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TRANSNATIONAL CORPORATIONS: CODE OF CONDUCT; FORMULATIONS BY THE CHAIRMAN

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PREFACE

At the fifth session of the Intergovernmental Working Group on a Code of Conduct (18-29 September 1978) the Chairman of the Group was requested to prepare formulations on the basis of the discussions held by the Group at its fourth and fifth sessions. Those discussions were based on a working paper submitted by the Centre on Transnational Corporations at the fourth session of the Group (20-31 March 1978) in which common elements that emerged during the earlier discussion of the annotations of the code were identified and formulated in a language designated to assist the Group in its deliberations on the formulation of a code of conduct, without prejudice to the positions of Governments.

The working paper of the Centre as well as the present formulations by the Chairman deal only with the subjects of the annotated outline that were discussed during the last three sessions of the Group. The outline, suggested by the Chairman at the second session, included annotations regarding items I. Preamble and objectives, II. Definitions, III. Major principles and/or issues related to the activities of transnational corporations, IV. Principles and/or issues relating to the treatment of transnational corporations. No annotations were prepared for items V. Legal nature and scope and VI. Implementation, since the Group had decided that these matters would be dealt with only after the substantive issues were further explored.

The text that follows was prepared by the Chairman of the Intergovernmental Working Group on a Code of Conduct.

INTRODUCTORY NOTE

This paper is in response to a request by the Intergovernmental Working Group at its fifth session. It should be regarded as an attempt to consolidate the discussions of the Intergovernmental Working Group so far. The Chairman is responsible for its form and contents and it does not commit delegations in any way.

Since the legal nature of the Code still has to be discussed by the Working Group, and the imperative scope of formulations related to the activities of transnational corporations as well as the treatment of transnational corporations should not be prejudged at this stage, the word "should", wherever appropriate, is used throughout the formulations without prejudice to a final agreement on the legal nature of the Code.

One exception to this principle is made. Agreement among Governments on intergovernmental co-operation is considered to be of fundamental importance to ensure the effectiveness of the Code of Conduct. This idea has received broad support in the Intergovernmental Working Group. In dealing with intergovernmental co-operation in a separate section of the Code, the proper location of which has to be determined later, the word "agree" appears to be the most appropriate.

ACTIVITIES OF TRANSNATIONAL CORPORATIONS

A. General and political

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

1. As set forth in this Code, transnational corporations should recognize and respect the national sovereignty of the countries in which they operate as well as the right of each State to exercise full permanent sovereignty over its resources and economic activities within its territory.
2. Transnational corporations should observe the laws, regulations and administrative practices of the countries in which they operate.
3. Transnational corporations should respect the right of each State to regulate and monitor the activities of their entities operating within its territory.

Adherence to economic goals and development objectives policies and priorities

4. Consistent with the need to maintain the viability of their operations, transnational corporations should take effective measures to ensure that their activities are compatible with and make a positive contribution toward the achievement of the economic goals and established development objectives of the countries in which they operate. To this effect transnational corporations should support the development efforts of the countries in which they operate, particularly developing countries, and participate effectively in these efforts at the national level, and where appropriate, at the regional level within the framework of regional integration programmes. In this context, they should consult and co-operate, as appropriate, with governmental authorities regarding ways of maximizing their contributions to the development process and of establishing mutually beneficial relations with these countries.
5. Transnational corporations should, as all parties to contracts freely entered into, respect and adhere to such contracts. In the absence of contractual clauses providing for review or renegotiation, transnational corporations should respond positively to requests for review or renegotiation of contracts concluded with Governments or governmental agencies in circumstances marked by duress, or clear inequality between the parties, or where the conditions upon which such a contract was based have fundamentally changed, causing thereby unforeseen major distortions in the relations between the parties and thus rendering the contract unfair or oppressive to either of the parties. Aiming at ensuring fairness to all parties concerned, review or renegotiation in such situations should be undertaken in accordance with applicable legal principles and generally recognized legal practices.

Adherence to socio-cultural objectives and values

6. Transnational corporations should respect the social and cultural objectives and values of the countries in which they operate. To this end, transnational corporations, should consult with Governments with a view to avoiding that their

practices, products or services cause distortions in basic cultural patterns or have socio-cultural effects, considered undesirable by the countries concerned, beyond those which necessarily accompany economic development and the introduction or generation of new technologies.

Respect for human rights and fundamental freedoms

7. Transnational corporations should respect human rights and fundamental freedoms.

8. In their employment practices transnational corporations should not discriminate on the basis of race, colour, sex, religion, language, social origin, or political and other opinions. Transnational corporations should apply this principle without prejudice to government policies designed to extend equality of opportunity.

9. Non-collaboration by transnational corporations with racist minority régimes in southern Africa. 1/

Non-interference in internal political affairs

10. Transnational corporations should not interfere in the internal political affairs of countries in which they operate by resorting to subversive activities aimed at influencing the political and social systems in these countries.

11. Acting as good corporate citizens in the countries in which they operate, transnational corporations should abstain from activities of a political nature which are inconsistent with domestic legislation or established practice in these countries.

Non-interference in intergovernmental relations

12. Transnational corporations should not interfere in affairs which are properly the concern of Governments.

13. Transnational corporations should not act as instruments for the advancement of the foreign policy of Governments, unless they operate in accordance with intergovernmental co-operative arrangements involving the countries in which they operate or behave in harmony with concerted actions of the international community.

14. Transnational corporations, in pursuing their corporate interests, should not request Governments to act on their behalf in any manner that exceeds normal diplomatic representation or other regular intergovernmental communication and in particular in any manner that amounts to the use of coercive measures of an economic and political character.

1/ The formulation of a text on the basis of this common element will be made after the Intergovernmental Working Group has had a full discussion on the issue.

15. Transnational corporations should, in accordance with generally accepted international standards, exhaust means provided by local law in host countries in which they operate or other agreed means for resolving disputes, before seeking diplomatic protection from their home Governments.

Abstention from corrupt practices 2/

16.

B. Economic, financial and social

Ownership and control

17. Transnational corporations should allocate decision making among their entities so as to enable these entities to act as good corporate citizens and to contribute to the economic and social development of the countries in which they operate.

18. The various entities of transnational corporations should co-operate with one another to help meet effectively the requirements established by the countries in which they operate.

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

20. Transnational corporations should ensure that the control shared by local partners as determined by equity or contractual terms in non-equity arrangements can be effectively exercised.

21. In implementing their personnel policies transnational corporations should give priority to the employment and promotion of nationals of host countries at all levels of management and direction with a view to enhancing their effective participation in the decision-making process of local entities.

22. Transnational corporations should contribute to the managerial training of nationals of host countries and facilitate their employment at all levels of management of the transnational corporation as a whole.

2/ The formulation of a text will be made after the work in this field is further advanced.

Balance of payments and financing

23. With full regard to the policy objectives of the countries in which they operate, particularly those of developing countries, transnational corporations should, while maintaining the viability of their entities, contribute to the promotion, and to the extent possible the diversification, of exports from these countries as well as to an increased utilization of goods, services and other resources of such countries.

24. Transnational corporations should be responsive to requests by Governments in host countries, particularly developing countries, concerning the phasing, over a period of time to be agreed upon, of the repatriation of capital in case of disinvestment, or remittances of accumulated profits, dividends or intracorporate payments, when the size and timing of such transfers would aggravate serious balance-of-payments problems of such countries.

25. In managing their short-term capital transactions, transnational corporations should not, contrary to generally accepted commercial practice, defer or advance current intracorporate payments in a manner that would increase currency instability, thereby aggravating serious balance-of-payments problems of the countries in which they operate.

26. Transnational corporations should, in their intracorporate activities, refrain from imposing, contrary to established development objectives of the countries in which they operate and beyond generally accepted commercial practice, restrictions on their entities regarding the transfer of goods, services or funds, which would adversely affect the balance of payments of such countries.

27. When using capital markets of host countries, particularly for medium and long-term financing, transnational corporations should, consistent with the policies of such countries, refrain from activities which would adversely affect the functioning of such markets, particularly by restricting substantially the availability of funds to domestic enterprises. When issuing, in accordance with governmental policies, shares to nationals of host countries in order to increase local equity participation in entities operating in such countries, transnational corporations should consult with the Governments concerned on the effects of such transactions on the local capital markets.

28. Transnational corporations should consult and co-operate with Governments in countries in which they operate, with a view to alleviating problems pertaining to balance of payments and financing of undertakings in such countries and to contributing to the achievement of national goals in this respect.

Transfer pricing

29. In their intracorporate transactions transnational corporations should not use pricing principles, which, contrary to national legislation and policies, serve to modify the tax base on which their entities are assessed, avoid exchange controls or adversely affect competition, technological development or employment and social conditions in the countries, in which they operate.

30. In their intracorporate transactions transnational corporations should use pricing policies based on international market prices, or in the absence of such prices, the "arm's length" principle.

31. Under conditions and safeguards set forth in this Code transnational corporations should disclose to the public the principles applied by them in transfer pricing and supply to governmental authorities all relevant information related to transfer pricing.

Taxation 3/

32.

Competition and restrictive business practices 3/

33.

Transfer of technology 3/

34.

Employment and labour 4/

35.

3/ The formulations under this heading will be made after further discussions of the Intergovernmental Working Group, taking into consideration relevant work in other bodies.

4/ A tentative formulation under this heading appears in a working paper prepared by the Centre on Transnational Corporations as requested at the fifth session of the Intergovernmental Working Group.

Consumer protection

36. In accordance with national laws, regulations, administrative practices and policies of the countries in which they operate and relevant international standards, transnational corporations should perform their operations in a manner that does not impose dangers to the health and safety of consumers or bring about variations in the quality of products in each market to the detriment of consumers.

37. Under conditions and safeguards set forth in this Code, transnational corporations should supply to the authorities of the countries in which they operate all relevant information concerning:

- features of their products and services which may affect the health and safety of consumers;
- prohibitions, restrictions, warnings and other regulatory measures imposed in other countries on grounds of health and safety protection on products which they produce or market or propose to produce or market in the countries concerned;
- experimental uses and related aspects of products which they propose to produce or market in the countries concerned.

38. Transnational corporations should disclose to the public in the countries in which they operate all appropriate information on the contents and possible hazardous effects of the products they produce or market in the countries concerned by means of proper labelling, informative and accurate advertising and other appropriate methods.

39. Transnational corporations should co-operate with the Governments of the countries in which they operate and with international organizations with a view to developing and promoting national and international standards for the protection of the health and safety of consumers, and meeting the basic needs of consumers.

Environmental protection

40. In accordance with national laws, regulations, administrative practices and policies of the countries in which they operate as well as relevant international standards, transnational corporations, in performing their activities, should protect and improve the environment and make efforts to develop and apply adequate technologies for this purpose.

41. Under conditions and safeguards set forth in this Code transnational corporations should supply to the authorities of the countries in which they operate, all relevant information concerning:

- features of their products or processes which may harm the environment and the measures and costs required to avoid harmful effects;

- prohibitions, restrictions, warnings and other regulatory measures imposed in other countries, on grounds of protection of the environment, on products and processes which they have introduced or intend to introduce in the countries concerned.

42. Transnational corporations should co-operate with Governments of the countries in which they operate and with international organizations in environmental protection activities with a view to developing and promoting national and international standards in this field.

C. Disclosure of information

43. Transnational corporations should, within reasonable time-limits and on a regular basis, but at least annually, provide to the public in the countries in which they operate, clear and comprehensible information designed to improve understanding of the structure, activities and policies of the transnational corporation as a whole.

Such information should supplement information required by national laws, regulations and administrative practices and be provided in a consolidated form. It should include financial as well as non-financial items, such as the structure of the transnational corporation, the main activities of its entities, the operating results and sales, significant new investment, the sources and uses of funds, employment, the research and development expenditure, the transfer pricing policies applied and the accounting principles used in compiling and consolidating the information. 5/

In providing information, transnational corporations should have particular regard to the significance of their operations for the countries concerned, irrespective of the relative importance of such operations for the transnational corporation as a whole.

The information should be broken down by geographical area, country of operation and major line of business as appropriate. The method of breakdown as well as the detail of information required is to be determined by the nature, scale and interrelationship of the transnational corporations' operations in various countries, the effects of disclosure on the transnational corporations' competitive position and the costs involved in producing information. 6/

5/ The listing of items should be regarded as illustrative. All these items have been referred to by delegates. The discussions of the Intergovernmental Working Group so far however, does not permit any conclusions as to what specific formulations could meet with the approval of the Intergovernmental Working Group. Furthermore, the Ad Hoc Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting, the mandate of which explicitly refers to the Code of Conduct, may provide guidance in this respect.

6/ The ultimate formulation of these qualifications obviously will depend on the specificity given to the items of information required.

44. Transnational corporations should supply to the authorities of the countries in which they operate, upon request, and on a regular basis as specified by Governments, all information required for legislative and administrative purposes relevant to their entities in the countries concerned and specifically needed to assess the performance of such entities.

Transnational corporations should, subject to relevant national legislation of all countries concerned, supply such information held in other countries, in order to enable Governments requiring information to obtain a true and fair view of the operations of the transnational corporation as a whole. ^{7/}

TREATMENT OF TRANSNATIONAL CORPORATIONS

A. General treatment of transnational corporations by the countries in which they operate

45. The countries in which transnational corporations operate determine the role that such corporations may be called to play in economic and social development. This Code does not affect the right of countries to regulate the establishment or entry of transnational corporations, including prohibitions or limitations on the extent of foreign presence in specified sectors.

46. With a view to creating mutually beneficial relations, transnational corporations should be given fair and equitable treatment by the countries in which they operate, in accordance with national laws, regulations and administrative practices as well as international obligations to which States have freely subscribed.

47. Consistent with national needs to maintain public order and to protect national security, transnational corporations should be accorded the same treatment under national laws, regulations and administrative practices of countries in which they operate as that accorded to domestic enterprises, in situations where the operations of transnational corporations are comparable to those of domestic enterprises.

48. Clarity and stability of national policies, laws, regulations and administrative practices significantly affecting the activities of transnational corporations are important elements in creating conditions by which mutually beneficial relations can be promoted. When, in the light of evolving circumstances, changes are deemed necessary by the Governments of countries in which transnational corporations operate, the changes should be made with proper regard to the legitimate expectations of such corporations and the impact on their activities in the countries concerned.

^{7/} The International Working Group has yet to decide whether standards on information to the employees in addition to those contained in the ILO Declaration of Principles are required in the context of this Code.

49. Unless they operate in accordance with intergovernmental co-operative arrangements involving the countries in which they operate or behave in harmony with concerted actions of the international community, transnational corporations should not be used by any Government as instruments for the attainment of foreign policy objectives.

50. Government action toward other countries on behalf of transnational corporations is subject to generally accepted international standards regarding exhaustion of local remedies, diplomatic representation and protection, and the submission of international legal claims, and should not amount to the use of coercive measures of an economic or political character.

51. Information supplied by transnational corporations in confidence to the authorities of the countries in which they operate should be subject to appropriate safeguards regarding its confidentiality in order to protect the position of the corporations concerned in relation to their competitors. 8/

B. Nationalization and compensation

52. In the exercise of their sovereignty, States have the right, acting in the public interest, to nationalize property in their territory. Fair and equitable treatment of transnational corporations by the countries in which they operate includes payment of just compensation in the event of nationalization or other taking of their property, such government action being undertaken under due process of law, in accordance with national laws, regulations and administrative practices without discrimination between enterprises in comparable situations and with full regard to international obligations and contractual undertakings to which States have freely subscribed. 9/

C. Jurisdiction

53. Entities of transnational corporations are subject to the jurisdiction of the countries in which they operate.

54. Disputes between a State and a transnational corporation, which are not amicably settled between the parties, are subject to the jurisdiction of the courts and other authorities of that State and are to be submitted to them, except for disputes which the State has agreed to settle by arbitration or by other methods of dispute settlement.

8/ A tentative formulation on the issue of "timely and unrestricted transfer of capital" appears in a working paper prepared by the Centre on Transnational Corporations as requested at the fifth session of the Intergovernmental Working Group.

9/ See annex for specific comments on this paragraph.

55. The validity of clauses providing for selection of applicable law or of the forum for settlement of disputes or for commercial arbitration in contracts between private parties, at least one of which is an entity of a transnational corporation, is to be determined by the national law of the countries concerned.

56. Where the exercise of jurisdiction over transnational corporations and their entities by more than one State may lead to conflicts of jurisdiction, adoption by the States concerned of mutually acceptable principles and procedures, bilaterally or multilaterally, for the avoidance or settlement of such conflicts, on the basis of respect for the interests of the States concerned and relevant international obligations, serves to improve the relations among States and between States and transnational corporations.

INTERGOVERNMENTAL CO-OPERATION 10/

57. Governments agree that intergovernmental co-operation on a bilateral as well as multilateral basis is essential in encouraging the positive contributions that transnational corporations can make to economic and social progress and in alleviating difficulties to which the activities of transnational corporations may give rise.

58. Governments further agree that such co-operation is necessary to ensure the effectiveness of this Code, particularly with regard to the exchange of information relevant to the various parts of the Code and the resolution of difficulties stemming from conflicting requirements or jurisdictional claims by Governments.

10/ A number of suggestions were made in the Intergovernmental Working Group to the effect that the issues pertaining to intergovernmental co-operation be separated from IV. In response to those suggestions these issues are dealt with under a separate heading.

Annex

Comments on nationalization and compensation (para. 52)

1. There is considerable controversy concerning the international legal principles and rules governing compensation in case of nationalization or other taking of foreign-owned property. The text of paragraph 52 attempts to reflect the points on which there appears to be general agreement. As to other points it attempts to articulate standards, which do not seriously infringe on the basic positions of States or group of States. Several aspects of the topic are dealt with in other parts of the Code and it would serve no purpose merely to repeat those points in paragraph 52.

2. The first sentence of paragraph 52 states the general principle that States possess the sovereign right to nationalize property in their territory. Like any other right, this right may be limited by means of international agreements specifying particular modalities for its exercise (e.g., that full compensation will be granted, prior to the taking). Again like other rights, its exercise in manifest bad faith (e.g., nationalization not in the public interest but for private gain) may cause legal problems, although it is hard to imagine actual situations where a sovereign State's good faith in exercising a sovereign right may be successfully impugned.

3. While considerable controversy exists concerning the international legal principles and rules governing the award of compensation for nationalized property, it is possible to mention several points on which there seems to be fairly general agreement:

(a) Owners of property being nationalized are normally entitled to compensation, although there is no agreement as to the law (national or international) that determines the modalities of compensation;

(b) Where specific international commitments exist (e.g., in an international treaty), the modalities of compensation will be governed by them;

(c) The national law of the nationalizing country is relevant. According to one view, it is the only relevant law; international law either has no relevant rules or it provides that national law is the only law applicable. According to another view, international law also includes certain independent standards, which override or supplement national law in order to protect the aliens affected.

4. The second sentence of paragraph 52 does not attempt to state international legal principles or rules. It describes the kind of measures concerning compensation for nationalization which would constitute "fair and equitable treatment" of transnational corporations. Such treatment has already been dealt

with in paragraph 46. To the extent that consistent implementation of the Code of Conduct (assuming that it would include this or equivalent language) would influence state practice an ultimate impact upon international law may be assumed. But the text of paragraph 52 as such does not purport to state what international law is on the subject.

5. The elements listed in connexion with the type of compensation that would constitute "fair and equitable treatment" are similar to those frequently mentioned in discussions of legal requirements, but here they are listed in view of their contributing to "fair and equitable treatment", thus leaving unaffected whatever legal status they have.

6. The adjective "just" refers to the final outcome of the compensation process rather than to the particular methods and criteria employed. A just result is to be sought taking into account all relevant circumstances in each case.

7. The reference to "due process of law" is intended to preclude arbitrary and capricious action on the part of Governments. While certain general principles as to what constitutes due process of law are broadly and virtually universally accepted, the specific rules concerning due process are to be found in national law regulations and administrative practices, and paragraph 52 duly refers to "national laws, regulations and administrative practices".

8. The concept of "discrimination" involves undue differentiation both between entities of foreign transnational corporations of differing national origin and between entities of foreign-based transnational corporations and local enterprises. To make comparison possible and thereby a finding as to the presence or lack of discrimination, the enterprises involved must be in situations which are reasonably similar. In the assessment of the degree of similarity of situations, criteria such as size, origin, sector, etc. will have to be used as appropriate in each particular case.

9. The duty of States to comply with freely undertaken international obligations is self-evident and requires no explanation. Obviously, problems of interpretation may arise with respect to the scope of the international obligation or to the character of the relevant acts. These will have to be resolved by peaceful means like other disputes between States.

10. It is not the purpose of the language offered in paragraph 52 to resolve the profound and long-standing differences of opinion between States on the issue of nationalization and compensation. The goal is to present a text which will be acceptable to all States concerned and which would, at the same time, express some meaningful standards - not merely evade the issue.