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Global Advocacy for Corporate Accountability: Translantic Perspectives from the NGO Community

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**GLOBAL ADVOCACY FOR CORPORATE
ACCOUNTABILITY:**

**TRANSATLANTIC PERSPECTIVES FROM THE
NGO COMMUNITY**

DR. ISABELLA D. BUNN*

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INTRODUCTION

Throughout Europe, a wide range of non-governmental organizations (“NGOs”) is focusing on the impact of multinational corporations in areas such as human rights, working conditions, environmental protection, and other social issues.¹ While

1. Among the many European-based NGOs involved in corporate social accountability issues, either in a research or advocacy capacity, are the following:

-Action Aid; *see About Us* (noting its commitment to corporate social accountability issues), at http://www.actionaid.org.uk/index.asp?section_id=2 (last visited Sept. 24, 2004).

-Amnesty International; *see AMNESTY INTERNATIONAL, THE UN HUMAN RIGHTS NORMS FOR BUSINESS: TOWARDS LEGAL ACCOUNTABILITY* (2003) [hereinafter AMNESTY INTERNATIONAL: UN HUMAN RIGHTS NORMS] (explaining recent developments in the field of corporate responsibility for human rights and indicating its support of the UN Draft), *available at* http://www.amnesty.nl/downloads/UN_norms_for_business.pdf (last visited Sept. 24, 2004); the website also provides a range of information about its campaign on Economic Globalization and Human Rights.

-Business and Human Rights Resource Centre; *see Business & Human Rights Resource Centre: A Brief Description* (noting the Centre provides an on-line library, updated regularly with relevant news items, reports, legal developments, and links to research and advocacy organizations) at <http://www.business-humanrights.org/AboutUs/Briefdescription> (last visited Sept. 24, 2004).

-Catholic Agency for Overseas Development (“CAFOD”); *see New Policy Reports* (providing materials on issues relating to corporate social responsibility), at <http://www.cafod.org.uk/archive/policy/default.asp#privatesector> (last visited Sept. 24, 2004).

-Christian Aid; *see MARK CURTIS, TRADE FOR LIFE: MAKING TRADE WORK FOR POOR PEOPLE* 109-32 (Christian Aid 2001) [hereinafter Trade for Life] (explaining the need for regulation of transnational corporations); *see also* CHRISTIAN AID, BEHIND THE MASK: THE REAL FACE OF CORPORATE SOCIAL RESPONSIBILITY 4 (2004) [hereinafter BEHIND THE MASK] (defining corporate social responsibility as “the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large”), *available at* http://www.christianaid.org.uk/indepth/0401csr/csr_behindtheface.pdf (last visited Sept. 24, 2004).

-Clean Clothes Campaign; *see CLEAN CLOTHES CAMPAIGN, CONTROLLING CORPORATE WRONGS: THE LIABILITY OF MULTINATIONAL CORPORATIONS* (2000) (outlining various approaches to hold transnational corporations accountable), at <http://www.cleanclothes.org/publications/corp-1.htm> (last visited Sept. 24, 2004).

-CORE Coalition; *see Globalisation Rules OK?* (focusing on corporate responsibility in the context of UK company law), at <http://www.corporate-responsibility.org> (last visited Sept. 24, 2004).

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- FAFO Institute for Applied Social Sciences; see *Economics of Conflict* (setting this issue in the context of its work on labor relations and welfare), at www.fafo.no/english (last visited Nov. 21, 2004).
- Foundation for International Environmental Law and Development (“FIELD”); see ALICE PALMER, COMMUNITY REDRESS AND MULTINATIONAL ENTERPRISES (2003) (discussing various forms of legal action communities can take against multinational corporations) available at <http://www.field.org.uk/PDF/redress.pdf> (last visited Sept. 24, 2004).
- Friends of the Earth International; see *Towards Binding Corporate Accountability* (outlining a case for an effective and legally binding international framework for corporate accountability), at <http://www.foei.org/publications/corporates/accountability.html> (last visited Sept. 24, 2004).
- Global Witness; see *Our Mission* (drawing attention to the connection between abuses in human rights and exploitation of natural resources, such as timber, diamonds, and oil), at <http://www.globalwitness.org> (last visited Sept. 24, 2004).
- Human Rights Watch; see *Who We Are* (providing various reports that expose human rights abuses, including those linked to corporations), at <http://www.hrw.org/about/whowere.html> (last visited Sept. 24, 2004).
- International Council on Human Rights Policy; see INT’L COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES (2002) [hereinafter BEYOND VOLUNTARISM] (evaluating issues surrounding corporate responsibility for human rights and the trend toward more legally-binding measures) at www.ichrp.org/ac/excerpts/41.pdf (last visited Oct. 7, 2004).
- International Institute for Environment and Development; see HALINA WARD, CORPORATE ACCOUNTABILITY IN SEARCH OF A TREATY? SOME INSIGHTS FROM FOREIGN DIRECT LIABILITY 9-11 (2002) [hereinafter INSIGHTS FROM FOREIGN DIRECT LIABILITY] (assessing substantive liability provisions in areas such as environment, human rights, health and safety to ensure corporate accountability), at <http://www.iied.org/cred/pubs.html> (last visited Nov. 11, 2004).
- International Peace Academy; see *About IPA: Economic Agendas in Civil Wars* (addressing how economic agendas of armed factions sustain violent conflict and hinder sustainable peace, and indicating areas of empirical and policy research), at <http://www.ipacademy.org/SiteMap.htm> (last visited Sept. 24, 2004).
- International Restructuring Education Network Europe (“IRENE”); see *International Labour Issues* (noting their focus on workers involved in the international industrial and services sectors), at <http://www.irene-network.nl/about.htm> (last visited Sept. 24, 2004).
- New Economics Foundation; see *Transforming Markets* (discussing research and advocacy efforts in corporate accountability), at http://www.neweconomics.org/gen/trans_markets_top.aspx?page=907&folder=135& (last visited Sept. 24, 2004).
- Oxfam; see *Mission Statement* (asserting the organization’s commitment to working with others to overcome suffering and poverty, and providing a link to the

acknowledging the value of voluntary initiatives and company policies that promote “corporate social responsibility,” these groups are beginning to place more pressure at the national, European and international levels for legally-binding approaches.

This article reviews ten key areas of policy related to corporate social responsibility, highlighting some of the questions in the debate and assessing the prospects for a global legal framework. It intends to serve as a practical guide to selected issues and resources, rather than as an analytical treatment of the subject.

I. CONTEXT OF THE CORPORATE SOCIAL ACCOUNTABILITY MOVEMENT

The very title of this symposium, *The Profitable and the Powerless: International Accountability of Multinational Corporations*, provides important insights into the debate on corporate social accountability.² First, the word “profitable” points to

topic of trade), at http://www.oxfam.org.uk/about_us/mission.htm (last visited Sept. 24, 2004).

- War on Want; see *Who We Are* (describing the fight against poverty and a campaign for workers’ rights as goals of the organization), at <http://www.waronwant.org/?lid=1345> (last visited Sept. 24, 2004).

- World Development Movement; see *Making Investment Work for People: An International Framework for Regulating Corporations* [hereinafter *Making Investment Work for People*] (stating its goal to ensure that foreign investment in third world countries occurs with minimum costs to the country’s poor people), at <http://www.wmd.org.uk/cambriefs/wto/TNCs.htm> (last visited Sept. 24, 2004).

- World Wildlife Fund; see *Who We Are* (reporting on the impact of multinational corporations on people and nature), at <http://www.wwf.org.uk/core/about/whoweare.asp> (last visited Sept. 24, 2004).

The author notes that all of these organizations have distinct purposes and priorities. This article is not intended to represent their views, but rather, to give a sense of the debate on some of the issues. Moreover, a range of business-oriented associations is also involved in research and advocacy. While generally recognizing the importance of social issues in the global economy, such groups tend to favor voluntary approaches to corporate social responsibility. See, for example, the International Chamber of Commerce, www.iccwbo.org, and the International Organization of Employers, www.ioe-emp.org.

2. See American University International Law Review Symposium on *The Profitable and the Powerless: International Accountability of Multinational Corporations* (Feb. 27, 2004) [hereinafter *The Profitable and the Powerless*] (providing scholarship on the role of international organizations in regulating

multinational corporations (“MNCs”), sometimes called transnational corporations (“TNCs”). For the most part, NGOs do not question that the end goal of companies is to make profits; but many challenge just *how* such profits are made.³ Although some NGOs have a distinctly “anti-corporate” stance, most readily acknowledge the potential benefits of corporate investment, including creation of jobs, improvement of infrastructure, and transfer of knowledge.⁴ The problem arises when corporate activities impinge on the realization of human rights, exploit workers, harm the environment, marginalize vulnerable populations, or produce other negative social consequences.⁵ Moreover, in their global advocacy to promote responsible corporate behavior, NGOs have differing views on how, and whether, to engage the private sector.⁶ Nonetheless, many NGOs believe that constructive dialogue will encourage business managers to appreciate the benefits of legally-protected social standards.⁷

multinational corporations, corruption, labor rights, and human rights).

3. See Christian Aid, *The Need for Legally Binding Regulation of Transnational Corporations* (relating NGO concerns that MNCs might disregard their ethical responsibilities in pursuing profit), at <http://christian-aid.org.uk/indepth/0202tnc/transc.htm> (last visited Sept. 24, 2004); Global Policy Forum, *Archived Articles: Transnational Corporations 1995-2002* (providing articles on TNCs that incurred fines for various activities), at <http://www.globalpolicy.org/socecon/tncs/archives.htm> (last visited Sept. 27, 2004).

4. See Trade for Life, *supra* note 1, at 109-110 (noting some of the positive contributions of TNCs to economic development).

5. See *id.* at 110-121 (noting some of the negative impacts of TNCs, especially on poor communities).

6. See The Communication Initiative, Pulse Comments (presenting opinions in the debate about the trend to involve private companies in policy discussions with NGOs and governments), at <http://www.comminit.com/PulseComments/sld-5020.html> (last visited Sept. 27, 2004); see also the International Business Leaders Forum (“IBLF”) (promoting cross-sector consultation between business, governments and civil society on the evolving role of the private sector with respect to human rights and other issues), at <http://www.iblf.org/csr> (last visited Oct. 23, 2004).

7. AMNESTY INTERNATIONAL: UN HUMAN RIGHTS NORMS, *supra* note 1 (noting that it is actively seeking to engage the private sector in discussions on the Global Compact and in the development of the UN draft norms on the human rights responsibilities of TNCs).

Next, who are the “powerless”?⁸ One can understand this on several levels. The first level is the national government that serves as either the home or the host of a TNC.⁹ Corporate structures and activities that transcend international boundaries are difficult to regulate.¹⁰ Another level includes the individuals or communities that are harmed by TNC activities.¹¹ These may be “powerless” due to limited avenues of legal or other forms of redress. A third level is the international community as a whole.¹² Every area of international law is challenged by difficulties in implementation and enforcement, generating charges that it is “powerless” to regulate global problems. This charge extends to control over some forms of TNC conduct.¹³

Finally, the organizers of the symposium defined the subject as *accountability*, rather than merely responsibility.¹⁴ While “corporate social responsibility” is the more familiar catchphrase, “corporate social accountability” moves the debate toward legally-binding standards and procedures. As the discussion will show, many NGOs are urging that a regulatory framework should constrain the activities

8. See *The Profitable and the Powerless*, *supra* note 2 (discussing groups and communities that potentially stand powerless against transnational corporations).

9. See ISH SINGHAL, ENVIRONMENT AND GLOBALIZATION: LATIN AMERICAN RESOURCES AND SOUTH-NORTH PROBLEMS 2-3 (2002) (noting that the powerful northern TNCs enjoy the strong support of their governments, which deprives developing countries of bargaining power), available at <http://www.redesma.org/confmedamb/environment.pdf> (last visited Sept. 24, 2004).

10. See PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 90-101 (Blackwell Publishers Inc., 1995) (discussing the difficulty of developing a regulatory agenda for multinational companies in relation to their home and host states).

11. See *id.* at 466-70 (providing examples of multinational corporations that fail to offer adequate wages and working conditions, and demonstrating how the application of International Labor Organization guidelines would promote improvements).

12. See BEHIND THE MASK, *supra* note 1, at 1 (quoting former UK prime minister Lord Harold Macmillan that “[w]e have lived so long at the mercy of uncontrolled economic forces, that we have become skeptical about any plan for human emancipation.”).

13. See *infra* Parts II.I & II.J.

14. See *The Profitable and the Powerless*, *supra* note 2 (discussing the trend among NGOs to hold TNCs more accountable for their actions).

of TNCs.¹⁵ The largely voluntary measures associated with corporate social responsibility should be augmented by legal means to promote important social values.

This is not just an abstract debate. The demise of Communism, an ideological shift toward democratization, and a market-driven world economy have transformed the international environment in which corporations operate.¹⁶ As one commentator explains, the legitimacy and value of private free enterprise is no longer questioned; rather, a new challenge is directed against such enterprise “as a polluter, an abuser of market power, a corruptor of state officials, an exploiter of workers, and a potential accomplice to violations of fundamental human rights.”¹⁷

This challenge to multinational corporations is taking place within an increasingly integrated political and economic system. As the wealth and power of corporations has grown, so too has concern about the negative social impact of their activities.¹⁸ The private sector, seen as the primary catalyst and beneficiary of globalization, meets renewed scrutiny in the quest for an “ethical globalization.”¹⁹

15. See discussion *infra* Part II (indicating several key policy arguments raised in favor of greater regulation of TNCs).

16. See generally Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT’L LAW. 1033, 1038 (1999) (reflecting on the changes in world politics and economics and the challenges of a new multilateral investment regime).

17. *Id.* at 1049 (noting the lack of a regulatory framework to deal effectively with various environmental and human rights problems).

18. See, e.g., Amnesty International and Prince of Wales International Business Leaders Forum, *Business and Human Rights: A Geography of Corporate Risk* (2002) (reporting on various forms of human rights risks in selected countries); JOHN MADELEY, *BIG BUSINESS, POOR PEOPLES: THE IMPACT OF TRANSNATIONAL CORPORATIONS ON THE WORLD’S POOR* 1-15 (Zed Books, Ltd. 1999) (arguing that the uncontrolled power of transnational corporations poses dangers to the political, economic, and social welfare of poorer countries); Business & Human Rights Resource Centre, at www.business-humanrights.org (providing updated coverage of media reports and legal developments related to corporate misconduct).

19. An “Ethical Globalization Initiative” has been launched under the leadership of Mary Robinson, former UN High Commissioner for Human Rights. See ETHICAL GLOBAL INITIATIVE, *Home* (introducing the Ethical Globalization Initiative as an organization that “brings key stakeholders together in new alliances to integrate concepts of human rights, gender sensitivity and enhanced accountability into efforts to address global challenges and governance shortcomings”) at www.eginitiative.org (last visited Nov. 21, 2004). For other

These broad demands for the transformation of the international economic system have been accompanied by a sea of change in the field of "Corporate Social Responsibility" ("CSR").²⁰ This term describes the expectation that corporate operations and strategies be conducted "in ways that respect ethical values, people, communities and the environment."²¹ The promotion and protection of human rights, labor standards and environmental sustainability are an important part of such responsibility. CSR has become a large and specialized topic, involving many different types of agencies and organizations with multiple sources of standard-setting and pressures for enhanced implementation.²²

Not surprisingly, NGOs pursuing a variety of social objectives, including poverty relief and development, are increasingly sensitive to the impact of corporate strategies and activities.²³ A number of

examples of the growing body of literature on the subject of globalization, see generally JOSEPH E. STILGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (W.W. Norton 2003); MAKING GLOBALIZATION GOOD: THE MORAL CHALLENGES OF GLOBAL CAPITALISM (John H. Dunning ed., Oxford Univ. Press 2003); GLOBALIZATION: THE UNITED NATIONS DEVELOPMENT DIALOGUE (Isabelle Grunber & Sarbuland Khan eds., UN Univ. Press 2000); JAN AART SCHOLTE, *GLOBALIZATION: A CRITICAL INTRODUCTION* (Palgrave 2000); JOHN BRAITHWAITE AND PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (Cambridge Univ. Press 2000); DAVID HELD, ANTHONY MCGREW, DAVID GOLDBLATT AND JONATHON PERRATON, *GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE* (Polity Press 1999); GARY BURTLESS ET AL., *GLOBAPHOBIA: CONFRONTING FEARS ABOUT OPEN TRADE* (Brookings Inst. Press 1998); DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR?* (Inst. for Int'l Economics 1997).

20. See generally HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS (Michael K. Addo ed., Kluwer Law Int'l 2000) (providing a broad overview of the responsibilities that TNCs have in protecting human rights standards); Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 153 (1997) (reviewing the status of transnational corporations and their responsibilities in protecting international human rights); TOM CANNON, *CORPORATE RESPONSIBILITY* 32-33 (Pitman Publishing 1994) (identifying the interdependence between society and business).

21. BUSINESS FOR SOCIAL RESPONSIBILITY, *About BSR*, at www.bsr.org (last visited Nov. 21, 2004).

22. See discussion *infra* Part II (noting selected organizations and standards involved in the CSR movement).

23. See AMNESTY INTERNATIONAL: UN HUMAN RIGHTS NORMS, *supra* note 1, at 2 (recognizing that human rights and other organizations seek to bring corporations under a framework for international human rights, especially as

groups are regularly reporting on complicity in human rights abuses, exploitation of workers in the supply chain, the flaunting of environmental standards, and other forms of corporate misconduct.²⁴ Such problems can be particularly acute in developing countries.²⁵ This increased attention has led to substantial publicity about international corporate behavior, prompting a range of public and private sector responses.²⁶

Corporations are also under scrutiny because of the magnitude of recent business scandals, which undermine economic growth and confidence throughout the world.²⁷ Over the last three years, questions of business ethics and accountability have been thrust into public awareness like never before.²⁸ With widespread recognition

economic globalization has expanded the reach of corporate power), available at http://www.amnesty.nl/downloads/UN_norms_for_business.pdf (last visited Sept. 24, 2004); *Corporate Accountability: About This Site* (providing a medium for NGOs and social movements to discuss the practices of TNCs, and encouraging the flow of information between Southern and Northern NGOs on CSR issues), at <http://corporate-accountability.org/info/about.htm> (last visited Sept. 29, 2004).

24. See *supra* note 1 (listing several NGO sources that review forms of corporate misconduct).

25. See *Making Investment Work for People*, *supra* note 1 (noting that while TNCs have the potential to benefit third world countries, some corporate operations actually cause conditions in poor communities to deteriorate).

26. See, e.g., *Business & Human Rights Resource Centre: A Brief Description*, *supra* note 1 (noting that the Centre presents articles and reports about the activities of multinational corporations, as well as a range of organizational and policy responses to corporate misconduct), at <http://www.business-humanrights.org/AboutUs/Briefdescription> (last visited Sept. 24, 2004); The Corp. Social Responsibility Newswire Service, *The Corporate Responsibility Newswire Service* (noting that the Service endeavors to provide the latest press releases, reports, and books related to corporate social responsibility), at <http://www.csrwire.com> (last visited Sept. 24, 2004).

27. See ABC News, *Confidence in Business: Was Low and Still Is* (reporting that over sixty percent of surveyed Americans lack confidence in big businesses and believe that businesses need more regulation), at http://abcnews.go.com/sections/business/DailyNews/corporatetrust_poll_020701.html (last visited Sept. 27, 2004).

28. See Howard Fineman & Michael Isikoff, *Laying Down the Law*, NEWSWEEK, Aug. 5, 2002, at 20 (profiling Enron, Andersen, WorldCom and Adelphia and observing that “[t]he rash of corporate misdeeds uncovered in recent months and the public’s thirst for retribution inspired Congress and President Bush to change the rules of the game”).

that self-regulation has failed,²⁹ American policymakers have acted decisively to enact new laws and regulations that set higher standards for corporate practice and impose tougher penalties for executive misconduct.³⁰ Other countries are also considering measures to improve private sector responsibility.³¹

While the social issues under consideration here are distinct, they similarly point to the need for a rigorous approach to corporate governance.³² Furthermore, NGOs argue that this overall economic and political environment provides an opportunity to advance a new international legal framework for greater corporate accountability.³³

This article will consider ten key policy issues that relate to corporate social accountability. Each of these areas of NGO involvement is set within a complex dynamic of global information exchange, political lobbying at all levels, potential tensions between the interests of developed and developing countries, conflicting views within the business community, and significant media exposure.³⁴

29. See Friends of the Earth, *Corporate Accountability vs. Corporate Responsibility* (quoting U.S. President George W. Bush as saying, “[s]elf-regulation is important, but it’s not enough”), at <http://www.foe.org/WSSD/acctvsresp.html> (last visited Sept. 24, 2004).

30. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (specifying that the purpose of the statute is “[t]o protect investors by improving the accuracy and reliability of corporate disclosures. . .”).

31. See, e.g., World Bank, *Corporate Social Responsibility Practice Work Program* (identifying Angola, El Salvador, the Philippines, and Vietnam as countries that the World Bank is advising on nation-wide corporate social responsibility frameworks to enhance their competitiveness and investment climate), at http://www.worldbank.org/privatesector/csr/prac_work_prog.htm (last visited Oct. 9, 2004).

32. See generally JANET DINE, *THE GOVERNANCE OF CORPORATE GROUPS* 151-201 (Cambridge Univ. Press 2000) (urging that implementation of corporate social responsibility must be tied to improvements in corporate governance in order to be effective).

33. See Friends of the Earth, *supra* note 29 (claiming that a corporate accountability framework would establish disclosure requirements for social and environmental impacts, allowing governments and members of the public to discern whether corporations are acting responsibly).

34. See discussion *infra* Part II (examining ten significant areas of policy that business managers, NGO representatives, policy makers and scholars have extensively debated).

II. KEY POLICY ISSUES RELATED TO CORPORATE SOCIAL ACCOUNTABILITY

An important area of activity for NGOs involved in questions of corporate accountability is the review of various policy initiatives and other actions aimed at improving corporate standards.³⁵ These are evaluated for their content as well as their practical impact, raising questions for legal research and empirical study. Depending on their findings, NGOs can develop appropriate responses ranging from private consultations and field visits to public testimony and media coverage.

This article will consider the following selected policy areas: intergovernmental efforts, the UN Global Compact, the UN Commission on Human Rights, private sector and market-oriented initiatives, foreign direct liability, national laws and regulations, CSR and development, CSR and trade, the parameters of international law, and an international legal framework.³⁶

A. INTERGOVERNMENTAL EFFORTS

Three intergovernmental organizations are of particular interest to European NGOs: the International Labour Organization (“ILO”), the Organization for Economic Cooperation and Development (“OECD”) and the European Union (“EU”). NGOs also are focusing increased attention on International Financial Institutions (“IFIs”) such as the World Bank and the International Monetary Fund, which have shown a new resolve to assess the social impact of their activities and provide some accountability mechanisms.³⁷

35. See *supra* note 1 (providing the websites of several NGOs for further information on their programs of policy review and research, as well as their diverse activities related to corporate social accountability).

36. See discussion *infra* Parts II.A-II.J (providing an analysis of key issues indicative of the types of policy developments that NGOs monitor; the author notes that this list is selective rather than a comprehensive, and that NGO priorities vary depending on their goals and campaign strategies).

37. See Chi Carmody, *Beyond the Proposals: Public Participation in International Economic Law*, 15 AM. U. INT'L. L. REV. 1321, 1327-38 (2000) (discussing initiatives of the International Monetary Fund and World Bank to increase transparency in their institutional operations and to enhance accountability for their activities).

In 1977, the ILO adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, bringing together business, labor, and government interests.³⁸ In 1998, the ILO updated the Tripartite Declaration by issuing a Declaration of Fundamental Principles and Rights at Work.³⁹ The ILO also introduced a Voluntary Private Initiatives Program and established a website for global developments related to codes of conduct, social labeling, and other private sector initiatives related to labor rights.⁴⁰ Thus, the ILO is devoting increasing attention to matters of globalization and the activities of TNCs.

NGOs appreciate the long history of the ILO and its early recognition of the importance of involving the corporate sector. However, the scope of the ILO's mandate is rather limited in that it largely reaches only conditions arising out of the employment relationship.⁴¹ Also, while the ILO has developed a vast range of conventions, the level of ratification is often low.⁴² Moreover,

38. See International Labour Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Nov. 16, 1977, 17 ILM 422 [hereinafter Tripartite Declaration] (setting forth principles that aim to increase the contributions of multinational enterprises to social and economic progress), available at <http://www.ilo.org/public/english/standards/norm/sources/mne.htm> (last visited Sept. 26, 2004).

39. See International Labour Organization Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233 (promoting social progress and economic growth through fundamental principles enabling workers to claim their "fair share of the wealth"), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm> (last visited Sept. 26, 2004).

40. See generally International Labour Organization, *Library and Information Services* (demonstrating the ILO's commitment to these issues through its broad range of sources and information, including materials from the World Commission on the Social Dimension of Globalization, the ILOLEX database of international labor standards, and the NATLEX database of national laws on labor, social security and related human rights), at <http://www.ilo.org/> (last visited Sept. 24, 2004).

41. See International Labour Organization, *About the ILO: Mandate* (setting forth the ILO's purpose to promote Conventions and Recommendations that set forth minimum standards of basic labor rights), available at <http://www.ilo.org/public/english/about/index.htm> (last visited Sept. 28, 2004).

42. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 538 (2001) (indicating the ILO's purpose to promote Conventions and Recommendations that set forth a range of labor rights and standards).

supporters of corporate accountability have long raised concerns about the limited number of enforcement actions.⁴³

The OECD broadened its consideration of investment matters in the 1970s, adopting a set of Guidelines 'for Multinational Enterprises.'⁴⁴ In June of 2000, it issued revised Guidelines for Multinational Enterprises, intended to supplement applicable law and to "complement and reinforce" codes of conduct and other private efforts to promote business responsibility.⁴⁵ The Guidelines provide that enterprises should "respect the human rights of those affected by their activities consistent with the host government's obligations and commitments."⁴⁶ Follow-up procedures through National Contact Points ("NCPs") support implementation.⁴⁷

The OECD Guidelines cover a wide range of issues including disclosure, employment and industrial relations, environment, bribery, consumer interests, science and technology, competition,

43. See, e.g., Virginia A. Leary, *Lessons from the Experience of the International Labour Organisation*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 580 (Philip Alston ed., 1992) (stating that although the ILO has a well-developed intergovernmental system for the defense of human rights, experts have largely ignored the ILO).

44. See Organization for Economic Cooperation and Development Declaration on International Investment and Multinational Enterprises: Guidelines for Multinational Enterprises, 21 June 1976, 15 I.L.M. 967, 969 (providing voluntary guidelines relating to economic and social progress, industrial and regional development, protection of the environment, creation of employment opportunities, and technological innovation and transfer), available at <http://www.olis.oecd.org/olis/1997doc.nsf/>. (last visited Oct. 3, 2004).

45. See Organization for Economic Cooperation and Development Declaration on International Investment and Multinational Enterprises: Guidelines for Multinational Enterprises, 21 June 2000, at 16 (revising the 1976 Guidelines to include recommendations on human rights, environment, corporate disclosure and transparency, the elimination of child labor and forced labor, and on combating corruption) available at [http://www.olis.oecd.org/olis/2000doc.nsf/4f7adc214b91a685c12569fa005d0ee7/c125692700623b74c1256991003b5147/\\$FILE/00085743.PDF](http://www.olis.oecd.org/olis/2000doc.nsf/4f7adc214b91a685c12569fa005d0ee7/c125692700623b74c1256991003b5147/$FILE/00085743.PDF) (last visited Oct. 3, 2004).

46. *Id.* at 19 (encouraging multinational enterprises to take fully into account generally established policies in the countries in which they operate, as well as the views of other stakeholders).

47. See *id.* at 32-63 (recommending that adhering countries establish NCPs to promote the OECD Guidelines and help solve related problems).

and taxation.⁴⁸ However, critiques of the implementation process cite the paucity of cases and lack of transparency.⁴⁹ Also, given their negotiating history and voluntary nature, it seems highly unlikely that these Guidelines will be transformed into more binding international obligations.⁵⁰

NGOs do acknowledge the OECD's success in forging a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, seeing it as a potential model for other areas of regulation.⁵¹ However, the OECD experienced a serious setback in attempting to develop a Multilateral Agreement on Investment ("MAI").⁵² NGOs note that the failure of the MAI negotiations in 1998 was tied to the inadequate involvement of developing countries in the negotiating process, as well as a lack of attention to social issues.⁵³ Activists are forming a new NGO, called

48. See *id.* at 17-33 (supplying implementation procedures for the OECD Guidelines and establishing a Committee on International Investment and Multinational Enterprises).

49. See BEYOND VOLUNTARISM, *supra* note 1, at 77-82, 99-102 (discussing the obstacles to the enforcement of corporate standards and exposing the weakness and lack of deterrence in OECD procedures); see also James Salzman, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L. L. 769, 774-848 (2000) (assessing the strengths and weaknesses of the OECD and proposing how the Organization can meet the challenges of globalization).

50. See Patrick Juillard, *Direct Investment: MAI: A European View*, 31 CORNELL INT'L L. J. 477, 483 (1998) (asserting that the Guidelines are useful, but are non-binding and limited in scope to the OECD, which requires the international economic order to formulate its own system of "checks and balances").

51. See Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (calling for the "prompt criminalization of bribery and the achievement of equivalence among measures to be taken"), available at [http://www.oilis.oecd.org/oilis/1997doc.nsf/LinkTo/daffe-ime-br\(97\)20](http://www.oilis.oecd.org/oilis/1997doc.nsf/LinkTo/daffe-ime-br(97)20) (last visited Sept. 26, 2004).

52. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, THE MULTILATERAL AGREEMENT ON INVESTMENT: THE MAI NEGOTIATING TEXT 7-106 (1998) (providing a draft of the negotiating text of the MAI as of April 28, 1998), available at <http://www.oecd.org/dataoecd/46/40/1895712.pdf> (last visited Sept. 24, 2004); see also Michael Hart, *A Multilateral Agreement on Foreign Investment: Why Now?*, in INVESTMENT RULES FOR THE GLOBAL ECONOMY: ENHANCING ACCESS TO MARKETS 60 (Pierre Sauve & Daniel Schwanen eds., 1996).

53. See World Dev. Movement, *Rights & Responsibilities: Lessons from the*

OECD Watch, to monitor and assess the performance of the OECD in a number of key areas.⁵⁴

The EU has taken a strong interest in CSR, issuing a Green Paper entitled *Promoting a European Framework for Corporate Social Responsibility*.⁵⁵ The Green Paper generated a wide range of responses at the national, international, and European levels from public authorities, political parties, companies, social partners and unions, advocacy groups, research institutes, academics and other interested parties.⁵⁶ As a result of this consultation process, the European Commission established a Multi-Stakeholder Forum on Corporate Social Responsibility to facilitate the dialogue process among CSR actors.⁵⁷ The Commission held its first roundtable on Codes of Conduct in Brussels in April of 2002, with participation

Multilateral Agreement on Investment (MAI) (arguing that the MAI undermines sustainable development and local economies, adversely impacting developing countries and promoting an imbalance of rights and responsibilities among nations), available at <http://www.wdm.org.uk/cambriefs/wto/MAI.htm> (last visited Sept. 23, 2004).

54. See OECD Watch, *OECD Watch on Investment and Multinational Enterprises* (describing the organization's efforts in establishing an international network of NGOs to review the policies and activities of the OECD's Committee on International Investment and Multinational Enterprises and to analyze the effectiveness of the OECD Guidelines for Multinational Enterprises), at <http://www.oecdwatch.org> (last visited Sept. 26, 2004).

55. See EUR. COMM'N., OFFICE OF EMP. & SOCIAL AFFAIRS, PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY: GREEN PAPER 5-28 (2001) [hereinafter GREEN PAPER] (setting forth a holistic approach to CSR, including the encouragement of socially responsible integrated management, reporting and auditing, and investment functions) available at http://europa.eu.int/comm/employment_social/publications/2001/ke3701590_en.pdf (last visited Sept. 23, 2004). NGOs are pursuing, through the EU multi-stakeholder process, many of the types of issues that this article raises. *Id.*

56. See Eur. Comm'n., Office of Emp. & Social Affairs, *Responses to the Consultation on the Green Paper on CSR* (listing individuals and entities that responded to the European Commission's Green Paper), at http://europa.eu.int/comm/employment_social/soc-dial/csr/csr_responses.htm (last visited Sept. 28, 2004).

57. See EURO. COMM'N, OFFICE OF EMP. & SOCIAL AFFAIRS, *E.U. MULTI STAKEHOLDER FORUM ON CSR: OBJECTIVES, COMPOSITION, AND OPERATIONAL ASPECTS 7* (establishing the Forum in order to "promote innovation, transparency and convergence of CSR practices and instruments"), available at http://europa.eu.int/comm/employment_social/soc-dial/csr/last_forum_complete2.pdf (last visited Sept. 27, 2004).

from employers, trade unions, consumers, investors, standard-setting organizations, business networks, and other groups.⁵⁸

Nevertheless, the EU upholds CSR on a voluntary rather than an obligatory basis; proposals with far-reaching legal implications for international corporate operations have not progressed.⁵⁹ The Green Paper reflects this stance in its definition of corporate social responsibility as a “concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with stakeholders on a voluntary basis.”⁶⁰

B. UN GLOBAL COMPACT

Even today, NGOs point out that the United Nations Code of Conduct on Transnational Corporations remains the most comprehensive effort to develop binding international standards for corporations.⁶¹ During the 1970s, alongside the debate on the New International Economic Order, widespread concerns emerged about the power of global companies and their impact on less-developed countries.⁶² Thus, the United Nations established a Commission on

58. See Eur. Comm'n, Office of Emp. & Social Affairs, *First CSR Round Table on Codes of Conduct* (reporting the minutes from the Forum's first meeting, at which participants reviewed existing initiatives, exchanged experiences, and debated the challenges of CSR codes of conduct), available at http://europa.eu.int/comm/employment_social/soc-dial/csr/conduct.html (last visited Sept. 27, 2004).

59. See EUR. PARL., COMM. ON DEV. AND COOPERATION, REPORT ON EU STANDARDS FOR EUROPEAN ENTERPRISES OPERATING IN DEVELOPING COUNTRIES: TOWARDS A EUROPEAN CODE OF CONDUCT 7 (1998) (requesting that the European Commission and the Council make proposals, as a matter of urgency, to cultivate the right legal basis for creating a European multilateral framework that would govern operations of companies worldwide), available at <http://www.cleanclothes.org/ftp/howittresolution.PDF> (last visited Sept. 26, 2004).

60. See GREEN PAPER, *supra* note 55, at 8 (defining corporate social responsibility as a voluntary concept).

61. See *United Nations Draft International Code of Conduct on Transnational Corporations*, U.N. Doc. E/C.10/1984/S/5 (1984), 23 I.L.M. 626 (1984) (setting forth a code of conduct which considers political, economic, socio-cultural, human rights, environmental, technology, taxation, and consumer protection issues in guiding transnational corporate operations).

62. See *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 528, U.N. Doc. A/9559 (1974) (calling for a code of conduct for TNCs to prevent economic

Transnational Corporations to develop a code covering areas such as labor, consumers, the environment, corruption, and restrictive business practices.⁶³ However, after years of negotiations and deep divisions between developing and industrialized countries, the code was never brought for a vote.⁶⁴

More recently, the UN launched a high-profile effort to forge a “Global Compact” with the business community, reflecting the movement toward a cooperative rather than confrontational stance with corporations.⁶⁵ This initiative, which Kofi Annan announced at the World Economic Forum in January 1999, encourages companies to support and adopt a series of principles related to social responsibility.⁶⁶ An increasing number of business “partners” have joined in this effort.⁶⁷

In promoting the Global Compact, the UN recognizes that “although Governments have primary responsibility for

exploitation of host countries). *See generally*, Adeoye Akinsanya & Arthur Davies, *Third World Quest for a New International Economic Order*, 33 INT’L & COMP. L. Q. 208 (1984) (explaining how developing countries became increasingly dissatisfied with an international economic order which shapes their economies but excludes them from management); GABE S. VARGES, *THE NEW INTERNATIONAL ECONOMIC ORDER LEGAL DEBATE* (1983) (considering the argument of developing countries in favor of greater economic and political obligations for industrialized nations to remedy a discriminatory and unjust international economic system).

63. *See* E.S.C. Res. 1908, U.N. ESCOR, 57th Sess., Supp. No. 1, at 13, U.N. Doc. E/5570 (1974) (indicating the Commission considered the reform of national laws as well as the development of an internationally-agreed upon code).

64. *See* Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT’L L. 123, 123 (2003) (noting that the Code of Conduct never moved beyond significant paragraphs in square brackets or ‘Chairman’s Formulation on Matters Not Yet Concluded’).

65. *See* U.N. Global Compact, *What is the Global Compact?* (identifying the initiative’s goals and offering updates on key issues), at http://www.unglobalcompact.org/Portal/?NavigationTarget=/roles/portal_user/aboutTheGC/nf/nf/theNinePrinciples (last visited Sept. 26, 2004).

66. *See Development of Guidelines on the Role and Social Responsibilities of the Private Sector: Report of the Secretary-General*, U.N. GAOR, at 8-9, U.N. Doc. A/AC.253/21 (2000) (recommending the development of guidelines that promote corporate social responsibility through existing OECD, UN, and ILO initiatives).

67. *See* U.N. Global Compact, *Participants* (featuring a searchable database of participants), at <http://www.unglobalcompact.org/Portal/Default.asp> (last visited Nov. 21, 2004).

implementing internationally accepted values, corporations acting on their own can do a great deal to actualize these principles within their spheres of influence.”⁶⁸ The Global Compact is a very brief statement, featuring the vital topics of human rights, labor standards, and the environment.⁶⁹ In June 2004, participants added a further principle on anti-corruption.⁷⁰ Overall, the Global Compact acknowledges the growing role of transnational corporations in addressing global social issues. Supporting documents, such as reports that outline the links between respect for human rights and

68. The U.N. & Business: *The Global Compact*, at <http://www.un.org/partners/business/otherpages/factsheets/fs1.htm> (last visited Oct. 31, 2004).

69. See U.N. Global Compact, *The Ten Principles*, at <http://www.unglobalcompact.org> (last visited Sept. 27, 2004). The Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the following areas:

Human Rights

Businesses should support and respect the protection of internationally proclaimed human rights; and

Make sure that they are not complicit in human rights abuses.

Labor Standards

Business should uphold the freedom of association and the effective recognition of the right to collective bargaining;

The elimination of all forms of forced and compulsory labor;

The effective abolition of child labor; and

The elimination of discrimination in respect of employment and occupation.

Environment

Businesses should support a precautionary approach to environmental challenges;

Undertake initiatives to promote greater environmental responsibility; and

Encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

Businesses should work against all forms of corruption, including extortion and bribery.

70. See U.N. Global Compact, *Corporate Leaders at Global Compact Summit Pledge to Battle Corruption* (outlining the commitment of chief executives from around the world to the Global Compact's efforts on corruption), available at <http://www.unglobalcompact.org/Portal/Default.asp> (last visited Sept. 27, 2004).

better business performance, aid in building a positive case for corporate action on these principles.⁷¹

Despite these advances, the Global Compact also reflects an unwillingness to pursue compulsory corporate regulation, opting to rely on moral persuasion rather than legal norms.⁷² Indeed, many business statements reiterate the voluntary nature of the program and the deliberate lack of any monitoring mechanisms.⁷³ Various NGOs have also criticized the closer relations between the UN and business. For instance, a group known as CorpWatch has launched a “Corporate-Free UN” campaign, calling attention to the dangers of collaborations such as the Global Compact.⁷⁴ However, several NGOs remain directly affiliated with the Global Compact and are

71. See Office of the High Commissioner for Human Rights, *Business and Human Rights: A Progress Report* (noting that active business concern for human rights helps companies accomplish several goals, including ensuring compliance with national and international laws, satisfying consumer concerns, promoting stable legal environments, building corporate community goodwill, aiding in the selection of ethical, well-managed, and reputable business partners, supporting a stable business enterprise, keeping markets open, and increasing worker productivity and retention), available at www.unhchr.ch/business.htm (last visited Oct. 3, 2004).

72. See U.N. Global Compact, *What is the Global Compact?* (explaining that the Global Compact is not a regulatory instrument and that it does not enforce or measure the behavior or actions of companies), available at <http://www.unglobalcompact.org/Portal/Default.asp> (last visited Oct. 3, 2004). Rather, the Global Compact relies on factors such as public accountability, transparency, and the self-interest of companies, labor, and civil society to initiate and share substantive action in pursuing the principles it sets forth. *Id.*

73. See, e.g., AVIVA PLC, AVIVA PLC: CORPORATE SOCIAL RESPONSIBILITY REPORT 2004 – A SUMMARY 5, 30 (expressing the corporation’s support of the Global Compact’s principles), available at <http://www.aviva.com/files/reports/csr/2004report/pdf/CSR2004.pdf> (last visited Oct. 26, 2004).

74. See CorpWatch, *Alliance for a Corporate-Free UN Campaign Profile* (noting that its corporate-free U.N. campaign calls on the U.N. to forgo collaborations and partnerships with companies that have poor human rights and environmental records), available at <http://www.corpwatch.org/article.php?list=type&type=101> (last visited Oct. 3, 2004). One CorpWatch document states, “The UN’s positive image is vulnerable to being sullied by corporate criminals—while corporations can ‘bluewash’ their image by wrapping themselves in the UN’s flag symbolizing peace, human rights and dignity.” *CorpWatch, UN and Corporations Fact Sheet* (commenting on the inadequacies in the Global Compact), at <http://www.corpwatch.org/article.php?id=614> (last visited Oct. 24, 2004).

helping to guide its evolution, particularly in “aligning economic activities with social and environmental priorities.”⁷⁵

C. UN COMMISSION ON HUMAN RIGHTS

The UN Commission on Human Rights, under its Sub-Commission on the Promotion and Protection of Human Rights (“Human Rights Sub-Commission”), considered the relationship between the enjoyment of economic, social, and cultural rights, including the right to development, and the working methods and activities of transnational corporations.⁷⁶ In 1998, the Human Rights Sub-Commission established a working group on transnational corporations and began efforts to develop a code of conduct for companies based on human rights standards.⁷⁷ These efforts led to the preparation of a series of reports and draft principles that set forth guidelines for businesses.⁷⁸ Following further deliberations, in 2003

75. See U.N. Global Compact, *The Global Compact Network* (listing various NGOs and explaining the integral role they play in the evolution and influence of the Global Compact), available at http://www.unglobalcompact.org/Portal/Default.asp?UNGC_CookieTest=true (last visited Oct. 3, 2004); see also Amnesty Int'l, *Global Compact Leaders Summit: NGO Participants Raise Concerns* (noting that the implementation of the Global Compact has fallen short of NGO expectations), at <http://web.amnesty.org/pages/ec-letter-240604-eng> (last visited Sept. 24, 2004).

76. See CHR SUBCOM Res. 1998/8, U.N. ESCOR, 50th Sess., 26th mtg. 1, U.N. Doc. E/CN.4/SUB.2/RES/1998/8 (1998) (considering the need to identify and examine the effects of the working methods and activities of transnational corporations on the enjoyment of economic, social, cultural, civil, and political rights); note that pursuant to a decision of the Economic and Social Council, effective July 27, 1999, the Sub-Commission on Prevention of Discrimination and Protection of Minorities was renamed the Sub-Commission on the Promotion and Protection of Human Rights), at www.unhcr.ch/html/menu2/2/51sub/51sub.htm (last visited Oct. 3, 2004).

77. See CHR SUBCOM Res. 1999/9, U.N. ESCOR, 51st Sess., Agenda Item 4(c), U.N. Doc. E/CN.4/Sub.2/1999/9 (1999) (establishing the creation of the sessional working group to examine the activities of transnational corporations and prepare a report); see also CHR SUBCOM Res. 2001/9, U.N. ESCOR, 53rd Sess., Agenda Item 4, at 14 (recommending an extension of the mandate of the working group), available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=7280 (last visited Sept. 28, 2004).

78. See, e.g., *Working Paper on Proposed Draft Human Rights Code of Conduct for Companies*, U.N. CHR, 52nd Sess., U.N. Doc. E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1 (2000) (providing materials on the

the working group and the Human Rights Sub-Commission adopted the latest version of the principles, entitled “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (“Draft Norms”).⁷⁹ In April 2004, the UN Commission on Human Rights adopted the report transmitting these Draft Norms, but emphasized that the norms had no legal standing.⁸⁰

For many NGOs, progress on the Draft Norms is an important step toward a legal framework on corporate responsibility for human rights.⁸¹ The Draft Norms are particularly useful because they synthesize a substantial amount of pertinent analysis conducted over several years.⁸² They draw carefully on many different sets of standards that are relevant to corporate activity, including binding conventions and charters, regional human rights instruments, certain

development of draft principles) available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/13e40a9bc4e3be3fc1256912003c5797?Opendocument> (last visited Oct. 3, 2004); see also *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations*, U.N. ESCOR, 54th Session, Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2002/13 (2002) [hereafter *TNC Report*] (containing the Draft Human Rights Principles and Responsibilities of Transnational Corporations and Other Business Enterprises, the Draft Principles with Commentary, and an introduction summarizing the development of the principles and their potential implementation), available at <http://www.unhchr.ch>.

79. See *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, U.N. ESCOR, 55th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12 (2003) [hereinafter *Draft Norms*] (setting forth norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights).

80. See U.N. ESCOR, 60th Sess., Agenda Item 21(b), U.N. Doc. E/CN.4/2004/L.11/Add.7 (2004) (indicating, in Decision 2004/116, that the document setting forth the draft norms “has not been requested by the Commission, and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard”).

81. See, e.g., Amnesty Int’l, *The UN Norms for Business—Taking Forward Corporate Responsibility* (asserting that the UN norms represent a major step forward in establishing a common global framework for businesses with regard to human rights because they set out in a single, succinct statement a comprehensive list of the human rights obligations of companies), available at <http://www.amnesty.org.uk/business/unnorms> (last visited Oct. 3, 2004).

82. See *Draft Norms*, *supra* note 79, at 1 (relying on established standards and guidelines and taking note of global trends affecting transnational corporations and other business enterprises).

ILO and OECD documents, and multilateral environmental agreements.⁸³ While the focus of the Draft Norms is on corporate responsibility for human rights, they also cover several other important social issues.⁸⁴ Of particular interest to NGOs are the "General Provisions of Implementation," outlined under Section H of the document, which provide for corporate adoption of internal rules in compliance with the norms, independent monitoring of corporate activity, national legal reinforcement supportive of the norms, and adequate reparation for those who have been adversely affected by a company's failure to comply with the norms.⁸⁵

The political momentum behind this process, with widespread input from and consultation with agencies such as the UN Environment Programme, the World Health Organization, and the World Intellectual Property Organization, is also important. Trade unions, business associations, human rights groups, environmental groups, and church-based organizations have also been involved, along with international lawyers and other experts.⁸⁶ Various NGOs

83. *See id.* at preamble (referencing multiple documents on subjects as varied as slavery, organized crime, oil pollution, and breast-milk substitutes).

84. *See id.* (outlining responsibilities toward equal opportunity and non-discriminatory treatment, security of persons, rights of workers, respect for national sovereignty, consumer protection, and environmental protection).

85. *See id.* at sec. H (detailing the means of implementing the Draft Norms). During the UN deliberations on the development of the norms, the importance of implementation procedures was repeatedly emphasized. For example, in U.N. ESCOR, 53rd Sess., 25th mtg., U.N. Doc. E/CN.4/Sub.2/RES/2001/3 (2001), the Sub-Commission asked the working group on TNCs to:

Analyze the possibility of establishing a monitoring mechanism in order to apply sanctions and obtain compensation for infringements committed and damage caused by transnational corporations and contribute to the drafting of binding norms for the purpose.

Also, in U.N. ESCOR, 54th Sess., 22nd mtg. at 4(b), U.N. Doc. E/CN.4/Sub.2/RES/ 2002/8 (2002), the Sub-Commission asked that the working group consider:

the establishment or nomination, by the Commission, of a group of experts, a special rapporteur or a working group to receive information and undertake effective measures with regard to human rights violations or abuses committed by transnational corporations and other enterprises.

86. *See, e.g., TNC Report, supra* note 78, at intro (listing some of the many organizations and individuals that commented on the Draft Principles and Commentary). The Human Rights Sub-Commission has repeatedly requested wide

are currently disseminating this document, deliberating over its scope and implementation mechanisms, assessing its practical impact, and seeking to advance its legal status.⁸⁷ The UN Office of the High Commissioner for Human Rights (“UNHCHR”), which is preparing a report on the scope and legal status of existing initiatives related to corporate responsibility for human rights, has requested NGOs to contribute comments on the Draft Norms and other relevant measures.⁸⁸

D. PRIVATE SECTOR AND MARKET-ORIENTED INITIATIVES

In addition to the intergovernmental efforts described above, a wide range of private sector and market-driven initiatives to promote CSR has emerged. To indicate the breadth of the topic, this article highlights several such initiatives. First, in recent years the number of company policy statements regarding standards of conduct or business ethics has proliferated.⁸⁹ While many of these statements include affirmations regarding values such as human rights, labor conditions, and environmental sustainability, the scope and wording

circulation of the working group’s reports among NGO’s, governments, specialized agencies, and others for commentary.

87. See, e.g., AMNESTY INTERNATIONAL: UN HUMAN RIGHTS NORMS, *supra* note 1, at 4 (explaining the nature of and need for UN Human Rights Norms for Business and encouraging companies to “road test” the principles it sets forth).

88. The High Commissioner is preparing a report on the human rights responsibilities of corporations, to be presented to the Commission on Human Rights in March of 2005. The report is to identify the scope and legal status of existing initiatives, including the Draft Norms, and to identify any outstanding issues. The UNHCHR has contacted all States, as well as a range of organizations, including transnational corporations, employer and employee associations, intergovernmental organizations, NGOs, and human rights treaty bodies to encourage their contributions. See <http://www.ohchr.org/english/issues/globalization/business/reportbusiness.htm> (last visited Sept. 29, 2004).

89. See Simon Webley, *The Nature and Value of Internal Codes of Ethics*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, *supra* note 20, at 109 (noting that a 1999 survey by the Institute of Business Ethics showed that fifty-seven percent of the largest UK companies had or were preparing a code of conduct or policy, compared to a mere eighteen percent in 1987); see also RONALD E. BERENBEIM, GLOBAL CORPORATE ETHICS PRACTICES: A DEVELOPING CONSENSUS 7 (The Conf. Board, Inc. 1999) (outlining trends which favor corporate articulation of global business ethics principles).

of the policies vary with each company, as do the oversight and compliance mechanisms.⁹⁰

The development of codes of conduct relevant to human rights and other social issues, as well as standards for greater corporate reporting and disclosure, are also aiding in the promotion of CSR.⁹¹ According to one report, NGOs, such as development organizations, trade unions and environmental groups, are leading the current revival of interest in codes of conduct for businesses.⁹² Relevant initiatives include Amnesty International's Human Rights Principles for Companies,⁹³ AccountAbility 1000,⁹⁴ the Ethical Trading Initiative,⁹⁵ Global Sullivan Principles,⁹⁶ Principles of Global

90. See Business & Human Rights Resource Centre, *Companies With Human Rights Policies* (listing the various codes of conduct and policies of nearly one-hundred different companies), available at <http://business-humanrights.org/Categories/Company policysteps/Policies/Companieswithhumanrightspolicies> (last visited Sept. 29, 2004). In the area of human rights, many of these policy statements include prohibitions on child and forced labor, as well as standards for wages, benefits, health and safety. *Id.*

91. See LPA, Inc., *Codes of Conduct* (offering examples of codes of conduct from different realms, including company codes, industry codes, union sponsored codes, and governmental codes), available at <http://www.codesofconduct.org> (last visited Oct. 4, 2004).

92. See Clean Clothes Campaign, *Codes of Conduct for Transnational Corporations: An Overview* (reviewing the role of charters and codes in regulating the behavior of transnational corporations, with a focus on how NGO's have addressed labor issues in the garment, sportswear, and toy industries), available at <http://www.cleanclothes.org/codes/overview.htm> (last visited Sept. 29, 2004).

93. See Amnesty Int'l, *Economic Globalization and Human Rights: Human Rights and Responsibilities of Companies* (outlining how Amnesty's principles require companies to protect human rights and abide by certain labor standards in countries in which they have facilities; also providing guidance on security arrangements), at <http://web.amnesty.org/pages/ec-index-eng> (last visited Sept. 25, 2004).

94. See AccountAbility, *Welcome to AccountAbility* (describing a set of standards for measuring the social achievements of companies against objective criteria that the Institute of Social and Ethical Accountability developed in 1999, and indicating how the framework intends to capture different stakeholder aspirations and needs, and balance and manage the interlinking elements of social, environmental and economic performance), at <http://www.accountability.org.uk/default.asp> (last visited Sept. 25 2004).

95. See The Ethical Trading Initiative, *Ethical Trading Initiative* (describing an alliance of companies, NGOs, and trade union organizations that promote and improve the implementation of corporate codes of practice, especially with respect

Corporate Responsibility: Bench Marks for Measuring Business Performance,⁹⁷ and the Global Reporting Initiative.⁹⁸

In addition, socially-responsible consumers are taking direct action to promote corporate protection of human rights. Consumers may boycott certain companies for tolerating exploitative working conditions, make purchasing decisions based on labeling or certification schemes to protect against child labor, and participate in programs to buy goods directly from third-world producers.⁹⁹ NGOs are closely tied to some of these efforts.

Similarly, investor activism is increasing. Shareholders may take their grievances about human rights and other issues to their board of directors.¹⁰⁰ A new category of “ethical investment” has also gained

to supply chain working conditions and adherence to international labor standards), at <http://www.ethicaltrade.org/Z/home/index.shtml> (last visited Sept. 25, 2004).

96. See The Global Sullivan Principles (describing a set of corporate guidelines, initially developed by Leon Sullivan in response to the need to combat racial discrimination during the period of apartheid in South Africa), at http://www.globalsullivanprinciples.org/new_page_4.htm (last visited Sept. 25, 2004).

97. See Press Release, Rev. David M. Schilling, Statement for the Launch of the Principles of Global Corporate Responsibility: Bench Marks for Measuring Business Performance (commenting on how the ICCR’s code will help representatives from around the world reach consensus on what constitutes positive corporate behavior towards people, communities, and the ecosystem), at http://www.iccr.org/news/press_releases/GP_pressconf/pr_schilling.htm (last visited Sept. 25, 2004).

98. See The Global Reporting Initiative, *GRI at a Glance* (promoting the GRI as an international multi-stakeholder effort to create a common framework for voluntary reporting of the economic, environmental, and social impacts of organization-level activity), at <http://www.globalreporting.org/test/brief.asp> (last visited Sept. 25, 2004).

99. See, e.g., RUGMARK, *About RUGMARK* (explaining how the RUGMARK campaign provides for special tags on imported rugs to certify that no child labor was used in their manufacture), at <http://www.rugmark.org/about.htm> (last visited Sept. 25, 2004); see also OXFAM, *Fair Trade* (describing OXFAM’s program with suppliers in the third world, which seeks to pay producers a fair price for their work, let poor people gain the skills and knowledge they need to develop their businesses, and challenge ways of trading which keep people poor), at <http://www.oxfam.org.uk/coolplanet/ontheline/explore/journey/ghana/fairtrade.htm> (last visited Sept. 25, 2004).

100. See Social Funds, *Shareowner Action Center* (supplying information on investor activism, including updates on corporate board action on a wide range of issues related to corporate social responsibility), at

momentum, leading stockbrokers and shareholding funds to scrutinize the business practices of companies in their portfolios.¹⁰¹ Moreover, a number of CSR-oriented indexes have recently emerged. For example, the *Financial Times* “FTSE4Good” program, launched in 2001, measures the performance of companies that meet globally-recognized corporate responsibility standards and facilitates investment in those companies.¹⁰²

Assuming companies are acting in good faith, corporate responsibility policies and programs do appear to influence corporate behavior.¹⁰³ Reference to the “triple bottom line” of financial, social, and environmental performance has become widespread.¹⁰⁴ Because CSR efforts are public, they encourage outside scrutiny of activities, leading to a greater likelihood that problems will be identified and corrected. The media, industry organizations, trade unions, and NGO interest groups can use CSR as a focal point to press for the protection of human rights, labor, and the environment.¹⁰⁵ However, some critics have charged that CSR efforts are merely elaborate

<http://www.socialfunds.com/sa/index.cgi> (last visited Sept. 25, 2004).

101. See The Ethical Funds, *What is SRI?* (urging customers to discover how their investments can shape the world of finance and contribute to a just and sustainable society), at http://www.ethicalfunds.com/do_the_right_thing/sri/what_is_sri (last visited Sept. 25, 2004).

102. See FTSE, *FTSE4Good Index Series* (noting how the program can help combine corporate profits and corporate ethical standards in a reliable product for investors), at <http://www.ftse.com/ftse4good/index.jsp> (last visited Sept. 25, 2004).

103. See Business & Human Rights Resource Centre, *Business & Human Rights. Resource Centre: A Brief Description* (describing how the information on its website helps influence corporate behavior around the world by promoting awareness of issues related to business and human rights), at <http://www.business-humanrights.org/AboutUs/Briefdescription> (last visited Sept. 25, 2004).

104. See PETER UTTING, REGULATING BUSINESS VIA MULTISTAKEHOLDER INITIATIVES: A PRELIMINARY ASSESSMENT 67 (2002) (recognizing how corporations must broaden their conception of success in the new global economy to include social and environmental goals in addition to profitability goals), available at <http://www.eldis.org/static/DOC11465.htm> (last visited Sept. 25, 2004).

105. See *id.* at 61 (discussing how the emergence of multistakeholder initiatives is encouraging companies to protect basic human rights, worker’s rights and the environment).

public relations exercises designed to give the impression that TNCs are concerned about social issues.¹⁰⁶

Indeed, many NGOs have argued that traditional CSR efforts do not go far enough.¹⁰⁷ Most such initiatives are purely voluntary in nature. Few include meaningful monitoring mechanisms or disclosure requirements designed to enhance compliance. While some high-profile TNCs are in the forefront of the corporate social responsibility movement, countless other companies remain uninvolved and unconcerned.¹⁰⁸

Professionals in the field increasingly recognize the inadequacy of voluntary initiatives, along with the need to move toward legally-binding norms for corporations. For example, a report by the Geneva-based International Council on Human Rights Policy concluded that, "The relevance of international law and enforcement is beginning to be treated seriously. Indeed, there is a growing sense that voluntary codes alone are ineffective and that their proliferation is leading to contradictory and incoherent efforts."¹⁰⁹ Similarly, the UN working group on TNCs acknowledges that the use of an entirely voluntary system for codes of conduct is not enough, and anticipates that the international community will move toward the codification of binding norms, backed by a range of implementation measures.¹¹⁰

106. See *id.* at 70 (noting that corporations were often guilty of "greenwashing," essentially purporting to follow codes of conduct, but creating a large gap between what existed on paper and what happened in practice).

107. See BEHIND THE MASK, *supra* note 1, at 3 (providing case studies of the CSR activities of certain TNCs, asserting that some companies raise CSR to deflect government regulation, and urging greater legal accountability due to the limits of a voluntary approach); see also *Towards Binding Corporate Accountability*, *supra* note 1 (detailing that voluntary measures to promote corporate social responsibility have failed because they (1) do not provide strong incentives for compliance to counterbalance the financial incentives for non-compliance, because, for example, sanctions are absent or weak; (2) rely on the appearance of compliance through self-regulation, without any independent verification; and (3) fail to empower citizens and stakeholders).

108. See BEHIND THE MASK, *id.* (arguing that most companies subscribe to CSR due to outside pressures, and also noting the problem of rogue businesses that operate with virtual impunity, especially in developing countries).

109. See BEYOND VOLUNTARISM, *supra* note 1, at 7 (noting the weaknesses of a voluntary approach to corporate responsibility, and maintaining that binding codes of conduct may be a more effective tool for changing company behavior).

110. See *Human Rights Principles and Responsibilities for Transnational*

E. FOREIGN DIRECT LIABILITY

Another important source of pressure on corporations to uphold social standards lies in litigation. A Royal Institute of International Affairs briefing paper on foreign direct liability observed that a new wave of legal action in the UK, US, Canada and Australia aims to hold parent companies legally accountable in developed countries for negative environmental, health and safety, labour or human rights impacts associated with the operations of members of their corporate family in developing countries.¹¹¹

In the United States, several claims for human rights violations allegedly implicating corporations have been brought under the Alien Tort Claims Act (“ATCA”), which gives courts power to hear civil cases brought by foreign citizens for injuries caused by actions “in violation of the law of nations or a treaty of the United States.”¹¹² By way of example, a federal case filed under the ATCA against Unocal for its operations in Myanmar may have far-reaching implications.¹¹³ The U.S. Supreme Court recently decided another case, though

Corporations and Other Business Enterprises, U.N. CHR, 54th Sess., Agenda Item 4, at 21, U.N. Doc. E/CN.4/Sub.2/2002/XX/Add.1 (2002), available at <http://www1.umn.edu/humanrts/links/normsdrafts.html> (last visited Sept. 29, 2004).

111. HALINA WARD, GOVERNING MULTINATIONALS: THE ROLE OF FOREIGN DIRECT LIABILITY 1 (2001) [hereinafter GOVERNING MULTINATIONALS] (indicating that foreign workers harmed in the fields of mining, oil or gas extraction, or chemical production are usually the plaintiffs in such actions) available at <http://www.ciaonet.org/pbei/rriia/wah01.pdf> (last visited Sept. 25, 2004). Occasionally, the governments of host states will file suit on behalf of its injured citizens. *Id.*

112. See 28 U.S.C. § 1350 (1789) (granting district courts original jurisdiction in certain matters of tort civil actions that aliens file); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (This ground-breaking case noted: “Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”).

113. See *John Doe, et al. v. Unocal Corporation*, 2002 WL 31063976 (9th Cir. 2002) (asserting that the plaintiffs in the appeal made sufficient allegations for UNOCAL to stand trial under the ATCA and the law of nations); see also Press Release, Center for Constitutional Rights, Court Orders UNOCAL to Stand Trial for Abuses in Burma (Sept. 15, 2004) (reporting how UNOCAL’s efforts to dismiss the suit failed), at <http://www.ccr-ny.org/v2/newsroom/releases/pReleases.asp?ObjID=HYDF8X6hrH&Content=438> (last visited Sept. 25, 2004).

unrelated to corporate behavior, which examined the nature of a cause of action under the ATCA.¹¹⁴ Not only are NGOs monitoring the progress of these cases, but groups such as the Center for Constitutional Rights and EarthRights are actively involved as plaintiffs' counsel.¹¹⁵

Other types of litigation have arisen in the United Kingdom, Canada, and Australia. In general, these foreign lawsuits reflect pressure for parent companies of multinational corporate groups to ensure that their behavior as direct investors in other countries matches the standard of care in the home country.¹¹⁶ Litigation involves many complex jurisdictional and procedural issues, and legal rulings have been inconclusive.¹¹⁷ Nonetheless, the potential threat of such claims in the corporation's home country is raising TNC awareness of human rights and other responsibilities. The loss of shareholder confidence and the threat of substantial financial liability will also induce greater internal scrutiny of worldwide operations.¹¹⁸

F. NATIONAL LAWS AND REGULATIONS

While NGOs devote substantial attention to international initiatives related to corporate accountability, they recognize that the

114. See *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004) (denying Alvarez-Machain's ability to bring a claim under the ATCA, but rejecting the United States government's attempt to eliminate the ability of human rights victims to bring such claims in US courts).

115. See Press Release, Center for Constitutional Rights, *supra* note 113 (setting forth the arguments to require Unocal to defend its actions in front of a jury).

116. See GOVERNING MULTINATIONALS, *supra* note 111, at 2 (explaining how a ruling by the House of Lords has held that certain workers in foreign enterprises owned by English-based companies may bring claims for work-related diseases before English courts, but noting that the potential for this new jurisdictional avenue in other cases will depend on access to justice in a host state).

117. See *id.* at 3 (discussing how cases have not resulted in clear victories for the plaintiffs on the substantive issues and how out of court settlements do not clarify outstanding judicial questions).

118. See Office of the High Commissioner for Human Rights, BUSINESS AND HUMAN RIGHTS: AN UPDATE, 26 July 2000 (pointing out that human rights litigation against businesses for violations of law taking place abroad has raised corporate awareness of their international obligations), available at www.unhchr.ch/business.htm (last visited Oct. 3, 2004).

adoption, implementation, and enforcement of laws at the *national* level will remain paramount in governing corporate behavior.¹¹⁹ A large range of substantive national laws relate directly to issues of corporate social responsibility, such as labor standards, health and safety regulations, consumer protection, factory emission requirements, anti-trust provisions, product liability, and many others. While the terminology may not expressly refer to human rights or environmental sustainability, these laws are a vital element of corporate social responsibility.

Such substantive laws, as well as procedures for implementation and redress, vary dramatically from country to country.¹²⁰ In situations where national laws are weak, companies may be able to engage in objectionable conduct with impunity. Even where legal standards do exist, governments may be unwilling or unable to enforce them. Given their relatively disadvantageous position, the governments of developing countries may be under particular pressure to avoid confrontation rather than risk losing the benefits associated with foreign investment.¹²¹ Official corruption, reportedly widespread in many countries, exacerbates this problem.¹²²

In response to these weaknesses, many European NGOs are seeking to evaluate the effectiveness of national laws related to CSR and to assess the potential impact of international legal efforts in promoting regulatory and procedural reform at the national level.¹²³

119. See Daniel Graymore & Isabella D. Bunn, *A World Summit for Business Development? The Need for Corporate Accountability in the World Summit for Sustainable Development Agenda* (noting that national laws and regulations are key elements of corporate accountability), available at <http://www.christianaid.org.uk/indepth/0208wssd/report.htm> (last visited Sept. 27, 2004).

120. See BEYOND VOLUNTARISM, *supra* note 1, at 77-82 (summarizing legal obstacles at the national level which, in turn, enhance the importance of international procedures).

121. See Graymore & Bunn, *supra* note 119 (arguing that developing countries, in particular, face pressure in attracting and maintaining foreign investment).

122. See, e.g., Transparency International (providing general information on the issue of bribery and corruption, including country reports), available at www.transparency.org (last visited Sept. 27, 2004).

123. See, e.g., Cecil Hunt, *Going International: Fundamentals of International Business Transactions, Recent Multilateral Measures to Combat Corruption*, ALI-ABA, May 13-15, 2004, at 261-62 (noting new efforts in the international fight

Where possible, they consult with local partners and legal experts in developing countries. Among other developments that NGOs monitor are national legal initiatives that seek to address corporate conduct overseas.¹²⁴ Two examples are instructive, though neither currently has enough political support for enactment.

First, legislation has been introduced in the US Congress that would require US nationals that employ more than twenty people in a foreign country to implement a Corporate Code of Conduct.¹²⁵ The bill imposes reporting requirements, identifies situations that allow for a termination of government contracts or other preferences, and provides enforcement mechanisms including civil liability.¹²⁶ While the proposal is stalled in the committee process, it provides a useful example of possible legislative action at the national level.¹²⁷

Second, the Corporate Responsibility Coalition is spearheading an effort in the United Kingdom, linked to an overall review of the Companies Act.¹²⁸ This group of NGOs, called CORE, is seeking new standards in the areas of reporting, duty of care, and liability to ensure that companies meet their environmental, social, and economic responsibilities.¹²⁹ However, various factors have stymied

against bribery and corruption).

124. See IRENE, *Controlling Corporate Wrongs: The Liability of Multinational Corporations: Legal Possibilities, Initiatives and Strategies for Civil Society* (conveying the importance of pressure by a corporation's home state to ensure that the company acts responsibly in other countries), available at <http://www.indianet.nl/irene.html> (last visited Oct. 9, 2004).

125. See Corporate Code of Conduct Act, H.R. 2782, 107th Cong. (2001) (establishing legal guidelines for corporations in terms of labor rights, human rights and environmental protection based on U.S. and internationally recognized standards), available at <http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.2782>. Rep. Cynthia A. McKinney introduced the legislation on Aug. 2, 2001. *Id.*

126. See *id.* §§ 6-8 (outlining mechanisms for implementing responsible business practices for United States nationals operating in foreign countries).

127. See *id.* (on Aug. 24, 2001, the Corporate Code of Conduct Act was referred to the House Subcommittee on International Monetary Policy and Trade, for a period that the Chairman would subsequently determine).

128. See generally CORE Coalition, *The CORE Report* (providing information on numerous NGOs seeking to promote greater corporate accountability under the law), available at <http://corporate-responsibility.org/> (last visited Sept. 28, 2004).

129. See Press Release, Corporate Responsibility Coalition, Business Leaders and NGOs Meet on Corporate Responsibility (May 1, 2003) (noting that CORE seeks information on the social, environmental, and ethical impacts of business

legislative proposals here as well. Despite calls for greater legal regulation of companies, the UK Minister for Social Responsibility “remains convinced that the main focus of CSR should be a voluntary one.”¹³⁰

G. CSR AND DEVELOPMENT

Most NGOs welcome the involvement of the private sector in forging global solutions to the problems of sustainable development.¹³¹ They acknowledge that business resources and expertise should be mobilized to promote the UN objectives of alleviating poverty, advancing human rights, and protecting the environment. Recent global policy initiatives make clear that business is to play an increasing role in development policies and programs.¹³² However, as companies intensify their collaboration

activities), *available* *at*
http://www.foe.co.uk/campaigns/corporates/core/news/pdf/core_iblf_press_release_2.pdf (last visited Sept. 28, 2004).

130. DEPT. OF TRADE AND INDUSTRY, CORPORATE SOCIAL RESPONSIBILITY: A GOVERNMENT UPDATE 4 (2004) (Stephen Timms, commenting on his organization’s role in promoting CSR in the interests of business and the rest of society), *available at* http://www.societyandbusiness.gov.uk/pdf/dti_csr_final.pdf (last visited Sept. 28, 2004).

131. *See, e.g.,* DAVID F. MURPHY & JEM BENDELL, PARTNER IN TIME? BUSINESS, NGOS AND SUSTAINABLE DEVELOPMENT 5 (UNRISD 1999) (asserting that NGOs, by working as agents of civil society, are gaining greater recognition and power at local, national, and international policy levels).

132. A new level of collaboration between the UN, the World Bank, the International Monetary Fund, and the WTO is emerging on development issues, acknowledging a strong role for the private sector. Impetus for this approach lies in the UN Millennium Declaration’s provisions on development and poverty eradication, which anticipate sources of development financing through expansion of trade, alleviation of debt, and increased foreign investment. *See United Nations Millennium Declaration*, G.A. Res. 55/2, U.N. GAOR, 55th Sess., 8th plan mtg., U.N. Doc. A/55/L.2 (2000); *see also Millennium Development Goals: Progress Report* (providing follow-up reports on implementation) *available at* <http://www.un.org/millenniumgoals/mdg2004chart.pdf> (last visited Nov. 21, 2004); *Final Outcome of the International Conference on Financing for Development*, U.N. Doc. A/Conf.198/3 (2002) (articulating the goals agreed in Monterrey, Mexico in March 2002, and focusing on national, international, and systemic issues involved in development financing in the face of interdependence and globalization), *available at* <http://www.un.org/esa/ffd/0302finalMonterreyConsensus.pdf> (last visited Sept. 28, 2004).

with governmental and international agencies in the development process, the need for international legal standards becomes ever-more compelling.

The 2002 World Summit on Sustainable Development (“WSSD”),¹³³ held in Johannesburg, South Africa, provides one example of how NGOs may advance corporate accountability in this debate; among the tens of thousands of participants were heads of state, national delegates, UN and inter-governmental agency staff, and representatives from NGOs, churches, labor and business groups, and other organizations.¹³⁴ The WSSD, intended as a follow-up to the 1992 Conference on Environment and Development at Rio de Janeiro, covered topics ranging from famine to global warming to the AIDS epidemic.¹³⁵

During preparations for the WSSD, a number of civil society groups argued that participants should firmly place corporate social accountability on the Johannesburg agenda.¹³⁶ While NGOs worked

133. See Report of the World Summit on Sustainable Development, UN Doc. A/Conf.199/20, at 74 (2002); see also UNITED NATIONS WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987) (supplying early policy analysis on the notion of environmental sustainability); INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 1-5 (Alan Boyle & David Freestone eds., 2001) (discussing the subjects of environmental protection and sustainable development and their increasing influence on the field of contemporary international law).

134. See Report of the World Summit on Sustainable Development, *supra* note 133, at 74-79 (listing all attending organizations and entities).

135. See Johannesburg Summit 2002, *The Johannesburg Summit Test: What Will Change?* (outlining how the Summit intends to lay the groundwork for sustainable development action), available at http://www.johannesburgsummit.org/html/whats_new/feature_story.html (last visited Oct. 11, 2004).

136. See World Dev. Movement, *Making Investment Work for People: An International Framework for Regulating Corporations* (noting that, as international law applies mainly to governments, the challenge is to design a regulation mechanism which can deal with the global nature of corporations and also recognize national governments as legal sovereigns), available at <http://www.wdm.org.uk/cambriefs/wto/TNCs.htm> (last visited Sept. 28, 2004); see also KENNY BRUNO, CORPWATCH, GREENWASH +10: THE UN’S GLOBAL COMPACT, CORPORATE ACCOUNTABILITY AND THE JOHANNESBURG EARTH SUMMIT 12 (2002) (arguing that a convention on corporate accountability would provide a step toward democratic control over corporations at an international level, and showing how this goal supports the Johannesburg Summit’s purposes),

throughout the summit to secure concrete commitments, these fell short of expectations. A lengthy "Plan of Implementation" did, however, provide some grounds for further relevant action.¹³⁷ A section on "sustainable development in a globalizing world" included a provision to

Actively promote corporate responsibility and accountability, based on the Rio Principles, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships, and appropriate national regulations, and support continuous improvement in corporate practices in all countries.¹³⁸

Thus, NGOs are following up on the results of the WSSD and preparing for other development-related conferences, while striving to ensure that this increased corporate involvement in development policy is accompanied by an increased commitment to global values. As this process unfolds, they seek to remain aware of the special needs and development objectives of poorer countries and communities.¹³⁹

available at <http://www.corpwatch.org/downloads/gw10.pdf> (last visited Oct. 9, 2004).

137. See Report of the World Summit on Sustainable Development, Plan of Implementation, A/CONF.199/20 (2002), revised by A/ CONF.199/20/Corr.1 (2002) (promoting the integration of the three components of sustainable development: economic development, social development, and environmental protection), available at http://www.johannesburgsummit.org/html/documents/summit_docs.html (last visited Sept. 29, 2004).

138. *Id.* ¶ 45 (affirming that globalization should be fully inclusive and equitable, and that states and NGOs should formulate and implement national and international policies to promote the participation of developing countries).

139. See, e.g., UN Research Institute for Social Development (UNRISD) (explaining that UNRISD is undertaking a five-year study on "Business Responsibility for Sustainable Development" that aims to examine the effectiveness of governmental and international regulation as well as the developmental impact of efforts to raise social and environmental standards), available at www.unrisd.org (last visited on Nov. 21, 2004); Business for Social Responsibility ("BSR") (providing a report on "Business and Economic Development: The Impact of Corporate Social Responsibility Standards and Practices"), available at www.bsr.org (last visited Nov. 21, 2004).

H. CSR AND TRADE

Developments such as the globalization of the economy, the widespread push for deregulation, and the privatization of sectors previously within the public sphere have created unprecedented opportunities for international businesses.¹⁴⁰ International regulations have provided new ways for companies to protect their interests in areas as diverse as the North American Free Trade Area, the International Center for the Settlement of Investment Disputes, and the World Intellectual Property Organization.¹⁴¹ NGOs often raise the argument that such corporate rights must be balanced with corporate responsibilities, especially where vulnerable populations may be affected.

A current focus of NGO activity is the troubled round of trade negotiations under the World Trade Organization (“WTO”).¹⁴²

140. See Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 INT’L. LAW 69, 78 (2003) (noting how globalization in both developed and developing countries has also led to a reduced role for the state through deregulation of the economy and the privatization of public ventures).

141. See North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993) (allowing corporations to seek recompense from foreign governments for certain breaches through the Agreement’s private dispute-settlement mechanism), available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 (last visited Sept. 29, 2004); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Oct. 14, 1966, 17 U.S.T. 1270 (enabling corporations to submit disputes to binding arbitration by the International Center for the Settlement of Investment Disputes), available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm> (last visited Sept. 29, 2004); Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1770, 828 U.N.T.S. 3 (noting the principal objective of the World Intellectual Property Organization as the protection of intellectual property throughout the world through cooperation among states and with other international organizations), available at <http://www.wipo.int/clea/docs/en/wo/wo029en.htm> (last visited Sept. 29, 2004).

142. See World Trade Organization, Doha WTO Ministerial Declaration, WT/MIN(01)/DEC/1 (Nov. 14, 2001) (setting forward priorities for a new set of trade negotiations and attaching great importance to implementation-related issues), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited Sept. 29, 2004); see also JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 73-78 (MIT Press 1997) (explaining the evolution of the trade negotiation rounds and the movement

Among the dozens of issues that NGOs monitor under the “Doha Development Agenda” are the prospects for an investment agreement.¹⁴³ In previous rounds, the WTO addressed associated areas such as Trade-Related Investment Measures (“TRIMs”) and a General Agreement on Trade in Services (“GATS”).¹⁴⁴ Many developing countries object to the inclusion of this “new issue” of an investment agreement in these trade negotiations. They fear that the resulting agreement may force them to open industry and service sectors to foreign competition, while diminishing their ability to apply domestic legislation.¹⁴⁵ Thus, any agreement on investment may portend less control over the activities of international corporations, rather than more.¹⁴⁶ NGOs are seeking to ensure that if

from the GATT to the WTO); BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* 100-08 (Oxford Univ. Press 2001) (offering an overview of the negotiating rounds); Oxfam, *The Trade Report: Rigged Rules and Double Standards* (examining key issues in the Doha round from the standpoint of the impact on poor countries), available at <http://www.maketradeair.com> (last visited Sept. 29, 2004).

143. See Doha WTO Ministerial Declaration, *supra* note 142, ¶ 20 (agreeing that, with respect to trade and investment, “negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations”).

144. See Agreement on Trade-Related Investment Measures, Apr. 15, 1994, 33 I.L.M. 108 (prohibiting trade-related investment measures, such as local content requirements, that are inconsistent with basic provisions of GATT 1994), available at http://www.wto.org/english/docs_e/legal_e/18-trims.pdf (last visited Sept. 29, 2004); General Agreement on Trade in Services, Apr. 15, 1994, 33 I.L.M. 1167 (expanding the scope and competence of the WTO), available at http://www.wto.org/english/docs_e/legal_e/26-gats.pdf (last visited Sept. 29, 2004).

145. See generally Constantine Michalopoulos, *Developing Country Strategies for the Millennium Round*, 33 J. WORLD TRADE 1 (1999) (identifying and analyzing issues fundamental to future multilateral trade negotiations and suggesting strategies for integrating developing countries into the multilateral trading system); DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK (Bernard Hoekman et al. eds., 2002) (outlining some of the challenges facing developing countries in the world trading system), Martin Khor, *The WTO, the Post-Doha Agenda and the Future of the Trade System: A Development Perspective* (2002) (presenting a critique of the WTO from a third-world view).

146. See, e.g., ALEJANDRO VILLAMAR, *RMALC-MÉXICO, LEARNING LESSONS FROM NAFTA: DANGERS OF AN INVESTMENT AGREEMENT IN THE WTO* 1 (explaining how the investment provisions in NAFTA impinged on the Mexican government’s constitutional law powers, as NAFTA’s rules apply when dealing

such an agreement does emerge, its provisions will adequately take the interests of developing countries into account.¹⁴⁷

As a matter of advocacy strategy, a number of European NGOs are working together in a “Trade Justice Movement” campaign to change the rules that govern international trade and investment to make them more responsive to the needs of the poor.¹⁴⁸ Although the issues raised in this article are generally distinct, this campaign has prompted NGO interest in corporate accountability.¹⁴⁹

I. PARAMETERS OF INTERNATIONAL LAW

The debate on CSR poses major conceptual questions about the status of corporations as moral actors and the nature of their ethical and legal obligations. As the debate moves to the global level, further issues arise concerning the scope, formation, and implementation of international law and the extent to which it can bring corporations within its purview. A topic of particular interest to NGOs, tied into

with TNCs), available at http://www.boell.be/download/Presentation_Villamar.pdf (last visited Oct. 9, 2004).

147. See Oxfam, *Unwanted, Unproductive and Unbalanced: Six Arguments Against an Investment Agreement at the WTO* (demonstrating that such an agreement would be against the interests of developing-country members of the WTO), available at <http://publications.oxfam.org.uk> (last visited Nov. 21, 2004); see also Global Trade Negotiations, *WTO Public Symposium 2003: Investment Negotiations in the WTO* (describing how NGOs such as Oxfam and the Third World Network petitioned to prevent investment issues from being considered in WTO negotiations because of the potentially negative impact on developing countries), at <http://www.cid.harvard.edu/cidtrade/geneva/investment.html> (last visited Oct. 9, 2004).

148. See Press Release, Christian Aid, Trade for Life Event Kicks Off Mass Lobby (June 19, 2002) (discussing a parliamentary event of the Trade Justice Movement aimed at forging a discussion about the negative impact of trade rules on developing countries), available at <http://www.christian-aid.org.uk/campaign/trade/lobby/1906blob.htm> (last visited Sept. 29, 2004); see also Trade Justice Movement, *Trade Justice Movement Members* (identifying members of the Trade Justice Movement as including Christian Aid, ActionAid, CAFOD, Friends of the Earth, Oxfam, World Development Movement), at <http://www.tradejusticemovement.org/members.shtml> (last visited Oct. 9, 2004).

149. See Trade Justice Movement, *About the Trade Justice Movement* (explaining how, through the Trade Justice Movement, NGOs hope to create a fundamental change in the unjust rules and institutions governing international trade, so that trade can benefit everyone), at <http://www.tradejusticemovement.org/about.shtml> (last visited Oct. 9, 2004).

many of the policy areas noted above, is international human rights law.¹⁵⁰

The legal basis for holding companies accountable under human rights law poses a number of theoretical challenges. For one, there is ambiguity about the responsibility of corporations under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.¹⁵¹ There is no express requirement that companies must affirmatively protect human rights or take steps to prevent others from violating them. However, similar language in all three documents indicates that no state, group, or person has any right to engage in any activity aimed at the destruction or limitation of any of the rights or freedoms recognized therein.¹⁵² Thus, there is an inference that companies are at least

150. See generally Peter T. Muchlinski, *Human Rights and Multinationals: Is There a Problem?*, 77 INT'L AFF. 31 (2001) (assessing the main arguments for and against extending responsibilities for human rights to corporations), available at http://rru.worldbank.org/Documents/PapersLinks/human_rights_and_multinational_s.pdf (last visited Sept. 27, 2004); see also HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS *supra* note 20 (analyzing some of the conceptual issues surrounding corporate accountability for human rights); The University of Minnesota Human Rights Library (providing a "Business and Human Rights Links" page with a comprehensive and accessible list of treaties, guidelines, business policies, codes, and various academic and non-governmental organizations), available at <http://www1.umn.edu.humanrts/links/codes.html> (last visited Nov. 21, 2004).

151. See Frey, *supra* note 20, at 163-64 (noting that the UN human rights covenants bind ratifying governments rather than non-state actors such as transnational corporations).

152. See Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., art. 30, U.N. Doc. A/810 (1948), (providing that "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."); see also International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 5(1), 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) (providing that "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant."); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 5(1), 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force

under a duty to *respect* the rights of others.¹⁵³

This leads to a vital question about the indirect or direct responsibility of corporations. The traditional view is that nation-states, and not corporations, are the bearers of human rights obligations.¹⁵⁴ Thus, through the nation-state, certain duties may be placed on corporations indirectly. The other view, which is gaining ground in the wider discussion of corporate social responsibility, is that persons and communities may hold corporations directly accountable for the observance of certain human rights.¹⁵⁵

While the complexities cannot be addressed within the scope of this article, legal experts are grappling with theories on corporate accountability for human rights. For example, in one analysis, the corporation's duties turn on four factors: its ties to the government or complicity in the violation, its nexus to affected populations, the nature of the particular human right at issue, and the internal structure of the business enterprise.¹⁵⁶ Overall, the trend appears to be towards establishing greater legal accountability.

Jan. 3, 1976) (providing that "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.").

153. See Frey, *supra* note 20, at 163-64 (commenting on corporations' ethical and moral duty to respect fundamental human rights).

154. See BEYOND VOLUNTARISM, *supra* note 1, at 23-43 (setting forth arguments that international human rights obligations should apply to companies as well as states).

155. See *id.* at 121-41 (applying principles of tort and international law to hold companies responsible for human rights violations).

156. See *Corporations and Human Rights: A Theory of Legal Responsibility*, *supra* note 42, at 496-522 (providing an inductive approach for finding corporate liability that considers the actual operations of business enterprises); see also BEYOND VOLUNTARISM, *supra* note 1, at 94-109 (advocating the use of international procedures to enforce obligations) and Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L.J. 339 (2001) (discussing the subject of complicity as a basis for holding TNCs accountable under international law).

A function of law is to balance power and obligation by establishing enforceable rights and corresponding duties. . . Just as human rights law was initially developed as a response to the power of states, now there is a need to respond to the growing power of private enterprise, which affects the lives of millions of people around the world.¹⁵⁷

This theme of responding to the growing power of private enterprise is at the core of many NGO campaigns related to the conduct and impact of multinational corporations.

J. AN INTERNATIONAL LEGAL FRAMEWORK

A growing number of NGOs, policy institutes, legal experts, and development specialists are urging that voluntary efforts toward CSR be augmented with legally-binding obligations, including the elaboration of an international framework or treaty. One general problem, as a United Nations Development Program report explains, is that “there are no mechanisms for making ethical standards and human rights binding for corporations.”¹⁵⁸ Aside from the lack of international procedures, NGOs report that the resort to national laws is often frustrated by the “corporate veil” of business structures, official corruption, the lack of effective procedures, or the unavailability of counsel or resources to aggrieved parties.¹⁵⁹ Effectively, this leaves TNC legal standards ambiguous and the avenues for redressing TNC breaches of such standards limited.

NGOs are well aware of the legal, practical, and political difficulties associated with the development and implementation of a binding normative framework for corporations. Apart from reaching agreement on substantive principles, the international community

157. See BEYOND VOLUNTARISM, *supra* note 1, at 9-10 (considering the use of legal principles to constrain corporate power).

158. UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 1999 8 (1999) (advocating national and global governance standards that center around human development and equity), *available at* http://hdr.undp.org/reports/global/1999/en/pdf/hdr_1999_full.pdf (last visited Sept. 30, 2004).

159. See INSIGHTS FROM FOREIGN DIRECT LIABILITY, *supra* note 1, at 2-4 (describing legal efforts to secure transnational corporate accountability).

would need to establish effective procedures to promote compliance and provide remedies in the event of breach. Indeed, such legal issues feature prominently in NGO conferences and workshop related to CSR.¹⁶⁰ Just a few of the questions NGOs are attempting to clarify include:

- The scope of industry sectors to be covered, as well as a definition of corporations or other business enterprises.
- The substantive set of principles to be upheld, including any distinctions for types of business or level of a country's economic development.
- The adequacy of any single set of principles to address the wide range of CSR issues—from human rights, to labor conditions, to environmental protection and so forth.
- The relationship between an international approach to regulation and national legal systems.
- The impact of legally-binding measures on voluntary initiatives and corporate policies.
- The need to assess the potential regulatory burden and liability exposure of transnational corporations, especially with respect to detrimental economic impacts on developing countries.
- The need to establish some type of oversight body and ensure its competence, legitimacy and authority.
- The challenge of establishing a system of implementation and enforcement, including corporate disclosure and reporting requirements; monitoring, investigation and complaint mechanisms; the problem of extraterritoriality and conflicting jurisdiction; the relationship with national laws and administrative processes; the potential legal procedures for making a claim for damages, including

160. See CHRISTIAN AID, LEGAL WORKSHOP ON INTERNATIONAL REGULATION OF MULTATIONALS 1 (2003) (communicating the aims of a joint legal workshop that Christian Aid hosted in collaboration with FIELD and CAFOD), available at <http://www.field.org.uk/PDF/Multinat.pdf> (last visited Sept. 30, 2004). The goals of the workshop were to: (1) develop ideas for future international regulation of the social and environmental impact of multinationals in light of the current political momentum around corporate accountability; and (2) consolidate and build upon past efforts to establish an international regulatory model for multinationals, addressing the application of international law to corporations through national governments, as well as through intergovernmental institutions and processes. *Id.*

standing to bring an action; the potential range of remedies available to provide redress to victims; the availability of sanctions against corporations and possibly their officers; the source of funding to operate such a system, and many other issues.¹⁶¹

- The prospects for establishing interim accountability mechanisms, as the process of securing any international convention on corporate accountability will be difficult and time-consuming.

In closing, this quest for greater legal accountability of corporations may be understood as part of the international community's commitment to the international rule of law. The law, of course, is not without its limits; but it is one means of advancing the realization of international justice. Many NGOs would argue that global companies, as powerful economic, social, and political actors, must increasingly be brought within the law's domain.

161. See *TRADE FOR LIFE* *supra* note 1 at 139-43 (arguing for the establishment of an official international body or agency to oversee the implementation of binding standards for corporations).