



International Baby Food Action Network – IBFAN

Geneva Infant Feeding Association - GIFA



Discussion paper

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The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights and the International Code of Marketing of Breastmilk Substitutes

1. The UN Guiding Principles on Business and Human Rights and their failure to set a regulatory framework for the activities of transnational companies

Nowadays, transnational corporations (TNCs) are no longer territorially confined: they source their primary input in one State, produce in another, and sell their products in many different States, sometimes worldwide. States in which they operate, in particular those in the developing world, face great challenges when wanting to develop and adopt national regulations as TNCs can exercise substantial political and economical pressure upon legislative and regulatory bodies. Regrettably, TNCs remain only subjects to domestic laws, which are in most cases too weak to make them responsible for their actions, while at the international level almost no effective rules has been put in place to regulate their activities.

In its 2011 resolution A/HRC/RES/17/4, the Human Rights Council (HRC) expressed a concern that “*weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies, fully realize the benefits of globalization or derive maximally the benefits of activities of transnational corporations and other business enterprises, and that further efforts to bridge governance gaps at the national, regional and international levels are necessary*”. Therefore, the HRC endorsed the UN Guiding Principles on Business and Human Rights (the Guiding Principles), implementing the UN ‘Protect, Respect and Remedy’ Framework. The Guiding Principles, developed by the Special Representative of the Secretary-General John Ruggie, call on States to “*set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations*” (Foundational Principle 2)¹. The Guiding Principles also ascertain that

¹ Official commentary to Foundational Principle 2 (Guiding Principles on Business and Human Rights): “*At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their*

“[in] all contexts, business enterprises should comply with all applicable laws and respect internationally recognized human rights, wherever they operate” (Foundational Principle 23 (a)).

However, many civil society organizations and social movements criticized the Guiding Principles as understating international human rights law and the obligations of States and private companies. Indeed, the UN Guiding Principles did not make any recommendation on regulations and remedies to be adopted in order to address TNCs human rights abuses and violations and therefore, fail to address the governance gaps created by globalization. Besides, the Guiding Principles lack clear recommendations in line with the international agreed standards; in particular, they did not reflect the increasing international recognition of the legal obligation for States to take action to prevent abuses by their companies overseas.² That is the reason why over 600 NGOs and social movements supported Ecuador’s proposal, tabled and adopted at the June 2014 Human Rights Council session, for creation of an intergovernmental working group to discuss binding human rights obligations for Transnational Corporations³. This 2014 development does not interfere with the implementation of the Guiding Principles but is complementary and envisages further development of international standards in this area.⁴

2. The Maastricht Principles and the reiteration of the Extraterritorial Obligations of States

Recognizing that territorial limitation of obligations has led to gaps in human rights protection and noting the lack of adequate regulation in this matter, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (the Maastricht Principles) were issued on the 28 September 2011. The Maastricht Principles constitute the missing link in the universal human rights system.⁵

territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction. There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State’s own reputation. States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on “parent” companies to report on the global operations of the entire enterprise; multilateral oft-law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States’ actions, for example whether they are grounded in multilateral agreement.”

² FIAN Statement to the Delegations on the Human Rights Council 2011, 17th Session, Agenda Item 3 (co-signed by IBFAN and 29 other NGOs). Available at: http://www.fian.org/fileadmin/media/publications/2011.05_Statement_to_Delegations_on_the_Human_Rights_Council_2011.pdf

³ All the updated information on the binding treaty process is available at www.treatymovement.com

⁴ UN Human Rights Council Resolution 17/4, Preamble : “further efforts to bridge governance gaps at the national, regional and international levels are necessary”; and in paragraph 6(e) mandated the UN Working Group to “continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities”.

⁵ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights - Introduction. Available at: http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23.

They were elaborated by an expert group composed of 40 distinguished experts in international law and human rights from all regions of the world, among them present and former members of international human rights treaty bodies, present and former special procedures mandate holders of the United Nations Human Rights Council, and leading academic and civil society legal experts. Based on the repeated commitment of States to realizing the economic, social and cultural rights of everyone⁶, the Maastricht Principles constitute an international expert opinion reiterating the extraterritorial obligations (ETOs) of States imposed by the existing human rights law.

3. *The International Code of Marketing of Breastmilk Substitutes: an international regulation imposing obligations on States and companies*

In 1981, the World Health Assembly (WHA) adopted the International Code of Marketing of Breastmilk Substitutes⁷ (the Code) to “contribute to the provision of safe and adequate nutrition for infants, by protection and promotion of breastfeeding, and by ensuring the proper use of breast milk substitutes, when these are necessary, on basis of adequate information and through appropriate marketing and distribution.”⁸ The Code, one of the few international codes and guidelines envisioned during the 1970s to share international obligations of TNCs that were actually adopted⁹, is not designed to prohibit the availability or use of infant formula and other breastmilk substitutes. It aims to ensure that parents can make free and informed, decisions about infant feeding by removing profit-driven obstacles to breastfeeding (i.e. unethical, aggressive marketing of infant formula). Such a policy and its national implementation were deemed necessary in order to prevent a further decline of breastfeeding rates and the resulting unnecessary deaths of newborns and infants. The impact of not breastfeeding on health of mothers has since also become better known.

Since the adoption of the Code through a WHA resolution, twenty one subsequent relevant WHA resolutions have been adopted, clarifying the Code in response to recent scientific findings and to new marketing practices of producers and distributors of products under the scope of the Code. These resolutions have the same legal standing as the previously adopted 1981 Code and therefore form an integral part of it.

The Convention on the Rights of the Child (CRC), adopted by the UN General Assembly in 1989, has enshrined breastfeeding protection, promotion and support in its Article 24, which articulates the right of the child to the enjoyment of the ‘highest attainable standard of health’. Since 1989, the CRC Committee has regularly emphasized the importance of optimal breastfeeding practices to fulfill this particular right of the child. On numerous occasions, the Committee has urged States under review to

⁶ See Charter of the United Nations, the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the International Convention on the Protection of the Rights of All migrants Workers and Members of Their Families, as well the International Covenant on Civil and Political Rights and many regional human rights instruments.

⁷ Available at : <http://www.who.int/nutrition/publications/infantfeeding/9241541601/en/>.

⁸ World Health Organization, 1981. International Code of Marketing of Breast-milk Substitutes. WHO: Geneva. Available at: http://www.who.int/nutrition/publications/code_english.pdf.

⁹ 1885 UN Guidelines for Consumer Protection ; 1985 FAO International Code of Conduct on the Distribution and Use of Pesticides ; 1988 WHO Ethical Criteria for Medicinal Drug Promotion.

implement or strengthen their national implementation of the Code¹⁰ and to adopt additional policies, programmes and initiatives in support of breastfeeding.¹¹ In addition, the CRC General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (article 24)¹² clearly reiterates the State party's obligation to implement the Code and the companies' obligation to comply with it (emphasis added):

Para 44: *"Exclusive breastfeeding for infants up to 6 months of age should be protected and promoted and breastfeeding should continue alongside appropriate complementary foods preferably until two years of age, where feasible. States' obligations in this area are defined in the "protect, promote and support" framework, adopted unanimously by the World Health Assembly.¹³ **States are required to introduce into domestic law, implement and enforce internationally agreed standards concerning children's right to health, including the International Code on Marketing of Breast-milk Substitutes and the relevant subsequent World Health Assembly resolutions...**"*

Para 81: *"Among other responsibilities and in all contexts, private companies should...comply with the International Code of Marketing of Breast-milk Substitutes and the relevant subsequent World Health Assembly resolutions..."*

The State party's obligation to implement the Code is further emphasized in the CRC General Comment No. 16 (2013) (emphasis added):

Para 57: *"States are also required to **implement and enforce internationally agreed standards concerning children's rights, health and business, including...the International Code of Marketing of Breast-milk Substitutes and relevant subsequent World Health Assembly resolutions.**"*

Similarly, the importance of the Code has been stressed by the Committee on Economic, Social and Cultural Rights in its General Comment No. 24¹⁴ (2017):

Para 19: *"The obligation to protect sometimes necessitates direct regulation and intervention. **States parties should consider measures such as restricting marketing and advertising of certain goods and services in order to protect public health, such as of tobacco products, in line with the Framework Convention on Tobacco Control, and of breast-milk substitutes, in accordance with the 1981 International Code of Marketing of Breast-milk Substitutes and subsequent resolutions of the World Health Assembly;**" (emphasis added)*

While the General Comments of human rights treaty bodies are sometimes dismissed by State Parties as a mere interpretation of international human rights law by a group of experts without any legal standing, the International Court of Justice is of a different opinion. The Court, while not obliged in the exercise of its judicial functions to model its interpretation on that of the Committee, has recently concluded in the case of Ahmadou Sadio Diallo, §67, page 29, that it should ascribe great weight to an interpretation adopted by independent bodies that were established specifically to supervise the

¹⁰ Any mention of "the Code" in the text will refer to the International Code and the subsequent relevant WHA Resolutions.

¹¹ Available at: www.ibfan.org/fact-convention-reports.html .

¹² Available at :

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f15&Lang=en .

¹³ WHO and United Nations Children's Fund (UNICEF), 2003. Global Strategy for Infant and Young Child Feeding. WHO: Geneva. Available at: <http://whqlibdoc.who.int/publications/2003/9241562218.pdf>.

¹⁴ The full text of the General Comment is available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f24&Lang=en

application of [the] treaty: the point of giving weight to such bodies, in that case the Human Rights Committee, “is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.”¹⁵ Consequently, the obligation of States parties to implement and enforce the Code and the obligation of companies to comply with it have to be seen as an element of the international human rights law.

In 2016, 40 countries have implemented most of the Code and subsequent World Health Assembly resolutions through comprehensive law; 31 States have implemented many provisions as legally enforceable measures; 56 States, among them 28 EU Member States, have mostly chosen to maintain a narrow scope, not taking into account the subsequent relevant WHA resolutions; and 13 States have incorporated parts of the Code into other laws. 12 further States have implemented the entire Code as a legally non-binding (voluntary) measure, which generally offers less protection either due to dominant industry influence and/or lack of independent monitoring mechanisms, or as a national policy¹⁶. Finally, 19 countries have some voluntary provisions which implement the Code. In summary, 86% of the 198 countries have taken some measures to implement the code. Considering the 37 years since its adoption, these figures demonstrate a level of progress in the Code implementation which cannot be seen as satisfactory. These figures also do not represent a reflection of quality and effectiveness of these national measures. As the recent WHO, UNICEF, IBFAN survey shows, only a handful of countries introduced monitoring and enforcement mechanisms¹⁷.

The major baby food companies are transnational corporations (such as Nestlé, Danone, Abbott, etc.). While companies have the responsibility to comply fully and universally with provisions of the Code, the baby food companies’ policy is usually to comply with the domestic law of the State where baby food is sold and not the State where it is produced, or where the TNC is headquartered. Moreover, most baby food TNCs approach infant and young child feeding and particularly Code implementation as a public relations exercise, engaging fully in corporate social responsibility initiatives, such as Global Compact, through which they promote ‘voluntary’, i.e., not legally binding codes of conduct rather than a regulation that would hold them accountable for this practices.¹⁸ This means that unless the State where the company sells its products implements a Code-compliant legislation and enforces it, companies disregard their responsibility under the Code. When States attempt such implementation and enforcement, the process is often met with many obstacles, including direct industry interference and lobby against strong national measures.¹⁹

4. *The Maastricht Principles, a useful tool to advance the implementation of the International Code*

¹⁵ International Court of Justice, reports of judgments, advisory opinions and orders; Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo); Judgment of 30 November 2010. Available at: www.icj-cij.org/docket/files/103/16244.pdf.

¹⁶ State of the Code by country, ICDC Penang, April 2016

¹⁷ Marketing of breast-milk substitutes: National implementation of the international code

Status Report 2016 www.who.int/nutrition/publications/infantfeeding/code_report2016/en/

¹⁸ As an example, see Nestle policy of implementation of the Code : www.nestle.com/asset-library/documents/creating%20shared%20value/nutrition/nestle_policy_who_code_en.pdf ; Danone policy of implementation of the Code : http://staging.62.danone.com/fileadmin/Publications/Danone_Policy_for_the_Marketing_of_BMS.pdf

¹⁹ Jimenez S. C., Spilled Corporate Milk in the Philippines. Available at: www.atimes.com/atimes/Southeast_Asia/IG25Ae01.html.

The nature and operations of companies that the Code aims to regulate is not unrelated to this slow progress. Yet under the Maastricht Principle 17, States are reminded that they must take due account of their human rights obligations when elaborating, interpreting and applying international agreements in areas such as international trade and development cooperation. Therefore, bilateral and multilateral trade agreements should not allow TNCs to act, either directly or indirectly, in a way that would violate national law of the countries in which those TNCs operate. This means that a normative conflict would arise if a bilateral investment treaty was allowing infant food companies to adopt marketing strategies that would result in violations of the Code or allow companies to interfere with national Code implementation.

The second useful provision is in relation to States' extraterritorial obligation to protect. The Maastricht Principle 25 on 'Bases for protection' clearly reiterates that *"States must adopt and enforce measures to protect economic social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances: [...] c) as regards business enterprises, where the corporation or its parent controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activity, in the State concerned"*. In this sense, States have an obligation under international law to ensure that companies based in (or significantly tied to) their territory do not infringe the human rights of people in other countries. Thus, States should be held accountable for adopting binding regulations and measures to ensure that companies registered or domiciled on their territory comply with the Code anywhere where they operate. So far, no infant food manufacturer has been 'brought to order' by the government where it is registered or domiciled, while some debates do take place. For example, recently, following New Zealand's expansion of the manufacturing and marketing of infant formula to overseas markets, particularly East Asia, *"the question has been raised as to whether New Zealand's public health obligations for protecting, promoting and supporting breastfeeding end at its own borders, especially where these obligations conflict with major trade imperatives"*.²⁰ Moreover, Maastricht Principle 26 on 'Position to influence', (although not setting out a clear legal obligation on the State) recalls that many other States, while they may not be in position to regulate TNCs, i.e. for the reason that they host no TNC's headquarters, should exercise their influence on the behaviour of non-State actors, in accordance with the UN Charter and general international law, in order to protect economic, social and cultural rights.

In addition, Maastricht Principle 28, with reference to Maastricht Principle 29, highlights the obligation of States to take steps *"separately and jointly through international cooperation to create an international enabling environment conducive to the universal fulfillment of economic, social and cultural rights"*, including in matters related to trade. It implies that States, when acting jointly through multilateral institutions, such as UN agencies or regional economic trading blocs, such as the EU, must take steps to address the impediments to the realization of women's and children's right to health, adequate food and nutrition. One such measure is the *"a) elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards [...]"*. To this regard, bi- and

²⁰ Galtry J., *Punching Above Its Weight: Does new Zealand's responsibility for Protecting, promoting and Supporting Breastfeeding Extend beyond Its Own Borders?*, *Journal of Human Lactation*, 2013, 29:128. Available at: <http://jhl.sagepub.com/content/29/2/128>

multilateral agreements as well as international standards, including trade and investment treaties, should be in line with the Code and its subsequent WHA resolutions.

The human rights approach seems to be a strategy for both strengthening the resolve of governments to implement and enforce the Code, and for pressuring manufacturers to respect this international instrument. So far we have been working mainly through the CRC mechanisms to compel governments to take action at national level. This approach is critical to ensure that governments are reminded of their human rights obligation to implement the Code into their national legislative system. However, it has not until recently taken into account the extraterritorial aspect of human rights obligations. The Maastricht Principles are a crucial entry point and a powerful tool to address the shortcoming in the international regulatory systems, and to advance our work to protect infants, young children and their families from commercial pressures we have to use the CRC and other treaty bodies review processes of host countries and ensure increasing number of ETO specific concluding observations.

Conclusions

All over the globe, TNCs have systematically resisted country-level efforts for implementation of any binding regulation, including full implementation of the Code and its subsequent WHA resolutions. Even when countries have adopted laws that regulate marketing of breastmilk substitutes, TNCs have outright challenged the domestic law (e.g. in India) or resisted the adoption of enforcement mechanisms such as administrative rules and regulation (e.g. in the Philippines). Thus, holding States were TNCs have their headquarters accountable for Code violations committed abroad by these TNCs through the application of the Maastricht Principles is a crucial step to fulfill human rights, especially the child's right to health protected by CRC, article 24. Requiring full implementation of the Maastricht Principles through the new binding treaty on TNCs with respect to human rights²¹ would help constitute a vital accountability mechanism, which would protect this right also in countries where neither effective monitoring of Code compliance nor adequate sanctions mechanism to address eventual violations exist.

The growing international recognition of ETOs, framed in the Maastricht Principles, offer a precious new way to pressure governments to implement the Code on the basis of their failure to take measures to prevent human rights violations.

With this discussion Paper, on which we welcome feedback, we would like to invite colleagues who work toward full implementation of the Maastricht Principles to work with IBFAN to identify ETO cases in our infant and young child feeding area. It would help to strengthen advocacy at international level and to campaign for global implementation and enforcement of the International Code of Marketing of Breastmilk Substitutes and its subsequent relevant WHA resolutions at national level.

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²¹ For more information related to the binding treaty, see www.treatymovement.com