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THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE INTERNATIONAL ECONOMIC ORDER AND THE PROMOTION OF HUMAN RIGHTS, THE REALIZATION OF THE RIGHT TO DEVELOPMENT

Written statement*/ submitted by the Indian Movement "Tupaj Amaru", a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[10 July 2000]

*/ This written statement is issued, unedited, as received from the submitting non-governmental organization(s).

THE CODE OF CONDUCT FOR TRANSNATIONAL CORPORATIONS

I – BACKGROUND

1. The concept of a Code of Conduct may be as old as time. It frightening rose to the mercantile society, where businessmen and public power felt the need and means to regulate commercial disputes and controversies which resulted from economic and trade affairs.

2. In the 20th century, "Latin American countries has put emphasis in the foreign policy on principles such as national sovereignty, territorial integrity and non-intervention as well as on the primacy of national law and domestic courts" (See chapter of the Organization of American States OAE, 1948)

3. Carlos Calvo (1822 – 1906) was the first to formulate the claim that "investment regulation in general and the taking of foreign property in particular are matters of domestic jurisdiction" (C. Calvo, Derecho internacional teorico y practico de Europa y America, 1968). Through the years, Calvo doctrine can be found in national standards and formulated in numerous Constitutions and other Conventions at regional level, for example, Decision 24 of Andean Pact. The abolishment of certain rules results in liberal policies.

4. In earlier times; "...In 1950, Uruguay took the initiative in formulating the sovereign rights of each State to freely exploit natural wealth and resources. In 1952, Chile proposed to include a paragraph dealing with permanent sovereignty over Natural Resources in the draft text of Article 1 on Self-determination and of the draft Covenants on Human Rights" (See Human Rights Covenants adopted in 1966.

5. Since 1970, the international community has been trying to draw up a set of international standards, which would constitute legal guidelines for Transnational Corporation and States.

6. Due to protracted and heated negotiations, the government delegations were unable to reach a consensus on the nature and legal status of the future code of conduct. Following the Earth Summit held in Rio de Janeiro, 1992; at the request of the United States of America, it was agreed to drop the discussion of one of the most burning issues of "post-industrial civilization".

7. This senseless decision, which countermined the basic principles embodied in international instruments, was taken in response to pressure exerted by economic and financial circles. More particularly, as a result of the guidelines issued to the government by the World Bank and IFM, in respect of the treatment of Tics and direct foreign investment in the Third World countries.

8. Times have changed and more people are concerned with an unethical behaviour of the TNC. The 20th century changed the face of the world, leaving us with a rather bleak inheritance, namely: collapse of socialist countries; globalisation; extreme poverty and external debt; corruptions and organized crimes; ethnic conflicts with expansionist connotation; and a return to the Cold War. Consequently, the future code needs to reflect the new reality.

II – NEGOTIATIONS IN THE UN SYSTEM

9. All discussions have been marked by controversial disputes between industrialised and Third World countries, with regards, to the nature and legal status of the future code. The former proposed a solemn declaration of principles in the form of recommendations whereas, the developing countries recognizes globalisation as being the highest stage of market economy, wished to give the code a normative status. In their point of view, this concept in permanent evolution will be defined as a set of rules and norms with political and juridical value, legally binding to regulate the behaviour of international agents and transnational corporations encrusted in all spheres of the world economy.

10. On the 28th of July 1972, the United Nations Economic and Social Council requested the General-Secretary to appoint a group of eminent persons (...). "To steady the impact of multinational corporations on the world, especially on the developing countries and international relations" (See World Competition: Law and Economic Review, 14 (4) – June 1991, page 37).

11. On the 5th December 1974, after two years, the Economic and Social Council (ECOSOC) by its Resolution 1913 (LVII), established the Commission on Transnational Corporations (TNC), an intergovernmental body composed of 48 countries with mandate to assist the ECOSOC in formulating a set of recommendations in regards to a Code of Conduct for Transnational Corporations and the States.

12. In the meantime, the Center on TNC was created in 1975 as a Secretary of the Commission. Since then, the Center has taken charged to develop a credible information system on the TNC's activities and to investigate its impact in developing countries, notably in direct foreign investment. In June 1994, the Center submitted its final report to the Working Group on Indigenous Populations in accordance with the Sub-Commission's resolutions and was eliminated.

13. However, the formulation of the international standards has become the highest priority and responsibility of the UN Commission. At its second session held in Lima (1-12 March 1976), the Commission on TNC decided to establish an intergovernmental Working Group responsible for the elaboration and formulation of

the draft text for the consideration of the Commission at its fourth session held in 1978.

14. Since the western countries sustain economic and strategic interests, it imputes to the complexity of the task, and the Working Group was unable to finalize and submit to the Commission, a substantive formulation. As of 1990, the draft code is still not concluded.

15. The Working Group has held 17 sessions between 1977-1982 but after sustained efforts made during the seven years, the Group, in its report, states that although significant progress has been made, the work is still incomplete. "Whilst most substantive parts of the draft code had been negotiated as follows: the Introductory part, which includes the Preamble; chapter I: Objectives and General Policies of the Code; chapter II: Definitions and Scope of Applications; Chapter III: Activities on Transnational Corporations; Chapter IV: Intergovernmental Co-operation; and Chapter V: Implementation and Institutional Machinery". (See Development and Peace, 4 (2), 1983; page 81)

16. The few comments relating to the process of controversial negotiations during the past 30 years should serve as a bitter lesson for developing countries, especially in its capacity of negotiations with TNC. The actual draft code should have a basic element in the elaboration and achievement of a NEW CODE OF CONDUCT which will be reflected in both political and economic mutations in the world.

17. In the chapter on general and political questions of the draft text, the relevant principles have been formulated by developing countries; such as the respect of national sovereignty, the right to self-determination of all people and the strict observance subject to the laws and regulations of countries in which the transnational corporations operates.

18. Following the De-colonization of the UN Declaration on the Granting to Independence to Colonial Countries and Peoples in 1960 (Res. 1514 (XV)), the General Assembly with its Resolution 1803 (XVII), adopted on 14 December 1962, declared that: "The rights of people and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interests of their national development and well-being of the people of the State concerned." (See Resol. 1803)

19. Through time, this resolution has become the most important guideline in the elaboration of a code of conduct. It's urging that TNC should carry on their activities in conformity with the development policies, objectives and priorities set out by the countries in which they operate and respect socio-cultural traditions, values and human rights. The entities of TNC should be abstained from using pricing policies and any interference in political affairs, nor practice in corruption in host countries.

20. The most controversial issues were on the treatment of transnational corporations. The chapter has three sections: (a) General Treatment, (b) Nationalization and

Compensation and (c) Jurisdiction. During the discussion in the Working Group, a strong confrontation arose between the North and South States, Developed and Developing Countries.

21. Many developed countries, however, argues that the most important reason for an international code of conduct, is the need for better co-operation between governments as to the behaviour of the TNC in the host countries. They are interested in a balanced code, which would stipulate general principles of the behaviour not only for TNC but also for governments.

22. The Representatives of the Western countries would prefer a "broad and voluntary set of guidelines endorsed by Member States. According to this point of view, the moral force of Member States will ensure that the voluntarily adopted regulations are observed" (E/C.10/19 or World Competition: Law and Economic review, 14 (4) June 1991, page 40)

23. In the opposing camp for developing countries, it is very important for a specific, legal and universal instrument curbing certain turpitude of the TNC. They believe that the code by its nature and reach, should contain essential regulations applying to the behaviour of TNC and States.

24. Their just claims were founded in the Program of Action on Establishment of a New International Economic Order, which states as follows: "All efforts should be made to formulate, adopt and implement international code of conduct for transnational corporations:
    (a) To prevent interference in the internal affairs of the countries where they operate;
    (b) To regulate their activities in the host countries, to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries, and in this context, facilitate as necessary, the review and revision of previously concluded arrangements;
    (c) To bring about assistance, transfer of technology and management skills to developing countries on equitable and favorable terms;
    (d) To regulate the repatriation of the profits accruing from their operations, taking into account the legitimate of all parties concerned;
    (e) To promote reinvestment of their profits in developing countries." (See General Assembly Resolution 3202 (S-VI).

25. Face with the pretension relating to free transfer capital and income to mobility of enterprises and workers in and out of countries, the States of Western countries and the Group 77 nations presented in the Working Group proposed and formulated the following proposal: "the rights of States to regulate the entry and establishment of TNC".

26. This provision reaffirms the right of host countries to authorize the establishment of transnational enterprises in their territories as well as to determine the role that TNC

may play in economic and social developments of the country concerned. In its second text, the Group 77 countries insisted to include, "the prohibitions or limitations on the extent of TNC's presence in specific and strategic sectors." (Development and Peace, 4 (2), 1983, page 85)

27. In relations to the section on Nationalization and Compensation, it appears to have many controversial interests. As a result, from the Working Group Report, the developing countries claims that they should be able and should have the right to define the level and conditions of participation of TNC. To determine conditions of profit, repatriation and expropriations of foreign property. The discussion of these issues has revealed two concepts on the development and two opposing philosophies, reviving thus almost irreconcilable divergences not yet been solved by the international law.

28. While the developed countries insists the issue of compensation, conditioning the right to nationalization on prompt adequate transferable and effective payment. "Such compensation payments should be freely convertible, transferable and should not be subject to any restrictive measures applicable to transfer of payments, income or capital" (Rev roumaine s'études internationales, 18 (1)/janv/fevr. 1984; page 44).

29. The nationalization provision and its dispute settlement clause have been stipulated in the Charter of Economic Rights and Duties of States as follows: "Each State has the right to nationalize, expropriate or transfer ownership of foreign property in which case, appropriate compensation should be paid by the State adopting such measures, taking into account its relevant law and regulations and all circumstances that the State considers pertinent." In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals."

30. On the other hand, paragraph 4 of the General Assembly Resolution 1803 (XVII), entailed: "Permanent sovereignty over natural resources", states a similar provision, "the nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interest, both domestic and foreign. In such cases, the owner shall be paid appropriate compensation, in accordance with rules enforced in the State, taking such measures as to exercise its sovereignty, and in accordance with international law".

31. The section on jurisdiction in the draft code contains three parts: the jurisdiction of the host State considered as an expression of its sovereignty; the situation where the jurisdiction applies to the operations of an entity of a transnational corporation and conflicts of jurisdiction between two or more States.

32. On the basis of this UN resolution, developing countries believe that, "any entity of a transnational corporation is subject to the national law, regulations and to establish administrative practices of the country in which it operates." "Disputes between States and entities of TNC, which are not amicably settled between the Parties, shall be submitted to competent national court" (Netherlands International Law Review, 39 (3), 1992; page 364).