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Transnational Corporations

Power, Influence and Responsibility

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ABSTRACT In terms of the New World Order, the largest Transnational Corporations (TNCs) are central players. They influence the policies of governments worldwide; they help to order the agenda of the World Trade Organization. They influence the destinies of individual economies in the developing world, they have a crucial impact on the eco-system, they set wage-levels, which can cause the first world to bend to their demands, and so on. Any constitutional architect who does not attempt to set a framework of accountability and global citizenship for the TNCs would demean their craft. How do we orchestrate the healthy influence of TNCs in terms of economic growth and opportunity with the necessity of their conforming to the underlying values of the world community? Can we legislate for corporate responsibility and if so, how? If not, what alternatives are available? This article will explore the values and mechanisms for ensuring that the corporate world is in tune with the expectations of cosmopolitan democracy. How much can be done by national governments, how much can be done by regional groupings such as the EU, how much can be done by bodies such as the OECD, what is the influence of global trade unions, can codes of practice be influential and if so, who are the most promising prime movers? Can procurement policies be directed to achieve corporate responsibility and how influential is civil society in the form of NGOs, for example? More and more detailed information is becoming available on the influential activities of TNCs but as yet there appears to be no game plan for where they fit in to canons of global responsibility. This article explores some possibilities.

KEYWORDS *corporate social responsibility, globalization, international organization, regulation, transnational corporation*

Introduction

The traditional Westphalian conception of international law being state-centred is becoming increasingly inappropriate in a global society where non-state actors wield great power. This is true even outside a strict legal context as we are also seeing a 'significant shift in international relations theory away from a state-centred "balance of power" paradigm ... towards a "transnational relations" analysis' (Muchlinski, 1999: 90).

The issue of corporate social responsibility is vexing. It sets at odds those who champion the 'business case' and advocate little or no corporate regulation, e.g. TNCs, and those who would impose compulsory regulatory mechanisms on corporations, e.g. NGOs. At the Sixty-Ninth Conference of the International Law Association in London, July 2000, René Van Rooij, Chief Legal Counsel for Shell posed the question 'Hasn't the case for mandatory rules become more rather than less acute in the 21st century?' He continued:

I am convinced that the answer is a firm 'no' for two reasons. First of all, the power of multinational companies is generally widely exaggerated. Secondly, the 21st century is the age of IT, of transparency, of globalisation. An age where speed will be of the essence. An era where the rigidity of mandatory rules of law would stifle activity, mute communications and create strife rather than prosperity. In short, *we have entered the age of self-regulation*.¹ [emphasis added]

Recent years have seen a proliferation of the type of self-regulatory measures advocated by Dr Van Rooij. TNCs as diverse as IKEA, Kmart, Philips, Levi Strauss and Shell itself have produced Codes of Conduct detailing workers' rights, environmental policies and ethical standards purportedly adhered to by the company wherever it operates.² NIKE, in addition, has appointed a Vice-President for Human Rights and recently the Board of Directors created a 'Corporate Responsibility Committee'.³ The practice of social accounting has gained momentum and visibility.⁴ Often these measures have been implemented in direct response to worldwide criticism of operational practices by non-governmental organizations (NGOs), consumers and citizens of the countries in which the corporations function. Such measures have rarely been implemented voluntarily by TNCs. More often they are a product of direct and indirect pressure. It is interesting to note that many of these informal mechanisms utilize the language of international law and often reiterate the provisions of the International Labour Organization Conventions or the text and aims of international human rights documents such as the Universal Declaration of Human Rights. However, it is questionable whether such mechanisms are effective. Nonetheless, the arguments put forward in favour of self-regulation are countless. Numerous propositions are put forward as 'good' reasons for supporting self-regulation. It has been suggested the self-regulation results in financial savings while

legislation stifles innovation and causes strife and judicial decisions cause uncertainty for commercial enterprises.⁵ Opponents argue that self-regulation instruments are weak, unenforceable, non-consensual, inappropriate and subject to frequent flouting.⁶

This article examines some of the recent trends in the regulation of TNCs, in particular, international developments under the auspices of the Organisation for Economic Co-operation and Development (OECD) and the Global Compact, regional developments at the European Union (EU) and national developments in the UK. The role of NGOs and the Trade Union movement is considered throughout.

*The International Level: 'The Global Economy Needs Global Rules'*⁷

OECD GUIDELINES ON MULTINATIONAL ENTERPRISES: 'A COMMON BLUEPRINT FOR ACTION?'⁸

... now is a particularly promising time for global instruments to have a major impact on international business behaviour and to play a prominent role in the public debate about the respective roles of companies, governments and individuals in ensuring that a broad cross section of the world's people can enjoy improved economic, social and environmental welfare. (Gordon, 2001)⁹

Originally drafted in 1976, the OECD Guidelines for Multinational Enterprises ('the Guidelines') are recommendations addressed to multinational enterprises (MNEs) by adhering states which set out principles of acceptable behaviour for corporations in the social and environmental sphere globally.¹⁰ It is indicative of the increasing importance of corporate governance that the Guidelines were revised in 2000, and 2001 saw the publication of the first Annual Report on their operation.¹¹

The Guidelines form part of the OECD Declaration on International Investment and Multinational Enterprises, and adhering governments agree to promote their observance among MNEs.¹² Although the Guidelines are voluntary and non-binding for MNEs,¹³ subsequent to the OECD Council Decision of June 2000, governments are obliged to set up National Contact Points (NCPs) in order to implement and promote the Guidelines among all corporations operating in or from their territory. This has been done with varying degrees of success.¹⁴ Under the Guidelines individual states are given wide latitude in relation to NCP structural arrangements. Some NCPs are single departments within government ministries (e.g. the UK), others are 'multi-departmental' and operate across a range of ministries (e.g. Korea) and a third group of NCPs are 'tripartite' incorporating commercial and trade union representatives as well as a number of ministries (e.g. Sweden).¹⁵ Finland's NCP is unique in being 'quadripartite,' composed of business,

trade unions, various ministries and significantly NGOs.¹⁶ However, it is recognized that characterizing the NCPs in this way 'does not provide a full picture of the scope and breadth of consultation'.¹⁷ Social partners and NGOs participate in the process formally and informally, so for example, in the USA they are consulted 'via the Advisory Council on International Economic Policy or individually on an *ad hoc* basis'.¹⁸

In relation to the legal effect of the Guidelines, it is made clear that they are not intended to supplant domestic laws, but are regarded as an 'add-on' to national legal provisions.¹⁹ In terms of content, the Guidelines are broadly designed to facilitate and improve foreign investment by providing 'principles and standards of good practice' in relation to human rights, labour standards and the environment.²⁰ MNEs are encouraged to cooperate closely with local communities, uphold and apply 'good corporate governance principles' and 'develop and apply effective self-regulatory practices'.²¹ In addition, there are relatively detailed provisions on disclosure matters which emphasize the need for full and accurate information to be made available in relation to structure, activities, financial situation,²² performance, accounting, audit, environmental and social reporting ('where they exist') plus other basic information relating to ownership, objectives, affiliates, voting rights, etc.²³ Employment and Environmental matters are dealt with in separate provisions.²⁴ In relation to labour issues, the Guidelines concentrate on trade union rights, child labour, forced labour, discrimination, collective bargaining and health and safety. The environmental provisions address environmental management systems, disclosure of information, health and safety, technology, training, etc. Finally, the Guidelines deal with bribery, consumers, science and technology, competition and taxation.²⁵

Procedurally, in addition to the NCPs, the Guidelines fall within the remit of the Committee on International Investment and Multinational Enterprises (CIME), which is required to coordinate 'exchanges of views' on relevant matters.²⁶ Those to be consulted include the Business Industry Advisory Council (BIAC)²⁷ and the Trade Union Advisory Council (TUAC),²⁸ as well as 'other non-governmental organisations'.²⁹ BIAC and TUAC are officially regarded as operating on an equal footing, with an emphasis being placed on 'strict parallelism of treatment'.³⁰ While it would appear that the 'business case' carries most weight with adhering governments, further research will be necessary to determine the extent to which this is true. Another interesting anomaly is that while individual corporations are permitted to make representations to CIME about Guideline matters relating to their own interests, 'the Committee shall not reach conclusions on the conduct of individual enterprises'.³¹ There is no institutional mechanism for ensuring compliance with the Guidelines.

The Business Industry Advisory Council (BIAC) stance on the Guidelines is unequivocal:

The Guidelines must remain voluntary – not legally binding. They are not designed to replace national or international legislation or individual company or sectoral codes of conduct.³²

Clearly and unsurprisingly BIAC vehemently supports the voluntary nature of the Guidelines and indeed goes further by condemning the Dutch government's proposals to oblige MNEs to adhere to the Guidelines as a prerequisite for obtaining export credit coverage and government subsidies.³³ It states that 'such an action would set a very negative precedent that should be avoided and in no way should be followed by other countries'.³⁴ Opposing any form of mandatory regulation is a recurring theme for big business in a variety of contexts. It can be seen, for example, in the individual corporate and collective industry responses to the EU's Green Paper on Corporate Social Responsibility.³⁵ It could appear to some that for BIAC the Guidelines represent a corporate marketing opportunity rather than an authentic opportunity to moderate corporate misbehaviour:

For companies, the wide coverage of the Guidelines represents a blueprint for management systems and practice in today's world where companies are subject to wider scrutiny than ever before. Used positively, the Guidelines are a helpful tool for companies positioning themselves in the global economy.³⁶

Predictably, BIAC focuses on and prioritizes one aspect of the Guidelines; that being the improvement of 'the climate for foreign direct investment'.³⁷ The social responsibility facet of the Guidelines appears to be secondary.

Unsurprisingly, both the Trade Union and NGO position is different. NGOs are particularly frustrated by their 'formal exclusion' from the Guidelines' international implementation process.³⁸ This would appear to conflict with the more general global project of widening stakeholder participation in the whole process of Corporate Social Responsibility (CSR).³⁹ However, it should be noted that the Council's Decision of June 2000 does require that NGOs be permitted to make their views known. There is also NGO dissatisfaction with the lack of a system for monitoring the 'effectiveness of the ... Guidelines in achieving corporate sustainable behaviour'.⁴⁰ On the face of it, the NGOs are not lobbying for the Guidelines to be made binding on MNEs. However, they do stress the need for practical solutions by stating that they have 'no interest in an instrument that will not have an actual impact on the ground'.⁴¹ In light of this, it is hardly surprising that the adhering states report that NGOs are reluctant to become involved at national level via the NCPs:

Some NCP reports note that NGOs were not always enthusiastic about participating in Guidelines implementation. The Swedish report states that NGOs' expressions of interest in the Guidelines were 'limited' while the Canadian report notes that NGOs seem quite sceptical about the Guidelines' effectiveness.⁴²

This may be connected to the weaknesses in the NCP system rather than an inherent unwillingness to participate on the part of the NGOs. TUAC asserts that 'too few NCPs have involved the social partners and NGOs in promoting the Guidelines'.⁴³ This leads to the conclusion that '[i]f governments do not take the Guidelines seriously it is unlikely that companies will do so'.⁴⁴

A further point to note about the NGO position in relation to the non-binding nature of the Guidelines is that it is very positive about the Dutch developments. The links between implementation of the Guidelines and 'financial instruments' are regarded as establishing 'policy coherence'.⁴⁵ They urge the Committee on International Investment and Multinational Enterprises (CIME) to support and expand such policy coherence in the future.⁴⁶ TUAC is also positive about this development (although not to the same extent as the NGOs) and argues that:

... the Guidelines should be used as a reference point for anticipated corporate good behaviour for those companies receiving voluntary state assistance, including export credits [sic] guarantees.⁴⁷

It is also noted that in Germany there are references to the Guidelines on application forms for outward investment guarantees.⁴⁸ This is not referred to or opposed by BIAC, probably because there is no obligatory element.

Within the OECD, and specifically in relation to the Guidelines, trade unions are in an entirely different position from the NGOs as a consequence of the creation of TUAC and its formal recognition since 1962. In the Annual Report 2001 TUAC criticizes the poor performance of the National Contact Points (NCPs) since their inception.⁴⁹ It seems to suggest that many NCPs have failed to retain 'the confidence of the social partners' by falling short of the key criteria of 'visibility, accessibility, transparency and accountability'.⁵⁰

The Annual Report highlights the continuing gulf between industry and NGOs. Unfortunately the familiar 'regulation v. no regulation' standoff is merely reproduced without offering solutions. Nevertheless, the solutions seem obvious: (1) regulation, (2) self-regulation or (3) some alternative hybrid or 'third way'. It would appear that so long as the BIAC viewpoint carries more weight than that of the NGOs and the TUAC within the context of the OECD, the Guidelines will remain voluntary and non-binding, which is of course exactly what corporations desire. The influence of TNCs behind the scenes at both the international and national level is well documented.⁵¹ There is also an established corporate view that 'these things take time' and therefore the effects of voluntary corporate initiatives, e.g. corporate codes of conduct, should be allowed to filter down. Moreover, those corporate leaders who contend that TNCs 'cannot be required to solve all the world's problems' are missing the point about the concept of

Corporate Social Responsibility.⁵² No one expects TNCs to ‘solve the world’s problems’. However, there *is* an expectation that TNCs do not add to them by, for example, polluting the environment or by being complicit in human rights abuses perpetrated by state actors. Furthermore, social philanthropy does not equate to social responsibility: ‘it’s about how you make your profits, not how much profit you give away’.⁵³ In a post-Enron world it is clear that the concept of Corporate Social Responsibility should not be defined and delimited by corporations themselves. Quite simply the conflict of interest is too great:

the notion that the company has binding obligations beyond those to its shareholders – the heart of corporate citizenship – is, or should be a genuinely subversive doctrine, going to the heart of what a company is and does. To that extent the free market Neanderthals are dead right: social responsibility is indeed a constraint on the manager’s sacred duty to pursue shareholder value by any means possible.⁵⁴

Ultimately, the ‘world’s problems’ can only be resolved through cooperative *and* regulatory measures that involve *all* stakeholders and operate at the global, regional and domestic level. At the global level, the recent United Nations Global Compact initiative goes some way to implement such a ‘hybrid’ approach.

UNITED NATIONS GLOBAL COMPACT

Mary Robinson in her capacity as the UN High Commissioner for Human Rights has written:

It’s not a simple case of choosing between voluntary or regulatory systems to induce corporate responsibility ... Regulation is crucial to minimise abuses and to enforce compliance with minimum norms but it alone will not establish the business case for making the necessary changes. To do so we must provide incentives, so that doing the right thing also makes good business sense. (Robinson, 2002: 34)⁵⁵

The recently created Global Compact (GC) attempts to steer the difficult course between these starkly opposing regulatory options.⁵⁶ Nine Principles relating to human rights, labour standards and the environment were laid down and corporations were asked voluntarily to ‘embrace, support and enact’ internationally recognized standards in these three areas.⁵⁷ These core values are derived from the Universal Declaration of Human Rights,⁵⁸ the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work,⁵⁹ and the Rio Declaration on Environment and Development.⁶⁰ Much emphasis is placed upon the benefits of ‘socially responsible business’ such as the ‘advantages of a good social reputation’ and ‘reduction of damaging criticism’ as well as ‘being more in touch with

markets, customers and consumers'.⁶¹ Companies committed to the GC further undertake to promote the Compact via corporate documentation, e.g. annual reports, mission statements, training programmes and press releases. Importantly, the GC harnesses UN 'inter-agency cooperation', bringing together the ILO, UNEP, UNHCR and UNDP.⁶² Although the GC is a voluntary initiative, it differs from the OECD's Guidelines in two important ways. Firstly, corporations subscribing to the Compact are required, as a condition of their participation, to submit on an annual basis concrete examples of measures taken to comply with the Nine Principles.⁶³ These are to be posted on the GC website to ensure that there is an element of transparency in the process. Unfortunately, of the 30 corporate submissions made during the 2001 pilot phase none were deemed 'worthy of publication'.⁶⁴ Several problems were identified ranging from 'substantial degrees of organizational change' to 'difficulties assessing the priority of corporate citizenship relative to profit-generating business activities'.⁶⁵ In an attempt to resolve some of these problems, companies will now be required to formulate their submissions in accordance with a 'concise template' in order to focus on the 'strictly factual elements of company experience'.⁶⁶ Companies must respond to four questions:

What is the issue being addressed? What actions has [sic] the company undertaken? Which of the nine principles have been addressed? What are the results of the company's efforts?⁶⁷

This is a promising response to genuine stakeholder concerns, although, it remains to be seen whether or not it will have a positive impact on TNC behaviour. There is a risk that it will merely encourage TNCs to focus on the style, rather than the substance of their submissions.

Secondly, the GC Advisory Council was convened by the UN Secretary-General in January 2002. The Advisory Council comprises 'senior business executives, international labour leaders, public policy experts and the heads of civil society organizations'.⁶⁸ Notably, it is the 'first UN advisory body composed of both private and public sector leaders'.⁶⁹ While the GC is 'neither an instrument for monitoring companies nor a regulatory regime', the Advisory Council has a significant role to play.⁷⁰ It has four key priorities: (1) safeguarding the 'integrity of the GC'; (2) serving as 'advocates' of the GC; (3) providing 'expertise'; and, (4) offering 'advice on policy and strategy'.⁷¹ Again on a positive note, the Council has issued guidelines 'regarding the official use of the Global Compact logo' after NGOs expressed concern about corporate abuse and exploitation.⁷²

Other positive developments include the expansion of the GC Learning Forum to encompass a 'global academic network' that will engage in relevant research and analysis.⁷³ There also seems to be a genuine desire to foster stakeholder participation in the process and recognition of the importance of 'high-level advocacy'.⁷⁴

Nevertheless, the architects of the GC must strive to ensure that it does not become yet another global instrument which is commandeered by TNCs for marketing purposes.

The Regional Level

EUROPEAN UNION

On a regional level, the European Union has been relatively slow to embrace the concept of CSR despite the long European tradition of 'socially responsible entrepreneurs'.⁷⁵ However, there have been several initiatives over the years that regulate corporations in the social sphere both within the EU and externally, e.g. the European Employment Strategy, EU-Ecolabels, the Eco-Management and Audit Scheme (EMAS) and the Cotonou Agreement.⁷⁶ In July 2001 the Commission published its Green Paper on Corporate Social Responsibility.⁷⁷ This initiative was designed to stimulate debate about CSR within the European context rather than 'making concrete proposals for action'.⁷⁸

The Green Paper draws on the concept of the 'triple bottom line' and asks several key questions including: (1) What is the role of the EU in the development of CSR? (2) What is the role of CSR in corporate business strategies? (3) What is the role of other stakeholders? (4) How should CSR strategies be monitored and evaluated? (5) What mechanisms are most appropriate for developing CSR? And at what level?⁷⁹

There were 261 responses to the Green Paper,⁸⁰ with only nine member states responding.⁸¹ Of the 49 individual company responses more than half were from UK based corporations.⁸² The trade union movement submitted 16 responses,⁸³ while NGOs submitted 35 responses.⁸⁴

Unfortunately, the Green Paper constricts the debate by broadly relying on a very limited, and business oriented, definition of CSR describing it as:

A concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.⁸⁵

Unsurprisingly, this emphasis on the voluntary nature of CSR did not find favour with some of the NGOs responding to the Green Paper.⁸⁶ Likewise, the proposition that CSR is something that should be *integrated* into business operations as opposed to being the starting platform from which business is conducted was negatively received. The trade unions and the NGOs advocated a 'regulatory framework' that established 'minimum standards' and ensured 'a level playing field'.⁸⁷

Another criticism levelled against the Green Paper is that there was too much focus on the 'business case' as opposed to considering the interests of the wider constituency of stakeholders. It has also been said that the

Commission's definition of CSR is flawed. In particular, it is not clear *what* the Commission is seeking to protect through the adoption of CSR. Much confusion has been caused by reference to a wide variety of international legal instruments, e.g. the Universal Declaration on Human Rights, ILO Conventions and the UN Convention on the Rights of the Child. Again there is clear conflict between those who want regulation and those who do not.

It is interesting to note that in the responses to the Green Paper there is a remarkable homogeneity between individual corporate responses as well as the responses of industry representatives. There is a definite emphasis on self-regulation, a lack of enthusiasm for enforcement mechanisms, temporization of implementation requirements, the voluntary nature of CSR, good practice and a general abhorrence of a 'one-size fits all' approach to CSR.

Published in July 2002, the European Commission's response to the Green Paper is both disappointing and heartening in equal respects. Entitled the 'Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development' it clearly adheres to the 'business case'. There are references to frameworks, promotion, assistance, awareness, support and good practice but no indication that formal regulation is a possibility. In addition the Commission has retained the flawed definition of CSR. On a more positive note, there is firm support for the OECD Guidelines that may impact upon the operation of the OECD NCPs and result in deeper cooperation. Further, convergence is encouraged between codes of conduct by utilizing the OECD Guidelines and ILO Conventions. On a practical level several proposals are made. Firstly, there is a proposal to create an EU multi-stakeholder forum on CSR with 'the aim of promoting transparency and convergence of CSR practices and instruments'.⁸⁸ Secondly there are concrete strategies proposed to integrate CSR into all EU policies including employment and social affairs policy, enterprise policy, environmental policy, consumer policy and public procurement policy.⁸⁹ The Commission Communication also specifically addresses external relations policies and advocates the promotion of CSR in line with the 'Communications on the EU role in promoting human rights standards and democratisation in third countries'.⁹⁰ This includes 'the use of bilateral dialogue with Governments' and 'trade incentives' as well as 'engaging directly with multinational enterprises'.⁹¹ Within the context of general support for the OECD guidelines, however, it is interesting to note that the Commission suggests that access to subsidies and export credit insurance and access to public procurement could be made 'conditional on adherence to and compliance with the guidelines'. Finally, the Commission encourages public administrations, itself included, to 'practice CSR principles'.

The National Level

NATIONAL EXAMPLES: CURRENT CSR DEVELOPMENTS IN THE UNITED KINGDOM AND FRANCE

In recent years, the UK has been relatively proactive in promoting CSR. For example, it was the first state to appoint a Minister for Corporate Social Responsibility in 2000. The Cabinet Office publication 'Rights of Exchange: Social, Health, Environmental and Trade Objectives on the Global Stage' sets out comprehensively the government's policies on sustainable growth and development.⁹² Additionally, at the international level, the UK NCP has received praise for its progress in this area from TUAC, particularly for its promotional literature.⁹³ Despite its support for the OECD regime, the UK government seems to support the so-called 'third way' of regulation:

CSR moves us on from old paradigms that see social benefit and economic successes as mutually exclusive, and either regulation or pure voluntary action as the only answers.⁹⁴

This philosophy has not found favour among some politicians, as evidenced by the introduction of a Private Members Bill on Corporate Responsibility in June 2002.⁹⁵ It is apparent that many do feel that formal regulation is the only way forward. The Bill, if enacted as it stands, will apply to all UK registered companies and all companies operating within the UK with an annual turnover of more than £5m.⁹⁶ It is a wide-ranging and ambitious proposal which attempts to regulate TNCs in a fairly detailed manner. Section 3 of the Bill imposes an obligation to prepare and publish yearly reports on 'any significant environmental, social, economic and financial impacts of any of its operations'⁹⁷ both in the preceding year and in the future. There is also a requirement to publish reports on corporate 'employment policies and practice', the details of taxes or monies paid to 'governments for any country of operation' and the particulars of all direct or indirect party political donations.⁹⁸ In addition, companies must 'take reasonable steps' to ensure that any reports produced are made available to stakeholders,⁹⁹ relevant regulatory bodies and 'any other person with an interest in the report'. These provisions also apply to any subsidiary of a company covered by the Bill, 'wherever registered'.¹⁰⁰ Sections 7 and 8 deal with directors' duties and require directors to take into account environmental and social factors when reaching corporate decisions. Directors will be held personally liable for 'significant adverse environmental or social impacts' arising from negligence or wilful misconduct.¹⁰¹ Section 9 makes provision for the creation of a 'Corporate Responsibility Board' which is to be responsible for issuing guidelines on the content of the various statutory reports. Among other things, it will also define the terms 'significant' and 'reasonable steps'. The Board must include persons with relevant expertise and stakeholders.¹⁰² Stakeholders are also granted remedies under the

Bill.¹⁰³ For example, a stakeholder may request that a company amend an inaccurate report, although companies are not required to consider unmeritorious requests. Where a company refuses to amend a report, the stakeholder may appeal to the Board for redress. The Board may dismiss or uphold the application or suspend judgement on the application. Regardless of the outcome, the Board will be required to publish reasons for its decision. Penalties for breach of these provisions are dealt with in section 11. For individuals, a breach may result in imprisonment, a fine or disqualification from being a director. Additionally, a company may be prevented from trading on the stock exchange or required to cease operation altogether. It is suspected that this Bill may be a step too far and may never reach the statute books. However, it is significant that the drafters of the Bill chose to adopt a broad brushstroke approach rather than a more detailed legislative proposal.

The UK is not alone in attempting to impose more stringent reporting standards upon companies. In a wider European context, mandatory CSR reporting recently came into force in France. The amendments to the Nouvelles Regulations Economique (NRE) are an attempt to entrench the concept of the 'triple bottom line' within French companies.¹⁰⁴ Corporations listed on the French Stock Exchange will be required to report on a variety of issues ranging from energy consumption and environmental emissions to employee working conditions and compliance with ILO standards. There is also an obligation to report on engagement with stakeholders including local communities and NGOs. While it is true that the NRE lay down *minimum* reporting standards, their mandatory imposition means that they are an important step forward in ensuring CSR. Clearly, other countries will be observing the outcome with interest.

Conclusion

The bottom line for constitutionalists and democrats generally, therefore, is to ask to what extent global and regional organisations, national governments, NGOs and trade unions can ensure accountability on the part of TNCs.

Within the international OECD framework the problem is clear. The Guidelines remain voluntary and non-binding. It seems also for the most part that the majority of governments are not taking their NCP obligations seriously. Undoubtedly, there has been an alienation of NGOs within the system and they at least feel that there is too much emphasis on and pandering to the 'business case'. There is a real perception that corporations may use the Guidelines as a mere marketing ploy. As things stand, it is almost impossible to measure the influence of the Guidelines on TNCs without an effective monitoring and compliance regime. The Global Compact initiative on the other hand appears to be engendering genuine

stakeholder participation and dialogue with civil society actors. Additionally, it has widespread and influential support. Although the Compact remains voluntary, the creation of a broad-based Advisory Council seems to provide a level of monitoring. Certainly, corporate submissions are scrutinized for compliance and steps have been taken to try to ensure that the Compact logo and concept are not hijacked by industry marketing departments. However, the Compact is at an early stage of development and implementation. It will be some time before it can be determined whether it has overcome its initial teething problems. The latest UN initiative, the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, have received widespread and influential support particularly within the NGO sector and are the most detailed statement to date of the potential human rights obligations of TNCs.¹⁰⁵ These Draft Norms are designed to complement the Global Compact project and like the GC recognize that TNCs ought to comply with a variety of international human rights norms. Like the Global Compact, however, it remains to be seen whether the Draft Norms will be effective in influencing TNC behaviour while an implementation and monitoring mechanism has not yet been initiated. With a regulatory lacuna at the international level attention must be focused on the regional and domestic levels. It is at these levels that the 'invisible' influence of TNCs through such organizations as the Trans-Atlantic Business Dialogue or indeed individual corporations could and should be tackled.¹⁰⁶

At the regional level, the European Union has some valuable contributions to make to the implementation of CSR. A powerful player within the WTO and an influential role model for the Association of Southeast Asian Nations (ASEAN) and others, the EU has the opportunity to lay down a system of 'best practice' for corporate actors. It could be argued that publishing a Green Paper without including a framework proposal for legislation is an opportunity lost. However, the Commission has made several concrete proposals for practical implementation and integration of CSR within the EU. Notwithstanding these proposals, there is a tendency for the Commission to champion the 'business case'. The European Union is in a position to make a difference and on the evidence of the Green Paper and the Commission's response there is a real hope that CSR will remain firmly at the top of the agenda.

Nationally, the OECD National Contact Points are not operating effectively and it is too soon to measure the effect of the Global Compact at this level. The NCPs must be strengthened and this can only be achieved if governments commit to the system and engage with the social partners. Individual states such as the UK are continuing to move the debate forward by actively supporting and implementing the global initiatives. The same can be said of some enlightened corporate actors. However, states can and ought also to implement CSR principles into the public sector supply chain.

This may become easier if the EU's CSR conditionality measures become reality. In the meantime, it is open to governments throughout Europe and the rest of the world to follow the lead of France and introduce compulsory measures to ensure responsible corporate behaviour.

On present trends, TNCs are unlikely to regulate themselves voluntarily to generally accepted standards of behaviour. In a post-Enron world, socially responsible behaviour cannot merely be assumed. It is time for, at least, skeletal regulation. Corporate Social Responsibility rules should operate at the global, regional and national level in order to be effective, since global and regional regimes are ineffective without the support of national governments. Moreover, corporate regulation must be accompanied by incentives such as tax allowances. Ultimately, TNCs are extremely effective at putting across the 'business case' for self-regulation both behind the scenes and in public whereas other stakeholders have considerable hurdles to overcome. It is the responsibility of international, regional and national actors, governmental and non-governmental, to ensure economic development without sacrificing common values. Clearly the EU has a unique and crucial role to play in ensuring that corporate enterprises behave in a socially responsible manner, most effectively through European legislation.

NOTES

1. Text of a speech delivered to a plenary session entitled 'Foreign Investment, Human Rights and Development: Integration or Fragmentation?' at the Sixty-Ninth Conference of the International Law Association, London, July 2000 [on file with authors].
2. The text of these Codes of Conduct and others are reproduced in Blanpain, 2000: 329–86.
3. Press Release, 10 September 2001, 'NIKE Board of Directors and CEO Philip H. Knight Create Corporate Responsibility Committee', http://www.nikebiz.com/media/n_crboard.shtml
4. Shell International recently won a social reporting award run by AccountAbility and the Association of Chartered Accountants. The 'inclusion of negative information and opinions' was cited as a key reason for the award (see Adams, 2000).
5. See individual corporate responses to the EU Green Paper 'Promoting a European Framework for Corporate Social Responsibility' COM (2001) 366 final, http://europa.eu.int/comm/employment_social/soc-dial/csr/csr_responses.htm (e.g. Abbey National, Agilent Technologies, Chiquita).
6. E.g. November 2000, 'Addidas Attacked for Asian "Sweatshops" in Breach of its own Code of Conduct', *Guardian* (23 November 2000); May 2000, Phil Knight withdraws donations and sponsorship from universities where students have campaigned against NIKE sweat shops, *Guardian* (May 2000). See also NGO responses to the EU Green Paper (note 5).
7. ICFTU, 1999: 78.
8. Witherall, 2001.

9. This Working Paper forms part of the Annual Report (OECD, 2001a: 57–69).
10. For a general overview of the structure and workings of the Guidelines see OECD Guidelines for Multinational Enterprises, Revision 2000 particularly the Commentary (e.g. see also Karl, 1999: 89–106).
11. The OECD Guidelines for Multinational Enterprises, Revision 2000.
12. OECD Declaration on International Investment and Multinational Enterprises, 27 June 2000.
13. Guideline I(1) ‘Observance of the Guidelines is voluntary and not legally enforceable’.
14. See discussion *infra*.
15. ‘Summary Report of the Chair of the Meeting on the Activities of National Contact Points’, Annual Report (OECD, 2001a: 12). See also Annex 1 ‘Structure of the National Contact Points’ (OECD, 2001a: 20–4). Denmark, Norway, Sweden, France and Belgium have tripartite NCPs.
16. See note 15.
17. See note 15.
18. See Annex 1, ‘Structure of the National Contact Points’ (OECD, 2001a: 24).
19. The OECD Guidelines for Multinational Enterprises, Revision 2000, Commentary (OECD, 2000b: 41, para. 2): ‘The Guidelines are not a substitute for nor should they be considered to override local law and regulation. They represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning the international operations of these enterprises.’
20. Guidelines I(1) and II(1) and (2).
21. Guidelines II(3), (6) and (7).
22. Ironic post-Enron et al.!
23. Guideline III(1), (2), (3) and (4).
24. Guidelines IV and V respectively.
25. Guidelines VI, VII, VIII, IX and X respectively.
26. Council Decision, June 2000 II(1).
27. The BIAC is composed of industrial and employers’ associations from OECD member states.
28. The TUAC is composed of national trade union organizations from OECD member states. Both the TUAC and BIAC have secretariats based in Paris and engage in formal and informal contact with the OECD itself. TUAC was deemed to be the organization most representative of labour interests. See OECD (2001b) document ‘Relations with BIAC and TUAC’, 7 June 2001.
29. OECD Council Decision, June 2000 II(1) and (2).
30. See note 29.
31. Council Decision, June 2000 II(4).
32. ‘Business Industry Advisory Council (BIAC) Statement’, in OECD Guidelines for Multinational Enterprises: Global Instruments for Corporate Responsibility, Annual Report (OECD, 2001a: 35).
33. OECD, 2001a: 34. The BIAC continues: ‘The Guidelines and their related implementation procedures are unequivocal in underscoring their voluntary nature with regard to MNEs. To render an essential element of international financial competitiveness conditional upon “acceptance” and to pursue such acceptance with tools of “enforcement” – or in other words, negative “sanctions” – are abridgements of the terms and spirit of the Guidelines and of the premise upon which BIAC leadership submitted the Guidelines to members for their consideration.’

34. BIAC Statement (OECD, 2001a: 34).
35. Commission of the European Communities, Green Paper 'Promoting a European Framework for Corporate Social Responsibility', COM (2001) 366 final, http://europa.eu.int/comm/employment_social/soc-dial/csr/csr_responses.htm (hereafter referred to as the 'Green Paper').
36. BIAC Statement, Annual Report (OECD, 2001a: 35).
37. OECD, 2001a: 31.
38. 'NGO Statement on the OECD Guidelines for Multinational Enterprises', in OECD Guidelines for Multinational Enterprises: Global Instruments for Corporate Responsibility, Annual Report (OECD, 2001a: 46): 'The unconvincing explanation given is that the NGOs are not organised in a similar fashion as BIAC and TUAC.'
39. See for example the OECD Response to the EU Green Paper at http://europa.eu.int/comm/employment_social/soc-dial/csr/csr_responses.htm: 'Each of the main actors involved in corporate responsibility programmes – business, trade unions, NGOs, governments and international organisations – offers a distinctive perspective and body of knowledge and expertise. The challenge is to bring these distinctive competencies together and to incorporate them into a shared way of seeing things and a common blueprint for action'. See also the Global Compact references to 'stakeholder participation'.
40. OECD Response to the EU Green Paper, p. 47 para. 4.
41. OECD Response to the EU Green Paper, p. 47 para. 4.
42. 'Summary Report of the Chair of the Meeting on the Activities of National Contact points', in OECD Guidelines for Multinational Enterprises: Global Instruments for Corporate Responsibility, Annual Report (OECD, 2001a: 13).
43. 'TUAC Survey of the Functioning of National Contact Points', Annual Report (OECD, 2001a: 39; hereinafter 'TUAC Survey' [pp. 37–41]).
44. TUAC Survey, p. 40. If this is indeed the case, it hardly surprising that NGOs remain apathetic.
45. 'NGO Statement on the OECD Guidelines for Multinational Enterprises', in OECD Guidelines for Multinational Enterprises: Global Instruments for Corporate Responsibility, Annual Report (OECD, 2001a: 47).
46. OECD, 2001a.
47. TUAC Survey, p. 39.
48. The TUAC Survey (p. 39) also singles out Finland because companies receiving export credits 'are assumed to observe the Guidelines'.
49. TUAC Survey, p. 37.
50. TUAC Survey, p. 38.
51. See for example (Lewis, 2001: 245ff.) for a discussion of the influence of the Trans-Atlantic Business Dialogue (TABD) a powerful network of 100 European and American CEOs; see also Lewis, 2002. For a discussion of TNC influence at the national level see MacLeod, 1999.
52. BIAC Statement (OECD, 2001a: 32).
53. S. Hilton, Letter to *Guardian* (11 June 2002). See also C. Caulkin, 'Good Thinking, Bad Practice', *Observer* (7 April 2002); R. Reeves (2001) 'The Way We Work', *Guardian* (17 July), accessed 12 July 2002, <http://www.guardian.co.uk/Archive/0,4273,4222812,00.html>; T. Macalister 'Corporate Ideals "Manipulated"', *Guardian* (15 May 2002).
54. Caulkin, 2002.

55. This would accord with the notion that the implementation of broad regulatory instruments eases the negotiation of regulatory detail.
56. See Kell, 2002: 4. 'The Global Compact is an ambitious and unprecedented experiment to fill a void between regulatory regimes, at one end of the spectrum, and voluntary codes of industry conduct, at the other. It is a cooperative framework based on internationally established rights and principles.'
57. United Nations Global Compact, 'The Nine Principles', <http://www.globalcompact.org>
58. UN Doc.A/811 10 December 1948.
59. ILO 86th Session, 18 June 1998.
60. UN Doc. A/CONF.151/26 (Vol. I) 12 August 1992.
61. 'The Global Compact and Human Rights', <http://www.globalcompact.org>
62. Global Compact Report, 2002: 3.
63. Global Compact Report, 2002: 8.
64. NGO Letter to Kofi Annan Recommending Redesign of Global Compact, 29 January 2002 at www.globalcompact.org (see also Global Compact Report, 2002: 18–19): 'According to a review conducted by an independent team of academics, none of the company submissions conformed to the guidelines suggested by the Global Compact Office, and 15 of the submissions did not directly address the implementation of the nine principles.'
65. See note 64.
66. NGO Letter to Kofi Annan, p. 19.
67. NGO Letter to Kofi Annan, p. 19.
68. NGO Letter to Kofi Annan, p. 7. See Appendix A, p. 31 for a list of current members. The Council has created two working groups: the Working Group on Company Participation and Civil Society Engagement and the Working Group on Compact Leadership.
69. NGO Letter to Kofi Annan, p. 19.
70. NGO Letter to Kofi Annan, p. 17.
71. NGO Letter to Kofi Annan, p. 7.
72. NGO Letter to Kofi Annan, pp. 7, 9. See also note 63. Daimler Chrysler is charged with appropriating the GC logo in its corporate literature.
73. NGO Letter to Kofi Annan, p. 6. The report also notes that the GC is being taught increasingly on MBA courses 'thus rooting the Global Compact in education'.
74. NGO Letter to Kofi Annan, pp. 13, 6. See for example the 'Global Policy Dialogue on the Role of Business in Zones of Conflict', p. 13.
75. 'Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development', Brussels 2 July 2002, COM (2002) 347 final, p. 5.
76. 'Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development', pp. 13, 14, 19, 22.
77. Commission of the European Communities, Green Paper 'Promoting a European Framework for Corporate Social Responsibility', COM (2001) 366 final, http://europa.eu.int/comm/employment_social/soc-dial/csr/greenpaper_en.pdf (Responses were invited from interested parties and submitted by 31 December 2001).
78. Green Paper, p. 23, para. 93.
79. Green Paper, pp. 22, 23, para. 92.

80. Green Paper, n. 12.
81. Belgium, Germany, Finland, France, Ireland, Netherlands, Austria, Sweden, UK.
82. Twenty-seven individual UK corporations responded. Another 32 responses were received from networks representing the corporate sector, e.g. International Chamber of Commerce, Law Centres Federation. A large number of UK based TNCs responded to the Green Paper. It may be that CSR has a high profile in the UK in the wake of, e.g., the RTZ asbestos litigation, and the BP Brent Spar fiasco. This could also explain the relatively large number of US firms responding, e.g. NIKE, Levi Strauss. However, it is surprising that Shell did not submit a response in light of its experiences in Nigeria.
83. Including the TUC.
84. Including at the international level OXFAM, Amnesty International, Save the Children and WWF. UK NGOs submitting responses were Baby Milk Action IBFAN, Christian Aid, Friends of the Earth, New Economic Foundation (NEF) and the Solicitors Pro Bono Group.
85. Green Paper, p. 6.
86. See for example response from Amnesty International, p. 6. AI argues that CSR should not be an 'add-on to core business activities' and states that the assumption that CSR should be viewed as voluntary is 'flawed in that it fails to take account of the reality that voluntary approaches are generally implemented in response to consumer and community pressures, industry peer pressure, competitive pressure or the threat of new regulations or taxes', i.e. rarely voluntarily.
87. Commission Communication, p. 4.
88. Commission Communication, p. 17.
89. So for example incorporating CSR into a new framework directive harmonizing the fairness of commercial practices and producing a handbook on 'green' public procurement (Commission Communication, pp. 21, 22).
90. COM (2001) 252 final.
91. COM (2001) 252 final, n. 77, pp. 22, 23.
92. Published September 2000. A new report is due shortly.
93. TUAC Survey, p. 39; Department of Trade and Industry, 'Business and Society: Corporate Social Responsibility Report 2002', DTI/Pub 6060/5k/05/02 NP, May 2002, p. 43.
94. 'Business and Society: Corporate Social Responsibility Report 2002', p. 43.
95. Corporate Responsibility Bill, Bill 145, 53/1, 12 June 2002. Australia has also attempted without success to introduce compulsory CSR. See the Corporate Code of Conduct Bill 2000, which proposed regulation of Australian corporations operating overseas. The Joint Statutory Committee on Corporations and Securities rejected it on 28 June 2001 on the basis that it was unnecessary and unworkable. In October 2000, USA Congresswoman Cynthia McKinney introduced the TRUTH Act of 2000 (Transparency and Responsibility for US Trade Health) HR 5492. The bill sought to require US companies operating abroad to disclose information about their operations, e.g. the location and address of facilities, age and gender of employees, environmental performance, and labour practices.
96. S.1(1)(a) and (b).
97. S.3(1)(a) and (b).

98. S.3(1)(c) and (d).
99. S.(3)(3) defines 'stakeholder' non-exhaustively as shareholders and investors, employees, communities and individuals.
100. S.6.
101. S.8(a), (b) and (c).
102. S.9(7).
103. S.10.
104. Loi relative aux nouvelles regulations économiques, Loi 2001-420 du 15 Mai 2001.
105. UN Doc. E/CN.4/Sub.2/2003/12 (2003). See for example the Amnesty International Public Statement of 8 August 2003 at 'Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises', 55th Session of the Sub-Commission on the Promotion and Protection of Human Rights (28 July–15 August 2003) AI Index: POL 30/012/2003 (Public).
106. See Lewis, 2001: 245ff., 2002 for a discussion on the significant influence of the TABD particularly in relation to the EU and the WTO. For an example of an individual corporation's influence at the national level see the case of Texaco in Ecuador described in MacLeod, 1999. For a discussion of regional CSR initiatives see MacLeod, forthcoming.

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RÉSUMÉ

Les Corporations Transnationales: Le Pouvoir, L'influence et la Responsabilité

Sur le plan du Nouvel Ordre Mondiale, les corporations transnationales (les CTN) les plus grandes sont les acteurs principaux. Elles influencent les politiques de gouvernements partout dans le monde, elles aident à organiser le programme de l'Organisation Mondiale de Commerce. Elles influencent les destins d'économies individuelles dans le monde en voie de développement, elles font une forte impression sur l'écosystème, elles fixent des taux de salaires qui peuvent faire que les pays industrialisés se soumettent à leurs exigences, etc. Tout architecte constitutionnel qui n'essaie pas de fixer un cadre de responsabilité et de citoyenneté mondiale pour les CTN dégraderait leur profession. Comment est-ce qu'on peut orchestrer la bonne influence des CTN, en ce qui concerne la croissance et l'opportunité économiques, avec la nécessité qu'elles se conforment aux valeurs sous-jacentes de la communauté mondiale? Est-ce qu'on peut légiférer pour la responsabilité des entreprises, et si c'est le cas, comment le faire? Sinon, quelles sont les autres solutions disponibles? Cet article examinera les valeurs et les mécanismes nécessaires pour assurer que le monde d'entreprises soit en accord avec les espérances de la démocratie cosmopolite. Combien les gouvernements nationaux peuvent-ils faire? Combien peut être fait par des groupements régionaux comme la UE? Combien peut être fait par des corps comme la OCDE? Quelle est l'influence des syndicats globaux? Est-ce que des règlements et usages peuvent exercer une influence, et si c'est le cas, qui sont les instigateurs les plus prometteurs? Est-ce que les politiques d'approvisionnement peuvent être dirigées dans une façon qui réaliserait la responsabilité des entreprises, et quelle est l'influence de la société civile sous forme des ONG par exemple? De l'information de plus en plus détaillée sur les activités influentes des CTN devient disponible, mais jusqu'à maintenant il paraît qu'il n'y a pas de stratégie pour les placer dans les canons de la responsabilité globale. Cet article examine de certaines possibilités.

RESUMEN

Las Corporaciones Transnacionales: Poder, Influencia y Responsabilidad

Por lo que se refiere al Nuevo Orden Mundial, las corporaciones transnacionales (las CTN) más grandes son los actores centrales. Influencian las políticas de gobiernos por todo el mundo; ayudan a organizar la agenda de la Organización Mundial de Comercio. Influencian los destinos de economías individuales en el mundo en desarrollo, tienen un impacto crucial en el ecosistema, señalan escalas salariales que pueden hacer que el mundo desarrollado se doble a sus exigencias, etc. Cualquier arquitecto constitucional que no trata de fijar un sistema de responsabilidad y ciudadanía mundial para las CTN degradaría su oficio. ¿Cómo instrumentamos la sana influencia de las CTN, por lo que se refiere al crecimiento y a la oportunidad económicos, con la necesidad de que se conformen a los valores subyacentes de la comunidad mundial? ¿Podemos legislar para la responsabilidad corporativa? Y si es así, ¿cómo? Si no, ¿cuáles son las alternativas? Este artículo investigará los valores y los mecanismos para asegurar que el mundo corporativo sea armonizado con las expectativas de la democracia cosmopolita. ¿Cuánto pueden hacer los gobiernos nacionales? ¿Cuánto pueden hacer los agrupamientos regionales como la Unión Europea? ¿Cuánto pueden hacer los cuerpos como la OCDE? ¿Qué es la influencia de los sindicatos globales? ¿Pueden tener influencia los códigos de práctica? Y si pueden, ¿quiénes son los promotores más prometedores? ¿Es posible dirigir las políticas de obtención para conseguir la responsabilidad corporativa? ¿Y qué es el nivel de influencia de la sociedad civil en la forma de las ONG, por ejemplo? Una fuente de información cada vez más amplia sobre las actividades influyentes de las CTN se hace disponible, pero hasta ahora parece que no hay ninguna táctica para que se conformen a los criterios de la responsabilidad mundial. Este artículo investiga algunas posibilidades.

BIOGRAPHICAL NOTES

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