Submission from World Vision of Australia

The Parliamentary Joint Statutory Committee on Corporations and Securities on the provisions of the Corporate Code of Conduct Bill 2000

Introduction

World Vision of Australia (World Vision) welcomes this opportunity to make a submission on the Corporate Code of Conduct Bill 2000. World Vision is a non-governmental organisation (NGO) and is part of a World Vision Partnership of Christian NGOs working in 103 countries implementing over 4000 development, relief and advocacy projects.

World Vision strongly supports the Corporate Code of Conduct Bill 2000, which seeks to establish standards on the conduct of Australian transnational corporations (TNCs) which undertake business activities in other countries, and for related purposes.

Industry is not simply the directors of corporations, but also includes workers, shareholders and consumers who make up the market. World Vision gives credit to those TNCs which take appropriate measures to act ethically, demonstrate due diligence and are sincere and responsible to all their stakeholders.

However, World Vision believes that a set of common legally binding rules should be established to ensure that all corporations demonstrate good governance.

While supporting the Bill, World Vision recognises the various challenges that poor and marginalised communities face in developing countries, due to other reasons such as poor national governance, corruption and mismanagement of resources.

Voluntary Codes of Conduct

World Vision recognises initiatives that Australian TNCs have taken toward achieving economic development social and environmental accountability, by developing codes of conduct to address these issues. Codes of conduct are of importance to social justice especially where they go beyond national and international regulations.

The biggest obstacle to making voluntary codes of conduct work is a lack of credibility in monitoring adherence to them. The following are some the problems with voluntary codes of conduct.

- They have often been proposed as a substitute for appropriate regulation and fail to live up to their intended expectations and are therefore regarded with deep suspicion by the public.
- Voluntary codes of conduct also lack credibility when their implementation is often monitored without the involvement of other important stakeholders (the trade unions, consumers and communities that are affected by TNCs).
- Monitoring is often weak because monitoring bodies are understaffed and have no real power.
- Monitoring and evaluation results are rarely independently verified. Therefore correct information on whether voluntary codes of conduct are working or not, is not always forthcoming.
- Penalties are soft, and there is no real compensation for victims.

There are several types of codes of conduct that exist and they could be categorised as the following:

1. International voluntary codes of conduct
2. Corporate codes of conduct
3. Industry codes of conduct
4. Statutory codes of conduct (e.g. corporations law)

International voluntary codes of conduct

Examples of such codes are the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (1976) and the International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977). The OECD guidelines are voluntary in nature and therefore cannot be legally enforced. The OECD does not have the institutional capacity to monitor the implementation of the guidelines. This can only be done through national contact points in the OECD

member states. Australia, for instance, does not have a well-established and appropriately resourced contact point, that is able to effectively monitor the adherence of the Guidelines in a multi-stakeholder manner.

The biggest drawback of the Guidelines however is that they do not address the behaviour of TNCs outside the OECD (which is comprised of 32 of the world's richest countries). **Yet it is in poor countries with weak regulatory and enforcement systems that TNC activity most needs to be monitored and regulated.**

The ILO Declaration on Multinational Enterprises has a Committee on Multinational Enterprises, which monitors the implementation of the Declaration. It receives reports from member states on implementation, it conducts studies on labour issues that involve TNCs and it interprets the Declaration through a disputes procedure (Sarah Joseph, 1999, p.182). The disputes procedure is not judicial and therefore corporations are not legally obliged to uphold the principles outlined in the Declaration (Sarah Joseph, 1999, p. 182).

Industry Codes of Conduct

These codes of conduct are jointly established by some industries such as the chemical industry or the mining industry. Such codes are rarely established in a multi-stakeholder manner, and not all corporations in a particular industry are obliged to sign these codes. Research indicates that often these codes are established to lobby against the introduction of appropriate regulations. A study on the implementation of the Responsible Care Initiative which is a global initiative set up by the chemical industry, indicates that codes which are not meant for the "public eye" are rarely adhered to, whereas those which fall into the external relations area are better implemented (Plahe, Van der Gaag, 2000, p. 238).

The Code for Environmental Management[1]

Minerals Council of Australia was developed in 1996 and then reviewed in 1999. Its main aim was to improve the Australian mineral industry's environmental performance and reputation. Despite this

[1] The following is a synopsis of a paper by the Mineral Policy Institute in Australia

code, there have been violations of some of the standards set out in the code which are demonstrated by the seriously damaging cyanide spills which took place in Romania and Papua New Guinea. Some of the damage is irreversible, and in the Romanian case, it will take up to at least ten to fifteen years before the water system can cope with the effects of the spill.

Because the code was not developed in a multi-stakeholder manner, it very narrowly defined 'environment' as the physical surroundings, which does not take into consideration the relationship between people and their environment. The cyanide spills affected not only the natural environment in the two countries, but also affected the lives of many communities who are dependent upon the environment for their survival.

Had it been obligatory for all mining corporations to abide by the code, and had the code of conduct been legally binding, the chances of the cyanide spill would have been greatly reduced (since the code goes above the required legal standards). In the case of an accident, communities would have been adequately compensated for the damage. Also companies would have been forced to adopt cleaner and better technology. Unfortunately this did not happen.

Voluntary codes of conduct may offer less opportunity for public participation and scrutiny that can lead to questions about their credibility (Industry Canada, 1998, p. 4). Voluntary codes of conduct cannot be a substitute for good environmental, labour and health laws and regulations, and they certainly cannot justify a neglect of human rights. Voluntary initiatives are meant to provide an incentive to companies and individuals to improve their behaviour, and not to be used as a justification for getting rid of regulations and hiding information about company practices from the public (TOBI, 2000). Corporate responsibility cannot exist without transparency and accountability.

Just as the behaviour of individuals is guided by the laws of society, corporations too must operate by regulating their practices according to the laws and regulations of the communities and societies to which they belong, and in which they operate (TOBI, 2000).

Given that the research on voluntary codes of conduct indicates that they have not necessarily improved human rights conditions, or promoted environmental protection in developing countries, but on the contrary in some cases, have actually

prevented the introduction of appropriate legislation, there is currently an urgent need for the establishment of legally enforceable standards which will ensure corporate accountability abroad.

The power of TNCs

It has been argued that enforcement should be left to the host country (the country that hosts the TNC). However this is not an easy task. The sheer size of TNCs as well as the financial capital that they generate and control wields them immense power. The gross product of all TNCs together is an estimated US$ 8 trillion (1997) which is approximately a quarter of the world's gross domestic product (GDP) (World Investment Report 2000, p. 3). Transnational Corporations control two thirds of global trade. According to a recent study, "of the 100 largest economies in the world, 51 are corporations; only 49 are countries - this is based on a comparison of corporate sales and country GDPs" (Anderson, 2000). Some TNCs are more powerful than many nation states, including Australia.

Because of this imbalance in power, it is problematic to rely mainly on host states to hold TNCs accountable for their poor labour practices and environmental degradation . These problems stem from the fact that TNCs are "uniquely international, uniquely mobile, and uniquely powerful entities" (Joseph, 1999 p. 176). Because of this power TNCs can threaten to leave a country, if the country in question tries to impose domestic sanctions. Developing countries are constantly competing for foreign investment and sometimes would rather not question the behaviour of a corporation if such questioning could drive the corporation to a "more corporate friendly" neighbouring state. Such threats have also been made against developed countries - e.g. Rolls Royce's threat to leave the UK if it should adopt Europe's more strict labour laws - (Joseph, 1999, p. 177).

Enforcement of human rights and environmental laws requires technical expertise and various other resources which many developing countries often lack. It is therefore only fair that the entire responsibility of regulating TNCs should be shared between the countries which host them, and those in which they are based.

Home countries and extra-territorial legislation

Most developed countries have the requisites to regulate TNCs in terms of skills and technology. More recently, recognising some of the problems that have been outlined in the section above, the European Union (EU) recently passed a resolution entitled "Resolution on EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct". After the resolution was passed, a Member of the European Parliament Richard Howitt, told the Parliament that "where the United Nations disbanded its monitoring centre for transnationals, and the International Labour Organisation has dealt with only seven cases of abuse in twenty years, today the European Parliament is taking decisive action to ensure our European companies achieve higher standards for workers, the environment and human rights".

The Resolution asks the European Commission and the European Council to establish legally binding standards with extra-territorial effect, for European TNCs so that they comply with international law as well as the OECD Guidelines and the ILO Declaration. The Resolution also recommends that such a code should be based on already existing standards developed by other bodies such as the Food and Agriculture Organisation (FAO), the World Health Organisation (WHO) and the World Bank, and efforts under the auspices of United Nations Conference on Trade and Development (UNCTAD) with regard to the activities of enterprises in developing countries.

The Resolution further recommends that such a code should uphold the basic human rights standards which are outlined in the Universal Declaration for Human Rights and the subsequent Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, as well as the Elimination of all Forms of Discrimination Against Women and the 1994 draft UN Declaration on the Rights of Indigenous Peoples, and the UN Declaration on the Elimination of All Forms of Racial Discrimination.

According to the text of the resolution, while the European Parliament "welcomes and encourages voluntary initiatives by business and industry [… it] emphasises

that such codes of conduct must not be used as instruments for putting multinational enterprises beyond the scope of governmental and judicial security". The resolution clearly recognises that "in the present context of globalisation of trade flows and communications as well as of increased vigilance of NGOs and consumer associations, it seems to be increasingly in the interest of multinational undertakings to adopt and implement voluntary codes of conduct, if they want to avoid negative publicity campaigns, sometimes leading to boycotts, public relation costs and consumer complaints".

The McKinney Bill

Cynthia McKinney introduced a Bill into the US House of Representatives in June 2000, which outlines legal standards for US corporations with more than 20 persons operating in a foreign country. The areas covered by McKinney's Bill include occupational health and safety, freedom from discrimination on the basis of race, gender, religious affiliation, pregnancy (or potential for pregnancy), the right to organise and minimum wages.

Alien Tort Claims Act: United States

Statutory extraterritorial jurisdiction is extensive in the US under the Alien Tort Claims Act. Under this Act "US district courts can exercise extra-territorial jurisdiction with respect to claims by aliens of torts committed in violation of international law, including violations of customary human rights, such as freedoms from torture and slavery" (Joseph, 1999, p. 179). On 5 December 2000, a coalition of US congressmen, lawyers and human rights activities began a court action alleging labour standards violations by Chentex - a garment factory operating in Nicaragua and owned by Nien Hsing based in Taiwan - (Dunne, 2000). While this Act has been used to bring action against leaders who have oppressed civil and political freedom (Ferdinand Marcos the former president of the Philippines was sued under this act), it is only very recently that this act has been used to address violations of human rights which are caused by globalisation (Dunne, 2000).

Doe v. UNOCAL is the first case in the US which extends the liability to private corporations for violations of international law. John Doe et al is a group of Burmese refugees who have brought a claim against UNOCAL - a California based energy giant - which built a pipeline where the plaintiffs used to live. In March 1997, a Federal judge in California upheld the right of the Burmese refugees to sue UNOCAL and its officers (US citizens) in a US court for alleged crimes against humanity (Moses, 2000, p. 1). The allegation brought against UNOCAL is that the corporation should have known that its key contractual partners the repressive Government of Burma, used slave labour to build the pipeline. The Burmese refugees further claimed that UNOCAL turned a blind eye as local peasants in the area were "forced to relocate, tortured, detained, beaten and in some cases raped" by government officials (Moses, 2000, p.1). This case will form a very important precedent in the United States under the Alien Tort Claims Act, since the abuser of human rights was not the corporation in question, but the contractual partner, in this case a rogue government.

Extra-territorial legislation in Australia

Currently Australia has two Acts which have extra territorial effect. In June last year the Australian Parliament passed a Bill to amend the Criminal Code Act 1995 in accordance with Australia's obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999 will have important implications for Australian companies and the way in which they conduct their business activities abroad.

The second Act is the Crimes (Child Sex Tourism) Amendment Act, which came into force in July 1994. The Act makes sexual activity with a child under the age of 16 years committed in an overseas country by an Australian citizen or a resident, a criminal offence in Australia (ECPAT, 1999). This law applies to individuals, companies or corporations, and provides a term of imprisonment for up to 17 years and fines up to $500,000. Under the Act it is an offence to encourage, benefit of profit from any activity that promotes sexual activity with children (ECPAT, 1999).

To date there have been 10 arrests, 9 prosecutions, 7 convictions and another 2 awaiting trial (Sunday Age 2000).

The pattern clearly suggests that extra territorial jurisdiction under the Act has been extremely crucial in assisting Australia to uphold the UN Convention on the Rights of the Child. Similarly, the Bribery of Foreign Public Officials Act will also help to uphold the OECD Convention on Bribery of Foreign Public Officials.

Amendments to the Corporate Code of Conduct Bill 2000

1. Under Section 4 of Part I of the Bill on Extraterritorial Operation, sub contractors of Australian TNCs should be added to the list.
2. Under Environmental standards in Part of 2 of the Bill, an Australian TNC must also abide by the following international agreements:
    - Convention on Biological Diversity
    - Montreal Protocol on Substances That Deplete the Ozone Layer
    - UN Framework Convention on Climate Change
    - Kyoto Protocol to the 1992 UN Framework Convention on Climate Change
    - United Nations Convention to Combat Desertification
    - Basel Convention on the Control of Trans-boundary Movement of Hazardous Wastes and Their Disposal
    - Convention on Persistent Organic Pollutants
    - Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

3. In part 2, under Employment standards, the following should be added
    - ILO Convention 182 on the Worst Forms of Child Labour
    - ILO Convention 138 on the Minimum Age for Admission to Employment

4. In Part 2, under the Human rights standards, the following should be added
    - The Universal Declaration of Human Rights
    - The International Covenant on Civil and Political Rights
    - The International Covenant on Economic, Social and Cultural Rights

- The Convention on the Elimination of Racial Discrimination
- The Convention on the Elimination of All forms of Discrimination Against Women
- The Convention on the Rights of the Child

5. Under the section on Enforcement, there also needs to be a sub-section on independent multi-stakeholder monitoring of corporate behaviour in foreign countries. Such monitoring should be undertaken jointly by a monitoring taskforce made up of members from trade unions, NGOs both in the North and the South as well as representatives of indigenous and local communities.

Conclusion

Given the trends developing in other parts of the world (European Union and the United States), it is clear that current legislation in Australia which covers corporate accountability, needs to evolve through the establishment of extra territorial legislation as proposed in the current Corporate Code of Conduct Bill 2000. This is especially important now, as the world is faced with new challenges in this era of corporate and economic globalisation.

The Australian Corporate Code of Conduct Bill 2000 is based on international law, which Australia has been involved in developing through the UN system. It is very important for international legal standards to be applied universally in all countries. This bill will not "impose" any new conditions on developing countries because like most developed countries, they have signed and ratified major international treaties that are negotiated under the aegis of the United Nations.

World Vision strongly supports a code of conduct for TNCs based on universal international human rights and environmental law and urges parliamentarians to vote for the establishment of an Act which will enforce corporate accountability especially in poorer countries, where impoverished people are particularly vulnerable to abuses by corporations.

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