UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/C.2/41/6
23 October 1986

ORIGINAL: ENGLISH

Forty-first session
Agenda item 12

REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Letter dated 22 October 1986 from the Permanent Representative of Brazil to the United Nations addressed to the Chairman of the Second Committee of the General Assembly

I would greatly appreciate your taking the necessary steps to have the annexed memorandum on the elaboration of a Code of Conduct on Transnational Corporations circulated as an official document of the Second Committee under agenda item 12.

(Signed) George A. MACIEL
Permanent Representative of Brazil
to the United Nations

Annex I

ELABORATION OF A CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS

The negotiations on the Code of Conduct on Transnational Corpo ations are going through a complex phase. We have lost two vital opportunities to finalize the Code in the last three years; first, in 1983, when developed countries rejected the Chairman's package and more recently in 1985, when those same countries rebuffed the texts of the expert advisers. The Brazilian delegation regrets this outcome. It further drains an already drained North-South dialogue, and makes it quite clear that some developed countries are determined to insist on proposals that are of a deeply controversial nature.

Many of the difficulties we have in the negotiations on the Code of Conduct seem to emerge from the debate on issues that have nothing to do with the control of transnational corporations but with more complex legal questions arising from the sovereignty of States.

Those issues have occupied our deliberations for such a long time that we seem not to realize that the real aims of the Code of Conduct have been lost in the process. We are debating a set of principles and rules that may or may not have something to do with transnational corporations but that usually fall within a broader area of competence of domestic laws and regulations. Thus, in fact, the Code is becoming an exercise in reconciling laws and regulations in the areas of private international law or conflict of laws and public international law, subjects not only of great complexity but also entirely outside the mandate of the Commission on Transnational Corporations.

Some developed countries insist upon the fact that those fundamental legal issues are related to the question of the so-called "treatment" of transnational corporations. Economic and Social Council resolution 1980/60 contains a reference to "provisions relating to the treatment of transnational corporations, jurisdiction and other related matters". However, this same resolution declares in paragraph 6 (c) that the code should:

> "Reflect the principle of respect by transnational corporations for the national sovereignty, laws and regulations of the countries in which they operate, and for the established policies of those countries and the right of States to regulate and accordingly to monitor the activities of transnational corporations."

We all agree that transnational corporations should be able to know their rights just as they must fulfil their obligations. This is a very happy coincidence of perspectives between developing and developed countries.

However, discrepancies start to emerge when some of the issues directly related to the question of treatment accorded to transnational corporations are tackled by the negotiators of some developed countries.

It would be a most welcome initiative if developed countries were to circulate specific proposals on the pending issues of the Code of Conduct to enable us to comment on their merits. As we do not have, however, a statement setting forth the comprehensive views of developed countries we find ourselves in the very awkward position of having to react to ideas, suggestions and even innuendos to which, very frequently, there are no traceable sources.

It seems that some developed countries cannot go along with any of the two sets of proposals presented to us either in 1983 or 1985, precisely because they resolve in a fair way the delicate issue of rights of States versus duties of transnational corporations.

In annex I to document E/1986/50, we find under the title "Main proposals for the solution of the outstanding issues in the draft Code of Conduct on Transnational Corporations" four sets of proposals, made respectively, by the Group of 77, by the Chairman and by the Rapporteur of the special session of the Commission in 1983, by the Chairman on behalf of the Bureau in 1985 and by the expert advisers, also in 1985. There are no proposals made by the developed countries.

The first point to be recalled has to do with the question of the role of international law in the Code of Conduct, perhaps the most artificial problem ever created in the negotiations and one which has the damaging potential to mislead observers about the real intentions of developing countries.

In both the proposals of the Chairman's package in 1983 and of the expert advisers in 1985 it is clearly stated that "in all matters relating to the Code, States shall fulfil in good faith their international obligations". This formulation, which should satisfy all parties concerned, is rejected by some developed countries because they consider it does not cover what they regard as "generally recognized international rules and principles".

Developing countries have been consistently asking developed countries to specify those principles and rules. In the absence of a clear answer to this question, we have even taken a new step forward and initiated a resolution in the Commission on Transnational Corporations asking for a study to be made on the question of international rules and principles. As a result, document E/C.10/1985/S/2 was circulated in May 1985 and its conclusions clearly showed that as we had expected from the beginning, there is no international consensus on what constitute international legal rules and principles in the area of foreign investment.

One would imagine that this lack of consensus exists solely between developed and developing countries and that it might be explained by divergent perceptions on the real meaning of the fundamentals of international law. This is not correct.

In reality, the debate on what are principles o law in the realm of foreign investment involves above all lawyers and scholars of developed countries. A good case in point has to do with the question of the use of the words "prompt, adequate and effective" to qualify compensation to be paid in cases of expropriation and

nationalization of assets of transnational corporations. Some developed countries insist that the words "prompt, adequate and effective" are standards of international law, disregarding the debate on those very words inside their own countries.

Another interesting controversy affecting the negotiations has to do with the question of the treatment to be accorded to transnational enterprises.

At first, developed countries have started claiming observance of a so-called most-favoured-nation clause in favour of transnational enterprises. In accordance with this notion, Governments of developing countries should not discriminate among different entities of transnational corporations based upon reasons of origin. Later, however, the most-favoured-nation clause was not considered enough and developed countries started advocating a so-called national treatment clause, that is, the idea according to which transnational enterprises should receive the same treatment given to domestic enterprises. Lately, the formulation of national treatment has been modified, to mean not only that the treatment given to transnational corporations should be the same as the one given to national corporations, but also that it should be "no less favourable". In other words, transnational corporations would be guaranteed to receive not only the same treatment as the one given by a Government to its own enterprises, but would also expect to obtain more incentives or protection than the latter. We may wonder why developing countries, which are striving to have their companies compete on an equal footing with transnational corporations in the international arena, should work against the best interests of their own enterprises and concede additional comparative advantages to huge foreign transnational enterprises, responsible for a substantial share of the $650 billion of world stock of foreign direct investment and 80 per cent of the international trade in services.

Another illustrative point touches upon the delicate chord of the settlement of disputes between States and transnational enterprises. Some developed countries cannot accept the competence of courts and tribunals of developing countries to deal with matters related to transnational corporations. They insist upon the need to submit any controversy between a transnational corporation on one side and the Government of a developing countries on the other to an international court of arbitration, regardless of previous exhaustion of local remedies or conformity with the laws and regulations of the country concerned. As document E/C.10/1985/S/2 states on page 24,

> "Apart from the intricacies which are inherent in the concept [of choice of law], it is felt that, within the context of the code of conduct a provision on it would (a) undermine the right of a country to regulate and monitor the activities of entities of transnational corporations operating within its territory; (b) oust the jurisdiction of its courts in a number of instances. Moreover, the reference to a free choice of means of dispute settlement, including arbitration, would - in contracts with the governments or governmental agencies - endorse a viewpoint that is not generally accepted."

It is matter for some thought that developed countries seem to have a double standard in relation to the question of national treatment, for it is obvious they do not appear to welcome the jurisdiction or jurisprudence of developing countries

over transnational enterprises with the same enthusiasm they claim those enterprises should receive economic incentives or be granted access to domestic capital markets on an equal footing with domestic enterprises. It would be interesting to know whether developed countries would consider it acceptable for a private enterprise of a developing countries to follow the example of transnational enterprises and refuse to be subject to the courts of the countries in which it operates. There should be no doubt that national treatment is a two-way road and one cannot ask to be treated as a national enterprise and at the same time ask for any form of preferential or privileged forum for the settlement of controversies. As document E/C.10/1985/S/2 states in paragraph 58,

> "There is, however, no universally accepted principle of national treatment in international law. In documents such as the OECD Declaration on International Investment and Multinational Enterprises, which deal with the subject, one or several of four approaches have been used in formulating a principle acceptable and applicable to nations with different policies. First, national treatment has been stated as a goal, rather than an absolute obligation, by the use of such phrases as 'States should endeavour'. Second, specific exceptions to national treatment have been mentioned, such as national security. Third, States have agreed to make transparent specific exceptions to national treatment affecting the interests of other States, to notify and to consult about them. Fourth, States have recognized that exceptions to national treatment do not justify treatment of alien enterprises so unfair and inequitable as to amount to a denial of justice."
