
CORPORATE SOCIAL RESPONSIBILITY IN INTERNATIONAL LAW

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I. INTRODUCTION

It is no secret that many multinational enterprises (MNEs) have annual turnovers higher than that of the GDP of a significant number of less developed countries (LDCs) put together.¹ At the same time, the grad-

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¹ Coca Cola Co. announced profits from its first six months of operations in 2003 in the amount of \$2.1 billion, Press Release, Coca Cola Company, The Coca Cola Company Announces Second Quarter and Year-To-Date 2003 Results, at <http://www2.coca-cola.com/presscenter/earnings07172003.html> (July 17, 2003); comparably, according to World Bank statistics, the GDP of Gambia for 2002 was \$370 million, for Liberia \$562 million, for Eritrea \$642 million, for Djibuti \$592 million. The World Bank Group, World Development Indicators Database, available at <http://www.world>

ual liberalization of trade at the global level, coupled with mounting external debt, lack of financial capital, and high unemployment in LDCs has resulted in many cases in the promulgation of enticing foreign investment legislation, rampant corruption, and lax control over the operations of MNEs, as far as the domestic law and enforcement by the host State is concerned. Since the addressees and bearers of human rights, labor, and environmental obligations under traditional treaty and customary international law have been States, MNEs have been able to hide behind the State “veil,” asserting that whatever violations under international law the host State had committed were attributable to the State – the MNEs being non-State actors with no legal personality to bear rights or duties under treaty or customary law. Until recent case law in the United Kingdom² – albeit limited in scope – the courts of the country of the parent company’s incorporation refused to entertain suits pertaining to the operations of the subsidiary in the host State, especially on the basis of the doctrine of *forum non conveniens*.³

This immunity, however, came to an end with the rapid growth of telecommunications and the resultant dissemination of corporate practice to a consumer public in the developed world that steadily predicated its consumer habits on how and under what circumstances MNEs manufacture their products.⁴ This change was to a very large degree the collective or individual effort of human rights and environmental NGOs. Some regulation was inevitable but impossible at the same time. If home States, i.e. the countries where parent companies were incorporated, took legislative action to regulate the corporate practice of their subsidiaries, they would interfere in the internal affairs of the host State. Although admittedly problematic in terms of international relations, the matter could have been addressed in bilateral instruments; however, as far as the author is aware no bilateral investment treaty (BIT) refers to such matters. Both the investor and the host State would fiercely resist this move, and it is

bank.org/data/databytopic/gdp.html (last visited September 25, 2004). On the basis of its predicted annual profits for 2003 Coca Cola would therefore occupy the 117th place in the World Bank’s list of States.

² See *Connelly v. R.T.Z. Corp. Plc.*, 3 W.L.R. 373 (H.L.(E.) 1997); *Lubbe v. Cape Plc.*, 1 WLR 1545 (H.L.(E.) 2000); Peter Muchlinski, *Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Case*, 50 INT’L & COMP. L.Q. 1 (2001).

³ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986).

⁴ A study conducted in 2002 by Cone revealed that of U.S. consumers aware of a corporation’s negative CSR practice, 91% would most likely prefer another firm, 85% would disseminate this information to family or friends, 83% would refuse to invest in that company, 80% would refuse to work at that company and 76% would boycott its products, *Opinion Research Corporation International, 2002 Cone Corporate Citizenship Study*, Cone, at http://www.coneinc.com/Pages/pr_13.html, (July 29, 2002).

apparent that the political will is lacking at the moment. The only legally binding and enforceable avenue is that of multilateral instruments. The diplomatic benefits of multilateralism clearly avoid the stigmatization or admonition of one State by another and apportion the same rights and duties among signatories. Unfortunately, however, multilateral human rights and environmental treaties are valuable only when prudently enforced at the domestic level, and the consequences of underdevelopment in most LDCs have precluded adherence at the domestic level by many MNEs.

This article is about a third way, where as a result of mounting public pressure, consumer awareness, and other forces, the MNE is forced to self-regulate in the sphere of human rights (broadly understood) and the environment. This self-regulation and cleansing, undertaken voluntarily by corporations, is known as corporate social responsibility (CSR), or "corporate citizenship."⁵ The latter is used more frequently in a business context, but the two terms are synonymous. Essentially, CSR recognizes that corporations are not only responsible to their shareholders, but owe, or should owe, particular duties to persons or communities directly or indirectly affected by their operations; such persons or communities comprise a corporation's "stakeholders."⁶ "Stakeholder theory," especially as propounded in the United States, recognizes various forms of relationships between the enterprise and its stakeholders: primary (employees, customers, investors, suppliers) and secondary (all others).⁷ Others refer to them as "core," comprising those that are essential for the corporation's survival; "strategic," i.e. those that are vital to its organization; and "environmental," which includes all of the remainder.⁸ Our effort is to explain the origins and sources of CSR in the context of an emerging international legal personality for MNEs. Moreover, we aim to explore the range of particular CSR principles and the modes of implementation, enforcement, and monitoring. Finally, we examine the viability and success of such measures and the extra-legal parameters of MNE adherence to norms that may be seen as irrelevant or non-binding because of their voluntary character.

⁵ See DON TAPSCOTT & DAVID TICOLL, *THE NAKED CORPORATION: HOW THE AGE OF TRANSPARENCY WILL REVOLUTIONIZE BUSINESS* 68-73 (2003).

⁶ *OECD Principles of Corporate Governance* Principle III, Organisation for Economic Co-Operation and Development (OECD) Doc. SG/CG(99)5 (1999), available at <http://www.worldbank.org/html/fpd/privatesector/cg/docs/oecd-principles.pdf> (last visited Oct. 1, 2004) [hereinafter *OECD Principles*]. See *The OECD Guidelines for Multinational Enterprises* 19, OECD Doc. OECD/GD(97)40 (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (last visited Sept. 19, 2004) [hereinafter *OECD Guidelines*].

⁷ A. B. CAROLL, *BUSINESS AND SOCIETY: ETHICS AND STAKEHOLDER MANAGEMENT* 74 (1996).

⁸ *Id.* at 72-80.

II. INTERNATIONAL LEGAL PERSONALITY OF MNEs

The question of whether MNEs are subject to any international regulatory regime(s) necessarily involves an examination of their international legal personality. The revised 2000 OECD Guidelines for Multinational Enterprises (OECD Guidelines), although recognizing that a precise definition is not warranted, states that MNEs:

[U]sually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.⁹

Professor Muchlinski, the leading authority on MNE regulation, recognizes six main MNE legal forms: contractual, equity-based corporate groups, joint ventures, informal alliances between MNEs, publicly owned MNEs, and particular supranational forms of international business.¹⁰ The main criterion, however, whether one or two parent companies exist (as may be the case in equity-based or joint ventures) is that of control over multiple subsidiaries.

International legal instruments addressing MNE issues are channeled in two ways: a) through binding treaties in which State entities are the direct addressees of rights and obligations, but which directly affect and have a domestic impact upon MNE operations, and b) "soft law" that is directly addressed to MNEs. Examples of the former include the vast majority of International Labour Organization (ILO) conventions, BITs, industrial pollution-related treaties, and others, while examples of "soft law" include the OECD Guidelines, the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights,¹¹ the Preamble to the 1948 Universal Declaration on Human Rights (UDHR),¹² the 1992 Rio Declaration on Environment and Development,¹³ and others.

⁹ OECD Guidelines, *supra* note 6, at 17-18. See The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications 9, OECD Doc. DAFFE/IME/WPG(2000)15FINAL (Oct. 31, 2001) [hereinafter OECD Guidelines Commentary].

¹⁰ PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 62-80 (1995).

¹¹ *Economic, Social and Cultural Rights: Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, U.N. ESCOR C.H.R., 55th Sess., 22nd mtg., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

¹² GA Res 217A(III), U.N. GAOR, 3d Sess., at 71-72, U.N. Doc. A/810 (1948).

¹³ *Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, Annex I, Agenda Item 21, at 8-11, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992) [hereinafter *Rio Declaration*].

The international legal personality of non-State entities must be premised on precise legal capacity emanating from customary law or binding treaties. All duties and obligations therein must be not only directly and clearly addressed to the particular non-State entity, but some form of enforcement mechanism must also be available. The crimes contained in the 1998 International Criminal Court Statute,¹⁴ for example, are only susceptible to personal violation, followed by enforcement either through domestic courts or the International Criminal Court itself. In this sense, individual perpetrators assume legal personality under the terms of the 1998 Rome Statute. Apart from some aspects of EC law relating to competition,¹⁵ international treaties have not endowed multinational corporations with legal personality, and the absence of duties in this respect has had a negative impact on the non-financial performance of MNEs. Let us, therefore, examine whether legal personality may be derived through customary international law.

Available “soft law” is clear testament to two significant factors. First, the whole structure of sustainable development (including human rights) is necessarily dependent on MNE direct participation, and second, particular MNEs have the capacity to influence government policy and practice. The former is evident in principles 5 and 27 of the 1992 Rio Declaration, where the obligations arising from sustainable development are addressed to “all States and all people.”¹⁶ A vital tool for understanding and implementing the Rio Declaration is Agenda 21, adopted as an implementing blueprint of the Declaration at the same conference. Chapter 30 of this instrument spells out the role of industry and MNEs in sustainable development, particularly by increasing the efficiency of resource utilization, reduction of waste, promotion of cleaner production, environmental reporting, and other concerns.¹⁷ The United Nations Millennium Declaration, adopted in 2000 by the General Assembly, recognizes the role of industry and MNEs expressly in making essential drugs available and affordable in LDCs and engaging in programs in pursuit of poverty eradication (Principle 20) and implicitly in most other principles.¹⁸ The corollary of these instruments, the 2002 World Summit on Sustainable Development (WSSD) Johannesburg Declaration on Sustainable Development expressly stated, “in pursuit of its legitimate activities

¹⁴ United Nations: Rome Statute of the International Criminal Court, 37 I.L.M. 999, U.N. Doc. A/CONF.183/9 (July 17, 1998).

¹⁵ Consolidated Version of the Treaty Establishing the European Community, Nov. 10, 1997, art. 81, 2002 O.J. (C 325) 33, 64-65.

¹⁶ *Rio Declaration, supra* note 13.

¹⁷ U.N. CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, AGENDA 21: THE UNITED NATIONS PROGRAMME OF ACTION FROM RIO (1992) § 30 U.N. Doc. DPI/1344, U.N. Sales No. E.93.I.11 (1993).

¹⁸ *United Nations Millennium Declaration*, G.A. Res. 55/2, U.N. GAOR, 55th Sess., Agenda Item 60(b), U.N. Doc. A/RES/55/2 (Sept. 18, 2000); *id.* at 5.

the private sector . . . has a duty to contribute to the evolution of equitable and sustainable communities and societies.”¹⁹ Similarly, Principle 29 is adamant that: “there is a need for private sector corporations to enforce corporate accountability, which should take place within a transparent and stable regulatory environment.”²⁰ On a regional level, the E.U. Parliament in its response to the Commission’s Communication concerning CSR and business contribution to sustainable development²¹ noted the “widespread and increasing recognition that undertakings have obligations other than just making profits.”²² More significantly, the Preamble to the 1948 UDHR, which is no longer a mere standard-setting instrument but an expression of customary international law, proclaims:

A common standard of achievement for all peoples and all nations, to the end that governments, other organs of society and individuals shall strive, by teaching and education to promote respect for human rights and freedoms. . . [emphasis added].²³

Although “soft law” urges toward some form of legal personality, from the foregoing discussion this is not clear or precise enough to forge on its own a customary rule on international legal personality for MNEs.

Let us try the same exercise through the second route identified above, by assessing the capacity of MNEs to influence government policy and practice. The financial strength of most MNEs and the desire of LDCs to attract foreign investment give the former a significant advantage in investment negotiations with the host State. This lead is particularly true in respect to non-extractive manufacturing operations. It means the MNE may impose favorable concessions regarding minimum wages, security measures, limitations in technology transfers, taxation, and others. The larger the investment, the greater the economic dependence of the host State. Similarly, the larger the democratic deficit of LDC public governance, the more likely it is that corruption will be rife and pres-

¹⁹ *The Johannesburg Declaration on Sustainable Development*, World Summit on Sustainable Development (WSSD), Agenda Item 13, para. 27, U.N. Doc. A/CONF.199/L.6/Rev.2 (2002), revised by U.N. Doc. A/CONF.199/L.6/Rev.2/Corr.1 (2002).

²⁰ *Id.* para. 29; Chapter V.49 of the WSSD Plan of Implementation stresses the promotion of corporate responsibility through a multiplicity of routes, *Report of the World Summit on Sustainable Development*, WSSD, at 38, U.N. Doc. A/CONF.199/20.

²¹ Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development, COM(02)347 final.

²² Report on the Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development (COM(2002) 347 – 2002/2261(INI)) EUR. PARL. DOC. (A5-0133/2003) 7 (2003).

²³ *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., Preamble, U.N. Doc. A/810 (1948), available at <http://www.un.org/Overview/rights.html>.

sure to sustain the particular investment status will be maintained. The MNE will likewise apply significant pressure to the home State in order to achieve the same results at an inter-governmental level,²⁴ to win contracts, and/or to promote a political regime that will safeguard the interests of the subsidiary in the host State.²⁵ On a more global level, it has been MNEs that have persistently lobbied industrialized States toward trade liberalization through the lifting of tariffs and domestic subsidies,²⁶ while since the 1970's the power of MNEs in challenging the internal sovereignty of nation States has been noted.²⁷

From our discussion thus far we have ascertained that: a) MNEs are necessary participants in the structure of international law, but that current "soft law" does not by itself constitute a sufficient platform by which to recognize international legal personality; b) MNEs substantially outstrip LDCs in financial and technological terms, and as a result; c) they are able to influence the policy and practice of LDCs. Moreover, they operate across a range of national borders, their operations directly or indirectly affecting a multitude of stakeholders, including individuals and States, who are bearers of direct rights and duties under international law. Finally, it should not be forgotten that MNEs have direct access to international arbitral fora for the settlement of disputes between themselves and State entities.²⁸ On the basis of these findings, a logical, yet perhaps radical, conclusion comes to mind. It is that MNEs by virtue of

²⁴ Arvind Ganesan, *Human Rights, the Energy Industry, and the Relationship with Home Governments*, in *HUMAN RIGHTS AND THE OIL INDUSTRY* 48 (Asbjørn Eide et al. eds., 2000).

²⁵ The U.S. company ITT was instrumental in the CIA-backed effort to topple President Allende of Chile in 1973, while nationalized U.S. copper multinationals seriously disrupted Chilean economic planning. See Muchlinski, *supra* note 10, at 6-7.

²⁶ Vivien A. Schmidt, *The New World Order, Incorporated: The Rise of Business and the Decline of the Nation State*, 124 *DAEDALUS* 75 (1995); Andrew M. McLaughlin et al., *Corporate Lobbying in the European Community*, 31 *JOURNAL OF COMMON MARKET STUDIES* 191 (1993).

²⁷ ROBERT GILPIN, *U.S. POWER AND THE MULTINATIONAL CORPORATION* 220 (1975); Samuel P. Huntington, *Transnational Organizations in World Politics*, 25 *WORLD POLITICS* 333, 363 (1973); Charles P. Kindleberger, *Introduction to THE INTERNATIONAL CORPORATION* 6 (Charles P. Kindleberger ed., 1970).

²⁸ For example, the International Centre for Settlement of Investment Disputes (ICSID) mechanism, established under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159, 162 (1966); similarly, the dispute settlement mechanism of the 1994 Energy Charter Treaty, established under Article 26 of this instrument, 1994 Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 360, 399-400 (1995). Invariably, ad hoc or other institutional arbitration is available on the basis of appropriate arbitration clauses in investment treaties or through separate compromise. See Ilias Bantekas, *International Oil and Gas Dispute Settlement and its Application to Kazakhstan*, in *OIL AND GAS LAW IN KAZAKHSTAN: NATIONAL AND INTERNATIONAL PERSPECTIVES*, 233—234 (Ilias Bantekas et al. eds., 2003).

their undoubted financial power, influence, and other capacities possess “implied responsibilities,” in accordance with the “implied powers” doctrine developed by the ICJ in its Advisory Opinion in the Reparations case.²⁹ Rosalyn Higgins, correctly rejecting the dichotomy between subjects and objects and viewing international law as a dynamic process that comprises a variety of participants whose object is to maximize particular values,³⁰ would agree with the ICJ’s contention in the Reparations case that:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life [emphasis added].³¹

Any other conclusion would result in absurdity. The European Court of Justice (ECJ) has early put this rationale into practice by examining the relationship between economic activities, most usually undertaken by corporations, and human rights.³² Similarly, the UN Committee on Economic, Social and Cultural Rights has in the case of most General Comments stressed that non-State actors in a position to assist are incumbent to provide a level of international assistance and cooperation that will enable LDCs to fulfill their obligations under the 1966 International Covenant on Economic, Social and Cultural Rights.³³ The fact that the principle of non-interference and MNE lobbying has thus far precluded addressing MNE rights and responsibilities in international treaties should not be interpreted as rendering them devoid of particular legal personality.³⁴ A good guide as to the particular content and limit of this

²⁹ *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 179 (Apr. 11, 1949).

³⁰ ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 50 (1994).

³¹ *Reparation for Injuries Suffered in the Service of the United Nations*, *supra* note 29, at 178.

³² Case 46/87, *Hoechst AG v. Commission*, 1989 E.C.R. 2859, 2860, 4 C.M.L.R. 410, 410-411 (E.C.J. 1991); Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491 (1974).

³³ General Comment No. 15 on the Right to Water, U.N. ESCOR, 29th Sess., Agenda Item 3, para. 38, U.N. Doc. E/C.12/2002/11 (2003); General Comment No. 14 on the Right to the Highest Attainable Standard of Health, U.N. ESCOR, 22nd Sess., Agenda Item 3, para. 42, U.N. Doc. E/C.12/2000/4 (2000); the same obligation is also implied in other Comments. For example, General Comment 13 on the Right to Education emphasizes the responsibility of inter-governmental organizations, including the World Bank; if the Bank is to realize this right, it has to implement and enforce its operational directives on human rights vis-à-vis the corporations benefiting from its loans. General Comment No. 13 on the Right to Education, U.N. ESCOR, 21st Sess., para. 60, U.N. Doc. E/C.12/1999/10 (1999).

³⁴ In his chapter on Globalization and Governance the Secretary-General strongly advocates that the decisions of global companies “have implications for the economic

personality may be ascertained from available “soft law.” However, for the purposes of a CSR discussion the issue of MNE international legal personality is irrelevant, because CSR is to a very large degree premised on self-regulation and voluntary action. This issue will be explored in detail in the remainder of this article.

III. SOURCES OF CORPORATE SOCIAL RESPONSIBILITY

The 2001 European Commission Green Paper on CSR defines this responsibility as “a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment.”³⁵ Three generations of CSR are generally thought to have evolved. The first focused on short-term corporate interests and motives, the second on long-term success strategies; the present third generation is aimed at addressing the role of business in matters essentially within the public domain, such as poverty, exclusion, and environmental degradation.³⁶ During the first two phases, corporations viewed CSR as a form of philanthropy. Although the application of CSR rests on a voluntary basis (indeed this has been the cornerstone of the concept),³⁷ the emergent “soft law” and the efforts to make it part of corporate practice have emanated from public international bodies and NGO efforts.

Surprisingly, the relative “force” of the various instruments has not depended on their origin from either public international or private bodies, but on their ability to elicit adherence from corporations. We have identified four types of CSR sources. The responsibility accruing from each one of these is subject to both subjective and objective variables. These sources comprise public international instruments, NGO guidelines (some of which encompass a CSR evaluation system), individual business codes of conduct, and domestic legislation relating to CSR. Each will be examined in turn.

A. Public International CSR Instruments

The growth of CSR public international instruments is a recent phenomenon. Prior to the mid 1990’s, the OECD, the ILO, and certain principal or subsidiary organs of the United Nations undertook the only

prospects of people and even nations around the world.” *We the Peoples: The Role of the United Nations in the Twenty-first Century, Report of the Secretary-General*, U.N. GAOR, 54th Sess., Agenda Item 49(b), at 13, U.N. Doc. A/54/2000 (2000).

³⁵ Promoting a European Framework for Corporate Social Responsibility: Green Paper, COM(01)366 final at 5, available at http://europa.eu.int/comm/employment_social/soc-dial/csr/greenpaper_en.pdf [hereinafter Green Paper].

³⁶ H. Dossing, *The Business Case for CSR*, in INTERNATIONAL CHAMBER OF COMMERCE (ICC) UK, GUIDE TO GLOBAL CORPORATE SOCIAL RESPONSIBILITY 34 (2003).

³⁷ Guideline I(1) of the OECD Guidelines stresses the fact their application is “voluntary and not legally enforceable.” *OECD Guidelines*, *supra* note 6, at 17.

serious work on the subject, through the examination of the impact of MNEs on LDCs. ECOSOC, at the insistence of an LDC-majority United Nations in 1972, convinced the Secretary-General to establish a Group of Eminent Persons to study the role of MNEs in development and international relations. The Group produced a report in 1974 recommending the creation of standard-setting institutions within the UN Organization³⁸ and opining that although MNE investment in LDCs was beneficial to the latter, the unharnessed power of many MNEs could potentially harm host States.³⁹ While an Inter-governmental Working Group has been working on a Code of Conduct on Transnational Corporations since 1977, the draft of this Code was eventually shelved in 1992 as a result of disagreement between capital-exporting and capital-importing countries on the minimum standard of treatment of MNEs by host States under customary international law. However, there was very little if any conflict on whether host States had the right to determine the role of MNEs in the field of economic and social development.⁴⁰ At the same time, the establishment in 1983 of the World Commission on Environment and Development (WCED) by the General Assembly – especially after publication of the Brundtland Report in 1987 – underlined the importance of sustainable development, leading to the 1992 Rio UN Conference on Environment and Development (UNCED).⁴¹ The idea behind the 27 Rio principles is that long-term economic progress must be linked to environmental protection, requiring a new and equitable global partnership involving governments, people and key sectors of society, including corporations.⁴² The implementation plan for the Rio principles was agreed on by UNCED participating States and is contained in Agenda 21, which constitutes an integral part of the Rio Declaration.⁴³ The 2002 Johannesburg Declaration on Sustainable Development and Implementation Plan was the culmination of UN efforts on sustainable development, where the role of MNEs was viewed as paramount.

The UN Human Rights Commission has also monitored the impact of MNE operations in the developing world from a human rights point of view. The Sub-Commission has examined in detail the “Activities and

³⁸ This is now the UN Transnational Corporations Management Division (TCMD).

³⁹ *The Impact of Multinational Corporations on the Development Process and on International Relations*, U.N. ESCOR, 57th Sess., Agenda Item 8, at 13, U.N. Doc. E/5500/Add.1 (Part I) (1974).

⁴⁰ Muchlinski, *supra* note 10, at 592-97.

⁴¹ Gro Harlem Brundtland, *Foreword* to WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE ix (1987).

⁴² See *Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles* 51, U.N. Global Compact (2002), at http://www.unglobalcompact.org/content/Public_Documents/gcguide.pdf (last visited Sept. 19, 2004) [hereinafter *Guide to the Global Compact*].

⁴³ *Rio Declaration*, *supra* note 13.

Working Methods of Transnational Corporations,”⁴⁴ while other working groups or Special Rapporteurs have also reported on such matters, especially where indigenous peoples are concerned.⁴⁵ The recently adopted UN Norms on the Responsibilities of Transnational Corporations⁴⁶ is an ambitious document that, unlike its other CSR counterparts stressing voluntary action, emphasizes that MNEs “have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law”⁴⁷ This instrument, however, does not seem to be as influential as any of its other counterparts; business organizations have objected to its somewhat unrealistically broad scope and binding references.⁴⁸

The most influential public international CSR instruments are the OECD Guidelines, the UN Global Compact, and the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Unlike other “soft law” that is addressed by particular bodies of international organizations to their member States, the OECD Guidelines are recommendations addressed by governments to MNEs. Although they are not legally binding on MNEs, OECD States have agreed to adhere to the Guidelines and encourage their companies to observe them wherever they operate. The Guidelines were first published in 1976 and most recently updated in 2000.⁴⁹ They contain recommendations on human rights, employment and industrial relations, environment, bribery, consumer interests, science and technology, competition, and taxation. The UN Global Compact was formally launched in September 2000 by the UN Secretary-General, who called on world business leaders to voluntarily “embrace and enact” the nine Compact principles in individual corporate practice and support complementary public policy initiatives. Both the OECD Guidelines and the Global Compact are accompanied by so-called “follow-up” mechanisms. This format is typical of such instruments, being a step below monitoring mechanisms. The Guidelines involve the creation of National Contact Points (NCPs) that are responsible for encouraging observance in the national context and for ensuring that the Guidelines are known

⁴⁴ See e.g. U.N. ESCOR, 47th Sess., Agenda Item 8, at 2, U.N. Doc. E/CN.4/Sub.2/1995/11 (1995) and U.N. ESCOR, 48th Sess., Agenda Item 8, at 3-4, U.N. Doc. E/CN.4/Sub.2/1996/12 (1996), which are Reports prepared by the Secretary-General on the basis of Human Rights Sub-Commission Resolutions 1994/37 and 1995/31.

⁴⁵ *Transnational Investments and Operations on the Lands of Indigenous Peoples*, U.N. ESCOR, Agenda Item 15, at 4, U.N. Doc. E/CN.4/Sub.2/1994/40 (1994).

⁴⁶ See *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, U.N. ESCOR, 55th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003).

⁴⁷ *Id.* at 4.

⁴⁸ U.N. ESCOR, 55th Sess., Agenda Item 4, at 2, U.N. Doc. E/CN.4/Sub.2/2003/NGO/44 (2003).

⁴⁹ Muchlinski, *supra* note 10, at 578-92; Stephen Tully, *The 2000 Review of the OECD Guidelines for Multinational Enterprises*, 50 INT'L & COMP. L.Q. 394 (2001).

and understood by the domestic business community. Similarly, the Global Compact requires companies to publicly endorse its principles and “pledge to work with the UN in partnership projects, either at the policy or at the operational levels.”⁵⁰ The 1998 Declaration was preceded by the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. While the latter is specifically addressed to MNEs, both set out fundamental principles in the fields of employment, training, working conditions, and industrial relations. Both instruments are endowed with particular follow-up mechanisms and are supplemented by subject-specific ILO conventions. Both ILO Declarations, the OECD Guidelines, and the UN Global Compact are not mutually exclusive; indeed, they are complementary,⁵¹ stressing further the cohesion and consistency of CSR in international law.

The involvement of the E.U. with CSR commenced in 1995 with the signing of the European Business Declaration against Social Exclusion between the Commission and a group of business leaders. In March 2000, at the Lisbon European Council Summit, E.U. leaders made “a special appeal to companies’ corporate sense of social responsibility regarding best practices on lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development.”⁵² The publication of the Commission’s CSR Green Paper in 2001 resulted in a consultation process with more than 250 organizations and individuals, leading to the release of an official E.U. strategy document on CSR in July 2002.⁵³

As is evident, public international CSR instruments do not constitute the same type of “soft law” encountered in the context of other inter-governmental organizations. However, they do not all carry the same weight. The OECD Guidelines, the Global Compact, and the ILO Declarations contain influential follow-up mechanisms, supplemented by strict disclosure requirements to which a significant number of companies have so far adhered. Let us now examine the potency of NGO guidelines.

⁵⁰ Kathryn Gordon, *The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison*, in OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: ANNUAL REPORT 2001 (OECD, Working Paper No. 2001/15, 2001) available at <http://www.oecd.org/dataoecd/46/36/2075173.pdf>.

⁵¹ *OECD Guidelines Commentary*, *supra* note 9, at 19.

⁵² European Council, Speech by the President Nicole Fontaine, Presidency Conclusions, EUR. PARL. DOC. (01/S-2000) para. 39 (2000), available at <http://www.europarl.eu.int/bulletins/pdf/1s2000en.pdf>.

⁵³ Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, *supra* note 21, at 3-12.

B. NGO Guidelines on CSR

These number in the hundreds. They can be broken down into three categories: those that simply provide a set of CSR guidelines (most often entailing reporting standards), those that act as CSR indicator self-assessment mechanisms (self-performance standards), and those that are a combination of the two. Some have a very specific focus, such as Social Accountability 8000,⁵⁴ which concerns labor issues, but most have a broader focus encapsulating social, labor, and environmental aspects. In this section we shall examine the most influential among these.

Perhaps the oldest initiative was that launched by the Reverend Leon Sullivan in 1977, providing guidelines to companies doing business in South Africa during apartheid. These Sullivan Principles were reformulated in 1999 (currently known as Global Sullivan Principles) with the input of several MNEs, focusing on eight broad directives on labor, business ethics, and environmental practices of MNEs and their business partners.⁵⁵ They act as a reporting standard whereby companies publicly pledge to integrate the principles into their operations and provide an annual letter to the Reverend Sullivan restating the company's commitment and its progress.

An example of guidelines lacking reporting or performance standards is the Caux Round Table (CRT).⁵⁶ The Caux "Principles for Business" issued in 1994 by senior business leaders from Europe, Japan, and North America "are a worldwide vision for ethical and responsible corporate behavior and serve as a foundation for action for business leaders worldwide." The principles concern, among other issues, social impact of business upon local communities, support for multilateral trade agreements that promote "judicious liberation of trade," environmental respect, and avoidance of illicit or corrupt practices.

As far as performance standards indicators are concerned, we have discerned two types: a) those that use the standard to provide information to investors committed to Socially Responsible Investing (SRI) or other stakeholders, and b) self-performance standards whose sole purpose is to allow the corporation concerned to determine its CSR compliance. An example of the former are the "Principles for Global Corporate Responsibility: Benchmarks for Measuring Business Performance."⁵⁷ The

⁵⁴ Reverend Leon Sullivan, *Business and Sustainable Development: A Global Guide, Social Indicators*, International Institute for Sustainable Development, http://www.bsdglobal.com/issues/sr_si.asp (last visited Sept. 23, 2004).

⁵⁵ Leon H. Sullivan, *Global Sullivan Principles of Social Responsibility*, <http://globalsullivanprinciples.org> (last visited Sept. 23, 2004).

⁵⁶ Caux Round Table, *Principles for Business*, <http://www1.umn.edu/humanrts/instreet/cauxrndtbl.htm> (last visited Oct. 16, 2004).

⁵⁷ The Ecumenical Council on Corporate Responsibility et al., *Principles for Global Corporate Responsibility: Bench Marks for Measuring Business Performance*, in *THE CORPORATE EXAMINER*, Vol. 26, Nos. 6-8 (May 29, 1998).

revised Benchmarks were issued in 1998 by the Interfaith Center on Corporate Responsibility (ICCR) with input from related NGOs, labor groups, religious organizations, and corporations. They contain nearly sixty principles considered “fundamental to a responsible company’s actions,” including benchmarks to be used by external parties in order to assess the company’s performance for the purposes of either SRI or other stakeholder involvement. The most widely known self-performance standard is the Global Reporting Initiative (GRI) that focuses on the economic, environmental, and social dimensions of corporate activity, products, and services.⁵⁸ It is a “Collaborating Centre” of UNEP, also encompassing the participation of corporations, accountancy organizations, universities, and other stakeholders from around the world. The GRI Sustainability Reporting Guidelines were first issued in 1999 and are renewed regularly, laying out a coherent format upon which corporations are to structure their social reports. The importance of the GRI Guidelines is stressed by the fact that the UN Global Compact has entered into an agreement of collaboration with it, whereby corporate submissions that meet the GRI Guidelines will be accepted under the relevant Compact reporting procedures.⁵⁹

International lawyers will ponder our description of NGO Guidelines as sources of law for MNE corporate social responsibility purposes. It should not, however, be forgotten that relevant public international law instruments clearly require voluntary action. To the extent that voluntary reporting constitutes: a) the only verifiable measure of MNE activity beyond the boundaries required under law, b) an ethical code of conduct to which MNEs adhere and want to become a part of, which c) has not been created within the public domain of any one country or inter-governmental organization, it is logical to advocate the existence of a particular legal regime outside normal structures, which is the direct effect of deregulation.⁶⁰ Let us now examine the rise, current status, usefulness, and impact of corporate codes of conduct.

C. *Corporate Codes of Conduct*

Corporate codes of conduct are policy statements that outline the ethical standards of conduct to which a corporation adheres. This may take the form of a general policy statement or be inserted in the corporation’s contracts with suppliers, buying agents, or contractors, in the sense that they must agree to abide by the company’s ethical standards. While not

⁵⁸ Global Reporting Initiative, <http://www.globalreporting.org> (last visited Sept. 23, 2004).

⁵⁹ *Guide to the Global Compact*, *supra* note 42, at 9.

⁶⁰ See John T. Scholtz, *Enforcement Policy and Corporate Misconduct: The Changing Perspectives of Deterrence Theory*, 60 *LAW & CONTEMP. PROBS.* 253 (1997); Samuel Peltzman, *Toward a More General Theory of Regulation*, 19 *J.L. & ECON.* 211 (1976).

all corporations possess such codes, recent years have witnessed a proliferation that is due in large part to corporate scandals in a number of industries and the growth of public awareness and concern.

Corporate codes differ substantially from industry to industry and also from company to company. The codes in the OECD inventory address the whole gamut of economic, social, and environmental issues identified above as enshrined in the OECD Guidelines, and some go even further.⁶¹ The most common entries concern environmental and labor relations, followed by consumer protection and anti-corruption. The inventory suggests significant divergence in the scope of commitments, even with regard to well-defined issues such as child labor. Some codes pledge to protect any children found to be employed by the company or its suppliers, others mention specific ages or none at all, and others, while committed to eliminating child labor, point out that releasing the child from work will not alleviate the child's predicament. The OECD inventory also demonstrates that the codes address ethical problems that are imported from the societies in which they operate.⁶² Since MNEs involve the operation of multiple subsidiaries and a workforce of many thousands, it is imperative that efficient training of employees and external suppliers and maintenance of strict managerial control are put into operation and periodically reviewed. The OECD further suggests that the effectiveness of corporate codes should not be assessed on the basis of what corporations do, but on how societies manage to formulate and channel reasonable pressures for appropriate business conduct.⁶³

Corporate codes have limited legal enforceability. With the exception of domestic legislation that perceives a breach of the code as affecting the contractual relationship between the consumer and the corporation,⁶⁴ a concept that is increasingly incorporated in EC law in relation to the

⁶¹ *Codes of Corporate Conduct: Expanded Review of their Contents*, in CORPORATE RESPONSIBILITY: PRIVATE INITIATIVES AND PUBLIC GOALS (OECD, Working Paper No. 2001/06, 2001) available at <http://www.oecd.org/dataoecd/57/24/1922656.pdf>.

⁶² *Private Initiatives for Corporate Responsibility: An Analysis*, in CORPORATE RESPONSIBILITY: PRIVATE INITIATIVES AND PUBLIC GOALS, at 16 (OECD Working Paper No. 2001/1, Feb. 2001), available at <http://www.oecd.org/dataoecd/46/42/2074991.pdf> (last visited Sept. 23, 2004).

⁶³ *Id.* at 18.

⁶⁴ In *Kasky v. Nike*, 45 P.3d 243 (Cal. 2002), an activist sued Nike Corp. for false advertising over a publicity campaign it used to defend itself against accusations of engaging in inhuman manufacturing conditions in Asia. The California Supreme Court argued that since a company's public statements could conceivably persuade consumers to buy its products, such statements deserve only limited First Amendment protection (freedom of speech). This was confirmed on appeal in *Nike v. Kasky*, 539 U.S. 654 (2003), by the U.S. Supreme Court in its decision of June 26, 2003.

effect of public statements on consumer choices,⁶⁵ no other legal effect may be cited. At the same time, some codes may be termed as “safe,” in the sense that the ethical standards contained therein are circumscribed by law in the home State and are as a result legally enforceable there. A notable example is extraterritorial bribery prohibited under the 1977 U.S. Foreign Corrupt Practices Act (FCPA).⁶⁶ Similarly, although little if any extraterritorial environmental legislation is binding on subsidiaries abroad, the operational policies of the World Bank⁶⁷ as well as other lending institutions would make it impossible to secure a loan without proper environmental assessment and sustainable operations.⁶⁸ However, a multiplicity of operations, pervasive outsourcing, and an endless chain of suppliers and agents necessitate that the most reliable compliance mechanism is an internal one. The U.S. Sarbanes-Oxley Act of 2002⁶⁹ requires subject companies to disclose whether or not they have adopted a code of ethics and to make this publicly available to investors, and amendments to and waivers from the code must be promptly disclosed.⁷⁰

The role of human rights in corporate codes and practices is a thorny one. We understand human rights within the scope of MNE operations to encompass not only labor rights, health and safety, child labor, and consumer protection, but also human rights issues that affect the communities where MNEs operate, whether corporate action has a direct or indirect effect on such populations. These include forced relocation, vio-

⁶⁵ EC Directive 93/13 on Unfair Terms in Consumer Contracts introduced the concept of good faith, according to which all the terms in consumer contracts which were not individually negotiated must be fair and comply with the requirements of good faith. Council Directive 93/13/EEC, art. 3, 1993 O.J. (L 95) 29. The fact that public statements may constitute contractual terms has long been recognized by English courts. *Carlill v. Carbolic Smoke Balls*, 1 Q.B. 256 (1893). Moreover, Art. 2(2)(d) of EC Directive 1999/44 on Certain Aspects of the Sale of Consumer Good and Associated Guarantees, states that consumer goods are presumed to be in conformity with the contract if they, inter alia “show the quality and performance . . . given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labeling.” Council Directive 1999/94/EC, art. 2(2)(d), 1999 O.J. (L 171) 12.

⁶⁶ 15 USC § 78 (2000).

⁶⁷ See, e.g., World Bank, *Operational Policy 4.01: Environmental Assessment* (Jan. 1999), <http://lnweb18.worldbank.org/ESSD/envext.nsf/47ByDocName/EnvironmentalAssessment>; World Bank, *Operational Policy 4.04: Natural Habitats* (June 2001), <http://lnweb18.worldbank.org/ESSD/sdvext.nsf/52ByDocName/NaturalHabitats>.

⁶⁸ See European Bank for Reconstruction and Dev., *Sound Business Standards and Corporate Practices: A Set of Guidelines* (Sept. 1997) available at <http://www.ebrd.com/pubs/law/standard/stande.pdf>.

⁶⁹ Sarbanes-Oxley Act, 15 U.S.C.A. §§ 7201-7266 (2004).

⁷⁰ *Id.* § 7264.

lence against local populations by security forces of the host State in order to “protect” MNE facilities, imprisonment, torture or killing of anti-MNE activists, and others. It is hard to find codes with such commitments, and we feel justified in naming all other codes as “safe.” In our sample survey of codes in the hydrocarbon extracting industry, only Shell was found to have enacted strong human rights commitments. Principle 2(e) of its 1997-revised Business Principles states the company’s pledge “to express support for fundamental human rights in line with the legitimate role of business,” while Principle 5(a) notes that Shell companies “have the right to make their position known on matters affecting the community, where they have a contribution to make.”⁷¹ No similar commitments were encountered in our survey of other MNE hydrocarbon extractors. It should not be forgotten, however, that Shell’s conversion to CSR and revision of its code and practices was a direct result of its role, or non-role, in the execution of activist Ken Saro-Wiwa by the Nigerian junta in 1995.⁷² Let us now examine existing domestic legislation relating to CSR.

D. Regulation of CSR through Domestic Legislation

The whole rationale behind CSR is premised on de-regulation. Therefore, any reference to CSR legislation raises questions of paradox. This necessarily begs the question of redefining the scope of CSR and the purposes of its existence. With the exception of bribery and tax evasion, most matters pertinent to MNE operations outside the host State are not subject to extraterritorial legislation. Similarly, until recently, not all corporate action on home territory was subject to rigid regulation, such as corporate governance and investment funds. It was logical to assume that companies themselves were best suited to allocating salary levels, appointing appropriate board members, etc., as well as having the expertise and know-how to invest accumulated funds for profit. What was missing from the picture were the social impacts of corporate mis-governance, as in the cases of Enron and WorldCom – corporations reporting losses while their CEOs were receiving extravagant salary raises, the subsequent loss of jobs and pensions because pension funds were invested in these deflated corporations. Now, from the de-regulation of corporate governance and investments as part of CSR broadly understood, we are entering a new phase of regulation, albeit still limited. This demonstrates boldly our initial argument that the company shares responsibilities to a broad spectrum of stakeholders.

It is beyond the scope of this article to make a detailed analysis of these measures, so we shall limit ourselves to some noteworthy examples. We

⁷¹ Royal Dutch Shell, *Statement of General Business Principles*, at <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/code/royal.htm>.

⁷² See Willem J.M. von Genugten, *The Status of Transnational Corporations in Int’l Public Law*, in HUMAN RIGHTS AND THE OIL INDUSTRY, *supra* note 24, at 84-89.

have already seen how the 2002 Sarbanes-Oxley Act requires companies to disclose and observe their codes of ethics. Similarly, the Act requires, among other things, a) CEOs of U.S. reporting companies to certify that their companies' annual and quarterly reports comply with specified disclosure standards; b) real-time reporting of material changes in the company's financial situation; c) prohibitions with few exceptions on making, arranging, or renewing personal loans to CEOs and directors; d) prohibitions on transactions by executive officers and directors during blackout periods under issuer individual account and profit sharing plans; and e) acceleration of the date for filing of change of stock ownership reports by CEOs, directors and more than 10% shareholders in the company's equity securities.⁷³

In the U.K., the 2003 Corporate Responsibility Bill, whose adoption is almost certain, is in some sense a response to the British government's perceived failure in its White Paper on Modernising Company Law⁷⁴ to specify transparency rules or hold corporations accountable to their stakeholders. In addition, Article 2 of the Bill provides for extraterritorial application regarding all major CSR areas of concern, demanding that corporations consult with stakeholders,⁷⁵ further imposing a duty to prepare and publish reports.⁷⁶ While Articles 7 and 8 stress the environmental and social duties of directors as well as their responsibilities, Article 6 establishes the liability of the parent company with regard to its subsidiaries, mergers, disposals, acquisitions, and other restructurings, "irrespective of whether the injury to persons or harm to the environment occurred within the United Kingdom." The impact of this provision could potentially revolutionize litigation claims against MNE operations abroad by a large range of claimants. Similarly, British legislation requires that pension funds disclose, in their statements of investment principles, the extent to which social, environmental, or ethical considerations are taken into account in the selection, retention and implementation of investments.⁷⁷

⁷³ Sarbanes-Oxley Act §§ 7241-7266.

⁷⁴ MODERNISING COMPANY LAW, 2002, Cm. 5553, <http://www.dti.gov.uk/companies/bill/part2.pdf> (last visited Sept. 23, 2004).

⁷⁵ Corporate Responsibility Bill, 2003, § 4, available at <http://www.publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf>.

⁷⁶ *Id.* § 3.

⁷⁷ The Stakeholder Pension Schemes Regulations, (2000) SI 2000/1403. . Similarly, under the Swedish Law on National Pension Funds 2000 all six Swedish pension funds are obliged to take into consideration in their instruments environmental and ethical concerns without influencing the overall objective of a high return. See Third Swedish Pension Fund Annual Report 2001, 7, available at http://www.ap3.se/upload/AP3_annualreport2001_eng.pdf. The same is true with regard to Art. 21 of the French Law No. 2201-152 of 2001, summarized in European Union Directorate-General for Employment and Social Affairs, *Corporate Social Responsibility, National Public*

In France, the newly amended *Nouvelles Régulations Economiques* (NRE)⁷⁸ is a Law that imposes reporting obligations (public disclosure) on all nationally listed companies, pertaining among others to the environment, domestic and international labor relations, local community, and others.⁷⁹ There is increasing pressure from society in all developed countries to impose legally enforceable public disclosure requirements upon corporations. This trend is in line with and closely connected to recent litigation concerning CSR issues, thus opening the way for further regulation in the near future.

IV. THE CORE CSR PRINCIPLES

In previous sections we made reference to principles encountered in public international and NGO-based instruments, as well as those found in corporate codes and domestic law. These include a range of human rights obligations, labor rights and relations (including child labor), environmental protection, consumer protection, prevention of monopolies, tax evasion, anti-corruption, and promotion of technology transfers to LDCs. Our aim here is to analyze human rights, labor rights, and environmental rights, only insofar as they pertain to MNE operations, utilizing as a point of reference the OECD Guidelines and the UN Global Compact. Monopolistic practices, tax evasion, and corruption have the effect of giving immense material benefit to the few to the detriment of the many (usually poverty-stricken LDC populations). Besides their immoral character, these acts are also prohibited under domestic or transnational criminal law entailing further civil penalties for all wrongdoers and are enforced through extraterritorial legislation.⁸⁰ By depriving LDCs of economic growth and sustainable development, such practices have a dire impact on the human rights of the people concerned.⁸¹

A. Human Rights

MNEs face a series of human rights concerns when deciding to invest in LDCs, particularly as regards an appropriate standard of working and their position on human rights issues outside their scope or impact of operations. As far as the first of these is concerned, both the Global Compact and the OECD Guidelines refer to the 1948 Universal Declaration of Human Rights (UDHR) as the most appropriate standard, but

Policies in the European Union 20, available at http://europa.eu.int/comm/employment_social/soc-dial/csr/national_csr_policies_en.pdf.

⁷⁸ See summary of Law No. 2001-240 of 2001, art. 116, in *Corporate Social Responsibility, National Public Policies in the European Union*, *supra* note 77, at 19.

⁷⁹ S. Nahal, *Mandatory CSR Reporting: France's Bold Plan*, in *ICC GUIDE TO GLOBAL CORPORATE RESPONSIBILITY*, *supra* note 36, at p.182.

⁸⁰ See OECD Convention on Combating Bribery of Foreign Officials in Int'l Bus. Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1998).

⁸¹ See ILIAS BANTEKAS & S. NASH, *INTERNATIONAL CRIMINAL LAW* (2003).

few MNEs have incorporated a commitment to the UDHR in their codes of conduct.⁸² While this has given rise to critical concern by human rights organizations,⁸³ it should also be acknowledged that the implementation of the UDHR by socially responsible corporations in an LDC whose social and legal system is underdeveloped is not a straightforward exercise. Shell's Human Rights Dilemmas: A Training Supplement provides some realistic examples, where even a socially committed human rights-trained manager would find no easy answer. One example refers to a scenario where Shell operations are situated in a country that prevents the establishment of trade unions, contrary to the company's Business Principles, which explicitly protect and foster unions. In the example, two well-respected local employees look at Shell's website and discover that Shell employees in other countries have formed unions that negotiate pay and other work-related matters. They inform the General Manager that they too want to form a union and then return later with fifty more workers who insist on the creation of a union.⁸⁴ The dilemma here is obvious; adherence to local law violates the company's Business Principles, generally accepted standards of international human rights, and the labor law of the parent State. Adherence to the UDHR, on the other hand, violates local law. It is evident that under these particular circumstances the UDHR is not a useful tool in itself for corporate purposes. Principle 1 of the Global Compact, in which the emphasis (as in the OECD Guidelines) is on material capacity to act, is more useful in this regard. It reads:

Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence.⁸⁵

On the basis of the Shell example provided above, MNEs are a) required to undertake a pre-investment human rights assessment study of the host country, b) guarantee the protection of human rights through a definitive agreement with the host government, and c) monitor its human rights practices at the investment phase. A pre-investment human rights assessment informs the company about the compliance of local laws and practices to its Business Code and the range of human rights problems it

⁸² BRITISH PETROLEUM, INC., POLICY OVERVIEW: ETHICAL CONSIDERATIONS, <http://www.bp.com/genericarticle.do?categoryId=27&contentId=2000422>.

⁸³ Morten Nordskog & Audun Ruud, *Transnational Oil Companies and Human Rights: What they say and how they say it*, in HUMAN RIGHTS AND THE OIL INDUSTRY, *supra* note 24, at 139.

⁸⁴ SHELL, INC., HUMAN RIGHTS DILEMMAS: A TRAINING SUPPLEMENT 4, available at http://www.businesshumanrights.org/Categories/Issues/Other/Culturalissues?&sort_on=effective&&batch_start=31.

⁸⁵ U.N. Global Compact, *The Ten Principles* Principle 1 (2000), available at http://www.unglobalcompact.org/Portal/?NavigationTarget=/Roles/portal_user/aboutTheGC/nf/nf/theNinePrinciples [hereinafter *Global Compact*]. See *OECD Guidelines*, *supra* note 6, at 19.

will face in its operations therein. Armed with this information, the host government guarantee stage ensures the company will be able to abide by its Business Code, even where compliance may conflict with local laws. This may be given effect in two cumulative ways: through appropriate clauses in the agreement between the company and the host government, and on the basis of World Bank (or other financial institution) loan⁸⁶ or investment guarantee agreements,⁸⁷ which also produce legal effects for the host State. Moreover, domestic friction will be avoided where the MNE constructively consults with all concerned stakeholders and discloses all information regarding its activities in the host State, whether good or bad.⁸⁸ Finally, the constant monitoring of human rights practices at the investment phase involves employee training, managerial control within the subsidiary or corporation, and monitoring of the corporation's supply chain and agents.⁸⁹ The human rights conformity of the supply chain can be further guaranteed by entering into binding contracts whereby such agents and suppliers are obliged to adhere to the corporation's Business Principles.

What socially responsible MNEs will find particularly troublesome is their involvement in human rights issues that have no bearing on their operations or that of their suppliers or agents, but for which they may exert some influence upon the government. Right up to the execution of Ken Saro-Wiwa by the Abacha regime in 1995, Shell vehemently refused to take any part in the matter, despite the fact that human rights organizations were of the opinion that the company was in a position to play a

⁸⁶ World Bank, *Operational Policy 4.12: Involuntary Resettlement* (Dec. 2001), <http://lnweb18.worldbank.org/ESSD/sdvext.nsf/52ByDocName/InvoluntaryResettlement>; World Bank, *Operational Directive 4.20: Indigenous Peoples* (Sept. 1991), <http://lnweb18.worldbank.org/ESSD/sdvext.nsf/52ByDocName/IndigenousPeoples>. See SIGRUN SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* 38-42, (2001).

⁸⁷ Art. 12(d) of the 1985 Multilateral Investment Guarantee Agency (MIGA) Convention provides that “[I]n guaranteeing an investment, the Agency shall satisfy itself as to: i) the economic soundness of the investment and its contribution to the development of the host country; ii) compliance of the investment with the host country's laws and regulations.” World Bank: Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, 24 I.L.M. 1598, 1612 (1985). Under paragraph 3.08 of MIGA's Operational Regulations, the Agency will not provide guarantees with regard, inter alia, to products or activities deemed illegal by the host State or international law, enterprises whose primary sources of income involve forced or child labor inconsistent with internationally recognized norms. MIGA, *Operational Regulations* § 3.08 (2002) available at <http://www.miga.org/screens/about/regulations/Operations-Regulations.pdf>.

⁸⁸ See *Guide to the Global Compact*, supra note 42, at 19.

⁸⁹ See *OECD Guidelines*, supra note 6, at 19; *Guide to the Global Compact*, supra note 42, at 18.

positive role if it made the effort.⁹⁰ The company's public image and finances suffered heavy blows as a result, and Shell was thereafter forced to take a proactive stance regarding its human rights approach, especially by revising its General Business Principles (GBP)⁹¹ in 1997 and constantly monitoring them, and meticulously training its personnel. The Global Compact distinguishes between direct MNE complicity, beneficial complicity, and silent complicity in human rights violations. An MNE is engaged in direct complicity where it participates in the violation; it is beneficially complicit where it benefits from the human rights abuses committed by government agents; it is silently complicit where it fails to raise "the question of systematic or continuous human rights violations in its interactions with the appropriate authorities."⁹²

Unlike traditional human rights law, CSR-related human rights recognizes a "collective" right of host State local communities living in or peripherally to the investment project, or which are directly impacted by the project's operations, relating to environmental and social well-being.⁹³ Besides the individual elements of this right, such as specific compensation for loss of one's land plot and relocation, MNEs and their lenders have not denied that many big investment projects, particularly those involving construction and extraction, have an effect on the environmental and social life of adjacent communities, whether indigenous or other. Most if not all MNEs have, as a matter of philanthropy, established schools and clinics, provided scholarships and running water to local communities, and performed other laudable, beneficial acts.⁹⁴ Most often, many of these benevolent projects, when they are not sincere philanthropy or public relations exercises, are mandated by loan conditions, especially those approved by the World Bank. Social and environmental grievances submitted to the World Bank Inspection Panel in connection with the Chad-Cameroon Pipeline Project case reveal that the incumbent equity corporation did in fact design and implement an Indigenous Peoples Plan (IPP) relating to health, education and agricultural assistance,⁹⁵

⁹⁰ Kristian Tangen et al., *Confronting the Ghost: Shell's Human Rights Strategy*, in HUMAN RIGHTS AND THE OIL INDUSTRY, *supra* note 24, at 185.

⁹¹ As already explained, Principle 5(a) of Shell's General Business Principles allows the company to make its position known as regards human rights issues in any country where it is operating. *Statement of General Business Principle*, *supra* note 71.

⁹² *Guide to the Global Compact*, *supra* note 42, at 24.

⁹³ E.g., *OECD Guidelines*, *supra* note 6, at 19, 23; see, e.g., *Guide to the Global Compact*, *supra* note 42, at 20.

⁹⁴ See, e.g., UNILEVER, LISTENING, LEARNING MAKING PROGRESS: 2002 SOCIAL REVIEW OF 2001 DATA 10,13, and 17 (2002), available at http://www.unilever.com/images/social_review_2001.pdf (last visited Sept. 19, 2004); Green Paper, *supra* note 35, at 13.

⁹⁵ *Cameroon Petroleum Development and Pipeline Project and Petroleum Environment Capacity Enhancement Project Inspection Panel Investigation Report* xx-xxi, No. 25734 (May 2, 2003).

but did not go beyond that.⁹⁶ The Panel noted that the IPP lacked a wider regional assessment, particularly in terms of the Bakola people's use of the wider littoral forest and gathering activities, but surprisingly pointed out that despite the delay the matter was being remedied.⁹⁷ The Panel recommended that:

The Bank should consider within its larger dialogue framework with the country, an effective incentive to help integrate important sectors, such as environment and public health, in a local monitoring team for the Pipeline Project.⁹⁸

Similarly, in the Pangu Hydroelectric Project case, serious social and environmental improprieties were reported to MIGA's Compliance Advisor Ombudsman (CAO).⁹⁹ The World Bank's International Finance Corporation had an equity share in the project, which it divested in 2002,¹⁰⁰ but at the time the associated adverse social and environmental effects the projects were visible. CAO recommended that the IFC take steps to ensure the social and environmental suitability of this particular project and other past projects where similar omissions were made.¹⁰¹ It further recommended that the

IFC strengthen its sponsor due diligence to include the environment and social performance and commitment to corporate social responsibility of all potential clients, including the records of parents and subsidiaries.¹⁰²

The message is clear, and it is not all "soft law." Although the CAO seems to equate CSR with a positive obligation, it stresses the responsibility of World Bank organs to impress the importance of this obligation upon all their clients. Such action would not only be in accord with World Bank policy directives but would also enhance the Bank's tarnished public image.

⁹⁶ Consultations with indigenous populations demonstrated their desire for water wells and education. *Id.* at xix.

⁹⁷ *Id.* at xxi-xxii.

⁹⁸ *Id.* at xxiii.

⁹⁹ *Assessment Report: Assessment by the Office of the Compliance Advisor/Ombudsman in Relation to a Complaint Filed Against IFC's Investment in ENDESA Pangu S.A.*, Compliance Advisor Ombudsman (May 2003), available at <http://www.cao-ombudsman.org/pdfs/Pangu%20Assessment%20Report%20June%20edits%20FINAL.doc>.

¹⁰⁰ The IFC completed its exit from the project ten days after the complaint to CAO had been received. The IFC's exit from the project, under its agreement with ENDESA, was conditional upon a number of social obligations being fulfilled by the latter. This condition was not respected by the IFC. *Id.* at 3-5.

¹⁰¹ *Id.* at 6.

¹⁰² *Id.* at 7.

B. Labor Rights

What has been said in the previous section on human rights applies mutatis mutandis with regard to labor rights, which represent a particular expression of human rights law. Both the OECD Guidelines and the Global Compact focus on six core labor principles that MNEs must observe. These are a) freedom of association and effective recognition of the right to collective bargaining; b) elimination of all forms of forced or compulsory labor; c) effective abolition of child labor; d) elimination of discrimination in respect of employment; e) encouragement of human capital formation; and f) observance of effective health and safety regulations.¹⁰³ The latter two are not expressly identified in the Global Compact,¹⁰⁴ but they are implied, since the Compact adheres to the principal ILO treaties and the ILO's Declaration on Fundamental Principles and Rights at Work. The OECD Guidelines, on the other hand, make explicit reference to these principles.¹⁰⁵ Finally, both the Guidelines and the EC Commission Green Paper on CSR recognize the social impacts, especially those related to redundancies, associated with MNE mergers, closures, and other actions that result in actual or potential job losses.¹⁰⁶ Those impacts are the reason constant consultation is necessary in order to mitigate and prevent social calamities.¹⁰⁷

Although the application of these principles seems to follow common sense, it is not straightforward. The freedom of association and collective bargaining, for example, may be subject to severe limitations in countries ruled by authoritarian regimes. Similarly, health and safety regulations in the host State may not meet the standards envisaged in the parent State. Moreover, minimum wage rates in some LDCs, coupled with working conditions, may in fact amount to slave labor, while lack of proper registration in the host State may make it very difficult to identify the precise age of workers. A socially irresponsible corporation could simply affirm its adherence to local laws and hope to escape any public condemnation. However, the spirit of the relevant instruments is to uphold domestic law as a matter of corporate compliance, not to allow corporations to benefit through exploitation. Several corporations have in the recent past been rightly accused of exploiting child labor and contributing to wages close

¹⁰³ In *Connelly v. R.T.Z. Corp. Plc.*, 3 W.L.R. 373 (H.L.(E.) 1997), the plaintiff suffered from larynx cancer as a result of having worked in a Namibian uranium mine with little or no protection and non-existent health and safety measures.

¹⁰⁴ *Global Compact*, *supra* note 85, Principles 3-6.

¹⁰⁵ *OECD Guidelines*, *supra* note 6, at 19, 21.

¹⁰⁶ *Id.* at 22; see Green Paper, *supra* note 35, at 13.

¹⁰⁷ Council Directive 94/45/EC, art. 1, 1994 O.J. (L 254) 64, 66, as amended by Council Directive 97/74/EC, 1997 O.J. (L 10) 22-23, obliged MNEs operating in Europe to establish works councils for information and consultation with workers on specific work-related issues.

to the UN's poverty standard,¹⁰⁸ while a number of corporations have been sued over labor issues.¹⁰⁹ For example, Unocal Corp. was sued for allowing the Myanmar government to rape, kill, employ forced labor, and relocate whole villages in relation to the company's gas production and pipeline project in that country.¹¹⁰

The three-phase monitoring and assessment mechanism identified in the previous section on human rights should also find application in the field of labor rights. The OECD Guidelines and the Compact, in relation to child and forced labor, instruct corporations not only to release such persons from their burden, but to contribute to their societal integration through the provision of vocational training, schooling for children, medical care, counseling, and if possible, income-generating alternatives that, in the case of child labor, may involve the participation of the child's parent or above-working-age members of the family.¹¹¹ This move fosters the formation of human capital, which if developed on a larger scale by the corporation, especially by providing vocational training and other education, will produce beneficial results for its operations since skilled local labor will be cheaper and more stable than imported labor. The benefits to the host economy are also significant.

As far as MNE closures or mergers affect host State employment, affected States attempt to solve such situations either in advance by promulgating MNE-friendly investment laws, or, where companies have resolved to deflect measures, host States resort to bargaining. It is clear that in such situations the negotiating advantage rests with the MNE. Some manufacturing companies, such as Nike, have made it their policy to invest in countries where labor costs were low, closing their factories where improvement of the economy pushes wages higher. The elimina-

¹⁰⁸ *Adidas Said to Use Slave Labor*, WASH. POST, Aug. 19, 1998 at M2. See HENRY STEINER & PHILLIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1356-1358 (2d ed. 2000).

¹⁰⁹ See Craig Forcese, Note, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INT'L L. 487, 488 (2001).

¹¹⁰ In the 1997 tort action in *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), a U.S. federal district court in California concluded that corporations and their executive officers may be held accountable under the Aliens Tort Claims Act, 28 USC § 1350, for human rights violations outside the United States. Although the court pointed out that Unocal benefited from the abuses, it dismissed the case because it was not proven that the company wanted and controlled the military to perpetrate these acts. On appeal, the Court of Appeals for the Ninth Circuit reversed this decision, holding that plaintiffs need only demonstrate Unocal's assistance to the military. *Doe v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. Dec. 3, 2001). In early 2003, the Ninth Circuit court reheard the case and reversed its previous ruling, thus giving a thriller ending to the case. *Doe v. Unocal Corp.*, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

¹¹¹ *Guide to the Global Compact*, *supra* note 42, at 35, 38-39.

tion of such policies, although generally lawful, should be an objective of CSR best practice.

C. *Environmental Rights and Sustainable Development*

International environmental treaties are addressed to States, who in turn address some of the obligations contained therein to natural or corporate persons in their domestic legislation. Besides domestic environmental legislation, no other instrument legally binds corporations in environmental matters, and the situation is similar to that described with regard to human rights and labor rights in the previous sections. The primary objective of the “soft law” analyzed in this article that is addressed to States, corporations, civil society, and inter-governmental organizations is that of sustainable development.¹¹² The concept essentially means that the pursuit of economic objectives should coincide with environmental and social growth.¹¹³ Environmental considerations are integrated into the policy of the WTO and increasingly into the decisions of its Appellate Body seeking to respect non-trade priorities.¹¹⁴ While the vast majority of MNEs have incorporated environmental perspectives into their business codes, these are not necessarily aimed at sustainable development, but may have to do with the environmental exigencies of a particular investment project. CSR-related sustainable development is reinforced through the lending or insurance mechanisms of inter-governmental institutions, and is also prominent in the OECD Guidelines, the Global Compact, and Agenda 21, among others.

The World Bank requires stringent environmental checks and control prior to and during implementation of an investment.¹¹⁵ In addition, all investment projects receive a loan relating to environment and social capacity enhancement in order to deal with relevant issues arising from the operation of the underlying project.¹¹⁶ Although the wording of the Bank’s environmental policy directives do not make clear reference to

¹¹² *Johannesburg Declaration on Sustainable Development*, *supra* note 19, para. 27; REPORT OF THE INTERNATIONAL CONFERENCE ON FINANCING FOR DEVELOPMENT at 1, U.N. Doc. A/CONF.198/11, U.N. Sales No. 02.11.A.7 (2002); *Rio Declaration*, *supra* note 13, Principle 1.

¹¹³ Phillippe Sands, *International Law in the Field of Sustainable Development*, 65 BRIT. Y.B. INT’L L. 303, 318 (1994).

¹¹⁴ WTO, *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/R (Sept. 8, 2000), available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2000.

¹¹⁵ See e.g. *Operational Policy 4.01: Environmental Assessment*, *supra* note 67; *Operational Policy 4.04 :Natural Habitats*, *supra* note 67; World Bank, *Operational Policy 4.07: Water Resources Management* (Feb. 2000), <http://lnweb18.worldbank.org/ESSD/ardext.nsf/18ByDocName/StrategyOperationalPolicies>.

¹¹⁶ For example, the Petroleum Environment Capacity Enhancement (CAPECE) Project (Credit No. 3372-CM) which was additional to the Chad-Cameroon Pipeline Project loan. See *Cameroon – Petroleum Development and Pipeline Project*;

sustainable development, this may certainly be implied from Article 12(d)(i) of the MIGA Convention, which agrees to guarantee only those investments that are “economically sound” and which contribute to the development of the host country. This has been interpreted by MIGA, part of the World Bank group,¹¹⁷ to include environmental performance and sustainability with regard to natural resource management.¹¹⁸

CSR-related environmental capacity building may be seen as the cornerstone of sustainable development. Whereas States may oversee, implement, and enforce environmental laws and regulations, MNEs possess the unique capacity to develop new technologies relating to recycling, energy alternatives to finite natural resources, cleaner air production, and others.¹¹⁹ States, even developed ones, do not have this technological capacity. If this is further coupled with the industry’s contribution to human capital and social development through the creation of productive employment,¹²⁰ it is evident that MNEs are essentially the driving force behind sustainable development, even though the legal framework is drawn up by States. The recurrent theme behind the OECD Guidelines, the Global Compact, and other relevant instruments rests on the application of a) sound environmental management; b) the precautionary approach fitted to industry needs; c) cleaner production, recycling, and use of renewable resources through technological innovation, and the sharing of such innovation, and d) public disclosure and consultation with stakeholders.

The combined application of the precautionary approach and sound environmental management requires that corporations either refrain from a particular operation that may produce potential, but unknown at the time of action, adverse environmental consequences, or avoid lack of full scientific certainty as justification for postponing cost-effective mea-

Petroleum Environment Capacity Enhancement (CAPECE) Project: Eligibility Report, Inspection Panel Report and Recommendation, (July 24, 2003).

¹¹⁷ The World Bank Group adheres to environmental guidelines established in the World Bank’s, *Pollution Prevention and Abatement Handbook* (1998), part III; This places great emphasis on the principle of sustainable development. World Bank Group, *Pollution Prevention and Abatement Handbook: Towards Cleaner Production*, § III, Doc. No. 19128, (1998), at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1999/06/03/000094946_99040905052283/Rendered/PDF/multi0page.pdf.

¹¹⁸ World Bank Group, *MIGA’s Environmental and Social Review Procedures* (1999), available at http://www.miga.org/screens/policies/disclose/soc_rev.htm.

¹¹⁹ AGENDA 21: THE UNITED NATIONS PROGRAMME OF ACTION FROM RIO, *supra* note 17, § 30.1-4.

¹²⁰ *Report of the Secretary-General on Industry and Sustainable Development*, U.N. ESCOR, 6th Sess., U.N. Doc. E/CN.17/1998/4 (1998), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N98/023/48/PDF/N9802348.pdf?OpenElement>.

asures to prevent environmental degradation.¹²¹ The Global Compact succinctly merges the two concepts for the purposes of a business approach by noting MNE benefits in terms of insurance costs, company image, and long-term benefits. This may be achieved through the mechanisms of environmental risk assessment, life cycle assessment, environmental impact assessment, and strategic environmental assessment.¹²² These mechanisms benefit from and require full public disclosure and consultation with all concerned stakeholders.¹²³ As far as the use of technology in mitigating environmental dangers is concerned, or the development of renewable resources, a significant number of MNEs gave specific examples in their replies to the Global Compact of how they had benefited financially from recycling, use of alternative energy and environmentally friendly resources, or how their staff had, as a response to such policies being circulated in the firm, taken initiatives to explore or develop these avenues.¹²⁴

Let us now examine the enforcement of corporate social responsibility through voluntary and non-voluntary mechanisms.

V. ENFORCEMENT OF CSR

In previous sections we have made references to CSR enforcement mechanisms, whether explicitly or implicitly. Again, we stress the point that as CSR is akin to a voluntary assumption of obligations toward stakeholders; external enforcement mechanisms would seem to be redundant. This is not so on account of two factors. First, corporations themselves wish to publicly communicate to their stakeholders their good corporate behavior in a verifiable, reliable and accessible manner. Second, we have seen the emerging conflicts between those segments of government and society that desire to “de-voluntarize” particular aspects of CSR and bring it within the ambit of the public domain. To some extent, therefore, in this latter case we are talking about public corporate responsibility with a bearing on social matters. The practical dimension of this approach corresponds to domestic legislation, a string of recent lawsuits against MNEs – in the United States and United Kingdom – for acts committed outside the home State, and complaints brought before public international loan and guarantee agencies, particularly the World Bank’s Inspection Panel and MIGA’s Ombudsman.¹²⁵ On the other hand, where MNEs assume voluntary obligations they subscribe to a wide variety of social reporting mechanisms, CSR management and economic corporate

¹²¹ *OECD Guidelines*, *supra* note 6, at 23. See *Rio Declaration*, *supra* note 13, Principle 15; *Global Compact*, *supra* note 85, Principles 3-6.

¹²² *Guide to the Global Compact*, *supra* note 42, at 54.

¹²³ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, June 25, 1998, 38 I.L.M. 517 (1999).

¹²⁴ *Guide to the Global Compact*, *supra* note 42, at 61-63.

¹²⁵ See below sections V.D and V.E.

strategies, all of which are directly related to a corporation's marketing strategy and profile. Let us now proceed to examine these in the context within which they arise.

A. *Voluntary Social Reporting*

Besides the few instances of domestic legislation demanding that certain corporations submit social and environmental reports (or submit the information as part of their financial reports¹²⁶) all other reporting initiatives are voluntary. As of 2002, KPMG reported that 45% of Global Fortune Top (GFT) companies produce environmental, social, or sustainability reports, in addition to their financial reports. A small part of these are even independently verified.¹²⁷ For the purposes of human rights broadly understood the number could be even smaller, since health, safety, and environment were found to be the most common types of reports.¹²⁸ The reporting of financial, social, and environmental information within single or separate reports is known as "triple bottom line."¹²⁹ The two major public international CSR guidelines, the UN Global Compact and the OECD Guidelines, do not themselves contain a particular reporting mechanism to which corporations are invited to subscribe. Nonetheless, the Global Compact requires that participating companies publish in their annual report (or similar corporate report) a "description of the ways in which [they are] supporting the Global Compact and its nine principles,"¹³⁰ advocate the principles at the same time through other public communication vehicles, and incorporate them at the management level. Corporations are further encouraged to attend the Compact's Global Policy Dialogues, establish local promotional structures, share their knowledge and experience, and establish partnership projects with UN agencies and civil society organizations that are aligned with UN development goals. The OECD Guidelines similarly promote high quality standards for disclosure, accounting, and audit of financial and non-financial information, all of which should be publicly reported.¹³¹ This concept includes information relating to corporate governance structures, company objectives, share ownership, and voting rights. Most importantly, the OECD Council decided to oblige adhering States to establish National Contact Points (NCPs), whose function is to

¹²⁶ 15 U.S.C. § 7264 (2004); see the French Law on New Economic Regulations, *supra* note 77.

¹²⁷ KPMG, INTERNATIONAL SURVEY ON CORPORATE SUSTAINABILITY REPORTING (2002), at <http://www.wimm.nl/publicaties/KPMG2002.pdf>.

¹²⁸ *Id.*

¹²⁹ See S. ZADEK ET AL., BUILDING CORPORATE ACCOUNTABILITY: EMERGING PRACTICES IN SOCIAL AND ETHICAL ACCOUNTING, AUDITING AND REPORTING (1997).

¹³⁰ *Guide to the Global Compact*, *supra* note 42, at 7.

¹³¹ *OECD Guidelines*, *supra* note 6, at 20.

undertake promotional activities and assist MNEs in the application of and resolution of disputes arising from the Guidelines.

As already noted in previous sections, the OECD Guidelines and the Global Compact recognize the importance and credibility of private or NGO-based reporting mechanisms. Perhaps the most important among these is the Global Reporting Initiative (GRI), which is partly supported by the UNDP. Its mission is to develop guidelines for reporting on and verification of economic, environmental, and social performance.¹³² The GRI guidelines serve as a performance indicator for the corporation, as well as a measure of comparison within a particular industry. Reports prepared on the basis of the GRI guidelines should be transparent, inclusive (i.e. involve the views of all stakeholders), auditable, complete, relevant, built within a sustainability context, accurate, neutral, comparable, clear, and timely.¹³³ While some MNEs prefer to produce their own reports based on the GRI or other guidelines, most financial auditing firms currently provide CSR reporting as an additional product.¹³⁴

The 2002 Johannesburg Implementation Plan seems to take the view that mere voluntary reporting is insufficient, having found participants in agreement about “actively promot[ing] corporate responsibility and accountability, based on the Rio principles, including through the full development and effective implementation of intergovernmental agreements, international initiatives, public-private partnerships and appropriate national regulation and support[ing] continuous improvement in corporate practices in all countries.”¹³⁵

¹³² *Sustainability Reporting Guidelines*, Global Reporting Initiative 1 (2002), available at http://www.globalreporting.org/guidelines/2002/gri_2002_guidelines.pdf (last visited Sept. 19, 2004).

¹³³ *Id.* at 23. Standards are also endorsed in the EC Commission CSR Green Paper, *supra* note 35, at 19. [Social Accountability 8000 (SA8000), designed as a labor standard, is premised on existing International Standardisation Organisation (ISO) quality standards. The ISO is a non-governmental organization, but composed of national standards institutes. It has developed more than 11,000 international uniform standards to facilitate international exchange of goods and services, but has recently developed ISO 9000 (quality assurance systems management) and ISO 14000 (an environmental systems management), both of which constitute generic standards applicable to a wide range of industries and services. ISO processes have been critical of MNEs and developed State bias due to their dominance therein. International Standardisation Organisation, www.iso.org; see Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 *ECOLOGY L.Q.* 479 (1995).

¹³⁴ KPMG, *BEYOND THE NUMBERS: HOW LEADING ORGANIZATIONS ARE LINKING VALUES WITH VALUE TO GAIN COMPETITIVE ADVANTAGE* (2000), at <http://www.kpmg.com/services/content.asp?11id=10&12id=0&cid=461>.

¹³⁵ *Plan of Implementation of the World Summit on Sustainable Development*, WSSD, Annex, para. 49, U.N. Doc. A/CONF.199/20 (2002) available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf.

A merging of the two opposing forces, i.e. voluntary reporting and national or intergovernmental regulation, is inevitable, and in some countries a reality with which corporations must live. In any event, since the production of voluntary reports is also aimed at stakeholders, including consumers, these will only be reliable where they contain the parameters specified above by the GRI, as consumer groups and interested NGOs will scrupulously seek to verify every statement made.

B. *CSR Integrated Management and Corporate Governance*

Since CSR is founded on the reasoning that the company owes duties not only to its shareholders but also its stakeholders, it follows that corporate governance structures and management regimes that accommodate the former to the detriment of the latter must be replaced. Contemporary corporate governance, whether law-based¹³⁶ or otherwise, requires transparency with regard to major share ownership and voting rights, independence of board members and key executives, precise information on their remuneration, and consultation with stakeholders and others. The necessity of such transparency is confirmed not only by recent corporate scandals, but has even prior to these been incorporated into major international initiatives, particularly the 1999 OECD Principles of Corporate Governance,¹³⁷ and the OECD Guidelines for MNEs,¹³⁸ which adopt the corporate governance provisions of the Principles. The OECD Corporate Governance Principles, moreover, encourage member States to provide effective redress for violation of stakeholder rights where these are protected by law.¹³⁹

Ultimately, the adoption of a CSR approach requires that it become an integral part of corporate strategic planning and routine operational performance.¹⁴⁰ CSR due diligence must persist throughout the managerial structure and into the entire workforce through constant training and evaluation of strategies. For outsourcing MNEs, this obligation extends to suppliers and other agents. In order to ensure CSR compliance at all levels of management and production, some corporations have established CSR departments. This ethical aspect of managerial procedures must foremost be incorporated into the curricula of business schools and taught as an intrinsic component of business degrees.

¹³⁶ See, e.g., 15 U.S.C §§ 7231-7266 (2004).

¹³⁷ *OECD Principles*, *supra* note 6, Principle IV.

¹³⁸ *OECD Guidelines*, *supra* note 6, at 20.

¹³⁹ *OECD Principles*, *supra* note 6, Principle III(B).

¹⁴⁰ See Green Paper, *supra* note 35, at 17. See also *White Paper on Corporate Governance in Russia* 20, Russian Corporate Governance Roundtable (Apr. 15, 2002), available at <http://www.oecd.org/dataoecd/10/3/2789982.pdf> (last visited Sept. 19, 2004), where the general lack of CSR and reporting mechanisms is noted.

C. *A Marketing Approach to Voluntary Compliance*

Corporations are not philanthropic institutions, even if at times they purport to also serve that function. Not only have they never led social or environmental developments, they have been the prime beneficiaries of the evils associated with colonialism and oppression in the developing world. Why give it up when you can have it on the plate? Law cannot adequately explain the voluntary drive towards CSR, nor the strategic marketing choices associated with it. While most choices are driven by market forces, others are premised on optimal productivity indicators.

Exposure of a corporation's egregious social or environmental record to public attention is often followed by brand image deflation (which frequently results in reduction of sales), a drop in share price and loss of share confidence, difficulties in attracting investment, possible law suits, and other negative effects. The relationship, therefore, between a good brand image or profile and CSR is apparent. This has given rise to a marketing mechanism that maximizes good brand image, so-called Cause-Related Marketing (CRM). Cause-related marketing is "[a] commercial activity by which businesses and charities or good causes form a partnership with each other to market an image, product or service for mutual benefit."¹⁴¹ Most, if not all, MNEs are now associated with independent charitable organizations, or similar foundations which they have established.

Closely related is the increasing use of social or eco-labeling, through which the social or environmental processes and conditions relating to the manufacture of a product are communicated to consumers. At present, there does not exist a universally accepted labeling standard; rather, these are created by NGOs or by sector-specific industry initiatives.¹⁴² In the E.U., labels are a step beyond the consumer's right to information, and the Union is promoting the standardization of eco-labeling procedures on the basis of ISO 14021 (1999).¹⁴³

Evidence suggests that the public's perception of a business has an effect on that business's value from a stock market point of view. Coca Cola's Belgian contamination scare in 1999, for example, coincided with a

¹⁴¹ S. Adkins, *Cause Related Marketing: who cares wins*, in ICC GUIDE TO GLOBAL CORPORATE SOCIAL RESPONSIBILITY 50, 51 (2003).

¹⁴² See generally ENVIRONMENTAL LABELLING PROGRAMMES: INTERNATIONAL TRADE LAW IMPLICATIONS (Arthur E. Appleton ed., 1997); Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205 (1996).

¹⁴³ Corporate Social Responsibility: A Business Contribution to Sustainable Development, document based on COM(2002)347 final, 20 available at http://europa.eu.int/comm/employment_social/soc-dial/csr/csr2002_col_en.pdf.

decline of its share price by about 40%.¹⁴⁴ Moreover, stock exchanges have seized on the importance of CSR. As a result, FTSE and Dow Jones companies are listed on the FTSE4GOOD and DJSI indices, where they are able to satisfy certain conditions relating to the environment, sustainability, human and labor rights, and stakeholder relations.¹⁴⁵ Although the financial impact of these initiatives is uncertain, such listings are of primary concern to socially responsible investing, explained below.

Socially responsible investing (SRI) is also closely related to a CSR marketing approach. For our purposes, SRI means two things on the basis of either a public or a private function: the public function, usually instituted by law, obliges corporations to minimize financial risks to directly affected stakeholders through the implementation of transparent, financially sound, and efficient risk management mechanisms. Its principal application is in the field of pension funds.¹⁴⁶ However, SRI has given rise to questions regarding the investment in or divestment of projects on the basis of their respect of sustainability and social growth. In this connection two SRI approaches may be identified: a) “investment fund screening,” and b) shareholder initiatives. Investment fund screening refers to basing investment in publicly traded corporate securities from investment portfolios on the social or environmental performance of the company.¹⁴⁷ The same notion applies vis-à-vis particular projects. Shareholder initiatives, on the other hand, involve the exercise of rights accruing from shareholding in order to influence corporate social behavior. This may take the form of tabling voting shareholder resolutions,¹⁴⁸ posing questions at annual or other meetings, and/or resorting to informal action with the management and board.¹⁴⁹

Finally, many other reasons are cited for the payoff of socially responsible corporate behavior, such as enhancing employee loyalty and productivity, reduced operating costs, and staving off increased regulatory

¹⁴⁴ A. Fitzsimmons, J. Farr, *Corporate Social Responsibility, Reputation and Stock Market Value: A Valuable Relationship*, in ICC, *GUIDE TO GLOBAL CORPORATE SOCIAL RESPONSIBILITY*, supra note 36, 114, 115.

¹⁴⁵ *FTSE4Good Index Series*, FTSE Group, http://www.ftse4good.com/media_centre/factsheets/FTSE4Good.pdf (last visited Sept. 9, 2004).

¹⁴⁶ See *Cowan v. Scargill*, 1 Ch. 270, 287 (1985).

¹⁴⁷ See, e.g., Social Investment Forum, <http://www.socialinvest.org/Areas/SRI/Guide/Screening.htm> (last visited Sept. 9, 2004).

¹⁴⁸ For example, Procter & Gamble shareholders filed a resolution demanding that the company start buying Fair Trade Certified Coffee, *Coffee Crisis Policy Report*, at http://www.iccr.org/products/proxy_book03/gca/coffee_p&g.htm (last visited Sept. 9, 2004).

¹⁴⁹ See generally Maria O'Brien Hylton, *Socially Responsible Investing: Doing Good Versus Doing Well in an Inefficient Market*, 42 AM. U. L. REV. 2, 14 (1992) (arguing that particular forms of social investing may not result in below-market returns).

oversight.¹⁵⁰ Ultimately, however, different corporations do not share the same goals or marketing requirements, and thus the importance of any one of the marketing-related factors indicated in this section is not self-evident in every case.

D. *Suits Against MNEs and Forum Non Conveniens*

Traditionally, suits against subsidiaries were not entertained in the forum of the parent company. The issue is one of jurisdiction initially, but it also concerns the forum's foreign policy. Suits against subsidiaries in the United Kingdom and the United States have urged MNEs to request the stay of proceedings in tort on the basis of the doctrine of *forum non conveniens*, according to which the disputed case should be brought before a more natural and appropriate forum, i.e. that of the subsidiary. The doctrine was accepted into English law by the House of Lords in the *Spiliada* case,¹⁵¹ where a two-pronged test was set out for determining *forum non conveniens* requests. The defendant is first required to demonstrate that another forum is more appropriate in the interest of the parties and the dictates of justice. Once this burden is discharged, the court will grant a stay and declare itself an inappropriate forum unless the plaintiff can show that special circumstances exist whereby substantial justice cannot be pursued in the foreign jurisdiction. Examples of special circumstances raised against MNEs that have been accepted include time bars in other jurisdictions¹⁵² and the lack of appropriate legal aid and contingency fee arrangements.¹⁵³ The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which specifies that MNEs can be sued in the forum of the parent, should make the *forum non conveniens* claim redundant.¹⁵⁴

In the United States, even if non-residents establish jurisdiction under federal due process rules, particularly the Aliens Tort Claims Act, the defendant may object on the basis of *forum non conveniens*. Ideally, U.S.

¹⁵⁰ See TAPSCOTT & TICOLL, *supra* note 5, who argue that corporate transparency is inevitable, which rather than being costly in fact enhances shareholder value.

¹⁵¹ *Spiliada Maritime Corp v. Cansulex Ltd.*, 1 A.C. 460 (1987).

¹⁵² *Id.*

¹⁵³ See *Connelly v. R.T.Z. Corp. Plc.*, 3 W.L.R. 373 (H.L.(E.) 1997); *Lubbe v. Cape Plc.*, 1 WLR 1545, 1604 (H.L.(E.) 2000).

¹⁵⁴ European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, September 27, 1968, 8 I.L.M. 229. As far as E.U. member States are concerned, Art. 27 of Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, states that "where proceedings involving the same cause of action and between the same parties are brought in the courts of different member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established". Council Regulation 44/2001, art. 27, 2001 O.J. (L 12) 1, 9.

citizens connected with a subsidiary abroad are best suited to institute a case in the United States. The U.S. test of *forum non conveniens* is similar to that in *Spiliada*, and much depends on the discretion of the court, which must decide whether an alternative forum exists and then balance public and private interest factors.¹⁵⁵ The second part of the test requires the court to assess whether the defendant is amenable to process in the foreign jurisdiction. Thus, in the Bhopal case, the New York court stayed proceedings because it held that India was a capable forum in every sense.¹⁵⁶ In the *sub judice* case of *Bowoto v. ChevronTexaco*, a California court refused on April 7, 2000 to stay proceedings on the grounds that Nigeria was the appropriate forum in respect to allegations that Chevron had authorized the shooting of protestors at its Parabe offshore platform in Nigeria and the destruction of two adjacent villages.¹⁵⁷

The above cases clearly indicate that courts will not readily stay proceedings against the acts of subsidiaries on the basis of *forum non conveniens*, and this conclusion is further reinforced in the European context in light of the Brussels Convention. The impact of Council Regulation 44/2001 should not have any impact on suits against subsidiaries outside the European Union where the vast majority of the abuses take place.

E. *The "Scourge" of the Extractive Industry*

Thus far we have provided a picture of the legal and voluntary framework of corporate social responsibility. On paper, while not perfect, most of it looks bold, enlightened, and promising, and some of it is exactly that. However, companies in the extraction industry (mining and hydrocarbon extraction) are reported to have committed egregious human rights violations. Most recently, and despite its human rights rhetoric, Shell resumed operations in the Niger Delta in Nigeria despite the fact that government forces crushed a local uprising that left sixty people dead.¹⁵⁸ Although some aspects of inter-tribal rivalry may be attributed to the violence, the protesters argued that extraction operations resulted in river erosion and serious environmental degradation, and demanded clean water, electricity, schools, and clinics for their villages. The U.S. government subsequently donated seven patrol vessels to help government forces police the creeks and swamps of the Delta.¹⁵⁹

In a more impressive case concerning a Canadian gold-mining MNE in Tanzania, one is astonished by MIGA's cover up, through its

¹⁵⁵ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

¹⁵⁶ *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 634 F. Supp. 842, 866-867 (1986).

¹⁵⁷ See Earthrights International, *Summary of Bowoto v. ChevronTexaco*, at <http://www.earthrights.org/chevron/index.shtml>.

¹⁵⁸ SriMedia, *Niger Delta: Two Villages Destroyed; Shell & Chevron to Resume Work*, April 7, 2003, at http://www.srimedia.com/artman/publish/printer_495.shtml.

¹⁵⁹ *Id.*

Ombudsman, of human rights violations, including killings reminiscent of the practices employed by the most brutal regimes of the past century. In 1994 the Tanzanian government granted a prospecting license for the Bulyahulu gold mine to a subsidiary of Sutton Resources, later purchased by Barrick Gold in 1999, which in turn managed to secure MIGA political insurance cover. The area adjacent to the mine was scattered with small-scale miners, many of whom had been generating income from this activity for generations, having established a residential community there. These small-scale miners challenged a government decree evicting them from the area in 1995 and in any event continued to dig pits as usual. In July-August 1996, government forces forcefully cleared the area, resulting in the live burial of 52 people in their pits, while thousands were evacuated without any relocation plan. The Lawyer's Environmental Action Team (LEAT), a Tanzanian NGO, lodged a complaint before MIGA's Ombudsman (CAO) in early 2002. In preliminary meetings between CAO and LEAT it was decided, at the insistence of CAO, that the matter of the killings and forceful evictions prior to 1999 would not be the subject of investigation, being beyond CAO mandate, so LEAT challenged breaches relating to MIGA's social and environmental safeguard policies and due diligence procedures. Nonetheless, in its first summary report of October 21, 2002, CAO accused LEAT of making undocumented assertions of the 52 killings, stating moreover that its own investigative team revealed that not only was there no list of names for the dead, but relatives and friends of the alleged deceased were aware of their whereabouts subsequent to the events.¹⁶⁰ The CAO Report is scandalous for a public international institution; as a result of this case the CAO will have to perform a significant turnaround to regain any sense of legitimacy, and certainly the institutional environment must radically change. Not only did CAO make an assessment of the killings despite its prior refusal to accept a complaint in that regard, but the report deliberately falsified the fact that none of the people interviewed by its investigative team admitted that any one of the 52 deceased was ever seen after the July-August 1996 events. The translator and liaison for the two-member CAO investigative team was a LEAT member who spoke the local language. CAO similarly lied in its Report when asserting that LEAT failed to produce, after request, the names of the 52 deceased, as LEAT had already provided this list in the complaint's supporting documentation.¹⁶¹

The CAO Report chastises LEAT for having brought the case before it, and concludes in the following manner:

The complaint before the CAO was one of a scattershot of approaches mainly oriented around maximum publicity for individu-

¹⁶⁰ See CAO, *Assessment Report Summary: Complaint regarding MIGA's guarantee of the Bulyahulu Gold Mine, Tanzania 7* (2002), available at <http://www.cao-ombudsman.org/pdfs/buly%20final.doc>.

¹⁶¹ See LEAT's response to CAO (Dec. 2, 2002), on file with the author.

als within LEAT and their domestic agendas. . . . To repeat an allegation that one knows not to be true, especially an allegation of murder, has consequences. It has consequences on the business reputation and trading ability of a private enterprise and on the individuals concerned.

There may be legal consequences to such actions. The CAO is distressed that some NGOs have felt that they may act with impunity in this case. In fact the CAO believes there is no impunity. The consequence is a backlash against the “non-accountability” of NGOs.¹⁶²

This author is not under the illusion that such forms of severe persecution of human rights activists and disregard of human life in favor of material profit had disappeared. However, the scale of complicity of supposed impartial public institutions, such as Ombudspersons that have been entrusted with a duty to ensure that human rights are respected by corporations in their dealings with them, is shocking. This is perhaps a message that voluntary compliance is not the preferred solution for every industry; in the present case, gold extracting companies do not sell directly to consumer markets, and thus have little concern about brand image marketing.

VI. CONCLUSION

Multinational corporations have a significant role to play in promoting sustainable development and alleviating global poverty. They not only possess the potential and resources, but the power to be persuasive and be heard. Until the early 1990s the attractiveness of foreign investment in less developed countries and the yet immature western consumer public allowed MNEs to bribe, perform illegal pricing transfers, participate in or be complicit in human rights violations, disrespect fundamental labor rights, etc, since neither the national law of the parent company nor international law could reach into the domestic affairs of other States. The rapid growth in telecommunications, human rights activism, and increased consumer awareness led companies and corporate lawyers to contemplate the significance of stakeholders other than shareholders. Companies, to some extent, were forced to re-evaluate their operational processes and managerial mechanisms, despite the fact that no binding laws obliged them to do so. This is the third and present stage in the evolution of CSR.

Although anti-competitive practices, bribery, and most forms of tax evasion or fraud are justiciable on the basis of extra-territorial legislation, the extent to which MNEs are bound to respect human rights, labor rights, and environmental protection in the host State is circumscribed by host State laws and MNE self-regulation. This self-regulation is reinforced by public international non-enforceable instruments, such as the

¹⁶² CAO, *supra* note 160, at 11.

OECD Guidelines for MNEs and the UN Global Compact, as well as NGO-based guidelines or reporting standards, such as the Caux Round Table, the Global Sullivan Principles and others. Based on the frequency of their use, their sponsors and their credibility, some of these are more influential than others. There is no telling whether a set of principles regarding MNE behavior has crystallized into customary law for the simple fact that conflicting host and parent State practice is conflicting and imprecise. In any event, the role of MNEs in influencing the creation or not of such customary law is a matter that has not been examined in the legal literature.

MNEs have through their Codes of Business Ethics accepted the admonitions of the fundamental principles established in the major Guidelines, some to a greater and others to a lesser extent. These include respect for labor rights, environmental protection, some human rights, and abstention from corruption, anti-trust, and illegal pricing transfers. While social and environmental reporting is practiced on a voluntary basis by a significant number of MNEs, laws in E.U. member States and the United States have recently established similar obligations. Similarly, traditional corporate governance schemes are being challenged by legislation and international initiatives in response to large corporate scandals resulting in significant job losses and accompanying financial ruin. U.S. and European courts increasingly ignore the doctrine of *forum non conveniens* – the 1968 Brussels Convention is a further aid towards that direction – allowing suits against parent companies as a result of the actions of their subsidiaries. We are far, however, from a satisfactory legal regime that allows for sufficient self-regulation that fosters business entrepreneurial spirit while legally obliging corporations to integrate particular human rights, labor rights, and environmental protection standards into their daily workings across the world.

One might expect World Bank and MIGA social and environmental policies would have the effect of curtailing corporate abuses in LDCs. To a certain extent this is true, and corporations do as a rule adhere to these policies, formulating sufficient environmental and social impact and risk assessment programs. We like to think that the relatively few cases brought before the World Bank Inspection Panel and the MIGA Ombudsman (CAO) are a direct result of the soundness of such programs and their thorough implementation. However, the record of these bodies to date does not convince us that they are adequately equipped to deal with MNEs that are near to completion of an investment project after having spent many millions of dollars only to be stopped by “illiterate peasants” and “annoying NGOs.” The CAO Report on the Bulyanhulu Gold Mine in Tanzania is disturbing because of its attempt to cover up acts of murder and forced evacuation and its utter disrespect for human life and suffering. We hope this reflects on only the particular Ombudsman, not the office of the CAO or MIGA. Other environmental and human rights abuses by MNEs in the mining and apparel industries, espe-

cially the former, have increased in recent years. Since the international community finds itself unable to adopt concrete enforceable measures, States themselves are realizing that only they can provide the regulation needed in order to alleviate world poverty and contribute to sustainable development in the developing world.

Finally, the criminal liability of MNEs, and a gradual recognition of their limited international legal personality, was recently reflected by the Report of the Security Council-appointed Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of the Congo.¹⁶³ The Report underlined the direct or indirect implication of 157 corporations, the operations of which fueled the purchase of arms, the perpetration of war crimes and crimes against humanity, and the exploitation of Congo's natural resources to the detriment of its people.¹⁶⁴ Moreover, the Prosecutor of the International Criminal Court (ICC), in his Report to the Assembly of States Parties on 8 September 2003, emphasized that "those who direct mining operations, sell diamonds or gold extracted [as a result of resource exploitation and general violence taking place in the Congo], launder the dirty money or provide weapons could also be the authors of the crimes, even if they are based in other countries".¹⁶⁵ This statement, which demonstrates ICC prosecutorial policy in what will be the Court's first case, undoubtedly opens the door for corporate liability and paves the way for restitution to victims on the basis of proceeds from illegal operations.¹⁶⁶

¹⁶³ Letter dated 23 October 2003 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2003/1027 (2003), available at http://www.un.org/Docs/sc/unsc_presandsg_letters03.html.

¹⁶⁴ See *id.* paras. 10-13.

¹⁶⁵ Luis Moreno-Ocampo, *Second Assembly of States Parties to the Rome Statute of the International Criminal Court: Report of the Prosecutor of the ICC 4* (2003), at http://www.icc-cpi.int/library/organs/otp/030909_prosecutor_speech.pdf.

¹⁶⁶ United Nations: Rome Statute of the International Criminal Court, arts. 79, 109, 37 I.L.M. 999, U.N. Doc. A/CONF.183/9 (July 17, 1998).

