

# **Making Corporations Accountable**

A Background Paper for the  
United Nations  
Financing for Development Process

By James A. Paul and Jason Garred



**weed**

GLOBAL POLICY FORUM



HEINRICH BÖLL STIFTUNG

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# CONTENT

	PAGE
GENERAL BACKGROUND .....	2
VOLUNTARY CODES.....	4
REGULATORY AND LEGAL APPROACHES.....	8
SUMMARY OF PROPOSALS .....	14

This paper has been prepared in conjunction with a roundtable on "*Corporate Investments: Towards Accountable Development*" held on November 8, 2000, in New York by **Global Policy Forum**, **WEED**, and the **Heinrich-Boell-Foundation**. The paper provides background and recommendations for the intergovernmental negotiations of the United Nations international conference on "Financing for Development," to be held in 2002. In particular, it addresses the topic of "foreign direct investment" under the official rubric of "enhancing the development impact of investments of transnational corporations." We are grateful to the many NGO representatives, staff of the Secretariat and other UN agencies, delegates and other experts who attended the roundtable and contributed to the development of this paper.

This paper is the first in a series of 4 background papers covering central issues of the Financing for Development agenda. The other papers will be on:

- **The Future of ODA**
- **Global Taxes**
- **Governance of the International System of Development Finance**

# GENERAL BACKGROUND

Since the origins of states several thousand years ago, monarchs and governments have regularly created rules for economic activity, responding to citizen demands and seeking to create a more just and harmonious society. The modern nation state followed in this long tradition. Citizens increasingly called for new and stronger rules to protect them in the era of *laissez faire*, nationally-based capitalism – rules that would restrict investors and companies in order to prohibit child labor, guarantee healthy foods and drugs, assure the safety of rail and air transportation, and promote the stability of banks and financial markets. Some called for the state to assume even wider economic responsibilities through direct state management of firms in order to better impose social priorities.

Regulatory initiatives did not stop at national borders. As early as the mid-nineteenth century, European governments saw the need to establish rules at an “international” (that is, largely Western European) level. Intergovernmental conferences in the second half of the century considered many such issues. Some were primarily of concern to investors, such as standardization and interconnection of railways and telegraph systems, stronger maritime and fisheries laws and broadened patent and copyright principles. Telegraph and postal cooperation also developed in this way. Even the question of dueling came up for international consideration. But there also arose issues of direct concern to the new mass electorates and trade union movements – like sanitation, slavery and labor conditions. Public international bodies were founded in those years to codify and strengthen these rules, including the International Telegraph Union, the International Maritime Bureau, the Metric Union, the Patent Union and the Universal Postal Union. The International Association of Labour Legislation, predecessor of the ILO, was founded in 1901 to improve and standardize working conditions. These new organizations were the forerunners of the

League of Nations and of the United Nations itself.

International rules governing investments and economic activity clearly are not a new idea or a new practice. But in spite of initiatives over 150 years, these rules remain very weak at the international level compared to the rules that exist within the framework of the national state. Today, in the era of increasing globalization of capital and cross-border operation of all major corporations, concerned citizens are again raising the issue of international norms and rules. The rules that have promoted a more orderly society within national borders no longer suffice in the open borders and open markets of a global economic system. A series of economic crises in the late 1990s proved this all too clearly, as have other emerging problems at the global level like climate change, toxic waste disposal, criminal money laundering and tax evasion.

At the national level, in all rich countries, economic rules include voluntary codes adopted by industry groups such as the US-based Securities Industry Association or the Motion Picture Industry Association. Mainly, though, the rules are codified as regulations or laws, enforced by the national government. They require corporations to disclose facts about their finances and other aspects of their activities. They govern competition and prevent monopolistic behavior. They oversee financial markets, preventing insider trading or investor collusion to manipulate markets. They require banks to hold reasonable reserves, engage in fair lending practices and the like. Most of these rules came into being when public outcries followed gross corporate abuses. They promote a more stable and less rapacious system. Firms and investors subject to such regulations often recognize them (however grudgingly) as reasonable and even necessary.

Other kinds of rules and regulations address social goals. Mandatory social insurance, the right of workers to organize, anti-

discrimination laws, laws protecting working conditions and hours – these are often now taken for granted, though they were fought for in long and often bitter political struggles. Other regulations protect the consumer and ensure environmental standards. Once such rules are enacted, the authorities do not always enforce them equally vigorously. Their protective status depends on a constantly changing balance of political power. But wherever the balance stands, they form the core social compact that defines the life of all citizens.

It seems reasonable that these rules would be increasingly applied on an international basis. Some intergovernmental bodies, especially the International Labour Organisation, sought to extend such rules to all states, under the assumption that these norms would be steadily embodied in national law as the national economies of poorer countries grew stronger and as their social and political structures came to resemble those of the rich countries. The International Social Security Association, which works on pensions and social protection systems, has operated on the same assumption. Their efforts have been under way for nearly a century, but the global economy has not leveled-up the poor countries. Conditions for harmonization of regulations on a truly international basis have not emerged.

Today, the project to elaborate and spread regulation at the national level seems slightly out of date, since national governments are now less capable than formerly of regulating enormous corporations and controlling economic activity in a world of global markets. Through mergers, corporations have been growing very rapidly and the largest six corporations now are larger than all but the seven largest nation states, if corporate revenues are compared with state revenues. This means that corporations are vastly richer and more powerful than most of the states that seek to regulate them. Obviously, then, only a global approach to

regulation will now succeed. But while more and more economic activity takes place on an international basis, global society has been slow to build a new rule-based global economic system.

Some important new rules have emerged - in a few cases quite quickly. Governments recognized the threat to the planet's ozone layer and swiftly put in place tight rules to phase out the production of ozone-threatening chemicals such as CFCs. Fortunately, major corporate producers had already developed alternative products, so they supported the new rules. Generally speaking, though, trans-nationalization of investment has not been matched by transnational regulation.

Globalization has also weakened regulation at the national level, through a combination of investor pressure, new international trade rules and weakened government tax bases. Many countries have set up special investment zones that are not only tax-free but also free of virtually all regulations. Budget cuts have resulted in the non-enforcement of existing regulations.

Over the past twenty years, as investors have sought global open markets, they have become increasingly critical of national investment rules and regulations, giving rise to a dominant economic ideology of neoliberalism that has enshrined deregulation as a universal principle of rationality and prosperity. Some conservative economists and commentators even refer to regulation as "repression," comparing it by allusion to the arbitrary rule of dictators. Not surprisingly, mega-corporations prefer to carry on their business without any regulatory oversight. In these circumstances, the political potential for new global regulatory initiatives might seem bleak. But a global political movement is emerging and demanding more citizen control over transnational capital. Mass demonstrations in Seattle, Washington, Prague and other cities express public outrage and press for urgent solutions. Even the World Bank now refers to the "inadequacy of regulatory and supervisory frameworks both at the global and country levels." (World Bank, 2000)

Corporations that adhere to regulations in their home countries often abuse labor, human rights and the environment in other countries, especially poor countries. Shell, Nike and The Gap - these large companies that consumers encounter on a daily basis, have violated the most basic standards of human rights and fair labor practices. Various transnational corporations (TNCs) still maintain substantially lower environmental standards in poor countries than in their home nations, which are generally in North America, Europe or Japan. Financial capital based in the Northern money centers often colludes in highly profitable tax evasion and money laundering, hides funds in dozens of "offshore" locations and increasingly avoids or undermines national regulation and tax systems. Speculative runs on currencies or financial markets may enrich a few investors in "hedge funds" while driving millions into poverty and plunging whole national economies into turmoil and crisis. Establishment figures like investor George Soros, former World Bank Vice President Joseph Stiglitz and Harvard economist Jeffrey Sachs have recently asserted that global capitalism is unacceptable in its present form.

National rules for investment no longer suffice, and the international community must put into place a global framework of rules. The UN Financing for Development process offers an ideal venue for such ideas. However, we are far from agreement as to what form these rules should take. Many critics of corporate globalization favor a return to stronger national regulation, a perspective that mirrors the protectionist backlash. Pro-business voices, on the other hand, insist that the globe must be the playing field, but that formal global rules would ruin the "new economy," which needs at most loose voluntary codes. Though voluntary codes are obviously weak and unevenly adopted, advocates of more robust global regulation must find an institutional basis for binding regimes. In the absence of a sovereign authority, what institutions can adopt and enforce binding rules at the global level?

In what follows, we will briefly consider both voluntary codes and binding regulations as

models for transnational investment rulemaking.

## VOLUNTARY CODES

In the past few years, many NGOs have promoted voluntary codes as a means of holding transnational corporations and investors to social responsibilities. Such codes are hardly new. Industry-based voluntary international codes go back at least to the nineteenth century. When considering such codes, it is useful to make a distinction between codes that are produced by companies or corporate associations, those produced by inter-governmental bodies and those produced by NGOs or other citizen bodies. Purely corporate codes tend to be ineffective, as we shall see, while codes produced by (or with the active involvement of) NGOs tend to be most likely to produce results.

The recent wave of codes, beginning in the 1970s, responded initially to two sources of pressure – campaigns against apartheid in South Africa and campaigns to protect the environment. Responding to these pressures, the International Chamber of Commerce adopted a code of conduct for international investment in 1972. In 1991, shortly before the UN's Rio Conference, it adopted a new code now known as **The Business Charter for Sustainable Development**. Shell, a pioneer of corporate codes, has maintained its own "Statement of General Business Principles" since 1976.

In 1977, Rev. Leon Sullivan proposed a set of rules that came to be known as the **Sullivan Principles**, relating to foreign corporate investments in apartheid South Africa. These principles were intended to serve as a benchmark for the behavior of foreign firms and were proposed as an alternative to blanket condemnation of all firms doing business in the apartheid state. Those companies that did not meet the Sullivan criteria were said to be legitimate subjects of disinvestment by anti-apartheid groups. Many campaigners at that time felt that the Sullivan principles were not robust enough. Sullivan himself, pastor of the Zion Baptist Church in Philadelphia, was at the time a member of the Board of Director of General Motors, a post he held for more

than twenty years. The United Nations General Assembly passed a resolution establishing a general embargo on investment, going well beyond Sullivan. Nevertheless, the Sullivan Principles remain an oft-cited if ambiguous milestone in the voluntary code movement.

The **MacBride Principles**, enunciated in 1984 by the Irish National Caucus (a Washington DC-based advocacy group) and originally developed by Irish statesman and Nobel laureate Sean MacBride, provide an important example of rules created independently by a citizen organization. They address the issue of employment-related discrimination in Northern Ireland. After lobby campaigns and investor initiatives, the Principles have succeeded in gaining great support and legitimacy. Many TNCs doing business in Northern Ireland adhere to these rules.

Today, many corporate leaders and policy experts argue that global regulation is unrealistic or unlikely and that voluntary codes represent the best route to responsible investment. Corporations or groups of corporations, perhaps in consultation with "stakeholders," are urged to draft a set of standards on labor rights, the environment, and other social responsibilities, and then integrate these standards into their business plan. Labor, human rights and the environment would thus be protected by corporations themselves, without the need for inter-governmental negotiations and regulatory intervention. According to the advocates of this approach, corporations will honor their own pledges because to violate them would lead to consumer outrage and loss of "brand value."

Proponents also argue that voluntary codes can be adopted more swiftly and are more "flexible" than regulatory rules in a rapidly evolving global marketplace. Governments of states such as the USA and Australia are now promoting voluntary codes, as exemplified by President Clinton's **Apparel**

**Industry Partnership**, launched in 1996, resulting in a code in 1997. Since 1992, when the United Nations abandoned negotiations on a Code of Conduct for Transnational Corporations under pressure from the United States and the United Kingdom (among others), voluntary codes have seemed the most promising alternative. Proponents also point out that such codes are far less expensive to administer, since no bureaucracy is needed to oversee and enforce them. Instead, public scrutiny is said to do the job.

Unfortunately, voluntary corporate codes of conduct have many weaknesses – so many that it is difficult to point to a single case that is an unqualified success. These codes are often vague statements of principle that cannot provide reliable guidelines for behavior in concrete situations. They do not generally include complaint procedures, nor any basis for legal claims or redress, and thus provide little scope for individuals to be compensated for corporate violations that cause harm. Codes are often neither transparent nor accountable, with their enforcement (or non-enforcement) an internal corporate concern or the responsibility of small monitoring bodies subject to corporate pressure or cooptation.

Corporations do not adopt codes unless faced with public pressure and negative publicity. This means that codes are adopted by only a few sectors that are especially vulnerable to consumer pressure and boycotts, and hence especially keen to preserve respected brand names. The consumer products and natural resources industries represent the lion's share of codes, predominantly in the apparel and petroleum sectors.

Some NGOs have pressured corporations through selective stock purchasing and shareholder actions. The "responsible investment" movement has developed criteria (or "screens") for socially-conscious investors, to guide their share purchasing. Specialized mutual funds, pensions, and

endowments belonging to trade unions, churches, hospitals, universities, and professional associations have adopted such criteria for their investing. Such selective investing theoretically can pressure corporations by lowering the stock prices of companies that do not meet the good-practices criteria relative to the stock price of other companies.

NGOs have also pressured corporations by means of public hearings, product boycotts, guerrilla theater, use of the mass media, and other kinds of pressure and public education. Some campaigns even seek to pressure media that accept advertising or to pressure sporting and cultural events that accept sponsorship from offending companies. A complementary approach awards seals of approval to those products or corporations deemed compliant with codes – seals that consumers are encouraged to take into account in their purchases.

The campaign by the NGO INFACT against the Swiss TNC Nestlé, demanded that the company stop marketing powdered baby milk formula in poor countries, because local unclean water mixed with the powder led to the deaths of many infants. The INFACT boycott, which urged consumers not to buy Nestlé products, began in 1977 and remains one of the most famous corporate accountability campaigns. It eventually spread to ten countries, attracted the active support of UNICEF and WHO and lasted until 1986, when Nestlé signed an agreement with INFACT and its partners. In 1981, the campaign resulted in action by the World Health Organization establishing an **International Code of Marketing for Breast Milk Substitutes**.

In spite of a few such high-profile campaigns, only a small percentage of corporations adopt codes at all - fewer than ten percent of US-based TNCs, according to an article by the Natural Heritage Institute (Leighton and Getzler, 1998).

Codes are almost non-existent in the crucially important financial sector, though "responsible" investment funds (such as the Calvert Group) have gained popularity and now represent a small but growing segment of the financial services industry. More pension funds and other closed investment

vehicles also now use human rights, labor and environmental criteria in their investment decisions.

**CALPERS** (the California Public Employees' Retirement System) is the world's largest investor with an active interest in corporate responsibility issues. As of June 1999, it was managing \$169 billion in assets, a not inconsiderable sum and enough to make corporations take notice. The **Interfaith Center for Corporate Responsibility**, based in New York, was founded in the early 1970s to press shareholder actions as part of the campaign against apartheid. As of late 2000 it had 275 faith-based groups as members, whose combined portfolios totaled \$110 billion. Each year it initiates over 100 shareholder actions such as corporate resolutions and it also actively organizes and participates in voluntary codes.

This field has become very active, but even advocates admit that progress has been slow and voluntary codes often disappointing. Codes, unlike regulations, almost always apply to a few companies only, and all corporations in an industry or sector rarely adopt them. This means that corporations adopting codes are likely to consider themselves to be at a competitive disadvantage if they actually put the code into practice. This obviously lessens their incentive to adhere to their own code. Other companies refuse to adopt the code for the same reason. Indeed, research cited in a report by the Dutch branch of Amnesty International and Pax Christi International in 1998 found little difference in behavior between companies with and without voluntary codes of conduct. For such reasons, the weaker variety of voluntary codes have fallen into disrepute.

Increasingly, however, corporations and NGOs are taking care to draft codes that avoid the most glaring disadvantages. Problems of enforceability and transparency are often addressed through the use of third parties that monitor a corporation's adherence to the standards. Sometimes, this is done by large public accounting firms. Nike and Disney have contracted Ernst and Young to conduct audits of their contractors' labor practices. PricewaterhouseCoopers has been especially active in promoting

auditable standards, including standards for what are called "social audits." Alternatively, NGOs may themselves participate in monitoring, as with human rights organizations in Central America.

"Multi-stakeholder codes" address most of these problems, as the codes are often industry-wide and attempt to incorporate precise language as well as complaint and remediation mechanisms and independent monitoring. The **Fair Labor Association**, which emerged from the Apparel Industry Partnership in the United States in 1998, includes several human rights groups as well as high-profile industry groups such as J. Crew and The Gap in its effort to establish credible auditing, certification and public information. More than 100 colleges and universities, pressured by local anti-sweatshop campaigns, are also affiliated with the Association. Though the code and the Association are promising, it is doubtful that the code will be adopted industry-wide and improbable that it will be reliably adhered to.

Such multi-stakeholder codes remain rare and they are especially unlikely to be adopted by sectors not directly exposed to consumer pressure. Auditing is now more common, but when undertaken by firms rather than NGOs, the process is typically disappointing. A corporation whose code of conduct is subject to audit is often given a report that it does not have to make public. This is the case, for example, with the Ernst and Young audits of Nike. But even when audit reports are made public, there is concern that accounting firms are too friendly towards the corporations, who are their regular clients for accounting and consultancy business. Finally, of course, the stronger the code, the less likely it is that TNCs will accept it. The large majority of codes remain weak, un-transparent and unenforceable, simply because these are the types of codes with which the corporations are most happy and which meet their public relations goals.

Rev. Sullivan launched a new code, called the **Global Sullivan Principles**, on January 24, 2000 at the United Nations. A number of TNCs including the Royal Dutch Shell Group, Chevron, Sunoco, Colgate and General Motors, have supported this

initiative, in which the companies agree to a set of vague standards such as the protection of human rights, assurance of employees' freedom of association, provision of a safe and healthy workplace and so on. The organizers call the code an "aspirational blueprint" and plans for compliance monitoring scarcely exist. The companies agree only to provide the Rev. Sullivan an "annual update on their progress." It is not clear what Rev. Sullivan, who is now retired in Arizona, will do with these reports and whether there will be any transparency in the process.

The **Global Compact** between the UN and corporations, launched by the Secretary General and fifty corporate representatives on July 26, 2000, offers another disappointingly weak voluntary code. The Compact embodies a classically vague statement of principles that does not provide rules for specific situations or complaint procedures of any kind. Nor does it include any form of systematic monitoring. Instead, the UN offers corporations an opportunity to exhibit their code-related "best practices" on a special web site ([www.globalcompact.org](http://www.globalcompact.org)). This allows the companies to demonstrate adherence by carefully-selected example only. Not surprisingly, the business community is enthusiastic about the Global Compact and in the first six months the number of participating corporations rose to about two hundred and fifty, without any campaigning or public pressure. Corporations signing up are able to claim the legitimacy of a wide-ranging code under the prestigious United Nations, while only having to adhere to it symbolically. Critics have called for a more robust, enforceable "Citizens' Compact" instead.

One of the least-known but most problematic voluntary codes has taken shape in the **International Organization for Standardization (ISO)**, a multilateral body that traditionally has set international technical standards for products such as screws, copper alloys and bearings. Recently, the ISO has established rules for corporate environmental management, under rule ISO 14001 (adopted June 1996). The ISO committee that established and oversees this process, though nominally composed of national technical standards

bodies, in practice has a membership of industry group representatives. The code is nominally voluntary, but it has been given special regulatory status under the Technical Barriers to Trade Agreement of the WTO. Not accountable to ordinary citizens and hidden by an aura of neutrality and by the technical arcana of engineering specifications, the ISO committee threatens to privatize environmental standard setting and to give corporations a certification of compliance based on a low and un-transparent standard.

NGO campaigns and initiatives have undoubtedly made some progress in a few important cases, but voluntary codes and one-off campaigns remain problematic and in some cases even dangerous. Broader and more robust voluntary codes can sometimes serve useful public purposes, mainly if they can provide a transition towards future regulation - though advocates must be clear what they hope to achieve and must keep their eyes open for failures by corporations to live up to pledges. Some critics believe that voluntary codes lull the public into a false belief in corporate good intentions and may thus even block progress. Highly visible public campaigns may not always reach their goal, but they can serve to build norms and expectations among the public that may lead towards future binding rule-making.

In conclusion, then, proponents of global rule-making should approach voluntary codes with caution, insisting that codes cover not a single corporation but a whole industry group, that they incorporate clear universal standards such as the core labor standards of the ILO, and that they be subject to independent public auditing mechanisms with multi-stakeholder involvement. Whenever possible, monitoring mechanisms should include company workers, since employees know a great deal about day-to-day corporate practices and can provide the most realistic and consistent source of monitoring information.

## REGULATORY AND LEGAL APPROACHES

**T**ransnational corporate or investment rules and regulations, drafted by an inter-governmental process, offer a stronger approach to corporate accountability. Enforceable regulations can provide more reliable protection of the public interest. Binding legal regulations demand adherence, and have behind them obligation deriving from a public authority. Features of compulsion are also present – including sometimes fines, withdrawal of licenses and other penalties. Regulations are also efficient, wide-ranging and consistent, since they are not drafted on a corporation-by-corporation basis but apply to an entire sector or even to all corporations generally. Their breadth of application removes the competitive problems faced by individual corporations which adopt voluntary codes and are then pressured by non-code competitors.

Of course, no sovereign state-like power exists at the global level that can adopt and enforce global regulations. But we are in a period of transition. In recent years, governments have negotiated an increasing number of binding agreements at the international level and have devised more or less effective means to enforce them. Many such agreements have contained substantial derogations from national sovereignty. These include not only accords of the European Union and NAFTA at the regional level, but also globally the World Trade Organization and many agreements on the environment, biodiversity and a range of other issues. Two failures that nearly succeeded – the UN Code of Conduct on Transnational Corporations in the late 1980s and the Multilateral Agreement on Investment (MAI) in the late 1990s – provide further evidence that governments may contemplate far-reaching international rules relating to investments – rules which depart considerably from a laissez-faire market model.

Many transnational investment regulations already exist at the global level. In 1996 UNCTAD published a compendium of more

than 60 multilateral and regional instruments for the regulation of foreign direct investment and TNCs. A further compendium of over 30 additional agreements (more than 20 of which were newly-adopted since the first volumes) appeared in 2000. Many or most of these transnational investment regulations guarantee investor rights. However, in the realm of investor responsibilities, broad-based agreements such as the **1976 OECD Guidelines for Multinational Enterprises** and the **1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy** have formed part of soft international law for some time.

Since the OECD established its first set of corporate guidelines in 1976, there have been a total of only 30 cases against offenders, of which only 2 occurred in the 1990s. It was clear that the process was not serious. But after the OECD was embarrassed by the collapse of the extremely investor-friendly MAI, it issued newly-revised corporate guidelines, which were published in June 2000. They are quite specific and offer interesting potential, since they have a much more effective complaint procedure than the earlier version. NGOs should test the possibilities of the revised code and press for improved enforcement, as part of a wider strategy.

European Union codes and legislation also provide an interesting venue for such initiatives, since so many large corporations are either domiciled in the EU or have important investments there and because EU legislation is rapidly evolving.

The **European Parliament resolution** of January 1999 on a code of conduct for European TNCs active in the developing countries, initiated by MEP Richard Howitt, provides another interesting opening. In its resolution, the Parliament repeats its call to the Commission and the Council “to lose no time in putting forward proposals for the creation of a suitable legal basis for the

establishment of a multilateral framework to govern the activities of corporations worldwide, and to organize hearings between representatives of corporations, the social partners and circles affected by the code.”

Additional international law in this area is based on a large number of treaties and regulations addressing specific issues including an important series of ILO labor rights agreements (some established for nearly a century), a variety of environmental treaties, the work of the UN human rights bodies and more. Recently, the work of the **Security Council** on conflict diamonds, the arms trade, finance, oil, and smuggling (as embodied in several resolutions) has set new rules for corporate accountability in security crises, especially accountability of the diamond industry.

With this many-faceted regulatory history in view, moves to strengthen the international regulatory system seem logical and attainable – a work-in-progress, not an impossible dream.

Most work on corporate accountability and regulation has focused on manufacturing, leaving services, and particularly financial services, neglected. Yet the financial sector is enormously influential. Further, many manufacturing corporations have powerful financial arms that engage in financial activities, including financial services. General Motors has an enormous subsidiary, GMAC, that finances consumer car loans, for example, while General Electric derives much of its corporate profits from its financial arm, GE Credit, that is one of the world's largest leasing and commercial credit companies. Banks and other financial service companies are, in turn, often deeply involved in all sectors of the economy, through control of shares, ownership of leased equipment, and the like.

Accountability issues arise in many aspects of financial services, but especially in such areas as tax evasion, criminal money

laundering, speculation, and corruption. Illicit activities, such as secret banking for public officials who have stolen public monies or accepted bribes, are estimated to amount to well over \$1 trillion per year and to yield especially high profits. Tainted accounts are not to be found uniquely in offshore territories like the Cayman Islands, Liechtenstein or Palau. Very problematic financial activity is now legal in even highly regulated environments like the United States and the UK. A *New York Times* editorial on December 22, 2000, pointed out that “profits from prostitution, extortion, smuggled immigrants and arms trafficking can still be laundered through an American bank with no consequence to either the bank or the depositor. Corrupt dictators and their business partners can still legally deposit their loot in American financial institutions.”

These financial activities must be brought under a global regime as a precondition for success in the campaign for corporate accountability in all sectors. As we have seen, banks and other financial institutions should be required to meet transparency rules and to respond promptly and fully to criminal investigations into corruption, money laundering, and theft. Authorities should be given the capacity to regain hundreds of billions of dollars in monies stolen by corrupt officials. “Offshore” havens for tax evasion and money laundering should be shut down completely. The governments of rich countries are effectively permitting these criminal activities, through their reluctance to hold players in finance to tough rules. To provide an incentive for corporate finance to reform, violators of standards should be faced with heavy fines and withdrawal of licenses to do business.

Effective reform, though, will require a very imaginative as well as robust regulatory approach. The financial services and corporate law industries are continually creating innovative financial and legal mechanisms that shelter funds from the scrutiny of authorities. They create multiple shell companies in different international jurisdictions, beyond the scrutiny of national authorities, and they create new, highly complex financial instruments that promote secrecy and tax evasion. New gambits of this kind come into being every day. As

these firms grow larger and more international in their scope, their capacity to avoid regulation grows apace. Regulatory agencies, faced with the difficult task of keeping up, need vigorous global citizen movements and watchdog NGOs. Weakening regulatory environments at the national level will not make this task any easier.

Unfortunately, opposition to regulation of TNCs comes from countries of the South as well as those of the North. All governments are influenced by TNC priorities because these companies wield enormously powerful political and economic influence. Southern governments also oppose regulation because they fear new rules will have protectionist effects on their export industries. Not only are Southern factories, fisheries and financial institutions less likely to meet such rules, but many fear that if they do comply with regulations they will lose their comparative advantage. Advocates of global rulemaking must overcome the strength of corporate lobbyists and must allay the concerns of Southern governments – not an easy task.

In the absence of strong global institutions, and in the face of such strong political counter-pressure, it may in some cases be more practical to achieve internationally harmonized national rules and regulations. This is a common approach within the European Union and it can help to minimize conflicts over sovereignty in rule-making and enforcement. However, when applied globally, this approach could lead to uneven levels of enforcement, where states with limited funding and capacity are unable to apply the rules. Even in large and well-funded states, weakening regulatory systems pose problems for this approach. For this reason, global institutions must always remain a goal, if rules or regulations are to effectively hold corporations responsible to global society.

This analysis will look at several different approaches to rule-based regulation. The strategies take into account the absence of a full sovereign power at the global level, showing that world government is not a necessary precondition for further advance in this area. However, many proposals include steps to increase in the powers of global institutions, such as new powers for

monitoring, enforcement and even perhaps the power to levy taxes and fees.

These proposals are of several kinds: (1) court cases and related legal efforts, (2) conventions, treaties and other agreements, (3) action by United Nations bodies, (4) an intergovernmental agency for corporate monitoring, (5) global taxes, fees and fines, (6) transparency rules, (7) rules to mitigate security crises, (8) rules aimed at improving markets, (9) anti-corruption rules, and (10) consumer protection rules.

The principal areas addressed are:

- labor conditions
- human rights
- the rights of women and children
- environmental protection
- product safety and consumer rights
- the impact of corporate practices on wars and security crises
- biosafety
- corruption
- ensuring the proper working of markets to prevent monopoly, excessive speculation and financial crises.

We will discuss all of these issues briefly in what follows:

**1 Court cases and related legal efforts** usually spring from particularly outrageous acts of corporate malfeasance such as the Bhopal disaster, Shell's actions in Nigeria and Unocal's Burma oil pipeline. Plaintiffs seek redress, and their legal teams usually seek to expand and strengthen the capacity of law at the international level to impose liability on corporations for actions that do harm to the environment, human health and basic rights. Such initiatives typically rely on an inventive combination of national and international law, but they frequently contribute to emerging international legal norms and standards. Establishing legal standing across national borders is one of the biggest barriers to such actions. Sometimes, purely national initiatives – like the big tobacco litigation suits in the United States in recent years – open up international possibilities that the litigants did not anticipate. Strengthened international criminal law, through the

International Criminal Court and other developments, greatly assists this process. Some NGOs, like the US-based Center for Constitutional Rights and the International Center for Law in Development, seek to develop innovative legal strategies in this area. US law, with its many jurisdictions and quirks, offers especially rich potential for experimentation by these and other policy-oriented groups.

Legal cases have the disadvantage of acting only *after* a severe abuse has already occurred. But legal precedents can restrain corporate behavior in the future by posing the threat of further action, with accompanying legal costs, public relations costs and high settlement costs. Intergovernmental action could help promote this expansion of law in a variety of ways - for instance, by developing an international treaty of legal cooperation which would allow prosecutors or judges in one national jurisdiction to call on the judiciary in another national jurisdiction for help with evidence, including the questioning of suspects and witnesses, a growing need in all trans-border cases.

**2. Conventions, treaties and other agreements**, such as the conventions developed in the framework of the International Labour Organization, provide a long-standing basis for rule-based action at the international level. The ILO, trade unions and some governments work constantly to add new agreements and to strengthen the compliance process (which usually takes the form of national reporting and periodic review). The so-called "core labor rights," embodied in ILO conventions and the 1998 ILO Declaration on Fundamental Principles and Rights at Work, offer well-focused and especially promising areas for further action (they include forced labor, freedom of association, non-discrimination, child labor standards, and occupational safety and health). The ILO is presently seeking to strengthen its compliance monitoring and enforcement and it will need more funds and political backing, since at present compliance is spotty and enforced largely by public pressure from trade unions, NGOs and the media.

The World Health Organization's work provides another interesting area for action.

The Framework Convention on Tobacco Control, presently under negotiation, will be one of the toughest international legal instruments to regulate a particular industry. This precedent, which addresses the negative health effects of a major consumer product, might usefully be transferred to other products and industries. Often, progress takes this form: public outrage drives advancement in a narrow field that then has far wider implications, both legally and politically.

UNICEF conceived and brought into being the Convention on the Rights of the Child, an instrument now ratified by nearly all the world's nations. UNICEF provides close monitoring of the Convention, insuring that its provisions are more respected than most such agreements.

In addition to these high-profile agencies and agreements, there are hundreds of other conventions, many of which are obscure and largely ignored. Ineffective monitoring is the bane of the convention system and lack of redress weakens public confidence.

Some NGOs have proposed that the WTO impose trade sanctions to enforce labor and environmental standards, but Southern governments have vigorously objected, on the basis that this would lead to protectionist abuses. In spite of the enforcement capacity of the WTO, this, then, is not a promising route. Nevertheless, as the Montreal Protocol on the ozone shows, vigorous commitment to enforcement by governments can lead to real progress within a treaty or convention framework. Efforts must be made, therefore, to make monitoring and compliance review more vigorous, to broaden ratification of the major instruments, and to promote greater "political will" through constant citizen pressure.

**3. Action by United Nations bodies** includes, of course, the work of the ILO, UNICEF, UNEP and other agencies in what we might call traditional convention-development and monitoring. But other bodies produce rules and standards as well. In particular, several UN human rights bodies have become increasingly interested in the behavior of

TNCs, including the Working Group on Transnational Corporations of the Sub-Commission on the Promotion and Protection of Human Rights and the Committee on Economic, Social and Cultural Rights. These bodies do not have enforcement powers, but their work contributes to the broadening of international law - law that may be used in court cases and incorporated into treaties. Most promising, the Sub-Commission started in 1999 a three year inquiry to examine the activities of TNCs and to consider the possibility of developing a code of conduct based on human rights standards. In 2000 it discussed a first draft human rights code of conduct for companies.<sup>1</sup>

The human rights bodies have a monitoring and reporting process that can be strengthened in two ways: first, through more active involvement of the human rights NGOs (major organizations like Amnesty International and Human Rights Watch have recently shown greater interest in social and economic rights and in corporate responsibility), and second, through better funding and staffing, for more research, reporting and public information work.

**4. An intergovernmental agency for corporate monitoring** might provide stronger backing for the development and monitoring of global accountability rules and regulations. Such an agency would build on an important precedent. The UN Centre on Transnational Corporations (CTC), in existence from 1974 to 1992, had an outstanding record. Its primary task was to aid the intergovernmental negotiations for a UN Code of Conduct on Transnational Corporations. This document, which could have served as a regulatory "constitution" for TNCs was never adopted, though for a time its success seemed assured. During eighteen years of existence, the CTC produced many excellent studies and proposed new international norms and law, especially in the environmental field. Unfortunately, the Secretary General closed the Centre in 1992. Many think that an agency of this type should be re-constituted, probably within the UN system. But the fate

<sup>1</sup> UN Doc. E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1 of 25 May 2000.

of the CTC suggests that corporations would oppose a successor agency, so public backing for the project would have to be very strong. A new agency of this kind would offer an important and necessary step towards a robust international rule-based accountability system.

**5. Global taxes, fees and fines** are policy instruments that could shape corporate action to promote more sound development. Taxes or other levies use market pricing, rather than regulatory rules, to press companies to adopt more socially responsible policies – for example, they can create a disincentive for financial speculation (Tobin tax) or they can create a disincentive for the use of carbon-based fuels or the production of products dependent on carbon-based fuels (carbon tax). The revenues raised by these instruments could be used to fund global agencies such as the UN, and they could be used to correct existing problems – to clean up environmental disasters, for example. These levies might be based on national legislation and harmonized internationally through a treaty or other accord. Alternatively, an international authority might levy them - a more difficult approach, since it implies erosion of states' sovereign taxing powers, still a sensitive area. Governments have shown considerable interest in global fees (President Mitterrand of France proposed a Tobin tax at the UN Social Summit in 1995, for example) and some international conventions and treaties already incorporate such levies (the Law of the Sea imposes international licensing fees for deep sea mining, for example). OECD concerns about tax havens might well lead beyond "name and shame" to an international disincentive tax on all offshore transactions. There are many interesting possibilities, but unfortunately, the United States has been staunchly opposed to international taxes and has blocked progress in this field during the past decade. Progress remains possible, however, and a vigorous international campaign led by the France-based NGO ATTAC has given the idea growing momentum.

**6. Transparency rules** based on national, OECD or global legislation offer very promising possibilities. Such rules would provide information about the global investment activity of corporations,

including their environmental and social impact. Governments in rich countries already mandate reporting of this kind, an area known in US domestic regulatory legislation as "disclosure." Disclosure requires corporations to adhere to very well-defined rules. However, although companies often argue that disclosure impairs their competitive advantage, existing disclosure rules are largely tailored to suit the needs of investors rather than the general public. Still, these rules could be broadened at the national level and made to apply to corporate activities in all countries. For example, rules could require corporations to publish annually a report setting forth details of their operations in all countries where they operate or have substantial investments. Such reports should show the amount of investments, the return on those investments, the number of employees, investment plans for the upcoming year, and social and environmental impact audits. Lobbying costs and contributions to political campaigns should also be revealed. These reports could be mandated by laws in corporate home countries and internationally harmonized, with a view towards eventual enforcement by a global authority. Computerization makes corporate reporting (for "disclosure" and other regulatory purposes) much easier and less costly than formerly. Regulatory authorities now even have direct on-line access to select company records, so as to monitor in real time. This technology makes global disclosure a serious possibility for the first time.

**7. Rules to mitigate security crises** have recently been proposed by the UN Security Council and are embedded in various Council resolutions. Many such rules have arisen in sanctions regimes, especially sanctions against the sale of diamonds that are fueling conflicts, the illicit trade in small arms, trade in conflict-fueling oil, financial transactions benefiting rebel groups, and the like. In the diamond case, the Council has embargoed diamonds fueling conflicts in Angola and Sierra Leone. The diamond industry has responded by proposing a system to track diamonds from their origin to final sale. Interestingly, the diamond industry decided it needed the authority of the UN General Assembly to legitimize its voluntary

approach. The Assembly passed such a resolution in December, 2000. The Security Council is continuing to investigate the broader role of illicit business activities in fueling civil wars and it has published three important reports on this subject in 2000. Another report, on primary materials (diamonds, copper, timber, etc.) and civil war in the Democratic Republic of the Congo is due for publication in 2001. Several NGOs, including Global Witness and the International Peace Academy, have published influential studies in this area as well. These initiatives have revealed the cruelty and corruption of business activity in conflict zones and they will likely result in more rule-making initiatives, as well as tightening the effectiveness of existing rules. As the international community calls for more "preventive" approaches to crises by the UN and by the Council, more attention will focus on restraint of corporate malfeasance.

**8. Rules to improve markets**, such as anti-monopoly (or "competition") legislation and regulations overseeing securities markets, are many and varied in the rich countries. Such rules are now urgently needed at the global level, where they could mitigate crises and address problems arising from the abuse of corporate monopoly power. Control of grain and other vital food markets by a very small number of multinational firms is especially troubling, but in nearly every market from aircraft to computer chips to pharmaceuticals to telecom service, moments of fierce competition are typically followed by long periods of oligopoly pricing and manipulation of supplies to the harm of the public. Currently the world lacks means to control abuses in financial markets, such as highly-leveraged funds and institutions (such as "hedge funds"), short-term financial and currency speculation, secretive and risky bank activities, monopolistic pricing, and other examples of what are sometimes called "market distortions." Recently, much has been said about the evils of "crony capitalism" in poor countries, without recognizing that capitalism rarely functions anywhere as an innocent market, free of abuses. Even when rules exist, national oversight can no longer work effectively in the richest countries, because companies

and investors bypass national regulatory authorities in a global environment.

Global market oversight is urgently needed. In financial services may develop as the various national stock markets merge, a process now under way. Institutions like the Bank for International Settlements, the OECD and the G-7 have set out rules in the past like the OECD's statement on Prevention of Criminal Use of the Banking system for the Purpose of Money Laundering (1988). New rules are under preparation, mainly through the recently-established Financial Stability Forum (1999). Though moving in a positive direction, these efforts have been far too cautious and these institutions have worked secretly and undemocratically, dominated by the thinking (and interests) of bankers in the world's richest countries. We need instead robust rules, openly and accountably arrived at, applied in a transparent and accountable process, and addressing the entire gamut of market-improving rules and regulations.

**9. Global consumer protection rules** should be implemented, so as to ensure that products are safe and do not harm consumers. Rich countries have quite elaborate rules of this kind, including standards for food and pharmaceutical safety, truth in advertising, motor vehicle safety, electrical product safety, and product labeling (especially food labeling). There have been many reports of cases in which a regulatory agency in the North ruled that a company's product was hazardous, after which the company shipped the product to a Southern country and sold it there, with serious (or even fatal) consequences for consumers. In an increasingly global marketplace, global consumer rules must exclude harmful products from every market.

The UN General Assembly has adopted "Guidelines for Consumer Protection" that could serve as a basis for strengthened global consumer protection rules. Through the work of the Commission on Sustainable Development and after expert meetings and intergovernmental negotiation, ECOSOC approved a revised text of the Guidelines in June 1999, incorporating environmental principles. That new text now awaits

adoption by the General Assembly. The UN should develop means to promote these guidelines and to monitor compliance. At the same time, the NGO community should take advantage of this text to press for stronger enforcement. UK-based Consumers International, an international NGO with affiliates in many countries, works to defend and expand consumer interests world wide, but everyone has a stake in making sure that products are safe, reliable and environmentally sound.

Consumer protection must include new regulatory approaches to advertising, which spreads into new domains each year. The average Northern consumer is exposed to hundreds of advertising messages each day. Every year, producers spend hundreds of billions of dollars promoting the sale of products that people do not need, or even that are seriously harmful, such as tobacco. Advertising promotes unsustainable lifestyles, and it manipulates people's desires and fears in ways that can be psychologically damaging. Advertisers also often engage in falsehoods and deception. A vigorous approach to consumer protection and sustainability must deny advertising's false claims to being "free speech." The campaigns, legal settlements and government rulings restricting tobacco advertising mark important precedents in this domain.

**10. Anti-corruption rules** must be made much more effective at the global level so as to eliminate the plague of corruption that affects nearly every government. Donor governments have proposed that development aid be made conditional on the adoption by recipients of anti-corruption "good governance" rules. However, corruption often originates in the North, with Northern companies and Northern governments, so effective anti-corruption rules must apply equally to Northern and Southern countries.

Transparency International, a Germany-based NGO founded in 1993, works worldwide to combat corruption and now has affiliates in more than 77 countries. Its lobbying has resulted in many new anti-corruption laws at the national level and a new awareness of the issue internationally as well. In 1997, the OECD adopted a

Convention on Combating Bribery of Foreign Public Officials in International Business, an instrument that will strengthen international anti-corruption efforts, but (as constant scandals remind us) the OECD should have addressed corporate bribery of all kinds and in all countries, not just "foreign public officials."

To effectively stamp out corruption, new rules must accomplish the following: (1) eliminate all business tax subsidies/deductions for bribery and corruption, (2) make participation in bribery and corruption a criminal offense world wide, (3) enforce criminal liability on international financial institutions that knowingly and purposefully collude or participate in bribery, corruption and diversion of their loan or grant aid funds, (4) strengthen investigation rules and capacity to identify accounts of those who participate in bribery and corruption as well as methods to promote the speedy recovery of the funds.

# SUMMARY OF PROPOSAL

## VOLUNTARY CODES

Voluntary codes should generally be approached as a transitional instrument towards legal and binding rules and regulations. To be reasonably effective, voluntary codes must meet a number of important criteria<sup>2</sup>:

1. content that is clear and language that is enforceable (this is, unambiguous and free of loopholes).
2. broad applicability, such as industry-wide coverage, as opposed to one or only a few companies.
3. text drawn up by a process that includes relevant stakeholders, including NGOs and trade unions, and not only industry groups.
4. a code enforcement process that includes clear incentives to comply.
5. reporting and measurement of code progress in corporate annual reports, web sites and other corporate documents, demonstrating that code compliance is an integral part of corporate strategies and goals.
6. transparency of monitoring and implementation, so that the process is fully visible to the public and sufficiently independent to be recognized as legitimate by all stakeholders.
7. accountability that includes sanctions and penalties for cases where companies consistently abuse and disregard voluntary mechanisms.
8. availability of legal protection for employee whistleblowers and NGO watchdogs, protecting them from unfair

retribution and giving them a legitimate place in the code implementation process.

## REGULATORY AND LEGAL APPROACHES

Rule-based approaches are far more effective than voluntary codes in assuring corporate accountability, but they must be based on robust global institutions that can bring significant pressure to bear on offenders and impose sanctions where necessary. The rule of law in this area would be strengthened by the following actions:

1. strengthening cross-border standing in corporate liability law and building international legal cooperation to strengthen criminal and liability action against corporations through cooperation of judicial institutions in gathering evidence, questioning of suspects and witnesses, and related access to critical information in cross-border cases.
2. strengthening conventions, treaties and other agreements relating to corporate accountability, developing new agreements, broadening ratification of existing agreements, and promoting more vigorous monitoring and enforcement, including penalties.
3. expanding the work of UN bodies in this area, notably the human rights bodies, through adequate funding and staffing and through the commitment of governments to more thorough monitoring and enforcement processes.
4. creating an intergovernmental agency to work on corporate accountability and monitoring, in the tradition of the UN Centre on Transnational Corporations.
5. developing global taxes, fees and fines (initially, perhaps, on an internationally harmonized basis) that could serve to

address policy issues associated with problems such as currency speculation and global warming.

6. adopting transparency rules requiring corporations to report information about their investment activity and their environmental, social and employment impact in each country where they do business, based on the well-developed concept of "disclosure."
7. drafting new rules to control the negative impact of corporate policy on peace and security crises through action by the UN Security Council, in line with its accomplishments in the area of conflict diamonds.
8. setting up effective rules to improve the global market, including competition policy, rules to prevent securities fraud and manipulation and to promote banking transparency regulations, and rules to stabilize currency and securities markets in times of crisis, as well as rules to control highly-leveraged funds and shut down offshore banking centers.
9. developing global consumer protection rules, based on strengthened UN guidelines, to ensure fundamental product safety and reliability, as well as promoting rules for restrained, truthful and unmanipulative advertising.
10. adopting vigorous international anti-corruption rules that would enable swift recovery of funds and apply equally to cases in the North and the South.

The UN Financing for Development summit offers a unique opportunity to consider and implement these strategies, so as to make private sector investments responsible to the needs and aspirations of the world's people and to promote a development that leads to the full realization of all citizens' human capacities and aspirations. ●

<sup>2</sup> Jeffrey Barber and the NGO Task Force on Business and Industry proposed similar ideas in their 1998 Background Paper to the CSD.



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## GLOBAL POLICY FORUM

A group of citizens from several countries founded **Global Policy Forum** in December 1993 to monitor global policy making at the United Nations. At a time of rapid globalization, when nation states are weakening, the founders of **GPF** wanted to promote a more open, accountable and democratic policy process at the global level. Seeing the UN as the most open and universal institution, they sought to make it more responsive to citizen concerns, and so to foster democracy, social justice, human rights and mutual solidarity.

**GPF** is based in New York City and has consultative status at the UN. It has addressed issues primarily in three areas:

- **Security Council** - so as to strengthen international peace and human security
- **UN Financial Crises** - so as to insure resources for the UN's many important programs
- **Social and economic policy** at the global level so as to win greater rights, equality and social justice

**GPF** also has substantial programs on:

- **NGOs** - especially to improve NGO access at the United Nations,
- **Global Taxes** - to provide resources for global policy programs
- **Sanctions** - to develop a more effective and humane policy tool to enforce international law
- **Financing for Development** - to create a global financial system that responds to human needs.

## HEINRICH BOELL FOUNDATION



## HEINRICH BÖLL STIFTUNG

The **Heinrich Böll Foundation**, which is associated with the German Green Party and has its headquarters in the heart of Berlin, is a legally autonomous and intellectually open political foundation. The **Heinrich Böll Foundation** is a federally-organized national foundation, whose 16 state foundations cooperate in carrying out regional educational work.

The foundation's foremost task is political education in Germany and abroad with the aim of promoting informed democratic opinion, socio-political commitment and mutual understanding. In addition the foundation supports artistic and cultural as well as scholarly projects, and cooperation in the development field. The political values of ecology, democracy, solidarity and non-violence are our chief points of reference.

In its international collaboration with a large number of project partners - currently some 130 projects in 56 countries - the foundation seeks to strengthen global ecological and civil action, intensify the exchange of ideas and experiences, and keep alive peoples's sensitivity to change.

The **Heinrich Böll Foundation's** academic department or „Studienwerk“ would like to become a workshop for the future, which supports particularly gifted students and scholars, encourages work of socio-political relevance, and overcomes the disciplinary boundaries between discourses.



## WORLD ECONOMY, ECOLOGY & DEVELOPMENT ASSOC. (WEED)

**WEED** was founded in Germany in 1990 to increase public awareness on the root causes of world poverty and global environmental destruction. **WEED** collaborates with national and international networks and facilitates dialogue between organisations in the North and South. Political dialogue and confrontation with decisionmakers in administration, parliament and the various national and intergovernmental organizations are further elements within our strategy towards a socially equitable and ecologically sustainable North-South policy.

Some of the issues that **WEED** addresses include:

- **International Financial Markets, IMF and World Bank, International Debt Crisis**
- **Trade and Investment Policy**
- **Reform and Democratization of the UN-System**
- **European North-South-Policy**