4

Historical Foundations of the UNGP Project

2005 was a momentous year for the development of legal and normative frameworks for embedding human rights (and eventually sustainability) norms into the calculus of economic activity. It signaled what appeared to be the ending of a long arc of development with the abandonment of the project to produce a Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the "*Norms*").[1] It was also the year that saw the announcement of the appointment of John Ruggie as Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprise ("SRSG),[2] and with it the start of a process leading to the endorsement of what would be the UNGP in 2011.[3]

None of this was undertaken in a vacuum.

The interpretation of what resulted—as well as the amplitude and intensity of efforts to interpret the UNGP or interpret around them—is heavily dependent on the understand or perspective of the historical context from which the UNGP emerged. This chapter briefly sketches the historical context from out of which the UNGP emerged. Like all histories, this one might stretch back to the first exchange between peoples. That is not the intention. The focus here is on the immediate pre-history of the UNGP. That history starts with efforts, after the 1960s, to recognize the character and behaviors of multi-national enterprises and thereafter to start to assess the nature of the challenge that these economic collectives pose and the means toward their better alignment with public policy, and emerging international public and private conduct expectations.[4]

---

1 U.N. Econ. & Soc. Council (ECOSOC), Sub-Comm'n on Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/L.8 (Aug. 7, 2003) (draft resolution prepared by Alfonso Martínez et al.), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/6b10e6a7e6f3b747c1256d8100211a60?Opendocument (Hereafter the "Norms"). This document was subsequently revised. *See* ECOSOC, Sub-Comm'n on Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?OpenDocument [hereinafter *Norms*]. All references to the *Norms* are to the revised *Norms* issued August 26, 2003. For the official commentary on the *Norms*, see ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.38.Rev.2.En?Opendocument [hereinafter *Commentary*]. For a report on the finalization of the statement of *Norms*, see ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Fifth Session*, U.N. Doc. E/CN.4/Sub.2/2003/13 (Aug. 6, 2003), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/906e3013f1cb27eac1256d82004d7fe2?Opendocument [hereinafter *Report of the Working Group, Fifth Session*].

2. Press Release, Secretary-General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005), *available at* http://www.un.org/News/Press/docs/2005/sga934.doc.htm.

3 Discussed infra Chapter 3.

4 For a brief history, see Peter T. Muchlinski, Multinational Enterprises and the Law (3rd Ed; OUP, 2021), 3-20; 80-118.

The context is important for several reasons, two of which are worth foregrounding. The first is that the UNGP were shaped by and reflects the context out of which it emerged. The second is that many of the ideas, ideologies, and objectives that were sidelined by the UNGP project have not merely survived, but may well have found a home within the interpretive nooks and crevices written into the UNGP itself.

The object of this Chapter is to provide a brief historical context for the SRSG project (2005-2011) and the resulting endorsement of the text of the UNGP in 2011.[5] Historical context is of critical importance for the interpretation of the UNGP—either as text, or as the manifestation of the intent of those were charged with crafting it.[6] It provides a basis for extracting meaning from text, or for ascertaining the intention of drafters and enactors, or for identifying then contemporary values or principles against which to evaluate current sensibilities. Historical context is also of critical importance for identifying what values or goals or frameworks were considered and rejected, as a basis for better understanding what was adopted and developed. Those initial choices, in the case of the UNGP, fundamentally shaped its structure, and identified the values and principles on the basis of which it was elaborated. Lastly, by identifying what was embraced and what was rejected, the historical context also provides context and continuity. Values and approaches that were rejected did not disappear upon endorsement of the UNGP. Rather these were transformed and reasserted now within the language and discursive tropes of the UNGP themselves, In effect, then, historical context provides the basis for understanding the development of the ranges of plausible interpretation of the UNGP principles themselves.[7]

Section 4.1, which follows, briefly sketches the historical context of what would become the field of business and human rights as it appeared at the start of the SRSG's mandate in 2005. The field, at the time, was to be developed by combining developments in corporate law and governance, with international soft and hard law on human rights (and eventually sustainability including bio-diversity and climate change). Its focus on the corporate governance side is on the development of legal structures for corporate philanthropy, coupled with an increasing emphasis on corporate compliance through systems of oversight and administration. The focus on the international law side foregrounds the convergence of developments of human rights principles and efforts to transpose these directly onto that most problematic of organizations, the trans- or multinational enterprise.

Section 4.2 then focuses on the last great effort at normative and regulatory convergence before the start of the SRSG's mandate, the process leading to the drafting of the *Norms*. The focus here is on principles, forms and effects of the Norms project which seeks to identify those elements that would have lingering effects in contemporary discourse. The object here is to provide a basis for comparison with the UNGPs. That comparison is meant to touch on the core ideological differences propelling each project as well as its expression in the structure and forms memorialized through its provisions. Meaning is sometimes possible when starting from the consideration of what a provision cannot mean.

Lastly, Section 4.3 briefly considers the movement from the development of the Global Compact as an alternative or supplementary modality of converging economic activity with human rights impacts, to the SRSG mandate. In that context the underlying effects of general trends toward changes in governance –

---

[5] Much of the material in this chapter was originally published as Larry Catá Backer, 'Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law,' (2006) 37 *Columbia Human Rights Law Review* 287-389.

[6] See Chapter 1, infra, for discussion about the focus of law on text, on intent of the drafters or enactors, or on application in a contemporary context. (evolutionary or current values theory). See discussion in William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett, *Legislation and Statutory Interpretation* (2nd ed.; New York: Foundation Press 2006), pp. 219-256.

[7] It might be kept in mind that interpretation can be understood as another form of translation. See, Shuo-yu Charlotte Wu "Autopoiesis and Interpretive Semiosis," *Biosemiotics* 4 (2011) 309-330

governmentalization of the private sector, judicialization of policy, and the regulatory role of compliance are considered to the extent that they would be reflected in the work of the SRSG and ultimately in the UNGPs.

4.1 The State of Business and Human Rights in 2005: A Movement Toward Convergence of Economic Activity and Human Rights.

Once upon a time, and for a very short time, there was something that people in authority, and those who manage collective memory, considered a stable system of political and economic organization.[8] It was grounded on a complex division of authority between states, economic entities, and social collectives. States had a monopoly of political authority exercised through law.[9] Economic entities exercised their authority through contract and the web of relationships with their stakeholders.[10] Lastly, through social collectives, "civil society" controlled the development of social norms that in turn impacted political choices by the citizens of states and the consumers of and investors in economic collectives.[11]

Contemporary economic globalization has destabilized this traditional system. In place of coherence, there appears to be a fragmentation of law at the transnational level.[12] Corporations are no longer completely controlled by the states that chartered them.[13] Within complex enterprises, the largest corporations are not entirely controlled even by those states in which they operate. Social collectives now operate to change the political cultures that affect the public policy of states and the economic behavior of companies. These changes have produced a dynamic state in governance, one that has been characterized as furthering misalignment among governance regimes.[14] These misalignments have the potential to detrimentally affect the welfare of individuals and groups.[15]

By the first decade of the 21st century, a number of efforts had been made to offer a new context for stability in the relationships between the political, economic, and social orders at the national and international levels. At the national level, states have responded by both expanding the nature and scope of their legislative control and by changing the nature of their regulation based on changes in policy. For example, efforts have been

---

8. Frederick L. Schuman, *International Politics: The Western State System in Mid-Century* 56-57 (5th ed. 1953).
9. James Wilford Garner, *Introduction to Political Science: A Treatise on the Origin, nature, Functions, and Organization of the State* 316 (1910). For a classic description: "The original, primary, and immediate end of the state is the maintenance of peace, order, security, and justice among the individuals who compose it. This involves the establishment of a régime of law for the definition and protection of individual rights and the creation of a domain of individual liberty, free from encroachment either by individuals, or by associations, or by the government itself." *Ibid.*
10. *See generally, e.g.*, John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).
11. *See, e.g.*, Gideon Baker, *Civil Society and Democratic Theory: Alternative Voices* 1-10 (2002); Muthiah Alagappa, 'Civil Society and Political Change: An Analytical Framework,' in Muthiah Alagappa (ed) *Civil Society and Political Change in Asia: Expanding and Contracting Democratic Space* 25-57 (2004).
12. For a discussion, *see, e.g.*, Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).
13. *See* Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41 TULSA L. REV. 541, 543-44 (2006).
14 *See, e.g.*, Vincent Cable, *The Diminished Nation-State: A Study in the Loss of Economic Power*, 124 DAEDALUS 23, 37 (1995), *available at* http://relooney.fatcow.com/0_New_8849.pdf.
15. *See, e.g.*, *Ibid.*

made to extend national law into extraterritorial jurisdiction,[16] to overhaul corporate law principles to extend to overseas operations of domestic corporations,[17] to make jurisdiction over foreign related entities easier to attain,[18] to widen the scope of disclosure with regard to overseas impacts,[19] and to impose some form of enterprise liability.[20] At the same time, significant changes in policy have been occurring. Corporate social responsibility has moved from an elaboration of issues of corporate charity to policy concerns with the power to change the legal regulation of corporations.[21] Disclosure systems, once the sole province of state efforts to regulate transactions in securities and grounded in the traditional view that corporations had a primary obligation to maximize shareholder wealth,[22] have begun to serve as a base for broader systems of disclosure and reporting.[23] Policy issues grounded in sustainability,[24] corporate citizenship, and similar approaches are increasingly seen as a basis for regulation.[25]

Before the end of the 20th Century, the traditional domestic context of the debates about so-called "corporate social responsibility" and its relation to basic issues of corporate governance appeared to be fairly

16. *See generally, e.g.*, *Extraterritoriality*, 124 HARV. L. REV. 1226 (2011). In the context of business and human rights, *see, e.g.*, Larry Catá Backer, *Extraterritoriality and Corporate Social Responsibility: Governing Corporations, Governing Developing States*, Law at the End of the Day (Mar. 27, 2008, 11:47 PM), http://lcbackerblog.blogspot.com/2008/03/extraterritoriality-and-corporate.html.

17. *See, e.g.*, Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (1998) (amended 1988 and 1998).

18. For a discussion, see Phillip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* 197 (1993).

19. *See, e.g.*, *SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change*, SEC. & EXCH. COMM'N (Jan. 27, 2010), http://sec.gov/news/press/2010/2010-15.htm. The SEC voted to provide companies with interpretive guidance on disclosure requirements as they apply to business or legal developments relating to climate change. *Ibid.* With respect to climate change issues triggering reporting, companies are to take into account the impact of international accords. *Ibid.* "A company should consider, and disclose when material, the risks or effects on its business of international accords and treaties relating to climate change." *Ibid.*

20 Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 7 (1980).

21. The interest in corporate social responsibility, especially as it affects the obligations of multinational corporations, has grown exponentially in the years since the fall of the Soviet Union system from 1989 to 1991. For an early example, *see* JERRY W. ANDERSON, JR., CORPORATE SOCIAL RESPONSIBILITY: GUIDELINES FOR TOP MANAGEMENT (1989). For an example of a contrasting current approach, *see* JOHN M. KLINE, ETHICS FOR INTERNATIONAL BUSINESS: DECISION MAKING IN A GLOBAL POLITICAL ECONOMY 14 (2005). For good descriptions of groups with an interest in corporate social responsibility, *see, e.g.* WILLIAM B. WERTHER, JR. & DAVID CHANDLER, STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: STAKEHOLDERS IN A GLOBAL ENVIRONMENT 3 (2d ed. 2011).

22. Dodge v. Ford Motor Co., 170 N.W. 668. (Mich. 1919) (corporate board owes a duty to make business decisions to profit shareholders, but the board of directors has broad discretion to determine the nature and character of those actions).

23. *See What is GRI?*, GLOBAL REPORTING INITIATIVE, https://www.globalreporting.org/information/about-gri/what-is-GRI/Pages/default.aspx (last visited Feb. 26, 2011) ("Global Reporting Initiative (GRI) is a network-based organization that has pioneered the development of the world's most widely used sustainability reporting framework and is committed to its continuous improvement and application worldwide.").

24. *See, e.g.*, Thomas Dyllick & Kai Hockerts, *Beyond the Business Case for Corporate Sustainability*, 11 BUS. STRATEGY & ENV'T 130, 130-31 (2002); Oliver Salzmann, Aileen Ionescu-Somers & Ulrich Steger, *The Business Case for Corporate Sustainability: Literature Review and Research Options*, 23 EUR. MGMT. J. 27, 27 (2005).

25. *See, e.g.*, Dirk Matten & Andrew Crane, *Corporate Citizenship: Towards an Extended Theoretical Conceptualization* (Int'l Ctr. for Corporate Soc. Responsibility, Research Paper Ser. No. 04-2003, 2003); WORLD ECONOMIC FORUM, GLOBAL CORPORATE CITIZENSHIP: THE LEADERSHIP CHALLENGE FOR CEOS AND BOARDS (2002), *available at* https://members.weforum.org/pdf/GCCI/GCC_CEOstatement.pdf.

stable.[26] The first part of the twentieth century witnessed a series of great debates about the nature of the corporation, its social function, its internal regulation, and the implications of the great wealth and power that these amalgamations represented. By the middle of the twentieth century, a rough consensus defined the parameters of the debate: Corporations were understood as private amalgamations of capital engaged in maximizing the value of the capital so amalgamated. In that role, the primary corporate purpose was to serve the holders of capital interests given pride of place—the holders of equity capital interests in the enterprise.[27] Corporations could serve others as well, but only to the extent that such service did not detract from their primary mission. Within broad state-imposed constraints, the market was increasingly seen as providing the most effective mechanism for regulating corporate activity.[28] By the end of the twentieth century, these assumptions were again the subject of increasingly intense attacks. This time, however, the attacks were grounded not only in principles of domestic corporate law and public policy, but in international law and human rights protections as well.

Section 4.1.1 examines the international law and human rights contexts in which the *Norms* were conceived. Since the 1970s, patterns of globalization have seriously challenged both the power of nation-states to regulate the scope of the "responsibilities" of corporations,[29] and the fundamental nature of those "responsibilities."[30] Globalization, as it has been popularized, is a system of increasingly integrated patterns of trade and economic activity.[31] Although it is institutionalizing transaction systems of all sorts,[32] its most dramatic

---

26. This section is intended to provide a fairly abbreviated context for the discussion and analysis that follows *infra* Parts II–IV. For more magisterial reductions of the complicated and highly nuanced development of this field of law, especially in the context of charitable contributions, see, for example, Symposium, *Corporate Social Responsibility: Paradigm or Paradox?*, 84 Cornell L. Rev. 1133 (1999); Symposium, *Corporate Philanthropy: Law, Culture, Education and Politics*, 41 N.Y.L. Sch. L. Rev. 753 (1997).

27. "[A] corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain." American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 2.01 (1994) (The Objective and Conduct of the Corporation). The holders of other forms of capital investment in the corporation—lenders of all varieties—were relegated principally to the private law of contract to protect their interests, which were viewed as more limited. *See, e.g.*, Mark J. Roe, Political Determinants of Corporate Governance: Political Context, Corporate Impact 27–47 (2003) (discussing comparative law context to political and economic dimension of issue) [hereinafter Roe, *Political Determinants*]. Other factors of production, principally labor, were effectively written out of the equation in the United States. *See* Franklin A. Gervurtz, *Getting Real About Corporate Social Responsibility: A Reply to Professor Greenfield*, 35 U.C. Davis L. Rev. 645, 660–64 (2002); Lynne L. Dallas, *Two Models of Corporate Governance: Beyond Berle and Means*, 22 U. Mich. J. L. Reform 19, 73–77 (1988) (discussing the controversy over the inclusion of labor representation on boards of directors). The Anglo/American solution, while reflecting a majority view, does not reflect the practice of all of the most industrialized states. German corporate law, in particular, has supplied an increasingly influential model of labor inclusion in corporate governance. *See, e.g.*, Klaus J. Hopt, *New Ways in Corporate Governance: European Experiments with Labor Representation on Corporate Boards*, 82 Mich. L. Rev. 1338 (1984). From the American perspective, this model poses problems of its own, principally the incentives it creates to shift governance power away from the representative board. *See* Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 Stan. L. Rev. 539, 568 (2000).

28 For a discussion, see Peter T. Muchlinski, *Multinational Enterprises and the Law* (3rd ed., OUP, 2021), pp. 80-117.

29. *See* Michael Zürn, *Sovereignty and Law in a Denationalised World*, *in* Rules and Networks: The Legal Culture of Global Business Transactions 39 (Richard P. Appelbaum et al. eds., 2001).

30. See Eric W. Orts, *The Legitimacy of Multinational Corporations*, *in* Progressive Corporate Law 247 (Lawrence E. Mitchell ed., 1995).

31. *See, e.g*, Joseph E. Stiglitz, Globalization and Its Discontents 3–22 (2002); R.J. Barry Jones, Globalisation and Interdependence in the International Political Economy: Rhetoric and Reality 3–17 (1995).

32. Thus, for example, Anne-Marie Slaughter has written about globalization as producing a disaggregation of the state into "functionally distinct parts. These parts—courts, regulatory agencies, executives and even legislatures—are

effect has been on the institutionalization of economic transactions.[33] The primary implementing agents for this institutionalization are economic entities operating across borders in corporate form.[34] Unlike domestic corporations, multinational corporations form webs of economic relationships well beyond the control of any one state.[35] As a result, the perception has grown that states lose the effective power to direct the character of corporate responsibility[36] and that the institutionalization of systems of economic transactions produced by globalization now tend to favor only foreign owners while allocating all risk domestically.[37] It has become common to hear arguments suggesting that multinational corporations can allocate risk within their global operations in a way that might make it harder for any one jurisdiction to provide effective remedies to its citizens in accordance with their own political tastes,[38] or to implement policies in aid of economic development, especially in the least developed states.[39] Thus articulated, the problem of the multinational corporation led to a number of potentially far reaching suggestions: that multinational enterprises must serve a social, political, and cultural role as well as an economic role;[40] that legal rules governing such multinational enterprises be modified to reflect the political, social, and economic realities "on the ground";[41] that such entities be vested with responsibilities traditionally assigned solely to states;[42] and that these enterprises ought to be recognized as state actors of sorts and on that

---

networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order." Anne-Marie Slaughter, *The Real New World Order*, Foreign Aff., Sept.–Oct. 1997, at 183, 184.

33. It is in this form that the phenomenon has been popularized in the West. *See, e.g.*, Thomas L. Friedman, The Lexus and the Olive Tree: Understanding Globalization (2000).

34. *See* Larry Catá Backer, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, 24 Penn. St. Int'l L. Rev. (forthcoming 2006). For a modern post-Marxist perspective on the same theme, see Kees van der Pijl, Transnational Classes and International Relations (1998).

35. *See* Jean-Philippe Robé, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, *in* Global Law Without a State 45, 52–56 (Gunther Teubner ed., 1997).

36. *See, e.g.*, Richard L. Grossman & Frank T. Adams, Taking Care of Business: Citizenship and the Charter of Incorporation 6 (1993); Grahame Thompson, *Multinational Corporations and Democratic Governance*, *in* The Transformation of Democracy? Globalization and Territorial Democracy 149, 153–54 (Anthony McGrew ed., 1997).

37. *See, e.g.*, Steven Lukes, *Five Fables About Human Rights*, *in* On Human Rights 19 (Stephen Shute & Susan Harley eds., 1993). The author argues that:
Markets reproduce existing inequalities of endowments, resources, and power; they can produce destabilizing crises of confidence with ramifying effects . . . they can encourage greed, consumerism, commercialism, opportunism, political passivity, indifference and anonymity. . . . They cannot fairly allocate public goods, or foster social accountability in the use of resources or democracy at the workplace. . . .
Ibid. at 35.

38. *See, e.g.*, Peter T. Muchlinski, Multinational Enterprises and the Law 123–72 (1995); Maria McFarland Sánchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 Fordham Int'l L. J. 1663 (2004).

39. "Thus, they may use workers in countries with low labour costs, locate manufacturing plants in countries with weak environmental regulation, and generally distribute jobs, wealth, people and goods according to factors such as geography, local subsidies, quality of infrastructure, etc." Tania Voon, *Multinational Enterprises and State Sovereignty Under International Law*, 21 Adel. L. Rev. 219, 232 (1999).

40. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 448–49 (2001); Sánchez-Moreno & Higgins, *supra* note 38, at 1665.

41. *See* Richard Meeran, *The Unveiling of Transnational Corporations: A Direct Approach*, *in* Human Rights Standards and the Responsibility of Transnational Corporations 161, 161 (Michael K. Addo ed., 1999) ("If a proper balance is to be achieved, the law must continue to develop to reflect the reality of TNC operations and adapt to counter TNC methods of avoiding legal responsibility."); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 Va. J. Int'l L. 931, 933 (2004).

42. *See* J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors and the Struggle for Peoples' Rights in Africa*, 18 Am. U. Int'l. L. Rev. 851, 895 (2003).

basis become subject to rules and norms flowing from the same source as rules regulating the conduct of states.[43] Since the 1970s, international and supra-national organizations increasingly sought to respond to these arguments, usually by urging multinational business enterprises to adopt voluntary codes of conduct.[44] But these early efforts proved insufficient and the international public and civil society communities undertook a year-long effort to provide a stronger international framework within which to solve the "problem" of the international or transnational corporation. Those efforts ultimately produced the *Norms*.

Section 4.2.2 moves to a critical analysis of the *Norms* themselves in this context of regulatory conflict. The *Norms* point to potential far reaching changes in global consensus with significant ramifications for American domestic corporate law. First, the *Norms* considerably alter the framework of the debate about corporate social responsibility. Corporations, seen as social, political, and economic actors, would serve not merely a broadened set of traditional stakeholders, but the state and international community as well. Traditional constraints on action against shareholders, and especially corporate shareholders, would be effectively disregarded for virtually all purposes. Second, the *Norms* enlist transnational corporations as agents of international law implementation, even against states that have either refused to ratify certain international instruments or that have objected to the gloss advanced by international institutions. The *Norms* implement current as well as aspirational international law standards through private law. The *Norms* command that all of the contractual relations to which transnational corporations are parties incorporate as fundamental terms of those agreements international human rights and other norm standards listed in the *Norms*, as well as the international standards underlying them. Because the *Norms* are based on a number of international instruments that have not been ratified by all states, they use transnational corporations as a means of end-running states, and in the process create a basis for the articulation of customary international law principles that will apply to states.[45] Third, the *Norms* substantially alter the balance of power over corporate governance between inside stakeholders (shareholders, lenders, etc.) and outside stakeholders (community, society, the state) by providing a substantial role for NGOs to monitor the conformity of transnational corporations (TNCs) with the requirements of the *Norms*.

Section 4.2.3 places the *Norms* in a broader context. It analyzes the *Norms*, not as *substance*, but as *symptom* of two great fundamental changes in the allocation of governance power in a global setting. First, it illustrates rearrangements in the relative power of systems of domestic, international, public, and private systems of governance. Indeed, the *Norms* evidence the way in which systems of governance previously invisible—private economic orderings—are less dependent upon any one or more political system for their existence. Gone are the days of the primacy of domestic law—and of the nation-state. This proposition is often articulated in multiple ways and is of little interest as such here.[46] Nor does the "death" of nation-state primacy necessarily suggest the "rise"

43. For a very perceptive critique of the limitations of traditional notions of sovereignty and the limits of direct regulation through international law on multi-national corporations, see Voon, *supra* note 39. For a discussion in some ways well ahead of its time, see Jonathan I Charney, *Transnational Corporations and Developing Public International Law*, 1983 Duke L.J. 748.

44. For an excellent early discussion of the conceptual and legal issues relating to voluntary codes of conduct, see Hans. W. Baade, *The Legal Effects of Codes of Conduct for MNEs*, *in* Legal Problems of Codes of Conduct for Multinational Enterprises 3 (Norbert Horn ed., 1980).

45. This adds an important wrinkle to the "CIL Game" well described in George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 Am. J. Int'l L. 541, 565–68 (2005) (using game theory to understand the process of creation of customary international law).

 46. For a sampling of the literature on the "retreat" of the nation-state as primary political actor see, for example, Inger-Johanne Sand, *Polycontextualioty as an Alternative to Constitutionalism*, *in* Transnational Governance and Constitutionalism 41 (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004); Gunther Teubner, '*Global Bukowina': Legal Pluralism in the World Society*, *in* Global Law Without a State, *supra* note 35, at 3.

of international law systems as a "replacement."[47] The *Norms* suggest that something more complicated than a mere replacement is occurring now at the global level. The *Norms* serve as acknowledgement of the rise of multiple sources of power and a world in which institutions with regulatory authority must compete. Regulatory power appears to be flowing *up* from states to international bodies and *out* from states to non-public actors like transnational corporations and elements of global civil society. Second, the *Norms* provide a template for the character and form of interaction and communication among these systems of governance. In a world of multiple competing systems of governance, each only partially overlapping the others, no one political, social, or economic system can claim a monopoly of power over an object of regulation. The problem of corporate regulation shows the evolution of the transnational—that is, the transformation of a regulatory issue from one exclusively centered within the nation-state (the 'problem' of corporate social responsibility), to one involving three actors: nation-states, international public law institutions,[48] and private law actors (transnational corporations) and institutions (associations of private or transnational civil society actors).

It also highlights the difficulty of asserting a monopoly of regulatory power by any system of domestic, international, public, or private law system. The saga of the *Norms* points to a reality of governance in the current age—power is diffuse and asserted through multiple and overlapping hierarchies.[49] That, at any rate, was the position successfully advanced by the SRSG from the start of his mandate through the development of the three Pillar framework, and ultimately to the memorialization of that framework in the UNGP. At follows that there is value in considering the possible collision between the methodology of the *Norms* and that of the UNGP—one that in its current form is treated in more detail in Chapter 13.That collision also marks the emerging dialectics between the principle of democratic governance that forms the basis of a public policy of corporate and state organization, and the convergence of governance norms for states and non-state entities. If corporations are to be treated as states for purposes of implementing international law norms, will states be treated as corporations for purposes of regulatory control under international law?[50] Should international institutions privatize their regulatory, monitoring or enforcement functions by delegation to elements of private, unaccountable and non-democratic organs of civil society? The failure of the *Norms* to address these issues might well have been their greatest failure; that is the deductive conservatism of the Norms, basing its structural forms on the core principle of State power, the superior authority of law, and the primacy f international law among the community of states as marking the outer boundaries of regulatory possibility blinded its developers to the realities emerging around them.[51] . The role of the UNGP in actually facilitating the trajectories of enterprise governmentalization, of the development of comprehensive systems of compliance and accountability, and of the transformation of the duties of state owned or controlled enterprises (SOEs) and related financial instrumentalities, may suggest that what appeared at first blush to be a defeat turned into the construction of a foundation on which the core objectives of the Norms might be realized.

---

47. For commentary suggesting the replacement of international law systems for the nation-state at the head of the hierarchy of "law" see, for example, Richard Falk, Law in an Emerging Global Village: A Post-Westphalian Perspective (1998); Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 Stan. J. Int'l L. 191 (2000).

48. In this case, these institutions are the United Nations and an array of other, and sometimes competing, public law institutions, either representing amalgamations of nation-states or having an autonomous existence of their own.

49. *See* Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory*, *in* Transnational Governance and Constitutionalism, *supra* note 46, at 3, 3–28.

50. *See* Backer, *supra* note 34.

[51] See, e.g., Larry Catá Backer, 'Governance Without Government: An Overview,' in Günther Handl, Joachim Zekoll, Peer Zumbansen, (eds) *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* 87-123 (Leiden, Netherlands & Boston, MA: Martinus Nijhoff, 2012; Larry Catá Backer, 'The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity,' (2012) 17(2) *Tilburg Law Review* 177-199.

4.1.1 The State of Corporate Responsibility as a Legal and Normative Construct

Two questions dominated a century-long debate about the economic, social, and political role of economic actors operating in corporate form: Whom must corporations serve[52] and to what extent should the regulation of corporations be left to the market, to private ordering (contract law) among corporate stakeholders, or to public regulation by the state?[53] Both of these questions reflect an even more fundamental question, the answer to which remains unresolved: What is the essential nature of the corporation? Is it an autonomous community, like a nation-state? Is it the sum of contractual relations among some of the people with stakes in the joint enterprise? Or is the corporation merely property, a complex commodity?[54]

These questions remained highly contested through the end of the twentieth century. Early on, however, the American bench and Bar seemed to reach an uneasy stalemate about the contours of the debate regarding corporate social responsibility.[55] Since then, it has been academics who argue, mostly among themselves, about the nature, character, and purpose of the corporation beyond those limits of discourse enforced by the practice community.[56]

---

52. American Law Institute, *supra* note 27, § 2.01 (1994). Reporter's Comment 1 states: "A business corporation is organized and carried on primarily for the profit of the stockholder." *Ibid.* cmt. 1 (quoting Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919)).

53. *Ibid. See also Ibid.* cmt. 4 ("Virtually all states have now adopted statutory provisions relating to corporate contributions."); *Ibid.* cmt. 5 ("There is very little direct authority on the permissibility of taking ethical considerations into account in forming corporate action where doing so might not enhance profits."); *Ibid.* cmt. 6: ("Section 2.01 does not address under what circumstances may a corporation that is organized under a business corporation law restrict the general profit-making objective, in a manner that goes beyond Section 2.01(b), by a shareholder's agreement or certificate provision."); *Ibid.* cmt. 7 ("[A]n orientation toward lawful, ethical, and public-spirited activity will normally further the corporation's long-run economic interests."); *Ibid.* cmt. 8 ("A number of new state statutes have authorized the board to take into account the interest of 'other constituencies.'").

54. Katsuhito Iwai has argued that there may not be a single answer to this question, noting that American law and culture tend toward a nominalistic or property view of corporations, while Japanese law and culture tend toward a realist view of corporations—that is, of corporations as autonomous and independent entities capable of self-ownership. Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 Am. J. Comp. L. 583 (1999); *see also* Gunther Teubner, *Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person*, 36 Am. J. Comp. L. 130, 138–48 (1988) (suggesting a broader notion of entity theory for corporations).

55. *See* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 Cardozo L. Rev. 261 (1992). This stalemate, however, has never settled the basic questions of corporate law—whether the corporation was a purely private, purely public, or mixed entity. The consequences for distribution of power among shareholders, boards of directors, and others, have been great. *See, e.g.*, Bren L. Buckley, *Models of Corporate Conduct: From the Government Dominated Corporation to the Corporate Dominated Government*, 58 Neb. L. Rev. 100 (1978) (examining the proper scope, function, and structure of corporate regulation).

56. American Law Institute, *supra* note 27, § 2.01 (1994). This section states:
The provisions of subsection (b) reflect a recognition that the corporation is a social as well as an economic institution, and accordingly that its pursuit of the economic objective must be constrained by social imperatives and may be qualified by social needs. . . . In very general terms, Subsection (a) may be thought of as a broad injunction to enhance economic returns, while Subsection (b) makes clear that certain kinds of conduct must or may be pursued whether or not they enhance such returns (that is, even if the conduct either yields no economic return or entails a net economic loss).
Ibid.

The most important points of agreement, at least among members of the American bench and Bar, were these: Corporations were understood as enterprises engaged solely in an economic role and the ultimate object of corporate existence was maximizing shareholder wealth.[57] Corporate boards were permitted some flexibility with respect to compliance with this latter requirement. This flexibility took three principle forms. First, corporations were permitted to distribute corporate property for charitable or other eleemosynary purposes within certain clearly defined limits.[58] Second, corporate boards of directors were given some flexibility when they sought to serve other constituencies, to the extent that such service was consonant with their primary missions.[59] After the merger manias of the 1970s and 1980s, such flexibility was sometimes memorialized in so-called "other constituency" statutes.[60] Third, boards of directors were accorded some flexibility in determining the factors, including time frame, which might be considered in maximizing shareholder value.[61] The state was to define the parameters within which this flexible framework could be effected and policed, but otherwise the market was to provide the mechanism for regulating corporate activity. As a matter of public policy, state regulation was crafted to ensure that law did not impede private efforts to maximize efficiency.

---

57. Among the more famous expositions of this proposition was the early twentieth century case *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919). In that case, the court stated:
A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself . . . .
Ibid. at 684.

58. Corporate statutes usually empower corporations to "make donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof." Del. Gen. Corp. L. tit. 8 § 122(9) (2005). Courts have developed standards for determining the validity of such giving in individual cases. *See* Theodora Holding Corp. v. Henderson, 257 A.2d 398 (Del. Ch. 1969); *see also* A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953), *appeal dismissed* 346 U.S. 861 (1953) (upholding corporate gift to Princeton University because the gift arguably advanced the long-run business interest of the company even in the absence of a statute permitting such gifts). Corporate charity has been both praised and criticized because of its character as advancing the corporate donor's economic interests. *See* Hayden W. Smith, *If Not Corporate Charity, Then What?*, 41 N.Y.L. Sch. L. Rev. 757 (1997). It has also been criticized as a front for the satisfaction of the directors' personal interests. *See* Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 U.C.L.A. L. Rev. 579 (1997). *See generally* Victor Brudney & Allen Ferrell, *Corporate Charitable Giving*, 69 U. Chi. L. Rev. 1191 (2002) (discussing different rationales for corporate charity).

59. *See, e.g.*, 805 Ill. Comp. Stat. 5/8.85 (West 2005) (permitting corporate officers to consider actions within the best interest of the corporation).

60. *See, e.g.*, Ohio Rev. Code Ann. § 1701.59(E) (West 2005) (allowing directors the discretion to consider, in determining the best interests of the corporation, factors such as employee interest, the state economy, and community considerations). Academics have tended to view these statutes with a certain degree of skepticism. *See, e.g.*, Lucien A. Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. Chi. L. Rev. 973, 1021–27 (2002); Comm. on Corporate Laws, Am. Bar Assoc., *Other Constituencies Statutes: Potential for Confusion*, 45 Bus. Law 2253 (1990); Oliver Hart, *An Economist's View of Fiduciary Duty*, 43 U. Toronto L.J. 299, 303 (1993). *But see* Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 Emory L.J. 1085 (2000) (proposing an opt-out statute for incorporating a stakeholder approach to corporate governance).

61. Again, the pattern was set early in the twentieth century by often cited cases such as *Dodge*, 170 N.W. at 684 ("The judges are not business experts. It is recognized that plans must often be made for a long future, for expected competition, for a continuing as well as an immediately profitable venture."). This flexibility is currently most apparent in the law developed to manage contests for control. *See* Ronald J. Gilson, *Unocal Fifteen Years Later (and What We Can Do About It)*, 26 Del. J. Corp. L. 491, 501 (2001); Richard E. Kihlstrom & Michael L. Wachter, *Corporate Policy and the Coherence of Delaware Takeover Law*, 152 U. Pa. L. Rev. 523 (2003).

In contrast to the American bench and Bar, American academics, increasingly joined by others outside the United States, continued to debate, with greater or lesser intensity, the foundations of a corporation's responsibilities beyond a simple primary obligation to investors. The history and contours of the academic debate about corporate social responsibility—what it is, to whom it is owed, and how it should be policed—is both long and well known. The highlights are worth recounting. This *national* debate, originally about the extent of permissible corporate *charity*, has formed the basis of the current *transnational* and *international* debate about the *public* role of corporations in social, political, cultural, scientific and economic matters affecting political communities. The transformation of the debate from charity to governance and from national to international is well illustrated by the *Norms*.

The usual start of the modern discourse of corporate social responsibility revolves around the debate between two influential academics, Adolph Berle and E. Merrick Dodd. Their arguments shaped corporate discourse for a generation, from the 1930s through the 1950s, and still influence policymakers and academics today. Berle took the position that a corporation owes only a duty to maximize shareholder benefit.[62] This position masked but did not resolve two possible meanings of maximization. On the one hand, the duty could be focused on the maximization of corporate profits (and thus embrace the corporate norm of short-term shareholder income maximization). This appears to be the older view.[63] On the other hand, the duty could point to a primary obligation to maximize shareholder wealth (and thus to maximize the value of the shareholder's investment in the corporation, possible from a long-term perspective). In either case, the focus was on the corporation as private property, whose existence, though licensed by the state, was focused solely on the shareholder.

Professor Dodd suggested that the corporation is an economic institution that serves a social purpose as well.[64] This view reflected an equally if not more ancient perspective, current in the United States, that "the purpose of making all corporations is the accomplishment of some public good."[65] As such, corporations might be made to serve other constituencies, or might seek to serve such constituencies within a broader context than that of mere shareholder profit maximization. The American legal system has appeared to have internalized the idea that corporations are principally entities whose purpose is to maximize the benefit of their open-ended investors—the shareholders. At the same time, this view sees corporations as embedded in the social and political fabric of society, in which corporations are expected or permitted to participate.[66]

Though Berle conceded the argument in the 1950s,[67] an extraordinarily influential voice rose in the 1960s to take up Berle's position once again from the perspective of economic as well as democratic theory.[68]

---

62. Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 Harv. L. Rev. 1049 (1931).

63. I. Maurice Wormser, Disregard of the Corporate Fiction and Allied Corporate Problems 181 (1927). According to Wormser:

After all is said and done, the directors of a corporation should know that the only positive benefit to the stockholders to be derived from the successful prosecution of the business of the corporation must come from the distribution of dividends in cash or property. That is why stockholders acquire stock ordinarily, —in order to obtain dividends.

Ibid.

64. E. Merrick Dodd, *For Whom are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145, 1148 (1932).

65. Wormser, *supra* note 63, at 36.

66. *See* A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953) (holding that a corporation may make a charitable contribution where it promotes the goodwill of the corporation).

67. *See* Adolph A. Berle, Jr., The 20th Century Capitalist Revolution 169 (1954).

68. *See* Milton Friedman, Capitalism and Freedom 133–34 (1962). For a more recent defense of these arguments see, for example, Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*,

Professor Milton Friedman argued that corporate shareholder benefit maximization is the only possible position consistent with American notions of democracy.[69] Shareholder benefit theory is the most efficient manner for maximizing corporate utility and general wealth maximization (free markets and the invisible hand theory applied). If corporations were to be granted social or public policy obligations, then corporations would be acting in the place of the state. But corporations are not legitimate state actors; their directors were not elected by, nor are they accountable to, the people. To be legitimate state actors, corporations with social policy functions would need to be fully accountable and responsible to the political community. They would have to be chosen by the political community and to serve it. Essentially, corporations would become governmental units. To avoid this, regulation ought to facilitate the operation of the market and limit market inefficiencies and fraud.[70] This position has proven very influential since the 1960s.[71]

In response, the 1980s saw a revival and expansion of Dodd's position. The idea of a direct and monopolistic connection between "ownership" and shareholders has been steadily questioned in some scholarship.[72] Progressive and critical scholarship, like that of Cynthia Williams,[73] Leonard Baynes,[74] Cheryl L. Wade,[75] and others[76] recast Dodd's social responsibility arguments in terms of accountability, responsibility, and legitimacy. In their various forms, these arguments turn Friedman's argument on its head. Most start from the assumption that it is too simplistic to believe that corporate actions do not have significant social, environmental, and political effects.[77] To deny those effects is to deny the obvious. If a corporation can be conceptualized as a bundle of privileges, then the nature of discourse about corporate legitimacy must be changed. This is especially the case if

---

50 Wash. & Lee L. Rev. 1423 (1993). This shareholder wealth maximization view is shared by the current American government. *See infra* Part IV.B.

69. Friedman, *supra* note 68, at 133–36.

70. As a consequence, Friedman tended to focus on monetary policy and markets as the principle regulatory object of the state. *See, e.g.*, Milton Friedman, There's No Such Thing as a Free Lunch (1975); Milton Friedman & Walter W. Heller, Monetary vs. Fiscal Policy (1969).

71. *See, e.g.*, Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 Harv. L. Rev. 1911 (1996) (proposing a self-enforcing model for corporations that creates shareholder protections with little use of law and the legal system). *See generally* Foundations of Corporate Law (Roberta Romano ed., 1993) (discussing the various policy debates in corporate law and the underlying economic concepts informing such debates, including how economic theory offers potential solutions for the legal system in addressing agency problems). This understanding serves as a foundation for analysis outside the United States as well. For a very perceptive critique of the system of Japanese corporate regulation with a call for more restrained governmental regulatory focus, leaving corporations free to develop in the market, see Michael E. Porter, Hirotaka Takeuchi & Mariko Sakakibara, Can Japan Compete? (2000).

72. *See, e.g.*, Lynn A. Stout, *Bad and Not So Bad Arguments for Shareholder Primacy*, 75 S. Cal. L. Rev. 1189, 1192 (2002) (finding no definitive empirical connection between shareholders and ownership).

73. *See* Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.S. Davis L. Rev. 705 (2004) [hereinafter Williams, *Social Responsibility*]; Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 Harv. L. Rev. 1197 (1999) [hereinafter Williams, *Transparency*].

74. *See* Leonard M. Baynes, *Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule*, 37 U. Rich. L. Rev. 819 (2003).

75. *See* Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. Pitt. L. Rev. 389 (2002).

76. *See* Edward S. Mason, *Introduction* to The Corporation in Modern Society 5 (Edward S. Mason ed., 1959); Lawrence E. Mitchell, Corporate Irresponsibility: America's Newest Export 3 (2001); Dow Votaw, Modern Corporations 87 (1965).

77. *See, e.g.*, Robert A. Dahl, After the Revolution? Authority in a Good Society 80–87, 100–02 (rev. ed. 1990) (arguing that corporations are social enterprises owing the political community "public" rather then merely shareholder focused service).

such privileges are based on increasingly suspect categories, such as race and gender. Thus, for example, to the extent that corporate privilege rests on or derives benefit from the privilege of race, gender, or other social or political hierarchies of power, then corporations ought to bear the burden (and liability) for the exercise of those privileges. Reparations from corporations that profited from slavery can then be grounded in a reconceptualized understanding of the corporate norm.[78]

Corporate privilege can only be legitimate if the corporation serves the community from which the factors of production of its wealth are derived.[79] For some, this translates into a broadening of the constituencies to which the corporation must be responsible, as well as a broadening of the nature of corporate responsibility to these constituencies in terms of disclosure obligations,[80] the form and focus of fiduciary duties,[81] and approval of corporate decisions.[82] For others, corporate responsibility is articulated as an active obligation[83]—the obligation to positively better the environment,[84] to increase the wealth of the inhabitants in places where corporations

78. On reparations in general and against corporations specifically see, for example, Kyle D. Logue, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. Rev. 1319 (2003); Ronald L. Mize, Jr., *Reparations For Mexican Braceros? Lessons Learned From Japanese and African American Attempts at Redress*, 52 Clev. St. L. Rev. 273 (2005); Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 Rutgers L. Rev. 309 (2003); Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 Harv. L. Rev. 1689 (2002).

79. *See* Daniel P. Sullivan & Donald E. Conlon, *Crisis and Transition in Corporate Governance Paradigms: The Role of the Chancery Court of Delaware*, 31 Law & Soc'y Rev. 713 (1997). The recent explosion of American legal academic interest in the field of socio-economics provides a firm exploration of this approach. *See, e.g.*, Robert Ashford, *The Socio-Economic Foundation of Corporate Law and Corporate Social Responsibility*, 76 Tul. L. Rev. 1187 (2002).

80. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 Va. L. Rev. 247 (1999); Williams, *Social Responsibility*, *supra* note 73, at 708–09.

81. *See* Baynes, *supra* note 74, at 822. For a more cautious view and discussion, see Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. Legal Educ. 351 (2004).

82. *See* Lisa M. Fairfax, *Achieving the Double Bottom Line: A Framework for Corporations Seeking to Deliver Profits and Public Services*, 9 Stan. J.L. Bus. & Fin. 199 (2004); Cheryl L. Wade, *For-Profit Corporations That Perform Public Functions: Politics, Profit, and Poverty*, 51 Rutgers L. Rev. 323 (1999).

83. Janet Dine, *Human Rights and Company Law*, *in* Human Rights Standards and the Responsibility of Transnational Corporations, *supra* note 41, at 209–10. Citing Philip Alston's work, Dine describes the cultural basis of the American wariness toward any embrace of a social responsibility or public law model of corporate governance as resting on the embrace of a distinction between political and civil rights–which constitute the whole of public rights–and social, economic and cultural rights–which are viewed as private law (that is, contractually based on property rights). This distinction was rejected during the Cold War period in the rhetoric of the Soviet Union and the so-called Third World. As such, by the end of the twentieth century, American traditionalists, especially, could conflate Communism and the "social responsibility" movements. *See Ibid.* at 209–14 (citing Philip Alston, *US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 Am. J. Int'l L. 365 (1990)).

84. *See* Mitchell F. Crusto, *Green Business: Should We Revoke Corporate Charters for Environmental Violations?*, 63 La. L. Rev. 175 (2003); Segun Gbadegesin, *Multinational Corporations, Developed Nations, and Environmental Racism: Toxic Waste, Exploration, and Eco-Catastrophe*, *in* Faces of Environmental Racism 187, 187–202 (Laura Westra & Bill E. Lawson eds., 2001); Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. Rev. 75, 77–80 (1996).

operate,[85] to develop economically depressed neighborhoods,[86] or to pressure other institutions (like banks or government) to change their social or regulatory practices.[87]

At about the same time, other academic currents caught the attention of policymakers. One was the rise of "Enterprise Liability" theory and other related attacks on traditional veil piercing theory, at least as applied to corporate groups.[88] These theories focus on a particular aspect of legal reform—on conforming the legal realities of firm organization to the economic and control realities of that organization.[89] They seek to limit the ability of corporations to "unfairly" allocate risk through manipulating an almost borderless power to reconstitute themselves through the use of legally distinct but economically inseparable units.[90] They can also limit the power of corporate groups or other constituencies to avoid liability for the torts of any of their subsidiaries or related entities.[91]

Another movement that was especially successful in capturing the attention of legal policymakers, particularly at the national level, was the monitoring and disclosure movement.[92] The focus there was on accountability and transparency for the benefit of shareholders in particular and, more generally, for the public benefit through

---

85. *See* Robert W. Shields, *Community Development Financial Institutions and the Community Development Financial Institutions Act Of 1994: Good Ideas In Need Of Some Attention*, 17 Ann. Rev. Banking L. 637 (1998).

86. *See Ibid.*

87. *See* Corporate Social Responsibility Forum, Enterprise and Economic Development: The Corporate Response, http://csrforum.org/csr/csrwebassist.nsf/content/ a1a2b3b4.html (last visited Nov. 9, 2005). *Cf.* Margaret Jungk, *A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad*, *in* Human Rights Standards and the Responsibility of Transnational Corporations, *supra* note 41, at 171, 177 (arguing that when the connection between a company's actions and human rights violations is direct, a business should review its operations, undertake corrective measures, and speak out when an oppressive government is contributing to these violations).

88. The pioneering work of Phillip I. Blumberg in the United States and Gunther Teubner in Germany (on network liability) has been very influential, at least within the legal academic communities. *See* Blumberg, *supra* note **Error! Bookmark not defined.**, at 121–50; Gunther Teubner, *The Many Headed Hydra: Networks as Higher-Order Collective Actors*, *in* Corporate Control and Accountability 41 (J. McCahery et al. eds., 1993).

89. For a recent example of the use of these notions in the context of traditional "veil piercing," see Andrew J. Natale, *Expansion of Parent Corporate Shareholder Liability Through the Good Samaritan Doctrine: A Parent Corporation's Duty to Provide a Safe Workplace for Employees of its Subsidiary*, 57 U. Cin. L. Rev. 717 (1988).

90. As one commentator noted in his discussion of the legal doctrines governing the collapse and recharacterization of corporate structures:

All of these doctrines espouse substance over form, but they also share three other common traits: they are judicially-created doctrines; they respond to material improprieties in a corporate arrangement; and they challenge that corporate arrangement to the extent it creates externalities by shielding assets from third party (usually creditor) claims. The challenge appears most robust where, as in cases of piercing the corporate veil and collapsing LBO transactions, the corporate arrangement shields assets of a party causing the improprieties.

Steven L. Schwarcz, *Collapsing Corporate Structures: Resolving the Tension Between Form and Substance*, 60 Bus. Law. 109, 119 (2004). *But see* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461 (1985) (arguing that even though courts are unlikely to adopt a standard of absolute liability, the theory of enterprise liability reflects the direction of modern tort law).

91. *See* Sarah Joseph, Corporations and Transnational Human Rights Litigation 129–43 (2004); W. Loomis, *The Responsibility of Parent Corporations for the Human Rights Violations of their Subsidiaries*, *in* Human Rights Standards and the Responsibility of Transnational Corporations, *supra* note 41, at 145.

92. On the effects of monitoring as a form of corporate regulation, see Larry Catá Backer, *Surveillance and Control: Privatizing and Monitoring After Sarbanes-Oxley*, 2004 Mich. St. L. Rev. 327.

governmental monitoring and disciplining of corporate ethics.[93] The most significant expression of this movement in the United States can be found in the many monitoring and surveillance provisions of the Sarbanes-Oxley Act of 2002.[94] In Europe, there has been a significant push toward disclosure as a means of harmonizing corporate governance within the framework of the European Union.[95] In the social policy context, the movement seeks to use disclosure and surveillance regimes to control substantive decisions of corporations in a variety of fields through an expansion of "social-reporting."[96] The grounding for this approach has been a normative assumption that the government's power to demand disclosure is broader than any narrowly focused requirement for shareholder wealth maximization, which may limit the discretion of directors.[97]

Despite these changes, the consensus about corporate social responsibility—derived in large part from a consensus on the nature of the corporation as a private enterprise with social responsibilities operated for the ultimate benefit of its equity holders—has remained durable as a matter of *domestic* policy.[98] Thus, for example, the explosion of corporate takeovers since the 1970s spawned state constituency statutes that permit, but do not require, corporate boards to consider the effects of corporate actions on the corporation's employees, customers, lenders, trade creditors, as well as the interests of local, state, and national communities, especially in the context of contests for control or other acquisitive activities.[99] The same corporate acquisitive activity generated relatively small responses in the courts. Delaware courts have carved a space for boards to consider the effects of corporate action on other constituencies in discharging their duty to act solely in the best interests of the corporation under a broad set of circumstances.[100]

---

93. The ethics component of the disclosure and transparency movement has been especially influential. *See* Richard W. Painter, *Lawyers' Rules, Auditors' Rules and the Psychology of Concealment*, 84 Minn. L. Rev. 1399 (2000). In Europe, there has been a focus on financial reporting harmonization, which, in some EU Member States, is "seen . . . as a safeguard for creditors." However, "[i]n other Member States . . . it is regarded more as a safeguard for the shareholder, albeit . . . not so much for the latter's role within the company as for its role as an investor who acquires and sells securities in reaction to this information." Stefan Grundmann, *The Structure of European Company Law: From Crisis to Boom*, 5 Eur. Bus. Org. L. Rev. 601, 624 (2004).

94. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C.). These provisions are analyzed in Backer, *supra* note 92.

95. Grundmann, *supra* note 93, at 617–23. Grundmann describes the harmonization of disclosure and information regimes at the Community level as avoiding substantive solutions. "Mandatory information rules, though mandatory in construction, leave intact the freedom of the parties to design their arrangements. They do not exclude different solutions for different preferences." *Ibid.* at 622. On France's efforts in this regard, see Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Regulations Economiques*, 21 Ariz. J. Int'l & Comp. L. 441 (2004).

96. For a discussion of "social reporting" see, for example, David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. Corp. L. 41 (1999) (arguing for the normalization of socially acceptable norms of corporate behavior through a regime of targeted social disclosure).

97. Thus, for example, as Cynthia Williams has suggested, "the SEC′s public interest disclosure power is separate from and broader than its investor protection disclosure power." Williams, *Transparency*, *supra* note 73, at 1204.

98. The policy is nicely articulated in modern statutory expressions of corporate charity powers. *See* Rev. Model Bus. Corp. Act § 3.02(13)–(15) (2002) (permitting corporations to make charitable donations, transact business that will aid governmental policy, and make other legal payments or donations that further the business and affairs of the corporation).

99. *See, e.g.*, Ohio Rev. Code Ann. § 1701.59(E) (West 2005) (allowing directors the discretion to consider, in determining the best interests of the corporation, factors such as employee interest, the state economy, and community considerations).

100. *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1985) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."). The rules are different when a corporation is for sale. *Ibid.* ("[C]oncern for non-stockholder interests is

More importantly, perhaps, the national dialogue about corporate social responsibility has largely occurred within a clearly defined and cohesive field of law. Calls for a public law basis for corporate governance are not common.[101] The issue of corporate social responsibility, when taken seriously, is treated as legitimate only within the field of corporate law,[102] a field with its own internal logic and structure.[103] "Corporate law is primarily about the relationships among shareholders, boards of directors, managers, and, occasionally, bondholders and other creditors; questions surrounding the role of corporations in society arise only at the periphery of the dominant narratives of corporate law, if at all."[104] These traditional parameters tend to influence the boundaries of comparative corporate law as well.[105] Discourse outside these accepted parameters tends to be treated as less authoritative, especially when that discourse seeks to upset the logic of traditional conceptions of corporate regulation within the domestic sphere.[106] Traditional American corporate law speaks the language of economics[107]

---

inappropriate when . . . the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.").

101. For an excellent example, see David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 Geo. L.J. 61, 108–10 (2003). "Shifting their attention from contract to property paradoxically would require legal scholars to reimagine the problem of corporate governance as essentially a question of public law." *Ibid.* at 108.

102. For a classic exposition of the field as traditionally bounded in the United States, see, for example, Melvin A. Eisenberg, The Structure of the Corporation (1976).

103. *See* Pierre Bourdieu, The Field of Cultural Production: Essays in Art and Literature (Randal Johnson ed., 1994). The field of corporate social responsibility may well be its own field in this respect. *See* Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 Law & Soc'y Rev. 635, 636 (2004) ("[T]he concept of the 'field' refers here to a specific site of struggle—maintained and asserted by a variety of social agents—over the very scope and meaning of the term *social responsibility*, as it applies or should apply to profit-seeking market entities.").

104. Kent Greenfield, *There's a Forest in Those Trees: Teaching About the Role of Corporations in Society*, 34 Ga. L. Rev. 1011, 1011 (2000). *But see* Gevurtz, *supra* note 27 (arguing that the goal of raising wages and decreasing economic inequality would be more effectively achieved by reforming employment contract law than by requiring corporations to consider the impact of their actions on employees).

105. *See, e.g.*, Reinier Kraakman et al., The Anatomy of Corporate Law: A Comparative and Functional Approach (2004) (comparing bodies of corporate law from a functional economic perspective). *But see* Larry Catá Backer, Comparative Corporate Law: United States, European Union, China and Japan (2002) (focusing on the internal logic of corporate governance as the foundation for the comparative study of corporate law but recognizing the need to push beyond the narrow governance parameters).

106. That is not to say that the discourse is neither powerful nor effective. Quite to the contrary. The principal effect of protecting the boundaries of the field has been to reduce the scope of the field to a narrower and narrower ambit. As one commentator has noted:

[P]rogressives recognized another way to empower employees, consumers, and the larger public: legislation outside of corporate law. As Chayes noted, since the late nineteenth century, "antitrust and public regulation have, broadly speaking, been the characteristic response of American politics, government, and law to the problems posed by the modern corporation." . . . .

Following this model, the late 1960s saw "an unprecedented wave of policy innovation" in the form of social welfare—or quality of life—legislation, as Congress and state legislatures granted broad new protections to workers, consumers, and communities harmed by big business.

Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 Law & Contemp. Probs. 109, 120 (quoting Abram Chayes, *The Modern Corporation and the Rule of Law*, *in* The Corporation In Modern Society 25, 37 (Edward S. Mason ed., 1959) and James Q. Wilson, *American Politics, Then and Now*, Commentary, Feb. 1979, at 40). In a sense, the *Norms* represent a tentative internationalization of this pattern.

107. Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law (1991).

and perhaps politics.[108] It generally does not speak the language of human rights.[109] It tends to draw a sharp line between public governance that serves a legitimating and mediating function, and private governance that serves efficiency and contract.[110]

Yet, on the transnational and international plane, the discourse of corporate responsibility has always formed part of a larger discourse of social and political obligation. The fields of international law, and, increasingly, of human rights, have tended to form the core fields within which corporations were discussed at the transnational and international institutional level.[111] For people in these fields of law and policy, the traditional forms of nation-centered normative corporate regulatory systems, centered on the economics of shareholder wealth maximization, hold no special magic. Instead of economics and private law, public law and public accountability provide a better model for corporate regulation, which can be articulated as policy, and eventually as law. At this level, the domestic law framing of the issue of corporate social responsibility—the extent to which the corporation may or must take into account the effects of its actions on others, and the fundamental limitation of ultimate corporate purpose to shareholders—is increasingly rejected. State governance and corporate governance theory conflate in norm-making outside the nation-state. The resulting revolution in "social responsibility" discourse is well evidenced in the *Norms*.

4.1.2 The State of Human Rights and International Law/Norms and the Long March to the *Norms*.

Patterns of globalization emerging after the 1970s seriously challenged the traditional state-centered understanding of corporate regulation. Globalization is commonly understood as an economic, open-markets driven movement. The movement is grounded in the belief that growth, prosperity and the greatest good for humanity is possible only through the construction of a tightly integrated global economy founded on trade liberalization, privatization, and macro-stability (only from which micro-stability and individual wealth maximization would be possible). The movement is essentially transnational—it can work only if all states (and private economic interests) embrace these objectives as a matter of legislative policy and behavior norms. At the same time, and to some extent, globalization also embraces the structural status quo—especially with respect to the constitution and regulation of private amalgamations of economic power.[112] Questions of the relationship of these economic actors to their various constituencies—shareholders, creditors, customers and the like—are left to

---

108. For an influential American perspective, see Mark J. Roe, Strong Managers, Weak Owners: The Political Roots of American Corporate Finance (1994); Roe, *Political Determinants*, *supra* note 27; Mark J. Roe, *Can Culture Constrain the Economic Model of Corporate Law?*, 69 U. Chi. L. Rev. 1251 (2002).

109. *See, e.g.*, Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 Int'l Law. 69, 73 (2003) ("Corporate law does not explicitly address the problem of corporate compliance with human rights standards; indeed, its systematic orientation aggravates the problem of standard setting and compliance."); *cf.* State ex rel. Pillsbury v. Honeywell, Inc., 191 N.W.2d 406, 411 n.5 (Minn. 1971) (stating that the only proper purpose for communication with shareholders is economic and that using stock to try to impress a particular political or social philosophy on the corporation is not a valid business purpose).

110. Modern scholarship in the United States, however, has begun to effectively question the extent and depth of this separation. *See* Franklin A. Gervurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 Hofstra L. Rev. 89, 172 (2004) ("[T]o dismiss the goal of political legitimacy is to ignore the history of the corporation and of the board of directors."). Professor Gevurtz notes the ease with which Americans especially dismiss the idea of applying a public law governance model to corporations. *Ibid.* (citing Henry G. Manne, *Citizen Donaldson*, Wall St. J., Aug. 7, 2003, at A10).

111. *See infra* Part II.

112. For an extended discussion of this point, especially in connection with developing country strategies for participating in economic globalization, see Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, Free Market Globalism*, 14 Transnat'l L. & Contemp. Probs. 337 (2004).

domestic regulation. The determination of the appropriate law to apply to resolve questions of liability is also left to private law, the law of conflicts. Yet, this sort of local regulation is acceptable in the context of economic globalization only if it does not deviate from globalization's core norms—centered on markets, contract, and private activity.

But the globalization of private markets through public regulation has produced a measure of tension, if not contradiction. Thus, for example, it has become common to hear arguments suggesting that multinational corporations can allocate risk within their global operations in a way that may make it harder for any one jurisdiction to provide effective remedies to its citizens in accordance with its own political tastes.[113] Also common are arguments that suggest that global economic enterprises use national borders to effectively partition their enterprise assets, passing risk unfairly onto third parties—customers, employees, trade creditors, and others unlikely to be able to protect themselves in the new global private market economy. As a result, the perception grew that states were losing the power to shape the character of corporate responsibility to their own liking,[114] and that the institutionalization of systems of economic transactions produced by globalization tended to favor only foreign owners while allocating all risk domestically, with little effective prospect of redress.[115]
These tensions have become the object of increasing criticism by other emerging global actors. Just as economic globalization added a transnational element to economic regulation, social and political globalization added a transnational and even an international element to social policy debates. Civil society, like corporations, became multinational. In this sense, at least, globalization has to be understood as not only economic, but also as producing powerful social, cultural, and political movements. These webs of political and social globalization seek to affect both the character and independence of economic actors and the power of nation-states to regulate these entities and their relation to others.

This globalized discourse added another question to the traditional two questions within which the debate about corporate responsibility had been framed:[116] *What is/are the appropriate institution(s) and institutional level(s) for the legal regulation of corporations—local, national, supra-national, or international?*[117] This additional question complicated the original problem matrix in three ways. First, it broadened the range of constituencies transnational businesses might seek to serve. Second, it broadened the framework for regulation to include an international structural and political dimension. Third, it opened the possibility that regulatory power would be dispersed among multiple actors.[118] This more recent question suggests the possibility that the power to control the authoritative discourse over corporate characteristics and responsibilities could be wrested from the

---

113. *See, e.g.*, Joseph, *supra* note 91, at 3–5; Redmond, *supra* note 109.

114. *See* David C. Korten, When Corporations Rule the World 124–26 (1995); Osvaldo Sunkel, *Big Business and "Dependencia": A Latin American View*, 50 Foreign Aff. 517 (1972).

115. *See* Marc Galanter, *Law's Elusive Problem: Learning From Bhopal*, *in* Transnational Legal Processes: Globalization and Power Disparities 172 (Michael B. Likosky ed., 2002); *cf.* Jamie Cassels, The Uncertain Promise of Law: Lessons From Bhopal (1993) (gauging the ability of domestic and international legal processes to prevent industrial accidents and to repair harm from such accidents).

116. The questions are: Whom must corporations serve and to what extent should the regulation of corporations be left to the market, to private ordering (contract law) among corporate stakeholders, or to public regulation by the state? *See supra* notes 52–53 and accompanying text.

117. This is the essential formulation of the question for even the most complex study of the issue of the "transnational" or "multi-national" corporation. *See, e.g.*, Muchlinski, *supra* note 38, at 102–14; K.P. Sauvant & V. Aranda, *The International Legal Framework for Transnational Corporations*, *in* Transnational Corporations: The International Legal Framework 83, 83 (A.A. Fatouros ed., 1994).

118. *See* Larry Catá Backer, *Economic Globalization Ascendant and the Crisis of the State: An Essay On Four Perspectives*, 16 Berkeley La Raza L.J. (forthcoming Spring 2006); Teubner, *supra* note 46.

institutions controlling the national discourse of corporate law,[119] and vested, to some extent, in the actors with some control over the transnational discourse of international and human rights law.[120]

The composition of this new layer of debate on corporate social responsibility is complex. It is made up of a variety of differing national understandings of the necessary relationship between entities (like corporations) and their chartering jurisdictions. States chartering the most economically powerful entities tend to resist any form of transnational interference other than the maintenance of open and transparent markets. Other states are more amenable to a larger amount of international or transnational regulation. Also important to the mix, especially among developing states, is the social, cultural, and economic development of the chartering jurisdiction, as well as their peculiar histories as host states to economic entities chartered elsewhere.[121] Pressure for regulation at a supra-national level came from virtually every state, but their respective motivations were very different.[122] First, developed nations feared competitive threats from each other. In the 1960s, the Europeans feared swamping by American companies. In the 1970s, the U.S. feared competitive threats to the domestic market by European and Japanese (and now Chinese) goods.[123] From the 1970s, the Japanese feared the effects of trade liberalization on its domestic economy as well as on its trade surplus.[124] Also since the 1970s, sectors of the

119. As an example, academic and judicial discourse on corporate law has tended to focus on the work of the Delaware judiciary. For the classic discussion, see Roberta Romano, *The State Competition Debate in Corporate Law*, 8 Cardozo L. Rev. 709 (1987); *see also* Mark J. Loewenstein, *Delaware as Demon: Twenty-Five Years After Professor Cary's Polemic*, 71 U. Colo. L. Rev. 497 (2000) (evaluating the debate about whether Delaware's corporate laws cause a race to the bottom or a race to the top in state corporate law development). The corporate Bar, and the academic professorate specializing in "corporate law," have also been critical in shaping and limiting the scope of the discourse. Academics and the elite Bar often compete for influence within the field, in which no others are invited to participate. For excellent examples, touching on the value of poison pills in contests for corporate control, see Bebchuk, *supra* note 60; Martin Lipton, *Pills, Polls, and Professors Redux*, 69 U. Chi. L. Rev. 1037 (2002). For a strongly worded criticism of the primacy of the elite Bar over the Revised Model Business Corporation Act (and the elite Bar's competition for influence within the American Law Institute, regarded as more in the thrall of academics) see Douglas M. Branson, *The Death of Contractarianism and the Vindication of Structure and Authority in Corporate Governance and Corporate Law*, *in* Progressive Corporate Law, *supra* note 30, at 93, 101–02.

120. That public discourse is centered in the international and human rights field within American legal academia, and elsewhere. Institutionally, the focus is on the organs of the U.N. Commission on Human Rights in Geneva.
The main themes addressed by the Commission are: the right to self-determination; racism; the right to development; the question of the violation of human rights in the occupied Arab territories, including Palestine; the question of the violation of human rights and fundamental freedoms in any part of the world; economic, social and cultural rights; civil and political rights, including the questions of torture and detention, disappearances and summary executions, freedom of expression, the independence of the judiciary, impunity and religious intolerance; the human rights of women, children, migrant workers, minorities and displaced persons; indigenous issues; the promotion and protection of human rights, including the work of the Sub-Commission, treaty bodies and national institutions; and advisory services and technical cooperation in the field of human rights.
Office of the U.N. High Comm'r for Human Rights, Comm'n on Human Rights, *Background Information*, http://www.ohchr.org/english/bodies/chr/background.htm (last visited Dec. 21, 2005). The United Nations Human Rights Commission "also acts as a forum where countries large and small, non-governmental groups and human rights defenders from around the world can voice their concerns." U.N. Comm'n on Human Rights, *Background Note* 1 (2004), www.un.org/issues/inf/documents/hrc-ebackground.pdf.

121. *See* Muchlinski, *supra* note 38, at 1–11.

122. For an excellent summary, from which the next paragraphs draw, see *Ibid.* at 1–11, 90–115, 573–604.

123. *See Ibid.* at 3–4 (citing Jean Servan-Schriber, The American Challenge (1968)).

124. On the politics of trade liberalization in Japan see, for example, Thomas J. Schoenbaum, *Trade Friction With Japan and the American Policy Response*, 82 Mich. L. Rev. 1647 (1984); Timothy J. Curran, *The Politics of Trade Liberalization in Japan*, 37 J. Int'l Aff. 105 (1983).

American political establishment feared the power of TNCs to exploit global labor and resource markets to move operations (and jobs) out of the United States.[125]

Second, developing nations feared that the continuing economic influence of the old colonial powers would give rise to economic imperialism through TNCs.[126] TNCs are widely believed to have a history of "intervening in or subverting the political processes of host states by contributing directly to political campaigns; bribing local government officials or co-opting local elites."[127] TNCs also have the capacity, "through their domination of the world's media," to "significantly limit states' rights to determine their own socio-cultural fates."[128] In addition, developing nations regard TNCs as impeding their ability to foster the growth of domestic economies.[129] These states had well developed economic and political agendas, with their genesis in the early work of the United Nations' economic development agencies. The goal of these agendas was to seek regulation of TNCs for the purpose of using TNCs as instruments of development and wealth transfer from the old metropolitan centers to the developing world.[130]

Third, starting with the involvement of TNCs in the overthrow of Chile's Marxist government (in league with the U.S. government) in the early 1970s, there were a series of highly publicized misadventures by TNCs involving

---

125. The sense, in some quarters of the United States political community was that "[m]ultinational corporations have become increasingly adept at pitting state and local governments throughout the world against one another." Michael H. Shuman, *GATTzilla v. Communities*, 27 Cornell Int'l L. J. 527, 528 (1994). By the early 1990s, American attitudes to TNCs were ambiguous at best:
There is the further complication that many U.S. companies now function multinationally and are no longer tied to the fortunes of any particular nation, although they are nevertheless interested in "their" government's aid in pursuing extraterritorial investment on favorable terms. Numerous federal statutes and regulations function to allow and sometimes reward U.S. investment *outside* the United States. These programs are sometimes defended as benevolence toward underdeveloped nations; at other times they may be depicted as part of a strategy for enhancing the competitiveness of "our" corporations. The Bush Administration received much criticism on this issue during the recent presidential campaign.
Fran Ansley, *Standing Rusty And Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 Geo. L.J. 1757, 1777–78 (1993). Some American commentators sought to find solutions within the context of American corporate law. *See, e.g.*, Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. Rev. 1189 (1991).

126. *See* Republic of Cuba, Permanent Mission to the United Nations and International Organizations With Headquarters in Switzerland, Note No. 461 to the Office of the UN High Commission for Human Rights, October 27, 2004. This concern was reflected in the work of various academics. *See, e.g.*, Dine, *supra* note 83.

127. Fleur Johns, *The Invisibility of the Transnational Corporation*, 19 Melb. U. L. Rev. 893, 905–06 (1994).

128. *Ibid.* at 906. These same practices infringe upon a state's people's right to self-determination, as history has shown TNCs "soliciting the assistance and protection of [foreign] troops," and "disturbing [the] traditional subsistence economies [of indigenous peoples], rendering them economically dependant upon corporate offerings . . . thus [making them] pliable to the corporate will." *Ibid.* at 908. "When foreign businesses come in they often destroy local competitors, quashing the ambitions of local businessmen who had hoped to develop homegrown industry. . . . [A]fter the international firm drives out the local competition, it uses its monopoly power to raise prices." Stiglitz, *supra* note 31, at 68.

129. However, the empirical evidence on this score is increasingly ambiguous, pointing to complexities beyond a mere distinction based on country of origin of investment. *See* Christian Bellack, *How Performance Gaps Between Domestic Firms and Foreign Affiliates Matter For Economic Policy*, 13 Transnat'l Corps. 29 (2004) (concluding that data suggests only a limited argument for discrimination in favor of domestic over foreign ownership of firms, but that data also indicates the relevance of distinction between investment by multi-national versus single nation firms).

130. *See* U.N. Econ. Comm. for Latin America, The Economic Development of Latin America and Its Principal Problems (1950), *discussed in* Rafael A. Porrata-Doria, Jr., Mercosur: The Common Market of the Southern Cone 7–9 (2005).

corruption and interference in local politics.[131] The popular media began to view TNCs as creatures worthy of suspicion and regulation.[132] A working document produced by the Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities declared that TNCs "are frequently, if not always, behind massive human rights violations; in the same spirit, the States that benefit from their activities pass legislation in their favour, protecting them to the detriment of the people and their rights. . . . Moreover, certain [TNCs] encourage States to violate their people's rights."[133]

Fourth, starting in the 1960s, academic interest in TNCs began to grow, resulting in the treatment of TNCs as something different or potentially different from domestic economic enterprises, irrespective of the form of their legal organization.[134] International institutions have contributed in significant ways to the fostering of this academic interest, and to harnessing it as well. Thus, for example, the U.N. Conference on Trade and Development ("UNCTAD") has been gathering data on TNCs for a number of years.[135] International organizations have also sponsored academic journals in which work on TNCs can be published and disseminated. The academic journal *Transnational Corporations*, formerly *The CTC Reporter*, has been published under the auspices of the United Nations since the 1970s.[136]

Fifth, academics and segments of global culture embraced "Marxist" and other "progressive" ideologies which were, at their heart, anti-capitalist/consumerist and which saw the TNC as the latest stage in the march toward

---

131. *See, e.g.*, T. Moran, Multinational Corporations and the Politics of Dependence: Copper in Chile 252–53 (1977); Anthony Sampson, The Arms Bazaar (2d ed. 1991).

132. *See, e.g.*, the website maintained by the Business and Human Rights Resource Centre, http://www.business-humanrights.org. For a more formal discussion of the nature of corporate complicity in human rights and other abuses, see Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 Hastings Int'l & Comp. L. Rev. 339 (2001). For an early example of the policy response to the perception of these abuses, see generally R.S. Barnett & R.E. Muller, Global Reach: The Power of Multinational Corporations (1974), analyzing the incentives and structure attributes of the multinational corporation that contribute to its power and lack of accountability on a global level.

133. ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Working Document: The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations*, ¶ 16, U.N. Doc. E/CN.4/Sub.2/1998/6 (June 10, 1998) (*prepared by* Mr. El Hadji Guissé), *available at* http://www.unhchr.ch/Huridocda/Huridoca .nsf/(Symbol)/E.CN.4.Sub.2.1998.6.En?Opendocument [hereinafter 1998 Sub-Commission Report]; *see also* Menno T. Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, *in* The EU and Human Rights 553 (Philip Alston ed., 1999) (describing TNC complicity in human rights abuses in Africa).

134. *See* D.K. Fieldhouse, *The Multinational: A Critique of a Concept*, *in* Multinational Enterprise in Historical Perspective 9 (Alice Teichova et al. eds., 1986); Sanjaya Lall, The Multinational Corporation (1980); Muchlinski, *supra* note 38 (esp. ch. 2); Raymond Vernon, Sovereignty at Bay: The Multinational Spread of U.S. Enterprises (1971); Raymond Vernon, Storm Over the Multinationals – The Real Issues (1977).

135. *See* U.N. Conference on Trade and Dev. (UNCTAD), http://www.unctad.org/ (last visited Dec. 21, 2005). UNCTAD maintains an extensive FDI/TNC database at http://www.unctad.org/Templates/Page.asp?intItemID=3137&lang=1 (last visited Dec. 21, 2005). The web site describes the database as follows: "Based on national, regional and international data sources, the FDI/TNC database contains information on inward and outward flows and stock of FDI, classified by type of investment, by region and by industry (and, whenever available, both by country and industry), for almost 200 countries and economies worldwide." *Ibid.*

136. *Transnational Corporations* is currently published by the UNTAD. The editorial statement provides that the "basic objective of this journal is to publish articles and research notes that provide insights into the economic, legal, social and cultural impacts of transnational corporations in an increasingly global economy and the policy implications that arise therefrom." *Editorial Statement*, 13 Transnat'l Corps. ii (2004).

monopoly capitalism or as the vanguard of capitalist consumerism.[137] These movements were not necessarily coordinated, nor did they necessarily pursue common goals.[138] Each, however, saw in the multinational corporation the great example, symptom, or cause of some or all of the great maladies affecting the world.[139] Moreover, the so-called neo-liberal model was not merely questioned by the far left; its basic assumptions and methods, especially in connection with globalization through private amalgamations of economic power, were also questioned by high-status Western academics.[140] In particular, Western academics began to question the artificiality of the separation of the economic and social roles of corporations in the context of a developing international normative framework of human rights.[141] These approaches are reflected in the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which influenced much of the *Norms*: "Today's economic and financial systems are organized in such a way as to act as pumps that suck up the output of the labour of the toiling masses and transfer it, in the form of wealth and power, to a privileged minority."[142]

Sixth, internationalization of the corporate governance debate provided both a firmer foundation and a broader context for the social responsibility dispute that had been traditionally confined to a purely national audience.[143] Arguments for the expansion of notions of stakeholders, for a more pronounced social role for corporations, and for a public law orientation for the regulation of corporations, tended to find a more receptive audience across national borders than within them and among communities of transnational civil society actors rather than across communities of national civil society actors.

---

137. *See, e.g.*, John H. Dunning, Global Capitalism at Bay? (2001) (cataloguing the influence that both TNCs and national governments have on the technological, social, and institutional development of global capitalism); Bob Milward, Globalisation? Internationalisation and Monopoly Capitalism: Historical Processes and Monopoly Capitalism 25–36 (2003) (arguing that TNCs are the current manifestation of the drive toward consolidation in the search for profit that, because of the basic contradictions of capitalism, will result in the system consuming itself).

138. These views, at the state level, have been expressed best by the official response of the Republic of Cuba to the *Norms*:

> En este sentido, un problema central dentro del actual esquema de globalización, es que en las últimas décadas, los círculos de poder politico, económico e informativo transnacional, con centro en los países desarrollados y con fuertes tentáculos en otras partes del mundo, vienen promoviendo a ultranza, de una manera fundamentalista, una supuesta liberalización y desregulación como receta universal para todos los países del mundo, como parte de su doctrina neoliberal.

Republic of Cuba, Permanent Mission to the United Nations and International Organizations With Headquarters in Switzerland, Note No. 461 to the Office of the UN High Commission for Human Rights (October 27, 2004), http://www.ohchr.org/english/issues/globalization/business/contributions.htm.

139. *See, e.g.*, J. Karliner, The Corporate Planet (1997); Korten, *supra* note 114.

140. *See, e.g.*, Douglass North, Institutions, Institutional Change and Economic Performance (1990); Amartya Sen, On Ethics and Economics (1987); Stiglitz, *supra* note 31.

141. Michael Aldo states:

> As a consequence of its devotion to the economic persona of corporations, the role of the law in corporate matters generally and in relation to transnational corporations in particular has been of relatively marginal effect. . . . The equally compelling non-economic aspects of corporate life are relegated to a separate moral domain in which compliance is voluntary and is based on the personal conscience of corporate executives.

Michael K. Aldo, *Human Rights and Transnational Corporations—an Introduction*, *in* Human Rights Standards and the Responsibilities of Transnational Corporations, *supra* note 41, at 3, 9.

142. 1998 Sub-Commission Report, *supra* note 133, ¶ 1.

143. *See* discussion *supra* Part I.

Seventh, the 1990s especially saw an intensification of structuralism and institutionalism in the creation of a universally applicable set of global legal norms centered on the United Nations and its agencies.[144] The intense concentration on the "phenomenon" referred to as "globalization" provided a context of "crisis"[145] in which these approaches could both be legitimated. Globalization of regulation has taken three forms. In one form, it appears as attempts to control global economic activity through a reliance on markets and market liberalization, leaving it to the states to impose non-trade threatening regulation of economic activity within their borders (the neo-classic or liberal model).[146] In another form, globalization of regulation appears as attempts to provide voluntary guidelines for corporate conduct and governance standards by national, supra-national, and international bodies (the moral restraint model).[147] This form of "volunteerism" has been criticized by developing countries as lacking input from representatives of developing states. Though crafted by developed countries as voluntary standards, such

144. David Weissbrodt, one of the principal authors of the *Norms*, helped explain it thusly:
Throughout the past half century, states and international organizations have continued to expand the codification of international human rights law protecting the rights of individuals against governmental violations. In parallel with increasing attention to the development of international criminal law as a response to war crimes, genocide, and other crimes against humanity, there has been growing attention to individual responsibility for grave human rights abuses. *The creators of this ever-larger web of human rights obligations, however, failed to pay sufficient attention to some of the most powerful non-state actors in the world, that is, transnational corporations and other business enterprises*. With power should come responsibility, and international human rights law needs to focus adequately on these extremely potent international non-state actors. David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 97 Am. J. Int'l L. 901, 901 (2003) (emphasis added) (referencing in part Mary Robinson, High Comm'r for Human Rights, Second Global Ethic Lecture (Jan. 21, 2002)).

145. There were any number of books produced in the 1990s foretelling the absorption of power in the world by groups of vast economic enterprises. *See, e.g.*, Richard Falk, Predatory Globalization: A Critique (1999); Leslie Sklair, The Transnational Capitalist Class (2001).

146. *See, e.g.*, Bernard S. Black, *The Legal And Institutional Preconditions for Strong Securities Markets*, 48 U.C.L.A. L. Rev. 781 (2001) (focusing on securities markets). Under this approach, national regulatory divergence is possible even as states embrace market liberalization models. *See, e.g.*, Martin Rhodes, & Bastiaan van Appeldoorn, *Capitalism Unbound? The Transformation of European Corporate Governance*, 5 Eur. J. Pub. Pol'y 406 (1998) (discussing market liberalization and divergence in national governance regimes); William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38 Colum. J. Transnat'l L. 213 (1999) (discussing the difficulty of converging corporate governance into a single best practice set of norms); *cf.* Comparative Corporate Governance: The State of the Art and Emerging Research (Klaus J. Hopt et al. eds., 1998) (making various contributions on issues of corporate organization and governance from the perspective generally of harmonization, its limits and best practices).

147. The push toward voluntary embrace of good corporate citizenship has been explained in a variety of ways. For a good synthesis, see Sklair, *supra* note 145. The explanations include: (1) that those who own and control TNCs are citizens too and may react to bad behavior by business like any other person; (2) that good citizenship results either from public regulation or the threat of regulation; (3) that good citizenship affects market share as well as the ability of individual managers to increase personal power within industry and advance careers. *Ibid.* at 149–51. Some of these motivations can be gleaned from the statements of organizations responsible for the development of these voluntary codes. For example, the Organisation for Economic Co-operation and Development (OECD) has promulgated its Guidelines for Multinational Enterprises at http://www.oecd.org/dataoecd/56/36/1922428.pdf (last visited Dec. 21, 2005). The OECD website suggests that these Guidelines are "voluntary recommendations to multinational enterprises in all the major areas of business ethics, including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. Adhering governments have committed to promote them among multinational enterprises operating in or from their territories." OECD, *The OECD Guidelines for Multinational Enterprises, About*, *available at*
http://www.oecd.org/about/0,2337,en_2649_34889_1_1_1_1_1,00.html (last visited Dec. 21, 2005).

volunteerism is binding in fact for developing states.[148] Last, this regulatory globalization takes the form of attempts to control global economic activity through direct and indirect international regulation (the control model).[149]

Some forms of the debates centering on supra-national regulation of economic enterprises reflect not changing theoretical stances but broader divisions between global actors. Many of the arguments tend to blend more than one of the strands of policy described above. Thus, for example, in current debates, the developed world and some members of the developing world tend to favor the liberal and moral restraint models.[150] On the other hand, an important segment of developing countries, along with portions of the academic community and international civil and public actors, tend to favor a control model, especially one that gives legislative primacy to human rights as the supreme and binding form of universally applicable international regulation.[151] These groups assert that the global power of TNCs dwarf that of many developing nations. TNCs' economic power produces social and political power as well, power that is enormous and global. TNCs can affect the level of enjoyment of the economic, social, and political rights of people across states, but states cannot effectively regulate them. Some regulation at the international level is necessary to control the possibility of abuse by TNCs of their dominant position and to ensure that TNCs contribute to the development of less developed states and to the protection of individuals' social, political, and economic rights.

Taken together, these strands of thought tended to point to a reassessment of the benefits of regulating multinational corporations at the international or at least supra-national level. Practitioners and academics in the field of corporate law were inclined to treat the issue of national regulation of corporations and other economic entities as a sacred cow. A new generation, with little allegiance to the institutional patterns of the corporate law field, sought to recast the debate about regulating corporations and other economic entities outside the narrow confines of the corporate law field.[152] As a result, analysis does not invariably start with presumption of the

148. *See* Fidel Castro Ruz, Speech at the Great Hall of the Central University of Venezuela: Una Revolucion Solo Puede Ser Hija de la Cultura y de las Ideas (Feb. 3, 1999), *available at* http://www.cuba.cu/gobierno/discursos/1999/esp/f03299e.html. In his speech, Fidel Castro Ruz stated:
La OCDE, club exclusivo de los ricos, estaba elaborando, practicamente en secreto, un acuerdo multilateral de inversions con carácter supranacional, para establecer las leyes relacionadas con las inversions extranjeras. . . .
Después lo ponen sobre una mesa, el que quiera subscribirlo que lo suscriba y el que no, ya sabe lo que le pasa.
Ibid. But see Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. Int'l L.J. 309, 319–20, 345–46 (2004) (describing TNC self-regulation as a voluntary response to changing market pressures and how non-binding codes, such as Organisation for Economic Co-Operation and Development Guidelines, act as a means of reinforcing TNC self-regulation).

149. For a discussion, see Kinley & Tadaki, *supra* note 41, at 993–1021. For a discussion of the *Norms* in this context, see, for example, Julie Campagna, *United Nations Norms On The Responsibilities Of Transnational Corporations And Other Business Enterprises With Regard To Human Rights: The International Community Asserts Binding Law On The Global Rule Makers*, 37 J. Marshall L. Rev. 1205 (2004). For an early call for the internationalization of this field, see Wolfgang Friedmann, The Changing Structure of International Law 230 (1964).

150. *See, e.g.*, Employment & Social Affairs, Eur. Comm., Green Paper: Promoting a European Framework for Corporate Social Responsibility (2001), http://www.europa.eu.int/comm/employment_social/soc-dial/csr/greenpaper_en.pdf.

151. *See, e.g.*, Joel R. Paul, *Holding Multi-National Corporations Responsible Under International Law*, 24 Hastings Int'l & Comp. L. Rev. 285 (2001); Ratner, *supra* note 40; Weissbrodt & Kruger, *supra* note 144.

152. *See, e.g.*, Kinley & Tadaki, *supra* note 41, at 933 ("This article is concerned with developing the arguments for, and designing the architecture of, such regulation with respect to the human rights obligations of corporations at the level of international law.").

primacy of national regulation,[153] or of shareholders (or other equity holders),[154] or of the private actor model for corporate activities.[155] This newer analysis, grounded in public law, increasingly came to view corporations as another factor in the production of power that, like states, required webs of regulation grounded in public law notions of transparency, democracy, and accountability.[156]

From an institutional context, these strands of thought on corporate social responsibility and state control found their most important home in the United Nations Human Rights community. The *Norms* themselves illustrate the extent to which the issue of corporate social responsibility is no longer confined to charitable giving, or understood in the context of shareholder welfare maximization. They also illustrate the way in which the transnational realities of corporate operation have affected assumptions of regulatory home, away from the state and toward transnational or international institutions. In addition, they evidence the great conceptual change in the basis of regulation. Corporate regulation is no longer merely a matter limited to the traditional fields of "corporate" or "economic" law and policy; it is now also a creature of social policy. The *Norms* make these great conceptual leaps with little explanation—corporate law is now also an object of international law. It assumes preemption, and the supremacy of international law, even an international law of private contract, over state

153. For a good example, see Craig Scott & Robert Wai, *Transnational Governance of Corporate Conduct Through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation*, *in* Transnational Governance and Constitutionalism, *supra* note 49, at 287, 289 ("This paper builds on models of transnational governance based on plural norm systems.").

154. For an example, see Orts, *supra* note 30, at 260–61.

155. The American school of Catholic Social Thought has become a leading voice in this respect. *See, e.g.*, William Quigley, *Catholic Social Thought and the Amorality of Large Corporations: Time to Abolish Corporate Personhood*, 5 Loy. J. Pub. Int. L. 109 (2004). Professor Quigley nicely summarized the basis of Catholic Social Thought with respect to corporations:

In 1961, Pope Paul XXIII, in the encyclical *Mater et Magistra*, explicitly underscored the duty of the juridical order to regulate public and private economic institutions towards the common good. The Second Vatican Council in 1965 in *Gaudium et Spes* pointed out that business enterprises like corporations are really, at base, groups of people who should have duties that transcend strictly construed ideas of ownership and mere accumulation of profit. In the 1967 encyclical *Populorum Progressio: On the Development of Peoples*, Paul VI restated the importance of subordinating rights to property and free commerce to the need for creating ways that all people can possess the necessities for basic human dignity. In 1971, Paul VI refined the critique of current arrangements and concentrations of economic power by private organizations. *Ibid.* at 122–23. *See also* Stephen M. Bainbridge, *Catholic Social Thought and the Corporation*, 1 J. Cath. Soc. Thought 595 (2004) (positing that the Catholic Church can have an institutional role in both corporate governance, though Catholic thought is understood appropriately as neither socialist nor pro-capitalist); Susan J. Stabile, *Using Religion to Promote Corporate Responsibility*, 39 Wake Forest L. Rev. 839, 872 (2004) ("The recognition of the communion of all beings, and the concomitant acceptance of more social liberalism and a more restrained capitalism, leads to a more-public conception of the corporation and an expanded view of both the obligations of the corporation and what constitutes appropriate regulation of corporations."). For other bases, see William W. Bratton, *Confronting The Ethical Case Against The Ethical Case For Constituency Rights*, 50 Wash. & Lee L. Rev. 1449, 1449 (1993) ("[A]s we describe corporate law's agency concept more fully, ethical and political barriers start to impede the case for constituency rights."). On the other hand, Stephen Bainbridge sought to bridge the gap between Catholic Social Thought and modern law and economics, suggesting an affinity, or at least a consistency, between the two, that permits harmonization at some level. *See* Stephen M. Bainbridge, *Law and Economics: An Apologia*, *in* Christian Perspectives on Legal Thought 208, 221–23 (Michael W. McConnell et al. eds., 2001).

156. For an example, see Michael K. Addo, *Human Rights and Transnational Corporations—an Introduction*, *in* Human Rights Standards and the Responsibility of Transnational Corporations, *supra* note 41, at 3, 13 ("[T]he emerging debate carries more of a global focus . . . and touches on social and moral issues. In other words, the subject of corporate responsibility exceeds the narrow focus on economic norms such as directors' duties to shareholders, reporting obligations to regulatory authority or employee relations.").

regulation. This great conceptual leap provides a basis for crafting revolutionary approaches to the regulation of corporations.

The *Norms* are grounded in three critical reports, discussed in the following paragraphs. The Sessional Working Group was instructed to base its work on three identified background documents, two of which were prepared at the time the Sessional Working Group was constituted,[157] and the last prepared in 1998 by El-Hadji Guissé, whose work with and through the Sessional Working Group provided the foundation and perspective for what eventually emerged as the *Norms*.

1. July 24, 1995 Report:[158] This Report develops an argument for the extension of state responsibility to TNCs based on a simple power analogy: A state is any amalgamation of power that can assert the power normally exercised by, or otherwise coerce entities that are recognized as, states.[159] The result leaves TNCs in a position to play politics in a manner once reserved to state actors. Thus, for example, TNCs use their great leverage to play governments and communities off one another in order to maximize profits and achieve the lowest labor, consumer and environmental costs possible.[160] TNC profit-maximizing behavior also affects the distribution of high and low

157. The reports are identified in the various resolutions of the Sub-Commission from the time of the constitution of the Sessional Working Group. *See, e.g.*, Sub-Comm'n on Human Rights Res. 2001/3, U.N. Doc E/CN.4/Sub.2/Res/2001/3 (Aug. 15, 2001) (taking into account background document E/CN.4/Sub.2/1995/11, the report E/CN.4/Sub.2/1996/12 and Corr.1 submitted by the Secretary-General, and the background document E/CN.4/Sub.2/1998/6 prepared by Mr. El-Hadji Guissé); Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities Res. 1998/8, U.N. Doc. E/CN.4/Sub.2/Res/1998/8 (Aug. 20, 1998) (reiterating that these documents form the background for any reports by the working group on the right to development).

158. ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *The Realization of Economic, Social and Cultural Rights: The Relationship Between the Enjoyment of Human Rights, in Particular, International Labour and Trade Union Rights, and the Working Methods and Activities of Transnational Corporations*, U.N. Doc. E/CN.4/Sub.2/1995/11 (July 24, 1995) (*background document prepared by the* Secretary General), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/716804351e67ab3c802566b2004f1cbf?Opendocument [hereinafter 1995 Sub-Commission Report].

159. The 1995 Sub-Commission Report states:

> A United Nations report summarized as follows the factors that have contributed to TNCs acquiring considerable market power vis-à-vis Governments and enterprises in developing countries: their command over resources of various kinds—finance, management, marketing, networks and skills, technology and "know-how" generally; their ability to combine and deploy such resources across the world; the success, particularly of TNCs enjoying monopolistic positions, in generally integrating their subsidiaries and affiliates into the company as a whole rather than into the economy of the host country; the behaviour of affiliates which have tended to act in line with the strategy of the parent company rather than as autonomous enterprises. *Ibid.* ¶ 52; *see also Ibid.* ¶¶ 4–8 (outlining the ways that transnational corporations function in global economies, their influence on the flow of transnational capital, and their relationship to developing nations).

160. *See Ibid.* ¶ 53. Globalization, according to the 1995 Sub-Commission Report, "increased locational mobility of TNC's and their monopolistic and oligopolistic tendencies have increased the bargaining power of TNC's and have been associate with a loss of decision-making capacity by States, especially in developing countries." *Ibid.* ¶ 99. As a consequence, globalization, understood as trade liberalization and the dismantling of locally protective legislation, has resulted in a reduction of "the capacity of national or local government to create the necessary conditions for the realization of economic, social and cultural rights," because "when measures designed to stimulate the private sector are put into place, what often occurs is the *de facto* relinquishment of what were previously State responsibilities." *Ibid.* ¶ 101.

skill work on a global basis in a way that penalizes developing states.[161] As a consequence, "[t]he activities and methods of work of TNCs have implications for the effective enjoyment of a number of human rights."[162]

As a corollary, the 1995 Sub-Commission Report elaborates a public law model of a corporate stakeholder. The Report abandons the traditional limits of shareholder primacy in favor of a model that equates the stakeholders of a nation in which the corporation operates as the stakeholders of the corporation.[163] From this model, it follows that TNCs share an obligation for development of poorer nations that might in some cases approach the obligation of nation-states.[164] In an extended section, the Report lays out the socio-legal and political foundations of its analysis.[165] This foundation is critical for an understanding of assumptions and theories underlying the construction of the *Norms*. It also highlights the extent to which these assumptions vary, and vary significantly, from traditional understandings of corporate governance in general and corporate social responsibility in particular. No longer grounded in a self-referential enterprise theory, corporate regulation must proceed from a broader context of the administration of individual public rights. "TNCs are one of the agents of [a new system of global] exclusion. . . . [T]his includes exclusion from international commodity markets on acceptable terms; from high wage labor markets; from the benefits of TNC operations; from security; [and] from global resources."[166]
2. July 2, 1996 Report:[167] This Report nicely illustrates a number of the assumptions about corporate governance in a human rights context as outlined above.[168] The 1996 Sub-Commission Report elaborated what it termed a "New International Regulatory Framework" for corporate governance, [169] based in substantial part on its earlier

161. *Ibid.* ¶ 57 ("The global strategies of TNCs also exacerbate existing regional and international inequalities by sharpening the polarization between low-wage assembly work (largely in developing countries) and high-skilled activities (likely to be carried out in industrialized countries with large markets and available skills)."). *See also Ibid.* ¶ 91 ("TNCs, however, tend to have a narrow conception of development in which their activities and methods of work are oriented towards maximizing profit rather than promoting equality and improving human well-being.").

162. *Ibid.* ¶ 89.

163. *Ibid.* ¶¶ 89–97 (describing the main human rights issues of TNC operation as stemming from principles of profit maximization and resistance to the democratization of the economy). The report noted that "[t]he Secretary-General has stated elsewhere that the management of the world's economic future can no longer be left to the law of profit." *Ibid.* ¶ 95.

164. The 1995 Sub-Commission Report concluded, on the basis of its analysis of the methodologies of TNC operations in a liberalized global economic environment that "[t]he concentration of economic and political power [in TNCs] was identified by the Working Group on the Right to Development as an obstacle to the realization of the right to development. . . . To this effect, 'ground rules' are necessary at the national and international levels to combat the abuses of economic concentration and restrictive trade practices." *Ibid.* ¶ 142.

165. *See Ibid.* ¶¶ 89–103.

166. *Ibid.* ¶ 103.

167. ECOSOC, Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, *The Impact of the Activities and Working Methods of Transnational Corporations on the Full Employment of all Human Rights, in Particular Economic, Social, and Cultural Rights and the Right to Development, Bearing in Mind Existing International Guidelines, Rules and Standards Relating to the Subject Matter*, U.N. Doc. E/CN.4/Sub.2/1996/12 (July 2, 1996) (Report of the Secretary General), *available at* http://www.unhchr.ch/Huridocda/Huridoca
.nsf/TestFrame/780fd883b848cf498025669d0059328d?Opendocument [hereinafter 1996 Sub-Commission Report].

168. The 1996 Sub-Commission Report states:
The present report addresses the consequences of the activities and methods of work of TNCs on the transfer of technology and information and their impact on the realization of human rights, in particular economic, social and cultural rights and the right to development, bearing in mind existing international guidelines, rules and standards relating to the subject-matter. *Ibid.* ¶ 6.

169. *See Ibid.* ¶¶ 71–85.

assessment of the necessary grounding of that framework in public international rather than domestic economic law.[170]

The Framework is based on two deviations from traditional corporate governance norms. The first posits a positive social role for corporations.[171] This social role is not the passive, voluntary, and permissive social role of corporations expressed in the Berle-Dodd debate, or in the American cases.[172] Instead, it seems to change the focus of maximization of corporate operations from maximization of shareholder wealth to maximization of corporate "contribution to economic and social development."[173] Corporate social obligations extend to development,[174] labor relations,[175] environmental protection,[176] human rights,[177] and technology transfers.[178] The second deviation posits enterprise liability for corporations operating through subsidiaries and other legal personalities.[179] A principal consequence of this approach is that international, rather than national, regulatory frameworks are necessary to appropriately control TNC activity across borders.[180] The authors of the Framework argued that an international regulatory framework was required in place of the traditional reliance on coordinated national legislation in order to create a uniform regulatory system and avoid abuse by powerful private economic interests able to exploit differences in economic power and social organization among the states hosting their operations.[181] This approach embraces a position that remains highly controversial, even within industrialized

170. *See Ibid.* ¶ 60.

171. The Report argues that the "globalization of economic activities by TNCs has led to expressions recognizing the increasing responsibility of TNCs towards society." *Ibid.* ¶ 77. *See also* ¶ 71 (noting that emerging and current international rules do not recognize TNCs' social activities and accordingly cannot regulate and promote TNCs' social responsibility); *Ibid.* ¶ 76 (arguing that economic and social aspects of development must be considered simultaneously).

172. *See supra* notes 58–66 and accompanying text.

173. 1996 Sub-Commission Report, *supra* note 167, ¶ 74.

174. *See Ibid.* ¶¶ 74–76. "[C]omplementary and multidimensional character of the right to development will not be achieved if only one aspect, as happens in the negotiation of TNC-related documents in economic forums, is considered to the exclusion of others." *Ibid.* ¶ 76.

175. *See Ibid.* ¶ 72.

176. *See Ibid.* ¶¶ 75, 82.

177. *See Ibid.* ¶¶ 76–81.

178. *See Ibid.* ¶¶ 83–85.

179. The 1996 Sub-Commission Report explains that "even though each TNC subsidiary is, in principle, subject to its host country's regulations, the TNC as a whole is not fully accountable to any single country. The same is true for responsibilities they fail to assume for activities of their subsidiaries and affiliates." *Ibid.* ¶ 72.

180. *See Ibid.*

181. *Ibid.* ¶ 60 ("Since the activities of TNCs impact on many aspects of life, including work, health, food, economics, environment, trade and transfer of technology, the international community has, since the 1970s, sought a comprehensive, multilateral and universal framework to regulate their conduct.").

countries.[182] Indeed, even those developed states that have taken steps to recognize enterprise liability within their borders have tended to treat this as exceptional regulation.[183]

3. June 10, 1998 Report:[184] The 1998 Sub-Commission Report represents a consolidation of ideas developed in earlier work. By 1998, the normative framework from which a regulatory program would be created became clear: TNCs were viewed as vehicles for the transfer of wealth from poorer to richer states and from workers to investors. This was viewed as bad policy—a market failure of sorts (at least a political market failure)—in need of correction at a level of political governance at least as powerful and extensive as the TNCs to be regulated.[185] Transnational corporations occupy a privileged place near the heart of these economic and financial systems.[186] Transnational corporations both "play an important part in international economic life" and are in a "position to block any moves towards the respect for and protection of human rights."[187] Since globalization "may lead to the creation of even more wealthy transnational corporations but also even greater numbers of poor people,"[188] international law must adapt "in order to deal with the problem arising from their operation."[189]

The 1998 Sub-Commission Report does concede that TNCs "are of course organizations whose *raison d'etre* is to make a profit."[190] But the profit motive itself is suspect in the greater context of the implementation of a universal democratic principle of governance[191] and evolving international standards.[192] "It is impossible to incorporate respect for the values on which our existence is based into the current practices that aim to maximize profit regardless of other considerations."[193] Moreover, nation-states have conceded that the corporate operations are not limited solely by a "profit motive." Since states generally permit a social role for corporations, regulatory bodies have the power, consistent with this understanding, to set out the scope and characteristics of that power as well.[194] Though this approach might be viewed as an expansion, or even a distortion, of the nature of debates about

---

182. For a discussion of the issue from one of the great proponents of enterprise liability standards from the United States, see Blumberg, *supra* note **Error! Bookmark not defined.**. Professor Blumberg has long suggested the need to conflate the development both of principles of enterprise liability and regulation at the supra-national level:
The challenge for the world order is the evolution over the years ahead of an international legal machinery to mediate, adjust, and reduce national conflicts and to emerge with a framework that will not only facilitate the imposition of effective governmental controls over the activities of multinational groups, but will encourage the harmonious development of international economic relations.
Ibid. at 201.

183. *See* René Reich-Graefe, *Changing Paradigms: The Liability of Corporate Groups in Germany*, 37 Conn. L. Rev. 785 (2005).

184. 1998 Sub-Commission Report, *supra* note 133.

185. *Ibid.* ¶ 1.

186. The definition of transnational corporations is left ambiguously but broadly defined in the Report. *See Ibid.* ¶¶ 2–5.

187. *Ibid.* ¶ 7.

188. *Ibid.* ¶ 8.

189. *Ibid.* ¶ 9.

190. *Ibid.* ¶ 13.

191. *Ibid.* ¶ 18 ("The economic and social development of a country requires the participation of all its active members. Individuals should come first and last in action for development, that is to say, they should benefit from it as well as participating in it.").

192. *Ibid.* ¶¶ 19–20 (citing Art. 30 of the Universal Declaration of Human Rights and Art. 3 of the Declaration on the Right to Development).

193. *Ibid.* ¶ 21.

194. *See Ibid.* ("However, in the pursuit of this aim it is possible for them to leave room for the protection and promotion of individual human rights.").

corporate social responsibility at the state level, nonetheless it provides a plausible legal opening, and a rationale grounded in the "rule of law" for international regulation of the sort to be proposed as the *Norms.*
With the 1998 Report, the foundation for the approach taken by the eventual drafters of the *Norms* had been fully developed. The 1998 Sub-Commission Report recommended that domestic law be revised to make "punishable offenses with the right to compensation" all acts that could constitute "mechanisms and practices leading to violations of economic, social and cultural rights."[195] At the international level, the 1998 Sub-Commission Report recommended harmonization of criminal laws targeting transnational criminal activities, broadly defined, and enhanced cooperation in monitoring the activities of TNCs.[196]

4.2 The Rise and Fall of the Norms Project.

The *Norms* considerably altered the framework of the debate about corporate social responsibility. Corporations, seen as social, political, and economic actors, would serve not merely traditional stakeholders, but the state and international community as well. A public law model of corporate governance underlies the *Norms*. The *Norms* significantly expand the way that international law is implemented. The multinational corporation, rather than the state, is charged with the implementation of the *Norms* by incorporating the *Norms* in all of its contractual relations. The *Norms* might be understood as an expression of a globalist ideological position that seeks to move forward the trajectories of what it may see as the implications of the UN system by contributing to the construction of legalities and institutions at the international level that reduce the ability of states to resist emerging international law norms.

Yet that process is neither straightforward nor direct. Because the *Norms* are based on a number of international instruments that have not been ratified by all states, they use transnational corporations as a means of end-running states, and in the process create the basis for the articulation of customary international law principles that will apply to states. The *Norms* suggest the future of the discourse of corporate regulation. As such, they also represented a challenge to the dominant conceptual matrix—a private law model based on national regulation focused on state-sanctioned economic amalgamations of power that ultimately serve one class of stakeholders, the shareholders, above all others. Most importantly for the future, the *Norms* indicate the ways that the governance norms for states and non-state entities are converging in theory and in fact.

4.2.1 The Road from the MNE Code of Conduct Project: The Rise and Fall of the Norms.

The journey from conception, within the framework of the human rights institutions of the United Nations, to finalization of the *Norms* took almost a decade.[197] The *Norms* thus represent a culmination of efforts to seek a supra-national basis for regulating corporations after the failure of such attempts through other organs of the United Nations. At the same time it ought to be remembered that this effort might also be understood as emerging from earlier efforts, in this case to bring about a Code of Conduct for Multinational Enterprises. And beyond that, as an expression of an ideological framework about markets, the role of the state, and principles about the ordering the post-imperial and post-colonial world that wove together strands of Soviet Marxist-Leninism and what would become Global South perspectives.

---

195. *Ibid.* ¶ 24.

196. *Ibid.* ¶¶ 25–26. The 1998 Sub-Commission Report also suggested the imposition of taxes to be used for environmental clean-up. *Ibid.* ¶ 27.

197 For an authoritative history of the adoption of the *Norms* by one of its principal architects, see Weissbrodt & Kruger, *supra* note 144. On the early history of efforts to adopt an international standard of corporate governance leading eventually to the *Norms*, see Muchlinski, *supra* note 38, at 592–97.

With that in mind, it may be useful to track the origins of the *Norms* back to 1997. "The idea for a Sessional Working Group on the Working Methods and Activities of Transnational Corporations arose from Sub-Commission Resolution 1997/11, which asked El-Hadji Guissé to present a working document to the Sub-Commission at its fiftieth session (in 1998) on the issue of human rights and transnational corporations."[198]

On August 20, 1998, the Sub-Commission on the Promotion and Protection of Human Rights in the Office of the High Commissioner for Human Rights adopted a resolution[199] establishing a Sessional working group composed of five members charged with the task of examining the working methods and activities of transnational corporations.[200] Prominent among the members of the Sessional Working Group were El-Hadji Guissé (representing Africa),[201] Mr. David Weissbrodt (representing Western Europe and other States),[202] Mr. Manuel Rodriguez-Cuadros (representing Latin America), and Mr. Vladimir Kartashkin (representing Eastern Europe).

By August 15, 2001, the Sessional Working Group's mandate was extended for another three year period for the purpose of drafting relevant norms "concerning human rights and transnational corporations and

198. Weissbrodt & Kruger, *supra* note 144, at 903 (internal citations omitted). "Senegalese Judge El Hadji Guise has led a working group of human rights experts who have spent four years compiling the social, economic and environmental obligations of transnational corporations already outlined in existing declarations into a single statement for the UN Commission on Human Rights." *Action*, New Internationalist, May 2004, at 26, *available at* http://www.newint.org. Mr. Guissé was the representative of Senegal to the Sub-Commission. He appeared to be no friend of global economic regulatory organizations: Reacting to a report on the effect of globalization on human rights, prepared for the United Nations by Oloka-Onyango of Uganda and Deepika Udagama of Sri Lanka, that accused the World Trade Organization of being a "nightmare" for developing countries, Mr. Guissé "accused the WTO—of which his country is a member—of carrying out a 'second colonialization process in which the only interest was profit,' according to a UN summary of his remarks." Global Policy Forum, *World Trade Organization Blasted* (Aug. 11, 2000), http://www.globalpolicy.org/socecon/bwi-wto/wto/nitemare.htm.

199. The Sub-Commission on the Promotion and Protection of Human Rights was created in 1947 by the Commission on Human Rights. It "is made up of 26 Experts from five regional groups. According to its mandate, it undertakes studies and makes recommendations to the Commission. One of its jobs as the Commission's think tank is to explore issues that are considered important and have not received sufficient attention." Press Document, ECOSOC, Sub-Comm'n on Promotion and Prot. of Human Rights, Sub-Commission on Promotion and Protection of Human Rights to Meet in Geneva From 26 July to 13 August 2004 (July 22, 2004), *available at* http://www.unhchr.ch/huricane/huricane.nsf/0/D75FAA3942FDA83AC1256EDA002FAC70?opendocument.

200. Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities Res. 1998/8, *supra* note 157 (establishing for a period of three years a Sessional Working Group to examine the working methods and activities of transnational corporations).

201. *See supra* note 198.

202. Mr. Weissbrodt is the Fredrikson & Byron Professor and Director of the Human Rights Center of the University of Minnesota Law School. He is the author of a number of books on human rights. His publications include David S. Weissbrodt, Training Manual on Human Rights Monitoring (2001); David S. Weissbrodt, Immigration Law and Procedure in a Nutshell (4th ed. 1998); David S. Weissbrodt et al., International Human Rights Law: Policy and Process (2d ed. 2001); David S. Weissbrodt, The Right to a Fair Trial (2002). He is described on the University of Minnesota Law School website as "a distinguished and widely published scholar of international human rights law." Univ. of Minn. Law Sch., Faculty and Admin., David S. Weissbrodt – Faculty Profiles, www.law.umn.edu/facultyprofiles/weissbrodtD.htm.

other economic units whose activities have an impact on the enjoyment of human rights."[203] The Sessional Working Group produced a report reflecting their work in 2002.[204] It also submitted a draft report entitled "Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises,"[205] along with a related commentary.[206] By this point, the normative focus of the Sessional Working Group was clear—discomfort with "free market philosophy," a sensitivity to the "intolerable" level of exploitation of developing countries by TNCs, and a fundamental disagreement with the profit motive as inimical to the greater imperative of development.[207]

On August 14, 2002, the Sessional Working Group was again encouraged in its work by the Sub-Commission on the Promotion and Protection of Human Rights.[208] Nearly a year later, on August 13, 2003, the Sub-Commission approved the *Norms*.[209] The *Norms* were revised and reissued with accompanying commentary on August 26, 2003.[210]

However, by action dated April 22, 2004, the Commission on Human Rights significantly narrowed the original objectives and methodologies of the *Norms.* By action without a vote, it recommended that the Economic and Social Council: (1) confirm the importance of the question of the responsibilities of transnational corporations with regards to human rights; (2) request that the Office of the High Commissioner for Human Rights compile a

---

203. Sub-Comm'n on Human Rights Res. 2002/8, at pmbl., U.N. Doc. E/CN.4/Sub.2/Res/2002/8 (Aug. 14, 2002).

204. *See* ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Fourth Session*, U.N. Doc. E/CN.4/Sub.2/2002/13 (Aug. 15, 2002) [hereinafter *Report of Working Group, Fourth Session*].

205. ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1 (May 24, 2002).

206. ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises: With Commentary on the Principles*, U.N. Doc. E/CN.4/Sub.2/2002/WG.2/WP.1/
Add.2 (June 3, 2002). The Commentary was added in 2001 after the Sessional Working Group agreed to radically shorten the guidelines into a statement of general principles. "Commentaries also were added to make more specific reference to the relevant international standards." ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Third Session*, U.N. Doc E/CN.4/Sub.2/2001/9, ¶ 26, (Aug. 14, 2001) [hereinafter *Report of Working Group, Third Session*].

207. The 2002 session of the Working Group was opened with an address by the Chairperson, Mr. Guissé:
[P]ost-colonial exploitation of developing countries by transnational corporations had become intolerable. The international economic system that was emphasizing the free market philosophy, privatization and a reduction of the public sector was preventing many poor countries from developing. In particular, transnational corporations had massive budgets, were driven essentially by profit, used the smallest number of workers possible, moved from jurisdiction to jurisdiction with relative ease, imported labour to the detriment of local labour, and did not always take into account the social needs of the countries in which they were operating.
Report of the Working Group, Fourth Session, *supra* note 204, ¶ 12.

208. Sub-Comm'n on Human Rights Res. 2002/8, *supra* note 203, ¶ 1.

209. Sub-Comm′n on the Promotion and Prot. of Human Rights Res. 2003/16, at 53, U.N. Doc. E/CN.4/Sub.2/2003/L.11 (August 13, 2003) [hereinafter Res. 2003/16].

210. "Mr. Weissbrodt . . . stated that the draft Norms constituted a very inclusive effort by the five members of the working group to draw together human rights norms and practices as they related to transnational corporations and other business enterprises. The Commentary provided a practical interpretation of the draft Norms." *Report of the Working Group, Fifth Session*, *supra* note 1, ¶ 10.

report setting out the scope and legal status of current initiatives and standards relating to the responsibility of transnational corporations, and submit such a report to the Commission on Human Rights at its 61st session; and (3) affirm that the *Norms* have no legal standing, had not been requested by the Commission on Human Rights, and that the Sub-Commission should not perform any monitoring function of the *Norms*. These recommendations effectively reversed the initial determination of the Sessional Working Group that the *Norms* serve as a set of mandatory obligations, and reduced the *Norms* to yet another statement of voluntary, aspirational goals.

The Office of the High Commissioner on Human Rights worked in early 2005 to produce the report requested by the Human Rights Commission. The final report was to be prepared for the Commission on Human Rights' 61st session, which met from March 14 until April 22, 2005. By February 2005, it was clear that a number of changes substantially diluting the thrust and substance of the *Norms* were likely.[211] By the Spring of 2005, it became clearer that the *Norms* would effectively be abandoned in their current form. It appeared that the High Commissioner would recommend that the Commission "maintain the draft *Norms* among existing initiatives and standards on business and human rights, with a view to their further consideration."[212] The abandonment of the Norms project and its approach continues to be criticized by one of its principal architects.[213]

---

211. On April 22, 2004, the Commission on Human Rights recommended that the Economic and Social Council confirm the importance of the responsibilities of transnational corporations with regard to human rights. The Commission further requested that the Office of the High Commissioner for Human Rights compile a report setting out the scope and legal status of current initiatives and standards relating to the responsibilities of transnational corporations, submit such a report to the Commission on Human Rights at its 61st session, and affirm that the *Norms* have no legal standing, have not been requested by the Commission on Human Rights, and that the Sub-Commission should not perform any monitoring function of the *Norms*. *See* Office of the High Commissioner for Human Rights Decision 2004/116, *Responsibilities of Transnational Corporations and Related Business Enterprises With Regard to Human Rights*, April 20, 2004, *available at* http://ap.ohchr.org/documents/E/CHR/decisions/E-CN_4-DEC-2004-116.doc [hereinafter Decision 2004/16]. With these restrictions, the *Norms* have lost virtually their entire sting.

212. ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises With Regards to Human Rights*, ¶ 52(d), U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005) [hereinafter *Report of the High Commissioner*]. The Report also suggested that:

Much of the consultation process focused on the draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights". In spite of opinions on the draft still being divided, there is merit in identifying more closely the "useful elements" of the draft Norms noted by the Commission in its decision 2004/116. In particular, the "road-testing" of the draft Norms by the Business Leaders' Initiative on Human Rights could provide greater insight into the practical nature of the human rights responsibilities of business.

Ibid. Indeed, by the end of 2005, the Business Leaders' Initiative on Human Rights, in conjunction with the U.N. Global Compact and the Office of the High Commissioner for Human Rights, had produced a consultation draft that in many respects mirrored the focus of the *Norms*. Unlike the *Norms*, however, this effort was business focused and voluntary, offering "practical guidance to companies that want to take a proactive approach to human rights within their business operations." Business Leaders' Initiative on Human Rights, U.N. Global Compact, and Office fo the High Commissioner for Human Rights, *A Guide for Integrating Human Rights Into Business Management* (Consultation Draft) (n.d.) at 3.

213 The SRSG's conclusion that the Norms were of little help in advancing the interests of business and human rights, has drawn criticism from Professor David Weissbrodt, one of the architects of the Norms. Weissbrodt has complained that Ruggie has "embark[ed] on an extremely negative and unproductive critique of the Norms - inspired, if not copied word for word, from the advocacy of the International Chamber of Commerce and the International Organization of Employers" while also not citing one of these "mainstream international lawyers and other impartial observers," but rather relying on the biased views of lawyers employed by the International Chamber of Commerce. *See* David Weissbrodt, *UN Perspectives on "Business and Humanitarian and Human Rights Obligations,"* 100 AM. SOC'Y INT'L L. PROC. 135, 138 (2006). Weissbrodt does find that a lot of Ruggie's

Whatever the immediate fate of the *Norms*, it is unlikely that the ideas represented by the *Norms*, as originally submitted, would disappear. "There is a growing interest in discussing further the possibility of establishing a United Nations statement of universal human rights standards applicable to business."[214] As important, the ideological basis for the Norms found new expression in the approaches of BRICS states and in the development of Chinese Marxist-Leninist perspectives on development, human rights, and sustainability, all of which became far more visible and significant after the first decade of the 21st century. The *Norms*, in this sense, represent an increasingly powerful and coherent basis for the regulation of corporations that is likely to attempt to reshape the context of debate in the coming decades. And, indeed, in some sense the success of the UNGP project itself provided the impetus for the re-emergence of the Norms and especially their underlying principles and ideology. This time the notion of public policy driven, state regulatory models suspicious of markets and intent on subordinating and recasting economic activity not an instrument of public policy memorialized and legitimated through law and administered through the apparatus of public bodies, appeared in the form a renewed effort to craft an international treaty governing MNEs.[215] For that reason, it is worth considering the *Norms* as originally proposed, even if they will not, for the moment, be embraced. More significantly, for purposes of interpreting the UNGPs—a careful study of the Norms provides a strong basis for understanding what the UNGP are not. Indeed, that objective of differentiation was built into the SRSG's interpretation of his mandate from the time of his 2006 SRSG Report.[216]

4.2.2 The Text and Spirit of the *Norms*.

As finally adopted, the *Norms* consist of two parts—the *Norms* themselves and the *Commentary*. The *Commentary* was written as a "useful interpretation and elaboration of the standards contained in the Norms."[217] Read together, the *Norms* and *Commentary* would have the international political community effect a revolution in both the character of corporate governance and the source of the authority to regulate corporations. The *Norms* and *Commentary* seek to achieve these overall objectives through the subtle and complicated regulatory scheme that lies just beneath the surface of what might otherwise appear to be yet another version of the usual litany of corporate social responsibility goals demanded by elements of the international and NGO communities for years. The simplicity and complications of the proposed regulatory revolution represented by the *Norms* becomes more apparent by a consideration of its provisions.

It is easy enough to read the *Norms* as an innocuous and descriptive; and on that basis irrelevant for purposes of corporate regulation, traditionally understood.218 Equally plausible was a reading of its text as an effort, from the perspective of corporate traditionalists perhaps misguided, attempt to regulate the external conduct of

---

work has great potential to advance the interests of business and human rights, but he does show a general disdain for the way that Ruggie has derided the Norms in form and function. Ibid., at 139.

214. *Ibid.* ¶ 52(b).

[215] See discussion Chapter 13, infra and Larry Catá Backer, 'Shaping a Global Law for Business Enterprises: Framing Principles and the Promise of a Comprehensive Treaty on Business and Human Rights,' (2016) 42(2) *North Carolina Journal of International Law* 417-504.

[216] Discussed supra Chapter 3.2.2.

217. *Norms*, *supra* note 1, at pmbl.

[218] That is, from an American perspective, understood as the regulation of the relationship among shareholders, officers and directors, and as such, written into corporate and securities statutes, and taught as a separate and identifiable field of law. *See, e.g.,* William A. Klein and John C. Coffee, Jr., Business Organization and Finance, Legal and Economic Principles 122-137 (9th ed., 2004).

corporations.[219] A careful reading of the Preamble, General Provisions,[220] and Definitions[221] sections of the *Norms*, however, suggests otherwise. The *Norms* appear to provide a basis for imposing, at an international level, a public law oriented constituency model on corporate organization.[222] Thus constituted, the *Norms* would serve as the basis for using corporations against states that may be reluctant or unable to implement emerging international law norms, whether or not technically binding as "law," within their territories.

4.2.2.1 Preamble. The Preamble sets forth the normative context for the application of the *Norms* and points to the very broad conception of the range of public law duties that should be undertaken as a matter of private law between TNCs and the whole web of actors with whom the TNC does business, or otherwise operates. TNCs have human rights obligations.[223] International institutions have suggested that these entities contribute to the delinquency of States in complying with their own human rights obligations. TNCs are in a position to influence the economies of most countries and are beyond the regulatory capacity of any one of them. TNCs, by their very wealth and power, have the means to make all people's lives better; they are not constrained to producing profits for their shareholders. TNCs can, by their behavior, contribute to new standards or otherwise to global consensus on human rights. TNCs may not stand aloof from either human rights issues or the general obligation to contribute to the development and progress of humankind since rights are universal, indivisible, interdependent and interrelated.[224]

As a consequence, the Preamble purports to merely *reaffirm* the fundamental character of the social responsibility of corporations to promote and secure "the human rights set forth in the Universal Declaration of Human Rights."[225] The scope of this obligation is then announced in the broadest possible language. The Preamble affirms "that transnational corporations and other business enterprises, their officers and persons working for them are obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments."[226] The Preamble then lists a large but open ended corpus of international human rights instruments incorporated by reference. The list is not exhaustive.[227] It contains several instruments that are not legally binding on state actors.[228] It also refers to a number of instruments that

---

219 In this sense, corporate social responsibility can be understood more as a problem of *tort* between separate and autonomous actors – corporations and the people which whom they deal – and conflict of laws – as the regulation of the jurisdictions having power to adjudicate these tort claims.

220 *Norms*, *supra* note 1, ¶¶ 15-19.

221 *Id.* ¶¶ 20-23.

222 *See, e.g.*, Frank Bottomly, *From Contractualism to Constitutionalism: A Framework for Corporate Governance*, – Sydney L. Rev. 277 (1997) (Aus.).

223 *See id. at* pmbl.

224 *Id.*

225 *Id.* States are recognized as having the primary, but not the exclusive, responsibility for securing such rights. *Id.*

226 *Id.*

227 The Preamble reference to the international law instruments is preceded by the qualifier "such as". See *Norms, supra* note 2, at Preamble. Moreover, Paragraph 23 of the Norms defines "human rights" and "international human rights" as including "civil, cultural, economic, political and social rights, as set forth in the International Bill f Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system." *Id.* at ¶ 23. Again, note both the open-endedness of the description, and its inclusion of binding international law and treaty, irrespective of its ratification by the nation-states in which the TNC is chartered or otherwise operates, and non-binding international declarations.

228 Several of the Member States of the European Union provided comments to the draft Norms setting forth in considerable detail the legal effect of many of the instruments identified as binding through the Norms. *See, e.g.*, *Reply of the*

have not been universally ratified.[229] For example, reference is made to, and TNCs are expected to incorporate into their contracts where ever they operate, the International Covenant on Economic, Social and Cultural Rights, an instrument that the United States has refused to ratify.[230] Ironically, American TNCs seeking to comply with the *Norms* would have to incorporate this Covenant into their contracts even in the United States, and thus effect American compliance with its provisions.[231]

The Preamble, then, serves both as an introduction to the *Norms* themselves and, more importantly, as a core part of the substance of the *Norms*. Together with the *Norms*' general provisions and definitions, the Preamble provides the foundation within which the substantive provisions of the *Norms* can be elaborated and interpreted. The *Norms* are meant to sweep broadly in every respect:

– virtually every form of economic activity undertaken worldwide can be subject to the *Norms*;

– the substantive rules of human rights to be implemented through the *Norms* include legally binding obligations and aspirational standards without regard to the incorporation of any of those standards or aspirations within the legal orders of the states in which TNCs operate;

– these standards are mandatory in two respects: they must be adopted as the internal rules of corporate operation, and they must form the basis of all contractual relations with TNCs;

– monitoring and supervision is to be undertaken through international institutions but will rely upon elements of civil society, non-governmental organizations, labor unions, and others;

– a broad principle of enterprise liability is adopted as the presumptive standard for determining the legal effects of actions by any TNC or related party, irrespective of the law of either the host or chartering state;

– a broad principle of stakeholder governance is adopted, the shareholder profit maximization theory underlying the law of many states is abandoned, and the term stakeholder is defined to include virtually every person or organization touched by the activities of any TNC; and

– the actions of TNCs under the *Norms* are meant to provide the basis for the elaboration of new customary international law norms applicable to all state actors, and thus reinforcing the centrality of global norm making through the traditional methodologies of international law.

It is in this context that the substantive standards of the *Norms* are elaborated.

Government of the Czech Republic to the OHCHR's Questionnaire on Responsibilities of Transnational Corporations and Related Business Entities With Regard to Human Rights, Enclosure No. 2421/2004, transmitted Sept. 30, 2004 at ¶ 13.

[229] Indeed, the Working Group reported prior to its adoption of the Norms in final form that at least "[o]ne expert highlighted the fact that many countries had not ratified all the principal human rights instruments and so a reference to customary international law could strengthen the draft norms." United Nations Economic and Social Council, Commission on Human Rights, Sub Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Fourth Session,* E/CN.4/Sub.2/2002/13, Aug. 15, 2002 at ¶ 27, page 9.

[230] *Id.*

[231] This, of course, presents problems, potentially at least, with American domestic law. See discussion, *infra* at Part IV.A.

4.2.2.2. General Provisions (¶¶ 15-19). A sense of the intent and goals of the *Norms* can be better gleaned from the General Provisions than from the substantive provisions. This analysis thus starts with the foundations through which the substantive provisions must be read. In particular, the General Provisions supply the foundations for the development of a system of international law implemented through the private law of contract. This construction is intended to develop in parallel with a number of other systemic developments in international and transnational governance, including the traditional systems of international law founded on public law,[232] the development and imposition of an enterprise theory of liability for corporations on a worldwide basis,[233] the application of the *Norms* to all persons and enterprises doing business with TNCs,[234] and the development of a corporate compliance monitoring system centered on the United Nations and civil law actors, rather than states.[235]

The *Norms* exploit the flexibility of private law making to maximize the efficiency of its implementation without the interference of state actors. The *Norms* require the incorporation of its provisions into all TNC contracts and include monitoring/disclosure obligations with respect to *Norm* compliance.[236] "TNCs are prohibited from doing business with any natural or other legal persons unless these also "follow these or substantially similar Norms.""[237] Where business is conducted with non-complying businesses, the TNC has the obligation to "work with them to reform or decrease violations, but if they will not change, the enterprise shall cease doing business with them."[238] The use of "low level" international governance--that is, international governance arising from the level of private law in the municipal systems of sovereign states--"has become a contested issue in the field of international relations."[239]

The *Norms* would regularize monitoring of the activities of TNCs at the international level by creating a web of reporting and observing involving states, international actors, and elements of civil society.[240] This web pays particular attention to "stakeholder" input and complaints about violations of the *Norms*.[241] The *Commentary* suggests the broad scope of this provision, and the critical role it is meant to play. Monitoring and implementation of the *Norms* require "amplification and interpretation of intergovernmental, regional, national and local standards with regard to the conduct of transnational corporations."[242] For this purpose, the United Nations would take the leading role through its treaty bodies and specialized agencies.[243] The Commentary suggests that much of the information gathering could be delegated to "non-governmental organizations, unions, individuals and others"; TNCs would then have "an opportunity to respond."[244]

---

232 *Norms*, *supra* note 1, ¶¶ 15, 19.
233 *Id.* ¶ 18.
234 *Id.* ¶ 15.
235 *Id.* ¶¶ 16-17.
236 *Id.* ¶ 15.
237 *Commentary*, *supra* note 2, ¶ 15 cmt. (c).
238 *Id.*
239 Jarrod Wiener, Globalization and the Harmonization of Law 20 (1999). For a general discussion on the issue, see *id.* at 20-40.
240 *Norms*, *supra* note 2, ¶ 16.
241 *Id.*
242 *Commentary*, *supra* note 2, ¶ 16 cmt. (a).
243 *Id.* ¶ 16 cmt. (b). Many Western States reacted negatively to this provision in particular. Most expressed skepticism about the ability of the United Nations to effectively monitor any of the obligations under the *Norms*. *See infra* Part IV.D.3.
244 *Commentary*, *supra* note 2, ¶ 16 cmt. (b).

The fruits of this surveillance scheme are meant to further the substantive goals of the *Norms* in a number of specific respects. Trade Unions are encouraged to use the information gathered from TNC monitoring in their negotiations with TNCs.[245] The transparency requirements of the surveillance system are both procedural and substantive. In their procedural aspects, they are meant to provide "stakeholders,"[246] with a right to ensure the incorporation of their views in reports of the TNCs, as well as to provide monitors and stakeholders with the means to observe TNC workplaces. In their substantive aspects, they are meant to serve as the means through which the surveillance and input power is to extend to the TNCs' "contractors, suppliers, licensees, distributors, and other natural or legal persons with whom they have entered into any agreement."[247] In addition, the *Commentary* suggests another substantive component to the monitoring obligation—the obligation to provide impact statements prior to the commencement of any "major initiative or project."[248] The scope of the *Norms*, and the breadth of its intrusive powers are, by current standards, quite extensive.

At least one of the provisions of the *Norms* is directed specifically to states. Paragraph 17 requires states to "establish and reinforce the necessary legal and administrative framework for ensuring that the Norms . . . are implemented" by TNCs.[249] The *Commentary* suggests that these efforts include dissemination of the *Norms* to the populace "and using them as a model for legislation and administrative provisions."[250]

The general liability provision of Paragraph 18 reinforce the normative assumption of enterprise liability for TNCs.[251] This provision obligates TNCs to provide "prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms."[252] Since the definition of TNC does not recognize the distinct legal personalities of the corporations that together constitute the TNC,[253] the *Norms* essentially pierce the corporate veil for all litigation involving an allegation of breach of its provisions. This goes a long way toward eliminating one of the great obstacles to recovery against a parent corporation by litigants seeking recovery against the operations of an affiliate, subsidiary, or related corporation, or other entity in a locality where harm occurred.[254]

Lastly, the general provisions section of the *Norms* contains a savings clause,[255] "intended to ensure that transnational corporations and other business enterprises will pursue the course of conduct that is the most protective of human rights – whether found in these Norms or in other relevant sources."[256] The savings clause is also meant as a sword against the nationality and territorial principles set forth in Paragraph 1 of the *Norms*[257]

---

245 *Id.* ¶ 16 cmt. (c).

246 For a definition and discussion of term 'stakeholder,' see *infra* at notes ---.

247 *Commentary*, *supra* note 2, ¶ 16 cmt. (d).

248 *Id.* ¶ 16 cmt. (i) ("The impact statement shall include a description of the action, its need, anticipated benefits, an analysis of any human rights impact related to the action, an analysis of reasonable alternatives to the action, and identification of ways to reduce any negative human rights consequences.").

249 *Norms*, *supra* note 2, ¶ 17.

250 *Commentary*, *supra* note 2, ¶ 17 cmt. (a).

251 *Norms*, *supra* note 2, ¶ 18.

252 *Id.*

253 See discussion at notes ---, *infra.*

254 On the traditional difficulties in litigation of reaching entities other than the (often impecunious) local operation see, e.g., Sarah Joseph, Corporations and Transnational Human Rights Litigation 129-143 (2004).

255 *Norms*, *supra* note 2, ¶ 19.

256 *Commentary, supra* note 2, ¶ 19 cmt. (a).

257 The *Norms* declare adherence to the principle that states remain the primary font of regulation in the fields of regulation covered by the *Norms*. This implicates both the nationality and territorial principles of state power to regulate under international law. The territorial principle provides that states exercise jurisdiction over all natural and juridical persons present

and a reinforcement of the use of the *Norms* to end-run state refusals to ratify certain conventions or treaties or apply certain other international law norms through the internationalization of the private law of TNC contracting.[258] The *Commentary* asserts, in this light, "that a State may not invoke the provisions of its internal law as justification for its failure to comply with a treaty, the Norms, or other international law norms."[259]

4.2.2.3. Definitions (¶¶ 20-23). The defined terms in the *Norms* stretch the applicability of the *Norms* extensively. In the process the transformative potential and intent of the Norms becomes clearer. That is, in order to develop the legal framework for the Norms, the legal framework for the operation of economic legal persons, their autonomy, and their relation to the public sector (generally) and the state (in particular) and international organizations (more broadly) would have to be re-imagined. At the limits of the plausible interpretation of the spirit of the Norms, it might be understood that economic activity is understood as an instrument of public policy, that as such it acquires a public character, and as a result of that public character must be subject both to the oversight of the administrative apparatus of public institutions, but also operate within the sensibilities and expectations of public law. At the other end of plausibility, the Norms could be read as imposing a regulatory framework around valuation and risk in the calculus of private economic activity; and that within that revised regulatory framework, human rights impacts serve as the ordering core of economic activity. This core is developed by and through international institutional efforts, which are transposed into domestic legal orders, and against the fulfillment of which all other law, rule, expectation and the like must be read. These possible readings are made more explicit in the definitions section of the *Norms*.

The term "transnational corporation" is broadly defined to include an "economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively."[260] The definition represents a compromise of sorts among three competing definitions.[261] The legal definition thus overrides domestic law with respect to the legal autonomy of corporations related to each other through share ownership. It embraces, to some extent, the idea of enterprise liability as the basis for the imposition of the

---

within their borders. The nationality principle provides that states exercise jurisdiction over their nationals, wherever they may be. The nationality principle can also work in reverse, to limit a state's jurisdiction (even within its territory) based on the nationality of th epersons or entities against whom jurisdiction might be asserted. *See* P. EBOW BONDZI-SIMPSON, LEGAL RELATIONSHIPS BETWEEN TRANSNATIONAL CORPORATIONS AND HOST STATES 23-59 (1990). See also discussion, *infra*, at notes 242-249---.

258 *See* discussion, supra, at notes 198-201, and infra, at notes 412-422---.

259 *Commentary, supra* note 2, ¶ 19 cmt. (a). The Commentary also encourages TNCs to adopt internal human rights norms "which are even more conducive to the promotion and protection of human rights than those contained in these Norms." *Id.* at cmt. (b).

260 *Norms*, *supra* note 2, ¶ 20.

261 El-Hadji Guissé Chairperson-Rapporteur, explained:

> "Three different concepts had emerged generally in the international discussions on this subject. One definition, favored by some from Western industrialized countries, would make the definition broad enough to encompass all types of business. A second approach, favoured by the then Soviet Union and similar parties, would make a clear distinction between transnational companies and foreign investment companies. A third concept, Favored by many developing countries, would stress the relative power of the company."

United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights, Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Third Session,* E/CN.4/Sub.2/2001/9 (Aug. 14, 2001) at 4.

substantive rules of the *Norms*. States that have not adopted enterprise liability as a basis for corporate liability must either ignore their own statutes or modify them to harmonize them with the *Norms*.
At first glance, this definition, as broad as it purports to be, is not broad enough to include local companies.

However, the definition of "other business enterprise"[262] potentially embraces virtually every other economic enterprise. "That [definition] had been included in order to ensure that transnational corporations could not change their identity – for example by incorporating as a national enterprise – and thereby avoid the draft Norms."[263]

But the broadness of the definition reaches well beyond that contingency. It is not clear whether there are any economic enterprises, except perhaps the most isolated, that do not constitute a "transnational corporation or other business enterprise" to which most of the substantive provisions of the *Norms* apply. Indeed, the "Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4."[264] Thus, as an initial matter, the *Norms* themselves create a substantial trap for the unwary. And it might more likely adversely affect the indigenous enterprise more than it ever affects the large TNC.[265]

An additional important definition with significant substantive effect is that of the term "Stakeholder." Stakeholders, whose rights are quite expansive throughout the *Norms*, are defined as "stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises."[266] This term "shall be interpreted functionally, in light of the objectives of these Norms."[267] The provision suggests that any number of individuals or groups can fall within the definition of stakeholder as long as the "substantially affected by the activities of the [TNC]" standard is met. These indirectly affected stakeholders can include "consumer groups, customers, Governments, neighboring communities, indigenous peoples and communities, non-governmental organizations, public and private lending institutions, suppliers, trade associations and others."[268] The *Commentary* provides no further guidance.[269] This is somewhat extraordinary given the ramifications of the definition for corporate law. Yet it

---

262 *Norms*, *supra* note 2, ¶ 21.

263 United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations in its Fourth Session,* E/CN.4/Sub.2/2002/13, Aug. 15, 2002 at ¶ 15 (comments of Mr. Weissbrodt).

264 *Norms*, *supra* note 2, ¶ 21.

265 It is much more likely that the TNC would become aware of the *Norms* and its intricacies than smaller and local enterprises (many of which might assume that since they themselves do not engage in economic activity across border, they would not be TNCs). But the *Norms* make it clear that even the snmallest local enterprise might come within the TNC definition if it has any relationship with a TNC. *See Norms, supra*note 2 at ¶ 21. Moreover, ithe costs of complying with the *Norms*, even if just measured by the costs of informing management of small local businesses seeking contracts with TNCs, may be greater than the value of contractual relations with the TNCs. And of course, the actual costs of compliance with the *Norms* will be significantly higher. Thus an irony, the *Norms* may have the effect of making it even harder for local enterprises on TNC host states to take advantage of the globalized markets through relationships with foreign TNCs. Development of local economies might become harder rather then easier under the *Norms*.

266 *Id.* ¶ 22.

267 *Id.* The definition, on this basis, includes even indirect shareholders when their interests will be substantially affected by the activities of the TNC.

268 *Id.*

269 Indeed, with respect to this definition, the *Commentary* offers no guidance at all.

also provides evidence of the difficulties of attempting corporate regulation by those whose field of expertise may not be grounded in corporate regulation.

The definition of stakeholder includes all actors affected by an economic enterprise as understood in the economic or socio-political sense. But as a matter of law, at least as a matter of the law of corporations throughout much of the globe, the definition stretches the constituencies of corporate operations beyond recognition. Unobtrusively, then, the *Norms* seek to abandon the shareholder model of governance and impose a stakeholder model as the standard for purposes of corporate governance. Yet, as applied in the *Norms*, this standard goes beyond the discourse of a stakeholder model of most national law systems. It radically broadens the community of actors who are, indirectly but effectively, given governance rights *within* any corporation required to adhere to the *Norms*.[270] It does this without any consideration to the collateral effects of this broadening on core issues of domestic corporations law—fiduciary duty, rights to control the corporation, rights to participate in corporate decision making, exit rights, and the like—all of which have traditionally been tied to shareholder primacy, the core assumption of corporate law.

Perhaps more important than the definition of "stakeholder" is the definition of "human rights" and "international human rights." These phrases include civil, cultural, economic, political and social rights and the right to development recognized "within the United Nations system."[271] The definition, broadly worded, encompasses norms with universal legal effect, norms with limited legal effect among nations ratifying provisions of particular agreements, and norms with no legal effect. Under the *Norms*, all will become legally effective as part of the *private law* of TNCs. What a neat trick! As the rest of this section will describe in more detail, the *Norms* use the traditional techniques of corporate regulation to undo the structure of corporate governance itself.[272] It uses the coercive power of the political community to compel the construction of particular webs of contractual relations that effectively displaces the shareholder model for a stakeholder model, and incorporates public law social responsibility as a core norm of TNC corporate governance compliance.

4.2.2.4. General Obligations (¶ 1). Paragraph 1 of the *Norms* not only reaffirms the primary responsibility of States with respect to human rights,[273] but also proclaims that "within their respective spheres of activity and influence" TNCs have the same obligations as States with respect to human rights.[274] This obligation "applies equally to activities occurring in the home country or territory . . . and in any country in which the business is engaged in activities."[275] The emphasis of the *Norms* appears to be on the obligations of TNCs.

---

[270] Underlying the *Norms*, then, is the view that shareholders have no special rights in the corporate enterprise. "Having made an investment in the business it is clearly appropriate that the shareholders' interests should be protected, but there is no reason *a priori* to regard the shareholders as standing in a unique relationship with the company, different in kind from the relationships between the company and other participants in the enterprise." John Parkinson, *The Socially Responsible Company, in* Human Rights Standards and the Responsibility of Transnational Corporations 49, 52 (Michael K. Addo ed., 1999).

[271] *Norms*, *supra* note 1, ¶ 23.

[272] The *Norms* use a combination of reforms to modify corporate governance beyond recognition: from a privat eeconomic entity primarily obliged to its investors and to the maximization of entity wealth, to a public social, political, and economic entity, obliged to the political communities in which it operates as well as to the international communities from which regulation arises, and to the maximization of the public welfare. This is a form of corporate regulation that has traveled far from the rough consensus of the last half century. See, *supra*, notes 29-35.

[273] "States have the primary responsibility promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law." *Norms, supra* note 1, ¶ 1.

[274] *Id.*

[275] *Commentary, supra* note 2, ¶ 1 cmt. (a).

States commenting on the *Norms*, however, tend to emphasize the ultimate importance of the responsibility of states as the primary obligor under the *Norms*.[276]

The *Commentary* suggests an additional duty–due diligence–to ensure that TNCs do not contribute to or benefit from human rights abuses.[277] There is a suggestion in the *Comments* that the failure of due diligence may result in TNC liability for underlying human rights abuses.[278] Moreover, TNCs are required to "use their influence in order to help promote and ensure respect for human rights."[279] The *Commentary* contains a caution for States as well: the creation of a web of private human rights norms through private contract "may not be used by States as an excuse for failing to take action to protect human rights, for example, through the enforcement of existing laws."[280]

4.2.2.5. Right to Equal Opportunity and Non-Discriminatory Treatment (¶ 2). TNCs are obligated to ensure equality of opportunity and equal treatment for all workers.[281] Labor standards are to be based on both national (host country) and international norms (including, it would seem, the international norms described in the Preamble, irrespective of their technical application in the host country).[282] This obligation applies to process as well as substance rights.[283] In addition to the broad anti-discrimination protections afforded employees, the Commentary suggests that this Norm applies to "other stakeholders, such as indigenous peoples and communities, with respect to dignity."[284]

4.2.2.6. Right to Security of Persons (¶¶ 3-4). TNCs may not engage in or benefit from violations of human rights or humanitarian laws.[285] TNCs producing or supplying military, security, or police "shall take stringent measures to prevent those products and services from being used to commit human rights or humanitarian law violations."[286] TNCs producing or supplying products to enforcement agencies (whether or not state operated) are under a positive obligation to "comply with evolving best practices" in this regard. [287]

---

276 "Within the EU territory itself, [corporate social responsibility] is defined in a way implying that companies voluntarily integrate social and environmental considerations into their operations with stakeholders, in addition to their compliance with a comprehensive system of European and national regulations." Permanent Mission of Austria to the United Nations at Geneva, *Austrian Reply to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and Related Business Enterprises With Regard to Human Rights*, No. 900 916/38-2004, Geneva, Switzerland, Oct. 11, 2004, at ¶ 8.

277 *Commentary, supra* note 2, ¶ 1 cmt. (b).

278 *Commentary, supra* note 2, ¶ 1 cmt. (b) ("Transnational corporations . . . shall inform themselves of the human rights impact of their principal activities . . . so that they can further avoid complicity in human rights abuses.").

279 *Commentary, supra* note 2, ¶ 1 cmt. (b).

280 *Id.*

281 *Norms, supra* note 2, ¶ 2.

282 *See* discussion, *supra,* at notes ---.

283 "Discrimination means any distinction, exclusion, or preference made on the above-stated bases, which has the effect of nullifying or impairing equality of opportunity to treatment in employment or occupation." *Commentary, supra* note 2, ¶ 2 cmt. (b). "No worker shall be subject to intimidation or degrading treatment or be disciplined without fair procedures." *Commentary, supra* note 2, ¶ 1 cmt. (a).

284 *Commentary, supra* note 2, ¶ 2 cmt. (d)).

285 *Norms*, *supra* note 2, ¶ 3. TNCs may not benefit from "war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law." *Id.*

286 *Commentary*, *supra* note 2, ¶ 3 cmt. a.

287 *Id.*

TNCs are under an obligation not to produce or sell weapons declared illegal under international law,[288] or otherwise to "engage in trade that is known to lead to human rights or humanitarian law violations."[289]

Considerably more attention is paid by the *Commentary* to *Norm* Paragraph 4 which applies the obligation to observe international human rights and humanitarian law to security arrangements for TNCs.[290] The applicable conduct standards include not only all instruments related to law enforcement, whether or not ratified by the relevant state in which the TNC operates, but also "emerging best practices developed by the industry, civil society, and Governments."[291] TNC security forces cannot perform functions "exclusively the responsibility of the State military or law enforcement services,"[292] nor may they be used to contravene or otherwise impede worker efforts to unionize or otherwise assemble.[293]

These security related obligations are specifically made binding through the private law of contract. The Commentary suggests that "the relevant provisions of these norms (paragraphs 3 and 4 as well as the related Commentary) shall be incorporated into the contract and at least those provisions should be made available upon request to stakeholders in order to ensure compliance."[294] Compliance is enforced by the parties to each of the TNC's contracts under the domestic law of contract. They might also be enforced by stakeholders, who include "stockholders, other owners, workers and their representatives, as well as any other group that is affected by the activities of [the TNC] . . . including consumer groups, customers, Governments, neighboring communities, indigenous peoples and communities, non-governmental organizations, public and private lending institutions, suppliers, trade associations and others."[295] This provision thus opens the TNC to review (and accountability) to an extraordinarily large number of actors, in addition to holders of capital interests (debt or equity) in the corporation.

4.2.2.7. Right of Workers (¶¶ 5-9). Paragraphs five through nine, in many respects, can be said to form the heart of the substantive provisions of the *Norms*. It divides worker rights into five parts: (1) prohibition of compulsory labor;[296] (2) prohibition of child labor;[297] (3) imposition of a positive obligation to provide a "safe and healthy environment";[298] (4) imposition of a remuneration standard requiring TNCs to set wages that "ensures an adequate standard of living," taking due account of worker needs "with a view towards progressive improvement";[299] and (5) recognition of a right to collective bargaining under standards established by national laws and the relevant conventions of the International Labor Organization (ILO).[300]

---

288 *Commentary, supra* note 2, ¶ 3 cmt. (b).

289 *Id.*

290 *Norms, supra* note 2, ¶ 4 (TNCs are also expected to comply with the laws and professional standards of the country in which they operate with respect to such security operations).

291 *Commentary, supra* note 2, ¶ 4 cmt. (a).

292 *Commentary, supra* note 2, ¶ 4 cmt. (b).

293 *Commentary, supra* note 2, ¶ 4 cmt. (c) (rights protected include those that might not have been recognized in states in which they would apply in any case by operation of the Norms – for example, the International Bill of Rights and the Declaration on Fundamental Principles and Rights of Work of the International Labor Organization).

294 *Commentary, supra* note 2, ¶ 4 cmt. (d).

295 *Norms*, *supra* note 2, ¶ 22.

296 *Id.* ¶ 5.

297 *Id.* ¶ 6.

298 *Id.* ¶ 7.

299 *Id.* ¶ 8.

300 *Id.* ¶ 9.

The *Commentary* fleshes out these provisions in a number of important respects. First, the commentary to the *compulsory labor prohibition* suggests that TNCs must "take all feasible measures to prevent workers from falling into debt bondage and other contemporary forms of slavery."[301] But it is not clear whether this is a general requirement or is limited to financial interactions between the TNC and its employees.

Second, the commentary to the *child labor prohibition* contains substantive limits to hiring practices that are inherently ambiguous. Thus, while the norm itself requires TNCs to respect international child labor standards, the *Commentary* prohibits employment of children under eighteen "in any type of work that by its nature or circumstances is hazardous, interferes with the child's education, or is carried out in a way likely to jeopardize the health, safety, or morals of young persons."[302] In addition to the inherent ambiguity of the terms, it is not clear whether these standards are measured by reference to the TNC host country, the home country, or developing international standards.[303]

Most interesting, the commentary to Paragraph 6 appears to impose on TNCs a positive obligation to negotiate with states to induce them to design and implement national action programs to "eliminate the worst forms of child labor consistent with ILO Convention No. 182."[304] This consultation directive is interesting for a number of reasons. First, it serves as de facto recognition of the power of TNCs as public law actors. Here is an international standard purporting to create an obligation in a non-state actor to negotiate national legislation with a nation-state in accordance with international norms memorialized in an international convention. From the perspective of traditional international law, this is curious indeed. Even more curious, perhaps, is that this call to consultation would appear to violate a TNC's behavior obligations under the *Norms* themselves! *Norm* Paragraph 10 obligates TNCs to "recognize and respect" the "authority of the countries in which the enterprises operate."[305] On the other hand, Paragraph 6 mirrors the obligation imposed on TNCs in Paragraph 12 to contribute to the realization of economic, social, cultural, civil, and political rights in states where they operate.[306] It is not clear how this interpretation could be harmonized with Paragraph 10's prohibition against interference with national sovereignty (unless this paragraph is limited solely to anti-corruption measures).

The commentary to Paragraph 7 on *occupational health and safety* incorporates by reference a number of conventions and other international instruments, some of which might not be enforceable and others of which might not have been ratified by the host state.[307] The occupational health and safety provisions also evidence the monitoring and disclosure focus of the *Norms*. The provision is a particular application of the general obligation to monitor and disclose set forth in Paragraph 15.[308] The commentary suggests that Paragraph 7 imposes on TNCs an obligation to disclose "available information about the health and safety standards relevant to their local activities."[309]

---

301 *Commentary*, *supra* note 2, ¶ 5 cmt. a.

302 *Commentary, supra* note 2-, at ¶ 6 cmt. (b). Children between the ages of 13 to 15 years are permitted some light work. *Commentary, supra* note 2, ¶ 6 cmt. (c).

303 The Commentary is silent on this point. But given the thrust of the Norms, it is likely that a uniform international standard, based on minimum conduct rules, is likely contemplated. But see *Norms, supra* note 2 at ¶ 10 (requiring TNCs to "recognize and respect applicable" social, economic and cultural policies).

304 *Commentary, supra* note 2, ¶ 6 cmt. (d).

305 *Norms, supra* at note 2, ¶ 10.

306 *Norms, supra* at note 2, ¶ 12.

307 *Commentary, supra* note 2, ¶ 7 cmt. (a).

308 *See* discussion, *supra* at notes —.

309 *Commentary, supra* note 2, ¶ 7 cmt. (b) (further obligation to arrange for safety training and disclosure of known special safety hazards). The Commentary cross references Comments (a) and (e) to ¶ 15. *See id.* Comment 15(a) obligates

The occupational health and safety commentary also evidences the intent of the drafters to give substantive effect to the *Commentary*. A TNC's obligation to permit workers to refuse unsafe work is premised on TNC compliance with the commentary to Paragraph 16 relating to the provision of a confidential complaint process.[310] The occupational health and safety commentary, like the child labor prohibitions, contains substantive provisions respecting maximum work weeks (48 hours), day work limits (10 hours) and overtime limits (12 hours per week) that might exceed national legislation.[311] Here, again, the *Norms* work to end-run non-conforming state legislation by imposing international law standards domestically through the private law of TNC contracts.

The *adequate remuneration provision* of Paragraph 8 appears to limit the ability of TNCs to take advantage of wage labor markets by setting a qualitative limit based on a "needs for adequate living conditions" standard.[312] At least with respect to operations in the least developed states, TNCs must provide just wages irrespective, it would seem, of local labor market conditions.[313] The idea of a living wage, deriving from Catholic social thought of the early part of the twentieth century,[314] remains contentious in the West.[315] This provision creates a potential trap for Western corporations, whose boards may find that paying *just wages* violates their fiduciary duty to maximize shareholder wealth, at least in the absence of domestic legislation requiring the payment of *minimum wages* set under a standard such as this. The relationship between *just wages* and *minimum wages*, like the differences between moral and legal obligation, suggests a mixing of foundational systems that can result in great difficulty to provide guidance or to implement. What it does seem to provide aplenty is the

---

TNCs to develop and disseminate internal operating rules and make them available to stakeholders. Comment 15(e) requires disclosure of conditions affecting health, safety or the environment to everyone who may be affected.

310 *Commentary*, *supra* note 2, ¶ 7 cmt. (e).

311 *Commentary*, *supra* note 2, ¶ 7 cmt. (f).

312 *Norms*, *supra* note 2, ¶ 8.

313 *Commentary*, *supra* note 2, ¶ 8 cmt. (a) (requiring that "[o]perations in the least developed countries . . . take particular care to provide just wages" and that wages must be set "so as to ensure an adequate standard of living for workers and their families.").

314 "The idea of a living wage was described as a family wage in Catholic social thought in 1931 because the support of the family was a driving force for the call of just wages. 'In the first place, the wage paid to the workingman should be sufficient for the support of himself and of his family.'" William P. Quigley, *Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even for Prisoners*, 44 Santa Clara L. Rev. 1159, 1174 (2004) (quoting in part Pius XI, Quadragesimo Anno: After Forty Years, para. 71 (1931) *reprinted in* Catholic Social Thought: The Documentary Heritage 58 (David J. O'Brien & Thomas A. Shannon eds., 2001). The adequate remuneration norm's basis runs parallel to that developed by the Catholic Church a century earlier:

> The Church does not deny that free negotiation is a prerequisite to the establishment of a just wage, yet it reminds us that 'there is a dictate of nature more imperious and more ancient than any bargain between man and man, that the remuneration must be enough to support the wage earner in reasonable and frugal comfort . . . if through necessity or fear of a worse evil, the workman accepts harder conditions because an employer will give him no better, he is the victim of force and injustice.'

Kevin J. Doyle, Comment: *The Shifting Legal Landscape of Contingent Employment: A Proposal to Reform Work,* 33 Seton Hall L. Rev. 641, 651-652 (2003) (quoting Pope Leo XIII, Rerum Novarum (On the Condition of Labor, 1891) 15, reprinted in Catholic Social Thought: The Documentary Heritage 31 (David J. O'Brien & Thomas A. Shannon eds., 1995)).

315 In addition to the cites in the previous footnote, *see, e.g.*, Susan J. Stabile, Religious Employers and Statutory Prescription Contraceptive Mandates, 43 Cath. Law. 169 (2004); William Quigley, *Full-Time Workers Should Not be Poor: The Living Wage Movement,* 70 Miss. L.J. 889 (2001).

opportunity for "stakeholders" to challenge wage determinations on the basis of a standard that is difficult to conceive, much less to apply.

The *right to collective bargaining* elaborated in Paragraph 9 of the *Norms* seeks to harmonize, at an international level, labor unionization rights.316 Such a right would be defined by and subject to international norms developed through the International Labor Organization.317 This might cause a problem both in those jurisdictions that have not ratified international labor conventions,318 and in those states whose political or judicial branches interpret domestic rights to unionize differently from that evolving under international standards (potentially, for example, in the United States).319

The right to collective bargaining commentary also suggests that the *Norms* ought to be incorporated into TNC collective bargaining agreements320 and violations of the Norms ought to constitute appropriate bases for worker grievances.321 The right to collective bargaining also explicitly evidences the intent of the drafters to use the Norms to end-run or trump inconsistent domestic law of either the host or home states.322 But here, as well, the *Norms* produce an internal inconsistency: it is not clear how a TNC can honor the labor obligations of the *Norms* in states that have refused to ratify the underlying international standards without also violating the *Norm's* equally important obligation that TNCs respect the national sovereignty of the states in which they operate,323 an obligation taken up next. Here is a situation in which a TNC could breach the *Norms*, whichever course it chose.

4.2.2.8. Respect for National Sovereignty and Human Rights (¶¶ 10-12). Paragraph 10 of the Norms would have required TNCs are required to recognize and respect not only the international and domestic law of the host state, but also are required to respect and recognize additional policy goals and objectives. Theses are: (1) the rule of law; (2) the public interest; (3) development objectives; (4) social economic and cultural policies including

316 *See, Norms, supra* note 2, ¶ 9 (TNCs to "ensure freedom of association and effective recognition of the right to collective bargaining by protecting the right to establish . . . and to join organizations of their own choosing").

317 The *Commentary* makes reference to the ILO's Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) "and other international human rights law," s*ee Commentary, supra* note 2, ¶ 9 cmt. (a), the Right to Organize and Collective Bargaining Convention, 1949 (No. 98) and the Collective Bargaining Convention, 1981 (No. 154) *Id.* at cmt. (b), the Workers' Representatives Convention, 1971 (No. 135) and the Communications Within the Undertaking Recommendation, 1967 (No. 129), *Id.* cmt. (c) The conventions are legally binding in those states that have ratified them. However, the current thrust of ILO standard making has been criticized for its volunteerism and reliance on principles rather than rights. *See, e.g.*, Philip Alston, *'Core Labour Standards' and the Transformation of the International Labour Rights Regime*, 15 Eur. J. Int'l L. 457 (2004).

318 For a listing of see International Labor Organization, *Ratifications of the Fundamental Human Rights Conventions by Country*, available at http://www.ilo.org/ilolex/english/docs/declworld.htm (last visited March 6, 2005). But implementation of the standards remain problematic. *See, e.g.*, Dmitri A. Pentsov and Iliana Christodoulou-Varotsi, *Labor Standards on Cypriot Ships: Myth and Reality*, 37 Vand. J. Transat'l L. 647 (2004).

319 *See, e.g.,* Philip R. Seckman, *Invigorating Enforcement Mechanisms of the International Labor Organization in Pursuit of U.S. Labor Objectives,* 32 Denv. J. Int'l L. & Pol'y. 675, 686-689 (2004).

320 See *Commentary, supra* note 2, ¶ 9 cmt. (b). (the right to force a TNC to comply with its obligations under the Norms as part of a collective bargain grievance process suggests a close tie between the worker rights provisions and the General Provision ¶ 15 on incorporation of the Norms into all agreements to which the TNC is a party).

321 *Commentary, supra* note 2, ¶ 9 cmt. (b) (respect of right to submit grievances, including grievances as to compliance with the Norms to persons who have the power to redress any abuses found).

322 *Commentary, supra* note 2, ¶ 9 cmt. (e). Comment. e purports to obligate TNCs to "take particular care to protect the rights of workers from procedures in countries that do not fully implement international standards regarding freedom of association, the right to organize and the right to bargain collectively").

323 *Norms, supra* note 2, ¶ 10.

transparency, accountability and prohibition of corruption; and (5) the authority of the host state.[324] The scope of these objectives is spelled out in more detail in the commentary to Paragraph 10.

Paragraph 10 elaborates a fundamental principle of corporate governance—that corporate activity must be directed to the encouragement of social progress and development, rather than shareholder wealth maximization.[325] Bound up in this obligation to aid development is the more specific obligation to transfer technology. Protection of intellectual property is characterized as an obligation to "contribute to the promotion of technological innovation and to the transfer and dissemination of technology."[326] The objective is to impose on TNCs an obligation for the implementation of social and economic welfare policies in a development context, perhaps in lieu of or in coordination with the state.[327]

Respect for the rights of local communities requires especial rules with respect to indigenous communities, including an obligation to refrain from depriving indigenous communities of "their own means of subsistence" or removing them from their lands. TNCs also have an obligation to use particular care with respect to road projects and "in situations in which indigenous lands, resources, or rights thereto have not been adequately demarcated or defined."[328] More generally, TNCs must respect the right to development of people within a regime of sustainable development[329] and "within the limits of their resources and capabilities . . . encourage social progress and development by expanding economic opportunities."[330] This expansive definition clearly expresses the *Norms'* attempted shift from a shareholder maximization model to a public law model, which imposes on corporations a primary obligation to serve the political community in which it operates in accordance with international standards.

Paragraph 11's anti-corruption provisions[331] add a transparency requirement to the *Norms*.[332] The *Commentary* prohibits receipt of benefits in the form of natural resources "without the approval of the recognized Government of the State of origin of such resources."[333] An anti-corruption principle is easy enough to state, but even in the context of the *Norms*, difficult to elaborate without collapsing on itself. Consider, for example, the contradictions possible between the anti-corruption standard of Paragraph 11 Comment (b) (no payment in the form of natural resources without the approval of the recognized government) and that of Paragraph 10 Comment (c) (rights of indigenous people with respect to their natural resources) when the interests of the State and indigenous people conflict, where the recognized government is non-democratic, or where the government is later found to have violated humanitarian or human rights law. A similar tension exists between Paragraph 11 Comment (b) and Paragraph 3 Comment (b) (TNCs may not benefit from violations of human rights or humanitarian laws).

---

[324] *Norms, supra* note 2 at ¶ 10.

[325] *Commentary, supra* note 2, ¶ 10 cmt. (a).

[326] *Commentary, supra* note 2, ¶ 10 cmt. (d). The Comment does not explain how transferring or privatizing traditional state functions in this manner will be compatible with the overall object of Paragraph 10 except in the most ironic way.

[327] *Id.*

[328] *Commentary, supra* note 2, ¶ 10 cmt. (c).

[329] *Commentary, supra* note 2, ¶ 10 cmt. (b).

[330] *Commentary, supra* note 2, ¶ 10 cmt. (a).

[331] Norms, supra note 2, ¶ 11. Paragraph 11 prohibits corruption, prohibits activity that encourages, supports or solicits human rights, and imposes a positive obligation on TNCs to see to it that good and services provides not be used to abuse human rights.

[332] *Commentary, supra* note 2, ¶ 11 cmt. (a). (TNCs shall enhance the transparency of their activities in regard to payments to government and public officials).

[333] *Commentary, supra* note 2, ¶ 11 cmt. (b).

The *Commentary* also extracts from the anti-corruption standard of Paragraph 11 a financial statement reporting standard. TNCs "and other business enterprises shall assure that the information in their financial statements fairly presents in all material respects the financial condition, results of operations and cash flows of the business."[334] The intent of this comment is unclear at best. Narrowly interpreted, it provides no more than the articulation of an obligation to disclose financial information in form that conforms to the requirements imposed by the domestic law of the state in which distribution is to be made. On the other hand, the comment may signal an intent to permit the Human Rights Commission to develop its own financial reporting rules for TNCs, focusing on the human rights obligations of these entities. Such a broad ambition would surely meet with substantial opposition currently, but may be a harbinger of efforts to come.

Paragraph 12 (TNCs shall respect and contribute to economic, social, political, civil, and cultural rights and the right to development) adds important constraints on TNC activity.[335] The *Commentary* suggests that the obligations of Paragraph 12 mirror an understanding of the scope of the International Covenant on Economic, Social, and Cultural Rights and the comments thereto,[336] which some states (including the United States) have not ratified.[337] Included in those obligations are requirements of self-assessment[338] that take into account the comments of stakeholders,[339] as the term is broadly defined in Paragraph 22. In addition, eviction law is internationalized[340] providing for recourse to legal and other protection pursuant to international human rights law, rather than to the law of the state in which eviction is to occur. The obligation to protect political and civil rights under the *Norms* is governed not only by the International Covenant on Civil and Political Rights[341] but also by the "relevant general comments adopted by the Human Rights Commission."[342]

4.2.2.9. Obligations with Regard to Consumer Protection (¶ 13). Paragraph 13 of the *Norms* describes substantive conduct standards with regard to consumer protection.[343] One interesting aspect of Paragraph 13 centers around the prohibition on the production, sale, distribution, marketing, or advertising of harmful or potentially harmful products.[344] The *Commentary* does not define "potentially harmful," except perhaps by reference to the "safe for intended and reasonably foreseeable uses" standard of *Commentary* Paragraph 13(c).[345] That commentary also requires regular monitoring and testing in the context of reasonable usage and custom.[346] Where the product is potentially harmful, the *Commentary* requires disclosure of "all appropriate information on the contents and possible hazardous effects of the products they produce" through labeling,

---

334 *Commentary, supra* note 2, ¶ 11 cmt. (c).
335 Norms, supra note 2, ¶ 12.
336 *Commentary, supra* note 2, ¶ 12 cmt. (d).
337 The Covenant as well as a listing of the status of ratification is available at Office of the High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights, *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm (last visited March 4, 2005).
338 *Commentary, supra* note 2, ¶ 12 cmt. (d).
339 *Commentary, supra* note 2, ¶ 16 cmt. (g).
340 *Commentary, supra* note 2, ¶ 12 cmt. (c) (no eviction without providing "recourse to, and access to, appropriate forms of legal or other protection pursuant to international human rights law.").
341 International Covenant on Civil and Political Rights, available at http://www.ohchr.org/english/law/ccpr.htm (last visited March 4, 2005).
342 *Commentary, supra* note 2, ¶ 12 cmt. (e).
343 *Norms, supra* note 2, ¶ 13.
344 *Norms, supra* note 2, ¶ 13.
345 *Commentary, supra* note 2, ¶ 13 cmt. (c).
346 *Id.*

advertising, and other appropriate methods.347 The *Commentary* also requires TNCs to "adhere to relevant international standards so as to avoid variations in the quality of products that would have detrimental effects on consumers, especially in states lacking specific regulations on product quality."348 The *Norms* contemplate that consumer protection standards are to be harmonized in accordance with international standards, with TNCs as agents of the international legal order through private ordering where states resist adoption of international standards.349 But this highlights another potential tension in the *Norms:* TNCs may not use "the lack of scientific certainty as a reason to delay the introduction of cost-effective measures intended to prevent such effects" even though TNCs are technically bound to respect the precautionary principle when dealing with preliminary risk assessment.350 Labeling requirements for hazardous products are also internationalized under the *Norms.351*

4.2.2.10.Obligations With Respect to Environmental Protections (¶ 14). The *Norm's* environmental provisions are written in parallel to the consumer protection provisions of Paragraph 13. Their focus is on the harmonization of environmental practice with international "laws, regulations, administrative practices and policies." In addition, TNCs are charged with a positive obligation to contribute to the "wider goal of sustainable development."352

The *Commentary* adopts a broad liability standard for environmental damage: liability may follow from any product introduced "into commerce, such as packaging, transportation, and by-products of the manufacturing process."353 TNCs "shall insure that the burden of negative environmental consequences shall not fall on vulnerable racial, ethnic and socio-economic groups."354 Environmental assessments are to be made available to the general public (as well as the government of the host and home states, and international bodies).355 In this respect, compare *Commentary* Paragraph 14 (e)356 with Paragraph 13(c).357

4.2.3 The Difficulties of Business and Human Rights Convergence–Sovereignty, Focus, and Rights.

Read as a whole, the *Norms* attempt to make great changes to both the internal norms of corporate governance and to the overall structure of international law. The *Norms*, even in draft form, have had an effect on the discourse of corporate responsibility on the international stage. This is especially the case among academics[358] and within academically oriented NGOs.[359] The Sub-Commission for the Promotion and Protection of Human Rights, in its most recent report on the status of the *Norms*, also noted the great divide between public sector-oriented

347 *Commentary, supra* note 2, ¶ 13 cmt. (e).
348 *Id.* ¶ 13 cmt. (c).
349 *Id.* ¶ 13 cmts. (b) - (c).
350 *Commentary, supra* note 2, ¶ 13 cmt. (c).
351 *Commentary, supra* note 2, ¶ 13 Comments (d) -(e).
352 *Norms, supra* note 2, ¶ 14.
353 *Commentary, supra* note 2, ¶ 14 cmt. (b).
354 *Commentary, supra* note 2, ¶ 14 cmt. (c).
355 *Commentary, supra* note 2, ¶ 14 cmt. (d).
356 *Commentary, supra* note 2, ¶ 14 cmt. (e) (adoption of prevention and precautionary principles, lack of scientific certainty to delay introduction of cost effective measures).
357 *Commentary, supra* note 2, ¶ 13 cmt. (c) and *supra*, at notes ---. (similar with respect to consumer protection).
358. *See, e.g.*, Carolin F. Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 4 German L.J. 1065 (2003) (describing the *Norms* and their effects on corporate governance discourse).
359. *See, e.g.*, Sánchez-Moreno & Higgins, *supra* note 38, at 1676–77, 1787 (2004) (reporting results of year long project undertaken by the Joseph R. Crowley Program in International Human Rights at Fordham University Law School).

participants—principally academics and NGOs—and private sector or market-oriented participants—businesses and developed states.[360]

The former primarily argued to the Sub-Commission that the *Norms* represent a clear and complete advance over existing voluntary standards for regulating business behavior.[361] They also suggested that the *Norms* represent an advance over existing standards by providing a single comprehensive regime drawing an appropriate balance between the obligations of states and of companies with respect to human rights, and by providing useful tools for evaluating performance.[362] More importantly, advocates of the *Norms* were fond of the *Norms*' utility in providing a template for State behavior—providing a framework of standards that states ought to impose—while providing a system of remedies for individuals, supervised by a supra-national organization that important elements of global civil society trust (or at least trust more than they trust states).[363]

States and businesses, on the other hand, stressed the extreme radicalism of the *Norms*: The mandatory approach of the *Norms* represents an unjustified shift from the prevailing model of voluntary standards; the presumptions of the *Norms* suggest that private economic entities are more rather than less likely to advance human rights and development; and that, in any case, the obligations imposed upon TNCs are beyond the competence of international law in general, and baseless in particular.[364] In addition, this group argued, the *Norms* themselves are vague and inaccurate, at least to the extent that they mean to impose upon TNCs legal obligations that are either merely aspirational or have not been adopted by some or all of the states in which TNCs may operate.[365] Moreover, these groups objected that the *Norms* seek to shift traditional subjects of state responsibility onto private economic collectives, providing a convenient means through which states can continue to avoid their own obligations to those for whom they might be responsible.[366]

Both groups raise important points elaborated below. But they fail to appreciate the enormity of the *Norms* as a modification of foundational elements of corporate regulation. What make the *Norms* striking are the extraordinary effects that one fundamental change in corporate governance can make: Substituting a public for a private law basis for corporate governance alters not only the focus of regulation, but also the division of power over the corporate entity. If everyone is a stakeholder, and everyone has an "ownership" interest in the corporation, then the focus of governance shifts. The direction of corporate activity, as well as the objects to which these organizations are directed, changes. This section provides a preliminary analysis of the character and nature of these shifts, and their relation to current understandings of corporate law and corporate governance.

4.2.3.1. Effect on Domestic Corporate Law. The *Norms* produce a standard incompatible with the domestic corporate laws of a majority of states. Yet the *Norms* make little effort either to recognize or resolve this conflict. This approach is not the product of ignorance or carelessness. Instead, it reflects a clever idea: assert the autonomy and supremacy of international law over domestic law by imposing international law standards through private law, thereby making state acceptance of those standards less relevant to implementation. The *Norms* seek to do this with the long term view of putting forward the *Norms*-grounded private and contractually binding behavior of TNCs as the basis for the recognition of new (and binding) customary international law.

360. The Sub-Commission admitted that: "Employer groups, many States and some businesses were critical of the draft while non-governmental organizations and some States and businesses as well as individual stakeholders such as academics, lawyers and consultants were supportive." *Report of High Commissioner*, *supra* note 212, ¶ 19.
361. *See Ibid.* ¶ 21(a)–(b).
362. *See Ibid.* ¶ 21(c)–(e).
363. *See Ibid.* ¶ 21(f)–(i).
364. *See Ibid.* ¶ 20(a)–(c).
365. *See Ibid.* ¶ 20(d)–(e), (h).
366. *See Ibid.* ¶ 20(f)–(g).

First, one might the Norms' potential for overturning the shareholder primacy model and national regulatory authority over (corporate) enterprises. The potential radicalism of the *Norms* from the perspective of traditional corporate governance is vast.[367] In particular, the *Norms* seek a substantial transformation of the old "shareholder vs. stakeholder" model in two ways. First, they suggest a model of stakeholder primacy. Second, they substantially expand the concept of stakeholder to include virtually every element of civil society—including states and the international community. Because the *Norms* are meant to apply in both home and host states, the effects of this change will be available and enforceable even in those jurisdictions that base their corporate law on a different model. As a consequence, should the *Norms* be given effect as contract, the thrust of much domestic (and especially American) corporate law can be brushed away.

The *Norms* seek to impose this change without addressing their effects on settled issues of domestic corporate law. The necessity of dealing with corporate power appears to justify the easy obliteration of nation-state sovereignty in connection with the regulation of legal persons. The *Norms*, in this sense, are especially powerful indicia of the way in which state sovereignty is viewed from the international level: National sovereignty, like state sovereignty in the United States, is a residuary power, to be observed only when convenient to the interests of the general power.

The *Norms* are clear that, at least with respect to economic entities subject to them, the old regulatory foundation of corporate governance—shareholder primacy and shareholder wealth maximization—has no legal basis. Under the laws of most of the industrialized world, the object of a corporation is to increase the wealth of its shareholders, within the limits of its resources and capabilities.[368] Shareholders retain ultimate control of the corporate governance machinery and the duty of those appointed by them flows exclusively to shareholders.[369] Under the *Norms*, shareholder interests are leveled with those of other stakeholders. The board of directors will have to balance the interests of a slew of different actors whose interests in the corporation, direct or indirect, appear now to form a part of the board's fiduciary obligation. Under the *Norms,* TNCs "and other business enterprises, within the limits of their resources and capabilities, shall encourage social progress and development by expanding economic opportunities—particularly in developing countries and, most importantly, in the least developed countries."[370] Paragraph 16 makes clear that all decisions of the TNC must take into account input from stakeholders.[371]

A number of other substantive provisions also define corporate purpose away from a model based on the primacy of shareholder wealth maximization. Paragraph 8 requires TNCs to pay "just wages."[372] Paragraph 10 requires a TNC to "apply [its] intellectual property rights in a manner that contributes . . . [to] the dissemination of technology . . . in a manner conducive to social and economic welfare."[373] Paragraph 12 imposes on TNCs an

---

367. The boundaries and forms of the traditional debate are described *supra* Part I.
368. *See supra* Part I.
369. As one scholar argues:

> Shareholders are the owners of the corporate enterprise. As the risk takers, they stand to gain from the success of the business. At the same time, they stand to lose their investment if the enterprise fails. Because of the shareholders' stake in the business, corporate law has vested ultimate control of the corporation in the shareholders.

Thomas Lee Hazen, *Silencing the Shareholders' Voice*, 80 N.C. L. Rev. 1897, 1900 (2002) (criticizing certain changes to the corporate law of North Carolina).
370. *Commentary*, *supra* note 1, ¶ 10 cmt. (a).
371. *Ibid.* ¶ 16 cmt. (i).
372. *Norms*, *supra* note 1, ¶ 8; *Commentary*, *supra* note 1, ¶ 8 cmt. (a).
373. *Commentary*, *supra* note 1, ¶ 10 cmt. (d).

obligation to contribute to the realization of economic, social, and cultural rights of the people in whose political territory the TNC operates.[374]

If the *Norms* are mandatory, and require transposition into contracts between TNCs and others, a board of directors may expose itself to liability if it fails to incorporate the *Norms* in its contracts—or even if it does. In the former case, a board of directors would cause the TNC, or its constituent parts, to breach its obligations under the *Norms*. In the latter case, a board may breach its fiduciary duty to its shareholders under the laws of the jurisdiction with authority to regulate its internal affairs, if the TNC allocates its resources in conformity with the *Norms* rather than in an attempt to maximize shareholder wealth.

In the United States, a strong argument could be made that any *mandatory* application of the *Norms* in contract would likely fail. The argument runs as follows: A stakeholder model, of the type sought to be implemented through the *Norms*, violates the public policy inherent in the corporate law of most states. The basic relationships between boards of directors, officers, and shareholders are creatures of both state law and the corporate documents describing the organization and governance of the entity.[375] Any attempt to change in any fundamental respect the relationship between these actors requires amendment of these basic documents. Such amendments are valid only within the bounds permitted under state law.[376] As a result, neither a corporate board of directors nor its officers would have the authority to enter into contracts that have the effect of altering the relationship between them and the corporate shareholders as prescribed by domestic law and public policy. But the *Norms* seek to do just that. On that basis, *even if a TNC board of directors and its officers desired to comply with the* Norms, contracts incorporating the *Norms* would be voided as exceeding the authority of the board and officers, or would be construed narrowly to avoid any attempt to deviate from the shareholder wealth maximization model absent shareholder approval in the manner prescribed under state law.

In the United States, at least, that result can be avoided only if the *Norms* themselves are incorporated into the law of the United States. In such a case, the *Norms*, as federal law, could preempt any state law to the contrary.[377] But the United States has resisted any wholesale preemption of state corporate law. There appears to be little political movement in that direction, especially since the federal government has been able to affect the nature of corporate law indirectly, at least with respect to corporations that matter most to the government, under the federal securities laws.[378]

Clearly the substantive standards of the *Norms* would be incompatible with the national law of some states. This incompatibility is heightened under any regime in which imposition of the *Norms* is made mandatory. In the absence of some method of harmonization, TNCs are put in an untenable dilemma—they must the either violate the *Norms* or the national law inconsistent with the *Norms*. If they choose to violate national law, there are few international legal mechanisms available to protect the TNCs within the territory of the state. There are even

374. *Norms*, *supra* note 1, ¶ 12. The *Commentary* identifies particular activities that promote rights to health, food, water, and housing. In addition, Paragraph 12 obligates TNCs to protect the civil and political rights of the population. *Commentary*, *supra* note 1, ¶ 12 cmt. (e).

375. These corporate documents can include the articles of incorporation, by-laws, and, in closely held corporations, a shareholder or similar agreement. *See, e.g.*, Del. Code Ann. tit. 8, §§ 102–109, 350 (2001 & Supp. 2004).

376. Thus, for example, the power of shareholders to divest the board of its power is constrained by strict limits and may require amendment of a corporate charter, see *Ibid.* § 141(a), or the execution of a unanimous shareholder agreement, see Rev. Model Bus. Corp. Act §§ 7.32, 8.01(b), 7.32 (2002).

377. For the constitutional law foundation of this proposition see, for example, William L. Carey, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L.J. 663, 703–04 (1974).

378. The creeping federalization of corporate governance issues inherent in this approach was especially apparent with the passage of the Sarbanes-Oxley Act. For a discussion, see Larry Catá Backer, *The Sarbanes-Oxley Act: Federalizing Norms for Officer, Lawyer, and Accountant Behavior*, 76 St. John's L. Rev. 897 (2002).

fewer means of forcing states to respect the *Norms* if the price of that respect requires abandonment of national legislation. If the standards are voluntary, however, they lose their sting. TNCs can then adopt the *Norms* as they like, and only to the extent that such private law adoption does not breach the domestic law of any jurisdiction with regulatory power. Thus, to the extent that compliance, in some form, with the standards articulated in the *Norms* may lead to expansions of markets, entry into new markets, or increased sales, for example, then voluntary incorporation will be a matter of business judgment well within the prerogatives of the TNC board of directors. In this form, the *Norms* can join the host of other voluntary standards of corporate conduct that have been developed over the last thirty years.[379] Viewed in this way, the voluntary code movement has achieved an additional success: It has not only provided a business solicitous basis for defining relationships between business, political communities, and individuals, the movement has also managed to make it extremely difficult for regulating bodies to impose any sort of mandatory regulatory regime—especially a regime less solicitous of business interest than a private law model of regulation.[380]

In addition, within the context of the *Norms*, the concept of stakeholder, to which the corporation would now owe its duty, has been expanded beyond all recognition from the traditional regulation of corporations within domestic legal orders. Stakeholders include "stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises."[381] Any individual or entity can be considered a stakeholder as long as it meets the "substantially affected by the activities [of the TNC]" standard.[382] Under this standard, stakeholders can include "consumer groups, customers, Governments, neighboring communities, indigenous peoples and communities, non-governmental organizations, public and private lending institutions, suppliers, trade associations and others."[383]

Moreover, the *Norms* require TNCs to incorporate their terms into labor contracts and rights to arbitrate.[384] To some extent, this may have the effect of treating labor as an important direct constituent stakeholder of a corporation. The role of labor within corporate governance has a long and tumultuous history as a subject of legal regulation. In some states, such as Germany, a form of labor participation in corporate governance is the norm.[385] Yet when the European Union sought to transpose this notion to the entire Community, the resistance from other Member States, the United Kingdom in particular, was fierce.[386] American law has tended to resist labor participation in corporate governance—though not worker acquisition of ownership rights through

379. For a discussion of voluntary codes applied by TNCs, see Redmond, *supra* note 109, at 87–99. For a discussion in the context of actions by specific corporate actors, see Lewis D. Solomon, *On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations—A Critical Assessment*, *in* Progressive Corporate Law, *supra* note 30, at 281, 285–303.

380. "The move by the TNCs to a more proactive corporate citizenship was in some part a preemptive strike against increasing pressure on and by governments and international bodies to regulate the activities of big business more tightly." Sklair, *supra* note 145, at 151. In fact, "[t]he strategy of major corporations is to avoid public contact with politicians as much as possible. Instead they prefer to work through sympathetic officials who control the regulatory agencies, the globalizing bureaucrats who have a supporting role in the transnational capitalist class." *Ibid.*

381. *Norms*, *supra* note 1, ¶ 22.

382. Stakeholders can include anyone "when their interests are or will be substantially affected by the activities of" the TNC. *Ibid.* It is not clear that any person or entity cannot qualify as a stakeholder.

383. *Ibid.*

384. *See Ibid.* ¶ 9.

385. For a useful description of the German form of labor participation in corporate governance, see Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 Geo. L.J. 439 (2001).

386. For a useful description of the history of the idea of labor representation in European Community corporate governance, see Vanessa Edwards, EC Company Law 399–404 (1999).

share purchases, or indirect worker participation through the mechanics of federal labor regulation. In this way, American law recognizes stakeholders other than shareholders.[387]

Nonetheless, the *Norms* appear to embrace a more all-encompassing model. At first blush, the broadening of stakeholders appears somewhat radical. But, as discussed above,[388] "other constituency" statutes have been written into law in a number of states. In addition, corporate law recognizes the power of corporations to enter into private law arrangements with stakeholders whose interests are not the subject of regulation by corporate law—lenders, trade creditors, employees, customers, suppliers, and the like. The *Norms* draw on these traditions in a very expansive way.

Second, one might then consider the Norms' effect on the principle of autonomy of the corporate legal person. In this respect the Norms might be read, at their broadest, to mandate (or at least encourage or point to) some sort of mandatory enterprise organization model the broad structures of which become a matter of international law as a function of human rights impacts. In this sense, it might be plausible to consider that the *Norms* attempt larger changes to the character of corporate governance. I have explored the ways the *Norms* seek to restructure the internal organization of corporations. In this section, I begin to explore the ways the *Norms* affect the external character of corporate organization. I sketch these effects in three respects: the imposition of an enterprise liability model for TNCs; the potential construction of alternative or conflicting financial and labor relations obligations; and concentration on TNCs as objects of enforcement under the Rome Statute of the International Criminal Court.

The *Norms* internationalize and adopt an enterprise liability model as the basis for determining the scope of liability for groups of related companies. This approach does, in a very simple way, eliminate one of the great complaints about globalization through large webs of interconnected but legally independent corporations forming one large economic enterprise.[389] The problem, of course, is that, as a matter of the domestic law of most states, the autonomous legal personality of a corporation matters. Most states have developed very strong public policies in favor of legal autonomy.[390] At the same time, virtually all states have rules for imposing liability on shareholders or related corporations under circumstances in which such "piercing of the veil" of autonomy is

387. *See* Winkler, *supra* note 106.

388. *See supra* notes 59–60 and accompanying text.

389. Many commentators have noted the problem of liability avoidance by large integrated economic enterprises through complicated division into subsidiaries. For most, it seems unfair that corporations may limit their liability by splitting their operations among juridically independent subsidiaries and thus avoid exposing all of the enterprises' assets to liability incurred by any of its parts. For a discussion of the problem see, for example, Blumberg, *supra* note **Error! Bookmark not defined.**, at 121–50; Joseph, *supra* note 91, at 128–43; Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 Conn. J. Int'l L. 379 (1999).

390. While this policy in favor of corporate autonomy is strong, it is not monolithic, even in the most "traditional" jurisdictions:

> When governments think of an appropriate regime for "their" transnational corporations, most tend to look for principles that will enlarge the rights of those corporations in foreign countries without impairing the responsibilities of such corporations to the home government. However, when governments (often the same governments) are thinking of an appropriate regime for the foreign-owned subsidiaries that lie within their own jurisdictions, they commonly look for principles that will minimise the influence of foreign governments and foreign parents.

R. Vernon, *Codes on Transnationals: Ingredients for an Effective International Regime*, *in* Transnational Corporations: The International Legal Framework, *supra* note 117, at 69, 72.

warranted.[391] Some states have developed at least some rudimentary form of enterprise liability principles, even in statutory form.[392]

The *Norms* do not address domestic law on this score. The implication drawn from the *Norms* suggests that, because international law forms part of the private law arrangement between the parties to them, domestic limitations on liability are essentially irrelevant; they are waived by the parties to the contract. However, it is not clear that the board of directors may waive the limited liability rights of shareholders without their consent. Such a power may be beyond the reach of a board or its officers.[393] To the extent that limited liability is waived, a shareholder's contract rights may be affected. Such a change might only be permitted either by way of an amendment to the articles of incorporation, or, under some circumstances, only with the approval of the shareholders themselves.

Moreover, it is not clear that such *Norms* contract rights can extend to "stakeholders," whether or not these stakeholders are parties to the contract. This problem is especially acute in the event of a tort affecting a community—for example, a situation like the gas poisoning of the local population in Bhopal, India.[394] But it has an even more important, and far more basic, aspect. To the extent that a *Norms*-driven stakeholder model creates fiduciary or quasi-fiduciary duty obligations on the part of the board of directors to constituencies other than shareholders, that extension may be invalid as a violation of the state corporate law and the strong public policy underlying that law,[395] absent the enactment of statutory authority.[396] The organized Bar in the United States has been quite wary of these "constituency statutes." The American Bar Association (ABA) Committee on Corporate Laws feared that these sorts of statutes "may radically alter some of the basic premises upon which corporation law has been constructed in this country without sufficient attention having been given to all of the economic, social,

---

391. *See* Nicole Rosenkrantz, *The Parent Trap: Using the Good Samaritan Doctrine to Hold Parent Corporations Directly Liable for their Negligence*, 37 B.C. L. Rev. 1061, 1086–87 (1996). This "veil piercing," grounded in equity in the United States, has the usual problems of equity—it is difficult to construct an easily applicable jurisprudence from a judicial mechanism meant to produce just results in individual cases. For a criticism of the messiness of veil piercing in the United States, see Stephen Bainbridge, *Abolishing Veil Piercing*, 26 J. Corp. L. 479, 506–14 (2001). To similar effect in Australia, see Ian Ramsey & David Noakes, *Piercing the Corporate Veil in Australia*, 19 Company & Securities L.J. 250 (2001).

392. *See* Muchlinski, *supra* note 38, at 123–57.

393. Del. Gen. Corp. L. § 102(b)(6) (authorizing waiver of limited liability "otherwise the stockholders or members of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts"); Mod. Bus. Corp. Act §§ 2.02(b)(v) (same as Delaware provision); 6.22(b) ("a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct"). The Official Comment to Section 6.22(b) describes the provision as setting "forth the basic rule of non-liability of shareholders for corporate acts or debts that underlies modern corporation law." Mod. Bus. Corp. Act § 6.22 Official Comment. *Cf.* Henry Hansmann & Reiner Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale. L.J. 1879, 1919–20 (1991) (advocating elimination of limited liability protection for shareholders in tort claims against the corporation).

394. In December 1984, as a result of various and cumulative safety failures, the Union Carbide plant in Bhopal, India released a cloud of toxic gas, killing about 2,500 people, mostly poor villagers who were not warned of the approaching cloud, and injuring about 200,000 more people. Some have said it is among the worst industrial accidents of its kind. *See* Lee Wilkins, Shared Vulnerability: The Media and American Perceptions of the Bhopal Disaster 1–4 (1987). For a discussion of the substantial efforts of Union Carbide to avoid direct liability, see Cassels, *supra* note 115, at 163–88; Marc Galanter, *The Transnational Traffic in Legal Remedies*, *in* Learning From Disaster: Risk Management After Bhopal 133, 133–57 (Sheila Jasonoff ed., 1994).

395. The Delaware courts, for example, have concluded that while boards of directors might consider the effect of decision on constituencies other than shareholders where decisions concern the maintenance of the corporate enterprise, "concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder." Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985).

396. Thus, about thirty states have enacted legislation that permits (and in one case compels) boards of directors to consider the effects of a corporate decision on constituencies other than shareholders. *See, e.g.*, Ohio Rev. Code Ann. § 1701.59(E) (West 2005).

and legal ramifications of such a change in the law."[397] One of those basic premises that might be radically altered or weakened would be the principle of "waste" under state corporate law.[398] Any corporate action that might seriously threaten or otherwise sacrifice profits may be beyond the power of corporate managers or the board to undertake.[399]

It would seem, then, that incorporating the *Norms* requires either domestic enabling legislation at the state or national level, or adoption of the *Norms* as binding international law, effectively preempting state corporate law.[400] But the intent of the *Norms*' drafters was to avoid the bother of the direct approach. Instead, the drafters appeared to assume that it would be possible to avoid issues of conflict with domestic corporate law by incorporating the *Norms* into domestic law in a more roundabout route. First, incorporating even non-binding international corporate behavior standards into contracts between corporations and others would serve to establish behavior baselines. Second, these changes in behavior, on a cumulative basis over time, would themselves serve to establish a new legal baseline for determining acceptable behavior. The mandatory provisions of contract, and the incorporation through them of non-binding standards would eventually create a standard of conduct that should become binding as international law. Thus the *Norms* would serve as a vehicle for creating customary international law through the cumulative changes in corporate behavior brought about through the *Norms*.[401] As customary international law, the *Norms*, it might be argued, would preempt state corporate law to the extent they were inconsistent.

This is a clever approach to law making, indeed, and one that survives into the UNGP project, at leats in terms of its openness to normative evolution. But the methodology might be troubling for sme more invested in the integrity of the contemporary system and its premises. The *Norms* present a method of law making by misdirection, and perhaps even by subterfuge. They effect changes in the laws of political communities without the active participation of either the electorate or its representatives in the process of legislation. It is not clear that this long term, ambiguous back-door approach to international lawmaking furthers democratic values or transparency in law-making, produces (with any assurance) customary international law of the sort hoped for, or otherwise will succeed.[402] Ironically, law making in the manner of the *Norms* might well violate the standards in the *Norms* itself.

The *Norms* weave a complex set of conflicts with domestic legislation regulating at the borders of corporate governance, as understood in the United States. Either TNCs will have to comply with multiple sets of regulatory standards—a large step backwards for any harmonization effort and for the reduction of transaction costs to trans-border activities—or TNCs will face multiple sets of irreconcilable regulations. In this latter scenario, TNCs either will have to ignore some regulations and so increase the risk of exposure to liability or will have to

397. Am. Bar Ass'n, Comm. on Corp. Laws, *supra* note 35, at 2253 (declining inclusion of such a provision in the ABA Revised Model Business Corporation Act).

398. The concept of waste serves a number of purposes. One of its more important purposes is to limit board of director discretion to commit corporate resources to actions that are not meant to credibly enhance corporate wealth. Corporate action undertaken solely in the interests of the social welfare of the political community may constitute waste, for example, in the absence of a credible connection with the welfare of the corporation as an investor wealth maximizing enterprise. *See supra* notes 58–72 and accompanying text.

399. *See* Einer Elhauge, *Sacrificing Corporate Profits in the public Interest*, 80 N.Y.U. L. Rev. 733, 840–58 (2005).

400. "The legal foundations of the 'legitimizing' effect of international declarations regarding the conduct of MNEs are most readily apparent where these declarations, or instruments adopted in reference thereto, affirmatively recommend the transformation of their contents into enforceable rules of domestic law." Baade, *supra* note 44, at 212, 230.

401. "Custom is a mechanism for international 'legislation' that requires only a degree of consensus . . . . [W]e might understand the CIL process as an alternative mechanism for global legislation . . . . [C]ustom may serve as a pathfinder for later-established, more specific treaty rules." Norman & Trachtman, *supra* note 45, at 569.

402. *See infra* notes 456–28 and accompanying text.

cease operating. One example of conflict concerns the *Commentary's* imposition of an "assurance" requirement that TNC "financial statements fairly present[] in all material respects the financial condition, results of operations, and cash flows of the business."[403] Narrowly interpreted, it is possible to view this comment as merely suggesting that the *Norms* require nothing more than compliance with the existing financial disclosure laws of the states in which such disclosure may be required. That reading is innocuous enough. However, this provision becomes problematic if more broadly read. Thus, for example, this provision can be read as empowering the construction of a set of international financial disclosure standards to be uniformly applied in enforcing the *Norms*. But such a reading could create conflicts with the very elaborate financial disclosure requirements of many states, as well as potentially obstruct regulation of securities and related markets. TNCs would either have to prepare multiple forms of financial statements or choose between conflicting reporting rules. But financial reporting is a highly complex and technical area, already subject to regulation by governmental and non-governmental organizations with considerable expertise in the area. It hardly seems an appropriate area for standard setting through the *Norms*. Moreover, such a provision, aggressively read, could interfere with a long standing project to harmonize financial reporting requirements on a global basis.

The same pattern of conflict/harmonization appears in the provisions relating to child and adult labor regulation. The *Norms* proscribe hazardous employment and employment interfering with education, health, safety, or morals for children less than eighteen years of age,[404] and limit labor for individuals aged thirteen to fifteen years to "light work."[405] In the former case, the prohibition extends to states that have recognized no such prohibition, and in the later case, the regulation, while tied to national laws, is limited to "light work," as defined in the *Norms* rather than by national law.[406] In cases of inconsistency, TNCs are under an obligation to consult with states to create and implement programs designed to ensure compliance with international covenants.[407] The working hours of other labor are also regulated directly in the *Norms*.[408] It seems that for the noblest of purposes, the *Norms* effectively subvert the rule of law through their pattern of indirect internationalization in which local law is made irrelevant, superfluous, or the object of interrogation and coercive change.

Last, the *Norms* seek to weave TNCs into the jurisdictional and substantive web of the Rome Statute of the International Criminal Court.[409] Thus, for example, the obligations stated in the commentaries to Paragraph 1

---

403. *Commentary*, *supra* note 1, ¶ 11 cmt. (c). Even if this standard is identical to that adopted in domestic legislation, the norm now serves as another source of financial disclosure law, and unless this standard evolves with changes in domestic legislation, it can potentially diverge from those standards. Moreover, it is not clear that this standard is meant to parallel global efforts to harmonize the rules for financial disclosure. Thus, for example, the International Accounting Standards Board is working toward harmonization of general purpose financial statements:

> The International Accounting Standards Board is an independent, privately-funded accounting standard-setter based in London, UK. The Board members come from nine countries and have a variety of functional backgrounds. The IASB is committed to developing, in the public interest, a single set of high quality, understandable and enforceable global accounting standards that require transparent and comparable information in general purpose financial statements. In addition, the IASB co-operates with national accounting standard-setters to achieve convergence in accounting standards around the world.

International Accounting Standards Board, Mission Statement, http://www.iasb.org/about/index.asp (last visited Dec. 23, 2005). Alternatively, the norm could serve as a source of authority to impose financial disclosure rules specific to human rights. In the absence of a convention or other binding instrument, however, it is not clear that there is authority for the assertion of this power. At the same time, to the extent that the *Norms* create customary international law, the adoption of disclosure behavior by the TNCs may produce a new disclosure regime as customary international law. *See infra* notes 447–21 and accompanying text.

404. *Commentary*, *supra* note 1, ¶ 6 cmt. (b).

405. *Ibid.* cmt. (c).

406. *Ibid.*

407. *Ibid.* cmt. (d).

408. *Ibid.* ¶ 7 cmt. (f).

409. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 37 I.L.M. 999 (entered into force July 1, 2002).

(use due diligence to ensure that activities do not contribute directly or indirectly to human rights abuses); Paragraph 3 (right to security of persons); Paragraph 10 (protection of indigenous peoples to their lands, property, culture, and subsistence); Paragraph 11 (corruption); and Paragraph 12 (protection of human rights) potentially expose TNCs to liability under ICC rules and to actions brought by the ICC prosecutor for violation of human rights. Thus, for example, with respect to the *Norms*' rights to security, there appears to be an implied suggestion that failure to comply may subject the TNC, in appropriate cases, to the jurisdiction of the International Criminal Court,[410] or to punishment under international conventions proscribing transnational criminal activity.[411] Failure to comply with the *Norms* in this respect may serve as evidence of violation of human rights or humanitarian law and potentially subject the TNC to the jurisdiction of the International Criminal Court.[412] This poses a particular problem for American companies because the United States has refused to ratify the Rome Statute of the International Criminal Court, and has entered into a number of bilateral treaties relating to waivers of rights under that international instrument.[413]

Taken together, these developments are troublesome as a matter of traditional corporate law. It is not clear that a corporation has the authority to submit itself to liability with respect to substantive provisions whose binding nature has been rejected by the corporation's country of origin or country of operation. From a shareholder primacy perspective, submission could be validated if the board of directors could demonstrate that embracing standards that increase a company's exposure to liability is in the best interests of the company and will contribute to, rather than diminish, shareholder wealth. This position is not as implausible as it might appear at first blush: It is possible to argue that in the absence of compliance, a corporation would lose market share, sales, or access to the lowest priced capital, resources, or labor. As such, long-term shareholder wealth maximization may require TNCs to embrace this potential exposure. This form of argument underlies much of the discourse on the utility of voluntary codes.[414]

Third, one might examine the potential effect of the Norms' on the core concept of corporate purpose at the macro level, especially with respect to corporate governmentalization. The *Norms*, at their broadest level of

410. *Commentary*, *supra* note 1, ¶ 4 cmt. (a) (requiring TNCs to observe international human rights norms set forth in the Rome Statute of the International Criminal Court and other international conventions). In effect, the *Norms* could ameliorate some of the difficulties academics have noted with respect to the International Criminal Court's assertion of jurisdiction over TNCs. *See, e.g.*, Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons*, *in* Liability of Multinational Corporations under International Law 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) (examining the debate about allowing ICC jurisdiction over "legal persons"); Stephen Kabel, *Our Business is People (Even if it Kills Them): The Contribution of Multinational Enterprises to the Conflict in the Democratic Republic of Congo*, 12 Tul. J. Int'l & Comp. L. 461, 474–85 (2004) (discussing the jurisdiction of the ICC). This approach does much to ameliorate the problem identified by several commentators of holding TNCs accountable for their torts or other wrongdoings in countries where the state power is weak relative to that of the TNC. *See, e.g.*, Ratner, *supra* note 40, at 492–95; Sánchez-Moreno & Higgins, *supra* note 38, at 1676–77.

411. Thus, for example, the 1998 Sub-Commission Report suggests the applicability of the Naples Political Declaration and Global Action Plan Against Organized Transnational Crime, adopted November 23, 1994, to the actions of TNCs. *See* 1998 Sub-Commission Report, *supra* note 133, ¶¶ 15–16. "The negative impact of the activities of transnational corporations on human rights could constitute an aspect of such international crime merely as a result of their presence in several societies." *Ibid.* ¶ 16. *See generally* Fausto Pocar, *The Rome Statute of the International Criminal Court and Human Rights*, *in* The Rome Statute of the International Criminal Court: A Challenge to Impunity 67 (Mauro Politi & Giuseppe Nesi eds., 2001) (discussing how the establishment of the ICC may be of key significance for the development of international human rights law).

412. *See* Philippe Kirsch, Comment, *The International Criminal Court: Current Issues and Perspectives*, 64 Law & Contemp. Probs. 3 (2001); Monroe Leigh, Editorial Comment, *The United States and the Statute of Rome*, 95 Am. J. Int'l L. 124 (2001).

413. *See* Jeffrey S. Dietz, *Protecting the Protectors: Can the United States Successfully Exempt U.S. Persons from the International Criminal Court with U.S. Article 98 Agreements?*, 27 Hous. J. Int'l L. 137 (2004); Chet J. Tan, Jr., *The Proliferation of BiLateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 Am. U. Int'l L. Rev. 1115 (2004).

414. *See, e.g.*, Bantekas, *supra* note 148, at 340–42.

construction, seek a radical transformation of the de jure function of TNCs. TNCs are no longer understood as entities whose purpose is limited to the economic sphere and whose activities must be regulated to ensure that they engage only in economic activities. Instead, the *Norms* understand TNCs as entities with social, cultural, civil, and political purposes on par with economic purposes. The de facto assertion of power by TNCs is used as the basis for extending their de jure authority into areas usually reserved for state power alone.[415] This is an ironic twist on one of the principal bases of the *Norms*—the charge that TNCs interfere with the political, social, cultural, and economic life of the countries in which they operate. The *Norms* effectively turn that fault into the basis for regulation. Rather than provide a means to eliminate TNC "interference," the *Norms* manage interference by treating TNCs as virtual state actors for purposes of many normative requirements.

The *Norms* effectively transform the corporation from an entity whose primary purpose is to maximize profits—that is, from a purely economic creature—into an entity whose principal purposes are encompassed in the great human rights treaty framework of the United Nations: the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights.[416] As I have described it in some detail above,[417] the *Norms*, through private law, impose a significant array of functions once monopolized by public bodies. They do this without state sanction or regulation. Ultimately, then, the TNC derives a direct relationship to international law on an order similar to that enjoyed by states. Thus, the *Norms* vest TNC private relations with an explicit social role: TNCs become important human rights and political actors, especially in the least developed states. But the roles have applicability even in the most developed states where, for example, in the case of the United States, the *Norms* would serve to impose de facto the standards of certain human rights instruments that the United States has refused to ratify.

The *Norms* thus impose a set of precise obligations on TNCs to change their character from private enterprises of limited objective to public actors with positive political obligations that in some cases rival, or even exceed, that of the states in which they operate. The breadth of the public, and inherently political, obligations of TNCs is immense: TNCs must "encourage social progress and development,"[418] adopt and internalize specific labor policies in their global operations,[419] and "contribute to [the] realization" of such rights as "the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights."[420] These obligations involve, at times, the further obligation to "consult with Governments on the design and implementation of national action programmes"[421] and sometimes to actively subvert host nation laws or policies.[422] TNCs have obligations, akin to those of other public law actors, to "refrain from any activity which

---

415. *But cf.* Stephen D. Krasner, Sovereignty: Organized Hypocrisy 223 (1999) ("There is no evidence that globalization has systematically undermined state control or led to the homogenization of policies and structures.").

416. *See Norms*, *supra* note 1, ¶¶ 10–12; *supra* notes 79–87 and accompanying text.

417. *See supra* Part III.

418. *Commentary*, *supra* note 1, ¶ 10 cmt. (a).

419. *See Norms*, *supra* note 1, ¶¶ 6–9; *Commentary*, *supra* note 1, ¶¶ 6 cmts. (b), (d), 7 cmts. (e), (f), 8 cmts. (a), (b), 9 cmt. (b); *supra* notes 253–56 and accompanying text.

420. *Norms*, *supra* note 1, ¶ 12.

421. *Commentary*, *supra* note 1, ¶ 6 cmt. (d). *See also Norms*, *supra* note 1, ¶ 4 (noting that the TNCs' security arrangements shall observe international human rights norms and abide by local law and professional conduct); *Commentary*, *supra* note 1, ¶ 4 cmt (e) (discussing the obligation of TNCs suing public security forces to ensure that security is provided in a manner consistent with human rights and ethical conduct).

422. *See Norms*, *supra* note 1, ¶ 9; *Commentary*, *supra* note 1, ¶ 9 cmt. (e); *supra* notes 275–77 and accompanying text. The obligation to protect the rights of workers against the laws of the host state appears to fly in the face of the requirement of non-interference set forth in *Norms* Paragraph 10, as well as the overarching approach set forth in Paragraph 1 ("States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights.").

supports, solicits, or encourages States or any other entities to abuse human rights,"[423] or to refrain from producing "weapons that have been declared illegal under international law" irrespective of the relationship of that law to the position of the host or home country.[424] In areas in which TNCs operate, the state recedes into the background as a secondary actor, an actor against which the TNC operates for the attainment of the greater, internationally-derived good. In a sense, the *Norms* assume a constitutional dimension at a supra-national level. The *Commentary* seems to mimic an application of ancient American constitutional law wisdom applicable to the interpretation of foundational legal documents: "never forget, that it is a *constitution* we are expounding."[425] When interpreting the *Norms*, the *Commentary* seems to suggest a similar broad interpretive posture: the *Norms* must be broadly interpreted as foundational rules rather than as a precise set of corporate regulations.

The *Norms* thus effectively work toward the convergence of corporate and state organization models. The model of a subordinate unit of private relationships, serving as the object rather than the subject of political will and policy, appears all but abandoned under the *Norms*, despite the façade of adherence to the model of state supremacy.[426] "Some critics of Corporate Social Responsibility argue that a corporation's assumption of responsibility for the health care or education of a developing country's citizenry represents at least as much a perversion of the corporation's function as it does an abdication of responsibility by the state."[427]

To a great extent, then, the *Norms* recognize the power of TNCs and seek to regulate or channel that power. From the perspective of domestic legal orders, however, this attempt at recognition and regularization constitutes de jure recognition of a competitor to state power and the admission that states no longer have a monopoly of power under international law. This attempt also vests public power in organizations that are not disciplined by democratic principles of governance. Like the non-governmental organizations that would be set out to discipline them, TNCs represent the expansion of anti-democratic governance by communities that are neither democratic, nor transparent, nor ultimately accountable in the manner of nation-states, yet who exercise great state power.[428]

4.2.3.2. Effect in International Law. The *Norms* themselves raise three significant issues that have the potential to substantially alter the nature and distribution of power in global governance. The first proceeds from the attempted direct imposition on TNCs of human rights and other international obligations. The second touches on the attempt, through the *Norms*, to vastly expand the meaning of applicable international law to include soft law—laws that states have never recognized as binding. The third relates to the deputization of "civil society" as an important element of the structure of monitoring TNC compliance with their obligations under the *Norms*. The states commenting on the draft *Norms* have been particularly sensitive to the perceived threat the *Norms* pose to their sovereignty. These were thought to tale a variety of forms.

First, the Norms might appear to impose direct obligations on TNCs for compliance with international law. Very narrowly read (and some states would be inclined to read the Norms this way, of course), the Norms might create a framework through which States could, on the basis of the peculiarities of their own constitutional orders, provide for the pass through of international obligations to TNCs—or block them until they were mediated by

423. *Norms*, *supra* note 1, ¶ 11.
424. *Commentary*, *supra* note 1, ¶ 3 cmt. (b).
425. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).
426. *See Norms*, *supra* note 1, at pmbl.
427. Hon. Delissa A. Ridgeway & Mariya A. Talib, *Globalization And Development—Free Trade, Foreign Aid, Investment And The Rule Of Law*, 33 Cal. Western Int'l L.J. 325, 332 (2003). *See also* Yoshiro Miwa, *Corporate Social Responsibility: Dangerous and Harmful, Though Maybe Not Irrelevant*, 84 Cornell L. Rev. 1227, 1250–53 (1999) (criticizing the conflation of corporate and state regulation in Japan before the Second World War and its relation to Marxist views of the relation of the state and corporation).
428. *See infra* notes 427–440 and accompanying text.

domestic law. More aggressively interpreted, however, the *Norms* could be read (and were red) as abandoning traditional limitations of international law in two important respects. First, they seek to impose responsibility for the enforcement of international law norms directly on TNCs through the imposition of a binding set of rules. Second, they would establish a direct connection between international law norms, non-state actors, and individuals without any mediating role for the state itself.

With respect to the first, the *Norms* seek to change the status of TNCs from objects to subjects of international law. That would constitute a significant change from the status quo, shifting regulatory power from states to non-state actors.[429] The 2002 Working Group Report explained that it "was faced with the problem that while there was a need to seek binding rules and norms relating to the activities of transnational corporations, it was not possible within the United Nations framework to enforce such rules and norms. Given this situation, the text went as far as possible in setting out binding responsibilities."[430] Not everyone associated with the work of the Working Group agreed that the *Norms* could be binding; there was also concern expressed that the imposition of binding norms on TNCs would constitute a significant and unwelcome departure from the current framework of international law.[431] By the end of the drafting process, most of the Working Group members had moderated the public discourse about the *Norms*, which had emphasized the moral and ethical value of the instrument.[432] But it seems clear that, had circumstances changed, there would be considerable support among a majority of the drafters to ensure the coercive effect of the *Norms*.[433]

Most of the states submitting comments on the *Norms* expressed strong reservations—and hinted at substantial opposition—to any regime that would threaten their monopoly of control over decisions to adopt and implement international norms within their territories. "The primary responsibility for the promotion and protection of human rights lies with States. . . . The international community could have an important role supporting these efforts, but creating and upholding the framework remains the responsibility of a State."[434] Others echoed this approach. For example, the Austrian government, representing the views of the European Union, stressed that human rights obligations "could allocate responsibility to corporations, but the legal obligations rest with the States."[435] Australia emphasized its "firm view that legal responsibility for the

429. *See* Johns, *supra* note 127. The author notes the usual reservations about this shift. *See Ibid.* at 912–14. She proposes, instead, the creation of a new category of international law subject—in dignity and effect ranking below that of the nation-state, for the TNC. *See Ibid.* at 922–23.

430. *Report of Working Group, Fourth Session*, *supra* note 204, ¶ 17 (relating the comments of Mr. Alfonso Martinez, a member of the Working Group).

431. Not all of the experts involved in the drafting of the *Norms* agreed. The 2002 Sub-Commission Report identified at least one unnamed expert who "expressed surprise at the assertion that the draft *Norms* were binding. The expert referred to traditional and new sources of international law, noting that the draft norms did not fall within either of those categories." In addition, "[t]he expert . . . noted that the mandate of the working group did not include the setting of binding standards and that there was no follow-up mechanism in the draft norms." *Ibid.* ¶ 27.

432. By the time the draft *Norms* were nearly in final form, the Chairperson, Mr. Guissé appeared to favor a more moderate position from that he had been suggesting in the five previous years.

> Mr. Alfonso Martinez referred to the letter of the IOE and the ICC and emphasized the fact that the draft Norms could not be used to coerce corporations. The United Nations did not possess an instrument of coercion. Thus, the value of the Norms was not in their binding effect but rather in their ethical and moral value, which should be reinforced by monitoring mechanisms. The Chairperson-Rapporteur supported Mr. Martinez's comments.

Report of the Working Group, Fifth Session, *supra* note 1, ¶ 13.

433. *See supra* Part II.

434. United Kingdom of Great Britain and Northern Ireland, *The Responsibilities of Transnational Corporations and Related Business Enterprises With Regard to Human Rights*, ¶ 3, http://www.ohchr.org/english/issues/globalization/business/contributions.htm (last visited Dec. 23, 2005).

435. Permanent Mission of Austria to the United Nations at Geneva, *supra* note **Error! Bookmark not defined.**, ¶ 6 ("The Covenants, Conventions and Declarations that lay at the basis of human rights responsibilities and duties have been negotiated, signed and ratified by States, which also bear prime responsibility for their implementation.").

implementation of international human rights standards rests primarily with those States who are a party to the standards."[436] Germany reminded the U.N. High Commissioner for Human Rights that "[e]ven under the conditions created by globalisation, every state continues to bear the main responsibility for its own sustainable development, and for ensuring protection of human rights."[437]

> Perhaps the official response of the United States put the Western position most forcefully:
>
> [T]he Norms are flawed for reasons of international law. By attempting to establish duties and obligations for business entities, which are non-State actors, this exercise goes well beyond the present state of international law as well as international legal process. . . . This exercise, therefore, circumvents all recognized law making processes by attempting to impose international obligations on entities that have neither accepted them nor played a part in their creation.[438]

On the other hand, the American position misstates somewhat the current position of the TNC within the international law system.[439] TNCs have the power to internationalize their dealings through their contractual relations, at least to some extent. If this is indeed the case, the *Norms* do not remake international law, they merely extend it in a plausible (if to some in a politically objectionable) way.

The more important ramification of the *Norms*, however, is that their methods have the potential to reduce the force of state monopoly on law-making, even within a state's territory. The *Norms* avoid a direct conflict between domestic and international law superiority within the territory of the state. Instead, they seek to substitute private law as an alternative for imposing public international law. In effect, the *Norms* do not seek to impose law *above* domestic law, but rather to impose law from *below* through domestic regulation of the private relations among individuals and entities. From the perspective of civil law societies, there could be nothing potentially more innocuous—after all, there is no question of the superiority of *statute* to *contract*. Yet, by imposing changes to the customs and practices of the largest global amalgamations of economic power and by changing behavior through private law, the implementation of the *Norms* can be far more effective as a means of implementing international

---

436. Austl. Permanent Mission to the U.N., *Comments by Australia in Respect of the Report Requested from the Office of the High Commissioner for Human Rights by the Commission on Human Rights in its Decision 2004/116 of 20 April 2004 on Existing Initiatives and Standards Relating to the Responsibility of Transnational Corporations and Related Business Enterprises With Regard to Human Rights*, at 2 (Sept. 8, 2004), http://www.ohchr.org/english/issues/globalization/business/contributions.htm.

437. Permanent Mission of the F.R.G. to the Office of the U.N. and Other Int'l Orgs. in Geneva, *German Response to OHCHR Notes Verbale of 19 May 2004 and 22 July 2004 Regarding CHR Decision 2004/116—Responsibilities of Transnational Corporations and Related Business Enterprises With Regard to Human Rights*, at 2 (Sept. 30, 2004), http://www.ohchr.org/english/issues/globalization/business/contributions.htm. The German government suggested that "defending fundamental freedoms" and related objectives is also in the interests of TNCs. *Ibid.* at 2. But, as detailed in the response, the most appropriate form of participation is through dialogue, sponsored by states and international actors, between government and business representatives, the trade unions and NGOs. *Ibid.*

438. Memorandum from U.S. Mission to Int'l Orgs., *Memorandum to Mr. Dzidek Kedzia, Chief of Research and Right to Development Branch, Office of the United Nations High Commissioner for Human Rights, re: Note Verbale from the OHCHR of August 3, 2004* (GVA 2537) (Sept. 30, 2004), http://www.ohchr.org/english/issues/globalization/business/contributions.htm [hereinafter Memorandum from U.S. Mission].

439. *See* Johns, *supra* note 127. The author notes that TNCs are already treated as "honorary" subjects of international law in certain circumstances, such as when a contract "expressly refers to general principles of international law in its 'proper law clause,' if it contains a clause referring the resolution of disputes to arbitration; or if the agreement falls within a 'new category' of 'economic development agreements.'" *Ibid.* In this instance, the breach of an "internationalised" contract may be considered a breach of international law, and the contract itself may be affected by international legal principles. *Ibid.* 901 (using as an example the jurisprudence of United States-Iran Claims Tribunal).

legal norms than the traditional method so dependent on state action.[440] Ultimately, TNC private conduct could have the potential to guide—or to limit—legislatures.

In this regard, the *Norms* perhaps proceed from the most innocent of motives. This is especially the case, it might be argued, where TNCs operate in states that refuse to comply with their treaty and other international law obligations.[441] Yet, even in this context, states are uncomfortable with the transfer of authority from state to TNC.[442] On the other hand, TNCs can also be used as a method of forcing, within the territory of any state, implementation of a host of international laws, some or all of which might have been lawfully rejected by the state itself. With respect to both, *Norms* incorporation through private law effectively end-runs state legislation and essentially deputizes TNCs as private legislators in non-complying states.

Western states, in particular, are not convinced that the *Norms*, thus construed, would attain even their most innocuous goals. The Canadian government, for example, expressed strong objection to the strategy of the *Norms*,[443] warning that shifting responsibility for the implementation of human rights standards to corporations could make it easier for states to evade their primary responsibility for ensuring respect for human rights.[444] Developing states might also resist the *Norms* as favoring corporate over state power to internalize human rights

440. *See* Scott & Wai, *supra* note 153, at 287. Another author notes:

> Much of the globalization literature seems to have accepted uncritically the liberal myth that public policy regulation *is* regulation and that private law is not, hence the conclusion that there is no way for states to control transnational civil society actors who present risks to the state. The strong thesis of globalization seems to restate . . . the premise that a liberal market system tends to destroy the political foundations on which it depends, without realizing that a market system depends just as much on "private" regulation function as it does on public policy.

Wiener, *supra* note **Error! Bookmark not defined.**, at 28–29.

441. Thus, several provisions in the *Norms* are meant to prevent states from shirking their obligations under international law. *See, e.g.*, *Norms*, *supra* note 1, ¶¶ 1, 19. *See also Commentary*, *supra* note 1, ¶ 9 cmt. (e) (collective bargaining rights); *Ibid.* ¶ 6 cmt. (d) (child labor). Some commentary on the draft *Norms* reflects this view. Thus, for example, the Norwegian Agency for Development Co-operation stated that the "Draft Norms should be used . . . to provide a basis for capacity building in Least Developed Countries and increased awareness in the private sector." Letter from Kingdom of Norway, Royal Ministry of Foreign Affairs, *Decision 2004/116—Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, at Annex (Nov. 4, 2004).

442. *See, e.g.*, United Kingdom of Great Britain and Northern Ireland, *supra* note 434. The United Kingdom stated:

> [W]e recognise that there may be exceptional circumstances in which a State is unable or unwilling to enforce such standards in its territory. In such cases, we acknowledge the arguments for exploring alternative approaches. Any analysis of this area would have to take into account the complex jurisdictional issues involved. It may be that measures are necessary to ensure an adequate standard of behaviour by companies operating in some countries. The UK considers that such measures would be most effective if focused on the responsibilities of States to regulate and enforce human rights standards in their own territories.

Ibid. ¶ 5.

443. Letter from Permanent Mission of Canada to the Office of the United Nations in Geneva, *Submission of Canada to the High Commissioner for Human Rights on the Responsibilities of Business Enterprises With Regard to Human Rights*, http://www.ohchr.org/english/issues/globalization/business/contributions.htm. The Canadian government also suggested that the "draft norms deal with issues which lie beyond the competence of the Commission on Human Rights." *Ibid.* ¶ 2.5.

444. The Canadian government noted that "attempts to impose international human rights law obligations directly on non-state actors, such as business enterprises, not only go beyond the express language of, and the parties to, international human rights instruments, but tend to dilute the responsibilities of States to respect their international human rights obligations." *Ibid.* ¶ 2.2. This is echoed in the response of the United States. *See* Memorandum from U.S. Mission, *supra* note 438 para. 20 ("Indeed, such an approach to corporate social responsibility may even have the unintended consequence of diverting attention away from State responsibility for human rights abuses.").

norms within a traditional rule of law context.[445] These comments reflect a notion rejected in the *Norms* that private law cannot be used to effect public policy.[446]

Second, the Norms might be read as a n instrument for the hardening of international soft law through TNCs. By the time the Norms project was nearing completion, the idea of indirect regulation was already conceivable. That is the possibility that law could be made by imposing obligations on enterprises to regulate within their own nexus on relationships, without the need to invoke the formal regulatory power of the State. The use of TNCs as a substitute for (or addition to) the state in the implementation of human rights norms is a significant event within any theory of international law and governance. But the *Norms* seek to do more. The *Norms* would use implementation of international human rights norms through private contract to significantly expand the scope of international norms, and to introduce new standards of international custom through contract. TNCs would, under the *Norms*, serve as a great source of customary international law and perhaps even as the developer of patterns of behavior that could produce hard international law as well.[447] The *Norms* themselves do not hide this ambition: The Preamble reaffirms "that transnational corporations and other business enterprises . . . have, inter alia, human rights obligations and responsibilities and that these human rights norms will contribute to the making and development of international law as to those responsibilities and obligations."[448]

The *Norms*, in this sense, could represent a refinement of the process of creating hard international law through soft lawmaking. The *Norms* are meant by their drafters to provide a basis for the building of consensus necessary for the adoption of hard international law.[449] For that purpose, non-state actors, and principally

---

445. *See, e.g.*, Republic of Croatia, Ministry of Foreign Affairs, Division for Multilateral Affairs and International Organizations, Department for Human Rights, Note, No. 5180/04, (Sept. 27, 2004), http://www.ohchr.org/english/issues/globalization/business/contributions.htm ("The Republic of Croatia has stable democratic institutions which function in an orderly manner and there are no significant problems in ensuring the rule of law and respect for fundamental human rights."); Mauritius Mission to the United Nations, Geneva, Note No. 346/2004 MMG/HR/3/6, (Oct. 1, 2004), http://www.ohchr.org/english/issues/globalization/business/contributions.htm (relating to application of international law norms to foreign labor in Mauritius); Philippine Mission to the United Nations and Other International Organizations, *Philippines Initiatives and Standards Relating to the Responsibility of Transnational Corporations*, No. 0297/EAM-2004, Geneva, Switz., Oct. 6, 2004, http://www.ohchr.org/english/issues/globalization/business/contributions.htm ("In the Philippines, laws are in place to ensure that transnational corporations and related business enterprises in the course of conducting their activities in this country respect and promote human rights such as labor, health and environmental rights among others."); Permanent Mission of the Syrian Arab Republic to the United Nations Office at Geneva, Note, No. 20/2004, July 12, 2004, http://www.ohchr.org/english/issues/globalization/business/contributions.htm ("Transnational corporations and business enterprises conduct their activities in accordance with the ordinances, laws and regulations in force in the country, in the same way as do other national enterprises. . . . They accord the utmost importance to human rights issues and are dedicated to the improvement of the material and moral well-being of persons. . . .").

446. *Cf.* Claire Cutler, *Global Capitalism and Liberal Myths: Dispute Settlement in Private International Trade Relations*, 24 J. Int'l Stud. 377 (1995) (arguing for private law as a basis for effecting public policy and rejecting the idea of the neutrality of private law).

447. The process would be similar to that noted by Norman and Trachtman for the construction of multilateral customary rules of international law, but, in this case, the protagonists are not states but TNCs. Norman and Trachtman explain that the

> likelihood of formation in any particular circumstance will depend on a number of factors, including (1) the relative value of cooperation versus defection, (2) the number of states effectively involved, (3) the extent to which increasing the number of states involved increases the value of cooperation or the detriments of defection . . . (4) the information available to the states involved regarding compliance and defection, (5) the relative patience of states to realize benefits of long-term cooperation compared to short-term defection, (6) the expected duration of interaction, (7) the frequency of interaction, and (8) the existence of other bilateral or multilateral relationships between states involved.

Norman & Trachtman, *supra* note 45, at 567–68.

448. *Norms*, *supra* note 1, at pmbl.

449. David Weissbrodt put it like this:

> No one can realistically expect business human rights standards to become the subject of treaty obligations

corporations, serve as an excellent vehicle for the adoption of behavior models on which soft and then hard law can be based. This was the intent of the United Nations' predecessor project—the so-called Code of Conduct for Transnational Corporations.[450] The corporation, rather than the state, can serve as a focal point for the transmission of international law principles to citizens. Corporate action becomes a source of, and evidence of the acceptance of, customary international law-making.

Western states have been quick to see this potential in the *Norms* and to treat it as a threat to their power. The Canadian government objected to the use of corporations for extending obligations that have not yet been established by states as binding international law.[451] The Australian Government noted a similar concern, that "the Norms would . . . obligate Transnational Corporations (TNCs) to adhere to treaties to which governments of countries in which they operate might not be parties, and which might not be enforced through domestic laws."[452] The member states submitting comments also transmitted a chart showing the various stages of effectiveness of a number of provisions covered by the *Norms* and defined as binding international law norms.[453]
Perhaps the most creative argument came from the United States. The Americans argued that the United Nations' attempts to create a normative framework for the regulation of corporate behavior has been preempted by "a variety of obligations under international human rights and humanitarian law instruments that occupy the field of protections the Norms purport to create."[454]

> immediately. The development of a treaty requires a high degree of consensus among nations. Although a few countries have already indicated their support for the Norms, as yet there does not appear to be an international consensus on the place of businesses and other non-state actors in the international legal order. The Norms, like numerous other UN recommendations and declarations, have started as ″soft″ law. As with the drafting of almost all human rights treaties, the United Nations begins with declarations, principles, or other soft-law instruments. Such steps are necessary to develop the consensus required for treaty drafting. . . . Any treaty takes years of preliminary work and consensus building before it has a chance of receiving the approval necessary for adoption and entry into force. Even soft-law instruments may take years to develop.

Weissbrodt & Kruger, *supra* note 144, at 914.

450. *See* U.N. Comm'n on Transnat'l Corps., *Transnational Corporations: Certain Modalities for Implementation of a Code of Conduct in Relation to its Possible Legal Nature*, ¶ 8, U.N. Doc. E/C.10/AC.2/9 (Dec. 22, 1978). "A Code of Conduct on transnational corporations, whether in legally binding or non-binding form, represents an effort to formulate expectations which Governments collectively feel justified to hold with regard to the conduct of transnational corporations." *Ibid.* Such a code "becomes thereby a 'source' of law for national authorities as well as for the international corporations themselves." *Ibid.*

451. The Canadians suggested that the draft *Norms* "in many places" misstate international human rights law, "or new obligations are posited which have not been established in international law." Permanent Mission of Canada to the Office of the United Nations in Geneva, *supra* note 443, ¶ 2.4.

452. Austl. Permanent Mission to the U.N., *Comments by Australia in Respect of the Report From the Office of the High Commissioner for Human Rights by the Commission on Human Rights in its Decision 2004/116 of 20 April 2004 on Existing Initiatives and Standards Relating to the Responsibility of Transnational Corporations and Related Business Enterprises With Regard to Human Rights*, Note 52/04, (Sept. 8, 2004), http://www.ohchr.org/english/issues/globalization/business/contributions.htm. Of course, the Australian Government might have been a bit disingenuous—while there might not be substantive law in states where the treaty has not been incorporated, virtually all states provide tremendous encouragement to arbitration in which the private law of the parties—reflected in their contract—will be enforced. *See, e.g.*, Yves Dezaley & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order 117–19 (1996); Thomas E. Carbonneau, *National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard, or Manifest Error*, *in* International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity 115, 115–17 (Richard B. Lillich & Charles N. Brower eds., 1993).

453. *See, e.g.*, Permanent Mission of Austria to the United Nations at Geneva, *supra* note **Error! Bookmark not defined.**, ¶13; *Reply of the Czech Republic*, *supra* note **Error! Bookmark not defined.**, ¶ 13; Permanent Mission of Denmark to the United Nations Office at Geneva, *Reply of Denmark to the OHCHR Questionnaire on Responsibilities of Transnational Corporations and Related Business Enterprises With Regard to Human Rights*, Ref. 119K.17, ¶ 13, (Oct. 1, 2004), http://www.ohchr.org/english/issues/globalization/business/contributions.htm.

454. Memorandum from U.S. Mission, *supra* note 438, at 2.

Yet, it is precisely these objections that make the methodology of the *Norms* so powerful.[455] Corporations are strong enough to threaten state power. That reality drove the push toward supra-national regulation in the first place. The *Norms*, ironically enough, by providing a means for direct regulation of corporations and their governance systems, would provide a legal basis for the assertion of state power by corporations as well. States have every justification to fear the development as a threat to their own power.

The use of TNCs to extend the scope of international law has implications for democratic principles as well. The European Union, speaking through Austria, voiced one aspect of those concerns when it urged the Office of the High Commissioner not to act unilaterally in promulgating the *Norms*.[456] The United States expressed concern about the anti-democratic manner that was used to craft the *Norms*.[457] The use of elements of civil society as a core sector for monitoring and compliance adds another element of anti-democratic process to the *Norms*. Civil society, especially in the form of self-constituted and exclusive communities of interest, is neither a legitimate nor necessarily authoritative instrument for governmental action. These non-governmental organizations are not always transparent, their memberships are not necessarily open, and they are responsible only to their members.[458] It is ironic indeed to use one set of constituted entities (non-governmental organizations and others) who are not subjects of international law to monitor compliance with international law norms of another set of constituted entities (TNCs and other business enterprises).

Third, the Norms' use of civil society as private agents for the enforcement of TNC international obligations was innovative and unsettling to the traditional State based order. Perhaps the most interesting aspect of the *Norms* lies in the mechanics of its implementation. Those mechanics suggest an effort to free international law from its dependence on the nation-state and reconstruct it as an autonomous body of law ultimately derived from and enforced by the global population as an undifferentiated mass.

---

455. "It is interesting to note that many people who use the term 'soft law' pejoratively often are concerned less with the alleged fictitious character of certain prescriptions that purport to be law . . . , and much more with the redistribution of political power in certain arenas of international lawmaking." G.F. Handl et al., *A Hard Look at Soft Law*, *in* Transnational Corporations: The International Legal Framework, *supra* note 117, at 333, 337 (remarks by W. Michael Reisman).

456. The Austrian Mission, on behalf of the European Union, stated that:

> The EU considers it vital that the Office engages in constructive dialogue with other relevant agencies and processes . . . . The present study would thus be a good opportunity for human rights organisations to examine the coherence between their own programmes and the policies and decisions of other mandated actors.
>
> Concerning the process, the EU fully subscribes to the importance of substantive consultation and cooperation with all relevant stakeholders.

Permanent Mission of Austria to the United Nations at Geneva, *supra* note **Error! Bookmark not defined.**, ¶ 10–11.

457. Memorandum from U.S. Mission, *supra* note 438, at 2 (objecting to the imposition of norms in whose development TNCs took no part.)

458. According to one scholar:

> In the last ten years or so, it became common for internationalists to reply to this problem by pointing to the growing influence of non-governmental organizations (NGO) in international law circles, as if these equally unaccountable, self-appointed, unrepresentative NGOs somehow exemplified world public opinion, and as if the anti-democratic nature of international governance were a kind of small accountability hole that these NGOs could plug.

Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971, 2018 (2004) (citing Kenneth Anderson, *The Ottawa Convention Banning Landmines, The Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 Eur. J. Int'l L. 91, 104–19 (2000)). *See also* Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 Ind. J. Global L. Stud. 25, 43 (2003) ("Most of these organizations are not governed in a democratic fashion. It is not clear why they should be treated as true representatives of the public.").

Telling examples of the autonomy of international law implicit in the *Norms* are their monitoring and enforcement provisions. Originally, the enforcement provisions of the *Norms* were to be effected through monitoring undertaken by agencies of states and the United Nations, in form to be determined, and implemented through the United Nations.[459] For that purpose, the United Nations, through the *Norms*, would have effectively deputized the entire population of the globe to report on TNC activity.[460] The *Norms*, as proposed, sought to privatize monitoring and enforcement of international standards through TNCs. Enforcement was conceived as especially important in those states, perhaps like the United States, that would otherwise resist compliance because of a failure or refusal to incorporate the underlying international law norms identified in the *Norms*. This privatization would meet objections from Western states indicating that the United Nations in general, and the Human Rights establishment within it in particular, lack the resources for monitoring compliance with the *Norms*.[461] Norway suggested an important consequence: "The existence of a monitoring system that is not equipped to respond adequately to the amount of reporting one must foresee could risk undermining the legitimacy and role of the Commission on Human Rights."[462]

The consequences of the approach adopted by the *Norms* will have to wait. The debate about monitoring was truncated by action of the Commission on Human Rights, which renounced any right to monitor for the *Norms*.[463] But the current position of the Commission on Human Rights might well change. And in any case, a different consensus might arise making it possible to move the original proposal forward in the future.[464] A sense of the battle lines for future discussion emerges from the 2004 report of the Working Group.[465] The need for surveillance and monitoring controlled through the United Nations was made clear in the various reports of the Working Group leading to the presentation of the draft *Norms*.[466] Resistance will be based on a number of related arguments: that the United Nations can have no authority above that exercised by nation-states; that the *Norms* themselves fail for conflicting with the thrust of United Nations' initiatives to date that emphasize a voluntary rather than a mandatory approach to corporate social responsibility; that national legislation is the sole appropriate coercive vehicle for ensuring compliance by business with human rights norms, the United Nations role being confined to technical assistance; and that TNCs could not, in any case, be subjects of international law, as a consequence of which the monitoring mechanisms proposed were misdirected and inappropriate.[467]
To these must be added the perhaps unintended anti-democratic effect of the *Norms*' monitoring focus.

---

459. In the 2003 report of the Working Group, one of the principal drafters of the *Norms* was recorded as having "emphasized the importance of developing implementation procedures for the draft Norms including periodic monitoring procedures and verification by the United Nations and the promotion by States of the inclusion of normative frameworks and the provision of reparations." *Report of the Working Group, Fifth Session*, *supra* note 1, ¶ 12 (summarizing the remarks of Mr. Weissbrodt, a member of the Working Group). This mechanism was later abandoned in favor of a more state-centered approach. My sense is that this change was made both under pressure from powerful Western states and as part of an effort to garner support for the *Norms*, an effort that ultimately proved unsuccessful.

460. *See Norms*, *supra* note 1, ¶ 16.

461. *See, e.g.*, Permanent Mission of Canada to the Office of the United Nations in Geneva, *supra* note 443, ¶ 2.6 ("The resources of the UN human rights system are already over-stretched. The Commission should focus its efforts on urging States to comply with their international human rights obligations.").

462. Letter from Kingdom of Norway, Royal Ministry of Foreign Affairs, *Decision 2004/116–Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, at 3, Ref. 2000/00046-17 (Nov. 4, 2004), http://www.ohchr.org/english/issues/globalization/business/contributions.htm.

463. *See* Decision 2004/116, *supra* note 211.

464. Thus, there was some sentiment in the Working Group that while the Working Group could not perform any monitoring under the *Norms*, the Commission's decision "would not preclude discussion on the establishment or identification of an appropriate monitoring mechanism." ECOSOC, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations in its Sixth Session*, ¶ 10, U.N. Doc. E/CN.4/Sub.2/2004/21 (Aug. 5, 2004) (comments of Mr. El-Hadji Guissé) [hereinafter *Report of Working Group, Sixth Session*].

465. *See Ibid.*

466. *See supra* Part II.

467. *Report of Working Group, Sixth Session*, ¶¶ 12–13 (comments of Messrs. Alfonso-Martinez and Alfredsson).

The continued expansion of the use and authority of elements of civil society—organized as any number of self-constituted entities—suggests the imposition of an aristocratic principle of international governance in place of, or perhaps over that of, the democratic principle of the organization of nation-states. Ironically, the principal elements of any international monitoring scheme—non-governmental organizations—mirror in many respects the institutional structure, narrow constituencies, and constituency benefit maximizing behavior that form the core of indictment against TNCs. The monitoring structure of the *Norms* lacks transparency and accountability directly to the people of the states affected by TNC activity. It appears to empower organizations not accountable to any democratically controlled community to serve as a sort of Praetorian Guard of a system of voluntary monitoring and disclosure.[468] States are accountable to their political community and are subjects of international law, through which they are legitimated and serve to reinforce principles of democratic organization and the rule of law. But elements of civil society, as well-meaning as some might be, are, like corporations, accountable only to their members. Though now vested with substantial governance responsibilities, they are under no obligation to be legitimated, to reinforce the principle of democratic governance, nor to act (internally at least) under the rule of law.

Consider the irony of stakeholder and monitoring provisions of the *Norms*. The *Norms* go out of their way to reject the traditional shareholder welfare model of corporate governance. Such a model is illegitimate, we are reminded, because of the great effect of corporations on others and their importance to development. Yet the *Norms* vest a substantial monitoring authority on elements of civil society with no corresponding obligation to legitimate their internal governance. The entities charged with monitoring corporate entities are under no such obligation despite the great effect of these entities on the operations of TNCs. Non-governmental organizations can be characterized as the not-for-profit cousins of the transnational corporations they seek to discipline. Like TNCs, these transnational elements of civil society may be far more powerful than any state—at least with respect to access to funds and political and media influence. Like TNCs, these groups may not be subject to control by any one state but can arrange their activities to avoid regulation except at the international level. Thus the irony: Using one portion of a large community of transnational non-state actors to perform a critical role in the disciplining of another portion of that community, without subjecting the monitors themselves to the same sort of discipline.

Yet this argument overlooks the realities of the operation of the global system as it has evolved—with the acquiescence of all states—since the middle of the last century. Non-governmental organizations have become a key private sector service provider for the development, assessment, and implementation of international legal standards within the U.N. system.[469]

The issue of monitoring thus raises a set of broader concerns. Issues of state sovereignty and control are implicated in both the for-profit and not-for-profit sectors. Elevating the status of TNCs, within the framework of international legal standards as contemplated through the *Norms*, also raises the status—and power—of non-

468. For an overview of the focus and concerns of the NGO community in this area, see Isabella D. Bunn, *Global Advocacy For Corporate Accountability: Transatlantic Perspectives From The NGO Community*, 19 Am. U. Int'l L. Rev. 1265 (2004).

469. *See* Peter Willetts, *Consultative Status for NGOs at the United Nations*, *in* "The Conscience of the World": The Influence of Non-Governmental Organizations in the U.N. System 31, 51 (Peter Willetts ed., 1996). "The United Nations was considered to be a forum of sovereign states alone. Within the space of a few years, this attitude has changed. Non-governmental organizations are now considered full participants in international life." *Ibid.* (quoting Boutros Boutros-Ghali, U.N. Secretary-General, Statement at the U.N. Department of Public Information Forty-Seventh Annual Conference on Non-Governmental Organisations, We the People: Building Peace (Sept. 2, 1994)). And indeed, it has usually been totalitarian regimes that have traditionally opposed the status of non-governmental organizations within the U.N. framework. *See Ibid.* at 36.

governmental organizations vis-à-vis the state. To developed states, this result may be as unpalatable as the regulation of TNCs. In order to control one set of non-state actors deemed to be a threat to the power of the community of states to set and enforce public policy, the *Norms* would empower another set of non-state actors, also substantially beyond the regulatory power of states. In a larger sense, then, the fight about the power and legitimacy of monitoring on the terms proposed by the draft *Norms* serves as an introduction to a great battle to be fought this century—a battle over the legitimacy and place of "civil society" as a constituent part of international law and legal structures. In another sense, the *Norms* provide a powerful additional venue for the proliferation of non-state actors beyond state control; making an ever more powerful case for supra-national regulatory frameworks and the subordination of state to international institutional power. Irony indeed.

4.3 A Grudging Reorientation--From Global Compact to the Constitution of the Ruggie Project.

Even as one part of the U.N. apparatus had long been working on a hard law framework for regulating multinational enterprises, other international public and non-governmental actors had been refining and elaborating non-binding systems of soft law that could be used by states and other actors as best practices or standards for modeling behavior.[470] Thus, while a regulatory strategy based on what would become the Norms, the U.N. also sought to develop an alternative regulatory track, one that was founded on a stakeholder-based, general principles-framed soft law approach, best known in its form as the "Global Compact."[471] These are understood as soft law in the sense that they are neither the product of national legislatures nor do they form part of the domestic legal orders of states.[472] The Organization of Economic Cooperation and Development ("OECD"),[473] with its soft law Guidelines for Multinational corporations,[474] has been among the most influential of the systems offered through international public law actors. Its influence has grown as it evolved from a system of principles-based norms to a system that is beginning to take on the characteristics of a substantially complete principles-based rule code.[475] The OECD's and U.N.'s principles-based approaches—*organizing* regulatory frameworks without

---

[470] *Ibid.* at 332-33.

[471] . *Human Rights*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html (last updated Dec. 22, 2011). The Norms have been disregarded by Special Representative of the U.N. Secretary-General Ruggie as unable to advance the interests of business and human rights, and the introduction of the U.N. Global Compact, the voluntary initiative, being followed more than other initiatives because it has gained a larger share of adherence by international organizations. *See* UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/ (last visited Mar. 17, 2012) [hereinafter U.N. Global Compact 2012].

[472]. But to call these "soft law" is to misunderstand their character and place within the constellation of regulatory regimes. What makes them "soft" is their position within the ideology and rules of the law-state system. *See, e.g.*, Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421-56 (2000). But outside of that system, for example, within the social-norm system of non-state communities, they can assume a compelling character, binding on the members of regulatory communities that accept their force and effect. For a discussion, *see, e.g.*, Larry Catá Backer, *Governance Without Government: An Overview and Application of Interactions Between Law-State and Governance-Corporate Systems,* (Pa. State Legal Studies Research, Paper No. 10-2010, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568934&http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCUQFjAA&url=http%3A%2F%2Fpapers.ssrn.com%2Fsol3%2FDelivery.cfm%3Fabstractid%3D1568934&ei=ZC1lT8n_IO_aiQL4xo2jDw&usg=AFQjCNFT9gOe15ZPGHGEpqjTh7x2C3Y7cg ; *see generally* Larry Catá Backer, *Inter-Systemic Harmonisation and Its Challenges for the Legal State*, *in* THE LAW OF THE FUTURE AND THE FUTURE OF LAW 427, 427-37 (Sam Muller et al. eds., 2011) [hereinafter Backer-*Harmonization*].

[473] . *See About the Organisation of Economic Co-operation and Development (OECD)*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Mar. 19, 2012).

[474] . *See* OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2008), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf. For a discussion, see Jernej Letnar Černič, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, 4 HANSE L. REV. 71 (2008).

[475]. *See, e.g.*, Larry Catá Backer, *Rights And Accountability In Development ('RAID') v Das Air and Global Witness v*

appearing to change their character or nature–have served as the most successful models for advancing regulation.[476]

As described ion the SRSG's personal web site at the time of his appointment as SRSG, "In 2005, responding to a request by the UN Commission on Human Rights (now Human Rights Council), Annan appointed Ruggie as the Secretary-General's Special Representative for Business and Human Rights, a post he continued to hold through 2011. In that capacity, his mandate was to propose measures to strengthen the human rights performance of the business sector around the world."[477] Mr. Ruggie was a well-known academic whose work, Embedded Liberalism"[478] made a significantly influential work that itself embedded so-called constructivist perspectives into the study, and the study of the manipulation, of social relations expressed through institutions. "Ruggie proposed that changes in both power and social purpose could lead to change in international regimes, putting forth what would later be one of the bedrocks of constructivist thought: that changing ideas or consciousness is a major factor in constituting changes in the international system."[479] That way of thinking might be understood as a constant leitmotif for Mr. Ruggie's work at the United Nations, and specifically on what became the UNGP.

His appointment as SRSG was not Mr. Ruggie's first encounter with regulatory efforts to embed human rights into economic activity. "Ruggie was interested not only in studying the real world but in changing it, too. In the 1980s he became active in the UN Association and moved back and forth from Columbia University in uptown and the UN in midtown New York City with apparent ease, a pattern that would increasingly characterize his professional life."[480] Mr. Ruggie's first directly UNGP relevant appointment was as Assistant Secretary-General and chief advisor for strategic planning to the United Nations Secretary-General Kofi Annan from 1997-200. During this appointment Mr. Ruggie was instrumental in developing, designing and overseeing the United Nations Global Compact.[481] The UN Global Compact is an initiative that was developed to encourage businesses worldwide to adopt ten universally accepted principles in the areas of human rights, labor, environment and anti-corruption within their operations and strategies.[482]

Mr. Ruggie also proposed and gained UN General Assembly approval for the Millennium Development Goals.[483] The MDGs had an ambitious agenda: to be something more than a mechanical benchmarking tool. "[A]n

---

Afrimex: *Small Steps Towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 MELBOURNE J. INT'L L. 258, 260-61 (2009).

476. *See* UNITED NATIONS GLOBAL COMPACT, *supra* note 26.

477 Harvard University, Kennedy School of Government, John Ruggie, available http://www.hks.harvard.edu/m-rcbg/johnruggie/index.html.

478 John G. Ruggie, "International regimes, transactions, and change: embedded liberalism in the postwar economic order," *International Organizations* 36(2) (1982) 379-415. See also John G. Ruggie, What Makes the World Hang Together: Neo-utilitarianism and the Social Constructivist Challenge," *International Organization* 52(4) (1998) , p.855–85.

479 Emanuel Adler and Kathryn Sikkink, "In Memorium: What Made John Ruggie's World Transformation Theory and Practice Hang Together," International Organizations (2022) 1-10. doi:10.1017/S0020818322000042.

480 IbIbid.

481 It was during this first appointment that John Ruggie served as one of the main architects of the UN Global Compact. http://www.un.org/News/Press/docs/2005/sga934.doc.htm.

482 One purpose of this initiative is to involve businesses, acting as private agents driving globalization, to "ensure that markets, commerce, technology, and finance advance in ways that benefit economies and societies everywhere." Overview of Global Compact, *available at* http://www.unglobalcompact.org/AboutTheGC/index.html.

483 These goals, signed into effect in 2000, require all of the participating nations to commit to eight goals to improve the standards and meet the needs of the worlds poorest within a set of time-based targets with a deadline of 2015. The goals include: End Poverty and Hunger, Universal Education, Gender Equality, Child Health, Maternal Health, Combat HIV/AIDS,

instrument for broader social mobilization, generating innovative responses to society's systemic challenges by, and among, all social actors."[484] The MDG eventually evolved into the Sustainable Development Goals (SDGs, and thereafter became a key feature of bridging human rights and sustainability, producing in 2022, the UN General Assembly Declaration of the human right to a clean and healthy environment.

The UN Global Compact and the Millennium Development Goals both served as a foundation to the critique of the Norms. The SRSG's involvement with both might suggest the trajectories of his criticisms of the *Norms* from before his appointment as SRSG. It might also suggest the source of the foundations that became the framework for the construction of the UNGP's alternative regulatory framework following the collapse of the *Norms* project. Both are reflected, for example, in the SRSG's substantial agreement about the utility of embedding human rights risks into the calculus of economic activity. He had already expressed the view that that the transnational corporate sector was a legitimate object of transnational governance.[485] Mr. Ruggie also agreed that the essence of the problem was inherent in the nature of globalized economic activity—the governance gaps made it difficult for any one state to successfully interpose a regulatory system embedding human rights.[486] Nonetheless, he suggested that "the Norms exercise became engulfed by its own doctrinal excesses. . . . Two aspects are particularly problematic in the context of this mandate. One concerns the legal authority advanced for the Norms, and the other the principle by which they propose to allocate human rights responsibilities between states and firms."[487] This criticism was not rhetorical, but the foundation of a new approach to the development of a regulatory scheme at the supra-national level, created to govern multinational corporations, while being based on the legal duties of states, the social responsibilities of corporations and the process obligations of both to their respective stakeholders.[488]

The rift that was produced by the abandonment of the Norms and the approval of the SRSG mandate, and ultimately, the endorsement of the UNGP by the UNHRC, has proven to be durable. Its durability is not merely substantive, though that is much of that. At its base the rift is conceptual. On one side a deductive approach grounded in the principle that authoritative regulation must be 'housed' in international law, preferably a treaty. On the other side, an inductive approach that was willing to accept multiple sources of regulation, public and private, and that approached the issue as one requiring a framework rather than a comprehensive system of law.

Environmental Sustainability, and Global Partnership. Millennium Development Goals Background, *available at* http://www.un.org/millenniumgoals/bkgd.shtml.

[484] Oct.2007 Washington Remarks, p.2

[485] Ruggie suggested three causes. The first is that large firms have become major players around the globe and countervailing efforts have currently come from civil society actors. Secondly, some companies have made themselves and their sector targets by doing bad things on a larger scale as a result of mistakes, shortsightedness and even malfeasance; which has generated an increased demand for corporate accountability. Thirdly, the fact that it has global reach and capacity while simultaneously being capable of making and implementing decisions that neither governments nor international agencies can accomplish with such speed. Oct 2005 speech p.3

[486] John Sherman III, "Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights," Corporate Responsibility Initiative, Harvard Kennedy School March 2020 – Working Paper No. 71; available [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf].

[487] John Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/2006/97 (2006) at ¶59, available http://www1.umn.edu/humanrts/business/RuggieReport2006.html. He also noted that "Even leaving aside the highly contentious though largely symbolic proposal to monitor firms and provide for reparation payments to victims, its exaggerated legal claims and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other impartial observers." Ibid.

[488] But see, David Weissbrodt, *International Standard-Setting on the Human Rights Responsibilities of Businesses*, 26 BERKELEY J. INT'L L. 373(2008).

But there were normative differences as well. The Norms rested on a long tradition that was suspicious of markets, was even more suspicious of collective autonomy other than as an instrument of public policy, and understood the centrality of development within a system that had to be stripped of its imperialist and colonialist past, with respect to which MNEs (or TNCs) were an instrument. On the other side was a deeper faith in the market and in the autonomy of collective behavior, one which understood that private collectives ought to align with policy but not necessarily serve primarily as its instrument. The Norms rested comfortably in the traditions of the old Soviet-Non-Aligned camp views of the world; the SRSG was deeply invested in the sensibilities and modes of operation of the OECD. Both proffered managerialism, but in quite different ways. IN the end, the Norms approach was not entirely defeated with the advent of the SRSG's mandate. Rather after 2014 it arose again in the form of the creation of the Open Ended Inter-Governmental Working Group on transnational corporations and other business enterprises with respect to human rights, "whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[489]

[489] UN Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights A /HRC/RES/26/9 (14 July 2014); available [https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9]; last accessed 15 March 2024.