

VI. MULTINATIONAL ENTERPRISES

Report of the Secretary-General (A/CN.9/104)*

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GENERAL INTRODUCTION

1. The General Assembly, at its twenty-seventh session, adopted resolution 2928 (XXVII) on the report of the United Nations Commission on International Trade Law on the work of its fifth session. In paragraph 5 of the resolution, the General Assembly invited the Commission "to seek from Governments and interested international organizations information relating to legal problems presented by the different kinds of multinational enterprises, and the implications thereof for the unification and harmonization of international trade law, and to consider, in the light of this information and the results of the available studies, including those by the International Labour Organisation, the United Nations Conference on Trade and Development and the Economic and Social Council, what further steps would be appropriate in this regard".

2. In response to the above invitation by the General Assembly, the Commission, at its sixth session, requested the Secretary-General:

"1. To draw up a questionnaire designed to obtain information concerning legal problems presented by multinational enterprises, and the implications thereof for the unification and harmonization of international trade law, and seeking suggestions as to the areas in respect of which measures might appropriately be taken by the Commission, and to address that questionnaire to Governments and interested international organizations, taking into account the views expressed by representatives during the discussion of the item.

"2. To prepare a report for the Commission's consideration setting forth:

"(a) An analysis of replies to the questionnaire;

"(b) A survey of available studies, including those by United Nations organs and agencies, in so far as those studies disclose problems arising in international trade because of the operations of multinational enterprises, which are susceptible of solution by means of uniform legal rules;

"(c) Suggestions as to the Commission's further course of action, in terms of programme of work and working methods in this particular area.

"3. To place his report before the Commission at a future session, with the timing of submission dependent on the time at which the replies to the questionnaire reach the Secretariat and the studies mentioned above are available, and to submit a progress report at the seventh session."¹

3. In implementation of this decision the following questionnaire was sent to Governments and interested international organizations:

"(1) In your country have problems arisen with respect to multinational enterprises for which a solution should be sought through the development of legal rules? If so, what is the nature of these problems?²

"(2) What objectives should be sought through the development of legal rules?

"(3) Is a national law or regulation in force, or under consideration, in your country which is intended to promote those objectives? If so, what are the provisions of that law or regulation?³

"(4) In your opinion should the objectives mentioned in your reply to question (2) be promoted through the development of international legal rules? If so, which of the following approaches should be used:

"A. A uniform law to be adopted by an international convention, or

¹ Report of the United Nations Commission on International Trade Law on the work of its sixth session, *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017)*, para. 116 (UNCITRAL Yearbook, vol. IV: 1973, part one, II, A).

² In the questionnaire addressed to international organizations this question was worded as follows: "Has your organization become aware of problems with respect to multinational enterprises for which a solution should be sought through the development of legal rules? If so, what is the nature of these problems?"

³ In the questionnaire addressed to international organizations this question was omitted.

"B. Model rules that might be employed, or adopted, in national legislation without the obligation of uniformity, or

"C. Other possible approaches to the development of international legal rules?"

"(5) Do you have other information or suggestions bearing on the future course of action by the United Nations Commission on International Trade Law in this particular area?"

4. A progress report was submitted to the seventh session of the Commission.⁴

5. The present report is in three parts. Part I describes the studies and activities which have taken place within the United Nations system in respect of multinational enterprises. Part II contains an analysis of legal problems presented by multinational enterprises based on an analysis of the replies to the questionnaire received from Governments and interested organizations and on an analysis of studies within the United Nations system. Part III contains the conclusions of those responding to the questionnaire as to the approaches which might be taken in the development of rules in respect of multinational enterprises, and the role of UNCITRAL in that effort, and contains suggestions for future work.

I. STUDIES AND ACTIVITIES WITHIN THE UNITED NATIONS SYSTEM

6. A detailed report of the activities of the United Nations system closely related to the subject of multinational enterprises was recently prepared for the Economic and Social Council by the Department of Economic and Social Affairs of the United Nations Secretariat.⁵ That report shows that, with few exceptions, most of the previous studies within the United Nations system have focused on the economic, social or political implications of multinational enterprises rather than on legal problems which such enterprises may present.

7. The United Nations Conference on Trade and Development (UNCTAD) has launched a programme of work on transfer of technology which encompasses a study of the role of patents.⁶ UNCTAD has also set out a comprehensive work programme in the field of restrictive business practices.⁷ Work on tax treaties and tax problems has been carried out since 1968 by an expert group assisted by the Department of Economic and Social Affairs.⁸ The International Labour Organisation has launched a programme of studies about the role of multinational enterprises in areas of interest to the organization, such as employment, working conditions, labour relations, collective bargaining and development of human resources⁹ which may eventually lead to recommendations of a legal nature.

⁴ A/CN.9/90.

⁵ The impact of transnational corporations on the development process and on international relations; activities of the United Nations system closely related to the subject of transnational corporations: report of the Secretary-General, E/5592. This report will be made available at the eighth session of the Commission.

⁶ *Ibid.*, para. 19. This programme is a continuation of earlier activities of the Economic and Social Council.

⁷ *Ibid.*, para. 38.

⁸ *Ibid.*, paras. 20-22.

⁹ *Ibid.*, paras. 48-50.

8. The first comprehensive study of multinational enterprises by the United Nations was launched only recently as a result of the adoption of resolution 1721 (LIII) by the Economic and Social Council in 1972. The resolution requested the Secretary-General to appoint a group of eminent persons to study the impact of multinational enterprises on development and on international relations. The report of the Group of Eminent Persons,¹⁰ as well as the preparatory report of the Department of Economic and Social Affairs,¹¹ discussed briefly a number of legal problems which are presented by multinational enterprises.

9. In its recommendations the Group of Eminent Persons suggested that prime subjects for future action are the creation of a code of conduct which would be addressed both to multinational enterprises and to Governments, the harmonization of anti-trust policies, and the harmonization of taxation, including the rules on transfer pricing.¹² In addition, the Group "noted... the serious lack of both financial and non-financial information, in usable form, and the desirability of working out agreed international reporting standards in this connexion". It suggested the convening of an expert group on international accounting standards "to identify the information needed, determine how and in what form it should be collected, and decide how it could best be used by all concerned".¹³

10. In addition, the Group of Eminent Persons recommended that a subsidiary body of the Economic and Social Council be established as a permanent forum for the discussion of multinational enterprises and that an information centre be created. In response to these recommendations the Economic and Social Council created a Commission on Transnational Corporations¹⁴ and, subsidiary to it, an Information and Research Centre on Transnational Corporations.¹⁵

11. The Commission is charged, i.a., with

"Undertaking work which may assist the Economic and Social Council in evolving a set of recommendations which, taken together, would represent the basis for a code of conduct dealing with transnational corporations;

"Undertaking work which may assist the Economic and Social Council in considering possible arrangements or agreements on specific aspects relating to transnational corporations with a view to studying the feasibility of formulating a general agreement and, on the basis of a decision of the Council, to consolidating them into a general agreement at a future date."¹⁶

Under paragraph 7 of resolution 1913 (LVII), the Commission on Transnational Corporations is requested to submit to the Economic and Social Council at its sixtieth session (spring 1976):

¹⁰ The impact of multinational corporations on development and on international relations, E/5500/Rev.1, ST/ESA/6 (1974) (United Nations publication, Sales No. E.74.II.A.5) (hereinafter cited as Eminent Persons).

¹¹ Multinational Corporations in World Development, ST/ECA/190 (1973) (United Nations publication, Sales No. E.73.II.A.11) (hereinafter cited as Multinational Corporations).

¹² Eminent Persons, pp. 54-57.

¹³ *Ibid.*, p. 55.

¹⁴ Resolution 1913 (LVII) of 11 December 1974.

¹⁵ Resolution 1908 (LVII) of 2 August 1974.

¹⁶ Resolution 1913 (LVII), paras. 3 (e) and (f).

"A detailed draft programme of work on the full range of issues relating to transnational corporations, including a statement of its proposed priorities within the framework of the following guidelines: the development of a comprehensive information system; preliminary work with the objective of formulating a code of conduct; the undertaking of studies, especially case studies, on the political, economic and social impact of the operations and practices of transnational corporations which seem most urgent; and the definition of transnational corporations;...".

12. The functions of the Centre are: (a) to provide necessary support to the Commission and the Economic and Social Council on matters related to transnational corporations; (b) to develop a comprehensive information system by gathering, analysing and disseminating information; (c) to organize and co-ordinate, at the request of Governments, programmes of technical co-operation in matters related to transnational corporations; and (d) to conduct research on various political, legal, economic and social aspects relating to transnational corporations, including work which might be useful for the elaboration of a code of conduct and specific arrangements and agreements.

13. The Commission on Transnational Corporations held its first session from 17 to 28 March 1975 at which time it considered a draft programme of work for submission to the sixtieth session of the Economic and Social Council in 1976. The resolution by which the Commission was created provides that "the draft programme should be without prejudice to the work undertaken within the United Nations system in related fields".¹⁷

II. ANALYSIS OF LEGAL PROBLEMS PRESENTED BY MULTINATIONAL ENTERPRISES

14. Relatively few replies have been received to the questionnaire on legal problems presented by multinational enterprises.¹⁸ This, and the fact that a number of replies mention issues that are of non-legal character, may explain why no clear pattern of legal issues can be said to emerge from the survey of replies. Hence, the reference to such issues in the paragraphs that follow should not be understood as reflecting a consensus among respondents as to what should be the course of

¹⁷ *Ibid.*, para. 7.

¹⁸ At the time of writing this report, replies to the questionnaire had been received from the Governments of the following countries: Austria, Barbados, Belgium, Canada, Colombia, Costa Rica, Czechoslovakia, Dahomey, Denmark, Ecuador, Fiji, Finland, Germany (Federal Republic of), Indonesia, Italy, Luxembourg, Mexico, Netherlands, Nigeria, Norway, Qatar, Tunisia, United Kingdom, United States of America, and Zaire. Replies have also been received from the following United Nations organizations and agencies, and international and national organizations: United Nations Economic Commission for Europe, United Nations Economic Commission for Latin America, Food and Agriculture Organization of the United Nations, European Communities, Council for Mutual Economic Assistance, Council for Europe, Organization for Economic Co-operation and Development, Organization of American States, International Monetary Fund, Bank for International Settlements, African Development Bank, World Intellectual Property Organization, International Chamber of Commerce, International Maritime Committee, Institut du Droit International, International Union of Maritime Insurance, Intergovernmental Maritime Consultative Organization and American Arbitration Association.

action of the Commission in the area of multinational enterprises.

15. This report leaves aside issues, mentioned in several replies, that have no direct bearing on international trade law, such as social problems that may result from the operations of multinational enterprises, labour-management relations and environmental issues.

16. In order to present a more comprehensive analysis of legal issues, this report includes material from the report of the Group of Eminent Persons¹⁹ and the report by the Department of Economic and Social Affairs.²⁰

A. General comments

17. The replies of Governments and interested international organizations show a wide divergence in their attitude towards the extent to which problems have arisen with respect to multinational enterprises for which a solution should be sought through the development and harmonization of legal rules. Some replies suggest that the primary problems are economic, social and political and that there are few legal measures which could be taken at the level of the United Nations at the present time. These replies often refer to the other studies in progress in the United Nations system and suggest that UNCITRAL should await the completion of those studies before deciding on its course of action. Other replies suggest that it is important to proceed carefully so as not to affect adversely the beneficial aspects of the current patterns of international trade and investment. Still other replies, submitted largely by host States of the developing and developed world, suggest that foreign investment in general, and multinational enterprises in particular, cause certain economic, social and political problems, the solution for some of which should be sought through the development and harmonization of legal rules.

B. Problems raised by multinational enterprises

18. The replies indicate that many host countries see the multinational enterprise as a source of distortion of the local economy because of such factors as drains on the local capital market, the hiring of scarce trained personnel and the creation of new and sometimes inappropriate patterns of consumption. Moreover, it is believed that multinational enterprises are less responsive to local economic and social priorities than are local enterprises. It is also believed that the desire to maximize the profits of the entire enterprise measured on a worldwide basis and not to maximize either the profits, and therefore the taxes, or the contribution to economic development which any given component in the enterprise might make, increases the danger that a multinational enterprise will act in ways which are harmful to a host country.²¹ Many replies expressed the view that it was necessary to reduce this danger by appropriate State action.

19. Various replies suggested that appropriate State action might include such measures as requiring closer

¹⁹ Note 10 *supra*.

²⁰ Note 11 *supra*.

²¹ These concerns are discussed in somewhat greater detail in: Eminent Persons, pp. 34-36, and Multinational Corporations, pp. 43-48.

adherence to a national plan of economic development, limitations on the transfer of profits from the host country, stricter control of suspected evasions of monetary controls and of taxation, enactment and enforcement of stricter anti-trust rules, and a requirement of greater job security for local personnel.

20. However, it has been observed that no one State has jurisdiction over all the activities of a multinational enterprise,²² or even over all the activities of the enterprise which affect the economy of a given State. A decision whether or not to make further investments, the determination of hiring policies, the establishment of the price of supplies purchased from or sold to an affiliated company, all these may have been made in another country and be effectively free from control by the country most concerned.

21. Moreover, the fractionalization of jurisdiction may also mean that a given State has no means of acquiring from the parent company or from subsidiaries of the enterprise in other countries some of the information directly relevant to activities of the enterprise in that State. Furthermore, the information it does receive may have been prepared on the basis of accounting and statistical principles different from those generally in use in that State, thereby making the information difficult to analyse.

C. Multilateral actions to meet the problems

22. In order to reduce the consequences which follow from the fractionalization of jurisdiction and the inadequacy of information, many replies called for the harmonization of governmental policies towards multinational enterprises and increased co-operation between States, particularly in respect of the exchange of information. Among the specific measures recommended by the Group of Eminent Persons are the following:

(a) Home and host countries should explore, with the help of the appropriate United Nations body, the possibility of concluding an international agreement regulating the issue of extraterritoriality of jurisdiction.²³

(b) Home and host countries, preferably through an international agreement, should prohibit the market allocation of exports by multinational corporations, unless it can be shown that such allocations are necessary to secure other benefits to the countries concerned.²⁴

(c) Home and host countries should introduce provisions into bilateral tax treaties for the exchange of available information, and should consider the feasibility of an international agreement on the rules concerning transfer pricing for purposes of taxation.²⁵

(d) Bilateral tax treaties should be as uniform as possible so as to prepare the way for an international tax agreement. Developed countries should, without delay, embark on a policy of entering into such treaties with developing countries.²⁶

(e) An expert group on international accounting standards should be convened, under the auspices of

the Commission on Transnational Corporations, to develop international standards of disclosure, accounting and reporting.²⁷

III. EXISTING NATIONAL LEGISLATION

23. One item in the questionnaire addressed to Governments was whether a national law or regulation was in force or under consideration in the respondent country which was intended to promote solutions to the problems raised by multinational enterprises. From an analysis of the replies it appears that legislation specifically directed at multinational enterprises is in force or under consideration in only a few countries. In addition, a regional approach is being attempted by the States of the Andean Group.²⁸

24. A number of States have enacted investment laws, some of which govern all investment within the State, both domestic and foreign, others of which govern only foreign investment. An analysis of the investment laws of 26 States is to be found in the annex. A key factor in all these statutes is the requirement that the foreign investor divulge extensive information prior to authorization of the original investment and, frequently, during the course of performance.²⁹

25. Some States have enacted disinvestment laws by which the foreign investor is required to transfer all or a specified part of the ownership of the local subsidiary to local owners over a period of time.

26. Several countries have attempted to control the prices of goods and services which are transferred between related companies in different countries by enacting statutes authorizing extensive audits of the corporate books and prescribing accounting standards for the determination of the transfer price.

27. In addition, in every country there are many laws which, without being specifically directed at foreign investment or multinational enterprises, are significant for the operation of such enterprises. Such statutes include the laws governing the organization and structure of corporations, the transfer of shares, takeover bids, the organization of labour unions and the right of labour to information about corporate plans and operations or to participate in management decisions. In a broader sense all commercial and economic legislation is of significance to the operations of multinational enterprises.

28. One Government indicates in its reply that many of its laws have been drafted without consideration of the impact of foreign investment or of multinational enterprises and that these laws are at times inadequate for the new situation. The example given is that local subsidiaries of multinational enterprises are usually organized in the corporate form intended for family-owned and other closely held corporations. Consequently, there is no requirement for a yearly deposit of a balance-sheet and profit and loss statement in a public registry, as other corporations whose shares are more widely held are required to do. Therefore, this potential source of information about the performance of multinational enterprises in that State is not available.

²² Multinational corporations, pp. 43-44.

²³ Eminent Persons, p. 50.

²⁴ *Ibid.*, p. 85.

²⁵ *Ibid.*, p. 89.

²⁶ *Ibid.*, p. 92.

²⁷ *Ibid.*, p. 95.

²⁸ A short description of the measures taken by the Andean Group can be found in the annex, paras. 30-33.

²⁹ See annex, paras. 7-10, 20-22.

IV. CONCLUSIONS AND FUTURE WORK

A. Approaches to the development of rules of law

29. The responding Governments and interested organizations expressed a range of views whether one approach to the development of international legal rules in respect of multinational enterprises was preferable to any other approach. Some replies noted that it would be premature to adopt a specific position until the substance of the intended rules was better known. However, the most widely stated position is that the primary need is the development of appropriate rules of national law. There was also general agreement that those rules should be harmonized between the home and host countries.

30. Many of the replies suggested that if UNCITRAL were to undertake the development and harmonization of legal rules affecting multinational enterprises, it should be by means of model rules without obligation of uniformity so as to preserve maximum flexibility. Other replies suggested that uniform rules would be more favourable in principle, but some of them expressed a doubt whether uniformity was attainable in this area.

31. A number of replies suggest that international agreements are the best means of unifying aspects of certain subjects such as competition, taxation, conflict of laws, and disclosure of information.

B. Role of UNCITRAL

32. Many of the replies express doubt that UNCITRAL is an appropriate body to consider multinational enterprises. These replies point out that the problems are primarily economic, social and political rather than legal. The view is expressed that most of the legal problems which do exist are far removed from the subjects of commercial law with which UNCITRAL has, so far, primarily concerned itself.

33. Another view expressed is that UNCITRAL should not undertake any further work in respect of multinational enterprises until the studies now in progress in international organizations and the conclusions therefrom are available. Since the submission of the replies, the Commission on Transnational Corporations and the Information and Research Centre on Transnational Corporations have been created by the Economic and Social Council in conformity with the recommendations of the Group of Eminent Persons.³⁰ It would be consistent with the view expressed above to await the studies which these bodies will undertake.

34. Yet another view is that UNCITRAL might proceed to study the existing national rules in some area of the law as they pertain to multinational enterprises. The most common suggestions made are in respect of company law and the disclosure of information.

35. One particular suggestion was that it may be possible to arrive at a fair degree of uniformity in accounting. It is pointed out that the basis of accounting principles varies from jurisdiction to jurisdiction, a situation which makes it difficult for persons in any single jurisdiction to understand the significance of the

financial statements of some multinational enterprises or to compare their financial statements with those of local corporations in the same industry.

C. Commission on Transnational Corporations

36. Both the Commission on Transnational Corporations and the Information and Research Centre on Transnational Corporations may generate a more detailed analysis of the problems relating to multinational enterprises than is presently available and their conclusions may facilitate the identification of the fields in which the most effective work could be undertaken by UNCITRAL.

37. However, both the new Commission and the Research Centre will need a period of time before they are organized and able to reach any conclusions. In the meantime UNCITRAL could commence its own studies of any problems which appear susceptible to the development or harmonization of legal rules.

D. Future work

38. The Commission may wish to consider the following courses of action with respect to its work in the field of multinational enterprises:

(a) In view of the complex nature of the subject, involving not only legal issues but also issues of an economic, social and political character which may have a bearing on the formulation of legal rules, the Commission may wish to follow closely the work of the newly created Commission on Transnational Corporations and the studies of the Information and Research Centre on Transnational Corporations. The Commission may wish to defer a decision on its own programme of work in this field until the Commission on Transnational Corporations has identified specific legal issues that would be susceptible of action by the Commission. If the Commission were to take this course of action, it may wish to inform the Commission on Transnational Corporations of its decisions and of its readiness to consider favourably any request which the Commission on Transnational Corporations might address to it.

It may be noted that the above course of action was advocated by a number of representatives during the debate in the Sixth Committee of the General Assembly on the report of the Commission on the work of its seventh session. An identical suggestion was also made in the replies of several Governments to the questionnaire on multinational enterprises.³¹

(b) Among the suggestions made in respect of a programme of work of the Commission in the field of multinational enterprises, the following matters would seem to be relevant, directly or indirectly, in the context of international trade:

(i) The development of model rules which States could embody in their national legislation with a view to exercising a greater degree of control over the activities of multinational enterprises. In this respect, the Commission may wish to request the Secretariat to prepare a comparative study of legislative rules in company laws,

³⁰ Para. 10, *supra*.

³¹ See para. 33 *supra*.

investment laws, etc. that are designed to elicit information about such activities.

- (ii) The development of an information system. In this respect, several replies mentioned the need for standardized accounting procedures and statistical systems for specific data reporting. Some replies suggested that an international convention should be formulated on the exchange of information, on disclosure, and on consultation and conciliation.

39. Finally, it may be noted that the report of the Secretary-General on the draft programme of work on the full range of issues relating to transnational corporations submitted to the first session of the Commission

on Transnational Corporations envisages that research on political, legal, economic and social aspects of transnational corporations could be undertaken by the Information and Research Centre on Transnational Corporations "in collaboration, as appropriate, with other departments, organizations and agencies of the United Nations system or with the assistance of *ad hoc* expert bodies."³²

ANNEX

Note on investment laws

[The annex is not reproduced in the present volume]

³² E/C.10/2, para. 16.