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COMPLETION OF THE FORMULATION OF THE UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS

Outstanding issues in the draft code of conduct on transnational corporations

Report of the Secretariat

SUMMARY

The draft United Nations code of conduct on transnational corporations contains a number of paragraphs on which agreement has not yet been reached. Many of the outstanding issues in these paragraphs were extensively discussed in the Intergovernmental Working Group on a Code of Conduct and at the special session of the Commission on Transnational Corporations. Although agreement was not reached, the discussions highlighted the areas of disagreement among delegations and various proposals were put forward in the course of the negotiations for resolving them The present information paper briefly reviews the status of the negotiations on the outstanding issues. The first chapter examines the major outstanding issues dealt with at the special session and the set of compromise proposals prepared on them. The second chapter deals with the other outstanding issues in the draft code.

[This paper was made available by the Un Commission on transnational corporation. The draft Code was the subject of a note in [1984] Australia I.L. News 51-54]

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I. INTRODUCTION

1. As directed by the Economic and Social Council in its resolution 1982/68 of 27 October 1982, the Commission on Transnational Corporations held a special session, open to the participation of all States, from 7 to 18 March and from 9 to 21 May 1983, in order to complete work on the draft code of conduct on transnational corporations on the basis of the work done by the Intergovernmental Working Group on a Code of Conduct. At its special session, the Commission dealt with the major outstanding issues in the sections of the draft code on the preamble and objectives, definitions and scope of application, activities of transnational corporations and treatment of transnational corporations. Although it made considerable progress, the Commission was unable to resolve all outstanding issues. The Commission submitted a report on the results of its work to the Economic and Social Council for its consideration and further action. 1/

2. At its second regular session of 1983, the Economic and Social Council considered the report of the Commission on its special session and decided to transmit it to the General Assembly at its thirty-eighth session (decision 1983/183 of 29 July 1983).

3. The General Assembly, after considering the report of the Economic and Social Council, decided to reconvene, for one week early in 1984, the special session of the Commission on Transnational Corporations, open to the participation of all States, for the purpose of assessing the work on the draft code of conduct on transnational corporations to facilitate the negotiation of outstanding issues The General Assembly further decided that if the outcome of that assessment was favourable, the Commission, at the end of its reconvened special session, should recommend to the Economic and Social Council, at its organizational session for 1984, a final reconvening of the special session for the completion of the code (decision 38/428 of 19 December 1983).

4. The reconvened special session for the assessment of the work on the Code was held from 9 to 13 January 1984. 2/ Upon the recommendation of the Commission, the Economic and Social Council decided to reconvene further the special session of the Commission from 11 to 29 June 1984, with a view to completing the formulation of the draft code of conduct on transnational corporations for submission to the General Assembly at its thirty-ninth session through the Economic and Social Council at its second regular session of 1984 (decision 1984/109 of 21 February 1984).

5. In calling for the convening of the special session in 1983, the Economic and Social Council had requested the Centre on Transnational Corporations to take steps to ensure that all States were provided with the necessary documentation in order to facilitate their participation in the special session. 3/ In response to that request the Centre prepared an information paper on the negotiations (E/C.10/1983/S/2 and Corr.1). This information paper was subsequently updated for the reconvened special session (E/C.10/1984/S/2 and Corr.1).

6. The present information paper has been prepared with a view to facilitating the discussion of outstanding issues at the reconvened session. It describes the status of the negotiations on disputed proposals by indicating the extent of agreement and the divergence of views among delegations The structure of the

paper follows the organization of work adopted by the Commission on Transnational Corporations at its reconvened special session in January 1984 (see E/1984/9, para. 5) Chapter II discusses the major outstanding issues dealt with at the special session of the Commission in 1983, namely, the set of compromise proposals presented by the Chairman, the preamble and objectives and the issue of non-collaboration by transnational corporations with racist minority régimes in southern Africa. Chapter III deals with the other outstanding issues in successive chapters of the draft code.

II. MAJOR OUTSTANDING ISSUES DEALT WITH AT THE SPECIAL SESSION*

7. At its special session, the Commission, pursuant to its mandate from the Economic and Social Council, focused on the major outstanding issues arising from the draft code of conduct relating to the preamble and objectives, definitions and scope of application, activities of transnational corporations and treatment of transnational corporations.

8. The Commission held discussions on these issues in two working groups. One of these working groups (chaired by the Chairman of the special session) dealt with the major outstanding issues on the sections of the draft Code dealing with activities of transnational corporations and treatment of transnational corporations, while the other (chaired by the Rapporteur) dealt with the major outstanding issues in the section on definitions and scope of application, the preamble and objectives and the issue of non-collaboration by transnational corporations with racist minority régimes in southern Africa. Based upon the discussions in these working groups as well as in the Commission itself, the Chairman and Rapporteur prepared for the consideration of the Commission a set of compromise proposals on the major outstanding issues in the sections of the draft code on definitions and scope of application, activities of transnational corporations and treatment of transnational corporations. 4/ 5/ Section A below deals with this set of compromise proposals. At the end of the special session, the Rapporteur, in his capacity as Chairman of the one of the working groups, also presented a proposal on the preamble and objectives 6/ as well as a text agreed ad referendum on the issue of non-collaboration with racist minority régimes in southern Africa. 7/ Sections B and C deal with those subjects.

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* The paragraph numbers cited in the present report refer to the draft United Nations code of conduct on transnational corporations as contained in the report of the Commission on Transnational Corporations on its special session, (Official Records of the Economic and Social Council, 1983, Supplement No. 7 (E/1983/17/Rev.1), annex II).

A. Issues dealt with in the set of compromise proposals presented by the Chairman of the special session 4/

1. Definitions and scope of application

9. Agreement was reached in the Intergovernmental Working Group on a Code of Conduct on the need for a definition of the term "transnational corporations" in the code. The approach agreed upon was to specify the main characteristics of a transnational corporation, by defining it as an enterprise (a) comprising entities in two or more countries, regardless of the legal form and fields of activity of those entities; (b) which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres; (c) in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others.

10. An important point of disagreement among delegations in the Intergovernmental Working Group related to the nature of the ownership of the enterprise. From the outset of the negotiations, some delegations took the position that the definition should underline the comprehensive character of its ambit with regard to the nature of ownership by including the phrase "whether of public, private or mixed ownership". Many other delegations, however, felt that the foregoing specification of the characteristics of a transnational corporation dealt sufficiently with the issue of the definition of transnational corporations. No agreement was reached on this question in the Intergovernmental Working Group.

11 At the special session of the Commission it was agreed that the issue of the nature of ownership should be dealt with in the section relating to the scope of application of the code. A number of proposals were put forward by delegations In one proposal, the relevant paragraph would state that the code applied to all enterprises as defined in paragraph 1 (a) of the draft code and as decided by the States concerned to other enterprises having those characteristics. In another proposal, the paragraph would state that the code applied to all enterprises having the characteristics described in paragraph 1 (a) of the draft code, regardless of ownership, whether public, private or mixed. Neither of these proposals, however, was able to elicit agreement at the special session.

12 Following further discussions the Rapporteur, in his capacity as Chairman of a working group dealing with this matter, prepared a compromise proposal whereby the paragraph on the scope of application would stipulate that the code applied to all enterprises having the characteristics indicated in the paragraph defining transnational corporations "regardless of their ownership". This provision would be followed immediately by a third paragraph stipulating that the code is universally applicable in all countries.

13. In their reactions to this package proposal, many delegations expressed the view that the issue of ownership was adequately dealt with in the compromise proposal Some delegations, however, maintained that it should be made clear that the code would apply to all enterprises without exception and that to this end the

words "regardless of ownership" should be followed by the words "whether private, mixed or state-owned".

14. During the special session, various formulations for a footnote had been put forward with a view to further clarifying the matter. In one proposal the footnote would state that:

> "The provisions of the Code on definitions and scope of application apply to all enterprises and entities irrespective of the "country of origin."

In another, it would state that:

> "The provisions above apply to enterprises or entities of all countries, irrespective of the origin and type of ownership of the transnational corporation."

A third proposal would have the text of the footnote read as follows:

> "The provisions above apply to enterprises and entities of all countries, whether of public, private or mixed ownership, and irrespective of the level of development and political and economic systems of these countries."

15. At the reconvened special session, the Chairman pointed to various possible solutions, including the introduction of a footnote to clarify the matter. In response to this suggestion, delegations that considered that the compromise proposal did not adequately meet their concerns stated that for them the crucial point was to ensure that the code would be universally applied; they stated that the precise manner of doing so was not important as long as universal coverage was clearly ensured. Some other delegations declared their readiness to consider solutions to the so-called problem of the ambiguity of the formulation regarding the scope of application of the code contained in paragraph 2 of the compromise text, provided that the balance of the package proposed by the Chairman of the special session was maintained. They stated that a final stand would be taken by their delegations in the light of the total outcome of the negotiations on all th items of the package text.

2. Activities of transnational corporations

(a) Respect for national sovereignty and applicability of international norms (para. 6)

16. One of the key issues in the section dealing with Activities of transnational corporations relates to the provision on respect for national sovereignty by transnational corporations (para. 6). The formulation proposed on this issue by the Chairman of the Intergovermental Working Group on a Code of Conduct stated that:

> "As set forth in this code, transnational corporations should recognize and respect the national sovereignty of th countries in which they operate as well as the right of each State to exercise full permanent sovereignty ov r its resources and economic activities within its territories " 8/

17 The fundamental difficulty in the formulation revolves around the scope of the concept of national sovereignty in this regard. Most delegations have felt that the concept of permanent sovereignty over natural resources, wealth and economic activities is a well-established principle of international law reflected in a number of United Nations resolutions and should be reaffirmed in the code. Some delegations, however, have taken the position that acceptance of such a broad concept of national sovereignty would have to be qualified by reference to international law.

18. During the negotiations in the Intergovernmental Working Group, it was felt that the paragraph on national sovereignty could be dealt with in the section on Activities without reference to the issue of international law, provided that that issue was adequately dealt with in the section on Treatment.

19. Following that approach, the Chairman, at the special session, put forward a compromise proposal, which would deal with the question of national sovereignty in one paragraph in the section on Activities and with the question of international law in a separate paragraph elsewhere in the code. The proposed formulation for paragraph 6 would read as follows:

> "Transnational corporations should/shall respect the national sovereignty of the countries in which they operate and the right of each State to exercise its permanent sovereignty over its natural resources and wealth."

20. With respect to the question of the reference to international law in the code, several delegations have insisted that such a provision is basic to the entire code, having implications not only for the section dealing with the regulation of transnational corporations but also for the section on the treatment of transnational corporations. During the discussions in the Intergovernmental Working Group, most delegations resisted a reference to "international law" but suggested alternatives founded on express consent such as "agreements reached by countries on a bilateral or multilateral basis", or "obligations in bilateral or multilateral agreements" or "international obligations to which States have freely subscribed". These formulations were, however, considered by other delegations to be unduly limited in scope.

21. During the special session, an attempt was made to resolve this difference by relying on the concept of "international obligations" without any reference to treaties or agreements. The term "international obligations" would thus be open to various interpretations. In this regard one delegation proposed the following:

> "Nothing in the present Code shall/should be construed as impairing the fulfilment in good faith of international obligations."

After further discussion, the Chairman proposed a compromise formulation, to be inserted in an appropriate place in the code, as follows:

> "The principle of the fulfilment in good faith of international obligations will apply to the Code."

22. While several delegations continue to prefer an explicit reference to "international law", many delegations consider the reference to "international obligations" acceptable.

(b) Observance of domestic laws, regulations and administrative practices (para. 7)

23. Agreement was reached in the Intergovernmental Working Group to the effect that one of the three paragraphs under the heading "Respect for national sovereignty and observance of domestic laws, regulations and administrative practices" should address the relationship of entities of transnational corporations to the laws, regulations and administrative practices of the countries in which they operate. In the formulation put forward by the Chairman of the Intergovernmental Working Group, this paragraph would provide that transnational corporations are subject to the laws, regulations and administrative practices of the countries in which they operate.

24. The formulation contained a number of areas on which there was disagreement One area of disagreement was the reference to administrative practices. This issue is dealt with below (para. 53). Another area of disagreement was the proposal by some delegations to include a reference to jurisdiction in the formulation. A third difficulty in the formulation relates to the reference to countries in which transnational corporations operate, a reference which in the view of some delegations raised questions of concurrent jurisdiction.

25 In the package proposal of the Chairman of the special session, the paragraph would stipulate that:

> "An entity of a transnational corporation is subject to the jurisdiction, laws, regulations and administrative practices of the country in which it operates."

Paragraph 55 of the draft code would consequently be deleted.

3. Treatment of transnational corporations

(a) Fair and equitable treatment (para. 48)

26. Agreement was reached in the Intergovernmental Working Group to deal with the concept embodied in the provision of the draft code on fair and equitable treatment. In his compromise formulation, the Chairman of the special session has proposed, as part of his compromise package, a provision that "transnational corporations should receive fair and equitable treatment in the countries in which they operate." This formulation is acceptable to all delegations - to most delegations as part of the compromise package and to other delegations in itself

(b) National treatment (para. 49)

27. One of the most controversial issues in the draft code arises in the paragraph on "national treatment", that is, th paragraph that would prescribe

non-discriminatory treatment of transnational corporations vis-à-vis domestic enterprises. It is generally recognized that the principle of national treatment must be appropriately qualified to be acceptable to all delegations. However, there are sharp differences as to the extent of such qualifications beyond the basic idea that the principle of national treatment must be subject to national requirements for maintaining public order and national security. One group of delegations maintains that the concept of national treatment of transnational corporations is fundamentally incompatible with their countries' social and economic systems as reflected in their national constitutions and consequently that the provision should contain an overriding qualification to that effect. Most delegations consider that the principle of national treatment, if applied indiscriminately, would be highly prejudicial to their countries' development in view of the unequal position of domestic enterprises vis-à-vis transnational corporations and that the provision should therefore be qualified by a "development clause" and accord national treatment to transnational corporations only "when the circumstances under which they operate are similar" to those of domestic enterprises. Some delegations insist further that vital national interests should constitute another qualification. Some others maintain that the principle of national treatment is fundamental and that while it may be reasonable to include a qualification concerning development needs, the qualification should be worded in such a way as not to undermine the basic principle recognized in the provision. The qualification regarding development could, for example, be made more specific, in their view, by referring to "the economic goals and the specific development plans of developing countries".

28. The compromise formulation proposed by the Chairman of the special session provides that, subject to certain specified exceptions, entities of transnational corporations should be given the treatment accorded to domestic enterprises when the circumstances under which they operate are similar. Exceptions to the principle would be made in respect of (a) national requirements for maintaining public order and protecting national security and other vital interests; (b) consistency with socio-economic systems as reflected in national constitutions and other laws; and (c) measures specified in legislation and policies relating to declared development objectives of the developing countries.

29. Some delegations maintain that the suggested qualifications in the Chairman's proposal are unduly broad and ambiguous. They consider that the terms "and other vital interests" and "and other laws" introduce exceptions so comprehensive as to prejudice the basic principle of national treatment. With regard to the development clause, they feel that the reference to "legislation and policies relating to declared development objectives" should be limited to legislation and policies existing at the time when the investment is made. The view was also expressed that the expression "when the circumstances under which they operate are similar" would negate the application of the principle of national treatment, since it could be argued that the circumstances can hardly ever be similar.

30. Many delegations noted that the Chairman's formulation of this paragraph did not include specific references to items that they considered important. They noted particularly the absence of any qualifications regarding economic co-operation among countries, particularly developing countries, or regarding claims by transnational corporations for preferential treatment or for incentives

or concessions granted to domestic enterprises. Nor was there any reference to the promotion of self-reliant development. Nonetheless, they stated that in a spirit of compromise they were prepared to accept the Chairman's compromise proposal as a whole.

(c) Nationalization and settlement of disputes (paras. 54 and 56)

31. The draft code evolved by the Intergovernmental Working Group dealt with the issue of nationalization and compensation in one subsection and with the issue of dispute settlement in a number of contexts, notably under the heading of jurisdiction. The compromise formulation put forward by the Chairman of the special session proposes to deal with these issues in two paragraphs under the heading "Nationalization and settlement of disputes".

(i) Nationalization and compensation

32 The paragraph on nationalization and compensation (para. 54) has been one of the most controversial in the code. In view of the fundamental and long-standing differences of views among delegations on this subject, the Intergovernmental Working Group considered the possibility of a procedural treatment of the subject according to which the relevant provision would merely acknowledge the existence of divergent positions among delegations without attempting to harmonize those positions.

33. The competing texts for the paragraph that emerged from the Intergovernmental Working Group included two that reflected respectively the basic positions of the developing countries and the developed market economy countries. The main difficulty revolves around the issue of compensation in the event of nationalization. In one proposal, the provision would state that adequate compensation should be paid, taking into account the laws and regulations of the State that nationalizes and all the circumstances that the State may deem relevant. The other proposal would make a reference to international law, would call for the payment of prompt, adequate and effective compensation and would further enumerate elements to be taken into account in assessing the compensation to be paid.

34 In an attempt to arrive at a compromise formula, a text was offered, the essence of which was to avoid specificity on the principal issues dividing Governments on this subject. This formula recognized the right of a State to nationalize or expropriate the assets of transnational corporations in its territory and the duty of the State to pay compensation, in accordance with its own laws and regulations and its international obligations. This approach, however, did not meet the concerns of those delegations that felt the need for a specification to the effect that compensation should be prompt, adequate and effective.

35. At the special session, the Chairman proposed a text that would recognize the sovereign right of a State to nationalize the assets of transnational corporations operating in its territory and the duty of th State to pay compensation In response to the concerns of delegations that had sought greater specificity, the text stipulated further that the compensation was to be paid by the State concerned

in accordance with the applicable legal rules. Some delegations consider that this formula does not go far enough in meeting their concerns.

(ii) Settlement of disputes

36 Regarding the settlement of disputes between States and entities of transnational corporations, there has been considerable disagreement among delegations as reflected in the three alternative formulae contained in the draft code evolved by the Intergovernmental Working Group. On the one hand, many delegations consider that such disputes should be settled in the national courts of the host country and, in any event, have opposed any explicit reference to arbitration as a method of settlement. On the other hand, some delegations consider that such disputes could be settled by the national courts of other countries and, furthermore, that the provision should make an explicit reference to international arbitration as a method of settlement.

37 The compromise proposal of the Chairman of the special session provides for the submission of such disputes to competent national courts or authorities in conformity with the principle that an entity of a transnational corporation is subject to the jurisdiction, laws, regulations and administrative practices of the country in which it operates. It also provides, where the parties so agree, for such disputes to be referred to other mutually acceptable dispute settlement procedures.

(d) Jurisdiction (paras. 55-58)

38 The Intergovernmental Working Group was unable to reach agreement on the difficult and highly technical issue of jurisdiction and a number of bracketed versions were therefore included in the Group's final draft.

39 The Chairman's compromise proposal does not include a separate section on jurisdiction but makes provision for certain of the elements of this subject as follows: (a) it deals in paragraph 7 (instead of in paragraph 55) with the issue of an entity of a transnational corporation being subject to the jurisdiction, laws, regulations, and administrative practices of the country in which it operates; (b) it deals with the issue of dispute settlement in a paragraph stating that disputes between States and entities of transnational corporations which are not amicably settled between the parties should be submitted to competent national courts or authorities in conformity with the principle of paragraph 7 and that, where the parties so agree, such disputes may be referred to other mutually acceptable dispute settlement procedures; (c) it deletes paragraph 57 relating to contracts in which at least one party is an entity of a transnational corporation; and (d) it deals with the issue of conflict of jurisdiction under a new subheading specifically addressing that issue in a paragraph that would state that where the exercise of jurisdiction over transnational corporations and their entities by more than one State may lead to conflicts of jurisdiction, the States concerned should endeavour to adopt mutually acceptable principles and procedures, bilaterally and multilaterally, for the settlement of such conflicts on the basis of respect for their mutual interests.

B. Preamble and objectives

40 The Intergovernmental Working Group conducted a preliminary discussion on the preamble and objectives but did not draft any formulations. The Group did, however, receive a number of relevant documents, including formulations by the Chairman of the Group, as well as some specific proposals by delegations.

41. During the special session in 1983, discussions were held on this part of the code in a working group. Based upon these discussions, the Rapporteur, in his capacity as chairman of that working group, prepared as indicated above (see para. 8), a working paper containing a proposal for the consideration of the Commission. 6/ The proposal contains texts pertaining to both the preamble and the objectives of the code.

42. As regards the preamble, the text recalls the legislative history of the code, makes reference to relevant work done by other bodies of the United Nations system and outlines the main considerations necessitating the adoption of the code. The text on objectives contains elements reflected in various consensus resolutions adopted by the General Assembly and the Economic and Social Council. 9/ These elements were supplemented by the Chairman of the Working Group with texts that refer to encouraging the contribution that transnational corporations can make in conformity with the development goals and established objectives of the countries in which they operate; facilitating co-operation among States on issues relating to transnational corporations and alleviating the difficulties stemming from the international character of those corporations and the diversity of national laws and policies to which they are subject; and creating an environment conducive to mutually beneficial relations between States and transnational corporations

43. Although the Commission at its special session did not consider the working paper prepared by the Chairman of the Working Group, many delegations expressed support for the proposals contained therein as an adequate expression of the main issues to be included in this part of the code. Other delegations did not share this view and stated that, among other modifications, they would wish to see the preamble and objectives contain more elements on the positive contribution of transnational corporations. Some of those delegations put forward a conference room paper containing additional elements to be included in the preamble. 10/ Various delegations also made a number of specific suggestions concerning some of the elements contained in the text proposed by the Chairman of the Working Group.

C. Non-collaboration by transnational corporations with racist minority régimes in southern Africa

44. On the issue of non-collaboration by transnational corporations with racist minority régimes in southern Africa, the Intergovernmental Working Group agreed that the code should acknowledge and make express reference to the efforts of the international community towards the elimination of apartheid in South Africa and ending its continued illegal occupation of Namibia. It was agreed further that the paragraph on this matter should be preceded by the following phrase:

> "In accordance with the efforts of the international community towards the elimination of apartheid in South Africa and its continued illegal occupation of Namibia"

Beyond that, there was disagreement in the Group on the substantive parts of the paragraph.

45 At the special session, the Working Group that dealt with this issue agreed upon a text ad referendum for the paragraph. 7/ Differences of view remained as to the heading of the paragraph. During a meeting of the Commission, many delegations stated that their acceptance of that text was based on the understanding that the heading "Non-collaboration by transnational corporations with racist minority régimes in southern Africa" formed an integral part of the text and that, together with the substance of the paragraph, it represented a balance. Other delegations stated that it was their understanding that in elaborating the text of the paragraph in the Working Group, no linkage was made between the text and an eventual heading.

III. OTHER OUTSTANDING ISSUES IN THE DRAFT CODE

A. Definitions and scope of application

1. Relevance of the code's provisions to domestic enterprises (para. 4)

46. In the Intergovernmental Working Group, some delegations expressed the view that the code should include a "good practice" clause, namely, a paragraph stipulating that the provisions of the code apply to domestic enterprises to the extent relevant. They accordingly proposed the inclusion of a paragraph in the section of the code relating to definitions and scope of application stating that the provisions of the Code addressed to transnational corporations reflect good practice for all enterprises, that they are not intended to introduce differences of conduct between transnational corporations and domestic enterprises and that, wherever the provisions are relevant to both, transnational corporations and domestic enterprises should be subject to the same expectations in regard to their conduct

47. Most delegations objected strongly to the inclusion in the code of such a provision on the ground that the promulgation of principles for domestic enterprises goes beyond the mandate of the Intergovernmental Working Group and the Commission on Transnational Corporations and the scope of the work on a code of conduct on transnational corporations.

48. During the special session of the Commission, delegations that supported the inclusion of a "good practice" clause stated that their intention was not to subject transnational corporations and domestic enterprises to the same standards but to express the idea that the principles contained in the code reflect good practice for all enterprises. The following amended text was subsequently put forward by one delegation for the consideration of the Commission:

> "The provisions of the Code, which solely relate to transnational corporations, reflect good practice also for domestic enterprises to the extent that these provisions are relevant to both."

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49. Many delegations stated that they were prepared to consider this proposal for inclusion in some other part of the code such as the preamble. A few delegations, however, stated that they still had difficulties with the concept embodied in the proposal as well as with its formulation.

50 Based upon the discussion, the Rapporteur of the special session, in his capacity as chairman of the Working Group on the preamble and objectives, proposed the following text for inclusion in the preamble:

> "Recognizing that the provisions of this Code establish acceptable standards of corporate conduct which may be applied as appropriate to enterprises other than transnational corporations, to the extent that the provisions are relevant."

This proposal has yet to be discussed.

2. Application of the code to regional groupings of States (para. 5)

51 In the Intergovernmental Working Group, some delegations expressed the view that the scope of the code's application with regard to States should take into account the fact that some of the matters dealt with in the code were subject to the competence not only of States but also of regional groupings of which those States were members. Those delegations therefore felt that in order to ensure its effective application, the code should expressly provide, as in the case of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, that it would, in appropriate circumstances, be applicable to such regional groupings of States. Several delegations, however, questioned the appropriateness of the concept and expressed the view that the proposed formulation should be deleted.

52. At the special session of the Commission, delegations that supported the inclusion of the concept said that their intention was to ensure that countries would not set aside the code on the grounds of membership in a regional grouping that exercised delegated competence over matters covered by the code. They stated that the basic idea which they wanted to see reflected in the code was a provision to the effect that "any reference in the Code to States, countries or Governments also includes regional groupings of States, insofar as the provisions relate to matters within these groups' own competence to the extent of such competence". Several delegations expressed support in principle for the concept embodied in the proposal and stated that they could accept it ad referendum. A few delegations, however, reiterated their view that the concept should not be included in the Code.

B. Activities of transnational corporations

1. Appropriate qualification of administrative practices (paras. 7, 37, 41, 44, and 45)

53. The code would require transnational corporations in various contexts to abide by the laws and regulations and policies, as well as the "administrative practices"

of the countries in which they operate. Some delegations have questioned the nature and character of the said administrative practices. In order to avoid ambiguity, they proposed to qualify references to all "policies" and "administrative practices", wherever they appear in the code, with the terms "established" or "explicitly declared" as the case may be. It was agreed that a solution should be found that would be applicable to all the paragraphs of the code in which references to these terms are made. 11/

2. Non-interference in internal political affairs: issue of defining the precise scope of the principle (para. 15)

54 The Intergovernmental Working Group reached an agreement to include in the code two paragraphs that would prohibit interference by transnational corporations in internal political affairs (paragraph 15) and their engaging in activities of a political nature (paragraph 16). On paragraph 16 agreement was reached on a stipulation that prohibits transnational corporations from engaging in activities of a political nature that are not permitted by the laws and established policies and administrative practices of the countries in which they operate. No consensus was, however, reached on the formulation of paragraph 15 of the draft code.

55. The difficulty relates to the precise scope of the principle of non-interference. Many delegations feel that there should be an unqualified prohibition of interference by transnational corporations in the internal affairs of the countries in which they operate and of any activities that undermine the political and social systems of these countries. Some delegations consider that the phrase "internal affairs" is too general and that the paragraph should refer to internal political affairs. They also feel that the provisions should explain the notion of interference by referring to illegal interference and illicit activities. Furthermore, they feel that the concept of non-interference would be more clearly understood if it were explicitly linked to the idea that the activities in question tend to undermine the political and social systems or are of a subversive nature in the countries concerned. Many delegations, however, feel that such qualifications are uncalled for; in their view, subversive and other illicit activities that undermine political and social systems constitute a category in themselves and should be specifically prohibited; they consider that the concept of non-interference is much broader than that of subversive and other illicit activities.

56 The proposals put forward at the special session reflect the two basic positions that divide delegations on this subject. One proposal would have the paragraph state the following:

> "Transnational corporations should/shall not interfere in the internal affairs of the countries in which they operate. They should refrain from any subversive and other activities undermining the political and social systems in these countries."

57 Another proposal would have the paragraph read:

> "Transnational corporations should not intervene illegally in the internal affairs of the countries in which they operate, nor should they interfere through subversive or other activities aimed at undermining the political and social systems of these countries."

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These two basic proposals and variants of them were discussed, but neither approach commanded the support of all delegations.

58 In the search for a compromise solution, a working group at the special session proposed the following text:

> "Transnational corporations should not interfere in the internal affairs of the countries in which they operate and, to achieve this end, should not engage in activities prohibited by the laws, established policies and administrative practices of the countries in which they operate and should refrain from activities undermining the political and social systems in these countries."

No consensus, however, emerged from the discussion on this text.

3. Non-interference in intergovernmental relations: issue of defining the precise scope of the principle (para. 17)

59. Substantial agreement was reached in the Intergovernmental Working Group on the question of non-interference in intergovernmental relations. As set out in the draft code under this heading, one paragraph (para. 17) would enjoin transnational corporations from interfering in intergovernmental relations. A second paragraph (para. 18) would enjoin transnational corporations from requesting Governments to take the measures referred to in the second sentence of paragraph 65 of the draft code A third paragraph (para. 19) would enjoin transnational corporations, with respect to the exhaustion of local remedies, from requesting Governments to act on their behalf in any manner inconsistent with paragraph 65. The only outstanding matter is whether and to what extent in the first of these paragraphs the principle of non-interference should be qualified.

60 Some delegations consider that transnational corporations may sometimes have a legitimate role in intergovernmental relations (for example, in implementing development assistance programmes) and are therefore in favour of formulations that acknowledge this, for instance by referring to intergovernmental relations "which are within the competence of Governments", "which are properly the concern of Governments" or "which are solely the concern of Governments". Some other delegations prefer a simple and unqualified formulation that calls upon transnational corporations not to interfere in intergovernmental relations

4. Treatment of issues covered by other United Nations and specialized agency instruments: corrupt practices and transfer of technology (paras. 20 and 36)

61 The Intergovernmental Working Group agreed that the code should deal in an appropriate manner with matters that are the subject of other United Nations and specialized agency instruments, namely, those concerned with employment and labour relations, competition and restrictive business practices, corrupt practices and transfer of technology

62. An appropriate formula for dealing with the question of employment was agreed upon in respect of the Declaration of Principles concerning Multinational Enterprises in Social Policy adopted by the Governing Body of the International Labour Office and in respect of the question of competition and restrictive business practices. The following texts were drafted, and a decision was taken to place them in one of the substantive introductory parts of the code:

> "For the purposes of this Code, the principles set out in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office, should apply in the field of employment, training, conditions of work and life and industrial relations."
>
> "For the purposes of this Code, the relevant provisions of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted by the General Assembly in its resolution 35/63 of 5 December 1980 shall/should also apply in the field of restrictive business practices."

The exact location of these paragraphs, however, has yet to be decided upon.

63 Agreement has not been reached on the manner in which the code should deal with the questions of corrupt practices and transfer of technology. Alternative proposals were drafted on each of these questions. One contains substantive provisions in each of these areas. The other proposal adopts the same approach as for employment and restrictive business practices, namely, simply to provide that the relevant provisions of the international agreement on illicit payments and the international code of conduct on the transfer of technology would apply, respectively, in the areas of corrupt practices and transfer of technology.

5. Employment and promotion of nationals (para. 24)

64. Agreement was reached in paragraph 24 of the draft code on the principle that transnational corporations should 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 nationals at all levels of management and direction of the affairs of each entity so as to enhance the participation of its nationals in the decision-making process. The only outstanding issue relates to the qualification of nationals of host countries whose employment and promotion are to be accorded priority by transnational corporations. Some delegations maintain that in some cases adequately qualified nationals may not be available in the countries in which transnational corporations operate and insist upon a reference to adequately qualified nationals. On the other hand, many delegations feel that such a reference could be used by transnational corporations to avoid the employment and promotion of nationals.

6. Contribution to the balance of payments with regard to exports and imports (para. 28)

65 The Intergovernmental Working Group reached general agreement on the basic thrust of paragraph 28, that is, the requirement that transnational corporations

should contribute to the balance of payments of host countries, through the promotion and diversification of exports, and to increased utilization of domestic goods, services and other resources available in these countries. However, there is disagreement over two points in this provision.

66. First, some delegations consider that transnational corporations should also be called upon to contribute to the balance of payments in the countries in which they operate through the diversification of imports. Some other delegations do not feel that transnational corporations should be called upon to make a contribution to the balance of payments in this way.

67. Second, some delegations consider that the paragraph should be so worded as to make it clear that the contribution of transnational corporations to the balance of payments depends upon the type of activities in which the corporation is engaged. To this end, they suggested wording such as "to the extent possible or practicable" or "consistent with the purpose, nature and extent of their operations".

68. Many other delegations are of the view that the requirement for transnational corporations to contribute to the promotion of exports should not be unduly diluted with such qualifications and reservations. They consider that the only applicable criterion should be government regulations and policies; hence, they propose the introductory words "As required by government regulations and in furtherance of government policies".

7. Transfer pricing (para. 33)

69. Agreement was reached in the Intergovernmental Working Group on the basic principle regarding appropriate pricing policies in intra-corporate transactions. The code would call upon transnational corporations not to 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 of the countries in which they operate. Beyond this, there is disagreement regarding pricing policies that have other effects. Some delegations are of the view that there should be a reference to pricing policies which have the effect of evading customs valuation regulations. In their view, mention should also be made of pricing policies of transnational corporations which adversely affect economic and social conditions in the countries in which they operate. Some other delegations consider the latter reference too general and propose either its omission or the introduction of a qualifying reference to national laws and regulations.

8. Extent of the obligation to restore a damaged environment (para. 41)

70 Agreement has been reached in this paragraph on a formulation stating that transnational corporations shall/should carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate and with due regard to relevant international standards. Furthermore, the provision would

call upon transnational corporations, in carrying out their activities, to take steps to protect the environment and where they have damaged the environment, to restore it. The outstanding problem, however, concerns the extent to which a damaged environment can be restored. Various formulations were put forward that would require transnational corporations to restore the environment to agreed standards or to the standards determined by competent authorities or to the maximum extent feasible, but they did not command the support of all delegations. It has also been suggested that the term "rehabilitate" may be more appropriate in the context of environmental protection than "restore".

C. Treatment of transnational corporations

1. Clarity and stability of national policies, laws, regulations and administrative practices (para. 50)

71. Some delegations have proposed the inclusion in the code of a provision that would call for clarity and stability of national policies, laws, regulations and administrative practices relating to transnational corporations. According to these delegations the paragraph should state further that changes in laws, regulations and other measures should be made with proper regard to the legitimate rights and interests of all concerned parties, including transnational corporations

72 Many delegations do not support the inclusion of such a paragraph in the code They consider that it is neither possible nor desirable for Governments to give assurances that the laws and regulations of their country will be stable; they state further that changes in laws and regulations are made by Governments as and when required in the national interest and that such changes cannot be tied to the interests of transnational corporations. On the other hand, they do not object to a stipulation that laws and regulations should be public and readily available.

73. Based upon the discussions in the Intergovernmental Working Group, the following formulation was put forward for further consideration:

> "Laws and regulations should be publicly and readily available. To the extent appropriate, relevant information regarding decisions of competent administrative bodies should be disseminated."

2. Treatment of information furnished in confidence to Governments (para. 51)

74. It is agreed that the information furnished by transnational corporations to the authorities in each of the countries in which they operate should be reasonably safeguarded, particularly to protect its confidentiality. The only pending problem in the provision relates to the qualification of the information which should be accorded the necessary safeguards. The Chairman of the Intergovernmental Working Group had proposed a qualifying reference to "confidential business information". Some other delegations, however, preferred a reference to "legitimate business secrets"

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3. Transfer of employees for training purposes (para. 52)

75. Some delegations have expressed the view that, with regard to paragraph 25 of the draft code relating to managerial and technical training and employment of the nationals of the countries in which transnational corporations operate, there should be a corresponding provision in the chapter on treatment, which would call upon such countries to facilitate the transfer of employees from one entity of a transnational corporation to another. They believe that such a provision would facilitate compliance by transnational corporations with the provisions of paragraph 25.

76. Many delegations do not favour the inclusion of such a paragraph in the code. They feel that the linkage of the proposal to paragraph 25 of the draft code would shift the onus of compliance with the provisions of paragraph 25 from transnational corporations to States. Furthermore, they consider that the formula "countries in which transnational corporations operate" would allow room for the transfer of employees from headquarters to subsidiaries, thereby defeating host countries' objectives with regard to the employment and training of nationals. The view has also been expressed that the paragraph would not be in accord with the concerns of developing countries about the emigration of skilled personnel.

77. Delegations that support the proposal consider that the phrase "where consistent with the laws and regulations of the countries concerned" would provide a sufficient safeguard against the transfer of employees in violation of such laws and regulations. In their view, this could be reinforced by the use of a term stronger than "consistent".

78. During the discussions in the Intergovernmental Working Group, it was suggested that one possibility would be to insert a general provision regarding action by Governments to facilitate compliance with the code in one of the introductory sections of the code.

4. Free and unrestricted transfer of all payments relating to investments (para. 53)

79. Some delegations consider that the code should include a paragraph stating that transnational corporations should be permitted to transfer freely and without restriction all payments relating to their investments, such as income from invested capital and the repatriation of such capital when the investment is terminated, as well as licensing and technical assistance fees and other royalties, without prejudice to the relevant provisions of the section of the code on balance of payments and financing, in particular, paragraph 29. In support of the inclusion of such a provision in the code, it is maintained by some delegations that some of the provisions in the balance-of-payments section go against established commercial practices concerning international trade and payments, as well as the principles and practices of the International Monetary Fund and the General Agreement on Tariffs and Trade on this matter.

80 Many delegations object to the inclusion of such a paragraph in the code They feel that the proposal fails to take into account the balance-of-payments

difficulties to which many developing countries are subject. They maintain in any case that financial transfers are covered by the exchange control regulations of countries and that investment contracts often specify the amount and timing of transfers of payments relating to investments. Furthermore, they consider that the formulation proposed is too sweeping, as reflected in its use of terms such as "freely and without restriction", and "all payments", and also that the ambiguous term "without prejudice to the relevant provisions of the 'Balance-of-payments and financing' section of this Code" could be used to undermine that section of the code.

D. Intergovernmental co-operation

1. Introductory formula "States agree/States should" (paras. 59-64)

81. Many delegations are of the view that in the section of the code, dealing with co-operation among countries, it would be appropriate, regardless of the outcome of the negotiations on the legal nature of the code, to use the formula "States agree". Some delegations, however, feel that this formula is appropriate only in a mandatory instrument and that its use here would introduce a discrepancy between this section and other sections of the code.

2. Reference to promotion of the contribution of transnational corporations to development goals and control and elimination of the negative effects of their activities (para. 60)

82. Agreement was reached on the part of the provision that states that intergovernmental co-operation should be established or strengthened at the international level and, where appropriate, at the bilateral, regional and interregional levels. A proposal had been made to stipulate that such co-operation should be undertaken with a view to promoting the contribution of transnational corporations to development goals while controlling and eliminating the negative effects of their activities. As a result of discussion in the Intergovernmental Working Group, it was agreed that it would not be necessary to include such a qualification in paragraph 60 if mention were made of these goals in the section of the code dealing with objectives.

3. Conflicting requirements as a subject of intergovernmental consultation (para. 62)

83. Paragraph 62 calls upon States to consult on a bilateral or multilateral basis, as appropriate, on matters relating to the code and its application and with respect to the development of international agreements and arrangements on issues related to the code. The outstanding problem in the paragraph concerns the proposal of some delegations to emphasize the matters relating to the code on which States should consult in particular. Some delegations have proposed that the provision should specify that States should consult "in particular on conflicting

requirements imposed on transnational corporations by the countries in which they operate and issues of conflicting national jurisdictions." Other delegations feel that these issues should be taken up in the provisions of the code dealing with conflict of jurisdiction and have expressed the view that it is unnecessary to mention them in the section on intergovernmental co-operation. A few delegations have stated that if the paragraph is to contain a reference to conflicting requirements imposed by countries on transnational corporations, there should also be a reference to conflicting requirements imposed by parent companies on their entities operating in different countries.

84. During the discussions in the Intergovernmental Working Group, the view was expressed that either of the additional proposals would unduly limit the scope of the consultations to be undertaken by Governments. The question was also raised whether the subject of the two proposed qualifications merited being singled out for special treatment.

4. Appropriate action by States to prevent transnational corporations from engaging in activities referred to in paragraphs 15 to 17 of the draft code (para. 64)

85. This paragraph calls upon States not to use transnational corporations as instruments to intervene in the internal or external affairs of other States. The outstanding matter in the paragraph relates to the proposal to include an additional clause that would specifically call upon States to take appropriate action within their jurisdiction to prevent transnational corporations from engaging in the activities referred to in paragraphs 15 to 17 of the draft code. Many delegations do not favour the additional stipulation; in their view, it would raise questions about the need for action by States concerning other provisions of the code.

E. Implementation of the code of conduct

1. Provision for the establishment of subsidiary bodies of the Commission and specific procedures (para. 67)

86. It has been agreed that the Commission on Transnational Corporations should assume the functions of the international institutional machinery required for the implementation of the code. An outstanding question in paragraph 67 is whether or not to specify that the Commission may establish the subsidiary bodies and specific procedures it deems necessary for the effective discharge of its functions. A few delegations consider that this would precipitate the establishment of subsidiary bodies and are therefore opposed to such a provision. Some delegations are of the view that the power to establish subsidiary bodies is implicit in the status of the Commission as a subsidiary body of the Economic and Social Council as well as in the term "specific procedures".

2. Access by non-governmental organizations to the Commission on matters related to the code (para. 69 (a))

87. It is agreed that one of the functions of the Commission with regard to the implementation of the code would be to discuss matters related to the code at its annual sessions. Furthermore, where Governments engaged in consultations on specific issues related to the code so agree, the Commission is to facilitate such consultations to the extent possible. In this context, it is proposed that the paragraph dealing with this function of the Commission should indicate that representatives of trade unions, business, consumer and other relevant groups may express their views on matters related to the code through the non-governmental organizations represented at the Commission. Some delegations have stressed the importance of the role of non-governmental organizations in the effective implementation of the code and are of the view that an explicit reference to them is not only necessary but also in line with the rules of procedure of the Economic and Social Council. Some other delegations have taken the position that the role of non-governmental organizations should not be over-emphasized.

3. Clarification (para. 69 (c))

88. Paragraph 69 (c) deals with the issue of the clarification of provisions of the code by the Commission. The subparagraph would stipulate that one of the functions of the Commission is to provide, upon the request of a Government, clarification of the provisions of the code in the light of actual situations in which the applicability and implications of the code have been the subject of intergovernmental consultations. Furthermore, the paragraph would prohibit the Commission, when clarifying the provisions of the code, from drawing conclusions concerning the conduct of the parties involved in the situation which led to the request for clarification and would also restrict the clarification to issues illustrated by such a situation. Finally, the paragraph would stipulate that the detailed procedures regarding clarification are to be determined by the Commission

89. A few delegations have stated that they are opposed to the provision for clarification on the grounds that the Commission might be converted into a quasi-judicial tribunal. Many delegations have expressed support for the concept embodied in the paragraph. They consider that without a provision for clarification, the effectiveness of the code would be minimized.

4. Channels of reporting by the Commission on Transnational Corporations (paras. 69 (d) and 71)

90. It is agreed that the Commission will report annually to the General Assembly on its activities regarding the implementation of the code (para. 69 (d)) and that it shall make recommendations to the General Assembly for the purpose of reviewing the code (para. 71). A proposal was made to indicate that the Commission should report to the General Assembly through the Economic and Social Council; although there were no objections to this procedure, it was suggested that the phrase providing for this should be bracketed for the time being.

F. Others

1. The legal nature of the code

91. Although the legal nature of the code was discussed extensively by the Intergovernmental Working Group, its final determination was, by consensus, deferred to the concluding phase of the negotiations and is still outstanding. Many delegations maintained that the code should be mandatory or legally binding. More specifically, it should take the form of a convention, treaty or other legally binding multilateral agreement that would obligate the parties thereto to enforce the provisions of the code in their respective States and would also involve some international enforcement machinery to reinforce national action. Others have urged the adoption of a voluntary or non-mandatory code, that is, a code which contains broad principles or guidelines to be observed by all parties concerned, but not legally enforceable rules. Pending the final resolution of this issue, the Intergovernmental Working Group adopted the formula of "shall/should" in its formulations to denote the mandatory and non-mandatory positions respectively. All delegations were, however, fully committed to an effective code, irrespective of its legal nature.

92 During the reconvened special session of the Commission held in January 1984, the Chairman expressed the view that the code need not deal with the issue of its legal nature. The matter was, however, not discussed further.

2. Headings and subheadings

93. The Intergovernmental Working Group adopted a tentative outline for the elaboration of the code which is reflected in the headings and subheadings used thus far in the draft code. However, no final decision regarding the use and contents of headings and subheadings appearing in the draft code has yet been taken

94. During the negotiations, some delegations stated that they could accept the headings but that they had difficulties with some of the subheadings, some of which, in their view, were too negative and prejudicial. They feel that those headings should be either deleted entirely or formulated in more neutral terms. A few delegations have stated that they attach importance to and would wish to retain the headings as well as the subheadings used in the draft code.

Notes

1/ Official Records of the Economic and Social Council, 1983, Supplement No. 7 (E/1983/17/Rev.1). Annex II of that report contains the draft United Nations Code of Conduct on Transnational Corporations.

2/ For the report, see E/1984/9.

3/ Economic and Social Council resolution 1982/68, para. 7.

4/ See Official Records of the Economic and Social Council, 1983, Supplement No. 7 (E/1983/17/Rev.1), annex IV

Notes (continued)

5/ The introduction to the set of compromise proposals described them in the following way:

"This document contains a set of proposals which, in the opinion of the Chairman of the special session and the Rapporteur in their capacities as Chairmen of the Working Groups II and I, respectively, constitute compromise formulations which could resolve some of the major outstanding issues in the code of conduct on transnational corporations.

"The following suggestions on the sections on definitions and on the treatment of transnational corporations are presented each as a package representing a delicate balance between the positions of the various groups represented in the Commission. It is the firm belief of the proponents that any major change in a particular part of this document is likely to upset this balance.

"In drafting these proposals, due account was taken of the priorities established by the Economic and Social Council in its resolution 1982/68. These proposals have been submitted in the genuine hope that they will make a meaningful contribution to the expeditious conclusion of our work.

"The Chairman and the Rapporteur would welcome the reactions of members of the Commission to this document."

6/ Official Records of the Economic and Social Council, 1983, Supplement No. 7 (E/1983/17/Rev.1), annex V.

7/ Ibid., annex III.

8/ See "Transnational corporations: A code of conduct: a composite text of formulations by the Chairman and elements prepared by the United Nations Centre on Transnational Corporations" (Working Paper No. 10 of 7 November 1979 of the Intergovernmental Working Group on a Code of Conduct), para. 1.

9/ These include General Assembly resolutions 3201 (S-VI) and 3202 (S-VI) on the Declaration and the Programme of Action on the Establishment of a New International Economic Order, 3362 (S-VII) on development and international economic co-operation and 35/56 on the International Development Strategy for the Third United Nations Development Decade and Economic and Social Council resolutions 1721 (LIII), 1908 (LVII) and 1913 (LVII) on the impact of transnational corporations on the development process and on international relations and 1980/60 on the role of transnational corporations in the progress made towards the establishment of the new international economic order and obstacles that impede it

10/ E/C.10/1983/CRP.4.

11/ The Commission reached agreement at its special session on a qualification in regard to "policies" in paragraphs 9 and 26. It agreed to include in those paragraphs the qualifying phrase "set out by the Government". In addition, in the proposal prepared by the Rapporteur of the special session on the preamble, the term "policies" would be qualified by the word "established".
