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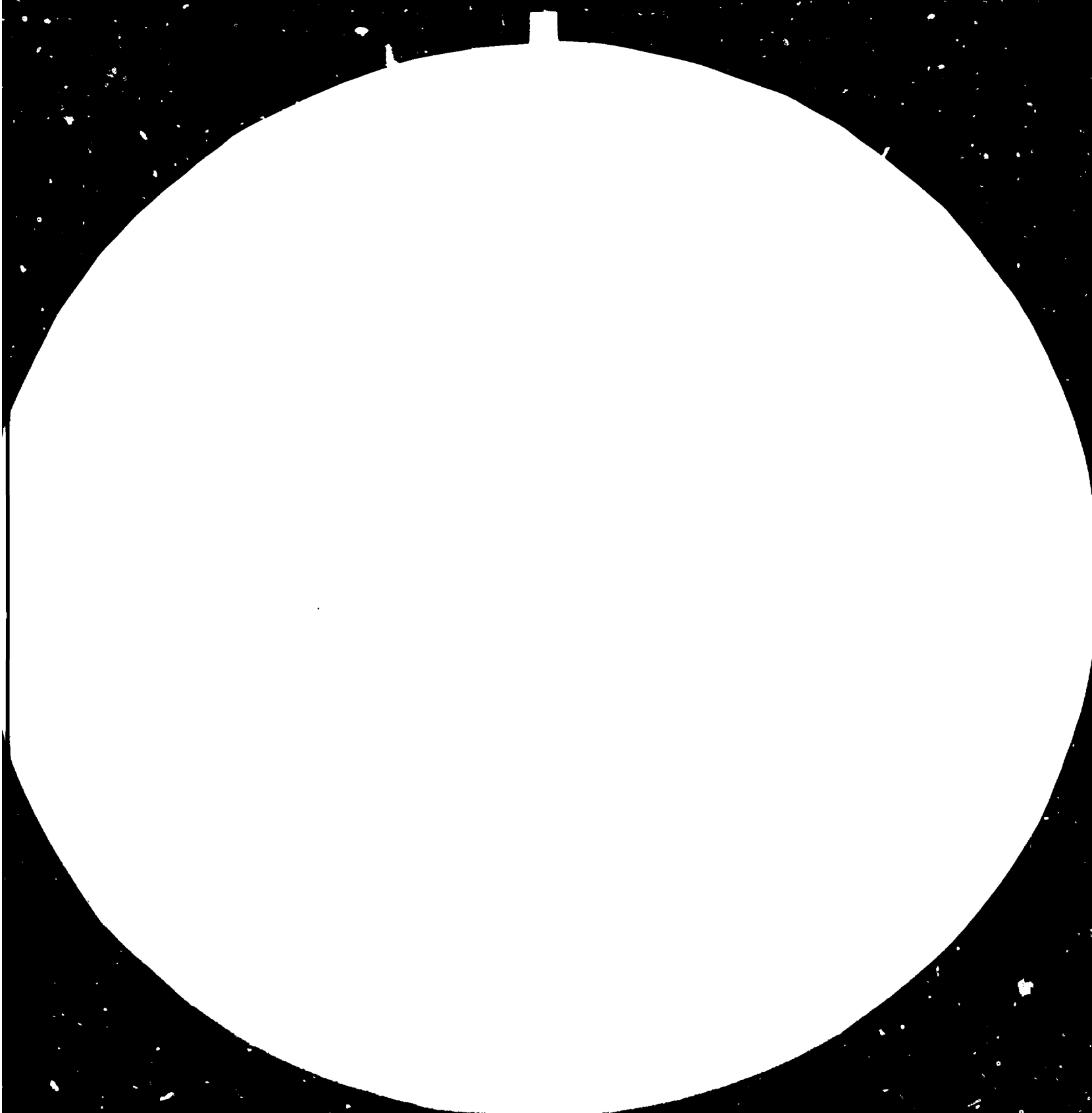

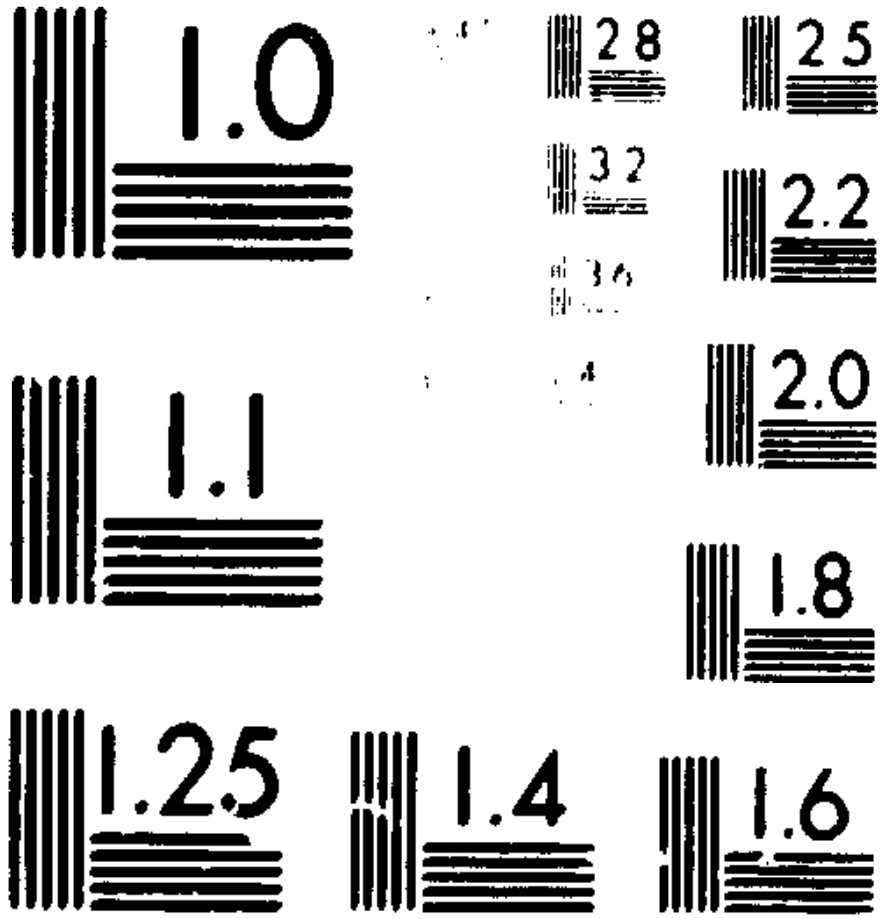

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# Problems of Control of Transnational * Corporations.

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698

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** IDC: Institute for Developing Countries.

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There is almost no international organization, regional grouping, syndicate or important public organization which is not undertaking measures or formulating policies in connection with the operation of transnational corporations (TNCs).

Important changes had already occured in developing countries regarding their relations with foreign investors even before the first beginnings of international action on a code of behaviour. These changes are in the first instance causing far-reaching implications in the process of decolonialization. From the mid-sixties developing countries have been reexamining evermore intensely their policies towards foreign investors and have been trying to formulate new fundaments and principles for these relationships.

Most important is the fact that new national legal regulations are emerging to promote new principles and norms in the relationships with foreign investors. The endeavors of developing countries have to be viewed through their exertions to bring about full control over their natural and economic resources, and therefore the main aim of legislation was to promote as the norm full sovereignty over natural

resources. As a part of this trend towards everincreasing national control over international enterprises emphasis was given to the formulation of regulations and norms for the behaviour of such enterprises and to changing existing contractual relationships with regard to exploitation of mineral raw materials. New legislation and new contractual forms (instead of the traditional concessions to foreign companies) were directed towards affirmation of national sovereignty and control over the entire process of foreign investment. The new contractual relationships were intended to ensure a more equal distribution of benefits and control by the host country over the research, use and marketing of mineral raw materials. Basic characteristics of the new investment regulations include an affirmation of the right to nationalize foreign property, in part or totally, and emergence of new criteria for determining compensation of nationalized property along with regulations for settling investment disputes.

These changes didn't of course proceed smoothly or peacefully. In spite of legal-institutional changes the old and unjust relationships between foreign investors and host countries were rarely kept. A certain number of transnational corporations did accept changes in the existing contractual arrangements. These changes were achieved through negotiations by these corporations who were trying to maintain good relations with the host country in order to reach mutual benefits through new contractual relationships. However, many corporations did not want to adjust to the new trend of change and

refused from the start to negotiate new contracts with the host countries. When these host countries were compelled, in order to materialize their own interests, to undertake expropriation measures they were exposed to the pressure to pay "immediate, adequate and effective" compensation.

Transnational corporations and their parent countries weren't satisfied with these new trends in developing countries towards national control of foreign investors and a strengthening of national sovereignty. The transnational corporations were trying to defend through "international law" their claims which were directed above all towards the protection of the existing positions of private investors.

Developing countries were categorically contesting that transnational corporations should be treated on the same level as nations and arguing that these corporations are not subject to international law. Here the fundamental starting position is that the principle of permanent sovereignty of the people over natural resoruces entirely undermines every argument that some quasi-sovereign rights should be given to transnational corporations which would, in effect, put these corporations on the same level as sovereign states. In this developing countries saw an attempt to restrict their sovereignty and to protect the position of transnational corporations with (traditional) international norms which would have priority over national legal norms.

Thus a certain duality exists in the position of developing countries; on one hand they are struggling against such international norms which originated in the colonial era and on the other hand they have a tremendous need for

international law to provide indispensable support in the often unbalanced and rough confrontation with the powerful giants of capital.

Although the most important area and form of control of transnational corporations is the control of their activity within the host country it is not in itself sufficient to defend national interests. Because transnational corporations generally create a structure in which host countries' economies are dependent on the foreign world it is very difficult to effect desirable changes through measures and actions on non-united levels. The New International Economic Order is demanding concrete solutions to materialize the concept of self-reliance so that economic collaboration and integration are supplemented with a common approach by developing countries to transnational corporations first on a regional but then on a wider level.

Nevertheless, it is obvious that it is very difficult to unify policies and approaches of developing countries towards foreign private capital and to achieve harmonization of their legal regulations despite the fact that they have, in principle, the same interests to co-operate with transnational corporations based on new fundaments. The fact is that very often very great differences exist among developing countries themselves in socio-economic systems, social structure and socio-ideological orientation and thus decision-making about the size, character, conditions and forms of collaboration with foreign companies have an important impact on every country with regard to internal social, political and

economic development.

Although the approaches, institutions, legal instruments and methods of regulation of transnational corporations are different among developing countries to eliminate the negative effects and bad experiences of collaboration with transnational corporations, and particularly to increase the bargaining power of developing countries, the need to harmonize the legal-organizational conditions to regulate the activity of transnational corporations is stressed together with the need to coordinate economic measures to regulate foreign capital investments. The expression of this need has led some interesting attempts and experiences e.g. investment regulations of the countries of the ANDEAN Pact or the already formulated code of conduct by SELA (Latin American Economic System).

In order to achieve effective control of transnational corporations measures and actions in three areas are necessary: singular (national level), specific (developing countries) and general (international community). Basically the relationship between developing countries and transnational corporations could be better improved and harmonized if the regulations applied were universally accepted i.e. accepted by the parent country and the host country.

From this originates the developing countries' vital interest in international negotiations about a Code of Conduct and general development of international laws "periphery".

In the early stage of the activity of the United

Nations Commission for Transnational Corporations and in particular during the first and second sessions, there was a very strong tendency towards regulation of foreign investment by means of limiting its negative effects. However, later development received different emphasis because there was increasing insistence on a balanced approach.

There is a strong impression (particularly bearing in mind the effect of developed countries and developing countries which we have just described) that the Code is being formulated mostly in concordance with the interests of developed countries and transnational corporations.

The Inter-governmental Group has after 17 sessions (during the period 1977-1982) finalized its activity on producing a Code of Conduct and has submitted its Draft Code to the UN Commission for Transnational Corporations at its 8th session (Manilla, 30 August - 10 September 1982). From the report of the Inter-governmental Group one can see that the delegations have various views on the further development of activity which is centred around the final version of the Code of Conduct. Most delegations have recommended that the UN Commission for Transnational Corporations, which is also open to all other countries, finishes the work on the Code of Conduct by the beginning of 1983 while a certain number of delegations are giving priority to continuation of work on the Code of Conduct within the Inter-governmental Group.

Despite the undeniable success and the important achievements by the Inter-governmental Group which have

pioneered this venture and with very controversial material succeeded in producing at least an incomplete version of a code of conduct, one should stress that some most important provisions remain in dispute and that exactly in the dispute of these provisions the widest gaps in attitudes are seen. These primarily concern a very important part of the Code which regulates treatment of transnational corporations (the problem of the so-called national treatment; nationalization and compensation; jurisdiction). Especially disputed parts of the Code are the preamble and aims, definition of a transnational corporation, activity of these corporations in South Africa, provisions which represent a direct link with "international law" (effects and implication of citing "international law" and above all its content and meaning).

Of great importance is how the negotiating parties are going to treat the finalized draft code when they themselves have not reached common agreement as to the disputed provisions. From the point of view of developing countries there seem to exist two possibilities. With respect to the first, orientation towards completion of work on the Code in the shortest possible time, orientation on achieving agreement about provisions in the dispute which would emphasize the need for flexibility by developing countries and even to a certain recognition of the claims of developed countries at the expense of their own interests. Such an orietation would perhaps be desirable and fruitful if only the least disputed provisions are considered i.e. where there is the least difference in opinion. However, in the case of the

more sensitive provisons which have the most far-reaching implications such a negotiating orientation would be justified only in so far as the other negotiating party (industrially developed countries) is ready to agree to mutual concessions in order to find a balanced solution and a generally acceptable compromise.

However, the experience of previous negotiations clearly showed that developed countries strictly defended their own positions and were even uncompromising in their main attitudes. This was one of the main reasons that the negotiations lasted so long (the original deadline for the Draft Code was Spring 1978). Being better prepared and sometimes more skilful in negotiations, developed countries succeeded to influence more solutions in the Code to positions which were closer to their interests than to the interests of developing countries.

Therefore, we consider that at this moment the more appropriate orientation for the developing countries would be that which would lead to adoption of an incomplete version of the Code of Conduct, provided that the procedure for future amending of the Code is specified, for reaching consensus about the remaining disputed issues, through international negotiations. It is very probable that in the near future an agreement could be reached by a compromise in attitudes of a whole range of provisions which are the least disputed. For developing countries it would be more favourable if the Code of Conduct were not adopted rather than adopt such a Code which would have as a final solution international law as the basis of authority and power, thus

at the expense of their interests would mean the legalization of unjust relationships for a great number of years to come.

In the case of adoption of an incomplete code i.e. without the main disputed issues, every country would somehow use its own ways and means to defend its interests. Even such an "abbreviated" code would contain a great number of useful and important provisions whose implementation would be an important step in the international regulation of transnational corporations. The issues would remain unregulated until adequate solutions were found through international agreements. However, the solution which we are suggesting is not without its disadvantages because it is certainly not in the interest of developing countries at the present moment to omit certain important parts from the Code e.g. provisons which refer to the activity of transnational corporations in South Africa.

Developed countries however are primarily expressing and defending the interests of transnational corporations. Their tactic is simultaneously flexible and strictly uncompromising. Above all, in cases when they consider that the interests of corporations cannot be seriously attacked or jeopardized they are opting for compromises or mitigation from their original positions. In that way they are trying to get concessions from developing countries on those points which they consider to be to their own benefit.

All this means, especially in the case of some developed countries, that they are not ready beyond a certain extent to accept the claims and interests of other participants in negotiations, nor are they able to search more flexibly for

generally accepted solutions. Developed countries are also interested in regulating some aspects of transnational corporations (e.g. tax evasion, transfer prices, some restrictive business practices), although according to our opinion developed countries would prefer less control of transnational corporations rather than submit them to strict control.

It is important that the activity within the United Nations represents a new effort and path for the achievement of badly needed international agreement on relations between countries and foreign investors. In that way essential positions of developing countries would be affirmed and the claims of developed countries accepted in a form which more realistically corresponds to the needs of international development. Such solutions should be pursued to strengthen national sovereignty and control over the behaviour of transnational corporations with simultaneous insurance of adequate protection of foreign investors' interest. It is certainly necessary to create certain criteria and principles for adequate guarantees to foreign investors in order to ensure engagement and collaboration of transnational corporations as potentially important factors in the economic development of developing countries. The point is that a "minimum standard for protection of foreign investment" has to be indeed minimal and it shouldn't follow the strictest norms for protection of private property of developed market economies as it is the obvious tendency of traditional international standards.