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CONTENTS

Articles

Reports

Book Reviews

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Publications of the Institute for International Law at the University of Kiel

In Memoriam Eberhard Menzel

Eberhard Menzel, professor of constitutional and international law and former director of the Institute for International Law at Kiel University, passed away after long illness on June 1, 1979 at the age of 68.

Since 1955 Menzel taught the subjects constitutional law, international law, and political theory at Christian-Albrechts-Universität and directed the Institute for International Law until illness compelled him to withdraw from his academic work in 1973. His acedemic career began while he was a student of Friedrich Giese in Frankfurt. Here he earned his doctorate with a fundamental thesis on "The English Theory of the Essence of the International Law Norm". Following temporary practical court work as *Justizassessor* and further extensive research papers, — interrupted by military service in 1940 — Eberhard Menzel finished his *Habilitation* in the field of public law in 1943.

Upon his return from an American prisoner of war camp in 1947, he took up his work again at the Research Center for International Law and Foreign Public Law in Hamburg. After his appointment to a professorship in Hamburg in July, 1952, he received tenure at Kiel University in the spring of 1955. Here Eberhard Menzel could develop his constitutional law and international law interests excellently. After only a few years of work at Kiel he finished his widely respected treatise on international law in 1962. The academic work of Eberhard Menzel covers an abundance of subjects of partly fundamental importance and partly current interest, such as the report before the German Association of Public Law Teachers in 1953 concerning the foreign affairs power, the commentary on the articles of the Basic Law with reference to international law, and his numerous works which foresaw the current problems in the new law of the sea and the relationship of national and international administration.

In the area of constitutional law, Eberhard Menzel strongly took position on a variety of topical questions, such as the problem of reorganization of the civil service, the emergency provisions in the Basic Law, the control of public finances and legal questions of higher education. Characteristic of his work is on the one hand his critical acumen in analysis, including the sociopolitical environment and on the other hand his creative, careful outline of possible new solutions.

These elements characterize finally a further emphasis in Eberhard Menzel's research — the occupation with the German Question and *Ostpolitik*. Critical in his analysis of the existing international law, constitutional law and political dogmas and taboos of official policy concerning Germany and the relations with its neighbours to the East, he made himself an advocate of a policy of European security and cooperation, the nucleus of which consisted in the confirmation of Germany as a partner and good neighbour. In the *Festschrift* by his students and colleagues honoring Menzel on his 65th birthday it is justly said that he has participated in the discussion of his time in a way which corresponds to his entire being: "Extremely critical towards the inside and protective towards the outside".

A large number of students, doctoral candidates and research assistants received manifold stimuli from his world-open, interested function as a teacher. Beyond that, he dedicated his entire energy to the Institute for International Law, the respect of which he knew to expand at home and abroad according to the tradition set by Theodor Niemeyer, Walter Schücking and Hermann von Mangoldt.

His close association with international law practice and foreign politics became manifest in the years of his successful international law training of foreign service candidates and in his participation in many international conferences, including those of the Pugwash Movement, to which he had a strong allegiance because of its peace-oriented goals. A highpoint of the combination of research and practical work was his participation as adviser for the German agents in the North Sea Continental Shelf Case at the International Court of Justice in 1968.

The German Yearbook of International Law is deeply indebted to Eberhard Menzel who dedicated to it so much of his energy and idealism during his years as a co-editor and editor until 1973. We have lost a profiled, scholarly personality, whose richness of ideas, constant readiness to step in and help, and tireless efforts beyond expectation will always remain a model for his students and colleagues.

Jost Delbrück Wilfried Fiedler Wilhelm A. Kewenig

ARTICLES

The Legal Effects of Codes of Conduct for Multinational Enterprises

Hans W. Baade*

Outline

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* A German version, entitled "Verhaltensleitsätze für multinationale Unternehmen", was presented at the Center for Interdisciplinary Research at the University of Bielefeld in January 1979, at the Max Planck Institut für ausländisches und internationales Privatrecht in Hamburg and at the Institut für Internationales Recht in Kiel in March 1979, at a meeting of the German - American Lawyers' Association in Munich in May 1979, at the Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht in Heidelberg in May 1979, and at the University of Bremen in June 1979. There remains the pleasant task of thanking the learned audiences who have suffered through the previous versions of this paper. Their critical comments have proved invaluable, but ultimate responsibility must rest, as always, with the author.

I. The Legal Setting and the Basic Legal Issues

A. The Setting

Multinational enterprises (MNEs) are enterprises which are directed from their countries of origin (or home countries) and engage in economically significant activities within other states, known as host countries[1]. What distinguishes them from other business enterprises is their ability to exercise market power and influence in host countries by what may be termed remote control. In a world divided into territorial sovereignties and thus compartmentalized jurisdictionally, such exercises of market influence and power are largely extraterritorial so far as the host countries are concerned, *i. e.*, not subject to their supervision and regulation in the same manner as are the business decisions of domestic enterprises. Moreover, the decisional nerve centers of MNEs are subject to home country regulation and guidance even as to business decisions designed to take effect within host countries.

Codes of conduct for MNEs are, in essence, devices for the protection of the economy of the host country (and of host-country workers, customers, competitors, and creditors) from unilateral action by MNE headquarters, especially if influenced by economic or policy factors indigenous to the home country[2]. The OECD Guidelines for MNEs, for instance, are expressly intended "to ensure that the operations of these enterprises are in harmony with the national policies of the countries where they operate"[3]. Almost identical terminology pervades the draft UN Code of Conduct for Transnational Corporations[4].

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[1] *John K. Galbraith*, The Defense of the Multinational Company, Harvard Business Review 1978, 83—93 (86). See also, e. g. *Henri Schwamm*, Origins, Nature, Economic and Political Significance of Codes of Conduct, in: *Henri Schwamm* and *Dimitri Germidis* (eds.), Codes of Conduct for Multinational Companies: Issues and Positions (European Centre for Study and Information on Multinational Corporations), 1977, 1.

[2] See *Hans W. Baade*, Codes of Conduct for Multinational Enterprises: An Introductory Survey (hereinafter cited as Baade Survey), to be published in: *Norbert Horn* and *E. R. Lanier* (eds.), Legal Problems of Codes of Conduct for Multinational Enterprises, text at n. 9—12.

[3] Annex to the Declaration of June 21, 1976 by Governments of OECD Member Countries on International Investment and Multinational Enterprises, Guidelines for Multinational Enterprises (hereinafter cited as OECD Guidelines), Department of State Bulletin (DptStBull) 1976, 83—87, Introductory Considerations and Understandings, § 6. In the text distributed by the West German Ministry of Economics, "countries where they operate" is translated, quite appropriately, as "jeweilige Gastländer" or host countries. BMWi Tagesnachrichten No. 7251, July 13, 1976, 4.

[4] Commission on Transnational Corporations, Transnational Corporations: Code of Conduct; Formulations by the Chairman. UN Doc. E/C. 10 2/8, December 18, 1978. The expression there used is "countries in which they [i. e., the transnational corporations] operate".

The call for such a code of conduct was apparently first articulated by the International Confederation of Free Trade Unions in December 1970[5]. The term itself gained general currency in the ensuing decade, especially after being endorsed by the Group of Eminent Persons in May 1974[6]. Yet its legal significance continues to remain somewhat less than precise, even in United Nations practice. It seems clear that a code of conduct is not as such incompatible with the notion of legally binding obligations. This is demonstrated by a General Assembly resolution of December 1972, regarding a "convention or other multilateral *legally binding* instrument on a code of conduct for liner conferences"[7]. On the other hand, as shown by the language just quoted, such a code is not, without more, a legally binding instrument. Otherwise, there would have been no need for a convention or other normative act in addition to the code itself.

Indeed, it is this meta- or para-legal status that gained the concept of codes of conduct such ready acceptance in the practice of international organizations. In the judgment of the Eminent Persons, there was an immediate need for the regulation of MNE conduct on a global scale[8]. The traditional device of multilateral conventions was regarded as too unwieldy for quick relief, and as too decentralized for pervasive coverage. A multilateral convention regarding the conduct of MNEs would have required protracted negotiation, followed by additional delays pending ratification or accession. Moreover, it would have bound only those states which ultimately chose to accede; and even *inter partes*, its uniformity might have been undercut by reservations. Especially some of the more prominent home countries of MNEs could be expected, in the end, to remain outside the treaty scheme, or to accept it only subject to crippling reservations[9].

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[5] ICFTU Executive Board, Resolution on Freedom of Association and Multinational Companies, December 8—10, 1970, reprinted as Appendix 2 in ICFTU, The Multinational Challenge, 1971, 63,64. (ICFTU World Economic Conference Reports No. 2). See Baade Survey (n. 2), text at n. 144—145.

[6] UN Department of Economic and Social Affairs, The Impact of Multinational Corporations on Development and International Relations (UN Doc. ST/ESA/6, Sales No. E. 74, II. A. S), 1, 52—57; Baade Survey (n. 2), text at n. 49. The Report is dated May 22, 1974.

[7] UN GA Resolution 3035 (XXVII), December 19, 1972. The Convention drafted under the auspices of UNCTAD and recommended for adoption on April 6, 1974, is reproduced in International Legal Materials (ILM) 1974, 917—948. For analysis, see *Klaus Grewlich*, Die UN-Konvention über einen Verhaltenskodex für Linienkonferenzen, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 1975, 742—758. For a case where the term "guidelines" was used to describe an instrument designed to modify treaty obligations, see *infra*, text at n. 137—140.

[8] *Supra*, n. 6, at 54—55.

[9] *Theodor W. Vogelaar*, Comment, in: *Paul-Marc Henry* (ed.), Value and Limitations of Codes of Conduct as Regulating Instruments for Multinational Corporations (European Centre for Study and Information on Multinational Corporations), 1978, 45.

Conventions embodying definite legal obligations of the contracting states are — at least *inter partes* and if compatible with *ius cogens* — hierarchically the top layer of "hard" international law[10]. The major codes of conduct for MNEs currently in existence or close to the point of formal adoption do not belong to that category. It is readily apparent that this is due not to any intrinsic defects of the international "legislative" process, but to a deliberate choice of the states concerned in the international norm-creating process, influenced in good part by the considerations just mentioned. For as shown by a comparison of the instruments adopted with the norm-creating powers of the international organizations involved, at least the codes of conduct extant today have quite uniformly failed to make full use of these powers.

The European Communities, for instance, have ample "legislative" powers[11], and there is strong political support in the Commission and in the European Parliament for a binding and legally enforceable code of conduct for MNEs[12]. Yet when in 1977, the Communities adopted the Code of Conduct for Companies with Interests in South Africa, this was accomplished not by a normative Community instrument such as a Regulation or a Directive, but by a decision of the Foreign Ministers of the member states that is formally not even an act of the Communities[13].

Similarly, the Principles Concerning Multinational Enterprises and Social Policy adopted by the International Labour Organisation (ILO) in 1977 are not embodied in a Recommendation of the General Conference (which would have automatically entailed reporting obligations based on treaty commitments already in effect)[14] but in a Declaration of the Governing Body — an instrument not contemplated in the Constitution of the ILO[15]. The OECD Guidelines, finally, were adopted without formal use of the OECD Council, which could have promulgated a Decision legally binding upon the member states or

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[10] See e. g., *Ian Brownlie,* Principles of Public International Law, 2d ed., 1973, 3—4.

[11] See e. g., *Derek Bowett,* The Law of International Institutions, 3d ed., 1975, 185—189.

[12] "Multinational Untertakings and the Community", Communication from the Commission to the Council, November 8, 1973, Bulletin of the European Communities, Supplement 15/73; European Parliament, Debates, April 19, 1977, and Resolution, same date, § 1, O. J. 1977 C. 118/15. See generally Baade Survey (n. 2), text at n. 91—112.

[13] Code of Conduct for Companies with Interests in South Africa, September 20, 1977, English text in Cmnd. 7233, 1978, 5—7, and Bulletin of the European Communities 9—1977, 2.2.4.

[14] Pursuant to article 19 (6) (d) of the Constitution of the International Labour Organisation, ILO members are obligated to report to the Director-General of the International Labour Office, "at intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation". See *Bowett* (n. 11), 127 et seq., 129.

[15] The Declaration, which is dated November 16, 1977, is reprinted in ILM 1978, 423—430.