BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 26 2008 NUMBER 2

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Berkeley Journal of International Law

Volume 26 | Issue 2 Article 1

2008

Keynote Address: International Standard-Setting on the Human Rights Responsibilities of Business

David Weissbrodt

STEFAN A. RIESENFELD SYMPOSIUM 2008 MARCH 14, 2008, BERKELEY, CALIFORNIA

Keynote Address: International Standard-Setting on the Human Rights Responsibilities of Businesses

By
David Weissbrodt*

It is a great honor to be invited to my alma mater to speak at this conference highlighting the human rights responsibilities of transnational corporations and to be selected to receive this year's Stefan A. Riesenfeld Award for my contributions in the field of international law.

It is particularly appropriate that this conference relating to the human rights obligations of transnational corporations is associated with Professor Riesenfeld. The human rights community and I are personally indebted to Stefan Riesenfeld for his contribution to the leading human rights precedent of *Filár-*

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tiga v. Peña Irala.[1] As a beginning law professor, I filed an amicus brief in that case for Amnesty International. Much more influential, however, was Professor Riesenfeld's brief for the U.S. State Department, which supported using the Alien Torts Statute[2] to bring human rights suits in U.S. courts. As a result of Riesenfeld's groundbreaking brief and the resulting *Filártiga* decision, this statute is now being used to sue corporations for their human rights abuses.[3]

This afternoon, I would like to contribute to our discussion by touching on five subjects: First, why should there be international concern about corporate social responsibility and human rights? Second, what international human rights standards can be interpreted to apply to business? Third, what international standards apply directly to business? Fourth, what contributions do the U.N. Sub-Commission Norms make to human rights standard-setting for business? And fifth, what contribution is the U.N. Special Representative to the Secretary-General making and how will the Sub-Commission Norms fare in that context?

I.
WHY SHOULD THERE BE INTERNATIONAL CONCERN ABOUT CORPORATE SOCIAL RESPONSIBILITY AND HUMAN RIGHTS?

Efforts to promote corporate social responsibility acknowledge both the positive and potentially negative consequences of business activity. Corporations are active in some of the most dynamic sectors of the national and world economies. They bring new jobs, technology, and capital, and are capable of exerting a positive influence on fostering development by improving living and working conditions. At the same time, however, companies may abuse human rights by employing child laborers, discriminating against certain groups of employees such as union members and women, attempting to repress independent trade unions thereby discouraging the right to bargain collectively, failing to provide safe and healthy working conditions, and limiting the broad dissemination of appropriate technology and intellectual property. These companies also dump toxic wastes, and their production processes may have negative consequences for the lives and livelihoods of neighboring communities.

Whether one perceives businesses as critical for the prosperity and economic success of the community or focuses upon the problems they may cause, there is certainly no doubt that companies are powerful forces in this beautiful

1. 630 F.2d 876 (2d Cir. 1980).

2. 28 U.S.C. 1350 (2006).

3. *See, e.g.*, Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254 (2d Cir. 2007); Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007), *reh'g granted*, 499 F.3d 923 (9th Cir. 2007); Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005). *See also* Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses*, 26 NW. J. INT'L L. & BUS. 43 (2005); Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1 (2004).

Bay Area, throughout this country, and around the world. The 300 largest corporations account for roughly one-quarter of the world's productive assets.[4] For example, one automobile company's sales in a single year are greater than the gross national product of 178 countries, including Malaysia, Norway, Saudi Arabia, and South Africa.[5] Transnational corporations (TNCs) hold ninety percent of all technology and product patents worldwide[6] and are involved in seventy percent of world trade.[7] TNCs directly employ ninety million people (of whom some twenty million live in developing countries) and produce twenty-five percent of the world's gross product. The top 1,000 TNCs account for eighty percent of the world's industrial output.[8] Not only are these companies economically powerful, but they have the mobility and capacity to evade national laws and enforcement, because they can relocate or use their political and economic clout to pressure governments to ignore corporate abuses.[9]

International human rights standards, such as those promulgated by the U.N., are increasingly important to achieving corporate social responsibility.[10] The need for such international standards is especially visible as the global economy becomes more complex.[11] Considering the

> ideology of profit maximization which subordinates all other considerations to . . . maximizing shareholder value[,] . . . temptations exist in business organizations of all kinds . . . to cut corners with regard to the environment, employees, producers, communities, third-world nations, and other stakeholders impacted by their policies and operations.[12]

In the absence of clear international standards articulating the human rights obligations of individual businesses, it is likely that temptations of short-term profit maximization may outweigh the benefits of socially responsible behavior.

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4. MEDARD GABEL & HENRY BRUNER, GLOBAL INC.: AN ATLAS OF THE MULTINATIONAL CORPORATION 5 (2003) (citing *A Survey of Multinationals*, ECONOMIST, Mar. 27, 1993, at 9).

5. *Id.* at 2.

6. "TNCs reportedly control 90% of the world's technology patents." Howard A. Kwon, *Patent Protection and Technology Transfer in the Developing World: The Thailand Experience*, 28 GEO. WASH. J. INT'L L. & ECON. 567, 570 n.13 (1995) (citing Suwanna Asavaroengchai, *Seeking a Fair Deal in Global Trade*, BANGKOK POST, Oct. 19, 1994, at 31).

7. TOM ATHANASIOU, DIVIDED PLANET: THE ECOLOGY OF RICH AND POOR 194 (1996); DAVID KORTEN, WHEN CORPORATIONS RULE THE WORLD 124 (1995).

8. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), WORLD INVESTMENT REPORT 2001 at 9.

9. Claudio Grossman and Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L & POL'Y 1, 8 (1993) ("The fact that they have multiple production facilities means that [transnational corporations] can evade state power and the constraints of national regulatory schemes by moving their operations between their different facilities around the world.").

10. Edwin M. Epstein, *The Good Company: Rhetoric Or Reality? Corporate Social Responsibility and Business Ethics Redux*, 44 AM. BUS. L.J. 207, 213 (2007).

11. *Id.*

12. *Id.*

Corporations themselves can benefit in a number of ways when they act in a socially responsible manner. For example, a corporation might benefit by attracting and retaining a higher-quality workforce, by increasing the job satisfaction of its employees, by receiving an improved reputation among consumers, and by protecting the value of its trademark and reputation.[13] Although increasing responsibility may not lead to an increase in short-term profits, TNCs may benefit in the long run by staying ahead of new, stricter regulations and by attracting investment from concerned investors.[14] Further, because of its global nature, business can promote the protection of human rights because it possesses "the capability to reach across borders and to get people who may not otherwise work together to do so."[15] Business may be in the position to "damper fires leading to violence simply by providing economic opportunity[,]" provided it does so without "sow[ing] the seeds for resentment and violence."[16]

II.
WHAT INTERNATIONAL HUMAN RIGHTS STANDARDS CAN BE INTERPRETED TO APPLY TO BUSINESS?

Given their importance in the world, it is really remarkable that corporations have not received more attention for their contributions to the evolution of international law and international human rights law in particular. International law and human rights law have principally focused on protecting individuals from violations by governments. There has been increasing attention, however, devoted to individual responsibility for war crimes, genocide, and other crimes against humanity, based on the Nuremberg tribunals in the 1940s,[17] the criminal tribunals established in the 1990s for the former Yugoslavia[18] and Rwanda,[19] and the International Criminal Court,[20] which has now been accepted by 106

13. Erik Assadourian, *The State of Corporate Responsibility and the Environment*, 18 GEO. INT'L ENVTL. L. REV. 571, 574 (2006).

14. *Id.* at 576.

15. Timothy L. Fort, Essay, *The Times and Seasons of Corporate Responsibility*, 44 AM. BUS. L.J. 287, 322 (2007). *See* LISBETH SEGERLUND, MAKING CORPORATE SOCIAL RESPONSIBILITY AN INTERNATIONAL CONCERN: NORM CONSTRUCTION IN A GLOBALIZING WORLD 220-28 (2007).

16. Fort, *supra* note 15, at 323.

17. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279, http://www1.umn.edu/humanrts/instree/imt1945.htm.

18. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

19. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

20. Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (July 17, 1998) (*entered into force* July 1, 2002). The International Criminal Court has jurisdiction only over natural persons (including corporate officers), but not over legal persons, such as corporations. *Id.*

nations, although unfortunately not the United States.[21]

Since businesses are comprised of individuals, these legal responsibilities would apply to business people as well. For example, in the trials of Nazi leaders following World War II, German industrialists were convicted of charges relating, *inter alia*, to the use of slave labor and for designing and producing poison gas used in the concentration camps of the Third Reich.[22] Further, the extension of legal responsibilities provides support for the application of international human rights law not only to states, but also to non-state actors, including individuals and businesses, as well as armed opposition groups.

Some human rights treaties and other law-making instruments may be interpreted to apply to businesses. Most prominently, one can find a relevant passage in the Universal Declaration of Human Rights,[23] the primary non-treaty instrument that in 1948 first established an authoritative, worldwide definition of human rights. While the Universal Declaration principally focuses on the obligations of states, it also mentions the responsibilities of individuals and "every organ of society," which includes businesses.

Human rights treaties also can be interpreted to apply indirectly to businesses. For example, under the International Covenant on Civil and Political Rights,[24] a treaty that has been ratified by 160 nations including the United States, each State party: "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the pre-

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Art. 25. *See* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 143-45 (Menno T. Kamminga and S. Zia-Zarifi eds., 2000).

21. COALITION FOR THE INTERNATIONAL CRIMINAL COURT, RATIFICATION/ACCESSION AND SIGNATURE OF THE AGREEMENT ON THE PRIVILEGES AND IMMUNITIES OF THE COURT (APIC), BY REGION, http://www.iccnow.org/documents/RatificationsbyUNGroup_14_mar_08_eng.pdf.

22. *See* United States of America v. Alfried Felix Alwyn Krupp von Bohlen und Halbach, "The Krupp Case," 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950); United States of America v. Carl Krauch "The Farben Case," 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952); Case no. 57, "the I.G. Farben Trial," US military Tribunal, Nuremberg, 14 Aug. 1947-29 July 1948, 10 Law Reports of Trials of War Criminals 1 (1952).

> While the Farben organisation, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the Farben organisation as an instrument by and through which they committed the crimes enumerated in the indictment. All of the members of the Vorstand or governing body of Farben who were such at the time of the collapse of Germany were indicted and brought to trial.

8 Trials of War Criminals Before the Nuremberg Military Tribunals 1108 (1952).

23. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

24. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

sent Covenant . . . ."[25]

Accordingly, if a corporation endangers the rights of an individual, the State has a duty to ensure respect of human rights and thus to use due diligence to take preventative action.

Some other U.N.-based treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, specify state responsibility for the misconduct of any "persons, group or organization"[26] or even of "any person, organization or enterprise."[27]

III.
WHAT INTERNATIONAL STANDARDS APPLY DIRECTLY TO BUSINESS?

In addition to these treaty and non-treaty standards that focus principally on governments and may be interpreted to apply, at least indirectly, to businesses, the OECD, ILO, UN, Social Accountability International, and other organizations have directly addressed the responsibilities of companies. For example, in 1976 the Paris-based Organization for Economic Cooperation and Development (OECD) established Guidelines for Multinational Enterprises, and updated them in 2000 to promote responsible business conduct consistent with applicable laws.[28] However, the OECD Guidelines mentioned human rights only once in a single paragraph. In 1977 the International Labor Organization (ILO) developed its Tripartite Declaration of Principles Concerning Multinational Enterprises, which calls upon businesses to follow the relevant labor conventions and recommendations, and which were updated in 2006.[29]

Since the 1980s, concerns of civil society and an emerging concern of companies themselves for social responsibility have led hundreds of companies and several industry associations to adopt voluntary codes of conduct.[30] This number has increased as many corporations, including those that have been the targets of protests and boycotts, have come to see the economic value inherent in

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25. *Id.* Art. 2.

26. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 1, 1965, S. Exec. Doc. C, 95-2 (1978); 660 U.N.T.S. 195, Art. 2(1)(d).

27. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, Art. 2(e).

28. Organization for Economic Cooperation and Development, *Guidelines for Multinational Enterprises*, 15 I.L.M. 967 (1976). The OECD updated these Guidelines in 2000. *OECD Guidelines for Multinational Enterprises, Revision 2000*, http://www.oecd.org/dataoecd/56/36/1922428.pdf.

29. International Labor Organization [hereinafter "ILO"], *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 17 I.L.M. 422, para. 6 (1978), http://www.ilo.org/public/english/employment/multi/download/declaration2006.pdf [hereinafter "Tripartite Declaration"].

30. *See* Peter Frankental & Frances House, Human Rights: Is It Any of Your Business? 23 (2000).

adopting socially responsible policies.[31] Some publicly spirited business organizations, such as Social Accountability International, the International Business Leaders Forum, and the Business Leaders Initiative on Human Rights have developed voluntary principles and educational activities, such as SA 8000, applicable to a broad range of companies. SA 8000, for example, focuses principally on the need for a safe and healthy work environment and other labor standards. There are now 1,373 SA 8000 certified facilities.[32]

In January 1998, at the World Economic Forum in Davos, U.N. Secretary-General Kofi Annan proposed a "Global Compact" of shared values and principles.[33] The original Global Compact asked businesses to voluntarily support and adopt nine very succinctly expressed core principles, which are divided into categories dealing with general human rights obligations, standards of labor, and standards of environmental protection. In 2004 the Global Compact added a tenth core principle on corruption.[34] These principles represented increased attention to the responsibilities of corporations in international law and international economic relations. Some scholars have even argued that the Global Compact reflects the increased influence of TNCs in international law making.[35] The new U.N. Secretary-General Ban Ki-moon endorsed the Global Compact a few days after he took office in January 2007.

Several U.N.-based institutions have also adopted fragmentary corporate responsibility standards, limiting their procurement to companies that protect, for example, the environment (UNHCR), do not engage in child labor (UNICEF), do not promote cigarettes (WHO), and do not engage in corrupt business practices (World Bank). If these standards were adopted more consistently, they could yield quite a powerful influence on corporate social responsibility.

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31. Surya Deva, *Sustainable Good Governance and Corporations: An Analysis of Asymmetries*, 18 GEO. INT'L ENVTL. L. REV. 707, 728 (2006).

32. Social Accountability Accreditation Service, *Certified Facilities List*, http://www.saasaccreditation.org/certfacilitieslist.htm.

33. *Economic Forum in Davos, Switzerland*, U.N. Doc. SG/SM/6448 (Jan. 31, 1998).

34. The Ten Principles of the U.N. Global Compact, http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html. The principles are that businesses should: (1) support and respect the protection of internationally proclaimed human rights within their sphere of influence; (2) make sure they are not complicit in human right abuses; (3) uphold the freedom of association and the effective recognition of the right to collective bargaining; (4) eliminate all forms of forced and compulsory labor; (5) abolish child labor; (6) eliminate discrimination in respect of employment and occupation; (7) support a precautionary approach to environmental challenges; (8) undertake initiatives to promote greater environmental responsibility; (9) encourage the development and diffusion of environmentally friendly technologies; and (10) work against all forms of corruption, including extortion and bribery.

35. *See* Surya Deva, *Global Compact: A Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship*, 34 SYRACUSE J. INT'L L. & COM. 107, 109 (2006).

IV.
WHAT CONTRIBUTION DO THE U.N. SUB-COMMISSION NORMS MAKE TO HUMAN RIGHTS STANDARD-SETTING AS TO BUSINESS?

In August 2003, twenty-six human rights experts from twenty-six nations around the globe who were then members of the U.N. Sub-Commission on the Promotion and Protection of Human Rights unanimously approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[36] The Sub-Commission Norms provide that:

> States have the primary responsibility to promote . . . and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote . . . and protect human rights recognized in international as well as national law . . . .[37]

This core provision of the Sub-Commission Norms addresses an issue that not only was considered in preparing the Norms, but also arose in preparing the ILO,[38] OECD,[39] and Global Compact[40] guidelines, that is, whether these standards apply only to TNCs or to all businesses. On the one hand, most media attention has focused on the activities and misdeeds of major corporations, such as Blackwater, Enron, Parmalat, Union Carbide (Dow Chemical), and Worldcom.[41] Further, as I mentioned earlier, TNCs have the mobility and power to evade national laws and enforcement because they can relocate or use their political and economic clout to pressure governments to ignore corporate abuses.[42] It was likely this sort of thinking which led the organizers of today's conference to focus on transnational corporations. On the other hand, if one applies human rights standards only to TNCs, such differential treatment could be considered

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36. Sub-Comm'n on Prot. & Promotion of Human Rights, Working Group, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) (Approved Aug. 13, 2003, by U.N. Sub-Comm'n on Prot. & Promotion of Human Rights Res. 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11at 52 (2003)).

37. *Id.* at para. 1.

38. Paragraph 11 of the ILO Tripartite Declaration provides that "[m]ultinational and national enterprises, wherever the principles of this Declaration are relevant to both, should be subject to the same expectations in respect of their conduct in general and their social practices in particular." ILO, Tripartite Declaration, *supra* note 29, at para. 11.

39. "Multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both." OECD Guidelines for Multinational Enterprises, Revision 2000, *supra* note 28, at paras. 1-4 (emphasis omitted).

40. The Global Compact is aimed at "businesses," rather than multinational or domestic enterprises in particular. The Ten Principles of the U.N. Global Compact, *supra* note 34.

41. *See* Business & Human Rights Resource Center, http://www.business-humanrights.org/Home.

42. Grossman & Bradlow, *supra* note 9, at 8 (1993).

discriminatory. Further, it is not easy to define a transnational corporation and there is a risk that sophisticated corporate lawyers, such as those trained here at Berkeley Law, will be able to structure any business so as to avoid the application of international standards designed only for TNCs.

Accordingly, the Sub-Commission Norms apply not only to TNCs but also to national companies and local businesses in that each will be responsible according to "their respective spheres of activity and influence." The U.N. Sub-Commission Norms further apply to subsidiaries and suppliers. This approach balances the need to address the power and responsibilities of TNCs and to level the playing field of competition for all businesses, while not being too burdensome on very small companies.

Although there is a very important educational value in voluntary company codes, such policies can be posted on the Web one day and taken down the next. They are often very vague with regard to human rights commitments and generally lack mechanisms for assuring continuity or implementation. For example, only approximately 150 corporations have mentioned human rights in their respective company codes.[43] The Global Compact has been a great success in encouraging about 3,700 companies to join,[44] but there remain about 67,000 other transnational corporations which have not yet joined. Such voluntary initiatives as SA 8000 and Valore Sociale in Italy play an extremely important role in encouraging corporate social responsibility for those companies that join and as to which there is far more implementation and monitoring than the Global Compact.

The U.N. Sub-Commission Norms, however, are still necessary to supplement existing international standards because they apply to all companies—not just those companies that agree to participate. It is also important to develop standards that carry the imprimatur of the United Nations.

In addition, the Sub-Commission Norms have the most comprehensive approach to human rights, requiring TNCs and other business enterprises to respect: the right to equality of opportunity and treatment; the right to security of persons; the rights of workers, including a safe and healthy work environment and the right to collective bargaining; international, national, and local laws and the rule of law; a balanced approach to intellectual property rights and responsibilities; transparency and avoidance of corruption; the right to health as well as other economic, social, and cultural rights; other civil and political rights, such as the freedom of movement; consumer protection; and environmental protection.

With respect to each of those subjects, the Sub-Commission Norms princi-

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43. Business & Human Rights Resource Center, *Companies with Human Rights Policies*, http://www.business-humanrights.org/categories/companypolicysteps/policies/companieswithhumanrightspolicies.

44. United Nations Global Compact, *Participants & Other Stakeholders*, http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html.

pally reflect, restate, and refer to existing international standards, but apply them not only to governments but directly to businesses. The Norms are consistent with the progressive development of international law in applying standards not only to states for which they were primarily drafted, but also to individuals, armed opposition groups, and other non-state actors.

While they apply to all states and companies, the Sub-Commission Norms are not legally binding but are similar to many other U.N. declarations, principles, guidelines, and standards that interpret existing law and summarize international practice without reaching the status of a treaty. The Sub-Commission Norms do, however, include some basic implementation procedures by: (1) anticipating that companies will adopt their own internal rules of operation to assure the protections set forth by the Norms; (2) indicating that businesses are expected to assess their major activities in light of the Norms; (3) subjecting companies' compliance with the Norms to independent and transparent monitoring that includes input from relevant stakeholders; (4) calling for reparations or other compensation in cases where the Norms have been violated; and (5) calling upon governments to establish a framework of application of the Norms.

The Norms were transmitted to the U.N. Commission on Human Rights—then the parent body of the Sub-Commission. The 2004 session of the Commission welcomed the Sub-Commission Norms and asked for a report from the High Commissioner for Human Rights, but at the same time noted that the document, as a draft before the Commission, did not on its own have any legal status. Simultaneously, however, the Commission recognized for the first time in its history that corporate social responsibility and human rights belong on the human rights agenda of the United Nations.

V.
WHAT CONTRIBUTION IS THE U.N. SPECIAL REPRESENTATIVE TO THE SECRETARY-GENERAL MAKING?

At its 2005 session, the Commission adopted a resolution[45] welcoming the High Commissioner's report[46] that in an extraordinarily balanced fashion identified precisely the same number of criticisms of the Sub-Commission Norms as it found positive attributes. The Commission also called for the appointment by the Secretary-General of a Special Representative on the issue of human rights

45. C.H.R. Res. 2005/69, U.N. Doc. E/CN.4/2005/L.11/Add.7 at 70 (2005), was adopted April 20, 2005, by a vote of 49 in favor, 3 against (Australia, South Africa, and the United States), and 1 abstaining (Burkino Faso). The United States called for a vote and explained its vote against the resolution. U.S. Delegation to the Commission on Human Rights, http://www.humanrights-usa.net/2005/0420Item17TNC.htm.

46. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Promotion & Prot. of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005).

and transnational corporations and other business enterprises. (You might note the similarity between the name of the norms and the title of the new post.) Secretary-General Kofi Annan appointed Professor John Ruggie, who had been the principal drafter of the U.N. Global Compact, to serve as the Special Representative for "an initial period of two years," and then his mandate was extended for one more year until this Spring 2008. The Special Representative of the Secretary General (known as the SRSG) was expected, *inter alia*, to "identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights."[47]

Meanwhile, the fifty-three member Commission on Human Rights has been replaced by a new forty-seven member Human Rights Council, and the procedural appendages (including thematic rapporteurs) of the Commission, such as the SRSG, were transferred to the Council that was elected in May 2006 and had its first meeting in June. The new Council has had a lot to do in establishing its procedures, organizing itself, and replacing the twenty-six member Sub-Commission with a new eighteen-member Advisory Committee. Thus, the Council is devoting some time to begin handling substantive matters such as the human rights responsibilities of business. The SRSG has however produced several initial reports[48] as well as an October 2007 article in the *American Journal of International Law*.[49]

Although in his first interim report the SRSG noted the Sub-Commission Norms and made a positive and generally balanced contribution to the international understanding of the relationship between human rights and business,[50] the SRSG in his 2007 article stated that the "business community, represented by the International Chamber of Commerce and the International Organization of Employers, was firmly opposed."[51] In drafting the Norms, the Sub-Commission did reach out to, and received some input from individual companies and the international business community, including the organizations mentioned in the SRSG's article. Certainly, input from the business community is

47. ECOSOC, Sub-Comm'n on Prot. & Promotion of Human Rights, Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006). *See also* U.N Human Rights Council, Business and human rights: mapping international standards of responsibility and accountability for corporate acts, A/HRC/4/35 (Feb. 19, 2007) & add. 1-4 (prepared by John Ruggie); U.N. Human Rights Council, Report by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Human rights impact assessments-resolving key methodological questions, A/HRC/4/74 (Feb. 5, 2007).

48. U.N. Doc. E/CN.4/2006/97 (2006). *See also* A/HRC/4/35 (2007) & add. 1-4; A/HRC/4/74 (2007).

49. John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 A.J.I.L. 819 (2007).

50. U.N. Doc. E/CN.4/2006/97, *supra* note 48. *See* Michael Wright & Amy Lehr, *Business Recognition of Human Rights: Global Patterns, Regional and Sectoral Variations* (2006).

51. Ruggie, *supra* note 49, at 821.

helpful, since their contributions would make it more likely that international standards will influence their actions.[52] It is not surprising, however, that these organizations representing large corporations have been more cooperative with the SRSG as he raised criticisms of the Sub-Commission Norms. These international business organizations—reflecting the most hard-line big corporate perspective—oppose any standards that are not voluntary. The International Chamber of Commerce initially even opposed the idea of the voluntary Global Compact.

The SRSG also argued that the Sub-Commission Norms "embodied sources of conceptual as well as factual confusion, with potentially deleterious consequences for the realization of human rights."[53] The SRSG's criticisms reflect a misunderstanding of the role of soft law principles in international law as distinguished from treaties.

According to the SRSG, although the Sub-Commission Norms enumerated rights that are particularly relevant to business, the list of rights also included many that "states have not recognized or are still debating at the global level."[54] In fact, the Norms summarize the principles of international human rights law relevant to each paragraph. For example, paragraphs three and four of the Norms summarize the principles of humanitarian law relevant to corporations, stating:

> 3. Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, or other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.
>
> 4. Security arrangements for transnational corporations and other business enterprises shall observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate.55

Those two provisions derive most prominently from the Geneva Conventions,[56] the Statute of the International Criminal Court,[57] the Code of Conduct

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52. Lisa M. Fairfax, *Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 800 (2007).

53. Ruggie, *supra* note 49, at 822.

54. *Id.* at 825.

55. Norms, *supra*, note 36, paras. 3-4.

56. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

57. Rome Statute of the International Criminal Court, July 17, 1998, art. 12 (2), U.N. Doc. 32/A/CONF, 183/9.

for Law Enforcement Officials,[58] and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,[59] which in turn have been applied to oil, mining, and other extractive industry companies in the Voluntary Principles on Security and Human Rights.[60] SRSG Ruggie's concern seems to rely on a contention initially presented by the International Chamber of Commerce[61] in which he argued that:

> In several instances, and with no justification, the Norms end up imposing higher obligations on corporations than states, by including as standards binding on corporations instruments that not all states have ratified or have ratified conditionally, and even some for which states have adopted no international instruments at all.[62]

The Sub-Commission Norms, of course, do not constitute a treaty and therefore cannot bind either states or corporations in the same way that treaties are binding once they are ratified. If, however, one wanted to identify the humanitarian law principles most applicable to both state and non-state actors, the Geneva Conventions, the ICC Statute, the Code of Conduct for Law Enforcement Officials, the Basic Principles on Firearms, and the Voluntary Security Principles are the most relevant. United Nations drafters regularly follow this approach of borrowing provisions from one instrument to develop another.[63] This approach to borrowing language is not at all uncommon. It should also be noted that the Sub-Commission carefully consulted the International Committee of the Red Cross to make sure that these provisions of the Norms were consistent with humanitarian law.

Further, the Norms clearly declare in the first paragraph that states, not corporations, have the primary responsibility to promote and protect human rights. If one were to take the SRSG/International Chamber of Commerce argument seriously and insist on universal ratification of every provision, it would disal-

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58. Code of Conduct for Law Enforcement Officials, G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979).

59. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990).

60. Voluntary Principles on Security and Human Rights, Fact Sheet Released by the Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, December 20, 2000.

61. *See* International Chamber of Commerce and the International Organisation of Employers, Joint Views of the IOE and ICC on the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. ESCOR, 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/NGO/44 (2003); http://www.reports-and-materials.org/IOE-ICC-views-UN-norms-March-2004.doc.

62. U.N. Doc. E/CN.4/2006/97, para. 66 (2006).

63. *See* DAVID WEISSBRODT, FIONNUALA NI AOLAIN, JOAN FITZPATRICK, & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS LAW, POLICY, AND PROCESS (forthcoming 4th ed.) (manuscript, chapter 2 at 4, on file with author) (noting that treaty language generally "has a long pedigree as it is usually adopted or at least heavily relied upon in future instruments. Its long-term use ideally strengthens the effect of and understanding about what the provisions are designed to accomplish").

low the development of any non-treaty instrument on this or any other subject. It would have even made it impossible to draft and get approved the Universal Declaration of Human Rights.

The SRSG also argues that the Sub-Commission Norms could "undermine corporate autonomy, risk taking, and entrepreneurship."[64] SRSG Ruggie believes that TNCs should be forced to assume the obligations of the government only when they perform state functions.[65] Since states are afforded a certain amount of discretion in meeting their human rights obligations, imposing on TNCs the "full range of duties . . . directly under international law by definition reduces the discretionary space" allowed in pursuit of human rights norms.[66] Additionally, the SRSG says that shifting the human rights burdens of weak governments onto private corporations would "undermine domestic political incentives to make governments more responsive and responsible to their own citizenry."[67]

In fact, the Sub-Commission Norms are meant to strengthen the hands of governments by giving them clear standards to which they can refer in dealing with powerful corporations. As a result, all governments, weak and strong, will be better able to protect their residents from the abuses of non-state actors, such as businesses. Businesses will also benefit from the leveling of the competitive playing field provided by the Sub-Commission Norms.

As I mentioned earlier, paragraph one of the Sub-Commission Norms, places secondary responsibility on corporations, stating:

> Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote . . . and protect human rights recognized in international as well as national law.[68]

The SRSG has criticized the concept of "spheres of influence" because it has "no legal pedigree," and the distinction between primary and secondary duties was not elaborated upon by the Sub-Commission Norms.[69] It is ironic that Ruggie attacks the concept of "spheres of influence"[70] because it derives from the Global Compact which he drafted for the U.N. Secretary-General. The Sub-Commission Norms do add "spheres of *activity* and influence," so as to take into account not only the external impact of businesses on surrounding communities, suppliers, and customers, but also the consequences upon the health and safety of employees.

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64. Ruggie, *supra* note 49, at 826 (citing Philip Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-state Actors? in* NON-STATE ACTORS AND HUMAN RIGHTS 3, 14 (Philip Alston ed., 2005)).

65. *Id.*

66. *Id.*

67. *Id.*

68. Norms, *supra* note 36, para. 1.

69. U.N. Doc. E/CN.4/2006/97, *supra* note 48, para. 67.

70. *See supra* note 34.

The SRSG noted that TNCs generally are organized in networks, which results in the divestment of a certain amount of direct control.[71] These networks, which consist of parent corporations, subsidiaries, and suppliers, operate in numerous countries, and as the size of the network grows, they become more difficult for the parent to monitor.[72] Generally the purchase of goods from a supplier is considered an arm's-length exchange, and even a parent and its subsidiary are considered to be distinct legal entities. Each separate entity in a large network is governed by the laws of the countries in which it operates, but the SRSG argues that the TNC as a network is not governed by international law. The move to establish global legal standards to govern TNCs, SRSG Ruggie states, seeks to alter this "foundational fact."[73]

This criticism of the Sub-Commission Norms seems to ignore the tremendous diversity in power that some companies, such as Microsoft and Wal-Mart, can wield over their suppliers and business partners. Also, the SRSG fails to note that the Norms apply to all businesses whether they are transnational corporations, suppliers, customers, or other business enterprises. The Norms require a company to inquire into the conduct of the companies with which it does business, but not further up or down the supply chain, except to the extent of their influence. As the Commentary to the Norms explains with regard to the primary and secondary influence of businesses:

> The obligation of transnational corporations and other business enterprises under these Norms applies equally to activities occurring in the home country . . . of the transnational corporation or other business enterprise, and in any country in which the business is engaged in activities . . . .
> Transnational corporations and other business enterprises using or considering entering into business relationships with contractors, subcontractors, suppliers, . . . or natural or other legal persons that do not comply with the Norms shall initially work with them to reform or decrease violations, but if they will not change, the enterprise shall cease doing business with them.[74]

Further, SRSG Ruggie argues that the international legal principles expressed in the Sub-Commission Norms diverged from the "actual state of international law regarding business and human rights."[75] The SRSG specifically discussed differences relating to: the duty of states to protect against third-party abuses of rights;[76] the growing potential of businesses to be held liable for international crimes;[77] a norm of customary international law establishing direct cor-

71. Ruggie, *supra* note 49, at 823.

72. *Id.*

73. *Id.* at 824.

74. U.N. Econ. & Soc. Council, Comm'n on Human Rights, Sub-Comm'n on Promotion & Prot. of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, paras. 1, 15, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003).

75. Ruggie, *supra* note 49, at 827.

76. *Id.* at 828.

77. *Id.* at 830.

porate responsibility for human rights abuses;[78] and "an expanding universe of self-regulation in the business and human rights domain."[79]

The Sub-Commission Norms represent an effort to develop a restatement of international human rights and related principles with regard to business. They are the most comprehensive of such standards that currently exist. SRSG Ruggie has criticized the Norms' characterization as a restatement, noting that its legal principles were "contested by business and . . . academic observers."[80] The SRSG cites the International Chamber of Commerce and two academics for this proposition while ignoring the dozens of favorable academic comments the Norms have received by legal and other academic scholars.[81] Indeed, when the Sub-Commission Norms were submitted for review by the German Government to the highly respected Max Planck Institute, the Norms were found to be consistent with the prevailing trends of international law.[82] They were vetted by the relevant international institutions, for example, the International Committee of the Red Cross as to humanitarian law and the ILO as to labor standards. Additionally, Ruggie seemed to be unaware that restatements do not merely describe the law "as it presently stands or might plausibly be stated by a court[,]"[83] but they have served to achieve progressive reform in the law.

In his discussion on the current state of international law regarding TNCs and human rights, the SRSG favorably mentions several soft law initiatives including the Global Compact,[84] the ILO, the OECD, the Fair Labor Association,[85] the Extractive Industries Transparency Initiative,[86] the Kimberly Process

78. *Id.* at 832.

79. *Id.* at 835.

80. *Id.* at 827.

81. *See, e.g.*, ANDREW CLAPHAM, *Corporations and Human Rights*, *in* HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 195 (2006); David Kinley, *The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations*, 25 COMPANY & SEC. L.J. 30 (2007); David Kinley, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUM. RTS. L. REV. 447 (2006); Tarek F. Maassarani et al., *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT'L L.J. 135 (2007); Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 FLA. J. INT'L L. 1 (2007).

82. Letter from Rüdiger Wolfrum, Co-Director, Max Planck Institute to Christian Lindemann (Nov. 18, 2003) (on file with author).

83. Ruggie, *supra* note 49, at 827 (quoting American Law Institute, *Projects Overview*, *available at* http://www.ali.org/index.cfm?fuseaction=projects.main). Just as with regard to the American Law Institute's restatements there is a tension in the Sub-Commission Norms between passive restatement and progressive reform. *See* Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute The Fairchild Lecture*, 1995 WIS. L. REV. 1 (1995); John P. Frank, *The American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615 (1998).

84. UN Global Compact Home Page, http://www.unglobalcompact.org.

85. Fair Labor Association, *Charter Document* (2007), *available at* http://www.fairlabor.org/docs/Charter_Feb07.pdf.

86. Extractive Industries Transparency Initiative Home Page, http://eitransparency.org.

Certification Scheme,[87] the Voluntary Principles on Security and Human Rights, and the Equator Principles,[88] but did not mention SA 8000 until the supplemental report of December 2006. The SRSG concludes, however, that "[a]lthough each has weaknesses that require improvement, the relative ease and speed with which such arrangements can be established, and the flexibility with which they can operate, make them an important complement to the traditional state-based treaty-making and soft law standard-setting process."[89]

I agree in this respect with the SRSG and I would add that like the Sub-Commission Norms, the Global Compact, the Kimberly Certification Scheme for avoiding blood diamonds, and the other initiatives mentioned by the SRSG have promulgated soft law instruments. Unlike the Sub-Commission Norms, however, the other soft law instruments are voluntary and not universal in application or substance. Further, these other initiatives generally lack effective implementation measures. The Sub-Commission Norms apply to all businesses to the extent of their activities and influence, and since no opt-in is required, no one may opt out. Further, the Norms represent the most comprehensive collection of standards applicable to all businesses, providing more detailed explication of the brief phrases in the Global Compact, and extending those principles into other areas like consumer rights, for example. The Sub-Commission Norms also recommend implementation measures not found in most of the other voluntary soft law standards.

The SRSG concluded his report by enumerating a number of guiding principles that bear specifically on the role of voluntary standards acceptable to the big business community. First, any strategy addressing the human rights responsibilities of businesses "needs to strengthen and build out from the existing capacity of states and the states system to regulate and adjudicate harmful actions by corporations, not undermine it."[90] Second, "the focal point in the business and human rights debate needs to expand beyond establishing individual corporate liability for wrongdoing."[91] To this end, soft law arrangements such as the Kimberly Process represent an "important innovation" because they attempt to create a process that is focused on prevention rather than assignment of liability.[92] Finally, SRSG Ruggie notes that "any successful regime needs to motivate, activate, and benefit from all of the moral, social, and economic rationales that can affect the behavior of corporations," and should provide "incentives as well as punishments, identify[] opportunities as well as risks, and build[] social movements and political coalitions that involve representation from all the rele-

87. Kimberley Process Home Page, http://www.kimberleyprocess.com.

88. The Equator Principles Home Page, http://www.equator-principles.com.

89. Ruggie, *supra* note 49, at 835.

90. *Id.* at 838

91. *Id.* at 839.

92. *Id.*

vant sectors of society."[93]

Beyond the voluntary human rights principles that the SRSG prefers, however, there is a tremendous demand in civil society for a comprehensive set of standards governing the conduct of international business, which go beyond voluntary codes of conduct like the Global Compact. For example, in November 2007 an open letter, signed by over 200 civil society groups around the world, was sent to SRSG Ruggie, expressing the need to develop international standards as to the conduct of international businesses.[94] Further, the broad dissatisfaction of the NGO human rights community extends not only to his failure to develop standards, but also to his failure to follow the approach of other U.N. thematic procedures in highlighting human rights abuses by the business community.

VI.
CONCLUSION

In conclusion, the Sub-Commission Norms have revived the global discussion on the need for international human rights standards for businesses. They have set forth the most comprehensive collection of international standards and implementation mechanisms, which sets the current high watermark for such efforts. It is most likely that significant progress will be made in developing standards when there is another major incident like the disastrous chemical spill at Bhopal that will make evident the need for standards like the Norms. In the meantime, some companies, such as a large mobile phone company, are using the Sub-commission Norms as a contract requirement for suppliers and subcontractors. Some nongovernmental organizations, such as Amnesty International, are using the Norms and/or their content as a basis for assessing the conduct of businesses. The Special Representative of the Secretary-General was supposed to develop standards, but has instead attempted to derail the standard-setting process and bow to the corporate refusal to accept any standards except voluntary codes.

I am pleased to have been part of this process and am very happy to report that many others are continuing this, as-yet incomplete, work. Indeed, while I am honored to receive the Stefan A. Riesenfeld Award today for my contributions to international law, I believe that my work as to the human rights responsibilities of businesses is still incomplete. Of course, Professor Riesenfeld was blessed by ninety useful years to make his many contributions, so this award may be an indication that I have some more time. Meanwhile, I encourage all of

93. *Id.* at 839-40.

94. *Available at* http://www.escr-net.org/usr_doc/OpenLetter_Ruggie_FinalEndorsements.pdf. *See also*, Center for Human Rights and Global Justice & Human Rights Watch, *On the Margins of Profit: Rights at Risk in the Global Economy* 1, *available at* http://hrw.org/reports/2008/bhr0208/bhr0208webwcover.pdf.

you to get involved in this effort to hold businesses responsible for their international human rights obligations.

Berkeley Journal of International Law

Volume 26 | Issue 2 Article 2

2008

Examining the Role of Companies in the Realization of Human Rights: The Case of Gap Inc.

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By
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I would like to begin by saying thank you to the *Berkeley Journal of International Law* and the University of California, Berkeley Law School for inviting me to speak with you today. It is an honor to be here among such distinguished company. As you know, this is a topic that is close to my heart, not only because I spent time earlier in my career examining the role that law plays in driving political and economic objectives, but also because the role of corporations in addressing human rights is an issue that I now grapple with every day in my job at Gap, Inc. I hope that I can offer some interesting thoughts this afternoon on this timely topic from the perspective of one company.

I would like to begin my remarks by asking you a question: how many of you have ever bought something on sale? Do you know that when you buy something on sale, for example, when you "bargain-shop," you are having an impact on global human rights and that impact probably isn't a positive one?

I ask this not to make you feel guilty, but because I want to highlight the complexity of the challenges that we are here to talk about today. When consumers bargain shop, they put downward pressure on prices. This pressure en-

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courages companies to negotiate lower prices with their suppliers, which, in turn, may have a negative impact on the human rights of the workers making those products if supplier factories do not have sophisticated production and compliance programs in place to protect workers.

The global system that we are here to discuss today is extremely complex. Yes, companies have tremendous potential to help facilitate the realization and protection of human rights around the world. Much of my talk today will focus on the way that Gap, Inc. has chosen to embrace that potential, as well as the challenges it has faced along the way. And yes, there is a critical role that law must play—whether it is in the form of legislation, litigation or judicial oversight. The distinguished members of today's panels will examine the different roles that lawyers can play. But this issue is bigger than international companies and the legal profession. In our globalized world, every single one of us—as consumers—also has an impact on human rights. And I believe that it is only when we all begin to realize and embrace our potential and our responsibility—as companies, as lawyers, as governments and as consumers—that we will begin to make meaningful progress toward the protection of human rights around the world.

THE GAP INC. EXPERIENCE

So let's turn for a moment to the Gap Inc. experience. Gap Inc. has had the luxury—although it has taken us a long time to see it that way—of having to address the issue of human rights in our global supply chain earlier than many other multinational companies.

We first faced allegations of labor rights abuses back in 1995 at the Mandarin International factory in El Salvador. Negative allegations and campaigns against the company continued throughout the late 1990s.

However, there was a positive side to this public attention. The allegations forced us to take a hard look at ourselves and what we could be doing differently as a company. We were extremely concerned by these allegations and the conditions that our ground-level investigations revealed, and wanted to find an effective way to address them. As a result, when most apparel brands and retailers doing business with the Mandarin International factory in El Salvador cut ties and left, we decided to stay and try to become part of the solution. We began collaborating with three non-governmental organizations (NGOs)—Business for Social Responsibility (BSR), the Center for Reflection, Education, and Action (CREA), and the Interfaith Center on Corporate Responsibility (ICCR) to form the Independent Monitoring Working Group (IMWG). The IMWG engaged the *Grupo de Monitoreo Independiente de El Salvador* (GMIES), a group of representatives from Salvadorian civil society who sought to help workers in the *maquila* sector. The effort marked the beginning of the first independent monitoring program in El Salvador and in the apparel industry globally.

The company has learned a lot since that initial effort, and our work has

evolved accordingly. Let me take you through a few milestones from the past decade. In 1996, Gap Inc. revised its Sourcing Principles into a comprehensive Code of Vendor Conduct (COVC) based on international principles, including the International Labor Organization (ILO)'s core labor standards. More importantly, we developed a mechanism to enforce this Code. We hired our first Vendor Compliance Officer (VCO) in 1996, and quickly built up one of the largest internal monitoring teams in the apparel industry.

Today, Gap Inc. has a team of approximately ninety people based in twenty-four countries around the world who are dedicated to improving the lives of garment workers. I have the privilege of being part of this team, and it is truly an extraordinary group. My colleagues are as diverse as the factories from which we source. Most are from the country or communities in which they work, and their local knowledge greatly enhances their ability to detect issues and communicate with factory managers and workers. Many of them are VCOs, who serve as the company's "eyes and ears" within factory walls. VCOs spend their days visiting factories, conducting inspections, documenting violations of our COVC, and working with garment manufacturers and external stakeholders to help build capacity within the industry for greater compliance.

To give you a sense of our team's scope, we conducted 4,316 inspections in 2,053 third-party contract garment factories around the world in 2006, reaching approximately 99.4 percent of factories that had been approved for Gap Inc. production for the entire year. We also rejected 18 percent of the new factories that we evaluated (which meant that they would not be approved to receive Gap Inc. production orders), and revoked our approval of approximately twenty-three garment factories for compliance violations. In addition, we conducted 1,498 formal and informal meetings with factory managers and workers to help address the root causes of compliance issues, develop effective corrective action plans and provide training sessions.

BECOMING MORE TRANSPARENT

Over the years, Gap Inc. has become quite open about the challenges that we face, although that, too, has been a learning experience for us.

When I joined the company, one of the first projects that I took on was the development of Gap Inc.'s first Social Responsibility Report in 2003. Having come from the academic world, I felt strongly that the company had a lot to gain by being open and honest about both our successes and our challenges. The company had a great story to tell, despite the complexity of the issues and the fact that much more work remains to be done. So my team and I set about writing the inaugural report content, which included the development of a chart that provided detailed data disclosure on the types of compliance violations that our monitoring team had found in Gap Inc.-approved garment factories.

And I remember getting into a long debate with our General Counsel at the time as to whether the company should publish such detailed information on

compliance violations in its supply chain. Gap Inc.'s legal team—quite understandably—was looking for assurance that this disclosure would not place the company at legal risk. While we strongly believed that transparency was the best approach for the company, we had no way of knowing with one hundred percent certainty that we had mitigated all risk. What we did know is that while no garment factory is perfect, we had a strong system in place to help factories improve their working conditions. The entire Gap Inc. leadership team was ultimately convinced that we had much more to gain from being honest about the challenges that we faced—and what we were doing to address them—than we did by remaining silent.

In the end, the company published its 2003 Social Responsibility Report in May 2004 with the comprehensive data disclosure—and the response was overwhelming. Articles detailing the company's efforts to strengthen labor standards in the supply chain ran on the front page of the *Wall Street Journal* and the *Financial Times*. Numerous other media outlets also carried stories about our work following the report's release. One of the most surprising aspects of the coverage was that the content was overwhelmingly positive. You have to remember that, up until this point, Gap Inc. had received mostly negative coverage about labor standards in its global supply chain. Yet when we totaled up all of the media coverage, it equaled about eighty million positive media impressions—the highest ever in company history at that time. To put that into perspective, it was equivalent to approximately two Super Bowl commercials.

In recent years, we have been encouraged to see other companies in the apparel and footwear industry publish comprehensive reports about their social responsibility activities as well. Nike, Adidas, Reebok, and Timberland have all issued reports that provide detailed information about the working conditions in their supply chains. Most recently, the retail giant Wal-Mart published a lengthy report that included considerable data about the contract factories in its supply chain. We applaud these companies' efforts, and hope that many more brands and retailers in our industry will begin to take similar steps towards greater transparency. When we all become more open and honest about the common challenges we face, we will be much better positioned to work together to develop collective solutions to address them.

THE POTENTIAL OF ONE COMPANY

So what is the potential of a company when it comes to protecting human rights? As I mentioned earlier, the topic of today's symposium is timely because we have also been wrestling with this question at Gap Inc.

We know that we're a big company with significant global reach. As a US$15.9 billion entity, we have considerable influence, particularly in countries where the garment industry is a key driver of the economy, such as Cambodia and Lesotho.

As a specialty apparel retailer, we have also had a long time—perhaps

longer than a number of other companies—to face the challenges of a globalized economy. In our industry, it is the norm for cotton to be grown in the United States or Brazil, then milled into fabric in China or South Korea, and then shipped to Bangladesh, Guatemala, or Lesotho to be cut and sewn into garments. Given this level of interconnectedness, social crises and ecological disasters present a very real risk to the stability of our supply chain.

Why do we focus on human rights? Put simply, we believe that it brings a sustained, collective value to our shareholders, our employees, our customers, and our society. I want to repeat that statement because it is extremely important and lies behind everything we do: we believe that a focus on human rights in our supply chain helps to bring a sustained, collective value to our shareholders, our employees, our customers, and our society.

How does it do this? Well, first and foremost, it helps us to manage our risk. When we know what is happening on the ground in supplier factories, we can address problems as they arise—before they turn into crises. But this focus on human rights also does much more for us. Not only does it help to drive social and economic progress in the countries from which we source, but increasingly we're learning that it can help us reach new heights as a creative company as well.

We've already seen incremental improvements over the past decade in garment factories around the world. In many countries, the worst abuses of child and forced labor in the multinational garment industry are thankfully rarer today than they were a decade ago. While we still have a long way to go, these small steps are an encouraging sign of progress.

Over the years, we've also learned that social responsibility is good for our business. When factories treat workers well, these factories also produce higher-quality products and deliver them on time. When we respect and empower our own employees, they are more inspired, engaged and creative in their work. And when we weave social responsibility attributes into our products, we open up new ways to differentiate our brands in the marketplace. The launch of Gap (PRODUCT) RED™ is a recent example of this. Socially responsible products provide us with new ways to introduce exciting and inspiring options to an emerging group of consumers who care deeply about these issues.

So imagine that—social responsibility is actually good for business.

REALIZING OUR POTENTIAL

How are we working today to realize this potential? Well, first, we're continuing to focus on our vast global supply chain. We've gained a lot of experience over the years from monitoring garment factories, and we are now putting that experience to work by helping these factories learn how to recognize and address the root causes of these compliance issues. This means introducing training programs to help managers and supervisors become more effective leaders, and to help workers better understand their rights and responsibilities. It

also means helping factories build management systems so that they implement policies and procedures that support a compliance-oriented culture. And it means using our leverage as a buyer to help factories around the world understand that respect for human rights will not only influence where we place our production, but will also help them build more efficient and productive businesses.

We're also taking a hard look at our own practices—and identifying ways in which we may need to change internally in order to facilitate compliance in our supply chain. Our product pipeline process from design to production to retail sale is very complicated. If we miss our design specification or production order deadlines along the way, it may have a negative impact later on the factories and workers who have to make up for lost time. So we're looking at ways that we can educate our own employees as well about the impact of their decisions.

Finally, we're also looking at new ways that we can engage and inspire our customers on human rights issues. Gap (PRODUCT) RED™ was our first foray into this space, but I hope and anticipate that you will see more from the company in the future.

LIMITS TO OUR POTENTIAL

It's important to note that there are also limits to our potential. Gap Inc. is a big company, but we are not the entire apparel industry. We are powerful, but we are not all-powerful. And the apparel industry is not a level-playing field. In recent years, we've faced some challenging sale results and the company is currently in the midst of a business turnaround. Yet many of our competitors with whom we are compared for financial results have invested far less in programs to address these issues.

National and international law have not kept pace with globalization. Because governments in developing countries are often unable or unwilling to enforce their own laws, some companies can get away with ignoring these issues. The fact that customers are fond of bargain shopping and analysts are focused on monthly sales and earnings makes it that much more difficult to maintain a long-term perspective.

In addition, it's not clear how far our obligations extend. As a company, we have clearly embraced our responsibility to work with garment suppliers, and this makes sense given that we have a direct contractual relationship and business leverage with these factories. But how far down the supply chain should we go? For example, many of our products are made from cotton, but we don't buy cotton directly. Who is responsible for the labor and environmental standards in the cotton fields around the world?

International human rights law doesn't give us much guidance here. The United Nations' Universal Declaration of Human Rights was written for governments, not for corporations. I currently represent Gap Inc. on the Business

Leaders Initiative for Human Rights (BLIHR), a group of leading companies chaired by Mary Robinson that is focused on just this issue. BLIHR is examining ways to translate these international obligations into a language and scope that works for companies. While we have made progress, we still have a long way to go.

Finally, companies are not democratically elected institutions. While companies can and should protect human rights within their sphere of influence—and even work to promote human rights—they cannot and should not be a substitute for governments. It is critical that we remember this point as we move forward with this work.

LOOKING AHEAD

So where does this leave us? At Gap Inc., we believe that the best way to protect human rights around the world is to encourage all players to start embracing their responsibilities and to come together to begin working on collective solutions. By all the players, I mean companies, governments, lawyers, multi-lateral institutions, NGOs, trade unions—and yes, even consumers.

Clearly, the solutions are going to vary depending on the situation at hand. Sometimes they may take the form of innovative trade agreements like the 1999 U.S.-Cambodia Bilateral Textile Agreement (USCBTA) that successfully made respect for labor standards a prerequisite for increased apparel trade between the U.S. and Cambodia. In other cases, we may need to develop frameworks to help hold companies accountable. In 2005 and 2006, I represented Gap Inc. on the Global Reporting Initiative (GRI)'s multi-stakeholder working group to develop reporting indicators for the apparel and footwear sector. This apparel and footwear "sector supplement" was recently published, and provides companies with credible guidance on what information they need to report about their human rights activities within the supply chain. However, the framework is voluntary, and thus far, most other specialty apparel retailers have yet to utilize it.

I think what is clear here is that there is no single silver bullet solution. However, there are many creative ones, and the sooner we all stop working in our own silos and start working with each other to develop them, the sooner we will make meaningful progress toward greater protection of human rights around the world.

I'd like to close by returning to the question that I asked at the outset about the role of all of us as consumers. For protection of human rights to take hold in a lasting way, we also need to see a shift in consumer attitudes—or, at the very least, a recognition of the part that we all play as consumers within the global supply chain. Consumers have incredible buying power—and I can tell you as a company representative that companies listen to their customers. That means that each of us sitting here in this room has the power start bringing about change. We need to think about what we're buying, and ask questions of the companies that are selling us these products. We need to start educating our

friends, and encourage them to ask the same questions. And we need to let our elected officials know that we care about these issues and that they need to take them into account as they go about their work in the legislatures, the state houses, and the White House.

When we each become fully aware of the potential that we have—whether it's as a company, a lawyer, or as an individual consumer—and when we are willing to work together to address our common challenges, we will be much better positioned as a society to ensure the protection of human rights around the world.

Berkeley Journal of International Law

Volume 26 | Issue 2 Article 3

2008

Business's Role in Human Rights in 2048

Robert D. Haas

Business's Role in Human Rights in 2048

Remarks by
Robert D. Haas*

All of us are honored by President Robinson's presence here today. A tireless and effective advocate for human rights, her remarks are inspiring and provide a pragmatic vision of the challenges and possibilities that lie ahead.

When you first scanned today's program you must have wondered, "Why is a businessman speaking to us about human rights? Isn't this the purview of politicians and non-government institutions? And why would an apparel company have an interest in the subject?"

These are sensible questions. Over the next half hour I'll try to give you some answers.

I'd like to start with a quiz. Consider the world's largest economic entities, including both countries and corporations.

Taking Gross Domestic Product to measure the size of countries and revenues for corporations, how many of the top 100 economic entities are corporations?

You may be surprised to learn that 44 of the largest economic entities in the world are corporations according to a website called the Kassandra Project.

- Wal-Mart, with revenue of $351 billion, ranked just behind Greece and Austria as the 28th largest economy in the world.
- Exxon Mobil and Royal Dutch Shell follow right behind Wal-Mart and round out the top 30.
- Toyota Motor's revenues, which rank #42, are only slightly smaller than the GDP of Thailand (#39).
- At number 59, Citigroup ranked just ahead of Pakistan, a country with a population of 169 million people.

These statistics are more than just interesting trivia. They illustrate the power and impact that global corporations have to affect the lives of people around the world. They underscore the reality that the 'nation-state' is no longer the preeminent source of economic power. In addressing pressing international problems—human rights, the environment, poverty, and so on—we need to

* Robert D. Haas is the chairman emeritus of Levi Strauss & Company. This speech was given at the "2048: Drafting the Future of Human Rights" conference at UC Berkeley School of Law, on February 29, 2008.

throw away our mental maps that assigned that role to governments. Like it or not, corporations have a role to play as well.

But here's the rub. In 1948, when the Universal Declaration of Human Rights was formulated, it made sense to assign the role of "political citizenship" to national governments. For the past sixty years, human rights advocates have operated on the assumption that governments were the primary actors in the field and were responsible for ensuring that human rights were respected, protected, and fulfilled. However, it's become abundantly clear that many human rights are the shared responsibility of multiple actors. What we currently lack is an agreed-upon set of expectations when it comes to the role of non-state actors—especially business—in this area.

Sadly, as we've seen, many governments are ineffectual in meeting their obligations with respect to basic economic, social and cultural rights, including the provision of housing, food, employment, and health. Despite external pressure and well-meaning promises, many governments simply do not have the resources to fulfill their responsibilities. Others have become so corrupt over time that they lack the will and the ability to provide basic human rights. To their shame, unscrupulous corporations, lacking ethical standards, exacerbate the problem by taking advantage of the corruption in these countries to pad their profits.

Back in 1948, global trade régimes confined most corporations to their countries of origin, with a few so-called "multinationals" operating branches in other places. As a result, corporations devoted themselves to a self-interested pursuit of sales and profit growth in their home markets. "The business of business is business" was their mantra, and charitable donations to local nonprofits or educational institutions satisfied corporate citizenship obligations.

Clearly, the world is a very different place today.

With the fall of trade barriers and resulting opening of markets, the globalization of enterprises has become the norm. With it has come the immense concentration of power cited in my earlier statistics. Today, potent corporations can truly influence the condition of life and livelihoods around the world.

Environmental conditions were not a meaningful concern sixty years ago. Today, however, issues of climate change and the availability of clean water are pressing concerns that are inextricably linked to industrial activity and human rights.

The mass privatization of natural resources has denied indigenous people their economic and cultural rights, particularly in countries where population increases are resulting in more and more people competing for fewer and fewer resources.

The gulf between the richest and the poorest is expanding. Migrations of job seekers within and between countries spawn abuses of human rights for unprotected workers. And mass international migrations facilitate the spread of infectious diseases that are resistant to traditional treatments.

In all of these situations, businesses often play a role.

BUSINESS'S ROLE

The Universal Declaration of Human Rights was adopted in the wake of the tragedies of World War II with high hopes of creating a fundamentally different future. Yet, as we have seen, progress has been undercut by a combination of ineffectual or indifferent governments, corporate activities unconstrained by human rights considerations, and unanticipated and uncontrollable change—change that has been accelerating at an astounding pace, enabled by technology; change that is alienating us from traditional human structures such as communities, families, and value sets; and change that will be our undoing unless we can somehow tether it to basic human values, including a strong sense of empathy.

Based on what I've said thus far, if we want to see human rights flourish globally, we need to confront a fundamental problem: the Universal Declaration focuses on the conduct of governments and pays insufficient attention to the impact and responsibilities of corporations.

I believe it is time to develop standards for corporate conduct.

WHAT MUST BE DONE

Business has tremendous economic power. And with that power comes responsibility. In order for business to live up to that responsibility, we must work with governments and other stakeholders to develop a mandatory framework that defines business's role in human rights, contains reporting and enforcement mechanisms, and includes consequences for non-compliance.

Achieving this will take time, and the challenges are daunting. The world has very limited experience with the establishment and enforcement of globally accepted principles on any issue. Formulating a universal standard for business and human rights will require vision, patience, and a commitment to balance business interests with those of states and other stakeholders. In order for a universal standard for business and human rights to succeed, it must be evenly applied and fairly enforced.

STEPPING STONES

This will be a huge undertaking, but fortunately we don't have to start from scratch. There have been encouraging advances in the sixty years since the creation of the Universal Declaration.

Prodded by non-governmental organizations' "name and shame" campaigns, companies have changed behaviors. A number of companies that have been exposed as indifferent or abusive with respect to global human rights and labor conditions have gone on to become champions of corporate social respon-

sibility and leaders in the development of voluntary initiatives to address human rights and environmental sustainability in their products and operations.

Indeed, the corporate social responsibility movement itself, which appears to be growing exponentially year over year, is another development that gives hope that business can live up to its potential in this area.

Once perceived as misguided public relations, a waste of corporate resources, and a breach of fiduciary duty to shareholders, corporate social responsibility is spurring meaningful progress. For example, supplier codes of conduct are becoming more commonplace, with some exceeding the standards set by host governments. Citing human rights concerns, several global companies have refused to source from countries with authoritarian regimes, such as Myanmar, Saudi Arabia, and other states.

The example of socially-responsible corporations has inspired other organizations. Think tanks and consultancies like Business for Social Responsibility, headquartered here in the Bay Area, are developing new and innovative opportunities for private-sector organizations to engage with multiple stakeholders on issues that intersect business and human rights. Through the creation of socially-responsible investment funds and more recent actions by mainstream financial institutions, the investment community is recognizing the longer term returns produced by foresighted business practices.

Many business schools, including the Haas School of Business on this campus, are developing strong corporate responsibility programs to ensure that future generations of business leaders are steeped in the issues, aware of best practices, and poised to steer business toward its full potential.

As part of their commitment to corporate social responsibility, many corporations are participating in multi-stakeholder initiatives like the United Nations Global Compact, which incorporates human rights as part of its ten core principles. Closer to home, Levi Strauss & Co. participates in an International Labor Organization public-private partnership called Better Factories Cambodia, that leverages the experience, resources, and good intentions of businesses, the Cambodian government, and non-governmental organizations to improve working and living conditions for apparel workers in Cambodia.

With a clear goal and the right partners involved, this partnership is proving to be successful. The Cambodian government has taken a more active role in upholding human rights for apparel workers, dialogue has increased among tripartite participants, and there is a greater understanding by workers of their labor rights and responsibilities. It serves as an encouraging example for those considering entering into multi-stakeholder alliances.

Legal frameworks for corporate citizenship, although imperfect, are also beginning to emerge. The application of the U.S. Alien Tort Claims Act in a number of cases is a wake-up call to the private sector. On another front, the recent U.S.-Jordan Free Trade Agreement included labor provisions with an enforcement mechanism, a first for this type of agreement. I am proud that Levi

Strauss & Co. was the only private sector organization to lobby for this path-breaking pact.

While NGO campaigns, the corporate social responsibility movement, public-private partnerships, and the emergence of legal frameworks undoubtedly are having a positive effect on the state of global human rights, it is clear that we still have a long way to go.

Most importantly, we need more reliable and mandatory legal frameworks. As I mentioned earlier, I believe that for business to fulfill its role in the area of human rights, we need to have a binding legal framework that applies across the board in every sector. The jury is still out on how effective the U.S. Alien Tort Claims Act may be in holding non-state actors accountable for human rights violations in foreign countries. From experience we know that it is complicated and imperfect. The U.S.-Jordan Free Trade Agreement is a start, but the enforcement mechanism has yet to be road tested. Using the force of the World Trade Organization to develop standards with strong labor, environmental and enforcement provisions would amplify and sustain the progress we've seen to date.

Despite examples of progress in corporate social responsibility, improvement opportunities abound. Initiatives are largely voluntary, and, in some cases, amount to little more than grand public relations exercises. What are we to think about an energy company that in its glossy annual report claims to be devoted to finding solutions to climate change, but neglects to mention that it lobbies in Washington for weaker emissions standards at their coal-fired generation facilities?

For this reason we need to keep up the pressure on companies that abuse their powers or mislead the public. In recent years the effectiveness of NGO "name and shame" tactics has stalled as a result of their being narrowly-focused on a few industry leaders and neglecting to address the misdeeds of other companies in the sector. Industry-wide pressure has the potential to help create real change—especially when it comes from consumers or the NGOs that can give voice to consumer interests or organize them. These types of efforts will be welcomed by progressive companies that have a strong interest in seeing a universal set of high standards applied to all in their respective markets.

Another approach would be for NGOs to help create incentives for businesses to make the right kinds of business decisions. These can be helpful in persuading some business leaders to do what they know is the right thing when it comes to issues of human rights.

Although public-private partnerships are proving to be a promising development, they are complex, with success hinging upon the abilities of varied partners to see beyond their own experiences and interests to forge a better future. Further, no particular formula has emerged that would dictate how to establish, sustain, and scale up such complex collaborations.

In the absence of enforceable, industry-wide standards created by international organizations, individual companies are left with the burden of regulating

their own conduct. By way of illustration, let me give you some examples of what Levi Strauss & Co. has done.

The Apparel Perspective and Levi Strauss & Co.'s Experience

At $4.4 billion in annual revenues, Levi Strauss & Co. is not big by the standards of a Wal-Mart or Toyota. Nevertheless, the apparel perspective is highly relevant in a discussion on business and human rights for the following reasons:

- The apparel industry is one of the most "globalized" in the world. It has a presence in every corner of the globe and operates with a unique combination of low-skilled labor and high-tech design, logistics and marketing.
- Over the years, developing countries have relied on apparel manufacturing to speed the industrialization of their economies. In the case of the U.S., it provided economic opportunities and enabled social integration for generations of immigrants from all over the world.
- Apparel production has emerged as an avenue by which women, who comprise two-thirds of the industry's workforce, have entered the wage labor market for the first time.
- Finally, the availability of apparel jobs has spurred rural-to-urban migration in manufacturing countries.

While not the largest player in the global apparel and retail industries, Levi Strauss & Co. has played a leadership role in promulgating standards of conduct for our industry. In 1991 we were the first global company—in any industry—to develop and implement a program to respect and protect the human rights of the people making our products. Additionally, we were the first in our sector to address the environmental impacts of apparel production on the communities where our products are made.

Paralleling those initiatives, our philanthropic endeavors evolved to focus on sustainable social change by addressing workers' rights, health issues, and economic empowerment in the communities in which we operate.

Our leadership in these areas is consistent with our longstanding commitment to responsible corporate conduct and practices. We integrated our sewing plants in the American South in 1960, well before others in our industry or national civil rights legislation.

We were among the first companies to develop policies and programs in the area of HIV/AIDS and were the first *Fortune* 500 company to extend health care benefits to the unmarried partners of our employees. We've pioneered socially responsible programs in the areas of the environment, employee community involvement, philanthropy, and employee assistance.

Among the lessons we've learned over the years is that to be successful and

enduring, corporate responsibility programs must be embedded in the business. They must be measured and managed in the same way that revenue-producing business units are managed.

Being a leader requires taking risks and going into uncharted territory. Inevitably we've stumbled along the way. But we've also made an effort to learn from our mistakes. Guided by a 155-year tradition of "Profits with Principles," we've seen that business can be a powerful force for positive social change.

A WAY FORWARD FOR BUSINESS

Now I recognize that I wasn't asked to talk about the world as we know it. My charge is to look out over the horizon forty years from now and survey the human rights landscape. That's a daunting task. Predictions are easy. Accurately portraying a distant future is another thing!

But since I have the comfort of knowing that I won't be around forty years from now to answer for my divinings, I'll take the plunge!

Based on what we know today and developing trends, I believe that in 2048:

- Rapidly changing environmental conditions, including the depletion of natural resources and shifts in weather patterns, will continue to affect society's ability to respect, protect, and fulfill human rights.
- Rapid advances in the areas of information and biotechnology will profoundly influence human activities and rights.
- Migrant labor forces will continue to figure prominently in global manufacturing. Migration to urban areas and the creation of new urban centers will impact global human rights.
- New and powerful global pandemics will be exacerbated by increased human mobility.
- Extreme poverty will continue to condemn large parts of humanity to suffering.
- Demographic and numeric shifts in populations will occur, widening the gulf between the rich and poor.
- The economic power of corporations will increase, with perhaps 50 percent or more of the largest economic entities being in the private sector.
- Considering the impact that these forces will have, it is very clear that the status quo is not sustainable.

I continue to believe that ensuring human rights is primarily the responsibility of governments. However, as I hope I've demonstrated, business has a role—indeed a responsibility—in advancing human rights globally, especially when we step back and consider the power and influence the private sector exerts in the global economy; the natural resources consumed by the private sector

in the pursuit of its economic goals; the speed at which business can move and innovate; the products and expertise that business can harness to help solve the world's most pressing problems, including human rights abuses; and the influence business can and does have on geo-political, social, and human rights issues.

As I've shown, there has been a gradual but incomplete awakening of the business sector to its responsibilities in respecting and protecting human rights. But much remains undone.

Over the next forty years we need to raise awareness and harness the power of business to create a world where child and forced labor are things of the past; where human rights principles are embedded into the laws that govern global trade; where we leverage the great democratizing power of information technology to put more information in more people's hands, providing them the tools they need to defend themselves and their rights more effectively; and where it is universally understood that human rights hinge on the maintenance of a clean and healthy environment.

To achieve these goals we need to develop a mandatory international framework on business and human rights. But we also know it will take time to develop a formulation that will be acceptable to all stakeholders and that works in practice. So the question for business today is, "what should business be focused on *now* in order to achieve this vision of a more just and sustainable world?"

Let me offer some thoughts:

First, *all businesses should examine their respective spheres of influence and responsibility and apply a human rights lens to their critical decision making*. This doesn't necessarily require an additional process. Many companies today profess to be "values-based" or have strong mission or vision statements that can serve as the starting point for this review. At Levi Strauss & Co., for example, we consistently refer to our values—empathy, originality, integrity, and courage—to guide us in making tough business decisions, especially when those decisions may have an impact on people or the ecosystems upon which they rely.

Second, *the private sector should strive to help shape societal norms by modeling strong ethical conduct and enabling positive change in both the workplace and the broader community*. One way individual businesses can move in this direction is by actively and constructively engaging the U.N. Special Representative on Human Rights, Professor John Ruggie, on his mandate.

His work represents important steps toward developing common principles around business' human rights responsibilities. By actively participating in the process, corporations can provide an informed business perspective that can make the mandate stronger and work better for the business community.

Next, *businesses need to embed programs that touch on human rights and related issues into their core functions and at the Board level.* Managing and

measuring these programs as an ongoing aspect of running the business limits the likelihood that they will be neglected or abandoned during difficult financial times.

Business should seek a new approach to corporate philanthropy. Corporate charitable contributions, however well-meaning, are insufficient. To have an impact, a corporation must consider moving to a model of social-change philanthropy.

Companies should apply the same strategic perspectives to their grant-making that they use to formulate business plans. Addressing the intersection of business and human rights in corporate giving programs can foster sustainable social change.

Business should do its part to create an educated consumer base. We should leverage our relationships and the power of our brands to influence responsible consumerism. This will require education and transparency.

Additionally, as consumers, each one of us in this room has an obligation to lead by example. We must recognize the human rights linkages in the purchases we make and educate our friends and family members about these connections. Businesses should seek opportunities to engage with NGOs, who also have an important role to play in this area.

Business should use its influence with governments, employing advocacy programs to push for positive change that is good for business and for the people affected by it.

In its advocacy, business should affirm its commitment to social responsibility by demonstrating a willingness to hold itself accountable. This may include advocating for legal or regulatory frameworks that could involve a cost to the business. In advocating for the passage of trade agreements, including the World Trade Organization, private sector leaders should insist on the inclusion of labor, environmental and other provisions that protect human rights along with related enforcement mechanisms.

And finally, *business should become involved in multi-stakeholder initiatives* in order to address targeted issues, participate in the dialogue, and share best practices. By bringing together unconventional allies, public-private partnerships have shown tremendous promise as a means of resolving issues and promoting human rights. They also represent an opportunity to build trust among different partners that will be necessary in the creation of binding international frameworks.

By following the measures I have just outlined, business has the capacity to play an ever larger and more important role in promoting global human rights.

But progress will require the participation and efforts of others. We need the commitments of NGOs to create a level playing field and a shared language of measurement and accountability. We need the commitment of governments to carry out their responsibilities and to create legal frameworks that are evenly applied.

If we are to succeed, we need consumers and investors to demand that we operate ethically, honestly, and transparently with respect to human rights and related issues. And finally, businesses must continue to do what they do best—identify opportunities, create products and services, and enjoy and share the rewards of their success.

In today's interdependent global world, business has an important role to play in respecting and protecting human rights. If we are to realize the promise of the Universal Declaration of Human Rights, business must be a key part of developing just and sustainable solutions.

Berkeley Journal of International Law

Volume 26 | Issue 2 Article 4

2008

Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill

Robin F. Hansen

Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the *Prestige* Oil Spill

By
Robin F. Hansen, LL.B., M.A.*

Abstract: This Article examines the activities of various multinational enterprises (MNEs) involved in the *Prestige* oil spill of 2002. The liability exposure of such enterprises is found to have been minimized by three legal phenomena which result from the current treatment of MNEs under national and international law. Review of the *Prestige* spill suggests that MNE liability exposure may be minimized by: (1) outsourcing, (2) reliance on renegade regime regulation, and (3) operation of the corporate veil. The reason for this observed minimized MNE liability is twofold. First, the current legal landscape which frames MNE activities is deficient to the extent that it facilitates this minimization. Second, MNEs adopt available minimization strategies to reduce liability exposure because this is consistent with their broader operational tendencies, as is explained in international business and international political economy scholarship. For instance, MNEs seek reduced liability exposure because this is consistent with their drive to reduce transaction costs.

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I.
INTRODUCTION

Multinational enterprises (MNEs), also called multinational or transnational corporations, play a leading role in the world economy. These business organizations generate an increasing proportion of global GDP and account for one third of world trade.[1] Moreover, various MNEs now command resources greater than the individual GDPs of many countries.[2] Such economic power and international reach pose new regulatory challenges to the nation state, particularly as national jurisdiction is often confined to territory while MNEs' agency is not.

While international law and its regulatory effects have developed in recent years,[3] domestic law and domestic legal institutions remain the most significant sources of oversight and regulation of MNEs.[4] In this Article, I examine MNE liability within national jurisdictions, noting that such liability is central to the rule of law and to states' pursuit of policy objectives. This Article reviews the events surrounding the 2002 *Prestige* oil spill, and examines three legal mechanisms that affected the liability exposure of the MNEs involved in the spill: (1) outsourcing; (2) use of renegade regime regulation; and (3) the corporate veil distinction between parent and subsidiary companies. I contend that these mechanisms operate to insulate MNEs from liability around the world. This Article offers several explanations, gleaned from international business and international political economy literature, for why MNEs seek minimized liability exposure and make use of the mechanisms currently available.

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1. The share of global GDP generated by MNEs has doubled over the past 25 years. In 2002, value-added by MNEs (3.4 trillion USD) accounted for approximately 10 percent of global GDP, or twice the 1982 percentage. In 2002 MNEs accounted for almost one third of world trade in goods and non-factor services. UNCTAD, WORLD INVESTMENT REPORT 2003: FDI POLICIES FOR DEVELOPMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES, at 23, U.N. Doc. UNCTAD/WIR/2003, Sales No. E.03.II.D.8, (2003), *available at* http://www.unctad.org/en/docs/wir2003_en.pdf [hereinafter WIR 2003].

2. UNCTAD's 2002 World Investment Report ranked the world's countries and MNEs alongside each other comparing their value-added annually. Of the 100 largest value-added entities ranked, twenty-nine were MNEs rather than states. The first MNE on the list at number 45 was ExxonMobil, which produced approximately 63 billion USD in value-added for 2000, and exceeded the GDP of countries such as Pakistan and the Czech Republic, along with most other countries. Half of the largest value-added entities ranked between 51 and 100 were MNEs. UNCTAD, WORLD INVESTMENT REPORT 2002: TRANSNATIONAL CORPORATIONS AND EXPORT COMPETITIVENESS, at 90, U.N. Doc. UNCTAD/WIR/2002, Sales No. E.03.II.D.8, (2002), *available at* http://www.unctad.org/en/docs//wir2002_en.pdf.

3. The near-universal membership of the World Trade Organization (151 as of February 2008), along with the obligations concerning domestic regulation that such membership entails, is one indication of the growing scope of international law rules and institutions. World Trade Organization, Members and Observers, http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm (last visited March 18, 2008).

4. *See, e.g.*, PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 107 (Blackwell Publishing 1995).

MNE liability minimization must be addressed by policy-makers who wish to effectively safeguard both universal human rights and our global environmental future. A grave ecological event such as the *Prestige* spill reveals significant weaknesses in the way in which national and international law currently treats MNE liability. The strain of human consumption on the earth's natural resources, along with the compounding problems of air and water contamination, make the regulation of environment-related interests increasingly important. Billions of citizens who depend on the integrity of the shared environment are profoundly affected by MNE activities.

A. MNE Liability Minimization, Public Policy, and the Rule of Law

Liability in this Article refers to an obligation that is court-ordered and state-enforceable, determined in either a criminal or civil law context.[5] A state may enforce a judgment finding liability by exercising its enforcement jurisdiction, such as through asset seizure or incarceration.

Courts give effect to law, and thus strengthen the rule of law, through findings of liability or, in other words, through their determination of state-enforceable obligations.[6] If a person avoids liability for breach of a law, even when the person has indeed broken that law, then the law is ineffectual, and the rule of law in that instance is weak.

Insofar as public policy is conducted through the court system, it is largely done so through findings of liability.[7] Such judgments alter citizen behavior by encouraging adherence to the law. Furthermore, since liability findings are inherently enforceable, specific judicial rulings implement public policy by affecting certain results. For example, states may pursue the public policy goal of deterring anti-competitive firm behavior. Courts enforce competition laws by making findings of liability in instances in which anti-competitive behavior is established.[8] Public policy motivations direct the creation of many laws as is suggested by the policy language found in the "Purpose" or "Preamble" sections of many laws.[9]

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5. DAPHNE A. DUKELOW & BETSY NUSE, THE DICTIONARY OF CANADIAN LAW 677 (2d ed., Carswell 1992).

6. The importance of indiscriminate application of the law or the rule of law generally is reflected in a key Canadian case, *Roncarelli v. Duplessis*, in which Quebec's Premier was held liable for arbitrarily, and thus illegally, revoking the liquor license of a restaurant owner who was a Jehovah's Witness. The court found the Premier liable for this and in doing so ignored the fact that the he was an official with public stature and power. The courts thus used a finding of liability to ensure that no one was above the law and that private interests could not trump public norms. Roncarelli v. Duplessis, [1959] S.C.R 121; 16 DLR (2d) 689.

7. In their implementation of public policy through findings of liability, courts are clearly bound by the rules of fairness which ensure due process.

8. In Canada, liability for an anti-competitive act would be established first by the Competition Tribunal and then by a court in case of appeal.

9. Policy objectives are evident in the "Purpose" section of Canada's Competition Act: "The

Since liability relates closely to both public policy and the rule of law, the strategic avoidance of liability can have repercussions for the rule of law within a state and on a state's ability to pursue public policy goals. If a person is able to evade a liability finding without ceasing the prohibited behavior, then the person will continue this behavior undeterred, and neither the rule of law nor public policy will be served.

Demonstrating actual liability avoidance requires extensive factual and legal reasoning, an exercise which is beyond the scope of this Article. Instead, this Article explores what I term "liability minimization." Liability minimization occurs when parties take steps to reduce the *likelihood* of a liability finding, without changing the behavior that ought to lead to a liability finding. Some element of speculation is inevitable in identifying liability minimization, while liability avoidance must be demonstrable in order to exist. However, since it is only one step removed from liability avoidance, liability minimization also represents a potential risk to the rule of law and effective public policy implementation.

B. What is a Multinational Enterprise?

A clear definition of a MNE is a prerequisite for a discussion of how MNE liability minimization operates. From a business perspective a MNE is, as John Dunning wrote, a business organization which "owns and controls income-generating assets in more than one country".[10] In other words, a MNE is a multinational actor which coordinates its activities in order to generate profits on an aggregate level.[11] In economic terms, MNEs are the global economy's main agents of foreign direct investment (FDI).[12] MNEs typically invest in a foreign country by establishing a directly controlled subsidiary endowed with some of its resources. Thus, from a legal perspective, a MNE may be understood as a series of related corporations. [13] As there is no process of international incorporation, the subsidiaries are incorporated under various countries' national laws. Thus, a parent corporation incorporated in one country will own the equity of a

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purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets . . . ." Competition Act, R.S., 1985, c. C-34, s. 1, *available at* http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-34///en.

10. J. H. Dunning, *The Distinctive Nature of the Multinational Enterprise, in* ECONOMIC ANALYSIS AND THE MULTINATIONAL ENTERPRISE 13 (J. H. Dunning ed., Routledge 1974).

11. J. H. DUNNING, EXPLAINING INTERNATIONAL PRODUCTION (Unwin Hyman 1988), cited in Lorraine Eden, *Bringing the Firm Back in: Multinationals in the Global Political Economy, in* MULTINATIONALS IN THE GLOBAL POLITICAL ECONOMY 36 (Lorraine Eden & Evan H. Potter eds., St. Martin's Press 1993).

12. Edward M. Graham, *The Contributions of Stephen Hymer: One View,* 21 CONTRIBUTIONS TO POL. ECON. 27, 29 (2002).

13. MNEs often assume much more complicated legal forms than a parent corporation's ownership of subsidiary corporations. For instance, trusts or partnerships can be included within a MNE's network of operations.

subsidiary corporation incorporated in another country (the "host country").[14] Incorporation results in legal personhood, and shields shareholders from full liability for a corporation's actions.[15]

Corporations are business organizations which have undergone the legal process of incorporation. A MNE's corporate components are often connected by equity capital: one corporation will be the shareholder of another corporation.

There is a striking difference between the way that business and economics view MNEs and the way the law does. Business and economics definitions of a MNE regard it more or less as a unified actor, while the legal definition of a MNE does not. Rather, national laws view each corporation within the MNE's ownership chain as a distinct entity, and liability does not automatically transfer between these individual corporate components. For instance, United States (U.S.) law recognizes British Petroleum as "more than one thousand separate interrelated corporations acting under a common control."[16] With these observations in mind, this Article will now address the facts surrounding the *Prestige* spill.

C. The Prestige Spill

After serving as a port storage facility in St. Petersburg for several months, the *Prestige*—a large tanker—left port in Ventspils, Latvia and began its journey to Singapore in November 2003. On November 13, 2003, 28 miles from the Spanish coast, heavy waves cracked the tanker's starboard stern.[17] Six days

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14. Under UNCTAD guidelines, when a parent corporation owns at least fifty percent of the shareholder voting power of a host country corporation, the latter is called a subsidiary. When the parent corporation owns at least ten percent of the shareholder voting power of the host country corporation, the host country corporation is called an associate. *See* UNCTAD, WORLD INVESTMENT REPORT 2004: THE SHIFT TOWARDS SERVICES, at 345, U.N. Doc. UNCTAD/WIR/2004, Sales no. E.04.II.D.36 (2004), *available at* http://www.unctad.org/en/docs/wir2004_en.pdf.

15. PAUL R. KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS THEORY AND POLICY 171 (6th ed. Addison Wesley 2003); DUKELOW & NUSE, *supra* note 5, at 260. As will be discussed in section 2.32, this separation of liability is not absolute. As Wallace writes, "[O]f all the essential or possible criteria one might mention, the one that is absolutely crucial and common to every form of multinational enterprise [. . .] is: central direction." CYNTHIA DAY WALLACE, LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE: NATIONAL REGULATORY TECHNIQUES AND THE PROSPECTS FOR INTERNATIONAL CONTROLS 20 (Brill 1982).

16. Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. LAW 493, 494 (2002).

17. Description of the hull crack: *The PRESTIGE Accident: what is the European Commission doing about it?* ENERGY AND TRANSPORT IN EUROPE DIGEST, SPECIAL EDITION, EUR. COMM'N, (Nov. 11, 2002), *available at* http://ec.europa.eu/dgs/energy_transport/newsletter/dg/2002/nlSEPrestige-2002-11-20_en.html [hereinafter EUR. COMM'N]; Time and location of spill: MARÍA JOSE CABALLERO, GREENPEACE INT'L, THE PRESTIGE DISASTER: ONE YEAR ON 6 (2003), *available at* http://www.greenpeace.org/multimedia/download/1/346545/0/Prestige_report.pdf; Dimensions of tanker: Prestige—Spills, Centre de Documentation, de Recherche et d'Expérimentations sur les Pollutions Accidentelles des Eaux (CEDRE), *available at* http://www.le-

later, the 243.5 meter long tanker lay broken in two at the bottom of the Atlantic Ocean, two hundred kilometers from the Spanish coast. As a result, 64,000 tons of oil were spilled; only 14,000 tons of oil were ever salvaged.[18] The *Prestige* flew the Bahamian flag at the time of its sinking, and the Bahamas Marine Authority concluded that rough waves caused the wreck.[19] The seas proved too much for the twenty-six-year-old single-hulled tanker which was reaching the end of its life cycle.[20]

The *Prestige's* heavy fuel oil contaminated 3,000 kilometers of European coastline and killed approximately 300,000 sea birds.[21] Experts predicted that the marine life would suffer for many years, given the presence of carcinogenic polynuclear aromatic hydrocarbons (PAHs).[22] The spill led to massive economic costs as well. Spain's clean-up costs and initial compensation totaled 3 billion Euros.[23] The International Oil Pollution Compensation Fund, which compensates only reasonable clean up costs and direct income loss, announced in June 2004 that *Prestige* related claims could total 1.038 billion Euros.[24] This

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cedre.fr/uk/spill/prestige/prestige.html (last visited Feb. 21, 2008).

18. Spill amount: RAUL GARCIA, WWF, THE PRESTIGE: ONE YEAR ON, A CONTINUING DISASTER 4 (2003), *available at* http://www.panda.org/downloads/marine/finalprestige.pdf; Carcinogenic cargo: *Almighty mess, almighty row*, THE ECONOMIST Nov. 20, 2002, *available at* http://www.economist.com/agenda/displayStory.cfm?story_id=1453846; Salvage amount: JACQUELINE MICHEL ET AL., POTENTIALLY POLLUTING WRECKS IN MARINE WATERS, ISSUE PAPER PREPARED FOR THE 2005 INTERNATIONAL OIL SPILL CONFERENCE IV (2005), *available at* http://www.iosc.org/docs/IOSC_Issue_2005.pdf. A salvage amount of 14,000 tons plus a widely cited spill amount of 64,000 tons gives a total amount of 78,000 tons. This figure exceeds the recorded cargo of the *Prestige* (77,033 tons) by about one thousand tons. This discrepancy may be explained by the fact that the tanker was also carrying non-cargo oil to be used for its own propulsion. Some sources do state a total spill amount of 63,000 tons rather than 64,000; however, the later is more commonly cited.

19. *Bahamas report into Prestige fails to pin down definite cause*, 15:49 TRADEWINDS 46 (Dec. 3, 2004).

20. EUR. COMM'N, *supra* note 17. Various parties have maintained that Spain's decision to have the tanker towed away from shore worsened the spill. *See, e.g.*, NEWS RELEASE, Am. Bureau of Shipping, ABS fires back at Spanish Government over Prestige (June 30, 2003), *available at* http://www.eagle.org/NEWS/PRESS/june30.html. Assessment of the precise validity of such claims is beyond the scope of this Article. Several facts do merit mention on this point, however: (1) Spain by no account was the initial cause of the spill; (2) the incident became an emergency quickly, as evidenced by the rapid crew evacuation; and (3) the nearest shore area was a highly sensitive ecological region with a significant fishing industry.

21. *Oil Pollution Damage Payments Rise to Trillion Dollar Limit,* ENVIRONMENT NEWS SERVICE, Dec. 15, 2004, *available at* http://www.ens-newswire.com/ens/dec2004/2004-12-15-03.asp (citing a WWF – Spain report).

22. Gaia Vince, *Prestige Oil Spill Worse than Thought*, NEW SCIENTIST, Aug. 27, 2003, *available at* http://www.newscientist.com/article.ns?id=dn4100.

23. GARCIA, *supra* note 18, at 19.

24. News Briefing, International Oil Pollution Compensation Funds 1971 and 1992, *The October 2004 sessions of the governing bodies – In brief* 2 (Oct. 25, 2004), http://www.iopcfund.org/newspdfs/Oct04e24.pdf. The International Oil Pollution Compensation Funds (IOPCF) are funded by levies "paid by [private] entities which receive oil after sea transport." IOPCF, Introduction, http://www.iopcfund.org/intro.htm (last visited Feb. 21, 2008).

amount greatly exceeded the Compensation Fund's available 171.5 million Euros.[25] Because of this shortfall, *Prestige* claims are disbursed at a 15 percent *pro rata* rate.[26]

The public in Spain and abroad was outraged at the *Prestige*.[27] In France, the public was appalled that another major spill could taint French beaches and fisheries so soon after the *Erika* spill, less than two years before. In December 1999, the twenty-four-year-old *Erika* broke apart on stormy seas and spilled 31,000 tons of heavy fuel oil, polluting 400 kilometers of French Northwest coastline.[28] The *Erika* incident was merely one of many serious oil spills in the past decade.[29]

The *Prestige* spill thus led many to believe there were endemic failures in the international regulation of oil transport.[30] It generated calls for improvements that would ensure responsible parties would be brought to justice within the rule of law. Another theme that emerged as part of the public response was the need for effective public policy, with strong pressure on European governments to take steps to stop oil spills from occurring.

In the end, public actors, such as the Spanish government, overwhelmingly paid for the clean-up and compensation to injured parties. The tanker owner's insurance company, London Steamship Owner's Mutual Association, was strictly liable for about 25 million USD,[31] under the *Protocol of 1992 to Amend The International Convention on Civil Liability for Oil Pollution Damage 1969* (CLC 1992).[32] Apart from this, the private parties involved in the *Prestige* spill

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25. *Id.*

26. *Id.*

27. In response, French fishermen dumped two tons of *Prestige* oil at the French Maritime Affairs office in Arcachon, France in early January 2003. *French fishermen dump oil in protest over Prestige*, REUTERS, Jan. 17, 2003, http://www.planetark.com/dailynewsstory.cfm/newsid/19443/story.htm. In Spain, 200,000 people gathered to protest at Santiago de Compostela on December 1, 2002. Jose Manuel Ribeiro, *Giant oil slick nears Spanish coast*, USA TODAY, December 1, 2002, http://www.usatoday.com/news/world/2002-12-01-spain-oil_x.htm.

28. *An Avoidable Disaster?*, DEUTSCHE WELLE, Nov. 20, 2002, http://www.dw-world.de/dw/article/0,1564,679174,00.html.

29. In 1996, the Sea Empress ran aground off the coast of Wales, spilling 72,000 tons of heavy bunker oil; and in January 1993, the Brear spilled 84,700 tons of heavy bunker oil off the Shetland Islands. In 1991, the Haven spilled 144,000 tons of Iranian heavy crude oil off Genoa, Italy. *See* International Tankers Owner Pollution Federation Limited, Case Histories, http://www.itopf.com/casehistories.html (last visited Feb. 21, 2008). In the region harmed the most by the *Prestige*, the nineteen-year-old Aegean Sea had run around in 1992, spilling 72,000 tons of crude oil. *See* European Maritime Safety Agency, Large Tanker Spills since 1984, http://www.emsa.eu.int/end185d014d001d017.html (last visited Feb. 21, 2008).

30. *Chirac hits at 'gangsters of sea'*, CNN, Jan. 3, 2003, *available at* http://edition.cnn.com/2003/WORLD/europe/01/03/prestige.chirac/index.html.

31. Paul Reynolds, *Analysis: Tightening Rules on Tankers*, BBC NEWS, Nov. 19, 2002, *available at* http://news.bbc.co.uk/2/hi/europe/2491699.stm.

32. Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollu-

do not appear to have financed any clean-up or compensation. The owner of *Prestige's* oil cargo, Swiss-incorporated Crown Resources Inc. (Crown), was sold by its parent company, and later liquidated, without having paid any compensation,[33] despite the fact that Crown's corporate ownership chain leads to the Alpha Group, a Russian conglomerate with significant capacity for compensation.[34]

Spain sued the tanker's classification agency, the American Bureau of Shipping, for clean-up costs under U.S. law for its alleged negligence in certifying the tanker as seaworthy.[35] But a New York federal judge dismissed the claim in January 2008, determining that the U.S. Court did not have jurisdiction over the case.[36] This judgment did not address the issue of asset location or nationality of the parties, but rather held that the CLC 1992, a convention to which the United States is not a party, required that damage claims be heard in a state which is a signatory to the convention.[37]

II.
MULTINATIONAL ENTERPRISE LIABILITY MINIMIZATION

With the facts of the event outlined above, I now begin my analysis of the three types of MNE liability minimization which come to light in the *Prestige* incident: first, the outsourcing arrangements, particularly as between charterer and ship owner; second, MNE reliance on secrecy havens and flags of convenience; and third, the legal distinction evident between parent and subsidiary corporations within a MNE.

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tion Damage 1969, Nov. 27, 1992, *available at* http://www.jus.uio.no/lm/imo.civil.liability.oil.pollution.damage.protocol.1992/doc#34 [hereinafter CLC 1992].

33. The following notice was published in the LONDON GAZETTE on June 4th, 2004, "A Petition to wind up the above-named Company of ERC Trading AG (formerly Crown Resources AG), presented on Wednesday 19 May 2004 by Kinetic Energy PTE Ltd./Sumitomo Corporation (Singapore) Pte Ltd., claiming to be Creditors of the Company, will be heard at the Royal Courts of Justice, Strand, London WC2A 2LL, on 23 June 2004, at 10.30 am." The notice cited the proceeding as "In the Matter of ERC TRADING AG (formerly Crown Resources AG) and in the Matter of the Insolvency Act 1986." The notice also named the following forum "High Court of Justice (Chancery Division) Companies Court." *Corporate Insolvency Notices,* 57308 THE LONDON GAZETTE, at 7029 (June 4, 2004), http://www.gazettes-online.co.uk/ ViewPDF.aspx?pdf=57308&geotype=London&gpn=7029&type= Issue&all= Kinetic%20Energy%20PTE%20Ltd.

34. Crown's reported 2006 asset value was over 32 billion USD and its declared profit for that year was 1.6 billion USD. The Alfa Group, Financial Highlights and Analysis, http://www.alfagroup.org/258/financial.aspx (last visited March 4, 2008). The site states that "the following financial information is extracted from the IFRS consolidated (or combined) financial statements of Alfa Group Consortium which was audited by PricewaterhouseCoopers."

35. Reino de Espana v. Am. Bureau of Shipping, Inc., No. 03 Civ. 3573 (LTS)(RLE), 2008 U.S. Dist. LEXIS 3, (S.D.N.Y. Jan. 2, 2008).

36. *Id.*

37. *Id.* at 17.

These three categories are not intended to be rigid; they relate closely to each other and can occur simultaneously. For instance, a MNE could outsource a high-risk process to a company which was within the jurisdiction of a secrecy haven. Furthermore, it is notable that the latter two methods of liability minimization can be traced to the gap that exists between the way in which international law treats MNEs, as weakly related individuals which are nationals of their state of incorporation, and how they exist in reality, as unified, transnational economic actors.

The following table summarizes the names and roles of actors involved in the *Prestige* spill.

Table 1: Principal Corporations Involved in the *Prestige* Spill[38]

Role in Spill	Name of Corporation	Country of Incorporation	Owners
Tanker Owner	Mare Shipping	Liberia	Couloupolos Family trust
Tanker Operator	Universe Maritime Ltd.	Greece	Unknown
Cargo Owner (*Prestige* Charterer)	Crown Resources Inc.	Switzerland	Crown Luxembourg, A.G.
	Crown Luxembourg A.G.	Luxembourg	CTF Holdings Ltd.
	CTF Holdings Ltd.	Gibraltar	Crown Finance Foundation

38. This chart outlines the relevant corporate actors as of 2002. Crown Resources Inc.'s name was later changed, as discussed. The identity of Mare Shipping was found through various newspaper reports. *See, e.g.*, *Secretive Greek Dynasty Linked to Sunken Tanker*, THE NEW ZEALAND HERALD, Nov. 20, 2002, http://www.nzherald.co.nz/section/2/story.cfm?c_id=2&objectid=3005312. The ownership chain of Crown Resources Inc. was identified mainly from pleadings in a lawsuit unrelated to the *Prestige*, information which has been reflected in successive court judgments on this lawsuit. *See* Complaint at ¶¶ 40-43, Norex Petroleum Ltd. v. Access Industries, Inc., et al, No. 02 Civ. 1499 (CTS)(KNF), 2007 U.S. Dist. LEXIS 70083, (S.D.N.Y. Sept. 24, 2007), *available at* http://www.norexpetroleum.com/litigation/claim/p40/eng.pdf (unamended complaint filed 28 Feb. 2002) [hereinafter Norex complaint]. The tanker operator, Universe Maritime Ltd., was identified in various newspapers, among other sources. *See e.g.*, *Analysis: Vulnerability of single hulls,* BBC, Nov. 19, 2002, http://news.bbc.co.uk/2/hi/europe/2491451.stm.

	Crown Finance Foundation (A Trust)	Liechtenstein	Beneficiaries: Mikhail Fridman, Alexey Kuzmichev and German Khan (Current Board Members of the Alfa Group)

A. Outsourcing

Outsourcing commonly refers to how a firm contracts out operational elements to unaffiliated arm's length entities.[39] Whether or not to outsource a particular element is a question of business strategy, and such decisions necessarily shape the boundaries of the firm.[40] Outsourced operations lie "outside" the MNE in the sense that the performing companies are not connected to the MNE by equity ownership, but rather by contractual relationships. Section 3, *infra*, examines the international business and international political economy explanations for outsourcing, notably those related to Ronald Coase's 1937 theory of the firm, which holds that firms internalize production within the firm only when it is economical to do so.[41] For the purposes of this section, however, I will focus on outlining the legal effects of outsourcing on MNE liability exposure.

On one level, outsourcing affects liability exposure because it represents contractual risk-sharing between parties. Allocation of risks, including liability risk as against third parties and public authorities, can be a major stumbling block in the negotiation and conclusion of an outsourcing agreement.[42] An outsourcing contract cannot shield a hiring corporation from all liability risk, however, as applicable law (such as non-derogable statutory obligations[43]) can create residual liability exposure despite the precise contractual terms. This statutory influence aside, the particular terms of an agreed contract affect (and can reduce) the liability exposure of an outsourcing MNE.[44]

In addition to contractual risk-sharing, outsourcing affects liability exposure on a more fundamental level: by shifting firm operations to an arm's length

39. *See, e.g.*, *The Benefits of Outsourcing for Small Business*, N.Y. TIMES, Jan. 1, 2008, http://www.nytimes.com/allbusiness/AB5221523_primary.html?ref=smallbusiness.

40. Marc T. Jones, *The Transnational Corporation, Corporate Social Responsibility and the 'Outsourcing' Debate* 6-2 J. Am. Acad. Bus. 91, 93-95 (2005).

41. *See* George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 NOTRE DAME L. REV. 955, 966-70 (2007).

42. Harry Rubin, *Supply-Side / Manufacturing Outsourcing – Strategies and Negotiations*, 38 GEOG. J. INT. L. 713, 717-18 (2007).

43. *See* Mamiko Yokoi-Arai, *The Evolving Concept of Operational Risk and its Regulatory Treatment*, 9 LAW & BUS. REV. AM. 105, 126-29 (2003) (on residual liability and outsourcing in banking).

44. *See, e.g.*, Geis, *supra* note 41.

party, an outsourcing company reduces its vicarious liability exposure for employee performance in such operations. Vicarious liability refers to legal responsibility for the misconduct of another person, and such liability commonly arises in the course of employment.[45] Outsourcing decisions therefore can strongly affect liability exposure because the contracted arm's length party largely carries the risk of vicarious responsibility, not the hiring party.[46]

Contrasting examples, particularly in the context of oil transport outsourcing, show how arm's length contracting affects vicarious liability. First, when the *Erika* spill occurred in 1999, the owner of the oil, TotalFina, disavowed any responsibility for the spill on the grounds that it did not own or operate the tanker but had only contracted with an arm's length service provider.[47] Conversely, in the 1989 case of the *Exxon Valdez* spill, Exxon actually owned and operated the tanker, making it impossible for the oil company to claim that it was a mere contractor protected from vicarious liability for the spill.[48]

Intuitively, it seems logical that when an arm's length party is hired for a task a MNE should not bear liability arising out of that party's action. However, the factual circumstances of outsourcing relationships require close scrutiny in order to address the scope of such relationships for liability minimization. Legislative redress is likely required in some instances in order to ensure that outsourcing is not a mechanism by which a MNE may reduce the likelihood of liability, without altering its behavior.

Specifically, leaders aiming to safeguard the rule of law and effective public policy should examine outsourcing as a potential means of liability minimization in light of three often interrelated factors: (1) the terms of outsourcing contracts; (2) the applicable legal regimes governing party responsibilities; and (3) the comparative significance of vicarious liability within overall liability risks.

With regard to the first factor, legal processes should be in place to compare the appropriateness of party behavior with the liability-sharing terms found in the outsourcing contract. For instance, outsourcing contracts may unduly bur-

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45. *See* DUKELOW & NUSE, *supra* note 5, at 260; ROBERT M. SOLOMON, R.M. KOSTAL & MITCHELL MCINNES, CASES & MATERIALS ON THE LAW OF TORTS 636-45 (5th ed., Carswell 2000).

46. *See* Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL'Y REV. 265, 306 (1998).

47. Peter Gumbel, *Total Clean Up*, TIME, Jan. 26, 2004, at A10, *available at* http://www.time.com/time/magazine/article/0,9171,993213-2,00.html. Gumbel writes: "Total even prevented its employees from volunteering for the cleanup." It is worth noting that an outsourcing contract does not necessarily protect a charterer from being found guilty in the court of public opinion. The French public did not accept TotalFina's claim that it lacked responsibility for the spill, and Total was forced to make "voluntary" contributions towards the clean-up.

48. *See, e.g.*, Marcia Coyle, *Exxon Valdez Case Brings $2.5B Damages Fight to Supreme Court*, THE NAT'L L.J., Sept. 12, 2007, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1189501364988.

den one party with liability exposure as a result of power imbalance in the bargaining process.[49] In such instances, factual determination regarding control and agency should prevail over the terms of the contract. For example, Canadian labour laws permit factual assessment of outsourcing agreements by providing that a purportedly independent contractor may be deemed an employee when the contractor is found to be "in a position of economic dependence on, and under an obligation to perform duties for" the hiring party.[50] Similar legislation permitting the determination of constructive relationships, or otherwise setting a standard of minimum liability for all parties, may be needed to address instances in which an outsourcing contract permits liability minimization by creating relationships with unbalanced liability exposure.

The second factor, that of the statutory context governing outsourcing relationships, can also result in liability minimization; this is true in cases where the law places a rigid and potentially undue burden on one type of party to an outsourcing contract.[51] The relationship can become fixed by applicable law without permitting an appreciation of actual party conduct. Lawmakers should be cognizant of areas of the law which create unequal liability exposure, and of the policy ramifications of such exposure inequities as well as their potential for liability minimization.

Thirdly, policymakers should acknowledge that outsourcing provides a level of protection from vicarious liability. As with the first two factors, this legal status should not operate without regard to the actual conduct of outsourcing parties, particularly concerning the effective control of employees. If clear direction and control over workers is evident, vicarious liability should arguably follow.

With the foregoing discussion in mind, it is notable that according to industry reports, oil companies, deterred by liability risk, are outsourcing oil transport more than ever.[52] Review of the *Prestige* facts suggests that this may be due in part to the operation of the aforementioned factors.[53] In particular, it may be due

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49. For one discussion of power imbalance in arm's length contracting and cost-shifting, *see* Barry C. Lynn, *Breaking the Chain: The Antitrust Case Against Wal-Mart*, HARPER'S MAGAZINE, July 2006, at 29, *available at* http://www.harpers.org/archive/2006/07/0081115.

50. Canada Labour Code, R.S. C., ch. L 2, § 3 (1985). Labour Boards have looked beyond the existence of an independent contractor agreement and constructively found an employer-employee relationship based on the facts of a given case.

51. For example, under the CLC 1992 the tanker owner is held strictly liable for oil pollution (according to tanker tonnage) while the tanker charterer in contrast is directly excluded from all liability, unless the ship-owner sues it directly or unless it is proved that "the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result." CLC 1992, *supra* note 32, at Art. 6. *See also* Article 3, ¶ 5 of the 1969 Civil Liability Convention, which holds: "Nothing in this Convention shall prejudice any right of recourse of the owner against third parties." CLC 1969, *infra* note 57.

52. *See, e.g.*, *Tanker Ownership Reflects Fear of Penalties*, OIL & GAS J., Jan. 15, 1996, at 23.

53. It is beyond the scope of this Article to explore in a meaningful fashion the bargaining relationship and potential for inequitable liability risk sharing, which exists between tanker owners and

to an aversion to vicarious liability, as well as a response to the liability exposure placed on tanker owners under applicable law, namely the International Maritime Organisation's CLC 1992 which governs most of the world's shipping.[54] This protocol imposes strict liability, to a limit determined by tanker tonnage, on the tanker owner.[55] In contrast to the tanker owner, however, the tanker charterer is directly excluded from all liability under the CLC 1992, unless the ship owner sues it directly[56] or "unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."[57]

The reasons for the CLC 1992's treatment of charterers as compared with its treatment of ship owners are complex and relate to the historic balancing of interests seen in the creation of these international norms.[58] A primary goal of the CLC regime is the payment of compensation to injured third parties at a strict liability standard.[59]

Crown, the owner of the *Prestige*'s fuel oil, chartered the tanker from Liberia-based Mare Shipping. Crown's liability as charterer was limited by the chartering contract and by the CLC 1992. Knowledge of this limited liability exposure was apparent in Crown's conduct, as evidenced by the company's response to the spill. Andrey Varganov, Vice President of Crown stated:

> We are very sorry for the Spaniards, but this is not our fault: we have chartered a tanker which was available on the market and was up to the standards of an international maritime register. As cargo owners we are entitled to compensation of our losses [the cargo was insured for $8 million]. However, the responsibility for the vessel is on the ship owner when the vessel is sailing.[60]

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oil cargo owners. It is worth noting, however, that the tanker ownership industry appears to be less concentrated (with a greater number of small players) than the oil production industry. For example, INTERTANKO maintains that independent owners (non-state and non-oil company) operate eighty percent of the world's tankers and that its 250 members comprise seventy percent of the world's independent tanker fleet. In contrast, sixty-eight percent of proven global oil reserves are said to be held and controlled by just ten oil companies. *See* INTERTANKO, About Us, http://www.intertanko.com/templates/Page.aspx?id=1086 (last visited Mar. 21, 2008); Natural Res. Canada, How World Oil Markets Work, http://www.fuelfocus.nrcan.gc.ca/fact_sheets/oilmarket_e.cfm (last visited Feb. 21, 2008).

54. CLC 1992, *supra* note 32.

55. CLC 1992, *supra* note 32 at Art. 6.

56. Article 3, ¶ 5 of the 1969 Civil Liability Convention holds: "Nothing in this Convention shall prejudice any right of recourse of the owner against third parties." International Convention on Civil Liability for Oil Pollution Damage, art. 3, ¶ 5, Nov. 29, 1969, 973 U.N.T.S. 3, *available at* http://sedac.ciesin.org/entri/texts/civil.liability.oil.pollution.damage.1969.html [hereinafter CLC 1969].

57. CLC 1992, *supra* note 32, at Article 4, ¶ 4.

58. *See e.g.*, Michael Mason, *Civil Liability for Oil Pollution Damage: Examining the Evolving Scope for Environmental Compensation in the International Regime*, 27 MARINE POL'Y 1, 2-3 (2003).

59. *Id.* at 10.

60. *Saga of Greed: Who is to Blame for Prestige Disaster*, INDYMEDIA EUSKAL HERRIA, Nov. 21, 2002, http://euskalherria.indymedia.org/eu/2002/11/2703.shtml (last visited Mar. 21, 2008).

Crown's protection, as a charterer, from a liability finding occurred even though the company appeared to directly control the *Prestige*'s movements. According to a U.S. court judgment, Crown directly ordered the *Prestige* to travel to Gibraltar for further instructions.[61] Unless sued directly by the ship owners or proved to be a willful polluter, Crown was likely protected from liability arising from the matter. To the best of this author's knowledge, neither of these two scenarios came to pass before the company's eventual sale and dissolution.

In sum, outsourcing can reduce the likelihood of a liability finding, without necessarily discouraging activity that would reasonably lead to a liability finding. This can result from at least three factors: (1) an outsourcing contract's terms may unduly allocate liability exposure to one party over another; (2) law applicable to the outsourcing agreement may shelter one class of party from liability; and (3) the reduction of vicarious liability exposure inherent in outsourcing may be unwarranted given actual party conduct. These factors are apparent in the example of the *Prestige* spill. Not only did Crown's choice to outsource oil transport create a buffer against vicarious liability for tanker employee conduct, but it also placed Crown as a charterer within the favorable liability protections offered under the CLC 1992.[62] These protections operated despite the fact that Crown exhibited some level of direct control over the tanker.

B. Renegade Regime Regulation

States' deference to each others' discrete spheres of domestic jurisdiction enables a second type of MNE liability minimization. I refer to this second form of liability minimization as "renegade regime regulation."[63] Simply put, renegade regime regulation occurs when a MNE avoids liability in State A by claiming that it is regulated by State B. Problems arise when State B's jurisdiction over the MNE impairs the ability of State A to effectively regulate MNE activities (*that is*, permits MNEs to avoid liability). Due to a lack of enforcement capacity, State B may fail to honor its international commitments to regulate appropriately. Another possibility is that there may not be relevant international commitments in the area, and State B acts purely in its best interests, without regard for how its failure to regulate affects other states. Finally, it is possible that a state is acting in knowing violation of applicable international norms.

The *Prestige* example offers two illustrations of renegade regime regulation. First, it illustrates the function of some states as secrecy havens. This is

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61. "[. . .] [I]n early November, Crown directed the Prestige to proceed to Gibraltar for further orders." Reino de Espana v. Am. Bureau of Shipping, Inc., 328 F. Supp. 2d 489, 491 (2d Cir. 2004).

62. CLC 1992, *supra* note 32.

63. I am building on others' terminology here. *See* Lorraine Eden & Robert T. Kudrle, *Tax Havens: Renegade States in the International Tax Regime?*, 27 LAW & POL'Y 100, 107 (2005) ("Strong international regimes provide rules that define rights and responsibilities, allocate benefits and costs, provide mechanisms that safeguard against opportunism and monitor compliance . . . . A *renegade state* is an outlier from the specific practices of a regime.").

achieved by maintaining strict confidentiality laws and withholding information that other states would find useful in the exercise of their own jurisdiction. Such havens attract investment, and generate applicable fee revenue, by offering confidentiality in business affairs. Second, the *Prestige* spill provides an illustration of commodified national jurisdiction in the form of unintrusive (and thus potentially low or inadequate) national regulatory oversight granted in exchange for registration fees. At play in the *Prestige* example were open ship registries, also referred to as flags of convenience.

1. Secrecy Havens

Incorporation in and reliance upon secrecy havens can facilitate liability minimization. A secrecy haven can pose a barrier to holding MNEs liable by cloaking the identity of the shareholders or personnel of a corporation registered in its jurisdiction, or otherwise withholding information relevant to a potential liability finding in another state.[64]

Conceptually and practically, secrecy havens are closely tied to tax havens, as tax havens entail a high level of confidentiality, particularly with regard to banking records. Currently, there are about seventy tax haven states globally, a number which has doubled over the past twenty-five years.[65] They may be broadly defined as states that adopt tax legislation designed to attract subsidiaries and branches from heavily taxed countries.[66] They range from states that impose no income tax, but rather collect license fees (for example, the Bahamas and the Cayman Islands) to those which impose minimal taxes (for example, Liechtenstein and Switzerland).[67] Tax havens now play an enormous role in the contemporary world economy. While their very nature makes tax haven activities difficult to quantify, one author estimates that one half of the global money supply either resides in or passes through tax havens.[68]

Liberia was a notable secrecy haven involved in the *Prestige* incident. Despite Liberia's civil unrest in recent decades, the country maintains a strong cor-

64. *See* UNITED STATES SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, TAX HAVEN ABUSES: THE ENABLERS, THE TOOLS AND SECRECY 46-48 (2006), *available at* http://hsgac.senate.gov/_files/TAXHAVENABUSESREPORT8106FINAL107.pdf (discussing examples of how secrecy havens can undermine U.S. enforcement jurisdiction).

65. Marc Lopatin, *Tax Avoiders Rob Wealth of Nations*, GUARDIAN OBSERVER, Nov. 17, 2002, *available at* http://www.guardian.co.uk/business/2002/nov/17/corporateaccountability.theobserver. The Article furthermore cites one industry estimate that offshore deposits have risen to comprise a quarter of the total global money supply.

66. Ronen Palan, *Tax Havens and the Commercialization of State Sovereignty*, 56 INT'L ORG. 151, 154 (2002).

67. *Id.*

68. *Id.* at 156.

porate registry, as well as the second largest open ship registry in the world.[69] Interestingly, these two functions overlap, as one website manages both types of registration.[70] Like other tax havens, Liberian corporate registration practice affords entities significant privacy and confidentiality. For example, taxes on foreign income are low or non-existent,[71] thus removing the need for stringent tax disclosure.

The culture of secrecy implicit in Liberian corporate registration was evident following the *Prestige* spill. Once it was publicly known that Mare Shipping, a Liberian-incorporated company, owned the tanker, the question still remained: who actually owned Mare Shipping? Strangely, this mystery remained for a number of days after the spill. Purportedly under Liberian law, the owners of Mare Shipping could remain unrevealed.[72] Whether the delay in identifying the true owners of the sunken tanker was a result of substantive Liberian law, or was rather the result of a culture of secrecy, is unknown to this author. However, it appears possible that if not for the high profile nature of the *Prestige* spill, the shareholder identity of Mare Shipping might never have been corroborated by the Liberian registry.

Liberia is not the only state that demonstrated curious conduct regarding ownership of the *Prestige*. Before it was publicly known that a Greek shipping trust (held for the Coulouspolus family dynasty) owned Mare Shipping, Greece's diplomatic representative in Spain stated on the record that the tanker did not have Greek owners.[73] Liberia and Greece's involvement in the confusion over the true ownership of the *Prestige* suggests that reliable information regarding the identity and conduct of MNE corporations registered in secrecy havens can be difficult to secure and validate. Thus, secrecy havens create a lack of transparency in MNE structure and conduct.

Without such information, lawsuits against MNEs are impossible to pursue, thus minimizing potential liability. Such havens impair the initiation of a legal investigation or trial, since plaintiffs may have difficulty knowing whom to sue, and may not ascertain the details of the MNEs' internal equity connections in time to sue, given statute of limitation requirements. Furthermore, such havens could impair the function of an investigation or trial that is already underway, since their involvement worsens the already daunting logistical task of acquiring information and evidence across jurisdictions. In sum, while the holdings of a MNE are economically connected, determining their precise legal connections

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69. *Panama to let US search its ships*, BBC NEWS, May 11, 2004, http://news.bbc.co.uk/2/hi/americas/3705029.stm.

70. LISCR, Liberian Registry, http://www.liscr.com/liscr/ (last visited Feb. 21, 2008).

71. Palan, *supra* note 66.

72. *Secretive Greek Dynasty Linked to Sunken Tanker*, *supra* note 38.

73. Specifically, "The ship was earlier described as Greek-owned. But the Greek embassy in Madrid has denied this, saying its owners Mare Shipping Inc were Liberian-based." *Tanker Faces Break Up as Port Refuses Entry*, SYDNEY MORNING HERALD, Nov. 19, 2002.

can be difficult. This is exacerbated by the involvement of secrecy havens, creating a method of liability minimization.

In addition to temporarily cloaking the tanker owner's corporate family tree, secrecy havens also protected the owner of *Prestige*'s oil. Crown, a Swiss-based corporation, was the immediate owner of the cargo, and a tracing of its ownership reveals entities that are all incorporated in tax havens, namely Gibraltar, Luxembourg and Lichtenstein.[74] The entity highest in the ownership chain is a trust established under Lichtenstein law, one of the few states currently identified by the OECD as an uncooperative tax haven.[75]

Use of secrecy havens in MNE corporate structuring further complicates lawsuits that already face the difficult challenge of determining an appropriate judicial forum for activities that span multiple jurisdictions. As discussed above, incorporation in countries that do not favor information sharing with other states can facilitate liability minimization in myriad ways (that is, the hindrance of evidence collection). Moreover, one need only recall the central role that secrecy havens played in the structure of the now-infamous Bank of Commerce and Credit International, to see how secrecy havens can obstruct national regulatory scope in addition to judicial process.[76]

2. Flags of Convenience

In addition to secrecy havens, lax regulatory oversight by states with exclusive jurisdiction provides another method of liability minimization. For example, liability exposure associated with shipping may be minimized by using open ship registries (also called flags of convenience). First, selecting a particular ship nationality because that state is unlikely to enforce its laws represents one form of liability minimization. Second, when a MNE registers a ship in Flag State A, which then acquires semi-exclusive jurisdiction over the ship, this can result in State B's inability to find liability against the MNE under its laws.

Currently, approximately 50 percent of all registered vessels are registered in open registry states.[77] These states allow non-nationals to register their ves-

74. Eden & Kudrle, *supra* note 63, at 102 (Switzerland and Luxembourg). *See also* Palan, *supra* note 66, at 155 (list of offshore havens).

75. Organization for Economic Co-operation and Development [OECD], List of Uncooperative Tax Havens, http://www.oecd.org/document/57/0,2340,en_2649_33745_30578809_1_1_1_1,00.html (last visited Feb. 21, 2008) [hereinafter OECD Tax Haven List].

76. The Bank of Credit and Commerce made extensive use of tax and secrecy havens in its international corporate structuring. At its height, the bank operated in seventy-three countries. Before its collapse in 1992, the Bank of Credit and Commerce engaged in criminality on a massive scale, including fraud, bribery and arms trafficking. *See, e.g.*, Finfacts Team, *Deloitte's failed BCCI case against Bank of England cost £100 million*, FINFACTS, Nov. 3, 2005, http://www.finfacts.com/irelandbusinessnews/publish/article_10003808.shtml.

77. *Panama to let US search its ships*, *supra* note 69.

sels and to fly the country's flag.[78] Under international law, a ship's flag state assumes exclusive jurisdiction over the ship and crew on the high seas.[79] Despite their prominence in world shipping, flags of convenience remain controversial, particularly due to inadequate regulatory oversight over labour abuses, illegal fishing, ownership transparency, and safety and pollution standards.[80] Fundamentally, such controversy relates to the way in which flags of convenience attract paying registrants by offering non-intrusiveness.[81]

The extent to which flag states hold exclusive jurisdiction over vessels registered in their territory requires further exploration. The balance of jurisdiction held between flag and non-flag states under international law is in fact quite nuanced. The *United Nations Convention on the Law of the Sea* (UNCLOS) encroaches on flag state jurisdiction by giving port and coastal states the authority to charge and apprehend vessels that pollute within their waters.[82] However, this right is mitigated by UNCLOS article 228 which shifts jurisdiction to flag states by holding that such port or coastal state charges "shall be suspended upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag state within six months of the date on which proceedings were first instituted."[83] This flag state right of preemptive prosecution can be overcome by port and coastal states in three circumstances: (1) if the violations occurred in the coastal state's territorial sea; (2) if proceeding related to a case of major damage to the coastal state; or (3) if the applicable flag state has a record of continually disregarding its international obligations to enforce relevant rules and standards.[84]

In addition to UNCLOS, another relevant treaty is the *1973 International Convention for the Prevention of Pollution by Ships* (MARPOL 1973), combined with its 1978 Protocol (MARPOL), which governs vessel source pollu-

78. Paul Stephen Dempsey, *Compliance and Enforcement in International Law – Oil Pollution of the Marine Environment by Ocean Vessels*, 6 NW. J. INT'L L. & BUS. 459, 479 (1984).

79. Stephen J. Darmody, *The Oil Pollution Act's Criminal; Penalties: On a Collision Course with the Law of the Sea*, 21 B. C. ENVTL. AFF. L. REV. 89, 103 (1993). *See also* Case of the S.S. "Lotus" (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10, at 25.

80. *See, e.g.*, Michael Richardson, *Crimes under Flags of Convenience*, YALEGLOBAL ONLINE, May 19, 2003, http://yaleglobal.yale.edu/display.article?id=1633. *See also* MATTHEW GIANNI & WALT SIMPSON, THE CHANGING NATURE OF HIGH SEAS FISHING: HOW FLAGS OF CONVENIENCE PROVIDE COVER FOR ILLEGAL, UNREPORTED AND UNREGULATED FISHING (Australian Gov't Dep. of Agriculture, Fisheries and Forestry, ITWF & WWF 2005), *available at* http://www.wwf.org.uk/filelibrary/pdf/flagsofconvenience.pdf.

81. Randon H. Draper, *Resuscitating the Victims of Ship Pollution: the Right of Coastal Inhabitants to a Health Environment*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 190, 190 (2004).

82. United Nations Convention on the Law of the Sea, arts. 218 & 220, 10 December 1982, 1833 UNTS 3; 21 ILM 1261 (1982) *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm [hereinafter UNCLOS].

83. *Id.* at Art. 228.

84. Dempsey, *supra* note 78, at 548. These exceptions are profiled in UNCLOS Art. 228.

tion.[85] MARPOL maintains deference to flag ship enforcement of the ship design and discharge standards contained in the treaty;[86] however, the treaty also protects port and coastal states' right to enforce inspection and other laws within their territorial waters.[87] Notably, MARPOL also requires that ships obtain an "International Oil Pollution Preventions Certificate" through a private classification society.[88]

Flag of convenience states may have an economic disincentive to strictly enforce MARPOL and UNCLOS pollution laws, and thus port and coastal states have had to increase their inspection of passing ships.[89] Port state initiatives, including the EU's *Erika I* and *Erika II* Directives, aim to reduce the power of open registry states in international shipping.[90] Despite such domestic legislation, flag states still retain a great deal of jurisdiction under international law. Flags of convenience continue to provide a method of liability minimization in those situations where a flag state's loosely enforced, but still exclusive, jurisdiction is an effective shield against a liability finding within another state's jurisdiction.

The *Prestige* was registered in the Bahamas, an open registry state and the self-proclaimed third largest ship registry.[91] The Bahamas is also among the flag of convenience states identified by UNCTAD, along with Bermuda, Cyprus, Liberia and Panama.[92] As a flag state, the Bahamas has exclusive jurisdiction over a registered ship, including the determination of its seaworthiness and the enforcement of international standards of pollution prevention and labour conditions.[93]

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85. International Convention for the Prevention of Pollution by Ships, 2 November 1973, reprinted in I.L.M. 1319 (1973) [hereinafter MARPOL 1973]; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, 16 February 1978, reprinted in 17 I.L.M. 546 (1978); Australian T. S. 1988 No. 29, *available at* http://www.austlii.edu.au/au/other/dfat/treaties/1988/29.html [hereinafter MARPOL 1978].

86. MARPOL 1973, *supra* note 85, at Art. 4.

87. Draper, *supra* note 81, at 188.

88. *Id. See also* MARPOL 1978, *supra* note 85, at Annex 1: Regulation for the Prevention of Pollution by Oil, Regs. 5-8.

89. Emeka Duruigbo, *International Relations, Economics and Compliance with International Law: Harnessing Common Resources to Protect the Environment and Solve Global Problems*, 31 CAL. W. INT'L L.J. 177, 200 (2001).

90. The *Erika I* package of law reform was comprised of two directives and one regulation. The *Erika II* package was comprised of one directive and one regulation. *Erika I*: Council Directive 2001/105 2002 O.J. (L 019) 9-16 (EC); Council Directive 2001/106 2002 O.J. (L 019) 17-31 (EC); Commission Regulation 417/2002, 2002 O.J. (L 064) 1-5. *Erika II*: Council Directive 2002/59, 2002 O.J. (L 208) 10-27 (EC); Commission Regulation 1406/2002, 2002 O.J. (L 208) 1-9.

91. Bahamas Ministry of Maritime Affairs and Labour, Bahamas Maritime Authority, http://www.bahamas.gov.bs/bahamasweb2/home.nsf/b9823a8db3a12e7d852568a800638515/0b29759cedd100d706256f0000705881!OpenDocument (last visited Feb. 21, 2008).

92. Duruigbo, *supra* note 89, at 153.

93. UNCLOS *supra* note 82, at Art. 94; MARPOL 1973, *supra* note 85, at Art. 4.

Open registry states, such as the Bahamas, are likely to only weakly exercise their exclusive regulatory jurisdiction as a result of at least three factors: (1) lack of connection between national territory and regulatory obligations; (2) lack of capacity; and (3) competing interests. First, the international nature of shipping creates a disassociation between territory and regulation. For instance, because of their possible lack of proximity, flag states may be less motivated to regulate pollution than may be nearby coastal states.[94] Second, several of the largest registries (*i.e.*, Panama and Liberia) are small countries that may lack the finances, human resources or infrastructure to adequately monitor their ships around the world.[95] Third, because open registries compete with one another to attract registrants, strong enforcement initiatives are tempered by a desire to maintain good business relations with registrants.[96] Unlike coastal or port states, whose regulatory activities are executed less in tandem with the business transaction of registration, flag states have competing roles. Consequently, strict regulatory enforcement may suffer at the expense of other objectives.

The pressures on open registries to weakly enforce their regulatory jurisdiction are potentially exacerbated by the central role that private classification agencies play in certifying ships as seaworthy.[97] Flag states often rely on such classification agencies to complete ship inspections. Since ship owners must pay for inspections, and classification agencies also compete with one another, questions as to the predominant character of such inspections arise.[98] The classification agency active in the *Prestige's* case was American Bureau of Shipping. At international law, Bermuda—as the flag state—was responsible for ensuring that the *Prestige* complied with international standards; however, Bermuda relied upon the vessel's classification agency, the American Bureau of Shipping, to actually determine whether the *Prestige* was, in fact, in compliance with such standards.

To the extent that Mare Shipping's registration of the *Prestige* in the Bahamas: (1) guaranteed low exposure to Bahamian law due to weak enforcement, and (2) ensured protection from other legal regimes due to the flag state's exclusive jurisdiction, use of this open registry state constituted a means of liability

94. In addition to this disconnect between states' national territory and their regulatory jurisdiction seen in the operation of ship registries, it must be underscored that open registries are by nature open to non-nationals. This can also affect the exercise of regulatory jurisdiction, since states may have a different attitude toward the regulation of non-nationals than they do toward their own nationals. State jurisdiction over nationals is common practice, while jurisdiction over non-nationals, exercised outside of national borders, has a weaker historical basis and may affect the regulatory attitude adopted.

95. *Richardson, supra* note 80. *See also* Nik Winchester & Tony Alderton, (2003) 'Flag State Audit 2003,' Seafarers International Research Centre: Cardiff University, http://www.sirc.cf.ac.uk.

96. Duruigbo, *supra* note 89, at 200.

97. ALLIANCE OF MARITIME REGIONAL INTERESTS IN EUROPE (AMRIE), THE ROLE OF SHIP CLASSIFICATION IN IMPROVING AND MAINTAINING SHIPPING QUALITY ¶¶ 2.4-.6 (2003), http://www.amrie.org/docs/Classification_Societies.pdf (last visited Feb. 21, 2008).

98. *Id.*

minimization for the company. While a factual determination of whether Bahamian enforcement of international standards was lax in this case is beyond this author's expertise, the theoretical scope for flags of convenience to provide a method of liability minimization is undeniable. Disassociation between territory and regulatory scope, lack of enforcement capacity and conflicting roles, may have undermined the Bahamas' function as an effective regulator in this instance, thus providing a source of liability minimization for the MNE involved.

C. Reliance on the Corporate Veil

A third category of MNE liability minimization is reliance on the corporate veil, which often limits the transfer of liability between the various corporations comprising the MNE. Limited shareholder liability, when applied to MNEs, means that parent companies are not always liable for the actions of their subsidiaries. The specific approaches of the United States, Canada and the United Kingdom will be discussed below.

In some circumstances, the corporate veil may be "pierced," and a parent company may be liable for the actions of a subsidiary. However, these circumstances tend to be the exception, rather than the rule.[99] Moreover, the fragmentation of a MNE's legal identify across many corporations acts to minimize liability, as well as to localize liability exposure to one corporate person at a time.[100] Thus, corporate structure is highly determinative of the potential success of holding one component of the MNE liable for the actions of another component.[101]

While the corporate veil provides a real barrier to legal proceedings against a MNE's multiple components, it must be noted that an even more insurmountable barrier is that posed by the logistical challenges of transnational litigation involving multiple corporate entities (*i.e.,* arranging cooperation among states in enforcement matters, tracking corporate finances and dissolution, witness subpoenas, evidence gathering, *etc.*). Moreover, civil litigation against MNEs is often financially very difficult, if not impossible, for the majority of the world's citizens.[102] Given the level of global poverty, as well income disparity levels both within and amongst countries, most of the world's population lacks the fi-

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99. Phillip Blumberg, *Accountability of Multinational Corporations: The Barriers Present by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT'L & COMP. L. REV. 297, 304 (2001) [hereinafter Blumberg (2001)].

100. *Id.*

101. To use a family analogy, while the veil may be pierced successfully and the parent company may be found liable, a corporate "cousin" of the subsidiary, while still a clear component of the MNE, may likely not be found liable for the actions of a given MNE subsidiary.

102. 2.4 billion of the world's citizens subsist on less than $2 a day. United Nations Development Program, HUMAN DEVELOPMENT REPORT: FIGHTING CLIMATE CHANGE: HUMAN SOLIDARITY IN A DIVIDED WORLD 25 (2007), *available at* http://hdr.undp.org/en/media/hdr_20072008_en_complete.pdf.

nancial means necessary for civil litigation, whether against locally incorporated or foreign incorporated MNE components.

1. The Scope of the Corporate Veil

The corporate veil describes the way in which a corporation is a separate legal being from its shareholders, directors and officers.[103] The separate legal personality of MNE corporate components, along with the doctrine of limited liability for shareholders means that, as a rule, parent companies are not liable for the actions of their subsidiaries.[104] This separation of liability is referred by some as the "entity law approach to MNE liability."[105] As Antunes writes, "[t]he so-called entity law approach is the traditional and still-prevailing regulatory strategy concerning intragroup liability for the great majority of Common or Civil Law countries."[106]

Barcelona Traction, Light and Power Company, Ltd. (Barcelona Traction) is the leading international law case dealing with the corporate veil, and its holding supports the entity law approach.[107] The International Court of Justice (ICJ) held in *Barcelona Traction* that corporations are nationals of their country of incorporation.[108] Furthermore, the ICJ "refused to lift the corporate veil to determine the real control relationship of the Belgian shareholders."[109] The ICJ based its decision on municipal law principles, since there was no direct guidance from existing international law.[110] The ICJ noted that piercing the veil was an exceptional step, and ultimately determined that it was not willing to take such a step in that case.[111]

MNEs can rely upon the corporate veil to minimize liability in at least two ways. First, the corporate veil discourages courts from assuming jurisdiction over MNE components which are deemed foreign nationals. Without a veil-piercing that would connect the foreign MNE components to the state, therefore providing subject matter or personal jurisdiction, foreign MNE components may

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103. DUKELOW & NUSE, *supra* note 5, at 899.

104. MNEs also operate internationally without controlling host country incorporated subsidiaries. MNEs achieve this by using branches or contractual joint ventures.

105. *See, e.g.*, Blumberg (2001), *supra* note 99.

106. Jose Engracia Antunes, *The Liability of Polycorporate Enterprises*, 13 CONN. J. INT'L L. 215, 215 (1996).

107. Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), 1970 I.C.J 3 at 9 (Feb. 5), *available at* http://www.icj-cij.org/docket/files/50/5387.pdf [hereinafter Barcelona Traction].

108. *Id.* at ¶ 70.

109. CYNTHIA DAY WALLACE, THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION 658 (Martinus Nijhoff Publishers 2002).

110. Barcelona Traction, *supra* note 107, at ¶¶ 56-58.

111. *Id.* at ¶¶ 56-58 &101.

be outside a state's jurisdiction.[112] Second, the corporate veil makes it difficult to plead a sufficient cause of action regarding the activities of a MNE component that is not locally incorporated. For instance, a court in the country of a MNE parent company may dismiss a claim against the parent company on the grounds that the actions in question were committed by a subsidiary company. In this instance, the subsidiary company is regarded as a separate legal entity whose acts cannot be imputed to the parent company in the absence of a veil-piercing doctrine or statutory direction. For instance, in *Doe v. Unocal*, claims that Unocal's French parent Total S.A. knowingly profited from Burmese forced labour were dismissed due to lack of personal jurisdiction; although Total S.A. was an "active parent corporation involved directly in decision-making about its subsidiaries' holdings," this was insufficient to pierce the veil since the two companies had maintained legal corporate separateness.[113]

It should be noted that there is a contrasting approach to the entity law approach: the enterprise or single entity approach. The enterprise approach has seen limited application to date, and has occurred mainly in European Court of Justice decisions,[114] proposals for EU legislative reform,[115] and in some areas of North American law (although it has been limited to competition and anti-trust regulation).[116] However it has not attained acceptance under international law.[117] The enterprise approach recognizes: (1) a presumption that a subsidiary will act in the accordance with the wishes of its parent, and (2) a rebuttable presumption that a parent and subsidiary may be properly treated as a single undertaking.[118]

Interestingly, the enterprise approach may face challenges on international law grounds, since international law currently favors the entity law approach, as interpreted from *Barcelona Traction*. International law may be nominally supportive, through soft law,[119] of states' use of the enterprise approach in regulat-

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112. In *Wiwa v. Royal Dutch Shell*, the U.S. Court of Appeals for the Second Circuit did not establish personal jurisdiction via Shell USA, but by Royal Dutch Shell's minimal contacts in New York. Originally, a magistrate had held such contacts inadequate, finding that New York did not have jurisdiction over Royal Dutch Shell because "neither the maintenance of the Investor Relations Office nor the defendants' direct actions in New York, were sufficient." Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 94 (2d Cir. 2000), *cert. denied*, 121 S.Ct. 1402 (2001).

113. Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001).

114. The European Court of Justice has employed this approach in several instances of competition law, leading to extraterritorial application of EU law. WALLACE, *supra* note 109, at 639.

115. *Id.*

116. Canada applies a similar approach in the area of tax law, and on certain occasions the United States has exhibited a single entity approach in its application of anti-trust law. *Id.*

117. *Id.* at 657.

118. As stated by Justice Advocate General Warner in Commission Decision of December 14, 1972, relative to a procedure of application of article 86 of the Treaty establishing the European Economic Community (IV/26.911 – ZOJ/csc – ici) 72/457/eec) ["Commercial Solvent"], [1972] O.J.E.C. No. L 299/51; [1973] C.M.L.R. D50. As per WALLACE, *supra* note 109, at 639.

119. International Labour Organisation (ILO), Tripartite Declaration of Principles Concerning

ing MNE activities in areas such as tort law. However, international law's general default adoption of the entity law approach can be seen as contrary to states' use of the enterprise approach in these circumstances; the prevailing international law view is that each of the corporations of a MNE is a distinct national of the nation-state in which it is incorporated.[120] This view is difficult to rectify with an alternative legal conception of MNEs which would recognize their unified elements more overtly and would permit liability findings to apply to MNEs' multiple corporate parts.

2. Legal Instances Where the Veil Unravels

In several jurisdictions the corporate veil's strict separation of liability between parent and subsidiary companies under the entity law approach can be transcended in at least four circumstances: (1) statutory intervention; (2) invocation of an applicable legal doctrine such as agency law; (3) invocation of a veil-piercing doctrine; and (4) a direct cause of action against a parent company itself. Each of these exceptions will be addressed in turn.

i. Statutory Intervention

The corporate veil cannot exist or minimize liability where there is directly applicable law to the contrary. Under Canadian Labour Law, for instance, Labour Boards have no trouble piercing the corporate veil in cases where they are required to permit workers' right to a collective bargaining unit.[121] Several areas of U.S. law are governed by statutes which include the concept of "controlling corporation," "controlled corporation," or "integrated enterprise," including labour, banking, sale of alcoholic beverages and foreign corrupt practices.[122] Where laws clearly overrule the entity law approach, "[t]raditional concepts of corporation law based on entity law and the severe limitations of 'piercing the veil' remedy are no longer relevant."[123]

ii. Agency Law

In some Common Law jurisdictions, such as the United Kingdom or the

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Multinational Enterprises and Social Policy (1978), 17 I.L.M. 423, http://www.ilo.org/public/english/standards/norm/sources/mne.htm; United Nations, The Global Compact, www.unglabalcompanct.org/Portal/default.asp; Organisation for Economic Co-operation and Development, OECD Guidelines for Multinational Enterprises (Revised 2000), http://www.oecd.org/dataoecd/56/36/1922428.pdf.

120. Blumberg, *supra* note 16, at 493.

121. Under Canadian Labour Law, the corporate veil is pierced readily in cases where an employer-employee relationship can be factually constructed despite the legal separation caused by the corporate veil. Canada Labour Code, *supra* note 50.

122. Blumberg (2001), *supra* note 99, at 315.

123. *Id.* at 315.

United States, agency theory can be used to overcome entity law.[124] A subsidiary may operate as the agent of the parent company such that the parent company is liable for the actions of the subsidiary. While the doctrine's factual requirement of "control" of a parent over its subsidiary is readily met, agency theory is inappropriate in most cases because both parties (the parent and subsidiary) must agree that the subsidiary is acting on behalf of the parent.[125] Consequently, the consent element of agency theory often maintains the corporate veil. Subsidiaries are frequently used to "shield the parent corporation from liability" and therefore parent companies are careful not to act as though they have consented to having their subsidiaries act as agents.[126]

iii. Veil-Piercing Doctrine

Many legal systems contain legal tests whereby the corporate veil can be pierced, which restrict the utility of the corporate veil for liability minimization purposes within that jurisdiction.[127] The United States is the source of one fifth of the world's outward FDI.[128] Since MNEs are the principle source of FDI, this fact underscores the importance of U.S. law and veil-piecing in the context of MNEs.

Under U.S. law, a corporate veil may be pierced if it is found that the parent company has exhibited a surplus of control of its subsidiary.[129] The following factors have contributed to a finding of excessive control: nonobservance of formalities, gross undercapitalization, and commingling of assets.[130] In addition, the veil may be pierced in instances of fraud, or in rare rulings, where veil-piercing is an equitable remedy to plaintiff injury.[131] Despite the presence of statutory veil-piercing in some legal areas,[132] the general U.S. approach to veil-

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124. *Id.* at 307.

125. *Id.*

126. *Id.*

127. *See, e.g.*, Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches*, 36 Am. Bus. L. J. 73, 79 (1998).

128. WIR 2003, *supra* note 1, at 70.

129. One hundred percent ownership of a subsidiary is not sufficient for a finding of excessive control. *See* United States v. Jon-T Chems, Inc., 768 F.2d 686, 691 (5th Cir. 1985), cert. denied, 475 U.S. 1014 (1986) (cited by Blumberg (2001), *supra* note 99 at 305).

130. Miller, *supra* note 127 at 82.

131. On fraud, *see* Morris v. N.Y. State Dep't of Taxation & Fin., 623 N.E.2d 681, 1160-61 (N.Y. 1993) (cited by Blumberg (2001), *supra* note 99, at 305). On veil-piercing as an equitable remedy, *see* Ranger Enter., Inc. v. Leen & Assocs., Inc., 1998 U.S. App. LEXIS 23774 (9th Cir. 1998) (cited by Blumberg (2001), *supra* note 99, at 305).

132. Lack of clarity in this area is evidenced by the fact that *Cannon Manufacturing Co. v. Cudahy Packing Co.* continues to apply, with its holding that "a parent's complete commercial and financial domination of its subsidiary did not bring the parent within the jurisdiction as long as the formal separation was scrupulously maintained." United States v. Watchmakers of Switzerland Information Centre, Inc., 133 F. Supp. 40, 45 (S.D.N.Y. 1955) (cited by WALLACE, *supra* note 109, at

piercing is imprecise and thus can be conducive to MNE liability minimization.[133]

Under U.K. law, the 1897 decision of *Salomon v. Salomon & Co.*, which still remains current, established that separately incorporated, parent companies are not liable for wholly-owned subsidiaries' actions.[134] This separation can be overcome by agency law (see above) or if there has been an abuse of the corporate form, namely if the subsidiary is merely "device and sham."[135] U.K. judges have generally shown greater reticence to pierce the corporate veil than have U.S. judges.[136]

There appears to be some movement towards greater ease in piercing the corporate veil, particularly in the U.S. legal system.[137] However, there remains wide discrepancy in judicial rulings on the matter.[138]

iv. Direct Claims Against the Parent Company

Another way to overcome the corporate veil is to plead a cause of action directly against the parent company. This has been achieved in the U.K., where in at least two decisions, the House of Lords has assumed jurisdiction over claims of parent company negligence in their operation of South African subsidiaries.[139] In *Connelly v. RTZ Corp. Plc*, the House of Lords found that it had jurisdiction over a cause of action brought by Mr. Connelly, who was diagnosed with laryngeal cancer and alleged that a U.K. parent company was responsible for the lack of uranium dust controls at the Namibian mine where he worked.[140] The House of Lords also assumed jurisdiction in *Lubbe and Others v. Cape Plc,* a case involving claims of 3,000 plaintiffs who had developed asbestosis or mesothelioma in connection with mines and manufacturing plants run by the Cape Asbestos Company Ltd.[141]

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637).

133. Blumberg (2001), *supra* note 99, at 305.

134. Salomon v. Salomon & Co., Ltd., [1897] A.C. 22. Reaffirmed in Re: International Tin Council, [1987] 1 All E.R. 890, [1987] BCLC 272, [1987] 3 All E.R. 257, [1988] 3 W.L.R. 1159, [1989] Ch. 309, C.A. Also reaffirmed in Maclaine Watson & Co. v. Department of Trade and Industry, [1989] 2 A.C. 418, 3 All E.R. 523, 549 (H.L. 1989). As the court said in *Adams v. Cape Industries Plc*, at 753 "[. . .] the court is not free to disregard the principle of Salomon v. A. Salomon & Co Ltd. [1897] A.C. 22 merely because it considers that justice so requires." Adams v. Cape Industries Plc., [1990] 2 W.L.R. 657 (C.A.). As referenced by WALLACE, *supra* note 109, at 663.

135. Jones v. Lipman, [1962] 1 W.L.R. 832 (High Court, Ch.) at 836.

136. Miller, *supra* note 127, at 79.

137. *Id.* at 80.

138. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1, 1036, 1058 (1991).

139. Connelly v. RTZ Corp. Plc., [1997] H.L.J. No. 31; [1998] A.C. 854 (H.L.); Lubbe and Others v. Cape Plc. [2000] 4 All ER 268; [2000] 1 WLR 1545 (H.L.).

140. *Connelly v. RTZ Corp. Plc.*, H.L.J. No. 31.

141. *Lubbe and Others v. Cape Plc.* 4 All ER 268.

Another alternative method to recovery is to sue the officers or directors of the parent company directly. This avoids the problem of piercing the veil, and if the suit is successful, the parent corporation itself will likely be found vicariously liable.[142]

3. States' Non-Assumption of Jurisdiction over Foreign Nationals

The prevailing view of international law—that corporations, regardless of ownership become nationals of their country of incorporation—has widespread ramifications.[143] If a national court pierces a corporate veil and thus implicates a foreign national in the proceedings (*i.e.*, a parent company incorporated in a foreign state), the national court will assess this finding according to existing principles of jurisdiction under international law.[144] International law permits countries significant leeway in setting their policies regarding extraterritorial legal application.[145] If a country has a policy against extraterritorial legal application, then it may not assume jurisdiction over a foreign national that is an implicated MNE component, even after a successful veil-piercing.[146] For example, the U.S., which has a demonstrated record of extraterritorial legal application, may pierce a corporate veil, implicate a foreign MNE component national, and continue the proceeding despite the existence of a foreign party. A country like Canada, however, which favors a policy *against* extraterritorial application of its laws,[147] may choose not to use its legal system against foreign nationals.

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142. Blumberg (2001), *supra* note 99, at 316-17.

143. Barcelona Traction included a restatement of this view. *See* Barcelona Traction, *supra* note 107, at ¶ 70.

144. Blumberg (2001), *supra* note 99.

145. *The Case of the S.S. "Lotus"*, *supra* note 78 at 19.

146. Similarly, courts will follow domestic practice in relation to *forum non conveniens* (FNC), another major barrier to MNE liability findings. FNC occurs when a court refuses to hear a case on the grounds that a better forum exists elsewhere. FNC is highly relevant to MNE liability. On one level, FNC can be characterized as a failing of the international system which permits individual states to forgo adjudication even when this denies access to justice. The EU has moved to address this: article 2 of the Brussels Convention prohibits FNC where a foreign plaintiff brings suit against a corporation in its home state. Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 Sept. 1968, 1972 O.J. (L 299) 32, *available at* http://www.jus.uio.no/lm/brussels.jurisdiction.and.enforcement.of.judgments.in.civil.and.commercial.matters.convention.1968/doc.html#21. One of the most prominent FNC dismissals was the 1987 dismissal of the case against Union Carbide for the methyl isocyanate spill at its Bhopal subsidiary (resulting in an estimated two to eight thousand mortalities). *See In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, 809 F.2d 195 (2d Cir. 1987). Also beyond the scope of this paper is the U.S. Alien Tort Claims Act, a statute that has in some cases overcome FNC in the U.S. 28 USCS § 1350 (2002).

147. Canada rarely asserts extraterritorial jurisdiction. *See e.g.*, OECD, CANADA – REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION, OECD MINISTERIAL REPORT 13 (2000) http://www.oecd.org/dataoecd/13/35/2385703.pdf. Canada does assert extraterritoriality in the prosecution of war crimes and child sexual abuse. *Crimes Against Humanity and War Crimes Act* 2000, c. 24; *Bill C-15A: An Act to Amend the Criminal Code and to Amend Other Acts*, *available at*

It appears that the Canadian approach to corporate nationality and extraterritorial jurisdiction[148] makes it difficult for Canadian courts to regulate Canadian-based MNEs' activities abroad, permitting added liability minimization. This inadequacy points to a need for a changed in the Canadian approach. Aversion to the extraterritorial application of laws, while comprehensible from a diplomatic and comity perspective, can prevent national courts from overseeing those MNEs which originate in their jurisdiction.[149]

While statutory intervention and veil-piercing can overcome the division of parent-subsidiary liability, it is unclear how this innovation should be best transferred onto the international stage inhabited by MNEs, given existing practices with regard to extraterritorial jurisdiction. While the unilateral application of extraterritorial jurisdiction is one option, some commentators maintain that in certain cases it is likely to be self-defeating, pointing again to the need for advances in international law in this area.[150]

4. The Many Veils of the Alfa Group

Having looked at the function of the entity law approach to the corporate veil, veil-piercing techniques and the broader problem of the allocation of national jurisdiction, I now turn to the specific facts of the *Prestige* case. There, the corporate veil successfully insulated the ultimate owners of the oil that was spilled from liability arising from the incident.[151]

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http://www.parl.gc.ca/common/Bills_ls.asp?lang=E&Parl=37&Ses=1&ls=C15A&source=Bills_House_Governmen.

148. WALLACE, *supra* note 109 at 631 (referencing Bowlen v. The Queen, [1978] 1 F.C. 798, 5 C.P.C. 215 (T.D.); CASTEL, EXTRATERRITORIALITY IN INTERNATIONAL TRADE: CANADA AND UNITED STATES OF AMERICA PRACTICES COMPARED 137 (Butterworths, 1988)).

149. For example, Canada's aversion to extraterritoriality and a lack of Canadian regulation of Canadian mining companies abroad have become contentious public policy issues in recent years. *See* NATIONAL ROUNDTABLES ON

CORPORATE SOCIAL RESPONSIBILITY (CSR) AND THE CANADIAN EXTRACTIVE INDUSTRY IN DEVELOPING COUNTRIES, Advisory Report, (March 2007), http://geo.international.gc.ca/cip-pic/library/Advisory%20Group%20Report%20-%20March%202007.pdf.

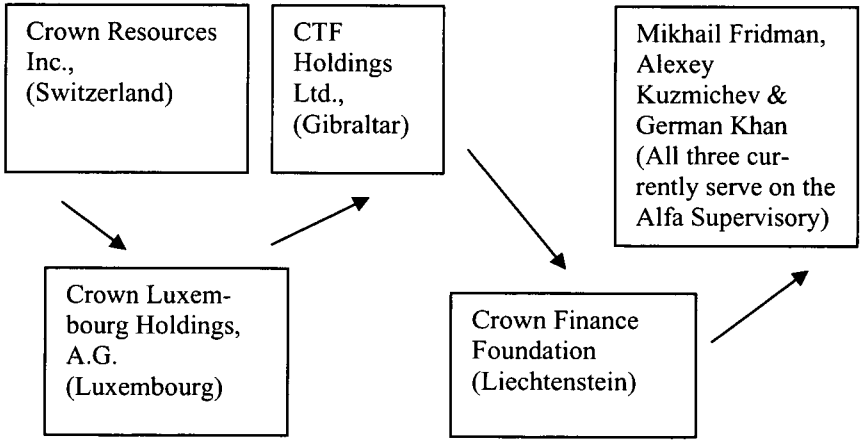
150. In Avi-Yonah's view antitrust and anti-discrimination regulation are two areas where unilateral extraterritoriality is likely to be ineffective. Prof. Avi-Yonah suggests multilateral moves toward harmonization in such areas instead. Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: an Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUMBIA J. OF TRANSNAT'L L. 5, 26-31 (2002).

151. As discussed in the preceding section, the CLC 1992 currently protects ship charterers (such as Crown) from liability arising from an oil spill. This protection, however, is limited because the ship owner is still entitled to sue the charterers under the Convention. The charterer may also be subject to liability where the damage was caused by the charterer's "personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result." CLC 1992, *supra* note 32, at Art. 4, ¶ 4. In an oil spill scenario, therefore, a MNE can still rely on the corporate veil to protect it from liability that would arise from suits launched by the ship owners, as well as from liability in situations where charterer intent is established.

If Crown's veil is not pierced, any liability arising from the spill would be faced only by Crown, regardless of evidence of parent corporation involvement, and regardless of whether Crown is adequately capitalized to pay a judgment against it.[152] As suggested earlier, depending on the domestic jurisdiction involved, Crown's veil might be overcome by statutory intervention, use of a legal doctrine such as agency law, use of a veil-piercing doctrine such as abuse of the corporate form or excessive control, or a direct cause of action against the parent company.

i. Crown Resources Inc.'s Legal Ownership Chain

There are several corporate veils involved in the MNE ownership of the *Prestige*'s oil. The immediate owner of the oil was Crown, which was widely reported to be a Swiss-incorporated subsidiary of a Russian conglomerate called the Alfa Group.[153] Crown's ownership chain was actually much more complex than direct ownership by the Alfa Group, although the ownership chain still ultimately led to Alfa.



Crown's ownership chain involved two corporations, a trust entity and various beneficiaries. Crown Resources Inc. was owned by a Luxembourg corporation called Crown Luxembourg A.G., which was in turn owned by a Gibraltar incorporated company called CTF Holdings Ltd. CTF Holdings was owned by a

152. A direct claim against a parent company would expand the scope of potential liability, despite corporate veil limitations. Blumberg (2001), *supra* note 99, at 316-17.

153. *E.g.*, Willmore, *infra* note 171. *See also* Bhushan Bahree, Carlta Vitzthum & Brandon Michener, *Oil Strikes Spanish Coast in Tanker Disaster*, WALL STREET JOURNAL, 20 NOVEMBER 2003, at A2.

Liechtenstein-created trust entity called the Crown Finance Foundation.[154] This foundation's beneficiaries included three individuals, Mikhail Fridman, Alexey Kuzmichev and German Khan[155] who currently serve on the Alfa Group's supervisory board.[156] In 2002, the Alfa Group itself was allegedly "an unincorporated association of various affiliated companies."[157] Therefore, at the time of the *Prestige* spill, the Alfa Group was presumably comprised of a partnership or contractual union involving, among others, the beneficiaries of the Crown Finance Foundation.

Following the *Prestige* incident, the Alfa Group has continued to prosper, as Board Chairman Mikhail Fridman wrote in his accompanying message to the 2003 Annual Report:

> 2003 also marked the Group's fifth consecutive year of strong profitability, with cumulative net profits of US $5.10 billion for the five-year period ended in 2003. At 31 December 2003, Group shareholders' equity reached US $4.65 billion.[158]

The Alfa Group appears to have sought incorporated status since the *Prestige* incident. According to its website it is

> one of Russia's largest privately owned financial-industrial conglomerates, with interests in oil and gas, commercial and investment banking, insurance, retail trade, telecommunications, technology, as well as other industrial-trade and special-situation investment."[159]

The Alfa Group is now held by CTF Holdings Ltd.,[160] which is still based in Gibraltar.[161]

ii. Crown Resources Inc.'s Role in the Alfa Group

There appears to be at least some degree of affiliation between Crown and

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154. Norex complaint, *supra* note 38, at ¶ 42.

155. The Alfa Group, Supervisory Board, http://www.alfagroup.org/142/about.aspx (last visited Mar. 18, 2008).

156. Norex complaint, *supra* note 38, at ¶ 44.

157. *Id.* at ¶ 40.

158. THE ALFA GROUP, 2003 ANNUAL REPORT 8 (2003), *available at* http://www.alfagroup.org/content/art_pict_url/18223.pdf. Under the laws of Gibraltar, where CTF Holdings, A.G. (Alfa's ultimate holding company) is incorporated, it appears that private companies organized by shares may only have a maximum of 50 shareholders. Forms of Company, Private Company Limited by Shares, Gibraltar Companies Ordinance 1930, http://www.lawandtax-news.com/html/gibraltar/jgilatcos.html#private (last visited Mar. 18, 2008). Alfa Group's Supervisory Board has 11 members. The Alfa Group, Supervisory Board, http://www.alfagroup.org/142/about.aspx (last visited Mar. 18, 2008).

159. The Alfa Group, What is the Alfa Group Consortium?, www.alfagroup.org (last visited Mar. 18, 2008).

160. "CTF Holdings Ltd. (CTF), founded in 1996, is the ultimate holding company of the Alfa Group Consortium and fulfils the functions of the Group Corporate Centre." The Alfa Group, Corporate Centre, http://www.alfagroup.org/105/17291/corporate.aspx (last visited Mar. 18, 2008).

161. The Alfa Group, Contacts, http://www.alfagroup.org/167/18243/contacts.aspx (last visited Mar. 18, 2008).

the Alfa Group.[162] News reports preceding the spill also allege a link between Crown and the Alfa Group.[163] As of November 2005, Crown was described on the Alfa Group's website as the "former international trading arm of the Alfa Group."[164] Alexey Kuzmichev, the former Chairman of Crown,[165] is still currently a supervisory board member of the Alfa Group.[166] In 2006, Mr. Kuzmichev was head of Alfa Group's oil business, acting as both executive director and board member of TNK-BP.[167]

At the time of the *Prestige* spill, the Alfa Group was an owner of TNK oil,[168] a major Russian oil company, and some reports have described Crown Resources Inc. as TNK's "trading arm."[169] While the oil spilled was officially owned by Crown, it is possible that TNK or other Alfa Group entities had some role in the oil's history, since before its attempted voyage from Ventspils, Latvia to Singapore, the *Prestige* was used as a makeshift port storage facility in St. Petersburg,[170] perhaps accumulating its cargo through TNK or other Alfa Group entities.

iii. The Alfa Group's Liability Minimization in Action

All of the MNE components in Crown's equity chain are incorporated in different jurisdictions, triggering the logistical problems inherent in transnational litigation. Two of the involved states are known to employ policies of secrecy in financial and corporate matters (Switzerland and Luxembourg)[171] and one is listed among only three countries identified by the OECD as "Unco-

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162. Among other factors, the *Prestige*'s geographic history suggests that Crown acted as a unit of a Russian based enterprise. Crown is based in Switzerland. This author could find no mention of a Russian office of Crown Resources Inc., suggesting that Crown acquired the oil loaded onto the *Prestige* through coordination with Russian counterparts.

163. One business news story reads: "Crown Resources, a Swiss-based energy trading concern owned by the Alfa Group of Russia." Elizabeth Olson & Sabrina Tavernise, *Rich Is Selling Trading Firm to Alfa Unit*, NEW YORK TIMES, Feb. 21, 2001, *available at* http://query.nytimes.com/gst/fullpage.html?res=9800E6DF1739F932A15751C0A9679C8B63.

164. The Alfa Group, Alexey Kuzmichev, http://www.alfagroup.org/142/16986/About.aspx (archived version on file with author).

165. *Managers buy metals trader from Alfa Group - Crown Resources*, AMERICAN METAL MARKET, Dec. 30, 2002. *See also The World's Billionaires #116 Alexei Kuzmichov*, FORBES, Aug. 3, 2007, *available at* http://www.forbes.com/lists/2007/10/07billionaires_Alexei-Kuzmichov_N0PL.html.

166. The Alfa Group, Supervisory Board, http://www.alfagroup.org/142/about.aspx (last visited March 18, 2008).

167. *#129 Alexei Kuzmichov*, FORBES, Sept. 2006, http://www.forbes.com/lists/2006/10/N0PL.html

168. Ian Willmore, *Slick business?*, GUARDIAN OBSERVER, Nov. 24, 2002, *available at* http://observer.guardian.co.uk/comment/story/0,6903,846684,00.html.

169. *See, e.g.*, *Saga of Greed: who is to blame for Prestige disaster*, *supra* note 62.

170. *Id.*

171. Eden & Kudrle, *supra* note 63, at 102.

operative tax havens" (Liechtenstein).[172]

The corporate veil is useful to the Alfa Group, not only for how it permits liability to be localized to one corporate component at a time, but also for how it localizes damage to reputation. For instance, the corporate veil permits TNK to publicly claim, uncontested, that it has no relation to Crown. This is exactly what TNK did following the *Prestige* incident. TNK spokesperson Vladimir Bobylyov is quoted as saying that "TNK has no relation to [Crown] and thus is not the cargo owner of the oil transported by the Prestige."[173] This is despite the fact that as of early 2002, ninety percent of TNK's stock was held by Alfa Petroleum Holding, a subsidiary of the Crown Finance Foundation, mentioned above as Crown's fourth generation parent company (or parent trust entity).[174]

Interestingly, a month after the *Prestige* spill,[175] Crown was effectively disowned by its parent company, and was sold by Crown Luxembourg Holdings, A.G., to Crown's management.[176] Six of Crown's managers bought the company for 90.8 million Swiss francs (or 65 million USD), and changed the company name to "ERC Trading."[177] With the sale of its corporate component, directly after the *Prestige* spill, the Alfa Group reduced the risk that a future piercing of Crown's corporate veil would lead to the parent company's liability exposure.[178]

III.
EXPLANATIONS FOR MNE LIABILITY MINIMIZATION

Having presented three types of liability minimization evident in the *Prestige* case—those related to outsourcing, renegade regime regulation and the corporate veil—I will now explain why MNEs might choose to pursue the liability minimization techniques currently available to them. To do so, I examine four theories of MNE operation from international business and international political economy scholarship: (1) the eclectic paradigm; (2) the international value

172. OECD Tax Haven List, *supra* note 75.

173. *Russians Deny Prestige Link*, FAIRPLAY NEWS SUMMARY, Nov. 21, 2002, *available at* http://www.marine-marketing.gr/newsclip.php?file=200247.txt.

174. *Id.*

175. *Gib-based company changes hands after 'Prestige' oil spill*, PANORAMA, Dec. 30, 2002, *available at* http://www.panorama.gi/archive/021230/updates.htm.

176. *Managers buy metals trader from Alfa Group - Crown Resources*, *supra* note 165.

177. Frederik Blassel, *The Swiss Crown without «Prestige»*, CASH (original in German), Jan. 17, 2003. Two years earlier Crown Resources Inc.'s business practice was described as follows: "Crown's trading in commodities totaled about $4.5 billion last year, a figure that Alfa, its parent, said would be more than doubled by [a proposed] merger." Olson & Tavernise, *supra* note 163.

178. While Crown Resources, Inc., is reported to have sought the legal services of the law firm Cyde & Co, with regard to the *Prestige*'s sinking, Crown does not appear to have been a defendant of a lawsuit related to the spill. Terry Macalister, *Owner of Tanker's Cargo Protests its Innocence*, THE GUARDIAN, Nov. 22, 2002, *available at* http://www.marine-marketing.gr/newsclip.php?file=200247.txt.

chain; (3) the obsolescing bargain; and (4) the law of uneven development.

A. The Eclectic Paradigm

One analytical framework offered by international business scholarship is the eclectic or OLI paradigm,[179] which states that MNEs seek to benefit from three types of advantages over local firms: internalization advantage, ownership advantage, and location advantage.[180] Location advantages are the most straightforward of the three types of advantages, and refer to MNE access to country factors of production, such as a country's natural and human resources, infrastructure, market size, and level of political risk.[181] National standards (both their level and their actual enforcement) can be seen as contributing to the location advantages of a given country. The two other advantages, internalization and ownership, are examined in greater detail below.

1. Internalization Advantage

The theory of internalization advantage within the eclectic paradigm holds that MNEs can gain advantages over one another, and over domestic firms, through market internalization.[182] Market internalization occurs when MNEs expand their operations into related industries and thereby envelope those open market activities which affect their business.[183]

Critical to internalization advantage theory, and to its explanation of liability minimization, is the concept of transaction costs. Internalization theory holds that MNEs internalize markets because they seek decreased transaction costs.[184] Where the transaction costs associated with expanded operations are less than the transaction costs of the open market, MNEs will choose to expand and internalize the market.[185] Transaction costs are the "cost of organizing relationships

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179. *See generally*, JOHN CANTWELL & RAJNEESH NARULA, INTERNATIONAL BUSINESS AND THE ECLECTIC PARADIGM: DEVELOPING THE OLI FRAMEWORK (Routledge, 2003). "OLI" refers to Ownership, Location and Internalization advantages, respectively. *See, e.g.*, John R. Dilyard, *A variant of the eclectic paradigm linking direct and portfolio investment, in* EXTENDING THE ECLECTIC PARADIGM IN INTERNATIONAL BUSINESS: ESSAY IN HONOR OF JOHN DUNNING 18 (H. Peter Gray ed., Edward Elgar Publishing 2003).

180. Eden, *supra* note 11, at 39

181. *Id.*

182. *Id.*

183. *Id.*

184. *See, e.g.*, J. H. Dunning, *Some Antecedents Of Internalization Theory*, 34:2 J. INT'L BUS. STUDIES, 108, 108 (2003) [hereinafter Dunning (2003)].

185. Ronald Coase first theorized in 1937: "[F]irms expand to the point where the organization costs for an extra transaction equal the cost of the using the market for that transaction, or the cost involved in organizing another firm." R. H. Coase, *The Nature Of The Firm*, 4 ECONOMICA 386 (1937). As summarized by A. Edward Safarian in A. Edward Safarian, *Internalization And The MNE: A Note On The Spread Of Ideas*, 34 J. INT'L BUS. STUDIES 118 (2003).

over and above that which have to be incurred in a perfect market."[186] In sum, internalization theory holds that MNEs can minimize their transaction costs through their decisions regarding market internalization.

Transaction costs can be heightened by market imperfection caused by state intervention, and as a result "[s]tate policies in the internalization literature are considered as inefficient policies to be arbitraged by MNEs . . . [and] MNEs with global horizons are thus seen as efficient actors, offsetting the inefficient activities of states."[187] Liability, which is a court-ordered and government-enforced obligation, can therefore be viewed under this theory as a source of market imperfection, because it can increase the costs of doing business from those associated with a perfect market. Many instances of corporate behavior suggest that MNEs recognize that liability findings increase transaction costs. For example, pending lawsuits are detailed in notes to corporate financial statements, often along with analysts' estimates as to the final cost of the lawsuit.[188]

In sum, internalization theory argues that MNEs will not expand where transaction costs will be increased as a result of the expansion.[189] It follows that MNEs will often not expand into areas with a high risk of liability. Instead, MNEs may choose to outsource activities where the risk of liability findings are high, since outsourcing steps in the production process tends to reduce overall transaction costs. In the *Prestige* context, internalization theory suggests that the transaction costs (likely including those associated with liability) deterred Crown from internalizing the market and owning its own tanker. Instead, an arm's length arrangement was seen as more advantageous, and a tanker was chartered. MNE liability minimization is consistent with internalization theory,

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186. Dunning, *supra* note 10, at 63. Later scholars added nuance to the scope of transaction costs. For instance, Buckley and Casson identified transaction costs as including *communication costs* and focused on the difficulties MNEs can experience in coordinating far-flung operations. P. J. BUCKLEY & C. CASSON, THE FUTURE OF THE MULTINATIONAL ENTERPRISE (Macmillian 1976), as cited in Alan M. Rugman & Alain Verbeke, *Extending The Theory Of The Multinational Enterprise: Internalization And Strategic Management Perspectives*, 34 J. INT'L BUS. STUDIES 127 (2003).

187. Eden, *supra* note 11, at 37.

188. In its 2004 Annual Report, Altria (formerly Phillip Morris) describes how liability findings are included in its financial statements: "ALG and its subsidiaries record provisions in the consolidated financial statements for pending litigation when they determine that an unfavorable outcome is probable and the amount of the loss can be reasonably estimated." ALTRIA GROUP, INC., 2004 ANNUAL REPORT 24, *available at* http://www.altria.com/download/pdf/investors_2004_AnnRpt_FinancialReview_section5.pdf. It is true that companies are required by law to include such information in their notes to the financials. This legal requirement does not detract from the fact that lawsuits are viewed in financial cost terms by corporations.

The famous Ford Pinto case illustrates how quantification of legal liability can direct business decisions. In this case Ford calculated the costs of the wrongful death lawsuits that would result from a defective car, and weighed this amount with the cost of a recall. *See, e.g.*, THE FORD PINTO CASE: A STUDY IN APPLIED ETHICS, BUSINESS AND TECHNOLOGY (Douglas Birsch & John H. Fielder eds., State University of New York Press 1994).

189. Dunning (2003), *supra* note 184.

which holds that MNEs will pursue reduced transaction costs where possible and since liability risk represents a type of transaction cost it is minimized according to available mechanisms.

2. Ownership Advantage

A second type of advantage in the eclectic paradigm is ownership advantage. Ownership advantages refer to often intangible MNE assets which permit them to profit in foreign markets and rise above the cost disadvantages of such foreign operation.[190] Ownership advantages have their foundation in either knowledge or oligopoly and can be transferred without cost within the MNE.[191] For example, ownership advantages can include MNEs' global scanning ability, which allows MNEs to exploit differences between countries.[192]

MNE knowledge of how to minimize liability (and thus reduce costs), gained by its global scanning ability, and identification of discrepancies in national regulation, fits within the concept of an ownership advantage. As the specifics of national regulation change, the MNE must constantly update its knowledge in order to reap the cost benefits of liability minimization. In the *Prestige* context, the Alfa Group had an ownership advantage in knowing which jurisdictions possessed favorable tax and secrecy laws. The Group then used this knowledge and located its subsidiaries in these states.[193]

B. The International Value Chain

Another important theory in international business scholarship is that of the international value chain.[194] This approach understands MNE successes as being based on their selection and enactment of a given strategy.[195] This adopted strategy determines the length and form of the MNE's value chain.[196] A chosen value chain is determined by the type and range of products sold, the geographic locations involved, and the steps in production which are completed within the MNE.[197] Some use the term "direct value chain" to refer to production by MNE

190. Eden, *supra* note 11, at 36.

191. *Id.*

192. *Id.* (citing C. K. Prahalad & Gary Hamal, *The Core Competence of the Corporation*, 68-3 HARVARD BUSINESS REVIEW 78 (1990)). *See also* Raman Muralidharan, *Environmental Scanning and Strategic Decisions in Multinational Corporations*, 11-1 MULTINATIONAL BUSINESS REVIEW 67 (2003).

193. As mentioned, Crown Resources, Inc., and its parent companies were organized under the laws of Switzerland, Luxembourg, Liechtenstein and Gibraltar, all states favoring policies of secrecy and tax non-evasiveness. *See, e.g.*, Palan, *supra* note 66, at 155.

194. Eden, *supra* note 11, at 40

195. *Id.*

196. *Id.*

197. *Id.*

components connected by equity ownership and use "indirect value chain" to refer to MNE production completed by parties not connected by ownership, such as that completed by contracted quasi-affiliates.[198]

The international value chain approach can explain MNE liability minimization if such behavior is viewed as being within MNE strategy and within a MNE's chosen chain of value creation. Not unlike the concepts of internalization advantage, value chain analysis adds to an understanding of where the boundaries of a MNE may lie, and why a firm may outsource liability-exposed elements of production that add little to their value chain. This perspective also adds to an understanding of how MNEs select the jurisdictions in which they operate. For example, just as taxation rates influence a MNE's location of particular functions,[199] so do potential costs associated with liability. MNEs structure their value chain across different countries in ways that allow them to maximize profit by taking discrepancies in national legal regimes into account.[200]

When a MNE outsources elements of its business, as in the *Prestige* example, it is hiring an unaffiliated organization to carry out operations which it chooses not to include within its direct ownership value chain—operations which it chooses to keep outside of its boundaries as a firm.[201] Such operations may be excluded from the MNE's direct value chain because they pose deterrent costs, which may include liability risk.

International value chain analysis recognizes that MNEs have an advantage over national firms in that they may arrange their operations across different countries.[202] For instance, a MNE could achieve net cost savings by structuring its value chain in a way that provides tax savings,[203] such as through its location in tax and secrecy havens. This strategic location permits different parts of the MNE value chain to engage in transfer pricing of intra-firm goods and capital flows.[204] Value chain analysis thus demonstrate, to some degree, the manner in which many MNEs arrange their corporate components across national jurisdictions in ways that offer cost savings in the form of minimized liability exposure.

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198. *Id.*

199. *See, e.g.*, Rangamohan V Eunni & James E Post, *What Matters Most? A Review of MNE Literature, 1990-2000*,

14 MULTINATIONAL BUS. REV. 1, 7, 18-19 (2006).

200. *See* Muralidharan, *supra* note 192, at 68; Peter.J. Buckley & Mark C. Casson, *Model of the Multinational Enterprise*, 29 J. INT'L. BUS STUD. 21, 35-36 (1998).

201. *See, e.g.*, Jones, *supra* note 40.

202. *Id.* As Ietto-Gillies writes: "The transnationality of their operations allow companies to act strategically towards labour, governments and rivals." Grazia Ietto-Gillies, *Hymer, The Nation-State and the Determinants of Multinational Corporations' Activities*, 21 CONTRIBUTIONS TO POL. ECON. 48 (2002).

203. *See, e.g.*, Eunni & Post, *supra* note 199.

204. Eden, *supra* note 11, at 41.

C. The Obsolescing Bargain

One international political economy approach to MNEs, developed by Raymond Vernon, focuses upon the bargaining relationship between MNEs and host states.[205] According to the obsolescing bargain approach, the host state is initially in a weaker position than the MNE in the bargaining relationship, because the state must offer concessions to attract the foreign direct investment.[206] As the relationship between a MNE and a host state matures, however, the MNE commits immobile assets to its investment. This weakens its bargaining power, since it then has more assets at stake than it did initially.[207] Therefore, the MNE's bargaining position *vis-à-vis* the host state weakens with the passing of time.[208]

The obsolescing bargain approach offers significant insight into MNEs' pursuit of liability minimization. One way to interpret this theory is to recognize that MNEs lose bargaining power when their assets are placed at risk. Liability exposure itself represents a risk to MNE assets, because a finding of liability could compromise assets through a fine or asset seizure. Since MNEs wish to maintain a strong bargaining position in their relations with states, they will try to keep their assets out of reach of the host state's enforcement jurisdiction, *i.e.*, through liability minimization. Therefore, MNE liability minimization is tantamount to avoiding risk to its assets.

In the *Prestige* example, use of potentially non-cooperative secrecy havens by the Alfa Group was a method of safeguarding assets which acted to strenghthen the bargaining position of this MNE. Furthermore, it is notable that the relationship between ship registries (*i.e.*, flag states) and shipping companies does not represent a usual MNE-host state investment relationship as the MNE does not submit immovable assets to the flag state when it chooses to register its ship with this authority.[209] Since the obsolescing bargain is not triggered, it appears that the state does not garner a stronger bargaining position with time, potentially contributing to pressure on flag states to exercise weak regulatory oversight in order to encourage ships' continued registration.

D. The Law of Uneven Development

The law of uneven development is an analytic framework developed by Stephen Hymer that holds that MNEs operate as hierarchical structures which,

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205. *See* Raymond Vernon, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (Basic Books 1971); Raymond Vernon, IN THE HURRICANE'S EYE: THE TROUBLED PROSPECTS OF MULTINATIONAL ENTERPRISES (Harvard University Press 1998).

206. Eden, *supra* note 11, at 31.

207. *Id.*

208. *Id.*

209. While the registrant must pay the vessel registration fee, the registrant stays in possession and control of the vessel registered.

as they increase in size, "create a spatial division of labour across the globe that corresponds to the vertical division of labour within the MNE."[210] According to the framework, the MNE's corporate hierarchy is "divided geographically into three divisions: top management in the largest core cities, white-collar co-ordination in smaller core cities, and blue-collar production distributed globally."[211] The core, which contains the top management, grows continually wealthier than the periphery.[212] This uneven development is facilitated through corporate tax avoidance, mobility of production facilities and loss of state power.[213]

From this theoretical perspective, liability minimization can be viewed as a method by which a MNE constrains state power in its pursuit of uneven development. This constraint of state power allows the MNE to pursue its economic endeavors unfettered, with inequitable results. Successful liability minimization represents a weakening of state power and a strengthening of MNE power, permitting the periphery to be marginalized and the core to be favored.[214] Corporate laws favoring MNEs avoidance of liability serve to weaken state power in that they lessen a state's ability to control the MNE.[215]

Interestingly, liability minimization can be regarded not only as part of how MNEs act to constrain state power, but it is also a characteristic of the inequitable structure of the MNE itself. This can be seen in the way in which the peripheral parts of the MNE can be forced to assume more liability exposure than does the core; for example, entities at the MNE's periphery, such as quasi-affiliates, may face more exploitative terms of engagement (*i.e.*, higher liability exposure) than do entities at the core of the MNE.[216] For example, tanker owners face a greater liability risk than do the oil companies which charter them.[217]

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210. Eden, *supra* note 11, at 31.

211. *Id.*

212. *Id.*

213. *Id.*

214. Liability minimization can happen at the core and at the periphery. The point is that with weakened state power, MNEs have the power to organise themselves in a value pyramid in disregard for other, non-MNE interests.

215. A. L. Calvet, *A Synthesis of Foreign Direct Investment Theories and Theories of the Multinational Firm*, 12 J. INT'L BUS. STUD. 48 (1981).

216. For instance, a contracted company at the MNE's periphery might have to assume all liability arising out of its operations, even in cases where the MNE itself bears some responsibility. As previously discussed, shifting firm operations to an arm's length quasi-affiliate permits an outsourcing company to reduce its vicarious liability exposure for employee performance. *See* Orts, *supra* note 46.

217. First, tanker owners (if they are also the tanker operators) are exposed to vicarious liability with regard to vessel operation, unlike the tanker charterers. Second, as discussed previously, under the CLC 1992 the tanker owner is held strictly liable for oil pollution (according to tanker tonnage) while the tanker charterer in contrast is directly excluded from all liability, unless the shipowner sues it directly or unless it is proved that "the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result." CLC 1992, *supra* note 33, at Art. 6. *See also* Article 3, ¶ 5 of the 1969 Civil

Hierarchy and wealth concentration appear clearly in the organization of the MNE which owned the *Prestige's* oil. The company at the bottom of the ownership chain, Crown, was sold by its parent company to its managers, and then eventually went into liquidation.[218] Crown was marginalized and then rejected from the core of the MNE, the Alfa Group. This MNE core continues to thrive, and judging by its financial statements is becoming continually wealthier, particularly as compared with its liquidated periphery, Crown.[219]

IV.
CONCLUSION

MNEs play too critical a role in the global economy to unduly minimize their liability exposure by outsourcing, renegade regime regulation, and the corporate veil. National legislators and treaty negotiators must acknowledge MNEs' liability minimization through the use of the three methods identifiable in the *Prestige* spill. Otherwise, liability minimization will ultimately become liability avoidance, and will undermine both the rule of law and states' ability to implement public policy through their court systems.

The *Prestige* example demonstrates several ways in which MNE liability minimization occurs. First, the existence of the outsourcing contract buffered the cargo owners from liability and thus served to minimize Crown's liability. Second, liability minimization also occurred when the Coulouspolus family trust, the owners of the Liberian company which owned the *Prestige*, remained insulated from liability since Liberian law purportedly forbid their identification as corporate shareholders.[220] Third, the tanker owners minimized their liability by registering the *Prestige* in an open ship registry, a jurisdiction which may have had less onerous regulatory requirements than those exercised by closed registry.[221] Finally, the corporate veil provided further liability minimization; while Crown owned the *Prestige's* oil on paper, it is but one of a network of corporations controlled by Russia's Alfa Group, an entity with the resources to contribute significantly to the clean-up and compensation necessitated by the spill, but also an entity that is well protected from liability by the legal fiction of the corporate veil.[222]

There are various explanations for why MNEs seek liability minimization.

Liability Convention ("Nothing in this Convention shall prejudice any right of recourse of the owner against third parties."). CLC 1969, *supra* note 56.

218. *See Managers buy metals trader from Alfa Group - Crown Resources*, *supra* note 165; *Corporate Insolvency Notices*, *supra* note 33.

219. THE ALFA GROUP, 2003 ANNUAL REPORT, *supra* note 158.

220. *Secretive Greek Dynasty Linked to Sunken Tanker*, *supra* note 38.

221. The Bahamas is a flag of convenience states identified by UNCTAD. Duruigbo, *supra* note 89, at 153.

222. Three corporate veils and one trust instrument separated Crown Resources Inc. from the Alfa Group. Norex complaint, *supra* note 38, at ¶ 42.

Under the international business theory of the eclectic paradigm, liability can be regarded as a source of increased MNE transaction costs;[223] MNEs thus seek to reduce liability exposure in the same fashion that they seek to reduce other sources of transaction costs. MNEs furthermore view liability exposure in relation to their internalization, location and ownership advantages. Directed by this type of analysis, MNEs may choose to expand into low liability industries, locate in areas with a low risk of a liability finding or safeguard sensitive information related to liability exposure. Under the international value chain theory of the MNE, liability minimization can be understood as the result of a selected MNE strategy that leads to the structuring of an international value chain such that liability-related costs are minimized.

In international political economy literature, the obsolescing bargain explains liability minimization as a result of a MNE's wish to retain a strong bargaining position *vis-à-vis* its host state.[224] Avoiding the risk of liability relates closely to MNEs' desire not to expose assets to state action, and to maintain bargaining power. Under the law of uneven development, MNE liability minimization can be understood as a method by which MNEs weaken state power, to ensure their ability to organize in an unequal hierarchy.[225]

There are several policy and legislative options available to address liability minimization. These include continued national and multilateral initiatives aimed at influencing secrecy regimes and flags of convenience. Outsourcing as a way of reducing liability exposure may also merit legislative attention. Furthermore, lawmakers could favor the enterprise rather than the entity law approach to the corporate veil in circumstances where to do otherwise would shield MNE components from liability.[226] State coordination with regard to appropriate extraterritorial regulatory and adjudicatory jurisdiction is another avenue meriting development.[227]

Addressing the liability minimization permitted by the corporate veil poses unique challenges. While states have moved towards international cooperation and comprehensive multilateral regimes that address this problem in areas such as bankruptcy and taxation, other areas such as MNE tort liability remain largely

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223. Dunning (2003), *supra* note 185. *See also* Harou Horaguci & Brian Toyne, *Setting the Record Straight: Hymer, Internalization Theory and Transaction Cost Economics*, 21 J. INT'L BUS. STUD. 491 (1990).

224. Eden, *supra* note 11 at 31.

225. *Id.*

226. As Avi-Yonah writes in the context of international bankruptcies, "there has been a long-standing consensus that the correct policy outcome only can be achieved under 'universalism,' i.e., an enterprise approach." Avi-Yonah, *supra* note 150, at 20. With regard to taxation, he notes that "Decades of experience have shown that the entity approach to taxing MNEs—i.e. separate accounting—is not feasible and that the only viable alternative is an enterprise approach." *Id.* at 23.

227. *See, e.g.*, SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 12, 113-119 (Hart Publishing, 2003).

undefined in the international realm.[228] With such areas largely undefined, states are free to use their own policies, such as aversion to extraterritoriality, in addressing MNE tort claims.[229] Deference to individual state policies in this area is not conducive to the creation of a comprehensive regime which would match MNE scope with appropriate regulatory scope. Furthermore, unless supported by developments in international law, states attempting to regulate MNEs using the enterprise approach may find it difficult to secure support from other states, resulting in challenges such as lack of access to information.[230]

This Article has stressed the importance of exposing MNE parent companies to liability for subsidiary actions because such a move would better reflect the economic reality of MNEs, entities which often act according to global strategies. It is notable that public policy objectives, such as deterrence of risky and polluting behavior, may also be better served when more than one corporate component is exposed to the legal ramifications of an event such as the *Prestige*. For instance, if Crown's veil were pierced, the wider MNE of which it is a part, including oil giant TNK, may be influenced. The whole MNE may recognize that its interests are served by acting to avoid oil spills in the future.

On a final note, it must be recognized that in affecting both the rule of law and effective public policy, liability minimization also has ramifications for democracy. A government's ability to effectively implement public policy goals is vital to the function of democracy. If a government is unable to act according to the will of the people, then there is little point to people voicing their will. In other words, democratic representation is useless if it is not tied to the possibility of effective state action. The rule of law is also critical to democracy because without common adherence to public laws, private power will dominate society and render obsolete the idea of democratic representation. The *Prestige* incident illustrates the challenges that MNE liability minimization mechanisms pose to states seeking to enable both effective public policy and the rule of law within their borders.

228. Avi-Yonah argues for a comity-driven, case-by-case application of the Enterprise approach in cases of tort liability. Avi-Yonah, *supra* note 150, at 15.

229. Canada, for example, tends not to apply extraterritorial jurisdiction. *See, e.g.*, OECD, *supra* note 147.

230. For example, OECD releases on Hard Core Cartels consistently note the challenges of international information gathering in the context of cartel prosecutions. OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation* 30 (OECD, Paris: 2005), *available at* <http://www.oecd.org/dataoecd/58/1/35863307.pdf>.

Berkeley Journal of International Law

Volume 26 | Issue 2 Article 5

2008

Corporate Governance as Social Responsibility: A Research Agenda

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Corporate Governance as Social Responsibility: A Research Agenda

By
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In the post-Enron years, corporate governance has shifted from its traditional focus on agency conflicts to address issues of ethics, accountability, transparency, and disclosure. Moreover, corporate social responsibility (CSR) has increasingly focused on corporate governance as a vehicle for incorporating social and environmental concerns into the business decision-making process, benefiting not only financial investors but also employees, consumers, and communities. Currently, corporate governance is being linked more and more with business practices and public policies that are stakeholder-friendly. This Article examines these developments and their impact on the formulation of a transnational body of legal norms by proceeding in three stages. First, the Article explores the recent transformations in the regulation of corporate governance and CSR and the shifts these two fields have experienced. Second, it reads these transformations as a convergence, taking place against the background of "New Governance" and encompassing both corporate self-regulation and efforts by social groups to make this regulation more effective ("meta-regulation"). Third, the Article discusses the prospects and challenges of this convergence by outlining a series of conceptual and methodological inquiries as well as policy ramifications to be pursued by scholars and practitioners in the fields of law and corporate conduct.

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I. INTRODUCTION

Corporate governance has traditionally specified the rules of business decision making that apply to the internal mechanisms of companies. This set of norms and laws has, first and foremost, served to shape the relations among boards of directors, shareholders, and managers as well as to resolve agency conflicts.[1] Yet in the aftermath of Enron, corporate governance has emphasized issues that go beyond this traditional focus to touch on corporate ethics, accountability, disclosure, and reporting. As companies seek to assure regulators and investors that they are fully transparent and accountable, corporations have increasingly pledged their commitment to honest and fair corporate governance principles on a wide spectrum of business practices.[2]

Simultaneously, the corporate social responsibility (CSR) movement has developed the notion of corporate governance as a vehicle for pushing manage-

1. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991); Harold Demsetz & Kenneth Lehn, *The Structure of Corporate Ownership: Causes and Consequences*, 93 J. POL. ECON. 1155 (1985); Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819 (1981).

2. *See, e.g.*, Joseph E. Murphy, *Can the Scandals Teach Us Anything? Enron, Ethics, and Lessons for Lawyers*, 12 BUS. L. TODAY 11 (2003), *available at* http://www.abanet.org/buslaw/blt/2003-01-02/murphy.html; William S. Lerach, *Plundering America: How American Investors Got Taken for Trillions by Corporate Insiders - The Rise of the New Corporate Kleptocracy*, 8 STAN. J.L. BUS. & FIN. 69, 106 (2002); Joel Seligman, *No One Can Serve Two Masters: Corporate and Securities Law After Enron*, 80 WASH. U. L.Q. 449 (2002).

ment to consider broader ethical considerations.[3] CSR has drawn on the dramatic progress made by companies in recent decades in balancing shareholder goals with the need to reduce externalities that impact other stakeholders. Thus, CSR has joined the political endeavors to make corporations more attuned to public, environmental, and social needs by pursuing corporate governance as a framework for boards and managers to treat employees, consumers, and communities similarly to, if not the same as, stockholders.[4]

In view of these processes, large public companies have recently created mechanisms of corporate governance that seek to engender investor accountability and stakeholder engagement. Such mechanisms include CSR board committees, company units dealing with business ethics, corporate codes of conduct, non-financial reporting practices, and stakeholder complaint and dialogue channels, among others. All of these governance devices have normally been created on a voluntary basis to constitute what is referred to as "corporate self-regulation."[5]

Institutional investors, regulators, NGOs, and social groups have generally responded by collaborating with the private sector to make self-regulation more enforceable and effective. Pension funds, consumer coalitions, non-profit organizations, and other groups have developed monitoring schemes that incorporate corporate governance aspects into their CSR guidelines, ratings, and best practices. For example, the California Public Employees' Retirement System (CalPERS),[6] one of the largest institutional investors in the United States,[7] has used its proxy power to implement its Core Principles of Accountable Corporate Governance.[8] The Dow-Jones Sustainability Indexes,[9] which are among the

3. For example, prominent NGOs in the CSR field such as Business for Social Responsibility (BSR) have increasingly provided consulting services and offered their expertise on stakeholder engagement strategy for companies to structure their boards and managerial units in accordance with CSR principles. *See* CSR Strategy and Structure, http://bsr.org/consulting/strategy.cfm (last visited Jan. 29, 2008).

4. *See generally* THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 9-237 (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007) [hereinafter NEW CORPORATE ACCOUNTABILITY]; DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 16-46 (2005).

5. *See generally* CHRISTINE PARKER, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY (2002); Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Industrial Perspective*, 19 LAW & POL'Y 363 (1997).

6. Welcome to CalPERS On-Line, http://www.calpers.ca.gov/ (last visited Mar. 25, 2008).

7. Press Release, CalPERS, CalPERS Adopts New Asset Allocation Mix - Equalizes U.S., International Stocks; Hikes Private Equity, Real Estate (Dec. 17, 2007), http://www.calpers.ca.gov/index.jsp?bc=/about/press/pr-2007/dec/calpers-adopts-new-asset-allocation-mix.xml (last visited Apr. 16, 2008) ("CalPERS is the nation's largest public pension fund with assets totaling more than $250 billion").

8. *See, e.g.*, CALPERS, CORE PRINCIPLES OF ACCOUNTABLE CORPORATE GOVERNANCE (2007), *available at* http://www.calpers-governance.org/principles/domestic/us/downloads/us-corpgov-principles.pdf.

9. Dow Jones Sustainability Indexes, http://www.sustainability-indexes.com/ (last visited Mar. 25, 2008).

most prominent CSR indexes in America, have paid close attention to corporate governance criteria while measuring corporate social and environmental performance. Such efforts are referred to as "meta-regulation" or "the regulation of self-regulation."[10]

At the crossroads of corporate self-regulation and meta-regulation, scholars have recently pointed to an evolving interplay between corporate governance and CSR.[11] These inquiries can and should be read as indicating a convergence between corporate governance and social responsibility. On the one hand, corporate governance is gradually becoming a framework for ensuring the public interest in business as well as structuring the procedures by which a company demonstrates its good citizenship and commitment to various constituencies. On the other hand, CSR-driven social coalitions are increasingly focusing on corporate governance as mirroring the company's conscience and long-term commitment to stakeholder accountability.

This Article identifies the key features and characteristics of an emerging body of norms that merges corporate governance with corporate social responsibility. It first explores and situates the synthesis between the two in the context of an evolving legal regime that mixes pro-shareholder preferences with pro-stakeholder considerations. Subsequently, the Article discusses the prospects and challenges of this governance-responsibility intersection, outlining a series of conceptual and methodological implications as well as policy ramifications.

The Article proceeds as follows: Part II explores the transformations that have taken place in the regulation of corporate conduct after the major corporate scandals of the early 2000s. Part III reviews the governance-CSR intersections addressed thus far in the research literature and offers a reading of these regulatory transformations as a convergence that hybridizes corporate governance with CSR via self and meta-regulation (and as part of the "New Governance" school of thought). Part IV discusses the prospects and challenges of the evolving intersection of corporate governance and CSR, first addressing the conceptual and methodological applications that the convergence of the two fields might have on the study, understanding, and perception of business law and then joining the public policy debate over corporate reform to discuss the advantages and shortcomings of the governance-CSR intersection.

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10. Christine Parker, *Meta-Regulation: Legal Accountability to Corporate Social Responsibility*, *in* NEW CORPORATE ACCOUNTABILITY, *supra* note 4, at 207. *See generally* RONNIE D. LIPSCHUTZ, GLOBALIZATION, GOVERNMENTALITY AND GLOBAL POLITICS: REGULATION FOR THE REST OF US? (2005); Bronwen Morgan, *The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality*, 12 SOC. & LEGAL STUD. 489 (2003); JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION (2000); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

11. *See, e.g.*, Lawrence E. Mitchell, *The Board as a Path Toward Corporate Social Responsibility*, *in* NEW CORPORATE ACCOUNTABILITY, *supra* note 4, at 279. *See also* Ruth V. Aguilera, Cynthia A. Williams, John M. Conley, & Deborah E. Rupp, *Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and the US*, 14 CORP. GOVERNANCE: AN INT'L REV. 147 (2006).

II. REGULATING CORPORATE CONDUCT IN THE POST-ENRON ERA

A. Corporate Governance: From Agency to Accountability

In the public marketplace of ideas, the term "corporate governance" has recently been described as "the set of processes, customs, policies, laws and institutions affecting the way in which a corporation is directed, administered or controlled."[12] Yet the substance attributed to this definition has changed quite dramatically over the past years, shifting from a functional, economic focus on agency problems within a private law sphere to a pubic policy approach that seeks to protect investors and non-shareholder stakeholders. The evolution in the perception of corporate governance reflects broad changes in the socio-legal view of business corporations.[13]

For decades, a controversy over the nature and purpose of the corporation articulated a fundamental tension in corporate law.[14] This controversy had its roots in the 1919 *Dodge v. Ford Motor Company* decision holding that a corporation must strive to maximize its shareholder-value.[15] A debate played out in the academic arena between Columbia Professor Adolf A. Berle and Harvard Professor E. Merrick Dodd, with the former taking a shareholder-centric position and the latter calling for greater non-stockholder considerations.[16]

Until not long ago, corporate governance aligned almost completely with the shareholder primacy wing of this debate, being primarily concerned with the structure and functioning of the board and its relations with other corporate organs *vis-à-vis* the purpose of maximizing profits. The core premise of corporate

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12. Corporate Governance, http://en.wikipedia.org/wiki/Corporate_governance (last visited Mar. 25, 2008).

13. JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER (2004) (exploring the evolution of the corporate entity as a powerful, often harmful social and legal institution); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004) (tracing the dominant knowledge structures that underline contemporary corporate regulation and policymaking); Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1986) (analyzing the historical development of the corporate personality notion in American legal thought).

14. This controversy has been extensively debated in the literature. For a recent overview of the debate, see Judd F. Sneirson, *Doing Well by Doing Good: Leveraging Due Care for Better, More Socially Responsible Corporate Decision-Making*, 3 CORP. GOVERNANCE L. REV. 438 (2007).

15. Dodge v. Ford Motor Co. 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes").

16. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931). For an overview of the legal debates over corporate responsibility throughout the twentieth century, see C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77 (2002).

governance relied on the famous analysis by Berle and Means describing and analyzing the agency problems that surface when corporations separate the ownership rights given to their stockholders from the broad judgment reserved for managers on how to best maximize shareholder-value. [17] In order to allow shareholders to trust managers with their investments, the business community looked to corporate governance to enable reduction of these agency problems.[18] By focusing on agency conflict resolution, the corporate governance discourse not only accepted the dominance of the shareholder primacy model but also the law and economics view of economic efficiency.[19] This approach set forth guidelines for business decision making based on a neoclassical perception of cost-benefit analysis and value-maximization ends,[20] often excluding stakeholder interests and overlooking environmental and social externalities caused by corporate conduct.[21]

It was only after the major corporate scandals of the early 2000s that corporate governance gained attention as a public policy topic. Proposals for corporate reform called upon legislators and businesses to allow greater scrutiny over accounting maneuvers and more transparency to prevent managers from engaging in fraud.[22] The Sarbanes-Oxley Act, which introduced comprehensive accounting reform for public companies and severe penalties for failures to comply,[23] divided pro-business and pro-regulation advocates over the value of these reformative approaches and their political effects.[24]

As a result, corporate governance has gradually become a realm for busi-

17. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

18. *See generally* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (Reinier Kraakman et al. eds., 2004).

19. Steven M.H. Wallman, *Understanding the Purpose of a Corporation: An Introduction*, 24 J. CORP. L. 807 (1999); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

20. In their classic book, EASTERBROOK & FISCHEL, *supra* note 1, provide concrete examples for these premises from the areas of corporate contracts, limited liability, voting, fiduciary duties, the Business Judgment Rule, and corporate control transactions.

21. LYNN L. DALLAS, LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH (2005). For a general critique of Law and Economics, see Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465 (Peter Newman ed., 1998); Mark Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics,"* 33 J. LEGAL EDUC. 274 (1983).

22. In 2002, following the Enron crisis, President Bush announced his "Ten-Point Plan to Improve Corporate Responsibility and Protect America's Shareholders" focusing on corporate governance reform. *See* The President's Leadership in Combating Corporate Fraud, http://www.whitehouse.gov/infocus/corporateresponsibility/ (last visited Jan. 23, 2008).

23. Public Company Accounting Reform and Investor Protection (Sarbanes-Oxley) Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18 U.S.C.).

24. Scott Harshbarger & Goutam U. Jois, *Looking Back and Looking Forward: Sarbanes-Oxley and the Future of Corporate Governance*, 40 AKRON L. REV. 1 (2007).

ness due process where corporate managers are required to make decisions with a strong internal monitoring system that protects investors first and foremost.[25] Good corporate governance in the years after Enron and WorldCom has often meant corporate morals and ethical behavior find their expression in accountability mechanisms, transparency, and disclosure.[26] Where there was once a private law discourse of value-maximization there has lately emerged a semi-public law debate where managers use governance as a synonym to describe their duties of care, fairness, and fiduciary responsibility.[27]

The agency focus associated with "old school" corporate governance has gradually yet overwhelmingly cleared the way for a "new school" focus on ethics and accountability.[28] Subsequently, the new public view of the field currently acknowledges that corporate governance is no longer merely about maximizing stock-value but rather about "the relationships among the many players involved (the stakeholders) and the goals for which the corporation is governed. The principal players are the shareholders, management and the board of directors. Other stakeholders include employees, suppliers, customers, banks and other lenders, regulators, the environment and the community at large."[29]

Notwithstanding these shifts towards accountability, large portions of the corporate governance public discourse and academic literature have generally remained devoted to "old school" goals. These wings have recognized many of the due process trends in corporate governance but have linked them primarily to the board's capacity to increase profits for shareholders.[30] Emphasizing corporate honesty and fairness has frequently if not typically served to empower financial investors (for instance, by providing them with a stronger voice and greater proxy power) rather than stakeholders who own no stock in the company.[31]

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25. *See* Gedeon J. Rossouw, *Business Ethics and Corporate Governance: A Global Survey*, 44 BUS. & SOC'Y 32, 36 (2005).

26. *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 HARV. L. REV. 2123 (2003); Brian A. Warwick, *Reinventing the Wheel: Firestone and the Role of Ethics in the Corporation*, 54 ALA. L. REV. 1455 (2003); Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697 (2002).

27. *See* Guhan Subramanian, Op-Ed, *Board Silly*, N.Y. TIMES, Feb. 14, 2007, *available at* http://www.nytimes.com/2007/02/14/opinion/14subramanian.html.

28. *See generally* LAWRENCE MITCHELL & MICHAEL DIAMOND, CORPORATIONS: A CONTEMPORARY APPROACH (2004).

29. *Supra* note 12.

30. Bernard Black, Brian Cheffins, & Michael Klausner, *Outside Director Liability*, 58 STAN. L. REV. 1055, 1089-91 (2006); *see also* Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641 (2006); Joseph A. Grundfest, *Advice and Consent: An Alternative Mechanism for Shareholder Participation in the Nomination and Election of Corporate Directors*, *in* SHAREHOLDER ACCESS TO THE CORPORATE BALLOT (Lucian Bebchuk ed. 2005).

31. Paddy Ireland, *From Amelioration to Transformation: Capitalism, the Market, and Corporate Reform*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND

These recent developments in corporate accountability signal a growing tension between corporate governance's engagement with shareholder and stakeholder interests. As discussed below, the CSR movement has played an increasingly important role in reconciling this tension and making corporate governance as a whole more attuned to constituency concerns.

B. Corporate Social Responsibility: From Ethics to Business Judgment

As in the realm of corporate governance, there has been ongoing debate regarding the definitions and interpretations of the term "corporate social responsibility." Upon emerging in the political and academic landscape several decades ago, CSR related first and foremost to the conceptual challenges raised by scholars and advocates who criticize corporate America's shareholder primacy ethos.[32] CSR offered theoretical insights as to why companies should not be treated solely as their shareholders' private property but rather as semi-public enterprises based on sophisticated transactions and relational contracts among investors, managers, and employees.[33] For example, scholars suggested that applying the contractarian approach to corporate law (which portrays the corporation as a voluntary "nexus of contracts")[34] as well as the realistic approach (which paints the corporation as a separate legal personality akin to a human being)[35] should not result in giving superior property rights to shareholders over employees. Rather, they posited, workers who invest their labor as an input in the enterprise should enjoy legal recognition of their residual interest in the company's assets.[36]

Moreover, the CSR literature drew on critiques of the law and economics school of thought to challenge the economic rationales behind shareholder centralism. Social welfare-driven approaches to corporate law and policy proposed that business efficiency should not only aim at higher stock prices, but also at internalizing environmental and social externalities and acknowledging the often

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POSSIBILITIES 197 (Joanne Conaghan, Richard Michael Fischl, & Karl Klare eds., 2002).

32. For an overview of the normative arguments set fourth in this context, see Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 813-18 (2005).

33. A key model that offers an understanding of the Board of Directors as mirroring the interests of various constituencies can be found in Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

34. Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. LAW 779, 782-84 (2006); Melvin A. Eisenberg, *The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 825–26 (1999).

35. David S. Allen, *The First Amendment and the Doctrine of Corporate Personhood: Collapsing the Press-corporation Distinction*, 2 JOURNALISM 255 (2001).

36. *See, e.g.*, Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 (1998). For a discussion on the property rights justification for shareholder primacy, see Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119 (1990); William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992).

unequal distributive consequences of creating corporate surpluses.[37] These critical theories, primarily in the social sciences, relied on moral arguments associated with justice, fairness, and communitarianism.[38] They also endorsed doctrinal approaches that reject the exclusivity of cost-benefit analysis and the exclusion of distributive aspects from efficiency models focused on maximizing each transaction's dollar-value.[39] Instead, CSR promoted the stakeholder theory, incorporating stakeholder interests and making various constituencies participants in how companies are run and operated on a daily basis.[40]

While some commentators still regard these conceptual challenges as the essence of CSR, today they are more commonly viewed as part of a general theoretical debate over corporate structure that is not linked directly to the CSR movement.[41] Several scholars developed these theories during the 1990s and 2000s to propose new corporate regulations that go beyond CSR and touch on concrete and enforceable legal rules. This body of scholarship, frequently entitled "Progressive Corporate Law," rejects the voluntary nature of CSR with its focus on self-regulatory ethics, and suggests far more comprehensive, mandatory changes in the fundamental legal structure of corporations.[42]

Corporate social responsibility itself has taken a different path altogether. In many ways, it was clear from the outset that the CSR movement neither sought to challenge the market framework in which it was positioned nor aimed to criticize the fictional corporate entity introduced in the early twentieth century. CSR was not about reinforcing the New Deal welfare state or introducing egalitarian policy amendments inspired by distributive justice philosophies.[43] Instead, it was about working with businesses, within the existing political and

37. For proposals to progressively reform corporate law and policy, see generally DALLAS, *supra* note 21; Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 89, 117 (2005); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992).

38. *See generally* Kent Greenfield, *Corporate Social Responsibility: There's a Forest in those Trees: Teaching about the Role of Corporations in Society*, 34 GA. L. REV. 1011 (2000). For a critique of how normative justifications attributed to CSR become part of the neo-liberal logic rather than undermine it, see Ronen Shamir, *The Age of Responsibilization: On Market Embedded Morality*, 37 ECON. & SOC'Y (forthcoming, 2008).

39. For a recent comprehensive critique of the existing foundations of corporate legal thought, see KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES (2006).

40. Regarding stakeholder theory, see generally THOMAS DONALDSON & LEE E. PRESTON, THE STAKEHOLDER THEORY OF THE CORPORATION: CONCEPTS, EVIDENCE, AND IMPLICATIONS (1995); R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984).

41. Sneirson, *supra* note 14.

42. Greenfield, *supra* note 38; Kellye Y. Testy, *Capitalism and Freedom–For Whom? Feminist Legal Theory and Progressive Corporate Law*, 67 L. & CONTEMP. PROBS. 87 (2004); LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT (2001). A much-cited work in which a group of scholars came together to offer company law reform touching on a range of concrete legal issues is PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995).

43. Mitchell, *supra* note 11.

economic landscape, to make companies adopt ethical guidelines, incorporate stakeholder concerns, and more efficiently internalize the costs externalized onto the environment and society.[44]

On the ground, this market-friendly approach offered companies the opportunity to decide for themselves a suitable scope for their practice of social responsibility.[45] The voluntary nature of the concept invited businesses to develop stakeholder engagement programs that increased their competitiveness, and launch marketing campaigns that emphasized their humanistic, democratic values as "corporate citizens." Businesses also declared their commitment to the idea that issues such as human rights, workers' rights, and protecting the environment could accompany profit-maximization goals.[46] This is often referred to as the "Triple Bottom Line" consisting of people, planet, and profit components.[47]

As a result, the CSR movement was gradually absorbed into the corporate ethos, part of a new consensus on the broader judgment that managers should exercise in the course of doing business.[48] CSR units have become highly-visible, with some corporations marking themselves as leading players in initiating CSR programs and public relations endeavors.[49] Moreover, CSR-related concepts and ideas are finding their way into the heart of the curriculum at many MBA programs. CSR has also increasingly been studied as a strategic tool to maximize profits, with extensive literature in business administration and economics testing the possible correlation between adopting CSR programs and improving performance.[50]

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44. VOGEL, *supra* note 4.

45. For a recent survey on how corporations choose to incorporate CSR aspects into their Human Resources practices, see 2007 CORPORATE SOCIAL RESPONSIBILITY PILOT STUDY: UNITED STATES, AUSTRALIA, INDIA, CHINA, CANADA, MEXICO AND BRAZIL (Society for Human Resource Management ed., 2007), *available at* http://www.shrm.org/hrresources/surveys_published/2007%20Corporate%20Social%20Responsibility%20Pilot%20Study.pdf.

46. *See, e.g.*, the Corporate Citizenship websites of Coca-Cola (http://www.thecoca-colacompany.com/citizenship/index.html), Gap (http://www.gapinc.com/public/SocialResponsibility/socialres.shtml), McDonalds (http://www.mcdonalds.com/usa/good/report.html), Nike (http://www.nikebiz.com/responsibility/), Wal-Mart (http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=217).

47. JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (1998).

48. ANDREW W. SAVITZ, THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO (2006).

49. Ronen Shamir, *Mind the Gap: The Commodification of Corporate Social Responsibility*, 28 SYMBOLIC INTERACTION 229 (2005).

50. *See generally* Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 78, 78-92, 163 (2006); Raymond J. Fisman, Geoffrey Heal, & Vinay B. Nair, *Corporate Social Responsibility: Doing Well by Doing Good?* (The Wharton School, Working Paper, Sept. 2005), *available at* http://finance.wharton.upenn.edu/~vbnair/Research_files/CSR.pdf; Claudia H. Deutsch, *For Wall*

Not surprisingly, all of these processes brought about what Ronen Shamir refers to as the "de-radicalization" of CSR,[51] echoing a growing critique of the industry by those seeking social change. In fact, as CSR has become a business-sensitive, if not business-driven practice, critics point out that original social change motives have been surrendered to the marketing interests of big corporations and the neo-liberal logic of private ordering more generally.[52] Notably this line of critique underscores a growing concern among scholars and policy advocates who fear CSR has become a cynical public relations tool.[53]

Parallel to this mainstreaming of CSR, a wave of public interest advocacy led by regulators and NGOs increasingly aims to insert more enforceable tools to oversee corporate accountability and social responsibility.[54] These tools include public monitoring campaigns, litigation that addresses human and workers' rights violations by multinational corporations (MNCs), and—in more rare instances—"soft" legislation.[55] These tools seek to improve corporate engagement with CSR by making public groups and coalitions participants in shaping the field.[56]

A tension has emerged between what has grown to be the two wings of CSR: the voluntary, pro-self regulation wing and the mandatory, pro-regulation wing. This growing tension makes it extremely difficult to characterize CSR using a single term, as it now refers to so many competing features and notions. As Shamir defines it, CSR is "[t]he social universe where ongoing negotiations over the very meaning and scope of the term social responsibility take place."[57]

Nonetheless, there is no dispute that in today's corporate arena, CSR has completed its journey from the political margins to the business mainstream. The movement no longer portrays itself as a radical counter-argument to profit-

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Street, Increasing Evidence that Green Begets Green, N.Y. TIMES, July 19, 1998, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A04E4DD1230F93AA25754C0A96E958260&scp=1&sq=For+Wall+Street%2C+Increasing+Evidence+that+Green+Begets+Green&st=nyt.

51. Ronen Shamir, *The De-Radicalization of Corporate Social Responsibility*, 30 CRITICAL SOC. 669, 671 (2004).

52. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005).

53. ROBERT REICH, SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE (2007) (arguing that CSR is a "pale substitute" for regulation which fails to replace the need for a campaign finance reform that would reduce corporate influence over the political process).

54. Jonathan P. Doh & Terrence R. Guay, *Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective*, 43 J. MGMT. STUD. 47 (2006).

55. For a discussion of the recent use of these tools by social groups, see Parker, *supra* note 10.

56. Morton Winston, *NGO Strategies for Promoting Corporate Social Responsibility*, 16 ETHICS & INT'L AFF. 71 (2002).

57. Ronen Shamir, *Corporate Responsibility and the South African Drug Wars: Outline of a New Frontier for Cause Lawyers*, *in* THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 38 (Austin Sarat & Stuart Scheingold eds., 2005).

maximization. Rather, CSR is a business strategy to make the ultimate goals of corporations more achievable as well as more transparent, demonstrate responsibility towards communities and the environment, and take the interests of groups such as employees and consumers into account when making long-term business decisions.[58]

III. THE CONVERGENCE OF CORPORATE GOVERNANCE AND RESPONSIBILITY?

A. Intersections and the "New Governance"

As corporate governance becomes increasingly driven by ethical norms and the need for accountability, and corporate social responsibility adapts to prevailing business practices, a potential convergence between them surfaces. Where there were once two separate sets of mechanisms, one dealing with "hard core" corporate decision-making and the other with "soft," people-friendly business strategies, scholars now point to a more hybridized, synthesized body of laws and norms regulating corporate practices.

Extant research offers a conceptual background for how the two fields have begun to converge, relying on executive fiduciary duties, stakeholder engagement, and economic analysis of management incentives to engage in CSR.[59] The scholarship also addresses how companies incorporate stakeholder-friendly business strategies,[60] examines the role of shareholder and board activism in pushing for social responsibility,[61] and provides quantitative assessments of re-

58. *Just Good Business*, ECONOMIST, Jan. 18, 2008, *available at* http://www.economist.com/business/displayStory.cfm?story_id=10491077.

59. For fiduciary duty aspects, see Lyman Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597 (2005); Blair & Stout, *supra* note 33. For stakeholder aspects, see Mitchell, *supra* note 11. For economic analysis, see Craig Mackenzie, *Boards, Incentives and Corporate Social Responsibility: The Case for a Change of Emphasis*, 15 CORP. GOVERNANCE: AN INT'L REV. 935 (2007); Jason Scott Johnston, *Signaling Social Responsibility: On the Law and Economics of Market Incentives for Corporate Environmental Performance* (U. of Penn, Inst. for Law & Econ Research Paper 05-16, 2005), *available at* http://ssrn.com/abstract=725103.

60. Adam Winkler, *Corporate Law or the Law of Business? Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109 (2004); Michael Bradley, Cindy A. Schipani, Anant K. Sundaram, & James P. Walsh, *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9 (1999).

61. Aguilera et al., *supra* note 11 (comparing between institutional investor activism in the United States and United Kingdom); Adam J. Sulkowski & Kent Greenfield, *A Bridle, a Prod and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior* (Boston College Law School Research Paper No. 76, 2005), *available at* http://ssrn.com/abstract=775125 (reviewing shareholder and employee strategies to use corporate law to affect corporate behavior); Thomas W. Joo, *A Trip Through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV.

porting practices, indexes, and ratings that link governance with responsibility.[62] Finally, scholars suggest models for pursuing this emerging frontier through greater involvement on behalf of the board of directors,[63] and utilize a comparative approach to cross the border between corporate governance and accountability.[64]

The potential convergence of corporate governance and CSR is frequently read against the backdrop of the New Governance theory which identifies a growing involvement of the private sector in shaping public policy and regulation.[65] In the face of global economic transformations, scholars argue that the regulatory power of the state has become increasingly decentralized.[66] Therefore, "hierarchical command-and-control" regulation[67] is being replaced by a mixture of public and private, state and market, traditional and self-regulation institutions that are based on collaboration among the state, business corporations, and NGOs.[68]

Those public policies which were traditionally imposed by formal regulatory bodies, such as workplace antidiscrimination and environmental protection boards, are now being collaboratively addressed through participation, negotiations, and dialogue between the public and private sectors.[69] Accordingly, the

735 (2003) (assessing the SEC proposal to provide shareholders with a louder voice in board composition in the context of racial diversity among directors).

62. Lori Holder-Webb, Jeffrey R. Cohen, David Wood, & Leda Nath, *The Supply of Corporate Social Responsibility Disclosures Among U.S. Firms* (Feb. 28, 2007), *available at* http://ssrn.com/abstract=970330; Ans Kolk, *Sustainability, Accountability and Corporate Governance: Exploring Multinationals' Reporting Practices* 18 BUS. STRATEGY & ENV'T. 1 (2008); Meir Statman, *Socially Responsible Indexes: Composition and Performance* (Jan. 2005), *available at* http://ssrn.com/abstract=705344; Craig Deegan, *The Legitimizing Effect of Social and Environmental Disclosures—A Theoretical Foundation*, 15 ACCT., AUDITING & ACCOUNTABILITY J. 282 (2002); Reggy Hooghiemstra, *Corporate Communication and Impression Management—New Perspectives Why Companies Engage in Social Reporting*, 27 J. BUS. ETHICS 55 (2000).

63. Mitchell, *supra* note 11.

64. *See generally* YADONG LUO, GLOBAL DIMENSIONS OF CORPORATE GOVERNANCE (2006); Arthur R. Pinto, *Globalization and the Study of Comparative Corporate Governance*, 23 WIS. INT'L L.J. 477 (2005); CONVERGENCE AND PERSISTENCE IN. CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004).

65. Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, *in* THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 1-14 (Lester M. Salamon ed., 2002).

66. Yuval Feldman & Orly Lobel, *Behavioral versus Institutional Antecedents of Decentralized Enforcement in Organizations: An Experimental Approach* (San Diego Legal Studies Paper No. 07-126, Nov. 2007), *available at* http://ssrn.com/abstract=1031853.

67. Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005).

68. For a discussion of employment disputes, organizational compliance, financial regulation, and employee misconduct, see Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498 (2004).

69. *See, e.g.*, David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency*, 17 BUS. ETHICS Q. 455 (2007); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal*

regulatory tools themselves are changing; they no longer consist solely of legislative or administrative acts, but also include market-oriented institutions that enforce business transparency, disclosure, reporting, and monitoring practices, as well as internal sanctions to tackle individual misconduct.[70] The primary challenge for New Governance arrangements is how to create the appropriate atmosphere and conditions for these tools to work as effectively as possible.[71]

The most common critique of New Governance arrangements is that they are in fact deregulation in disguise.[72] Critics argue that the decline of state regulation at the expense of private ordering symbolizes a conservative, pro-business movement that hides deregulation behind a curtain of unrealistic promises for self-regulation. However, the New Governance literature presents a far more complex vision that in many ways rejects deregulation as its political agenda.

In order to function effectively as a tool for regulation, New Governance highlights the need for public scrutiny and enforcement, but also promotes new regulatory structures requiring companies to follow growing public expectations for accountability. In fact, studies show that internal governance policies that emphasize social responsibility through transparency and coordination have been more successful in bringing about ethical corporate conduct than traditional command-and-control structures.[73] Moreover, contrary to more traditional forms of regulation, proponents of New Governance believe these structures can and should be designed to rely less on state-dictated preferences and more on public-private collaboration, flexibility, and pragmatism.[74] Empirical evidence suggests that corporations are more willing to consider effective ways of enforcing compliance standards and processes, as well as share more information, when they operate in a collaborative climate that allows them to perform their own monitoring.[75] Finally, studies have shown that enforcing environmental protections

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Thought, 89 MINN. L. REV. 342 (2004).

70. The issue of social enforcement exercised within companies and organizations requires a careful identification of those particular behaviors and misconducts that allow an internal enforcement system as well as those which may serve the interest of the organization at the expense of the public unless formally regulated. *See* Feldman & Lobel, *supra* note 66, at 9.

71. For an illustration of these challenges in the CSR context, see John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement* (UNC Legal Studies Research Paper No. 05-16, 2005), *available at* http://ssrn.com/abstract=691521.

72. Guy Mundlak, Eva Schram & Els Sol, *Hard Law/Soft Law Hybrids as a Conceptual and Policy Framework: Looking at the Regulation of Temp Agency Work in Highly Regulated Countries* (on file with author).

73. PHILIP SELZNICK, THE COMMUNITARIAN PERSUASION 101 (2002); Andy Hochstetler & Copes Heith, *Organizational Culture and Organizational Crime*, *in* CRIMES OF PRIVILEGE (Neal Shover & John Paul Wright eds., 2001); JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).

74. *See, e.g.*, Bradley Karkkainen, *New Governance in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004).

75. *See, e.g.*, Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691 (2003).

through non-conventional regulatory tactics may also enhance corporate compliance with financial and workplace protections.[76]

The complex mixture of governance and responsibility that characterizes the post-Enron corporate transformation demonstrates a decentralization of regulatory power away from the state to the private sector and public monitors, and reveals an emerging set of rules and norms. The growing number of codes of conduct, best practices, and guidelines initiated by businesses, regulators and administrative agencies serve as a primary source of business regulation. At this juncture, New Governance finds its strongest expression in the field of corporate conduct as it encompasses two of the most important socio-legal patterns that enable the convergence of corporate governance and CSR: self-regulation and meta-regulation. The sections below address these specific patterns.

B. Corporate Self-Regulation

As the authority and power of the nation-state dramatically decline in the global era, non-state actors and transnational bodies are increasingly engaged in creating regulatory schemes and devices for businesses.[77] Corporate self-regulation, as encouraged by international agencies, social groups, and business-related entities has gained overwhelming attention as it emerges as a complement to, if not a substitute for, formal governmental regulation.[78]

One highly visible, frequently debated form of self-regulation is the corporate code of conduct. In contrast to private business codes that regard transactional and contractual aspects of commerce,[79] codes of conduct address corporate ethics, moral guidelines, and key CSR issues such as human rights, labor, the environment, and sustainable development. Throughout the 1990s, such codes were adopted by MNCs, particularly those with a strong presence in developing countries with weak state-based regulatory systems.[80]

For example, in 1999 the Leon H. Sullivan Foundation proposed an international code of corporate conduct known as the Global Sullivan Principles of Social Responsibility. The Principles cover a broad range of CSR issues, including employee freedom of association, health and environmental standards, and

76. Christine Parker & Vibeke Nielsen, *Do Corporate Compliance Programs Influence Compliance?* (U. of Melbourne Legal Studies Research Paper No. 189, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=930238.

77. *See, e.g.*, John W. Cioffi, *Governing Globalization? The State, Law, and Structural Change in Corporate Governance*, 27 J.L. & SOC'Y 572 (2000).

78. PARKER, *supra* note 5; Gunningham & Rees, *supra* note 5.

79. Eddy Wymeersch, *Corporate Governance Codes and Their Implementation* (U. of Gent Fin. Law Inst. Working Paper No. 2006-10, 2006) *available at* http://ssrn.com/abstract=931100.

80. Harry Arthurs, *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES, *supra* note 31, at 471.

sustainable development.[81] The Principles have since inspired Fortune 500 companies to pledge to modify their internal policies in order to meet the guidelines set forth.[82]

Two major critiques have surfaced with respect to codes of conduct. The first echoes concerns regarding New Governance and criticizes the free market ideology underlying self-regulation.[83] In response, advocates of the codes of conduct posit arguments similar to those set forth in the New Governance context more generally, namely that analysis of the codes' potential for engendering change requires more complex doctrinal and empirical understanding.[84]

The second critique contends that, as a practical matter, codes have failed to actually improve corporate behavior worldwide, thus serving merely as lip service.[85] Indeed, many agree that even codes backed by a strong monitoring system might not generate ground-level change, unless accompanied by appropriate changes in business culture and decision-making.[86]

Another recent trend in self-regulation that has drawn attention is non-financial reporting. First published in the 1990s in response to a series of environmental disasters, non-financial corporate reports increasingly cover a much wider range of corporate policies.[87] The non-financial reporting trend seeks to not only inform the public of existing CSR policies implemented by the reporting firm but also to provide incentives for companies to ensure transparency and create channels for dialogue with their stakeholders.[88] In other words, corporate disclosure aside, the virtue of reporting is that it encourages companies to create better mechanisms for long-term accountability to their constituencies.

Nevertheless, such reporting is still largely a voluntary concept, despite the recent attempts to mandate non-financial corporate reporting. Some companies have chosen to incorporate governance and CSR issues into their annual financial reporting, creating what have become known as "integrated reports."[89]

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81. The Global Sullivan Principles, http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp (last visited Mar. 26, 2008).

82. Gordon Leslie Clark & Tessa Hebb, *Why Do They Care? The Market for Corporate Global Responsibility and the Role of Institutional Investors* (Sch. Of Geography and the Env't, Univ. of Oxford, Working Paper, 2004), *available at* http://www.community-wealth.org/_pdfs/articles-publications/state-local/paper-clark.pdf.

83. *See, e.g.*, Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401 (2001).

84. *See, e.g.*, Peer Zumbansen, *The Parallel Worlds of Corporate Governance and Labor Law*, 13 IND. J. GLOBAL LEG. STUD. 261 (2006).

85. Richard M. Locke & Monica Romis, *Beyond Corporate Codes of Conduct: Work Organization and Labor Standards in Two Mexican Garment Factories* (MIT Sloan Research Paper No. 4617-06, 2006), *available at* http://ssrn.com/abstract=925273.

86. *See, e.g.*, PROGRESSIVE CORPORATE LAW, *supra* note 42.

87. Kolk, *supra* note 62.

88. Hess, *supra* note 69, at 3.

89. Kolk, *supra* note 62.

Many others have published special CSR reports (i.e., Sustainability or Triple Bottom Line reports), often conducted according to the Global Reporting Initiative (GRI) Guidelines.[90]

Scholars have responded with a growing interest in this reporting wave. Thus far, researchers have addressed the conceptual goals and roles of reporting in encouraging corporate accountability,[91] especially in the context of environmental disclosure policies.[92] Researchers have also surveyed CSR reporting practices adopted by U.S. firms[93] and those adopted by MNCs linking governance with sustainability.[94] Additional studies have assessed the accomplishments and failures of reporting in achieving accountability,[95] particularly with regard to transparency[96] and stakeholder engagement.[97] Still others have proposed new strategies, including the adoption of other transparency models from U.S. laws[98] or mandatory social reporting.[99]

Both codes of conduct and non-financial reporting trends illustrate how corporate self-regulation serves as one of the most notable vehicles for linking governance with responsibility. Through various strategies and instruments, self-regulation has subjected businesses with a mixture of supervisory principles that reflect the convergence of corporate governance and CSR. A push for stronger external supervision over self-regulation catalyzed this process, a pattern to which this Article turns to in the next section.

C. Corporate Meta-Regulation

Non-state actors and transnational agencies previously undertook regulatory efforts to control corporate behavior under an umbrella of self-regulation.

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90. Sustainability Reporting Guidelines, *available at* http://www.globalreporting.orgReporting Framework/ G3Guidelines.

91. Hess, *supra* note 69.

92. Sylvie Berthelot, Denis Cormier, & Michael Mgnan, *Environmental Disclosure Research: Review and Synthesis*, 22 J. ACCT. LITERATURE 1 (2003).

93. Holder-Webb et al., *supra* note 62.

94. Kolk, *supra* note 62.

95. Hess, *supra* note 69, at 4; Craig Deegan, *The Legitimizing Effect of Social and Environmental Disclosures—A Theoretical Foundation*, 15 ACCT. AUDITING & ACCOUNTABILITY J. 282 (2002); Hooghiemstra, *supra* note 60.

96. Hess, *supra* note 69; Amanda Ball, David Owen, & Rob Gray, *External Transparency or Internal Capture? The Role of Third-Party Statements in Adding Value to Corporate Environmental Reports*, 9 BUS. STRATEGY AND THE ENV'T 1 (2000).

97. Hess, *supra* note 69, at 4-5; PARKER, *supra* note 5; David L. Owen, Tracey Swift, & Karen Hunt, *Questioning the Role of Stakeholder Engagement in Social and Ethical Accounting, Auditing, and Reporting*, 25 ACCT. F. 264 (2001).

98. Hess, *supra* note 69.

99. Ans Kolk, *Trends in Sustainability Reporting by the Fortune Global 250*, 12 BUS. STRATEGY & ENV'T 279 (2003); Justine Nolan, *Corporate Accountability and Triple Bottom Line Reporting: Determining the Material Issues for Disclosure* (UNSW Law Research Paper No. 2007-15, 2007), *available at* http://ssrn.com/abstract=975414.

At present, however, there is a common distinction between the mechanisms adopted by companies and financial institutions to govern their internal policies (e.g., self-regulation) and those pursued by external social actors to monitor self-regulation by looking at it from the outside. "Meta-regulation,"[100] as the latter set of mechanisms is known, is characterized by three major features deriving from the voluntary, private nature of business associations.

First, meta-regulation is carried out by social groups that participate in the process—from employee and consumer coalitions, to public-interest groups and international NGOs, to courts and legislators—rather than exclusively by regulators. Second, meta-regulation focuses on making self-regulation of corporate conduct more effective rather than on replacing it with formal binding laws. Third, since enforceable legal frameworks are scarce in the context of voluntary stakeholder corporate governance, meta-regulation focuses on non-legal measures,[101] and engages in ground-level activism, advocacy, and media campaigns.

Scholars have devoted substantial attention to investigating efforts undertaken by civil society actors (e.g., NGOs and non-profits) and corporations to mandate self-regulation.[102] As to the former, these efforts have, thus far, concentrated on such strategies as working with companies to build their CSR tools through consulting and training[103] and publishing stock market indexes and ratings that measure CSR performance.[104] As to the latter, the literature on corporate meta-regulation also observes the growing efforts to enforce voluntary CSR through binding legal frameworks. Such studies have focused on MNCs in particular and extensively discuss the utility of international law and transnational litigation in achieving global corporate accountability.[105]

Through the use of "outreach" programs, administrative agencies such as

100. For studies exploring the concept of meta-regulation, see PARKER, *supra* note 5; HARM SCHEPEL, THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS (2005); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

101. Such non-legal measures include best practices, indexes, ratings, guidelines, principles, advisory products, and publications. *See generally* Parker, *supra* note 10.

102. PARKER, *supra* note 5.

103. Kees Bastmeijer & Jonathan M. Verschuuren, *NGO-Business Collaborations and the Law: Sustainability, Limitations of Law, and the Changing Relationship between Companies and NGOs*, *in* CORPORATE SOCIAL RESPONSIBILITY, ACCOUNTABILITY, AND GOVERNANCE: GLOBAL PERSPECTIVES 314 (Istemi Demirag ed., 2005).

104. *See, e..g.*, Statman, *supra* note 62 (empirically evaluating the differences among social responsibility indexes and their characteristics compared to non-CSR company indexes).

105. *See generally* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (2004); LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); Hari M. Osofsky, *Local Approaches to Transnational Corporate Responsibility: Mapping the Role of Subnational Climate Change Litigation*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 143 (2007); Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC'Y REV. 635 (2004); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 34 U.C. DAVIS L. REV. 705 (2002).

the Securities and Exchange Commission (SEC), the Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA) have played an increasingly large role in making CSR more binding.[106] Notable examples include granting business licenses and permissions conditioned upon integrity and disclosure performance,[107] whistleblower protections,[108] government-sponsored auditing schemes and tax incentives,[109] and using a company's implementation of a compliance program as a basis for sentencing guidelines used to determine corporate criminal liability.[110] Courts also are more attentive to how a company conducts its own voluntary compliance program. Internal procedures are often considered when brought before the court as a defense against a liability claim or when a company is sued for punitive damages (e.g., in an employment discrimination suit).[111]

Meta-regulation, like the parallel mechanism of self-regulation, is a vehicle through which corporate governance and social responsibility merge and create a regulatory synthesis. The changing nature of corporate monitoring, the identity of the social regulators participating in the process, and the substantive mechanisms unfolding to control corporate behavior indicate the important role of meta-regulation in this convergence. Section IV will discuss the applications and implications of this synthesis on the study and regulation of corporate conduct.

IV. PROSPECTS AND CHALLENGES

A. Conceptual and Methodological Applications

The merging of corporate governance with corporate social responsibility affects how academics study, understand and analyze corporate law and policy. In today's transnational climate, this synthesis corresponds broadly with the complexity of evolving business norms. Business associations are increasingly embedded in layers of rules stemming from multiple sources, including corporate law, securities and antitrust regulation, labor and employment law, tax law, environmental law, commercial law, and consumer protection law. These fields generally include both "hard" law, such as federal and state statutes, and "soft" law, such as codes and standards.[112]

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106. Feldman & Lobel, *supra* note 66, at 1, 8.

107. Parker, *supra* note 10.

108. *See, e.g.*, Feldman & Lobel, *supra* note 66.

109. Parker, *supra* note 10.

110. John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 313-36 (2004); Murphy, *supra* note 26, at 704.

111. Feldman & Lobel, *supra* note 66.

112. *See, e.g.*, Zumbansen, *supra* note 84 (analyzing the embeddedness of corporations in layers of rules of both business and employment protection natures); SANFORD JACOBY, THE EMBEDDED CORPORATION: CORPORATE GOVERNANCE AND EMPLOYMENT RELATIONS IN JAPAN

Corporate self-regulation and meta-regulation, read against the New Governance literature, capture a central element in the complexity of business law. That is, these regulatory patterns accompany socio-legal changes in market economies, highlighted by the fall of state authority and the rise of private ordering.[113] As the legal landscape changes, a more complex understanding of corporations is required: one that acknowledges and pursues the synthesis between old and new legal institutions, orthodox and novel social concepts, and conservative and liberal political conceptions.[114]

Institutional and political duality is a key feature in the emerging intersection of governance and responsibility. Corporate governance and CSR have begun to form a unified body of norms[115] that constitutes a new and very different "constitution of the firm."[116] Corporate governance is abandoning its sole focus on agency conflicts to enable managers and investors to pursue stakeholder participation. At the same time, CSR has gained mainstream acceptance by both incorporating business concepts it once neglected and emphasizing its own strengths as a value-creation tool.[117]

The traditional separation between corporate law as a field dealing with investor-manager relations, and non-corporate legal fields relating to other corporate constituencies (e.g., labor),[118] can no longer be maintained. For example, the presence of CSR board committee members and institutional investor activists on corporate boards of directors[119] as employee representatives indicates that corporate governance has changed its approach to company-worker relations.[120] However, the assimilation of notions of responsibility and accountabil-

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AND THE UNITED STATES (2005) (comparing the implementation of corporate governance and employment law tools of various forms by Human Resources departments in U.S. and Japanese companies).

113. Lobel, *supra* note 67 (addressing the fall of formal regulation); Arthurs, *supra* note 78 (studying corporate codes of conduct as an emerging sphere of labor market private ordering).

114. Zumbansen defines this embeddedness as "Transnational Corporate Governance," suggesting that Transnational Law (TL) should not be understood merely as a set of rules relating to globalization (e.g., international trade law) but also as a methodological tool to comprehend the cross-boarder transformations that corporate governance (and, in the case of his analysis, labor law) are experiencing. *See* Zumbansen, *supra* note 84, at 299-305.

115. Yohanes E. Riyanto & Linda A. Toolsema, *Corporate Social Responsibility in a Corporate Governance Framework* (National University of Singapore Department of Economics, Working Paper No. 0703, 2007), *available at* http://nt2.fas.nus.edu.sg/ecs/pub/wp/wp0703.pdf

116. Zumbansen, *supra* note 84, at 268.

117. *See, e.g.*, *Just Good Business*, *supra* note 58; Porter & Kramer, *supra* note 50.

118. MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW (1995).

119. Marleen O'Connor, *Labor's Role in the American Corporate Governance Structure*, *in* CORPORATE GOVERNANCE: LAW, THEORY AND POLICY (Thomas W. Joo ed., 2004); Stewart J. Schwab & Randall Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1030 (1998), Jennifer G. Hill, *At the Frontiers of Labour Law and Corporate Law: Enterprise Bargaining, Corporations and Employees*, 23 FED. L. REV. 204 (1995); Katherine V.W. Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV 73 (1988).

120. Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151

ity into corporate governance runs the risk, unless designed effectively, of serving merely as superficial re-labeling. When *The Economist* recently asked over 1,000 executives "how [their] organization[s] define corporate responsibility," 31.4% of the respondents answered "maximizing profits and serving the interests of shareholders." [121] This was the second most common answer, after "taking proper account of the broader interests of society when making business decisions," chosen by 38.4% of respondents.[122] As these numbers illustrate, there is a fine line between approaching responsibility as a rhetorical tool for maintaining shareholder primacy or realizing it as a transformative tool for change.

The conceptual applications of corporate governance and social responsibility carry methodological implications. Not surprisingly, the study of corporate governance is gradually incorporating such concepts as non-financial accountability, ethical codes and standards of conduct, socially driven investment and fiduciary duties, board diversity, stakeholder engagement, sustainability reporting, and socially responsible business strategies.[123] Simultaneously, the study of social responsibility requires paying much closer attention to shareholder activism and proxy voting, board and committee composition, fiduciary duties, managerial units, disclosure policies, board chair and CEO statements, executive compensation, and auditing and external verification.[124]

Meta-regulation is also bound to draw more scholarly emphasis as a less familiar form of corporate law-making. Adjusting to the emergence of new regulators in the corporate realm, business law studies should assess how corporate regulation is being reshaped, both from within the business community, as well by external actors using soft law tools. Feldman and Lobel write about the potential of studying New Governance:

> First, a better understanding of the factors that contribute to informal enforcement can provide policymakers with additional legal strategies for effective compliance. Second, it could direct policy makers to areas in which the state should invest in formal enforcement, instead of relying on ineffective social enforcements.

U. PA. L. REV. 1861 (2003).

121. ECONOMIST INTELLIGENCE UNIT, GLOBAL BUSINESS BAROMETER JANUARY 2008, *available at* http://www.economist.com/media/pdf/Barometer2.pdf.

122. *Id.*

123. *See, e.g.*, Sandra Dawson, *Balancing Self-Interest and Altruism: Corporate Governance Alone is Not Enough*, 12 CORP. GOVERNANCE: AN INT'L REV. 130 (2004).

124. Testy mentions that there are many social movements that seek to engage in progressive corporate law issues, but so far, there has been little crossover work between the movements. Therefore, it is vital that a dialogue begin and that coalitions be formed between progressive corporate law and social movements. The distance between the corporate field and other fields is diminishing. While in the past it was extremely rare to find progressive lawyers dealing with corporate law and corporate lawyers addressing public-interest issues, this is no longer the case. Corporate law is increasingly seen as a site of "liberation, not just oppression." Moreover, critical legal scholars are increasingly becoming comfortable, even eager, to discuss economics and corporate structure. Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements to Corporate Governance*, 76 TUL. L. REV. 1227, 1247-1251 (2002).

> The recognition of [New Governance] mechanisms that rely on co-enforcement also contributes to more effective traditional command-and-control strategies, as it allows agencies to target their resources in a more sophisticated manner.[125]

The study of corporate meta-regulation could shed light on the changes initiated in corporate law and policy by groups of all types: small, influential nonprofits like As You Sow,[126] large, consulting-oriented NGOs like Business for Social Responsibility (BSR),[127] international organizations such as the World Bank[128] and the International Labor Organization (ILO),[129] regional and transnational coalitions like the Organization for Economic Co-operation and Development (OECD),[130] and national associations such as the Social Investment Forum (SIF).[131] The involvement of these groups in shaping corporate norms is relatively new but already intensive, thus inviting legal and organizational analysis of their strategies.

In addition, corporate governance has lately drawn on the emergence of research that utilizes socio-legal methods.[132] This research indicates a developing interest in the social and cultural impact of concrete mechanisms of corporate governance. Looking ahead, socio-legal studies will be challenged to respond to meta-regulation and its effects on corporate governance by engaging in not only quantitative but also qualitative inquires consisting of in-depth observations, field exploration, individual interviews and case studies.

Comparative studies within business law will also expand as the field adapts to the intersection between governance and CSR. Numerous studies have already utilized a comparative approach, examining, for example, how legal systems worldwide treat the role of boards and investors in monitoring managerial conduct,[133] the degree to which cross-border models of governance affect CSR decision-making,[134] how reporting practices that link governance to sustainability vary among United States, European, and Japanese firms,[135] and how institutional investors push for CSR on corporate boards in the United States and the

125. Feldman & Lobel, *supra* note 66, at 9.

126. As You Sow: Corporate Accountability, Shareholder Action and Toxics Reduction Home Page, http://www.asyousow.org/ (last visited Apr. 4, 2008).

127. Business for Social Responsibility Home Page, http://bsr.org/ (last visited Apr. 4, 2008).

128. The World Bank Home Page, http://www.worldbank.org/ (last visited Apr. 4, 2008).

129. International Labour Organization Home Page, http://www.ilo.org/ (last visited Apr. 4, 2008).

130. Organization for Economic Co-operation and Development Home Page, http://www.oecd.org/ (last visited Apr. 4, 2008).

131. Social Investment Forum Home Page, http://www.socialinvest.org/ (last visited Apr. 4, 2008).

132. Beth Ahlering & Simon Deakin, *Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?*, 41 LAW & SOC'Y REV. 865 (2007).

133. Aguilera et al., *supra* note 11.

134. Bastmeijer & Verschuuren, *supra* note 103.

135. Kolk, *supra* note 62.

United Kingdom.[136] This comparative scholarship should also be applied to substantive topics and geographic regions that have not been examined thus far.[137]

Further exploration of this comparative perspective will also add to the ongoing debate in corporate law scholarship regarding the convergence or divergence of corporate regulation. On one side of the controversy, scholars have argued that corporations worldwide are converging on the Anglo-American shareholder-centric approach, thereby excluding non-shareholder concerns from the boundaries of corporate law. Famously writing in 2001 on *The End of History for Corporate Law*, Hansmann and Kraakman followed Fukuyama's assertion that the end of the Cold War marked the ultimate triumph of the market ideology, specifically ending any real dispute over the effectiveness of the shareholder primacy model.[138] In response, critics stressed that the United States has diverged politically from other parts of the world post-9/11, and corporate policy exemplifies this divergence.[139] More importantly, studies have provided evidence that models of governance emphasizing the role of stakeholders prevail in highly-developed economies such as Germany and Japan.[140] Some suggest that even within the United States, businesses are increasingly converting to stakeholder-oriented structures,[141] a claim supported by this Article as well.

These conceptual and methodological inquiries may invite new voices to take part in the evolving scholarly debate, such as those working in public interest law, or those investigating broader themes of accountability.[142] The convergence of CSR and corporate governance may provide practitioners, policymakers, regulators, businesses, and NGOs with tools to address the changing landscape of corporate regulation. Those interested in business trends might look at whether and how companies are changing their approaches to corporate governance, while those interested in CSR will explore the incorporation of governance devices into reports, indexes, and ratings, and those studying social change will test the impact of non-profits and public-interest groups on business.

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136. Aguilera et al., *supra* note 11.

137. Zumbansen, *supra* note 84.

138. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO L. J. 439 (2001).

139. Kent Greenfield, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders? September 11th and the End of History of Corporate Law*, 76 TUL. L. REV. 1409 (2002).

140. Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 136-138, 150 (1999).

141. Winkler, *supra* note 60.

142. Testy, *supra* note 124.

Finally, from a normative perspective, studying the convergence of corporate governance and CSR carries policy ramifications for companies, regulators, and social actors. Understanding this convergence will inform how parties can work to stimulate economic performance, corporate governance and accountability best practices, effective self-regulation, social change, and a more prosperous business environment for both investors and stakeholders. A preliminary outline of these ramifications follows.

B. Policy Ramifications

The hybridization between corporate governance and corporate social responsibility is typically viewed by the mainstream in the business community and in the CSR movement as an innovative process that holds promise for markets as well as society.[143] However, many have expressed concern regarding the potential policy outcomes of this process—from both a business and social change perspective. Business advocates often fear that dedicating considerable efforts to meeting social and environmental demands will distract managers from focusing on financial wealth creation and serving the interests of investors.[144] These advocates agree with Nobel Prize winner Milton Friedman that, "the social responsibility of business is to increase its profits,"[145] and that the more corporate governance is preoccupied by non-business activities, the less it will fulfill its designated role. On the other hand, CSR-skeptics who seek public policies aimed at achieving economic justice have serious reservations about the direction the stakeholder movement is taking. They argue that, if CSR becomes preoccupied with business decision-making, the movement—already critiqued as one that essentially helps corporations market themselves more effectively—will become even more corporate-friendly and less effective in promoting eco-

143. Media coverage of CSR practices in business during recent years has frequently taken such an approach. *See, e.g.*, Cornelia Dean, *Executive on a Mission: Saving the Planet*, N.Y. TIMES, May 22, 2007; Adi Ignatius, *Meet the Google Guys*, TIME, Feb. 20, 2006, *available at* http://www.time.com/time/magazine/article/0,9171,1158956,00.html; Steven Greenhouse, *How Costco Became the Anti-Walmart*, N.Y. TIMES, July 17, 2005, *available at* http://www.nytimes.com/2005/07/17/business/yourmoney/17costco.html. For an account of how environmental sustainability integrates into business models and economic policy, see PAUL HAWKEN ET AL., NATURAL CAPITALISM: CREATING THE NEXT INDUSTRIAL REVOLUTION 1-21, 144-169 (1999).

144. *See, e.g.*, Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 J. APPLIED CORP. FIN. 8, 10-13, 16-20 (2001) (suggesting an "Enlightened" model that acknowledges stakeholder interests but maintain value-maximization as the firm's long-term objective); Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 857-862 (1997) (reviewing PROGRESSIVE CORPORATE LAW, *supra* note 42, and offering a conservative version of the law and economics analysis of corporate law).

145. Milton Friedman, *The Social Responsibility of Business it to Increase Its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, *available at* http://select.nytimes.com/gst/abstract.html?res=F10F11FB3E5810718EDDAA0994D1405B808BF1D3&scp=1&sq=The+Social+Responsibility+of+Business+it+to+Increase+Its+Profits&st=p.

nomic justice.[146]

A growing voice within the research literature takes a more intricate approach to this policy debate. This approach acknowledges all of the limitations mentioned above, but chooses to pursue the potential of corporate governance, CSR, and their interaction in reconstructing markets. The proponents of this approach often share many of the concerns expressed by the CSR-skeptics but are captivated by the opportunity of turning companies into semi-public entities and creating a more democratic business environment via corporate responsibility.[147]

The two areas most likely to face the long-term challenges highlighted by this policy debate are business regulation and social change advocacy. In a public atmosphere that places emphasis on corporate ethics and social responsibility, the regulation of business and finance may undergo changes that would mitigate some of the current focus on profit maximization. The current wave of meta-regulation and "soft" law may inevitably shift more efforts from the legislature to public coalitions, NGOs, investment groups, and other social players. This shift may also encourage administrative agencies to extend their collaboration with the private sector and further engage in sentencing guidelines and incentives for self-enforcement.[148]

Substantively, business regulation—whether "hard" or "soft"—is likely to become socially-conscious and absorb some of the "Triple Bottom Line" practices that increasingly link business with sustainability, broadly defined.[149] Voluntary mechanisms may become mandatory, self-imposed sanctions may be subject to greater scrutiny and enforcement, but most importantly, the study and practice of CSR is likely to introduce new managerial institutions that can coexist with growing public, social, and environmental expectations of corporate conduct.[150]

Social change advocacy is already responding to the governance-responsibility convergence by engaging in a vigorous debate over the future of CSR, as described earlier.[151] One can expect that the conceptual disagreement

146. Mitchell, *supra* note 11, at 279-284; REICH, *supra* note 53, at 168-209; Testy, *supra* note 124, at 1238-1240.

147. *See generally* the works linking CSR to legal frameworks of action in the new corporate accountability, *supra* note 4; Zumbansen, *supra* note 84, at 269; PARKER, *supra* note 5, at 31-62, 292-302.

148. Feldman & Lobel, *supra* note 66, at 8 ("Designed effectively, self-regulation can create a virtuous cycle of ethical behavior in private organizations. Indeed, the emerging insight of the modern research on regulation is that decentralized enforcement is one of the key factors in successful societal implementation of governmental rules").

149. Mark Kramer & John Kania, *Changing the Game*, STAN. SOC. INNOVATION REV. 22, 25-29 (Spring 2006), *available at* http://www.ssireview.org/pdf/2006SP_feature_Kramer_Kania.pdf.

150. Kent Greenfield, *Saving the World With Corporate Law?*, 12-16, 23-31, (Boston College Law School, Research Paper No. 130, 2007) *available at* http://ssrn.com/abstract=978242.

151. *See* Greenfield, *supra* note 36; SAVITZ, *supra* note 48; Shamir, *supra* note 49; Shamir, *supra* note 51.

between change agents who favor CSR and those who are critical of it will not prevent the movement from strengthening and deepening its interface with corporate governance. In fact, the growing voice that seeks a "third way" between endorsing CSR and rejecting it is likely to gain support not only in academia but also among practitioners and activists.[152]

Similar to the potential outcomes in business regulation, social change advocacy will likely adapt to changes that are both formative and substantive in nature. Formative changes will potentially present new tactics for socially-sensitive investors, NGOs, and public-interest organizations to work more closely with businesses to try and modify corporate practices through dialogue and negotiations. Changing tactics may also yield the devotion of more resources to consulting and providing guidance and expertise, at the expense of more traditional legislative or administrative advocacy.[153]

The latter category of potential changes may lead the social justice movement to embark on new journeys, such as proposing concrete steps for business law and policy reform. For example, public groups in the CSR field may recommend new guidelines for companies on how to disclose social information[154] and how to compensate their shareholders and executives while increasing other stakeholders' share of the pie.[155] Such proposals for corporate reform from the public and non-profit sectors could maintain the long-term goals of social welfare while accommodating business needs that are inherent to the creation of economic wealth in market economies.

V. CONCLUSION

Corporate governance and corporate social responsibility have become hard to distinguish in the global economic landscape. Their convergence in the face of regulatory, business, and social changes in transnational markets has evoked debate and controversy over both the potential and limitations of corporate accountability mechanisms. Recently, scholars and practitioners in many fields have looked beyond their traditional perceptions to explore how synthesizing governance and responsibility may affect existing practices in business and social advocacy. This Article offers a framework to approach this evolving study, suggesting that while the synthesis between corporate governance and CSR poses serious challenges to how we currently apply business law and policy, it may also generate innovative concepts and methodologies. Pursuing the emerg-

152. For a recent example of public-interest litigation trying to use voluntary CSR and corporate codes of conduct to establish enforceable protections for workers' rights, see Jane Doe v. Wal-Mart Stores, Inc., *available at* http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign/resources/1018

153. Bastmeijer & Verschuuren, *supra* note 103.

154. Cynthia Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999).

155. Greenfield, *supra* note 37, at 109-14; Mitchell, *supra* note 11, at 276-79.

ing frontier of corporate governance as social responsibility is a platform for new research and new policies that, if designed effectively, may generate a more equitable global business environment.

Berkeley Journal of International Law

Volume 26 | Issue 2 Article 6

2008

Business, Human Rights & the Environment: The Role of the Lawyer in CSR & Ethical Globalization

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Business, Human Rights, & the Environment: The Role of the Lawyer in CSR & Ethical Globalization

By
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The need and potential for lawyers to have a positive impact on global governance, human rights and environmental protection has never been greater. Recurrent financial instability in global markets, threats to the sustainability of global capitalism and governance, pressures on international human rights and the rule of law itself, and global climate change with its unprecedented risks to the planet and its species, all combine to make it imperative that legal professionals advising and engaging in various ways with global business incorporate this larger practical and ethical context.

Those imperatives have lately resulted in a constellation of forces coming together under the name of Corporate Social Responsibility ("CSR")—sometimes more colloquially known as "Corporate Scandal Response." Recognizing the need to ameliorate the worst negative social and environmental impacts of global business activity, and to harness the power of multinational corporations to help solve the pressing (and even existential) problems facing the planet and its people, businesses have joined with governments, nongovernmental organizations, unions, and bar associations.[1]

In this Article I propose a model for "CSR Lawyering" that responds not only to social imperatives, but also to opportunities to build value and competitive advantages for business enterprises. I begin with a brief survey of the geopolitical currents that drive demand for CSR and then, more particularly,

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1. The American Bar Association, the Council of Bars and Law Societies of the European Union (CCBE), the International Bar Association, and many other national, regional, and local bar associations have over the last decade formed committees to study and make recommendations on how their members can more effectively contribute to corporate social responsibility.

the demand function for CSR *lawyering*. To this end I recount ways in which CSR influenced my own career, and produced optimized outcomes for my clients as well as other stakeholders. I then explore the increasing ubiquity of CSR and the concomitant explosion of opportunities for lawyers – whether working within an NGO, as in-house counsel, or advising a client whether to litigate a legal right. Next, I demonstrate the falsity and irrelevance of the debate over whether CSR is properly considered "legal" or is merely "voluntary." Given the practical consequences of failing to comply even with so-called "voluntary" principles, lawyers cannot afford to ignore such standards in advising their corporate clients. In fact, I submit, not only do rules of professional ethics leave room for "CSR Lawyering," but neglecting to account for CSR principles in a representation may actually amount to a *failure* of professional responsibility. Finally, I identify and examine the skills conducive to successful "CSR Lawyering," and sketch a model that steers a moderate middle ground between the "Legal Enabler" and public-interest-enforcer extremes.

It is important at the outset to emphasize that this is not a call for businesses to replace or step into the shoes of governments, which appropriately retain the primary duties and responsibilities under international law to address human rights and environmental ills and achieve vital progress. But global businesses and the lawyers advising them just as indisputably have critical roles to play.

I.
THE DEMAND FOR CORPORATE SOCIAL RESPONSIBILITY

This renewed call for common and effective global norms and actions to address the increasingly global major problems facing all of us – including promoting public goods like human rights, the rule of law, and environmental protection, and reducing global dangers like growing inequality, persistent poverty, massive hunger, spreading disease, climate change, refugee flows, terrorism, conflict, and war – comes at a time of resurgent appreciation for international law's potential in the wake of the unfortunate hostility levied by the George W. Bush administration. Whether in diluting global standards pertaining to torture, repudiating important global initiatives such as the Kyoto protocol and the International Criminal Court, or relaxing standards for going to war, the common theme has been failure on the part of the powerful to recognize the practical and ethical benefits of accepting sensible cooperative limits on the exercise of power.

The related reaffirmations of the importance of international law, from across the world as well as the domestic political spectrum, were a predictable response to such excesses. Of the hundreds of notable instances, take just two from U.S. Supreme Court justices appointed by presidents representing the two different major U.S. political parties. Former Justice Sandra Day O'Connor in a

speech at Georgetown a few years ago said that the enhanced relevance of international law was:

> . . . a concern for the lawyer counseling her client on issues ranging from commerce to the environment, family law, human rights, immigration and intellectual property. International law is no longer an issue only for diplomats and trade lawyers. With increasing globalization, international law affects business and litigation decisions across the board.[2]

Her colleague Justice Stephen Breyer has pointed out even more succinctly and directly "the truth about the world, which is that of course business is international; of course law is more and more international; and of course, human rights, too, are more and more international."[3] This places an onus on lawyers to know at least about the broad patterns and basics of international law, of common and civil law systems, the continued differences as well as the increasingly shared human rights values underlying the legal systems, and the major role played by transnational corporations in shaping those laws and values. In some jurisdictions the myth that laws and institutions are objective and value neutral persists, with lawyers viewed as technocrats merely applying the rules to fact patterns; but in most developed countries, at least, that myth has long been obliterated. Recognizing the subjective value judgments involved opens space for critical scrutiny and action aimed at incorporating more appropriate and sustainable values.

II.
CSR'S INFLUENCE AND POTENTIAL: ONE LAWYER'S EXPERIENCE

I vividly observed these rapidly converging global norms in my own legal career, which has spanned private practice in a major global law firm, an in-house legal role including responsibility for a major multinational telecommunications company's human rights and corporate citizenship policies, and in recent years, teaching law and business students the relevance and interrelationship (as well as the not-infrequent tensions) between bodies of international trade, corporate, project finance, and intellectual property laws, on the one hand, and international human rights and environmental laws and norms, on the other.

At the outset of my career more than twenty-five years ago, before the word if not the phenomenon of "globalization" was recognized as such, I never expected to see the synergies and reciprocal relevance of these seemingly divergent areas. My international and domestic litigation and transactional matters handled for the private law firm's corporate clients seemed at first worlds apart from my pro bono human rights work for victims of apartheid in

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2. Sandra Day O'Connor, *Keynote Address, Dedication of the Eric E. Hotung International Law Center Building, Georgetown University Law Center*, 36 GEO. J. INT'L L. 651, 652 (2005).

3. *The Relevance of Foreign Law for American Constitutional Adjudication* (C-SPAN television broadcast Jan. 13, 2005).

South Africa, refugees and asylum applicants fleeing Central America, HIV/AIDS patients seeking legal assistance, and women and children fleeing trafficking. While client interview, analytical, communication, drafting, and advocacy skills seemed relevant to both realms, the realms seemed as different from each other as love and money.

Then, gradually but with gathering force, the points of intersection started to appear. J.C. Penney International's CEO called up to ask what to do about Guatemalan protesters clamoring outside its corporate offices about sweatshop conditions. American Airlines sought advice on maximizing the brand benefits from its philanthropic programs through various global trademark and intellectual property strategies. Starbucks and The Body Shop wanted to take human rights into account in their international transactions, but were criticized for not "walking the talk." Radisson Hotels, TGI Friday's, and other franchisors had to deal with concerns that they were harming indigenous culture by spreading American monoculture and locating in historically sacrosanct areas. A yogurt franchisor suddenly had to deal with another form of culture: avoiding the unsafe yogurt cultures prohibited under the global Codex Alimentarius food safety standards. Energy companies and other multinationals sought advice on dealing with demands for bribes from corrupt local officials who wanted to divert funds from public health, education, and welfare to private use, not to mention indigenous peoples concerned about the environmental and human rights impact of drilling and pipeline projects. Various clients expanding into Mexico and Canada wanted the benefits of enhanced access that came with NAFTA, but were aware of substantial resistance on human rights and environmental grounds.

Without my intending, CSR issues suddenly became a notable part of my practice, regularly affecting my corporate clients' attempts to expand globally and requiring creative solutions, both sensible and sensitive, in order to solve pending and avoid future problems. Nominally specializing in a private international legal practice, I saw the famous public/private distinction blur before my eyes as mediating between private and public interests became a significant aspect of my professional life.

When I moved to Finland with Nokia, human rights and environmental issues initially played no role. But when Amnesty International, nascent socially responsible investors, and others asked about Nokia's commitment to responsible conduct, it came as no surprise when my CEO asked me to add global corporate citizenship to my portfolio. I thereafter led a participatory process resulting in a Code of Conduct and policies and procedures guaranteeing a strong commitment to the Universal Declaration of Human Rights and green conduct. Because Nokia arose in the Artic Circle—where cooperation, human solidarity, and respect for the environment were not just laudable values but essential survival techniques – these efforts enjoyed a supportive reception among Nokia's executives, employees, and other stakeholders. This is not to say that there were not hard questions asked about what the commitments meant:

another Finnish virtue is honesty and not making promises on which one cannot deliver. But the fairly widespread consultation process resulted in a high degree of consensus that we could and should make the commitments to socially responsible, sustainable actions.

To this day, I believe that confirmation of those values, at the critical time when Nokia was expanding so widely around the globe, played a major role in reinforcing and crystallizing the company's ethical culture in ways that conferred enduring and vital competitive advantages, without in any way diminishing entrepreneurial initiative or productive risk-taking. Among those competitive advantages were energizing, motivating, and recruiting stellar employees, spurring innovative designs and technologies, nurturing trust and enthusiasm among all stakeholders, and building the global brand that represented Nokia's remarkable global business success.

III.
CSR'S INCREASING UBIQUITY AND NEW OPPORTUNITIES FOR LAWYERS

Despite speed bumps like the stalled Doha Round of multilateral trade talks, the pace and penetration of globalization has only accelerated in the last decade, as have CSR norms. This decade has witnessed proliferating company and industry codes of conduct, global and sector-specific multistakeholder initiatives, monitoring standards and organizations, labeling and certification schemes, NGO-based guidelines, reporting standards, and legislative, judicial, and administrative law developments on an almost daily basis. Combined with the appointment of the U.N. Special Representative on Business and Human Rights and the growing popularity of the U.N. Global Compact, these developments demonstrate that, as *The Economist* magazine noted in its 2008 survey, "Clearly CSR has arrived."[4] China, of all places, amended its 2006 Company Law[5] to explicitly provide that companies shall "bear social responsibilities" (although it is an understatement to say that enforcement lags). The Chinese Securities Regulatory Commission's Corporate Governance Code confirms a stakeholder view,[6] as opposed to merely a shareholder view, for listed companies. Even the conservative Tory government in the United Kingdom is on board, with a new CSR strategy that goes beyond mere reliance on market forces to encompass what's described as "light" regulation.[7] CSR

4. *The Next Question*, ECONOMIST, Jan. 19, 2008, at 8.

5. Company Law of People's Republic of China (promulgated by Presidential Order, Oct. 27, 2005, effective Jan. 1, 2006) P.R.C. LAWS, art. 5.

6. Requiring listed companies to respect the interests of "banks and other creditors, employees, consumers, suppliers, the community, and other stakeholders." Code of Corporate Governance for Listed Companies in China (promulgated by the China Sec. Reg. Comm'n, St. Econ. & Trade Comm'n, Jan. 7, 2001, effective Jan. 7, 2001), *available at* http://www.ecgi.org/codes/documents/code_en.pdf.

7. Conservative Party Working Group on Responsible Business, http://www.conservatives.

developments are happening so quickly today that business seems ahead of states, which must leave states feeling like the snail beaten up by the two turtles. The police ask the snail "did you get a good look at the turtles who did this?" The snail replies, "No, it all happened so fast!"

Lawyers are on the frontline in dealing with these issues both for corporations and for the other stakeholders affected by corporate conduct. This means that no lawyer interfacing with corporations, or working within one, can afford to be ignorant of CSR's basic content, principles, and processes or the variety of existing soft and hard law instruments that can either cause problems and/or offer solutions when CSR issues and dilemmas arise. Environmental and human rights issues are now increasingly standard in due diligence for mergers and acquisitions. CSR reports from public corporations are increasingly commonplace. Human rights and environmental impact assessments are being used—and should be considered for broader use—in major investment and other corporate decisions across the board. As I will demonstrate later in this Article, neglecting to consider these issues will increasingly amount to failure of professional responsibility and of directors' fiduciary duties.

Entire new legal careers are arising as a result of these developments. Lawyers are filling such positions as CSR vice-presidents and directors, public affairs and communications officials, compliance officers, business ethics professionals, supply chain management heads, sourcing chiefs and employees, and CSR consultants, among others, where they help implement CSR programs. In-house counsel and law firms advising corporations are increasingly having experiences like my own in which they find that CSR issues are encroaching on their regular practices, and that they must increasingly consider them when counseling, advising, negotiating, mediating, drafting, advocating, and litigating. Some of these professionals are actively nurturing and marketing those practices both as inside and outside counsel. Legislators and aides draft laws dealing with these issues. Executive agency officials help set policy, draft regulations, and enforce laws and regulations in this area. Law school deans and professors help inculcate the values that will shape entire generations of lawyers. NGO lawyers, directors, and employees help broaden the campaigns to assure further development and compliance with the standards. Ideally, a CSR leadership mentality and a strong ethical orientation should pervade all these roles.

com/pdf/responsiblebusiness.pdf (last visited Apr. 6, 2008).

IV.
CSR TRANSCENDS THE FALSE DICHOTOMY BETWEEN LEGAL AND "VOLUNTARY"

CSR is thus increasingly recognized as directly or indirectly "legal" in its implications and effects – and if the social and environmental expectations are not now formal law they certainly highlight the direction in which the law is evolving. But even formally "voluntary" duties are rarely purely voluntary, and lawyers therefore cannot afford to ignore them.

In fact, the voluntary/mandatory distinction is overblown and misleading on many levels. "Voluntary" commitments made by corporations, no less than individuals, are still commitments that in many ways can take on the character of "law" viewed more expansively. Sanctions of various sorts accompany such commitments, often lending them equal or greater normative force than law as a practical matter. If, for example, a company makes an important commitment on which it reneges, the consequences can include various forms of market rejection by consumers or investors, alienated employees or unions, a regulatory response by government, or even loss of the social license to operate in the eyes of the community. And this is before one considers a tremendously powerful yet often overlooked sanction: personal embarrassment of the company's directors, lawyers, executives, and managers in the eyes of family and friends. Thus, companies tend not to make great distinctions in their CSR reports as to whether the standards they are complying with are "voluntary" or "mandatory," or a matter of "law" or "ethics." The commitment may thus be mainly "market" based (for example to avoid risk and attract socially responsible or other investment funds) or "ethical," but its violation may have immense practical consequences, up to and including (depending on the importance of the broken promise) losses in stock price and brand value that would dwarf any likely legal penalty imaginable. In the extreme, as happened with Arthur Andersen in the Enron scandal, the violation of trust can even have the existential consequence of the enterprise ceasing to exist.

Beyond that, however, some nominally "voluntary" commitments have the greater weight of authority that comes from government involvement (as with the "soft law" OECD Guidelines for Multinationals and the ILO's Tripartite Declaration).[8] The same applies to use by governments and domestic and international institutions to determine various rewards (as with government procurement advantages, other subsidies, export credit guarantees, or tax

8. Organisation for Economic Co-operation and Development [OECD], *Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, OECD Doc. DAFFE/IME/WPG (2000)15/FINAL (Oct. 31, 2001), *available at* http://www.olis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/$FILE/JT00115758.PDF. *See also*, INTERNATIONAL LABOUR OFFICE, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (3d ed. 2001), *available at* http://www.ilo.org/public/english/employment/multi/download/english.pdf.

breaks)[9] or punishments (including benefits withheld) for compliance or noncompliance with various standards. This is the case, for example, with the human rights and environmental operational guidelines and performance standards of the World Bank and the International Finance Corporation.[10] Companies must meet these standards to qualify for funds both from the international agencies and the many banks that follow them as part of compliance with the Equator Principles,[11] as well as for a growing number of export control agencies and government insurance schemes for promoting trade, investment, and development. But whether contained in "external" codes drafted with or at the behest of governments, or in the hundreds of normative performance standards and reporting instruments produced by business groups and industry associations, NGOs, faith groups, and socially responsible investment groups,[12] there is little question that new and largely complementary standards have cumulatively served as sources of corporations' own "internal" codes, policies, practices, procedures, and "law."

Even voluntary commitments are made "in the shadow of the law."[13] Voluntary commitments can form the standard of care legally expected (and litigable), especially if those commitments are broadly similar across a large number of individual corporate codes as well as industry codes. This is precisely what has been happening over the past several years in the human rights and environmental fields. Many "voluntary" standards incorporate binding law (as with parts of the UN Norms, for example).[14] The well-known role for voluntary and "soft law" instruments in paving the way for hard law—as happened for example when corporate "best practices" were formalized by Karl Llewellyn and others into the U.S. Uniform Commercial Code—makes it only prudent for lawyers and businesspeople to be aware of such instruments and take them into account. The voluntary standards both reflect social expectations and corresponding commitments and serve as signposts pointing toward where the

9. The U.K. and other governments extend public procurement benefits based on compliance with such standards, and U.S. examples are various, ranging from lighter sentences under the U.S. Sentencing Guidelines for corporations demonstrating an ethical culture (U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2005)), to government subsidies for charitable donations of conservation easements (*see, e.g.*, 26 U.S.C. § 170(f)(3) (2006)).

10. IFC Environment - Environmental and Social Standards, http://www.ifc.org/ifcext/enviro.nsf/ Content/EnvSocStandards (last visited Apr. 6, 2008).

11. The Equator Principles | A Benchmark for the Financial Industry to Manage Social and Environmental Issues in Project Financing, http://www.equator-principles.com (last visited Apr. 6, 2008).

12. Such principles include the classic and the new Sullivan Principles, the Caux Principles, the Interfaith Center on Corporate Responsibility's Principles, the SA8000, and those of BLIHR.

13. *See, e.g.*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). *Cf.* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

14. U.N. Econ. & Soc. Council [ESCOR], Sub-Comm'n on the Promotion and Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003).

"harder" law domestic and international standards are headed.[15]

The voluntary/mandatory distinction also vanishes when so-called voluntary standards are incorporated within binding contracts, thus forming a private law regime between the parties, and sometimes even a public law regime. This happens, for example, when voluntary standards are referenced in agreements between large multinationals and their suppliers, or when they are referenced in host agreements that actually become a "prevailing legal regime" binding upon the parties – even being ratified as binding treaties among the governments involved. This is what occurred, for example, in cases such as the huge cross-border project-financed BTC Pipeline case.[16] CSR standards are also frequently incorporated in other agreements between mining and forestry companies and host governments so as to become part of the binding and enforceable legal regime. This route from voluntary to mandatory is especially relevant to lawyers. By their daily actions, lawyers around the world working in myriad capacities help create such private and public legal regimes through the cumulative effect of their bottom-up structuring, drafting, negotiation, advocacy, dispute resolution, and institution-building activities. As the legal process schools have noted, these bottom-up processes (more than top-down command and control regulation) actually form the main drivers in the creation of law.[17]

So while there has been a concerted effort[18] to label CSR as strictly "voluntary," that effort is now increasingly seen as inaccurate, outdated, futile, and irrelevant. Responsible conduct of course begins with minimum legal compliance, but it just as surely transcends this minimum to encompass areas of

15. Another example is the recently proposed U.S. legislation known as the "Decent Working Conditions and Fair Competition Act" (which would prohibit the import, export, or sale in the United States of goods produced with abusive child or sweatshop labor that fails to respect local labor laws in the country of production or internationally recognized core labor standards). This bipartisan bill contemplates private plaintiffs being enabled to sue companies engaging in unfair competition or deceptive trade practices as a result of their having procured goods from other businesses that have violated core labor standards or international human rights. The Federal Trade Commission would be charged with investigating worker complaints alleging violations of the law. Decent Working Conditions and Fair Competition Act, S. 3485, 109th Cong. (2006).

16. *See* U.N. Global Compact & U.N. Off. of the High Comm'r of Human Rights, *Embedding Human Rights into Business Practice*, http://www.ohchr.org/Documents/Publications/Embeddingen.pdf (last visited Apr. 6, 2008).

17. *See, e.g.*, Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967); *see also* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602-3 (1997); Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005); Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 242 (2000).

18. Such efforts have been successful to some extent, particularly in Europe. *See* Commission of the European Communities, Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, at 8, COM (2002) 347 final (July 2, 2002), *available at* http://europa.eu.int/comm/employment_social/soc-dial/csr/csr2002_en.pdf (deferring to the views of those segments of the corporate lobby that insisted on defining CSR as voluntary).

action that are not easily or wisely pigeonholed as "merely voluntary." Legal regimes at various levels setting forth norms of environmental and social protection—ranging from nondiscrimination to prohibitions on false advertising—provide a background and context for business decisions and action that lawyers must consider when counseling and litigating. NGOs and advocacy organizations exploiting these more fluid boundaries between legal and social norms may at times appear as adversaries, but may also be serving in effect as unpaid consultants to the corporation, playing a vital social role that inures to the business's long-term benefit by explicating the social expectations that form the contemporary business milieu.

Thus, in issuing its CSR guidelines[19] for the more than half a million lawyers it represents, the Council of Bars and Law Societies of the European Union (CCBE) highlights the special opportunity lawyers have to advise on CSR issues as a result of their influence and ready access to corporate boardrooms. When the guidelines were adopted in 2003, the CCBE President said "Corporate Social Responsibility is widely accepted today as a vital part of corporate life. The CCBE intends to play a leading role in the promotion of Corporate Social Responsibility in ensuring that lawyers understand its importance when advising clients."[20]

Rather than a merely voluntary regime, therefore, what we are seeing emerging is in essence a new *customary global law* for responsible business action – "global" rather than "international" because it involves not just nations but non-state actors.[21] Professor Ralph Steinhardt identified elements of this phenomenon several years ago when he described the currents feeding into a new "lex mercatoria" or law of merchant akin to that applying to medieval guilds and bodies corporate.[22] Professor Andrew Clapham also described in 2006 the extensive new body of human rights obligations on non-state actors (including corporations) that had arisen in the years since he wrote his first book on the subject just more than a decade earlier.[23] It would be a mistake to describe this body of norms as merely "optional" when noncompliance could result in penalties in fact up to and including losing the corporate license to operate, and more practical sanctions such as the public humiliation of the

19. CORPORATE SOCIAL RESPONSIBILITY AND THE ROLE OF THE LEGAL PROFESSION (2005), *available at* http://www.ccbe.org/fileadmin/user_upload/NTCdocument/csr_guidelines_0405_1_1182254964.pdf

20. Helge Kolrud, President, CCBE, *quoted in* Hans Corell, Address to the American Bar Association Section of Business Law, 2004 Midwinter Council Meeting, at 7, (Jan. 17, 2004), *available at*: http://www.un.org/law/counsel/english/address_17_01_04.pdf.

21. *Cf.* Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005).

22. Ralph Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New* Lex Mercatoria, *in* NON-STATE ACTORS AND HUMAN RIGHTS 177 (Philip Alston ed., 2005).

23. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006).

corporation's executives.

V.
CSR AND THE LAWYER'S ETHICAL DUTIES

These new realities recommend ethical, socially conscious and environmentally aware lawyering, with the lawyer advocating business actions that make sense both for the business client or counterparty *and* for the long-term, best interests of society and the environment. In-house lawyers, in addition to "zealous advocacy," are concerned with internal policies and mechanisms designed to assure compliance with external law, and helping to manage risks of corporate litigation and liability (including anticipating and resolving issues, stakeholder concerns, and various disputes). In recent years that role has expanded to recognize a more explicit role in protecting the brand and good name of the corporation (which, after all, represents one of if not the main components of corporate value). This reputation-assurance function may require an even more expansive vision of the law that encompasses the realities described above, the emerging trends in the law, and even the "spirit" of the law. The standard view of lawyer as zealous advocate entitled to press her client's cause without regard for the justice of that cause— to advance conduct that, if technically legal, undermines the goals or spirit of the law—is wrong. The corrective to that, in part—for lawyers as well as all corporate employees and stakeholders—is to consider the goals and spirit of the law as well. (General Electric's ethics code is called the "The Spirit & the Letter" in part to serve as a reminder of this). Beyond even the "spirit of the law" are moral values such as: integrity, honesty and good faith, respect for dignity, encouragement of individual autonomy, tolerance for dissent, nondiscrimination, fair treatment, achievement and self-expression, teamwork and solidarity, respect for the environment, openness and transparency, and accountability – the kind of values found both in the global human rights regime and across good businesses and good societies.

Good, authentic leadership is inherently moral,[24] reflecting such values. What is emerging is a greater leadership role for lawyers in guiding ethical decision-making (including strategy, spotting issues, asking questions, helping analyze costs/benefits, resolving dilemmas, seizing opportunities) and ensuring an ethical culture. For example, General Electric's current General Counsel, Brackett Denniston, played a leading role alongside the Vice-President for Corporate Citizenship Bob Corcoran in this complex global corporation (with well over 330,000 employees and worldwide operations), adopting a strong policy affirming the corporate commitment to the Universal Declaration of

24. *See, e.g.*, the essays in MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY (Deborah Rhode ed., 2006) (hereinafter MORAL LEADERSHIP).

Human Rights,[25] just as former General Counsel Ben Heinemann so effectively emphasized integrity as the basis of GE's ethical culture.[26] Such lawyers are critical but creative, not obstructionist, possess the vision enabling them to see social norms and expectations arising from over the horizon, and how responding to and reinforcing the authoritative pull of the rule of law and international human rights norms adds strategic value to the enterprise.

Such an ethical culture is increasingly required both by laws and by markets.[27] Given the enhanced levels of global scrutiny prevailing, such a culture amounts to a "basic competitive requirement" for all successful businesses. It is also a competitive advantage for many (especially in terms of "business case" benefits such as reducing risk; recruiting, retaining, and motivating better and more productive employees; attracting customers and maintaining customer loyalty; accessing both socially responsible and mainstream investment capital; enhancing stakeholder relations; and achieving long-term sustainable success for shareholders and all stakeholders). In addition to such practical concerns, an ethical duty arises from the enhanced power of transnational corporations globally and that of lawyers advising them. Transnational corporations now have the power—under regional and bilateral investment treaties for example—to appear directly as private parties (as opposed to the traditional proxy appearances by or at the initiation of states) before supranational dispute resolution enforcement tribunals dealing with trade, investment, and intellectual property matters. No corresponding right to effective dispute resolution of this sort generally exists for victims of human rights violations or environmental degradation. Whether from secular ethical philosophy, the book of Luke in the New Testament, sacred texts from other traditions, or the movie "Spiderman," the lawyer should recall that "with power comes responsibility."

Scientists, pediatricians, psychologists, psychiatrists, and ethics theorists all speak of the evolution of moral sensibility, and stages of moral development.[28]

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25. *See* General Electric's Statement on Human Rights, *available at* http://www.ge.com/company/citizenship/humanrights/index.html.

26. Ben W. Heineman, Jr., *Avoiding Integrity Land Mines*, HARV. BUS. REV., Apr. 2007, *available at* http://blogs.law.harvard.edu/corpgov/files/2007/11/hbr_heineman_avoiding-integ.pdf.

27. A corporate culture in the United States must be ethical in order to reap the benefits of lighter sentencing. *See generally* US SENTENCING GUIDELINES MANUAL (2007), *available at* http://www.ussc.gov/guidelin.htm; *see also* Memorandum from John Sherman, Deputy General Council, National Grid to Andrea Shemberg, Legal Officer, Int'l Econ. Relations Programme, Int'l Comm'n of Jurists, *Human Rights Implications of the 2004 Amendments to the US Sentencing Guidelines for Organizational Defendants*, (June 7, 2006), *available at* http://www.ibanet.org/images/downloads/ppid/Memo_ICJ_%20Paper_%20Final.pdf. Ethics codes are also increasingly required by various stock exchanges, *e.g.*, the business ethics and conduct requirements of NYSE Euronext, *available at* http://www.nyse.com/lcm/1078416930909.html?enable=section&snumber=3 &ssnumber=303A.00.

28. *See, e.g.*, LAWRENCE KOHLBERG, FROM IS TO OUGHT: HOW TO COMMIT THE NATURALISTIC FALLACY AND GET AWAY WITH IT IN THE STUDY OF MORAL DEVELOPMENT (1971); *see also* LAWRENCE KOHLBERG, THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES (1984) (describing six stages of moral development).

Many also note a "gap" in which organizations (such as corporations) lag a full stage behind individuals. Certainly, there are many examples of moral deflection by which individuals fail to apply to the groups they are in the same standards they believe they apply to themselves, using the group as an excuse to act in ethically problematic ways. The initial moral development models applicable to individuals have now been improved by our enhanced understanding of gender differences and insights from neuroscience about the role of emotion in learning and reasoning. More sophisticated models have been applied to stages of organizational moral development as well. Simon Zadek, for example, describes a five-stage process, running from (1) denial ("it's not our responsibility"), to (2) compliance ("we'll do just as much as we have to"), to (3) managerial ("our core business will manage the problem and the solution"), to (4) strategic ("we'll get a competitive edge"), to (5) "civil" ("we'll make sure others do it").[29] Lawyers also play different roles that (perhaps unfairly) may be roughly analogized to such stages of moral development, ranging from (1) denial and defense (often the position of litigators defending the company), to (2) compliance with legal minimums (often a "check-the-box" approach that elevates form over substance), to (3) risk management that involves a broader and more reflective view, to (4) proactive and strategic thought partner and leader with regard to the company, to (5) proactive and strategic thought partner and leader with regard to society. Clients and objective situations drive the roles that lawyers play, and any given lawyer will shift between these roles from time to time, even on a given matter. All things being equal, activities toward the proactive and strategic end of the spectrum are generally advantageous.

Is the classic professional duty of "zealous representation" an insuperable obstacle to such lawyering? As the CCBE position set forth above suggests, the answer is "no." Yet too many lawyers, and even law students graduating today, continue to mistakenly think so. It should be obvious that the notion of lawyers giving up their basic humanity and ethics just because of their professional status is both wrongheaded and dangerous; on the contrary, notions of ethics have always infused even the special professional responsibility regimes applying to lawyers. The American Bar Association's Model Rules clarify that ethics do retain a role even from the narrower professional standpoint. According to the preamble, "[a] lawyer . . . is a representative of clients, *an officer of the legal system and a public citizen having a special responsibility for the quality of justice*."[30] The duties to the client are thus complemented by duties to the rule of law, legal system, the wider community, and to justice itself. Law firms are themselves businesses subject to CSR requirements, with the added push toward CSR that comes from the role of lawyers in advancing justice.

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29. Simon Zadek, *The Path to Corporate Responsibility*, HARV. BUS. REV., Dec. 2004, at 125.

30. AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT pmbl. para. 1 (2007) (emphasis added), *available at* http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

A concern for justice inevitably implicates ethics, environmental responsibility, domestic civil liberties, international human rights, and international law. In representing clients in whatever role, therefore, lawyers are obligated to keep those concerns in mind. (Law schools should do the same). This of course requires lawyers to refrain from counseling or assisting clients with crimes or fraud,[31] presumably including human rights violations or environmental pollution or assisting with cover-ups of the same. But more affirmatively, this also requires lawyers to render "independent" judgment and "candid" advice–duty that explicitly allows the lawyer to bring in moral and political considerations (including those relevant to human rights or the environment) to bear on legal problems.[32] Such judgment and advice should always be given keeping in mind the right answer to the question "who is the client": not the management or directors seeking the counsel—even if they may have power over the lawyer's advancement within the corporation or even remaining employed— but the *extended enterprise* that constitutes the corporation itself.[33] So the very pressing temptation to give answers that may satisfy the executive asking the question, or the manager whom an in-house counsel often works with, should be resisted if those answers may work against the long-term interests of the client properly defined. This is easier said than done, but important to do nonetheless.

There are other legal ethics rules relevant here, including the requirement to escalate knowledge of conduct that may result in legal violations likely to cause substantial injury to the corporation (unless the lawyer believes this is not in the best interests of the organization).[34] This provision allows the lawyer to take a

31. *Id.* § 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

32. *Id.* § 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

33. *Id.* § 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."). This is not the place to engage in the debate over whether the corporation is best equated narrowly with its shareholders, or whether as Edwin Dodd finally persuaded Adolph Berle in their famous Harvard Law Review debate, with the broader interests of stakeholders and society in general, except to say that the author deems the narrow shareholder primacy view as both historically inaccurate as a matter of law even in the United States, and empirically inconsistent with both enlightened, long-term shareholder value and the more socially productive stakeholder view. *See* Edwin Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148, 1161 (1932). Compare the U.K. government's explanation that the new 2006 Companies Act enshrines in law "Enlightened Shareholder Value" for the practical reason that long-term success is best promoted when businesses take into account broader stakeholder interests such as those of employees and the environment. *See* Government of the United Kingdom, *Policy and Legislation-UK*, *available at* http://www.csr.gov.uk/ukpolicy.shtml.

34. *Id.* § 1.13(b) (" If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a

view of the corporation as an extended enterprise, including its stakeholders, to protect the entity from risks and liabilities. Yet another is the rule allowing lawyers to reveal even privileged information if necessary to prevent reasonably certain death or substantial bodily harm, a crime or fraud,[35] and in other limited circumstances. But the point is that there is significant room to take a truly broad ethical view in the larger interests of the corporation and society; the rules of professional conduct should not hinder ethical action.

VI.
CSR IN LEGAL PRACTICE

Now that it is clear that a lawyer may raise these issues, the question becomes how to do so effectively, whether one is an in-house lawyer, an outside corporate lawyer, or even for example a lawyer from an advocacy organization trying to influence business conduct in a desired direction. There are many different roles that lawyers might play with reference to business, as mentioned above, but in all of them they have to be a bit schizophrenic. Lawyers are part of society no less than the businesses they deal with or represent. They want to facilitate deals that are good for the company and society, but challenge deals that could harm the company or others.

On the business side, lawyers aren't there to bless shady or harmful deals, despite what some clients think or Justice Potter Stewart's famous remark about the ethics of the business lawyer being the "morals of the market place."[36] I love the story about how legendary international lawyer Elihu Root reflected this schizophrenia. Root said "[a]bout half the practice of a decent lawyer consists in

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matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law."). While focusing on law as opposed to ethics, and imperfect in other respects, the escalation procedure contemplated does give the lawyer some notable room for maneuver.

35. *Id.* § 1.6(b)(1)-(2):

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; . . .

36. Hon. Potter Stewart, *Professional Ethics for the Business Lawyer: The Morals of the Market Place*, 31 BUS. LAW. 463, 467 (1975) ("the ethics of the business lawyer are indeed, and perhaps should be, no more than the morals of the market place").

telling would-be clients that they are damned fools and should stop."[37] But he also said "The client never wants to be told he can't do what he wants to do; he wants to be told how to do it, and it is the lawyer's business to tell him how."[38] "How," here—I would like to think—includes ethical and CSR considerations. As Dean Harold Koh of Yale Law School has noted with respect to international human rights (and the same could be said regarding environmental considerations):

> [A] lawyer who acquires knowledge of the body politic acquires a duty not simply to observe transnational legal process, but to try to influence it. Once one comes to understand the process by which international human rights norms can be generated and internalized into domestic legal systems, one acquires a concomitant duty . . . to try to influence that process, to try to change the feelings of the body politic to promote greater obedience with international human rights norms.[39]

On the non-business advocacy side, NGO and public interest lawyers must recognize that successful CSR propositions have to be realistic and "work" for business. Requests, demands, legal proposals, or laws that are unrealistic even for responsible businesses are not sustainable and simply won't succeed.

Being close to the business and knowing the facts and the law is now indispensable, even as this has become more challenging as a result of the burgeoning new developments and growing complexity all around. The trust that stems from obvious competence, thorough preparation, and good judgment is the best platform for successful persuasion and good outcomes. Certainly for business lawyers, but especially for NGO lawyers or advocates, this means disciplining oneself, despite all the other personal and professional pressures, to find time to routinely absorb at least major developments in the law and business that one would not ordinarily follow. I have counseled many an environmental and human rights NGO lawyer to read *The Financial Times* and *The Economist*, and many a corporate lawyer to read *Ethical Corporation* magazine and similar sources. Mastering the facts and the law in this more complex global field is tougher than ever, but cannot be neglected.

Creatively deploying the "business case" arguments relevant to the issue, assuming they apply genuinely and forcefully, is the foundation for incorporating CSR. Continual attention to the specific business benefits in the relevant context is difficult, because although CSR frequently saves costs (as with the massive savings available from more environmentally sensitive actions, attracting even a company like Wal-Mart to "go green" in recent years), sometimes CSR involves short-term costs or even longer-term costs, and ultimately the case is moral. But the more attention that one can muster to

37. PHILIP CARYL JESSUP, ELIHU ROOT 133 (1938).

38. ROBERT TAYLOR SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS 667 (1946).

39. Harold Hongju Koh, *How Is International Human Rights Enforced?*, 74 IND. L.J. 1397, 1416 (1999).

practical business and long-term benefits, the better. This begins with highlighting risks not otherwise perceived or sufficiently appreciated, but at its best it proceeds on to identify new opportunities to add value or competitive advantage via CSR. Lawyers are usually better at the former than the latter, needing little encouragement to gloomily ensure that every potential liability, downside, and cost is taken into account. They are not as well versed at describing the veritable cornucopia of benefits available as a result of CSR that can enhance the core assets of the business (including its brand, people, other stakeholder relationships, knowledge, and capacity to adapt and innovate). In terms of risk management, a focus on the full panoply of risks including non-financial and even existential is warranted, and may be especially necessary in strongly entrepreneurial, risk-taking corporate cultures (as with many technology, financial services, and other companies). In terms of potential benefits, new products, services, and even entirely new lines of business are often available with a little imagination. Indeed, General Electric even brands its multi-billion-dollar environmental efforts "Ecomagination."[40] Sometimes lawyers feel role-constrained in addressing such items, in which case they may need to call on their own diplomatic resources or those of other allies; but they must find ways to make sure that the message is heard if it's the right one.

Unfortunately, many lawyers still hinder the application of CSR principles and rob their companies of significant value by favoring the negative, risk-management side of this dynamic. As such they often represent the greatest obstacle within corporations to a more enlightened approach that puts the business on an energized path to seizing the advantages and opportunities available from an authentic CSR commitment. By taking the usual, excessively cautious approach stereotypically associated with lawyers as "deal killers," narrowly emphasizing confidentiality and fear of liability instead of the tremendous benefits of dialogue, openness, responsible, rights-aware, and simply humane action, the lawyers can sometimes do tremendous damage to their client's true, long-term interests and potential. Although risk management remains a core legal competency, sometimes taking more risks and being more entrepreneurial in the direction of CSR principles—such as respecting and trusting stakeholders, being open and transparent, investing in joint understanding and action or creative monitoring or auditing solutions—can actually accomplish desired objectives through better routes, and produce ancillary "business case" benefits like more engaged and highly motivated employees and other stakeholders.

Executives at The Gap, Inc. (including during this symposium) have relayed how the General Counsel was initially very skeptical of the level of data disclosed in the company's first CSR report. This report, however, received global acclaim and resulted in tens of millions of dollars worth of positive publicity for the company, more positive media "hits" than the company had

40. *See* http://ge.ecomagination.com/site/index.html.

ever received, and huge recruiting and retention benefits. This enormous goodwill served, among other things, as a sort of insurance policy for the company when it encountered further CSR issues (including a now aberrational incident involving child labor in India during Autumn of 2007, which the company promptly and appropriately handled without the negative fallout and consequences that it would have experienced in the years prior to its CSR commitment).

A key lesson I have learned since beginning my professional life as a litigator – a lesson which sometimes comes as an epiphany to many lawyers and businesspeople – is that the risks of liability are often overstated, and the benefits of openness, ethical culture, honest and fair dealing understated. As different ethical teachers have noted in various ways: the best risk management device, the best way to seem good is in fact to *be good*. CSR can help achieve that in practice. While I was at Nokia, we were remarkably litigation free (except for strategic intellectual property litigation undertaken for other purposes). I have no doubt that this was attributable in large part to Nokia's culture, values, and the open, honest, and good faith fair-dealing practiced by the company and its lawyers, executives, and employees–whether in proactively anticipating and resolving customer issues in supply agreements or consulting with indigenous people in the Amazon rainforest prior to building a new plant in Manaus, Brazil.

VII.
CSR LEGAL SKILLS

One can thus speak of the "basic competitive requirements" of good CSR lawyering. These differ only slightly from good lawyering generally. Both ideally require some degree of smarts (intelligence, reason, capacity for skeptical and critical analysis even of one's own reason, practical wisdom, deliberative judgment, a flexible willingness to learn), basic honesty and integrity, self-confidence, tolerance for ambiguity and complexity (in mind and heart), oral and written communications ability, negotiation abilities, basic legal knowledge, research skills, and some knowledge of society, business, politics, and economics. To such an incomplete but illustrative cluster of basic skills one can now add the need to have a more global and comparative knowledge of all such subjects, specifically including at least some familiarity with international human rights and environmental law and the leading CSR standards and tools globally and in relevant sectors.

Beyond those basics, however, we may identify "critical success factors" for lawyers wishing to excel as CSR practitioners. Some have already been alluded to, including perhaps above all, *vision, empathy, and imagination*. These allow both rational and emotional understanding of values, positions of other parties (and even contradictory values within a given party, as individuals are often themselves conflicted on difficult questions), and trends affecting the wide

variety of corporate stakeholders (ranging from employees and customers, to suppliers and contractors, to indigenous peoples and local communities). Instead of automatically settling on short-term, instrumentalist solutions, the skilled CSR lawyer takes the additional time to deeply consider longer-term, collaborative possibilities, both good and bad, in a rich expanded view that includes not only worst-case scenarios (such as executives testifying before Congress, or a major stock decline), but also positive potential (such as new lines of business to serve, for example, the third of the world's population without electricity).

To this we might add a closely related skill—an *ethical sensibility*—which involves a willingness to take responsibility and be accountable. Lawyers, like businesspeople, have choices. And in practical reasoning—from ends to means, with choices among various courses of action—means matter. Both reason and passion can be harnessed to deploy *persuasive and rhetorical skills* including *storytelling* and *story-appreciation.* Storytelling abilities have classically been prized and used mainly by trial lawyers. Now there is rightly a new appreciation among businesspeople as well as the legal academy for stories: the empowering myths of one's own personal or group story as well as those of others. The truth is that we are a storytelling species, and the ability both to shape and to truly listen with empathy to compelling and authentic narratives that tie together human experiences can be as or more important than the ability to draft a contract or complaint. These abilities are certainly necessary for effective stakeholder engagement and analysis. When combined with emotional intelligence, strong *interpersonal skills*, and the ethical sensibility I have mentioned, these higher rhetorical abilities allow the sort of collective reasoning that can not only resolve disputes but proactively anticipate and avoid them. At their best, such rhetorical skills, as Aristotle said, create community.

Just about any situation—an advocate dealing with a corporation, a lawyer dealing with a client, two counterparties negotiating – is helped by a sincere and genuine desire to listen to and understand the other party's perspective, and a desire to work together in partnership to jointly solve problems. It is often better to ask questions and let people come up with their own answers than to make assertions or sketch threatening scenarios. Case studies from the corporation's own history, its "received learning" or "internal common law" can be helpful, as can analogous stories from other companies that have encountered such situations (whether well known cases, as with Shell's complicity in the execution of Ken Saro-Wiwa, which resulted in a complete turnaround in that company's policies and approach to CSR issues, or lesser known cases specifically researched for the purpose). Taking my cue from legal and business ethicists ranging from Professors Laura Nash,[41] Lynn Sharp Paine,[42] and

41. *See, e.g.*, Laura L. Nash, *Ethics Without the Sermon*, HARV. BUS. REV., Nov. 1, 1981, at 79-90 (1981).

42. *See, e.g.*, LYNN SHARP PAINE, VALUE SHIFT: WHY COMPANIES MUST MERGE SOCIAL AND

Deborah Rhode,[43] a technique I've used with success is simply raising the question of how the situation would look from the other stakeholder's perspective; truly imagining what a given harm would feel like can be a powerful heart, mind, and eye-opener. Stories and language have much to do with values. As wordsmiths trained in dissecting and understanding and manipulating the nuances of language, lawyers have the ability to make especially valuable contributions in using language not to paper over conflicts but to help each party see the other's legitimate point of view and to embed a fair approach that ensures ongoing attention to those points of view in ways that contribute to enduring and sustainable solutions.

To improve their abilities in this regard, lawyers must exercise their ethical muscles by consciously looking for ways in their various roles to regularly engage in and encourage ethical reasoning and capacity building–reasoning that respects stakeholders and nominal "opponents" and the arguments made by these parties, uses empathy, examines alternative modes of decision, and recalls the instinct for justice that is all-too-often somehow lost in law school. In my own business and legal experience, teaching, and interviews of world-class business leaders on this topic, I have discovered that the best corporations (via executive leadership training, human resources, legal, CSR, compliance, and other departments) are increasingly using varieties of experiential learning–including role playing, theatre, literature, multimedia, story telling, field visits, scenario planning – to enhance these imaginative abilities and prepare in advance (to the extent possible) for the dilemmas of right versus right, or right versus business imperative, that will inevitably arise.[44] Although there is often no easy or right answer to such ethical questions, the lawyer can help by identifying the facts, values, norms, issues, and perspectives to be considered, and both the rational and emotional reasoning processes that can yield the right answer when possible, the ethically better answer when one is available, or at least the best answer one can give under the circumstances. Lawyers are already finding themselves mediating at times between management and the world, between shareholders and stakeholders, and between public and private interests. But the lawyer's role should not be reduced to a mere "balancing" of values: these functions require judgment & leadership, because they pertain to the questions of "who we are"–and who we will become.

Clearly these skills do not work in isolation but, to the extent they are present, reinforce each other in positive ways. Interdisciplinary knowledge and skills like these are vital parts of the CSR lawyer's toolkit for dealing with the new global realities, which (being so complex) benefit from a combination of

FINANCIAL IMPERATIVES TO ACHIEVE SUPERIOR PERFORMANCE (2002).

43. MORAL LEADERSHIP, *supra* note 25.

44. Child development experts understand the value of scenario planning and role playing in changing the behavior of children. *See, e.g.*, Alan E. Kazdin, *Tiny Tyrants: How to Really Change Your Kid's Behavior*, SLATE, Apr. 10, 2008, *available at* http://www.slate.com/id/2188744/. Similar techniques can prepare adults in advance for difficult situations.

what is over-simplistically called "right brain" (creative) as well as "left brain" (analytical) thinking—synergistic abilities to see and feel patterns between apparently unconnected events using the combined rational and emotional resources that neuroscience confirms as part of "intelligence." Perhaps the renewed emphasis on such holistic, system-level perspectives stems in part from the large societies of the East once again coming "online" and becoming integrated with the global system in ways that they have not been for centuries, with the more communitarian and relationship-oriented philosophies, cultures, and ways of thought merging with the more individualistic Anglo-American approaches that were so dominant during the twentieth century. Just as civil law systems influence common law systems, and vice versa—often resulting in hybrids that display elements of each—China and India are influencing the West in ways only now coming to the fore.

But whatever the source, lawyers (like businesspeople and global citizens generally) would be well served to nurture such skills, whether as preparation for launching or responding to a global campaign on Facebook, negotiating and drafting a new technological standard or multi-stakeholder labor rights initiative, arguing before an arbitral tribunal, or participating in one of the even more innovative and customized alternative dispute resolution techniques emerging to bridge perspectives, values, and interests. Although such interdisciplinary, multicultural skills and approaches are not traditionally taught in law school, they are starting to be, and should receive more attention as they relate to the traditional and emerging legal, business, and global governance contexts. It is worth taking them very seriously indeed, as they already are critical determinants of success and will only grow in importance.

Finally, there are "competitive advantages" for CSR lawyers just as there are for businesses. Those include a *diverse background* and/or genuine *passion for diversity and inclusion* – of culture, religion, national origin, ethnicity, language and other factors – which can be an invaluable guide to better information, allowing higher quality decisions. *Language abilities*, in particular, serve as windows into whole new worlds of thought and feeling. *Expertise in CSR principles and instruments, and their application,* can also serve as a competitive advantage for both lawyers and their clients. Best practice crisis management and litigation approaches these days recognize that old-style blanket denials, circling the wagons, and aggressive refutations of claims are less likely to succeed (and could create greater risks) than human responses admitting imperfection but genuinely seeking to resolve issues in line with CSR principles. Lawyers can be vital intermediaries in helping other corporate executives understand the new context and respond effectively.

Having listed out some of the main basic competitive requirements, critical success factors, and competitive advantages for CSR lawyers, we can now see that they have much in common with those of global businesses generally: they are also good business.

VIII.
CSR LAWYERING: A MODEL

One approach to lawyering is that of the "zealous advocate" which, as discussed above, has its limitations (including possible myopia about trends, system level considerations, moral and socio-political factors, and stakeholder interests that should be taken into account in order to take high-quality decisions and actions). This model assumes that lawyers will defer to management's pursuit of short-term profits, without raising issues of long-term business or reputational impact or ethics of human rights (or environmental) harm. The model has also been described as that of "Legal Enabler":

> . . . what the average corporate lawyer follows to make a living at the law. Legal Enablers pass no judgment on corporate acts and take no position on the wisdom of business decisions. Instead, they provide morally neutral risk analysis. Their stock in trade is not legal judgment; it is legal rationalization.[45]

At the other extreme is the model that Ralph Nader and some others have urged on lawyers: to be enforcers of the public interest.[46] While this approach has the virtue of appropriately recognizing the lawyers' "gatekeeper" role and the public duties to justice and CSR referenced above, it has the potential vice of turning lawyers into instruments of the state and jeopardizing the lawyer's role as trusted client counselor, inverting the responsibility for decisions, and potentially putting the lawyer into an adversarial relationship with the client.

A better model reconciling these competing tendencies is what we might call the "CSR Lawyering" model. This approach embraces the special role that lawyers have in society to promote justice, human rights, protection of the environment and other aspects of the public interest – emphasizing the special obligation to affirmatively raise such issues and proactively initiate discussions of them – while acknowledging that these duties obtain within the context of concrete duties to the client. Some might quibble with the term "CSR" instead of e.g. "CR" (for Corporate Responsibility), on grounds that it may implya possible dichotomy between the corporate responsibility to society and the corporate responsibility to investors. That is not the intent in use of the term CSR here. In fact, the "business case" for CSR—emphasizing that what's good for society can also be good for shareholders—brings together these duties to the client and to the public interest that may otherwise sometimes be in tension. The lawyer may and should advance the long-term and broader interests of the true client (the corporation as a whole, including shareholders and other stakeholders, as opposed to merely individual managers or directors), without damaging the rule

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45. *It's About Time: Corporate Responsibility Law Finally Makes Lawyers More Accountable*, Aug. 14, 2002, *available at* http://www.upenn.edu/researchatpenn/article.php?379&bus.

46. *See, e.g.*, RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA (1996); Joel F. Henning, *Corporate Social Responsibility: Shell Game for the Seventies?*, *in* CORPORATE POWER IN AMERICA 151, 151-70 (Ralph Nader & Mark J. Green eds., 1973).

of law, fundamental rights, the environment, or the extended enterprise. This model would revive the sense of law as a profession – a calling, with public as well as private responsibilities – while simultaneously conforming to current requirements that lawyers be well-informed and integrally connected and close to the business so as to proactively and flexibly respond to complex and ever-changing realities on the ground.

On this view, the lawyer's role – whether formally "in-house" or "outside"—partakes of the "moral leadership" described in Professor Deborah Rhode's book of the same name. Such a role resembles that of "rights-aware" businesspeople promoted by the United Nations and BLIHR,[47] and is also analogous to the role of corporate directors and other leaders in promoting the broader and long-term interests of the corporation seen from the standpoint of all stakeholders, not merely shareholders.[48] Again, lawyers as well as businesspeople today benefit both practically and ethically from being informed and compassionate global citizens—realizing that in terms of the "big picture," the continued unsustainable trends of growing inequality and persistent poverty mean a shrinking middle class in relative terms, and markets narrowing instead of reaching their potential, while also presaging greater conflict (including at the extremes, war and terrorism) and the possibility of our species extinguishing not only other species (e.g. through loss of biodiversity, climate change, and WMD proliferation), but itself.

Thus, for example, although a legal right may exist for a pharmaceutical company to sue a generic manufacturer for a violation of patent rights, a lawyer would be well within her professional role to advise the client that moral and *commercial* reasons make it unwise to press the legal case. In fact, the failure to take such sensible advice resulted in the scandalously bad press and reputational damage suffered by pharmaceutical companies until the Doha Agreement,[49] tiered pricing schemes, and philanthropy reversed much of the damage and saved many lives in poor countries.

Business leadership, when reinforced by CSR Lawyering, has yielded mutual learning and the emergence of creative new approaches and solutions. This has happened to some extent (but not nearly an adequate extent) regarding

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47. *A Guide for Integrating Human Rights Into Business Management* (2006), *available at* www.blihr.org. (A new edition of this Guide will be published during the latter half of 2008).

48. This is not the place to review the evidence that values-driven companies embracing CSR and stakeholder perspectives are more successful, but that evidence from the socially responsible investment sector, numerous academic studies and metastudies, and otherwise is compelling. *See, e.g.*, Henry Blodget, *The Conscientious Investor*, ATLANTIC MONTHLY, Oct. 2007, *available at* http://www.theatlantic.com/doc/200710/socially-responsible-investing; *see also* Marjorie Kelly, *Holy Grail Found: Absolute, Positive, Definitive Proof CSR Pays Off Financially*, 18 BUS. ETHICS MAG. (Winter 2004).

49. World Trade Organization, Declaration on the TRIPS Agreement and Public Health, Nov. 14, 2001, available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm (affirming that the Trade Related Intellectual Property Rights Agreement allows balancing public health and intellectual property interests).

the global health problems involving HIV/AIDS and the pharmaceutical companies, issues confronting the extractive industries in emerging economies in places such as Chad and Nigeria, conflict situations involving mining companies in places such as the Congo and Sudan, and child and forced labor issues facing the footwear and apparel industry.

Business leadership in human rights requires, to some extent, a level playing field. Robert Haas, longtime Chairman of Levi Strauss & Co., recognizes the collective action problem inherent in CSR; in his remarks in this issue he calls upon business "to work with governments and other stakeholders, to develop a mandatory framework that defines business's role in human rights, contains reporting and enforcement mechanisms and includes consequences for non compliance."[50] Lawyers, therefore, play a crucial facilitator role in creating and advancing more effective global legal frameworks-like the U.N. Norms[51] yet more concrete, practical, and actionable–to remedy this collective action problem and level the playing field by a combination of rationalized standards and enhanced enforcement.

A final difficult but cardinal virtue for CSR lawyering is thus *courage*: the courage to stand up for one's convictions, bring the ethical considerations and CSR standards to bear, and raise issues of good public policy, even forcefully if necessary, in ways that might even threaten one's career and position. As hard as this may be to do, it defines the good lawyer, the good person, and the good company.

Lawyers are no less subject to, and may even be more subject to, the organizational pressures to deliver a decision, buttressed by a persuasive selection of legal materials, that allows a corporation to be oblivious to the consequences of its actions other than for short-term shareholder profit. Corporate history is littered with the remnants of once-great businesses that succumbed to such thinking. Now more than ever, in the new era of unparalleled interconnectedness (and scrutiny), such conduct is a mistake. As argued throughout this essay, the risks of raising the issues may in fact be less than the risks of not raising the issues and seeing damage done to the company or stakeholders, or opportunities for greater value lost.

At this time of great need to explore new solutions to growing global problems that threaten us all, lawyers, law students, professors, judges, and businesspeople seeking to implement CSR principles could do worse than to adhere to Thoreau's injunction to be like other explorers, which we may paraphrase as: "Be an explorer to whole new continents and worlds within you, opening new channels not of trade, but of thought and feeling."[52]

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50. *See* Robert Haas's Article in this issue.

51. *See supra* note 15.

52. Thoreau's original was: "Be a Columbus to whole new continents and worlds within you, opening new channels, not of trade, but of thought."