion of the roles of both TNCs and socialist state-owned corporations would probably be considered advantageous only to the western world because the state-owned corporations have little independent power.

3. Allowing TNC participation in the international legal system presents the practical difficulties of identifying the relatively few TNCs that should participate, distinguishing between TNCs and other business entities with international interests and power, and determining which forums and what subjects to target for the proposed changes.⁷⁶

Multinational Enterprises, *supra* note 2, ¶¶ 33-34; see also Sauvant & Lanier, *Host Country Councils: Concepts and Legal Aspects*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 341, 354-57 (N. Horn ed. 1980).

Similarly, the Economic and Social Committee provides a bridge between the EEC and EURATOM. E. STEIN, P. HAY & M. WAELBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* 51-52 (1976). Articles 193 through 198 of the EEC Treaty provide for the establishment of the Economic and Social Committee with a membership representing "the various categories of economic and social life, in particular, representatives of producers, agriculturists, transport operators, workers, merchants, artisans, the liberal professions and of the general interest." Treaty Establishing the European Economic Community, art. 1983, March 25, 1957, 298 U.N.T.S. 11, 79-80 (English version). Although seats are allocated on the basis of nationality, the committee members are appointed by the Council of the EEC and serve in their personal capacity. See *id.* art. 94, 298 U.N.T.S. 11, 80. Specialized sections of this committee may issue reports and opinions on their subjects of expertise and, in certain instances, the EEC Council and Commission are required to consult with this committee. See *id.* art. 197-98, 298 U.N.T.S. 11, 80-81. Of course, the relative homogeneity of the OECD and EEC membership has played a pivotal role in their success.

76. Galtung has proposed such a system. See Galtung, *supra* note 24, at 181-82. TNCs differ in character and strength. Rubin, *supra* note 8, at 908.

4. If TNCs were allowed to participate in the international legal system, various non-business groups would also seek that right, if for no other reason than to provide a counterweight to the influence exerted by the participating TNCs. Thus, the identification of the appropriate participants from that group of international actors would be difficult.

Each of these presents a formidable obstacle to implementing TNC participation in the international legal system, but this opposition is self-defeating. The interests of third world countries, socialist countries, and TNCs and other non-state entities would be best served if the international legal system conformed to the reality of international power. If TNCs have such power, their participation would benefit all interest groups.

B. *What Might The Compromise Be?*

In order to show that TNC participation can be implemented, it is useful to examine further the ways in which non-state entities have participated in international negotiations. First, the ILO's accreditation of business and union representatives as full voting delegates provides the maximum participant rights.

Congress attempted to integrate business and government in a different way when it passed the National Industrial Recovery Act (NIRA), 15 U.S.C. §§ 70-711 (1935), in 1933. Congress hoped to achieve economic recovery by stimulating heavy industry and creating government-sponsored jobs. The NIRA's provisions exempted participating industries from the anti-trust laws and encouraged big business to draw up enforceable codes for the protection of labor and the restriction of competition. The NIRA was a declared failure even before the Supreme Court found it unconstitutional in 1935. *See Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

Historians disagree on the reasons for its demise. Some blame the continuing Depression for disillusioning the participating business community and fostering noncompliance with the codes. *See D. PERKINS, THE NEW AGE OF FRANKLIN ROOSEVELT 1932-45 44* (1957). Others blame the hurried speed with which the codes were formulated. Enthusiasm and the pressure of economic hardship caused labor and business to make imprudent concessions. Once the Act began to produce results and economic prosperity slowly returned to industry, industries resisted compliance with the codes. *See R. MOLEY, THE FIRST NEW DEAL 293-94* (1966).

The comparison between the NIRA solution, and a hypothetical alliance today between governments and TNCs is flawed. During the Great Depression, the government wanted to strengthen business; business, in turn, made significant concessions. Faced with a common goal—economic recovery—business, labor, and the government joined forces. Yet, once the economy improved and the common threat receded, they again divided and the codes became anachronistic. The relationship between government and business was a one-way street. Business felt no commitment to government and supported the NIRA provisions for as long as direct benefits could be realized.

On the other hand, the interests of nation-states and TNCs on the international level are more intertwined and crystallized. Both TNCs and nation-states have a stake in the goals of the codes currently under development—the elimination of friction between nation-states and TNCs, a more equitable distribution of wealth, and the facilitation of business operations. *See supra* note 2.

The ILO was originally envisaged to address labor-management relations. In this context, the interests of nation-state governments were secondary and, as a result, the ILO negotiations were more comparable to labor-management collective bargaining than to discussions in an interstate negotiating form. Viewed from that perspective, full accreditation of business and labor representatives was not a drastic change from current practice.

Labor-management relations are not at the core of most of the new TNC norms under consideration. Thus, the question arises whether this "full accreditation" approach is applicable to other situations. At first glance, the answer appears to be no. As the ILO has moved away from its focus on labor-management relations, it has faced greater difficulties.⁷⁷ In most other forums the identification of the interested parties, the balance needed among them, and the role of the interested public make this approach even less manageable. Furthermore, to accord TNCs full voting participation at these negotiations may present difficult practical problems. Would all interested TNCs be accorded such status? If not, how would the selection be made? Perhaps in negotiations involving limited subjects the presence of a small number of interested TNCs would obviate this problem. In other circumstances, the selection of participants would present a formidable obstacle to this procedure. Finally, would TNC participation have to be balanced by similar accreditation of other interest groups? If so, how would those groups be identified and selected?

An alternative to the "full accreditation" approach involves accreditation of certain TNCs as non-voting participants. Their status could be similar to that given international organizations at many international conferences in that they would have the right to attend all formal meetings, to speak, and to distribute written material.⁷⁸ To bal-

77. In recent years the ILO has become substantially less productive as it has shifted its focus to broad social issues. See E. HAAS, *supra* note 3, at 340-46. See generally *supra* note 74.

78. The United Nation's Economic and Social Council (ECOSOC) has established rules for the participation of intergovernmental organizations, granting many of them observer status. Under article 71 of the United Nation's Charter, non-governmental organizations may also consult with ECOSOC. Rule 79 of the Rules of Procedure of the Economic and Social Council, U.N. Doc. No. E (5715) (1975), grants permanent observer status to certain international organizations. Observer status in ECOSOC amounts to participation rights without the right to vote. Articles 80-84 accord similar rights to non-governmental organizations. Arrangements for Consultations with Non-Governmental Organizations, E.S.C. Res. 1296, 44 U.N. ESCOR Supp. (No. 1) U.N. Doc. No. E/45/48 (1968).

An Appendix to the Provisional Rules of Procedure of the Security Council, U.N. Doc. S/96/Rev. 6 (1974), sets out the Provisional Procedure for Dealing with Communications from Private Individuals and Non-Governmental Bodies. See *id.* at 12. It provides for a list of communications received by the Security Council to be circulated and for members to request copies of communications found on the list.

ance the TNCs' participation, similar accreditation might be given to other identified interest groups and state corporations.

In many situations, such accreditation might be difficult due to the potentially large number of interested business organizations and other non-state entities seeking equal accreditation. Their lack of voting power may, however, make these issues less critical and more easily resolved. Nevertheless, it might be desirable to start with other approaches.

A third type of participation combines business and other "balancing" groups to form expert groups analogous to those consulted at various technical conferences.⁷⁹ Such groups would observe both the formal and informal negotiations, serve as vehicles of information exchange, issue reports, and interact with state representatives to develop new norms. This approach is an improvement over the expert committee system currently used in the TNC Code of Conduct negotiations, the OECD's BIAC-TUAC system, the EEC system, and the system in which nongovernmental organizations (NGOs) participate at the United Nations.

Under this "expert group" approach, businesses and other interested groups might be given the right to be present at the forum's formal and informal meetings. With this right they would be privy to most discussions and would thus be better able both to acquire and to provide information about the topic of negotiations. This improves upon OECD practice, which excludes BIAC and TUAC from the interstate negotiations, and UN practice, which admits non-state representatives only to formal meetings.⁸⁰

Also, this approach might include the right of nongovernmental representatives to participate in some intergovernmental negotiations. Although the nongovernmental participants would lack voting power, their presence and participation would make their political and economic power apparent. If effectively used, this exchange of views between state and non-state representatives could bring negotiations closer to reality, permit them to focus more readily on the central issues, and increase the number of issues negotiated at these more visible, open forums. The points of view and information these entities

79. Charney, *Technology and International Negotiations*, 76 AM. J. INT'L L. 78 (1982). This would contrast with the rather amorphous role played by NGOs at the United Nations. See W. FELD, *supra* note 1, at n.51 & n.78.

80. Such participation at the UN is inadequate because unfortunately, those sessions are most often devoted to procedural matters and the conduct of a ritual negotiation necessary to formalize previously negotiated results. As a consequence, access to information is limited as is the ability to interact with the state representatives.

can deliver to these open negotiations are also likely to have a profound effect on the product. While these negotiations may become more complicated as a result, the anticipated costs may be justified if the issues that are truly ripe for settlement are effectively resolved.

Finally, business interests ought to be represented primarily by industry employees and officers, instead of officials of such industry associations as the International Chamber of Commerce (ICC).⁸¹ Although organizations such as the ICC have a valuable role to play, the direct participation of business representatives would allow them to speak with authority, to share their familiarity with the details of specific problems, and thereby to gain additional benefits.⁸² Regardless of the approach, the objectives are the same—to ensure useful and direct interaction between nation-states and business and to draw business representatives into the process of developing international norms.

The drawbacks of such expanded business participation include the possible stagnation of international norm development and the subordination of public interest to business interests. Even the inclusion of several other interest groups will be viewed by many as a face-saving move that will not balance the power of business groups. Many private citizens of the western, developed world and third world and socialist countries will probably regard such balancing group participation as a dilution of their own influence. The ideal method of bringing industry into the international arena will effectively account for the needs and interests of other power groups. The "expert group" approach outlined above may come closest to this ideal. Although there are risks inherent in any approach, it should be clear that the international legal system risks losing contact with political and economic realities if it effectively excludes business and other significant power groups.

81. Such secondary representation has been used by the ILO, and by the Expert Committee to the negotiations on the Code of Conduct for TNCs.

82. A good example of practice that is consistent with this view is found in the BIAC, which has pursued a balanced approach in which representatives from both industry and industry associations participate. Whether the TNCs will be willing to participate in the discussions or negotiations remains unclear. So long as TNCs do not view the forum as hopelessly hostile to their interests there is no reason to believe that they would be reluctant to participate. Indeed, if nation-states provide a reasonably fair forum, TNCs will want to participate in order to influence the outcome in their favor. After all, most TNCs are themselves interested in the establishment of uniform international norms. *See supra* note 48.

V. POSSIBLE FUTURE TNC PARTICIPATION IN THE
IMPLEMENTATION OF SUBSTANTIVE RULES: TNC
PARTICIPATION IN LAW ENFORCEMENT

Once a new norm is established, the subjects to whom it applies are expected to conform. Although procedural steps can be taken at international negotiations to increase industry involvement in international law *development*, the international legal system does not have the means to ensure its *compliance* with that law. Thus, the question arises whether TNCs, like states, should have a direct *duty* to conform to applicable rules of international law. If so, how can the community be assured of that conformity in the absence of an enforcement authority?

The opportunities for TNC participation in international law enforcement appear remote. Positivists would probably consider this conclusion apparent because they contend that only nation-states have the governmental structure necessary for enforcing legal norms. Thus, no such structure either exists or could likely be established at the international level.⁸³ Even if TNCs were to have rights and obligations under international law, there would be no mechanism to encourage them to perform these obligations.

Even non-positivists would probably view TNC participation in law enforcement as unworkable. According to them, nation-states have long accepted international legal obligations because they share interests in maintaining certain types of mutual relations. Two significant factors at the foundation of these interests are the nation-state's territoriality and the identifiable population for which it is responsible.⁸⁴ In this light, the question whether TNC participation in norm implementation is possible translates to whether entities such as TNCs, with neither population nor territory, share enough interests with nation-states to interact successfully in the rudimentary international legal system.⁸⁵

83. Rostow, *The Need for a Treaty*, in GLOBAL COMPANIES, *supra* note 42, at 159-60.

84. See RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (Tent. Draft No. 2, 1981).

85. See Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 3100, T.S. No. 881, 169 U.N.T.S. 19, 3 Bevans 145. Modern international law probably originated with the development of the sovereign territorial state. Jessup described the period prior to the development of territorial states:

[E]ven in the early feudal period there was "no territorial law as we today understand it—a body of law applying to all within the land, whether foreigners or not"; the system of personal law continued. Because thieves, swindlers, and murderers traveled from city to city and each city was equally affected by their depredations, the malefactors were likely to be punished in whatever city they were found regardless of the place where they had committed the crime.

P. JESSUP, *supra* note 1, at 42. Walker argues that the development of the territorial sovereigns gave rise to legal principles governing their relations. See T. WALKER, *supra* note 8, at 182, 184-

These concrete attributes of nation-states mandate that their governments continually consider the need to preserve the more tangible characteristics of their existence.⁸⁵ Not only do territory and population serve as targets of retribution in cases of violations of international law, but they require that all actions be taken with reference to the preservation of these tangible elements.

It is not apparent that TNCs have a sufficient commonality of interests to operate successfully within this rudimentary legal system. Although TNCs are largely separated from fixed territories and populations, they all have employees and most have interests in real and personal property. Compared to nation-states, however, those elements can be considered relatively expendible and interchangeable with other employees and property around the globe. Consequently, their interests need not be formulated with as great an emphasis on the specific tangible elements in their possession. The costs of misbehavior can therefore be imposed in more limited ways and can be minimized by facile management decisions.

The actions of national liberation movements and other groups seeking international status further illustrate the differences between territorial and nonterritorial entities. Prior to assuming control of the target state, national liberation movements have traditionally demonstrated little respect for the international legal system or for such be-

85. It is not an accident of history that territory and population are prerequisites to statehood. Traditionally, the core of substantive international law has been the management of these characteristics; only relatively recently has international law started managing less tangible subjects such as economic relations. International rules in this new frontier have been motivated largely by the mutual economic interests of and benefits to nation-states. It is also clear that the rules regarding the behavior of large bureaucracies play a large part in international behavior. Economic self-interest and bureaucratic behavior are common to governments and the managements of TNCs. See generally FROM MAX WEBER: *ESSAYS IN SOCIOLOGY* 196-244 (H. Gerth & C. Mills eds. & trans. 1958). Notwithstanding these new legal frontiers, modern international law is still built on the foundation of territory and population and it may be difficult for TNCs to exercise substantive rights and duties in the same manner as nation-states.

86. Galtung stresses the functional distinctions between the territorial (T) and nonterritorial (NT) actors on the international plane:

Underlying any analysis of this sixth continent [of NT actors] is one fundamental factor: the variable of communication/transportation speed and capacity. Basically constant for a million or two years of human history, it has increased exponentially since the first successful attempts early last century to install steam engines in ships (Fulton) and in locomotives (Stephenson). The system of territorial actors (Ts) developed in the first phase with spatial contiguity as a basic and undisputed assumption. That the ensuing exponential growth of transportation/communication should lead to the emergency of nonterritorial actors (NTs) is hardly strange. . . .

Galtung, *supra* note 24, at 158.

This impact of territoriality on the interrelations of Ts as distinct from NTs is clear. He says: "Territorial space is finite and clearcut; if a new territorial actor is to be carved out, it will be at the expense of somebody else's power over the slice of territory. But nonterritorial space is without limitation. . . ." *Id.* at 161.

havior-controlling concepts as *Realpolitik* and *Staatsraeson*. Once they assume control of the target territory and population, however, they rapidly accept these concepts.⁸⁷ Galtung, in his study of the nonterritorial system, has recognized the relevance of territoriality in the behavior of international actors.⁸⁸ He identifies two separate political systems operating in the international arena—the territorial (T) and nonterritorial (NT) systems. He says, “the NT system has its own dialectic, its own sources of growth; it is much less dependent on what happens in the system of states”⁸⁹ Thus, it appears that territoriality may be fundamental to the nation-state system and, particularly, to the effectiveness of the system of international law.

If this view of the international system has merit, one must conclude that TNC compliance with public international law would be unlikely in the absence of a formal law enforcement system. Therefore, the primary duty to encourage subjects of international law to observe the law must remain with the individual nation-states. This approach preserves the traditional nation-state leverage over non-state entities and its use of the effective, positivist-type enforcement systems it currently provides.⁹⁰ If, after the development of norms regarding TNC behavior, a commonality of interests evolves among these international

87. J. LADOR-LEDERER, *supra* note 9, at 167, has stressed

that the legal sphere of State-preparing was situated on a level essentially different from *Staatsraeson* and *Realpolitik*, but that those who were the leaders of such State-preparing [entities], would have inexorably to switch over to both *Staatsraeson* and *Realpolitik* as soon as they are burdened with responsibilities ensuing from the territorial reality of their new-founded State. They are caught in the incompatibility of their (territorial) existence with whatever competing pretension of other nations to the same territory. . . .

See also *id.* at 143. J. LADOR-LEDERER, *supra* note 9, at 143, points out that territorial entities introduce into the law the logic and spirit of their territorial existence. See also W. FELD, *NON-GOVERNMENTAL FORCES AND WORLD POLITICS*, *supra* note 1, at 233.

88. See Galtung, *supra* note 24. Galtung believes there are two contemporary international communities: the community of states and the community of nonterritorial actors. He labels the system of nonterritorial (NT) actors as the sixth continent, which he believes is one of the most significant of all the continents in world politics. See *id.* at 158. Galtung concludes that there ought to be a two-chambered UN with one chamber representing the nonterritorial actors and the other representing the territorial actors. He expects that this would result in a world allegiance that would be of high salience and would change individual loyalty from the territorial actors to the nonterritorial actors. See *id.* at 184-85; see also J. LADOR-LEDERER, *supra* note 9, at 11, 381.

89. Galtung, *supra* note 24, at 159.

90. It has been argued that “‘a sound international order cannot be built on the wreckage of nation-states.’ The nation-state provides the internal order and sense of political community that underlie democratic institutions. . . . Our political norms have not kept pace with the evolution of transnational political roles.” Nye, *Two Views of World Order*, in *GLOBAL COMPANIES*, *supra* note 42, at 164. Conflict-resolving mechanisms used domestically by nation-states are useful, see Rubin, *supra* note 8, at 14, and should be preserved. Rubin argues that the sovereignty of nation-states has not been weakened by the increased presence of TNCs. Rubin, *supra* note 1, at 475. For a documentation of national and international efforts to regulate TNCs, see *id.* at 478-88.

actors, TNCs might be recognized as having greater capacities. Without that commonality of interests, however, nation-states will continue to resist greater TNC participation in the international legal system despite the stresses such resistance places on the system.

A hybrid system, keeping law enforcement as a nation-state responsibility and opening law development to TNC participation, might permit the nation-state to keep its influence and power while providing the flexibility that would prevent international law from losing touch with reality. Such a system also has the potential to make the interests of TNCs and nation-states more alike, thereby making possible future TNC participation in *all* aspects of the international legal system.

VI. CONCLUSION

In light of the undeniable movement towards greater international regulation of international business, the question arises whether the system used to develop these new rules is well designed. Prohibiting direct business participation in the development of these rules poses certain risks: (1) that the rules may be impracticable, (2) that the developments will needlessly promote conflict between nation-states and TNCs, and (3) that the international community's current respect for the international legal system will diminish. Nevertheless, including in the rulemaking process representatives of organizations with direct interests in the rules under consideration might both minimize these risks and maximize the positive results.

This article has focused on the value of expanding the TNCs' role in this law-making process. Certain TNCs have already acquired substantial economic power that in some ways rivals the power of the nation-state. Yet, although juridical personality in international law has expanded in recent years, the present international structure does not take full account of the international importance of TNCs and other non-state entities possessing such economic power. The international legal community has failed to give these entities a role because of the power struggles among nation-states and the perceived threats to the nation-state system that they represent. Continuing this conflict imposes unnecessary costs on the international legal system. The effectiveness of international law depends largely upon the legitimacy of its rules. Because the law development process is the vehicle by which these rules are legitimized, a process that excludes powerful international actors will become less legitimate in the eyes of the excluded actors and will breed disrespect for the international system as a whole.

In order to avoid these adverse consequences, excluded power groups should be given a direct role in the development of the new

international norms that concern them. Representation through national governments is not sufficient, primarily because government interests often do not coincide with the interests of these groups. Direct involvement facilitates communication within and commitment to the international legal system. However, because of the conflicting concerns of these states and interest groups, the independent participation of TNCs and other non-state entities in the creation and enforcement of international law is best achieved through an evolutionary process.

The issues discussed in this article are products of the development of TNC power and state efforts to control that development through international regulation. Greater TNC participation in the international legal process may actually strengthen the system in the face of this power struggle. Thus, it is important that some steps be taken in response to this reality and in preparation for the day when, perhaps, nonterritorial entities are the more significant actors in international affairs.