Antarctica: The recent conference in Canberra on the Antarctic has raised a number of important issues. Immediately preceding the conference, it was reported (Sydney Morning Herald, 8 August, 1983, page 5) that the Prime Minister, Mr. Hawke, had written to the Malaysian Prime Minister, Dr. Mahathir bin Mohamed, asking him to defer his proposal to put the issue of the Antarctica on the UN Agenda for the session beginning in September. Apparently, Dr. Mahathir was not dissuaded. No doubt Australia wished to avoid threatening its territorial claim to the Antarctic or upsetting the Antarctic Treaty System. The Australian Government believes that the Antarctic was once res nullius and capable of acquisition and that it has in fact sovereignty over its sector through effective occupation by itself and its predecessor in title the U.K. The Third World would argue either that it is, or should be, res communis as for example is the moon, and according to UNCLOS, the wealth in the deep seabeds and the seabeds themselves. The two superpowers seem to say that the continent is presently incapable of acquisition, but that they reserve their positions. The 1982 Platform of the ruling Australian Labor Party is, as a statement of party policy, not a binding legally on the government. In relation to Antarctica, it is of interest to note its provisions:

'Whilst not affecting Australia's current claims to certain areas of Antarctica, a Labor Government would be prepared to enter into discussions with other interested nations to investigate the desirability and practicability of international control of Antarctica. Further, it would oppose any development or exploitation of resources such as may cause damage to the marine or terrestrial environment. Its science and technology programme proposes energetic research on the Continent.'

In November, as a result of a compromise resolution, the Secretary General of the UN was requested to prepare a report on Antarctica. The question of UN involvement is therefore in abeyance. See also the statement by the Australian Minister in the section below "Australian Practice".

In the meantime, a minerals regime for the Antarctic was discussed by the fourteen interested powers in Bonn 11 to 22 July 1983 on such a minerals regime, see also R. Rich, A Minerals Regime for Antarctica (1982) 31 1 & CLQ Rev. 709-725.

We noted in our last issue Professor S.M. Auburn's authoritative work, Antarctic Law and Politics, London and Canberra, 1982. Papers were pesented at the recent conference in Canberra by Dr. G. Triggs and Professor Auburn.

D.F

TRANSNATIONAL CORPORATIONS

Third World Transnational Corporations

One factor may well change the approach of some third world countries to the question of the code of conduct in relation to transnational corporations. That is research which indicated the phenomenon of a growing number of transnational corporations from the third world. If state corporations are accepted within the definition of transnational corporations, (see below), the four state oil companies from Kuwait, Mexicao, Brazil and Venezuela are listed in the top eleven of the worlds largest 500 non-American industrial companies. One journal suggests that much of the feeling against transnational corporations, reflected in the demand for rigorous provisions in the UN Draft Code, are based on the fact that hitherto transnational corporations have been essentially Western based: The Economist 23 July 1983, p.61.

UN Code of Conduct on Transnational Corporations

The work of the UN Commission on Transnational Corporations has not been

finalized, nothwithstanding the special session for this purpose held in March and May, 1983: UN Documents E/C. 10/1983/2/5 and E/1983/18. One of the major difficulties in negotiating the codes is the actual definition of a transnational corporation. Among the questions involved are whether there should be a minimum size, how many countries should the transnational corporation be present in, and should the definition cover government and corporations, particularly those in the communist states. One of the definitions which emerged in the relevant working group in 1982 is:

The term "Transnational Corporation" as used in this Code means an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision making, permitting coherent policies and a common strategy through one or more centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular to share knowledge, resources and responsibilities with the others.

It will be seen that there is no de minimus rule in deciding on whether an entity is a "transnational corporation", that is to say, size is not at all important. Flexible arrangements using corporate structures, joint venture agreements and partnerhsips would be sufficient to consitute a "transnational corporation" under this definition, provided that one party has a "significant influence" and that there is a "system of decision making" through one or more centres. Even an isolated country, such as Australia, would find that a vast number of its economic entities would fall under the classification of transnational corporations, either because of their activities outside of the country, say in New Zealand or Singapore, but also because of their being involved in a joint investment in Australia with a foreign investor who can be said to have a significant influence over the activities of the Australian party. The concept is vast, and its implementation will, if this definition is adopted, have a major impact on many Australian businesses. Australian business interests are still in the process of absorbing the recent and continuing changes to company and securities law; it may come as a surprise that international law will also impose obligations on them.

Of course if the code were to be merely in the nature of a series of guidelines not to have legally binding effect, then the question may be of lesser importance. It would take on the status of the OECD Guidelines which are specifically not binding. This still remains an outstanding issue in the negotiations so much so that scattered throughout the draft is the formula "shall/should". This formula, as well as the use of bracketed paragraphs, indicates the unsettled areas of the Draft Code.

Another aspect of the Draft Code is in Articles 47 to 58 on the treatment of transnational corporations. This raises some controversial issues. First, whether there are international minimum standards for the treatment of foreign transnational corporations throughout the world. As we have said, it is generally agreed that states have the right to regulate the entry and establishment of transnational corporations. Thus there would under this provision be no objection to Australia's present foreign investment policy, which, for example restricts foreign presence in for example the financial and mining sectors. But once admitted, the question is whether the foreign investor is entitled to fair equitable and non-discrimatory treatment in accordance with national and international law. Much of the Third World objects to international legal standards of treatment being applied here. They argue that this is a matter exclusively for domestic law. A related question is whether transnational corporations should be accorded treatment no more favourable than that applicable to domestic enterprises. In some states, preferential treatment or incentives are given to transnational corporations; it is proposed that this be outlawed. Some Australian businesses have

naturally taken advantage of incentives in less developed countries, particularly fiscal advantages.

A second important issue in relation to the treatment of transnational corporations is the question of nationalisation and compensation. The basic Western position is that under international law states have a right to nationalise or expropriate foreign investment on a non-discriminatory basis for a public purpose, not in violation of specific undertakings by contract or other agreement and accompanied by the payment of prompt adequate and effective compensation. According to this view, such compensation should correspond to the full value of the property or interest taken, on the basis of its fair market value, including going concern value, or where appropriate, other internationally accepted methods of valuation. These would be determined apart from any effect on the value of the expropriated property caused by the nationalisation or expropriatory measure or measures, or the expectation of them. Such compensatory payments should be freely convertible and transferable and should not be subject to any restrictive measure applicable to the transfer of payments, income or capital. At the other extreme the principle advanced is that there is an absolute right in the state to nationalise. Compensation is a matter for domestic law exclusively. Indeed, even previous "excess profits" may be deducted from such compensation, as was the case in Chile when the copper industry was nationalised. Where any dispute arises thereunder the settlement of that may only be effected under the domestic law of the nationalising state. If the Western view were adopted it should also be borne in mind that there is authority for the proposition that measures taken which effectively hinder a corporation might well amount to nationalisation. Thus the action taken by the Fraser Government in relation to Fraser Island, and perhaps the suspension of certain uranium mines recently could be treated as a form of "creeping nationalisation" and thus under the doctrine in the Revere Case, 56 ILR 258 (1978) be treated as nationalisation. Of course measures clearly expropriatory such as the action taken in relation to mineral royalties in N.S.W. would if foreign investors were involved, constitute nationalisation or expropriation for this was effected without clear lgislative provision for prompt adequate and effective compensation: Coal Acquisition Act, 1981.

A third important issue in this area of the treatment of transnational corporations is the question of jurisdiction. This involves a determination of the extent to which concurrent jurisdiction of other countries may be exercised over foreign investment, or conversely home government jurisdiction be operative over foreign investment overseas. The Soviet gas pipe line dispute shows the extent to which there is a division of opinion amongst Western countries as to the extent of jurisdiction over foreign investment. A fourth unresolved and important question is the law under which agreements entered into between transnational corporations and governments, including state governments should be governed. (Article 6-20).

The Draft Code also makes provision in Article 14 concerning the activities of transnational corporations and the extent to which these must follow the directives and policies of the state. There is agreement prohibiting transnational corporations from engaging in activities of a political nature which are not permitted by laws established policies and administrative practices of the countries in which they operate. There is some dispute as to whether there should be an unqualified prohibition of interference in internal affairs, both legal and illegal. There is also a disputed provision, Article 66, requiring transnational corporations to reduce their business activities in the Republic of South Africa and to cease all activities in Namibia. It is not yet decided whether, if this article is accepted, it should constitute a binding obligation or merely be a guideline.

Another area of relevance is the implementation of the Code. Paragraph 69(c) seems to give jurisdiction to the Commission of Transnational Corporations to

interpret the meaning of the Code, without being able to draw conclusions in a specific dispute as to the conduct of the parties involved and the situation which leads to the request for clarification. It is also provided that states "shall/should" follow the implementation of the Code within their territories and report to the United Nations action taken to promote the Code and the experience gained from its implementation. This is an example of a "federal clause" which was the subject of comment in the Dams Case (Commonwealth v. Tasmania (1983) 57 ALJR 450).

It is most unlikely that the United States would sign a convention to adopt the Code in the form proposed by the Third World. At an Australian Mining Industries Seminar in May 1983 it was explained that the United States would not sign the United Nations Convention on the Law of the Sea, not only because of the contents of the Convention, but because the ideas contained therein could easily be applied in other areas. It

... would set a precedent for further third world efforts to dictate the use of resources beyond national jurisdiction, such as control of Antartica and other unclaimed resource deposits, and possibly the International Monetary Fund and World Bank. (Roger A. Brooks, The Law of the Sea Treaty and the New International Economic Order, A.M.I.C. Minerals Outlook Seminar, May 1983 Canberra).

It was said that what had happened over the past few years was that almost without the North noticing it the New International Economic Order had become the basic constitution of all United Nations economic work.

It is clear that the issues involved in the Draft Code are of considerable import to the law of foreign investment. It would be difficult to make any realistic predictions as the outcome of these negotiations.

D.F.