

Global Policy Forum Europe (Ed.)

Whose Partnership for whose development?

**Corporate Accountability in the UN System
beyond the Global Compact**



Speaking Notes

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On July 5 and 6, 2007 UN Secretary General Ban Ki-moon chaired the second "Global Compact Leaders Summit" at the United Nations in Geneva. It was, according to the UN, *"the largest ever gathering convened by the United Nations on the issue of corporate citizenship"*.

The Global Compact claims to bring corporations together with the UN to promote *"responsible corporate citizenship"* based on ten principles. But without any effective monitoring and enforcement provisions, the Global Compact fails to hold corporations accountable. On the contrary, companies can misuse the Global Compact as a public relations instrument for *"bluewashing"*, as an excuse and argument to oppose any binding international regulation on corporate accountability, and as an entry door to increase corporate influence on the policy discourse and the development strategies of the United Nations.

On the day before the Global Compact Leaders Summit, an international group of NGOs and researchers met at the Palais des Nations in Geneva for a Hearing, to assess the partnership approach of the Global Compact, to present specific case studies of corporate misbehavior, and to discuss alternative proposals and next steps for the United Nations towards real corporate accountability.

As many colleagues were interested in the Hearing but not able to participate, we decided to publish the (more or less unedited) speaking notes and talking points of the panellists. We hope that this informal documentation can contribute to the growing critical discourse on UN-business relations and legally binding accountability mechanisms for transnational corporations.

Jens Martens, Global Policy Forum Europe

1 Ann Zammit

UN-Business partnerships and the Global Compact

I shall address just a few issues, spanning both UN-business partnerships and the Global Compact and hope that, despite being rather schematic, my comments help generate a fruitful discussion.

1. "Critical" comment

My first point is that there is still a need to assert that "critical comment" on the issue of UN-Business partnerships for development and the activities of the Global Compact does not necessarily reflect an anti-business stance. Business in one form or another has existed across the globe for generations and what is at issue is the manner of conducting business and the regulatory framework within which it operates. Perhaps business itself needs reminding of Milton Friedman's affirmation that the business of business is business within the existing regulatory framework.

I recently reread a document published in 1978 that contains excerpts from the internal files of major Swiss businesses in connection with their efforts to influence UN discussions on establishing a code of conduct for multinationals.¹ These included explicit efforts to discredit those pressing for such a code by branding them as politically inspired. Such an attitude is wholly dismissive of constructive comment and of the search for approaches that hasten development in the South and contribute to greater North-South balance in the interests of all. (This is not, of course, intended to suggest that Swiss business operates in a manner significantly different or worse than any other.)

Those earlier initiatives to establish a UN code of conduct for multinationals were aborted. The soft option of self-regulation, if there was to be any regulation at all, won the day. Despite a number of voluntary initiatives to promote corporate social responsibility since then, it would be hard to argue that this has been an overwhelmingly successful approach, the efforts of the Global Compact and of UN-business partnerships included.

2. Implementation of the ten Global Compact principles and assessment of progress

There have been many criticisms of the Global Compact's initiative to encourage businesses to implement its 10 principles, in response to some of which the Compact has introduced new measures. For example, a new process has been introduced involving voluntary efforts to review and log companies' Communications on Progress regarding their implementation of the ten principles. This is a potentially beneficial step, though its usefulness depends on the assessment framework that guides the reviews, the competence of the reviewers, and the type of overarching analyses of the material derived from these voluntary efforts. This is an area where skilled NGO personnel and academics could make an important contribution to charting progress. But it is equally important to ensure that there is a continual search for measures that would enhance implementation of the principles.

¹ Berne Declaration. 1978. The Infiltration of the UN System by Multinational Corporations. Excerpts from internal files. Zürich.

3. The evolution of the global production system and the Global Compact

Nowadays, many of the large corporate participants in the Global Compact are likely to be in the higher reaches of cross-border value chains and involved in offshoring, outsourcing and subcontracting in countries with lower production costs and associated lower wages and inadequate health and safety and environmental standards. (A small example indicating the global nature of production is that of Swiss watches: the industry's current definition of a "Swiss made" refers only to the "movement", that is, the mechanical heart of a watch, ignoring other, often expensive components, such as the bracelet, dial and casing. Even under this definition, only 50 per cent of the value of the movement has to be made in Switzerland to gain the designation "Swiss made".) This "vertical disintegration of production" applies in other industries such as the electronics and automotive industries, in which the final article is composed of many inputs made in different countries (known as the vertical disintegration of production).

In parallel to this development, however, there has been a significant increase in mergers and acquisition (M&As), including cross-border M&As. (Currently this process is being further propelled by the surge in private equity funds.) Large companies individually, and in some sectors in concert, exercise considerable pressure on supplier prices, thereby limiting the capacity of enterprises and workshops at the bottom of the value chain to make significant improvements in labour conditions and improve other standards.

Unless progress is made toward improving labour and other standards in low- and middle-income countries as well as in the North, the Compact's objectives will be thwarted. In this context, it is incumbent on the Global Compact to give greater attention to promoting decent work in the firms and workshops providing supplies or undertaking offshore services. The capacity of such enterprises to make significant improvements in labour and other standards is "squeezed" by the hard bargain driven by buyers or outsourcing firms. Many are small- and medium-sized enterprises (small employing less than 50 workers) and medium employing between 50 and 200. Homeworkers doing sub-contracted work have little or no bargaining power at all. (Most SMEs are too small to participate in the Global Compact.) Concerted Global Compact initiatives, including UNIDO and private sector firms, could work to upgrade technology and productivity in small firms and thereby facilitate improvement in labour and other standards.

Nevertheless, this does not resolve the inbuilt imbalance in bargaining power between large, often monopolistic or oligopolistic, businesses in the Global Compact, that also exert exceedingly strong (oligopolistic) buying power, and small supplier firms in lower wage countries. New Global Compact approaches are therefore crucial: would this include promoting fair trade arrangements to facilitate increasing adherence to GC principles at the bottom end of the supply chain? And how can the Global Compact help to strengthen the bargaining power of small and medium supplier enterprises in developing countries so that they have the resources to better implement the GC principles?

4. UN-business partnerships

In relation to UN-business partnerships, the term "partnership" is a very elastic word and does not always imply a well-defined arrangement with strict terms of accountability. Many of the businesses involved in UN partnerships or public-private partnerships intended to promote development are large multinational

businesses. In this context, I wish to point to some aspects that should be taken into account when assessing such partnerships.

In my earlier work I drew attention to general absence of careful evaluation of UN “partnering” initiatives and emphasized the need to assess the wider associated socio-economic and socio-political outcomes of any particular partnership activity. At that time, the more serious evaluation efforts seemed to have been made in the field of health. Importantly, these assessments provided strong support for the need to assess not only results in terms of the immediate aims of the partnership activity, but also the wider implications.

When UN-Business partnerships involve relatively powerful businesses in activities in low-income countries, assessment of partnership outcomes should include aspects that have important potential sectoral and possibly national macroeconomic effects. For example, partnerships may facilitate market penetration by large foreign firms in a manner that distorts or prevents healthy competition. If competition is deemed to be an issue of corporate social responsibility in Europe (see recent statements by the European Competition Commissioner), it is no less so in developing countries. Indeed such issues should be considered prior to establishing partnerships, owing to the significant development implications that in fact may need policy responses by the government of the country concerned.

To sum up, I would suggest that too little attention is paid to the wider development implications of the Global Compact and the UN’s partnering initiatives, as also to the implications for multilateralism. Moreover, greater attention to the “development thinking” that has emerged from the work of other UN bodies such as UNCTAD, DESA, ILO and UNIDO could enable public-private initiatives proceed to better effect in developing countries.

<p>Ann Zammit is an independent researcher and, among other things, author of <i>Development at Risk: Rethinking UN-Business Partnerships</i>.</p>

2 Vicente Paolo Yu Talking Points on the role of TNC's in financing development

When one speaks of the role of foreign direct investment (FDI) from Transnational Corporations (TNCs) in financing the development of their host economies, it can be said that TNCs can provide supplementary financial resources, technologies, managerial skills, employment opportunities, and play a positive role in economic and social development of host countries.

FDI global inflows have shown a 29% increase to US\$916B in 2005 as compared to 2004, although inflows to developed countries (US\$542B) continue to outstrip inflows into developing countries (US\$334B). Furthermore, most global FDI to developing countries remain concentrated in only a few countries – mostly in East Asia (such as China, Hong Kong, Singapore, India, and some of the ASEAN countries). In 2005, global FDI outflows in 2005 amounted to US\$779B. FDI is still currently generally undertaken by TNCs, largely coming from developed countries.

But FDI outflows from developing countries – mostly from Hong Kong, British Virgin Islands, Russia, Singapore, and Taiwan Province of China – is also slowly increasing (amounting to US\$133B or 17% of outward FDI – but most of that come from offshore tax havens such as the British Virgin Islands with US\$123B). In addition, global FDI flow increases have been spurred not by greenfield projects but by cross-border corporate mergers and acquisitions (M&As) – worth US\$716B in 2005 – and mostly in services industries such as finance, telecommunications, and real estate. There has been sharp decline in FDI into manufacturing, and increase of FDI into primary commodities and natural resource sectors (such as energy, mining).

TNCs now have approximately 77,000 parent companies with around 770,000 foreign affiliates, generating in 2005 approximately US\$4.5Tr in value added, employing approximately 62 million workers, and trading goods and services valued at more than US\$4Tr. TNCs continue to come largely from the EU, Japan, and the US. Developing country TNCs sold in 2005 approx US\$1.9Tr and employed approximately 6 million workers.

Discussing the activities of TNCs, especially in relation to trade and FDI, is important because much of global trade is carried out through intra-firm trade (e.g. 1/3 of goods exports from Japan and US), and increases of TNC-driven FDI often correlate to increased intra-firm trade. Much intra-firm trade between TNC affiliates in DdCs often have little value-added since it is probably composed of nearly finished goods destined for marketing and distribution. Furthermore, intra-firm trade between TNC affiliates in developed and developing countries often involve the assembly of imported inputs for re-export to foreign markets (e.g. maquiladoras). The increase in intra-firm TNC trade reflects a greater degree of internationalization of production and value chains – implying greater degree of dependence on openness of overseas markets for continued economic growth and production. The concentration of intra-firm trade in specific products (e.g. information and communications technology) implies that international

transmission of specific industry or product-specific shocks may be more rapid (e.g. downturn of demand for ICT products in the US are likely to rapidly affect ICT goods and components production in Asia).

There are many possible downsides to having a strong reliance on TNC-driven FDI as a means for capital accumulation, especially in developing countries. These include the following:

- TNCs' financial and technological resources, global reach and scale of operations often provide them with abilities that may make it difficult for host governments to effectively regulate their conduct and harness their potential to contribute to development;
- Their global scale of operations provide TNCs with flexibility to respond to exchange rate movements, minimize their global tax bill, circumvent financial or capital control restrictions, minimize political risks/provide political risk cover, access to information, and the ability to bargain with host government from position of strength;
- The difficulties in many developing country host governments to effectively regulate TNC activity could lead to conflicts between TNC commercial objectives and host country developmental policy objectives
- TNCs could engage in restrictive business practices, transfer price manipulation, or other anti-competitive behaviour to the detriment of domestic corporations.

However, regulatory trends in many developing countries relating to FDI have continued to be on the liberalizing trend that seeks to facilitate TNC-driven FDI, involving simplified investment procedures; enhanced fiscal and administrative incentives; reduced taxes – race to the bottom; generally greater openness. Contradictorily, developed countries are now also showing increased protectionist tendencies vis-à-vis FDI from developing countries into certain economic sectors deemed to be on strategic interest to the host developed countries (e.g. ports and airports).

Past attempts to establish a set of binding rules on TNC conduct (e.g. the initiative on the UN Code of Conduct on TNCs in the late 1970s to the early 1990s) have failed. Initiatives to establish non-binding or voluntary guidelines, e.g. UNCTAD's Set on Restrictive Business Practices, the Global Compact, the OECD Guidelines on MNEs, national initiatives, NGOs campaigns, do not provide for a legally enforceable set of investor and home country obligations that could ensure that TNC-driven FDI do provide developmental benefits to the host developing country. This lack of global rules, and the consequent reliance on TNC voluntary compliance with non-binding guidelines, has resulted in many cases of TNC malpractice – both in developed and developing countries – in the financial and operational areas.

Norms which could be made legally enforceable at the global or domestic level with respect to TNC investor conduct and their home countries' obligations would be required to effectively ensure that TNC operations provide positive rather than negative development outcomes for host developing countries. The UN, especially through UNCTAD, should take the lead in developing such norms. It should be more responsive to developing country concerns on TNC regulation; and focus on setting international policy framework for TNC regulation. Some suggested norms on TNC regulation from a developing country perspective can be found in, for example:

- South Centre, Enhancing Positive Corporate Contributions to Development: Making Corporate Responsibility for Development Operational in the UNCTAD XI MTR Context (SC/GGDP/AN/GEG/2, May 2006), at http://www.southcentre.org/publications/AnalyticalNotes/GlobalEconomicGov/2006May_CSRinUNCTADXIMTR.pdf
- WTO, Submission by China, Cuba, India, Kenya, Pakistan, Zimbabwe – Investors' and Home Governments' Obligations (WT/WGTI/W/152, 19 November 2002).

Vicente Paolo Yu is Programme Coordinator of the South Centre's Global Governance for Development Programme.

3 ActionAid International² UN Global Compact fails to stop corporate human rights violations

"What is needed are legally-binding regulations to control corporate activities with respect to human rights."

The UN flagship initiative on corporate responsibility - the Global Compact - is failing to stop corporate human rights violations, says ActionAid ahead of a UN summit on corporate responsibility in Geneva this week.

"These companies are trampling over the lives of thousands of poor people, locking women and children into a vicious cycle of hunger," said Aftab Alam Khan, head of trade from ActionAid during the launch-week of ActionAid's HungerFREE campaign.

World leaders and global business chiefs will convene for the Global Compact Leaders Summit (5-6 July 2007) to assess progress on the seven-year-old voluntary initiative aimed at promoting human rights standards for corporate operations.

"The UN's Global Compact is flawed because it's entirely voluntary," said Khan. "What's needed are legally-binding regulations to control corporate activities with respect to human rights."

"It's been a mockery because several companies violating human rights have been free to join and remain in the Global Compact - benefiting from an association with the UN," he added.

More than 3,000 corporations worldwide, including Anglo American, Coca-Cola, Ericsson, Tata Steel and Fuji Xerox, have joined the Global Compact since it was launched in 2000 in an effort to encourage multinationals to voluntarily adopt ten UN standards on human rights, labour, environment, and anti-corruption.

One of the key figures at the Leaders Summit will be the chairman of Anglo American, Sir Mark Moody-Stuart, who is also a member of the UN's Advisory Council for the Global Compact.

He is a leading advocate of responsible corporate behaviour and urges a greater role for big business in tackling poverty in Africa.

AngloGold Ashanti - a subsidiary of the \$17bn mining giant Anglo American - is operating in Obuasi, Ghana, and research carried out by ActionAid in 2006 indicated its activities were allegedly causing:

- Rivers and streams to become polluted with arsenic and iron from past gold mining.
- Farmers to lose their livelihoods because land has been poisoned by cyanide.
- Brutality and human rights abuses involving company security guards against local men suspected of mining illegally on AGA property.

² The following text was published by ActionAid as press release on 4 July 2007.

ActionAid says only a tiny proportion of the world's 77,000 multinationals have joined the Global Compact, pointing to the real need for universally binding standards for all companies.

Over the last few months, Anglo Platinum, another subsidiary of Anglo American (74%-owned) has entered into an explosive standoff with local communities at the Bushveld mineral complex in the Limpopo region of South Africa.

"More than 17,000 people are being relocated to townships where there are no jobs and no land - their whole way of life has been taken away from them," said Khan. "We are shocked by cheap offers of compensation for the loss of these people's pastures and livelihoods."

The Global Compact makes no specific reference to economic social and cultural rights. The principles also neglect the responsibilities of companies with respect to development, gender discrimination, indigenous peoples, corporate transparency and tax avoidance.

As part of the launch of its new HungerFREE campaign, ActionAid is calling on the UN and member states to engage seriously to agree on global human rights standards to hold all companies to account for violations of human rights and to establish effective monitoring and enforcement mechanisms.

Notes:

While Anglo Gold Ashanti (AGA) acknowledges some of the issues contained in public reports, investigations by ActionAid reveal serious discrepancies between AGA's official version of events and the accounts of local witnesses.

Villages, community leaders, academics and civil society campaign groups claim large-scale surface and open-pit gold mining activities by AGA – and previously AGC – are responsible for widespread social and environmental degradation in Obuasi, Ghana, and demand urgent action and compensation.

ActionAid's statement was presented by Aftab Alam Khan , international coordinator of ActionAid's Stop Corporate Abuse and Trade Justice Campaigns.
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4 Daniel Mittler Voluntary action by business is welcome – but the Global Compact is flawed

Greenpeace supports businesses when they do the right thing, such as eliminating climate-damaging gases in their cooling systems or stopping soy production in the Amazon. We have constructively worked with firms such as Unilever in making their cooling systems free of HFC's – some of the worst climate killing gases - and with McDonald's, who helped us to achieve a current moratorium on the expansion of soy production in the Amazon³.

Greenpeace opposes all 'Greenwash'. We are only in the business of applauding *concrete* steps that really benefit the environment and people. Greenpeace is fiercely independent. We take no money from corporations (or governments) and we do not endorse brands. Greenpeace also believes that voluntary action, though welcome, can never be a substitute for much needed government regulation.

Greenpeace is therefore opposed to the UN Global Compact:

It is not the business of the United Nations to organize business roundtables. It is the job of the United Nations to set binding international standards and ensure that these can and are enforced. The world does not need more talks shops and glossy brochures. The world needs action and global binding codes for corporate behaviour. The World Summit on Sustainable Development in 2002 committed governments to "actively promote corporate responsibility and accountability... including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and ... appropriate national regulations"⁴. The world is still waiting for governments to fulfill this promise, rather than to waste time on merely voluntary efforts such as the Global Compact.

The Global Compact is not delivering. Even a sympathetic analysis by McKinsey⁵ showed that only in 10% of all cases was there any evidence of companies doing something that they would otherwise not have done as a result of being a member of the Global Compact. Only in 50% of all cases was there evidence of companies doing specific projects that related to the Global Compact's aims. This is simply not good enough, especially as these are results based on self-reporting by companies.

The Global Compact principles are too vague to be meaningful and fail to be clearly defined and enforced. Global Compact Principle 7, for example, calls for a "precautionary approach to environmental challenges". Yet companies that ignore precaution by producing unproven to be safe genetically modified organisms, such as Novartis, or proven to be dangerous nuclear power, such as Areva, are allowed to be members of the Pact. The UN is endangering a very

³ See: <http://www.greenpeace.org/international/news/ask-and-ye-shall-receive-comp> and <http://www.greenpeace.org/international/news/McVictory-200706>

⁴ See:

http://www.un.org/jsummit/html/documents/summit_docs/131302_wssd_report_reissued.pdf

⁵ See:

http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2004_06_09/imp_ass.pdf

high value good, it's reputation, by associating its name with such activities through the Global Compact.

At the Second Leaders Summit on the Global Compact, a new climate initiative of the Compact will be launched⁶. Greenpeace welcomes that this initiative seems to support a second commitment period of the Kyoto Protocol, with drastic binding cuts in greenhouse gas emissions in developed countries. This is the only way to ensure a stable (and meaningful) price of carbon, as the statement demands. However, again, this initiative is too vague and - as a voluntary addition to the voluntary Global Compact - too weak, to be meaningful in 2007 when the need for urgent action on climate change can no longer be questioned⁷.

We are also deeply concerned that companies such as Areva or RWE are signatories of this initiative. Areva is behind a new-built nuclear power plant in Finland, which is already 1.5 years late and 400-700 million over budget. By signing the Global Compact initiative, Areva is no doubt trying to pretend that dangerous and expensive nuclear power, can be part of the solution to the climate crisis. This is simply not the case⁸. If anything, nuclear power cements the kind of centralized energy system, that we need to overcome in order to deliver real emission reductions in the power sector. RWE, meanwhile, is pursuing plans to build further coal-fired power plants, which will tie the world into long-term carbon-dependency. RWE's continued support for coal, including the worst kind of coal, lignite, is incompatible with taking climate change seriously.

The UN should not allow its name to be misused by such companies, which have failed to catch on to the energy revolution the world needs – an energy revolution based on energy efficiency and sustainable renewable energy production⁹. Only such an energy revolution will prevent dangerous climate change, as the UN Framework Convention on Climate Change demands. We believe the UN Secretary General, Ban Ki-Moon, is genuine in his concern for climate change. We therefore ask him to disassociate himself from 'greenwashing' attempts by the coal and nuclear industries through the Global Compact.

Daniel Mittler is a Political Advisor to Greenpeace International based in Berlin. He is one of the founders of CorA - the German Network on Corporate Accountability (www.cora-netz.de) and led the Friends of the Earth International "Don't let big business rule the world" campaign for the World Summit on Sustainable Development in 2002.

⁶ See: http://www.globalcompact.org/docs/issues_doc/Environment/CLIMATE_STATEMENT.pdf

⁷ See: www.ipcc.ch

⁸ See: <http://www.greenpeace.org/international/press/reports/the-economics-of-nuclear-power> and <http://www.greenpeace.org/raw/content/international/press/reports/briefing-nuclear-not-answer-apr07.pdf>

⁹ Greenpeace has shown that a 50% reduction in the energy sector is possible by 2050, see: www.energyblueprint.info

5 Melik Özden Sociétés transnationales et droits humains

Les violations graves et massives des droits humains commises par les Sociétés transnationales (STN) ces dernières années rivalisent avec celles causées par les Etats et qui y sont souvent associées. Ces violations concernent entre autres:

- les dommages causés à l'environnement
- le travail des enfants
- la criminalité financière
- les conditions de travail inhumaines
- l'ignorance des droits du travail et des droits syndicaux, etc.

Cependant, il n'existe pas de mécanismes au niveau international pour prévenir et le cas échéant sanctionner les agissements criminels des STN. Et au niveau national, les STN sont passées maîtres pour éluder leurs responsabilités en recourant à différentes pratiques abusives telles que le transfert d'activités interdites ou réglementées dans un Etat vers des pays disposant d'une réglementation moins importante et/ou en obtenant de réglementations les moins contraignantes possible en menaçant les gouvernements et les travailleurs de délocalisation.

Les violations des droits humains commises par les STN se faisant de plus en plus nombreuses et étant de plus en plus graves, la communauté internationale s'est orientée vers l'adoption de codes de conduite volontaires, donc aux dispositions non contraignantes, tel que le Global Compact. Or, comme nous le verrons dans cet exposé, cette solution revient clairement à faire primer le droit des affaires sur les droits humains universellement reconnus. Le rapport de force est certes défavorable, mais il est urgent que les mouvements sociaux, organismes de défenses des droits humains et les citoyens exigent aujourd'hui que les activités des STN soient encadrées juridiquement (et non volontairement) à l'échelle internationale si l'on veut mettre fin à l'impunité dont jouisse des STN et prévenir les violations futures.

Encadrement des STN au niveau international

La question de l'encadrement juridique des STN au niveau international s'est posée dès les années 70. Les questions suivantes sont soulevées :

- faut-il adopter un code de conduite volontaire ou contraignant destiné aux STN?
- les entreprises nationales doivent-elles également être visées?
- comment répartir les responsabilités entre pays hôtes et pays d'origine dans le contrôle des activités des STN?

En 1974, l'ECOSOC créa en son sein la Commission des sociétés transnationales et le Centre sur les sociétés transnationales avec le mandat «d'élaborer un code de conduite des sociétés transnationales». Bien que la Commission des STN soit

arrivée à un compromis sur la «majorité des dispositions» d'un code de conduite, il est finalement resté dans les tiroirs de l'ONU.

Démarches à la Sous-Commission

La montée en puissance des STN dans les années 80 et 90 a de nouveau mis à l'ordre du jour leur encadrement juridique au niveau international.

Le CETIM, en collaboration avec son partenaire l'Association américaine des juristes, a mené des réflexions sur un encadrement juridique efficace des STN au niveau international:

- De quelle manière peut-on, dans le cadre des normes nationales et internationales en vigueur, rendre effectif l'encadrement juridique des STN et de leurs dirigeants?
- De quelle manière peut-on, dans le cadre des juridictions nationales et internationales, les sanctionner en cas de transgression de ces normes?
- Comment consolider et développer les normes spécifiques existantes concernant les STN?
- Quels sont les enjeux du débat sur les codes de conduite pour les sociétés transnationales, qu'ils soient volontaires ou contraignants?

Guidés par ces réflexions, nos deux ONG ont contribué à la création en 1998 d'un Groupe de travail sur les STN au sein de la Sous-Commission de la promotion et de la protection des droits de l'homme de l'ONU¹⁰.

Normes sur la responsabilité en matière de droits de l'homme des sociétés transnationales et autres entreprises

En 2003, un «Projet de normes sur la responsabilité en matière de droits de l'homme des sociétés transnationales et autres entreprises»¹¹, élaboré par le Groupe de travail en question, a été adopté par la Sous-Commission.

Les normes reconnaissent la responsabilité des STN pour leurs activités dommageables en matière de droits humains et leur impose des conditions générales pour le respect de ces derniers. Elles exigent entre autres que les STN « reconnaissent et respectent les normes applicables du droit international, les dispositions législatives et réglementaires ainsi que les pratiques administratives nationales, l'Etat de droit, l'intérêt public, les objectifs de développement, les politiques sociales, économiques et culturelles, y compris la transparence, la responsabilité et l'interdiction de la corruption, et l'autorité des pays dans lesquels elles opèrent» (art. 10).

Fruit d'un consensus, ces normes comportent évidemment des lacunes, mais force est de reconnaître que nous ne disposons d'aucun autre instrument de référence au niveau international pour contrôler les activités des STN, nuisibles aux droits humains. A ce titre, ces normes constituent un ensemble complet, précisant la responsabilité des STN. Il s'inscrit dans un cadre juridique visant un contrôle effectif des activités des STN.

Position de la CDH et du milieu patronal

¹⁰ Résolution intitulée «Rapport entre la jouissance des droits économiques, sociaux et culturels et du droit au développement et les méthodes de travail et activités des sociétés transnationales» (E/CN.4/Sub.2/RES/1998/8).

¹¹ E/CN.4/Sub.2/2003/12/Rev.2, adopté le 13 août 2003 par la résolution de la Sous-Commission de la promotion et de la protection des droits de l'homme de l'ONU, E/CN.4/Sub.2/RES/2003/16.

Saisie en 2004 par la Sous-Commission, la Commission des droits de l'homme (CDH), soumise à la pression du milieu patronal, a esquivé le débat sur les normes sur les STN.

En effet, dès le départ, le milieu patronal, par l'intermédiaire de l'Organisation internationale des employeurs (IOE) et la Chambre de commerce international (ICC), s'est opposé à l'élaboration du projet de normes. Tout au long du processus, ces organisations ont insisté sur le fait que la Sous-Commission devrait élaborer un code de conduite volontaire, s'opposant fermement à toute règle contraignante.

Selon elles:

- les normes nuiraient aux projets d'investissement, en particulier dans les pays du Sud;
- le Global Compact, partenariat volontaire des STN avec l'ONU, est largement suffisant comme outil. Nul n'est besoin d'opter pour des normes contraignantes;
- les STN ne sont pas concernées par les droits humains, c'est le devoir des Etats de les respecter. L'adoption des normes reviendrait à «privatiser» (sic) les droits humains!

S'agissant du premier point, les exemples démontrent que les investissements des STN sont souvent éphémères et ne correspondent pas aux besoins des populations locales ou sont dommageables pour la santé et l'environnement.

S'agissant du Global Compact, dès le départ, la grande majorité des ONG et mouvements sociaux l'ont désapprouvé en le qualifiant de marché de dupes. En effet, cet accord ne s'inscrit dans aucun cadre juridique clair et ne décrit nulle part les moyens et capacités envisagés pour vérifier le respect par les STN des engagements qu'elles voudraient bien prendre.

A bien des égards, ce partenariat semble avant tout être destiné à offrir aux STN signataires, souvent accusées de violer les droits humains, le moyen de redorer leur image auprès de l'opinion publique.

Quant au troisième point, les STN ne sont pas au-dessus des lois. Bien que seuls les Etats soient sujets du droit international et, à ce titre, chargés de faire respecter les droits humains et de les promouvoir, les STN sont aussi tenues de les respecter comme tout un chacun. En effet, le dernier article de la Déclaration universelle des droits de l'homme précise qu'« aucune disposition de la présente Déclaration ne peut être interprétée comme impliquant pour un Etat, un groupement ou un individu un droit quelconque de se livrer à une activité ou d'accomplir un acte visant à la destruction des droits et libertés qui y sont énoncés» (art. 30).

Bien que les arguments du milieu patronal ne résistent pas à l'analyse de la réalité, l'écrasante majorité de la Commission des droits de l'homme a été sensible à leur thèse et a privilégié les intérêts d'une minorité d'élites de leurs pays à l'intérêt général de l'ensemble de leurs concitoyens. Ainsi, en 2005, la Commission des droits de l'homme a ignoré une fois de plus les normes élaborées par les experts de la Sous-Commission. Elle a décidé la nomination d'un représentant spécial du Secrétaire général sur les STN avec un mandat dont l'esprit ressemble fâcheusement au Global Compact. D'ailleurs, le Secrétaire général a nommé à ce poste le père du Global Compact en la personne de M. John Ruggie.

Depuis sa nomination en 2005, M. Ruggie a présenté deux rapports. Dans ces documents, le Représentant spécial se positionne en substance contre un encadrement juridique contraignant, autrement dit un contrôle efficace externe, des activités des STN et fait l'éloge des initiatives volontaires telles que le Global Compact et les Principes directeurs de l'OCDE. A l'instar de tous les mandats thématiques, son mandat a été prorogé d'une année par le nouveau Conseil des droits de l'homme. Vu ses deux premiers rapports et sa vision sur le monde des affaires, il est illusoire d'attendre une solution de la part du Représentant spécial sur cette question.

Conclusion

A titre de conclusion, je dirai deux choses:

- 1) si le statu quo est maintenu, cela équivaudra au maintien de la juridiction de la Banque mondiale (Centre international pour le règlement des différends relatifs aux investissements, CIRDI) et de l'Organisation mondiale du commerce (Organe de règlement des différends, ORD) sur les agissements des STN. Or pour ces organismes, les intérêts privés priment sur les droits humains qui ne sont d'ailleurs pas pris en considération;
- 2) Malgré les pressions fortes du milieu patronal et le manque de volonté politique des Etats pour un encadrement juridique contraignant au niveau international, il ne faut pas baisser les bras. Il faut poursuivre le travail et la mobilisation, car il s'agit du respect des droits humains et de la défense des principes démocratiques.

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Pour plus d'information sur cette question, prière de se référer à la brochure du CETIM intitulée «Sociétés transnationales et droits humains», Genève, novembre 2005 (www.cetim.ch/fr/publications_details.php?pid=125 pour la version française et www.cetim.ch/fr/publications_details.php?pid=125 pour la version anglaise) et au dossier sur cette même question sur notre site (http://www.cetim.ch/en/dossier_stn.php).

6 Elisabeth Strohscheidt Is John Ruggie, UN Special Representative on Business and Human Rights, showing a way forward?

In July 2005, Harvard Professor John Ruggie – one of the mental fathers of the Global Compact - was appointed by the then UN Secretary General, Kofi Annan, as his Special Representative for questions on „Business and Human Rights“. His appointment was a consequence of the unanimous approval of the „UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights“ by the UN Sub-Commission on the Promotion and Protection of Human Rights in August 2003. NGOs had seen the comprehensive draft submitted after years of intensive work by the Sub-Commission as an excellent starting point to strengthen corporate responsibility and accountability for human rights at UN level, and to achieve an international level playing field. Not so the majority of the business world and nation states at the (then) UN Human Rights Commission. They avoided to discuss the UN Norms in any detail. Instead, they pointed out that they had never asked for such a document and that it had no legal status. However, they noticed „useful elements“ within the Norms, but did not identify them. In spite of its opposition to the UN Norms, the Commission had to acknowledge the importance and urgency to deal with the negative impacts of economic globalisation. Thus, their resolution 2005/69 recommended the above mentioned appointment of a Special Representative by the UN Secretary General.

John Ruggie was asked:

- a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
- c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as „complicity“ and „sphere of influence“;
- d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
- e) To compile a compendium of best practices of States and transnational corporations and other business enterprises.

At the end of his 2year-mandate, he was meant to come up with views and recommendations to the (now) Human Rights Council of how to further proceed with the topic, in order to strengthen corporate responsibility and accountability for human rights.

Up to now, John Ruggie presented two reports, and more than two dozen research and discussion papers on various topics. On his own request, his mandate has just been extended by the 5th session of the Human Rights Council until mid-2008, in order to enable him to come up with views and

recommendations, as requested. His reports were disappointing, at least to many NGOs, as they limit themselves to describing what is there. They lack vision for the way ahead. Ruggie himself said that he stands for a „principled pragmatism“, and that he is not up to develop one international instrument that might find the way through the UN system in 10 or 20 years. He wants to see results in the medium run.

John Ruggie’s reports focus on state responsibilities and obligations rather than on corporate accountability. He holds that states have a duty to respect human rights, as well as to protect and fulfill human rights, whereas companies only have a duty to respect human rights – an issue certainly worth to be debated. With regard to business operations, Ruggie emphasises the state duty to protect, i.e. the duty of the state to protect all human rights of its citizens (and those living on its territory), also against violations by third parties, including companies.

Ruggie emphasises that such a duty to protect not only lies with host governments, but also with home governments of companies. Home governments are also responsible and shall be held accountable for the human rights performance of „their“ companies abroad. Strengthening such „extraterritorial state obligations“, as Ruggies does, and his shift of focus from host to home governments certainly is an important step forward to hold companies accountable.

Ruggies arguments for

- effectively using and strengthening soft law instruments, such as, e.g. the OECD-Guidelines for Multinational Enterprises, the Voluntary Principles on Security and Human Rights, the EITI process, and many others, and, where necessary, develop new ones,
- making better use of UN special mechanism to report on issues of corporate responsibilities for human rights, and to hold states and companies accountable towards human rights standards,
- using legal avenues available (such as the Alien Tort Claims Act in the US, other national laws, the International Criminal Court etc.) and for developing new laws where appropriate

are also to be supported. If effectively implemented, all these mechanisms can strengthen and further empower the victims of human rights violations to hold companies accountable.

In his second report of February 2007, as well as in a recent public debate in Berlin, Ruggie explicitly stated that, „clearly, a more fundamental institutional misalignment is present: between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other“. ¹² One of the goals he has set for himself and his team for the next 8 months or so is to come up with views and recommendations of how to align this structural misalignment and how to close the gap of access to effective remedy for the victims of human rights violations. To come up with sustainable recommendations, Ruggie and his team will look into a number of investment agreements, some of which may severely undermine a state’s capability and willingness to improve existing legislation in order to strengthen human rights or environmental standards. If John Ruggie can come up with

¹² A/HRC/4/35, 19 February 2007, p. 5 (paragraph 3)

recommendations that would alleviate – or even remove- the de facto dominance of trade law over human rights law this would be a real step forward.

Thus, Ruggie's „principled pragmatism“ can make some real change and go „beyond the Global Compact“. However, a globalising world, where the economic and political power of some Transnational Corporations, as well as that of some large state owned companies, by far exceed that of many nation states, certainly can't do without an effective international mechanisms to hold all of them accountable on universally agreed human rights standards. Anything less means to continue living with unacceptable patchwork solutions. As long as there is no such valid international instrument in sight, we should think of establishing a dispute settlement mechanism at UN level that would be accessible to the victims of human rights violations. Here their complaints, as well as the response from companies, should be heard by a body of independent experts. One could learn from the OECD guidelines. Maybe it is time to re-establish the UN Centre for Transnational Corporations that, unfortunately, had been dissolved in the 1990s.

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7 Peter Utting Closing address: Whose Partnership for Whose Development? Corporate Accountability in the UN System beyond the Global Compact

This hearing is concerned with how the United Nations system might promote corporate accountability, and how current approaches, centred on the Global Compact, public-private partnerships and corporate social responsibility (CSR), cannot meet this challenge. How then do we move “beyond the Global Compact”, as suggested in the title of this hearing?

The panelists have each focused on different aspects of corporate practice, public policy and governance arrangements that need to be reformed or transformed. And they have identified some current reform initiatives where civil society advocacy might yield results. In these brief closing remarks, I would like to highlight a number of institutional developments and forms of regulatory politics that are essential in strategies to promote corporate accountability, but which are somewhat different to those associated with CSR.

Before doing so, however, we should remind ourselves what corporate accountability means. Like CSR, there are various definitions. But for the “movement” of activists and academics concerned with taming corporate capitalism it seems to suggest four things:

First, that we can’t rely on companies to put their own house in order through self-regulation and voluntary initiatives, or a combination of CSR and minimalist regulation. As evidenced by recent cases of companies such as BP, Siemens and KPMG that had a high profile in CSR circles, companies and managers are simply under too much pressure to cut costs; compete and maximize profits in ways that inevitably generate perverse social, labour, environmental, governance and fiscal effects; as well as to seek out new frontiers where regulations and rights can be ignored.

Second, in view of this situation, companies must be held to account. This implies not just responsibility but some sort of obligation to answer to others through, for example, mandatory reporting and disclosure, as well as more effective independent monitoring and auditing.

Third, companies that fail to comply with agreed standards must incur some sort of penalty or cost. This contrasts sharply with CSR practice where such costs are often limited to the reputational arena, or where there is impunity. This implies not only that new regulations and laws may be needed but that regulatory and legal institutions must have the capacity to implement existing standards and prosecute malpractice.

Fourth, victims of corporate wrong-doing must be able to channel grievances, settle disputes and seek redress.

The corporate accountability agenda that has developed since the World Summit on Sustainable Development in 2002 is, then, quite different to the CSR agenda that took-off internationally around the time of the Earth Summit ten years earlier.

Let's turn now to what needs to be done to overcome the limitations of the approach that is symbolized by the Global Compact. I say "symbolized" because any criticism people might have of the Global Compact is really a criticism of CSR, i.e. that:

- it provides ample space for companies to engage in window-dressing and cherry pick among standards;
- it is characterized by weak implementation of agreed standards throughout corporate structures and supply chains;
- reporting standards and procedures are weak;
- there are no significant penalties for non-compliance;
- global corporations gain undue influence in the public policy arena and unfair competitive advantages through their association with the United Nations and public-private partnerships; and
- key issues that explain why corporate capitalism and its institutions fuel underdevelopment or unsustainable development are often ignored.

There are also concerns that CSR in general, and the Global Compact in particular, are a means of diverting attention from harder regulatory alternatives. It should be noted that the Global Compact explicitly states that it is not intended to displace other regulatory approaches. But in some sense, the Global Compact has become "the only game in town", given its considerable success in expanding the number of participating companies, spreading the word about CSR and partnerships throughout the world, and in demonstrating a remarkable capacity to convene corporate, political and civil society leaders.

To go beyond this approach, various paths need to be pursued simultaneously.

The first involves the "hardening" or "ratcheting-up" of voluntary initiatives. To some extent this is already happening, largely in response to criticism and civil society pressures. CSR standard-setting, reporting and monitoring institutions have evolved and matured through time, and complaints procedures are gradually being developed. Even the Global Compact, which has often claimed to be nothing more than a forum for learning and dialogue, has been nudged in this direction. Companies must now report on progress; they are rendered "inactive" if they fail to report; a mild complaints procedure was introduced last year, and most recently, an external review procedure has been established for the "Communications on Progress" that companies must submit. These mechanisms need to be tried and tested to prove their worth, but at least on paper, such reforms suggest a slight shift in the pendulum away from self-regulation toward corporate accountability.

The second path involves expanding the body of national, regional and international norms and law related to corporations. International law is now going beyond a focus on state actors and, as the lawyers say, is "fixing" increasingly on corporations. There has been a proliferation of so-called international "soft" law, involving declarations, resolutions, guidelines, and codes related to corporate activities. At the national level we see, in some countries, laws mandating various forms of reporting and disclosure. But while the body of standards and laws has expanded, there are still major weaknesses in regulatory capacity of both states and civil society organizations, including trade unions. It is perhaps this feature of the neoliberal paradigm, namely the weakening of state

regulatory capacity and basic labour rights, that requires the most urgent attention.

The third involves enhancing the ability of victims of corporate wrong-doing to use the existing regulatory or legal infrastructure to settle disputes and seek redress. This is occurring in countries such as the United States and the United Kingdom where cases have been brought against companies for wrongs committed abroad, or in India through Public Interest Litigation. The Aarhus Convention allows NGOs in countries that host TNCs to obtain information about their environmental performance.

The fourth path, involves connecting the issue of corporate performance with economic policy. The signals and incentives that companies are receiving from governments often encourage them to externalize costs; transfer risk to employees and suppliers; avoid taxes through regulatory loopholes, transfer pricing and off-shoring; and seek out new frontiers around the world or along supply chains where regulatory institutions and labour rights are weakest.

A fifth path involves forms of activism that vary to some extent from those that characterize CSR, where considerable attention has been focused on strengthening NGO-business relations or partnerships, and "stakeholder dialogues". The difference relates not only to the types of issues and demands, but also to patterns of social mobilization. Modes of organizing and mobilizing associated with "transnational" or "multi-scalar" activism, which involve linking organizations and networks at local, national, regional and international levels, are particularly important, and have played a key role in efforts to prosecute corporate wrong-doing, as well as in campaigns where activists "name and shame" companies. Multi-scalar approaches are also a prominent feature of the strategies of Global Union Federations, several of which have signed Framework Agreements with TNCs, that extend union/company relations beyond the local and national levels to the global level. Civil society organizations, operating at different levels, must also focus on reconnecting with local and national governments, to develop complementarities and synergies in regulatory capacity.

Last but not least, the process of change requires keeping the institutional and policy agenda alive with ideas for reform or more fundamental restructuring of development models. In this respect, it is important that civil society organizations engage actively with the UN business and human rights agenda that involves the work of the Secretary-General's Special Representative on Business and Human Rights, and the Norms on the Responsibilities of TNCs and Other Business Enterprises with regard to Human Rights. Whilst declared a "distraction" by the Special Representative, the standards and mechanisms proposed in the Norms – i.e. monitoring, reporting and redress – have considerable backing within civil society, and some aspects of the Norms are even being tested by a group of global companies.

Other ideas should also be kept alive, such as that of expanding the remit of the International Criminal Court to address corporate crimes; setting up new UN activities including information systems on corporate accountability initiatives and laws, as well as on business practices associated with maldevelopment; new institutions such as a Special Rapporteur on TNCs, or a Corporate Accountability Organization; the (re)chartering and down-sizing of corporations; a set of Civil Society Rules for TNCs; or even revisiting the principle of limited liability.

In this hearing we are supposed to be focusing on the role of the UN in the field of corporate accountability. But we also need to consider whether civil society is

up to the challenge. Is there the capacity among NGOs and trade unions to operationalize or activate complaints procedures, such as those that exist at least on paper in the OECD Guidelines on Multinational Corporations? Will NGOs test the new Global Compact complaints procedure? Serious doubts indeed exist about their capacity to do so, but perhaps more significant is a bigger question: Can civil society organizations, and NGOs in particular, forge the types of alliances necessary to really exert pressure for change? Despite advances in networking and transnational activism, civil society is often fragmented, with too many internal divisions – between large and small, between North and South, between NGOs and trade unions. In contrast to the labour movement, NGOs and their networks are often distanced from parliamentarians, political parties and mainstream democratic politics. Civil society, then, as much as the UN and national governments, also needs to face up to key challenges if progress on the corporate accountability front is to be made.

Regarding the United Nations, from my perspective as a social science researcher, a central issue relates to the need for the UN to recoup its capacity for so-called “critical thinking”. This involves questioning dominant policy approaches and patterns of development, exposing power relations and injustice, identifying the winners and losers of development policies and processes, and proposing alternatives.

A large project on the history of ideas in the United Nations, the UN Intellectual History Project, has recently documented numerous instances where individuals and agencies associated with the UN have exercised bold intellectual leadership, questioned conventional wisdom, and promoted ideas and policies associated with alternative visions of development and harder regulation of powerful interests. Notable examples include UNCTAD’s questioning of North-South relations in the 1960s, the ILO’s focus on “basic needs” in the 1970s; UNICEF’s critique of structural adjustment in the 1980s; the rights-based perspectives of the Human Development Report, or of the High Commissioner for Human Rights’ in the late 1990s; and more recently, the World Health Organization taking on the tobacco companies.

The Global Compact and much of the UN today, largely ignores critical thinking. Instead there is a tendency to focus narrowly on learning about best practices. i.e. trying to identify the positive things that big business does, and disseminating this information in the hope that such practices will be replicated elsewhere. This, of course, is an essential activity for international development organizations, but it should not be at the cost of other types of analysis and learning, which are needed to understand the other half of the story – if not the main story – that we have heard about during this hearing. There is a danger, then, that best practice learning is marginalizing, if not stifling, critical thinking.

The Global Compact states it is a learning forum and international development agencies increasingly refer to themselves as “knowledge agencies”. If they are really to fulfil this role, then the nature of learning, and the choice of academic disciplines, institutions and experts engaged in learning networks, need to change.

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