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WORK RELATED TO THE FORMULATION OF A CODE OF CONDUCT

Report of the Intergovernmental Working Group on a Code of Conduct
on its eighth, ninth and tenth sessions

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INTRODUCTION

1. The Intergovernmental Working Group on a Code of Conduct, established by the Commission on Transnational Corporations at its second session, held at Lima from 1 to 12 March 1976 1/ and approved by Economic and Social Council decision 180 (LXI) of 5 August 1976, commenced its work in 1977. A report describing the progress of work at the first two sessions of the Group (E/C.10/31) was submitted to the Commission on Transnational Corporations at its third session. A similar report on the third and fourth sessions (E/C.10/36) was submitted to the Commission at its fourth session. A report describing in some detail the discussions of the Group at its fifth, sixth and seventh sessions (E/C.10/46) was submitted to the Commission on Transnational Corporations at its fifth session. 2/ On the basis of that report, the Commission:

(a) Took note of the report of the Intergovernmental Working Group on a Code of Conduct on the work of its fifth, sixth and seventh sessions (E/C.10/46);

(b) Expressed its appreciation for the progress made so far and for the substantial reports which were presented by the Chairman of the Group and the Rapporteur;

(c) Expressed its appreciation for the assistance provided by the United Nations Centre on Transnational Corporations to the work of the Intergovernmental Working Group on a Code of Conduct;

(d) Instructed the Working Group to continue its work with a view to presenting a comprehensive draft code of conduct to the Commission at its sixth session; and

(e) Requested the Economic and Social Council to decide that the Intergovernmental Working Group on a Code of Conduct should hold three more sessions of two weeks' duration in order to accomplish its task, as set out in its mandate, and that these three sessions should be held before the sixth session of the Commission and that the eighth session of the Group should be held before the thirty-fourth session of the General Assembly. 3/

2. Subsequently the Economic and Social Council decided that the Group should hold three sessions in 1980. 4/ Accordingly the eighth session of the Intergovernmental Working Group was held from 7 to 18 January, the ninth from 17 to 28 March, and the tenth from 12 to 21 May.

1/ Official Records of the Economic and Social Council, Sixty-first Session, Supplement No. 5 (E/5782), paras. 10-17.

2/ Ibid., 1979, Supplement No. 8 (E/1979/38/Rev.1).

3/ Ibid., para. 19.

4/ See Council decision 1979/73.

I. ORGANIZATIONAL MATTERS

A. Eighth session

3. The Working Group held its eighth session at United Nations Headquarters from 7 to 18 January 1980, with the following States members of the Commission in attendance: Algeria, Argentina, Brazil, Canada, Cuba, France, German Democratic Republic, Germany, Federal Republic of, Ghana, India, Iran, Iraq, Italy, Japan, Kenya, Mexico, Netherlands, Nigeria, Panama, Peru, Poland, Romania, Swaziland, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Yugoslavia, Zaire and Zambia. Egypt, Norway, the Philippines and Spain were represented by observers.

4. The first week of the session was also attended by the following persons selected by the Commission on Transnational Corporations to assist it and the Working Group as expert advisers: Mr. J. D. Akumu, Mr. S. Babar Ali, Mr. J. M. Goudswaard, Ms. E. Jager, Mr. G. E. Jones, Mr. D. Lea, Sir A. Lewis, Mr. S. Paul, Mr. G. Tacke and Mr. T. Zaki. The Group decided that the expert advisers should not be present during the drafting of general and political principles.

5. During the session, the Working Group held 20 meetings. At its 92nd meeting, on 7 January, the Group re-elected Mr. S. Niklasson (Sweden) Chairman. Mr. R. S. Bhatt (India), Mr. H. Heininger (German Democratic Republic) and Mr. M. H. Kaabachi (Tunisia) were elected Vice-Chairmen, and Mr. B. Sepulveda (Mexico) Rapporteur.

6. The Working Group adopted the provisional agenda contained in document E/C.10/AC.2/12. In addition to documents prepared for previous sessions, the Group had before it a working paper entitled "Transnational corporations: a code of conduct, a composite text of formulations by the Chairman and elements prepared by the Centre on Transnational Corporations" (working paper No. 10). The paper consisted of (a) key elements regarding the preamble, prepared by the Centre at the request of the Working Group; (b) formulations by the Chairman on activities of transnational organizations and intergovernmental co-operation; and (c) common elements/tentative formulations on the application of the Code at the national and international levels, prepared by the Centre at the request of the Working Group.

7. During the session, the Centre prepared, upon request of the Group, a text containing key elements on the definition of the term "transnational corporation" (working paper No. 11) to serve as a basis for the discussions.

8. At the conclusion of the session, the Centre was requested to prepare for the ninth session: (a) a document on revised key elements of the preamble and (b) a paper further elaborating key elements for the definition of the term "transnational corporation". Further, the Chairman was asked to provide

formulations on the implementation of the code, including formulations for intergovernmental co-operation. With respect to disclosure of information, the Working Group decided to request comments on the technical aspects on the subject from the Intergovernmental Working Group on International Standards of Accounting and Reporting.

9. Lastly, the Working Group agreed on the following agenda for its ninth session:

1. Opening of the session
2. Adoption of the agenda and organization of work
3. Preparation of a code of conduct
4. Draft provisional agenda for the ninth session of the Intergovernmental Working Group on a Code of Conduct.

B. Ninth session

10. The ninth session was held at United Nations Headquarters from 17 to 28 March 1980 with the following States members of the Commission in attendance: Algeria, Argentina, Benin, Brazil, Canada, Colombia, Cuba, France, German Democratic Republic, Germany, Federal Republic of, India, Iran, Italy, Ivory Coast, Jamaica, Japan, Kenya, Mexico, Netherlands, Nigeria, Panama, Peru, Poland, Romania, Swaziland, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Yugoslavia, Zaire and Zambia. Australia, Egypt, Finland and Spain were represented by observers.

11. The second week of the session was also attended by the following expert advisers: Mr. J. D. Akumu, Mr. S. Babar Ali, Mr. J. M. Goudswaard, Ms. E. Jager, Mr. S. Paul, Mr. G. Tacke and Mr. T. Zaki.

12. During the session, the Working Group held 19 meetings. The Working Group adopted the annotated provisional agenda contained in document E/C.10/AC.2/13. In addition to documents prepared for previous sessions, the Group had before it the following documents: (a) "Transnational corporations: a code of conduct; revised key elements on the preamble" (working paper No. 12), which presented two possible approaches for the preamble, taking into account the suggestions made by the Working Group at its eighth session; (b) "Transnational corporations: a code of conduct; elaboration of key elements regarding the term 'transnational corporation'" (working paper No. 13); and (c) "Transnational corporations: a code of conduct; formulations by the Chairman on the implementation of the code of conduct" (E/C.10/AC.2/14).

13. The Group also had before it Conference Room Paper No. 29, entitled "Draft provisions of the code of conduct for transnational corporations proposed by India on behalf of the Group of 77 (26 March 1980)".

14. At the end of the session, the Working Group adopted the following provisional agenda for its tenth session:

1. Opening of the session
2. Adoption of the agenda and organization of work
3. Preparation of a code of conduct
4. Report of the Intergovernmental Working Group on the Code of Conduct to the Commission on Transnational Corporations at its sixth session.

C. Tenth session

15. The tenth session was held from 12 to 21 May at United Nations Headquarters, with the following States members of the Commission participating: Argentina, Brazil, Canada, Cuba, France, German Democratic Republic, Germany, Federal Republic of, India, Italy, Ivory Coast, Jamaica, Japan, Kenya, Mexico, Netherlands, Nigeria, Pakistan, Panama, Peru, Poland, Romania, Swaziland, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Yugoslavia, Zaire and Zambia. Australia, Egypt and Spain were represented by observers.

16. The first week of the session was also attended by the following expert advisers: Mr. J. D. Akumu, Mr. S. Babar Ali, Mr. J. M. Goudswaard, Mr. K. Kojima, Sir A. Lewis, Mr. S. Paul and Mr. T. Zaki.

17. During the three sessions, representatives of the United Nations Secretariat, the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Industrial Development Organization (UNIDO) were present.

18. The following specialized agencies were represented: the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the International Monetary Fund (IMF); moreover, the Food and Agriculture Organization of the United Nations (FAO) was represented at the eighth session and the World Health Organization (WHO) at the ninth and tenth sessions.

19. The following intergovernmental organizations were also represented: the Organisation for Economic Co-operation and Development (OECD), the Commission of the European Communities and the Latin American Economic System (SELA).

20. Among the non-governmental organizations represented were the International Chamber of Commerce, the International Confederation of Free Trade Unions, the International Organization of Employers, and the World Federation of Trade Unions; the International Organization of Consumers Unions was represented at the ninth and tenth sessions.

21. During the tenth session, the Working Group held 18 meetings. It adopted the provisional agenda contained in document E/C.10/AC.2/15. The Group had before it the documents mentioned in paragraphs 12 and 13 above.

22. The Group considered its draft report (E/C.10/AC.2/CRP.23 and Add.1--6) under agenda item 4 at its 146th and 147th meetings on 21 May 1980, and approved it ad referendum. As various delegations made oral amendments during consideration of the draft, the Group entrusted the Rapporteur with the finalization of the report.

II. PREPARATION OF A CODE OF CONDUCT

23. As stated in the previous report of the Working Group to the Commission (E/C.10/46), a step-by-step approach has been followed in the preparation of the code, according to which each section of the code evolves through successive stages of discussion, negotiation and formulation: an identification of the key elements in each issue, followed by the presentation of common elements with a tentative formulation prepared by the Centre on Transnational Corporations; discussions on the common elements lead to formulations prepared by the Chairman. The Chairman's formulations serve as a basis for the negotiations involved in the drafting of provisions by the Group itself. The Group entered the last stage at its eighth session and by its tenth session had concluded the drafting of 24 provisions reaching consensus on a number of them, as shown in the annex. It was understood that agreement relating to the draft provisions was provisional pending the conclusion of the drafting of the code as a whole. In addition, the Group began discussions on key elements on the preamble and definitions, and common elements on the implementation. On the basis of the discussion on implementation the Chairman prepared formulations on that subject.

24. More specifically, during the first week of its eighth session, the Working Group discussed in a preliminary way the preamble to the code, on the basis of the key elements contained in a working paper prepared by the Centre on Transnational Corporations (working paper No. 10). The Working Group also considered the section of the code dealing with the implementation of the code, on the basis of the common elements prepared by the Centre on Transnational Corporations, as well as the section on intergovernmental co-operation, on the basis of the Chairman's formulations. During the second week of the session, the Working Group began drafting the code's provisions, using as a basis the Chairman's formulations on the paragraphs under the heading General and political. The Working Group also discussed the question of definitions on the basis of working paper No. 11.

25. At its ninth session, the Working Group devoted most of its time to the continuation of the drafting of the code's provisions under the headings "General and political", and "Economic, financial and social". During the discussions, the Working Group took the Chairman's formulations as a point of departure and had before it conference room paper No. 20 entitled "Draft provisions of the code of conduct for transnational corporations proposed by India on behalf of the Group of 77 (26 March 1980)".

26. At its tenth session, the Working Group continued its work on the drafting of the code's provisions on the sections relating to balance of payments and financing, transfer pricing and taxation. Informal consultations were also held on those provisions, as well as on the provisions prepared during the preceding sessions on which a measure of disagreement remained.

27. Texts relating virtually to all parts of the code, although at various stages of elaboration, are at present before the Group. They consist of (a) concluded provisions; (b) the Chairman's formulations on the substantive part and on implementation of the code; and (c) key elements on the preamble and on definitions.

Discussion on the code

28. The following paragraphs of the present report summarize the progress of work in the sections of the code so far covered by the Working Group at its last three sessions. The description follows the outline of the code as contained in the Chairman's formulations, rather than the order of the discussion of each item during the past three sessions.

29. On the preamble, a preliminary discussion was held at the eighth and ninth sessions. The Working Group agreed upon the need to include a preamble to the code, setting out the considerations for the adoption of the code, as well as the circumstances leading to its adoption.

30. It was generally agreed that the discussion on the preamble at the present stage could not be considered as conclusive until the other issues dealt with in the code had been further developed. In that connexion, several delegations stated that there was a link between the legal nature of the code and the preamble, and that the drafting of the preamble would also depend on the evolution of other substantive parts of the code.

31. With respect to its content, it was suggested that reference should be made to the relevant resolutions of the General Assembly or other United Nations organizations and specialized agencies. Examples of resolutions referred to in the discussions were the resolutions of the Economic and Social Council establishing the Commission on Transnational Corporations and setting the mandate of the Commission and the Intergovernmental Working Group.

32. In addition to those resolutions, it was also suggested that the preamble should include a statement of the principles underlying the code. As to the nature of those principles, some delegations mentioned only general principles, while others referred to principles contained in General Assembly resolutions relating to the establishment of a new international economic order, the Charter of Economic Rights and Duties of States, permanent sovereignty and the international development strategy.

33. It was generally agreed that the preamble should also contain the goals and objectives of the code. Some delegations expressed the view that any statement of goals and objectives should be selective and include only certain fundamental, but specific, objectives.

34. It was felt by some delegations that the preamble should be a rather brief formal declaration on the nature of the code, to be accompanied by an introductory part which would be more substantive and would express the objectives, general principles and scope of the code.

35. Several delegations felt that certain issues, being relevant to several substantive provisions of the code, should be dealt with comprehensively in the introductory part so as to avoid unnecessary repetition.

36. With respect to specific items suggested by delegations for inclusion in the preamble, several suggestions were made which to a large degree had been reflected

in a working paper prepared by the Centre (working paper No. 12). In the part dealing with considerations underlying the adoption of the code, they included the impact of transnational corporations on the international economy and on international relations, and the concern about their activities which had led to measures regarding regulation and supervision of those activities. There was consensus that the preamble should stress the need for an effective application of the code by establishing a framework for international co-operation to supplement national action. It was also suggested that the main objectives of the work of the Commission should be included in the preamble.

37. Among the principles, goals and objectives to be included, many delegations emphasized, inter alia, the principle of full respect for national sovereignty; the permanent sovereignty of States over their natural resources, wealth and economic activities; non-interference in internal and intergovernmental affairs; and the right of States to regulate and control the activities of transnational corporations. Several delegations also emphasized that a reference to those principles would have to be balanced by a reference to, inter alia, international law, the protection of legitimate activities and the principle of fair treatment. It was also stated that the formulations in the preamble should be balanced and should also refer to the positive contributions of transnational corporations. It was also felt by several delegations that among the principles, specific mention should be made of the importance of a universally adopted code.

38. At the request of the Group, the Centre had prepared working paper No. 12, providing two alternatives with regard to the format of the preamble. The Group decided to take up the issue again at a later stage in its work.

39. At the eighth session, during the discussions on definitions - a discussion which was also requested by the Commission at its fifth session - it was generally agreed that there was a need for a definition of the term "transnational corporation" for the purposes of the code of conduct. It was also agreed that in defining the term "transnational corporation", its main characteristics should be specified. The objectives of such a definition would be to identify clearly the enterprises to which the provisions of the code would apply. It was felt that the definition should be made in general and comprehensive terms so as to enable it to meet changing circumstances and evolving patterns of business operations.

40. Among the characteristics, most delegations thought that the following were essential: first, operations in two or more countries; secondly, a centralized decision-making system which might reflect global strategies and, thirdly the sharing of information, resources and responsibilities among the entities. It was emphasized by most delegations that those characteristics were sufficient for the definition and that no distinction should be made between such enterprises in terms of size, field of activity, legal form or nature of ownership - namely, whether they were private, mixed or State-owned. Some delegations indicated that the size of the corporation should be taken into account when formulating certain provisions of the code.

41. It was, however, also pointed out by some delegations that the definition of the term "transnational corporation" should reflect the circumstances that led to

the mandate for the formulation of a code of conduct and that the code should therefore concern itself with those enterprises which gave rise to that mandate. It was suggested by those delegations that the definition should not cover State-owned and socially owned self-managed enterprises which were under the effective control of Governments and competent national authorities. Furthermore, they proposed that the motivation of transnational corporations' activities, that is, profit maximization, should be included as an additional criterion.

42. Many delegations noted that it was necessary to take into account the definitions already formulated in other forums, particularly ILO and UNCTAD, with a view to ensuring uniformity. Other delegations insisted on the necessity of having a specific definition for the present code.

43. Some delegations thought that a transnational corporation should be defined as an enterprise comprising various entities established in different countries. It was also suggested that the definition should not include enterprises established under or pursuant to a treaty or other intergovernmental agreement on economic co-operation. It was finally pointed out that a distinction could be made between the definition of the term used in the code and the scope of application of the code, the latter possibly being broader than the former or vice versa. Some delegations expressed the view that a precise definition of transnational corporations would not be necessary, given the fact that the code should also apply to national enterprises, whenever its provisions were relevant to both. According to those delegations, the introductory part of the code should state that explicitly.

44. After the discussions, the Working Group requested the Centre to elaborate further on the issue of definitions in light of the views expressed by delegations and to submit to the Working Group at its ninth session a paper further elaborating key elements regarding the term "transnational corporation". In response to that request, the Centre prepared working paper No. 13, which, however, has yet to be discussed by the Group.

45. In drafting the provisions of the code on activities of transnational corporations, general and political and economic, financial and social, which began at the eighth session, the Working Group used as a basis the Chairman's formulations, taking into account other proposals made by delegations. In the concluded paragraphs the Group placed brackets around terms and clauses which did not command general agreement. To indicate further current lack of consensus regarding the legal nature of the code, the Group agreed to use both terms "should" and "shall" at the beginning of each provision.

46. During the second week of its eighth session, the Group took up and concluded the drafting of the first four provisions under the section entitled "Activities of transnational corporations. A. General and political". The Group agreed, in paragraph 1, that transnational corporations should respect the national sovereignty of the countries in which they operated. Many delegations expressed the view that transnational corporations should respect the right of each State to exercise full permanent sovereignty over its natural resources, wealth and economic activities. Some delegations, however, could only accept such a broad

reference if it was balanced by a reference to international law and pending the outcome of the discussion on the chapter concerning the treatment of transnational corporations.

47. On paragraph 2, there was a consensus in the Group that transnational corporations should be required to observe the laws, regulations and administrative practices of the countries in which they operated. Some delegations wanted to have the reference to administrative practices qualified by the term "explicitly declared". Many delegations also wished to include a reference to the submission by transnational corporations to the jurisdiction of the countries in which transnational corporations operated. Some delegations felt that a statement that transnational corporations were subject to the laws, regulations and administrative practices as well as the jurisdiction of the countries in which they operated would not adequately reflect the complexity of the legal relationship between the different entities of a transnational corporation and between transnational corporations and other enterprises and pointed out that the section on jurisdiction was a more appropriate place to deal with that issue.

48. The Group agreed on paragraph 3, calling on transnational corporations to respect the right of each State to regulate and monitor accordingly the activities of their entities operating within its territory.

49. In paragraph 4, under the heading "Adherence to economic goals and development objectives, policies and priorities", the Group agreed on the basic substance of the paragraph, although some delegations insisted on a number of qualifications which reflected the view that transnational corporations should endeavour, consistent with their resources, capabilities or nature of their activities, to adhere to such objectives.

50. On paragraph 5, referring to renegotiation of contracts, the discussion focused on the key notion that in the absence of clauses providing for review or renegotiation, transnational corporations should co-operate with Governments or governmental agencies in the renegotiation of contracts or agreements where there had been a fundamental change in circumstances on which the contract or agreement was based, rendering the contract or agreement unfair or inequitable. There was no agreement on the nature of the parties to contracts or agreements which could be subject to renegotiation, nor on certain other elements of the provision. The Group decided to pursue negotiations on the subject.

51. During the ninth session, the Group elaborated provisions on paragraphs 6 to 22, with the exception of the formulations proposed for paragraphs 9 and 13 to 17, the drafting of which was postponed, as indicated below.

52. The Group agreed on paragraph 6 which called on transnational corporations to respect the socio-cultural objectives, values and traditions of the countries in which they operate and to consult with Governments.

53. Agreement was reached on paragraphs 7 and 8 which were combined into one under the heading "Respect for human rights and fundamental freedoms".

54. Regarding paragraph 9 of the Chairman's formulations, dealing with non-collaboration by transnational corporations with racist minority régimes in southern Africa, many delegations proposed a text (see conference room paper No. 20) consisting of two provisions which called on transnational corporations to reduce progressively their activities in South Africa and Namibia, and terminate further investment in those areas; to refrain from collaborating in the racist practices of those régimes and to assist in the implementation of United Nations resolutions in that regard. Some delegations fully supported the proposal and some others, while supporting it, thought that it should be strengthened. A number of other delegations, while recalling their individual and collective engagement to eradicate apartheid in South Africa and Namibia and indicating their concurrence in the principle of non-collaboration by transnational corporations in racist practices, as reflected in their national policies, expressed the view that it was not appropriate for the code to contain references to the problems existing in specific geographical areas; they added, however, that they remained open to further discussions on the matter. Some other delegations, while recalling their rejection of policies of apartheid, saw merit in the arguments made by certain delegations against the inclusion of a specific provision of the nature proposed in the code. Those delegations none the less considered that discussions on the subject had to be pursued, and some resolution found for dealing with the subject in connexion with the code. It was agreed to continue discussions on the subject.

55. On non-interference in internal political affairs in the Chairman's formulations, the Group reached agreement on paragraph 11, requesting transnational corporations not to engage in activities of a political nature which are not permitted by the laws and established policies and administrative practices of the countries in which they operate. No consensus, however, was reached on paragraph 10. Many delegations suggested that transnational corporations should not interfere in the internal affairs of the countries in which they operate and should refrain from any activities which undermine the political and economic systems of these countries. Some delegations felt that the provisions should explain the notion of interference by referring to illegal interference and illicit activities. It was thought, however, by many delegations that no such qualifications were called for. Still other delegations expressed the view that the notion of non-interference would be sufficiently explained by a clear link to the undermining of political and social systems or by qualifying the reference by using the term subversive activities. Other delegations maintained that internal affairs was too general a notion and that the paragraph should refer to internal political affairs.

56. The Group agreed on the basic substance of paragraph 12 calling on transnational corporations not to interfere in intergovernmental relations, but did not reach full agreement on the wording of the paragraph. There was disagreement on the specific interpretation of the word "interference"; some delegations indicated their preference for referring to improper involvement in intergovernmental relations.

57. The Group decided to postpone the drafting of paragraphs 13 to 15. There was no consensus, however, on whether these provisions should be discussed together with counterpart provisions under the part on treatment of transnational corporations in the Chairman's formulations.

58. Discussion of paragraph 16 on abstention from corrupt practices was also postponed in view of the pending decision on the future of the draft agreement on illicit payments prepared by the Committee on an International Agreement on Illicit Payments, established by the Economic and Social Council.

59. The Group subsequently started drafting provisions under the heading "Ownership and control". The Group reached agreement on paragraph 17 referring to the allocation of decision-making powers among the entities of a transnational corporation, with the exception of the qualifying word "endeavour" which was suggested by some delegations. The Group further agreed on the substance of paragraph 18 calling on entities of transnational corporations to co-operate with one another to enable them to meet effectively the requirements established by the laws, policies and regulations of the country in which they operated to the extent permitted by such national policies, laws and regulations. Some delegations, however, felt that such co-operation should not be inconsistent with the legal status and obligations of those entities.

60. The Group agreed on paragraphs 19, 21 and 22, which referred to co-operation of transnational corporations with Governments regarding the implementation of national objectives for local equity participation, employment and promotion of nationals, the managerial and technical training of nationals and the facilitating of their employment at all levels of management of the entities and enterprises as a whole.

61. Regarding paragraph 20, most delegations agreed that transnational corporations should ensure that their policies and practices do not impede the effective exercise of the rights of local partners as determined by the terms and conditions of equity participation or the contractual terms in non-equity arrangements. A few delegations, however, felt that such a provision was not acceptable. It was thus decided that further consultations were necessary on the subject.

62. On balance of payments and financing, the Group decided to formulate, in paragraph 23, a chapeau, applicable to subsequent provisions of the sections, relating to the observance of laws, regulations and policy objectives of the countries in which transnational corporations operate, regarding balance of payments, financial transactions and other relevant issues. The Group agreed in paragraph 24 that transnational corporations should respond positively to governmental requests for consultations in this regard.

63. On the issue of the contribution of transnational corporations to promotion and diversification of exports dealt with in paragraph 25, the Group, while agreeing on that basic issue, did not reach a consensus. Some delegations preferred a reference to the purpose, nature and extent of transnational corporation operations. Many others thought that a reference to governmental regulation and/or policies was sufficient. Furthermore, several delegations suggested that transnational corporations should also contribute to the diversification of imports.

64. Agreement was reached in paragraph 26 on the phasing over a limited period of time of the repatriation of capital in case of disinvestment or remittance of

accumulated profits, when the size and timing of such transfers would cause serious balance-of-payments difficulties for such countries. While there was consensus on the basic concept in paragraphs 27 and 28, some delegations thought it necessary to refer to prudent financial practices in paragraph 27 and to generally accepted commercial practices in paragraph 28. Some delegations felt that the concept of freedom of transfer should be dealt with in the section related to treatment of transnational corporations. Many other delegations objected to this suggestion. In paragraph 28, some delegations suggested that transnational corporations were not to impose restrictions only with regard to their intra-corporate transactions.

65. The Group agreed on paragraph 29 regarding capital markets, with the exception that some delegations suggested that reference should be made to generally accepted financial practices.

66. With regard to paragraph 30 on transfer pricing, the Group agreed on the basic principle regarding the appropriate policies in intra-corporate transactions, but did not reach consensus on some of the negative effects of the non-application of those pricing policies.

67. The Group agreed on paragraph 31 referring to taxation. The Working Group in agreeing on paragraphs 30 and 31, deleted the paragraph on disclosure of information on these matters on the understanding that they would be dealt with in the section on disclosure of information.

68. With regard to competition and restrictive business practices, the Group decided to request the Chairman to prepare an appropriate formulation referring to the instrument on this matter recently agreed upon within UNCTAD. Discussion on transfer of technology was postponed pending developments in UNCTAD.

69. The Group agreed on a provision regarding employment and labour based on the Chairman's formulations of paragraph 35 consisting of a reference to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the International Labour Office. The reference "to the extent relevant to the code of conduct" contained in the Chairman's formulation was deleted.

70. The Group was unable, because of lack of time, to pursue the drafting of subsequent sections entitled "Economic, financial and social" and "Treatment of transnational corporations". However, at its eighth session, it had discussed the questions of intergovernmental co-operation and implementation, on the basis of formulations and common elements prepared by the Chairman and the Centre respectively, and contained in working paper No. 10.

71. It was agreed that the sections dealing with those matters should be integrated in view of the interrelationship between them. It was further suggested that certain ideas contained under intergovernmental co-operation, such as its essential character in accomplishing the objectives of the code or the exchange of information among Governments, could be reflected in the introduction of a new integrated section on implementation.

72. In its discussion of common elements - tentative formulations regarding implementation, the Group first dealt with application at the national level. While delegations agreed that action at the national level was essential to make the code effective, it was suggested by some delegations that the language of future provisions on the subject should be kept general and flexible in order to take into account different situations existing among countries. There was broad support for the view that Governments should publicize and disseminate the code, review its application within their territories and report to the Commission on Transnational Corporations - on action taken and experience gained in respect of its application. There was also broad support for the proposal that Governments should take the code fully into account when introducing, implementing and reviewing laws, regulations and administrative practices and should take no action contrary to the objectives of the code. Many delegations, however thought that it was not appropriate to spell out the possibility that Governments could incorporate the code into their national legislation, amend their laws in order to reflect the spirit of the code or use the code as a source for law.

73. Regarding application at the international level the delegations felt that the existing machinery - namely, the Commission on Transnational Corporations assisted by the Centre on Transnational Corporations - could be adequately utilized and that there would be no need to create new bodies. Different views were, however, expressed regarding the functions of the institutional machinery - namely, review and appraisal of the application of the code, clarification of its provisions, consultations among States and revision of the code periodically on the basis of reviews of its application.

74. With respect to review, several delegations suggested that reviews should take place every two years on the basis of reports submitted by Governments and other relevant sources and studies prepared by the Centre. Other delegations, however, thought that it should be left to the Commission to decide on the periodicity of such reviews and that for practical reasons the first review should not be undertaken for at least four or five years after the adoption of the code. Broad support was expressed for the view that the reviews should be undertaken on the basis of reports submitted by Governments on a format to be established by the Commission and that reports from non-governmental sources, although relevant, should not be equated with those of Governments. It was suggested by many delegations that reports from business and labour and consumers' organizations should be conveyed to the Commission through Governments or through relevant non-governmental organizations represented at the Commission. It was also felt that other United Nations bodies and agencies, such as UNCTAD and ILO, should make available to the Commission reports on their experience with instruments for which they were responsible and to which reference was made in the code.

75. On clarification of the code, delegations expressed differing views. Several delegations thought that the clarification of the provisions should be made in connexion with both general and concrete situations that might arise. Other delegations emphasized that such clarifications would be appropriate only as regards issues of principle arising from the implementation of the code and not as regards concrete situations; a few expressed reservations about the function of clarification itself. It was generally felt that the Commission should not act as

a judicial body, making conclusions related to the conduct of individual transnational corporations or States. In this connexion, the Working Group also considered whether only Governments should be entitled to initiate requests for clarification, or whether individual transnational corporations, labour unions or other interested parties should also have direct access to the Commission. It was concluded that such interested parties would have access to the Commission through Governments. It was pointed out, however, that non-governmental organizations could request clarification according to the rules of procedure of the Economic and Social Council and that the Commission, if it so decided, could respond to such requests.

76. Although consultations were recognized as necessary for the implementation of the code, particularly in cases where transnational corporations are subject to conflicting national requirements, it was generally agreed that it is for Governments to decide whether, when and how they would consult on issues related to the code. It was noted that in practice, most consultations would take place at the bilateral level. A few delegations felt that the Commission could be used as a venue for the conduct of consultations among Governments; if there were to be such consultations the Centre could provide facilities upon the request of the parties involved.

77. With respect to revision, it was stressed that this concept should be clearly distinguished from review. While it was recognized that revision of the code might be required, it was emphasized that stability and continuity of implementation were essential to the acceptance and effectiveness of the code. Consequently, it was felt by several delegations that although provisions for possible revision should be incorporated in the code, no such revision should be undertaken for a fixed period - five years, for instance - after the adoption of the code.

78. It was thought that the Centre, as required by the Commission, should provide services with regard to information, documentation, research and surveys on a regular and ad hoc basis.

79. Several delegations supported the promotion of the exchange of views between individual transnational corporations and trade union representatives of the various units of a transnational corporation in regard to the application of the code. They also felt that a specific provision dealing with disclosure of information to the employees of transnational corporations should be included in the section of the code on disclosure of information. Other delegations felt that the notion of Governments facilitating such exchange of views was not appropriate for the code.

80. At the conclusion of the discussion, the Group requested the Chairman to prepare formulations on the implementation of the code incorporating in it provisions on intergovernmental co-operation. In response to this request, the Chairman prepared the formulations contained in document E/C.10/AC.2/14, which had been available at the ninth session of the Group but had not been discussed owing to time constraints.

III. SUGGESTIONS OF THE WORKING GROUP

81. The Working Group considered that the pace of its work should be accelerated and the draft code of conduct should be concluded in an expeditious manner by the Group. It was emphasized that clarification by the Commission on items included in the following list would be of considerable importance to the final stage of drafting.

(a) The effectiveness, comprehensiveness, general acceptability and universal adoption of the code.

(b) The objectives of the code and the scope of their application.

(c) The application of the code to transnational corporations as appropriately defined.

(d) Respect by transnational corporations of the national sovereignty and of the laws and regulations of the countries in which they operate.

(e) Transnational corporations and the achievement of developmental goals and established objectives of the countries in which they operate, in particular, developing countries.

(f) Activities of transnational corporations with regard to internal affairs in the countries in which they operate and to intergovernmental relations.

(g) Transnational corporations and their relations with racist minority régimes in southern Africa.

(h) Treatment of transnational corporations.

(i) The interrelationship of the various sections of the code and the need to regard it as an integrated whole.

82. The Group felt that substantive progress towards drafting the code was achieved during its last three sessions. It was concluded that, in order to complete its task, the Group needed three more two-week sessions before the seventh session of the Commission. The Group expressed its strong hope that, in view of the need to maintain its momentum and the continuity of its work, it would be important for the first of these sessions to be held in the autumn of this year. The Working Group also felt the need to ask the Commission to decide on the modalities and the timing of the adoption of the code and to present recommendations to the Economic and Social Council in this regard.

Annex

CONCLUDED PROVISIONS

Respect for national sovereignty and observance of domestic laws, regulations and administrative practices

1. Transnational corporations should/shall respect the national sovereignty of the countries in which they operate and the right of each State to exercise its /full permanent sovereignty/ /in accordance with international law/ /in accordance with agreements reached by the countries concerned on a bilateral and multilateral basis/ over its natural resources /wealth and economic activities/ within its territory.

2. /Transnational corporations/ /Entities of transnational corporations/ /shall/should observe/ /are subject to/ the laws, regulations /jurisdiction/ and /administrative practices/ /explicitly declared administrative practices/ of the countries in which they operate. /Entities of transnational corporations are subject to the jurisdiction of the countries in which they operate to the extent required by the national law of these countries./

3. Transnational corporations should/shall respect the right of each State to regulate and monitor accordingly the activities of their entities operating within its territory.

Adherence to economic goals and development objectives, policies and priorities

4. Transnational corporations should/shall /endeavour to/ carry on their activities in conformity with the /declared/ /established/ development policies, objectives and priorities /established by/ the countries in which they operate. /Consistent with their financial, technological and managerial resources and capabilities/ /Consistent with the nature, purpose and extent of their business operations/ /entities of/ transnational corporations should /endeavour to/ make a positive contribution towards the achievement of /established/ /declared/ economic development goals of the countries in which they operate at the national and, where appropriate, the regional level within the framework of regional integration programmes. Transnational corporations should/shall /be prepared to/ engage in consultations and co-operate with governmental authorities in the countries in which they operate with a view to maximizing their contributions to the development process thereby establishing mutually beneficial relations with these countries.

5. Informal consultations will be pursued at future session.

Adherence to socio-cultural objectives and values

6. Transnational corporations should/shall respect the social and cultural objectives, values and traditions of the countries in which they operate. While

/...

economic and technological development is normally accompanied by social change, transnational corporations should/shall avoid practices, products or services which cause detrimental effects on cultural patterns and socio-cultural objectives as determined by Governments. For this purpose transnational corporations should/shall respond positively to requests for consultations from Governments concerned.

Respect for human rights and fundamental freedoms

7+8. Transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations should/shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational corporations should/shall conform to government policies designed to extend equality of opportunity and treatment.

9. Informal consultations will be pursued at future sessions.

Non-interference in internal political affairs

10. Transnational corporations should/shall not interfere /illegally/ in the internal /political/ affairs of the countries in which they operate / by resorting to / /They should refrain from any/ /subversive and other /illicit// activities /aimed at/ undermining the political and social systems in these countries.

11. Transnational corporations should/shall not engage in activities of a political nature which are not permitted by the laws and established policies and administrative practices of the countries in which they operate.

Non-interference in intergovernmental relations

12. Transnational corporations should/shall not interfere in /any affairs concerning / intergovernmental relations /which are the sole concern of Governments/.

13-15. Discussion was postponed.

Abstention from corrupt practices

16. Discussion was postponed.

Ownership and control

17. Transnational corporations should/shall so allocate /endeavour so to allocate/ their decision-making powers among their entities as to enable them to

contribute to the economic and social development of the countries in which they operate.

18. To the extent permitted by national laws, policies and regulations of the country in which it operates, each entity of a transnational corporation /consistent with its legal status and obligations/ should/shall co-operate with the other entities so as to enable each entity to meet effectively the requirements established by the laws, policies and regulations of the country in which it operates.

19. Transnational corporations should/shall co-operate with Governments and nationals of the countries in which they operate in the implementation of national objectives for local equity participation.

20. Informal consultations will be pursued at future sessions.

21. Transnational corporations should/shall carry out their personnel policies in accordance with the national policies of each of the countries in which they operate which give priority to the employment and promotion of its /adequately qualified/ nationals at all levels of management and direction of the affairs of each entity so as to enhance the effective participation of its nationals in the decision-making process.

22. Transnational corporations should/shall contribute to the managerial and technical training of nationals of the countries in which they operate and facilitate their employment at all levels of management of the entities and enterprises as a whole.

Balance of payments and financing

23. Transnational corporations should/shall carry on their operations in conformity with laws and regulations and with full regard to the /declared/ policy objectives of the countries in which they operate, particularly developing countries, relating to balance of payments, financial transactions and other issues dealt with in the subsequent paragraphs of this section.

24. (ex-28). Transnational corporations should/shall respond positively to requests for consultation on their activities from the Governments of the countries in which they operate, with a view to contributing to the alleviation of pressing problems of balance of payments and finance of such countries.

25. (ex-24). /As required by government regulations and in furtherance of government policies/ /Consistent with the purpose, nature and extent of their operations/ transnational corporations should/shall contribute to the promotion of exports and the diversification of exports /and imports/ in the countries in which they operate and to an increased utilization of goods, services and other resources which are available in these countries.

26. Transnational corporations should/shall be responsive to requests by Governments of the countries in which they operate, particularly developing countries, concerning the phasing over a limited period of time of the repatriation of capital in case of disinvestment or remittances of accumulated profits, when the size and timing of such transfers would cause serious balance-of-payments difficulties for such countries.

27. (ex-25). Transnational corporations should/shall not, /contrary to prudent financial practices/, engage in short-term financial operations or transfers /short-term financial transactions/ nor defer or advance foreign exchange payments, including intra-corporate payments, in a manner which would increase currency instability and thereby cause serious balance-of-payments difficulties for the countries concerned.

28. (ex-26). /In respect of their intra-corporate transactions,/ transnational corporations should/shall not impose restrictions on their entities, /beyond generally accepted commercial practices/ regarding the transfer of goods, services and funds which would cause serious balance-of-payments difficulties for the countries in which they operate.

29. (ex-27). When having recourse to the money and capital markets of the countries in which they operate, transnational corporations should/shall not /beyond generally accepted financial practices/ engage in activities which would have a significant adverse impact on the working of local markets, particularly by restricting the availability of funds to other enterprises /than transnational corporations/. When issuing shares with the objective of increasing local equity participation in an entity operating in such a country, or engaging in long-term borrowing in the local market, transnational corporations shall/should consult with the Government of the country concerned upon its request on the effects of such transactions on the local money and capital markets.

Transfer pricing

30. (ex-29-30). In respect of their intra-corporate transactions, transnational corporations should/shall not use pricing policies that are not based on relevant market prices, or, in the absence of such prices, the arm's length principle, which have the effect of modifying the tax base on which their entities are assessed or of evading exchange control measures /or customs valuation regulations/ /or which /contrary to national laws and regulations/ adversely affect economic and social conditions /of the countries in which they operate.

Taxation

31. (ex-32b). Transnational corporations should/shall not, contrary to the laws and regulations of the countries in which they operate, use their corporate structure and modes of operation, such as the use of intra-corporate pricing which is not based on the arm's length principle, or other means, to modify the tax base on which their entities are assessed.

Competition and restrictive business practices

32. (ex-33). The Group decided to request the Chairman to prepare an appropriate formulation referring to the instrument on this matter recently agreed upon within UNCTAD.

Transfer of technology

33. (ex-34). Discussion was postponed pending developments in UNCTAD.

Employment and labour

34. (ex-35). Transnational corporations should adhere in the field of:

(a) Employment, and in particular in respect to employment promotion, equality of opportunity and treatment and security of employment;

(b) Training;

(c) Conditions of work and life, and in particular in respect to wages, benefits, conditions of work and safety and health;

(d) Industrial relations, and in particular in respect to freedom of association and the right to organize, collective bargaining, consultation, examination of grievances and settlement of industrial disputes, to the principles set out in the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, commended to the Governments, the employers' and workers' organizations of home and host countries and to the multinational enterprises themselves, adopted by the Governing Body of the International Labour Office.