THE UN CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS: DISPUTED AND RESOLVED ISSUES

DR. NAGY, BOLDIZSÁR

1. North – South or something else

The first thing to emphasize is that the Code[1] is being drafted by state representatives, for adoption by states. This fact entails that those *transnationalist, liberal or revolutionary ideas* which envisage the reduction of the role of the state *do not have strong postions around the negotiating* table.[2] The Code will be state centric and will not appropriately consider the role of the TNCs in a global community not devided by state frontiers.

It could not be differently.[3] It is revealing that it was a sovereign state, Chile, complaining against the massive interference of the International Telephone and Telegraph Company (ITT) which induced the intensive and systematic UN concern with the control of the TNC in 1972. The Secretary General appointed a Group of eminent persons, the report of which led to the establishment of the Commission on Transnational Corporations (ECOSOC Res. 1913 (LVII) of 5 December 1974) and of the Centre on Transnational Corporations (ECOSOC Res. 1908 (LVII) of 2 August 1974).[4] The Commission is composed of forty eight member states of the UN, thirty three from Latin America, Africa and Asia, ten from „Western European and other" states and five from the Socialist countries. The actual formulation of the Code is the work of an Intergovernmental Working Group, set up upon the Commission's recommendation. (COONROOD, 273) The steps taken towards a Code therefore are not simply the product of the demand for a new international economic order (NIEO). The actions committed in furtherance of the NIEO certainly are closely linked with the efforts to control and regulate the activities of the TNC[5] but the two *are not identical.* This distinction may become important. The North – South dialogue, aimed at formulating the NIEO came to a stale-mate in the early 1980s. (NORTH – SOUTH, 28) According to the second report of the Brandt Commission, published in 1983, the North – South dialogue needs a new start. (COMMON, 142). Whether there will be a successful new round in the North – South dialogue remains to be seen. But if the goal of regulating the activities of the TNC is not merely a part of the NIEO, but a separate, relatively independent objective then the prospects for achieving it increase,

since then the completion of the Code is not held hostage to the success of the NIEO.

The *differentiation within the South* my be another reason for treating the case of the Code outside a simple North – South framework. Referring to the difference between the African growth rate of 0.5 per cent in 1980 – 1982 and the Asian one of 4.1 per cent (among low income countries, in both cases), *S. Strange* notices that the "line dividing North from South on the world map as shown on the cover of the [second] Brandt Report may not be so hard and fast as we thought." (STRANGE, 276) The emergence of the newly industrializing countries, the political-ideological-strategic diversification of the Third World countries necessitates new paradigms.[6] This new approach would take into account the various differentiating factors among Third World states. such as their expanding role as home country for TNCs.

2. The provisions of the Code

How does all this apply to the text of the draft Code? Three points will be discussed.

A: Issues covered by other United Nations and specialized agency instruments;

B: Issues, essentially resolved;

C: Major outstanding issues.

A: *Issues covered by other United Nations and specialized agency documents*

Intergovernmental and nongovernmental attempts to regulate the activities of the TNC mushroom wildly.[7] Yet, the drafters of the Code could only rely on documents adopted or under preparation within the UN family. There was agreement that instead of regulating employment and labour relations the Code will refer to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office, on 16 November 1977. Similarly in respect to the problems of competiton and restrictive business practices, the Code will confine itself to a formula stating that: "For the pruposes 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." (REPORT, 618)

Concerning the corrupt practices and the transfer of technology, no agreement has been reached yet. Some proposals contain substantial pro-

visions on both areas, others simply refer to the international agreement on illicit payments and to the code of conduct on the transfer of technology.

For the sake of bravity, these documents will not be discussed in this paper.

B: *Issues essentially resolved*

An issue is essentially resolved if the paragraph(s) of the draft contain no bracketed versions. The solution can either be in favour of the developing /host country or it can be impartial. In the former case it requires a behaviour of the parties (home country, TNC, host country) which is in harmony with the demands of the LDCs. These demands can generally be accociated with the ideas of dependence thinking.[8] If the solution included in the Code does not correspond to the demands of the LDCs, then it is impartial. Impartiality means that it is a compromise formula without any bias to one of the three interest groups (developed countries, TNCs, LDCs).[9] With the exception of paragraph 51 which protects the confidentiality of the information furnished by the TNC to the authorities I have not found any *undisputed* provision in the Code which would be more in keeping with the interests of either the developed/home states or the TNCs, than with the interests of the LDCs.

The number in the bracket refers to the paragraph(s) in the Code.

a) *Interest conflicts which are resolved in favour of the LDCs.*

Economic matters

– The TNC should not constitute an enclave, but establish meaningful links with the local economy (25, 28. paragraph 28 has not been fully agreed upon yet.).

– The TNC should not use transfer pricing to evade taxation and control measures (33, 34).

– The TNC should not worsen the balance of payment position of the host country but contribute to its improvement (26 – 32 But see also the impartial solutions.).

– Critical decisions should not be taken in headquarters, but in local branches with due respect to the host state's objectives (21, 23, 31).

– Local entities of the TNC should be informed about the plans of the parent company in due time and in appropriate detail (46).

– The TNC should promote the employment of local nationals at all levels (24).

– The TNC should supply to the competent authorities all information required (44, 45).

Social matters

– The TNC should "avoid practices products or services which cause detrimental effects on cultural patterns and socio-cultural objectives as determined by the Governments" (12; the quotation is taken from the paragraph).

– The TNC should not collaborate with racist regimes in Southern Africa. (Agreement was reached upon the text of the paragraph, but it has not appeared in the Code yet. See: REPORT, 614)

Decision making

– The TNC should not use its government to put pressure on another government (18, 65).

– The TNC should not seek the support of its government in violation of the principle of the exhaustion of local remedies (19).

– The TNC should cooperate with the government for the review or renegotiation of contracts concluded between them. (11. Part of paragraph 11 is still disputed but it does not prejudice the fact that the principle of renegotiation is adopted.)

The states may regulate the entry and determine the role of the TNC in their economic development (47).

Sovereignty

– The TNC should act in conformity with the host country's development plans and policies, and "work seriously towards making a positive contribution" to them (9).

b) *Interest conflicts to which the Code offers an impartial solution*

Economic matters

– With respect to the balance of payment situation the TNC is allowed to impose restrictions on its entities and engage in activities on the local capital and money market within the generally accepted practices prevailing in the country (31, 32).

– The Code contains the requirement to protect the environment. This is not to be associated exclusively with either of the interest groups. It is in the common interest and therefore an impartial regulation (41 – 43).

Social matters

– The above said apply to the provisions on the respect for human rights and fundamental freedoms (13).

Decision making

– The TNCs should "not engage in political activities which are not permitted by the laws and established policies and administrative practices of the countries in which they operate." (16. This 16th parapgraph can be considered impartial only because the act of interference in the internal affairs is regulated by another – the heavily disputed paragraph 15.)

Sovereignty

– The relationship between the international business interests and the interests of the countries in which the TNC operates should be harmonious (22).

The Code contains further undisputed *and* impartial provisions. By and large the parts "Intergovernmental cooperation" (paragraphs 59 – 65) and "Implementation of the Code of conduct" (66 – 71) fall into this category, with two qualifications: there is no agreement on the exact formulation of the subject matter of the states' consultation (par. 62) and on the question whether the Commission on Transnational Corporations should be entitled to clarify provisions of the Code or not (par. 69(c)).

I shall comment on the undisputed (resolved) matters after the overview of the outstanding issues.

C: *Major outstanding issues in the Code*

Economic matters

– There is disagreement whether the TNC should contribute to the balance of payment through diversification of imports – and not only through diversification of exports. Moreover some delegations think that this contribution depends upon the type of activities in which the TNC is engaged, whereas many other delegations are of the view that it should be governed by government regulations and policies (28).

Decision making

– There are differences concerning the phrasing of the non-interference in internal political affairs principle. The developing countries opt for a broad formula, the developed prefer a qualified one, prohibiting only "illegal" interference in internal "political" affairs (15).

It is also disputed whether a separate stipulation is needed to call upon the states to take action within their jurisdiction to prevent the TNC from such an interference (64).

Sovereignty

– The Report is enlightening on this point: "The fundamental difficulty in the formulation revolves around the scope of the 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." (REPORT, 609; 6).

– With respect to the legal system of the country in which the TNC operates, the question is not solved whether the TNC should be subject only to the laws and regulations of the country or also to its administrative practices and jurisdiction (7).

– No solution has been found for the case of conflicting jurisdictions (58).

There are three other persistent problems unresolved.

– *National treatment.* Should entities of the TNC enjoy the same treatment accorded to the domestic enterprises or not? The developed market economy countries insist on non-discriminatory treatment, both the socialist and the developing states refuse it. The socialist states maintain that the principle is incompatible with their social and economic system, the developing countries think that national treatment, if applied indiscriminately, would be highly prejudicial to their development.

– *Nationalization and compensation.* The fundamental and long standing difference of views between the developed market economy countries and the LDCs is reflected by the proposals put forward by them. The developed states' intention is to make reference to international law, to call for prompt, adequate and effective compensation and to enumerate further elements to be taken into account in assessing the compensation to be paid. The proposition of the LDCs claims 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.

– *Settlement of disputes.* According to the LDCs, disputes between the TNC and the host country should be settled in the national courts of the host country. They oppose an explicit reference to arbitration. The developed market economy countries prefer settlements in courts of third countries and maintain that a reference to international arbitration should be made in the Code.

3. Evaluation

From this overview of resolved and still disputed issues some substantial conclusions can be drawn.

With regard to the *economic matters* it is apparent that *the majority of the demands* of the developing countries *met a positive response.* The enu-

meration of the problems resolved in favour of them is impressively long. The provisions of the Code unequivocally promote the goals of the LDCs in achieving a better integration of the TNC into their economy, in strengthening its contribution to the development plans and policies of the country, in shifting the locus of decision from the headquarters of the TNC to the local entity and in improving the host state's control over the activity of the TNC. The provisions on information disclosure and environmental protection deserve special mentioning because of their degree of specificity and direct applicability. (FATOUROS, 113) The success of the LDCs is proved by the fact that one can not find any significant economic issue, either among the impartially resolved, or among the still disputed issues.

Basically the same applies to the *social issues*. The LDCs did not have to make any concessions. They achieved the codification of the protection of their cultural patterns and socio-cultural objectives. This paragraph of the Code can be interpreted as creating a shield against cultural imperialism and distortion of consumption patterns – usually called "coca-colonization".

The efforts of the LDCs to eliminate or minimize the interference of the TNC in the autonomous *decision making process* of the host country were less fruitful. They could not relegate the traditional rules of diplomatic protection (by substituting it with the Calvo doctrine), they were unable to make the developed market economy countries to accept an unqualified prohibition of interference by the TNC. The only real progress is the reinforcement of the renegotiation principle, even if it is still subject to some disagreement of minor importance.

Matters concerning the sovereignty are the most disputed. Here the LDCs only have one major score, the provision obliging the TNC to comply with and contribute to the host country's development plans – as mentioned in the economic context. In all the other issues[10] the parties are deeply entrenched in their respective positions with fairly dim hopes to move closer to each other. *What is the explanation for that?*

The Code involves a number of disputes which at first sight seem to be legal, such as those, concerning the permanent sovereignty of states over natural resources, wealth and economic activity; the extent of interference by the TNC; the national treatment; conditions and requirements for nationalization; conflicting jurisdictions and the methods of dispute settlement. They all can be subsumed under the heading: does international law pose any limit to the freedom of action of a state, i.e. to its sovereignty, and if yes, where are these limits. This is very much like the everlasting topic of public international lawyers concerning dualistic and monistic solutions in the relation between international law and domestic law. Instead of becoming overwhelmed by the aboundance of legal treatises let us have a glance at the underlying controversy.

Immutability or change, that is the question. The international law is dear to the developed countries because it protects the present state of

affairs. The LDCs want to modify the law, *because* they strive for a change in the world order. *Conflicts do not arise within the law, they are only translated into the "language", into the context of the law.* The role of law is confined to reflecting the solution found on the level of the original conflict. The parties must modify their real behaviour, they must achieve a real compromise in order to enable the evolution of a legal common denominator.[11]

Of course it is not stability or reform *per se* that the states advocate. The status quo in the opinion of most of the developed market economy countries serves their interest, whereas the majority of the LDCs is convinced that it is detrimental to them. A closer look at the disputes on the permanent sovereignty over natural resources and on nationalization may give some insight into the value clashes. Why do developed capitalist countries oppose nationalization without promt, adequate and effective compensation and the permanent sovereignty principle providing a ground for such nationalization? Not because it causes unbearable material damage (BURTON, 397),[12] but because *it runs against their values*, it can be said, *against their ideology*. The refused acts represent wealth redistribution, and that is unacceptible for them. It is well known, that the Western states have nothing against income redistribution. They themselves practice it through taxation. But wealth redistribution, encroachment on property without a compensation of the same market value is unbearable for them.

Certainly the arguments of the other party, based on a belief in and a claim of a more just and equitable world order are not less ideological. Hence it seems to be proven that *the fundamental controversy* – naturally unsolvable in this paper –, is *philosophical*.

This point enables a reference to another question, that of the relation between the home state and the TNC. It is frequently stated that the position of the developed states is induced by their responsibility for their juridical entities, that they simply protect the interests of their citizens. However, it seems to me, that the alliance between the home state and the TNC is not absolute, that the picture is more complicated. The developed home states made several concessions in economic matters, which presumably will cause a decrease in the earnings of the TNCs, or at least will limit their freedom of action. The developed market economy states only became unyielding with respect to matters directly affecting them as states. Their primary aim is not to give up anything which they consider as part and parcel of their existence as sovereign states. These assets frequently are symbolic[13] goods. Thus the present state of the Code is evidence of how *much more difficult it is to negotiate over symbolic goods, values and philosophic views, than over intellectual or actual property.*

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NOTES

[1] In order to comply with the terminology of the UN, the expression "transnational corporations" will be used to denominate transnational enterprises, multinational companies, etc. (See also n. (3))

The Draft United Nations Code of Conduct on Transnational Corporations appears in IIM XXIII (1984) No 3. May pp. 626 – 640, as reproduced from Report on the Commission on Transnational Corporations, Official Records of the Economic and Social Council, 1983, Supplement No. 7 (E/1983/17/Rev. 1), Annex II, pp. 12 – 27.

In the text I shall call this draft "the Code".

[2] The case of the Reagan Administration is particular. In its economic propaganda it is close to the neoclassical (liberal) school. However, I see no sign of any intention of the Administration to reduce the role of the state in the foreign relations, including the protection of business interests abroad.

[3] "While a political theorist may rightly question the suitability of the whole concept of national sovereignty to the maintenance of international order in a world which is both capable of self-destruction and daily growing smaller, a practical international program must be based on this fundamental fact of life, at least for the immediate future, rather than of some form of ideal system." (Wang, 217)

[4] More details in: (BAADE, 414 – 417; WANG, 220 – 225).

[5] The basic documents of the NIEO expressly mention the regulation of the activities of the TNC as an aim. Declaration on the Establishment of a New International Economic Order [GA. Res. 3201 (S – VI) of 1 May 1974] in its 4 (g) point; the Programme of Action for the Establishment of a New International Economic Order [GA. Res. 3202 (S – VI) of 1 May 1974] in its section V;
the Charter of Economic Rights and Duties of States [GA. Res. 3281 (XXIX) of 12 December 1974] in Article 2, paragraph 2(b).

[6] *U. Menzel* in his valuable article on the need of a new paradigm publishes the following table: (see p. 16.)

Lists of NICs Grouped According to Various Traits

World Bank[a]	OECD[b]	ECM[c]	Foreign and Commonwealth Office[d]	BMZ[e]	DIE[f]	Balassa[g]
Egypt	Spain	Philippiens	Hong Kong	Algeria	Egypt	Argentina
Argentina	Portugal	South Korea	India	Argentina	Algeria	Brazil
Brazil	Greece	Taiwan	South Korea	Brazil	Argentina	Chile
Greece	Brazil	Egypt	Taiwan	Chile	Brazil	Hong Kong
Hong Kong	Mexico	Algeria	Singapore	Costa Rica	PR China	Israel
Israel	Yugoslavia	Brazil	Malaysia	Domin. Republ.	India	South Korea
Yugoslavia	Hong Kong	Nigeria	Pakistan	Ecuador	Indonesia	Mexico
Columbia	South Korea	Iran	Iran	Greece	Iraq	Singapore
Mexico	Taiwan	Iraq	Philippines	Israel	Iran	Taiwan
Philippines	Singapore	Hong Kong	Thailand	Jamaica	Columbia	Uruguay
Portugal		Singapore	Brazil	Yugoslavia	Mexico	Yugoslavia
Roumania		Mexico	Argentina	South Korea	Nigeria	Greece
Singapore		Argentina	Mexico	Lebanon	Pakistan	Portugal
Spain		Venezuela	Spain	Malaysia	Philippines	Spain
South Africa		Chile	Portugal	Malta	Saudi Arabia	Turkey
South Korea		Uruguay	Israel	Mexico	South Korea	Hungary
Turkey		Lebanon	Malta	Nicaragua	Thailand	Bulgaria
Uruguay			Yugoslavia	Panama	Turkey	Roumania
Taiwan[h]			Greece	Portugal	Venezuela	
			Turkey	Singapore		
			Poland	Spain		
			Roumania	Syria		
			Hungary	Taiwan		
				Trin. and Tob.		
				Turkey		
				Tunesia		
				Uruguay		
				Venezuela		
				Cyprus		

[a] 1981; 72, 148 – 149: "semi-industrialized countries with middle income" (more than US $ 1,000 GDP/per capita 1979)

[b] 1979; 18: "NICS" (high share of world industrial production and world production of manufactures)

[c] 1974; 16 *et seq.*: "countries on the road to industrialization" (a combination of per capita income like the World Bank and structural traits)

[d] 1979; 8: "NICs" (Indicators of competetiveness and assumed potential for increase in manufactures exports)

[e] (Federal Ministry of Economic Cooperation) 1979; 8: "countries on the threshold" (per capita income above US $ 630 in 1976 and various economic and non-economic indicators)

[f] (German Institute of Development Policy) Esser/Wiemann 1981; 20: "countries of emphasis" (potential regional economic and power potential)

[g] 1981; XIX: "NICs" (per capita income from US $ 1,100 – 3,500 in 1978 and share of manufacturing industry in GDP of 20% or more)

[h] Taiwan, for political reasons, is no longer cited in the World Bank list

The sources:

a) World Bank 1981 World Development Report 1981 Washington D.C.

b) OECD 1979: The Impact of the Newly Industrializing Countries on Production and Trade in Manufactures. Paris

c) ECM, 1974 "Entwicklungshilfe" In: Bulletin der Europäischen Gemeinschaften Beilage 8

d) Foreign and Commonwealth Office 1979: The Newly Industrializing Countries and the Adjustement Problem. Government Economic Service Paper 18. London

e) BMZ = Federal Ministry of Economic Cooperation 1978 Zusammenarbeit mit Schwellenländern Mimeo paper 200 – E 1010 – 76/78 Bonn

f) ESSER, K. – WIEMANN, J. 1981 Schwerpunktländer in der Dritten Welt. German Institut of Development Policy

g) BALASSA, 1981: The Newly Industrializing Countries in the World Economy New York etc.

[7] A list of ten documents regulating the TNC is fairly modest (GROSSE, 419–424) compared with other compilations (SAUVANT 404–419 and BAADE 416–440).

[8] This is a crude simplification, but the analysis of the provisions of the Code reveals that the absolute state centredness does not leave any room for transnationalism, or structural dependency thinking. Accordingly most of the LDCs in their policy follow the line reflected in the dependence thinking.

By dependence theory one refers to those views which probe and explore the symmetries and assymmetries among nation states with the aim of securing symmetry either in the form of mutual balanced dependence or in the form of self reliance. It includes that part of the dependencia thinking, which concentrates on any one particular developing country and its dependence from concrete core states. At the same time the category "dependence theory" should be construed broadly, comprising the ideologies of all those nationalist revolutionary regimes which have anticapitalist attitudes. The border between mercantilism and dependence theory is not absolute, a nationalist developing state can well be at odds with its dependent status stemming from the given (capitalistic) world order and attempt to behave mercantilistly at the same time.

[9] The investigation of the draft and the commentary to it gives the impression, that the socialist states usually sided with the developing countries. The NIOCs seem not to have taken separate position from the G 77.

[10] The problem of the national treatment, and the quarrel over the methods of dispute settlement in the strict sense are "below" and "above" sovereignty. However in both cases the freedom of action of the state is the core of the issue, so they will be included in the analysis.

[11] To be somewhat more precise and pay due tribute to the proper potential of law I have to add a differentiation between our case and the typical legal disputes in the national law. The model presented here applies to cases when the legal system as a whole, or at least a major subsystem of it, is challenged. Then the solution must come from outside the law, and the legal formulation will only sanctify it.

However, in most of the domestic law disputes in local courts, the parties do not challenge the validity of the law as such. Thus, in regular civil and penal law cases the law and the administrator of justice has a genuine role.

[12] For the determinant role of data gathering, compare two articles, published in the same year on cross national analysis of expropriations. (See BURTON and see KOBRIN)

[13] *Fatouros* writes concerning the disputes over nationalization: "The issue has become symbolic of differing perceptions of appropriate state conduct; like many another symbol, it has lost to some extent its link to reality." (FATOUROS, 116–117)

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GELÖSTE UND UMSTRITTENE PROBLEME IN DEM VERHALTENSKODEX DER VN FÜR DIE TRANSNATIONALEN UNTERNEHMEN

DR. BOLDIZSÁR NAGY

Die Streiten um das Verhaltenskodex der VN für die transnationalen Unternehmen können nicht in die Rahmen der Nord-Süd Dialog eingedrängt werden. Die Ursache dafür ist dass der „Süd" nicht als ein einheitlicher Block aufgefasst werden kann.

Das Entwurf beinhaltet die noch streitigen und schon angenommenen Artikel. Diese können in vier Klassen geteilt werden: ekonomische, soziale, die Entscheidungsmacht und letzten die Souveränität betreffenden.

Die Lösung in den ersten drei Klassen wiederspiegeln die Ansprüche der Entwicklungsländer. Die heftigsten Kontroversen betreffen die Fragen der Souveränität (Nationalisation, Streitschlichtung). Die Erklärung könnte sein, dass die Staaten über die Fragen die ihren wirtschaftliche Interessen unmittelbar betreffen leichter zur Einigung kommen, als über deren die nur scheinbar rechtliche Natur haben, in der Wirklichkeit aber den Zusammenstoss ideologischer Wertordnungen verdecken.

СПОРНЫЕ И РАЗРЕШЁННЫЕ ВОПРОСЫ В ПРОЕКТЕ КОДЕКСА ООН – а О ПОВЕДЕНИИ ТРАНСНАЦИОНАЛЬНЫХ КОРПОРАЦИИ

БОЛДИЖАР НАДЬ

Обсуждение проекта кодекса в ООН-е о поведении транснациональных корпорации не могут быть ввести в рамки конфликта «Север» и «Юг». Причиной этого среди других является то, что нельзя читать «Юг» единым блоком. Проект кодекса заключает в себе ещё спорные и уже принятые статьи. Они могут быть классифицированы в четыре класс : связанные экономическими, социальными проблемами, вопросами власти внесить решене и суверенитетом. Во первых трёх классах решение отражает запросы развивающихся стран. Споры связаны суверенитетом (национализация, разрешение споров) являются острейшими. Обьяснение этого наверно то, что государства договариваются легче о тех вопросах которые связаны непосредственно экономическими вопросами, но не о тех которые только по-видимому юридические, но действительно отражают конфликта идеологических ценностных систем.