ABSTRACT: This article considers the ramifications of current efforts to internationalize the regulation of corporate social responsibility. The primary focus will be on current United Nations efforts to regulate ‘transnational corporations’ through the development of its “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights.” The Norms are critically important for two reasons. First, the Norms themselves point to the evolution of fundamental changes in global thinking about corporations, the character and source of their regulation that together will have significant ramifications for American domestic law. The Norms evidence an increasing taste, at the international level, for a shift from a private to a public law basis for corporate regulation. The corporate social responsibility debate is ultimately a debate about the fundamental character of corporations as essentially private or public entities. Second, the development and continued life of the Norms and the ideas it embodies illustrate the development of a mechanics of interplay between national, international, public and private law systems in allocating, and competing, for power to regulate. The regularization and institutionalization of these mechanics evidence transnational law coming into its own as a separate field of power. The article first briefly describes the traditional domestic context of the debates about so-called corporate social responsibility and its relation to basic issues of corporate governance. The article then turns to the changing context in which the Norms were conceived. A critical analysis of the Norms in this context points to potential critical changes in global consensus with significant ramifications for American domestic 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 also 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 have objected to the gloss advanced by international institutions. The Norms create an effective system for the implementation of international law norms through private law. The Norms are implemented through the law of contract between individuals rather than by treaty or state action. Because the Norms are based on a number of international instruments that have not been ratified by all states, the Norms 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. 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 to NGOs to monitor TNC conformity to the requirements of the Norms. The article ends with a preliminary consideration of the Norms in a broader context. It analyses 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. Second, the Norms provide a template for the character and form of interaction and communication, among these systems of governance.
Multinational Corporations, Transnational Law:
The United Nations’ Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law

Larry Catá Backer*

This Article considers the ramifications of current efforts to internationalize the regulation of corporate social responsibility. The primary focus will be on the United Nations’ efforts to regulate “transnational corporations” through the development of its Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights.¹ The Norms are unlikely to be adopted in any sort of binding form in the current round of negotiation respecting its final form.²

* Professor of Law, Pennsylvania State University, Dickinson School of Law. An earlier version of this article was presented for the plenary panel on Corporate Social Responsibility: Reform and Race at the Second National People of Color Legal Scholarship Conference, George Washington University Law School, Washington, D.C., October 7, 2004. Special thanks to my research assistant Michael Davey (Penn State ’05) for his very able work on this project.


² The Norms were effectively abandoned in early 2005, and efforts to formally regulate transnational corporations have been transferred to other United Nation’s offices. See infra notes 181-83 and accompanying text. Most Western states made their opposition to the Norms absolutely clear from the start. The public comments of states and others are available at http://ap.ohchr.org/documents/dpage_e.aspx?s=58. These states base their opposition to the Norms on opposition to making transnational corporations both a subject and a source of international law. See infra Part IV. On the “nationality principle” underlying these views, see,
However, the Norms are critically important for two reasons. First, the Norms themselves point to the evolution of significant changes in global thinking about corporations, and the character and source of their regulation, which together will have significant ramifications for American domestic law. Second, the development and continued support for the Norms and the ideas it embodies by important sectors of civil society and the international law establishment illustrate the development in fact of a mechanics of interplay between national, international, public, and private law systems in allocating, and competing, for regulatory power. The regularization and institutionalization of these mechanics evidence transnational law coming into its own as a separate field of power.

This Article first briefly describes the traditional domestic context of the debates about the so-called “corporate social responsibility” and its relation to basic issues of corporate governance. 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. Corporations could serve others as well, but


3 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).

4 “[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, viewed as more limited. See, e.g., Mark J. Roe, Political Determinants of Corporate Governance: Political Context, Corporate Impact 27-47 (1993) (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, 660-664 (2002); Lynne L. Dallas, Two Models of Corporate Governance: Beyond Berle and Means, 22 Mich. J. L. Reform 19, 73-77 (1988) (discussing the controversy over the inclusion of labor representation of 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
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. By the end of the twentieth century, these assumptions were again the subject of increasingly intense attack. 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.

In Part II, this Article turns to 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, and the fundamental nature of those “responsibilities.” Globalization has been popularized especially in its form as a system of more closely integrated patterns of trade and economic activity. It is institutionalizing transaction systems of all sorts, but principally economic transactions. The primary implementing agents for this institutionalization are economic entities operating across borders in corporate form. Unlike domestic corporations, multinational corporations form webs of economic relationships well beyond the control of any one or more states. As a result, the perception has grown that states lose the effective power to direct the character of corporate responsibility, and that the institutionalization of systems of economic transactions produced by globalization now tend to favor only foreign owners.

from the representative board elsewhere. See Mark J. Roe, Political Preconditions to Separating Ownership from Control, 53 Stan. L. Rev. 539, 568 (2000).


8 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 networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental legal order.” Anne-Marie Slaughter, The Real New World, 76 Foreign Affairs 183, 184 (Sept.-Oct. 1997).

9 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).


while allocating all risk domestically. 13 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, 14 or to implement policies in aid of economic development, especially in the least developed states. 15 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; 16 that legal rules governing such multinational enterprises be modified to match the political, social, and economic realities “on the ground”; 17 that such entities be vested with responsibilities traditionally assigned solely to states; 18 and that these enterprises ought to be recognized as state actors of sorts and on that basis become subject to rules and norms flowing from the same source as rules regulating the conduct of states. 19 Since the 1970s, international and supra-national organizations

13 See, e.g., Steven Lukes, Five Fables About Human Rights, in On Human Rights (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. . . .

14 Id. at ()

15 “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 Adelaide L. Rev. 219, 232 (1999) (Aus.).


19 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 Tania
increasingly sought to respond to these arguments, usually by urging multinational business enterprises to adopt voluntary codes of conduct. But these early efforts proved insufficient and the international public and civil society communities undertook a years 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.

Part III 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 also 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. 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.

Part IV 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


20 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 4-38 (1980).

21 This adds an important wrinkle to the “CIL Game” well described in George Norman and Joel P. Trachtman, The Customary International Law Game, 99 AM. J. INT’L L. 541, 565-568 (2005) (use of game theory to understand the process of creation of customary international law).
invisible—private economic orderings—are less dependant 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.22 Nor does the “death” of nation-state primacy necessarily suggest the “rise” of international law systems as a “replacement.”23 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,24 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.25 The Article ends with a consideration of the possible collision between the methodology of the Norms and 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

24 In this case, 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.
norms, will states be treated as corporations for purposes of regulatory control under international law? 26

PART I. CORPORATE SOCIAL RESPONSIBILITY WITHIN ITS TRADITIONAL LEGAL CONTEXT: A PROBLEM SOLELY OF NATIONAL REGULATION

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 27 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? 28 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? 29

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. 30

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27 American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 2.01 (1994). Reporter’s Comment 1 states: “A business corporation is organized and carried on primarily for the profit of the stockholder.”

28 Id. See also id. cmt. 4 (“Virtually all states have now adopted statutory provisions relating to corporate contributions.”); id. cmt. 5 (“There is very little direct authority on the permissibility of taking ethical considerations into account in farming corporate action where doing so might not enhance profits.”); id. 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.”); id. cmt. 7 (“[A]n orientation toward lawful, ethical, and public-spirited activity will normally further the corporation’s long-run economic interests.”); id. cmt. 8 (“A number of new state statutes have authorized the board to take into account the interest of ‘other constituencies.’”).

29 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 corporations—that is, of corporations as autonomous and independent entities capable of self ownership. See 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, 138-148 (1988).

30 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
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.31

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.32 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.33

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31 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).

32 Among the more famous expositions of this proposition was the early twentieth century case, Dodge v. Ford Motor Co., 170 N.W. 668 (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 . . . .

33 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). 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 (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 or 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).
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.34 After the merger manias of the 1970s and 1980s, such flexibility was sometimes memorialized in so-called “other constituency” statutes.35 Third, boards of directors were accorded some flexibility in determining the factors, including time frame, which might be considered in maximizing shareholder value.36 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.

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, whose arguments shaped corporate discourse for a generation, from the 1930s through the 1950s, and whose arguments still influence policymakers and academics. Berle took the position that a corporation owes only a duty to maximize shareholder benefit.37 This position masked but did not resolve two possible meanings of

36 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).
37 Adolf A. Berle, Jr., Corporate Powers as Powers in Trust, 44 Harv. L. Rev. 1049 (1931).
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. 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 perhaps 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. 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 view.” 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.

Though Berle conceded the argument in the 1950s, 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. Professor Milton Friedman argued that corporate shareholder benefit maximization is the only possible position consistent with American notions of democracy. 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 or accountable to the people. Conversely, if corporations with social policy functions would be legitimate only if fully accountable and responsible to the political community,

38 I. Maurice Wormser, Disregard of the Corporate Fiction and Allied Corporate Problems 181 (1927) (“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.”).
39 E. Merrick Dodd, For Whom are Corporate Managers Trustees?, 45 Harv. L. Rev. 1145 (1932).
40 Wormser, supra note 38, at 36.
43 See Milton Friedman, Capitalism and Freedom 133-134 (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, 50 Wash. & Lee L. Rev. 1423 (1993). This shareholder wealth maximization view is shared by the current American government. See infra Part IV.B.
44 Friedman, supra note 43, at ()
they would have to be chosen by the political community and serve them. Essentially, corporations would become governmental units. To avoid this, regulation ought to facilitate the operation of the market and limit market inefficiencies and fraud.45 This position has proven very influential since the 1960s.46

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.47 Progressive and critical scholarship, like that of Cynthia Williams,48 Len Baynes,49 Cheryl L. Wade,50 and others51 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.52 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 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

45 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, Monetary vs. Fiscal Policy (1969).
52 See, e.g., Robert A. Dahl, After the Revolution? Authority in a Good Society 80-87, 100-102 (rev. ed. 1990) (arguing that corporations are social enterprises owing the political community “public” rather then merely shareholder focused service).
privileges. Reparations from corporations that profited from slavery can then be grounded in a reconceptualized understanding of the corporate norm.53

Corporate privilege can only be legitimate if the corporation serves the community from which the factors of production of its wealth are derived.54 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,55 the form and focus of fiduciary duties,56 and approval of corporate decisions.57 For others, corporate responsibility is articulated as an active obligation58—the obligation to positively better the environment,59 to increase the wealth of the inhabitants in places where corporations


55 See Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247 (1999); Williams, supra note 48, at 708-09

56 See Baynes, supra note 49, at (). For a more cautious view and discussion, see Thomas W. Joo, Race, Corporate Law and Shareholder Value, 54 J. Legal Educ. 351 (2004).


58 Janet Dine, Human Rights and Company Law, in Human Rights Standards and the Responsibility of Transnational Corporations, supra note 17, at 209, (). 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 or 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 id. 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)).

59 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, Oil Explorations and Eco-Catastrophe, in Faces of Environmental Racism 187, 187-202 (Laura Westra & Bill E.
operate, to develop economically depressed neighborhoods, or to pressure other institutions (like banks or government) to change their social or regulatory practices.

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. These theories focus on a particular aspect of legal reform—conforming the legal realities of firm organization to the economic and control realities of that organization. It seeks 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. It can also limit the power of corporate groups or

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61 See id.


63 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 2, at chapter six; Gunther Teubner, The Many Headed Hydra: Networks as Higher Order Collective Actors, in Corporate Control and Accountability 41 (J. MacCahery et al. eds., 1993).

64 For a recent example of the use of these notions in the context of traditional “veil piercing,” see A.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. Cinn. L. Rev. 717 (1988).

65 In the United States, all of the 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.

other constituencies to avoid liability for the torts of any of their subsidiaries or related entities.66

Another movement that was especially successful in capturing the attention of legal policymakers, particularly at the national level, was the monitoring and disclosure movement.67 The focus there was on accountability and transparency for the benefit of shareholders in particular and, more generally, for the public benefit through governmental monitoring and disciplining of corporate ethics.68 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 2002.69 In Europe, there has been a significant push toward disclosure as a means of harmonizing corporate governance within the framework of the European Union.70 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.”71 The grounding for this approach has been a normative assumption that the government’s power to demand disclosure is broader than any narrowly focused

68 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).
71 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).
requirement for shareholder wealth maximization that may limit the discretion of
directors.72

Despite this, 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.73 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, and the interests of local, state, and
national communities, especially in the context of contests for control or other acquisitive
activities.74 The same corporate acquisitive activity generated relatively small responses
in the courts. Delaware courts have carved a space for board’s to consider the effects of
corporate action on other constituencies in discharging its duty to act solely in the best
interests of the corporation under a broad set of circumstances.75

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.76 The issue of
corporate social responsibility, when taken seriously, is treated as legitimate only within
the field of corporate law,77 a field with its own internal logic and structure.78

“Corporate law is primarily about the relationships among shareholders, boards of
directors, managers, and, occasionally, bondholders and other creditors; questions

72 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 48, at __.
73 The policy is nicely articulated in modern statutory expressions of corporate charity
powers. See Rev. Model Bus. Corp Act § 3.03(13) – (15) (permitting corporations to make
charitable donations, transact business that will aid governmental policy, and make payments or
donations not otherwise inconsistent with law, which further the business and affairs of the
corporation).
74 See, e.g., Ohio Rev. Code Ann. Sec. 1701.59(e) .
The rules are different when a corporation is for sale. See, e.g., McMullin v. Beran 765 A2d. 910,
920 (Del. Supr. 2000).
76 For an excellent example, see Davis A. Westbrook, Corporation Law After Enron: The
from contract to property paradoxically would require legal scholars to reimagine the problem of
corporate governance as essentially a question of public law.” Id. at 108.
77 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).
78 See Pierre Bourdieu, The Field of Cultural Production: Essays in Art and Literature
(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 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.”).
surrounding the role of corporations in society arise only at the periphery of the dominant narratives of corporate law, if at all.” 79 These traditional parameters tend to influence the boundaries of comparative corporate law as well. 80 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. 81 Traditional American corporate law speaks the language of economics, 82 and perhaps politics. 83 It tends not to speak the language of human rights. 84 It tends to


81 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.


draw a sharp line between public governance that serves a legitimating and mediating function, and private governance that serves efficiency and contract.85

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.86 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, holds 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.

PART II. THREATS TO NATION-STATE MONOPOLIES ON REGULATORY POWER: THE GENESIS OF THE NORMS IN ITS TRANSNATIONAL CONTEXT

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.87

85 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 (“[T]o dismiss the goal of political legitimacy is to ignore the history of the corporation and of the board of directors.”). Professor Gervurtz notes the case with which Americans especially dismiss the idea of applying a public law governance model to corporations. Id. (citing Henry G. Manne, Citizen Donaldson, Wall St. J., Aug. 7, 2003, at A10).

86 See infra Part II.

87 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: Finessing the Tensions Between Cuban Marxism and Free Market Globalism, 14 (1) Journal of Transnational Law & Contemporary Problems (forthcoming 2004).
Questions of the relationship of these economic actors to their various constituencies—shareholders, creditors, customers and the like—are left to domestic regulation. The determination of the appropriate law to be applied to resolve questions of liability are 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. 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, 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.

These tensions increasingly have become the object of 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: What is/are the appropriate institution(s) and institutional level(s) for the legal regulation of

91 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 88 - 90 and accompanying text.
corporations—local, national, supra-national, or international? 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. 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 institutions controlling the national discourse of corporate law, and vested, to some extent, in the actors with some control over the transnational discourse of international and human rights law.

92 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 14, at 102-114; K.P. Sauvant & V. Aranda, The International Legal Framework for Transnational Corporations, in Transnational Corporations: The International Legal Framework 83, (A.A. Fatouros ed., 1994).


94 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, 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). 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, to which no others are invited to participate. For excellent examples, touching on the value of poison pills in contests for corporate control, see Lucian Arye Bebchuk, The Case Against Board Veto in Corporate Takeovers, 69 U. Chi. L. Rev. 973 (2002) and Martin Lipton, Pills, Polls and Professors Redux, 60 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 91, 101-02 (1995).

95 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
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.96 Pressure for regulation at a supra-national level came from virtually every state, but their respective motivations were very different.97

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.98 From the 1970s, the Japanese feared the effects of trade liberalization on its domestic economy as well as on its trade surplus.99 Also since the 1970s, sectors of the 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.100

institutions; and advisory services and technical cooperation in the field of human rights.

Office of the United Nations High Commissioner for Human Rights, Commission on Human Rights, Background Information, Main Themes, available at http://www.ohchr.org/english/bodies/chr/background.htm. 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.” Id.

96 See Muchlinski, supra note 14, at 1-11.
97 For an excellent summary, from which the next paragraphs draw, see id. at 1-11, 90-120, 573-604.
98 See id. at 3-4 (citing Jean Servan-Schriber, The American Challenge (1968)).
100 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. Rev. 527, 528 (1994). By the early 1990s, American attitudes to TNC 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
Second, developing nations feared that the continuing economic influence of the old colonial powers would give rise to economic imperialism through TNCs. 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.” 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.” In addition, developing nations regard TNCs as impeding their ability to foster the growth of domestic economies. 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.


103 Id. 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.” Id. at 908. “When foreign business 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 7, at 68.

104 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 data also indicates the relevance of distinction between investment by multi-national versus single nation firms).

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 corruption and interference in local politics.106 The popular media began to view TNCs as creatures worthy of suspicion and regulation.107 A working document produced through the Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities declared that “[t]hese companies 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.”108

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.109 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.110 International organizations have also sponsored academic journals in which

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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.\footnote{Transnational Corporations is currently published by the United Nations Conference on Trade and Development. 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 Transnational Corp. ii (2004).}

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 monopoly capitalism or as the vanguard of capitalist consumerism.\footnote{See, e.g., John H. Dunning, Global Capitalism at Bay? (2001); Bob Milward, Globalisation? Internationalisation and Monopoly Capitalism: Historical Processes and Monopoly Capitalism (CH. 3) (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).} These movements were not necessarily coordinated, nor did they necessarily march toward common goals.\footnote{These views, at the state level, have been best expressed by the official response of the Republic of Cuba to the Norms. 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 (“En este sentido, un problema central dentro del actual esquema de globalización, es que en las últimas décadas, los círculos de poder político, 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.”).} Each, however, saw in the multinational corporation the great example, symptom, or cause of some or all of the great maladies affecting the world.\footnote{See, e.g., J. Karlín, The Corporate Planet (1997); David C. Korten, When Corporations Rule the World (1995).} Moreover, the so-called neo-liberal model was not merely questioned from 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.\footnote{See, e.g., Douglass North, Institutions, Institutional Change and Economic Performance (1990); Amartya Sen, On Ethics and Economics (1987); Stiglitz, supra note 7.} In particular, Western academics began to question, as artifice, the separation of the economic and social roles of corporations, but now in the context of a developing international normative framework of human rights.\footnote{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}
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.”117

Sixth, internationalization of the corporate governance debate provided both a
firmer foundation and a broader context for the social responsibility debate that had been
traditionally confined to a purely national audience.118 Arguments for the expansion of
notions of stakeholders, of a more pronounced social role for corporations, and of a
public law orientation for the regulation of corporations, tended to find a more receptive
audience across national borders than within them and among the communities of
transnational civil society actors rather than across the communities of national civil
society actors.

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.119 The intense concentration on the

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.

Rights Standards and the Responsibilities of Transnational Corporations, supra note 17, at 3, 9.
118 See discussion supra Part I.
119 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
(emphasis added) (referencing in part Mary Robinson, Second Global Ethic Lecture, University
of Tübingen, Germany (Jan. 21, 2002), http://www.ireland.com/newspaper/special/2002/robinson
(Robinson was high commissioner for
human rights at that time)).
“phenomenon” referred to as “globalization” provided a context of “crisis” 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). In another form, it appears as attempts to provide voluntary guidelines for corporate conduct and governance standards by national, supra-national, and international bodies (the moral restraint model). This form of “volunteerism” has been criticized by developing countries because it was drafted only by the developed countries without input from representatives of developing states, and though crafted as voluntary standards are actually binding in fact. Last, it takes the form of 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). 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 Sklar, The Transnational Capitalist Class (2001).


The push toward voluntary embrace of good corporate citizenship has been explained in a variety of ways. For a good synthesis, see Leslie Sklar, The Transnational Capitalist Class (2001). 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. Id. at 149-151. Some of these motivations can be gleaned from the statements of organizations responsible for the development of these voluntary codes. For example, the Organization for Economic Co-operation and Development (OECD) has promulgated it Guidelines for Multinational Enterprises, available at http://www.oecd.org/dataoecd/56/36/1922428.pdf. 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_1,00.html (last visited March 6, 2005).

See Fidel Castro Ruz, Una Revolucion solo puede ser hija de la cultura y de las ideas, speech delivered at the great hall of the Central University of Venezuela, Feb. 3, 1999, available
economic activity through direct and indirect international regulation (the control model).124

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.125 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.126 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

at http://www.cuba.cu/gobierno/discursos/1999/esp/f03299e.htm (“La OCED, club exclusivo de los ricos, establa elaborando, practicamente en secreto, un acuerdo multilateral de inversiones con character supranacional, para establecer las leyes relacionadas con las inversiones extranjeras. . . . Despues lo ponen sobre una mesa, el que quiera suscribirlo que lo suscriba y el que no, ya sabe lo que le pasa.”). But see Ilias Bantekas, Corporate Social Responsibility in International Law, 22 B.U. Int’l L.J. 309 (2004).


corporate law field, sought to recast the debate about regulating corporations and other economic entities outside the narrow confines of the corporate law field. As a result, analysis does not invariably start with presumption of the primacy of national regulation, or of shareholders (or other equity holders), or of the private actor model for corporate activities. This newer analysis, grounded in public law,

127 See, e.g., 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) (“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.”).

128 For a good example, see Craig Scott and 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 25, at 287, 289 (“This paper builds on models of transnational governance based on plural norm systems.”).


130 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.

Id. at 122-23. See also 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.”); Stephen M. Bainbridge, Catholic Social Thought and the Corporation, 1 J. Cath. Soc. Thought 595 (2004). For other bases, cf. William W. Bratton. Confronting The Ethical Case Against The Ethical Case For Constituency Rights. 50 Wash. & Lee L. Rev. 1449 (1993). 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).
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.131

From an institutional context, these strands of thought on corporate social responsibility and state control found its most important institutional 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. It also evidences 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 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,132 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:133 This Report develops an argument for the extension of state responsibility to TNCs based on a simple power analogy: A state is any

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131 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 17, 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.”).


amalgamation of power that can assert the power normally exercised by, or otherwise coerce entities that are recognized as, states. 134 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.” 135 TNC profit-maximizing behavior also affects the distribution of high and low skill work on a global basis in a way that penalizes developing states. 136 As a consequence, “[t]he activities and methods of work of TNCs have implications for the effective enjoyment of human rights.” 137

As a corollary, the 1995 Sub-Committee 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. 138 From this model, it follows that TNCs share an obligation for development of poorer nations that might in

134 The 1995 Sub-Committee Report states:

The ability of TNC’s to command varied resources (finance, management, marketing, technology), their ability to combine and deploy such resources across the globe, their success in integrating subsidiaries into the company as a whole as opposed to into the economy of the host country, and the behavior of affiliates which have tended to act in concert with TNC’s rather than with autonomous enterprises, are all reasons why TNC’s have greater market power than do governments and enterprises in developing countries.

Id. ¶ 52; see also id. ¶¶ 4-8.
135 Id. ¶ 53. Globalization, according to the 1995 Sub-Committee Report, “increased locational mobility of TNC’s, and their monopolistic/oligopolistic tendencies have increased the bargaining power of TNC’s, while at the same time decreasing the decision-making power of states.” Id. ¶ 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 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.” Id. ¶ 101.
136 Id. ¶ 57 (“The global strategies of TNC’s 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 id. ¶ 91 (“TNC’s tend to have a narrow view of development in which their activities and work methods are oriented towards maximizing profit rather than promoting equality and improving human well-being.”).
137 Id. ¶ 89.
138 Id. ¶ --.
some cases approach the obligation of nation-states. In an extended section, the Report lays out the socio-legal and political foundations of its analysis. 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. “TNC’s are one of the agents of a new system of global exclusion; namely, exclusion from international commodity markets on acceptable terms, high wage labor markets, benefits of TNC operations, security, and global resources.”


139 The 1995 Sub-Committee 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.” Id. ¶ 142.

140 Id. ¶¶ 89-103.
141 Id. ¶ 103.

143 The 1996 Sub-Committee 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.

Id. ¶ 6.
144 Id. ¶¶ 71-85.
145 Id. ¶ 66.
The Framework is based on two deviations from traditional corporate governance norms. The first posits a positive social role for corporations.\cite{146} 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.\cite{147} 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.”\cite{148} Corporate social obligations extend to development, labor relations, environmental protection, human rights, and technology transfers.\cite{153}

The second deviation posits enterprise liability for corporations operating through subsidiaries and other legal personalities.\cite{154} A principal consequence of this approach is that international, rather than national, regulatory frameworks are necessary to appropriately control TNC activity across borders.\cite{155} 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.\cite{156} This approach embraces a position that remains highly controversial, even within industrialized countries.\cite{157} Indeed, even those developed states that have taken steps to

\begin{itemize}
\item \cite{146} The Report argues that the “globalization of economic activities by TNCs has led to expressions recognizing the increasing responsibility of TNCs towards society.” \textit{Id. ¶ 77.} See also ¶¶ 71, 76.
\item \cite{147} See \textit{supra} notes – and accompanying text.
\item \cite{148} 1996 Sub-Committee Report, \textit{supra} note 142, ¶ 74.
\item \cite{149} See \textit{id.} ¶¶ 74-76. “[C]omplementary and multidimensional character of the right to development will not be achieved if only one aspect, as it happens in the negotiation of TNC-related documents in economic forums, is considered to the exclusion of others.” \textit{Id. ¶ 76.}
\item \cite{150} See \textit{id.} ¶ 72.
\item \cite{151} See \textit{id.} ¶¶ 75-82.
\item \cite{152} See \textit{id.} ¶¶ 77-81.
\item \cite{153} See \textit{id.} ¶¶ 83-85.
\item \cite{154} The 1996 Sub-Committee 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.” \textit{Id. ¶ 72.}
\item \cite{155} \textit{Id.} ¶ 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.”).
\item \cite{156} Id. ¶ 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.”).
\item \cite{157} For a discussion of the issue from one of the great proponents of enterprise liability standards from the United States, see Blumberg, \textit{supra} note 2. Professor Blumberg has long suggested the need to conflate the development both of principles of enterprise liability and regulation at the supra-national level:

\begin{quote}
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
\end{quote}
\end{itemize}
recognize enterprise liability within their borders have tended to treat this as exceptional regulation.158

3. **June 10, 1998 Report:** The 1998 Sub-Committee 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.160 Transnational corporations occupy a privileged place near the heart of these economic and financial systems.161 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 the protection of human rights.”162 Since globalization “may lead to the creation of even more wealthy transnational corporations, but also even greater numbers of poor people,”163 international law must adapt in order to “deal with the problem arising from their operation.”164

The 1998 Sub-Committee Report does concede that TNCs “are of course organizations whose raison d’être is to make a profit.”165 But the profit motive itself is suspect in the greater context of the implementation of a universal democratic principle of governance166 and evolving international standards.167 “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.”168 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

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*Id.* at 201.


160 *Id.* ¶ 1.

161 The definition of transnational corporations is left ambiguously but broadly defined in the Report. *See id.* ¶¶ 2-5.

162 *Id.* ¶ 7.

163 *Id.* ¶ 8.

164 *Id.* ¶ 9.

165 *Id.* ¶ 13.

166 *Id.* ¶ 18 (“The economic and social development of a country requires the participation of all of its active members. Individuals should come first and last in action for development, that is to say, they should benefit form it as well as participate in it.”).

167 *Id.* ¶¶ 19-20 (citing Art. 30 of the Universal Declaration of Human Rights and Art. 3 of the Declaration of the Right to Development).

168 *Id.* ¶ 21.
bodies have the power, consistent with this understanding, to set out the scope and characteristics of that power as well. 169 Though this approach might be viewed as an expansion, or even a distortion, of the nature of debates about 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-Committee 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.” 170 At the international level, the 1998 Sub-Committee Report recommended harmonization of criminal laws targeting transnational criminal activities, broadly defined, and enhanced cooperation in monitoring the activities of TNCs.171

PART III. MEMORIALIZING CONFLICTS IN THE DIVISION OF REGULATORY POWER: THE Norms RESHAPING THE CORPORATE, DOMESTIC, AND INTERNATIONAL POWER.

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.172 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.

For my purposes in this paper, I 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.” 173

169 See id. (“However, in the pursuit of this aim it is possible for them to leave room for the protection and promotion of individual human rights.”).
170 Id. ¶ 24.
171 Id. ¶¶ 25-26. The 1998 Sub-Committee Report also suggested the imposition of taxes to be used for environmental clean-up. Id. ¶ 27.
172 For an authoritative history of the adoption of the Norms by one of its principal architects, see Weissbrodt & Kruger, supra note 119. On the early history of efforts to adopt an international standard of corporate governance leading eventually to the Norms, see Muchlinski, supra note 14, at 592-97.
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 establishing a Sessional working group composed of five members charged with the task of examining the working methods and activities of transnational corporations. Prominent among the members of the Sessional Working Group were El-Hadj Guissé (representing Africa), Mr. David Weissbrodt (representing Western Europe and other States), Mr. Manuel Rodriguez-Cuadros (representing Latin America), and Mr. Vladimir Kartashkin (representing Eastern Europe). Others served as members of the Sessional Working Group as well, sometimes on a more temporary basis.

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 other economic units whose activities have an impact on the enjoyment of human rights.” The Sessional Working Group produced representative of Senegal to the Sub-Committee. 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, August 11, 2000.

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, Sub-Commission on Promotion and Protection of Human Rights to Meet in Geneva From 26 July to 13 August 2004, July 22, 2004, http://www2.unog.ch/news2/documents/newsen/sc04001e.htm.

Sub-Comm. on Prevention of Discrimination and Prot. of Minorities Res. 1998/8, supra note 132 (establishing for a period of three years a Sessional Working Group to examine the working methods and activities of transnational corporations).


These members included

a report reflecting their work in 2002.180 It also submitted a draft report entitled “Human Rights Principles and Responsibilities for Transnational Corporations and other Industrial or Commercial Enterprises,”181 along with a related commentary.182 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.183

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.184 Nearly a year later, on August 13, 2003, the Sub-Commission approved the Norms.185 The Norms were revised and reissued with accompanying commentary on August 26, 2003.186

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183 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 has 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 180, ¶ __.
186 “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.” United Nations, Economic and Social Council,
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 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.187 By the Spring of 2005 it became clearer that the Norms would effectively be abandoned in its 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.”188

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187 By decision taken April 22, 2004, the Commission on Human Rights recommended to the Economic and Social Council to confirm the importance of the question of the responsibilities of transnational corporations with regard to human rights, request the Office of the High Commissioner for Human Rights compile a report setting out scope and legal status of current initiatives and standards relating to the responsibilities of transnational corporations, and 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, Responsibilities of Transnational Corporations and Related Business Enterprises With Regard to Human Rights, 2004/116, April 20, 2004, available at [http://ap.ohchr.org/documents/E/CHR/decisions/E-CN.4-DEC-2004-116.doc](http://ap.ohchr.org/documents/E/CHR/decisions/E-CN.4-DEC-2004-116.doc). With these restrictions the Norms have lost virtually their entire sting.

Whatever the immediate fate of the Norms, it is unlikely that the ideas represented by the Norms, as originally submitted, will 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.”189 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. For that reason, it is worth considering the Norms as originally proposed, even if they will not, for the moment, be embraced.

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.”190 Read together, 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. 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 sections that follow expose the simplicity and complications of the proposed regulatory revolution represented by the Norms.

A. The Devil is in the Small Print: of Preamble, General Provisions and Definitions.

It is easy enough to read the Norms as an innocuous and irrelevant for purposes of corporate regulation, traditionally understood,191 or as a misguided attempt to regulate the external conduct of corporations.192 A careful reading of the Preamble, General

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.

Id. ¶ 52(b).
190 Norms, supra note 1, at pmbl.
191 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 & John C. Coffee, Jr., Business Organization and Finance, Legal and Economic Principles 122-37 (9th ed. 2004).
192 In this sense, corporate social responsibility can be understood more as an issue of tort between separate and autonomous actors—corporations and the people with whom they
Provisions, 193 and Definitions 194 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. 195 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.

1. 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, 196 the development and imposition of an enterprise theory of liability for corporations on a worldwide basis, 197 the application of the Norms to all persons and enterprises doing business with TNCs, 198 and the development of a corporate compliance monitoring system centered on the United Nations and civil law actors, rather than states. 199

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. 200 TNCs are prohibited from doing business with any natural or other legal persons unless these also “follow these or substantially similar Norms.” 201 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.” 202 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.” 203

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193 Norms, supra note 1, ¶¶ 15-19.
194 Id. ¶¶ 20-23.
196 See Norms, supra note 1, ¶ 15, 19.
197 See id. ¶ 18.
198 See id. ¶ 15.
199 See id. ¶¶ 16-17.
200 See id. ¶ 15.
201 Commentary, supra note 1, ¶ 15 cmt. (c).
202 Id.
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. This web pays particular attention to “stakeholder” input and complaints about violations of the Norms. 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.” For this purpose, the United Nations would take the leading role through its treaty bodies and specialized agencies. 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.”

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. The transparency requirements of the surveillance system are both procedural and substantive. In their procedural aspects, they are meant to provide “stakeholders,” 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 TNCs’ “contractors, suppliers, licensees, distributors, and other natural or legal persons with whom they have entered into any agreement.” 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.” 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

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204 Norms, supra note 1, ¶ 16.
205 See id.
206 Commentary, supra note 1, ¶ 16 cmt. (a).
207 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.
208 Commentary, supra note 1, ¶ 16 cmt. (b).
209 Id. ¶ 16 cmt. (c).
210 For a definition and discussion of term “stakeholder,” see infra notes --- and accompanying text.
211 Commentary, supra note 1, ¶ 16 cmt. (d).
212 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.”).
TNCs. 213 The *Commentary* suggests that these efforts include disseminating the *Norms* to the populace “and using them as a model for legislation and administrative provisions.” 214

The general liability provision of Paragraph 18 reinforce the normative assumption of enterprise liability for TNCs. 215 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.” 216 Since the definition of TNC does not recognize the distinct legal personalities of the corporations that together constitute the TNC, 217 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 pursuing action against the operations of an affiliate, subsidiary, related corporation, or other entity in a locality where harm occurred. 218

Lastly, the general provisions section of the *Norms* contains a savings clause, 219 “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.” 220 The savings clause is also meant as a sword against the nationality and territorial principles set forth in Paragraph 1 of the *Norms* 221 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. 222 The *Commentary* asserts,

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213 *Norms*, supra note 1, ¶ 17.
214 *Commentary*, supra note 1, ¶ 17 cmt. (a).
215 See *Norms*, supra note 1, ¶ 18.
216 Id.
217 See infra notes --- and accompanying text.
218 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).
219 *Norms*, supra note 1, ¶ 19.
220 *Commentary*, supra note 1, ¶ 19 cmt. (a).
221 The *Norms* declare adherence to the principle that states remain the primary font of regulation in the areas covered by the *Norms*. This declaration 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 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 the persons 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 infra notes --- and accompanying text.
222 See supra notes 198-201 and accompanying text and infra notes 412-22 and accompanying text.
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.”

2. Definitions (¶¶ 20-23). The defined terms in the Norms stretch the applicability of the Norms extensively.

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.” The definition represents a compromise of sorts among three competing definitions.

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 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 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” 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.”

But the breadth 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

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223 Commentary, supra note 1, ¶ 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. cmt. (b).
224 Norms, supra note 1, ¶ 20.
225 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.

Report of Working Group, Third Session, supra note 182, ¶ 12.
226 Norms, supra note 1, ¶ 21.
227 Report of the Working Group, Fourth Session, supra note 180, ¶ 15 (comments of Mr. Weissbrodt).
involve violations of the right to security as indicated in paragraphs 3 and 4.”228 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.229

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.”230 This term “shall be interpreted functionally, in light of the objectives of these Norms.”231 The provision suggests that any number of individuals or groups can fall within the definition of stakeholder as long as they are “substantially affected by the activities of the [TNC].”232 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.”233 The Commentary provides no further guidance.234 This is somewhat extraordinary given the ramifications of the definition for corporate law. Yet it 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 for purposes of corporate governance. Yet, as applied in the Norms, this standard goes beyond the stakeholder model discourse of most national law systems. It radically broadens the community of actors who are, indirectly but effectively, given

228 Norms, supra note 1, ¶ 21.
229 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 cross border, they would not be TNCs). But the Norms make it clear that even the smallest local enterprise might come within the TNC definition if it has any relationship with a TNC. See id. Moreover, the 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 ironically, the Norms may have the effect of making it even harder for local enterprises in TNC host states to take advantage of the globalized markets through relationships with foreign TNCs. Development of local economies might become harder rather than easier under the Norms.
230 Id. ¶ 22.
231 Id. The definition, on this basis, includes even indirect shareholders when their interests will be substantially affected by the activities of the TNC. See id.
232 Id.
233 Id.
234 Indeed, with respect to this definition, the Commentary offers no guidance at all.
governance rights within any corporation required to adhere to the Norms. 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.” 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. It uses the coercive power of the political community to compel the construction of particular webs of contractual relations that effectively displace the shareholder model for a stakeholder model and incorporate public law social responsibility as a core norm of TNC corporate governance compliance.

3. 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 TNCs should undertake 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. 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

235 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.


236 Norms, supra note 1, ¶ 23.

237 The Norms use a combination of reforms to modify corporate governance beyond recognition: from a private economic 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 and accompanying text.

238 See Norms, supra note 1, at pmbl.
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.239

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.”240 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.”241 The Preamble then lists a large but open ended corpus of international human rights instruments incorporated by reference. The list is not exhaustive.242 It contains several instruments that are not legally binding on state actors.243 It also refers to a number of instruments that have not been universally ratified.244 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.245 Ironically, American TNCs seeking to comply

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239 Id.
240 Id. States are recognized as having the primary, but not the exclusive, responsibility for securing such rights. See id.
241 Id.
242 The Preamble’s references to international law instruments is preceded by the qualifier “such as.” See id. at pmbl. 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 of Human Rights and other human rights treaties,” in addition to “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. ¶ 23. Again, note both the open-endedness of the description, and its inclusion of binding international law and treaty, irrespective of ratification by the nation-states in which the TNC is chartered or otherwise operates, and non-binding international declarations.
243 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 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 ¶ 13.
244 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.” Report of Working Group, Fourth Session, supra note 180, ¶ 27.
245 Id.
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.246

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 world wide 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, 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.

B. General Obligations (¶ 1)

246 This, of course, presents problems, potentially at least, with American domestic law. See infra Part IV.A.
Paragraph 1 of the Norms not only reaffirms the primary responsibility of States with respect to human rights,247 but also proclaims that “within their respective spheres of activity and influence” TNCs have the same obligations as States with respect to human rights.248 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.”249 The emphasis of the Norms is on the obligations of TNCs. States commenting on the Norms, however, tend to emphasize the ultimate importance of the responsibility of states as the primary obligor under the Norms.250

The Commentary suggests an additional duty—due diligence—to ensure that TNCs do not contribute to or benefit from human rights abuses.251 There is a suggestion in the comments that the failure of due diligence may result in TNC liability for underlying human rights abuses.252 Moreover, TNCs are required to “use their influence in order to help promote and ensure respect for human rights.”253 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.”254

C. Right to Equal Opportunity and Non-Discriminatory Treatment (¶ 2)

TNCs are obligated to ensure equality of opportunity and equal treatment for all workers.255 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.256) This

247 “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.
248 Id.
249 Commentary, supra note 1, ¶ 1 cmt. (a).
250 "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.
251 Commentary, supra note 1, ¶ 1 cmt. (b).
252 See id. (“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.”).
253 Id. ¶ 1 cmt. (b).
254 Id.
255 Norms, supra note 1, ¶ 2.
256 See supra notes --- and accompanying text.
obligation applies to process as well as substance rights. 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.”

**D. Right to Security of Persons (¶¶ 3-4)**

TNCs may not engage in or benefit from violations of human rights or humanitarian laws. 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.” 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. TNCs are under an obligation not to produce or sell weapons declared illegal under international law, or otherwise to “engage in trade that is known to lead to human rights or humanitarian law violations.”

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. 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.” TNC security forces cannot perform functions “exclusively the responsibility of the State military or law enforcement

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257 “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 1, ¶ 2 cmt. (b). “No worker shall be subject to intimidation or degrading treatment or be disciplined without fair procedures.” Id. ¶ 1 cmt. (a).
258 Id. ¶ 2 cmt. (d).
259 Norms, supra note 1, ¶ 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.
260 Commentary, supra note 1, ¶ 3 cmt. a.
261 Id.
262 Id. cmt. (b).
263 Id.
264 See Norms, supra note 1, ¶ 4 (stating that TNCs are expected to comply with the laws and professional standards of the country in which they operate with respect to such security operations).
265 Commentary, supra note 1, ¶ 4 cmt. (a).
services,”266 nor may they be used to impede worker efforts to unionize or otherwise assemble.267

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.”268 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.”269 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.

E. Right of Workers (¶¶ 5-9)

Paragraphs 5 through 9, 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;270 (2) prohibition of child labor;271 (3) imposition of a positive obligation to provide a “safe and healthy environment”;272 (4) imposition of a remuneration standard requiring TNCs to set wages that “ensures an adequate standard of living,” taking due account of wages that “with a view towards progressive improvement”;273 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).274

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.”275 But it is not clear whether this is a general requirement or is limited to financial interactions between the TNC and its employees.

266 Id. cmt. (b).
267 Id. 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).
268 Id. cmt. (d).
269 Norms, supra note 1, ¶ 22.
270 Id. ¶ 5.
271 Id. ¶ 6.
272 Id. ¶ 7.
273 Id. ¶ 8.
274 Id. ¶ 9.
275 Commentary, supra note 1, ¶ 5 cmt.(a).
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.”276 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.277

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.”278 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.”279 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.280 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.281 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 15.282

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276 Id. ¶ 6 cmt. (b). Children between the ages of 13 to 15 years are permitted some light work. Id. cmt. (c).
277 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 1, ¶ 10 (requiring TNCs to “recognize and respect applicable” social, economic, and cultural policies).
278 Commentary, supra note 1, ¶ 6 cmt. (d).
279 Norms, supra at note 1, ¶ 10.
280 Id. ¶ 12.
281 Commentary, supra note 1, ¶ 7 cmt. (a).
282 See supra notes --- and accompanying text.
suggests that Paragraph 7 imposes on TNCs an obligation to disclose “available information about the health and safety standards relevant to their local activities.” 283

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. 284 The occupational health and safety commentary, like the child labor prohibitions, contains substantive provisions respecting maximum work weeks (forty-eight hours), day work limits (ten hours) and overtime limits (twelve hours per week) that might exceed national legislation. 285 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. 286 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. 287 The idea of a living wage, deriving from Catholic social thought of the early part of the twentieth century, 288 remains contentious in the

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283 Commentary, supra note 1, ¶ 7 cmt. (b) (providing further obligation to arrange for safety training and disclosure of known special safety hazards). The Commentary cross references Comments (a) and (c) to ¶ 15. See id. Comment 15(a) obligates TNCs to develop and disseminate internal operating rules and make them available to stakeholders. Id. ¶ 15 cmt. (a). Comment 15(e) requires disclosure of conditions affecting health, safety or the environment to everyone who may be affected. Id. cmt. (e).

284 See id. ¶ 7 cmt. (e).

285 See id. cmt. (f).

286 Norms, supra note 1, ¶ 8.

287 See Commentary, supra note 1, ¶ 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.”).

288 “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
West 289 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 as to guidance or implementation. What it does seem to provide aplenty is the 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, worker unionization rights.290 Such a right would be defined by and subject to international norms developed through the International Labor Organization.291 This might cause a problem both in those jurisdictions that have not ratified international labor conventions,292 and in those states (potentially, for

accepts harder conditions because an employer will give him no better, he is the victim of force and injustice.’


289 In addition to the cities 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).

290 See Norms, supra note 1, ¶ 9 (requiring 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”).

291 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,” see Commentary, supra note 1, ¶ 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 voluntarism and reliance on principles rather than rights. See Philip Alston, ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime, 15 Eur. J. Int’l L. 457 (2004).

example, the United States) whose political or judicial branches interpret domestic rights to unionize differently from that evolving under international standards.293

The right to collective bargaining commentary also suggests that the Norms ought to be incorporated into TNC collective bargaining agreements294 and violations of the Norms ought to constitute appropriate bases for worker grievances.295 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.296 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,297 an obligation taken up next. Here is a situation in which a TNC could breach the Norms, whichever course it chose.

**F. Respect for National Sovereignty and Human Rights (¶¶ 10-12).**

Under Paragraph 10, 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 transparency, accountability, and prohibition of corruption; and (5) the authority of the host state.298 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.299 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

294 **See Commentary, supra note 1, ¶ 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 general provision ¶ 15 on incorporation of the Norms into all agreements to which the TNC is a party. See Norms, supra note 1, ¶ 15.**
295 **Commentary, supra note 1, ¶ 9 cmt. (b) (requiring TNCs to respect the right of workers to submit grievances, including grievances as to compliance with the Norms to persons who have the power to redress any abuses found).**
296 **See id. 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.”).**
297 **See Norms, supra note 1, ¶ 10.**
298 **Id.**
299 **See Commentary, supra note 1, ¶ 10 cmt. (a).**
promotion of technological innovation and to the transfer and dissemination of technology.”

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.

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.”

More generally, TNCs must respect the right to development of people within a regime of sustainable development and “within the limits of their resources and capabilities . . . encourage social progress and development by expanding economic opportunities.”

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 they operate in accordance with international standards.

Paragraph 11’s anti-corruption provisions add a transparency requirement to the Norms. 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.” 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).

The Commentary also extracts from the anti-corruption standard of Paragraph 11 a financial statement reporting standard. TNCs “and other business enterprises shall

300 Id. 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.
301 See Id.
302 GET CITE
303 Commentary, supra note 1, ¶ 10 cmt. (c).
304 Id. cmt. (b).
305 Id. cmt. (a).
306 Norms, supra note 1, ¶ 11. Paragraph 11 prohibits corruption, prohibits activity that encourages, supports, or solicits human rights, and imposes a positive obligation on TNCs to ensure that goods and services provided are not used to abuse human rights.
307 See Commentary, supra note 1, ¶ 11 cmt. (a) (stating that TNCs shall enhance the transparency of their activities in regard to payments to government and public officials).
308 Id. cmt. (b).
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.”309 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.310 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,311 which some states (including the United States) have not ratified.312 Included in those obligations are requirements of self-assessment313 that take into account the comments of stakeholders,314 as the term is broadly defined in Paragraph 22. In addition, eviction law is internationalized315 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 Rights316 but also by the “relevant general comments adopted by the Human Rights Commission.”317

G. Obligations with Regard to Consumer Protection (¶ 13).

Paragraph 13 of the Norms describes substantive conduct standards with regard to consumer protection.318 One interesting aspect of Paragraph 13 centers around the prohibition on the production, sale, distribution, marketing, or advertising of harmful or potentially harmful products.319 The Commentary does not define “potentially

309 Id. cmt. (c).
310 See Norms, supra note 1, ¶ 12.
311 Commentary, supra note 1, ¶ 12 cmt. (d).
313 Commentary, supra note 1, ¶ 12 cmt. (d).
314 Id. ¶ 16 cmt. (g).
315 Id. ¶ 12 cmt. (c) (prohibiting eviction without providing “recourse to, and access to, appropriate forms of legal or other protection pursuant to international human rights law.”).
317 Commentary, supra note 1, ¶ 12 cmt. (c).
318 See Norms, supra note 1, ¶ 13.
319 See id.
harmful,” except perhaps by reference to the “safe for intended and reasonably foreseeable uses” standard of Commentary Paragraph 13 comment (c). That commentary also requires regular monitoring and testing in the context of reasonable usage and custom.321 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, advertising, and other appropriate methods.322 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.”323 The Norms contemplates 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.324 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.325 Labeling requirements for hazardous products are also internationalized under the Norms.326

**H. 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.”327 In addition, TNCs are charged with a positive obligation to contribute to the “wider goal of sustainable development.”328

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.”329 TNCs “shall insure that the burden of negative environmental consequences shall not fall on vulnerable racial, ethnic and socio-economic groups.”330 Environmental assessments are to be made available to the general public (as well as the government of the host and home

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320 Commentary, supra note 1, ¶ 13 cmt. (c).
321 Id.
322 Id. cmt. (e).
323 Id. cmt. (c).
324 See Id. cmts. (b) - (c).
325 Id. cmt. (c).
326 See id. cmts. (d) - (e).
327 GET CITE
328 Norms, supra note 1, ¶ 14.
329 Commentary, supra note 1, ¶ 14 cmt. (b).
330 Id. cmt. (c).
states, and international bodies). 

In this respect, compare Commentary Paragraph 14 (e) 332 with Paragraph 13(c). 

PART IV. THE NORMS AS TRANATIONAL LAW. 

Read as a whole, the Norms attempt to make great changes to both the internal governance 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 and within academically oriented NGOs. 

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 participants—principally academics and NGOs—and private sector or market oriented participants—businesses and developed states. 

The former principally argued to the Sub-Commission that the Norms represent a clear and complete advance over existing voluntary standards for regulating business behavior. They also suggested that the Norms represent an advance over existing standards by providing a single comprehensive standard 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. 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 framework.

331 Id. cmt. (d).
332 Id. cmt. (e) (requiring adoption of prevention and precautionary principles, lack of scientific certainty to delay introduction of cost effective measures).
333 See id. cmt. (c); supra notes ---- and accompanying text (similar with respect to consumer protection).
336 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.” Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Report of the United Nationals High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises With Regards to Human Rights, E/CN.4/2005/91, Feb. 15, 2005 at ¶ 19 (advance edited version).
337 See id. ¶ 21(a)-(b).
338 See id. ¶ 21(c)-(e).
organization that important elements of global civil society trust (or at least trust more than they trust states). 339

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. 340 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. 341 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. 342

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, and the direction of corporate activity—the objects to which these organizations are directed—changes. This section provides a preliminary analysis of the character and nature of these shifts, and its relation to current understandings of corporate law and corporate governance.

A. 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: to assert the autonomy and supremacy of international law over domestic law by imposing international law standards through private law, thus 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 Norm-grounded private and contractually binding behavior of TNCs as the basis for the recognition of new (and binding) customary international law.

1. Overturning the Shareholder Primacy Model and State Regulatory Authority Over Corporations. The potential radicalism of the Norms from the

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339 See id. ¶21(f)-(i).
340 See id. ¶ 20(a)-(c).
341 See id. ¶ 20(d)-(e), (h).
342 See id. ¶ 20(f)-(g).
perspective of traditional corporate governance is vast. In particular, the Norms seek a substantial transformation of the old “shareholder vs. stakeholder” model in two ways. First, it suggests a model of stakeholder primacy. Second, it substantially expands the concept of stakeholder to include virtually every element of civil society—including the state and 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 on corporations subject to its standards while oblivious to its 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 make it clear that at least with respect to economic entities subject to its norms, 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. Shareholders retain ultimate control of the corporate governance machinery and the duty of those appointed by them flows exclusively to shareholders. 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

343 The boundaries and forms of the traditional debate are described supra Part I.
344 See supra Part I.
345 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.

developed countries.”346 Paragraph 16 makes clear that all decisions of the TNC must take into account input from stakeholders.347

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.”348 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.”349 Paragraph 12 imposes on TNCs an obligation to contribute to the realization of economic, social, and cultural rights of the people in whose political territory the TNC operates.350

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 attempting 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 would run something like this: a stakeholder model, of the type sought to be implemented through the Norms, would violate 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.351 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.352 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

346 Commentary, supra note 1, ¶ 10 cmt. (a).
347 Id. ¶ 16 cmt. (i).
348 Norms, supra note 1, ¶ 8; Commentary, supra note 1, ¶ 8 cmt. (a); see supra notes --- and accompanying text.
349 Commentary, supra note 1, ¶ 10 cmt. (d).
350 Norms, supra note 1, ¶ 12. The Commentary identifies in particular activity that promotes rights to health, food, water, and housing. In addition, Paragraph 12 obligates TNCs to protect the civil and political rights of the population. See Commentary, supra note 1, ¶ 12 cmt. (e).
351 These can include the articles of incorporation, bylaws and in closely held corporations, a shareholder or similar agreement. See, e.g., Del. Gen. Corp. Code §§ 102-09, 341 et seq.
352 This, for example, the power of shareholders to divest the board of its power are constrained by strict limits and may require amendment of a corporate charter, see Del. Gen. Corp. Code §141(a), or the execution of a unanimous shareholder agreement, see Rev. Model Bus. Corp. Act §§ 8.01(b), 7.32.
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.353 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.354

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 either violate the Norms or the national law inconsistent with the Norms. If they chose to violate national law, there are few international legal mechanisms available to protect the TNCs within the territory of the state. There are even 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.355 Viewed thus, 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, it has also managed to make it extremely difficult for regulating bodies to impose any sort of mandatory regulatory

353 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 (1974).

354 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 Officers, Lawyer and Accountant Behavior, 76 St. John’s L. Rev. 897 (2002).

regime—especially a regime less solicitous of business interest than a private law model of regulation.\textsuperscript{356}

In addition, 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.”\textsuperscript{357} Any individual or entity can be considered a stakeholder as long as the “substantially affected by the activities” of the TNC standard is met.\textsuperscript{358} 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.”\textsuperscript{359}

Moreover, the Norms require TNCs to incorporate its terms into labor contracts and rights to arbitrate.\textsuperscript{360} 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, like Germany, a form of labor participation in corporate governance is the norm.\textsuperscript{361} 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.\textsuperscript{362} American law has tended to resist labor participation in corporate governance—though not worker acquisition of ownership rights through share purchases, or indirect worker participation through the mechanics of federal labor regulation. In this way, American law recognizes stakeholders other than shareholders.\textsuperscript{363}

\textsuperscript{356} “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.” Leslie Sklair, The Transnational Capitalist Class 151 (2001). 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.” \textit{Id.}

\textsuperscript{357} Norms, supra note 1, ¶ 22.

\textsuperscript{358} Stakeholders can include anyone “when their interests are or will be substantially affected by the activities of” TNCs. \textit{Id.} It is not clear that any person or entity cannot qualify as a stakeholder.

\textsuperscript{359} \textit{Id.}

\textsuperscript{360} See \textit{id.} ¶ 9

\textsuperscript{361} For a useful description of the German form of labor participation in corporate governance, see Henry Hansmann & Reinier Kraakman, \textit{The End Of History For Corporate Law}, 89 Geo. L.J. 439 (2001).

\textsuperscript{362} 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).

But the Norms appear to embrace a more all-encompassing model. At first blush, the broadening of stakeholders appears somewhat radical. But, as discussed above, 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.

2. Effect on Autonomy of Corporate Legal Personality: A Mandatory Enterprise Organization Model and the Role of Domestic Law. The Norms also attempt larger changes to the character of corporate governance. I have explored the way 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. The problem, of course, is that, as a matter of the domestic law of most states, the autonomous legal personality of corporations matters. Most states have developed very strong public policies in favor of legal autonomy. At the same time,

364 See supra Part I at notes --- and accompanying text.
365 Many commentators have noted the problem of liability avoidance of 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 liabilities incurred by any of its parts. For a discussion of this problem, see, e.g., Sarah Joseph, Corporations and Transnational Human Rights Litigation 128-43 (2004); Blumberg, supra note 2, at chapter six; Robert B. Thompson, Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors, 13 Conn. J. Int’l L. 379 (1999).
366 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 minimize the influence of foreign governments with foreign parents.

R. Vernon, Codes on Transnationals: Ingredients for an Effective International Regime, in Transnational Corporations: The International Legal Framework, supra note 92, at 69, 72.
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 warranted. Some states have developed at least some rudimentary form of enterprise liability principles, even in statutory form.

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. But 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. 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 Norm 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 tort affecting a community—for example, a situation like the gas poisoning of the local population in Bhopal, India. 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.

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367 See N. 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 Steve Bainbridge, Abolishing Veil Piercing, 26 J. Corp. L. 479 (2001). To similar effect in Australia, see Ian Ramsey & D. Noakes, Piercing the Corporate Veil in Australia, 19 Comp. & Sec. L.J. 250 (2001).

368 See Muchlinski, supra note 14.


370 In December, 1984, as a result of various and cumulating safety failures, a cloud of toxic gas was released from the Union Carbide plant in Bhopal, India, killing about 2,500 people, mostly poor villagers who were not warned of the approaching cloud of toxic gas, 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 Marc Galanter, The Transnational Traffic in Legal Remedies, in Learning From Disaster: Risk Management After Bhopal 133-57 (Sheila Jasonoff ed., 1994); Jaime Cassells, The Uncertain Promise of Law: Lessons From Bhopal (1993).

371 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-shareholder interests is inappropriate when an auction among active bidders is in progress, and the object is no longer to
absent the enactment of statutory authority. The organized Bar in the United States has been quite wary of these “constituency statutes.” The 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 the economic, social and legal ramifications of such a change in the law.”

One of those basic premises that might be radically altered or weakened would be the principle of “waste” under state corporate law. Any corporate action that might seriously threaten or otherwise sacrifice profits may be beyond the power of corporate managers or the board to undertake.

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 preempts state corporate law. 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

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372 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). 373 Am. Bar Ass’n, Comm. on Corp. Laws, Other Constituencies Statutes: Potential for Confusion, 45 Bus. Law. 2253, 2270-71 (1990) (declining inclusion of such a provision in the ABA Model Business Corporation Act).

374 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 --- and accompanying text.


376 “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.” Hans W. Baade, The Legal Effects of Codes of Conduct for MNEs, in Transnational Corporations: The International Legal Framework, supra note 92, at 212, 230.
through the Norms. 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. But its methodology is troubling. 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. 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 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 operation, and cash flows of the business. Narrowly interpreted, it is possible to view this comment

377 “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.” George Norman and Joel P. Trachtman, The Customary International Law Game, 99 Am. J. Int’l L. 541, 569 (2005).

378 See infra Part IV.B.2 at notes --- and accompanying text.

379 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 March 5, 2005). Alternatively, the norm could
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 employment for children less than eighteen years of age, and regulate child labor for individuals aged thirteen to fifteen years. 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. In cases of inconsistency, TNCs are under an obligation to lobby states to comply with international covenants. The working hours of other labor is also regulated directly in the Norms. 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. Thus, for example, the obligations stated in the commentaries to Paragraph 1 (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, 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

serve as a source of authority to impose financial disclosure rules specific to human rights. But in the absence of a convention or other binding instrument it is not clear that there is authority for the assertion of this power. However, 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 --- and accompanying text.

380 Commentary, supra note 1, ¶ 6 cmt. (b).
381 Id. cmt. (c).
382 See id.
383 Id. cmt. (d).
384 Id. ¶ 7 cmt. (b).
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that failure to comply may subject the TNC, in appropriate cases, to the jurisdiction of the International Criminal Court,386 or to punishment under international conventions proscribing transnational criminal activity.387 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.388 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.389

Taken together, these enlargements appear 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

386 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). In effect, the Norms could serve to ameliorate some of the difficulties academics have noted with the International Criminal Court’s assertion of jurisdiction over TNCs. See, e.g., 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); Andrew Clapham, The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons From the Rome Conference on an International Criminal Court, in Liability of Multinational Corporations Under International Law 139-95 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000). This approach does much to ameliorate the problem identified by several commentators of holding TNCs accountable for their torts or other wrongs in countries where the state power is weak compared to that of the TNC. See, e.g., Maria McFarland Sanchez-Moreno & Tracy Higgins, No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia, 27 Fordham Int’l L. Rev. 1663, (2004); Steven R. Ratner, Corporations and Human Rights: A Theory of Legal; Responsibility, 111 Yale L.J. 443, 492-95 (2001).


perspective, such a stance 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 be denied 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.390

3. Effect on Concept of Corporate Purpose at the Macro Level: Vesting TNCs With State Power. The Norms, at their broadest level of construction, appear to 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 a 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.391 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 a number of its 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—to an entity the principal purposes of which 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.392 As I have described it in some detail above,393 the Norms impose through private law a significant array of functions once monopolized by public bodies. It does this without sanction of the state and without regulation by state bodies. 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.

391 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.”).
392 See Norms, supra note 1, ¶ 10-12; supra notes --- and accompanying text.
393 See supra Part III.
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,”394 adopt and internalize specific labor policies in their global operations,395 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.”396 These obligations involve, at times, the further obligation to “consult with Governments on the design and implementation of national action programmes”397 and sometimes to actively subvert host nation laws or policies.398 TNCs have obligations, akin to those of other public law actors, to “refrain from any activity which supports, solicits, or encourages States or any other entities to abuse human rights,”399 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.400 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 suggests that in considering the Norms, it will be necessary not to forget that it is a constitution that is meant to be expounded in the form of the Norms, to paraphrase an old American constitutional law case, rather than a precise and technical set of corporate regulations.401

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.” “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

394 Commentary, supra note 1, ¶ 10 cmt. (a); see supra notes --- and accompanying text.
395 See Norms, supra note 1, ¶¶ 6, 7, 8, 9; Commentary, supra note 1, ¶¶ 6 cmts. (b), (d), 7 cmts. (e), (f), 8 cmts. (a), (b), 9 cmt. (b); supra notes --- and accompanying text.
396 Norms, supra note 1, ¶ 12.
397 Commentary, supra note 1, ¶ 6 cmt. (d). See also Norms, supra note 1, ¶ 4; Commentary, supra note 1, ¶ 4 cmt (e).
398 See Norms, supra note 1, ¶ 9; Commentary, supra note 1, ¶ 9 cmt. (e); supra notes --- 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 ¶ 10, as well as the overarching approach set forth in Norms ¶ 1 (“States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights.”).
399 Norms, supra note 1, ¶ 11.
400 Commentary, supra note 1, ¶ 3 cmt. (b).
401 See McCulloch v. Maryland, 17 U.S. 4 (Wheat.) 316, (1819) ("In considering this question, then, we must never forget, that it is a constitution we are expounding").
represents at least as much a perversion of the corporation's function as it does an abdication of responsibility by the state. 402

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 recognition de jure of a competitor to state power and the admission that states no longer have a monopoly of power under international law. And it vests this 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. 403

B. 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 attempts, through the Norms, of vastly expanding 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 threat posed by the Norms to their sovereignty.

1. Imposition of Direct Obligation on TNCs for Compliance with International Law. The Norms abandon 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. 404 The 2002 Working Group Report explained that it “was faced with the problem that while there


403 See infra notes 398-400 and accompanying text.

404 See Fleur Johns, The Invisibility of the Transnational Corporation, 19(4) Melbourne L. Rev. 893 (1994) (Australia). The author notes the usual reservations about this shift. See id. 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 id. at 922-23.
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.”405 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.406 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.407 But it seems clear that, had circumstances changed, there would be considerable support among a majority of those participating in the drafting to ensure the coercive effect of the Norms.408

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.”409 Others echo this approach. For example, the Austrian

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405 Report of Working Group, Fourth Session, supra note 180, ¶ 17 (relating the comments of Mr. Alfonso Martinez a member of the Working Group).
406 Not all of the experts involved in the drafting of the Norms agreed. The 2002 Sub-Committee 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.” Id. ¶ 27.
407 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.

408 See supra Part II.
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.”410 Australia emphasized its “firm view that legal responsibility for the implementation of international human rights standards rests primarily with those States who are party to the standards.”411 Germany reminded the U.N. High Commissioner for Human Rights that “[e]ven under conditions created by globalization, every state continues to bear the main responsibility for its own sustainable development, and for ensuring protection of human rights.”412 Perhaps the official response of the United States put the Western position most forcefully:

"The 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.413

410 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, ¶ 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.”).


On the other hand, the American position misstates somewhat the current position of the TNC within the international law system. TNCs have already been recognized as having 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 the way 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 seeks 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 legal norms than the traditional method so dependent on state action. Ultimately, TNC private conduct could have the potential to guide—or limit—legislatures.

In this regard, the *Norms* might be said to 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.

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414 See Fleur Johns, The Invisibility of the Transnational Corporation, 19(4) Melbourne L. Rev. 893 (1994) (Australia). She 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’. Id. at 901. In this instance, the breach of an “internationalized” contract may be considered a breach of international law, and the contract itself may be affected by international legal principles. Id. 901 (using as an example the jurisprudence of US-Iran Claims Tribunal).

415 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 17, at 287. “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 the ‘private’ regulation function as it does on public policy.” Jarrod Wiener, Globalization and the Harmonization of Law 28-29 (1999).

416 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); *Id.* ¶ 6 cmt. (d) (child labor).
in this context, states are uncomfortable with the transfer of authority from state to TNC. 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, *Norm* 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 their strategy, 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. Also developing states might resist the *Norms* as favoring corporate over state power to

Some commentary on the draft *Norms* reflect this view. Thus, for example, the Norwegian Agency for Development Cooperation 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.” Contributions from Members of the Consultative Kompakt-Group attached to Kingdom of Norway, Royal Ministry of Foreign Affairs, Letter: *Decision 2004/116 – Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, Ref. 2000/00046-17 III, Oslo, Norway, Nov. 4, 2004 at Annex. 417

417  See, e.g., United Kingdom and Northern Ireland, *The Responsibilities of Transnational Corporations and Related Business Enterprises With Regard to Human Rights*, (n.d.) (“The UK was willing to concede that there might be exceptional circumstances in which a State is unable or unwilling to enforce such standards in its territory” that called for “exploring alternative approaches.” However, the U.K. insisted that even in this case any approach would have to “take into account the complex jurisdictional issues involved.” However, whatever measures “are necessary to ensure an adequate standard of behaviour by companies operating in some countries” the U.K. government “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.” *Id.*


419  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.” *Id.* ¶ 2.2. This is echoed in the response of the United States. *See United States Mission to International Organizations, Geneva, Switzerland, 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 (CVA 2537), Geneva, Switzerland, dated Sept. 30, 2004, received Oct. 4, 2004 (“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.”).
internalize internal human rights norms within a traditional rule of law context. These comments reflect a notion rejected in the *Norms* that private law cannot be used to public policy effect.241

2. Use of TNCs as vehicles for the extension of international soft law. The use of TNCs as a substitute (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 developers of patterns of behavior that could produce hard international law as well.422 The *Norms* themselves do not hide this

420 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, transmitted Sept. 27, 2004 (“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 rights.”); Mauritius Mission to the United Nations, Geneva, Note No. 346/2004 MMG/HR/3/6, Geneva, Switzerland, Oct. 1, 2004 (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, Switzerland, Oct. 6, 2004 (“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 (“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. . . .”).


422 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.”
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.”

The Norms represent a refinement of the process of creating hard international law through soft law making. The Norms are meant by their drafters to provide a basis for the building of consensus necessary for the adoption of hard international law. For that purpose, non-state actors, and principally 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. 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, 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

423 Norms, supra note 1, at pmbl.
424 David Weissbrodt put it like this:

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

425 See U.N. Commission on Transnational Corporations, Certain Modalities for Implementation of a Code of Conduct in Relation to its Possible Legal Nature, UN Doc. E/C.10/AC.2/9, ¶ 8 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.” Such a code “becomes thereby a ‘source’ of law for national authorities as well as for the international corporations themselves . . . ”).
international law. 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.” 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.

The most creative argument, perhaps, 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.”

426 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, Submission of Canada to the High Commissioner for Human Rights on the Responsibilities of Business Enterprises With Regard to Human Rights, Geneva, Switzerland (n.d.) ¶ 2.4.

427 Australian Permanent Mission to the UN, Geneva, Switzerland, 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, Geneva Switzerland, Sept. 8, 2004. 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., Ives Dezaley & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (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).


Yet, it is precisely these objections that make the methodology of the Norms so powerful. Corporations are strong enough to threaten state power on the ground. That reality has been what has driven 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, will 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. The United States expressed concern about the anti-democratic manner that was used to craft the Norms. 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

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430 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 Corporation: The International Legal Framework, supra note 92, at 333, 337 (remarks by W. Michael Reisman).

431 The Austrian Mission, for 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 organizations 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.


432 United States Mission to International Organizations, Geneva, Switzerland, 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 (CVA 2537), Geneva, Switzerland, dated Sept. 30, 2004, received Oct. 4, 2004 (objecting to the imposition of norms with respect to which TNCs took no part in their development. “This is especially true given the process through which the Sub-commission has drafted the ‘norms’ forwarded to – and rejected by – the Commission on Human Rights at its last session.”).
they are responsible only to their members. It is irony 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).

3. Use of Elements of Civil Society as Agents for Enforcement of International Law Under the Norms. Perhaps the most interesting aspect of the Norms lies in the mechanics of its implementation. Those mechanics suggests 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.

A telling example 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.

For that purpose, the United Nations, through the Norms, would have effectively deputized the entire population of the globe to report on TNC activity. 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

433 “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.”).

434 For a similar effort, far more successful to date, under very similar circumstances, see McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

435 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 the 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.” 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 Fifth Session, E/CN.4/Sub.2/2003/13, Aug. 6, 2003 (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.

436 See Norms, supra note 1, ¶ 16.
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*. 437 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.” 438

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*. 439 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. 440 A sense of the battle lines for future discussion emerges from the 2004 report of the Working Group. 441 The need for surveillance and monitoring controlled through the United Nations was made in the various reports of the Working Group leading to the presentation of the draft *Norms*. 442 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,


442 See *supra* Part II notes --- and accompanying text.
be subjects of international law, as a consequence of which the monitoring mechanisms proposed were misdirected and inappropriate.443

To these must be added the perhaps unintended anti-democratic effect of the Norms’ monitoring focus. 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.444 States are accountable to their political community, and 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, reinforce the principle of democratic governance nor 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 obligation to legitimize their internal governance, 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: to use one portion of a large community of transnational non-state actors to perform a critical role in the disciplining of another


444 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. 265 (2004).
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 systems 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.445

The issue of monitoring thus raises a set of broader concerns. Issues of state sovereignty and control are implicated in both the 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-governmental organizations vis-à-vis the state. To developed states, this result may be as unpalatable as the regulation of TNCs. 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. Irony indeed.

CONCLUSION

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 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 reduce the ability of states to resist emerging international law norms. 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, it also represents 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

445 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 (Peter Willetts ed., 1998). “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.” Id. at 59 (quoting Boutros Boutros-Ghali). And indeed, it has usually been totalitarian regimes that have traditionally opposed the status of non-governmental organizations within the U.N. framework. See id. at 36.
the future, the *Norms* suggest the ways that the governance norms for states and non-state entities are converging in theory and in fact.