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# Accountability of Transnational Corporations under International Standards

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ACCOUNTABILITY OF TRANSNATIONAL CORPORATIONS  
UNDER INTERNATIONAL STANDARDS

by

LEA HANAKOVA

(Under the Direction of Gabriel M. Wilner)

ABSTRACT

Due to the process of globalization and rapid economic evolution in the last several years, transnational corporations have become extremely powerful. There is an evident disproportion between the numerous rights enjoyed by transnational corporations and the scarce obligations undertaken by them. Given their transnational nature, transnational corporations have been successfully avoiding national regulations of both their home and host states, and they are seeking to operate in countries with the lowest standards so as to increase their profits. This has resulted in the violation of basic human rights. Therefore, there is an increasing need for the creation of international instruments addressed to transnational corporations with express and clear obligations aimed at the respect of human rights. This study will analyze the nature and scope, as well as the advantages and disadvantages of the most important current instruments regulating transnational corporate conduct at the international level.

INDEX WORDS: Transnational Corporations, Multinational Enterprises, Corporate Accountability, Corporate Responsibility, UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, OECD Guidelines for Multinational Enterprises, Codes of conduct.

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UNDER INTERNATIONAL STANDARDS

by

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Master of Law, Faculty of Law, Masaryk University in Brno, 2002

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of the Requirements for the Degree

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UNDER INTERNATIONAL STANDARDS

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DEDICATION

To my father, for his unconditional love and constant support

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## ABBREVIATIONS

|        |   |
|--------|---|
| BIAC   | Business and Industry Advisory Committee (of the OECD)              |
| BITs   | Bilateral Investment Agreements                                     |
| CIME   | Committee on Investment and Multinational Enterprises (of the OECD) |
| EU     | European Union  |
| FLA    | Fair Labor Association  |
| GATT   | General Agreement on Trade and Tariffs                              |
| GMP    | Global Manufacturing Principles                                     |
| ICCA   | International Center for Corporate Accountability                   |
| ILO    | International Labor Organization                                    |
| MAI    | Multilateral Agreement on Investment                                |
| MIMCO  | Mattel Independent Monitoring Council                               |
| NGOs   | Non-governmental Organizations                                      |
| OECD   | Organization for Economic Cooperation and Development               |
| TNCs   | Transnational Corporations  |
| TUAC   | Trade Union Advisory Committee (of the OECD)                        |
| UN     | United Nations  |
| UNCTAD | United Nations Conference on Trade and Development                  |
| WHO    | World Health Organization   |
| WTO    | World Trade Organization  |

## **INTRODUCTION**

The present work is divided into five chapters. Chapter I defines the problem of corporate abuse of power, describes general issues connected to corporate social accountability and responsibility, and explains why there is an urgent need for effective legal regulation of transnational corporate conduct. Chapter II deals with NGOs activism and their role in pressuring transnational corporations (TNCs) to behave in a socially responsible manner. Chapter III analyzes advantages and disadvantages of voluntary codes of conduct, as a way of ensuring corporate compliance with certain standards. It also describes some of the most known or the most successful codes of conduct created in the past.

Chapter IV deals with international instruments regulating transnational corporate conduct. International instruments are divided into the following four groups: general human rights instruments addressed particularly to states; specific international instruments directed to only some kinds of TNCs and focusing on a very narrow area of corporate standards; international instruments aimed at regulation of a broader area of corporate standards (labor standards, environmental standards, consumer protection, or bribery); and international instruments addressed directly to TNCs (not only to governments) and covering a broad scope of standards related to transnational corporate conduct.

Chapter V then describes and analyzes in further detail two crucial international instruments regulating transnational corporate conduct: OECD Guidelines for Multinational Enterprises, and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.

Finally, the conclusion of this work focuses on the imperfections of all present available instruments regulating transnational corporate conduct and suggests possible solutions to the problem.

## CHAPTER I

### TRANSNATIONAL CORPORATIONS

#### A. Defining Transnational Corporation

“Transnational corporation,” also called “multinational corporation” or “multinational enterprise,” is defined by the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises as:

“[A]n economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.”<sup>1</sup>

Another definition of TNC is contained in the OECD Guidelines for Multinational Enterprises:

“These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.”<sup>2</sup>

From the above definitions, it is possible to derive certain typical features of TNC:

- An entity having legal status;
- Its motive is to gain profit;
- It performs economic activities in more than one country;

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<sup>1</sup> *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. ESCOR, 55<sup>th</sup> Sess., 22d mtg., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter *Norms*].

<sup>2</sup> *Guidelines for Multinational Enterprises*, OECD (Revision 2000), Part I.3, available at <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>> [hereinafter *OECD 2000 Guidelines*].

- It consists of more entities that are related to each other.<sup>3</sup>

## B. Structure of Transnational Corporations

A transnational corporation consists of a parent company and its foreign affiliates.<sup>4</sup> These foreign affiliates can be of two different types depending on their legal status – an incorporated subsidiary or an unincorporated branch.<sup>5</sup> A subsidiary is incorporated under the local law of a host country as a separate legal entity and thus, a parent company is generally not accountable for its conduct.<sup>6</sup> The parent company is liable only up to the amount of capital that it has invested in the subsidiary.<sup>7</sup> However, such limited liability does not have to be always applied since, in some cases, it is possible to “pierce the corporate veil”, and thus, to hold a parent company liable for conduct of its subsidiary.<sup>8</sup>

A parent company controls its subsidiaries through ownership of the whole subsidiary or its significant part, or through other contractual measures.<sup>9</sup> These other contractual measures include the following forms of control: (1) a parent company keeps an exclusive right to manage and offer technical services to its subsidiary for a certain fee; (2) a parent company keeps an exclusive right to occupy certain positions in the management of its subsidiary, such as the managing director; or (3) a parent company keeps the right of veto, by which it ensures that certain decisions cannot be taken without its approval.<sup>10</sup> These measures enable TNCs to keep

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<sup>3</sup> See, e.g., Menno T. Kamminga & Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law: An Introduction*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 2-4* (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

<sup>4</sup> See DETLEV F. VAGTS ET AL., *TRANSNATIONAL BUSINESS PROBLEMS* 184, 415 (3d ed. 2003).

<sup>5</sup> *Id.*

<sup>6</sup> See Jose Engracia Antunes, *The Liability of Polycorporate Enterprises*, 13 *CONN. J. INT'L L.* 197, 203 (1999).

<sup>7</sup> See John A. Swain & Edwin E. Aquilar, *Piercing the Veil to Assert Personal Jurisdiction over Corporate Affiliates: An Empirical Study of the Cannon Doctrine*, 84 *B.U.L. REV.* 445, 446 (2004).

<sup>8</sup> See generally Swain & Aquilar, *supra* note 7.

<sup>9</sup> See P. EBOW BONDZI-SIMPSON, *LEGAL RELATIONSHIPS BETWEEN TRANSNATIONAL CORPORATIONS AND HOST STATES* 138-39 (1990).

<sup>10</sup> *Id.*

control over their subsidiaries even in situations when a host state or one of its nationals possess majority shares in the company.<sup>11</sup>

In the contrast to a subsidiary, a branch does not function as a separate legal entity; rather, it is a permanently established office in a foreign country, which is entirely owned by a parent company.<sup>12</sup> A parent company is therefore legally liable for its conduct.

TNCs usually consist of one parent company and its subsidiaries so that their organizational structure resembles a pyramid.<sup>13</sup> On the top there is a parent company that controls its wholly or partially owned subsidiaries that may further control their own partially or wholly owned subsidiaries.<sup>14</sup> In addition, some TNCs consist of two parent companies (e.g. Unilever or Royal Dutch Shell) and as such they are controlled from two countries.<sup>15</sup>

### **C. Corporate Social Responsibility v. Corporate Social Accountability**

Corporate social responsibility is used in connection with *voluntary* acts of a corporation that are undertaken to implement certain labor, environmental and other human rights standards.<sup>16</sup> In other words, a TNC is socially responsible whenever its ethical conduct is voluntary and is not required by any legal norms or other regulations. Corporate voluntary codes of conduct are a typical example of performing corporate social responsibility.

In contrast, corporate social accountability is used in connection with binding government regulations that are imposed on corporate conduct in the area of human rights and

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<sup>11</sup> *Id.*

<sup>12</sup> See VAGTS ET AL., *supra* note 4, at 184, 415.

<sup>13</sup> *Id.* at 201.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., David Monsma & John Buckley, *Non-financial Corporate Performance: The Material Edges of Social and Environmental Disclosure*, 11 U. BALT. J. ENVTL. L. 151, 175-76 (2004); Dr. Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM U. INT'L L. REV. 1265, 1270-72 (2004).

other standards.<sup>17</sup> Simply said, corporate social accountability means that a TNC is exposed to certain binding legal norms, which it is obliged to follow without regard to its desire.

In the title of this comment, the term “accountability” is intentionally used instead of the term “responsibility” since emphasis should be put on corporate social accountability in order to ensure compliance of all TNCs with certain minimum human rights and other standards.

#### **D. Protection of Transnational Corporate Rights**

When discussing the duties of TNCs it is also important to mention the protection of their rights. Transnational corporate rights are specifically protected by bilateral investment treaties (BITs), which are used by countries (especially the least developed ones) as typical instruments to attract foreign direct investment.<sup>18</sup> These agreements are designed to protect foreign direct investment and usually include basic principles of corporate treatment, such as fair and equitable treatment, most-favored-nation treatment and national treatment, and establish dispute settlement mechanisms.<sup>19</sup> They also often prohibit nationalization or expropriation of corporate property without just compensation.<sup>20</sup> The amount of BITs has grown rapidly in the last years as it moved from the number of 385 in 1989 to the number of 2,265 in 2003 covering 176 countries.<sup>21</sup>

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<sup>17</sup> See sources cited *supra* note 16.

<sup>18</sup> See The Robinson Rojas Archive, Transnational Corporations: Impediments or Catalysts of Social Development?, Part 2: Rights and Responsibilities of Transnational Corporations, at <<http://www.rrojasdatabank.org/op05-05.htm>> (last visited Apr. 4, 2005) [hereinafter *Transnational Corporations: Impediments or Catalysts of Social Development?*]; United Nations Conference on Trade and Development, Investment Instruments Online, What Are BITs?, at <[http://www.unctadxi.org/templates/Page\\_\\_\\_1006.aspx](http://www.unctadxi.org/templates/Page___1006.aspx)> (last visited May 2, 2005) [hereinafter *What Are BITs?*].

<sup>19</sup> See sources cited *supra* note 18.

<sup>20</sup> *Id.*

<sup>21</sup> United Nations Conference on Trade and Development, Quantitative data on bilateral investment treaties and double taxation treaties, at <<http://www.unctad.org/Templates/WebFlyer.asp?intItemID=3150&lang=1>> (last visited May 2, 2005).



Transnational corporate rights are also protected under the WTO system and its complex set of agreements.<sup>22</sup> The WTO/GATT system is focused on the creation of a global economic system that would minimize trade barriers imposed by national governments.<sup>23</sup> Since TNCs act as the main participants in international trade, either as importers or exporters, they are the ones that benefit from such a system. Moreover, certain agreements under the WTO protect corporate rights directly. For instance, the Agreement on Trade Related Aspects of Investment Measures (TRIMs) prohibits investment measures that would distort or restrict trade;<sup>24</sup> and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) provides protection to trademarks, patents, etc., which are owned by TNCs.<sup>25</sup> Additionally, some TNCs benefit in a similar way from other preferential agreements, like the North American Free Trade Agreement (NAFTA)<sup>26</sup> or the European Community Treaty,<sup>27</sup> which create free trade areas.<sup>28</sup>

Furthermore, recent economic and political changes in Eastern Europe, Latin America and Southeast Asia, accompanied by privatization efforts, provided TNCs with the opportunity to

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<sup>22</sup> See, e.g., *Transnational Corporations: Impediments or Catalysts of Social Development?*, supra note 18; James A. Paul & Jason Garred, *Making Corporations Accountable, A Background Paper for the United Nations Financing for Development Process*, Global Policy Forum, Dec. 2000, available at <<http://globalpolicy.igc.org/soecon/ffd/2000paper.htm>>.

<sup>23</sup> See generally *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.; JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 208-11 (4<sup>th</sup> ed. 2002); World Trade Organization, at <<http://www.wto.org/>> (last visited May 2, 2005).

<sup>24</sup> *Agreement on Trade Related Aspects of Investment Measures*, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO Organization, Annex 1A - Item 14, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994).

<sup>25</sup> *Agreement on Trade Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO Organization, Annex 1A - Item 14, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994); see also *Transnational Corporations: Impediments or Catalysts of Social Development?*, supra note 18.

<sup>26</sup> Chapter Eleven of NAFTA deals with protection of foreign investment made by one contracting party in a country of another contracting party. *North American Free Trade Agreement*, Dec. 17, 1992, U.S.-Can.-Mex. 107 Stat. 2057 (1994), 32 I.L.M. 605 (1993).

<sup>27</sup> *Treaty Establishing the European Union*, 1992, 31 I.L.M. 247, O.J. (C 191) (1993).

<sup>28</sup> See Paul & Garred, supra note 22.

expand their field of influence and increase their market access to these regions and therefore, to enhance their power worldwide.<sup>29</sup>

As described above, the current international economic and political situation is pushing to enforce and protect transnational corporate rights at a global level.<sup>30</sup> This well-established international protection of corporate rights is in absolute disproportion with the level of international binding regulations imposed on TNCs.<sup>31</sup> Therefore, the focus of this comment is aimed at the creation and enforcement of corporate obligations in a global dimension that would ensure fair balance between those obligations and their correlative rights.

### **E. The Increasing Power of Transnational Corporations**

Due to the process of globalization and rapid economic evolution in the last several years, TNCs have become extremely powerful. According to UNCTAD's World Investment Report 2004 there are currently at least 61,000 TNCs worldwide with over 900,000 foreign affiliates.<sup>32</sup> TNCs account for 70% of total international trade and their annual earnings are higher than the GDP of many countries.<sup>33</sup> In fact, 51 of the 100 world's largest economies are TNCs, and only 49 are countries.<sup>34</sup>

In general, TNCs tend to establish manufacturing subsidiaries in countries with low labor and environmental standards, particularly in developing nations. This represents an advantage to them, in comparison to the contrasting high standards generally existing in their home

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<sup>29</sup> See *Transnational Corporations: Impediments or Catalysts of Social Development?*, *supra* note 18.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> UNCTAD, World Investment Report (2004), 38-39, available at <[http://www.unctad.org/en/docs/wir2004\\_en.pdf](http://www.unctad.org/en/docs/wir2004_en.pdf)>.

<sup>33</sup> UNCTAD, Multinational Corporations in Least Developed Countries, at <<http://www.globalpolicy.org/reform/2002/modelun.pdf>> (last visited July 2, 2005) [hereinafter *MNCs in Least Developed Countries*].

<sup>34</sup> Sarah Anderson & John Cavanagh, *Top 200: The Rise of Global Corporate Power*, Corporate Watch, at <<http://www.globalpolicy.org/soecon/tncs/top200.htm>> (last visited July 2, 2005).

countries.<sup>35</sup> Due to their high mobility, TNCs can easily move their capital and affiliates out of host countries that impose stricter and less convenient legal regulations on their business conduct.<sup>36</sup> Such loss of foreign investment would have serious consequences for a developing country.<sup>37</sup> Consequently, the governments of these countries might prefer lowering regulations imposed on corporate conduct rather than increasing them, so as not to lose the corporate businesses' investments.<sup>38</sup>

## **F. Main Violations and Abuses by Transnational Corporations**

Given their increasing power and their transnational character, TNCs or their contractors and sub-contractors can easily violate non-efficient legal regulations or take advantage of low legal standards in their host states in order to gain profit.<sup>39</sup> The main transnational corporate violations can be found in four main grounds: (1) violation of labor standards; (2) violation of environmental standards; (3) violation of consumers' rights; and (4) bribing of governmental officials.

### **1. Violation of Labor Rights**

TNCs operating in developing countries are legally allowed to pay their employees very low wages (around 25 cents per hour) and they are often not legally obligated to pay a higher

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<sup>35</sup> See, e.g., Paul & Garred, *supra* note 22.

<sup>36</sup> See, e.g., Jamie Cassels, *Outlaws: Multinational Corporations and Catastrophic Law*, 31 CUMB. L. REV. 311, 313 (2001); *MNCs in Least Developed Countries*, *supra* note 33; Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 WIS. INT'L L.J. 89, 94-95 (2001); Ryan P. Toftoy, *Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?*, 15 ARIZ. J. INT'L & COMP. L. 905, 906 (1998).

<sup>37</sup> See sources cited *supra* note 36.

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 76 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); Paul & Garred, *supra* note 22.

wage rate for overtime.<sup>40</sup> For example, average Nike employees in Vietnam work for \$1.60 a day making shoes that are sold for \$180 a pair.<sup>41</sup> Corporations also often buy cheap raw materials from suppliers that do not comply with labor standards. Even though this constitutes an indirect violation, it also has to be considered and avoided by TNCs.<sup>42</sup>

The most serious violations of labor standards consist of child labor,<sup>43</sup> forced labor, poor and unhealthy working conditions,<sup>44</sup> insufficient safety regulations,<sup>45</sup> payment of wages under a legal minimum level, discrimination.<sup>46</sup> Some important TNCs, such as Nike and Gap, have

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<sup>40</sup> See, e.g., S. PRAKASH SETHI, SETTING GLOBAL STANDARDS, GUIDELINES FOR CREATING CODES OF CONDUCT IN MULTINATIONAL CORPORATIONS 58-59 (2003); *MNCs in Least Developed Countries*, *supra* note 33.

<sup>41</sup> See Jim Hightower, *Nike just does it to Vietnamese Workers – Torture, Abuse*, ALBION MONITOR, May 3, 1997, available at <<http://www.albionmonitor.com/9704b/jh-nikeabuse.html>> (last visited July 5, 2005).

<sup>42</sup> On June 10, 2004, Human Rights Watch called on Coca-Cola to stop using sugar from El Salvador because of child labor. See Human Rights Watch, *El Salvador: Hazardous Child Labor on Sugar Plantations*, available at <<http://www.hrw.org/children/labor/elsalvador>> (last visited July 5, 2005).

<sup>43</sup> The India Committee of the Netherlands, in cooperation with its partners in Europe and India, and the International Labor Rights Fund, released a new report saying that “an estimated 12,375 children continue to work under terrible conditions on cottonseed farms” in southern India. The report mentions Bayer, Monsanto, Avanta and Emergent Genetics as some of the TNC’s benefiting from these farms, where children work 12 to 14 hours a day and earn around 50 cents a day. Suhasini, *Multinational Corporations Reap Profits from Child Labor in India’s Cottonseed Farms*, ONE WORLD SOUTH ASIA, October 6, 2004, available at <http://southasia.oneworld.net/article/view/95471/1/>> (last visited July 5, 2005).

<sup>44</sup> A good example can be found in the banana industry. Shell Chemical Co. and Dow Chemical have been selling dibromochloropropane (DBCP) as a pesticide to banana producers such as Dole Food Co., Chiquita Brands International Inc. and Fresh del Monte Produce Co. DBCP was banned in the U.S. in 1979 due to its sterility effects on males when inhaled or absorbed by the skin, but these TNC’s are still using it in Central American banana plantations, causing serious health damages among the banana workers. See Stephen Leahy, *Workers Left Sterile by Pesticide Seek Justice*, TIERRAMERICA, November 12, 2004, available at <<http://www.tierramerica.net/2004/1106/iacentos.shtml>> (last visited July 5, 2005).

<sup>45</sup> Coca-Cola was accused of lack of security for its workers, after a number of labor organizers were murdered at bottling plants in Colombia. The TNC admitted that its bottling plants needed increased security. See Maxine Frith, *The Ethical Revolution Sweeping through the World’s Sweatshops*, THE INDEPENDENT (LONDON), April 16, 2005, at News-20. A lack of safety standards was also experienced in the Bhopal disaster (1984), where a Union Carbide subsidiary was held responsible for a gas leak in one of its factories, causing an explosion that killed thousands of people and is still the cause of many chronic illnesses. See Justin Huggler, *Bhopal 20 Years On: Polluted Water, Chronic Illness and Little Compensation*, THE INDEPENDENT (LONDON), November 29, 2004, at Foreign News-24.

<sup>46</sup> See, e.g., Joseph, *supra* note 39, at 76; Centre Europe – Tiers Monde, Will the UN compel transnational corporations to comply with international human rights standards? 3 (2002), available at <[http://www.aaj.org.br/artigos/02stn1\\_en.pdf](http://www.aaj.org.br/artigos/02stn1_en.pdf)> (last visited July 5, 2005).

recently admitted that workers were exploited in some of their factories, and they are now trying to take the proper measures to correct their conduct and clean up their public image.<sup>47</sup>

## 2. Violation of environmental standards

TNC's often abuse the lack of environmental protection regulation in developing nations. These violations are often associated to oil companies. Two good examples are Engen in South Africa, which has been polluting the air for years producing asthma in children,<sup>48</sup> and also the highly criticized British Petroleum, which is one of the major polluters of the globe.<sup>49</sup>

## 3. Violation of consumer rights

These violations occur when TNC's sell harmful products or provide incorrect information. The most relevant example is the wave of genetically modified organisms ("GMOs") now circulating around the world. The main beneficiaries of this technology are U.S.-based companies (e.g., Monsanto and Syngenta), who are trying to convince the world that GMOs are the best option to solve the problem of hunger, even when nobody is currently sure of their effect on human health.<sup>50</sup> Consumers have the right to be informed about the consequences

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<sup>47</sup> "Nike" recently disclosed that a quarter of its factories were not meeting minimum standards, and pledged to ensure that its codes of conduct on pay, hours and conditions are complied with from now on. "Gap" also published a report revealing terrible working conditions (child labor, working weeks of over 80 hours, etc.) in its factories in Mexico, China, Russia, and India, and therefore, it decided to cancel contracts with 136 factories. *See Frith, supra* note 45.

<sup>48</sup> A medical study carried out in 2002 by Durban's Nelson Mandela School of Medicine and a U.S. university, found that an abnormally high 52% of students and teachers at a primary school bordering the Engen plant suffered from asthma. It found that increases in air pollution tended to aggravate asthma symptoms in children. Grant Clark, *Durban's Poor Fight For Clean Air*, BBC WORLDWIDE MONITORING INTERNATIONAL REPORTS, December 14, 2004.

<sup>49</sup> British Petroleum is the world's third largest oil and gas company. It is in charge of the 1,100-mile long oil pipeline running from Azerbaijan down to the Turkish seaport of Ceyhan. The project has taken local people's lands illegally, it has damaged local roads, drainage and irrigation systems, and it has polluted the water. *See Hannah Ellis, The Baku-Ceyhan Pipeline: BP's Time Bomb*, CORPWATCH, June 2, 2005, available at <<http://corpwatch.live.radicaldesigns.org/article.php?id=12340>> (last visited July 5, 2005).

<sup>50</sup> "The critical forces behind the development of the technology itself are just five companies – Dow, DuPont, Syngenta, Aventis and Monsanto – which control three out of every four patents issued over the past ten years for genetically modified crops." Mark Schapiro, *Sowing Disaster?*, THE NATION, Oct. 10, 2002. "Despite claims from the biotech industry, GM foods cannot end world hunger, and new studies add to the evidence that they may pose a

of eating genetically modified foodstuffs (i.e., through proper labeling), especially when there are professional studies carried out by TNCs themselves about this potentially-threatening issue.<sup>51</sup>

#### 4. Bribing of governmental officials

It is common for national or municipal governments to grant concessions over natural resources in favor of TNC's that are capable of paying high sums of money in return. For example, the residents of Cochamba, Bolivia found that their water system was under control of a multinational consortium headed by the giant Bechtel. The consortium's name was "Aguas del Tunari," and due to acts of corruption, it was granted a 40-year concession to run Cochamba's water system, as well as many other privileges. This represented huge profits for the consortium and high water prices for the citizens.<sup>52</sup> Another case is taking place in the area where the Baku-Ceyhan Pipeline is being constructed by British Petroleum. This TNC has been accused of bribing officials in order to occupy lands not formally sold.<sup>53</sup>

TNC's are often accused of facilitating corruption and provoking instability.<sup>54</sup> This is most common in Africa, where U.S. oil companies (assisted by western banks) paid bribes to the Nigerian government to let them drain out the country's oil resources; Chinese companies armed

serious threat to human health." Kirsten Schwind and Hoollace Poole-Kavana, *We Need GM Food Like a Hole in Our Kidneys*, COMMON DREAMS, June 21, 2005, available at <<http://www.commondreams.org/views05/0621-33.htm>> (last visited July 5, 2005).

<sup>51</sup> "A recent study conducted by Monsanto itself indicated abnormalities in the kidneys and blood of rats fed MON863, a strain of Bt corn that many Americans eat every day without their knowledge. Monsanto has resisted calls from the European Food Safety Agency to release the full study to the public [...]." See Schwind and Poole-Kavana, *supra* note 50.

<sup>52</sup> After many claims, "Aguas del Tunari" finally left and the Bolivian government handed over the city's water system to a public board, and passed a new law that helps keep common water sources in common hands. Will Braun, *Campesinos vs. Oil Industry: Bolivia Takes On Goliath of Globalization*, GLOBAL EXCHANGE, December 5, 2004, available at <<http://www.globalexchange.org/countries/americas/bolivia/2775.html>> (last visited July 5, 2005).

<sup>53</sup> British Petroleum has effective governing power over a strip of land 1,750 miles long for the next 40 years. See Ellis, *supra* note 49.

<sup>54</sup> David Leigh and David Pallister, *Revealed: The New Scramble for Africa*, THE GUARDIAN (LONDON), June 1, 2005, at Home Pages-1.

military rulers and built pipelines in Sudan and Chad; and French companies encouraged the Congolese government to engage in huge debts as part of an “African Strategy,” which has now turned into huge debts for local oil producers.<sup>55</sup>

## G. Conclusions

It is apparent that corporate compliance with minimum local legal requirements is no longer sufficient.<sup>56</sup> TNCs operate with enormous power that is not accompanied by effective legal control.<sup>57</sup> There is a clear disproportion between the numerous rights possessed by TNCs, and the few obligations imposed on them.<sup>58</sup> Therefore, there is an urgent need for the creation of certain binding standards with an effective enforcement mechanism. This mechanism would ensure corporate compliance with minimum human rights and other standards protecting host countries with inefficient or non-existent local legal regulations of corporate conduct from corporate abuse. Most importantly, these standards must be created on an international level so as to hinder the capability of transnational corporations to avoid national regulations.<sup>59</sup>

However, while there have been attempts to balance transnational corporate rights and obligations, it remains a complicated issue since international rules concerning transnational corporate liability have been incorporated only in codes of conduct or guidelines bearing a form of voluntary regulations, also called “soft law.”<sup>60</sup> Although the issuance of such codes or guidelines is a good step forward, these instruments are lacking effective enforcement mechanisms through which corporate compliance could be realized.

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<sup>55</sup> *Id.*

<sup>56</sup> *See, e.g.,* Paul & Garred, *supra* note 22.

<sup>57</sup> *Id.*; *see also* Kamminga & Zia-Zarifi, *supra* note 3, at 5-6.

<sup>58</sup> *See Transnational Corporations: Impediments or Catalysts of Social Development?*, *supra* note 18; Kamminga & Zia-Zarifi, *supra* note 3, at 5-6.

<sup>59</sup> *See, e.g.,* Paul & Garred, *supra* note 22.

<sup>60</sup> *Id.*; *see also* Kamminga & Zia-Zarifi, *supra* note 3, at 9-10; *MNCs in Least Developed Countries*, *supra* note 33.

## CHAPTER II

### NGO PRESSURE ON TRANSNATIONAL CORPORATIONS

#### A. Definition and Types of NGOs

Non-governmental organizations (NGOs) and their various pressures on TNCs represent one of the most efficient currently available means of forcing TNCs to become socially responsible.<sup>61</sup> However, despite the positive role of NGOs involvement and the good results of their attempts, NGO activism should serve only as an additional instrument in regulating corporate conduct, and not as an exclusive one.

NGOs can be defined as:

“[P]rivate organizations that pursue activities to relieve suffering, promote the interests of the poor, protect the environment, provide basic social services, or undertake community development. In wider usage, the term NGO can be applied to any non-profit organization which is independent from government. NGOs are typically value-based organizations which depend, in whole or in part, on charitable donations and voluntary service. Although the NGO sector has become increasingly professionalized over the last two decades, principles of altruism and voluntarism remain key defining characteristics.”<sup>62</sup>

There is a high number of NGOs working in different areas, which are not always related to corporate responsibility, such as family/women issues, religions, services, etc.<sup>63</sup> The NGOs that include corporate responsibility projects on their agenda usually work in a certain specific

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<sup>61</sup> See generally Joseph, *supra* note 39, at 80-82.

<sup>62</sup> Working with NGOs: A Practical Guide to Operational Collaboration between the World Bank and Non-governmental Organizations 13-14 (March 1995), available at <[http://wbln0018.worldbank.org/HDNet/hddocs.nsf/65538a343139acab85256cb70055e6ed/b4414c86d30eadc585256f0900662a24/\\$FILE/Working%20with%20NGO-%20Carmen%20Malena.pdf](http://wbln0018.worldbank.org/HDNet/hddocs.nsf/65538a343139acab85256cb70055e6ed/b4414c86d30eadc585256f0900662a24/$FILE/Working%20with%20NGO-%20Carmen%20Malena.pdf)>; see also Sustainable Development, Non-governmental Organizations on Development Issues (last visited May 3, 2005), at <<http://www.globalissues.org/TradeRelated/Poverty/NGOs.asp>>.

<sup>63</sup> See NGO Watch, NGOs, at <http://www.ngowatch.org/ngo.htm> (last visited July 4, 2005) (provides listing of NGOs).



area, such as civil/human rights, environment, consumer interests, or corruption.<sup>64</sup> Some NGOs focus exclusively on corporate responsibility projects; others include corporate responsibility projects on their agenda, as well as other unrelated projects from different areas. Following are some examples of NGOs focusing wholly on corporate responsibility projects:

1. Interfaith Center on Corporate Responsibility (ICCR)

ICCR concentrates entirely on work with corporations in various areas, including access to health care (prescription drugs access, pharmaceutical lobbying, fraud), business supply chains (sweatshops, human rights abuses, wage inequalities, unfair labor practices), corporate governance (independency and transparency of boards of directors), environment (pollution, applicable laws and regulations), global warming, promoting human rights (TNCs operating in countries with repressive governments, corporate codes of conduct, forced/compulsory/child labor, worker health and safety), water and food (the health risks of genetically modified food, the scarcity of water resources).<sup>65</sup>

2. International Center for Corporate Accountability (ICCA)

ICCA is a non-profit organization aimed at promotion of good corporate citizenship. Its mission is to encourage TNCs in creating voluntary codes of conduct that would guide their business conduct in host countries regarding protection of human and labor rights.<sup>66</sup> Most importantly, ICCA provides independent monitoring of TNCs aimed at ensuring their compliance with corporate codes of conduct.<sup>67</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> Interfaith Center on Corporate Responsibility, Issues, at <<http://www.iccr.org/issues/>> (last visited July 4, 2005).

<sup>66</sup> International Center for Corporate Accountability, About Us, at <[http://www.icca-corporateaccountability.org/02a\\_pres.html](http://www.icca-corporateaccountability.org/02a_pres.html)> (last visited July 5, 2005).

<sup>67</sup> *Id.*

### 3. Transparency International

Transparency International concentrates its entire agenda on corporations. Its work is devoted to only one aspect of corporate accountability – combating corruption, which includes raising awareness about corruption and monitoring.<sup>68</sup>

### 4. Consumers International

Consumers International consists of many independent consumer organizations and its work focuses on another area of corporate accountability – consumers.<sup>69</sup> Its projects include consumer health and safety, consumer education, corporate responsibility, and consumer protection.<sup>70</sup>

### 5. Clean Clothes Campaign (CCC)

CCC is an organization aimed at improving working conditions in the global garment industry in order to end exploitation and abuse of workers in this industry.<sup>71</sup> Its work includes pressuring companies to take responsibility for ensuring that their products are produced in decent working conditions; supporting workers, trade unions and NGOs in producer countries; and raising awareness among consumers about working conditions in the garment industry.<sup>72</sup>

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<sup>68</sup> Transparency International, Project and Activities, *at* <<http://www.transparency.org/activities/activities.html>> (last visited July 4, 2005).

<sup>69</sup> Consumers International, About CI, Frequently Asked Questions, *at* <<http://www.consumersinternational.org/Templates/Internal.asp?NodeID=89657&int1stParentNodeID=89651&int2ndParentNodeID=89651>> (last visited July 4, 2005).

<sup>70</sup> Consumers International, Programmes, *at* <<http://www.consumersinternational.org/Templates/Internal.asp?NodeID=89651>> (last visited July 4, 2005).

<sup>71</sup> Clean Clothes Campaign, Frequently Asked Questions, What does the Clean Clothes Campaign do? What are its main objectives and activities?, *at* <[http://www.icca-corporateaccountability.org/02a\\_pres.html](http://www.icca-corporateaccountability.org/02a_pres.html)> (last visited July 4, 2005).

<sup>72</sup> *Id.*

## 6. Prince of Wales International Business Leaders Forum (IBLF)

IBLF is a non-profit organization based in Great Britain aimed at the promotion of business activities in the field of corporate social responsibility and supporting sustainable socio-economic development in local communities.<sup>73</sup>

### **B. NGO Pressure Techniques**

NGO techniques of pressuring TNCs include a wide range tools, such as the dissemination of information about human rights violations to the public, the cooperation with other NGOs and other entities at the international level, the reporting and consultations with governments and intergovernmental organizations on human rights problems.<sup>74</sup> Other NGO pressure techniques include traditional tools of protest, such as boycotts and street demonstrations, as well as newly developed tools, including networking or “buying company shares and pressing for shareholder resolutions.”<sup>75</sup> NGOs are also active in international litigation intervening in cases as parties, court or party-appointed experts, witnesses or amici curiae.<sup>76</sup> Furthermore, in recent years, NGOs have extended their access to intergovernmental organizations.<sup>77</sup> For instance, the UN has increased the number of NGOs involved in their work.<sup>78</sup> The Committee on Economic, Social and Cultural Rights, the Committee on the Rights

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<sup>73</sup> The Prince of Wales International Business Leaders Forum, at <<http://www.iblf.pl/cms/english/index.html>> (last visited July 4, 2005).

<sup>74</sup> See Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT’L L. REV. 1335, 1368 (1999).

<sup>75</sup> See Evelyn Iritani, *From the Streets to the Inner Sanctum*, L.A. TIMES, Feb. 20, 2005, available at <<http://www.globalpolicy.org/ngos/business/2005/0220sanctum.htm>>.

<sup>76</sup> See generally Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT’L L. 611 (1994) (analyzing the role of NGOs in international litigation).

<sup>77</sup> See Mertus, *supra* note 74, at 1371.

<sup>78</sup> *Id.*

of Child, and the Committee against Torture allow NGOs to formally intervene on human rights issues.<sup>79</sup>

The strongest instrument available to NGOs is to shame corporations violating international standards in public. Creating pressure by negative publicity often causes a decrease in consumer interest as well as difficulty with hiring high quality employees.<sup>80</sup> NGO activism has reached a significant number of positive results leading to changes in transnational corporate business conduct. For example Nike, as a response to negative publicity, improved working conditions in its factories located in Asia;<sup>81</sup> Whirlpool Corp., influenced by Greenpeace, started to use environmentally friendly insulation;<sup>82</sup> and Home Depot stopped buying lumber from Canada's Great Bear rain forest.<sup>83</sup>

Another possible and newly developed tool used by NGOs in order to influence corporate conduct is direct cooperation between NGOs and TNCs.<sup>84</sup> Such cooperation can be carried out on different levels and in different intensity, varying from a company's simple donation to support a certain project, to a true long-term partnership.<sup>85</sup> Some examples of this type of

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<sup>79</sup> *Id.*

<sup>80</sup> See Joseph, *supra* note 39, at 81.

<sup>81</sup> See Nike Announces New Initiative, available at <<http://www.michaelmoore.com/dogeatdogfilms/nike2.html>> (last visited May 3, 2005); see also Joseph, *supra* note 39, at 81.

<sup>82</sup> Greenpeace, Campaigns, Greenfreeze, at <<http://www.greenpeace.org/international/campaigns/climate-change/solutions/greenfreeze>> (last visited July 4, 2005) (Greenpeace initiated development of the world's first ozone and climate friendly refrigerator technology (Greenfreeze) in 1992. There are over 100 Greenfreeze models now available on the market as products of numerous different companies, including Bosh/Siemens, Electrolux, and Whirlpool.); see also Iritani, *supra* note 75.

<sup>83</sup> Greenpeace.CA, A History of Greenpeace Canada's Rainforest Campaign, at <<http://www.greenpeace.ca/e/campaign/forests/greatbear/background/history.php>> (last visited July 4, 2005) (Greenpeace has been focusing on saving Canada's Rainforests since 1993. In 1999, after lengthy protests by numerous environmental groups across North America, Home Depot finally agreed to stop buying wood from endangered forest areas, including Western Red Cedar from the Canadian rainforest.)

<sup>84</sup> See Roger Cowe, *Business/NGO Partnerships – What's the Payback?*, ETHICAL CORPORATION, Apr. 2004, available at <<http://globalpolicy.igc.org/ngos/credib/2004/0404partner.htm>>; see also Pact and International Business Leaders Forum (last visited Apr. 24, 2005), at <<http://www.pactworld.org/initiatives/cce/ibf.htm>>, their work is aimed at developing NGO-business partnerships.

<sup>85</sup> See Cowe, *supra* note 84.

cooperation can be found in Fair Labor Association,<sup>86</sup> Global Alliance,<sup>87</sup> or Pact and International Business Leaders Forum.<sup>88</sup> Nevertheless, this approach brings certain dangers to both sides: NGOs risk their good reputation and may waste their limited resources in an unsuccessful partnership; and companies risk wasting time and financial resources, as well as misuse of sensitive information.<sup>89</sup> Despite the possible risks, such partnership can also bring positive results: (1) a company can gain credibility and improve its reputation; (2) it can also benefit from the NGO's knowledge and expertise; (3) there are also monetary benefits for NGOs; (4) such partnership provides NGOs with an opportunity to make a substantial positive change in corporate business conduct; and therefore, to become more useful and relevant.<sup>90</sup>

### C. Conclusions

Despite their numerous positive results, NGOs activism is limited and has not proven to be always effective. NGOs have to rely on corporate willingness to cooperate. In case corporations are not willing to cooperate, the most effective instrument available to NGOs is negative publicity, which does not always work.<sup>91</sup> Sometimes, even consumer boycotts do not lessen corporate huge worldwide profits.<sup>92</sup> For instance, Nestlé keeps making huge profits even despite the long-term negative campaigns against that company for its improper marketing of

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<sup>86</sup> Fair Labor Association, *at* <http://www.fairlabor.org/> (last visited July 4, 2005) (Fair Labor Associations is a non-profit organization working in cooperation of industry, NGOs, colleges and universities in order to promote corporate compliance with international labor standards and to improve working conditions worldwide.)

<sup>87</sup> Global Alliance for Workers and Communities, About Global Alliance, Background, *at* <http://www.theglobalalliance.org/background.htm> (last visited July 4, 2005) (Global Alliance is a partnership of private, public and nongovernmental organizations aimed at promoting corporate social responsibility in areas related to health, workplace issues, and improvement of workplace environment.)

<sup>88</sup> Pact and International Business Leaders Forum, *at* <http://www.pactworld.org/initiatives/cce/ibf.htm> (last visited Apr. 24, 2005) (Their work is aimed at developing NGO-business partnerships.); *see also* Cowe, *supra* note 84.

<sup>89</sup> *See* Cowe, *supra* note 84.

<sup>90</sup> *Id.*

<sup>91</sup> *See* Joseph, *supra* note 39, at 82.

<sup>92</sup> *Id.*, *see also* Simon Zadek & Maya Forstater, *Making Civil Regulation Work*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 69-75 (Michael K. Addo, ed., 1999).

baby milk formula in developing countries, which contributes to high infant mortality there.<sup>93</sup>

Another example is a failure of NGO activists to persuade Wal-Mart Stores Inc. to open its supplier factories to public scrutiny and to monitoring by independent auditors.<sup>94</sup>

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<sup>93</sup> See, e.g. Joseph, *supra* note 39, at 82

<sup>94</sup> See Iritani, *supra* note 75.

### CHAPTER III

#### PRIVATE CODES OF CONDUCT

##### A. General Considerations

TNCs are beginning to adopt their own voluntary sets of labor, environmental and human rights standards that seek to regulate their business conduct.<sup>95</sup> These codes have become popular among corporations for several reasons. Firstly, codes provide corporations with a convenient possibility of assuring their stakeholders and the public in general that their business is conducted in an ethical and socially responsible fashion.<sup>96</sup> Moreover, proponents of voluntary codes of conduct argue that there is no need for external corporate regulation by governments, since labor, environmental and other human rights standards can be secured by corporations themselves.<sup>97</sup> They also argue that codes of conduct are a more adaptable and less expensive way of regulation since no monitoring institutions need to be established.<sup>98</sup>

Unfortunately, voluntary codes of conduct suffer from many imperfections.<sup>99</sup> Such codes usually include only vague statements, lack transparency and an effective enforcement mechanism.<sup>100</sup> Companies are not willing to be exposed to independent external monitoring procedures that would ensure their compliance to the codes.<sup>101</sup> Because of their voluntary character, there is no guarantee that the codes will always be followed in practice.<sup>102</sup>

Additionally, companies usually implement codes of conduct only under public pressure to make

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<sup>95</sup> See SETHI, *supra* note 40, at 81; see also Joseph, *supra* note 39, at 82-83.

<sup>96</sup> See SETHI, *supra* note 40, at 82, see also Mark B. Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?*, 24 U. MIAMI INTER-AM. L. REV. 399, 416 (1993).

<sup>97</sup> See Paul & Garred, *supra* note 22.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*; see also SETHI, *supra* note 40, at 82; Baker, *supra* note 36, at 138-40.

<sup>101</sup> See SETHI, *supra* note 40, at 84.

<sup>102</sup> See Baker, *supra* note 36, at 138-40; Joseph, *supra* note 39, at 83.

an impression of a socially responsible business.<sup>103</sup> Also, restrictions are imposed only on the corporations that adopt a voluntary code of conduct and put it into practice.<sup>104</sup> Therefore, these corporations might assume that they place themselves at a competitive disadvantage in comparison to other corporations that do not adopt their own corporate codes of conduct.<sup>105</sup> To eliminate the most obvious disadvantages, companies sometimes perform monitoring procedures by third parties like public accounting firms (for instance Ernst and Young, or PricewaterhouseCoopers).<sup>106</sup> Unfortunately, the monitoring that is performed by these firms does not prove to be very efficient either, since audit reports usually do not have to be published. Also, there is a possibility that the monitoring firms might not be strict enough because of dealing with corporations that are their permanent clients, and therefore their significant financial source.<sup>107</sup> Thus, the more efficient alternative way is to involve NGOs in monitoring procedures.<sup>108</sup>

## **B. Types of Codes of Conduct**

Codes of conduct can be generally divided into two groups – public and private codes of conduct.<sup>109</sup> Public codes of conduct are those created by inter-governmental organizations, such as the UN, the OECD and the ILO.<sup>110</sup> Private codes of conduct can be further divided into

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<sup>103</sup> See Toftoy, *supra* note 36, at 917-18; Paul & Garred, *supra* note 22; Baker, *supra* note 36, at 135.

<sup>104</sup> See Paul & Garred, *supra* note 22; *see also* Joseph, *supra* note 39, at 83.

<sup>105</sup> See sources cited *supra* note 104.

<sup>106</sup> See Paul & Garred, *supra* note 22.

<sup>107</sup> See Toftoy, *supra* note 36, at 923; Paul & Garred, *supra* note 22.

<sup>108</sup> See Paul & Garred, *supra* note 22.

<sup>109</sup> See Toftoy, *supra* note 36, at 913-15; Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 400-01 (2005); Justin Nolan, *Human Rights Responsibilities of Transnational Corporations: Developing Uniform Standards* 5-6, available at <<http://www.law.usyd.edu.au/scigl/anzsil/Conferences/2004%20Conference%20Proceedings/nolan.pdf>>; SETHI, *supra* note 40, at 81.

<sup>110</sup> These codes of conduct are not related to this chapter, so they will be discussed in more detail in the following chapters. See Toftoy, *supra* note 36, at 913-14;



multistakeholder codes of conduct and individual codes of conduct.<sup>111</sup> Multistakeholder codes of conduct are created either by a number of companies in a certain region or industry, or in cooperation with non-governmental or trade union organizations and companies.<sup>112</sup> This type of corporate codes is then applied by a whole group of corporations that participated on its creation.<sup>113</sup> The second type of private codes is created and applied by individual companies.<sup>114</sup>

Companies usually prefer the multistakeholder approach since it provides them with the possibility of hiding among the others when dealing with the code's implementation and their possible critics.<sup>115</sup> Individual codes of conduct are used if the multistakeholder approach does not prove to be successful.<sup>116</sup> Unfortunately, multistakeholder codes of conduct appear to be even less efficient than individual codes of conduct for several reasons.<sup>117</sup> Firstly, to succeed, they need to be adopted by as large number of companies as possible.<sup>118</sup> This might bring difficulties in decision-making procedures since a consensus of all companies is required.<sup>119</sup> Also, it is hard to force a large number of companies to follow particular standards.<sup>120</sup> If only a small number of them fail to comply with a particular code of conduct, it might cause a failure of such corporate code for all the companies involved.<sup>121</sup> And most importantly, multistakeholder codes of conduct suffer from the so called "free rider problem".<sup>122</sup> Individual companies are usually not interested in improving certain standards of their business conduct since there are no enforcement

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<sup>111</sup> See Nolan, *supra* note 109, at 5-6.

<sup>112</sup> See sources cited *supra* note 109.

<sup>113</sup> *Id.*

<sup>114</sup> See Toftoy, *supra* note 36, at 915-17; Nolan, *supra* note 109, at 5-6; SETHI, *supra* note 40, at 88-90.

<sup>115</sup> See SETHI, *supra* note 40, at 85-87.

<sup>116</sup> *Id.* at 85.

<sup>117</sup> *Id.* at 85-87.

<sup>118</sup> *Id.* at 87.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

procedures available to ensure companies' compliance with their obligations.<sup>123</sup> Thus, companies often participate on such multistakeholder codes of conduct only to make a public impression of a socially responsible corporation, without having any real intention to improve their business performance.<sup>124</sup>

### C. Some Examples of Codes of Conduct

To demonstrate their character, advantages and disadvantages, following are some examples of the most known voluntary codes of conduct:

#### 1. The Sullivan Principles in South Africa (Multistakeholder Code of Conduct)<sup>125</sup>

The Sullivan Principles (The Principles) serve as one of the best and most successful examples of an international code of conduct.<sup>126</sup> They were proposed by Reverend Leon Sullivan in 1977, and were accepted by twelve major U.S. TNCs that agreed to apply the Principles to their business operations in South Africa.<sup>127</sup> The Principles were aimed against the apartheid legally practiced in South Africa and were supposed to improve working and living conditions for black employees.<sup>128</sup> The signatory companies reached success in removing apartheid from their operations.<sup>129</sup> They also increased wages for black workers and played an important role in improving their living conditions.<sup>130</sup>

However, the companies did not make satisfactory progress in increasing the number of black workers in management and supervisory positions, nor did they succeed in supporting

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Sullivan Principles for U.S. Corporations Operating in South Africa*, 24 I.L.M. 1494 (1985) [hereinafter *Sullivan Principles*].

<sup>126</sup> See SETHI, *supra* note 40, at 95-109; Baker, *supra* note 96, at 418-20.

<sup>127</sup> Reverend Sullivan was a black West Virginian Baptist minister and a member of the Board of Directors of General Motors Corporation at that time. See Baker, *supra* note 96, at 419; SETHI, *supra* note 40, at 95.

<sup>128</sup> SETHI, *supra* note 40, at 96-98; Baker, *supra* note 96, at 419.

<sup>129</sup> SETHI, *supra* note 40, at 107; Baker, *supra* note 96, at 419.

<sup>130</sup> SETHI, *supra* note 40, at 107.

black business development.<sup>131</sup> In the end, most of the U.S. companies, when faced with constant public critics, decided to withdraw their economic activities from South Africa.<sup>132</sup>

2. The Fair Labor Association's Workplace Code of Conduct (Multistakeholder Code of Conduct)<sup>133</sup>

The Fair Labor Association ("FLA") emerged from the Apparel Industry Partnership, which was established in 1996, to deal with public criticism about violations of labor standards by suppliers of U.S. corporations in plants in Latin America and Asia.<sup>134</sup> The FLA functions as a nonprofit organization that currently consists of 12 major U.S. apparel and footwear manufacturers and retailers, and also includes participation of other companies, NGOs, universities and colleges.<sup>135</sup> The essential task of the FLA is to promote labor rights in factories in the U.S. and abroad.<sup>136</sup> To achieve this task the FLA created a code of conduct and a monitoring system.<sup>137</sup> The Workplace Code of Conduct includes nine principles in the area of labor rights – prohibition of forced and child labor, protection against harassment and discrimination, declaration of safe and healthy environment, freedom of association and collective bargaining, establishment of minimum wages, maximum working hours per week and overtime compensation.<sup>138</sup> As to the monitoring system, the FLA accredits independent monitors to perform inspections in factories of its participating companies, then the monitors issue public

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 108.

<sup>133</sup> Fair Labor Association, Workplace Code of Conduct, at <<http://www.fairlabor.org/all/code/index.html>> (last visited May 3, 2005).

<sup>134</sup> See SETHI, *supra* note 40, at 135; Paul & Garred, *supra* note 22; Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111, 125 (1998).

<sup>135</sup> See SETHI, *supra* note 40, at 136; Fair Labor Association, About Us, at <<http://www.fairlabor.org/all/about/>> (last visited May 3, 2005).

<sup>136</sup> See SETHI, *supra* note 40, at 137; Fair Labor Association, *supra* note 126.

<sup>137</sup> See SETHI, *supra* note 40, at 138-46; Workplace Code of Conduct, *supra* note 133.

<sup>138</sup> See sources cited *supra* note 137.

reports stating whether these companies' business operations are in compliance with the established principles.<sup>139</sup> Beside the external monitoring system, companies are also obliged to perform internal monitoring to ensure their compliance with the code principles.<sup>140</sup>

Unfortunately, the FLA code also has many disadvantages. The most important flaw is that every decision made by the FLA has to be approved by all members. Thus, it is always a question of making political compromises and lowering the level of standards, so that all members, especially corporations, would consent.<sup>141</sup> The code contains broad statements and does not include specific factors that would determine whether corporations are in compliance with the declared principles.<sup>142</sup> Moreover, in case a company fails to comply with the FLA principles, the FLA operates with few inefficient enforcement methods.<sup>143</sup> A company can be placed under special review for a 90-day period that can be extended for an indefinite period.<sup>144</sup> Also, there is no obligation of making these actions public.<sup>145</sup> In the end, if a company does not comply, its participation can be terminated.<sup>146</sup> However, such termination requires a supermajority vote (at least two thirds of all the industry board members and two thirds of the labor/NGO board members), which is very hard to reach.<sup>147</sup> Under these circumstances, it is not probable that a company would be exposed to negative publicity.<sup>148</sup>

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<sup>139</sup> See Fair Labor Association, Monitoring, at <<http://www.fairlabor.org/all/monitor/index.html>>; Fair Labor Association, Charter 20-21 (As Amended July 27, 2004), available at <<http://www.fairlabor.org/all/about/FLAcharter.pdf>> (last visited May 3, 2005) [hereinafter *FLA Charter*]; SETHI, *supra* note 40, at 142-45.

<sup>140</sup> See sources cited *supra* note 130.

<sup>141</sup> See SETHI, *supra* note 40, at 137.

<sup>142</sup> *Id.* at 140; see also FLA Workplace Code of Conduct, *supra* note \_\_\_\_.

<sup>143</sup> See *FLA Charter*, *supra* note 139, at 26; SETHI, *supra* note 40, at 145-46.

<sup>144</sup> See sources cited *supra* note 143.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See *FLA Charter*, *supra* note 139, at 4, 9; SETHI, *supra* note 40, at 145-46.

<sup>148</sup> See SETHI, *supra* note 40, at 145-46.

3. Mattel, Inc.: Global Manufacturing Principles (Individual Code of Conduct)<sup>149</sup>

Mattel, Inc., the world's largest toy company, created the first version of its code of conduct for Mattel's plants and plants of its contract suppliers (called Global Manufacturing Principles – GMP) in 1997, partly as a response to external NGO criticism.<sup>150</sup> Mattel, Inc. announced that its compliance with GMP would be monitored by an external independent group (Mattel Independent Monitoring Council – MIMCO) that would be performing audits on a regular basis with the authority of making its findings public and most importantly, without prior approval of the company.<sup>151</sup>

The monitoring procedure is aimed to ensure GMP compliance functions on two separate levels.<sup>152</sup> One level is an internal monitoring by the company itself that is responsible for regular audits of all Mattel owned or Mattel controlled plants, as well as in its suppliers' plants.<sup>153</sup> Another level of the monitoring system is external monitoring that is performed by an independent external group of monitors called International Center for Corporate Accountability (ICCA) (a successor of MIMCO) that performs audits every three years in Mattel's owned or Mattel's controlled plants. In case of Mattel suppliers' plants, it is up to ICCA's sole discretion to decide when and which individual plants will be monitored.<sup>154</sup> ICCA audits are aimed at verification of Mattel's compliance with GMP and thus, ICCA does not have to monitor each individual plant.<sup>155</sup> By this way of monitoring, it is ensured that ICCA is not overwhelmed by

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<sup>149</sup> Mattel, Inc., Global Manufacturing Principles, *at*

<[http://www.mattel.com/about\\_us/Corp\\_Responsibility/GMPoverview.pdf](http://www.mattel.com/about_us/Corp_Responsibility/GMPoverview.pdf)> (last visited July 6, 2005).

<sup>150</sup> *Id.* at 239-72; *see also* Mattel History, *at* <[http://www.mattel.com/about\\_us/history](http://www.mattel.com/about_us/history)> (last visited May 3, 2005).

<sup>151</sup> *See* SETHI, *supra* note 40, at 239-240.

<sup>152</sup> *Id.* at 252-53; *see also* Mattel, Independent Monitoring and Transparency, *at* <[http://www.mattel.com/about\\_us/Corp\\_Responsibility/cr\\_mimco.asp](http://www.mattel.com/about_us/Corp_Responsibility/cr_mimco.asp)> (last visited May 3, 2005).

<sup>153</sup> *See* sources cited *supra* note 152.

<sup>154</sup> *See* International Center for Corporate Accountability, Special Reports, Mattel, Inc., *at* <[http://www.icca-corporateaccountability.org/04\\_reports.php?sp\\_rep=2](http://www.icca-corporateaccountability.org/04_reports.php?sp_rep=2)> (last visited May 3, 2005).

<sup>155</sup> *See* SETHI, *supra* note 40, at 252-53.

more work than it could handle and at the same time, an efficiency of the monitoring system is guaranteed since each single plant is put under equal pressure that it might be chosen for an ICCA verification audit.<sup>156</sup>

By undertaking all these steps, Mattel, Inc. proved that it has taken its social responsibility and its compliance with GMP seriously. The GMP and its monitoring system have brought very good results and could serve as a model example of private voluntary corporate codes of conduct.<sup>157</sup>

#### **D. Conclusions – Recommendations**

As discussed above, private codes of conduct have proved in most cases to be inefficient and insufficient in obliging TNCs to adhere to certain human rights standards.<sup>158</sup> Therefore, it is apparent that these codes do not play an essential role in the regulation of transnational corporate conduct. However, as there are currently no binding rules regulating corporate social accountability on the international level, the voluntary codes of conduct should serve as a temporary instrument in the process of moving from corporate social responsibility to corporate social accountability.<sup>159</sup> As such, private corporate codes should not be used as an empty gesture only to satisfy external public pressures, but they should be made as efficient as possible by meeting the following minimum criteria:

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 260-64; *see also* International Center for Corporate Accountability, *supra* note 154; *see also in general* UNCTAD, *The Social Responsibility of Transnational Corporations* (1999) 38-41, U.N. Doc. UNCTAD/ITE/IIT/Misc. 21., *available at* <<http://www.unctad.org/en/docs/poiteiitm21.en.pdf>>.

<sup>158</sup> *See* SETHI, *supra* note 40, at 277.

<sup>159</sup> *Id.* at 284; *see also* Paul & Garred, *supra* note 22.

### 1. Creation

- Codes of conduct should be created through the cooperation of companies with NGOs, trade unions and other stakeholders;<sup>160</sup>

### 2. Content

- Content must be clear and enforcement must be guaranteed;<sup>161</sup>
- Labor and environmental standards should be guaranteed on a higher level than are guaranteed by local legal regulations since the laws in developing countries usually cover only very low level of these standards;<sup>162</sup>
- TNCs should not promise more than they are able to carry out since that could seriously harm their reputation;<sup>163</sup>

### 3. Publicity

All employees should become familiar with their company's code of conduct and their rights resulting from this code;

### 4. Compliance

- Corporate compliance with a code of conduct must be monitored by an independent group of experts, including members of NGOs;<sup>164</sup>
- Monitoring must be performed on a regular basis and in a transparent way, audit results must be available to public without company's prior consent;<sup>165</sup>

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<sup>160</sup> See Paul & Garred, *supra* note 22.

<sup>161</sup> *Id.*

<sup>162</sup> See SETHI, *supra* note 40, at 287.

<sup>163</sup> *Id.* at 286.

<sup>164</sup> *Id.* at 287; see also Paul & Garred, *supra* note 22.

<sup>165</sup> See SETHI, *supra* note 40, at 240; Paul & Garred, *supra* note 22.

## 5. Enforcement

- In cases of corporate non-compliance with its code of conduct, there must be efficient sanctions available to ensure the company's interest in an effective code implementation;<sup>166</sup>
- A complaint procedure should be available to company employees in cases when their rights guaranteed by a company code of conduct are violated.

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<sup>166</sup> See Paul & Garred, *supra* note 22.



## CHAPTER IV

### INTERNATIONAL INSTRUMENTS REGULATING TRANSNATIONAL CORPORATIONS

#### A. UN Instruments on Protection of Human Rights Aimed at States

Certain actions constitute violations of international law and are prohibited by customary international law binding on all - states and private individuals, including TNCs - without regard to state consent.<sup>167</sup> Such violations include for instance genocide, torture, and slavery.<sup>168</sup> The international instruments that prohibit these crucial human rights obligations are usually addressed preferably to states as the contracting parties.<sup>169</sup> However, private individuals, including TNCs, are also obliged to comply with such instruments.<sup>170</sup>

Some international instruments clarify the obligation of private individuals to comply with the expressed human rights norms by directly referring to them.<sup>171</sup> For example, the preamble to the Universal Declaration of Human Rights states that “every individual and every organ of society” shall promote and secure the rights and freedoms included in this Declaration.<sup>172</sup> Thus, also TNCs, as organs of society, shall ensure compliance with these rights.<sup>173</sup> The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both refer in their preambles to the obligations of private individuals by including the following sentence: “Realizing that the

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<sup>167</sup> See Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 71-78 (2002) (explaining why universal human rights norms bind also TNCs and individuals).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*, at 72.

<sup>172</sup> *Universal Declaration of Human Rights*, pmbl, Dec. 10, 1948, U.N. Doc. A/810 [hereinafter *Universal Declaration*]; see also Stephens, *supra* note 167, at 72; Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT’L L. 1, 13 (2003).

<sup>173</sup> See Stephens, *supra* note 167, at 72, 77-78; Deva, *supra* note 172, at 13.

individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.”<sup>174</sup> Also, the Convention on the Prevention and Punishment of the Crime of Genocide states that: “persons committing genocide shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”<sup>175</sup>

The most important UN human rights instruments that apply also to TNCs despite the fact they are addressed to states are as follows:

- Universal Declaration of Human Rights <sup>176</sup>
- The Convention on the Prevention and Punishment of the Crime of Genocide <sup>177</sup>
- International Convention on the Elimination of All Forms of Racial Discrimination <sup>178</sup>
- The International Covenant on Economic, Social and Cultural Rights <sup>179</sup>
- The International Covenant on Civil and Political Rights <sup>180</sup>
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment <sup>181</sup>

However, these instruments have not been able to ensure corporate compliance with certain standards for several reasons.<sup>182</sup> Obligations are imposed on the states parties and not

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<sup>174</sup> *International Covenant on Civil and Political Rights*, Dec. 16, 1966, pmbl., 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, pmbl., 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>175</sup> *Convention on the Prevention and Punishment on the Crime of Genocide*, Dec. 9, 1948, art. 4, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter *Genocide Convention*].

<sup>176</sup> *Universal Declaration*, *supra* note 172.

<sup>177</sup> *Genocide Convention*, *supra* note 175.

<sup>178</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

<sup>179</sup> *International Covenant on Economic, Social and Cultural Rights*, *supra* note 174.

<sup>180</sup> *International Covenant on Civil and Political Rights*, *supra* note 174.

<sup>181</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

<sup>182</sup> *See* Deva, *supra* note 172, at 13-14.

directly on TNCs; and therefore, they do not provide an effective controlling and enforcing mechanism addressed to TNCs.<sup>183</sup> The implementation of the obligations depends on the ability of states to control TNCs, which is not always easy, in view of the growing powers of TNCs.<sup>184</sup> Moreover, these instruments do not cover a whole set of standards that need to be applied on transnational corporate conduct; on the contrary, they include only particular obligations concerning human rights, which are not sufficient to regulate corporate conduct in all necessary aspects.

### **B. International Instruments Covering a Narrow Scope of Obligations and Regulating Specific Types of Transnational Corporations**

These are the most specific instruments regulating transnational corporate conduct. Such instruments cover a limited field of standards that shall be carried out by corporations that do business in the particular field of regulation.

An example of such an instrument is the WHO Framework Convention on Tobacco Control, which seeks to regulate the tobacco industry in order to protect human health and to prevent negative social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke.<sup>185</sup> States, as the contracting parties to the Convention, are responsible for the implementation of the document.<sup>186</sup> Thus, tobacco manufacturers, distributors and importers are regulated indirectly by the Convention since the states parties commend themselves to undertake appropriate legislative and other measures affecting tobacco products at the national level.<sup>187</sup>

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<sup>183</sup> *Id.*; see also Stephens, *supra* note 167, at 75.

<sup>184</sup> See Deva, *supra* note 172, at 13-14.

<sup>185</sup> *WHO Framework Convention on Tobacco Control*, May 21, 2003, WHA56.1 (entered into force Feb. 27, 2005).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

Another example of this type of instrument is the WHO International Code of Marketing of Breast-Milk Substitutes (The Infant Formula Code), which is a set of recommendations to the WHO member states that promotes and encourages breastfeeding and proper use of breast-milk substitutes in order to ensure safe and adequate nutrition for infants.<sup>188</sup> The Code also calls upon the manufacturers and distributors of breast-milk substitutes to ensure that their business conduct is in compliance with the Code.<sup>189</sup>

These instruments are certainly of essential importance in the particular fields of business that they seek to regulate. However, they do not cover a comprehensive list of standards regulating transnational corporate conduct; on the contrary, they focus on very narrow fields of obligations including only specific areas of business. They also impose obligations only on contracting states in order to reach the objectives of a particular document. Thus, the implementation of such an instruments depends on the efficiency of the states' legal mechanisms and on their ability to regulate powerful TNCs, which can be sometimes problematic, especially in the case of developing countries.<sup>190</sup> Additionally, some of these instruments, like The Infant Formula Code mentioned above, represent only a set of recommendations, which are not legally enforceable and in fact depend on the willingness of the particular parties to comply with them.

### **C. International Instruments Covering a Narrow Scope of Obligations and Regulating All Types of Transnational Corporations**

These instruments are of a more general character than the previous group of instruments since they are aimed at regulating all types of TNCs and not only particular types of them.

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<sup>188</sup> *International Code of Marketing of Breast-milk Substitutes*, World Health Assembly Res., WHA34/1981/REC/1 (May 21, 1981).

<sup>189</sup> *Id.*

<sup>190</sup> See, e.g., Deva, *supra* note 172, at 49 (explaining why there is a need for a change in regulating TNCs and why the current regulation of transnational corporate conduct does not work); *Multinational Corporations in Least Developed Countries*, *supra* note 33, at 1, 6.

However, this group of instruments has a specific character since they focus on a narrow scope of obligations covering only certain areas of human rights or other standards. The most important instruments in the areas of labor, environment, bribery, and consumer protection are the following:

1. ILO Regulation: Labor Standards

The International Labour Organization (ILO) is the UN specialized agency that seeks to promote and secure basic labor rights by implementing Conventions and Recommendations in this area. The ILO has adopted hundreds of documents covering broad scope of labor standards - over 180 Conventions and over 190 Recommendations had been adopted by the end of June, 2003.<sup>191</sup> The crucial ILO instruments are the following:

- a. *ILO Convention Concerning Forced or Compulsory Labour*<sup>192</sup>
- b. *ILO Convention Concerning Freedom of Association and Protection of the Right to Organize*<sup>193</sup>
- c. *ILO Convention Concerning the Application of the Principles of the Right to Organize and Bargain Collectively*<sup>194</sup>
- d. *ILO Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*<sup>195</sup>
- e. *ILO Convention Concerning the Abolition of Forced Labour*<sup>196</sup>

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<sup>191</sup> See The ILO. What it is. What it does., ILO, at 15, available at <[http://www.ilo.org/public/english/bureau/inf/download/brochure/pdf/broch\\_0904.pdf](http://www.ilo.org/public/english/bureau/inf/download/brochure/pdf/broch_0904.pdf)>.

<sup>192</sup> *ILO Convention concerning Forced or Compulsory Labour*, No. 29, June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932).

<sup>193</sup> *ILO Convention Concerning Freedom of Association and Protection of the Right to Organize*, No. 87, July 9, 1948, 68 U.N.T.S. 17 (entered into force July 4, 1950).

<sup>194</sup> *ILO Convention Concerning the Application of the Principles of the Right to Organize and Bargain Collectively*, No. 98, July 1, 1949, 96 U.N.T.S. 257 (entered into force July 18, 1951).

<sup>195</sup> *ILO Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, No. 100, June 29, 1951, 165 U.N.T.S. 303 (entered into force May 23, 1953).

- f. *ILO Convention on Discrimination (Employment and Occupation)*<sup>197</sup>
- g. *ILO Convention Concerning Minimum Age for Admission to Employment*<sup>198</sup>
- h. *ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*<sup>199</sup>
- i. *ILO Declaration on Fundamental Principles and Rights at Work*<sup>200</sup>
- j. *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*<sup>201</sup>

The purpose of the Tripartite Declaration is to encourage transnational corporate positive contribution and to minimize difficulties related to the operations of TNCs.<sup>202</sup> It formulates principles in the areas of employment, training, conditions of work and life, and industrial relations.<sup>203</sup>

In contrast with the above ILO instruments, the Tripartite Declaration and its implementation process is not directed only to the member states, but also to the workers' and employers' organizations, and to the TNCs themselves.<sup>204</sup> Unfortunately, the instrument bears a form of declaration, which means that it is not legally binding upon the contracting parties in contrast to the previous mentioned conventions.<sup>205</sup>

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<sup>196</sup> *ILO Convention Concerning the Abolition of Forced Labour*, No. 105, June 25, 1957 (entered into force Jan. 17, 1959).

<sup>197</sup> *ILO Convention on Discrimination (Employment and Occupation)*, No. 111, June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960).

<sup>198</sup> *ILO Convention Concerning Minimum Age for Admission to Employment*, No. 138, June 26, 1973, 1015 U.N.T.S. 297 (entered into force June 19, 1976).

<sup>199</sup> *ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, No. 182, June 17, 1999, 38 I.L.M. 1207 (entered into force November 10, 2000).

<sup>200</sup> *ILO Declaration on Fundamental Principles and Rights at Work*, 86th Sess., June 1998.

<sup>201</sup> *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, ILO, 204th Sess., Nov. 16, 1977, 17 I.L.M. 422 (1978).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

## 2. Environmental Standards

- a. *Declaration of the UN Conference on the Human Environment (“Stockholm Declaration”)*<sup>206</sup>
- b. *Montreal Protocol on Substances that Deplete the Ozone Layer*<sup>207</sup>
- c. *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*<sup>208</sup>
- d. *Agenda 21*<sup>209</sup>
- e. *Rio Declaration on Environment and Development*<sup>210</sup>
- f. *Malmö Ministerial Declaration*<sup>211</sup>

## 3. Bribery

- a. *UN Declaration against Corruption and Bribery in International Commercial Transactions*<sup>212</sup>
- b. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*<sup>213</sup>
- c. *The UN Convention against Corruption*<sup>214</sup>

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<sup>206</sup> *Declaration of the UN Conference on the Human Environment*, U.N. GAOR, U.N. Doc. A/Conf.48/14/Rev. 1; 11 I.L.M. 1416 (June 16, 1972).

<sup>207</sup> *Montreal Protocol on Substances that Deplete the Ozone Layer*, U.N. Environment Programme (Ozone Secretariat), S. Treaty Doc. No. 10, 100th Cong., 1st Sess.; 26 I.L.M. 1550 (Sept. 16, 1987) (entered into force on Jan. 01, 1989).

<sup>208</sup> *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, U.N. Environment Programme, 1673 U.N.T.S. 126; 28 I.L.M. 657 (Mar. 22, 1989) (entered into force May 5, 1992).

<sup>209</sup> *Agenda 21: Programme of Action for Sustainable Development*, U.N. Conference on Environment and Development, U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (Jun. 14, 1992).

<sup>210</sup> *Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (Jun. 13, 1992).

<sup>211</sup> *Malmö Ministerial Declaration*, Global Ministerial Environment Forum, UNEP, 6th Spec. Sess. (May 31, 2000).

<sup>212</sup> *Declaration against Corruption and Bribery in International Commercial Transactions*, G.A. Res. 191, U.N. GAOR, 51st Sess., 86th mtg. (Dec. 16, 1996).

<sup>213</sup> *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD Doc. DAF/IME/BR(97)20 (Nov. 21, 1997).

<sup>214</sup> *UN Convention against Corruption*, G.A. Res. 4, U.N. GAOR, 58th Sess., Agenda Item 108 (Oct. 31, 2003).

#### 4. Consumer Protection

- a. *The UN Guidelines for Consumer Protection*<sup>215</sup>
- b. *The OECD Guidelines for Consumer Protection in the Context of Electronic Commerce*<sup>216</sup>

#### 5. Conclusions

The instruments listed in this subchapter have played a crucial role in the attempts to regulate TNCs. However, they bear some features that impede the efficient enforcement of obligations with regard to transnational corporate conduct.

These instruments are in general of two types. The first type is an instrument that is legally binding and imposes obligations on the contracting parties, which are always states. This means that even though such an instrument is legally enforceable against the states parties that have ratified it, it is not directly enforceable against TNCs. States are the ones that must ensure transnational corporate compliance with the particular instruments, which is problematic given the fact that TNCs often operate with more powers than the states that seek to regulate them.

The second type of the instruments described in this subchapter is even less efficient since it is a set of recommendations, which are usually addressed to states. But even if these recommendations are sometimes directed to TNCs, they are not legally enforceable, and therefore, they cannot serve as major regulating instruments of transnational corporate conduct.

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<sup>215</sup> *UN Guidelines for Consumer Protection*, G.A. Res. 248, U.N. GAOR, 39th Sess. (Apr. 16, 1985); G.A. Res. 449, U.N. GAOR, 54th Sess. (1999) (expanded in 1999).

<sup>216</sup> *Guidelines for Consumer Protection in the Context of Electronic Commerce*, OECD (2000).



## **D. International Instruments Covering a Broad Scope of Obligations and Regulating All Types of Transnational Corporations**

### 1. UN Regulation

#### *a. UN Draft Code of Conduct for Transnational Corporations*<sup>217</sup>

Negotiations on the UN Draft Code began in 1977; however, the Code was never fully adopted and in 1992 the negotiations were definitely abandoned.<sup>218</sup> The Code sought to regulate TNCs by applying certain standards on their conduct, as well by imposing obligations on governments that would guarantee certain level of treatment for TNCs.<sup>219</sup> One of the main issues was whether the Code should have been in the form of voluntary guidelines or legally binding.<sup>220</sup> While the developing and socialist countries preferred a legally binding code of conduct, the OECD countries firmly insisted on a voluntary form of the document.<sup>221</sup>

If the Draft Code had been fully adopted, it would have represented a radical movement forward in the process of regulating TNCs on international level since it would be the first document covering a broad scope of obligations related to transnational corporate conduct and involving such a large number of states. However, the document probably articulated higher goals than it was possible to realize at the time of the drafting process, and therefore was doomed to fail.

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<sup>217</sup> *United Nations Draft Code of Conduct for Transnational Corporations*, U.N. Doc. E/1990/94 (June 12, 1990) [hereinafter *UN Draft Code*].

<sup>218</sup> See Jan Huner, *The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 198 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

<sup>219</sup> See SIDNEY DELL, *THE UNITED NATIONS AND INTERNATIONAL BUSINESS* 73-74 (1990).

<sup>220</sup> *Id.* at 77.

<sup>221</sup> *Id.*

*b. The UN Global Compact*<sup>222</sup>

The Global Compact is a voluntary program between the United Nations and corporations that was initiated by UN Secretary-General Kofi Annan in January, 1999, and formally established on July 26, 2000.<sup>223</sup> Its purpose is to support corporate compliance with certain minimum standards.<sup>224</sup> To ensure such compliance, Global Compact offers its own voluntary code that consists of originally nine (now ten) principles in the areas of human rights (1<sup>st</sup> and 2<sup>nd</sup> principle), labor (3<sup>rd</sup> to 6<sup>th</sup> principle), environment (7<sup>th</sup> to 9<sup>th</sup> principle) and anti-corruption (10<sup>th</sup> principle).<sup>225</sup>

Unfortunately, the Global Compact offers only vague statements without any enforcement or monitoring procedures that would ensure corporate compliance with the principles.<sup>226</sup> There have been expressed concerns that “many corporations would like nothing better than to wrap themselves in the flag of the United Nation in order to ‘bluewash’ their public image, while at the same time avoiding significant changes to their behavior.”<sup>227</sup> In other words, the Global Compact provides corporations with great possibilities for covering the most critical areas of social responsibility - human rights, environment, labor and anti-corruption standards, while declaring these standards only symbolically without making any major changes in their business conduct.<sup>228</sup>

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<sup>222</sup> UN Global Compact, at <<http://www.unglobalcompact.org/>> (last visited July 6, 2005).

<sup>223</sup> See SETHI, *supra* note 40, at 110-11; see also Paul & Garred, *supra* note 22; The Global Compact, The Ten Principles, at <<http://www.unglobalcompact.org/Portal/>> (last visited May 3, 2005).

<sup>224</sup> The Global Compact, The Ten Principles, at <<http://www.unglobalcompact.org/Portal/>> (last visited May 3, 2005).

<sup>225</sup> *Id.*

<sup>226</sup> See SETHI, *supra* note 40, at 127; Paul & Garred, *supra* note 22.

<sup>227</sup> See SETHI, *supra* note 40, at 127.

<sup>228</sup> *Id.* at 123; see also Paul & Garred, *supra* note 22.

*c. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms/Norms)*<sup>229</sup>

The Norms currently represent the most promising international instrument regulating transnational corporate conduct. Therefore, the instrument is discussed in more detail in the following chapter of this comment.

2. OECD Regulation

*a. OECD Guidelines for Multinational Enterprises (OECD Guidelines/Guidelines)*<sup>230</sup>

The OECD Guidelines play a crucial role in regulating transnational corporate conduct. Therefore, this instrument is further discussed in the following chapter of this comment.

*b. The OECD Multilateral Agreement on Investment (the MAI)*<sup>231</sup>

The MAI was aimed to promote and protect investment by including provisions on investment protection as well as the revised OECD Guidelines for Multinational Enterprises.<sup>232</sup> The MAI also contained an independent dispute settlement mechanism, and as such covered all essential aspects of foreign direct investment.<sup>233</sup> It was intended to be in the form of a legally binding document with the exception of the Guidelines, which were to keep their voluntary character.<sup>234</sup> However, as in the case of the UN Draft Code of Conduct on TNCs, the negotiations on the MAI were eventually abandoned.<sup>235</sup> The aspirations of the instrument were

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<sup>229</sup> *Norms*, *supra* note 1.

<sup>230</sup> *OECD 2000 Guidelines*, *supra* note 2.

<sup>231</sup> *The Multilateral Agreement on Investment Negotiating Text*, OECD Directorate for Financial, Fiscal and Enterprise Affairs, Paris (as of Apr. 24, 1998) (negotiated from 1995 to 1998, never adopted) [hereinafter *MAI*].

<sup>232</sup> *Id.*; *see also* Huner, *supra* note 218, at 197-98.

<sup>233</sup> *See* sources cited *supra* note 232.

<sup>234</sup> *See* Huner, *supra* note 218, at 202.

<sup>235</sup> *Id.*

huge, and there were issues that could not be agreed on, such as the incorporation of labor and environment provisions, both of which were strongly opposed by some states.<sup>236</sup>

### 3. Conclusions

The UN Norms and the OECD Guidelines are crucial instruments regulating transnational corporate conduct. Therefore, the following chapter deals with them in more detail.

The advantage of the instruments included in this subchapter is that they cover a broad scope of obligations aimed directly at transnational corporate conduct. However, their major disadvantage is that they were adopted as a set of voluntary recommendations that are not legally enforceable, and thus, do not guarantee compliance of all TNCs. Although the UN Norms go further than the other non-binding documents in setting up implementation procedures, they still remain on the level of soft law.

Nevertheless, these documents, especially the UN Norms and the OECD Guidelines, prove that there is an increasing interest of international organizations and states in dealing with the issue of ensuring transnational corporate compliance with certain established standards. The UN Norms might serve as a model for a legally binding document in the future. However, this is a question of further intergovernmental discussions.

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<sup>236</sup> *Id.* at 199-200.

## CHAPTER V

### CRUCIAL UNIVERSALLY APPLICABLE INSTRUMENTS REGULATING TRANSNATIONAL CORPORATIONS

#### A. OECD Guidelines for Multinational Enterprises<sup>237</sup> (OECD Guidelines/Guidelines)

##### 1. Origins and Development

The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises, which is aimed at promoting and protecting foreign direct investment.<sup>238</sup> Besides the Guidelines, the Declaration also includes the following parts:

- Principle of national treatment for foreign-owned enterprises;
- Co-operation among adhering governments in order to avoid conflicting requirements on multinational enterprises;
- Co-operation among adhering governments with regard to international investment incentives and disincentives.<sup>239</sup>

The OECD Guidelines were adopted in 1976 and are currently supported by 39 adhering governments consisting of all 30 OECD member countries and 9 non-member countries (Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia).<sup>240</sup> The

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<sup>237</sup> *OECD 2000 Guidelines*, *supra* note 2; *see also in general* Joachim Karl, *The OECD Guidelines for Multinational Enterprises*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 89-106 (Michael K. Addo ed., 1999); Huner, *supra* note 218, at 200-05; Joris Oldenziel & Anna Bohman, *The added value of the UN Norms, A comparative analysis of the UN Norms for Business with the OECD Guidelines, the Global Compact, and the ILO Declaration of Fundamental Principles and Rights at Work 5-7* (somo, 2004), available at <<http://topics.developmentgateway.org/businessenvironment/rc/filedownload.do~itemId=1005189>> [hereinafter *The added value of the UN Norms*].

<sup>238</sup> *See sources cited supra* note 237; *Declaration on International Investment and Multinational Enterprises*, OECD (Paris, 1976) [hereinafter *OECD Declaration*].

<sup>239</sup> *OECD Declaration*, *supra* note 238.

<sup>240</sup> *See* OECD, *Guidelines for Multinational Enterprises*, About (last visited June 28, 2005), at <[http://www.oecd.org/about/0,2337,en\\_2649\\_34889\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/about/0,2337,en_2649_34889_1_1_1_1_1,00.html)>; *see also* Karl, *supra* note 237, at 90; Huner, *supra* note 218, at 201.

Guidelines are non-binding recommendations addressed by adhering governments to TNCs headquartered on their territories to ensure their compliance with laws and policies of the countries where they operate.<sup>241</sup>

The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises, which is aimed at promoting and protecting foreign direct investment.<sup>242</sup> Besides the Guidelines, the Declaration also includes the following parts:

- Principle of national treatment for foreign-owned enterprises;
- Co-operation among adhering governments in order to avoid conflicting requirements on multinational enterprises;
- Co-operation among adhering governments with regard to international investment incentives and disincentives.<sup>243</sup>

The Guidelines were amended in 1979, in 1984, in 1991, and in 2000.<sup>244</sup> The 1991 amendment added a new chapter on environmental protection.<sup>245</sup> The most significant revisions of the Guidelines were approved on June 27, 2000 after long negotiations among member countries and consultations with numerous NGOs.<sup>246</sup> These revisions included an extension of labor rights (Chapter IV) by adding abolition of child labor, elimination of all forms of forced or compulsory labor, and prohibition of discrimination with regard to employment.<sup>247</sup> Also, the latest Guidelines revision added a direct reference to human rights in Chapter II, stating that multinational enterprises should “[r]espect the human rights of those affected by their activities

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<sup>241</sup> *OECD 2000 Guidelines*, *supra* note 2, Preface, art. 1.

<sup>242</sup> *Id.*; *see also OECD Declaration*, *supra* note 238.

<sup>243</sup> *OECD Declaration*, *supra* note 238.

<sup>244</sup> *See James Salzman, Labor Rights, Globalization and Institutions: The Role and Influence of The Organization for Economic Cooperation and Development*, 21 MICH. J. INT’L L. 769, 795 (Summer 2000).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *OECD 2000 Guidelines*, *supra* note 2, Chapter IV.1(b)-(d).

consistent with the host government's international obligations and commitments.”<sup>248</sup> Further, a paragraph referring to the business supply chain was added stating that multinational enterprises should “[e]ncourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.”<sup>249</sup> Finally, and most importantly, the applicability of the Guidelines was extended to extraterritorial activities of TNCs, which are the ones performed outside their home territories.<sup>250</sup> Therefore, the Guidelines now cover, for example, activities of an Indian subsidiary of an American business enterprise.<sup>251</sup> This revision is crucial since the use of the Guidelines is especially needed in host countries, where relevant legal norms and policies are often lacking or are ineffective when enforcing basic human rights and other standards related to transnational corporate conduct.

## 2. Contents of the Guidelines

The latest version of the Guidelines covers a broad scope of transnational corporate activities and is divided into the following chapters:

### *a. Concepts and Principles*

The first chapter includes introductory paragraphs that state the purpose, nature and scope of the Guidelines.<sup>252</sup> It explains that the Guidelines are voluntary and not legally enforceable recommendations addressed by governments to multinational enterprises.<sup>253</sup> This chapter also includes a definition of a multinational enterprise and clarifies that the Guidelines are not aimed

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<sup>248</sup> *Id.*, Chapter II.2.

<sup>249</sup> *Id.*, Chapter II.10.

<sup>250</sup> The OECD Guidelines state: “Governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country.” *OECD 2000 Guidelines*, *supra* note 2, Chapter I, art. 2.; *see also The added value of the UN Norms*, *supra* note 237, at 6; Salzman, *supra* note 244, at 795.

<sup>251</sup> *See* Salzman, *supra* note 244, at 795.

<sup>252</sup> *OECD 2000 Guidelines*, *supra* note 2, Chapter I.

<sup>253</sup> *Id.*, Chapter I.1.

at distinguishing between domestic and multinational enterprises.<sup>254</sup> Whenever it is relevant, the Guidelines should apply to multinational as well as domestic enterprises.<sup>255</sup> However, the Guidelines acknowledge that small- and medium-sized enterprises do not always operate with the same capacities as larger businesses.<sup>256</sup>

*b. General Policies*

The second chapter encourages enterprises to comply with policies of host countries and to respect interests of other stakeholders.<sup>257</sup> To reach this goal, the chapter further states general principles that should be followed by multinational enterprises.<sup>258</sup>

*c. Disclosure of Information*

The third chapter encourages enterprises to disclose “timely, regular, reliable and relevant information” regarding their activities, structure, financial situation and performance.<sup>259</sup> The chapter further lists what kind of basic and additional information enterprises should disclose.<sup>260</sup>

*d. Employment and Industrial Relations*

The fourth chapter covers numerous labor rights to be respected by enterprises with regard to employment and industrial relations including the right of their employees to be represented by trade unions and other bona fide representatives, abolition of child labor, eliminations of all forms of forced or compulsory labor, prohibition of discrimination against

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<sup>254</sup> “A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.” *OECD 2000 Guidelines, supra* note 2, Chapter I.3.

<sup>255</sup> *Id.*, Chapter I.4.

<sup>256</sup> *Id.*, Chapter I.5.

<sup>257</sup> *Id.*, Chapter II.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*, Chapter III.

<sup>260</sup> *Id.*



their employees, providing necessary facilities and information to employee representatives, promotion of co-operation between enterprises and employees and their representatives.<sup>261</sup>

*e. Environment*

Enterprises should take into account “the need to protect the environment, public health and safety [and] to conduct their activities in a manner contributing to the wider goal of sustainable development.”<sup>262</sup> To reach this goal, the Guidelines encourage enterprises to engage in numerous activities, such as establishing and maintaining an appropriate system of environmental management, providing the public and employees with adequate and timely information on environment, health and safety impacts of their activities, providing adequate education and training to employees in environmental, health and safety matters.<sup>263</sup>

*f. Combating Bribery*

The sixth chapter deals with the prohibition of bribery.<sup>264</sup> In order to eliminate bribery, enterprises should: avoid paying any portion of a contract payment to public officials or the employees of their business partners, ensure appropriate remuneration of their agents, enhance the transparency of their activities, promote employee knowledge of and compliance with their anti-bribery and anti-corruption policies, adopt management control systems discouraging bribery and corruption, and avoid illegal contributions to candidates for public office or to political parties.<sup>265</sup>

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<sup>261</sup> *Id.*, Chapter IV.

<sup>262</sup> *Id.*, Chapter V.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*, Chapter VI.

<sup>265</sup> *Id.*

### *g. Consumer Interests*

To ensure protection of consumer interests, enterprises should follow fair business, marketing and advertising practices and should ensure the safety and quality of their products or services.<sup>266</sup> This chapter further includes numerous particular recommendations that should be followed by enterprises in order to reach the general goal of protecting consumer interests, such as meeting all agreed or legally required health and safety standards of goods or services; providing clear and accurate information regarding content, safe use, maintenance, storage, and disposal of products or services, etc.<sup>267</sup>

### *h. Science and Technology*

The eighth chapter of the Guidelines includes recommendations to enterprises related to science and technology ensuring that their business activities are compatible with policies and plans of host countries.<sup>268</sup>

### *i. Competition*

The ninth chapter encourages enterprises to comply with all applicable laws and regulations related to competition.<sup>269</sup>

### *j. Taxation*

The last chapter encourages enterprises to pay their tax liabilities in host countries.<sup>270</sup>

## 3. Institutional Framework

The institutional set-up for implementation procedures on the Guidelines consist of three main elements: National Contact Points (NCPs); the OECD's Committee on International

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<sup>266</sup> *Id.*, Chapter VII.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*, Chapter VIII.

<sup>269</sup> *Id.*, Chapter IX.

<sup>270</sup> *Id.*, Chapter X.

Investment and Multinational Enterprises (CIME); and the advisory committees of business and labor federations (Business and Industry Advisory Committee – BIAC; and Trade Union Advisory Committee – TUAC) and NGOs (represented by OECD Watch).<sup>271</sup>

NCPs play the most important role in the implementing process. They are set up by the adhering countries and are aimed at promoting the Guidelines and handling enquiries and discussions of concerned parties.<sup>272</sup> NCPs assist businesses, employee organizations, and other concerned parties with solving issues arising under the Guidelines. When dealing with such issues, NCPs can seek advice from relevant authorities, representatives of business community, employee organizations, and other NGOs; consult other NCPs concerned; and seek the CIME's guidance with regard to the interpretation of the Guidelines.<sup>273</sup> NCPs are required to meet and report to the CIME every year.<sup>274</sup>

The establishment of NCPs represents a unique way of implementing an international instrument. However, the implementation system does not have sufficient tools enabling an effective implementation of the Guidelines. In case the parties have not agreed on a resolution of an issue related to said implementation, NCPs do not have an obligation to make the results public.<sup>275</sup> The Procedural Guidance states: “After consultation with the parties involved, [NCPs

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<sup>271</sup> See Organization for Economic Co-operation and Development, Implementation of the OECD Guidelines for Multinational Enterprises, at <[http://www.oecd.org/document/43/0,2340,en\\_2649\\_34889\\_2074731\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/43/0,2340,en_2649_34889_2074731_1_1_1_1,00.html)> (last visited June 29, 2005). The implementation of the Guidelines is covered in a separate document – Decision of the OECD Council with an attachment on procedural guidance for NCPs and the CIME. The Council's Decision sets up main responsibilities of NCPs and the CIME with regard to the Guidelines implementation. OECD, Decision of the OECD Council (June 2000), available at <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>> (last visited July 1, 2005) [hereinafter *OECD Council Decision*]; OECD, Procedural Guidance, available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (last visited July 1, 2005).

<sup>272</sup> *OECD Council Decision*, supra note 271, Chapter I.1.

<sup>273</sup> *Procedural Guidance*, supra note 271, Chapter I.C.2.

<sup>274</sup> *OECD Council Decision*, supra note 271, Chapter I.3.

<sup>275</sup> *Procedural Guidance*, supra note 271, Chapter I.C.4.b; see also *The added value of the UN Norms*, supra note 237, at 6-7.

will] make publicly available the results of these procedures unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines.”<sup>276</sup> Thus, in the light of “preserving confidentiality,” the only available tool to punish enterprises violating the standards included in the Guidelines becomes ineffective.

CIME functions as the ultimate body responsible for implementation of the Guidelines.<sup>277</sup> Its responsibilities include: issuing clarifications on the Guidelines; organizing discussions on issues related to the Guidelines, and reporting to the OECD Council with regard to the Guidelines.<sup>278</sup>

#### 4. Conclusions

The Guidelines are undoubtedly a significant effort in establishing international standards to regulate transnational corporate conduct. However, they suffer from several disadvantages. Firstly, although the Guidelines mention in the Preface some major international instruments including the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, the Agenda 21 and the Copenhagen Declaration for Social Development, they do not expressly state that multinational enterprises are obliged to respect the principles included in these instruments.<sup>279</sup> Further, although the Guidelines represent recommendations addressed to multinational enterprises, their implementation is left solely to the governments and international bodies.<sup>280</sup> Moreover, NCPs are not obliged to make the results of complaint procedures public,

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<sup>276</sup> *Id.*

<sup>277</sup> *Id.*, Chapter II.

<sup>278</sup> *Id.*, Chapter II.4, 5, 7.

<sup>279</sup> See *OECD 2000 Guidelines*, *supra* note 2, Preface; see also *The added value of the UN Norms*, *supra* note 237, at 5-6.

<sup>280</sup> *Procedural Guidance*, *supra* note 271; *OECD Council Decision*, *supra* note 271; see also *The added value of the UN Norms*, *supra* note 237, at 6.

which substantially weakens the efficiency of the Guidelines' implementation.<sup>281</sup> Additionally, the instrument, even though now applied also to business conduct outside of the territory of OECD countries, was still adopted only by a relatively small number of wealthy countries, which cannot be measured with the general authority of the UN Norms. Finally, the Guidelines represent an international instrument of entirely voluntary nature, which is emphasized in the Guidelines themselves, and therefore it can hardly serve as a guarantee of transnational corporate compliance with international standards.<sup>282</sup>

### **B. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights**<sup>283</sup> (UN Norms/Norms)

On August 13, 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) adopted the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.<sup>284</sup> The Norms currently represent the most significant instrument at the international level that imposes a wide range of obligations on TNCs.

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<sup>281</sup> *Procedural Guidance*, *supra* note 271, Chapter I.C.4.b.

<sup>282</sup> "Observance of the Guidelines by enterprises is voluntary and not legally enforceable." *OECD 2000 Guidelines*, *supra* note 2, Chapter I.1.

<sup>283</sup> *Norms*, *supra* note 1; *see also in general* David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (Oct. 2003); Carolin Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, 4 GERMAN L. J. 1065 (2003), available at <<http://www.germanlawjournal.com/print.php?id=330>> (last visited April 15, 2005); Surya Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?*, 10 ILSA J. INT'L & COMP. L. 493.

<sup>284</sup> *Norms*, *supra* note 1; Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Sub-Commission on the Promotion and Protection of Human Rights [hereinafter Sub-Commission], Res. 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11, at 52 (2003) [hereinafter *Res. 2003/16*]. The provisions of the Norms are explained in further detail in Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. Sub-Commission, Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 [hereinafter *Commentary*].

## 1. Drafting History

The drafting history of the UN Norms began when the Sub-Commission in its Resolution 1998/8 of August 20, 1998,<sup>285</sup> established a working group of the Sub-Commission consisting of five of its members, which received a mandate for a three-year period “to examine the working methods and activities of transnational corporations.”<sup>286</sup> The working group considered the first “Draft Code of Conduct for Companies” in August 2000.<sup>287</sup> At a seminar in March 2001, members of the working group met with representatives of NGOs, companies and unions, and several scholars to discuss their comments on the Norms.<sup>288</sup>

After considering all received comments, the working group submitted a draft of the Norms to be presented at the fifty-fifth session of the Sub-Commission in July-August 2003.<sup>289</sup> Finally, during the fifty-fifth session, the working group adopted a revised version of the Norms and the Commentary, and submitted the document to the Sub-Commission, which approved the Norms in its Resolution 2003/16 of August 13, 2003.<sup>290</sup> Resolution 2003/16 also transmitted the Norms to the Commission on Human Rights for consideration, and established an initial implementation procedure based on receiving information by the working group from all interested parties on negative business conduct.<sup>291</sup> Adoption of the Norms received a strong

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<sup>285</sup> Sub-Commission, *The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations*, UN Doc. E/CN.4/Sub.2/RES/1998/8.

<sup>286</sup> *Id.*; see also Weissbrodt & Kruger, *supra* note 283, at 903-04.

<sup>287</sup> Sub-Commission, *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on Its Second Session*, UN Doc. E/CN.4/Sub.2/2000/12, paras. 26-58; see also Weissbrodt & Kruger, *supra* note 283, at 904.

<sup>288</sup> Sub-Commission, *Report of the Seminar to Discuss UN Human Rights Guidelines for Companies*, UN Doc. E/CN.4/Sub.2/2001/WG.2/WP.1/Add.3, available at <<http://www.umn.edu/humanrts/links/draftguidelines-ad3.html>> [hereinafter *Seminar Report*]; see also Weissbrodt & Kruger, *supra* note 283, at 904.

<sup>289</sup> *Norms*, *supra* note 1; *Commentary*, *supra* note 284; see also Weissbrodt & Kruger, *supra* note 283, at 906.

<sup>290</sup> *Res. 2003/16*, *supra* note 284, para. 1.

<sup>291</sup> *Id.*, para. 2.

support from a large number of NGOs, and some of them stated their intention to use the Norms as standards for reporting on business conduct with regard to human rights.<sup>292</sup>

## 2. The Scope of the Norms

One of the issues discussed during the drafting process was whether the Norms should be directed only to TNCs or to all businesses.<sup>293</sup> The main argument against addressing the Norms only to TNCs was based on the fact that a defective definition of TNC would allow businesses to hide their transnational character, and therefore, avoid applicability of the Norms on their conduct.<sup>294</sup> For this reason, the Norms are addressed to TNCs but also to “other business enterprises,” and the document defines a TNC as well as “other business enterprise.”<sup>295</sup> Thus, all businesses, whether domestic or international, should respect and follow the Norms. However, the implementation of the Norms concentrates on TNCs, large businesses, and firms connected to TNCs.<sup>296</sup>

Another closely connected issue is whether to apply the Norms to all businesses in their supply chains. The Norms state:

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<sup>292</sup> NGOs, which expressed their support of the Norms, include Amnesty International; Christian Aid; Human Rights Advocates; Human Rights Watch; the Lawyers Committee for Human Rights; the Federation Internationale des Ligues des Droits de l’Homme; Forum Menschenrechte (Human Rights Forum); Oxfam; The Prince of Wales International Business Leaders Forum; World Economy, Ecology and Development; and The World Organization against Torture. Moreover, Amnesty International presented a list of fifty-eight NGOs supporting the Norms, and Forum Menschenrechte submitted another list in support of NGOs containing other twenty-six NGOs. *See* Weissbrodt & Kruger, *supra* note 283, at 906;

<sup>293</sup> *See* Weissbrodt & Kruger, *supra* note 283, at 907.

<sup>294</sup> *Id.*, at 908.

<sup>295</sup> The Norms define a TNC as “an economic entity operating in more than one country or a cluster of economic entities operation in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.” The Norms also define “other business enterprise” as “any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity.” *Norms*, *supra* note 1, paras. 20-21.

<sup>296</sup> The Norms state: “These Norms shall be presumed to apply as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4.” *Norms*, *supra* note 1, para. 21.

“Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contract or other arrangement and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.<sup>297</sup>

The Commentary on the Norms further explains:

“Transnational corporations and other business enterprises shall ensure that they only do business with (including purchasing from and selling to) contractors, subcontractors, suppliers, licensees, distributors, and natural or other legal persons that follow these or substantially similar Norms. Transnational corporations and other business enterprises using or considering entering into business relationships with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that do not comply with the Norms shall initially work with them to reform or decrease violations, but if they will not change, the enterprise shall cease doing business with them.”<sup>298</sup>

Therefore, all businesses – regardless of their domestic or international character, size, and position in the supply chain – should comply with the Norms.<sup>299</sup> Moreover, business enterprises should ensure that their contractors, subcontractors, suppliers, licensees and distributors respect the Norms, and in case business enterprises are not able to ensure such compliance, they are required to end business relationships with violators of the Norms.<sup>300</sup>

Even though the Norms are applicable to all businesses without differentiating among them, the document does make a difference with regard to their responsibilities under the Norms according to the degree of influence they have on markets, governments, stakeholders, and communities.<sup>301</sup> The Norms provide:

“Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized

<sup>297</sup> *Norms*, *supra* note 1, para. 15.

<sup>298</sup> *Commentary*, *supra* note 284, para. 15 (c).

<sup>299</sup> *See* Weissbrodt & Kruger, *supra* note 283, at 911.

<sup>300</sup> *Commentary*, *supra* note 284, para. 15 (c).

<sup>301</sup> *See* Weissbrodt & Kruger, *supra* note 283, at 911-12.



in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”<sup>302</sup>

The Norms presume that larger businesses and TNCs, in comparison with smaller businesses, operate with more powers and engage in wider areas of activities, which bring them larger amount of influence.<sup>303</sup> Thus, in this way, the Norms ensure that businesses with larger influence have adequate responsibilities in protecting human rights.

### 3. The Preamble of the Norms

The Norms consist of a preamble followed by eight sections and definitions of major terms.<sup>304</sup> The preamble of the Norms specifically refers to major UN documents.<sup>305</sup> It also refers to other essential international documents, such as the OECD Guidelines for Multinational Enterprises, and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>306</sup>

Direct reference to the most crucial international human rights instruments is one of the most significant features of the Norms.<sup>307</sup> By doing this, the Norms gain more respect that is related to the high authority of the international instruments mentioned in the preamble of the Norms.<sup>308</sup>

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<sup>302</sup> *Norms*, *supra* note 1, para. 1.

<sup>303</sup> *See* Weissbrodt & Kruger, *supra* note 283, at 912.

<sup>304</sup> *Norms*, *supra* note 1.

<sup>305</sup> The preamble refers to Universal Declaration of Human Rights; Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Rio Declaration; the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; the ILO Declaration on Fundamental Principles and Rights at Work; and many others. *Norms*, *supra* note 1, pmb.

<sup>306</sup> *Norms*, *supra* note 1, pmb.

<sup>307</sup> *See* Deva, *supra* note 283, at 498.

<sup>308</sup> *Id.*

#### 4. Human Rights Obligations Included in the Norms

##### a. *General Obligations*

The first paragraph of the Norms clarifies general obligations of states, TNCs and other business enterprises in promoting and securing human rights.<sup>309</sup> This paragraph establishes a general rule that is applicable to all other sections and should be kept in mind when reading other sections of the instrument.<sup>310</sup> Primary responsibility to promote and secure human rights is left upon states, including their responsibility to ensure that TNCs and other business enterprises respect human rights.<sup>311</sup> By emphasizing primary state responsibility in the area of human rights, the Norms send a clear message to governments: they cannot use the Norms to justify their failures in protecting human rights.<sup>312</sup> This is also supported by paragraph 19 of the Norms (savings clause), which provides that nothing in the Norms shall be construed to diminish, restrict or adversely affect human rights obligations of states or more protective human rights norms.<sup>313</sup>

TNCs and other business enterprises are responsible for promoting and respecting human rights within their respective spheres of activity and influence.<sup>314</sup> As explained above, this means that enterprises with larger influence should also have larger responsibilities.

##### b. *Right to Equal Opportunity and Non-discriminatory Treatment*

The second section of the Norms deals with the right to equal opportunity and non-discriminatory treatment, which is one of the most crucial workers' rights.<sup>315</sup> Prohibited reasons

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<sup>309</sup> *Norms, supra* note 1, para 1.

<sup>310</sup> *See Commentary, supra* note 284, para 1(a).

<sup>311</sup> *Norms, supra* note 1, para 1.

<sup>312</sup> *See Weisbrodt & Kruger, supra* note 283, at 912.

<sup>313</sup> *Norms, supra* note 1, para. 19; *see also* Weisbrodt & Kruger, *supra* note 283, at 912.

<sup>314</sup> *Norms, supra* note 1, para. 1.

<sup>315</sup> *Id.*, para. 2.

for discrimination include race, color, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age, health status (including HIV/AIDS, disability), marital status, capacity to bear children, pregnancy and sexual orientation.<sup>316</sup> However, greater protection of children does not constitute discrimination.<sup>317</sup>

Additionally, the Commentary on the Norms defines discrimination as “any distinction, exclusion, or preference made on the above-stated bases, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”<sup>318</sup>

*c. Right to Security of Persons*

The third section deals with international crimes against human beings.<sup>319</sup> Businesses shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, force or compulsory labor, hostage-taking, extra-judicial, summary or arbitrary executions, nor other violations of humanitarian law and other international crimes against the human person.<sup>320</sup> Some readers might believe that this paragraph does not need to be included in the Norms.<sup>321</sup> However, this paragraph has proved to be necessary as a result of past experiences.<sup>322</sup> One of the most representative examples is the Zyklon B Gas Case, where the provider of the gas that was used to kill concentration camp prisoners was convicted for complicity in international crimes.<sup>323</sup>

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<sup>316</sup> *Norms, supra* note 1, para. 2; *Commentary, supra* note 284, para 2(a).

<sup>317</sup> *Norms, supra* note 1, para. 2.

<sup>318</sup> *Commentary, supra* note 284, para 2(b).

<sup>319</sup> *Norms, supra* note 1, para. 3.

<sup>320</sup> *Id.*

<sup>321</sup> *See* Hillemanns, *supra* note 283.

<sup>322</sup> *Id.*

<sup>323</sup> *United Kingdom v. Tesch, et al.* (Zyklon B Gas Case), Law Reports of Trials of War Criminals 93, 102 (1947); *see also* Hillemanns, *supra* note 283.

The third section of the Norms also deals with business security arrangements.<sup>324</sup> Such arrangements shall observe international human rights norms and laws of the countries in which the companies operate, and “shall be used only for preventive and defensive services.”<sup>325</sup> Security personnel are prohibited to use force except when “strictly necessary” and the force used in such a case must be proportional to the threat.<sup>326</sup> Security personnel shall not violate workers rights, such as freedom of association and peaceful assembly, and the right to engage in collective bargaining.<sup>327</sup> Moreover, companies shall avoid hiring private militias and paramilitary groups, or working with units of state security forces known for human rights or humanitarian law violations.<sup>328</sup>

*d. Rights of Workers*

The fourth section formulates the following rights of workers: prohibition of forced or compulsory labor; prohibition of economic exploitation of children; the right to a safe and healthy working environment; remuneration ensuring adequate living for workers and their families; freedom of association; the right to collective bargaining; and finally, the right to establish and join organizations of the worker’s own choosing.<sup>329</sup> The Commentary on the Norms further refers to relevant international instruments, mostly to ILO conventions.<sup>330</sup>

The problematic issue with these provisions is that they are established in such a broad and all-embracing manner that allows companies to avoid their fulfillment.<sup>331</sup> For example, the expressions “fair and reasonable remuneration” and “adequate standard of living” leave space for

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<sup>324</sup> *Norms*, *supra* note 1, para. 4.

<sup>325</sup> *Id.*; *Commentary*, *supra* note 284, para 4(b).

<sup>326</sup> *Commentary*, *supra* note 284, para 4(b).

<sup>327</sup> *Id.*, para. 4(c).

<sup>328</sup> *Id.*, para. 4(d).

<sup>329</sup> *Norms*, *supra* note 1, paras. 5-9.

<sup>330</sup> *Commentary*, *supra* note 284, paras. 5(a); 5(c); 6(a); 6(d); 7(a); 8(a); 8(e); 9(a); 9(b); 9(c).

<sup>331</sup> *See* Deva, *supra* note 283, at 506.

companies to adopt their own interpretation of the terms, which might result in insufficient protection of workers' rights.<sup>332</sup> However, an exact interpretation of these terms is not always easy, since the living conditions and the level of wages significantly varies in each country, and it would be unrealistic to suggest a unified level of wages for all countries.<sup>333</sup>

*e. Respect for National Sovereignty and Human Rights*

The fifth section, entitled 'Respect for National Sovereignty and Human Rights', addresses a wide scope of rights regarding the relationship between TNCs and host governments.<sup>334</sup> By including this section, the Norms take a modern approach towards the social role of TNCs.<sup>335</sup> TNCs are not anymore required to respect only political and civil rights, but also social, economic and cultural rights, including the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression.<sup>336</sup> Additionally, this section also includes prohibition of bribery.<sup>337</sup>

Even though the Norms shall be given credit for including those rights, it is not clear how to exercise them in reality.<sup>338</sup> The rights are described in very broad terms without any specification on the manner in which they should be brought into practice.<sup>339</sup>

*f. Consumer Protection*

The sixth section of the Norms deals with obligations related to consumer protection, which include the obligation of companies to act in accordance with fair business, marketing and

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<sup>332</sup> *Commentary, supra* note 284, para. 8(a) ; *see also* Deva, *supra* note 283, at 506.

<sup>333</sup> *See* Deva, *supra* note 283, at 506.

<sup>334</sup> *Norms, supra* note 1, paras. 10-12.

<sup>335</sup> *See* Deva, *supra* note 283, at 507.

<sup>336</sup> *Norms, supra* note 1, para. 12.

<sup>337</sup> *Id.* at para. 11.

<sup>338</sup> *See* Deva, *supra* note 283, at 507-08.

<sup>339</sup> *Id.*

advertising practices; the obligation to take all necessary steps to ensure the safety and quality of the goods and services they provide, including observance of the precautionary principle; and the prohibition of producing, distributing, marketing, or advertising harmful or potentially harmful products for use by consumers.<sup>340</sup>

Moreover, the Commentary on the Norms refers to existing relevant international instruments on consumer protection to be observed by businesses.<sup>341</sup> The Commentary also provides that in cases where a product is potentially harmful to the consumer, companies are required to disclose all appropriate information on the contents and possible hazardous effects of the products they produce, which can be done through proper labeling, informative and accurate advertising.<sup>342</sup>

*g. Environmental Protection*

The seventh section of the Norms addresses obligations of TNCs and other business enterprises with regard to environmental protection.<sup>343</sup> Companies are required to observe national as well as international law related to preservation of environment, human rights, public health and safety, bioethics, and the precautionary principle.<sup>344</sup> Moreover, business conduct of companies shall be performed in accordance with the wider goal of sustainable development.<sup>345</sup>

Since environmental laws of host countries do not always prove very effective and often consist of very low environmental standards, it is crucial that the Norms require businesses to respect international agreements and standards.<sup>346</sup> However, the vague formulation of

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<sup>340</sup> *Norms*, *supra* note 1, para. 13.

<sup>341</sup> *Commentary*, *supra* note 284, paras. 13(a); 13(b).

<sup>342</sup> *Id.*, para. 13(e).

<sup>343</sup> *Norms*, *supra* note 1, para. 14.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *See Deva*, *supra* note 283, at 509.

environmental international standards does not seem to provide enough environmental protection either.<sup>347</sup>

## 5. Implementation Provisions

The Norms deal with their implementation in section eight. They provide with implementation procedures on several levels, starting from implementation by business enterprises themselves, and then moving on implementation by intergovernmental organizations, states, unions, and others.<sup>348</sup>

Businesses are required to adopt internal codes of conduct reflecting the content of the Norms and to ensure that these codes are disseminated.<sup>349</sup> They are also required to report periodically on which measures were taken to implement the Norms.<sup>350</sup> As previously mentioned, businesses are also required to apply the Norms and ensure their implementation in their supply chains.<sup>351</sup> Additionally, businesses shall perform periodic evaluations analyzing the impact of their own activities on human rights under the Norms.<sup>352</sup> Moreover, companies shall ensure that workers are provided with legitimate and confidential means to file complaints with regard to violations of the Norms.<sup>353</sup> Finally, in case of their non-compliance with the Norms, business enterprises shall ensure that adversely affected persons, entities and communities are provided with adequate reparation.<sup>354</sup>

The UN and other international and national mechanisms shall perform periodic, transparent and independent monitoring of business enterprises to ensure their application of the

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<sup>347</sup> *Id.*

<sup>348</sup> *Norms, supra* note 1, paras. 15-18.

<sup>349</sup> *Id.*, para. 15.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*, para. 16.

<sup>353</sup> *Commentary, supra* note 284, para. 16(e).

<sup>354</sup> *Norms, supra* note 1, para. 18.

Norms.<sup>355</sup> The Commentary provides a few suggestions on how the UN could participate in the implementation procedure.<sup>356</sup> To ensure implementation of the Norms, UN human rights bodies could create additional reporting requirements for states.<sup>357</sup> The Norms could also be used as the basis for procurement requirements for the UN and its agencies.<sup>358</sup> Country reporters and thematic procedures of the Commission on Human Rights could use the Norms when raising concerns about actions by business enterprises within their respective mandates.<sup>359</sup>

The Commentary on the Norms also encourages trade unions to use the Norms as a basis for negotiating agreements with companies and monitoring compliance with them.<sup>360</sup> NGOs are encouraged to use the Norms as the basis for their expectations of business conduct and for monitoring the compliance of businesses with the Norms.<sup>361</sup> Industry groups shall also use the Norms for their monitoring.<sup>362</sup>

Finally, the Norms call upon governments to use the Norms as a model for legislation or administrative provisions related to businesses conduct within their respective territories.<sup>363</sup>

## 6. Conclusions

In comparison to other international instruments seeking to regulate TNCs, the Norms have several advantages. First, they directly refer to major international human rights instruments in their text.<sup>364</sup> The instrument also covers all crucial areas related to corporate conduct, including human and labor rights; prohibition of international crimes; social, cultural and

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<sup>355</sup> *Id.*, para. 16.

<sup>356</sup> *Commentary*, *supra* note 284, para. 16(b).

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*, para. 16 (c).

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Norms*, *supra* note 1, para. 17.

<sup>364</sup> *Id.* at pmb1; *see also The added value of the UN Norms*, *supra* note 237, at 12.



economic rights; relationship between business enterprises and host states; consumer and environmental protection. The Norms are addressed directly to business enterprises and impose obligations on them, which is in sharp contrast with most international documents that impose obligations primarily on governments.<sup>365</sup> Also, as mentioned before, the Norms address all business enterprises and not only TNCs.

Most importantly, although the Norms were not adopted as a treaty, the numerous implementation provisions of the Norms demonstrate that the goals of the Norms reach further than a typical voluntary code of conduct.<sup>366</sup> Also, the Norms use the term “shall” instead of the traditional “should”, which is a clear sign that the Norms intend to play more important role than typical soft law instruments.<sup>367</sup> This is one of the main advantages of the Norms in comparison with other international instruments aimed at corporate conduct.

The Norms certainly represent a radical step towards imposing obligatory standards on transnational corporate conduct. However, the Norms still lack enough details concerning the implementation mechanism.<sup>368</sup> Although the Commentary on the Norms includes some suggestions dealing with this issue, it is still not specific enough in indicating exactly how to ensure compliance with the Norms and reparation in case of business’ non-compliance.<sup>369</sup> Most importantly, since the Norms are not in a form of a treaty, they are not legally enforceable as the other existing international instruments addressed to TNCs. Therefore, it is too soon to make any

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<sup>365</sup> See Deva, *supra* note 283, at 500.

<sup>366</sup> See Weissbrodt & Kruger, *supra* note 283, at 913-15 (explaining the nature of the Norms and why they are not considered to be completely voluntary).

<sup>367</sup> See Deva, *supra* note 283, at 499.

<sup>368</sup> See *The added value of the UN Norms*, *supra* note 237, at 13.

<sup>369</sup> *Id.*; Commentary, *supra* note 284.

conclusion on the efficiency of the Norms since it will depend on how successfully the implementation mechanism is developed.<sup>370</sup>

### C. Conclusions: Comparison of the OECD Guidelines and the UN Norms

The UN Norms have numerous advantages in comparison to the OECD Guidelines:

- Although the last Guidelines revision added a paragraph referring to the business supply chain, it is definitely a weaker provision than the one included in the UN Norms.<sup>371</sup>
- Unlike the Guidelines, the UN Norms directly refer to obligations under other human rights international instruments.<sup>372</sup>
- The Guidelines do not sufficiently emphasize the protection of human rights since they only include one paragraph on this regard.<sup>373</sup>
- The Guidelines (unlike the UN Norms) do not include any means of implementation by TNCs themselves.
- The UN Norms do not emphasize their voluntary nature as much as the OECD Guidelines.<sup>374</sup>
- The OECD Guidelines were accepted by a relatively small number of “wealthy” countries in comparison to the global authority of the UN and its Norms.

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<sup>370</sup> See *The added value of the UN Norms*, *supra* note 237, at 13; Weissbrodt & Kruger, *supra* note 283, at 915.

<sup>371</sup> Compare the Guidelines (“[E]nterprises should encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.”) with the Norms (“Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementations of the Norms.”) *OECD 2000 Guidelines*, *supra* note 2, Chapter II.10; *Norms*, *supra* note 1, para. 15.

<sup>372</sup> Compare the preamble of the Norms with the Preface of the Guidelines. *Norms*, *supra* note 1, pmb1.; *OECD 2000 Guidelines*, *supra* note 2, Preface.

<sup>373</sup> Compare the Guidelines (“[E]nterprises should respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”) with the Norms, which include the whole section called “Respect for national sovereignty and human rights.” *Guidelines*, *supra* note 2, Chapter II.2; *Norms*, *supra* note 1, Section E.

<sup>374</sup> See *supra* note 282.

As to the coverage of transnational corporate obligations, both instruments include a wide range of human rights and other standards. However, neither of the instruments includes sanctions, such as imposing fines on TNCs, which would be enforceable in case TNCs violate the standards included in the Guidelines or the UN Norms. This is related to the fact that neither of the instruments was adopted in the form of a legally binding treaty that would enable states to impose such sanctions on TNCs.

## CONCLUSIONS

TNCs have benefited greatly from the globalization process; in fact, they are the entity that is benefiting from this process the most. TNCs have gained broad protections of their rights and huge economic power. On the other hand, they are still not subject to any obligations that would balance their rights and make sure their powers are not being abused.

It is important to note that globalization could be useful for everyone, including workers and consumers, and not only for TNCs. It is a process that appears to be a necessary part of social progress and foreign direct investment is an essential element of it. The advantages are obvious - TNCs bring capital, employment and foreign technology (know-how).<sup>375</sup> However, it also depends on the particular TNC to what extent these advantages are expanded since such a TNC might not be willing to hire local residents and instead will bring its own employees; the company might not want to share its know-how; and moreover it might tend to only gain its own profits instead of supporting economic development of the host country.<sup>376</sup>

The solution is not to stop or fight against globalization but to make sure that the advantages are expanded and the disadvantages are reduced. To reach such a result, it is particularly important to hold TNCs liable for their violations of international standards and national legal regulations. That can be realized only by imposing binding norms on transnational corporate conduct. As discussed throughout this comment, such binding regulation should be created at the international level since single states are not capable of regulating TNCs that operate in many countries. Without such international regulation, TNCs can successfully avoid

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<sup>375</sup> See Douglas M. Branson, *The Social Responsibility of Large Multinational Corporations*, 16 *TRANSNAT'L LAW* 121, 123-24 (2002).

<sup>376</sup> *Id.* at 124-26.

state legal systems and continue in violations of human rights and other standards without being sanctioned for it.

The international regulation would ensure that the same standards and obligations are imposed on TNCs all over the world. Thus, states accepting such international norms would not have to be concerned that the TNCs that they are hosting will be in a comparative disadvantage against others.<sup>377</sup> As described above, there are already some important international instruments seeking to regulate TNCs. However, they have many disadvantages. The instruments that bear a binding character impose obligations only on states and cover only certain specific fields of transnational corporate conduct. On the other hand, the instruments that could essentially contribute to efficient international regulation of TNCs, because of being directed to TNCs and containing a wide coverage of standards, are non-binding, and thus, not legally enforceable. The latter group of instruments also includes the OECD Guidelines for Multinational Enterprises and the UN Norms, which are currently the most important instruments regulating transnational corporate conduct at the international level.

Therefore, to efficiently regulate TNCs the following improvements will be needed. First of all, a political consensus among the majority of states supporting a binding treaty regulating TNCs needs to be achieved. Such a treaty should be created under the authority of the UN since this will ensure its global nature. The provisions contained in the treaty should bind states that would be obliged to ensure transnational corporate compliance with the respective instrument by creating an effective enforcement mechanism at the national level and imposing sanctions on TNCs. Such sanctions could include imposing higher taxes and tariffs on TNCs violating the

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<sup>377</sup> See Joseph, *supra* note 39, at 88-89.

treaty, as well as making their violations public.<sup>378</sup> On the contrary, TNCs that would be in compliance with the standards included in the treaty could be encouraged by economic incentives, such as tariff reductions, tax breaks, and public recognition.<sup>379</sup> The treaty should contain all the areas and standards already agreed on, including human rights, labor standards, consumer protection, environmental protection, prohibition of corruption and respect for national sovereignty. Also, to ensure its efficiency, the document must have clear and effective enforcement provisions that should include regulation by an international body as well as regulation at the national level. The international body should consist of representatives of the states, NGOs and other interest organizations, and professional lawyers. It should perform regular, independent and transparent monitoring of TNCs, including their supply chains. In a case of transnational corporate non-compliance with the agreed binding rules, the international body should be entitled to impose certain sanctions on TNCs, including the right to make information about their non-compliance public and to impose penalties on them.

It appears that the most difficult problem to overcome before such a treaty is accepted is to persuade states to agree on this. The developed nations might not agree because they benefit financially from the current situation; and the less developed nations might see such a treaty as an intervention into their sovereignty. However, if states were able to overcome their fear of such binding international regulation, in the end, they would all benefit from it. Ethical business conduct would raise production efficiency and satisfaction of employees.<sup>380</sup> More effective production would contribute to economic development, which would subsequently bring

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<sup>378</sup> See Toftoy, *supra* note 36, at 928.

<sup>379</sup> *Id.*

<sup>380</sup> See Joseph, *supra* note 39, at 88.

enjoyment of civil and political rights and expansion of democratic regimes worldwide.<sup>381</sup> That would further contribute to political and economic stability on global level, and thus to trade and investment.<sup>382</sup>

Despite the fact that states and TNCs do not always realize that moral business conduct can be also highly profitable, it seems that it is only a matter of time when political consensus is reached and binding international norms are established. The acceptance of The UN Norms is a great and promising step forward that indicates fast evolution in this field and also means that states are becoming conscious about the importance of this issue.

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<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

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