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Article — Digitized Version

The state of preparations for a UN code of conduct

Intereconomics

Suggested Citation: Scheele, Hartmut (1979) : The state of preparations for a UN code of conduct, Intereconomics, ISSN 0020-5346, Verlag Weltarchiv, Hamburg, Vol. 14, Iss. 6, pp. 273-277, <https://doi.org/10.1007/BF02925857>

This Version is available at:

<https://hdl.handle.net/10419/139642>

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stability and a favourable investment climate for foreign investors. This requires, above all, that the respective government has a clearly defined policy towards foreign investment which is not basically hostile and is not changed at short notice. If bureaucratic obstacles are put in their way, or if the role of multinational companies is constantly being questioned publicly, foreign investors will hardly commit themselves on any larger scale.

Thus, the decisive factors for more direct investment in the LDCs are confidence and good-will on both

sides. I am, therefore, in favour of efforts, such as those undertaken by the International Chamber of Commerce, to establish a code of conduct as a basis for mutual trust and a secure investment climate.

In the long run, however, borrowed capital from outside can never be a substitute for a secure internal capital base. Therefore the more advanced LDCs in particular must make every possible effort to encourage domestic savings and to build up effective capital markets – parallel to the capital inflow from foreign sources.

TRANSNATIONAL CORPORATIONS

The State of Preparations for a UN Code of Conduct

by Hartmut Scheele, Geneva*

In the United Nations an Intergovernmental Working Group tries to cope with the phenomenon of transnational corporations by working on a code of conduct. Hartmut Scheele, who participated in this work, reviews the results the Group has achieved up to now.

It seems that transnational corporations are a potential source of conflict since they invest and operate commercially on a world-wide scale while the scope of legal systems and executive powers of host and home countries do not, as a rule, extend beyond national frontiers. Such incongruity of political and economic spheres of influence may give rise to problems. Lacking ease of making the positions of some transnational corporations easy to grasp as well as their sizes and complex organizational set-ups have caused concern on the part of host and home countries, trade unions, consumer organizations and others. In this connection it is not much amazing to learn that several international organizations are dealing with aspects and problems concerning transnational corporations, e. g.:

□ The Organization for Economic Cooperation and Development: The 1976 Guidelines for Multinational Enterprises have just been reviewed by the OECD Council of Ministers in June 1979.

□ The International Labour Organization: In 1979 the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was made by the ILO.

□ The United Nations Conference on Trade and Development: The ongoing work in UNCTAD regarding an International Code of Conduct on the Transfer of Technology (second negotiating conference: November 1979) and regarding a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (first negotiating conference: November/December 1979) will have an impact on transnational corporations as well although these exercises cover other businesses, too.

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□ The United Nations: The UN negotiations on an International Agreement on Illicit Payments now under way have also an impact on this matter.

In this article, however, the emphasis is laid on the negotiations on a code of conduct which take place in New York within the scope of the United Nations.

Work in the United Nations

At the request of the Economic and Social Council (ECOSOC) the Secretary General of the United Nations in 1972 appointed a group of Eminent Persons to study "the role of multinational corporations and their impact on the process of development, especially that of the developing countries, and also their implications for international relations". In 1974 the ECOSOC established the Intergovernmental Commission on Transnational Corporations as its advisory body and the Information and Research Centre on Transnational Corporations. The Commission in 1976 created the Intergovernmental Working Group on a Code of Conduct which started work in January 1977. So far, the Working Group has held seven sessions of two weeks each, the eighth session will take place in January 1980.

The Working Group has adopted a step-by-step approach: Early discussions centered on the concerns of groups of countries and the views of individual governments as well as non-governmental interests, mainly business and labour. After the drafting of an annotated outline of a code the Centre on Transnational Corporations prepared a set of "common elements – tentative formulations". In the light of comments by members of the Working Group on these elements the Chairman submitted formulations for a code of conduct in most of the substantive areas. The Working Group had a first reading on that.

Envisaged Scope of the Code

The formulations by the Chairman indicate the comprehensive scope of the code envisaged. They have the following headings:

ACTIVITIES OF TRANSNATIONAL CORPORATIONS

A. General and Political

- Respect for national sovereignty and observance of domestic laws, regulations and administrative practices
- Adherence to economic goals and development objectives, policies and priorities

- Adherence to socio-cultural objectives and values
- Respect for human rights and fundamental freedom
- Non-interference in internal political affairs
- Non-interference in intergovernmental relations
- Abstention from corrupt practices

B. Economic, Financial and Social

- Ownership and control
- Balance of payments and financing
- Transfer pricing
- Taxation
- Competition and restrictive business practices
- Transfer of technology
- Employment and labour
- Consumer protection
- Environmental protection

C. Disclosure of Information

TREATMENT OF TRANSNATIONAL CORPORATIONS

- A. General treatment of transnational corporations by the countries in which they operate
- B. Nationalization and compensation
- C. Jurisdiction

INTERGOVERNMENTAL CO-OPERATION

The Commission on Transnational Corporations at its fifth session in May 1979 instructed the Working Group to continue its work with a view to presenting a comprehensive draft code of conduct to the Commission at its sixth session scheduled for May 1980. Whether or not this aim can be achieved depends on the willingness of all governments taking part to look for solutions in some crucial areas.

Balance of Objectives

The Commission in determining the programme of work at its second session stated as one of the objectives "to secure effective international arrangements for the operation of transnational corporations designed to promote their contribution to national developmental goals and world economic growth while controlling and eliminating their negative effects".

One of the crucial issues is how a balance of these two goals can be best achieved in a code of conduct. From the very beginning of the work on a code the majority of the industrialized countries stressed that a code laying down recommendations directed to transnational corporations only would not be acceptable. Balance could only be achieved, they

argued, if the code in addition to that would contain recommendations for the treatment of transnational corporations by home and host countries which allow productive and satisfactory co-operation, meet in a fair and equitable way the interests of all parties involved, and thereby create favourable conditions for investments by these corporations. Otherwise, they would not be able to make the positive contributions to the economic development process expected from them.

Prerequisites for Investment

Elements which are prerequisites for a favourable investment climate include adequate protection of investment by the following standards:

- ☐ transparency or clear definition of national policies, laws, regulations and administrative practices significantly affecting private foreign direct investment;
- ☐ stability of these policies, laws, etc., necessary changes to be made in the light of evolving circumstances in an orderly way with proper regard to the rights of investors established at the time;
- ☐ non-discrimination and national treatment, the right of a host country to regulate the establishment of foreign investment, including prohibitions or limitations on the extent of foreign investment in specified sectors, remaining unaffected;
- ☐ timely and unrestricted transfer of the income from investment capital and repatriation of capital when the investment is terminated, except in so far as restrictive measures of limited duration are required by exceptional balance of payments difficulties;
- ☐ fair and equitable treatment of property: nationalization (directly or indirectly) exclusively for a public purpose, non-discriminatory and in accordance with due process of law with prompt, adequate and effective compensation to be paid;
- ☐ rapid resolution of disputes according to the procedural standards called for by international law with access to international arbitration.

Whereas the basic idea of a chapter concerning the treatment of transnational corporations seems to meet no major obstacles anymore from most members of the Working Group the question of balance is still highly controversial when it comes to specific points such as for example "national sovereignty" in relation to "nationalization and compensation" or "international dispute settlement". The main problem here arises from the flat rejection of the notion of international law by the developing countries; for example, they insist on

"full permanent sovereignty" (the claimed absolute right of a state over its wealth, natural resources and economic activities, subjected exclusively to its national laws) and on "exclusive national jurisdiction". For most industrialized countries, however, "balance" in this context means that the principles of international law must be taken into account.

Balance plays an important role also in other respects, for example:

- ☐ A standard demanding that "transnational corporations should not ask home governments to act on their behalf in any manner that amounts to the use of economic or political pressure on host governments" must be complemented by a standard assuring diplomatic protection.
- ☐ "Obligations" of transnational corporations must not be open-ended but qualified in order to avoid unrealistic demands and to maintain the viability of the enterprise.

Although there is no doubt that the code of conduct would not affect the right of states to regulate the entry or establishment of transnational corporations, developing countries feel that such qualifications are inconsistent with the principle of permanent sovereignty.

The discussions of the points mentioned revealed that the Working Group has become the most important current forum for dealing with North-South investment issues. The outcome will have an impact on future developments in this field at the multilateral and bilateral (e. g. investment protection treaties) levels.

Legally Binding or Voluntary Code?

Developing countries want a legally binding code as they do in the negotiations on a Code of Conduct on Transfer of Technology. Most industrialized countries are of the opinion that the code must be a voluntary one like the OECD Guidelines and the ILO Tripartite Declaration. In most countries legally binding force would require particular formulations in sufficiently concrete terms. Although an agreement under international law may theoretically contain only general provisions to be further elaborated by governments, such a solution would make transnational corporations subject to different requirements in the various countries. This would lead to a fragmentation of law and to a considerable distortion of competition among individual enterprises. A legally binding code would thus require concrete rules and harmonization of national legislations. Given the widely divergent views

and different economic and legal systems of UN member states it seems unlikely at present that these conditions can be met.

Discussions in the Working Group revealed that the most important aim should be to work out an effective code. Effectiveness, however, does not necessarily require legally binding rules, it could also be achieved by a widely accepted code combined with an implementation procedure including follow-up action on the national and international levels.

OECD Guidelines

In this context it may be of interest to look at what happened in the OECD. The Guidelines are recommendations jointly addressed by member countries to multinational enterprises operating in their territories. Observance of the Guidelines is voluntary and not legally enforceable. The basic conclusion of the review carried out in June 1979 after three years was that the Guidelines offer an efficient and realistic framework for further encouragement of the contribution which multinational enterprises can make to economic and social progress and for the reduction and resolution of the difficulties to which the operations of these enterprises may give rise. Experience with the Guidelines has shown that the public in the various countries – especially trade unions – closely watch whether the recommendations are observed by the enterprises. Transnational corporations for their part will seek to avoid any violation in order to maintain a good investment climate.

As in the OECD a future UN Code of Conduct could be supplemented by an intergovernmental consultation procedure on matters related to the code, the experience gained in its application and for the purpose of clarification. The danger here is, however, that such a procedure drifts into the judicial or semi-judicial sphere, especially since some countries are linking this idea to a kind of fact finding and complaints procedure in specific cases. It is not by chance that the OECD Guidelines *expressis verbis* state, that the Committee on International Investment and Multinational Enterprises “shall not reach conclusions on the conduct of individual enterprises”.

Intergovernmental co-operation and provisions for review of the code after a certain time may also contribute to its effectiveness.

Absence of a Precise Definition

One major handicap for the Working Group is the absence of any definition of the term “transnational

corporations”. Like the general public members of the Group have differing views on what these corporations really are. The OECD Guidelines and the ILO Tripartite Declaration state that a precise legal definition is not required; these documents enumerate only some criteria such as

- ☐ Establishment in different countries and linkage of companies or other entities so that one or more of them may be able to exercise a significant influence over the activities of others (OECD).
- ☐ Ownership or control by enterprises of production, distribution, services or other facilities outside the country in which they are based (ILO).

No distinction is made between private, state or mixed ownership.

Members of the Working Group expressed different opinions on whether one wide definition would do or whether several definitions are preferable for various purposes (e. g. one for the code in general and another one for the collection and analysis of information – a field of intense activity of the Centre on Transnational Corporations).

The discussions are getting even more difficult because of the point of view expressed by the state-trading countries which insist that they do not have any transnational corporations in their systems at all, this phenomenon being a typical product of the “capitalist” countries. This argumentation makes it very easy for them to support most of the demands of the developing countries.

Industrialized countries, on the other hand, argue that corporations fully or partly owned by states must be covered by the code as well, regardless of their legal set-up. Because of their powerful position, state-owned corporations are in cases of international operations just as liable as privately owned ones to get into conflict with the legal systems of host and home countries.

The Group of Eminent Persons used a rather broad definition which reads: “Multinational corporations are enterprises which own or control production or service facilities outside the country in which they are based. Such enterprises are not always incorporated or private, they can also be co-operatives or state-owned entities”.

The chapter “disclosure of information” raises many so far open questions with regard to confidentiality, comparability, geographical and sectoral breakdown, cost, size and in particular with regard to the kind of information that should be disclosed to the public, to

the authorities of countries and to trade unions who want information for representatives of employees including future plans and policy options.

Further problems arise with regard to the relationship to work in other fora. This concerns in the first place the chapters on transfer of technology, restrictive business practices and competition, taxation, abstention from corrupt practices. Views differ on what should be done if the work in other bodies is not finished by the time the Working Group is ready to submit its draft to the Commission.

There are, of course, a lot of other problems to be resolved, especially when the Working Group reaches the drafting stage.

An Almost Impossible Task

As the Chairman of the Working Group on a Code of Conduct has pointed out recently, the Group has to fulfil an almost impossible task. It is supposed to formulate standards related to all sorts of transnational corporations in all sorts of activities. It shall have to deal with a number of very complex issues, some of them having bedeviled both national and international rule-makers for decades. The code is also expected to cover, in a way acceptable to all, a wide range of political, economic and social topics, several of which are treated differently in different countries, if they are treated at all. The provisions of the code are not supposed to counteract national laws and policies, but rather provide a yard-stick of commonly agreed behaviour in terms of mutually consistent standards which preferably should mean the same thing everywhere.

Considering this task it is rather impressing what the Group has already achieved up to now: By the step-by-step approach basic agreement has been reached on a number of important issues and concepts in a relatively short time. However, it is impossible to predict the outcome of the whole exercise since all depends on the solution of the crucial issues mentioned above. These problems some of which carry the weight of old differences of views concerning the New International Economic Order, will become even more evident the moment the Group starts drafting. So far, all participants in the Commission on Transnational Corporations have assigned highest priority to the elaboration of a code of conduct. The future meetings of the Intergovernmental Working Group will reveal whether or not this attitude is strong enough to overcome the existing difficulties.

Neue *campus* Bücher zur Internationalen Wirtschaft

C. Deubner, U. Rehfeldt, F. Schlupp, G. Zieburg Die Internationalisierung des Kapitals

Neue Theorien in der internationalen Diskussion
1979. 277 S., DM 39,–

Dieses Buch behandelt Fragen, die im Mittelpunkt des wissenschaftlichen und politischen Interesses stehen: Wirtschaftskrise, internationale Arbeitsteilung, Konkurrenz zwischen hochindustrialisierten Ländern. Wegen ihrer extremen Weltmarktabhängigkeit ist die BRD von diesen Strukturveränderungen besonders betroffen. Um so mehr wird in Lehre und Forschung wie in der politischen Praxis beklagt, daß die alten theoretischen Konzeptionen und politischen Instrumentarien nicht mehr ausreichen, um die Determinanten und Konsequenzen der Internationalisierung erfassen zu können. Das Buch gibt einen Überblick über den neuesten internationalen Diskussionsstand.

Barbara E. Mettler-Meibom Internationalisierung der Produktion und Regionalentwicklung

Elsaß und Lothringen als Beispiele
1979. 265 S., DM 34,–

Von der Forschung vernachlässigt wurde bisher das unmittelbare sozioökonomische Umfeld ausländischer Kapitalanlagen, und zwar sowohl hinsichtlich der Ursachen und Rahmenbedingungen, die aus diesem Umfeld für den Internationalisierungsprozeß der Produktion erwachsen, wie auch hinsichtlich der sozioökonomischen Folgewirkungen im Anlageraum. Die Arbeit stößt in diese Forschungs- und Wissenslücke vor, indem sie anhand von zwei Fallstudien umfangreiches Material über die Wechselwirkung zwischen Internationalisierung der Produktion und Regionalentwicklung zusammenträgt und analysiert.

Eva Senghaas-Knobloch Reproduktion von Arbeitskraft in der Weltgesellschaft

Zur Programmatik der Internationalen Arbeitsorganisation
1979. 306 S., DM 38,–

Das Buch vermittelt den Hintergrund für die gegenwärtige diskutierte „Politisierungskrise“ der Internationalen Arbeitsorganisation (IAO). Die Veränderung der Weltgesellschaft bildete für die IAO eine Herausforderung, die zur Veränderung von Problembestimmung und Problemlösung führte. Die mangelnde materiale Grundlage für eine standardisierende und normsetzende Tätigkeit in den Drittweltländern wurde mit zunehmender Aktivität im engeren entwicklungspolitischen Sinn beantwortet.

Campus Verlag Schumannstraße 65 6000 Frankfurt/M.