

Evaluating the missing link amongst the major international arrangements to minimize the broad based conflicts between nation-states and Transnational Corporations: what next?

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Evaluating the missing link amongst the major international arrangements to minimize the broad based conflicts between nation-states and Transnational Corporations: what next?

Abstract

The Draft Code of Conduct for Transnational Corporations (the Code) towards the Corporate Social Responsibility (CSR) has not been able either to minimize the conflicts between nation-states and transnational corporations or to settle a universal framework for minimizing their conflicting interests. Rather, these frameworks have some uncommon and unresolved broad based global trade issues which have dynamics of governance beyond government, regulation beyond law, and responsiveness beyond their responsibility. Hence, a hypothesis might be formulated that the missing link amongst these frameworks are the root cause behind the failure of creating a well accepted international framework for international trade related conflicts. With a thorough assessment of this hypothesis, this article argues that either the approaches of CSR have to be resettled considering the unresolved issues of the Code or the abandoned negotiation of the Code has to be given a new start.

Keywords

Transnational Corporations, the Code, the Set, the Declaration, developing nation-states, sustainable trade environment, conflicting interests, Corporate Social Responsibility

Introduction

An effective way to upgrade the environmental conditions, human rights and living standards of the people in developing nation-states would be the development of a sustainable trade environment in every developing nation-state. For developing a sustainable trade environment, both the developing nation-states and TNCs need to ensure maximum cooperation amongst them. This cooperation could be maximised if the trade related conflicts amongst Transnational Corporations (TNCs)¹ and developing countries could be resolved following an international framework based on undisputed international norms.

It is evident that there is always a necessity for an international framework that can maintain the quiet coexistence of the trade related actors with minimum conflicts. In line with this necessity, there are some major initiatives that were initiated to harmonize the activities amongst TNCs and countries. Other than the Draft Code of Conduct for Transnational Corporations (the Code) and the Corporate Social Responsibility (CSR) paradigms, those major initiatives include the International Labor Organization's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the OECD Guidelines for Multinational Enterprises, and the UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and the Global Compact.

The objectives of these frameworks are almost the same: to minimize conflicts amongst the corporate bodies in order to develop a sustainable trade environment. In particular, the Code and the CSR paradigms were initiated for contributing into the development of sustainable trade environment though they have not been fully successful. Rather, these frameworks have some uncommon and unresolved broad based global trade issues which has dynamics of governance beyond government, regulation beyond law, and responsiveness beyond responsibility. Hence, a hypothesis might be formulated that the missing links amongst these frameworks might be the main reasons behind the failure of creating a complete and well accepted international framework.

To evaluate this hypothesis, this article examines the major international arrangements for minimizing global trade related conflicts and highlights the major missing links amongst them. At the end, it states that the unresolved issues of the Code mostly comprises the missing links amongst these frameworks and argues that either the approaches of CSR have to be resettled considering these unresolved issues or the abandoned negotiation of the Code has to be given a new start.

¹The term 'Transnational Corporation' is used here in conformity with UN practice following Article I of the Draft Code of Conduct on Transnational Corporations. No distinction is intended from the term 'multinational enterprise' in this article. However, TNC and MNE are sometimes distinguished. For the purpose of this research the terms are used interchangeably.

Mapping the major international frameworks for minimizing the trade related broad based conflicts.

International initiatives for minimizing conflicts between TNCs and developing countries notably started in the economic and political changes of early 1970s. Before this decade there were also some activities varying in scope according to geographical application, substantive coverage and successfulness. These include the International Convention of Treatment of Foreigners (1920)², the Havana Charter of the International Trade Organization (1948)³, the International Code of Fair Treatment for Foreign Investments (1949)⁴, the International Association for the Promotion and Protection of Private Foreign Investment (1959)⁵, the Harvard Conventions on the International Responsibility of States for Injuries to Alien (1929 & 1961).⁶ Almost all of these instruments are directly related to investments, mainly in developing and poor countries by the investors of developed countries/TNCs. It shows that developed countries, at the early days of creating rules/regulations, only created the ones that could directly serve their interests. However, though these instruments were not aimed at the regulation of TNCs but these earlier attempts for handling the relationship amongst developing countries and TNCs are significant as examples of the problems involved in achieving consensus on the rules that govern the relationship between foreign investors and host countries. The rules are also significant in their emphasis on investor's protection, a theme that has been a consistent factor both in moves towards the conclusion of codes of conducts on TNCs and its relation to the content of recent bilateral investment treaties.

However, the wave of inflation and increasing protectionism, food and oil crisis in the 60s and early 70s changed the views of Least Developed Countries (LDCs) and the issues of TNCs became salient to them. At that time, they started to control TNCs more and by this way tried to step into a New International Economic Order (NIEO). At the same time, nationalization of foreign owned companies and increasing control of LDCs over TNCs invited developed countries to act on behalf of TNCs since almost all of the owners of TNCs at that time were citizens of developed countries. At this juncture, the Organization of Economic Cooperation and Development (OECD) set up the Committee for International Investment and Multinational Enterprises (CIME) to counter the pressure of LDC's, and started working to influence the UN to move away from a highly regulatory position of TNC control. Another reason for OECD's initiative towards adoption of a Guideline for TNCs was the demand of greater control over TNCs from Canada, the Netherlands, some Scandinavian countries and the trade unions articulated demands for controls over TNCs through the Trade Unions Advisory Committee (TUAC) of the OECD. However, this was counterbalanced by calls from the representatives of the business community, articulated through the Business and Industry Advisory Committee (BIAC) of the OECD⁷. On 21 June 1976 the OECD Guidelines on Multinational Enterprises was adopted as an Annex to the OECD Declaration on International Investment and Multinational Enterprises.

The newly independent overseas colonies of the major European countries also tried to establish a pattern in the regulatory forms of TNCs. Two of the most important political and economic implications of this proposed pattern were, firstly, the political influence of the colonial powers over the independent countries diminished and secondly, most of the newly independent countries considered the foreign TNCs as the extended part of the colonial imperialism though not through the colonial administrators.⁸ Therefore, with the sovereign power and separate identity in the UN, these new countries formed 'Group of 77' - a new international pressure group and earned voting majority in the UN. This new group of countries also got supports from the then communist block and thereby the issues of their developmental goals got the top most priority in the UN's social and economic agendas and gradually the concept of the New International Economic Order (NIEO)⁹ emerged.

The basis of NIEO were 'equity, sovereign equality, interdependence, common interest and cooperation among all countries...' ¹⁰ to '..eliminate the widening gap between the

² League of Nations. Doc.C.174 M 53,1928 11 14 (1929)

³ U.N.Doc.E/CONF.2/78

⁴ I.C.C. Pub. No. 129 (1949)

⁵ Shawcross (1961). *The Problem of Foreign Investments in International Law*, Hahue Recueil, p334

⁶ Sohn & Baxter. Responsibility of States for Injuries to the Economic Interests of Aliens, *American Journal of International Law*, Vol. 55,(1961), pp545-584

⁷ OECD (1994), *The OECD Guidelines for Multinational Enterprises*, OECD, Paris, pp 17-19.

⁸ Muchlinski.P.T, *Multinational Enterprises and the Law* (2nd ed,1999) 5

⁹ Res 3201 (S-VI) of 9 May 1974 of the UN General Assembly, Resolution on the New International Economic Order; Res 3202 (S-VI) of 16 May 1974 of the UN General Assembly, The Program of Action on the Establishment of a New international Economic Order

¹⁰ Preamble of the Declaration on the Establishment of a New International Economic Order, Res 3201 (S-VI) of 1 May 1974 of the UN General Assembly.

developed and developing countries'.¹¹ The purpose set forth in the preamble of NIEO is to 'promote the economic advancement and social progress of all peoples'¹² through ensuring 'steady, accelerating economic and social development and peace and justice for present and future generations.'¹³ This attempt showed the necessity of developing a long reaching economic cooperation and they based this cooperation on stable and equitable trade transactions. To establish this economic cooperation through trade transactions, developing countries incorporated the essence of the Charter of the United Nations, International Development Strategy for the Second United Nations Development Decade and the Charter of Economic Rights and Duties of Countries¹⁴ in NIEO.

Following the purpose of NIEO, these countries tried to develop a suitable trade environment but in these development process of that environment, TNCs were not included at all. Rather, through NIEO, developing countries declared that they must be entitled to regulate and supervise the TNCs operating in their territories.¹⁵ On the one hand, it was clear according to the objectives of the newly independent countries' promoted NIEO that the private transnational corporations were very much related and needed for the economic development but on the other hand, these countries tried to exclude any role of TNCs in the development of any international economic policy framework.

To minimize conflicts and to ensure favourable conditions for TNCs and developing countries, UN attempted to harmonize the activities of developing countries with the objectives of smooth dealings and negotiations with TNCs through a fairly detailed policy framework like a universal code of conduct.¹⁶ It was also felt that activities of TNCs need to be effectively codified with the development goals and objectives of the host countries so that any negative effect of their operations in any particular country can be eliminated or minimized. Thus, in the early 1970s, UN formally attempted for the Draft Code of Conduct for Transnational Corporation (the Code) with the hope that the Code would serve as an instrument for promoting world economic growth and well-being by enhancing a positive climate for international trade.¹⁷ In 1974, the Commission on Transnational Corporation was set up and the preparation of the draft text of the Code was entrusted to an Inter-governmental Working Group of the Commission in January 1977.¹⁸

The long codification process of the Code was not smooth. Rather, this process was full of conflicts amongst the member countries of the UNO. One of the most basic conflicts arose when they wanted to set a standard of international legal norms so that the legitimacy of the conduct of host countries in their treatment of TNCs could be tested. But the Group of 77 and the socialist countries questioned the validity of these standards on the ground that those were established by the practice of the major capital exporting countries at a time when most developing countries were under colonial rule and therefore, they did not command the consent of the majority of the contemporary international community.¹⁹ Again, they argued that national law of an individual country was well enough for dealing these matters and since international law is uncertain and unclear it could not help. However, they favoured a compromise proposal referring to international obligations saying that 'the principle of the fulfilment in good faith of international obligations will apply to the Code'.²⁰ At this stage, developing countries did not want to take the risk of exploitation mainly by the companies of Western European countries. Developed countries also loosed their faith on the quality and integrity of developing countries legal system in where their TNCs would operate.

During these conflicts, both the parties' of the UN member countries' objective was to ensure a favourable guiding norm so that the Code could serve more in their individual group interests. For example, developing countries tried to create such a code, which can help them to control TNCs effectively and socialist countries were trying to keep their national enterprises out of the Code's jurisdiction. On the contrary, developed countries, such as Canada, focused mainly upon two main areas following the main underlying objectives of the OECD Guidelines that were '(a) a requirement for national treatment of foreign controlled enterprises by a host country and (b) an attempt to restrain the various incentives and disincentives to foreign

11 Ibid

12 Ibid

13 Ibid

14 This charter was adopted but never accepted by many developing countries.

15 Article 4(e) of the Declaration on the Establishment of a New International Economic Order, Res 3201 (S-VI) of 1 May 1974 of the UN General Assembly

16 Bondzi-Simpson, *Legal Relationships between Transnational Corporations and Host Countries* (1990) 118.

17 ICC, Paris, 1983

18 On request of the Economic and Social Council through its 1982/68 of 27 October 1982 number resolution, Inter governmental Working Group prepared the draft code of conduct. This draft also considers a variety of resolutions adopted by the General Assembly and Economic and Social Council. It applies the ILO Tripartite Declaration of Principles concerning Multinational Enterprises.

19 Robinson, *The Question of a Reference to International Law in the United Nations Code of Conduct on Transnational Corporations* (1986) 1

20 Official record of the Economic and Social Council, 1983, Supplement No.-7. Annex- II

investment which the various governments imposed.’²¹ In general, developed countries specific interests for the Code were first, liberalize international investments and second, limiting the controlling power of host countries over TNCs.²²

In accordance with neo-liberal textbook economic reasoning, it was further contended by the developed countries that outcomes of international trade and investment generally need to be market-driven in order to maximize welfare and those interventionist policies, like the draft Code, in trade and investment would reduce global welfare. Consequently the very merit of an international code of conduct for TNCs was questioned.²³ Furthermore, lack of equally powerful opposition mainly at the beginning of 1990s to counter the position of the developed countries into the codification of the Code was another reason that ended the negotiation finally. By March 1991, USA quietly built up a consensus against further negotiation on the Code and in 1992 the President of UNO reported that ‘delegations felt that the changed international environment and the importance attached to encouraging foreign investment required a fresh approach.’²⁴ This codification initiative was declared abandoned in 1992, in spite of over two decades of time and energy expended by the Working Group and other bodies within the UN system.

Nonetheless, in tune with the liberal expectations and in accordance with the liberal concepts, there are some major initiatives that were initiated to harmonize the activities amongst TNCs and countries too. Other than the Code initiative, those initiatives are - the International Labor Organization’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the Declaration), the OECD Guidelines for Multinational Enterprises (the Guidelines), the UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set), the Draft Norms on the Responsibilities of TNCs and other Business Enterprises with Regard to Human Rights (the Norms), United Nations Global Compact (the Compact) and Corporate Social Responsibility (CSR).

In 1977 the ILO Governing Body issued a Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy which is regarded voluntary regulation of corporate behaviour.²⁵ By the adoption of this Declaration the ILO first set a code of conduct on labour standards for the multinationals. This Declaration articulates all the issues pertaining to labour rights and their protection contained in the different conventions of the ILO. In 2000 this Declaration was revised to incorporate the ILO Declaration on Fundamental Principles and Rights at Work that embody (a) the freedom of association and right to collective bargaining; (b) the elimination of forced and compulsory labour; (c) the abolition of child labour; and (d) the elimination of discrimination in the workplace.²⁶

The ILO Tripartite Declaration provides guidelines in relation to labour and employment issues applicable to governments, employers and workers’ organisations and multinational enterprises. The text itself states that ‘the principles set out in this Declaration are commended to the governments, the employers’ and the workers organisations of home and host countries and to the multinational enterprises themselves.’²⁷ It further states that these principles are intended to guide the governments, the employers’ and workers organisations and multinational enterprises in taking such measures and actions and adopting such social policies, including those based on the principles laid down in the Constitution and the relevant Conventions and recommendations of ILO, as would further social progress.²⁸ Its aim is to ‘encourage the positive contribution which Multinational Enterprises can make to economic and social progress, and to minimize and resolve the difficulties to which their various operations may give rise.’ To reach this aim the Declaration contains common principles anticipated to guide governments’, employers’ and workers’ organizations, TNCs; and particular provisions regarding industrial relations. Unlike the Code, this Declaration is successful as most of the consulted parties agreed with its aims and objectives.

The Declaration does not provide any specific mechanism or monitoring process to implement the recommended principles. It presents a co-regulatory approach or tri-party participation such as government, workers and the enterprises in implementing the principles. However, the ILO has established a bureaucratic system to implement the Declaration which includes investigations carried out by the ILO Secretariat and a subsequent report presented to the Board of Directors of the concerned company. In order to maintain industrial relations it

21 Arnet, *Canada-a case study* (1980) 43

22 Ibid

23 http://cornerhouse.icaap.org/briefings/26.sidebar_1.html at 6 September 2008

24 Ibid

25 Phillip H. Rudloph, ‘The Tripartite Declaration of Principles Concerning Multinational Enterprises’ in Rammon Mullerat (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2005) 217.

26 Ibid.

27 ILO Tripartite Declaration, above n 46.

28 Ibid; this statement provides co-regulatory approach for handling corporate social activities.

proposes to undertake some steps to resolve any dispute, with the joint intervention of enterprises and representatives and organisations of the workers.²⁹

The OECD Guidelines for Multinational Enterprises (the Guideline) aims "Multinational enterprises (MNEs) operate in harmony with the policies of the countries in which they operate." To cover wider issues amongst countries and business entities, this guidelines deal with almost all related issues in business, government and labour. It is one of the parts of a wider and more objective OECD Declaration on International Investment and Multinational Enterprises which intended for protecting and promoting foreign direct investment.³⁰ The Guidelines were first adopted in 1977, and subsequently amended several times.³¹ Finally in June 27, 2000, the OECD issued its revised Guidelines after lengthy negotiations with the member countries and consultation with numerous NGOs.³²

The revised Guidelines represent a comprehensive CSR code for TNCs by providing non-binding principles and standards for responsible business conduct with the aim of promoting economic, environmental and social progress. The current text of the Guidelines, therefore, is relatively detailed, covering 38 to 54 specific corporate responsibility issues.³³ The revision was important since the use of the Guidelines is specially needed in host countries, where relevant legal norms and policies are often lacking or ineffective in enforcing basic human rights and other standards. It is applicable to all entities within multinational enterprises, whether parents or subsidiaries. Although the nomenclature of the Guidelines specifies its application to TNCs, they are also relevant for domestic enterprises.³⁴ However, the Guidelines do not expect from the small and medium-sized enterprises the same degree of performance as from larger businesses.³⁵

It is argued that the Guideline is an attempt to balance between the aims of controlling the activities of TNCs and reducing the obstacles to their operations and its underlying approach is 'corporatism' consistent with international law.³⁶ However, it is a non-binding model for investment protection treaties and still has disagreements about the treatment and regulation of FDI amongst its member countries. The lack of an enforcement mechanism, voluntary nature of the compliance procedure, exemptions on ground of business confidentiality etc might be its inherent weakness for which it has not been accepted yet as a model universal instrument for TNC related matters. For more than 30 years of its inception only 30 cases against Corporations has been dealt under these Guidelines.³⁷ While the Code tried to provide a more legally effective instrument, the Guidelines are with moderate approach to all TNC related issues and are influenced more by non country stakeholders.

The United Nations Conference on Trade and Development's (UNCTAD) Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set) was created with the 'need to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries.' The Set is directly focused to the development of the developing countries through minimizing the trade related barriers amongst the countries as well as to set a universal mechanism to promote competitions and eliminate anti competitive behaviour of TNCs. But like the Declaration and the Guidelines, it also does not give a clear definition of TNCs.³⁸

All the major frameworks briefly mentioned above have one common aim; particularly, all these frameworks are focused to develop a sustainable trade environment though in different ways. But almost all these frameworks have not been successful to serve at an acceptable level. One of the major reasons behind their failure to become fully successful to reach their aims is that these frameworks failed to create any universal and well

²⁹ Ibid

³⁰ OECD Guidelines for Multinational Enterprises, above n 57.

³¹ The OECD Guidelines were amended in 1979, 1987 and in 1991.

³² Lea Hanakova, 'Accountability of Transnational Corporations under International Standards' (LL.M Thesis, University of Georgia School of Law, 2005) <http://digitalcommons.law.uga.edu/stu_llm/17> 18 May 2007.

³³ Business for Social Responsibility (BSR) Report (November 2000) <www.bsr.org> 16 October 2007.

The current text was enriched with the entirety of social responsibilities after a revision. The revision added a number of issues to the main text including an extension of labour rights, a direct referral to human rights assigning the multinational responsibilities, and a reference to their responsibility to the supply chain (i.e., business partners, suppliers and sub-contractors). More importantly the applicability guidelines cover extraterritorial activities of TNCs.

³⁴ Chapter 1. 4 of the OECD Guidelines says "the Guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to same expectations in respect to their conduct wherever the Guidelines are relevant to both."

³⁵ OECD Guidelines, above n 57, Chapter 1.5.

³⁶ Hamilton *The Control of Multinationals: What Future for International Code of Conduct in the 1980s* (1984) 25

³⁷ <http://www.cluistian-aid.org.uk/indepth/0111trbk/05-Chapter5.pdf> at 9 August 2003

³⁸ Though the Set defines 'Enterprise'

accepted administering body to look after their implementation. For the lack of any universal and well accepted administering body, all of these frameworks are voluntary in nature. But to fulfil the aims that these frameworks hold, complete institutional structures, exact implementation and effectual monitoring systems are needed. Another important reason for their incapability to minimize the conflicting interests of developing countries and TNCs is their failure to define and incorporate 'international law' unanimously.

Additionally, the pattern of these frameworks gradually changed and finally with the Set, it has been argued that more liberalization is needed to develop a stable trade environment for the countries and TNCs with the background where most of these frameworks also aimed to regulate the relationship of TNCs and countries. However, significantly, these frameworks raise the issues which could be labelled as the reasons of the conflicts amongst the TNCs and countries. Furthermore, these frameworks show that the relationship pattern of these two international actors depends upon some basic issues. Those issues would be : (a) the historical trait and the shifts into the theoretical basis; (b) the nature of an universal framework, that is, voluntary or mandatory; (c) the necessity of international forum for regulating this relationship; and (d) the necessity of settling all debates on universal international norms and definitions; for example, the definition of TNC or guiding norms for international law.

Nonetheless, all these initiatives other than amplifying the necessity of sustainable trade environment, acknowledging the non country actors in international economic policy initiatives and narrowing down the conflicting interests of different stakeholders, all these frameworks has not been successful to expand a well accepted and sustainable trade environment through minimizing the conflicting interests amongst countries and TNCs. Till now, most of the frameworks that are related with TNCs refer to the customary international legal norms in accordance with good faith and appropriate standards, which are not well accepted by developing countries and carry some uncertainties. Therefore, with the growing numbers of Bilateral Investment Treaties (BIT), the necessity of any universal framework has become less popular particularly to developing countries and TNCs. By a bilateral arrangement, both the parties can negotiate their interests freely without following any settled rule; even they can go beyond any international practice if they want. Therefore, BIT becomes a noteworthy alternative to the elusive search for generally agreed international legal standards for the governance of TNCs-host countries' relations.³⁹ But, gradually BIT- as a concept- has lost its credibility as its use as a means of exploitation has also been increased. Most significantly, in most cases developing countries are being exploited by TNCs through BITs since most developing countries still do not have the required expertise to ensure their rights and liabilities in BITs where they are parties. Most of the developing countries' politics have not been institutionalized yet and therefore in most BITs either they cannot negotiate for their countries properly or their representatives become biased. As a result, developing countries' failures in international judicial or conciliation forum are noteworthy. Moreover, international political, military and economic power structures play significant roles in shaping and maintaining BITs most preferably between natural resource extracting TNCs and developing countries.

In the absence of a complete, binding and universal framework for TNCs and developing countries, the drafting of 'guidelines', 'code of conducts' and 'multi-stakeholder' approaches continues at a more modest level. Guidelines are focussed on specific issues for specific actors and do not cover the general reasons that create conflicts of interests amongst TNCs and countries in general. Moreover, in most cases, TNCs' initiated guidelines ultimately result both the globalized capitalist economy and the unlimited ambition for power and wealth of its foremost owners. In this circumstances development of a common standard of social responsibilities of TNCs through the concept of CSR is noteworthy. CSR that contains the essence of multi stakeholder approach is a non binding framework for the TNCs and, in fact, based on the voluntary collaboration of TNCs in developing softer forms of self regulation and self monitoring.

However, UN is trying to bridge the voluntary collaboration of TNCs through the Global Compact. It is an agreement between the UN and world business community that came into being on the basis of UN Secretary-General Kofi Annan's speech delivered in 1999 at the World Economic Forum at Davos, Switzerland and was implemented in July 2000.⁴⁰ Initially, the Global Compact was a set of nine principles of good corporate citizenship comprising human rights, labour standards and the environment. Then it was revised in 2004 with the addition of one more principle regarding bribery and corruption.⁴¹ It urges the business community to 'enact and embrace its principles in the said areas.'⁴² The principles encompassed

39 Munchlinski.PT, *Multinational Enterprises and the Law* (2nd ed,1999) 604

40 Hans Corell, 'The Global Compact' in Ramon Mulert (ed.) *Corporate Social Responsibility: the Corporate Governance of 21st Century* (2005) 235.

41 Ibid.

42 United Nations, *Global Compact* (2000, revised in 2004) <www.unglobalcompact.org> 04 September 2007.

by the Compact are based on the Universal Declaration of Human Rights (1948), the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977) and the Rio Declaration for Environment and Sustainable Development (1992) which the companies are expected to adopt and integrate in the areas of their business.⁴³

The Global Compact presents an integrated approach towards international business. Its importance mainly relates to its provision of 'a global framework to promote sustainable growth and good corporate citizenship through committed and creative corporate leadership'.⁴⁴ Not only that, it also attempts to detail its principles in a way that informs corporate activity on a global scale.⁴⁵ In the opinion of Hans Corell, the Compact attempts to achieve two kinds of goals that are complementary:⁴⁶ first, is to make the Compact and its principles part of the internal strategy and operations of a business;⁴⁷ second, is to engage the stakeholders and facilitate cooperation among them in order to resolve common problems.⁴⁸ Four mechanisms have been developed to achieve these goals within the organisational forum of Global Compact; dialogue, learning, local networks and project partnerships. With these initiatives the Compact proposes to hold dialogues to obtain mutual understanding and joint efforts among businesses, labour and non-governmental organisations in resolving the key challenges of globalisation. It is a facilitating forum to advance global corporate social responsibility and to work for a sustainable future. It engages the private sectors to directly work with the UN, in partnership with ILO and NGOs, to identify and promote good corporate practices based on universal principles. It is viewed as a new type of partnership at a global level among the UN member states, MNCs, the ILO and NGOs to promote good corporate citizenship.⁴⁹ As a global platform, the Compact aims to make the business sector a strategic partner for development as it appears to have brought together business, labour and civil society to search for solutions to contemporary challenges.⁵⁰

But, some critics highlight the vagueness of the Global Compact as it lacks proper monitoring and enforcement procedures, expressing their impression that companies' participation in the Global Compact is tokenistic or opportunistic. It is said that 'many corporations would like nothing better than to wrap themselves in the flag of the U N in order to "blue wash" their public image, while at the same time avoiding significant changes to their behaviour'.⁵¹ Likewise it has been viewed that the companies 'participation in the Global Compact is only "reputation management"'.⁵² The decision by the UN to adopt a 'facilitative approach rather than enforcement' has led to the more cynical accusations that the Global Compact offers companies a 'free ride'.⁵³

Nevertheless, despite the criticisms referred to, the fact remains that to an extent, the initiative launched with the Global Compact undoubtedly reflects the new prominence of CSR on the international agenda. The development of the Global Compact like the Guideline and the Declarations has intensified the sense of urgency about CSR in some subsequent international forums and conferences.⁵⁴ For example, CSR was a prominent issue at the Kananaskis G8 Summit in 2002 and the World Summit on Sustainable Development in Johannesburg.

With the massive expansion of corporate business practice in the last few decades the impact of business activities on the international community became an increasingly concern of the UN. In response to this concern, it began to pay greater attention to the impact of corporate operations, particularly on human rights. Since the 1970s until 2000 many attempts were taken by the UN to set human rights standards, but each unfortunately failed.⁵⁵ Finally on 13 August

⁴³ Lisa Whitehouse, 'Corporate Social Responsibility, Corporate Citizenship and the Global Compact: A New Approach to Regulating Corporate Social Power' (2003)3:3 *Global Social Policy* 299, 307.

⁴⁴ Global Compact Office, *The Global Compact: Corporate Leadership in the World Economy*, (2001) New York, United Nations

⁴⁵ Ibid.

⁴⁶ Corell, above n 100, 235.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Hevina Dashwood, 'Corporate Social Responsibility and the Evolution of International Norms' in John J. Kirten and Michael Trebilcock (ed.) *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (2004) 189.

⁵⁰ George Kell, *The UN Global Compact: Concept, Achievements, Future* (2002) United Nations <www.unglobalcompact.org>20 September 2007.

⁵¹ S. Prakash Sethi, *Setting Global Standards, Guidelines for Creating Codes for Multinational Corporations* (1st 2003) p.; Lea Hanakova, *Accountability of Transnational Corporations under International Standards* (LL.M theses, University of Georgia School of Law, 2005) 40 <http://digitalcommons.law.uga.edu/stu_llm/17> 10 September 2007.

⁵² Whitehouse, above n 107, 310.

⁵³ Ibid; Corporate Europe Observatory, *Global Compact Give TNCs a Free PR Ride* (2000), Amsterdam: Corporate Europe Observatory <www.unglobalcompact.org> 10 September 2007.

⁵⁴ Dashwood, above n 113, 353.

⁵⁵ Jakob Ragnwaldh, Paola Konopik, 'The UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights', in Ramon Mullerat (ed.) *Corporate Social Responsibility: The Corporate Governance of 21st Century* (2005) 251, 252.

2003, the UN Sub-Commission on the Promotion and Protection of Human Rights⁵⁶ adopted Draft Norms on the Responsibilities of TNCs and other Business Enterprises with Regard to Human Rights (the Norms) and a commentary on the draft.⁵⁷ The Norms are considered as a landmark step in representing a significant instrument at the international level which imposes a wide range of accountability on TNCs and countries.⁵⁸

It clarifies the general obligations of countries, TNCs and other enterprises in promoting and securing human rights. It establishes that the primary responsibility for the promotion and protection of human rights is left with countries, including their responsibility to ensure whether TNCs and other business enterprises are duly respectful of human rights.⁵⁹ The obligations imposed on enterprises under these Norms at no stage reduce the obligations of states⁶⁰ within 'the respective spheres of their influence'.⁶¹ The responsibilities as reflected by the Norms can be enumerated as the right to equal opportunity and non-discrimination treatment; the right to security of persons; the right of works including safe and healthy working environment and the right to collective bargaining; respect for national sovereignty and human rights,⁶² and consumer and environmental protection.⁶³ With respect to all of these issues, the Norms to a large extent refer to existing international principles, additionally specifying some basic methods for implementation.⁶⁴

The text describes three means of implementing the Norms. First, adoption, dissemination and the application of internal rules of operation in compliance with the Norms. The second is a periodical report on the implementation of the Norms to all stakeholders and to the UN and the third is monitoring by the United Nations and other International or national mechanisms. It argues that each TNC or other business enterprise shall adopt, disseminate and implement rules of operation in compliance with the Norms.⁶⁵ Hence, it requires cooperation to 'apply and incorporate these Norms in their contracts and other arrangements' amongst all individuals party to them such as contractors, subcontractors, suppliers, licensees, distributors and all other natural or legal persons.⁶⁶ Moreover, the commentary on the Norms states that companies must attempt to influence the human rights of all their business partners and in the case of a persistent breach of the Norms the company must conclude the business contract.⁶⁷ Companies are required to place a periodically report on their implementation of the Norms to all stakeholders as well as to the United Nations.⁶⁸ As for monitoring, it is stated that companies shall be subject to periodic monitoring and verification by the United Nations, or other national and international mechanisms already in existence or to be formed in the future for the purpose of application of the Norms.⁶⁹

The text of the Norms defines both transnational and 'other business enterprises'. The definition of transnational as cited in the Norms has clearly meant an international business entity as it refers to '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.'⁷⁰

The definition of 'other business enterprises' as cited in the Norms do not clearly mean the domestic enterprises.⁷¹ The phrase 'other business entities' may include any business regardless of the international or domestic nature of its activities, including a transnational corporation; and a corporate, partnership or other legal form used to establish the business

⁵⁶ The Sub-Committee is the main subsidiary body of the United Nations Council on Human Rights, and is composed of 26 human rights experts acting in their personal capacity.

⁵⁷ United Nations High Commission on Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003) <[www.unchr.ch/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev ...](http://www.unchr.ch/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev...)> 4 September 2007.

⁵⁸ Weissbrodt David and Muria Kruger, 'Norms on Responsibility of Transnational Corporations and Other Business with Regard to Human Rights' (2003) 97:4 *The American Journal of International Law* 901,904.

⁵⁹ UN Norms above n 123 ; see also Caroline Hillemanns 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 4:10, *German Law Journal* 1,4.< www.germlawjournal.com/article.php?id=330> 15 October 2007.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid; see also Heenan Blaikie, 'Corporate Social Responsibility and Codes of Conduct: The Privatisation of International Labour Law' (Paper presented at Canadian Council on International Law Conference 15 October 2004) 13.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Jakob Rangwaldh and Paola Konopik, 'The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' in Ramon Mullerat (ed.), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2005) 253.

entity.⁷² In addition, it has been mentioned that the ‘norms are presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activity is not entirely local, or the activities involve violation of the right to security.’⁷³ Its ‘presumption of the application’ it is not entirely clear and hence failed to identify the scope of the term ‘other business enterprises’. While Amnesty International interprets by the term as ‘encompassing purely domestic enterprises’⁷⁴ Professor David Weissbrodt’s clarification as to the application of the Norms to ‘other business enterprises’ includes three kinds of other business entities beyond multinationals.⁷⁵ Firstly, businesses engage in activities related to international commerce through import or export, even though they do not have any foreign subsidiaries.⁷⁶ Secondly, the other businesses operating locally are connected with international commerce and transnational corporations through supply chains.⁷⁷ And thirdly, influential businesses that are active in local or national markets and have a significant impact on the enjoyment of human rights.⁷⁸

To resolve this issue, the guideline as available in the Code and likewise, in the Guidelines and the Declarations could be referred. It has been stated in the Code that this code is not intended to introduce differences between domestic and international enterprises but wherever the provisions are relevant to both, transnational corporations and domestic enterprises should be subject to the same expectations in regard to their conduct.⁷⁹ Similar ideas and provisions are contained in the Guidelines and the Declaration.⁸⁰ Both these international corporate codes, though apparently drafted for multinationals, could be applied in both TNCs and domestic enterprises as mentioned before. So the term ‘other business enterprises’ could cover all kinds of domestic enterprises irrespective of their size of operations and these fall within the scope of application of the Norms.

Moreover the basic principles as set out in the Norms are so crucial that they should be respected by all kinds of businesses.⁸¹ The general observation is that all kinds of businesses in the era of economic globalisation are essentially in competition in the global markets to some degree.⁸² In this situation, making a distinction between the standards that should apply to transnational and those that should apply to smaller domestic corporations appears to be difficult⁸³ specially in the current era of globalisation, where foreign investments are largely increasing in domestic enterprises, which has diversity in structures, forms of ownership and functional scope.

In this circumstances and gap amongst the international frameworks, voluntary regulation contributes to the development of CSR standards across the world. As CSR deals with companies’ social and ethical responsibilities, direct regulatory initiatives are often absent in the application of CSR. At a national level, there are significant barriers for regulating companies to ensure that they manage their social and environmental impacts properly. Direct regulation or prescriptive legislation often leads to tokenistic responses and can quickly become an inaccurate reflection of society’s concerns, lagging behind public opinion. Following the notion of CSR, ISO I400I, SA 8000, United Nations Global Compact, Ethical Trading Initiative and AA I000 etc. regulations/regulatory institutions create different regulatory relations between countries and TNCs. Till 2003 only 12 companies participated in Fair Labour Association along with 1266 affiliated companies. 1184 companies enlisted in UN Global Compact till 2003 whereas 49462 companies entered into ISO I400I Certification by December 2002.⁸⁴ But this huge incorporation in ISO I400I certification does not only mean that those TNCs are keen in development of production base environmental hazards but they mostly joined there out of comparative interests in international business. Particularly, with this certification it becomes easier for TNCs for getting into countries’ markets. If the TNCs are also emphasising the overall development of the living standard of the people and degradation of the world environment then the members in UN Global Compact would not less than 3 per cent of the certified companies of ISO 1400 by 2003. In 2003, only 1184 companies have participated in UN Global Compact that demand TNCs active role in promotion of human rights, labour rights and anti corruptions principles.

⁷² UN Norms, above n 123.

⁷³ Ibid.

⁷⁴ Rangwaldh and Konopik, above n 137.

⁷⁵ Weissbrodt and Kruger, above n 124, 909.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ UN Norms, above n 123.

⁸⁰ OECD Guidelines for Multinational Enterprises, part-1, Para 4 ; ILO Tripartite Declaration, Para. 11

⁸¹ Hillemanns, above n 125.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ UNRISD Research and Policy Brief 1, March 2004, Geneva

CSR is one of the most important frameworks which is mostly boosted by the TNCs and got necessary acknowledgement by other international actors and civil societies. However, there are strong opponents of this concept as well as evidences that show that this concept is not strong enough to minimize most of the trade related conflicts amongst TNCs and developing countries. As some critics believe, CSR introduces social and environmental clauses resulting in protectionism by the back door, imposes inappropriate cultural standards or unreasonably bureaucratic monitoring demands on business enterprises most particularly on the Small and Medium Sized Enterprises (SMEs) of Least Developed Countries (LDCs).⁸⁵ For example, regulations such as those arising from the EU's Restriction on Hazardous Substances (RoHS) and End of Life Vehicle (ELV) directives, sanitary and phytosanitary standards, rules on traceability of food products, energy efficiency and take-back requirements, often demand changes to production methods or development of more sophisticated monitoring systems. Some of these social and environmental standards could, willingly or unwillingly, act as protectionist measures and could create unfair trade barriers to least developed countries' exports.

Considering the above mentioned discussion, it could be safely argued that at the international level, due to inadequate global governance and discrepancies in social and environmental issues, no framework is yet concluded where TNCs are directly subject to regulation in respect of its activities having social, economic and environmental impacts. These frameworks though succeeded to some extent to attempts to create a more socially responsible form of business, there are severe limitations that prevented these frameworks from redefining the role of the TNCs in a lasting way that would measure up to the challenges of the new era. The major problem is the difficulty of operationalizing the underlying concepts of these frameworks while the idea of social responsibility still remains vague and too confusing to seize upon.

Missing link amongst the initiatives and the scope of a new approach

As we observed, the patterns of the initiatives that are focused to minimize conflicts between non state actors, private regimes, TNCs and countries for the development of sustainable trade environment is changing. As described earlier, the initiatives through the NIEO was totally country centric and it undermined the TNCs role for the development of international economic conditions. Thereafter, UN initiative for a universal code of conduct for TNCs to foster the development of a less conflicting trade environment though incorporated the implication of TNCs in international trade but failed to become a final framework. The Code initiative though failed but it was successful in pointing out some of the main unresolved issues in the relationship between countries and TNCs as well as the conflicting interests amongst the different groups of countries.

The Declaration and the Set only related with international commercial and economic issues. These frameworks are with particular objectives and restrained from the incorporation of general conflicting issues amongst TNCs and developing countries. The Guideline is not yet considered as a universal framework though it has modified its earlier standpoint as it points out that it is not the substitute of national laws and it only represents supplementary principles and standards of behaviour of a non-legal character.⁸⁶ For example, the latest instrument of OECD, that is, Multilateral Agreement on Investment⁸⁷ is in different tune. But even though it's underlying policies are still beyond the interests of developing countries. The Norm mostly focused on the issues of human rights and creates confusion with its scope of application rather than settling the ambiguities in the issues of corporate coverage.

In the absence of any universal framework for regulating the TNCs and countries relationships, now most TNCs and some developed countries are focusing on the concept of CSR as an efficient framework for developing sustainable trade environments and minimizing conflicts amongst them. However, so far there is no overall agreement⁸⁸ or consensus on the definition of CSR. As a result, there remains an uncertainty about what CSR exactly is and how it can be defined accurately or conclusively.⁸⁹ The reason may be rooted in its interchangeable

⁸⁵ For details, see: Maya Forstater, Alex MaeGillivray and Peter Raynard, 'Responsible trade and market access: opportunities or obstacles for SMEs in developing countries' (Report No. V.06-53285-July 2006 600. United Nations industrial development Organization, 2006) 55,4

⁸⁶ http://www.coc-runder-tisch.de/dokumentationtete/texte_grundlagen/00082259.pdf at 28 September 2008

⁸⁷ <http://www.oecd.org/daf/cm/mai> at 18 September 2008

⁸⁸ Michael Hopkins 'Corporate Social Responsibility: An Issue Paper' (Working Paper No. 27, Policy Integration Department, World Commission on Social Dimension of Globalisation, 2004)1 <www.ilo.org/public/english/bureau/integration/download/publicat/4_3_285_wcsdg-wp-27-27.pdf> at 12 July 2008.

⁸⁹ Jamie Snider and others in their articles titled 'Corporate Social Responsibility in 21st century: A View from the World's Most Successful Firms' said that an exact definition of CSR is elusive since beliefs and attitudes regarding the nature of this association fluctuate with the relevant issue of the day. As such, view points have varied over time and occasionally are even oppositional. See also T.Pinkston, A.B. Carroll, 'A Retrospective Examination of CSR Orientations: Have They Changed?' (1996) 15:2 *Journal of Business Ethics* 199,207

and overlapping character with other terminologies such as ‘corporate citizenship, ‘the ethical corporation, ‘corporate governance, ‘corporate sustainability, social responsible investment, and ‘corporate accountability.’⁹⁰ The reason may also lie in the fact that the contemporary CSR agenda essentially involves the concept of stakeholders approach and development as an integral issue of business operation in the present context. This holistic character of CSR creates confusion about the exactness of associated issues. Another reason for the lack of agreed definition could be to lay in the ever-changing and dynamic character of this concept and its expansion of practices aligning with the increased demands from the society and needs of the development issues. Additionally, the social responsibility view point has not yet got enough support that could stand it realistic enough to be sufficiently concerned with the critical need of business to perform its economic functions effectively: to obtain venture capital, increase productivity, produce sales revenue etc. Professor Sethi expressed this limitation well : ‘underneath all the rhetoric, business still considered its primary role to be profit-making and its noneconomic functions a necessary though noneconomic functions a necessary though undesirable cost of doing business, at best, and a nuisance at worst’.⁹¹

The concept of CSR started mostly by the TNCs with almost the same underlying objectives of the Code but with a different approach regarding the relationship pattern between TNCs and countries. The Code dealt into the direct conflicting issues in TNCs and developing countries’ relationship whereas CSR denotes indirect ways for tackling probable conflicts amongst corporate entities and countries. Therefore, the main issues in the Code are not being specifically dealt through CSR. Following the CSR, corporate entities are more related with labour and environmental issues without addressing the prolonged conflicts regarding the legal status of TNCs in international arena,⁹² legal effects of Codes and the limit of sovereign countries’ rights over the foreign corporate bodies. There were some initiatives in the Code era for an effective mechanism to implement the procedures of international frameworks and to penalize the wrongdoer but these initiatives becomes obscure in the later international major frameworks for minimizing the conflicts amongst TNCs and developing countries. Even the initiatives that were initiated following the experiences from the Bhopal Disaster for protecting the global environment has not got effective formal recognition in the related international frameworks. The U.N. International Law Commissions Draft on International Liability for Injurious Consequences arising out of Acts Not Prohibited by International Law though transcends the boundaries of domestic tort, contract, criminal and environmental law but failed to stretches the boundaries of conflict of laws, rules relating the jurisdiction, choice of law and the underlying norms.

Without addressing the unresolved issues of the Code, CSR is trying to fulfil the same objective, which is, minimizing conflicts amongst TNCs and countries for developing sustainable trade environment. How far CSR would be successful in fulfilling its objectives is a burning question. This question becomes more important with the complicated and increasing number of conflicts between TNCs and developing countries. Therefore, if the reasons for these conflicts are the unresolved issues of the Code and other main international regulatory frameworks for TNCs then the missing link amongst the Code, the Declaration, the Guideline, the Norm, the Set and CSR would be one of the main reasons that hinders the development of an universal framework to minimize conflicts between TNCs and developing countries.

Concluding remarks

The major international frameworks to minimize the conflicts amongst the nation-states and TNCs has not been able either to minimize the conflicts between TNCs and developing countries or to settle down a universal framework that can minimize conflicts amongst TNCs and developing countries for developing sustainable trade environment. With this backdrop, this article places a hypothesis that these major international frameworks have some missing links amongst them. After evaluating the major international frameworks, it tries to establish this hypothesis and argues that the concept of CSR has to be resettled or the abandoned negotiation of the Code has to be given a new start.

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⁹¹ S. Prakash Sethi, *Private Enterprises and Public Purpose* (1981) 106

⁹² J. Dine ‘Multinational Enterprise: international codes and the challenge of ‘sustainable development’, *Non-Country Actors and International Law* (2001) 81,106

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