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Sara Anderson

Institute of Policy studies

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I. INTRODUCTION: GLOBAL CORPORATE POWER AND CITIZEN RESPONSES

Most of what we eat, drink, wear, drive, and watch is the product of firms that are now global in their operations. The power of these transnational corporations over our lives, our planet, and our democratic institutions has never been greater. And it is growing.

According to the United Nations, there were 7,000 transnational corporations in 1970. Today, there are about 64,000, with 870,000 affiliates around the world.

[i] Of these, the largest 200 firms are the dominant engines of the global economy. One way to measure the power of global corporations is to compare the rate of growth in their sales and assets to the growth in the world economy as a whole. Between 1983 and 2002, the top 200 firms' sales and assets outpaced world economic growth. At the same time, their economic expansion far exceeded the increase in their workforces. In 2002, the combined sales of the Top 200 were the equivalent of 28.1% of world GDP, while their employees comprised only 0.82% of the world's workforce. [ii]

Is big necessarily bad? Some point out that mammoth corporations are more efficient because they can take advantage of economies of scale. Others argue that the development of new medicines and technologies requires massive investment in research that only large firms can afford. However, concern about the growing economic power of corporations is justified at a time when environmental and other public interest regulations, as well as government oversight to control corporate behavior, are being weakened in most countries of the world. This has increased the possibilities for giant corporations to undermine democracy through excessive political influence and put their goal of increased profits above social goals, such as high quality jobs and a clean environment.

Unfortunately, most governments around the world are pursuing policies to further enhance corporate power. Existing and proposed trade agreements increase the ability of corporations to move their products, money and factories around the globe more quickly and with less impediment from regulations. These policies are also supported by the World Bank and International Monetary Fund.

Yet a powerful backlash has been gaining strength. In recent years, Bolivians used people power to drive out foreign corporate water privatizers that had hiked prices beyond reach. Consumers and small farmers around the globe forced Monsanto to drop plans to market GMO wheat. Lawyers, working with Burmese plaintiffs, won a historic settlement against Unocal for forced labor. Environmentalists pressured Home Depot into adopting a policy on sustainable logging. Millions have promoted positive business models by buying fair trade products. Unions have worked together across borders to pressure

transnationals into respecting the right to organize. Students have pressured their universities to buy only sweatshop-free goods. In the United States, a national campaign is taking shape that will unite a broad swath of the U.S. public and international allies to pressure the world's largest corporation - Wal-Mart - to end its union-busting and other destructive practices.

These are only a few examples of how people are working at the local, national and global level to challenge corporate power. In order to be most relevant to the Workshop on International Regulations, the bulk of this paper will focus narrowly on efforts at the international level to influence corporate behavior through public institutions. It will begin with the oldest, the International Labor Organization Conventions, and end with the most recent development --the Norms for Business developed by a sub-commission of the UN Human Rights Commission, which many NGOs have hailed as a positive step towards binding international standards. The author recognizes that more positive actions to check corporate power are also vital at the local and national levels but they are beyond the scope of this paper.

II. GOVERNMENT RESPONSES AT THE INTERNATIONAL LEVEL

A. ILO

The International Labor Organization sets standards for working conditions globally. Although it targets governments rather than corporations, these standards set out internationally recognized norms in many areas that affect corporate behavior. Since its founding in 1919, the ILO has adopted 185 standards in the form of conventions that are subject to ratification by member states. Of these, the ILO has identified the following as most fundamental: the rights to freedom of association and collective bargaining and bans on forced labor, child labor, and discrimination in the workplace. Not all governments have ratified even these core standards, but those that

are members of the ILO are nevertheless obliged to observe them.[iii]

As a standard-setting body, the ILO has had tremendous impact in strengthening the legal protections for workers around the globe. There are some important omissions in the standards. For example, there is no ILO convention related to sub-contracting, a practice used increasingly by corporations to limit their liability for rights violations. In general, however, the most pressing labor rights problems today are not the result of weaknesses in the ILO standards or even of a lack of good national legislation. The problem is enforcement. While the ILO monitors government (not corporate) compliance with global standards, its authority is limited by the fact that it holds no power to impose sanctions. In some cases, ILO reports and monitoring have created a sufficient "shame factor" to result in concrete improvements. But there continues to be rampant abuse of basic labor rights in rich and poor countries, including those that have ratified many of the core standards and incorporated them into national law.

The limits on the ILO's authority are perhaps most evident in its failure to remedy one of the most egregious violations in the world: the widespread use of forced labor in Burma. In 2000, an estimated 800,000 Burmese were being forced to work as porters for the army or as workers on construction or agriculture projects for no or very little pay. In response, the ILO took the unprecedented step of approving a resolution that denounced Burma's military regime for inflicting a "contemporary form of slavery" and calling on ILO member states to consider imposing economic sanctions on the country unless it resolved the problem. This was the strongest measure available under the ILO charter. Unfortunately, it had little impact. The Burmese government responded by claiming that it was officially banning slave labor, but five years later, the problem remains. According to the ILO, forced labor continues to be a common practice on infrastructure projects. In fact, human rights groups report more than 50 prison camps that include women and young girls across the country.[iv]

B. OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises represent the only comprehensive code for corporate conduct that is endorsed by a large number of governments. They cover multinational enterprises operating in or from the 30 OECD countries, plus 8 non-members, which means that they cover most of the large transnational corporations in the world.[v] The areas covered are fairly extensive and include employment and industrial relations, environment, bribery, consumer interests, science and technology, competition, and taxation.[vi]

The OECD Guidelines explicitly state that they are non-regulatory and purely voluntary. However, they do provide a channel for raising complaints with governments. Each member state has considerable flexibility in establishing its own entity responsible for investigating and reporting on compliance, called a "National Contact Point" (NCP). According to OECD Watch, while a handful of countries have created NCPs that represent union and other stakeholders, the vast majority are made up solely by one government department. In the United States, it is the Office of Investment Affairs in the State Department, which lacks expertise in labor or environmental matters. As a result, support for the guidelines varies greatly, depending on the make-up of the NCP and the national government's political will.

A summary of cases compiled by the Trade Union Advisory Committee to the OECD clearly reflects the unevenness of implementation. Since 2000, trade unions have raised more than 50 complaints, half of which were still unresolved at the end of September 2004.[vii] The TUAC report includes some examples in which the NCPs played a positive role. For example, in 2002, the Czech NCP helped pressure a subsidiary of the German company Bosch to

resolve a labor dispute. Workers had complained that the local management had used physical force and other means to prevent the workers from exercising their rights to organize. The Czech NCP raised the matter with the German government and held four meetings that eventually led to consensus between the workers and management.

On the other hand, the TUAC report includes numerous examples in which the NCPs were either unresponsive or ineffective in handling complaints regarding violations of the OECD guidelines. The U.S. NCP appears to have been particularly unhelpful. For example, the report notes that the AFL-CIO wrote to the U.S. NCP in May 2001 to complain about U.S. corporations with ties to the military government of Burma, which the ILO had accused of using forced labor. According to the report, the AFL-CIO did not even receive a reply. Other problems include the reluctance of the NCPs to deal with cases regarding subcontractors of multinational enterprises or with cases in which the enterprises do not have a direct investment in the host country, but rather are involved in trade or service work. There is considerable disagreement over the interpretation of the Guidelines regarding these two points. Nevertheless, the TUAC argues that the Guidelines should be seen as one of numerous channels for resolving complaints of labor rights violations.

A number of environmental and other groups have also filed complaints under the OECD Guidelines, including Friends of the Earth, Greenpeace, Attac Sweden, and the Clean Clothes Campaign. Like TUAC, they have also reported mixed experiences and views. Friends of the Earth, for example, has pointed out a number of weaknesses, but also notes that the procedure for filing complaints under the guidelines is not as expensive or complicated as filing a lawsuit and thus can give individuals or groups with limited means a chance at recourse.[viii]

C. UN Global Compact

There is considerable skepticism about the ability of the United Nations to play a strong role in controlling transnational corporations. In part, this is due to the painful history of efforts begun in the 1970s to formulate a code of conduct. After more than a decade of work, the initiative fell apart in the 1980s due to opposition from the Reagan administration and also the Japanese and some European governments.[ix] A further blow came in 1993

when the UN Centre on Transnational Corporations, which had conducted important research on corporate activity, was reduced to a small unit of UNCTAD and tasked with promoting foreign investment.

In 2000, the United Nations rather timidly eased back into the area of corporate social responsibility with an initiative called the Global Compact. The Compact seeks to create a partnership between the UN and transnational corporations to promote 10 principles in the areas of human rights, labor, the environment, and anti-corruption.[x] The project's official goal is to "advance responsible corporate citizenship so that business can be part of the solution to the challenges of globalization."

It is run by a small Global Compact Office, with support from six UN agencies: the <<http://www.unhchr.ch>> Office of the High Commissioner for Human Rights; the <<http://www.unep.org>> United Nations Environment Programme; the <<http://www.ilo.org>> International Labour Organization; the <<http://www.undp.org>> United Nations Development Programme; the <<http://www.unido.org>> United Nations Industrial Development Organization; and the <<http://www.unodc.org>> United Nations Office on Drugs and Crime.

Hundreds of companies have agreed to participate in the Global Compact. In addition, some international business associations, union bodies, and nongovernmental organizations are included as participants, with the stated goal that the Compact would provide the opportunity for them to engage with the corporations through four mechanisms: dialogue, learning, local networks and project partnerships.

The Global Compact has been widely criticized as nothing more than a ploy by transnational corporations to use their partnership with the UN for PR purposes (dubbed "blue-washing" by some, in a reference to the color of the UN flag). To participate, firms simply must state that they support the 10 principles and report annually on how they are supporting them.

According to Kenny Bruno, of Earthrights International, "The Compact allows companies to say they are committed to UN principles, but they do not have to follow them. There is no monitoring, no evaluation and no accountability. No criticism is allowed, only good news." [xi] In addition, Bruno and other critics argue that the Global Compact sets a tone throughout the UN system whereby corporate partnership is considered legitimate and desirable in almost any circumstance. It has also been used by the corporate participants to argue that stronger corporate accountability initiatives (e.g., the draft Norms described below) are unnecessary. [xii]

The International Confederation of Free Trade Unions (ICFTU), the umbrella body for most labor federations in the world, is a participant in the Global Compact, but concedes that trade union experience with the initiative has been mixed. In a 2004 report, the ICFTU explained that a number of national trade unions had complained about the behavior of some of the corporate

Global Compact members and wanted the Compact to kick out serious offenders

and require that others address problems with the appropriate parties.

However, the ICFTU cautioned against transforming the initiative into "yet another management-oriented mechanistic corporate social responsibility initiative that would 'certify' companies through what could only be a dubious 'monitoring' process." [xiii]

The ICFTU sees the Compact primarily as a channel for dialogue, and points out that some international union organizations have found it a useful means of engaging high-level corporate officials. The report cites examples of how Global Union Federations (union bodies that represent various sectors at the international level) have made use of the Global Compact in the process of forging Global Framework Agreements with a few corporations. These agreements commit the firm to upholding a set of standards in all of its operations around the world. At the same time, the ICFTU laments that "throughout the activities of the Compact, too much attention has been devoted to promoting the corporate social responsibility industry while not enough attention has been spent on genuine dialogue." [xiv]

D. UN Human Rights Norms on the Responsibilities of Transnational Corporations

Around the same time that the UN was launching the Global Compact, another effort to promote greater corporate accountability was getting off the ground within the UN Sub-Commission on the Promotion and Protection of Human

Rights. This is a body of independent human rights experts elected from all regions of the world by the UN Commission on Human Rights. In 1999 the Sub-Commission began a process of developing a draft corporate code of

conduct, based on existing international agreements signed by nation states, including the Universal Declaration of Human Rights, as well as a wide range of labor, environmental, consumer protection, and anti-corruption agreements. The Norms are innovative in that they are a comprehensive interpretation of the responsibilities of corporations under these international laws.

After four years of work, including consultation with business, union, human rights and other organizations, the Sub-Commission unanimously approved the Norms in August 2003.[xv] Approval by the entire 53-nation UN Commission on Human Rights is the next step.

The substantive provisions of the Norms cover:

- * right to equal opportunity and non-discriminatory treatment
- * right to security of persons (e.g., businesses shall not engage in nor benefit from war crimes, genocide, torture, forced labor)
- * rights of workers (includes right to a living wage)
- * respect for sovereignty and human rights (includes prohibition on bribery, rights to development including adequate housing and clean water, and indigenous peoples rights)
- * consumer protection (prohibits producing or marketing harmful products)
- * environmental protection (e.g., businesses shall respect the precautionary principle and be responsible for the environmental and health

impacts of all of their activities)

The Norms further would oblige corporations to incorporate the norms not only in their own practices but also in their contracts or other dealings with suppliers. Another significant point is that they state that corporations "shall be subject to periodic monitoring and verification by UN, other international and national mechanisms already in existence or yet to be created, regarding application of the norms." They would also oblige corporations to compensate any people or communities adversely affected by violations of the norms.

There are differing interpretations of the Norms' potential legal effect. Most of the NGOs engaged in the issue, including Amnesty International, Oxfam, Human Rights Watch, Christian Aid, and others, consider them an important step in what would be a long road towards binding international standards. Amnesty International claims that the Norms could over time evolve to become part of customary international law, especially if national and international tribunals and courts begin to reference and apply them and if advocates and corporations use them. [xvi] <> According to Human Rights Watch, the Norms and the accompanying commentary "could provide the conceptual basis for a binding international instrument on corporate responsibility." [xvii]

By contrast, statements by business groups give the impression that the Norms would result overnight in UN thugs hauling off CEOs for minor offenses. For example, the Confederation of British Industry lobbied its government to oppose adoption of the Norms by arguing that they are "ill-judged and unnecessary," would impose "absurdly onerous" report requirements, and would hurt poor countries by discouraging foreign investment. [xviii] The International Chamber of Commerce has stated that

the Norms "clearly seek to move away from the realm of voluntary initiative, and we see them as conflicting with the approach taken by other parts of the UN." [xix] The ICC not surprisingly prefers the Global Compact, which it helped design.

III. PROPOSALS

A. Long Term Goal: Binding International Standards

Nation states will and should remain primarily responsible for regulating corporate behavior. But national governments are often too weak, too desperate for foreign investment, or too dependent on corporate campaign contributions to hold global firms accountable for their crimes. Moreover, the complexity of many firms' global operations has made it increasingly difficult for national governments to monitor and address a wide range of problems, from tax evasion to anti-competitive practices.

Thus, there is a pressing need for stronger mechanisms at the international level to build a counterweight to corporate power. Trade unions and other groups have managed to obtain some significant results by using existing voluntary codes. If nothing else, these codes and standards give legitimacy to civil society campaigns against corporate abuses. However, gains made through these mechanisms are often dependent on support from fickle national governments or firms being particularly sensitive to public pressure.

Thus, while work to strengthen the capacity of national governments and to

improve and critique existing mechanisms should continue, the long-term goal should be to develop binding international standards.

International Court for Corporate Crimes

Following the precedent set by the creation of the International Criminal Court, a similar court should be established for corporations that could exact real punishment on corporate criminals. Why is it that a dictator now faces the prospect of being brought before an international tribunal over a crime such as torture but a CEO who has profited from forced labor does not? Another important precedent at the international level is the mechanism for handling investment disputes. Why is it that a private foreign investor can sue a government in an international tribunal over the loss of a contract or a new environmental law that reduces their profits, while residents of a community poisoned by a global company must rely solely on domestic courts for justice?

Obviously, this vision of an International Court for Corporate Crimes will not be realized any time soon. There are numerous obstacles to establishing any type of international enforcement mechanisms. First, there is the problem of political will. Ideally the court would operate under UN auspices, but the reality is that the UN is currently a cash-strapped institution that has been weakened by the sole global superpower's decision to act unilaterally with regard to Iraq. It is unlikely at this moment that the UN will take on new roles that would not only further strain resources but also spark new conflicts with the U.S. government.

Another obstacle is the lack of consensus within global civil society. Some

have argued that while international corporate codes and guidelines are fine, any enforcement mechanism would be manipulated by the richer countries to undermine the sovereignty of the poorer nations. This argument is not without merit, as there are countless examples of U.S. bullying of international institutions. However, I think there is a stronger argument that the suffering caused by a lack of enforcement authority at the international level outweighs these concerns. To compare it with a local context, if a judge in the Southern United States was a racist who only convicted black men, it wouldn't make sense to eliminate the whole judicial system, but rather to find ways to safeguard it against such abuses.

The mere threat of international enforcement may also strengthen national government actions. For example, when a Spanish judge used international law to accept jurisdiction over a case against former dictator Augusto Pinochet, the Chilean government charged that this undermined Chile's national sovereignty. In the end, it was the international pressure that resulted from the Spanish case that led to Chilean authorities stripping Pinochet of the immunity he had enjoyed in his home country, opening the door for a trial there. Without the threat of prosecution under international law, this would not have happened.

Another argument against international enforcement is that punishing a corporation for violating international standards will only hurt the workers employed by that firm. It is certainly possible that a stiff fine could result in job cuts. But would people really prefer to give corporations that are known rights violators a free pass, allowing them to continue to abuse people or the environment? Some might also argue that a judgment against the corporation might cause it to move to another country, where workers might be less likely to file complaints. I would argue that this would be far less likely to happen under uniform binding standards that apply to all countries than if we continue to have only national-level regulations. Corporate criminals would have fewer places to hide.

These points all deserve a great deal more discussion - hence, the need for a medium-term strategy.

B. Medium-Term Strategy

1. UN Support for the Norms

The UN Commission on Human Rights should support the UN Norms for Business by formally adopting them and encouraging all member states to view them as a benchmark for national legislation.

2. UN Information Activities to Lay the Groundwork

To address concerns over binding international standards, the UN should take on new areas of work designed to document whether or not national governments are capable of handling complete responsibility for holding corporations accountable to the standards laid out in the draft Norms of Responsibilities for Transnational Corporations. This work could be conducted by existing UN agencies or by a new UN Organization on Corporate Accountability, similar to that proposed by the International Forum on Globalization.[xx] The work would primarily involve information gathering to help lay the groundwork for binding international standards.

Here are a few examples of what such work could include:

Database of corporate crime:

- * Maintain comprehensive and accessible public records of regulatory infractions and civil and criminal prosecutions and convictions for all corporations with transnational operations.
- * Publish a review of efforts to use national laws to hold global corporations accountable for offenses committed abroad (e.g., the Unocal case filed in U.S. courts over abuses in Burma). The publication would cover the opportunities and obstacles associated with such efforts.

Right-to-Know

- * Corporations often must report more information about their home country operations than their overseas operations. For example, in the United States, environmental groups have succeeded in gaining "right-to-know" legislation that requires U.S. corporations to make public detailed information regarding toxic emissions from their U.S. facilities. However, these firms do not have to report to the U.S. government anything about their toxic emissions abroad. The UN should publish regular reports on these gaps and double standards in reporting.

Documenting the Race to the Bottom in Standards:

- * Collect information on corporations that move facilities from one

country to another in response to union organizing drives or increased public interest regulation.

Anti-Corruption:

- * Convene an international panel to recommend national legislation to limit the political influence of global corporations on government policymaking, including limits or prohibitions on corporate financial contributions to political parties and candidates, and spending on campaigns related to legislation.
- * Publish an annual review of the national laws regarding corporate money in politics in each member state.

In addition to work related to the major provisions of the draft Norms, the UN should also carry out research designed to address whether there is a need for an international anti-trust mechanism. Addressing anti-competitive practices seems to be an area in which national governments are particularly disadvantaged.

Anti-trust:

- * Compile and publicize periodic reports on corporate concentration in major sectors and the impact of this concentration, naming dominant corporations
- * Produce studies on anti-competitive practices, including price-fixing, monopolies and monopsonies
- * Publish an annual evaluation of each member state's anti-trust laws

and monitoring and judicial capacity, pointing out areas of weakness.

These are just a handful of ideas on the types of activities that the UN could carry out that could advance the goal of binding international standards. While this would be the primary goal, the information generated could also support citizen and government initiatives at the local and national level.

3. International Court for Corporate Crimes, Focusing on Most Egregious

In the long-term, we would ideally have a court that would investigate and impose sanctions related to the entire range of norms adopted by the sub-commission of the UN Commission on Human Rights. In the medium-term, it may be more realistic to follow the precedent of the International Criminal Court and focus on the most egregious corporate crimes, where there is the strongest consensus. For example, these could include:

- * slave labor and forced labor (ILO Convention No. 29 and No. 105) and
- * the worst forms of child labor (ILO convention No. 182, which addresses the sale and trafficking of children and engaging children in prostitution and drug trafficking).

[i] United Nations Conference on Trade and Development, World Investment Report 2003 (United Nations: New York and Geneva, 2003), p. 14.

[ii] Calculated by the author from data in Fortune, July 21, 2003, International Labor Organization, and World Bank, World Development Indicators Online. Note: US banks were excluded from assets for 2002, since they were not included in 1984 surveys.

[iii] For full text of the fundamental rights, see:
www.ilo.org/public/english/standards/norm/whatare/fundam/index.htm

[iv] Marwaan Macan-Markar, "Rights-Burma: Despite Vow, Generals Still Use Forced Labour," Inter-Press Service, June 8, 2004.

[v] The eight nonmember countries are Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, and Slovenia.

[vi] For full text of the Guidelines, see:
http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00

.html

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[vii] Trade Union Advisory Committee, "The OECD Guidelines for Multinational Enterprises: October 2004 TUAC Internal Analysis of Treatment of Cases Raised by Trade Unions with National Contact Points, 2001-2004," October 2004.

[viii] Friends of the Earth, "OECD Guidelines,"
<http://www.foe.org/oecdguidelines/>

[ix] Robin Broad and John Cavanagh, "The Corporate Accountability Movement: Lessons and Opportunities," The Fletcher Forum of World Affairs, Vol. 23: 2, Fall 1999.

[x] For details, see <http://www.unglobalcompact.org>.

[xi] Email communication with the author, March 4, 2005.

[xii] For extensive criticism of the UN Global Compact by a number of international NGOs, as well as documentation of rights abuses by Global Compact corporate participants, see: <http://www.corpwatch.org>.

[xiii] ICFTU, "A Trade Union Guide to Globalisation (2nd edition), 2004, pp. 77-78.

[xiv] Ibid, p. 77.

[xv] For full text, see:
<http://www1.umn.edu/humanrts/links/norms-Aug2003.html>.

[xvi] Amnesty International, "The UN Human Rights Norms For Business: Towards Legal Accountability," 2004, p. 14.

[xvii] Human Rights Watch, "The U.N. Norms: Towards Greater Corporate Accountability," Sept. 30, 2004.

[xviii] David Gow, "Business cries foul over UN rights code," Manchester Guardian Weekly, March 11-17, 2004.

[xix] William Blue, "UN to Hold Corporations More Responsible for Human Rights and the Environment," Socialfunds.com, August 26, 2003.

[xx] John Cavanagh, Jerry Mander, et al, "Alternatives to Economic Globalization: A Better World is Possible" (San Francisco: Berrett-Koehler: 2004, 2nd edition).