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**CODES OF CONDUCT:
THE FICTION OF CORPORATE
SELF-REGULATION**

What are the international obligations of corporations in regards to human rights and the environment? Human rights law and environmental law are based on the idea that governments regulate private actors to do as their national government tells them, but on the international level the obligation is on states, not private actors.

It works quite well in theory, but not in practice, as we all know. Governments don't adequately regulate corporations, especially given globalization. So there has been a need to try to find a way to bypass the state intermediary, and work directly at the level of corporate entities.

There were attempts in the 1970s to do this. The idea was to try to create a binding code that would govern the activities of multinational corporations, including financial misconduct, technology transfer, corruption, and some human rights and environmental obligations. It was rejected by the United States and other powerful countries. The approach that was taken instead was a code-of-conduct scheme: corporations would voluntarily come up with codes of conduct in these areas, making regulation unnecessary because they would take care of the problem themselves.

It has become abundantly clear that this approach has serious limitations. One is that each corporation gets to decide what level of its own performance is adequate. Sometimes they do a good job, but usually they do not. In addition, there is no disclosure, no outside verification or enforcement.

There have been a series of efforts to improve the code-based approach. There is a set of OECD (Organization for Economic Cooperation and Development) Guidelines on Multinational Corporations, which was revised in June 2000. It contains a list of obligations to respect human rights, practice environmental stewardship, prevent corruption, and act as a good corporate citizen. It's a broad set of obligations which in and of themselves are not bad. The problem is enforcement.

The Guidelines set up a system of national contact points, where individuals can supposedly assert claims against corporations that are not complying

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with the OECD Guidelines. There is no judicial process. When you bring a complaint, the national contact point is supposed to look into it, talk to the corporation, and attempt some sort of conciliation or mediation. Non-governmental groups find this approach unsatisfactory, but it is a starting point for developing a complaint procedure that would have at least the value of exposure.

In the United Nations, there are a number of different efforts; some of them work at cross-purposes with each other. The U.N. Subcommission on Human Rights directed a group of experts to work on a code of conduct. It is basically an attempt to bring together in one comprehensive document the many codes that already exist. It is a compendium covering crimes against humanity, labor rights, the environment, the use of security forces, and other areas. Some members on the Subcommission favor making this a mandatory code through the U.N. system. But that won't happen anytime soon.

One obstacle is the Global Compact that was adopted at the world economic board at Davos in response to the U.N. Secretary-General's advocating measures to avoid a Seattle-like backlash. It too is a completely unenforceable arrangement, whereby transnational corporations sign on to nine principles: businesses are to support and respect the protection of international human rights within their sphere of influence and make sure their own corporations are not complicit in human rights abuses; they must work to eliminate forced and compulsory labor, child labor, and discrimination in occupation; and must undertake initiatives to promote environmental responsibility and the development and transfer of environmental-friendly technologies. But the Compact does not spell out the obligations of these corporations.

Another problem is that there is no way anyone can tell whether a corporation that signed on to the Compact is complying, and whether what it says it is doing is enough. Nonetheless, this is the measure that is being pushed through the U.N. system, and much effort is being made to get corporations to sign on to it. An indication of the limits of this approach is the initial list of signatories, such as Shell and UNOCAL, who are defendants in ongoing human rights litigation under the Alien Tort Claims Act.

One effort to strengthen the code-of-conduct approach involves improving the disclosure provisions. What kind of information do corporations have to provide? To whom do they have to provide it? When corporations have to put out information about what they are doing, interesting things happen. Suddenly all the employees of the corporations get this data and start generating internal processes and changes. Local communities, regulators, and investors also start tracking data on bad-or-good performance.

A number of different disclosure-related vehicles are being discussed. There is an International Right to Know Coalition of nongovernmental groups that is working to pass federal legislation that will expand existing disclosure requirements on U.S. corporations' overseas operations. Much of the information those corporations now have to provide covers only their operations in the U.S. The right-to-know approach seeks disclosure to verify corporations' statements that they don't have a double standard, but use the same systems everywhere. Such disclosure should not be burdensome if they really act overseas as they do at home.

The International Right to Know Coalition is considering extending the right to know in the areas of TRI (toxic release inventory) — data about what kind of pollutants corporations release above a certain threshold — and resource extraction (requests to expand permits). In the U.S., to expand a facility, generally a Clean Air Act or a Clean Water Act permit is required, which regulates what and how much can be discharged into the environment. Governmental requirements abroad exist in many places only in theory.

The Coalition's proposed bill also applies to OSHA regulations. It extends hazardous materials disclosure to overseas operations. It requires reports on labor rights policies, public and private security arrangements involving military or paramilitary forces, the human rights policy and any human rights-related complaints that the corporation has received. It requires the disclosure of the name and location of facilities abroad and the facilities and subsidiaries of contractors and suppliers. And it would include penalties for noncompliance.

The disclosure issue has been very touchy. Corporations have not wanted to provide the locations of their subcontractors and suppliers, claiming competitive disadvantage: if the information were public, their competitors would be able to undercut them and lure away their best suppliers. This ignores the human rights advocates' position that there is no way to verify corporate statements of compliance without disclosure of suppliers so they can be monitored.

Another approach is being tried through the SEC. Publicly held corporations must file annual reports, and disclose to shareholders anything that will have a material impact on share price, including environmental matters. They usually don't do this. There is an attempt now to make the SEC require greater and more detailed disclosure on environmental and human rights issues. For example, criticism of Shell for its human rights policies in Nigeria eventually led to bad publicity, boycotts, and lawsuits, all of which will have an effect on share prices. Investors need to know what's going on. There is no reason why the SEC can't do this; it's a political, not a legal, problem.

The last approach I want to mention uses the unfair business practices law. An effort is underway to penalize corporations under unfair business practice penalties for claims of good conduct, such as falsely stating that they pay their workers double the minimum wage. Getting the benefit of investment from people who are concerned about these issues is then unfair and a violation of the unfair business practice law.

*Kasky v. Nike*¹ is a case in California that is proceeding on precisely these grounds. Phil Nike claimed the company was paying minimum wage and a half and that it had no labor problems. People went into Nike factories and found they were not even paying minimum wage, much less minimum wage and a half. So suit was brought under the California unfair business practices law.

The case was dismissed on First Amendment grounds. The court said that because Nike's statements hadn't referred to any particular Nike product, but referred to Nike as a company, they were not commercial speech, but political speech, addressing a matter that was of great political import and public discourse of the U.S. The case is on appeal to the California Supreme Court.

NOTES

1 2 P. 2nd 1065, 97 Cal.Rptr.2d 511 (2000), *rev. granted*, No. S087859, Jun. 21, 2000.

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