

## **International approaches to corporate accountability**

Working paper<sup>1</sup>

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### **I. Introduction and background**

Transnational corporations (TNCs) provide many of the components of our daily lives – whether it is the food we eat, the clothes we wear, the medicine we take or the energy we need for heating and transport.<sup>2</sup> Their financial wealth and economic clout has made them major players on the international and national plane – often at the expense of the nation state. It has been estimated that in 2009, 59% of the world's 150 largest economic entities were corporations.<sup>3</sup> The largest one, Wal-Mart, had revenues exceeding the GDPs of 174 countries, including Sweden, Saudi Arabia and Venezuela. Together the top 44 companies generated revenues equal to 11% of the global GDP. Their total revenues were larger than the combined economies of 155 countries – all except the largest 40 in terms of GDP.<sup>4</sup>

Whilst the activities of TNCs may affect large numbers of citizens, communities or societies at large, they primarily answer to their shareholders. Their accountability for *inter alia* human rights violations, environmental pollution or the loss of livelihoods is

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<sup>2</sup> For the purpose of this paper the term Transnational Corporation (TNC) describes corporations that spread their operations across several countries. We do not distinguish between TNCs and Multinational Corporations that may maintain a stronger national home connection.

<sup>3</sup> Tracey Keys and Thomas W. Malnight, "Corporate Clout: The Influence of the World's Largest 100 Economic Entities" (Strategy Dynamics Global Limited, 2010).

<sup>4</sup> Global Trends, "Corporate Clout: The Influence of the World's Largest 100 Economic Entities" <<http://www.globaltrends.com/features/shapers-and-influencers/66-corporate-clout-the-influence-of-the-worlds-largest-100-economic-entities>>.

limited. As a result of their complex legal structure a home state often lacks jurisdiction to regulate the activities of subsidiaries based abroad. Equally, a project country rarely has the means to control headquarters decisions in another jurisdiction. So TNCs are often beyond the reach of national legal and regulatory systems. The only formal mechanisms that allow citizens to challenge TNCs are generally those available under the domestic legal order of the host country. Particularly in developing countries, however, courts and tribunals can be inefficient and reluctant to interfere with a TNC's operational activities. Weak governance and civil society structures in many host countries further compound this problem.

The global financial and economic crises in 2008 provided an opportunity to demand the democratisation of the economy and call for better participation, transparency, decentralisation and accountability.<sup>5</sup> But how should the rights of those who are usually most affected by corporate decision making processes but least equipped to influence their outcomes be protected? Or can the interest of immediately affected groups and communities somehow be balanced against the benefits (such as job creation or economic growth) of large scale investments? Even with the best intentions the activities of TNCs across a range of sectors will not result in win-win solutions only.

This paper examines existing approaches at the international level that allow other stakeholders to hold TNCs accountable for the social and environmental impacts of their activities (II-VII). A radical democratisation of the global economy and its transformation into a system that is equitable and accessible to all may have to encourage new forms of corporate accountability. The paper therefore also offers some general observations on the pros and cons of existing approaches, and – on that basis – draws some general conclusions on possible next steps with a view to strengthening the accountability of TNCs at the international plane.

## **II. Voluntary corporate responsibility schemes**

There is no global regulatory system for TNCs. Instead there is an array of voluntary standards and corporate social responsibility initiatives. In recent years, multinational companies have been developing codes of conduct, sustainability principles and other commitments to ethical practice with the aim of increasing transparency and improving their environmental and social performance. Many have signed up to global voluntary initiatives such as the UN Global Compact (a set of ethical principles for corporations), the OECD Guidelines for Multinational Enterprises, and sector-specific initiatives such as the Extractive Industries Transparency Initiative (EITI).

### **1. OECD Guidelines**

The OECD Guidelines for Multinational Enterprises (Guidelines) are the principal inter-governmentally agreed voluntary instrument on corporate responsibility.<sup>6</sup> All 34 OECD countries and 8 non-member countries adhering to the Guidelines “encourage [TNCs] operating on their territories to observe the Guidelines wherever they operate,

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<sup>5</sup> See e.g. Direct Democracy, “Democratising the economy” <<http://www.directdemocracyuk.com/blog/2010/10/democratising-the-economy.html>>.

<sup>6</sup> Unlike other voluntary international instruments such as the U.N. Global Compact, the Guidelines are negotiated and approved by national delegations, and therefore potentially reflect the *opinio juris* of adhering states.

while taking into account the particular circumstances of each host country.”<sup>7</sup> Collectively, the adherents of the Guidelines are the source of the large majority of foreign direct investment and house the headquarters of a majority of the largest TNCs.<sup>8</sup>

The Guidelines include provisions on access to environmental information and public consultation. Other sections focus on continually improving environmental management and the minimisation of environmental harm, without addressing compliance or liability. Aligned with these goals is the Guidelines’ acknowledgement of the precautionary approach, that “where there are threats of serious damage to the environment...[TNCs should] not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage”.<sup>9</sup> Without creating new commitments or precedents, the Guidelines recommend how the precautionary approach should be implemented by TNCs.<sup>10</sup>

Of all the voluntary instruments on corporate responsibility, the Guidelines’ unique added value is their function as a grievance mechanism. The Guidelines establish National Contact Points (NCPs) which take a variety of organisational forms. NCPs may be a senior government official, a government office headed by a senior official, an interagency group, or a group including independent experts. Project affected individuals and communities can seek redress by making a complaint to an NCP. NCPs must respond to enquiries from the business community, worker organisations, NGOs, the public, and the governments of non-adhering countries. This mechanism was opened to NGOs in 2000.<sup>11</sup> NCPs are limited to consensual and non-adversarial methods of dispute resolution. In practice complaints to NCPs can require action by the adhering state and offending TNCs after NCPs make an initial assessment that the issues raised merit further examination.<sup>12</sup>

This may enable “civil regulation” of TNCs by NGOs.<sup>13</sup> But civil regulation has thus far proven ineffective. From 2001 to 2010, NGOs filed only 96 cases with NCPs, while unions filed another 117. The vast majority of these cases concerned an alleged breach of the Guidelines in a non-adhering developing country. Of the 96 NGO cases, 31% did not pass an initial assessment and only 25% (26 cases) were concluded with a mediated settlement or final statement. Of these 26 cases, only a handful have led to improved corporate behaviour or improved conditions on the ground.<sup>14</sup>

This is in part because NCPs have not followed up on mediated settlements or their final statements. Furthermore, if an NCP does follow up it cannot compel a

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<sup>7</sup> OECD Guidelines for Multinational Enterprises (2011 update) (“OECD Guidelines”) para. I(3) <<http://www.oecd.org/dataoecd/43/29/48004323.pdf>>.

<sup>8</sup> The 8 non-member adhering countries are Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania.

<sup>9</sup> OECD Guidelines para. VI(4).

<sup>10</sup> OECD Guidelines, Commentary on the Environment, 44.

<sup>11</sup> OECD Watch, “10 Years On, Assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct”, 6 <[http://oecdwatch.org/publications-en/Publication\\_3550/](http://oecdwatch.org/publications-en/Publication_3550/)>.

<sup>12</sup> OECD Guidelines, Procedural Guidance paras. I(C)(2)(d) and (1)-I(C)(2).

<sup>13</sup> For an overview of specific instances, see OECD Watch (n 11); for an argument that the Guidelines can provide effective governance, see G. Schuler, “Effective Guidance Through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises”, 9 German LJ 1753 (1 November 1998).

<sup>14</sup> OECD Watch (n 11) 9-10, 22.

corporation to cooperate or comply with its recommendations. But the Guidelines have resulted in some positive outcomes.

In May 2011 the adhering countries completed an update to the Guidelines. The update includes a new chapter on human rights which draws upon the UN “Protect, Respect and Remedy” framework for business and human rights (see below) and “is in line with the Guiding Principles for [the framework’s] Implementation.”<sup>15</sup> TNCs are to respect human rights, avoid causing or contributing to adverse human rights impacts, and address such impacts when they occur.

The new chapter also addresses TNC responsibility for supply chains. TNCs should “seek ways to prevent or mitigate adverse human rights impacts that are *directly linked* to their business operations, products or services *by a business relationship*, even if they do not contribute to those impacts.”<sup>16</sup> “Business relationships” include those with “business partners, entities in [the TNC’s] supply chain, and any other...entity directly linked to its business operations, products, or services.”<sup>17</sup> The Guidelines expect that TNCs use their leverage to prevent or mitigate human rights abuses caused by these entities.

The update made small changes to the environment chapter. For example, TNCs are now encouraged to reduce greenhouse gas emissions and to provide information on the environmental implications of using their products and services.<sup>18</sup>

The Implementation Procedures of the OECD Guidelines were also made slightly stronger. Adhering countries “shall make available human and financial resources to their [NCPs] so that they can effectively fulfil their responsibilities...”.<sup>19</sup> NCPs are to be “composed and organised such that they provide an effective basis for dealing with the broad range of issues covered by the *Guidelines*...”<sup>20</sup> and will address specific complaints “in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the *Guidelines*.”<sup>21</sup> An indicative timeframe for specific complaints is included in the commentary on the new procedures.<sup>22</sup>

The update also spells out the information NCPs are to make public at the end of the complaint procedure. When the NCP decides that the issues did not merit further examination, it must issue a statement describing “the issues raised and the reasons for the NCP’s decision”.<sup>23</sup> If the parties reach agreement, the NCP’s report must describe “the issues raised, the procedures the NCP initiated in assisting the parties and when agreement was reached.”<sup>24</sup> For any content of the agreement to be included, the parties must agree. When there is no agreement or a party is unwilling to participate, the NCP must issue a statement describing “the issues raised, the reasons why the NCP decided that the issues raised merit further examination and the procedures the NCP initiated...The NCP will make recommendations on the

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<sup>15</sup> OECD Guidelines, Commentary on Human Rights, 29.

<sup>16</sup> OECD Guidelines para. IV(3) (emphasis added).

<sup>17</sup> OECD Guidelines, Commentary on Human Rights, 31.

<sup>18</sup> OECD Guidelines paras. VI(6)(b)-(d).

<sup>19</sup> OECD Guidelines, Part II, Decision of the Council on the OECD Guidelines for Multinational Enterprises, 66.

<sup>20</sup> OECD Guidelines, Procedural Guidance para. I(a)(1), chapeau of section I(C)

<sup>21</sup> OECD Guidelines, Procedural Guidance.

<sup>22</sup> OECD Guidelines, Commentary on the Procedural Guidance, 82-3.

<sup>23</sup> OECD Guidelines, Procedural Guidance para. I(C)(3)(a).

<sup>24</sup> OECD Guidelines, Procedural Guidance para. I(C)(3)(b).

implementation of the Guidelines *as appropriate...Where appropriate*, the statement could also include the reasons that agreement could not be reached.”<sup>25</sup>

These procedural improvements will likely make the Guidelines more amenable to civil regulation by NGOs, but will not guarantee effective implementation of the Guidelines. Where consensual dispute resolution has failed, NCPs are not required to determine whether the Guidelines were observed. Nor are they required to monitor and follow-up on their recommendations or the parties’ agreements. NCPs cannot impose effective sanctions for breaches of the Guidelines. For these and other reasons, the NGO coalition OECD Watch concludes that “civil society organisations cannot rely on [the Guidelines] for guaranteeing responsible business conduct and effective remedies.”<sup>26</sup>

## 2. U.N. Global Compact

In contrast to the government-driven Guidelines, the U.N. Global Compact (Compact)<sup>27</sup> was developed by international experts and invites direct participation by businesses. It includes ten principles said to enjoy universal consensus, including the following three: “Businesses are asked to support a precautionary approach to environmental challenges; undertake initiatives to promote greater environmental responsibility; and encourage the development and diffusion of environmentally friendly technologies.”<sup>28</sup>

The Compact derives these principles from the Rio Declaration and Agenda 21. The over five thousand businesses who participate in the Compact are expected to incorporate these principles into board decision-making processes and include a description of how the principles are implemented in their annual reports. The Compact is subject to light governance spread over seven network-based entities.

Participants must communicate their progress in implementing the ten principles of the Compact annually. If they do not, they will be listed as “non-communicating” and will eventually be delisted from the Compact.<sup>29</sup> Since its introduction in 2005, nearly 1,800 companies have been delisted for repeated failure to disclose their practices.<sup>30</sup>

But the Compact was not designed to, nor does it have the mandate or resources to measure participants’ performance.<sup>31</sup> It is not and does not aspire to become a compliance based initiative.<sup>32</sup> When allegations of systematic or egregious abuses are presented in writing to the Global Compact Office, it has the discretion to

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<sup>25</sup> OECD Guidelines, Procedural Guidance para. I(C)(3)(c) (emphasis added).

<sup>26</sup> OECD Watch, “OECD Watch Statement on the update of the OECD Guidelines for MNEs: Improved content and scope, but procedural shortcomings remain” (25 May 2011) <[http://oecdwatch.org/publications-en/Publication\\_3675](http://oecdwatch.org/publications-en/Publication_3675)>.

<sup>27</sup> U.N. Global Compact <[www.unglobalcompact.org](http://www.unglobalcompact.org)>.

<sup>28</sup> U.N. Global Compact, Principles 7 through 9 <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>>.

<sup>29</sup> Global Compact Integrity Measures, s. 3, “Failure to Communicate Progress” <<http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html>>. See also Global Compact Policy for the “Communication on Progress” <[http://www.unglobalcompact.org/docs/communication\\_on\\_progress/COP\\_Policy.pdf](http://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy.pdf)>.

<sup>30</sup> Global Compact International Yearbook (2010) 9.

<sup>31</sup> Global Compact Integrity Measures, s. 1, “Background”.

<sup>32</sup> Global Compact Integrity Measures, s. 4, “Allegations of Systematic or Egregious Abuses”.

encourage resolution of the matter, either by itself or by referral to a Global Compact network or UN organisation.<sup>33</sup> But should the company concerned refuse to engage, the worst that can happen is again classification as “non-communicating” and potential delisting. The Compact is clearly not designed to promote direct accountability.

### **3. ISO Standards**

Another voluntary international instrument, one designed with heavy influence from industry, is the ISO 14000 series of environmental management standards. These cover a multitude of areas including environmental labelling and life-cycle assessment. Certification is site-specific and can only be obtained for ISO 14001 on environmental management systems. Each certified site must have its own environmental policy statement which commits to compliance with local environmental laws, continual improvement and the prevention of pollution; implement a management system to ensure conformity with the statement; audit implementation of the management system; and encourage suppliers and contractors similarly to conform to ISO 14001.<sup>34</sup>

Like other voluntary industry initiatives which focus on environmental management and do not set standards for environmental performance, the ISO 14000 series of standards is accused of being mere “greenwash”. Key questions include whether in practice certified facilities set low goals which barely exceed domestic laws,<sup>35</sup> and whether the widespread adoption of ISO 14001 pre-empts or softens developing state regulation.

The ISO 26000 standard on corporate social responsibility was released on 1 November 2010. In contrast to ISO 14001, ISO 26000 is a voluntary guidance standard and certification is not possible. Therefore, although it provides guidance on how an organisation can integrate social responsibility in its decisions and actions, compliance is voluntary and not externally assessed.

### **4. Sector-specific Instruments**

Alongside these broad soft law instruments stand others which are industry specific. Chief among these are the International Finance Corporation’s Performance Standards, which are not only a precondition of its own lending, but are followed by banks adhering to the Equator Principles, which account for two-thirds of global project lending.<sup>36</sup> They require social and environmental assessment but do not incorporate a grievance process.<sup>37</sup>

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<sup>33</sup> *ibid.*

<sup>34</sup> See J. Clapp, “The Privatization of Global Environmental Governance: ISO 14000 and the Developing World”, *Global Governance* 4 (1998) 295, 300.

<sup>35</sup> Compare *ibid.* at 309 with M. Potoski et al., “Racing to the Bottom? Trade, Environmental Governance, and ISO 14001”, 50 *Am. J. Pol. Sci.* (2006) 350, 352.

<sup>36</sup> U.N. Human Rights Council, Fourth Session, Report of the Special Representative of the Secretary-General, “Business and human rights: mapping international standards of responsibility and accountability for corporate acts”, *A/HRC/4/35* (19 February 2007) 51.

<sup>37</sup> See IFC Policy on Social and Environmental Sustainability at para. 15 <[http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol\\_SocEnvSustainability2006/\\$FILE/SustainabilityPolicy.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/$FILE/SustainabilityPolicy.pdf)>; see also CIEL et al., “The International Finance Corporation’s

Other industry-specific initiatives include the International Council of Mining and Metals (ICMM), a CEO-led body formed by major mining companies accounting for 50% of mining market capitalisation.<sup>38</sup> Another is the Forest Stewardship Council (FSC), a global forest certification system run collaboratively between business and NGOs.<sup>39</sup>

Both the ICMM and FSC have modest guidelines relating to accountability. ICMM principle 3, which member companies commit to implementing, is to “[u]phold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.”<sup>40</sup> ICMM guidance recognises that a potential activity under this principle is a system for recording and managing employee grievances and dispute resolution.<sup>41</sup> But this does not ensure the implementation of a grievance mechanism, much less its practical effectiveness. Accountability under the ICMM is only addressed through a more general reporting framework.

The FSC principles and criteria are more specific. One of the criteria under principle 4 on community relations and worker’s rights requires that “[a]ppropriate mechanisms shall be employed for resolving grievances and for providing fair compensation in the case of loss or damage affecting the legal or customary rights, property, resource, or livelihoods of local peoples.”<sup>42</sup> But it is unclear what strength of mechanism is appropriate and whether this criterion translates into effective accountability on the ground.

### **III. Accountability mechanisms of international financial institutions**

Similar to transnational corporations, international finance institutions such as the World Bank or regional development banks hold extensive power over governments and national economies. Their activities are regulated through policies, procedures and rules adopted by bodies that form part of their internal governance structure. In order to carry out their operational activities without interference from national laws and courts they enjoy special privileges and immunities. By and large, and except where immunities are waived, they are beyond the reach of administrative and judicial recourse mechanisms established under domestic law. Consequently, they effectively operate outside national jurisdictions.

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Performance Standards and the Equator Principles: Respecting Human Rights and Remediating Violations?” (2008).

<sup>38</sup> U.N. Human Rights Council, Fourth Session, Report of the Special Representative of the Secretary-General, Addendum, “Business recognition of human rights: Global patterns, regional and sectoral variations” A/HRC/4/35/Add.4 (8 February 2007) 156. See 159 for other collective initiatives.

<sup>39</sup> See P. Muchlinski, *Multinational Enterprises and the Law* (2<sup>nd</sup> ed., Oxford, 2007) 551-52 for a description of the FSC and other NGO-business partnership arrangements.

<sup>40</sup> ICMM, ‘10 Principles’ <<http://www.icmm.com/our-work/sustainable-development-framework/10-principles>>.

<sup>41</sup> ICMM, ‘Sustainable Development Framework: Assurance Procedure’, Annex 1: Detailed guidance on management systems in relation to the 10 ICMM Principles <<http://www.icmm.com/document/498>>.

<sup>42</sup> FSC, FSC Principles and Criteria for Forest Stewardship FSC-STD-01-001 (version 4-0) <[http://www.fsc.org/fileadmin/web-data/public/document\\_center/international\\_FSC\\_policies/standards/FSC\\_STD\\_01\\_001\\_V4\\_0\\_EN\\_FSC\\_Principles\\_and\\_Criteria.pdf](http://www.fsc.org/fileadmin/web-data/public/document_center/international_FSC_policies/standards/FSC_STD_01_001_V4_0_EN_FSC_Principles_and_Criteria.pdf)>.

Traditionally, their accountability to project affected groups for the social and economic impacts of project finance has been very limited. Under pressure from civil society to address this gap and improve means of public corporate control, various international financial institutions have developed citizen-based accountability mechanisms. In most cases these mechanisms combine internal compliance review with a general dispute settlement approach.

## **1. The compliance review of the World Bank Inspection Panel**

The World Bank was the first international financial institution to establish an accountability mechanism. Through identical resolutions in 1993, the two public sector arms of the World Bank group, the International Bank for Reconstruction and Development and the International Development Association, created the Inspection Panel to provide a forum where people could request the bank to adhere to its own policies and procedures.<sup>43</sup> All international financial institutions (banks, credit and investment agencies) have internal rules, policies or guidelines on how to involve social and environmental considerations in the decision-making process (impact assessment, stakeholder involvement etc.). The World Bank's accountability mechanism only verifies if and to what extent such policies and procedures have been complied with.

The Inspection Panel is authorised to accept complaints which claim that an adverse effect on the affected party arises directly out of the World Bank's failure to follow its own operational policies and procedures.<sup>44</sup> Requests for an investigation can be filed by two or more people (not an individual) in the country where the bank-financed project is located. A duly appointed local representative may act on their behalf. In exceptional cases where no adequate or appropriate local representation is available, representation through a foreign lawyer or NGO is possible.<sup>45</sup>

Eligible complaints are forwarded to the bank management, which has 21 days to provide evidence for its compliance with the bank's relevant policies and procedures.<sup>46</sup> The panel then has 21 days to review the management's response and to make a recommendation to the Board of Executive Directors whether the complaint warrants a full investigation.<sup>47</sup> Although the board has the sole authority to authorise or deny an investigation, it usually follows the Inspection Panel's recommendation.<sup>48</sup> If a full investigation is authorised the panel can use any investigatory method it considers reasonable, including public hearings, project site visits, questioning of bank staff, hiring independent consultants or researching bank files.<sup>49</sup>

After the investigation the Inspection Panel issues a report showing its findings on whether the bank has complied with its relevant policies and procedures.<sup>50</sup> Within 6

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<sup>43</sup> IBRD Resolution No. 93-10 and IDA Resolution No. 93-6, both adopted on 22 September 1993.

<sup>44</sup> Inspection Panel Operating Procedures para. 1  
<<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20175161~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>>.

<sup>45</sup> *ibid* paras. 4, 11.

<sup>46</sup> *ibid* Chapters III, IV.

<sup>47</sup> *ibid* Chapter V.

<sup>48</sup> David Hunter, "Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People" *Chicago Journal of International Law* 4(1) (2003) 201.

<sup>49</sup> Inspection Panel Operating Procedures (n 44) para. 45.

<sup>50</sup> Inspection Panel Operating Procedures (n 44) Chapter VIII.

weeks of receipt of the report, the Bank's management then has to submit its own recommendations in response to the Panel's findings to the Board of Executive Directors, which decides on any further action. This can range from the World Bank's complete withdrawal from a project to the inclusion of affected parties in a compensation scheme. The Panel's report, the management's recommendation and the Board's decision will be made publicly available. Past practice shows that although only the Board has the power to launch or deny an investigation it usually follows the Inspection Panel's recommendation.<sup>51</sup>

While not without critiques, it is generally acknowledged that the Bank's compliance review mechanism has helped to improve the environmental and social performance of Bank-financed projects and programmes over the years. The example most often mentioned in this respect is the Bank's repeated refusal to back the construction of dams and other high-risk, large-scale infrastructure projects.<sup>52</sup> As of November 2010 the Bank has received 71 formal requests since the Panel's operation began.

Its first ever case concerned the Arun III hydropower dam project in Nepal, filed by the NGO International Institute for Human Rights, Environment and Development (INHURED). The complaint alleged violations of the bank's policies on environmental assessment, involuntary resettlement and indigenous peoples. The panel confirmed a number of violations and in its report requested the bank to comply with its own rules before signing the loan agreement with the government of Nepal. The Bank's new President decided to withdraw from the project. In 2008 the government of Nepal agreed to enter into a joint venture with India's Himachal Pradesh State to fund and construct the dam. However, local opposition continues and construction of the dam remains stalled.

The Inspection Panel has also helped to improve accountability. In another case, the Albania Integrated Coastal Zone Management and Clean-Up Project, the Inspection Panel uncovered evidence that a Bank-financed project had led to the demolition of family homes in violation of the Bank's policy on involuntary resettlement. After an internal process that uncovered egregious breaches of policy by Bank Management, the Bank decided to guarantee compensation and suspend further disbursement under the project.

## **2. Problem-solving through the Compliance Advisor/Ombudsman of IFC and MIGA**

Within the World Bank Group, a second accountability mechanism was established by the International Finance Cooperation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) in 1999.<sup>53</sup> Unlike the World Bank, which lends to governments, the IFC and MIGA directly support corporations operating in

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<sup>51</sup> David Hunter (n 48).

<sup>52</sup> See e.g. International Rivers, "Fact Sheet: Gibe III Dam, Ethiopia" (2009), <[http://assets.survival-international.org/documents/69/Gibe3\\_IRN\\_Fact\\_Sheet\\_final.pdf](http://assets.survival-international.org/documents/69/Gibe3_IRN_Fact_Sheet_final.pdf)> (the Gilgel Gibe III Dam in Ethiopia that will affect indigenous peoples living along the lower Omo River Valley).

<sup>53</sup> The IFC is an agency of the World Bank Group that promotes growth in the developing world by financing private-sector investments (loan and equity finance) and providing technical assistance and advice to governments and businesses. MIGA is an agency of the World Bank Group that encourages foreign direct investment in developing countries by providing guarantees to foreign investors against loss caused by non commercial risks (war, inflation) and technical assistance on investment promotion.

developing countries either through loans or guarantees. Their Office of the Compliance Advisor/Ombudsman (CAO) has the mandate to assist the IFC and MIGA in addressing complaints by people affected by projects in a fair, objective and constructive manner to enhance the social and environmental outcomes of projects. In comparison to the World Bank Inspection Panel the CAO has a wider scope of review. While the World Bank Inspection Panel only reviews compliance with internal rules and policies, the CAO mechanism allows affected parties to complain about other specific environmental and social effects related to the funding, financing or securing of projects, and focuses on problem-solving.

A complaint can be submitted by an individual, a group or entity affected by the social and/or environmental impact of an IFC or MIGA project. It must include previous attempts to resolve the problem and should include a statement of the desired outcome. It may also refer to policies and procedures but is not restricted to claiming a violation of these.<sup>54</sup> If the complaint is accepted the CAO will then further assess and determine how to best handle the situation, through for example research, site-visits or meetings with the parties. The responsible management will be requested to provide information and propose action. Then, depending on the seriousness, urgency, scope and complexity of the case, as well as the project stage and possible results that may be achieved, the CAO may conclude the complaint process or decide on the further course of action.

This course of action can take any form of negotiations that may stimulate a self-generated solution among the parties, or be a more formal approach such as conciliation or mediation facilitated either by the office of the CAO or a third party. If necessary, affected local interests other than the complainant and the implementing entity/borrower/investor should be part of the problem-solving process. This approach is envisaged to lead to a (written) settlement agreement between the parties comprising, for example, remedial actions, incentives or deadlines. Alternatively, or if no settlement agreement is reached, the CAO can authorise a further investigation.

In all cases, the CAO will prepare a report to the president of the World Bank Group, which may include recommendations for future action on the part of the IFC or MIGA if the process is not concluded with an agreement.<sup>55</sup> In contrast to the Operational Procedures of the World Bank's Inspection Panel, the CAO Guidelines emphasize the importance of monitoring and following up on recommendations made. The CAO should therefore ensure that provisions to that effect are included in a settlement agreement.<sup>56</sup> The CAO can close the complaint process at any point in time if it believes "that problem-solving approaches or investigation are not appropriate or would be an inefficient use of resources". The CAO must however give the complainants reasons for terminating the complaint process.

The CAO may also decide to audit the IFC and MIGA's social and environmental performance in relation to the project if there is serious evidence for non-compliance with IFC/MIGA policies. If the CAO decides to conduct such a compliance audit, that process will be separate from the ombudsman process and the complainant will no

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<sup>54</sup> Compliance Advisor/Ombudsman Operational Guidelines s. 2 < <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf>.

<sup>55</sup> *ibid* ss. 4.1-4.2.

<sup>56</sup> *ibid* s. 4.3.

longer control the process and will have no more “rights” within the process than anyone else.<sup>57</sup>

By the end of the 2009 the CAO had received 110 formal complaints.<sup>58</sup> Of these, 67 were accepted and 64 had been closed. At the beginning of 2011 the CAO’s website listed 12 ongoing cases. According to its Vice President, the CAO has enjoyed success in developing dispute resolution between affected communities, non-governmental organizations and companies. Dialogue processes created by the CAO have resulted in many agreements between various stakeholders including financial compensation, the returning of land to communities, and the establishment of social development services. However, the CAO has experienced challenges in achieving internal compliance through its auditing process. Nevertheless, there is a growing internal recognition of the CAO’s auditing and monitoring role, and hence an increasing sense of accountability inside the IFC and MIGA.

### **3. The overall picture**

To date all regional development banks (Asian Development Bank, Inter-American Development Bank, the European Bank for Reconstruction and Development, African Development Bank) have established accountability mechanisms that allow affected groups to complain about impacts of bank-financed projects. The procedures and requirements broadly correspond to those established by the IFC and MIGA and combine a problem-solving and compliance review approach. Although different in form, scope and practical relevance the mechanisms have some common features. They are designed as quasi-legal frameworks that offer only limited protection. Recommendations made in connection with the investigation of a complaint are neither binding on the financial institution concerned nor subject to further legal remedies.

Even where strict time limits for the handling of a complaint are prescribed, non-compliance with these does not entail sanctions. Launching a complaint also does not suspend a project or result in an award for individual compensation. In every instance complaints are a means of last resort and will only be considered eligible if the affected party can demonstrate previous contact with the finance institution and efforts to solve the dispute. The complaint itself is usually not subject to any particular demanding formal requirements, and its submission is facilitated by, amongst others, templates and further instructions on the internet.

Experience indicates that formal complaint procedures can be helpful in controlling financial institutions’ activities and enhancing their environmental and social performance. Recommendations are often taken seriously and complaint procedures have also proved useful in raising public awareness and developing political pressure.

### **IV. National financial institutions**

In addition, some national financial institutions whose operational activities affect groups and communities in developing countries have established similar

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<sup>57</sup> *ibid* s. 5.

<sup>58</sup> CAO 2008-09 Annual Report <[www.cao-ombudsman.org/publications/documents/CAO2008-9AnnualReportEnglish\\_low.pdf](http://www.cao-ombudsman.org/publications/documents/CAO2008-9AnnualReportEnglish_low.pdf)>.

mechanisms. The first of these was created in January 2002 by Export Development Canada (EDC), the export credit agency of Canada. An ombudsman-like position of Compliance Officer was established with a mandate to address corporate responsibility issues related to transparency, environmental risk review, human rights and business ethics.<sup>59</sup> Any interested person, including non-governmental organizations and communities, can submit a complaint. However, the Compliance Officer only investigates complaints that relate directly to EDC's performance in adhering to its own corporate social responsibility policies or practices. Out of the 23 complaints received through 2009, only six were determined to fall under the Compliance Officer's mandate. If deemed appropriate, the Compliance Officer promotes dialogue or dispute resolution, or it can conduct a compliance audit.

The Japan Bank for International Cooperation (JBIC) created objection procedures to ensure internal compliance with its Guidelines for Confirmation of Environmental and Social Considerations.<sup>60</sup> Under the procedures, two independent examiners may investigate projects that receive JBIC funding that have, or are likely to, cause harm due to JBIC's non-compliance with its Guidelines. In addition, Nippon Export and Investment Insurance (NEXI) has similar guidelines and objection procedures relating to project insurance contracts.<sup>61</sup>

Finally, the European Investment Bank (EIB) and the United States' Overseas Private Investment Corporation (OPIC) have established accountability mechanisms.<sup>62</sup> In 2008 the EIB formalized a Complaints Mechanism Policy to hear allegations of maladministration from any person or group, including civil society organizations affected by EIB-financed projects. As defined, "maladministration" includes violations of human rights and may also relate to environmental or social impacts.<sup>63</sup> In order to facilitate eligibility of complaints from non-EU citizens or residents, the European Ombudsman signed an MOU with the EIB agreeing to handle non-EU complainants.<sup>64</sup> The Complaints Mechanism Policy provides an internal information-gathering and compliance review through its Complaints Office, as well as dispute resolution. In 2008, out of the 40 complaints submitted to the Complaints Mechanism Policy, seven concerned environmental or social impacts of projects.<sup>65</sup>

In 2005, under a mandate from the U.S. Congress, OPIC established an Office of Accountability (OA) to address complaints regarding environmental, social, worker rights or human rights from affected communities of OPIC-supported projects. The OA may initiate Problem Solving Consultations, which may include independent fact-finding, dialogue facilitation and mediation, or an internal Compliance Review.

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<sup>59</sup> Export Development Canada, Resolutions Respecting the Compliance Officer for Export Development Canada s. A, para.1 <[http://www.edc.ca/english/docs/board\\_resolution\\_e.pdf](http://www.edc.ca/english/docs/board_resolution_e.pdf)>.

<sup>60</sup> Summary of Procedures to Submit Objections concerning JBIC Guidelines for Confirmation of Environmental and Social Considerations <<http://www.jbic.go.jp/en/about/environment/guideline/disagree/pdf/en-disagree-2009.pdf>>.

<sup>61</sup> Procedures for Submitting Objections on Guidelines of Environmental and Social Considerations in Trade Insurance <[http://nexi.go.jp/e/pdf/08b\\_1.pdf](http://nexi.go.jp/e/pdf/08b_1.pdf)>.

<sup>62</sup> For information on campaigns to make the European Investment Bank more transparent, see <<http://www.clientearth.org/eib-and-transparency-new-oct-09>>

<sup>63</sup> The EIB Complaints Mechanism: Principles, Terms of Reference and Rules of Procedure, 5 <[http://www.eib.org/attachments/strategies/complaints\\_mechanism\\_policy\\_en.pdf](http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf)>.

<sup>64</sup> *ibid* 11.

<sup>65</sup> Complaints Office Activity Report 2008, 6 <[http://www.eib.org/about/publications/complaints\\_office\\_annual\\_report\\_2008.htm](http://www.eib.org/about/publications/complaints_office_annual_report_2008.htm)>.

Between 2005 and 2009, the OA had received four written requests for problem-solving or compliance review.<sup>66</sup> Two of the requests were deemed ineligible, and compliance reviews were conducted in response to the other two.

## **V. Corporate accountability mechanisms<sup>67</sup>**

Corporate structures tend to be complex. For example, the parent company may be based in one country while operating in another through an offshore company registered in a third jurisdiction. As a result a home state could lack the jurisdiction or capacity to control the activities of subsidiaries abroad while the state hosting the subsidiaries is unlikely to have any control over the parent company. Like international finance institutions, TNCs that operate across different jurisdictions can be beyond the reach of national legal and regulatory systems. Responding to demands for better corporate accountability for the social, economic and environmental impacts of their operations, TNCs increasingly operate inbuilt complaints and grievances procedures.

### **1. Project level mechanism**

Setting up company-run grievance and redress mechanisms that allow local citizens to complain about a project's social and environmental impacts offers a potential avenue to resolve disputes before they escalate into full-blown conflict. In certain sectors – in particular oil, gas and mining – the management level of transnational corporations has therefore increasingly recognised the business case for their establishment.<sup>68</sup> At the same time project related complaints mechanisms have become a formal eligibility requirement for different types of project finance. If a company seeks funding from an international or regional development bank or Equator principle bank, they will often be required to establish some kind of local grievance mechanism.

For example, since 2006 the International Finance Corporation, the private sector investment arm of the World Bank Group, requires clients that receive project finance to “set up and administer mechanisms or procedures to address project-related grievances or complaints from people in the affected communities”.<sup>69</sup> The mechanism should address concerns promptly using a culturally appropriate, accessible and transparent process.<sup>70</sup> The Environmental and Social Policy of the European Bank for Reconstruction and Development requires a “mechanism, process or procedure to receive and facilitate resolution of stakeholders’ concerns and grievances about the client’s environmental and social performance”.<sup>71</sup> Projects

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<sup>66</sup> Office of Accountability, Four Year Report 2005 – 2009, 2  
<[http://www.opic.gov/sites/default/files/docs/office\\_of\\_accountability\\_four\\_year\\_report\\_2009.pdf](http://www.opic.gov/sites/default/files/docs/office_of_accountability_four_year_report_2009.pdf)>.

<sup>67</sup> This section is largely based on a number of interviews conducted with corporate social responsibility practitioners of different TNCs.

<sup>68</sup> Christoph Schwarte and Emma Wilson, “Building public trust: transnationals in the community”, International Institute for Environment and Development, Briefing (2009).

<sup>69</sup> IFC, Policy on Social and Environmental Sustainability (2006) para. 31.

<sup>70</sup> IFC, Performance Standard 1, Social and Environmental Assessment and Management Systems (2006) para. 23.

<sup>71</sup> EBRD, Environmental and Social Policy, Performance Requirement 10, paras. 24-26.

that affect indigenous peoples or result in the resettlement of communities must have an additional appeal mechanism.<sup>72</sup>

Corporate grievance and redress mechanisms provide communities with channels of communication to make their concerns known to the company as they arise, and to varying degrees provide for formalised procedures to settle these disputes. This may include a telephone hotline and a network of community liaison officers. A more elaborate mechanism will have an internal company procedure for logging and addressing the complaints, with dedicated staff and often a stated time frame to resolve the issue. There may be a special committee or arbitration panel to deal with particularly complex issues and an opportunity for third party mediation. The complainant may sign a formal statement when the grievance is resolved to their satisfaction.

The international mining company Anglo American initially introduced guidance on the establishment and operation of stakeholder complaint and grievance procedures in 2007 as part of their Socio Economic Assessment Toolbox (SEAT). With the beginning of 2011 a company-wide system to record and handle complaints has been put in place at all Anglo American project sites (70 to 80) worldwide. Based on an existing software package, the corporation has developed an action management tool to capture and reflect social stakeholder concerns. Complaints and grievances are recorded and classified according to type and severity of the incident and gradually processed through the system. This includes the allocation of tasks, approximation of timelines, reminders to responsible staff and possibly referral to a review committee and third party mediation. Evaluation and monitoring is part of the computerised system which allows headquarters to follow the different steps of an investigation and compile empirical data on incidents and outcomes of complaints.

At each Anglo American site the grievance and redress mechanism has to meet the minimum requirements summarised in the SEAT tool. This includes that complaints can be made anonymously and free of charge. Each operation has to nominate a complaints coordinator who is responsible for the processing of a complaint, its allocation to the different functions on site, further investigations etc. The company is in the process of developing further guidance on how to manage social incidents and resolve disputes amicably. Sites are responsible for the dissemination of information about the existence and use of the stakeholder complaints and grievances mechanism.

Although it is too early to extract relevant empirical data from the system, Anglo American ascertains that as general trend the new system has made a positive contribution to the company's cultural integrity, openness and accountability. The majority of complaints appear to be very low level ("housekeeping stuff") and are not associated with serious rights violations. In general, however, people are not yet aware of the system and only use it occasionally. Following the introduction of the system, the next stage will be to properly embed the system over the next one to two years through awareness raising, training, report generation and also internal auditing.

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<sup>72</sup>

ibid.

## **2. Corporate level mechanism**

At the corporate level Anglo American operates the “SpeakUp” whistle-blowing programme with regard to its offices in the United Kingdom, Luxembourg and South Africa. Under the programme employees, suppliers, communities or others can draw attention to any conduct that violates the ethical principles contained in Anglo American’s Good Citizenship Business Principles or other relevant policies. This could, for example, include actions that result in health and safety hazards or damage to the environment, criminal offences or unethical accounting practices.

Complaints can be submitted to a third party provider (Tip-offs Anonymous) by phone, email or post in different languages. An anonymous version of the complaint is channelled through the central assurance function to the relevant company of the Anglo American Group for evaluation and possible investigation. The complaints can result in recommendations to management. They are often filed by one employee against another, and the SpeakUp programme has been particularly successful in controlling corruption.

As part of their corporate social responsibility agenda many TNCs have formulated internal policies pertaining to the conduct of employees and governance of the organisation. Their content, scope of application and relevance in practice vary significantly. In general, they tend to outline the company’s expectations of its staff and offer guidance on handling some of the more common ethical problems that might arise in the course of doing business. The implementation of such policies is often supported through some form of institutional arrangement – for example an ethics committee or designated officials (described as “compliance” or “business conduct officers”) to assess the ethical implications of a company’s activities, establish best practice, support application of the policy and make recommendations to management. While the Anglo American system does not limit the eligibility for filing a complaint the more traditional model primarily provides a tool for employees and other internal stakeholders. Their relevance in practice often depends on the robustness and effectiveness of internal compliance processes.

Within TNCs the different complaint processes at the corporate and project level are perceived as two separate strands of corporate accountability. Where the whistle-blower policy allows for complaints by external stakeholders, project affected communities could use both avenues. But it appears that to date, no company has established a more integrated approach – through, for example, linking both tiers as a first and second instance for complaints. Few companies have yet contemplated the establishment of a group-wide system to deal with project related grievances in line with the more centralised approach of international finance institutions. A potential review and dispute settlement process that includes institutional arrangements at the group level (such as an ombudsman or inspection panels) are usually considered impractical and too far removed from the actual problem.

## **VI. Accountability under public international law**

Public international law is traditionally described as a system of rules and principles that govern the relationship between States and other subjects of international law (e.g. the United Nations or the European Community). International treaties (“conventions”, “covenants”, “protocols” etc.) are concluded between states and – like any other contract – primarily create rights and obligations between the participating parties. Traditionally, communities, individuals and other non-state actors have had

little relevance in international law. While an international legal instrument may confer rights to them, in general citizens still have to rely on the state to represent their interests on the international plane.

## **1. Existing citizen-based accountability mechanisms**

The principle of state sovereignty continues to seal off most options for citizens to seek recourse beyond their national jurisdiction. There are, however, an increasing number of cracks in the ceiling of the traditional sovereignty principle. This erosion is particularly evident in the arena of human rights law, where individuals may bring complaints to the attention of several international fora, including the European Court of Human Rights, the UN Human Rights Council or the Inter-American Commission on Human Rights. The procedures and possible outcomes of such complaint procedures vary considerably. Whilst the European Court of Human Rights' decisions bind parties and include sanctions against a government, other mechanisms may only result in concluding observations and further reports. But before the Court can deal with a case all available domestic legal remedies have to be exhausted.

The North American Agreement on Environmental Cooperation allows non-governmental organisations and individuals to make submissions to the Commission for Environmental Cooperation, established under the Agreement, if they believe a Party is failing to effectively enforce its environmental law.<sup>73</sup> The 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) requires its parties to make compliance review arrangements which may consider complaints from the public.<sup>74</sup> At their first meeting in October 2002, the Parties established such a mechanism and elected the first Compliance Committee. This system is not only open to the Parties and the Secretariat, but also allows members of the public to raise concerns related to the national implementation of the Convention.<sup>75</sup>

The communication of an alleged case of non-compliance by a member of the public must be made in writing (electronic submission is permitted). It should be supported by corroborating information.<sup>76</sup> The Committee will inform the State Party concerned, which then enjoys up to five months to respond to the allegations. The Committee may request further information and seek expert advice.<sup>77</sup> A complainant is entitled to participate in the Committee's discussion of his or her case. Following its investigation, the Committee can make recommendations to the Meeting of the Parties, which may then adopt appropriate measures to bring about full compliance with the Convention. This may include specific advice, a declaration of non-

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<sup>73</sup> North American Agreement on Environmental Cooperation between the Government of Canada, the Government of Mexico and the Government of the United States (17 December 1992) Can. T.S. 1994 No. 2, 32 I.L.M. 1480 Art. 14.

<sup>74</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 2161 U.N.T.S. 447, (1999) 38 I.L.M. 517 (Aarhus Convention) Art. 15.

<sup>75</sup> See United Nations Economic Commission for Europe (UNECE), Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, "Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance", ECE Dec. I/7, UN ECEOR, Annex, 1st Mtg., UN Doc. ECE/MP.PP/2/Add.8 (2004) (Review of Compliance) para. 18.

<sup>76</sup> *ibid* para. 19.

<sup>77</sup> *ibid* para. 25.

compliance, a caution, the suspension of treaty rights, or other “non-confrontational, non-judicial and consultative measures as may be appropriate.”<sup>78</sup>

The Committee now meets every three to four months.<sup>79</sup> The website of the Aarhus Convention currently lists 55 communications submitted to the Committee from members of the public.<sup>80</sup> There is some anecdotal evidence that the Aarhus Convention’s Compliance Review Mechanism may exert a positive influence on national norms and legal practice. Without needing to declare a Party non-compliant, the examination of cases may inspire national authorities to take positive steps.<sup>81</sup> The Aarhus Convention’s mechanism is similar to the compliance mechanism developed under other multilateral environmental agreements. Nevertheless, it is unusual in that it responds to input from the public.

## **2. The Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises**

In 1998, the UN Sub-Commission on the Promotion and Protection of Human Rights (The Sub-Commission) of the then Commission on Human Rights (The Commission) established a working group on business and human rights. The working group was tasked with examining the working methods and activities of TNCs,<sup>82</sup> and preparing a draft code of conduct for TNCs.<sup>83</sup> After much process and deliberation, in August 2003 the Sub-Commission approved the Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises (the Norms), and passed them along to the Commission for consideration.

The Norms attempted to compile many scattered voluntary codes of conduct and hard international legal human rights standards applicable to TNCs into one document. They were meant to address, as broadly as possible, the possible rights capable of being affected by TNC activities. They were also intended to cover as many operating entities as possible. As such, “transnational corporation” and “other business enterprise” were both defined in broad terms.<sup>84</sup> The Norms confirm that “States have the primary responsibility to promote, secure respect of and protect human rights” and further state that TNCs and other business enterprises, as organs of society, also “have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights”. The more powerful the company, the more justified the imposition of responsibility.

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<sup>78</sup> *ibid* para. 37.

<sup>79</sup> According to the Review of Compliance, *ibid* para. 12, the Committee should meet at least once a year.

<sup>80</sup> Aarhus Convention Compliance Committee, “Communications from the Public” <<http://www.unece.org/env/pp/pubcom.htm>> accessed on 21 February 2011.

<sup>81</sup> See Jeremy Wates (Secretary to the Aarhus Convention, UNECE), “Aarhus Convention’s Compliance Review Mechanism”, International Network for Environmental Compliance and Enforcement (INECE) Newsletter 13 (December 2006) <<http://www.inece.org/newsletter/13/international.html>>.

<sup>82</sup> David Weissbrodt and Muria Kruger, “Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights” 97 *American Journal of International Law* (2003) 901, 904.

<sup>83</sup> *ibid*.

<sup>84</sup> The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Articles 20 and 21.

The Norms list rights protected under international law and capable of being affected by TNCs. TNCs and other business enterprises are not allowed to engage in or benefit from human rights or humanitarian law violations. This means corporations cannot provide military, security or police products/services that they know will be used to violate human rights. Furthermore, TNCs must take measures to ensure that those they employ for security do not engage in human rights violations.<sup>85</sup> The Norms also prohibit forced or compulsory labour and guarantee the right to a safe and healthy working environment.<sup>86</sup> In addition, they require respect for the rights of children to be protected from economic exploitation. TNCs and other business enterprises must also provide workers with adequate pay, ensure freedom of association, and respect the right to collective bargaining.<sup>87</sup> The Norms require respect of laws and regulations relating to preservation of the environment.<sup>88</sup>

The Norms require TNCs and other business enterprises to create internal rules in order to comply with the Norms, and to periodically report on their implementation.<sup>89</sup> The Norms must also be incorporated into contracts and other dealings with business partners. In order to effectuate these provisions, the Norms call for “transparent” and “independent” periodic monitoring and verification by the United Nations with inputs from other stakeholders, including NGOs.<sup>90</sup> TNCs must also provide “prompt, effective and adequate” reparation for harms caused that violate the Norms.<sup>91</sup>

Despite obligations placed on TNCs by the Norms, States remained primarily responsible for promoting, protecting, and ensuring respect for human rights. However, Article 17, which is addressed to States, is worded in non-mandatory language. It requests that States reinforce the necessary “legal and administrative framework” to ensure that the Norms are properly implemented by TNCs. The Commentary states that this should be done by using the Norms as a model for legislation and administrative provisions, and by using labour inspections, ombudspersons, national human rights commissions, or other national human rights mechanisms.<sup>92</sup> In determining damages the Norms must be applied by national courts and/or international tribunals, pursuant to national and international law.<sup>93</sup>

These provisions were problematic and perhaps highlight why many thought the Norms to be unworkable. Although the Norms imposed mandatory obligations on TNCs, by giving discretion to States to ensure the Norms were implemented the drafters failed to provide an efficient method of enforcement or implementation. This left the Norms open to criticism that they create confusing contradictions as to who is primarily responsible for human rights protection.

Supporters argued that the Norms established a proper balance between the obligations of States and companies with regard to human rights. The Norms do not challenge the role of the State as primary duty bearer for human rights, but indicate that companies have secondary responsibilities with regard to human rights within

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<sup>85</sup> *ibid* Arts. 3, 4.

<sup>86</sup> *ibid* Arts. 5-7.

<sup>87</sup> *ibid* Arts. 9-10.

<sup>88</sup> *ibid* Art. 14.

<sup>89</sup> *ibid* Art. 15.

<sup>90</sup> *ibid* Art. 17.

<sup>91</sup> *ibid* Art. 18.

<sup>92</sup> *ibid* Art. 17.

<sup>93</sup> *ibid* Art. 18.

their respective spheres of activity and influence.<sup>94</sup> The Norms merely prohibit TNCs from excusing themselves from adhering to international human rights standards where States are unwilling or unable to protect human rights. The Norms also offer the possibility of a remedy to victims of human rights violations.<sup>95</sup>

Critics argued that by imposing binding legal obligations upon TNCs, the Norms would privatize human rights obligations.<sup>96</sup> If parallel obligations traditionally imposed on states are extended to corporations, this would give states an excuse not to comply with their obligations. Moreover, imposing direct legal obligations on corporations would take away the ability of governments to use discretion in weighing the best methods of “securing the fulfilment” of economic, social, and cultural rights.

Due to hard lobbying by corporate actors and developed industrialised nations, the Norms received a cool reception from the Commission and were not adopted. In the run up to the Commission’s Decision, the US and the UK were apparently quite vocal critics. After debate, a Decision was drafted recognizing that the document contained “useful elements and ideas”, but adding that the Commission had not requested it and that, as a draft proposal, it had no legal standing.<sup>97</sup> The Decision also instructed the Sub-Commission not to engage in any monitoring of corporate activities.<sup>98</sup>

## **VII. Ruggie framework and principles**

After the Commission’s Decision regarding the Norms, it subsequently requested that the UN Secretary-General appoint a Special Representative (SRSG) to, *inter alia*, “identify and clarify” international policies in relation to business and human rights. In 2005, political scientist John Ruggie was appointed SRSG. Ruggie neither endorsed nor built upon the Draft Norms as the basis for his mandate. He disassociated himself from the political inflexibility that mired the development of the Norms and sought to strike a compromise between both sides of that debate.

In 2008, he completed a framework for business and human rights. Titled “Protect, Respect, and Remedy”, Ruggie’s framework has three pillars: the state duty to protect against human rights abuses by third parties, including businesses; the corporate responsibility to respect human rights; and the need for more effective access to remedies.<sup>99</sup> It can be characterised as an attempt to create an authoritative focal point on TNC adherence to human rights with the scale necessary to move markets.<sup>100</sup>

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<sup>94</sup> “Report of the UN High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights”, UN Doc. E/CN.4/2005/91 (15 February 2005) 10.

<sup>95</sup> *ibid* 11.

<sup>96</sup> David Kinley, Justine Nolan and Natalie Zerial, “The Politics of Corporate Social Responsibility: Reflections on the UN Human Rights Norms for Corporations”, 25 C&SLJ 30 (2007) 36.

<sup>97</sup> Original sponsors of the Decision were Australia, Belgium, the Czech Republic, Ethiopia, Ghana, Hungary, Ireland, Japan, Mexico, Norway, South Africa, Sweden, and the UK. They were later joined by Austria, Bangladesh, Croatia, Denmark, Equatorial Guinea, Finland, France, Guatemala, Italy, Luxembourg, the Netherlands, Nigeria, Poland, Spain, and Switzerland.

<sup>98</sup> UN Commission on Human Rights, Dec. 2004/116, UN Doc. E/CN.4/DEC/2004/116 (22 April 2004).

<sup>99</sup> UN Doc. A/HRC/8/5 para. 9.

<sup>100</sup> Ruggie speech 11 January 2011; UN Doc. A/HRC/17/31 para. 5.

The Ruggie framework sidesteps several problems which arose with the Norms. To avoid debate over which human rights apply to TNCs, Ruggie makes clear that “[b]ecause companies can affect virtually the entire spectrum of internationally recognized rights, the corporate responsibility to respect applies to *all* such rights.”<sup>101</sup>

Instead of extending to companies the duties of states, qualified by undefined concepts such as the “secondary” duties of TNCs and the “corporate sphere of influence”, Ruggie focused on identifying the distinctive responsibilities of TNCs.<sup>102</sup> The corporate “responsibility” to respect, rather than “duty”, reflects that international human rights law generally imposes obligations on states and not companies.<sup>103</sup> This responsibility is not a legal duty but stems from a TNC’s social license to operate.<sup>104</sup> Therefore, the corporate responsibility to respect is independent of the state’s duty to protect and does not compete with it.

In June 2008, Ruggie’s framework was unanimously welcomed by the Human Rights Council, and his mandate was extended for three years.<sup>105</sup> The Council asked Ruggie to operationalise the framework by providing concrete and practical recommendations for its implementation. The resulting Guiding Principles on Business and Human Rights were adopted by the Council in June 2011.

In the Guiding Principles, the corporate responsibility to respect is discharged by conducting due diligence, which includes a human rights policy statement, human rights impact assessments, integration of these assessments into internal corporate processes, tracking performance, reporting to stakeholders, and remediation.<sup>106</sup> Operational-level grievance mechanisms help track performance and also provide an important access to remedy under the third pillar of the framework.<sup>107</sup>

Although the Guiding Principles focus on implementation, they do not recommend specific mechanisms for implementation. For example, Ruggie provides several criteria to measure the effectiveness of operational-level grievance mechanisms, but does not suggest any particular processes or procedures.<sup>108</sup>

## **VIII. Conclusion and outlook**

Although the Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises were never formally adopted, they continue to influence the general debate on human rights obligations of TNCs. The International Commission of Jurists (ICJ), for example, has used the Norms as a reference point to define legal aspects on corporate complicity and human rights.<sup>109</sup>

There are currently a multitude of initiatives to influence business conduct through gradual, non-legally binding approaches which borrow from each other. Building on the Draft Norms, the Ruggie initiative recognises the current fragmentation of efforts and aims to develop a global approach with sufficient scale to have an impact. At the

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<sup>101</sup> UN Doc. A/HRC/14/27 para. 59 (emphasis added).

<sup>102</sup> UN Doc. A/HRC/8/5 paras. 51-53.

<sup>103</sup> UN Doc. A/HRC/14/27 para. 55.

<sup>104</sup> UN Doc. A/HRC/8/5 para. 54.

<sup>105</sup> Human Rights Council Resolution 8/7.

<sup>106</sup> UN Doc. A/HRC/17/31, Annex paras. 16-24.

<sup>107</sup> *ibid* para. 20, commentary para. 29.

<sup>108</sup> *ibid* para. 31.

<sup>109</sup> *ibid*.

same time, however, it avoids defining specific legal obligations for TNCs. Ruggie argues that while states have a legal duty to protect, TNCs – whose activities can affect all rights – have instead a responsibility to respect grounded in the social license to operate.

However, who monitors if and to what extent business entities have the support of the people whose lives they immediately affect – and thus the social license to operate – if the state is weak or unable to protect? The majority of existing accountability mechanisms – e.g. the World Bank, expert credit agencies, and corporate grievance mechanisms – are inherently inward-looking and part of the internal institutional structure. Consequently the legal entities essentially evaluate their own performance and are not subject to third party control and enforcement.

This corporate social responsibility approach also results in the application of different self selected standards and a constant potential for conflicts of interest. As a matter of self interest there will always be a tendency to “smooth things over”. While the formal requirements of voluntary and corporate accountability processes may – to some extent – drive behaviour, they are without teeth. Corporations escape legal duties and sanctions, and have little incentive to not only meet minimum requirements but pro-actively change the way they do business. TNCs should have immutable obligations regardless of the regulatory framework of the countries in which they operate. But neither voluntary corporate standards nor national legislation can ensure comprehensive accountability of transnational corporate activities and fully lift the corporate veil.

So there remains a need to regulate TNCs outside the domestic sphere and prescribe expected behaviour in a more binding international framework. In this connection, the existing accountability mechanisms provide useful experience and guidance (e.g. failure of NCPs to follow-up on settlements) upon which we can build and improve. However, to globally secure the application of the rule of law vis-à-vis TNCs innovative blueprints, institutional linkages and ideas will also have to be developed. Additional creative thinking about new approaches and legal structures is necessary.

For example, a new international legal instrument similar to large scale investment or production sharing agreements could be concluded between states and TNCs. Different elements of existing voluntary mechanisms – such as reporting or the filing of complaints – would be easy to integrate into a mandatory scheme. The OECD guidelines' complaint mechanism may operate as compliance system with the competence to issue sanctions; or a combination of project related grievance and redress mechanisms with an external corporation wide appeals system might help to close existing accountability gaps. New governance structures recognising and institutionalising civil society monitoring could also drive the democratisation of the global economy.

While the privatisation of accountability appears to reflect a global trend – ranging from health care to military operations – it nevertheless lacks legitimacy and potentially undermines state sovereignty (e.g. by circumventing the domestic courts). And while some of the substantive norms determining an expected business conduct are increasingly undisputed (for example minimum standards on human rights), mechanisms for compliance and implementation remain a challenge. Apart from the loss of good-will, what are the consequences of non-compliance for TNCs: exclusion from public procurement contracts, de-listing or a ban on certain activities?

Provided there actually is the political will to make TNCs more accountable to those whose lives they directly affect, the international community has a lot of homework to do.



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