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MULTINATIONALS: FIRST VICTIM OF THE U.N. WAR ON FREE ENTERPRISE

INTRODUCTION

Multinational corporations are under attack by the U.N. These companies, which maintain major operations in two or more countries outside their home base, have been the object of a series of attempts to regulate, legislate, and restrict their corporate activities by the official agencies of the United Nations and those consumer groups that maintain nongovernmental (NGO) status at the U.N. With increasing frequency and decreasing concern for the impact on global economic health, the U.N. is attempting to enact codes for such areas as technology transfer, accounting and reporting, illicit payments, and the marketing of breastmilk substitutes and pharmaceutical products. The U.N. has already succeeded in enacting a code for so-called restrictive business practices.

The assault on the multinational corporation--or MNC, as it is widely known¹--rages on other fronts as well. There is, for instance, the campaign by several developing or Third World nations, under the auspices of the World Intellectual Property Organization (WIPO), to revise the 1883 Paris Convention on Patents. The proposed changes would allow any Third World nation, in effect, to ignore traditional patent rights, thereby depriving the original patent owner of the rewards of his invention.

¹ "Multinational corporation" (MNC) is the most commonly employed term in the United States to describe companies operating in several countries. The Department of State, however, refers to these enterprises as transnational enterprises (TNEs). The Organization for Economic Cooperation and Development (OECD) uses the term "multinational enterprise" (MNE) and the United Nations uses the term "transnational corporation" (TNC). The term "MNC" is used in this paper.

Codes that have been adopted already by the U.N. General Assembly, or separate agencies of the U.N., or are still under negotiation within the framework of the United Nations, include:

- 1) The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, under the auspices of the U.N. Conference on Trade and Development (UNCTAD), adopted by the General Assembly in December 1980;
- 2) The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of the International Labor Organization (ILO Tripartite Declaration), adopted by the ILO Governing Body in 1977;
- 3) Draft International Code of Conduct on the Transfer of Technology (UNCTAD Transfer of Technology Code), still being negotiated under the auspices of UNCTAD;
- 4) Adoption of a final report (April 1982) to the U.N. Commission on Transnational Corporations by the Ad Hoc Intergovernmental Group of Experts on International Standards of Accounting and Reporting, recommending use of a minimum "disclosure list" of financial and nonfinancial items for reporting by MNCs and their individual enterprises;
- 5) U.N. Code of Conduct for Transnational Corporations, in preparation, under the auspices of the U.N. Commission on Transnational Corporations, an arm of the U.N. Economic and Social Council (ECOSOC); the Eighth Session of the Commission began in late August 1982 in Manila to consider future work on the Code;
- 6) The International Infant Formula Marketing Code, adopted by the U.N.'s World Health Organization (WHO) in 1980, with the U.S. as the lone vote in opposition, and several other nations in abstention.

In addition to the restrictive and narrow codes proposed within various U.N. agencies, the MNCs also must ward off an assault from a growing and potentially dangerous, internationally based, and self-styled "consumerist" movement that already is helping set the agenda at various U.N. agencies. This movement, spearheaded by one of the U.N.'s most influential NGOs the International Organization of Consumer Unions (IOCU), is bolstering an anti-capitalist and anti-free enterprise bias, which in the past decade has grown to alarming proportions within U.N. documents and literature.

Various consumer, union, and church organizations have been banding together and refining and sharing their techniques. Though many of these groups may be well-intentioned, they pose a growing threat--not only to the MNCs, but sadly to the very citizens of the least developed nations for whom they purport to be fighting. These groups are developing international networks that allow them to attract world attention and through their

rhetoric to distort single issues. And at many U.N. agencies, such as the WHO, these NGOs sit as official participants in critical negotiations.²

In the wake of the adoption of the WHO's Infant Formula Marketing Code,³ the U.N. Economic and Social Council (ECOSOC), the U.N. Center on Transnational Corporations, the U.N. Environmental Program, and the WHO have turned their attention to the so-called "dumping" of hazardous chemicals and unsafe pharmaceuticals in developing countries. This initiative is part of a global campaign, which signals yet another attempt by U.N. agencies to single out specific industries for affirmative action and demonstrates the strength of the consumerist lobby within the official U.N. agencies.⁴

The assault on the MNCs comes at a time when it is increasingly evident that the MNC contributes importantly to economic development within Third World nations and, in some cases, to protecting and improving the status of health in the poorest countries with their greater exposure to famine and a myriad of physical ills and often fatal disease. Indeed, at a time of shrinking multilateral and bilateral development assistance outlays, it has become crucial for developing countries to create a hospitable climate that will attract MNC investment.

Almost always, developing countries that have created the most attractive climates for such investment also benefit from increases in private direct investment, as well as portfolio investment and export credits. With sound private investment policies, these countries are also often able to convince their benefactors among the industrialized countries and the multilateral development banks of their economic soundness and credit worthiness.⁵

² Business International, Volume XXVII, No. 42 (October 17, 1980), p. 329.

³ For a complete and lucid analysis of the controversy surrounding the drafting and implementation of the Infant Formula Marketing Code, see Guy M. Hicks, "The Infant Formula Controversy," Heritage Foundation Backgrounder No. 142, May 14, 1981.

⁴ International Organizations Monitoring Service (IOMS), Bulletin No. 81-55, August 10, 1981, p. 1.

⁵ Brazil, a country which has fostered a strong private investment climate, provides a useful example. Between 1977 and 1979, private sector net investment in Brazil increased 137 percent from \$1.9 billion to \$4.5 billion, while net bilateral development aid decreased from \$57.8 million to \$53.8 million, and net multilateral aid increased modestly from \$79.5 million to \$106.8 million. Today, Brazil is receiving only 5 percent of its total capital from inflows from the multilateral development banks, and has had its annual commitment from the Inter-American Development Bank capped at \$250 million for four years (1980-83). In 1981, total export earnings were \$23.3 billion, of which debt service represented 67 percent. Although Brazil continues to carry a tremendous debt load through borrowings from both the private and multilateral development banks, it continues to be very successful in promoting opportunities for private investment. Brazil offers a productive labor force, abundant raw materials, and viable systems of transportation to attract investment in that country's private sector.

A great deal of controversy and debate have surrounded the role of MNCs in developing economies during the past decade. There is widespread acknowledgement, however, of the central contribution of MNCs to the rate of global economic growth in providing an integrated package of technology, financial and physical resources, managerial knowledge, training, entrepreneurial ability, and market outlets. Since most MNCs enter a market in a developing country for the "long haul," they provide sustained back-up and support services. MNCs have a proved capacity to develop new technology and make it work. They take risks in the expectation of financial gains--with a single-minded purpose and motivation to get things done and to secure measurable results that will optimize the return on investment.⁶

It should not be surprising that MNCs account for over 50 percent of total fixed capital investment in a number of developing countries. In Brazil, South Korea, Mexico, and others, foreign direct investment accounts for a very significant 20 percent or more share of capital formation.⁷

The prospect of onerous codes of conduct for technology transfer, accounting and reporting procedures, and overall corporate activities and the proposal to discourage technologically beneficial innovation through the imposition of revised patent legislation pose as great a threat to the economic vitality of many developing nations as to the commercial profitability or success of major MNCs. A British expert in business management within MNCs supports this view:

Consider the outcome if MNC's are made ineffective by massive and detailed controls. What other organization will replace the economic wealth created by the MNC's at a time when it is desperately needed?⁸

He also warns those who would expect too much from the MNCs in terms of their ability to cure both economic and social problems in developing nations:

No matter how economically powerful a company may be, the smallest and weakest nation state has unquestioned and absolute power over the company. Moreover, MNC's are not all-purpose panaceas for the world's ills. They can and do create economic wealth, but how this is distributed is a matter for political discussion. MNCs

⁶ John Humble, The Responsible Multinational Enterprise (London: Foundation for Business Responsibilities, 1975), p. 14.

⁷ Robert G. Hawkings and Ingo Walter, "The Multinational Corporation," in Challenges to a Liberal International Economic Order, edited by Ryan C. Amacher, et al. (Washington, D.C.: American Enterprise Institute, 1979), p. 163.

⁸ Humble, op. cit., p. 72.

help developing countries in many different ways, but they are business institutions, not aid-giving organizations.⁹

If it is apparent that the MNCs can and do bring obvious benefits in terms of increased economic wealth and improved health and well-being to the needy populations of the developing nations, why do these countries demand that the U.N. adopt codes and legislation to discourage private investment in many developing countries? Can it be that an anti-free enterprise milieu is being fostered at the United Nations that attempts to mislead the developing nations? How can the U.N. General Assembly, which under the U.N. Charter has no "legal" right to direct the formulation of either binding or voluntary codes of conduct for multinational corporations, proceed to perform that very task? And how has the U.N., whose Charter makes the promotion of peace and security the core principle of that organization, come to declare de facto war on the MNCs and the free enterprise system? These questions urgently deserve answers.

THE CONCERNS OF DEVELOPING NATIONS

Certain concerns of the developing nations have prompted the United Nations to try to exercise regulatory authority over the activities of MNCs. Among them are:

- 1) The concern about creation of monopoly power within a country in a small group of key industry sectors, particularly automobiles, pharmaceuticals, computers, and oil. Although there is often little competition to the MNC in these sectors within a developing country, the fear remains that decisions about plans and developments in key industry sectors are being made outside the country.
- 2) The concern that the influx of foreign capital may increase the "dependency" of the country receiving MNC investment and "hosting" MNC facilities.
- 3) Concern that MNCs could undermine the developing countries' sovereignty, specifically that they pose a threat to intervene directly in the political affairs of a host country. Examples of this kind were not uncommon in the early days of the MNCs, but are rare in the post-World War II world.
- 4) Concern that the "balance of benefits" between the MNC and the host country are no longer equitable and that initial agreements with the MNCs should be renegotiated. The host nation now may feel that, at the time of the original negotiation, its needs were too great, and negotiating experience too inadequate,

⁹ Ibid.

to obtain a "fair deal."¹⁰ A number of these concerns might once have been warranted; a few still may be, yet the relations between MNCs and host countries have evolved considerably in the past decade.

There is, for example, a growing recognition, that, because foreign aid will at best rise only slowly in the 1980s, many countries are beginning to view direct investment as a critical factor in their development. At the same time, there are indications of greater sophistication and confidence among developing countries in their dealing with MNCs. A recent State Department report notes ironically that, while the level of activity concerning MNCs mounts in the U.N. and its related agencies, less urgency appears to be felt now than in the past for composing "blueprints" that restrict the corporate activities of those entities, and it is more widely recognized that the complex issues under discussion elude simplistic solutions.¹¹

Despite these incipient shifts in the negotiating position of the developing countries, MNCs remain the object of assault within various U.N. agencies, especially the General Assembly. The U.S. must therefore continue to advocate the private sector option for economic development, particularly the establishment of an attractive climate for multinational investment. The U.S. should also continue to assist developing nations in promoting the processes and means for attracting private direct investment. After all, the developing nations stand to gain the most from the increased standards of livelihood and health to which multinational corporations can make a significant contribution.

WHAT IS BEHIND THE ASSAULT ON THE MNCs?

In the 1960s and early 1970s hopes were raised for resolving the fundamental disputes between developed "North" and developing "South" countries through special meetings within and outside the U.N. Rather than fostering a successful dialogue between North and South, the meetings, particularly at the United Nations, have often been confrontational. The developing countries have used the U.N., where they maintain numerical superiority, to demand far-reaching changes in the world economic system without offering anything in return. These demands encompass three broad areas:

- 1) Changes favorable to the less developed countries in the broad economic principles under which economic interaction currently takes place (e.g., primary reliance on market forces for determining the terms of trade, and nondiscrimination);

¹⁰ Humble, op. cit., pp. 8-9.

¹¹ U.S. Department of State, Office of Investment Affairs, Current Status Report: Selected International Organization Activities Relating to Transnational Enterprises, July 1982, p. i.

2) Specific concessions in, and greater amounts of, aid, including generous treatment of exports from developing countries and specific commodity agreements;

3) Greater power in decision making, for example, by moving more negotiations [from the bilateral arena] to the United Nations where votes have more weight.¹²

The spokesmen for the developing nations, particularly the some 120 nations belonging to the Group of 77, contend that the industrial nations owe them these concessions because of alleged injustices during the colonial period and subsequent unfair treaties. They maintain that such concessions are merely a matter of equity.¹³

There are several reasons for the North-South controversy and the assault on MNCs through the United Nations. First, in the short term, Third World leaders need an external scapegoat to explain away the unfulfilled expectations or extremely difficult circumstances of their peoples.

Second, far from being homogeneous, the Third World is diverse and replete with conflicts of interest, such as that between the Organization of Petroleum Exporting Countries (OPEC) and the developing countries with no oil.¹⁴ They are unified mainly by the tactic of confrontation, particularly within the negotiations for the various MNC codes.

Third, there is an unmasked attempt by the developing nations to play upon the industrialized world's feelings of guilt over the wide differences in standard of living between North and South. Thus, the developing countries justify their demands for a redistribution of global wealth, for which they view the MNCs as a prime vehicle.¹⁵

¹² Timothy W. Stanley, "International Codes of Conduct for MNC's: A Skeptical View of the Process", The American University Law Review, Volume 30, No. 4 (Summer 1981), at note 32, p. 979.

¹³ Stanley, op. cit., p. 987.

¹⁴ There is a wide diversity of interest among the various developing countries. The poorest countries seek increased official development assistance; middle-income countries seek balance-of-payments support and improved conditions for commodity trade; and the wealthier developing countries are most concerned about access to markets for industrial products, technology, and capital. Policies that might help one group of developing countries would be of limited value, or even detrimental to others. See U.S. Department of State, Current Policy "North-South Dialogue," No. 4, 1980.

¹⁵ Stanley, op. cit., p. 988.

It should become increasingly clear to the leadership of the developing countries that schemes for global wealth redistribution, and the rhetoric that supports them, will neither gain the development assistance of industrialized countries, nor attract the investment necessary for growth in the private sector of their economies.

THE NEW INTERNATIONAL ECONOMIC ORDER

An integral part of the schemes for economic change is the New International Economic Order (NIEO), a radical program designed, in part, to increase the level of resource transfers to the poor. Demand for the NIEO, in fact, is one of the few sinews binding the developing states into the Group of 77--or G-77. The NIEO, however, is perhaps more a political than an economic program. Its fundamental goal is to allow the developing nations to secure greater wealth, and reduce their vulnerability in the world economic system at the same time, by creating new institutional structures, growing out of the existing U.N. system, to govern the world economy. These new structures would be controlled by the developing states.¹⁶

Also, this system creates a rationale by which a country pursuing a moderate "prudent" policy that does not challenge existing international norms in some areas is justified in endorsing immoderate "imprudent" policies in others.¹⁷ Thus, the NIEO aims at control, and not merely at wealth.

A key element of the NIEO is the U.N. General Assembly resolution of 1974 containing the Charter of Economic Rights and Duties of States.¹⁸ The significance of the MNCs in the changes sought by the NIEO is manifested in Article 2 of this document which declares that each state has a right

--to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules, and regulations, and conform with its economic and social policies;

¹⁶ Stephen D. Krasner, "The United Nations and Political Conflict Between the North and South," a background paper prepared for the U.N. Association of the United States for the project on: "The U.N. System at 35: International Organizations and the Management of Global Change," April 1980, p. 8.

¹⁷ For instance, under the presidency of Luis Echevarria, Mexico became a leader of the Third World Movement at the U.N. Conference on Trade and Development (UNCTAD), one of the most active anti-free enterprise organizations at the United Nations. At the same time, the Mexican Ministries of Development and Finance were welcoming investment in several sectors of the Mexican economy. See *ibid*, p. 9.

¹⁸ G.A. Resolution 3281, 29 U.N. GAOR, Supp. (no. 30) 50, U.N. Document A 19631 (1974).

--to nationalize, expropriate, or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.¹⁹

Thus, while the Declaration on the Establishment of a New International Economic Order²⁰ and the Charter of Economic Rights and Duties of States recognize that "appropriate compensation" for nationalization of MNCs should be paid, they also maintain that any disputes are to be settled in terms of the national laws of the host country. "Presumptive relevancy," or the right to intervene, is denied both to international organizations and to home country, that is, the governments of those countries where the specific MNCs are based. These resolutions effectively disallow any power to MNCs vis-a-vis host country governments; under their terms, the multinational firm cannot appeal to its own government or to international law or engage in economic retaliation.²¹

Most technology transfer in the world today is controlled by multinational corporations. The NIEO, however, would impose regulations requiring that host countries receive the transfer of technology and other advantages from MNCs on a bargain, concessional basis. This claim by the developing countries is based on the widely disputed principle that technology somehow is part of the "common heritage of mankind"--a resource that belongs to no one, to be shared by all countries. Access to technology is perceived as a right rather than as private property that must be purchased.²² In the world of the NIEO, envisioned by the Group of 77, the free enterprise system that protects and rewards those who undertake risks to generate and sell all goods and services would be replaced by a system that would discourage innovation and risk taking, encourage the improper use of technology, and reward the users instead of the generators of the technology.²³

¹⁹ Ibid, Article 2, p. 5. The Charter was preceded by a General Assembly Resolution in 1962 concerning "permanent sovereignty over natural resources, which was used as justification for the numerous nationalizations and expropriations during the 1960s. See G.A. Resolution 1803, 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Document A15217 (1962).

²⁰ G.A. Resolutions 3201 and 3202 (S-VI), 29 U.N. GAOR, Supp. (No. 1) 3,5, U.N. Doc. A19559 (1974).

²¹ Krasner, op. cit., p. 12.

²² Ibid.

²³ Karl P. Sauvart and Hajo Hasenpflug, The New International Economic Order: Confrontation or Cooperation Between North and South? (Boulder, Colorado: Westview Press, 1977), Part V.

The Group of 77 has also outlined the process of negotiations for various multinational corporate codes as a means of realizing the goals of the NIEO. A 1980 resolution of the U.N. Commission on Transnational Corporations confirms that

...the Code of Conduct, which is of the highest priority in the work of the Commission will be an essential contribution in the accomplishment of the goals of the new international development strategy, and the New International Economic Order.²⁴

There can be little argument that many of the developing countries face serious economic and social problems. There are, moreover, significant political as well as moral reasons for developed countries to attempt to alleviate the genuine distress suffered by much of the globe. The problem is that the NIEO, just because it presumes that "everyone everywhere should be entitled to a substantial income by virtue of being alive, regardless of economic performance,"²⁵ does not solve Third World difficulties.

Despite the problems that the adoption of the NIEO would pose for developed and developing countries, some voices in the industrial world back the program. Like their counterparts in the developing countries, these NIEO supporters²⁶ assume that worldwide poverty has been caused by the West, specifically by Western multinational corporations. There is no credible evidence to substantiate this assumption. Though some of the MNCs have done little to make themselves loved,²⁷ they clearly are not the villains causing the social and economic distress of the developing countries. Much more culpable is the oil cartel, whose high prices have offset the benefits of foreign aid in developing countries and have nearly frozen economic growth.²⁸

²⁴ U.N. Commission on Transnational Corporations, Sixth Session, Agenda Item 12, U.N. Document E/c.10/1.38, Para 6 (1980).

²⁵ Peter Bauer and John O'Sullivan, "Foreign Aid for What?" Commentary, December 1978, pp. 41-48.

²⁶ Examples are the Club of Rome and the Brandt Commission. For an analysis of the Brandt Commission and its 1980 Report, see William L. Scully, "The Brandt Commission: Deluding the Third World," Heritage Foundation Background #182, April 30, 1982.

²⁷ The Subcommittee of the Senate Foreign Relations Committee, headed by Senator Frank Church, documented a number of questionable activities by U.S. MNCs during the 1960s and early 1970s. See Multinational Corporations and United States Foreign Policy, Hearings before the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations, 93rd Congress, 1st Session (1973), and 94th Congress, 2nd Session (1976).

²⁸ The cost of oil to the less developed countries went from \$4 billion in 1972 to \$60 billion in 1980, even though volumes of purchases did not increase greatly. Although the recently released annual development report of the World Bank maintains that most developing countries adjusted better than the industrialized countries to the oil shocks of the 1970s, it also maintains that the situation has worsened for the less developed countries since 1979. See: The Economist, August 21, 1982, p. 56.

THE INITIAL ATTACK ON THE MNC'S

Although global corporations are neither an American invention nor an American phenomenon, it was the purported relationship of U.S.-based MNCs with the U.S. government in their overseas operations, particularly in Latin America, that led to hearings before the Senate Foreign Relations Committee intermittently from 1973 to 1976 on "Multinational Corporations and U.S. Foreign Policy."²⁹ The Senate investigation of the offshore operations of U.S.-based MNCs helped provide an incentive for international scrutiny of MNC operations. The Secretary-General of the United Nations in 1974 established the "Group of Eminent Persons" to study the role of the MNC in the process of Third World Development.³⁰ This group subsequently proposed the establishment of the U.N. Commission on Transnational Corporations (UNCTC).

In 1974, the General Assembly created both the Commission and the Information and Research Center on Transnational Corporations under the auspices of the U.N. Economic and Social Council (ECOSOC).³¹ The General Assembly Resolution establishing the U.N. Commission on Transnational Corporations empowered it, among other things,

--to act as a focal point within the United Nations for comprehensive consideration of issues relating to multinational corporations;

--to undertake work leading to the adoption of specific arrangements or agreements in selected areas pertaining to the activities of multinational corporations;

--to make recommendations that would constitute a code of conduct for governments and multinational corporations to be considered and adopted by the Economic and Social Council; and review, in light of the experience, the effective application and continuing applicability of such recommendations;

--to explore the possibility of concluding a general agreement on multinational corporations, enforceable by appropriate machinery, to which participating countries would adhere by means

²⁹ Subcommittee on Multinational Corporations, *op. cit.*

³⁰ United Nations, Department of Economic and Social Affairs, The Impact of Multinational Corporations on Development and on International Relations, E/550/Rev. 1/ST/ESA/6, New York, 1974.

³¹ The UNCTC was established pursuant to ECOSOC Resolution 1913, U.N. ESCOR, Supp. (No. 1A) 31, U.N. Document E/557/ Add. 1 (1975). The information and Research Center was established by ECOSOC Resolution 1908, 57 U.N. ESCOR, Supp. (No. 1) 13, U.N. Document E/5570 (1974).

of international treaty.³²

The Group of Eminent Persons' report established a spearhead within the U.N. for the assault on the MNCs. It provided the framework for subsequent MNC codes under the auspices of various U.N. agencies. Completely disregarded was the fact that the General Assembly, within the guidance provided by the U.N. Charter, has no "legal" right to direct the formulation of either binding or voluntary codes for multinational corporations. Nevertheless, during the 1970s, the General Assembly, recognizing that "multinational corporations are important actors on the world stage,"³³ began a series of steps to regulate and restrict the corporate activities of MNCs in the developing world.

THE CONTINUING ASSAULT

Even before the watershed year of 1974 which saw the publication of the Declaration on the Establishment of a New International Economic Order, the Charter of Economic Rights and Duties of States, and the Report of Eminent Persons, the attack on multinational corporations and on the free enterprise system had begun. In March 1973, for example, a Group of Experts from the United Nations Conference on Trade and Development (UNCTAD) met to identify several so-called Restrictive Business Practices, resulting from the activities of multinational corporations, which were claimed to adversely affect the trade and development of developing countries. However, final agreement on a "Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices" was not reached until April 1980.

During the same year in which these documents appeared, the Trade and Development Board of the United Nations Conference on Trade and Development (UNCTAD) transformed a 69-member Intergovernmental Group on Transfer of Technology into a permanent committee. Even before this committee convened in November 1975, the UNCTAD Secretariat established a Group of Experts on a Code of Conduct on Technology Transfer and one on patent systems.³⁴

Following the second session of the Interim Committee of the U.N. Conference on an International Code of Conduct on the Transfer of Technology in May 1982, there remained significant differences between the Group of 77 and the group of industrialized nations

³² U.N. Document, E/5500/Rev.1/ST/ESA/6, Report of the Secretary-General, p. 7.

³³ Ibid, p.5.

³⁴ Work on patent systems has since been shifted to WIPO.

(Group B Nations), particularly on the question of applicable law for contractual relations and settlement of disputes. In a code of conduct for technology transfer, the Group of 77 would seek to restrict the freedom of choice of the parties contracting for the transfer so that the application of national laws in the developing nations would severely limit the choice of other applicable laws which those parties had made. Although the industrialized nations agree that national laws have a role to play in such cases, they are justifiably not prepared to see the principle of freedom of choice completely restricted by clauses in an international code.

In March 1975, at the Second General Conference of the United Nations Industrial Development Organization, a "Declaration and Plan of Action of Industrial Development and Coordination" was adopted with the intended goal of increasing the developing countries' share of the world industrial production to 25 percent by the year 2000, compared to the 1981 figure of 9 percent. This program would also seek the mandatory transfer of manufacturing and technological know-how from the industrialized states to the developing ones.

Also in 1975, the proposal by the developing countries, within the World Intellectual Property Organization, for damaging and restrictive changes in the Paris Convention on Patents was first discussed. These changes, which would provide neither protection nor reward to the originator of a technology who had taken risks to develop it, have been discussed continuously since that time, most recently at a conference of the World Intellectual Property Organization in the Fall of 1982.

In 1976, the International Labor Organization's Tripartite Advisory Committee on the Relationship of Multinational Enterprises and Social Policy recommended that the International Labor Organization draw up a "Declaration of Principles" concerning the social aspects of MNC activities. A tripartite group completed the code in 1977. The Declaration of Principles was then forwarded to the U.N. Commission on Transnational Corporations, where in September 1978, the Expert Working Group on the U.N. Code of Conduct for Transnational Corporations recommended that the Declaration be cross-referenced in the U.N. Code and annexed to it. This recommendation is still pending.³⁵

Also in 1978, the U.N. Commission on Transnational Corporations, meeting in its Fourth Session to negotiate a Code of Conduct for Transnational Corporations, recommended the creation of an Ad Hoc Intergovernmental Group of Experts on Accounting and Reporting

³⁵ International Organizations Monitoring Service (IOMS), The International Organizations Regulatory Guidebook, International Business-Government Counsellors, Inc., 1982, p. 141. For an in-depth discussion of the activities of the International Labor Organization, see Walter Galenson, The International Labor Organization: Mirroring the U.N.'s Problems (Washington, D.C.: The Heritage Foundation, 1982).

Standards, and endorsed the negotiations of the Economic and Social Council to conclude an illicit payments treaty, which had begun in March 1976.

Using all these agencies of the United Nations and their varied agenda, the Group of 77 has made a concerted effort to effect changes in the World Economic Order, and to increase the political leverage of the developing nations in negotiations with both the industrialized states and the global corporations that maintain a home base in those states. By removing many of the incentives for continued investment and transfer of technology and know-how to the developing states, the Group of 77 has ensured a ringing lack of success for the goals of the New International Economic Order and continued economic and social problems for a large number of developing nations. During some of the negotiations in the U.N. agencies, the developing states have begun to perceive the enormous problems created by either overlooking the creation of incentives, or creating disincentives for private investment in their economies. In other negotiations, the extreme anti-free enterprise bias of the Group of 77, supported to a large degree by the Soviet Union and its East Bloc allies, has continued to hold sway, and to greatly influence the negotiating positions of conference and agency delegates.

Two different negotiations illustrate how the developing nations have carried out their assault on the MNCs, in particular, and in a larger sense, on the entire free enterprise system.

The U.N. Commission on Transnational Corporations: Drafting a Code of Conduct

The U.N. Commission on Transnational Corporations agreed in 1976 that its highest priority was to draft a Code of Conduct for multinational corporations.

Work on the draft began in January 1977 and industrialized and developing nations have accepted several of its provisions. Among them are the statements that MNCs must respect the national sovereignty and laws of their host countries, not interfere in the internal political affairs of the host countries, and adhere to the economic goals and development objectives of the host countries. There is no agreement, however, on the questions of nationalization, compensation, and jurisdiction.³⁶ Overall, the draft text is badly flawed. A major problem is that it fails to

³⁶ The industrialized nations have maintained that the exercise of the sovereign right of states to nationalize property in their jurisdiction is constrained by international obligations and contractual undertakings entered into by states, and that nationalization should also apply to domestic enterprises in comparable situations. See United States Council for International Business, U.N. Report, Vol. 3, No. 5 (June 22, 1982), p. 1.

meet all the criteria which the international business community argues are necessary for a balanced code. As noted by the International Chamber of Commerce, balance requires that

--the code apply equally to all MNCs regardless of the nature of their ownership;

--it embody the principle of national treatment (i.e., that MNCs be treated no differently than national firms);

--it reflect recognition by governments of their responsibilities to treat MNCs fairly and equitably, and in accordance with international law and the contractual obligations to which they have subscribed;

--it include acknowledgement by governments of the need to find solutions to conflicts of jurisdiction;

--it be legally non-binding.³⁷

Complicating the draft process are the adamant views of Moscow. The Soviet Union and its allies insist that their state-owned companies, which have operations in Third World nations, are not true multinational corporations. As such, maintains Moscow, they would not have to abide by the regulations that would govern the activities of Western-based MNCs. The Soviets further argue that MNCs do not operate in the Soviet Union and that the code would not be valid in the U.S.S.R. U.S. negotiators and many other Western nations dispute this point. At the recent meeting of the Commission on Transnational Corporations, which concluded in Manila on September 10, 1982, U.S. negotiators noted some opposition among the developing nations to Moscow's position on these issues and support for the negotiating position of the industrialized nations. However, the issues are still far from being resolved.

The conflicting views of the developing and developed nations have been expressed most strongly over the legal nature of codes of conduct. In the negotiations for a Restrictive Business Practices Code within the U.N Conference on Trade and Development, which concluded in 1980 in the formulation of a non-binding Code, the Western nations were successful in maintaining the position that the code "rules" were recommendations only and that there be no binding dispute settlement formula. The developed nations have held to this position as well during the recent meeting in Manila, and will probably maintain it at the next meeting of the U.N. Commission on Transnational Corporations in 1983.

A binding code would, in theory, have treaty status, thereby requiring the signatories to implement the code through national

³⁷ Ibid.

legislation.³⁸ Furthermore, with a binding code, there would be no assurance that Western-based MNCs in many developing countries would receive adequate due process of law in cases where there is political bias. Experience of American MNCs has shown that such bias is common. The President of the International Economic Policy Association observes:

What may be in the making at the United Nations is an effort by the South to exchange a "tacit" recognition that the codes must, in fact, if not in name, be voluntary in their legal nature in return for the North's acceptance of more substantive political and economic concessions in the code itself.³⁹

Even if a code is stated to be non-binding, the fact that it has been negotiated and settled within an official agency of the United Nations may provide incentives to other U.N. agencies to carry out further attempts to regulate, control, and harass foreign private sector investment.

The periodic meetings of the Commission on Transnational Corporations provide the occasion for formal submission by the Secretariat of the Commission of a number of papers on the activities of MNCs. These meetings also provide the opportunity for consideration of the U.N.'s future work in this field. Many of the following examples of studies that the Commission's Secretariat has initiated or plans to undertake betray, in their themes alone, the bias in the Commission's approach to multinationals:

--a comprehensive study on transnational corporations in world development;

--an examination of the relationship between MNCs and state-owned enterprises in developing countries;

--a study of the nature and extent of MNC activity in the military sector, particularly in armaments production in developing countries (the Soviet Union and its East Bloc allies are reportedly extremely interested in promoting this study);

--an analysis of the impact of MNCs on the development of the pharmaceutical industry in developing countries.

³⁸ Proponents of a binding code have, according to one critic of the code process, enormously underestimated the difficulties posed by the additional layers of governmental regulation of business that would be necessary in most industrial states as a result of a binding code. For example, in the U.S., special legislation would be required to give federal courts jurisdiction under the codes to regulate conduct of U.S. MNCs operating abroad. See Stanley, *op. cit.*, p. 982.

³⁹ Ibid.

The past two years of negotiations for a code of conduct, have produced a growing realization among some developing countries that MNCs will be playing an increasingly vital and positive role in their economic futures. There has also been a growing realization, among some developing nations, that the end-product may not be worth the diplomatic effort--that the code may be superfluous to regulatory machinery already established by those nations. Some Latin American nations, for instance, see their own laws going far beyond anything that could be agreed to in the negotiations for a Code of Conduct in terms of protection of host country interests. Others, particularly India and the members of the Association of Southeast Asian Nations (ASEAN), have an increasing number of their own MNCs whose interests they wish to protect, and for whom they seek more opportunities for investment under free market conditions.

Continued U.S. participation in negotiations for a Code of Conduct seems to be preventing Western concessions that would damage the free enterprise system in the U.S. and the long-term interests of the developing nations. If the negotiations were to escalate to the status of a U.N. Conference on a Code of Conduct for Transnational Corporations, as it might be called, the attempts of the developing nations to establish the mechanism to restrict multinational investment, and the support of Moscow and its allies for those efforts, might become extremely difficult to counter.

U.S. negotiators therefore should maintain their adherence to free enterprise principles, particularly equal treatment for state owned and privately owned corporations, in negotiations within the U.N. Commission on Transnational Corporations. They should also strive to ensure that negotiations for a code of conduct are kept within the U.N. Commission and not brought to the conference level.

The World Intellectual Property Organization: Revising the Paris Convention⁴⁰

The World Intellectual Property Organization (WIPO), one of fifteen specialized agencies of the U.N., was established to protect industrial property and copyright material throughout the world. A substantial part of its activities and resources is devoted to assistance to developing countries, particularly in negotiations for transfer of technology from the developed nations and from MNCs.

⁴⁰ For a more complete discussion of the developing nations' attempts to revise the Paris Convention for the Protection of Industrial Property, see the author's paper, "At the U.N., A Mounting War on Patents," Heritage Foundation Background No. 215, October 4, 1982.

WIPO has responsibility for the implementation of the 1881 Paris Convention for the Production of Industrial Property, last revised in 1967, which regulates the use of patents worldwide.⁴¹ This Convention has been described by the U.S. Chamber of Commerce as a "monument to the spirit of international cooperation which can exist between nations interested in the development and utilization of technology."⁴² At present, there are justified fears that such cooperation is endangered.

Ostensibly to facilitate the transfer of technology to themselves, the developing nations are attempting to change the patent convention in a way that could erode the property rights of patent owners and remove incentives for continued research and innovation by inventors and the corporations who finance them. A U.N. conference convened in Geneva in October 1982 to address this and other issues related to industrial property.

Specifically, developing country governments have demanded provisions that give them the right to take over and manufacture on an exclusive basis any patented invention if the original patent holder does not "work" it in their country within 30 months of receiving the patent approval.

At present, only a handful of countries grant exclusive, nonvoluntary licenses as a means of penalizing firms for not "working" a patent. Adoption of these provisions would therefore severely weaken patent protection in almost all developing countries. In the case of the pharmaceutical and agro-chemical industries, which market products only after extensive clinical tests--often lasting up to ten years--have established product safety and efficacy, the new code would mean automatic confiscation of manufacturers' rights to their products.

Another change proposed by Third World governments authorizes patent forfeiture or revocation when the patented invention is not "worked" or is otherwise "abused" in a developing country within five years from the grant of the patent in that country. According to the proposed revision, importing the product into the country would not meet the requirements of "working." For some industries, such changes would dissolve patent protection, since the time needed to meet regulatory requirements would often not allow them to "work" their patents in the time prescribed.

⁴¹ A patent is a statutory grant conferring on the patent holder the right to exclude another from using an invention for a set period, usually 15 to 20 years. The patent holder has the right to use the patent himself or to sell it under license to someone else in return for a licensing fee and subsequent royalty payments. See IOMS, 1982, *op. cit.*, p. 156.

⁴² Draft letter of U.S. Chamber of Commerce to the White House, "Subject: Paris Convention," March 18, 1982, p. 1.

There is little doubt that the U.S. and its industrial allies realize that the developing countries are justified in calling attention to their plight; they do need Western-based technology and capital. And it is in the best interests of the U.S. and its industrial allies to make it easier for developing nations to take full advantage of the patent system as a means of gaining important and critical technology. Third World nations, however, cannot attract these advantages until they create real incentives for foreign capital investment. Weak patent protection does not constitute such an incentive. Strong patent protection, on the other hand, is a necessary and central component of an attractive investment climate. In many cases, even if a multinational is willing to license the production of a patented technology to a manufacturer in a developing country, it may not be able to find a local source capable of handling such production. If the multinational is then to consider producing its invention locally, it must have an incentive to stay there and produce the patented technology itself. If the MNC perceives that its invention is not going to be protected by patents in the developing country, it will go elsewhere to produce its invention. The loser is not the MNC, but the developing nation.

THE INTERNATIONAL CONSUMERIST MOVEMENT

Another threat to the free enterprise system, Western-based MNCs, and freedom of choice and economic improvement in the developing countries is the extremist wing of the international consumerist movement. New consumer organizations, through sophisticated tactics, are forcing multinational firms to pay closer attention to their corporate activities. Various consumer, union, and church organizations are banding together and refining and sharing techniques. They are developing international networks that allow them to draw world attention to targeted issues. Some of the most extreme groups have been embraced by U.N. agencies, thus acquiring a patina of respectability. The World Health Organization, for example, has made the consumerist organization, Health Action International, an official participant in critical negotiations.⁴³

Some of these organizations have attained non-governmental organization (NGO) status at the United Nations. Such status allows them not only to criticize MNCs from within the U.N. system, but also to introduce their documents and data--often distorted--into the U.N. pipeline. These documents frequently turn up, re-cast, as official documents of various U.N. agencies.

One of the most active of these NGOs is the International Organization of Consumer Unions (IOCU), founded in 1960 by consumer unions representing Australia, Belgium, the Netherlands, the United Kingdom, and the United States. It has grown to include 111 consumer associations in 47 countries, as well as government financed consumer councils supported by family organizations,

⁴³ Business International, op. cit., p. 329.

labor unions and similar groups. The current President of the IOCU is Anwar Fazal of Malaysia, a founder of the organization. He has spawned a "new wave" of extremist, anti-free enterprise consumer organizations⁴⁴ including:

--Consumer Interpol, a global citizen-alert system on hazardous products, processes, and waste;

--IBFAN, International Baby Food Action Network, a coalition of action groups active in the infant formula campaign;

--HAI, Health Action International, a coalition of action groups working on pharmaceutical issues;

--PAN, Pesticide Action Network, a global coalition of groups working on pesticide issues.

What gives these groups and IOCU particular clout is the semiofficial mantle of association with the United Nations. NGOs such as IOCU wield a great deal of power and influence within the U.N., as illustrated by the activities of "constituency-based" consumer groups from both developed and developing countries at the October 1979 meeting in Geneva on Infant and Young Child Feeding, sponsored by the World Health Organization (WHO) and the United Nations International Children's Education Fund (UNICEF). Notes a staffer of the U.N. NGO liaison office in Geneva:

While the Geneva meeting has a strong "South" orientation and devoted much of its work to the situation in Third World countries, it did not rest content with the assumption that cleaner water equals fewer health hazards from breast-milk substitutes; it also raised questions of cultural and social alienation as in-built components of the unimpeded spread of culture-specific technology.⁴⁵

In short, these consumer groups appear content to deemphasize the problems caused by the use of local water supplies in the care and feeding of infants in developing nations, while attempting to rally support through the rhetoric concerning the cultural and social alienation allegedly brought about by Western-based multinational corporations.

Regardless of the argument on the validity of that charge, attempting to convince Third World populations that Western-based

⁴⁴ Interview with Anwar Fazal, Multinational Monitor, July 1982, p. 16.

⁴⁵ Thierry Lemaesquier, "Beyond Infant Feeding: The Case for Another Relationship Between NGO's and the United Nations System," Development Dialogue, Volume 1, 1980, p. 122.

MNCs have generated this alienation does little to contribute to economic development in regions where famine and disease routinely claim the lives of mothers and children. This same rhetoric appears in various official U.N. documents and literature, for example, the packet provided by the U.N. Center on Transnational Corporations for its Seventh Session in September 1981.⁴⁶

According to IOCU's Fazal, the developed countries' MNCs commit a multitude of sins:

- 1) MNCs are engaged in manipulation and advertising, aimed at causing certain wants and desires to be identified with certain products that the MNCs make;
- 2) MNCs trade in violence; they market drugs that are restricted and pesticides that are banned or restricted in the United States;
- 3) MNCs take away purchasing power from Third World consumers; they market "economic wastage" by selling such things as liquor and tobacco in developing countries.⁴⁷

Although the small, potential element of truth in some of these charges warrants attention, most of Fazal's statements are distortions designed to undermine the MNCs and private sector approach to development. Fazal and his IOCU are, of course, entitled to say what they wish. It is quite another matter, however, for them to receive political and financial backing from the U.N., which, in turn, looks to the U.S. Treasury as its most important supporter.

The international consumer movement, led by IOCU, is pushing for an international code for the promotion and sale of pharmaceuticals in Third World countries. This confronts the World Health Organization with a dilemma. It is "caught between the need to regulate the operations of pharmaceutical companies, and the desire to retain their cooperation in mutually beneficial research programs."⁴⁸ The pharmaceutical industry is united in rejecting the WHO regulation plan. Opponents of the proposed code in the U.S., as a recent article in the magazine South notes, charge proponents of a WHO pharmaceutical code with "the seizure--by political force, if necessary--of economic power by those with no respect for the profit incentive and the rights of private property on which our society is based."⁴⁸ The Reagan Administration so objects to the proposed code that it threatens to withdraw from the WHO should a drug code be adopted. The U.S. is one of the six industrialized nations that provide 75 percent of the world's

⁴⁶ See: U.N. Commission on Transnational Corporations, Aspects of the Social and Political Effects of the Activities of Transnational Corporations, U.N. Doc. E/C.10/86, 22 June 1981.

⁴⁷ Multinational Monitor, op. cit., p. 17

⁴⁸ Charles Medawer, "Public Health and Private Practice," South, August 1982, p. 29.

⁴⁹ Ibid.

pharmaceuticals and 50 percent of WHO income.⁵⁰

Moscow's support for the proposed WHO code and continued rhetorical criticism of Western-based pharmaceutical manufacturers have been particularly evident during the past year. In November 1981, the Soviet controlled World Federation of Trade Unions sponsored a conference in Moscow for more than 200 representatives of trade unions in 57 countries. The gathering was entitled the "International Conference Against Pharmaceutical TNC's." The carefully choreographed sessions were a marathon attack on the pharmaceutical MNCs. The Soviet Union, meanwhile, was praised for being "the first socialist state in the world" and for being concerned enough about the issue to pay the airfares and hotel bills of nearly everyone at the conference.

CONCLUSIONS

The efforts to regulate the activities of multinational corporations in Third World markets have come under many guises and from various sources during the past decade. The attempts to impose codes of conduct, marketing and distribution codes, and changes in international conventions affecting protection of MNC technology, and the criticism of MNCs for past conduct and business practices, on balance, threaten only to discourage private sector innovation, research, and investment.

If MNCs were actually to pull back and retrench these activities, the result would be particularly tragic for the great majority of developing countries, which need the financial and technological benefits that MNCs can bring them. The MNC has demonstrated that it is probably the only organization capable of generating massive flows of technology--both in hardware and software--to other countries. In a world where economic aid and technological assistance programs are shrinking, the MNC is certain to increase in importance as the agent of technology transfer to developing countries.⁵¹

But it is not only as the agent of technology that multinational corporations may serve developing countries. It is also, and more particularly, as the creator of wealth and catalyst for improvement in standard of living. Notes an internationally renowned patent attorney for a major U.S. multinational firm:

The magnitude of the economic problems of the world are such that even if all the personal income in the U.S. in 1979 were redistributed to the rest of the world each person outside of the U.S. in the world would receive only \$421.00. The solution, therefore, cannot

⁵⁰ Ibid.

⁵¹ Cruzan Alexander, Chief Patent Counsel, Minnesota Mining and Manufacturing Company, "The International Role of the Multinational in Intellectual Property Transfer," reprinted from Les Nouvelles, June 1980, p. 1.

be limited to an unrealistic more equal distribution of existing resources. More wealth must be created and one way to create that wealth and to improve the welfare of the underprivileged of the world, is through the multinational.⁵²

If the multinational firm is not able to protect its investment and maintain legal rights to its own technology and know-how, but is faced instead with the loss of that technology and with additional costs to its investment, it is probably not going to make the investment and assume the risks that go with it. In such a case, the MNC is a loser. A much bigger loser, however, is the developing country that has prevented that investment, or at least not taken the steps necessary to make such an investment attractive to the multinational firm.

There is, among developing countries, a growing recognition that official development assistance will at best increase only slightly in the 1980s. Many countries thus seem prepared to recognize that private direct investment can and should play a greater role in the development process.⁵³ This realization seems particularly evident in the negotiations for a Code of Conduct within the U.N. Commission on Transnational Corporations. The U.S. negotiators should continue defending their strong and sensible U.S. position in these and related code negotiations at the United Nations.

The Reagan Administration, however, must become more aware of the dangers posed to U.S.-based multinational firms by the international consumerist movement and the attempts to revise the Paris Convention on Patents under the auspices of the World Intellectual Property Organization. In order to increase U.S. effectiveness in these areas, and in the negotiations for various TNC codes, the Administration should consider several measures:

1. Increasing the participation and effectiveness of industry in negotiations for codes of conduct, distribution and marketing codes, and conventions dealing with the transfer of intellectual property. Participation by corporate representatives in specific negotiations conducted by the United Nations should continue to be encouraged and promoted.

2. Developing specific counter-proposals to the developing nations'--particularly G-77's--proposals for various codes, such as the industry counter-proposal to the World Health Organization for a pharmaceutical code. This would help to change the "damage-limitation" exercises that have been too large a part of U.S. negotiations with developing nations in the past.

⁵² Ibid., p. 6.

⁵³ Current Status Report, July 1982, op. cit., p. 1.

3. Providing the U.S. Mission at the U.N. increased access to industry experts familiar with consumer issues at the United Nations in order to counter the effectiveness of the consumer NGOs at that organization. U.S.-based multinational firms have no influence comparable to that wielded by the NGOs at the U.N. U.S. representatives should increase the effectiveness and frequency of their counter-arguments and facts to answer the NGO rhetoric and to clarify their accusations. U.S. representatives at the U.N. must recognize that industry needs support and assistance in facing these issues.

4. Attempting, in cooperation with U.S. allies in the industrialized nations (the Group B countries), to coordinate a unified and consistent position on critical issues, particularly in negotiations for the various U.N. codes for multinationals and for proposed changes in the Paris Convention. While the U.S. may not be able to, and should not, demand support from its allies in these negotiations, it should make abundantly clear to those countries that the U.S. does not look favorably upon their support for the anti-free enterprise, restrictive initiatives of the Group of 77 within the United Nations.

Persevering in such measures should increase U.S. effectiveness within these various negotiations at the U.N. It will also provide support for U.S.-based multinational firms in their efforts to protect their technology and interests abroad and will effectively counter the continued assault on Western-based MNCs and the free enterprise system.

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