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CORPORATE SOCIAL RESPONSIBILITY: CURRENT STATUS AND FUTURE EVOLUTION*

Joe W. (Chip) Pitts III[±]

“The peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of [laws] in one part of the world is felt everywhere.” – Immanuel Kant, Perpetual Peace (1795)¹

* This article is based on a chapter written for a new book examining the law of corporate social responsibility, *Corporate Social Responsibility: A Legal Analysis*, co-authored and edited by the author. MICHAEL KERR, RICHARD JANDA, & CHIP PITTS, *CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS* (Joe W. (Chip) Pitts ed., 2009). He is grateful to his coauthors Michael Kerr and Richard Janda for their kind input and permission to re-use material from the book.

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¹ IMMAUNEL KANT, *POLITICAL WRITINGS* 107-08 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991), *quoted in* Martha Nussbaum, *Cultivating Humanity in Legal Education*, 70 U. CHI. L. REV. 265, 265 (2003). Nussbaum explained her use of the quote:

I alter Nisbet’s translation of ‘Recht’ from ‘right’ to ‘law’. Here as elsewhere, Kant uses ‘Recht’ to translate Latin *ius*, frequently including the Latin in parentheses after the German. Often he alludes to classical ideas of natural law, *ius naturae*. Kant’s continuity with Cicero, Seneca, and other

INTRODUCTION

Whether or not those words were true when Kant penned them over two centuries ago, they are truer today than ever before in human history, and will resonate even more profoundly in the future. The current interrelated financial, economic, climate, energy, food, water, political, and security crises affecting the globe only highlight the historically unprecedented degree of interconnectivity and interdependence. Last year alone, the potent combination of social networking,² mobile internet devices,³ location mapping,⁴ text messaging,⁵ video,⁶ and collaboration⁷ technologies more integrated with users' lives have merged online and offline advocacy to inspire millions of people across the globe to protest against the Colombian revolutionaries,⁸ map the genocide in Darfur⁹ as well

Roman authors can best be appreciated if we bear these facts in mind.

Nussbaum, *supra*, at 279 n.1.

² Popular examples are Facebook, <http://www.facebook.com> (last visited Mar. 10, 2009), and Myspace, <http://www.myspace.com> (last visited Mar. 10, 2009).

³ Especially web-enabled smart phones with camera and video capabilities as well as voice, email, and data.

⁴ Such as global positioning satellite technologies complementing prior cell-tower triangulation technologies, used in conjunction with Google Maps or similar geographic plotting interfaces to offer location-specific services. See Google Maps, <http://maps.google.com> (last visited Mar. 10, 2009).

⁵ Including, for example, short message service (SMS) messages as well as more recent technologies like Twitter, <http://twitter.com> (last visited Mar. 10, 2009).

⁶ Such as YouTube, <http://www.youtube.com> (last visited Mar. 10, 2009).

⁷ Such as open-source MediaWiki software, www.mediawiki.org (last visited Mar. 10, 2009), Google Groups, <http://groups.google.com> (last visited Mar. 10, 2009), and Wetpaint, <http://www.wetpaint.com> (last visited Mar. 10, 2009), among others.

⁸ See, e.g., John D. Negroponte, U.S. Deputy Sec'y of State, Remarks at the 38th Assembly of the Organization of American States (June 3, 2008) ("[A] young engineer launched 'Un Millon de Voces Contra Las FARC' on the Facebook website. Within days, hundreds of thousands of youth added their

as the violence in Kenya,¹⁰ and organize strikes and civil disobedience in Egypt.¹¹ The billions of cell phones in the world will increasingly be used to record, upload, forward, and display corporate and other abuses, whether of sweatshops employing child labor, pipeline leaks, trafficking of women and children, or corporate resources used to support crimes against humanity or genocide.¹² People everywhere – even in the slums of Brazil or the jungles of Peru – can immediately see disparities in living and environmental conditions via smart phones, satellite television and internet. These new, powerful, ubiquitous, and interactive communications technologies help make possible efficient cross-border financial flows, just-in-time production, and economic globalization, to be sure; but they also empower rapid, bottom-up¹³ democratic “WikiAdvocacy”¹⁴ by individuals, “citizen journalist” bloggers, and self-organizing coalitions, while simultaneously allowing greater scrutiny and pressure from investors, consumers, communities, established NGOs, and other market monitors.¹⁵ WikiAdvocacy generally supports and works to extend existing corporate social responsibility

voices to his, and on February 3 and 4, millions more did so in person in over 100 cities around the world.”).

⁹ See Eyes on Darfur, <http://www.eyesondarfur.org> (last visited Mar. 10, 2009).

¹⁰ See Posting to The Ushahidi Blog, <http://blog.ushahidi.com/index.php/category/reports/> (Mar. 10, 2009).

¹¹ Michael Geist, *Internet Matures as Tool for Political Advocacy*, TORONTO STAR, June 2, 2008, at B3, available at <http://www.thestar.com/article/435085>.

¹² Indeed, recording such abuse by the powerful is the idea behind “Witness,” the global NGO founded by Peter Gabriel and others. See Witness, <http://witness.org> (last visited Mar. 10, 2009).

¹³ “Bottom-up” in terms of empowering those previously on the lower rungs of hierarchy, and as contrasted with “top-down”; in reality, the bottom-up processes often enable moves toward peer-to-peer relationships.

¹⁴ A term coined by the author in 2006 to represent the use of open-source, collaborative technologies to advocate for change.

¹⁵ Cf. DON TAPSCOTT & DAVID TICOLL, *THE NAKED CORPORATION: HOW THE AGE OF TRANSPARENCY WILL REVOLUTIONIZE BUSINESS* (2003).

(CSR) principles, monitoring and accountability mechanisms, and amounts to a powerful independent force on its own.

This historically unprecedented degree of technology-driven transparency, scrutiny, and accountability is likely the most important and enduring of all the drivers for CSR.¹⁶ A “super-driver” underlying most of the other CSR drivers (such as brand/reputation assurance, business productivity, risk management, employee recruitment and retention), it makes this new global iteration of CSR different in kind and degree from the old nineteenth and twentieth century “shareholder versus stakeholder” debates, and different as well from previous CSR phases that, generally speaking, have evolved toward more strategic, socially valuable and enduring forms, such as:¹⁷

- ‘compliance’ with legal minimums and creating compliance systems (often prompted by company or industry scandals and viewed as a cost vs. an investment);
- robber-baron type corporate philanthropy (given in an attempt to offset questionable or harmful practices);
- selective stakeholder consideration and the beginnings of integrated decision-making that incorporates some

¹⁶ Since every age marvels at its new communications and other technologies, a note of caution is probably in order. In 1774, German philosopher Johann Gottfried von Herder said of the emerging and unifying “System of Commerce”: “When has the entire earth ever been so closely joined together, by so few threads? Who has ever had more power and more machines, such that with a single impulse, with a single movement of a finger, entire nations are shaken?” Emma Rothschild, *Who is Europe?: Globalization and the Return of History*, 115 FOREIGN POL’Y 106 (1999).

¹⁷ While this more detailed list of rough historical phases differs from Simon Zadek’s stages of organizational moral development, the evolution as a whole is similar. Simon Zadek, *The Path to Corporate Responsibility*, 82.12 HARV. BUS. REV., Dec. 2004, at 127 Zadek posits five stages: (1) denial (“it’s not our responsibility”), to (2) compliance (“we’ll do just as much as we have to”), to (3) managerial (“our core business will manage the problem and the solution”), to (4) strategic (“we’ll get a competitive edge”), to (5) “civil” (“we’ll make sure others do it”). *Id.*; see also H. Dossing, *The Business Case for CSR*, in INT’L CHAMBER OF COMMERCE UK, GUIDE TO GLOBAL CORPORATE SOCIAL RESPONSIBILITY 34, (2003) (“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.”).

nonfinancial, i.e. social and environmental considerations, but serves mainly short-term business interests (e.g. more efficient energy use and waste disposal);

- “corporate statesmanship” (both in its good form of promoting attention to broader policy issues and its bad form of misguided ideology that in the 20th century sometimes involved overthrowing democratic governments);¹⁸
- Basic risk management and brand/reputation assurance – i.e. to stop losses and preserve/reinforce assets; beginning to apply integrated decision-making that more fully incorporates social and environmental with economic analysis;
- Broader stakeholder consultation, learning, and engagement, and greater transparency and reporting on corporate activities; undertaken also mainly to prevent losses and preserve benefits but perhaps to identify mutual gains as well;
- Strategic philanthropy (philanthropic investment aligned with profit goals and the core business mission, vision, and strategy);¹⁹
- Strategic CSR deploying consistent best practices, more sophisticated risk management and reputation assurance in keeping with a sensible version of the precautionary principle,²⁰ alignment of internal and external

¹⁸ See generally STEPHEN KINZER, *OVERTHROW: AMERICA’S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ* (2006).

¹⁹ Michael E. Porter & Mark R. Kramer, *Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 88-89.

²⁰ Cass Sunstein and others have pointed out that an excessively strong version of the precautionary principle can paralyze action since any course of action involves risks or substitute risks. See, e.g., CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005). Sunstein elaborates on these arguments and develops an anti-catastrophe principle in his more recent book, *Worst-Case Scenarios*. CASS R. SUNSTEIN, *WORST-CASE SCENARIOS* (2007). Without getting into this debate, it is clear at a minimum that softer versions of the precautionary principle that counsel pausing to fully consider the implications of actions, and not using the absence of conclusive scientific evidence to avoid cost-effective precautionary measures, can be invaluable risk management tools for businesses and society.

accountability systems and internal corporate goals with external social goals, and community investment to achieve the long-term business vision, mission, and goals;²¹

- Opportunity creation based on CSR principles, including serving bottom-of-pyramid markets²² and perhaps involving further extensions of related community investment;²³ and
- A system perspective that aligns the corporation and its activities with society and the goals of sustainable development, applies the major CSR principles effectively, and supports a higher level playing field that addresses collective action problems while allowing for continuous improvement.

It is indeed ironic that the same information flows and tools that drive this CSR evolution also enable today's ruthlessly competitive and truly global markets. Perhaps they have not made the world "flat," as Tom Friedman famously argues,²⁴ but the new information and communications technologies and "Wikinomics"²⁵ have certainly made the world "flatter" in the

²¹ Cf. Porter & Kramer, *supra* note 19, at 82.

²² Cf. C. K. PRAHALADAD, *THE FORTUNE AT THE BOTTOM OF THE PYRAMID: ERADICATING POVERTY THROUGH PROFITS* (2005).

²³ Examples of government mandated community investment by corporations include the U.S. Community Reinvestment Act of 1977, 12 U.S.C. §§ 2901-2908 (2006); South Africa's Broad-Based Black Economic Empowerment Act 53 of 2003, *available at* <http://www.info.gov.za/view/DownloadFileAction?id=68031>; Indonesia's Mandatory Corporate Environmental and Social Responsibility Law no. 40 of 2007, *available at* <http://irmadevita.com/wp-content/uploads/2008/04/company-law-uu-40-2007.pdf>; and the various legal requirements for Impact and Benefit Agreements associated with investment in indigenous communities in countries such as Canada and Australia. *See e.g.*, IRENE SOSA & KARYN KEENAN, CANADIAN ENVTL. LAW ASS'N, *IMPACT BENEFIT AGREEMENTS BETWEEN ABORIGINAL COMMUNITIES AND MINING COMPANIES: THEIR USE IN CANADA*, (2001), *available at* <http://cela.ca/uploads/f8e04c51a8e04041f6f7faa046b03a7c/IBAeng.pdf>.

²⁴ THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (Picador 2007) (2005).

²⁵ DON TAPSCOTT & ANTHONY D. WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* (2nd ed. 2008).

sense of empowering companies, groups and individuals to quickly create, spread, and collaborate on digital content. The increased reliance on contracting and reduced transaction costs from today's collaborative technologies are in fact changing the nature of the firm into a leaner, more networked entity.²⁶ In fact, the authors of *Wikinomics* argue that Coase's Law²⁷ has now, in effect, reversed in direction so that it counsels shrinking the formal firm²⁸ (if not necessarily its power and influence). Rather than reducing the firm's power, the outsourcing of previously in-house firm capabilities can actually have the effect of expanding the firm's "sphere of influence" to all those competing for firm business and affected by decisions that ripple through the network.²⁹ Such outsourcing may simultaneously reduce the ability to constrain externalities imposed by the firm's mediating hierarchy (its board of directors and managers).

Barring catastrophe, the two sides of the information and communications revolution – Wikinomics and WikiAdvocacy – will only continue and accelerate. Such drivers arguably have produced at least seven CSR principles that underpin existing

²⁶ Cf. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 131 (2003) ("The story of the company in the last quarter of the twentieth century is of a structure being unbundled. . . . Coase's requirement of the company – it had to do things more efficiently than the open market – was being much more sorely tested.").

²⁷ Shorthand for Coase's assertion that the boundaries of the firm are established when the costs of externalizing allocative decisions using the price mechanism equal the costs of bureaucratic oversight using the firm. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937), reprinted in RONALD H. COASE, *THE FIRM, THE MARKET AND THE LAW* 33, 34-36 (1988).

²⁸ TAPSCOTT & WILLIAMS, *supra* note 25, at 56 (Instead of a firm expanding "until the costs of organizing an extra transaction within the firm become equal to the costs of carrying out the same transaction on the open market," firms today "should shrink until the cost of performing a transaction internally no longer exceeds the cost of performing it externally.").

²⁹ The sphere of influence concept is used to define the CSR obligation of companies under a variety of approaches, including that of the U.N. Global Compact. For further general discussion, see U.N. Global Compact, www.unglobalcompact.org. See, e.g., *RAISING THE BAR: CREATING VALUE WITH THE UNITED NATIONS GLOBAL COMPACT* 22 (Claude Fussler et al. eds., 2004).

law and voluntary initiatives, which now, in turn, influence their future direction.³⁰ A new book I have co-authored and edited, *Corporate Social Responsibility: A Legal Analysis*, describes these principles as (i) integrated decision-making (to incorporate environmental and social as well as economic factors), (ii) stakeholder engagement, (iii) transparency and triple-bottom-line reporting, (iv) respect for and consistent implementation of the highest global environmental and social norms and best practices, (v) the precautionary principle, (vi) accountability, and (vii) community investment. While the occasional tension or contradiction can be found in the specific instantiations of these CSR principles, this is the exception rather than the rule. In the main, the law and voluntary initiatives are largely consistent and complementary in substance, promoting the overall strategic imperative of being more inclusive, socially and environmentally aware, stakeholder-engaged, transparent, and accountable. Taken as a whole, they present an edifice with easily seen outlines and reasonably hard edges that still leave room for experimentation and innovation.

This article begins by describing the “new *lex mercatoria*” of global commerce.³¹ This body of law contributes to the “new global governance” but nevertheless leaves significant gaps needing to be filled if business and social aspirations for a more stable and sustainable system are to be realized. Strengthened CSR principles can contribute significantly to filling those gaps. Next the article confronts the powerful critique of CSR that remains. Then, the article turns toward providing a bird’s eye view of the status of the CSR principles by geographical region –

³⁰ These seven principles and their legal basis in statute, regulations, case law, and “voluntary” initiatives are extensively discussed in *Corporate Social Responsibility: A Legal Analysis*. KERR, *supra* note 1.

³¹ The concept of *lex mercatoria* refers to the medieval “law of merchant” or private law norms (for example, of good faith and fair dealing) that medieval merchants at markets and fairs used to fill the gaps in Roman civil law and other “hard law” of the Middle Ages. Professor Ralph Steinhardt has noted the ways in which several legal regimes from the realms of the market, domestic regulation (such as administrative law and securities law), civil liability, and international regulation are now coming together to form a “new *lex mercatoria*” in the CSR area. See R. Steinhardt, *The New Lex Mercatoria*, in NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston ed., 2005).

including in China and India as examples of the BRIC countries³² and “Second World”³³ countries that are increasingly influencing the global economy. The article then considers the implications of the recent interconnected financial, economic, political, security, climate, and related crises for the future of CSR. Finally, the article highlights proposals for continued legal reforms and examines the prospects that these principles may be embodied in even stronger global frameworks in the future.

This article is written from the perspective of the jurist seeking to discern trends in the law’s development. Despite the increased complexity and pace of change that characterize business, economics, technology, and politics in this newly interdependent and networked world,³⁴ some generalizations can be ventured about how the principles identified are beginning to unfold.

The principle of integrated decision-making represents a body of knowledge, skills, and an attitude or frame of mind that sets the stage for effective implementation of all the other principles. It represents a system perspective that sees business value not merely from a truncated financial point of view, but from the more holistic “triple bottom line” that takes non-financial, social, and environmental results into account. Stakeholder engagement, the second principle, provides an important pathway and methodology for strengthening those triple-bottom-line results. The principle of transparency is both a key expectation forming a prominent feature of the new global business landscape, and an enabler for all the other principles.

³² Brazil, Russia, India, and China. See Dominic Wilson & Roopa Purushothaman, *Dreaming with BRICs: The Path to 2050* (Goldman Sachs Global Economics Paper No. 99, 2003), available at <http://www.gs.com/insight/research/reports/99.pdf>.

³³ PARAG KHANNA, *THE SECOND WORLD: EMPIRES AND INFLUENCE IN THE NEW GLOBAL ORDER* (2008) (defining Second World countries not to mean the wealthiest (generally the OECD, excluding Mexico and Turkey) or the poorest countries (Haiti, for example), or the old socialist bloc nations using that rubric, but the hundred or so countries in the second economic tier that combine rich and poor, developed and developing aspects, and are increasingly influencing global relations – including but not limited to the so-called “BRIC” countries of Brazil, Russia, India and China).

³⁴ Cf. MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY: THE INFORMATION AGE, ECONOMY, SOCIETY AND CULTURE* (2d. ed. 2000).

The principle of consistent best practices emerges as a result of the first three principles (integration, stakeholder engagement, and transparency), forming a substantive core of standards that insists that businesses consistently apply the highest environmental and social standards throughout their business operations, regardless of location. These principles in turn will continue to evolve along with the other CSR principles. Like the other principles, the precautionary principle puts a healthy check on what could otherwise be imprudent action, but if it and the others fail, the accountability principle steps in as the final incentive for the business to “walk its talk.” Community investment is the final principle, and it is perhaps the principle most subject to future evolution, prompting businesses not just to avoid harm but to invest resources in helping to address pressing social and environmental challenges.

I. THE LEGAL CONTEXT OF THE ONCE AND FUTURE CORPORATION

A. THE LEGAL ENVIRONMENT FACING THE “FLATTENED” CORPORATION

Today’s corporations derive from ancient predecessors and have a long pedigree as instruments for collective social purpose, with CSR “in their DNA.” This was the case with the Roman *societates* that developed as a way for nobles to share the burden of guaranteeing taxes collected for public purposes, as well as the *collegia* or corporate guilds formed by merchants and craftsmen lower on the social scale. These latter organizations were similarly supposed to be licensed and anticipated the medieval guilds, towns, universities, and other corporate bodies formed with an eye toward Roman law and which provided “security and fellowship in an otherwise forbidding world.”³⁵ Despite a self-oriented and thus private aspect to early trading and business ventures, the very act of reaching out to cooperate with others to manage risk engaged public values of trust and community. Early companies were often based in trusted relationships of friends and family

³⁵ MICKLETHWAIT & WOOLDRIDGE, *supra* note 26, at 12.

brought to bear on public works projects like roads, bridges, and ensuring water supply. Therefore, businesses would pool investments using limited liability for large infrastructure projects that were considered by the state to be in the public interest.³⁶

Enterprises are inherently and have historically been collective enterprises that transcend the self. The very name “company” derives from the 12th-century term “compagnia” (a Latin compound meaning “breaking bread together”), which points to the origins in trusted, cooperative relationships.³⁷ Public purposes certainly characterized the companies chartered by the early American states, with incorporation granted primarily for public purposes such as schools, roads, canals, banks, and churches.³⁸ And the purposes of some companies became practically indistinguishable from public purposes. For example, the Virginia Company introduced a relatively democratic General Assembly whose members elected the company officers; the Massachusetts Company became the Commonwealth of Massachusetts (with the “freeman” stockholders transformed into citizens).³⁹ Throughout history, the state generally reserved to itself the power to determine what kinds of entity it would permit to come into existence, vetting both the identity of the promoters and the nature of the venture. Corporate social responsibility was thus encoded into the DNA of the firm, since the firm could not come into existence unless it could withstand a valid public purpose test.

The bonds of trust and principles of good faith and fair dealing used by medieval merchants, guilds, and bodies corporate in the medieval *lex mercatoria* (“law of merchant”) reflected that cooperative and beneficial public purpose and sense of mutual responsibility. Corporate leaders continue to

³⁶ See ALFRED F. CONRAD, CORPORATIONS IN PERSPECTIVE (1976).

³⁷ MICKLETHWAIT & WOOLDRIDGE, *supra* note 26, at 8.

³⁸ *Id.* at 43; see also Oscar Handlin, *The Development of the Corporation*, in THE CORPORATION: A THEOLOGICAL INQUIRY 1 (Michael Novak & John W. Cooper eds., 1981); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780-1970 (1970).

³⁹ MICKLETHWAIT & WOOLDRIDGE, *supra* note 26, at 34.

affirm today that corporations also serve public purposes intended to benefit society as a whole.⁴⁰

Yet today's corporation is different in power and, some say, purpose, from its predecessors. As the corporation evolved, law in a sense "looked the other way." Global business flourished – sometimes with horrific consequences including those associated with the often violent chartered companies such as the British and Dutch East Indies companies, the slave trade, and colonialism. Those abuses preceded today's information technology revolution, and thus were generally shielded from scrutiny, with only the most egregious atrocities (such as slavery) slowly generating enough public awareness and opposition to be reformed.⁴¹ Socially productive business flourished as well, with transnational corporations (TNCs) expanding dramatically in number, geographical reach, and power throughout the 20th century. The spread of rapid information technologies has added to competitive pressures but also empowered competitive businesses and businesspeople, driving corporate form and function globally to replicate in many ways the less hierarchical, more networked technological structures themselves.⁴² Corporations have become flattened – that is, less vertically integrated and more reliant on flexible and adaptive open-source contracting and collaboration for both internal and external business models. The benefits to business of this ability to quickly adapt are clear. When businesses adapt to competitive pressures by externalizing costs, however, the detriments to various stakeholders and vulnerable populations can also be clear.

⁴⁰ See, e.g., Corporate Governance and American Competitiveness: Statement of the Business Roundtable (the Leading CEOs of the Top Corporations in the United States) 46 BUS. L. 241, 241 (1990) ("Business corporations in the United States are chartered under the laws of the various states to pursue economic activities that are intended to benefit both the shareholders of the corporation and society as a whole.").

⁴¹ Among the exceptions was the Burgoyne Committee's condemnation of the British East India Company in 1773: "In the East, the laws of society, the laws of nature have been enormously violated . . . Oppression in every shape has ground the faces of the poor defenseless natives; and tyranny in her bloodless form has stalked abroad." MICKLETHWAIT & WOOLDRIDGE, *supra* note 26, at 177.

⁴² See, e.g., PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 12 (2nd. ed., 2007).

As the corporation becomes flat and “virtual,” relying increasingly on a web of outsourced contracts, the legal instruments and remedies that stakeholders have begun to acquire with respect to the corporation threaten to become virtual as well. Can CSR, like ancient property rights that “ran with title,” run with brand and follow the corporation throughout its supply chain? Indeed, there is a potential disjuncture between the flattening process and the growing legal protections that the corporation has achieved for itself. Two such legal protections are the enhanced legal status the corporation has gained in international law and the emergence of a new *lex mercatoria*. These two developments are discussed in turn and related to the emergence of CSR principles.

1. Corporations Achieve Rights Including to Sue Internationally

At the same time as the corporation is changing its character as an entity, corporations have lobbied successfully for important legal rights ranging from intellectual property rights to free speech to due process of law.⁴³ Among the achievements was extension of the protective and empowering cloak of strong and favorable public international law trade and investment rules to their private arrangements, by means of the detailed *General Agreement on Tariffs and Trade* [GATT – now administered by the World Trade Organization (WTO)] and various regional and bilateral trade agreements. These are the most effective international legal arrangements today and contain the most robust dispute resolution mechanisms, such as that of the WTO, pertaining to international trade;⁴⁴ regional

⁴³In the United States, for example, see *Buckley v. Valeo*, 424 U.S. 1 (1976) (speech); regarding Europe, see, for example, *Autronic AG v. Switzerland*, Eur. Ct. H.R. Series A. 178 (1990); 12 E.H.R.R. 485 at 47 (1990); see also *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (stating without elaboration that corporations are “persons” under the Fourteenth Amendment); Michael K. Addo, *The Corporation as a Victim of Human Rights Violations*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 187, 192-93 (Michael K. Addo ed., 1999) (describing European Court of Human Rights jurisprudence confirming corporate rights to free speech, privacy, and fair trial).

⁴⁴ Under the WTO Dispute Settlement Understanding (DSU) Agreement, it remains the case as a formal matter that only states may pursue claims.

trade and investment agreements such as the North American Free Trade Agreement (NAFTA); and the thousands of bilateral trade and investment treaties.⁴⁵ But, unlike most human rights victims or environmental damage claimants,⁴⁶ private foreign investors can appear directly against sovereign nations in international tribunals (bilateral investment treaty arbitral tribunals),⁴⁷ bypass normal procedural obstacles such as foreign sovereign immunity and the act of state doctrine, make treaty-based claims, and obtain damages for any treaty violations found.

There are now stronger signs at every enforcement level – global, regional, national, and local – of enhanced business accountability for human rights and environmental matters.⁴⁸ Those remedies still generally pale in comparison to the strong remedies available to investors, however. These real instances of corporations being subjects under global law, with “international personality,” confirm that corporations can be

Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1226 (1994).

⁴⁵ On corporate influence over home agreements to successful achievement of favorable intergovernmental agreements, see, for example, Arvind Ganesan, *Human Rights, the Energy Industry, and the Relationship with Home Government*, in HUMAN RIGHTS AND THE OIL INDUSTRY 48 (Asbjorn Eide et al. eds., 2000).

⁴⁶ There are certain exceptions, such as the European Court of Human Rights, after exhaustion of domestic remedies. See, e.g., European Court of Human Rights, <http://www.echr.coe.int/echr> (last visited Mar. 10, 2009).

⁴⁷ Compare also the dispute settlement mechanism contained in the 1994 Energy Charter Treaty, art. 26, Dec. 17, 1994, 34 I.L.M. 360, 399-400 (1995); see generally Ilias Bantekas, *International Oil and Gas Dispute Settlement and its Application to Kazakhstan*, in OIL AND GAS LAW IN KAZAKHSTAN: NATIONAL AND INTERNATIONAL PERSPECTIVES 225, 233-234 (Ilias Bantekas et al. eds., 2004).

⁴⁸ See, e.g., Joe W. (Chip) Pitts III & John Sherman, *Human Rights Corporate Accountability Guide: From Law to Norms to Values* (Harvard Kennedy Sch. & BLIHR Working Paper No. 51, 2008), available at http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_51_sherman_pitts.pdf.

subjects of international law for CSR principles like accountability as well.⁴⁹

2. Private Law Unification as New Commercial *Lex Mercatoria*

Less visibly, corporations worked hard behind the scenes to achieve a remarkable and growing degree of private law unification – a sort of commercial “*lex mercatoria*” (“law of merchant”) presaging the more environmentally sensitive and rights-based CSR *lex mercatoria* that also emerged during the 20th century. Milestones in this achievement, rivaled only by the global revolution in human rights law, included such items as the *U.N. Convention on the International Sale of Goods*,⁵⁰ INCOTERMS,⁵¹ and various UNIDROIT⁵² principles and rules of international commercial contracts,⁵³ transnational civil procedure,⁵⁴ and insolvency⁵⁵ – not to mention the entrenchment of various convenient arbitral regimes⁵⁶ as the

⁴⁹ Those who are interested may see the excellent analysis in ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* (2006).

⁵⁰ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

⁵¹ International Chamber of Commerce, World Business Organization, <http://www.iccwbo.org/incoterms/id3045/index.html> (last visited Mar. 10, 2009).

⁵² See International Institute for the Unification of Private Law [UNIDROIT], <http://www.unidroit.org> (last visited Mar. 10, 2009).

⁵³ See UNIDROIT, *Principles of International Commercial Contracts*, <http://www.unidroit.org/english/principles/contracts/main.htm> (last visited Mar. 10, 2009).

⁵⁴ See Am. Law Inst. & UNIDROIT, *Principles and Rules of Transnational Civil Procedure*, 4 UNIFORM L. REV. 758 (2004), available at <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>.

⁵⁵ See, e.g., Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, at 1, U.N. Doc. A/Res/52/158 (Jan. 30, 1998).

⁵⁶ Such as those of UN Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC), the American

preferred mode of resolving commercial disputes. This achievement again indicates the extent to which corporations are subjects (and not mere objects) of international trade, investment, and other laws in many contexts, and how corporations actively contribute to forming international law and to such private law unification efforts, both directly via participating in drafting and negotiations and indirectly via lobbying states and leading officials. The pharmaceutical companies, entertainment, and software companies, for example, had a major role in drafting the TRIPS (Trade Related Intellectual Property Rights Agreement)⁵⁷ as Pfizer's President loudly trumpeted.⁵⁸

Accordingly, the 20th century saw a great degree of corporate, securities, and administrative legal harmonization occur, with previously isolated common and civil law regimes intermixing to a notable extent under the influence of easing communication, transportation, and trade. While this is a subject of passionate scholarly debate, it does seem that the overall trend is toward some form of convergence, along with persistence of variation in business practice (and other practices) based, among other things, on local culture and path dependency.⁵⁹ Yet while such gradual convergence is discernible, it is not focusing on the U.S. model of corporate governance and shareholder primacy to the degree that most

Arbitration Association (AAA), the International Center for Settlement of Investment Disputes (CSID), and the London Court of International Arbitration. See, e.g., Arbitration Rules of the United Nations Commission on International Trade Law, G.A. Res. 31/98, § C, U.N. Doc. A/31/17 (Dec. 15, 1976); World Bank, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (establishing the International Centre for Settlement of Investment Disputes).

⁵⁷ E.g., Michael A. Santoro, *Human Rights and Human Needs: Diverse Moral Principles Justifying Third World Access to Affordable HIV/AIDS Drugs*, 31 N.C.J. INT'L L. & COM. REG. 923, 925 (2006).

⁵⁸ Michael Perelman, *In Patents We Trust: How the U.S. Government Learned to Stop Worrying About Monopoly and Love Intellectual Property*, MR ZINE, Oct. 24, 2005, <http://www.mrzine.monthlyreview.org/perelman241005.html>.

⁵⁹ Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 129 (1999).

Anglo-American corporate finance and corporate law practitioners seem to think.⁶⁰ Douglas Branson put it this way:

The self-anointed corporate governance experts, elite as they may be in the United States corporate law academy, are not cognizant of the real issues of the twenty first century. Their advocacy of “global” convergence, and that along the lines of United States style corporate governance, is not based upon “global” developments, is culturally chauvinistic, and is anachronistic.⁶¹

The trend does not emphasize shareholder primacy as much as it does the place of business in society. The seven principles described are in fact part of a converging corporate law *lex mercatoria* that, far from erecting shareholder primacy as a standalone concept, situates corporate responsibilities to shareholders within the broader social context in which corporations operate.

B. COUNTERVAILING PUBLIC VALUES BALANCE PRIVATE COMMERCIAL VALUES

Thus, to complement the new private commercial *lex mercatoria*, seeds of a *lex mercatoria* more sensitive to public values of human rights, peace, and environmental sensitivity were also being planted throughout the 20th century, including the CSR principles described in this article. Such values properly understood are just as critical to providing an enabling environment for business as the values underlying global trade, investment, protection of intellectual property and other economic rights of business. Following the first wave of pre-WWI globalization, the successful ban upon slavery and the slave trade inspired further calls to temper unconstrained commerce and resulted in the birth of the International Labour Organization (ILO) in 1919, as well as nascent nongovernmental

⁶⁰ As one example, see Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

⁶¹ Douglas M. Branson, *The Very Uncertain Prospect of “Global” Convergence in Corporate Governance*, 34 CORNELL INT’L L.J. 321, 361 (2001).

lobbying for greater institutionalization of public values in law through organizations such as the League of Nations.

After the failure of the League and the atrocities of WWII, the United Nations was founded to promote peace, development, and human rights, agreeing on its Universal Declaration of Human Rights (UDHR)⁶² in 1948. This historically notable expression of *universal human values* was intended in part to complement the growing trade and investment relations and emerging universal business culture and to provide an overarching framework for a peaceful global regime. The labor rights previously identified could now be seen (for those who wanted to see) as instances of broader human rights, and the stage was set for corporate social responsibility to move beyond the labor rights (that the ILO had been identifying) to the broader human rights and environmental concerns that characterize CSR today. The various international efforts to legislate such values in international instruments may be thought of as resembling prior responses on the local or state level as societies took larger steps toward an untrammelled market – such as the 19th century social welfare and child labor laws in Britain responding to the excesses of the Industrial Revolution, or the Progressive-era regulation in the United States – only much weaker, given the absence of a global sovereign and robust enforcement mechanisms.

Concerns about persistent human rights abuse and environmental degradation prompted not only more comprehensive environmental regulation in the developed countries,⁶³ but also a proliferating series of other international law declarations and treaties relevant to the obligations of business and depending in part on corporations for their success. Among these were the Stockholm Declaration,⁶⁴ the

⁶² Universal Declaration of Human Rights, GA Res. 217A (III), at 71, UN Doc. A/810 (Dec. 12, 1948).

⁶³ RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 67 (2004) (discussing “the extraordinary decade” of the 1970s, when, for example, the United States brought together and dramatically expanded scattered regulatory efforts into a more comprehensive legal regime).

⁶⁴ United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev. 1 (June 16, 1972).

Rio Declaration,⁶⁵ and Agenda 21.⁶⁶ The Rio Declaration, addressed to “all states and all people,” proclaims in Principle 1 that “human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”⁶⁷ Agenda 21’s blueprint acknowledged the need for a mix of legal and market incentives and cooperative action between government, business, and citizens in order to achieve sustainable development. The UN Millennium Declaration similarly looks to business for help in meeting development goals including poverty eradication and in expanding affordable access to essential medicines.⁶⁸ The Johannesburg World Summit on Sustainable Development two years later called at several points for active implementation of corporate responsibility and accountability and “continuous improvement in corporate practice.”⁶⁹

A number of other treaties and declarations, while formally between and to be enforced by states, reference businesses, “enterprises,” “organizations,” and “private organs of society.” These include the ILO conventions that proliferated throughout the century, the UN General Assembly resolutions in the 1980s calling on businesses to respect sanctions against apartheid, and other specific environmental and human rights treaties (such as the Convention on the Elimination of Racial Discrimination

⁶⁵ United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, A/CONF.151/26 (vol. I) (Aug. 12, 1992) [hereinafter *Rio Declaration*].

⁶⁶ United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Agenda 21: Program of Action for Sustainable Development*, U.N. Doc. A/CONF.151/4 (Aug. 12, 1992).

⁶⁷ Rio Declaration, *supra* note 65.

⁶⁸ United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18 2000).

⁶⁹ World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26 – Sept. 4, 2002, *Plan of Implementation*, U.N. Doc. A/CONF 199/20, ¶¶ 18, 29, 49. The business commitment to continuous improvement in quality is also codified in ISO 9000. See International Organization for Standardization, Management Standards, http://www.iso.org/iso/iso_catalogue/management_standards.htm (last visited Mar. 10, 2009).

(CERD)⁷⁰ and the Convention on the Elimination of Discrimination Against Women (CEDAW)),⁷¹ and of course the UDHR itself.⁷² Many of these provisions are now considered customary international law⁷³ and some are deemed *jus cogens* norms binding on states and non-state actors even in the absence of a treaty. In the course of their work monitoring implementation of the treaties, several of the UN Treaty Bodies, Special Rapporteurs, and other mechanisms have had occasion to comment on the need to prevent violations by private actors including businesses, in areas ranging from privacy,⁷⁴ to food,⁷⁵ to water,⁷⁶ to health.⁷⁷ Other instruments emphasizing the state duty to protect from violations by corporations include the

⁷⁰ International Convention on the Elimination of All Forms of Racial Discrimination arts. 2(1)(d), 5(b), *opened for signature* Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 (“persons, group, or organization”; “individual, group, or institution”).

⁷¹ Convention on the Elimination of All Forms of Discrimination Against Women arts. 2(e), 4(c), Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) (“any person, organization, or enterprise”); *see also* Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 4(c), U.N. Doc. A/RES/48/104 (Dec. 20, 1993) (“private persons”).

⁷² The preamble to the UDHR speaks of the obligation of “private organs of society” to help secure universal observance of human rights. *See* Universal Declaration of Human Rights, *supra* note 62, pmbl. *See also id.* arts. 2, 29(1), 30.

⁷³ E.g. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 289 (1996).

⁷⁴ Human Rights Comm., *General Comment 16, The Right to Respect Privacy, Family, Home, Correspondence, and Protection of Honour and Reputation*, ¶ 1, Apr. 8, 1988, *reprinted in* Compilation of General Observations and Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.7, at 142 (2004) (providing that right to privacy can be violated by “natural or legal persons”).

⁷⁵ Comm. on Econ., Soc. and Cultural Rights [CESCR], *General Comment 12, The Right to Adequate Food*, UN Doc. E/C.12/1999/5 (May 12, 1999).

⁷⁶ CESCR, *General Comment 15, The Right to Water*, ¶ 23, UN Doc. E/C.12/2002/11 (Jan. 20, 2003).

⁷⁷ CESCR, *General Comment 14, The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4 (Aug. 11, 2000).

Maastricht Guidelines on violations of economic, social, and cultural rights.⁷⁸ Around the world, a number of cases have held states responsible for failing in their duty to protect against infringements by private corporate actors. These include cases addressed by UN Treaty Bodies⁷⁹ and regional human rights mechanisms.⁸⁰ Corporate executives may also be liable for the crimes within the purview of the International Criminal Court, and indeed some have already been threatened with prosecution by the prosecutor, Luis Moreno Ocampo.⁸¹

⁷⁸ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691, 698 (1998) (referencing the state duty “to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights”).

⁷⁹ *E.g.* Human Rights Comm., *Francis Hopu v. France*, Communication No. 549/1993, CCPR/C/60/D/549/1993/Rev.1 (Dec. 29, 1997) (finding France responsible for violations of a tribe’s family and privacy rights in development project entered into in partnership with a private company).

⁸⁰ Social and Econ. Rights Action Ctr. and Ctr. for Econ. and Social Rights v. Nigeria, Comm. No. 155/96 (Afr. Comm’n on Human and Peoples’ Rights, 2001), available at <http://www1.umn.edu/humanrts/africa/comcases/155-96.html> (decision referencing Shell’s involvement in the consortium that harmed the Ogoni people and infringed their rights as it condemned Nigeria’s failure to prevent the harm); Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No. 79 (Aug. 31, 2001). (logging concessions granted by Nicaragua affected the Awas Tingni Community land in violation of the community’s constitutionally protected status).

⁸¹ *E.g.* *Firms Face “Blood Diamond” Probe*, BBC NEWS, Sept. 23, 2003, <http://news.bbc.co.uk/go/pr/-/1/hi/business/3133108.stm>. In the final negotiations of the Rome Statute of the International Criminal Court, a decision was made to rely for deterrence on prosecuting individuals instead of corporate entities, in large part because “[t]ime was running out.” CLAPHAM, *supra* note 49, at 246 (quoting P. Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 199 (Roy S. Lee ed., 1999); see also Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000). Scholars have noted that the Nuremberg Tribunal spoke of corporate criminal liability for the enterprises complicit in Nazi war crimes, and that corporate criminal liability exists today and is appropriate. See, e.g., Gwynne Skinner, *Nuremberg’s Legacy Continues: The Nuremberg Trials’ Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321, 364 (2008).

The Cold War sidelined the proposed 1948 Havana Charter for an International Trade Organization (ITO). But the draft Charter was not oblivious to social values, referencing the need for members to eliminate unfair labor conditions. Even the more modest GATT that was then substituted for the failed ITO provided (in what persists as Article XX) that:

[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect public morals[,] . . . human . . . life or health[,] . . . conservation of exhaustible natural resources[,] . . . [and measures] essential to the . . . distribution of products in . . . short supply, . . . [or] relating to the products of prison labor.⁸²

The end of the Cold War not only opened up space to revisit the idea of a truly global trade organization; it revealed the artificial nature of the ideological divide between the civil and political rights preferred by the United States, the United Kingdom, and their allies, on the one hand, and the economic, social, and cultural rights preferred by the Soviet Union and its allies, on the other. This offered new possibilities for creative global corporate action with respect to the latter sets of rights, and for supporting all human rights as universal, interrelated, and indivisible. Corporations such as the Body Shop began thinking about how they could support fair trade via ethical sourcing and promoting ethical consumerism. Enhanced concerns and related protests about globalization gave new impetus to the growing “human rights” prong of CSR, as labor rights and environmental side agreements had to be attached to NAFTA to gain congressional approval, and growing scrutiny of corporate labor and human rights practices started receiving higher level board and top executive attention.

Recognized in the preamble to the Agreement Establishing the World Trade Organization⁸³ are human and environmental

⁸² General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

⁸³ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1125, 1144 (1994).

values underlying and justifying trade. Among the chief purposes of trade are elevating standards of living and ensuring “full employment and a large and steady volume of real income” while using world resources optimally “in accordance with sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so.”⁸⁴ The Generalized System of Preferences by which developed economies (for example, the European Union and the United States) grant trade access and benefits are at least in theory conditioned on respect for internationally recognized workers’ rights,⁸⁵ and such labor, human rights, environmental, and CSR provisions are increasingly finding their way into regional as well as bilateral trade and investment agreements⁸⁶ in more prominent and often more enforceable ways than in NAFTA.⁸⁷

⁸⁴ *Id.*

⁸⁵ See, e.g., 19 U.S.C. § 2462(c)(7) (2006) (conditioning generalized system of preferences U.S. trade benefits to developing countries and designated zones within such countries on whether the country has taken steps to afford workers there “internationally recognized worker rights”). The ILO Conventions of course are also frequently implemented in domestic law. *E.g.* Código De Trabajo [Labor Code], Decreto No. 1441, art. 150 (1961) (Guatemala’s implementation of ILO Convention 138 on minimum age of employment to avoid child labor).

⁸⁶ For example, the Canada-Peru Free Trade Agreement includes preambular language committing the parties to encourage “internationally recognized corporate social responsibility standards and principles and pursue best practices,” and in the chapter on investment, each party is similarly committed to “encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies . . . [including statements of principle on] issues such as labour, the environment, human rights, community relations and anti-corruption.” Free Trade Agreement Between Canada and the Republic of Peru, Can.-Peru, pmbl. and ch. 8, art. 10, May 29, 2008, *available at* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-perou-table.aspx> (not yet in force) [hereinafter Canada-Peru FTA].

⁸⁷ For examples of post-NAFTA trade agreements with the environmental and labor provisions in the body of the agreement, see United States – Singapore Free Trade Agreement, U.S.-Sing., July 16, 2003, Temp. State Dep’t No. 04-36, 2003 WL 23522254; Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 117 Stat. 909; United States – Australia Free Trade Agreement, U.S.-Austl., May 18, 2004, 118 Stat. 919, Dominican Republic – Central America – United States Free Trade Agreement, Aug. 5, 2004, 119 Stat. 462; and the Canada-Peru FTA.

C. A PLURALISTIC NEW *LEX MERCATORIA*

The “corporate rise to power” accelerated during the trade liberalization era of the 1990s to eclipse that of even some nation states, and inspired a strong backlash from NGOs, consumers, academics, and the community at large. This CSR driver, along with the other drivers such as the benefits to reputation, employee recruiting and retention, risk management, and seizing opportunities, resulted in momentum toward an ever more notable CSR-inspired *lex mercatoria*. This new *lex mercatoria* overtook the purely commercial *lex mercatoria* that had preceded it, resulting in the mixed hard law, soft law, and “voluntary” initiatives containing core CSR principles. UN initiatives such as the Global Compact,⁸⁸ the Principles on Responsible Investment,⁸⁹ and the activities of the UN Special Representative of the Secretary General for Transnational Business and Human Rights, John Ruggie,⁹⁰ reinforce these trends toward legal and ethical harmonization, clarification, and expansion of the field of public values, as do the other prominent global standards⁹¹ and national, regional, and global legal reforms both existing and pending.⁹² One cannot underestimate the global social signaling value of having the UN imprimatur on serious efforts aimed at improving

⁸⁸ The preamble and ten principles can be found online at the U.N. Global Compact, *supra* note 29.

⁸⁹ See UNPRI, www.unpri.org (last visited Mar. 10, 2009).

⁹⁰ The activities and documentary output of the SRSG may be traced through the portal provided by the Business and Human Rights Resource Centre, <http://www.business-humanrights.org> (last visited Mar. 10, 2009).

⁹¹ Ranging from the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration to initiatives such as the Global Sullivan Principles, the Caux Principles, or standards such as SA8000 (promulgated by Social Accountability International) or sectoral standards such as those of the Fair Labor Association or the Workers Rights Consortium.

⁹² See, for example, the proposals from Corporation 20/20, <http://www.corporation2020.org/> (last visited Mar. 10, 2009); see also FILIP GREGOR & HANNAH ELLIS, EUROPEAN COAL FOR CORPORATE JUSTICE, FAIR LAW: LEGAL PROPOSALS TO IMPROVE CORPORATE ACCOUNTABILITY FOR ENVIRONMENTAL AND HUMAN RIGHTS ABUSES (2008), http://www.corporatejustice.org/IMG/pdf/ECCJ_FairLaw.pdf.

business conduct affecting human rights and sustainable development. The resulting new *lex mercatoria*, like customary international law, applies as a practical matter whether a given company subscribes to a particular voluntary initiative or not. Beyond states themselves, through institutions such as the Office of Financial Review in the United Kingdom, among those enforcing initiatives such as the UN Principles on Responsible Investment and the Equator Principles are SRI and mainstream investors, fair trade and ethical consumer organizations, and major stock exchanges in Europe and North America. The UN Principles now cover approximately fourteen trillion dollars in assets,⁹³ and the Equator Principles now cover nearly all (approximately ninety percent) of the world's project finance,⁹⁴ and are influencing mainstream commercial finance as well. Practical tools such as the UNEP Human Rights and Finance Guidance Tool⁹⁵ support the finance industry's activities. Although subject to recent critical scrutiny based on resistance to the U.S. *Sarbanes-Oxley Law* among some foreign issuers, the so-called "bonding hypothesis" (that companies tend to elevate corporate governance standards by opting-in to more rigorous disclosure and compliance rules) has been noted by eminent scholars.⁹⁶ Cross-listing on key stock exchanges that

⁹³ See Press Release, UN Principles for Responsible Investment, Signatories Double in One Year; Institutional Investors 'Taking Implementation to the Next Level' (June 17, 2008), <http://www.unpri.org/report08/PRI%20Press%20Release%2017%20June%202008.pdf>.

⁹⁴ See INT'L FIN. CORP., 2007 ANNUAL REPORT – PREATING OPPORTUNITY 20 (2007), <http://www.ifc.org/AR2007>.

⁹⁵ See United Nations Environment Plan Financial Initiative – Human Rights, http://www.unepfi.org/work_streams/human_rights/index.html (last visited Mar. 10, 2009).

⁹⁶ There are many issues, however, still surrounding both the bonding hypothesis itself – which relates mainly to investors – and the extent to which disclosure can substitute for substance, or to which it can be readily analogized to the CSR principles discussed herein. For the basic hypothesis, see, for example, John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 652 (1999). For an updated qualification, see John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757 (2002) (qualifying the bonding thesis by noting that fragmentation is possible for those firms with concentrated ownership that prefer control to the benefits

require ethics codes and favor sustainable practices certainly reinforces classic self-regulation based on powerful social norms (again, one of the forms of the new *lex mercatoria*) and thereby helps drive CSR forward.

In other words, a variety of pluralistic legal, ethical, and market enforcement mechanisms exists at every level, again making it a serious question whether many of the legally imbued so-called “voluntary” initiatives are truly voluntary, or whether they amount to a form of “supra-governmental regulation.”⁹⁷ These initiatives usually include and respond to state regulatory law but transcend it – in the “shadow of the law” – and can complement and enhance often limited state enforcement capacity, made more limited by the speed of business today and regulators’ difficulties “keeping up.” While current coordination remains limited and incomplete, there is nevertheless a discernible convergence of capital and other market pressures, social, environmental, and legal requirements toward substantively similar global standards that form the parameters and *quid pro quo* of the new, more competitive global business stage. Some significant substantive differences certainly remain, but mostly at the margin. These include, for example, the exact age of child labor to be banned or addressed, the exact form and application of the precautionary principle, and how a living wage is calculated as well as how it can be implemented broadly enough (e.g. on an industry basis) to avoid competitive disadvantage to any one company. As state authority and enforcement have fragmented, the pluralistic alternative enforcement mechanisms remain inconsistent and of variable quality – some might say that they themselves are as fragmented as the state.

Yet cumulatively, the CSR legal and ethical principles that are clearly discernible dispel the myths that corporations are wholly private actors, subject only to local and national law, with rights but no duties under what might be termed emergent

of maximizing investment, share price, and high growth prospects via broader public ownership).

⁹⁷ E.g., Errol Meidinger, *Global Networks: The Environment and Trade: Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHI. J. INT’L L. 513, 528 (2008).

customary global law.⁹⁸ It may seem to some that corporations are uniquely powerful actors, neither capable of nor suited to being subjected to international law or serving as subjects of international law, but although there is tremendous room for ongoing legal development, the multiplicity of convergent norms and enforcement mechanisms even today is striking. The “law of nations” envisioned by the founders and most influential thinkers in the discipline – such as Grotius, de Vitoria, Vattel and Blackstone – applied to non-state actors (including individual merchants, guilds, pirates and ambassadors) as well as states, and this is the version that influenced, for example, the framers of the U.S. Constitution and the drafters of the *Alien Tort Claims Act* when they used the phrase “law of nations.”⁹⁹ The more truncated view of “inter-national law” as merely public and between nations dates from the late 18th and 19th centuries, under the influence of Jeremy Bentham (who coined the phrase “international law”) and his disciple John Austin.¹⁰⁰ Although largely forgotten today, at a time when most people date international human rights to the end of World War II, there were also international courts established to suppress the slave trade pursuant to treaties concluded between Britain and other countries (ultimately even the United States) between 1817 and 1871.¹⁰¹ These courts, the first international human rights courts, heard over 600 cases and applied international law against both state and non-state actors to free over 80,000 slaves.¹⁰²

In summary, the growing body of public international law and private law unification created an environment very favorable to business, but also resulted in governance gaps whereby newly powerful private corporations were granted

⁹⁸ Joe W. (Chip) Pitts III, *Business, Human Rights, and the Environment: The Role of the Lawyer in CSR & Ethical Globalization*, 26 BERKELEY J. INT’L L. 479, 488 (2008).

⁹⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714-18 (2004).

¹⁰⁰ M.W. Janis, *Jeremy Bentham and the Fashioning of “International Law,”* 78 AM. J. INT’L L. 405 (1984).

¹⁰¹ Jenny S. Martinez, *Anti-Slavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 552 (2008).

¹⁰² *Id.* at 553.

significant rights and constrained by few duties, with the market increasingly outpacing global public institutions aimed at protecting social and environmental values. Even corporations that were well-regulated domestically (at least in developed countries with significant resources and capacity) were left relatively unconstrained by regulation globally, while their global power and impact grew around the world and often surpassed that of the nations in which they invested and operated. Into the breach flowed the notion of CSR and the seven principles identified here, offering at least the beginnings of a more sensible equilibrium between private and public values. Nevertheless, despite this significant progress, the initial governance gaps have not closed completely, and are joined now by one of even greater concern both to global business and society: the gap between today's tremendous, persistent, and interrelated global problems (such as climate change, food, water, and energy shortages, intractable poverty and growing inequality, disease, illiteracy and other educational deficits, war, internal conflict including genocide, refugee flows, terrorism, nuclear proliferation, and financial volatility) and a global governance system whose design and ability to adequately address such issues remains highly dubious. This article now turns to a more detailed examination of the current governance system and the prospects for its evolution toward a more effective model.

II. "NEW GLOBAL GOVERNANCE" ARISING FROM THE "MACRO" BUSINESS CASE

A. TRANSGOVERNMENTAL NETWORKS ACCOMMODATING PRIVATE ACTORS

The transformation of the prior state-centered governance regime (often overstated as "the end of sovereignty") has been widely noted, including by scholars such as Anne-Marie Slaughter. Slaughter has described "a new world order" of disaggregated government agencies using information networks to coordinate policy issues across borders and thus enhance global governance to try to solve otherwise intractable global

problems.¹⁰³ This reveals the relative, partial capacity of even powerful states and the need for greater coordination. Yet there are uncontestable public trust¹⁰⁴ and democratic legitimacy issues involved with a greater role for corporations in global governance. In the search for “world governance without world government,” it is therefore tempting to emphasize governmental networks instead of the global “public policy networks” first noted in the 90s,¹⁰⁵ “epistemic communities,”¹⁰⁶ or the more commonly touted “public-private partnerships.”¹⁰⁷

¹⁰³ ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

¹⁰⁴ See INDUS. CANADA, *CORPORATE SOCIAL RESPONSIBILITY MONITOR 2004: EXECUTIVE BRIEF* (2004), <http://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/rs00123.html> (reporting on the major findings of a 2004 CSR study conducted by Environics International); cf. also *L.A. Times Poll* (Roper Ctr. For Pub. Opinion Research), Mar. 27 – 30, 2004; iPoll Databank (Roper Ctr. For Pub. Opinion Research), Apr. 1, 2004, www.ropercenter.uconn.edu/ipoll.html (poll indicating that only one percent thought that corporate executives could always be trusted to do what’s right, and a quarter said they could almost never be trusted to do so). These trust issues regarding corporations and the international economic system undoubtedly played a role in the collapse of the Doha trade round in July 2008. Stephen Castle & Mark Landler, *After 7 Years, Collapse on World Trade*, N.Y. TIMES, July 30, 2008, available at <http://www.nytimes.com/2008/07/30/business/worldbusiness/30trade.html?ref=business>.

¹⁰⁵ WOLFGANG H. REINICKE & FRANCIS DENG, *CRITICAL CHOICES: THE UNITED NATIONS, NETWORKS, AND THE FUTURE OF GLOBAL GOVERNANCE* vii (2000) (discussing how “networks, states, international organizations, civil society, and the corporate sector collaborate to make globalization work for all”); see also COMMISSION ON GLOBAL GOVERNANCE, *OUR GLOBAL NEIGHBOURHOOD* (1995), and Steve Waddell, *Global Action Networks: A Global Invention Helping Business Make Globalisation Work for All*, J. CORP. CITIZENSHIP, Dec. 22, 2003, at 27.

¹⁰⁶ See, e.g., Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1 (1992).

¹⁰⁷ World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26 – Sept. 4, 2002, *Plan of Implementation*, U.N. Doc. A/CONF 199/20, ¶ 9. Such partnerships, however, have been criticized by some as privileging the powerful, providing a mask for lucrative privatization, weakening state responsibility or capacity, or simply “greenwashing” or “bluwashing” (using the environment or affiliation with the United Nations as a cover for harmful activities). See e.g. Friends of the Earth, *Type 2 Outcomes - Voluntary Partnerships* (2002), <http://www.globalpolicy.org/reform/business/2002/o8o2type2.htm>.

Slaughter's account mentions, but does not further analyze, the significance of the many ways private actors already "can and do perform government functions, from providing expertise to monitoring compliance with regulations to negotiating the substance of those regulations, both domestically and internationally."¹⁰⁸ Influential corporate actors and the notion of corporate social responsibility play no significant role in her account. Why? As she says, the problem is one of "ensuring that these private actors uphold the public trust."¹⁰⁹

The democratic deficit is indeed an issue for public policy networks or public-private partnerships that involve corporations, NGOs and others in the new, decentralized, networked global governance. But it is also an issue for many governments, including nominally democratic governments, as democracy has been reconfigured and arguably vitiated by various pressures including moves from local to more distant federal or quasi-federal structures in the United States or even more dramatically in the European Union. Moreover, a democratic deficit is also a problem with Slaughter's transnational governmental networks. Ironically, this leads Slaughter later in the book to redefine the concept of democracy in a way that acknowledges "the empirical fact of mushrooming private governance regimes in which individuals, groups, and corporate entities in domestic and transnational society generate the rules, norms, and principles they are prepared to live by."¹¹⁰

While this is by no means direct Athenian democracy, the new global governance does have novel attributes of representative and deliberative process. Stakeholder engagement aimed at seeking consensus between companies and workers, unions, NGOs, faith-based groups, and affected communities has a democratic cast to it.¹¹¹ And the Forest

¹⁰⁸ See SLAUGHTER, *supra* note 103, at 9.

¹⁰⁹ *Id.* Jürgen Habermas has expressed similar misgivings about the participation of corporations in the "postnational constellation". See JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* (Max Pensky ed. & trans., MIT Press 2001) (1998).

¹¹⁰ SLAUGHTER, *supra* note 103, at 194.

¹¹¹ See, e.g., Archon Fung, *Deliberative Democracy and International Labor Standards*, 16 *GOVERNANCE* 51 (2003).

Stewardship Council’s “general assembly,” bicameral chambers, representative aspects, voting, and procedural rules demonstrate that at least some initiatives clearly take elaborate steps in the direction of trying to enhance quasi-democratic legitimacy.¹¹² Meidinger has gone so far as to argue that if stakeholder engagement is effectively undertaken and properly managed to achieve broad-based representation, competition between various initiatives can successfully bring various stakeholders together to dialogue and achieve consensus on processes and outcomes as or more democratic and legitimate than governmental or intergovernmental alternatives.¹¹³ In keeping with the theme that the new governance realities often require meta-regulation (of overall standards and desired goals but not specific implementation paths),¹¹⁴ Slaughter notes that the state is thus to “manage these processes, rather than regulate behavior directly.”¹¹⁵ And that is happening to a notable extent – although much activity is wholly *outside* of government’s purview.

Many of the CSR principles identified have relevance for new global governance and even for the sub-portion managed by states. States too are increasingly seeking to apply integrated decision-making and a stakeholder perspective that ensures participatory engagement with all those affected. In addition to national identity and the norms coming from the state, there are multiple and overlapping identities, loyalties, and normative associations – now including transnational advocacy, religious,

¹¹² See FOREST STEWARDSHIP COUNCIL, STATUTES (2005), http://www.fsc.org/fileadmin/web-data/public/document_center/institutional_documents/1_3_FSC_Statutes_2005.pdf?PHPSESSID=bc733733ef2f6d4eeb7185c05ec47e29; see also FOREST STEWARDESS COUNCIL, BY-LAWS (2006), http://www.fsc.org/fileadmin/web-data/public/document_center/institutional_documents/1_1_FSC_By_Laws_2006.pdf?PHPSESSID=bc733733ef2f6d4eeb7185c05ec47e29.

¹¹³ See, e.g., Meidinger, *supra* note 97.

¹¹⁴ Christine Parker, *Meta-regulation: Legal Accountability for Corporate Social Responsibility*, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 207 (Doreen McBarnet et al. eds., 2007).

¹¹⁵ SLAUGHTER, *supra* note 103, at 194.

political, or other networks¹¹⁶ – that require or at least would benefit from mediation and coordination in order to avoid the fractured and limited approaches that could otherwise naturally result. Generous and transparent information flows among the networked actors are, as Slaughter notes, fundamental to enhanced understanding, negotiation, and the achievement of effective outcomes.¹¹⁷ Consistent best practices with a commitment to learning and continuous improvement enhance these outcomes. The precautionary principle adds a “prudent pause” prior to implementation. And if the problem with corporate participation in global governance is, as she says, one of “ensuring that these private actors uphold the public trust,” these legal principles – reinforced notably by the accountability principle – assure that the values served, in deed as well as in word, are not only private but truly are public.

B. THE “MACRO” BUSINESS CASE SPURS CORPORATE INVOLVEMENT

1. Relation between the “Micro” and the “Macro” Business Case

Corporations are increasingly making verifiable public commitments and playing documented positive roles for a variety of reasons, including to enhance their brand (usually by far their most valuable asset) by demonstrating their social value.¹¹⁸ They thereby derive a set of benefits, which parallel the basic drivers for CSR: greater access to investment capital; managing risks and liabilities; employee recruitment, retention, and productivity/motivation; improved stakeholder relations; innovation; and increased business opportunities. But in addition to this “micro” business case appealing to the enlightened self-interest of *individual* corporations, there is

¹¹⁶ MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* (1998).

¹¹⁷ SLAUGHTER, *supra* note 103, at 28, 52.

¹¹⁸ See Guido Palazzo, *The Ethical Dimension of Corporate Branding* (Univ. of Lausanne Inst. of Int’l Mgmt. Working Paper No. 0506, 2005), http://www.hec.unil.ch/cms_irm/WP0506.pdf.

what might be termed the “macro” business case relevant to all firms taken together: ensuring that *business generally* continues to have a “license to operate,” and that the *global market system as a whole* continues to survive, prosper, and be seen as stable, reliable, legitimate, socially worthwhile and, in a word, sustainable. This macro need undoubtedly explains in part why initiatives are expanding from the individual company level, to the industry sector level and beyond to the diverse but increasingly universal efforts at global harmonization on these issues – a trend that will likely continue. CSR principles have gone global, and appear likely to garner even more normative and democratic legitimacy in the future.

This “macro” business case differs from the usual “micro” or firm-level business case in that it is more visionary in space and time: seeing entire enterprise value and supply chains across boundaries, and also seeing what is in the long-term interests of shareholders, stakeholders generally, and future generations. As indicated by the examples examined below relating to the fight against HIV/AIDS and attempts to meet the other challenges identified in the Millennium Development Goals, businesses are increasingly taking this view.

2. The Examples of Coca-Cola and ExxonMobil in Africa

As illustrated by the CSR principle of community investment, CSR goes beyond merely “doing no harm” to embrace “doing what good you can.” At the turn of the century, the then UN Secretary General Kofi Annan made explicit pleas for businesses to get more involved in the global fight against HIV/AIDS¹¹⁹ and other global problems. He stressed the bottom-line business case benefits of doing so: failing such action, customers and employees of businesses would die and the stable environment depended upon by business would be threatened.

In response, Coca-Cola partnered with UNAIDS to offer its formidable distribution and logistics network, skills, and

¹¹⁹ Press Release, Secretary-General, United Nations, Secretary-General Urges United States Business Leaders to Take Concerted Action Against ‘Unparalleled Nightmare’ of AIDS, U.N. Doc. SG/SM/7827-AIDS/13 (June 1, 2001).

warehouses to store and distribute condoms and antiretroviral drugs, and its advertising and design capabilities for AIDS educational billboards and pamphlets.¹²⁰ This was not pure philanthropy – a fifth of its consumers and workers in Southern Africa were dying and its market was shrinking. But, as with many companies, Coke thought it essential to go beyond the workplace to engage in community outreach in order to reach the families, consumers, and youth affected by the disease and to intervene where attitudes were shaped.¹²¹ ExxonMobil has engaged in similar programs in Africa for similar reasons: keeping its workforce and contractors healthy and productive.¹²²

Of course, ExxonMobil has been severely criticized on a number of CSR fronts, ranging from oil spills like the Exxon Valdez, to discrimination against employees, to complicity in repression in Aceh, Indonesia¹²³ -- so the old caveat applies that good actions in one arena do not compensate for bad actions in another arena. Coke has also been implicated in various CSR-related scandals, including collaboration with the apartheid regime, repression against union members in Colombia, and creating water pollution and water shortages in India.¹²⁴ Still,

¹²⁰ Donald G. McNeil, Jr., *Coca-Cola Joins AIDS Fight in Africa*, N.Y. TIMES, June 21, 2001, available at <http://query.nytimes.com/gst/fullpage.html?res=9C05E1D71F31F932A15755CoA9679C8B63>.

¹²¹ Excellent online manuals from various company case studies are available online. See World Economic Forum, Global Health Initiative Case Study Library, <http://www.weforum.org/en/initiatives/globalhealth/Case%20Study%20Library/index.htm> (last visited Mar. 10, 2009). Coca-Cola's *Community Outreach Manual* for its HIV/AIDS Workplace Prevention Program is also available online. COCA-COLA AFRICA, HIV/AIDS WORKPLACE PREVENTION PROGRAMME: COMMUNITY OUTREACH MANUAL 4, http://www.weforum.org/pdf/Initiatives/GHI_HIV_CocaCola_AppendixE.pdf.

¹²² Global Business Coalition on HIV/AIDS, Workplace Intervention: Exxon Mobil Corporation (2007), http://www.gbimpact.org/itsc_node/4/13/program_summary/185 (last visited Mar. 10, 2009).

¹²³ For an example of cases brought against ExxonMobil, see Business & Human Rights Resource Centre Profile on Exxon Mobile, <http://www.business-humanrights.org/Categories/Individualcompanies/E/ExxonMobil> (last visited Mar. 10, 2009).

¹²⁴ For similar cases involving Coca-Cola, see Business & Human Rights Resource Centre Profile on Coca-Cola, <http://www.business->

the proactive and networked activities of Exxon and Coca-Cola in partnering with the community to combat HIV/AIDS have been greeted as innovative and commendable.¹²⁵ Moreover, such business actions can potentially transform the attitudes of the company and its leaders with respect to issues such as the HIV/AIDS crisis,¹²⁶ perhaps in turn influencing other leaders in business and government.

Corporations have long given both cash and in-kind donations to communities, especially in proximity to their headquarters and home-country operational facilities. There is also a distinctive tradition of some companies getting involved in public policy issues, again especially affecting their “home” jurisdictions, including minority rights, urbanization, and the environment.¹²⁷ The close connections between those in power in business and government are of course nothing new, and corporate executives and lawyers have also been active as “statesmen” in global affairs, sometimes with responsible and

humanrights.org/Categories/Individualcompanies/C/Coca-Cola (last visited Mar. 10, 2009).

¹²⁵ See e.g., ‘E-Learning for Life’ - Partnerships - Coca-Cola Co. and the United Nations, UN CHRON., June – Aug. 2002, available at http://findarticles.com/p/articles/mi_m1309/is_2_39/ai_91088419; see also ExxonMobil Receives 2008 Malaria Award from Global Business Coalition, BUS. WIRE, June 4, 2008, available at http://findarticles.com/p/articles/mi_moEIN/is_2008_June_4/ai_n25476061.

¹²⁶ The company surprised some when its management supported a shareholder proposal calling for a report on HIV/AIDS, malaria, and tuberculosis. See Coca-Cola, Proxy Statement (Form DEF 14A), at 53-54 (Mar. 4, 2004), available at <http://sec.edgar-online.com/2004/03/04/0001047469-04-006480/Section16.asp>. The proposal received 98% of the vote. Moreover, Coca-Cola joined the Global Compact in 2006, the Business Leaders Initiative for Human Rights in 2007, is now investing in important water conservation projects in various countries. See Coca-Cola African Sustainability Initiatives, <http://www.thecoca-colacompany.com/citizenship/africa.html> (last visited Mar. 10, 2009). It has also partnered with the WWF (formerly World Wildlife Fund) and qualified for several sustainability stock exchange indices including FTSE4Good and the Dow Jones Sustainability Index.

¹²⁷ As with the U.S. National Association of Manufacturing noting in the 1960s the “growing effort of industry to help resolve basic social problems.” J.A.C. Hetherington, *Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility* 21 STAN. L. REV. 248, 291 (1969) (quoting NAT’L ASS’N OF MFRS., EFFECTIVELY EMPLOYING THE HARD-CORE (1968)).

sometimes with irresponsible results. Now, however, those traditions are being extended on the global scale as never before, in host as well as home countries. Since it has become more difficult to say whether a company with distributed management and production activities is based in or aligned with any particular country, this is only to be expected. Indeed, it is often welcome, as businesses can have competitive advantages over governments, as regards resources, and in particular as regards skills, competencies, technology, results-oriented strategic thinking and prospects for developing and implementing practical solutions. Microsoft, IBM, and other high-tech companies have assisted agencies like the UN High Commissioner for Refugees with managing refugee registrations, and more recently, Google has worked with UN agencies, using technologies like Google Earth's satellite mapping to show villages burnt during the genocide in Darfur.¹²⁸

The growing expectations for corporations to play a greater role in global governance generally relate to their everyday business. In response to these expectations, core business capabilities and competencies are deployed more toward the periphery of the corporation's sphere of influence and with more of an express public, rather than merely private, purpose. That is, the goal shifts more toward helping society at large, or helping to protect the environment. Sometimes this will accord with short- or long-term market opportunities, as for example with the Google.org renewable energy project,¹²⁹ or most of the instances associated with the Millennium Development Goals "Call to Action."¹³⁰

C. SYSTEMIC CHALLENGES

Not only is our world more tightly and complexly bound now than at any point in human history; so are the top issues facing

¹²⁸ See Google Earth Outreach Case Study, http://earth.google.com/outreach/cs_darfur.html (last visited Mar. 10, 2009).

¹²⁹ Google.org, <http://www.google.org> (last visited Mar. 10, 2009).

¹³⁰ See U. K. Dep't for Int'l Dev., Millennium Development Goals: Business Call to Action, <http://www.dfid.gov.uk/mdg/call-to-action-business.asp> (last visited Mar. 10, 2009).

the world, all of which are inevitably cross-border in their implications (such as economic volatility/instability, increasing inequality, persistent poverty, access to energy, climate change, disease, food and water shortages, natural disasters, education, refugees, war, conflict, and terrorism). Global terrorist incidents in recent years in the United States, London, Madrid, Bali, Algeria, Egypt, Israel, Pakistan, Jordan, and elsewhere vividly remind all of us that what happens abroad, even in remote and lesser developed countries like Afghanistan and Sudan, can have life or death consequences at home. Many analysts assign as key, root-causes of terrorism the lack of economic opportunity and outrage at perceived injustice in the Muslim world. Rising oil prices in 2008 that benefited wealthy elites in oil-producing nations also influenced the energy inputs into the rising food prices that put an estimated 100 million more people in poverty, hurt children's educational prospects as they could no longer receive adequate nutrition, and set back anti-poverty efforts "seven years," according to World Bank President Robert Zoellick.¹³¹ Political instability and deaths (in countries including Cameroon) also resulted, with riots in over thirty-five countries and at least one change of government (in Haiti),¹³² as opposed to the social stability needed by most (e.g. non-defense or security-related) businesses. Amnesty International condemned the often repressive responses to the riots, but also noted the underlying human rights violations contributing to the crisis.¹³³

The Intergovernmental Panel on Climate Change predicted in 2007 that global warming would lead to extreme weather events, conflict over water shortages, and food security concerns. Notably, the global drivers for the food crisis starting in 2008 were considered to include climate change (including

¹³¹ Craig Kielburger & Marc Kielburger, *World Food Crisis Hinders War on Poverty*, TORONTO STAR, June 2, 2008, at AA02.

¹³² *Malthus Proved Correct: World Will Die for Food*, COMMODITY ONLINE, Aug. 11, 2008, available at <http://www.commodityonline.com/news/Malthus-proved-correct-World-will-die-for-food-11043-3-1.html>.

¹³³ Amnesty Int'l, Statement to United Nations Human Rights Council First Thematic Special Session on the World Food Crisis (May 22, 2008), available at <http://www.amnesty.org/en/news-and-updates/world-must-act-food-crisis-20080522>.

drought in Australia), globalization (as nations like China and India join the global economy and demand for meats, feed grains, and better food increases), urbanization (as mega-cities resembling the old city states as new sources of global power replace agricultural fields with parking lots), and increased use of corn ethanol biofuels for energy.¹³⁴ Ironically, corn ethanol was promoted as part of the solution to energy scarcity, climate change, and also a way to help address the national security implications both of the direct “threat multiplier” effects of climate change¹³⁵ and the continued dependence on finite and increasingly scarce and expensive fossil fuels. Those implications included military actions and occupations that in turn produced new cycles of resistance and terrorism, with counterproductive systemic effects. The interrelationships between issues such as climate change, human rights, energy, and national security are now increasingly appreciated,¹³⁶ as are the risks, for example, from unsafe and toxic products produced abroad without adhering to global standards. Such Chinese-manufactured products imported into North America in 2007 and 2008 began to raise awareness of the impact at “home” of low quality, environmental, or labor standards a rich country’s TNC may impose in host countries abroad. A systemic perspective reveals the connections between seemingly disconnected events and has already prompted corporations involved in various sectors (e.g. energy, agribusiness, automotive, technology, construction, national security) to consider those connections.

¹³⁴ George Raine, *The Growing Squeeze; Soaring Food Costs; Shock Waves from Skyrocketing Prices Felt in Every Part of Global Economy*, S. F. CHRON., July 20, 2008, at A1.

¹³⁵ E.g. CNA CORP., NATIONAL SECURITY AND THE THREAT OF CLIMATE CHANGE 6 (2007), available at <http://securityandclimate.cna.org/report/National%20Security%20and%20the%20Threat%20of%20Climate%20Change.pdf>.

¹³⁶ See INT’L COUNCIL FOR HUMAN RIGHTS POL’Y, CLIMATE CHANGE AND HUMAN RIGHTS (2008), available at <http://www.ichrp.org/en/projects/136>; Wolfgang Sachs, *Climate Change and Human Rights*, in PONTIFICAL ACAD. OF SCIS., INTERACTIONS BETWEEN GLOBAL CHANGE AND HUMAN HEALTH 349 (2004); Ruth Gordon, *Climate Change and the Poorest Nations: Further Reflections on Global Inequality*, 78 U. COLO. L. REV. 1559, 1563 (2007).

D. SYSTEMIC OPPORTUNITIES

For instance, regarding issues as interrelated as the environment and the rights to food, water, and an adequate standard of living, in addition to paying their workers enough to buy food, corporations selling food or food inputs will sometimes consider the impact of their pricing policies (as the pharmaceutical companies did).¹³⁷ Or, more generally, companies may consider their role in urbanization, and attempt to mitigate the impact of their contribution to activities that are knowingly or unknowingly harmful or unsustainable.

After being criticized for depleting the watershed on which Indian farmers and communities depend, Coca-Cola woke up to the reality that water was a strategic global issue for the company. Like many TNCs, Coca-Cola uses an immense amount of water in its business (especially if one considers the extended value chain including upstream inputs like sugarcane as well as the product itself and downstream activities – a gallon of milk takes 800 to 1000 gallons of water to produce). So, in a version of the CSR investment principle, Coca-Cola partnered with an NGO, WWF, to consider for the first time where the water in its plants came from, and how best to work with communities globally to ensure a sustainable supply.¹³⁸

Another example of a company seizing the opportunity to do good is BP's targeting the market of an estimated 2.5 billion people who burn so-called regressive biomass fuels (including wood and dung), an estimated 1.6 million of whom die each year from inhaling the fumes generated.¹³⁹ Defining its mission as eliminating indoor pollution for 30 million customers over fifteen years, BP has already sold "Oorja" stoves using pelletized agricultural waste (from used sugarcane, coffee, or corn cobs) to over a million households in India (expanding now to South

¹³⁷ David B. Ridley, *Price Differentiation and Transparency in the Global Pharmaceutical Marketplace*, 23:7 PHARMACOECONOMICS 651-658 (2005).

¹³⁸ PETER SENGE ET AL., *THE NECESSARY REVOLUTION: HOW INDIVIDUALS AND ORGANIZATIONS ARE WORKING TOGETHER TO CREATE A SUSTAINABLE WORLD* 77-78 (2008).

¹³⁹ See HUGH WARWICK & ALISON DOIG, *SMOKE – THE KILLER IN THE KITCHEN: INDOOR AIR POLLUTION IN DEVELOPING COUNTRIES* (2004), available at http://www.ehw.org/Healthy_House/documents/kitchensmoke.pdf.

Africa and China).¹⁴⁰ BP also uses a distribution network that includes joint ventures with NGOs which hold an equity interest and so participate in the wealth generated and provide the women who are compensated at a living wage for selling the products and services.¹⁴¹ That some businesses seek to take paths that have the dual goal of mitigating harms and seizing new opportunities presents us with an early indicator of what might lie ahead for CSR in the future.¹⁴²

III. CSR CRITICS REMAIN

Although some might argue that the debate about whether to adopt CSR is largely over, there is a persistent question confronting CSR as it continues on its evolutionary journey: is CSR mere public relations? This section briefly re-examines this question as it has a bearing on whether CSR will remain an integral part of the business and regulatory environment into the future.

Although CSR has longstanding universal roots in global ethical, religious, and practical traditions of human solidarity and prudent ecology, its present form began to emerge in the United Kingdom with calls for accountability occurring from practically the moment the modern limited liability corporation was proposed.¹⁴³ Proto-concepts of CSR then influenced the varieties of corporate form in different jurisdictions, such as

¹⁴⁰ See e.g., Adam Smith, *Growth and Innovation Lights Up India*, 4 B.P. MAGAZINE, 2007, at 4, available at http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/bp_magazine/STAGING/local_assets/pdf/bp_magazine_issue_4_2007.pdf.

¹⁴¹ *Id.*

¹⁴² See, e.g., STUART L. HART, CAPITALISM AT THE CROSSROADS: THE UNLIMITED BUSINESS OPPORTUNITIES IN SOLVING THE WORLD'S DIFFICULT PROBLEMS (2005); PRAHALAD, *supra* note 22; CRAIG WILSON & PETER WILSON, MAKE POVERTY BUSINESS: INCREASE PROFITS AND REDUCE RISKS BY ENGAGING WITH THE POOR (2006) (arguing not only for profit making and innovation from pursuing "bottom-of-the-pyramid" opportunities, but also tracing how a more systemic view of the poor not only as consumers but suppliers and employees helps business contribute to economic development and poverty reduction which should be seen as part of core business strategy).

¹⁴³ MICKLETHWAIT & WOOLDRIDGE, *supra* note 26, at xviii, 50, 53.

those in Europe including stakeholders in the board structure, and the various proposals by legal academics and others in the 20th century to temper corporate power.¹⁴⁴ The contemporary notion of CSR truly emerged, however, only after the flourishing globalization of the past several decades gradually exposed the governance gaps referenced herein.

Now the most vociferous critics of CSR come not from the right, but from those typically more associated with the left. They charge that CSR is mere “window-dressing”, or empty rhetoric that exists mainly for public relations or marketing purposes,¹⁴⁵ allowing companies to reap the rewards and some business benefits of having a good CSR reputation without keeping CSR promises or bearing the investment costs of doing so.¹⁴⁶ The negative view of CSR as public relations accelerated especially after July 2001 when U.S. and European companies, many of which had been and remain CSR leaders, got jitters about whether CSR would hurt business competitiveness. Such companies successfully lobbied the European Union to issue its least common denominator Green Paper, which misleadingly re-defines all of CSR as voluntary when, as has become apparent, on the contrary, CSR begins with legal compliance, but does not end there.¹⁴⁷ CSR is thoroughly imbued and intermixed with legal as well as voluntary principles.¹⁴⁸ One can understand how

¹⁴⁴ E.g. William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L.J. 663 (1974); RALPH NADER, MARK GREEN, & JOEL SELIGMAN, *TAMING THE GIANT CORPORATION* (1976).

¹⁴⁵ For elaboration of such arguments, see, for example, Andrew A. King & Michael J. Lenox, *Industry Self-Regulation without Sanctions: The Chemical Industry's Responsible Care Program*, 43 Acad. Mgmt. J. 698 (2000); Owen E. Herrnsstadt, *Voluntary Corporate Codes of Conduct: What's Missing?*, 16 LAB. LAW. 349, 350 (2001).

¹⁴⁶ See also CHRISTIAN AID, *BEHIND THE MASK: THE REAL FACE OF CORPORATE SOCIAL RESPONSIBILITY*, available at <http://www.globalpolicy.org/soecon/tncs/2004/0121mask.pdf>.

¹⁴⁷ Comm'n of the European Communities, *Green Paper: Promoting a European Framework for Corporate Social Responsibility*, COM (2001) 366 final (July 18, 2001), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0366:FIN:EN:PDF>.

¹⁴⁸ *Id.* at ¶ 8 (“Corporate social responsibility is essentially a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment.”). Note that at some points in the Green Paper, the

from a wealthy nation, European Union perspective, CSR might be viewed as relevant mainly to corporate actions over and above the already extensive and well-resourced realm of laws that protect consumers, investors, workers, and the environment. In the developing world, however, where an increasing proportion of global production occurs, these assumptions do not apply. It is in CSR's application there, especially, that the "mere PR" criticism has picked up steam, because both market monitors and activists have increasingly perceived CSR as having been tried and found wanting. The fact that CSR went "viral," with everyone from Walmart to ExxonMobil suddenly trumpeting their corporate citizenship and supposed interest in sustainable development, also seemed to devalue its currency.

The criticism of CSR as merely, or excessively, a public relations activity represents the frustration some critics have with the pace of progress on the ground and insufficient or counterproductive implementation of the concept.¹⁴⁹ It is also raised in response to occasional deceptiveness and hypocrisy of CSR commitments formally made but not honored, and claims in essence either that voluntary efforts must be seriously

relevance of law slips back in: "Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing 'more' into human capital, the environment and the relations with stakeholders." *Id.* at ¶ 21. Similarly, although the Green Paper acknowledges the need for a broad definition of "framework," it then says that "[p]roposals should build on the voluntary nature of corporate social responsibility." *Id.* at ¶ 90. The European Parliament, however, under the leadership of legislators including the Honorable Richard Howitt, currently continues its longstanding activities aimed at having the Commission and Council "develop the right legal basis for establishing a European multilateral framework governing companies' operations worldwide." Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, 1990 O.J. (C 104) 180. For a more recent example of the European Parliament's attempt to encourage the European Commission to adopt clearer legal standards of corporate accountability, transparent CSR reporting, fiduciary duty, and foreign direct liability, see Resolution of 13 March 2007 on Corporate Social Responsibility: A New Partnership, EUR. PARL. DOC. P6_TA(2007)0062 ¶¶ 27, 29, 37 (2007).

¹⁴⁹ See, e.g., S. PRAKASH SETHI, SETTING GLOBAL STANDARDS: GUIDELINES FOR CREATING CODES OF CONDUCT IN MULTINATIONAL CORPORATIONS (2003) (regarding the marketing benefits from CSR and the widespread practice of insufficient or inconsistent implementation).

reformed to enhance actual accountability,¹⁵⁰ or that voluntary efforts alone are inadequate and even counterproductive because they distract from the necessary work of strengthening legal mandates domestically and globally to require (and not merely suggest) that companies be accountable and “walk the talk.” The same criticism often condemns company CSR actions for bad faith: whitewashing dirty laundry, or “green-washing” if it covers up environmental sins, or “blue-washing” if it does so using the mandate of the United Nations, known for its blue logo and blue-helmeted peacekeepers. Thus, Amnesty International, Human Rights Watch, Friends of the Earth, Greenpeace International, and others, while remaining affiliated with the U.N. Global Compact, regularly criticize it for being too relaxed with respect to the demands placed on its members.¹⁵¹ Corporate accountability litigator Terry Collingsworth, Executive Director of the International Labor Rights Fund, found it “ridiculous” and “incredible” to believe that companies are sincere in their CSR codes and voluntary initiatives when those same companies lobby against corporate accountability under law and claim that it subjects them to a competitive disadvantage.¹⁵² Similarly, former U.S. Labor Secretary Robert Reich dedicates an entire chapter in his recent book *Supercapitalism* to condemning CSR, using many of the arguments usually leveled by the right – that it is asking companies to go against their profit-seeking nature and demanding from them competencies they do not have.¹⁵³ His conclusion, reverting to the argument typically more associated with the left, is that stronger regulation is the only thing that will

¹⁵⁰ Cf. SIMON COUNSELL & KIM TERJE LORAAS, RAINFOREST FOUND., TRADING IN CREDIBILITY: THE MYTH AND REALITY OF THE FOREST STEWARDSHIP COUNCIL 30-34, available at <http://www.rainforestfoundationuk.org/files/Trading%20in%20Credibility%20full%20report.pdf>.

¹⁵¹ See, e.g., Global Policy Forum, Joint Civil Society Statement on the Global Compact and Corporate Accountability (July 2004), available at <http://www.globalpolicy.org/reform/business/2004/07gcstatement.pdf>.

¹⁵² Terry Collingsworth, *Corporate Social Responsibility, Unmasked*, 16 ST. THOMAS L. REV. 669, 670-71 (2004).

¹⁵³ Robert Reich, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* (2007).

work to address the underlying social and environmental problems.¹⁵⁴

This critique considers CSR as, at best, toothless and marketing-oriented, and at worst a malevolent strategy to co-opt or render powerless the critical forces hoping to tame corporations with the more meaningful constraints of law. There's truth to this critique, although the malevolence is perhaps overstated. Public-relations considerations always drive CSR efforts to some degree, whether businesses admit it or not. In fact, a dismaying number of CSR initiatives are still run by or report to the corporate public relations, communications, or marketing functions, which is unlikely to be a good sign of authentic commitment and seriousness of purpose, though there are exceptions. Smart businesses want the public to think well of them. But the smartest businesses know that there must be substance behind the claims or the result is greater, rather than less, risk of distrust and even of liability.

What really upsets Reich and other such critics is not so much CSR's content as it is the perceived *voluntary*, weak, optional and incomplete nature of the accountability and enforcement mechanisms, as opposed to *mandatory* rules. To which one might reply: CSR is already far less "voluntary" and far more "legal," substantive, and sanctionable than they realize. It has a tangible impact even if originally seen mainly as PR and rhetoric, and is evolving toward even more meaningful and actionable regimes, even if those new regimes blur the voluntary/mandatory distinction and make it far less relevant than usually appreciated. There may be an illegitimate effort by some companies and commentators to fight a rearguard action and suggest that all CSR is voluntary. But that is both inaccurate as an empirical matter and increasingly beside the point given the evolution toward stronger normative regimes. As important as hard law can be in motivating human behavior, it works in tandem with market incentives as well as affirmations of one's particular social or cultural ethos. Sometimes the latter two sources of motivation have more significant impact than the coercive force of law. Relying as they do on markets and culture, a number of the so-called voluntary initiatives are flexibly responding to fast-paced business

¹⁵⁴ *Id.*

activities much more quickly and effectively than is the hard-law legislative process domestically, or certainly, globally.¹⁵⁵ Furthermore, it is arguably a virtue of CSR that it seeks to coordinate all three sources of human motivation.

Notwithstanding the sentiment of Shakespeare's Troilus to the contrary, even mere words – rhetoric itself – can drive normative and behavioral change.¹⁵⁶ And rhetorical benchmarks such as policy statements or codes are usually more than mere rhetoric, accompanied as they are in responsible corporations by implementation processes, procedures, metrics, and review mechanisms. These can take on a life of their own, even extending to supply chains of large and powerful companies. They are also increasingly the subject of stronger formal and informal enforcement measures including boycotts, divestment, and even litigation if they are violated.¹⁵⁷ The growing practice of independent third-party verification and assurance tends to counter the argument that CSR is mere public relations, although like any form of auditing, it is dependent upon how truly independent and searching the process proves to be and how much is learned from it. Quite often, although not always, multi-stakeholder fora can also facilitate major improvements in mutual understanding among previously antagonistic diverse stakeholders and spur virtuous cycles of continuous improvement. Such mutual learning is also driving improvements in the admittedly imperfect CSR mechanisms themselves, including those recently seen in the Global Compact's reporting and accountability mechanisms, in

¹⁵⁵ Cf. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992).

¹⁵⁶ See Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 715 (2006); Lisa M. Fairfax, *Easier Said Than Done: A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771 (2007).

¹⁵⁷ See, e.g., Evelyn Iritani, *Effort to Divest from Sudan Picks Up Steam*, L.A. TIMES, Apr. 11, 2007, available at <http://articles.latimes.com/2007/apr/11/business/fi-sudan11> (noting Talisman's divestment from Sudan after alleged complicity in genocide there). See also, e.g., Keith Ecker, *Labor Group Holds Wal-Mart To Code Of Conduct*, CORP. LEGAL TIMES, Nov. 1, 2005, available at <http://www.laborrights.org/creating-a-sweatfree-world/wal-mart-campaign/1516> (regarding the 2005 lawsuit against Wal-Mart alleging that Wal-Mart was not enforcing its own "Standards for Suppliers").

implementation of the U.N. Voluntary Principles on Security, and in the reforms aimed at making the OECD National Contact Points more substantive and effective.

Admittedly, CSR laws and voluntary initiatives remain pluralistic, which can be viewed positively as inclusive or negatively as fragmented, so it is worthwhile to perform a reality check. Do they individually or collectively make a helpful difference for the stakeholders – i.e. the people – affected by corporate, social, and environmental externalities, both positive and negative? Put another way, are the new standards and accountability mechanisms “privatizing” and manipulating social good, or are they legitimately advancing social good?¹⁵⁸ While the answer depends on the individual law, standard or initiative, when norms are accompanied by attention to the other mutually reinforcing CSR principles as well as by strong state action when necessary, they can and do represent progress toward achieving public purposes.

Terry Collingsworth rightly counsels watching what companies “do, not what they say,” but could be accused of exaggerating when he says “any progress made in ‘corporate social responsibility’ is simply on paper.”¹⁵⁹ Even some of the companies most vilified in the original scandals giving impetus to global CSR – such as Shell, Nike, and Reebok – are now well-recognized as having made substantial progress in their own approaches. There is a new appreciation for the complexity of some issues, like child labor, which cannot be addressed merely by firing the children without affirmative action on underlying issues such as poverty and education.¹⁶⁰ It should also be acknowledged that progress is being made at least within the supply chains of some multinationals in reducing such abuses as child labor and forced labor, and providing grievance procedures for workers in places like Cambodia and Bangladesh

¹⁵⁸ Dara O'Rourke, *Multi-Stakeholder Regulation: Privatizing or Socializing Global Labor Standards?*, 34 WORLD DEV. 899, 902 (2006).

¹⁵⁹ Collingsworth, *supra* note 152, at 686.

¹⁶⁰ Cf. Comm'n of the European Communities, *Green Paper: Promoting a European Framework for Corporate Social Responsibility*, at ¶ 57, COM (2001) 366 final (July 18, 2001), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0366:FIN:EN:PDF>.

that did not previously exist.¹⁶¹ The problems are that not enough companies are involved and the progress to date is inadequate. So while the CSR leaders are reaping the business case benefits from their activities, competing rogues and laggards may still undercut them by externalizing the social and environmental “costs” of pollution, labor rights violations, and other abuse. Since TNCs are the most visible and high-impact actors involved in such environmental or social “dumping,”¹⁶² the focus has primarily been on their activities abroad where double standards are far too common. At the same time, however, it must be said that since a relatively small number of TNCs represents a large proportion of global economic activity, successful efforts to influence their behavior can have a significant general impact.

Given the mature legal regimes and relatively greater enforcement resources available in the wealthiest countries – most of which already have extensive laws on the books preventing pollution, the endangerment of consumers, or such egregious behavior as slavery, forced labor, child labor, discrimination, or torture – some corporate executives readily assume that the CSR problem is one that arises *only* when doing business abroad, especially in poor countries or those with a poor human rights record. This is why large TNCs and even small- to medium-sized enterprises in the richest countries often automatically assume that a baseline level of compliance with CSR principles already exists at home. Yet there is a regular stream of incidents, sometimes involving among the largest TNCs operating at home in the wealthiest countries (or in their special processing zones, like the U.S.-controlled territory of Saipan),¹⁶³ concerning such things as slave and child labor in the

¹⁶¹ This is the consensus among businesses and NGOs, unions, academic experts, and government officials at numerous CSR conferences, U.N., and other meetings attended by the author.

¹⁶² Social or environmental dumping (although referring to businesses rather than the states subject to trade law “dumping” and “antidumping duties”) is essentially garnering unfair competitive advantage by externalizing costs. For further detail, see Eurofound, Social Dumping, <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/socialdumping.htm> (last visited Mar. 10, 2009).

¹⁶³ JOHN BOWE, *NOBODIES: MODERN AMERICAN SLAVE LABOR AND THE DARK SIDE OF THE NEW GLOBAL ECONOMY* (2007).

agricultural, textile, or oil industries,¹⁶⁴ illegal and abusive sweatshops,¹⁶⁵ abuse of immigrants,¹⁶⁶ and sexual trafficking of women and children.¹⁶⁷ So it is a myth that CSR principles are meant to apply only abroad.

No complex set of norms – be it a criminal justice regime, a body of religious doctrine, the compendium of academic standards, or the principles of CSR – can ever pretend or truly aspire to result in perfect adherence. The measure of success for CSR as a body of norms is thus not so much whether one can no longer point to outliers or to abuse, but whether CSR can succeed not only in channeling behavior but also in gathering for itself social and institutional reinforcement and deepening legitimacy. While this article cannot assert that such legitimacy has already been fully achieved for CSR, the gathering

¹⁶⁴ See e.g., Parveen Chopra, *US Court Summons Man for Not Compensating Indian Workers*, HINDUSTAN TIMES, Feb. 15, 2008, available at <http://www.hindustantimes.com/StoryPage/StoryPage.aspx?sectionName=&id=59e62119-25a1-40bb-8303-d1d9881e6409&&Headline=US+court+summons+company+owner&strParent=strParentID> (regarding failure of John Pickle of the John Pickle Company in Oklahoma to pay the \$1.3 million owed to Indian workers kept in virtual slave labor conditions in his oil-field and power equipment company).

¹⁶⁵ See, e.g., Steven Greenhouse, *Apparel Factory Workers Were Cheated, State Says*, N.Y. TIMES, July 24, 2008, available at <http://www.nytimes.com/2008/07/24/nyregion/24pay.html> (“It was one of the worst sweatshops that state inspectors have visited in years, they said, sometimes requiring its 100 employees to work seven days a week, sometimes for months in a row.”); see generally BJORN SKORPEN CLAESON, SWEATFREE COMMUNITIES, SUBSIDIZING SWEAT SHOPS: HOW OUR TAX DOLLARS FUND THE RACE TO THE BOTTOM, AND WHAT CITIES AND STATES CAN DO, (Liana Foxvog & Victoria Kaplan eds., July 2008), available at http://www.sweatfree.org/docs/subsidizing_sweatshops_hr_color.pdf (alleging severe human rights violations in factories used by companies that supply public employee uniforms to the U.S. federal government).

¹⁶⁶ See, e.g., Julia Preston, *Iowa Rally Protests Raid and Conditions at Plant*, N.Y. TIMES, July 28, 2008, available at <http://www.nytimes.com/2008/07/28/us/28immig.html> (regarding Agriprocessors, the largest U.S. kosher meatpacking plant, previously cited for worker safety and unpaid overtime labor violations, now also implicated in child labor and other harsh working conditions).

¹⁶⁷ See, e.g., U.S. Immigration and Customs Enforcement, *Human Trafficking and Smuggling*, Nov. 19, 2008, available at <http://www.ice.gov/pi/news/factsheets/humantrafficking.htm>.

momentum behind its principles and their institutional anchoring in the law should at the very least give pause before the contrary is dogmatically asserted.

IV. CSR TOUR D'HORIZON

Now that this article has sketched the outlines of CSR's emergence as a new *lex mercatoria*, linked it to its "macro" business case, and responded to the key legitimate CSR criticism that remains, it is worthwhile taking a rapid geographical tour. This tour will make some observations about the status of the CSR principles using illustrative countries and regions – with the caveats that these are rough generalizations from which individual instances will vary, and that this is only a snapshot of a rapidly evolving process.

A. CSR IN THE OECD COUNTRIES

1. European Union

There have been various proclamations, often with defeatism but occasionally with triumphalism, that "the stakeholder ideal is in gradual retreat" in its European "stronghold."¹⁶⁸ Nevertheless, Europe retains a strong and even growing commitment to CSR principles including to the stakeholder engagement principle, although the ambivalence expressed in the 2001 Green Paper occasionally rears its head.¹⁶⁹

Several factors explain this, including the deep tradition of solidarity in Europe, especially since the horrors of World Wars I and II, as compared to the more individualistic United States. Other factors include the nature of European capitalism and approach to economic matters, and Europe's position taken toward international law in the last several decades. The continental European economies are more "mixed" than in, say,

¹⁶⁸ See, e.g., MICKLETHWAIT & WOOLDRIDGE, *supra* note 26, at 187.

¹⁶⁹ As with the *EU Utilities Directive 2004/17*, which failed to clarify whether, and the extent to which, CSR standards can be incorporated in, for example, water, energy, postal, and transport services, indicating that businesses and at least certain EU officials and governments continue to resist CSR principles in some contexts.

the United States or its E.U. cousin, the United Kingdom, with Germany having a significantly corporatist history and tendencies and France, having a more statist history and tendencies. European capitalism tracks the stakeholder approach to the corporation more closely, with the board serving as a mediating hierarchy for various competing social interests and stakeholder constituencies,¹⁷⁰ and having formal obligations to society.¹⁷¹ This approximates Berle and Means' vision of "a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity."¹⁷² The U.K. and U.S. perspectives may also owe something to the more diverse and widespread share ownership there, as compared to continental Europe, where as recently as 2002 only 1 in 5 German adults reportedly owned shares,¹⁷³ as compared to half of adults in the United States. This latter distinction is even more striking in parts of Asia, Latin America, and Africa.

Also, since the European Union is a regional body composed of various nations, with domestic judges able to directly apply European law, recourse to international law is necessarily more developed in Europe than in the United States or many other countries – although the U.S. Supreme Court has shown a marked receptivity in recent years to taking international law

¹⁷⁰ Cf. Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 934-39 (1984) ("The corporation is conceived as the central social unit, and corporate operations and planning are to be coordinated by government agencies and industry associations.").

¹⁷¹ See generally Commission of the European Communities, *Corporate Social Responsibility: A Business Contribution to Sustainable Development*, COM (2002) 347 final (July 2, 2002), available at http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_127374.pdf.

¹⁷² ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 312 (Harcourt Brace & World, 1968).

¹⁷³ Mark Landler, *The Nation; For Germans, a Recession is a Pretty Smooth Ride*, N.Y. TIMES, Sept. 29, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9B05E7DA1638F93AA1575ACoA9649C8B63>.

into account.¹⁷⁴ The stronger and more longstanding tradition of ethical consumerism in Europe undoubtedly plays a role as well.

The European Union's commitment to CSR is globally significant. As the largest market in the world, with correspondingly greater powers to dictate rules,¹⁷⁵ the source of most of the world's foreign investment, and a community built explicitly on a blend of market and social values, the European Union's standards, requirements, and expectations influence companies and suppliers from every region. That can be affirmed even before considering the European Union's role as the largest source of development assistance globally, including significant aid and technical assistance specifically aimed at promoting CSR and sustainable development. At least with regard to CSR, the European Union has more influence and "soft power" than the United States.

The next frontier in Europe is enhancing accountability for corporations in light of the detour taken by the Green Paper's 2001 emphasis on voluntary aspects of CSR. However, substantial pressure is being exerted both within the official European bodies and by the European Parliament,¹⁷⁶ and by civil society organizations, such as the European Coalition for Corporate Justice, to enhance the ability now existing in theory under the *Brussels Convention* to hold European companies accountable for harms caused abroad. Some existing legal rules and practices, such as the "loser pays" rule in lawsuits and the fact that contingency fees are disfavored outside of the United

¹⁷⁴ The application of foreign and international law in the United States Supreme Court has been the topic of debate internally as well as externally. Strong exponents of diverging opinions, Justice Breyer advocating for and Justice Scalia arguing against the application of foreign and international law, participated in a live debate on the issue at American University, Washington College of Law on Jan. 13, 2005. See U.S. Association of Constitutional Law Discussion, Transcript of Debate: *Constitutional Relevance of Foreign Court Decisions*, Jan. 13, 2005, available at <http://www.freerepublic.com/focus/f-news/1352357/posts>.

¹⁷⁵ Cf. ALBERT O. HIRSCHMAN, NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE (Berkeley: Univ. of California Press, 1945).

¹⁷⁶ See Resolution of 13 March 2007 on Corporate Social Responsibility: A New Partnership, EUR. PARL. DOC. P6_TA(2007)0062, ¶¶ 27, 29, 37 (2007); see also *supra* text accompanying note 148.

Kingdom, serve to temper litigation in Europe. Yet other pressures combined with the continental reluctance to block lawsuits using procedural rules such as *forum non conveniens*¹⁷⁷ make it likely that the future will bring more lawsuits in the European Union to enforce notions of corporate accountability.

2. Canada, The United Kingdom, and Australia

The common law jurisdictions of the United Kingdom, Canada, and Australia are very much “three peas in a pod,” when it comes to the future of CSR from a legal perspective. At least as regards corporate law, all three jurisdictions share closely linked common law heritages and those ties – although they are not as strong as they used to be – are likely to continue well into the future, particularly in the area of progressive corporate law reform. Canada may have a touch of continental European influence as evidenced by the significance of family-held companies and perhaps even by the special prominence of its oppression remedy. Nevertheless, as an example of the influence the three jurisdictions can have on each other, one only needs to look at the U.K government’s decision to introduce pension fund disclosure laws in 1999,¹⁷⁸ the move of the Australian government to follow suit no less than three years later,¹⁷⁹ and now the increasing pressure being placed on the Canadian government to do likewise.¹⁸⁰ In keeping with this trend, Australian and Canadian lawmakers are likely to closely watch the implementation of the new U.K. directors’ duties mandating consideration of environmental and social issues according to section 172 of the 2006 U.K. Companies Act,¹⁸¹ weighing whether to move in the same direction. The Canadian decision of *Peoples v. Wise*, takes a “permissive” approach to

¹⁷⁷ *Owusu v. Jackson*, 2005 E.C.R. I-1383.

¹⁷⁸ *The Occupational Pension Schemes*, 1999, S.I. 1999/1849, § 2(4) (U.K.).

¹⁷⁹ *See Corporations Act*, 2001, §1013D(1)(L) (Austl.).

¹⁸⁰ Perhaps the strongest proponent of this type of disclosure is Canadian based NGO SHARE. To view SHARE’s various government submissions on this issue, *see* SHARE, Policy Submissions, http://www.share.ca/en/policy_submissions (last visited Mar. 10, 2009).

¹⁸¹ *Companies Act*, 2006, c. 5, § 417 (U.K.).

integrated decision-making.¹⁸² This has already taken Canada one step closer to the U.K model, and it is not unreasonable to speculate that Canada might one day formally adopt the principles set out in *Peoples* under the legislative provisions of the *Canadian Business Corporations Act* and parallel provincial legislation.¹⁸³ The recent tabling of a bill in Canada to enhance CSR among Canadian mining companies by ensuring that they comply with international law and the International Bill of Rights is still further evidence of CSR's advance.¹⁸⁴

Australian courts at the time of this writing have not yet had a case come before them that would give them the opportunity to adopt an interpretation of directors' duties under Australian corporate law, mirroring that provided in *Peoples v. Wise*. However, the government-led committee heading the 2005/2006 Australian parliamentary inquiry into corporate responsibility took it upon itself to declare that Australian corporate law already "permits directors to have regard for the interests of stakeholders, other than shareholders."¹⁸⁵ A recent change in government in Australia, from the conservative liberals to the more centre/left Labor government, might also have implications for corporate law reform, and CSR more generally, in Australia. In the course of the Australian parliamentary inquiry just mentioned, Labor members of the committee called for a strategic direction and engagement from government with the primary objective of "encouraging more companies to integrate sustainable, responsible business

¹⁸² *Peoples Dep't Stores Ltd. v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68, para. 42 (Can.) (allowing directors to take social and environmental concerns of stakeholders into account in the best interests of the corporation as opposed to merely the financial interests of shareholders).

¹⁸³ *Canada Business Corporations Act*, 1985, R.S.C., ch. C-44.

¹⁸⁴ See *Corporate Social Responsibility of Mining Corporations Outside Canada Act*, 2009 S.C., ch. C-298 (Can.); *Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act*, 2009, 2009 S.C. ch. C-300 (Can.).

¹⁸⁵ Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (Canberra: Senate Printing Unit, June 2006) at xiv, available at http://www.aph.gov.au/SENATE/COMMITTEE/corporations_ctte/completed_inquiries/2004-07/corporate_responsibility/report/do1.htm.

practices into their operations.”¹⁸⁶ To further this goal, they recommended, among other things, the establishment of a corporate responsibility unit within a government department and the introduction of mandatory reporting of sustainability risks for large private and public companies.¹⁸⁷

Proponents of progressive corporate law reform in the United Kingdom, Canada, and Australia, particularly the NGOs, are also following parallel agendas that are likely to align the legislative response to CSR in the three jurisdictions. This is not surprising given the global reach of many of today’s largest NGOs. For example, members of the Corporate Responsibility (CORE) Coalition in the United Kingdom (a strong proponent of progressive corporate law reform) include, among others, Amnesty International, Friends of the Earth and Oxfam, all of which have a strong presence in Australia and Canada; and when the opportunity arises these NGOs do not hesitate to promote their law reform agenda in their Canadian and Australian advocacy.¹⁸⁸

Yet even if differences remain in how the law might mandate or interact with CSR in these three jurisdictions, it is something of a moot point when it comes to the many multinational companies operating within and between them. Put simply, the jurisdiction with the highest benchmark for behavior can become the default for standard-setting. Take, for example, the mining sector, where recent acquisitions and dual listings have created mining giants that are simultaneously subject to U.K., Australian and Canadian corporate law and governance regimes. For instance, BHP Billiton has dual listing on the Australian and London stock exchanges with subsidiaries based in Canada. Likewise, Rio Tinto has a dual listing and recently acquired Canadian-based aluminum producer, Alcan. In such situations, the corporate decision makers of these multinational corporate groups are subject to myriad jurisdictional duties and to reduce transaction costs will likely follow the tougher standards (e.g. the U.K directors’ duties) throughout their global operations.

¹⁸⁶ *Id.* at 175.

¹⁸⁷ *Id.* at 177, 180.

¹⁸⁸ CORE, <http://www.corporate-responsibility.org> (last visited Mar. 10, 2009).

3. France

The French stakeholder view of the corporation, its expansive laws on workers' rights, its provision for employee representation on corporate boards, its significant amount of socially responsible investors which continues to grow, and its mandatory CSR disclosure under the 2001 *Loi relative aux nouvelles régulations économiques*,¹⁸⁹ make France more amenable to CSR principles than most. The French securities regulator, *L'autorité des marchés financiers* (AMF), already looks to the same Committee of Sponsoring Organizations (COSO) internal control framework as the United Kingdom and other jurisdictions. Furthermore, as a monist jurisdiction, France allows its treaties to be directly applicable in domestic proceedings – unlike the United States, for example, which has a mixed monist/dualist approach that generally requires implementing legislation for the treaty to take effect. So as in many other European jurisdictions, international law claims are easier to bring in France.

The current French challenge turns on implementing and extending the CSR principles and improving corporate accountability. Currently, French companies are sharing best practices through peer-to-peer learning networks including Entreprises pour les Droits de l'Homme (EDH), the French initiative related to the Business Leaders Initiative on Human Rights. Both France and its TNCs also have significant influence in francophone Africa, reinforcing CSR principles in those emerging markets. In France and other civil law jurisdictions, criminal procedure is available to private citizens to bring actions before an investigating magistrate, somewhat akin to the “private attorney general” statutes and causes of action in the United States.¹⁹⁰ Unfortunately, the French criminal case of this nature against Total Oil Company, arising from facts akin to those in the *Unocal/Burma* case, ended before judgment could be reached, as did a parallel politically charged case in Belgium. After the case had stalled on evidentiary issues and choice of

¹⁸⁹ See *Loi n° 2001-420 du 15 mai 2001*, J.O., May 16, 2001, p. 7776, at art. 116, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000223114&dateTexte=#LEGIARTI000006516878>.

¹⁹⁰ See *Nouveau Code de Procédure Civile (Fr.) Art. 1er ss.*

law, the French claimants settled with Total.¹⁹¹ Nevertheless, more of such cases are likely to be brought in France on CSR grounds.

4. United States

Traditionally, U.S. executives favored “leadership and vision, knowledge, and quality” over the triple-bottom-line attention to environmental, financial, and social credibility given higher significance by their European counterparts.¹⁹² Accordingly, in Europe, “CSR has focused on the environmental and social impact of companies' business functions,” whereas in the United States, CSR historically was seen as mainly “donations to social and artistic causes and other such acts of corporate philanthropy.”¹⁹³ As regards codes of conduct, the United States shows considerable leadership. But as for legal developments underpinning the CSR principles, it has lagged behind the European Union and its member states, undoubtedly due in part to the more individualist form of liberal capitalism practiced in the United States.¹⁹⁴

This situation is evolving. When a company the size and complexity of General Electric, with over 300,000 employees and a vast range of businesses that in many ways reflect the global economy, commits itself to the Universal Declaration of Human Rights, and decides to audit and verify that commitment in conformity with its own world-class operational reviews and metrics, that decision ripples throughout the U.S. and global economies.¹⁹⁵

¹⁹¹ Further detail on these cases is available at Business & Human Rights Resource Centre, <http://www.business-humanrights.org> (last visited Mar. 10, 2009).

¹⁹² See, e.g., *The Measure of Things: Surveys on Corporate Citizenship*, 11 J. CORP. CITIZENSHIP 18 (Sept. 22, 2003).

¹⁹³ Abid Aslam, *Background: Corporate Social Responsibility* (2007), available at http://www2.gsb.columbia.edu/ipd/j_corporatesocial.html.

¹⁹⁴ Cf. PETER A. HALL & DAVID SOSKICE, *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* (2001).

¹⁹⁵ See General Electric Company, *Statement on Human Rights*, <http://www.ge.com/company/citizenship/humanrights/index.html> (last visited Mar. 10, 2009).

GE is one of hundreds of U.S. companies to have adopted CSR policies and codes of conduct since the 1990s, building on the legal foundation of ethics and compliance required by such decisions as *Caremark*.¹⁹⁶ Whereas once the United States was a relative CSR laggard vis-à-vis Europe, today it is rapidly catching up and the trend is likely to continue. The U.S. Climate Action Partnership (USCAP) is an interesting example of how voluntary initiatives can seek to enhance the law, committing as it does many of the nation's leading companies to seek urgent legislative action against climate change.¹⁹⁷ Even the resistance of the business lobby to stronger forms of CSR in the United States seems to be relaxing somewhat in light of the new information realities emphasized throughout this article. This shifting approach seems to have arisen from various market drivers for CSR – both carrots (such as the new markets opening up when CSR principles are deployed) and sticks (such as the availability of the Alien Tort Claims Act (ATCA)¹⁹⁸ and similar litigation remedies). The ATCA action available for especially egregious violations that implicate the law of nations and meet ATCA's standards is unique, although growing recognition and use of foreign analogues is proceeding apace. Successful settlements like *Unocal* “[signal] to corporations that this law is applicable to them, and that they are going to face major litigation.”¹⁹⁹

A note of realism, however: although the notion of CSR is spreading widely and endorsed to one degree or another by the

¹⁹⁶ In re *Caremark Int'l Inc.*, 698 A.2d 959, 968 (Del. Ch. 1996) (a director's obligation includes a duty to ensure that the company has put in place adequate compliance-related information and reporting procedures and that failure to do so, in theory at least, could render a director liable for losses caused by noncompliance). This aspect of the decision was later affirmed in *Stone v. Ritter*, 911 A.2d 362, 373 (Del. 2006).

¹⁹⁷ See United States Climate Action Partnership, <http://www.us-cap.org/> (last visited Mar. 10, 2009).

¹⁹⁸ Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

¹⁹⁹ Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005, available at <http://www.globalpolicy.org/intljustice/atca/2005/0322unocalsettle.htm> (quoting Robert Benson, Professor of Human Rights Law at Loyola Law School).

major U.S. companies and a surprising number of small to medium-sized firms, it is understood in very different ways at this point, with the lowest common denominator being simple philanthropy. U.S. businesses as a whole still have a long way to go to truly understand and effectively apply CSR principles. Still, the longest journey begins with a first step, and more and more companies have taken it.

5. Japan

The Japanese word for “business” is made up of the elements “kei,” meaning “governing the world in harmony while bringing about the well-being of the people,” and “ci,” meaning making “ceaseless efforts to achieve.”²⁰⁰ With its traditions of interrelated corporate “keiretsu” and state-supported capitalism, Japan has traditionally favored more of a civil law, relationship-based stakeholder view as opposed to the more classic common law, bargained-for exchange, shareholder view. Inroads into this were made during the recent ascendance of neoliberal “market fundamentalism,”²⁰¹ and in the face of the relative economic success and influence of Japan’s close ally, the United States. Among other things, this trend has seen the erosion of some Japanese corporate traditions including lifetime employment, and those consequences are likely to continue. Yet CSR’s popularity “provided the greatest obstacle to the deregulation that recently began to accelerate in Japan” in the late 1990s.²⁰² The classic Japanese preference for the stakeholder view, opposed to the view that the corporation exists primarily for shareholder profit, has been confirmed empirically.²⁰³ Thus, experts continue to advise that when

²⁰⁰ Kyoko Fukukawa & Jeremy Moon, *A Japanese Model of Corporate Social Responsibility?: A Study of Website Reporting*, 16 J. CORP. CITIZENSHIP 45 (2004).

²⁰¹ For a good representation in the Japanese context of that ideology at its apogee, see, e.g., Yoshiro Miwa, *Corporate Social Responsibility: Dangerous and Harmful, Though Maybe Not Irrelevant*, 84 CORNELL L. REV. 1227 (1999).

²⁰² *Id.* at 1250.

²⁰³ See, e.g., studies cited by Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 685-86 (2004).

implementing CSR in countries such as Japan, “explanations of motivations should be couched in terms of doing the right thing for its own sake, as opposed to explaining that CR and CR reporting ultimately benefits the firm and its owners.”²⁰⁴

The result is that Japan still falls closer to the same “stakeholder” side of the spectrum as does the E.U., in contrast to the relatively greater emphasis in the United States on shareholders – although in light of constituency statutes in most of the states and precedents such as *A.P. Smith Manufacturing Co. v. Barlow* (1953)²⁰⁵ and *Theodora Holding Corp. v. Henderson* (1969)²⁰⁶ (confirming the board’s right to make charitable donations), the U.S. model also includes stakeholders more than commonly assumed.²⁰⁷ The vast majority of Japan’s leading companies publishes social reports and accounts for carbon emissions. The stronger historical support in Japan for CSR²⁰⁸ as compared with jurisdictions like the United States, however, has simultaneously been narrowing in some respects, as traditional Japanese influences wane, while resurging in other respects as Japanese companies no less than others find adherence to CSR principles increasingly required in law and as a “basic competitive requirement” of global business. Codes of conduct, for instance, have proliferated in Japan as elsewhere, including for Japanese production abroad. But these codes are more “Japanese” in that they arise primarily out of quality control concerns and only gradually began to reference labor

²⁰⁴ Adam J. Sulkowski et al., *Corporate Responsibility Reporting in China, India, Japan, and the West: One Mantra Does Not Fit All*, 42 NEW ENG. L. REV. 787, 807 (2008).

²⁰⁵ *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953).

²⁰⁶ *Theodora Holding Corp. v. Henderson*, 257 A.2d 398 (Del. Ch. 1969).

²⁰⁷ Although classics of corporate law theory such as that of Berle and Means are often cited for the shareholder primacy view, their treatise actually concludes the opposite: that corporations had to be responsive “not alone the owners or the control but all of society.” See BERLE & MEANS, *supra* note 172, at 356. Shareholder primacy has not been as dominant as many commentators suggest. For further discussion see, e.g., Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford* (Research Paper No. 07-11, UCLA School of Law, Law & Econ. Research Paper Series, 2007).

²⁰⁸ Miwa, *supra* note 201, at 1250.

rights and then human rights. Their tone is also different, emphasizing, for example, respect and cooperation between the parties.²⁰⁹ There is judicial precedent in Japan, as in other jurisdictions, confirming the need for corporations to have internal controls and risk management systems to avoid the recurring corporate scandals seen there, as elsewhere.²¹⁰

Another interesting example of distinctive Japanese CSR evolution pertains to the greater willingness of Japanese judges to entertain forced labor, “comfort woman,” or other war crime victim compensation claims against Japanese companies from citizens of China, Korea, or other countries. This development, which has enhanced the prospect of settlements and other relief for the victims, is attributed by some commentators to Japan’s perceived need to take into account the new, more networked geopolitical and economic realities in Asia.²¹¹ Generally, however, Japan remains much less litigious and a much less favorable venue for foreign plaintiffs than, say, the United States, although a director could be sued for breach of fiduciary duty for an incident abroad that damaged the Japanese company.²¹²

In the future, Japan can be expected to continue to refine and endorse its distinctive approach to the CSR principles at home and abroad.

²⁰⁹ Koji Ishikawa, *The Rise of the Code of Conduct in Japan: Legal Analysis and Prospect*, 27 LOY. L.A. INT’L & COMP. L. REV. 101, 113-23 (2005).

²¹⁰ *E.g.* Daiwa Bank Shareholders Representative Suit, 1721 HANREI JIH³, 32 (Osaka D. Ct., Sept. 20, 2000), *cited and translated in* Koji Ishikawa, *The Rise of the Code of Conduct in Japan: Legal Analysis and Prospect*, 27 LOY. L.A. INT’L & COMP. L. REV. 101, 124 (2005).

²¹¹ William Gao, *Overdue Redress: Surveying and Explaining the Shifting Japanese Jurisprudence on Victims’ Compensation Claims*, 45 COLUM. J. TRANSNAT’L L. 529, 548 (2007) (“Contrary to . . . received wisdom, self-interest and social responsibility may converge for Japanese corporate defendants in compensation suits.”).

²¹² Ishikawa, *supra* note 209, at 113.

6. South Korea

The culture of South Korea, like that of China and Japan,²¹³ is heavily influenced by Confucian values. Unsurprisingly, South Korean business holds stakeholder values similar to those in Japan, although a bit less fervently than in Japan, as confirmed by recent surveys.²¹⁴ Such cultural values do make a difference. But there have been serious gaps in practice in Korean business' understanding of CSR principles. Failure to achieve internalized values of the rule of law and an ethical, accountable "legal culture"²¹⁵ has been identified as the cause not only of the corporate scandals in the United States and Europe at the turn of the century,²¹⁶ but also those in the Asian Crisis shortly before. The sidestepping of corporate governance controls by certain banks and companies in South Korea, and also in Japan, Indonesia, Thailand, and Malaysia -- but not Hong Kong, Singapore, or Australia -- seems to have made a significant difference in the unfolding of that crisis.²¹⁷

Like other Asian countries, Korea has in recent years upgraded its corporate governance laws and practices. Korean businesses have even started taking the human rights prong of CSR quite seriously, with several major seminars involving the top Korean business associations and companies. Korea recognizes that to compete, CSR principles are now expected in the global marketplace.

²¹³ Also the cultures of Taiwan, Singapore, and to a perhaps surprising extent still, Hong Kong are heavily influenced by Confucian values.

²¹⁴ See, e.g., SANG-WOO NAM & IL CHONG NAM, POTENTIAL ROLE OF STAKEHOLDERS (Asian Dev. Bank Inst., 2005) available at <http://www.adbi.org/book/2005/02/02/884.corporate.governance.asia/potential.role.of.stakeholders/>.

²¹⁵ See Lawrence M. Friedman, Law and Society: An Introduction 6-9 (Prentice Hall, 1977).

²¹⁶ E.g., Ronald R. Sims & Johannes Brinkmann, *Enron Ethics (Or: Culture Matters More than Codes)*, 45 J. BUS. ETHICS 243, 244 (2003), available at <http://www.springerlink.com/content/p712j1555807774r/fulltext.pdf>.

²¹⁷ Benny S. Tabalujan, *Why Indonesian Corporate Governance Failed – Conjectures Concerning Legal Culture*, 15 COLUM. J. ASIAN L. 141, 145-46 (2002).

B. THE BRICS AND THE “SECOND WORLD”

There is a growing consensus that the BRIC countries (Brazil, Russia, India, and China) and the “Second World” countries generally represent a coming historic shift in relative wealth and power away from the current “First World”²¹⁸ – so the rules and standards that these countries and their companies adopt will influence the future of global business, and indeed geopolitics for generations to come. At this point, relatively few of the world’s largest TNCs come from the “Second World,” but this will continue to evolve rapidly. In the meantime, “Second World” emerging markets are tremendous growth markets for established TNCs.

This power shift to the “Second World” countries and their companies, with the corresponding and predictable impact on global values, norms, and the global system itself, causes legitimate concern to many. The historical record of China, Russia, or Saudi Arabia²¹⁹ with regard to CSR, human rights, and environmental issues is, to say the least, not exemplary. The insatiable quest for energy on behalf of newly globalizing countries (global energy demand is projected to increase at least 50% by 2030), and the new geopolitical dimensions of that global quest, do not help the prospects for CSR. For example, China’s state-owned enterprises roam the globe to lock up new fossil fuels in Africa and Latin America and are prepared to go where CSR has deterred others from going, including Sudan. Organizations such as the Shanghai Cooperation Organization, in which China, Russia, and the Central Asian Republics have partnered on not only energy but also security matters, are a reminder that there is even an implicit military dimension to resource quests. Nevertheless, China is not alone. The recent U.S. assistance to Nigeria in quelling “unrest” in the Niger Delta is yet another example, to say nothing of Iraq.

Yet three out of the four BRIC countries actually have extensive activities aimed at implementing CSR and those three

²¹⁸ Cf. CLYDE PRESTOWITZ, *THREE BILLION NEW CAPITALISTS: THE GREAT SHIFT OF WEALTH AND POWER TO THE EAST* (Basic Books 2005).

²¹⁹ Saudi Arabia is also sometimes considered a Second World country. See PARAG KHANNA, *THE SECOND WORLD: EMPIRES AND INFLUENCE IN THE NEW GLOBAL ORDER* (Random House 2008).

seem amenable to the idea of responsible competitiveness.²²⁰ Russian industry, by contrast, is, in the main, notoriously oblivious to CSR principles,²²¹ which creates difficulties for the many businesses in the country undoubtedly trying hard to be more responsible.

As for CSR's future progress, it seems likely, again with the exception of Russia, that the position of the BRICs, lying as it does between the two extremes in the global economy – understanding the benefits of markets but also the acute predicament of those not benefiting from globalization – will in the long-run spur rather than retard the momentum toward sustainable development. Indeed, a number of “Second World” corporate executives from countries such as China, India, and South Africa have demonstrated a strong desire to deploy corporate power in the interest of helping their compatriots achieve sustainable development.²²² To illustrate the opportunities and challenges involved, this article now turns to the important examples of China, India, Singapore and Malaysia before addressing CSR's relevance for Africa and the least developed countries.

1. China

After a two-century hiatus, China – self-described in the first article of its 1994 Company Law as a “social market economy,” – is again moving toward having the biggest economy in the world (as it did in the 18th century). Now (and with apologies to Mao)

²²⁰ SIMON ZADEK, ACCOUNTABILITY, RESPONSIBLE COMPETITIVENESS: SCALING UP CORPORATE RESPONSIBILITY (2004), available at http://ec.europa.eu/enterprise/csr/documents/business_case/zadek.pdf (focusing on the benefits to national economic competitiveness from triple-bottom-line business actions).

²²¹ *E.g.*, *CSR Goes Global*, ECONOMIST, Jan. 17, 2008 (“Among the BRICs, Russian companies seem the least interested in the idea of corporate citizenship.”); *Corporate Social Responsibility in Russia*, CSR EUROPE, June 27, 2008, http://www.csreurope.org/news.php?action=show_news&news_id=1510&type= (quoting Moscow News to the effect that CSR “remains a relatively ignored concept in Russia”).

²²² This desire has been communicated to the author in personal interactions with corporate executives from these countries.

there is a new Chinese middle class of 100 million to 150 million people with a household income of USD\$10,000/yr.²²³ As the equilibrium of the global economic and political system is shifting from the West in an eastern and southerly direction, China deserves special consideration, both because of its size and influence and because it is already so integrated with production in other countries including the West.

Although the European Union is presently the largest market in the world, ahead of the United States, China and India have their sights set on overtaking the leaders, with all the implications this has for the socioeconomic and political models offered by these competing powers. While Chinese rhetoric and many actions in the field of CSR are quite encouraging, China still has a very nascent rule of law and of course remains an authoritarian country with major environmental and human rights issues. At a time of increasing Chinese and Second World power, the entry into the global economy of corporations from jurisdictions without the same traditions of law and human rights again reminds us of the need for a wider perspective. China highly values “sovereignty” and “noninterference in domestic affairs.”²²⁴ By joining the WTO, China was committing itself and its companies to global rules and a level playing field in the realm of economics and trade, although the opportunity to condition accession on CSR principles pertaining to human rights and the environment was lost. In a very real signal of how standards could be lowered in the absence of global CSR principles, leading Western companies such as Yahoo, Microsoft, Google, and Cisco have already been implicated in alleged human rights abuse complicity. Several of their highest executives testified before the U.S. Congress in defense of the corporate actions. After the adverse publicity and stakeholder pressure, the companies recently concluded lengthy negotiations with NGOs on a new multi-stakeholder voluntary initiative on the internet and censorship launched in Paris in

²²³ Leslie T. Chang, *China's Middle Class*, NAT'L GEOGRAPHIC, May 2008, available at <http://ngm.nationalgeographic.com/2008/05/china/middle-class/leslie-chang-text/1>.

²²⁴ See e.g., Sophie Richardson, *Challenges for a Responsible Power*, in HUMAN RIGHTS WATCH, WORLD REPORT 2008 (2008), available at <http://www.hrw.org/legacy/wr2k8/china/china.pdf>.

December 2008 – the Global Network Initiative (GNI)²²⁵ -- in lieu of proposed U.S. legislation on the issues.²²⁶ While Amnesty International and Reporters without Borders decided to refrain from joining the GNI in part because of the generality and malleability of its commitments, it is hoped that the effort will gain in substance and credibility over time, and be a vehicle for effective collective action to ensure free expression in new media globally and indeed broader respect for CSR principles in general.

Even though Chinese formal law and corporate governance (*gongsi zhili*) have made great strides in recent years in incorporating the CSR principles, enforcement makes the difference as to whether the laws have any meaning, and like many Second World countries China still lags dramatically in that regard. Codes of conduct are nominally accepted, but double-bookkeeping, fraud, and audit manipulation and evasion are common.²²⁷ This means in practice that external verification, enhanced state capacity, and multi-stakeholder partnerships take on even greater significance, as is true in many other Asian countries. Personal relationships (*guanxi*) remain important in China as throughout Asia generally, for good (e.g. stakeholder perspectives) or bad (e.g. corruption), although progress is being made toward transparency and more objective rules.²²⁸ China's system at present, emphasizing economic over political reform, also partakes of a form of "corporatism" that conjoins a strong state with some calibrated autonomy for certain private actors, all in a still hierarchical if now more chaotic relationship, in part deriving from the persistent influence of Confucianism and the communist legacy.

²²⁵ Global Network Initiative, <http://www.globalnetworkinitiative.org> (last visited Mar. 10, 2009).

²²⁶ See Global Online Freedom Act, H.R. 275, 110th Cong. (2007), available at http://thomas.loc.gov/home/gpoxmlc110/h275_1h.xml.

²²⁷ E.g., Dexter Roberts et al., *Secrets, Lies and Sweatshops*, BUS. WEEK, Nov. 27, 2006, available at http://www.businessweek.com/magazine/content/06_48/b4011001.htm?chan=globalbiz_asia_today%27s+to+p+story.

²²⁸ International Business Leaders Forum, *China's Business Leaders to Raise Standards*, Mar. 11, 2005, available at http://www.iblf.org/media_room/general.jsp?id=121.

Pursuant to the Confucian ideal of harmonious social relations, arbitration is still preferred over litigation, although human rights and environmental litigation is on the rise.²²⁹

CSR is also on the rise in China, at both the national and the provincial levels of government and among Chinese businesses. Why? Chinese elites are not oblivious to the trends affecting their cosmopolitan counterparts around the globe or to the fact that markets are demanding CSR. U.N. Special Representative for Business and Human Rights, John Ruggie, studied this and discovered that the only predictor of whether Chinese corporations had a CSR policy embracing human rights at the time of his 2007 study was whether they were in the Fortune 500.²³⁰ Many Chinese leaders recognize that the growing global prevalence of CSR standards means that they may face sanctions of various sorts, such as consumer boycotts, divestment actions from SRI funds, and future trade sanctions, if they fail to progress on this front.

In addition to attributes of the rule of law such as property rights and due process of law with an independent judiciary, China needs to make progress both on standards and enforcement with respect to protecting minority rights, human rights in general, and the environment. The Chinese do, however, seem to be moving in the direction of a “meta-regulatory” approach, in the sense of setting standards and allowing complaint mechanisms to develop that will engender dialogue and problem solving consistent with the CSR principle of stakeholder engagement.²³¹ This accords with the continued

²²⁹ Howard W. French, *Despite Flaws, Rights in China Have Expanded*, N.Y. TIMES, Aug. 2, 2008 (“the country now has 165,000 registered lawyers, a five-fold increase since 1990, and average people have hired them to press for enforcement of rights inscribed in the Chinese Constitution”), available at http://www.nytimes.com/2008/08/02/world/asia/02china.html?_r=1&ei=5070&en=c8402fdcobbb87fec&ex=1218340800&pagewanted=all.

²³⁰ JOHN G. RUGGIE, HUMAN RIGHTS POLICIES OF CHINESE COMPANIES: RESULTS FROM A SURVEY (2007), available at <http://www.business-humanrights.org/Documents/Ruggie-China-survey-Sep-2007.pdf> (conducted under the mandate of the U.N. Secretary-General’s Special Representative for Business and Human Rights).

²³¹ Examples include a new labor dispute mediation and arbitration law passed by China’s National People’s Congress in 2007 and the new labor contract law’s provision that labor unions should give support and assistance to workers who file claims (allowing worker complaints to be addressed before

deep Chinese attachment to Confucian values of moral, harmonious relations in society as the key to effective governance (as opposed to the reliance on detailed legal rules promoted by the Legalists in Chinese history – although the force of law has always been seen in practice as a necessary backstop and the law of force remains quite apparent in China).²³²

Thus, China does indeed have a local Global Compact network (as do many of the countries in Asia, ranging from, India, Indonesia, Malaysia, the Philippines, and Sri Lanka, to Thailand),²³³ and also has enshrined social responsibility and the stakeholder perspective in law in various remarkable ways.²³⁴ Also noteworthy is the new labor law which has, since January 2008, enhanced workers' rights, including by requiring that companies give them written contracts.²³⁵ Disturbingly,

they erupt into protests). *See* Labor Contract Law (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), art. 78 (P.R.C.).

²³² *See, e.g.*, ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 11 (Butterworths Asia 2d ed., 1998) (1992) (reliance on "fa" or legal coercion/violence "is to be employed as a last resort to maintain social order when li has failed to do so.").

²³³ For information regarding current networks, *see* U.N. Global Compact, Networks Around the World, <http://www.unglobalcompact.org/NetworksAroundTheWorld/index.html> (last visited Mar. 10, 2009).

²³⁴ The 2006 amendments to the Chinese Company Law expressly provide that companies shall "bear social responsibilities." *See* Company Law (promulgated by Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006) (P.R.C.). Moreover, the Chinese Securities Regulatory Commission's Corporate Governance Code confirms a stakeholder view instead of succumbing to shareholder primacy, confirming that listed companies must respect the interests of "banks and other creditors, employees, consumers, suppliers, the community, and other stakeholders." *See* Code of Corporate Governance for Listed Companies (promulgated by the China Sec. Reg. Comm'n, State Econ. and Trade Comm'n, Jan. 7, 2001), available at http://www.ecgi.org/codes/documents/code_en.pdf.

²³⁵ Lyle Morris, *An Uncertain Victory for China's Workers*, YALE GLOBAL, June 24, 2008, available at <http://yaleglobal.yale.edu/display.article?id=10983> (stating that China's new labor law, in effect as of January 2008, has been described as part of China's efforts to create a "harmonious society" and "the Chinese government taking steps to rein in what they see is an unacceptable gap between economic expansion and poor condition of workers.").

many U.S. and some European companies strongly lobbied against these new workers rights in China through local trade associations and their chambers of commerce. Nevertheless, these progressive Chinese developments – applying not just to export industries (where CSR has formerly been concentrated) but to all Chinese companies and workers – should give pause to all those who predicted that the stakeholder ideal is in retreat in China.²³⁶ China's Academy of Social Sciences recently established a new Corporate Social Responsibility Research Center, aimed at “exploring a [CSR system] with Chinese characteristics, establishing and improving effective CSR external mechanisms, and assisting Chinese enterprises to find a practical path for CSR.”²³⁷ The new head of the center, Chen Jiagui, stated that “[f]ulfilling CSR is the fundamental point for corporate sustainable development, the global trend of accelerating economic development and social progress, and motive force for harmonious society.”²³⁸

The “business case” for Chinese CSR includes both domestic and foreign policy aspects. An article in the San Francisco Chronicle²³⁹ recently predicted that “China just might surprise the U.S. on climate change” in order to avoid otherwise grave repercussions in the form of pollution, droughts, flooding, and other environmental harm. China is already a locus of growing clean-tech energy investment. The stakeholder engagement principle similarly acts as a safety valve and signal that an issue needs to be addressed before it undermines system stability, as suggested by China's tolerance of the more than 85,000 protests during 2007²⁴⁰ surrounding CSR-related issues like labor

²³⁶ MICKLETHWAIT & WOOLDRIDGE, *supra* note 26.

²³⁷ ChinaCSR, CASS Sets Up CSR Research Center, July 7, 2008, available at <http://www.chinacsr.com/2008/07/07/2488-cass-sets-up-csr-research-center/>.

²³⁸ *Id.*

²³⁹ Tony Haymet & Susan Shirk, *China Just Might Surprise the U.S. on Climate Change*, SAN FRANCISCO CHRON., May 28, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/05/27/ED2K10U856.DTL>.

²⁴⁰ Johann Hari, *We Shop Until Chinese Workers Drop*, THE INDEP., May 3, 2007, available at <http://www.independent.co.uk/opinion/commentators/johann-hari/johann-hari-we-shop-until-chinese-workers-drop-447178.html>.

conditions,²⁴¹ displacement caused by large infrastructure projects (usually involving Western corporate partners), environmental degradation, and the absence of healthcare for those not receiving it either through a state-owned enterprise or a company providing benefits. Former U.S. Trade Representative and current World Bank President Robert Zoellick called on China to be a “responsible stakeholder” in the global system,²⁴² and China and many of its companies – including some that remain state-owned²⁴³ – have taken notable steps in that direction (although the horrendous environmental problems,²⁴⁴ the continuing sweatshop abuses,²⁴⁵ discrimination against migrant workers, recurring crackdowns on Tibetan protesters and other dissenters,²⁴⁶ entrenched censorship,²⁴⁷ and support for genocide abroad²⁴⁸ demonstrate the long path

²⁴¹ *E.g.*, *Rioters Clash with Police Over Unpaid Wages*, ASIANEWS.IT, Sept. 30, 2005, available at <http://www.asianews.it/index.php?l=en&art=4234>.

²⁴² Media Note, Robert B. Zoellick, Deputy Secretary of State, U.S. Dep’t of State, Statement on Conclusion of the Second U.S.-China Senior Dialogue (Dec. 8, 2005), available at <http://merln.ndu.edu/archivepdf/china/State/57822.pdf>.

²⁴³ The expansion of Chinese State-Owned Enterprises abroad raises a host of other issues, including Chinese government accountability for the activities of these often irresponsible entities.

²⁴⁴ *E.g.*, Mara Hvistendahl, *China’s Three Gorges Dam: An Environmental Catastrophe?*, SCI. AM., Mar. 25, 2008, available at <http://www.sciam.com/article.cfm?id=chinas-three-gorges-dam-disaster>.

²⁴⁵ Roberts et al., *supra* note 227.

²⁴⁶ *E.g.*, Richard Spencer & James Miles, *China Crackdown Silences Tibet Protests*, DAILY TELEGRAPH, Apr. 18, 2008, available at <http://www.telegraph.co.uk/news/worldnews/1582112/China-crackdown-silences-Tibet-protests.html>.

²⁴⁷ *E.g.*, Wikipedia, http://en.wikipedia.org/wiki/Internet_censorship_in_the_People's_Republic_of_China (last visited Mar. 10, 2009) citing Jonathan Zittrain & Benjamin Edelman, *Empirical Analysis of Internet Filtering in China* (2003), available at <http://cyber.law.harvard.edu/filtering/china/>.

²⁴⁸ *E.g.*, Editorial, *China and Darfur: The Genocide Olympics?*, WASH. POST, Dec. 14, 2006, at A30, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/13/AR2006121302008.html>.

ahead).²⁴⁹ Just as successful global businesses today must have a Chinese strategy, so it can be hoped that China will embrace CSR principles, and CSR will embrace China.

If the European Union is the most mature CSR region these days, and the United States is showing significant progress, Asia may – contrary to conventional wisdom – be a “dark horse” of sorts. Throughout the region, the excitement about CSR is palpable, with constant conferences, enthusiastic embrace of the terminology, and an appreciation among elites of CSR’s potential practical significance to the point that it is being “localized” into cultural containers (such as “the harmonious society” in China) that can help carry the freight of the CSR concepts. The fear, and it remains a very real one, is that if the BRICs, the Second World nations, and their companies don’t become “responsible stakeholders” they will dilute the substance of the CSR principles. This fear takes on new significance after the most recent global financial and economic crises, which in the eyes of many in the South and East call into question the continuing viability of the “Western” model and give new credence to the more autocratic, if fast-changing, “Chinese” model of development, to date less sensitive to human rights and the environment.²⁵⁰

²⁴⁹ See also Joshua Kurlantzick & Devin Stewart, *Hu’s on First?*, 92 NAT’L INT. 63 (Nov./Dec. 2007), available at <http://www.carnegieendowment.org/files/kurlantzick2.pdf> (stating “even as wealthier Asian nations are beginning to embrace environmental stewardship, better labor rights and corporate social responsibility, China’s companies, now beginning to invest abroad, remain plagued by low environmental standards, poor governance and little accountability. As Xiaobo Lu, a Columbia University professor, says, China needs institutions to establish the ethical ‘rules of the game’ . . . to many Southeast Asian nations, there seems no way to hold Chinese firms accountable for disasters ranging from clear-cutting in northern Myanmar to exports of tainted products to significant problems with Chinese joint venture partners.”).

²⁵⁰ Jasmine Wang, *Mainland Learning from the Fatal Errors of Laissez-Faire Capitalism*, SOUTH CHINA MORNING POST, Dec. 23, 2008 (quoting various Western and non-Western leaders on the point); Ching Cheong, *China Adheres to Marxism*, SING. TIMES, Dec. 22, 2008 (quoting a speech by Chinese President Hu Jintao, “[d]elivered amid a global financial crisis, during which many have expressed strong doubts about the American model of capitalism,” which reiterated China’s commitment to Marxism and the “categorical rejection of the Western political model”); Paul Richter, *Bush Steps Out of World Picture in Which U.S. No Longer a Star*, CHI. TRIB., Dec. 28, 2008 (“Many analysts expect that the current economic crisis will convince many countries that they

2. India

Companies in India also show increasing enthusiasm for CSR. Precedents such as the long-standing mandatory environmental reporting²⁵¹ and the support for the precautionary principle by the Supreme Court of India undoubtedly prepare the ground. But the Indian concept of CSR nevertheless remains somewhat thin, being associated mainly with corporate philanthropy and voluntary community investment, including such activities as digging wells, planting trees, health clinics in partnership with the government, and training youth. This is the usual starting point in most countries. One recent estimate is that many large businesses in India dedicate about a half-percent of profits to charity and consider it to meet their CSR commitment.²⁵² Some industries, such as the publicly owned steel companies, reportedly earmark 2% to CSR, focusing in areas such as “environment, family welfare, education, health, cultural development as well as building social infrastructure, water supply and sanitation activities.”²⁵³ The “CSR as charity” approach is changing as Indian businesses include new world-class competitors. A University of Nottingham study found that Indian businesses were the most likely in Asia to engage in CSR reporting on their websites, with globally active companies being the most likely to report,²⁵⁴ despite India’s economy being driven more by domestic demand than, say, China’s economy. The increasing

shouldn’t emulate the loosely regulated American economic model but should turn to a more authoritarian form of capitalism.”).

²⁵¹ The Companies Act, 1956, No. 1, Acts of Parliament, 1956. The Board of Directors Report, attached to every balance sheet tabled at a company annual general meeting, must contain information on energy conservation. *Id.* at § 217(1)(e).

²⁵² P.V. Indiresan, ‘Eco-Rating’ as a Social Leveller, HINDU BUS. LINE, June 23, 2008, available at <http://www.thehindubusinessline.com/2008/06/23/stories/2008062350660800.htm>.

²⁵³ Ram Vilas Paswan, Hon’ble Minister for Steel, Speech at India Steel Conclave 2008 (July 16, 2008), available at <http://www.ficci.com/media-room/speeches-presentations/2008/july/july16-steel-minister.htm>.

²⁵⁴ Eleanor Chambers et al., *CSR in Asia: A Seven Country Study of CSR Website Reporting*, INT’L CENTRE FOR CORP. SOC. RESP., RES. PAPER SERIES No. 09-2003 (2003), available at www.nottingham.ac.uk/business/iccsr.

share of global manufacturing being taken up by Indian suppliers also drives CSR in India, as they cooperate with the Indian government, home country governments, such as the U.S. State Department (which invests in “social compliance” in Indian supply chains), and major TNCs to receive training on codes of conduct and more sophisticated understandings of the human rights and environmental requirements. Of course, there are also countervailing pressures on suppliers from TNCs and domestic companies to cut corners, and in keeping with the CSR principles these should be viewed critically.

The top Indian government officials now support CSR as a “basic competitive requirement” for successful participation in the global economy, and Indian chambers of commerce and industry associations show similar enthusiasm (spurred on by the burgeoning number of Indian and foreign consultants offering CSR services of various sorts).²⁵⁵ Indian Prime Minister Dr. Manmohan Singh publicly endorsed CSR in a speech before the Confederation of Indian Industry annual meeting in 2007, including calling for business, among other things, to share the benefits of economic growth, factor in community needs, engage in affirmative action for women and minorities, adopt more caring policies for workers, engage in environmental sustainability, and avoid corruption.²⁵⁶ The Prime Minister, Finance Minister, and business leaders continue to carry this message forward.²⁵⁷ At the time of writing, nearly 200 Indian companies, trade associations, and civil society organizations participate in the U.N. Global Compact.²⁵⁸

Nevertheless, serious child labor, other labor, environmental, health and safety violations persist in India,

²⁵⁵ See, e.g., *Chidamabaram Asks Industry to Help Inclusive Growth*, ECON. TIMES (India), May 16, 2008, available at http://economictimes.indiatimes.com/News/Economy/Indicators/Let_the_rupee_appreciate_to_check_inflation/articleshow/articleshow/3047073.cms.

²⁵⁶ Manmohan Singh, *Ten Point Social Charter*, FIN. EXPRESS (India), May 25, 2007, available at http://www.financialexpress.com/old/latest_full_story.php?content_id=165194.

²⁵⁷ See, e.g., *Chidamabaram Asks*, *supra* note 255.

²⁵⁸ See U.N. Global Compact, Participants and Stakeholders, available at http://www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.html (according to participant search function by country).

especially among the less globally integrated small- to medium-sized businesses and in the informal sector.²⁵⁹ The deeply entrenched caste system remains influential despite the affirmative action rhetoric and initiatives. As in many countries, good laws on the books are not always enforced in practice, so issues regularly arise regarding payment of minimum wages, workers subjected to excessive overtime, industrial accidents and the like. Government enforcement capacity remains low and is the subject of several programs of international cooperation with developed country agencies.

3. Singapore

As a high-income non-OECD country, Singapore is in the top-tier of “Second World” countries. Singapore has a relatively new “Singapore Compact” for CSR that is affiliated with the U.N. Global Compact.²⁶⁰ CSR concepts are spreading within the Singapore business community although there remains a heavy public relations and philanthropic emphasis to the activities at this point.²⁶¹ Violations of human rights also continue to be attributed to certain businesses’ activities in Singapore.²⁶²

4. Malaysia

As in India, China, Singapore and other Asian countries, CSR is on the upswing in Malaysia and has received support from the highest levels of government. Under European Union influence,

²⁵⁹ See, e.g., *CSR Bulletin for the ICT Sector*, 2 ASK-VERITÉ 2 (June 2007), available at http://www.askindia.org/CSR_Bulletin_ICT_Vol2No2.pdf.

²⁶⁰ See, e.g., *Singapore Compact: Corporate Social Responsibility*, <http://www.csrsingapore.org/> (last visited Mar. 10, 2009).

²⁶¹ Krishnamurthy Sriramesh et al., *Corporate Social Responsibility and Public Relations: Perceptions and Practices in Singapore*, INT’L PUB. REL. SYMP., (Slovenia) (2007), available at www.bledcom.com/uploads/papers/Sriramesh_Ng_Ting_Wanyin.pdf.

²⁶² See, e.g., *Ethicsworld.org, Women’s Group Bringing Workplace Sexual Harassment in Singapore into Spotlight*, July 28, 2008, available at <http://www.ethicsworld.org/ethicsandemployees/surveysandtrends.php#harassment> (last visited Mar. 10, 2009).

CSR is seen as “usually on a voluntary basis”²⁶³ and still associated primarily with philanthropy, although disclosure of CSR activities by publicly listed companies (PLCs) has been required for the last several years. The Prime Minister called for CSR reporting in his 2005 budget speech, and the budgets since then have reiterated government support for CSR.

In 2006 the Bursa Malaysia (formerly the Kuala Lumpur Stock Exchange) launched a CSR Framework for PLC reporting and implementation. The Framework includes four focal areas: the environment, workplace, community, and marketplace.²⁶⁴ Regarding the marketplace, for example, the Malaysian CSR Framework echoes the stakeholder engagement principle and the notion of sphere of influence: “The Marketplace is where we find important stakeholders – our shareholders, suppliers, and customers. Companies can interact responsibly with this group in a number of ways, such as supporting green products or engaging in only ethical procurement practices.”²⁶⁵ Regarding “the Workplace,” the CSR Framework states “We draw our employees from society and so everything we do with our staff needs to be socially responsible, whether we are dealing with basic human rights or gender issues.”²⁶⁶ Starting in the 2008 financial year, PLCs must also disclose their employment makeup by race and gender, in addition to programs undertaken to cultivate domestic and Bumiputera (ethnic Malay) vendors.

As Islam is the official religion of the country, Malaysia is also seeking Islamic modes of CSR. Among other ways, it does this by cooperating with Saudi Arabia and other Islamic countries to emphasize the importance of CSR from an Islamic perspective and by helping to develop a governance standard for

²⁶³ See Malaysian Securities Commission, *Corporate Social Responsibility (CSR)*, CORP. GOVERNANCE, available at <http://www.sc.com.my/eng/html/cg/csr.html>.

²⁶⁴ See Bursa Malaysia, CSR: Our Approach, http://www.klse.com.my/website/bm/about_us/the_organisation/csr/approach.html (last visited Mar. 10, 2009).

²⁶⁵ Bursa Malaysia, CSR: Resources, *Corporate Social Responsibility (CSR) Framework for Malaysian Public Listed Companies*, http://www.klse.com.my/website/bm/about_us/the_organisation/csr/downloads/csr_writeup.pdf (last visited Mar. 10, 2009).

²⁶⁶ *Id.*

Islamic financial institutions.²⁶⁷ Such efforts by Malaysia, and those in its predominantly Islamic neighbor Indonesia, highlight CSR's increasingly universal legal and ethical appeal.

C. SUB-SAHARAN AFRICA AND THE LEAST DEVELOPED COUNTRIES

At first blush, CSR might seem irrelevant to Sub-Saharan Africa and the least developed countries. These are, after all, by definition some of the most blighted areas of the world, subject to corrupt governments and exploitative TNCs. Despite gains in literacy, it can be forgotten that many of the world's "bottom billion" are completely illiterate,²⁶⁸ that gender and other forms of discrimination remain rampant – two-thirds of the world's illiterate are female – and that education and literacy rates correlate quite closely to poverty rates.²⁶⁹ The "market for virtue"²⁷⁰ is even less developed with respect to the poorest countries than it is in richer countries. The sphere of influence for powerful companies operating in such countries may be proportionately larger and matched by correspondingly greater expectations, which the company in turn may feel must be addressed in order to serve the long-term interests of its shareholders and other stakeholders. For example, expectations to provide basic necessities for workers and their families, such as food, water, housing, clothing, health clinics, and schools, are

²⁶⁷ Posting of Emmanuel to International Political Economy Zone, *Islamic Banking, A CSR Concept?*, <http://ipezone.blogspot.com/2007/11/islamic-banking-csr-concept.html> (Nov. 23, 2007, 2:57 EST).

²⁶⁸ PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 71, 94 (2007). (stating that "a critical mass of educated people" is essential to turn around a country experiencing stunted development, but the bottom billion countries are "desperately short of" qualified, educated people.)

²⁶⁹ See, e.g., Wikipedia, *List of Countries by Literacy Rate*, http://en.wikipedia.org/wiki/List_of_countries_by_literacy_rate (last visited Mar. 10, 2009) citing United Nations Development Program, *Human Development Indices*, 2008, http://hdr.undp.org/en/media/HDI_2008_EN_Tables.pdf (last visited Mar. 10, 2009).

²⁷⁰ Cf. DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2005).

often much higher for certain businesses in countries without extensive or effective public sectors. Yet as in India, China, and many of the Second World countries, the legacy of colonialism remains in the popular mind. Continued patterns of inequitable power and wealth cause resentment and sometimes even violence²⁷¹ (companies and their executives will also want to ensure that they avoid perpetuating conflict and the allegations and legal remedies that could be associated with doing so).²⁷²

A frequent criticism of CSR from or on behalf of the developing world is that it serves as a mask for globalization, economic and political hegemony, “cultural imperialism,” domination, and homogenization by both wealthy states and their TNCs.²⁷³ On this view, CSR is nothing more than saccharine offered before swallowing a bitter pill. If, however, businesses in fact take the CSR principles seriously – listen to and learn from stakeholders, explain the impact of their plans and show willingness to amend them based on input, test those plans using the precautionary principle when appropriate, and

²⁷¹ In such situations, corporations are well advised to consider the guidance provided by such initiatives as the Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org/files/voluntary_principles.pdf (last visited Mar. 10, 2009), and other tools such as the Organization for Economic Co-Operation and Development, *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, http://www.oecd.org/document/52/0,3343,en_2649_34889_35560500_1_1_1_1,00.html (last visited Mar. 10, 2009), or those available from organizations such as International Alert, <http://www.international-alert.org> (last visited Mar. 10, 2009), including the Red Flags project, www.redflags.info (last visited Mar. 10, 2009).

²⁷² A U.N. Panel of Experts under Security Council auspices in October 2002 alleged that 85 companies were breaching international norms (including the OECD Guidelines for Multinational Enterprises) by their actions in the Democratic Republic of Congo. The situation also attracted the attention of the International Criminal Court prosecutor and ultimately led to the companies either modifying their conduct or leaving the country. For further information, see OECD Directorate for Financial and Enterprise Affairs, *Illegal Exploitation of Natural Resources in the Democratic Republic of Congo: Public Statement by CIME*, Feb. 12, 2004, http://www.oecd.org/document/6/0,3343,en_2649_34889_27217798_1_1_1_1,00.html (last visited Mar. 10, 2009).

²⁷³ Cf., e.g., EDWARD W. SAID, *CULTURE AND IMPERIALISM* (Vintage Books 1994) (1993); EDWARD W. SAID, *ORIENTALISM: WESTERN CONCEPTIONS OF THE ORIENT* (Vintage Books 1994) (1978); Kishore Mahbubani, *The West and the Rest*, 28 NAT'L INT. 3 (Summer 1992).

apply consistent and demanding best practices instead of damaging double standards – this could be a powerful antidote to the neo-imperialistic criticism.

The prospects for CSR playing a positive role in the least developed countries are better than one might think. Many of the world's poorest nations are beginning to embrace responsible competitiveness as a development strategy and are actively seeking partnerships with corporations, unions, and NGOs in doing so.

In Africa, charity remains an important thrust of many CSR functions, with large companies often using foundations to make community investments. Many companies show a clear understanding that CSR is not merely charity, but compliance with laws and best practices aimed at creating sustainable, long-term businesses that help communities, as well as other stakeholders.²⁷⁴ A 2005 East African Survey of CEOs found that “many CEOs now view CSR as very important to a company’s reputation.”²⁷⁵ Given the persistence of corruption and human rights violations in many African countries, an increasing number of companies take strong public stances against these ills in their policies, codes of conduct, annual reports, and company statements.²⁷⁶ The ongoing HIV/AIDS crisis in the region, and continued dire poverty and lack of education make these natural imperatives for CSR activities.

²⁷⁴ See, e.g., Mobile Telephone Network Group Ltd., *Sustainability Policy*, <http://www.mtn.com/Sustainability/Policy.aspx> (last visited Mar. 10, 2009) (committing among other things to “[c]omplying with all the relevant laws on sustainability issues and, in the absence of legislation, seeking out and observing appropriate best international practice.”). Other African mobile phone companies similarly highlight their sustainability and CSR programs prominently on their websites. See, e.g., that of the Kenyan mobile phone operator Safaricom, <http://www.safaricom.co.ke/index.php?id=19> (last visited Mar. 10, 2009).

²⁷⁵ PricewaterhouseCoopers, *East Africa’s Most Respected Companies Survey 2005*, Nov. 19, 2005, available at <http://www.pwc.com/Extweb/ncsurvres.nsf/docid/8F5A83A5A8FFB07C802570C300362F8C>.

²⁷⁶ See, e.g., VODACOM, ANNUAL REPORT: CORPORATE GOVERNANCE (2006), available at https://secure1.telkom.co.za/apps_static/ir/pdf/financial/pdf/CorporateGovernance.pdf (describing Chief Governance Officer position and ethics and compliance program intended to manage risk of corruption).

Not that CSR alone is a panacea that will achieve prosperity and sustainable development in the least developed countries; but local businesses and governments in nations as diverse as Lesotho, Bangladesh, and Cambodia are cooperating with developed countries, international development NGOs, and TNCs to experiment with innovative multi-stakeholder initiatives and monitoring programs involving the ILO or other independent inspectors. These innovative programs emerging over the past several years take international labor, human rights, and environmental standards not as an optional matter but as authoritative legal and ethical mandates to which businesses are held to account. Applying the stakeholder engagement principle, this offers TNCs a platform to negotiate the expectations often placed on them in countries with weak governments. Working together with the government, local company, and civil society stakeholders also generates ideas and resources to more efficiently meet the expectations placed on all parties. Although certainly not without risks, including that of self-interested domination by TNCs of what should be a process aiming at public as well as private interest, the programs that authentically engage stakeholders and use integrated decision-making and the other CSR principles are beginning to raise standards where they are used. Fair trade coffee is a salient example, though limited in its reach to a small subset of the relevant businesses. Again, the combination of carrots (including more business from the TNCs and more official development assistance and capacity building from the wealthier countries) and sticks (especially loss of contracts and funds) helps these programs to make a positive contribution toward gradually transforming poor countries from the bottom up.

To again take Bangladesh as an illustration, CSR principles are increasingly looked to as a way to promote sustainable growth, as opposed for example to the prevalent child labor that is increasingly seen as an obstacle to both growth and poverty reduction. Bangladesh also has over 30 U.N. Global Compact members at the time of writing, and a young Global Compact network is forming there as is happening in many developing countries.²⁷⁷ Wealthy governments such as those in Japan,

²⁷⁷ See, e.g., U.N. Global Compact, *Local Network Update – Bangladesh*, Oct. 2007, available at http://www.unglobalcompact.org/docs/networks_

Germany, the United Kingdom, Sweden, Norway, the Netherlands, and the United States (e.g. USAID)²⁷⁸ often fund programs that start with raising basic awareness and legal compliance in the most obvious TNCs and sectors (e.g. the garment sector). They then gradually spread out to small- and medium-sized enterprises and the informal sector, while simultaneously broadening and deepening awareness to include more operational issues. Ultimately they begin to help address more significant social development issues. Just as the emerging markets have been leapfrogging over established markets in going directly to wireless, as opposed to copper-wire telephony, many of them are modeling the new governance meta-regulation described above. As noted by astute regulation expert John Braithwaite:

I have become persuaded that we live in an era of networked governance. An implication of this is that developing countries might jump over their regulatory state era and move straight to the regulatory society era of networked governance. Developing states might therefore cope with their capacity problem for making responsive regulation work by escalating less in terms of state intervention and more in terms of escalating state networking with non-state regulators.²⁷⁹

CSR in Africa and the least developed countries is certainly in its early stages, and businesses there are certainly subject to competing models of business, both domestically and from some of the “Second World” countries, that do not take CSR into

around_world_doc/Annual_Reports_2007/Bangladesh_Annual_Activity_Report_2007.pdf.

²⁷⁸ See, e.g., BANGLADESH ENTERPRISE INSTITUTE, PRIVATE SECTOR DEVELOPMENT (PSD) DONOR MAPPING 2006,10-11 (2006), available at http://www.lcgbangladesh.org/PSD/reports/2007-04-17_psdmap06.pdf (Japanese and German government-supported report for Bangladesh, acknowledging mandatory, as well as voluntary, aspects of CSR).

²⁷⁹ John Braithwaite, Responsive Regulation and Developing Economies, 34 WORLD DEV. 884, 890 (2006), available at http://regnet.anu.edu.au/program/publications/PDFs/2006_Braithwaite_RRDE_WD.pdf.

account in an authentic or enduring way. Still, CSR's presence in even the poorest countries is visible and growing.

V. IMPLICATIONS FOR CSR FROM THE 2007-2009 FINANCIAL AND ECONOMIC CRISES

Without a doubt, progress in CSR as in climate change, alternative energy and other areas has been challenged by the financial crisis that began in 2007 and spread around the world during 2008 and 2009, deepening into a global economic crisis with severe ramifications for poverty, equality, access to food, water, energy, and the ability to transcend cycles of violent conflict. But as with climate change and alternative energy, the crises highlighted the need for serious coordinated global action to address the underlying causes.

The causes of the financial and economic crises, in fact, had much to do with the lack of sufficient progress in CSR. Speaking of the economic crisis in January 2009, then U.S. President-Elect Barack Obama attributed it to "an era of profound irresponsibility that stretched from corporate boardrooms to the halls of power in Washington, D.C."²⁸⁰ He went on to highlight that there were "imprudent and dangerous decisions, seeking profits with too little regard for risk, too little regulatory scrutiny, and too little accountability."²⁸¹ The underlying causes indeed do now seem clear: excessive deregulation (as admitted even by former U.S. Federal Reserve Chairman Alan Greenspan, who acknowledged a "flaw" in his prior conception of "how the world works" when he expected that the self-interest and self-regulation of bankers would have prevented the sub-prime crisis);²⁸² a lack of transparency and accountability; a lack of meaningful minimum standards and consistent best practices; incautious risk management; an utter neglect of duties to

²⁸⁰ See President-Elect Barack Obama, Speech on the Economy (Jan. 8, 2009), in INT'L HERALD TRIB., Jan. 8, 2009, available at <http://www.ihl.com/articles/2009/01/08/america/08obama-speechtext.php>.

²⁸¹ *Id.*

²⁸² See, e.g., Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES, Oct. 24, 2008, available at <http://www.nytimes.com/2008/10/24/business/economy/24panel.html?hp>.

society, the system, and individuals; and a greedy focus on short-term profit instead of long-term, sustainable value. In short, these actions are the opposite of sensible CSR principles. It should thus be no surprise that in a November 2008 survey of executives by Business for Social Responsibility two-thirds said that the crisis would have been lessened, or even avoided, had there been greater adherence to CSR standards.²⁸³

While some companies may be seen myopically cutting back on CSR initiatives and laying off CSR personnel, this reveals a misunderstanding of how the interrelated crises arose and how best to reverse them and ensure they don't arise again. A more prudent response would be to take this opportunity to work even harder to implement prudent CSR principles. CSR is not just about enhancing the bottom-line through more efficient and ecologically sensitive processes that conserve resources, remove waste, and reduce costs through better social and environmental risk management, and more enlightened pursuit of new opportunities – although CSR does have those benefits. More importantly, however, CSR is about building businesses that are sustainable and valuable over the long-term because they are more closely aligned with and adaptable to the needs and goals of the societies in which those businesses are embedded. Difficult though it may be, enlightened businesses will thus take CSR principles more rather than less seriously in times of crisis.

VI. TRENDS TOWARD EVEN STRONGER LEGAL FRAMEWORKS

To the extent that governance gaps in CSR persist, one might expect that the pressures from WikiAdvocacy and the ongoing drivers for CSR will result in continued movement toward closing those gaps. Thus, initiatives that have come under increasing criticism, like the Forest Stewardship Council and the Voluntary Principles on Security, will reform in the direction of greater effectiveness, as the Global Compact has done at least to some extent in response to criticism, or lose legitimacy.

²⁸³ CSR Newswire, *Corporate Responsibility News*, Nov. 6, 2008, available at <http://www.csrwire.com/News/13642.html> (citing *BSR/Cone 2008 Corporate Responsibility in a New World Survey*, 2008, available at http://www.bsr.org/files/BSR_Cone_2008_Survey.pdf).

Similarly, trends such as the adoption of soft law standards by governments (e.g. export credit agencies, procurement agencies) and international financial institutions and other international organizations will likely amplify and expand.

Enlightened companies increasingly understand that reasonable regulation – which need not be top-down, command-and-control but could be the more nuanced varieties of information regulation and meta-regulation/enforced self-regulation – is indispensable to effectively functioning, sustainable markets. This may be through rules pertaining to greater transparency, enforcing contracts, preventing fraud, or preventing other socially or environmentally damaging, unfair competition that exploits and harms people or the environment.

Thus, Mark Moody Stuart, current chairman of Anglo-American and former chairman of Royal Dutch Shell, says: “business must embrace appropriate regulation that enables healthy competition, and reduces competition that has damaging social and environmental consequences.”²⁸⁴ Robert Haas, longtime chairman of Levi Strauss & Co., has similarly called on business “to work with governments and other stakeholders, to develop a mandatory framework that defines business’s role in human rights, contains reporting and enforcement mechanisms, and includes consequences for noncompliance.”²⁸⁵ WTO Director-General Pascal Lamy²⁸⁶ and many others have come to the same realization.

In his report on climate change, British economist Nicholas Stern said the costs of enacting global measures to reduce

²⁸⁴ Simon Caulkin, *Can Business Save the World?: Corporate Responsibility is Catching, But It Needs to Stick*, OBSERVER (U.K.), Oct. 5, 2003, available at <http://www.guardian.co.uk/business/2003/oct/05/madeleinebunting.corporateaccountability/print>.

²⁸⁵ Robert D. Haas, *Business’s Role in Human Rights in 2048*, 26 BERKELEY J. INT’L L. 400, 402 (2008).

²⁸⁶ Pascal Lamy, *quoted in* Simon Zadek, *China’s Opportunity to Embrace Responsible Competitiveness*, CHINA DIALOGUE, Oct. 19, 2007, available at <http://www.chinadialogue.net/article/show/single/en/1407> (“Responsible competitiveness is an essential ingredient for effective global markets. It blends forward-looking corporate strategies, innovative public policies, and a vibrant, engaged civil society. It is about creating a new generation of profitable products and business processes underpinned by *rules* that support societies’ broader social, environmental and economic aims.”) (emphasis added).

greenhouse gas emissions could amount to about 1% of world economic output annually.²⁸⁷ But not doing so, he noted, might ultimately lead to a massive global “market failure,” ranging from five to more than twenty times that amount. In like measure, the backlash against globalization will prove costly unless CSR is made more effective.

A. PROPOSALS FOR CORPORATE & OTHER DOMESTIC LAW REFORM

Legal reforms across the globe in recent years have begun to correct what was perhaps an over-emphasis on neoliberal globalization and corporate shareholder primacy during the heyday of the 80s and 90s. Some of the thinking in response to this is addressing foundational issues of corporate design,²⁸⁸ even re-imagining how the corporation could be organized on principles more akin to organic life. Many other reforms echo long-standing proposals to reform corporate law in order to enhance attention to stakeholders and the public interest in ways resembling Berle and Means’ “neutral technocracy.” While these proposals support the CSR principles described, they do not, at least thus far, change the fundamental concept of the corporation or even endorse other ideas for structural reform that circulated throughout the 20th century.

The most recent manifestation of these calls for reform is the “Progressive Corporate Law” movement,²⁸⁹ which among other things has included calls for an expansion of directors’ fiduciary

²⁸⁷ Nicholas Stern, *Stern Review: The Economics of Climate Change*, at Summary of Conclusions, available at http://www.hm-treasury.gov.uk/stern_review_report.htm.

²⁸⁸ See, e.g., Corporation 2020, at www.corporate2020.org (last visited Mar. 10, 2009) and related materials including those on corporate design, at <http://www.corporate2020.org/pdfs/CorporateDesign.pdf> (last visited Mar. 10, 2009) and on the Chrysallis Initiative, at http://www.corporate2020.org/pdfs/Chrysallis_Initiative_Proposal.pdf (last visited Mar. 10, 2009).

²⁸⁹ Compare LAWRENCE E. MITCHELL, *PROGRESSIVE CORPORATE LAW* (Westview Press 1995) (generally advocating a more communitarian, stakeholder-oriented view of the firm as an alternative to the extreme contractualist economic nexus-of-contracts view generally more favored by law and economics scholars), with FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (Harvard Univ. Press 1991).

duties, formal stakeholder representation on corporate boards, increased corporate transparency, extraterritorial legislation, and an explicit change in corporate purpose to make its public purpose primary – indeed sometimes to suppress its private profit-making purpose to one degree or another. Without trying in any way to review this extensive scholarship, this article will now highlight only some of its key proposals and gives an evaluation of where they stand.

1. Pro-Stakeholder Board and Corporate Governance Reforms

One reform seen already in jurisdictions as diverse as China and the United Kingdom in the last several years is to require enhanced attention to stakeholders, and not just shareholders, on the part of company directors and managers. This formal legal reform, to be implemented in various ways, including a judicially enforceable fiduciary duty or the equivalent, reflects the growing reality that in practice companies in nearly every country around the world are expected to take stakeholder interests into account when they make decisions. Because the reform both serves a useful purpose of clarifying corporate duties and indirectly confirms that corporations need not be, in Joel Bakan's words, "pathological"²⁹⁰ externalizers of costs, it is a realistic reform that seems likely to appear in other jurisdictions in coming years.

A further step has boards include representatives of workers or other stakeholders (along the lines of Germany and, for some companies, France and other European countries). This reform proposal regularly recurred in popular business books in the 1950s²⁹¹ and again in the 1970s where it was sometimes accompanied by proposals that control over corporations be enhanced by national/federal, as opposed to state, charters.²⁹²

²⁹⁰ JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER*, ch. 3 (Simon and Schuster 2005) (2004).

²⁹¹ *E.g.*, PETER F. DRUCKER, *THE NEW SOCIETY: THE ANATOMY OF THE INDUSTRIAL ORDER* 207-08 (Transaction Publishers 2d ed. 1993) (1962).

²⁹² *See, e.g.*, Cary, *supra* note 144 (lamenting the "race to the bottom" from state chartering and advocating more federal control); *see also* RALPH NADER ET

Among other things, this reform might begin to address growing inequality by using a market mechanism of sorts to temper the truly outrageous growth in executive compensation, especially in the United States.²⁹³

But there has been little practical momentum in the direction of more formal board representation for non-shareholder stakeholders in recent years, and that is unlikely to change in the immediate future. What has happened is that the model of corporate governance has expanded beyond the merely “internal” to embrace mindsets and processes that reach out as a bridge to external constituencies and the broader CSR principles as well, as is still seen to a greater extent in the approaches taken in continental Europe and civil law countries. This trend is rapidly expanding globally. Furthermore, less formal governance mechanisms, such as stakeholder review panels reporting to the board, are beginning to proliferate.

2. Greater Triple-Bottom-Line Transparency and Disclosure

Numerous jurisdictions have implemented mandatory CSR reporting requirements.²⁹⁴ Of all the progressive law reform proposals, mandatory reporting and disclosure has been the most widely adopted and embraced by lawmakers. In a world where non-financial risk factors are often as, or more, relevant to investors than classic financial risk factors, it would seem likely that further jurisdictions will join those requiring greater transparency and public reporting.

AL., *TAMING THE GIANT CORPORATION* (W. W. Norton & Co. 1977) (1976); CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (Harper & Row 1975).

²⁹³ See SARAH ANDERSON ET AL., *EXECUTIVE EXCESS 2007: THE STAGGERING SOCIAL COST OF U.S. BUSINESS LEADERSHIP* (Aug. 29, 2007), *available at* <http://www.ips-dc.org/reports/070829-executiveexcess.pdf> (U.S. CEOs made 24 times the compensation of the average worker in 1965 but nearly 300 times the average worker’s pay in 2005. Today the ratio, according to some studies, is closer to 400 times that average).

²⁹⁴ See, e.g., KPMG & UN Env’t Programme, *Carrots and Sticks for Starters: Current Trends and Approaches in Voluntary and Mandatory Standards for Sustainability Reporting* (2006), *available at* <http://www.unep.fr/shared/publications/pdf/WEBx0120xPA-CarrotsSticks.pdf>.

3. Extraterritorial Legislation

Another legal development, which is also front and center in the progressive law reform movement, is the use of domestic laws with extraterritorial effect in a transnational attempt to reach environmental and human rights abuses. Absent stronger enforcement mechanisms at the global level, this route can also be expected to expand. As has been noted: “[t]he combined force of the inventive use of extraterritorial legislation to restrict the actions of corporations operating overseas and the relaxation of the *forum non conveniens* doctrine, allowing greater access to home state courts for settlement of disputes over alleged human rights violations, offer potential solutions.”²⁹⁵

4. Legally Recognizing a Public Purpose for the Corporation

Some progressive corporate law commentators, hearkening back to the original public purposes of the corporation,²⁹⁶ would suggest either strong (e.g. linked to charter revocation if not met) or weak (hortatory) changes to the foundational incorporation documents to reflect a required public purpose of serving either stakeholders or society, in addition to, or instead of, making a profit for shareholders.²⁹⁷ This is already happening to some extent implicitly, as corporations like Coca-

²⁹⁵ David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 938 (2004).

²⁹⁶ See, e.g., JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780-1970* (Lawbook Exchange Ltd 2004) (1970).

²⁹⁷ E.g., Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 89, 91 (2005) (“Principle One: the ultimate purpose of corporations should be to serve the interests of society as a whole”); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 783-814 (2005) (arguing against shareholder primacy and for allowing consideration of moral norms and the public good even at the expense of private profit); cf. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 265 (1992) (describing two conceptions of the corporation as either (i) shareholder primacy or (ii) a social organization “tinged” with “a public purpose”).

Cola, BP, Exxon-Mobil, Google, and many others complement their cash philanthropy with creative partnerships aimed not only at current stakeholders but at larger purposes benefiting society, the natural environment, and sustainable development. But the envisaged reform would make those purposes explicit and mandatory.

Among the benefits of such a change could be support for a more long-term view among corporate leaders and managers, as opposed to the short-term focus on quarterly profit that currently drives so much decision-making. And like many of the other proposed reforms, and indeed the CSR principles, the change would seek to imbue market values with public values so that, for example, pollution or oppressive labor practices or unsafe products would not remain merely a question of quantitative cost-benefit analysis but would involve qualitative social and environmental considerations as well.

To the extent that the formal legal reforms suggested are consistent with CSR principles, the instinct to guide corporations toward a greater sense of public purpose and responsibility would seem to be realistic and supported by current global trends. To the extent, however, that it is grounded in the expectation that corporations in general will be fundamentally reoriented to seek the public good as opposed to private profit, or will repudiate such profit, that will not happen any time soon, notwithstanding the proposals of Bill Gates and others for a more “creative capitalism.”²⁹⁸ There are some interesting proposals for hybrid and public purpose entities active in the non-profit and social entrepreneurship realms that on at least a limited scale will be a realistic and growing complement to more responsible for-profit corporations.²⁹⁹

²⁹⁸ See the essays in *Creative Capitalism: A Conversation with Bill Gates, Warren Buffett and Other Economic Leaders* (Michael Kinsley ed., 2008).

²⁹⁹ See, e.g., MUHAMMAD YUNUS, *CREATING A WORLD WITHOUT POVERTY: SOCIAL BUSINESS AND THE FUTURE OF CAPITALISM* (Public Affairs 2007). An example of a business that has moved quite a bit down that path is Pura-Vida Coffee, a fair-trade organic coffee company operated using familiar business principles except it pursues both for-profit and charitable goals. The latter include helping farmers and producers earn a living wage, educating and motivating consumers to take action toward social good, inspiring business leaders to replicate the model, and ultimately serving and empower at-risk children and families, http://www.puravidacoffee.com/work/work_body.html (last visited Mar. 10, 2009).

B. GREATER USE AND ACCEPTANCE OF NETWORK AND ENTERPRISE LIABILITY

The corporation is not about to disappear any time soon; but if the trend noted above for corporations to evolve toward “networks” of less formally affiliated firms and other entities continues,³⁰⁰ that serves as a reminder that although the CSR principles have been described as “Corporate Social Responsibility” principles, much of their legal and normative force continues regardless of the specific form of the business – partnership, contractual joint venture, entity joint venture, or even e.g. loosely affiliated individuals coming together in a temporary constellation for a particular project. The rationale behind these principles applies regardless of form, although the principles may have to evolve to accommodate the fact that accountability in a “head-less” network could be more difficult. As discussed at the outset of this article, the corporation has shifted from a unitary entity to a network of relationships. Global business has grown in reach and complexity, involving project finance, joint ventures, and licensing, all of which are less directly controlled by a central entity. It thus becomes more challenging, but even more important, to identify the loci of control and to confirm and elaborate rules that will capture responsibility and deter irresponsible actions.

Enterprise liability theories are one response to addressing abuses of power within and among corporate groups or networks of related entities – although individual entities can still be expected to offer formal defenses that deny the appropriateness of “piercing the veil”. In general, public and corporate decision-makers are increasingly willing to constrain abuses by looking at the economic reality of the relationships, the knowledge the parties had regarding abuse or harm, and the nature of their actual assistance to the enterprise that may have

³⁰⁰ For a view of the multinational as a network of parents, subsidiaries, and related forms, see PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 12 (Blackwell Publishing 1999) (1995). Of course, these forms are readily manipulated to gain liability, tax, or other advantages. For a view that the firms have gone beyond networks to “an entirely new business structure,” see, e.g., Beth Stephens, *The Amoral of Profit: Transnational Corporations and Human Rights*, 20 *BERKELEY J. INT’L L.* 45, 48 (2002).

assisted with the abuse or harm.³⁰¹ As this happens, it will also enhance understanding of the best approaches to applying concepts of complicity in more traditional contexts. It is worth recalling that the UDHR speaks of both individuals as well as private organs of society. Precedent also exists in both criminal and civil law, and in common law and civilian jurisdictions for individual liability for acts of corporate irresponsibility. Much of the historic problem relating to CSR has been achieving accountability when individuals have the opportunity to deflect their ethical or legal responsibilities to an organization. Current trends suggest that business enterprises will continue to evolve from unitary entities to corporate groups and other types of networks. And while the law is often slow to react, it is not unreasonable to speculate that it will eventually respond by extending liability appropriately.

C. EXPLICIT INCORPORATION OF CSR PRINCIPLES INTO THE WORLD TRADE REGIME?

There are many books and hundreds of articles examining the issue of whether formally linking trade issues to “non-trade” environmental or human rights issues would be effective and desirable as a policy matter.³⁰² Arguments for doing so have the goal of enhancing enforcement by means of recourse to the most effective international dispute resolution system currently in existence. But arguments against turn on issues of competency within the WTO to address, for example, human rights issues, the possible bias of the decision makers, and whether such a move would subvert rather than support the wealth-producing goal of the global trade system.³⁰³ Detailed discussion of this

³⁰¹ Cf. Business and Human Rights Resource Centre, *ICJ Panel on Complicity*, <http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity> (last visited Mar. 10, 2009).

³⁰² E.g., Joel P. Trachtman, *Legal Aspects of a Poverty Agenda at the WTO: Trade Law and ‘Global Apartheid’*, 6 J. INT’L ECON. L. 3 (2003); cf. Robert Wai, *Countering, Branding, Dealing: Using Economic and Social Rights in and around the International Trade Regime*, 14 EUR. J. INT’L L. 35 (2003).

³⁰³ See, e.g., MARION PANIZZON ET AL., *How Human Rights Violations Nullify and Impair GATS*, in *GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES* 534 (2008).

complex topic is beyond the scope of this article, but suffice it to say that although the WTO Appellate Body has found positive ways to take some so-called “non-trade” (e.g. health and environmental) considerations into account,³⁰⁴ the political will to take on labor rights or human rights issues to a greater degree does not exist at the present time and is less, rather than more, likely after the collapse of the Doha Round of global trade talks. Even were the WTO seen as the best locus for more enforceable protections of human rights and the environment of the sort existing on the domestic level, to fill the governance gaps discussed earlier, many questions remain as to how this would be done and whether it is feasible or desirable as a practical matter – although it is hard to understand how WTO member states bound by *jus cogens* norms (e.g. against slavery) could suddenly avoid them in an international forum, so some solution must be found. The last time the issue of labor rights rose to high level attention in the WTO, at the 1996 WTO Ministerial Conference, the delegates affirmed their commitment to such rights but stated that the ILO was the appropriate body to set and deal with such standards – adding that they should not be used for protectionist reasons or to question the “comparative advantage of countries, particularly low-wage developing countries.”³⁰⁵ This trend toward including environmental and social issues, and indeed direct references to the promotion of CSR in regional and bilateral trade agreements, is likely to continue.

D. PROLIFERATING “HARDER” GLOBAL CSR STANDARDS

More generally, it seems reasonable to expect to see a continued evolution of standards toward greater clarity and harmonization so as to reinforce consistent best practices, and more rationalized accountability mechanisms – on both the

³⁰⁴ E.g., WTO, European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R (Sept. 18, 2000), available at <http://docsonline.wto.org/>; see also, e.g., Shrimp-Turtle WTO Appellate Body Ruling (Shrimp/Turtle II), WT/DS58/AB/RW (Oct. 22, 2001), available at http://www.wto.org/english/tratop_e/dispu_e/58abrw_e.pdf.

³⁰⁵ World Trade Organization, *Trade and Labour Standards: Subject of Intense Debate*, available at http://www.wto.org/English/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm.

levels of global and domestic law via the sort of “enforced self-regulation in the shadow of the law” that Ayres and Braithwaite³⁰⁶ and other thoughtful commentators have sought for decades. One might also expect that many of the existing soft law standards and approaches will crystallize into hard law.

For example, the private use – and even governmental endorsement of – environmental and social or human rights impact assessments is becoming much more deeply and broadly embedded as an “information regulation” tool that responds to the otherwise existing market failure³⁰⁷ when the key issue of transparency is left merely to the voluntary discretion of corporate officials. The sensible procedural pause recommended by a nuanced version of the precautionary principle may well expand to further contexts, while accountability mechanisms will likely be complemented by analogous extensions to existing mechanisms (e.g. civil and criminal analogues to ATCA) as well as additional legal tools. Community investment impact and benefit agreements³⁰⁸ will likely become even more institutionalized as “Second World” nations grow in bargaining power. They may serve as a complement or substitute for more formal legislative or administrative regulatory conditions upon investment and initial or ongoing review of licenses, loans, subsidies, and other government benefits to business.³⁰⁹

³⁰⁶ AYRES & BRAITHWAITE, *supra* note 155.

³⁰⁷ Cf. John C. Coffee, Jr., Market Failure and the Economic Case for a Mandatory Disclosure System, 70 VA. L. REV. 717 (1984).

³⁰⁸ See e.g., Irene Sosa & Karyn Keenan, Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada (2001), available at <http://cela.ca/uploads/f8e04c51a8e04041f6f7faa046b03a7c/IBAeng.pdf>.

³⁰⁹ E.g., Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 77 (2001) (noting, in the environmental context, this trend toward so-called “voluntary” or “negotiated” agreements or “environmental covenants”).

1. Rationalization and Enhanced Enforcement Throughout the Supply and Value Chains

Inconsistent enforcement of standards remains a significant problem that puts at risk both companies and people affected by globalization. In part, this is because of the multiplicity of current standards and the pluralistic new governance approach. Inconsistency is rendered more complex by the realities of different levels of enforcement in different legal systems. The best companies take the high road and adhere to more stringent global standards rather than weaker local standards (such as those prevailing in, e.g., Burma) or fairly good standards that are badly enforced (e.g. China or Indonesia). As the President of Finland urged in an early 2008 address to Parliament: “What exactly is corporate social responsibility? Its goals are set by legislation enacted, resolutions made and international treaties signed. But this is not enough: we must abide by these too.”³¹⁰

Of course to some extent individual companies can improve enforcement by applying the CSR principles more effectively throughout their supply and value chains. Individual companies are doing this including by applying integrated decision-making and implementation that involves continuous learning and improvement by the board, management, employees, and all relevant departments in the enterprise (such as procurement/sourcing/purchasing, marketing, legal, compliance, public affairs/communications, human resources, operations, quality, and environmental). But that will have only a limited effect if their competitors, including for example newer companies arising in China or other Second World countries, do not do so.

All stakeholders, including governments – who have a duty to protect³¹¹ – thus possess a compelling need to rationalize the

³¹⁰ Tarja Halonen, *Speech by President of the Republic Tarja Halonen at the Opening of the 2008 Session of Parliament* (Feb. 5, 2008), available at <http://www.tpk.fi/netcomm/news/showarticle.asp?intNWSAID=68125&intSubArtID=27303>.

³¹¹ John G. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Apr. 7, 2008, at 1, available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises).

many existing standards throughout sectoral supply and value chains, to innovate in rendering them more effective and efficient, and to cooperate in verification in order to enhance legitimacy and reduce costs. Currently, requests to companies and suppliers from various voluntary initiatives, governments, NGOs, and others can be overwhelming, involving different formats, subject areas, and priorities instead of a uniform reporting format, leading to “audit fatigue” and backlash. One industry effort at rationalization, which has a pilot project in Turkey, brings together some of the leading voluntary initiatives in the retail sector in a “Joint Initiative on Corporate Accountability and Workers’ Rights” (also known as “Jo-In”).³¹² The slow progress achieved by Jo-In demonstrates that it will not be easy to converge competing standards or different organizations with rival interests into a more rationalized approach. That does not make the effort any less important or necessary. A company led effort that has had more success, including a new reference code achieved in late 2008, is the Global Social Compliance Program (GSCP).³¹³ The GSCP, which aims to promote substantive convergence but itself will not monitor or offer certification or accreditation, focuses heavily on the retail sector but also includes some manufacturers and distributors. The difficulties facing such initiatives make it likely that upcoming work and successes will continue to be at the sectoral level. Yet another example of this is the relatively recent Electronics Industry Code of Conduct (EICC),³¹⁴ now working in partnership with the Information and Communications Technology sector’s Global e-Sustainability Initiative (GeSI)³¹⁵ to enhance supply chain auditing and accountability. Through various fora, such groups coordinate

³¹² Joint Initiative on Corporate Accountability and Workers Rights, About Us, <http://www.jo-in.org/about.html> (last visited Mar. 10, 2009).

³¹³ See GSCP Reference Code (Sept. 2008), http://www.ciesnet.com/pfiles/programmes/gscp/2008_Sept_GSCP_Reference_Code.pdf (last visited Mar. 10, 2009).

³¹⁴ See Electronic Industry Citizen Coalition, <http://www.eicc.info/> (last visited Mar. 10, 2009).

³¹⁵ See Global e-Sustainability Initiative, <http://www.gesi.org/> (last visited Mar. 10, 2009).

with each other and across industries to identify and further refine best practices. There is even some informal consideration being given to harnessing market incentives by harmonizing the various country, industry, and thematic indices and rating systems currently existing³¹⁶ into one global index that would broaden the criteria by which firms are judged, and thus do for substantive CSR more broadly what, for example, GRI does on the reporting front.

Several leading companies at the time of this writing are considering support for a greater ILO role in monitoring and auditing factories in supply chains.³¹⁷ In addition to such coordination efforts among standards and initiatives, there is movement to try to consider what some call “third generation supply chain management,” which would have a broader, full-spectrum, “rights-aware” purpose and approach based on international as well as national law, and a more expansive and collaborative methodology including a broader range of players (such as the international development agencies and as well as additional government, union, and civil society stakeholders).³¹⁸ While even more complex and challenging, this next stage of supra-regulation/meta-regulation holds great long-term promise for the coordination and rationalization of the current pluralistic regimes. By involving so many diverse players, such “next generation” approaches make it easier to see things from a proactive, systemic perspective and note and consider ways of correcting the weak links in the chain. For example, having both the home and host countries of TNCs at the table will inevitably

³¹⁶ Including, *e.g.*, stock exchange indices such as FTSE4Good, http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp (last visited Mar. 10, 2009), the Dow Jones Sustainability Indexes, <http://www.sustainability-index.com> (last visited Mar. 10, 2009), or China’s Taida Environmental Index, <http://www.chinacsr.com/2008/01/03/1995-chinas-first-environmental-protection-formally-released> (last visited Mar. 10, 2009), but also public-private indices such as Business in the Community’s Corporate Responsibility Index, which is used and funded by governments such as the United Kingdom and Australia, *see, e.g.*, Corporate Responsibility Index, <http://corporate-responsibility.com.au> (last visited Mar. 11, 2009), or the “Responsible Competitiveness Index” discussed above.

³¹⁷ This is based on author’s private interviews with several TNC executives.

³¹⁸ This concept is being pursued by several companies in the Business Leaders Initiative on Human Rights, among others.

highlight the need to enhance state capacity in many of the developing countries, and could result in greater technical and financial assistance as well as creative new ideas in that regard. The involvement of international organizations like the ILO and OECD could result in further replication of the innovative projects in Cambodia, Jordan, and elsewhere, bringing together the credibility and expertise of all these actors.³¹⁹

2. A Stronger Global Legal Framework Still?

Although the CSR principles and new global governance have had a positive effect, the persistent problems associated with the corporate role in globalization are seen as outrunning all the varied approaches of the status quo. Realistically, the problem with so-called voluntary initiatives of any sort, despite their advantages, is that by being optional they usually exclude parties on each side. On the corporate side, rogues and laggards, especially, but also many businesses lacking the knowledge or size to participate are left out. On the stakeholder side, many parties, especially women, children, the poor, disenfranchised minorities, and the most vulnerable, will be typically be unaware of or unable to participate in the process. So there are and will continue to be pressures toward more comprehensive and effective regimes.

The state role in what Ayres and Braithwaite call “enforced self-regulation”³²⁰ in the shadow of the law can take many forms – including Parker’s meta-regulation establishing standards and overall goals but not specific details of the paths to those goals, as well as auditing and spot-checks by the state to determine whether conduct accords with state goals, typical command-

³¹⁹ The ILO established and continues to manage the Better Factories Cambodia initiative which carries out independent unannounced audits of working conditions in Cambodian factories. See Better Factories Cambodia, <http://www.betterfactories.org/ILO/aboutBFC.aspx?z=2&c=1> (last visited Mar. 10, 2009). A more recent pilot project entitled Better Work has already been implemented in Jordan and was being extended to Lesotho and Vietnam in 2008. The program will combine independent assessments of labor standards at the factory level with training and capacity building, including not only local suppliers affiliated with international buyers but ideally purely domestic players as well. See International Labour Organization, http://www.ilo.org/wow/Articles/lang--en/WCMS_094381/index.htm (last visited Mar. 10, 2009).

³²⁰ AYRES & BRAITHWAITE, *supra* note 155.

and-control civil or criminal penalties, information regulation, incentives such as procurement, subsidies, or tax benefits, public recognition, market-based programs like carbon trading, or other devices. While continued rationalization and evolution of soft law global instruments and multi-stakeholder “voluntary” initiatives is the most likely immediate direction the CSR principles will take internationally, movement toward a stronger global framework to address these issues is highly likely. After all, solutions that are primarily market-based are not likely to be the answer to addressing the continued market failures present in the system. Sanctions as well as incentives are important even to an information-based disclosure regime or any regime, if only to catch the rogues; compliance can improve under scrutiny and enforced laws.³²¹ Hence, it is important to recall not only the important role of (i) enforced self-regulation, but also (ii) the *law*.

Improved law on the global level could – and probably should – still take a meta-regulatory form whereby governments set or endorse the relevant standards but allow for different paths to implementing those standards. This reflects how the current nascent and piecemeal meta-regulatory system generally operates in practice, involving both governments and NGOs informing, persuading, engaging, negotiating with, and cajoling companies in an iterative process that sometimes must turn to more coercive and adversarial measures for incompetent, recalcitrant, persistently noncompliant, and especially rogue companies. Both the extreme cases that serve as examples of effective enforcement, and the more routine cases in which consensus emerges from dialogue and negotiation, serve to reinforce the standards and their normative effect on behavior, contributing to the growing purchase that the CSR principles now have globally.

³²¹ See generally Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171, 186 (2007) (although McInerney is mistaken when at page 189 and following he says things like “[o]nly states can undertake the necessary work to ensure that the international norms to which they have bound themselves in international fora are respected in their territories” and “[o]nly states have the knowledge necessary to regulate industries operating within their territories”) (emphasis added).

3. A Global Treaty or International Court?

Many continue to see a strong rationale for a global treaty on CSR and sustainable development obligations pertaining to non-state actors, perhaps broken out into separate environmental and human rights treaties.³²² Indeed, proponents of a global treaty of this nature were given some hope by statements made in *The Johannesburg World Summit of Sustainable Development (WSSD) Plan of Implementation*, which at paragraph 49 encourages action at all levels to:

Actively promote corporate responsibility and accountability, based on the Rio Principles, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships, and appropriate national regulations, and support continuous improvement in corporate practices in all countries.³²³

Clearer standards and enhanced enforcement would go a long way toward addressing the worst aspects of the collective action problems posed by corporate human rights harms and environmental degradation.³²⁴ An even clearer, more detailed and authoritative regulatory floor than exists from the present combination of CSR norms and consistent best practices would also help protect the first movers and enlightened companies from competitive disadvantage created by rogues and laggards, while also (if well conceived and drafted) contributing to the resolution of persistent collective action and systemic problems in a more effective fashion. Developments such as the U.N.

³²² See, e.g., FRIENDS OF THE EARTH INT'L, TOWARDS BINDING CORPORATE ACCOUNTABILITY, http://www.foe.co.uk/resource/briefings/corporate_accountability.pdf (last visited Mar. 10, 2009) (the corporate accountability convention proposed by NGOs in the lead up to WSSD in 2002).

³²³ See World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26 – Sept. 4, 2002, *Plan of Implementation*, U.N. Doc. A/CONF 199/20.

³²⁴ *Id.* ¶ 162.

Norms³²⁵ and the U.N. Special Representative's mandate on business and human rights could be and have been read as a harbinger of more authoritative law to come.³²⁶ Regional declarations and treaties are also possible, although there is little movement in that direction at present, beyond the existing and pending trade agreements referencing CSR issues.

Yet experts have advanced reasons for caution prior to proceeding directly to a treaty, at least in the case of the social (human rights) side of CSR. U.N. Special Representative for Business and Human Rights John Ruggie has three reservations about taking the treaty path in the near future:

First, treaty-making can be painfully slow, while the challenges of business and human rights are immediate and urgent. Second, and worse, a treaty-making process now risks undermining effective shorter-term measures to raise business standards on human rights. And third, even if treaty obligations were imposed on companies, serious questions remain about how they would be enforced.³²⁷

The International Criminal Court even now can reach individual corporate executives in theory, but in reality limited resources and other pressing cases mean that any such action would be rare, symbolic and mainly exemplary. Hence the prospect of a specialized international tribunal or court for multinational abuses has been raised and will be raised again in

³²⁵ Comm'n on Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), available at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>.

³²⁶ Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 287 (2006).

³²⁷ John Ruggie, *Business and Human Rights - Treaty Road Not Travelled*, ETHICAL CORP., May 6, 2008, available at <http://www.ethicalcorp.com/content.asp?ContentID=5887>.

the future.³²⁸ The reality is that the political will does not exist at present for a treaty or enhanced enforcement by an International Court or the U.N. treaty bodies, either on behalf of states or on behalf of most corporations, and, as Ruggie points out, practical design issues remain: “How would one such committee handle millions of companies, while addressing all rights of all persons?”³²⁹ One might also note as obstacles to a treaty or tribunal the persistence of entrenched interests opposed to the idea, conceptual blinders regarding CSR being strictly “voluntary,” resistance to any enhanced “regulation” of any kind, and cross-sectoral challenges of creating rules valid for industries as different as financial, apparel, media, and technology. None of these is insurmountable, however, and as long as proponents of a global treaty continue to extol its benefits for the promotion of CSR principles, some form of international agreement will continue to receive consideration.

In the interim, corporations and other stakeholders will benefit from the enhanced clarity initially provided by Ruggie’s tripartite (respect-protect-remedy) framework. The framework is minimalistic, not going into detail regarding the required due diligence, and not addressing those situations in which corporations may have higher duties to protect or fulfill, such as in privatization or other contexts. It nevertheless serves as a useful clarification and as a helpful resource for analysis. Moreover, his extended mandate, ending in 2011, should provide further detail both regarding the content of the normative principles applying to corporations and regarding tools, guidelines, and approaches on how best to operationalize them. This would not only be of practical assistance to companies, but would further address one critique against CSR, now voiced less often than in earlier decades, that it fails to provide adequate guidance to companies.³³⁰ Further reiteration

³²⁸ Cf. Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 633 (2008) (“the antislavery story told here suggests that one of the most suitable uses for international courts may be in combating illegal action by non-state, transnational actors”).

³²⁹ Ruggie, *supra* note 327.

³³⁰ For critiques emphasizing this claim, see, e.g., David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 2-3, 59-63 (1979); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L.

under U.N. auspices of the CSR principles guiding corporations would also inform future domestic legislation and could help prepare the ground for any eventual treaty or convention on the subject.

CONCLUSION

Whether CSR principles ultimately become enshrined in a binding global treaty or not remains an open question affected by obstacles including ideology, political will, the countervailing power of some resistant corporations, and limited resources. But a treaty should not be viewed as the Holy Grail. Much can be accomplished by strengthening the new *lex mercatoria* of CSR without a treaty, and any treaty that is likely to emerge will itself be meta-regulatory in character, requiring ongoing interaction of formal legal and voluntary initiatives. The very forces that are flattening corporate structures to render them less directly subject to control are also exposing them to greater online and offline scrutiny. The contest between these forces hearkens back to the time, described by Jules Verne, when “[c]annon-balls and iron plates struggled for supremacy, the former getting larger as the latter got thicker.”³³¹ This review of legal developments suggests that CSR will continue to gain in scope and substance, and has some prospect of matching the ability of the corporation itself to evolve.

REV. 923 (1984); Gerald P. Neugebauer III, *Indigenous Peoples as Stakeholders: Influencing Resource-Management Decisions Affecting Indigenous Community Interests in Latin America*, 78 N.Y.U. L. REV. 1227, 1237 (2003) (noting that abstract rights from treaties and declarations in themselves do not offer “concrete guidance on how these business enterprises might change their behavior or what they have to gain by doing so . . . what specific actions they might or might not undertake, when they should or should not do so, and why it would or would not be in their interest to undertake such a course of action.”).

³³¹ Jules Verne, *From the Earth to the Moon*, in THE MOON VOYAGE ch. 10 (1865).

has self-endowed itself with thought and expression controls (at least in the realm of intra-faculty interactions, if not beyond) in implementation of a no-holds-barred politically correct, liberal-left agenda. And, it's likely to only get worse. But, does anyone care? "That is the congestion. Consumption be done about it? Of cough. Of cough."⁷⁶¹

of David Bernstein to The Volokh Conspiracy, http://volokh.com/archives/archive_2006_08_13-2006_08_19.shtml (Aug. 17, 2006, 3:28 EST) (citing the ABA's status as "quasi-state actor" subject to due process restrictions). The monopoly linkage between ABA accreditation and the States has been expressly conceded in litigation. See Amicus Curiae Brief of the American Association of Law Schools, at 2, *Avins v. White*, No. 79-1747 (3rd Cir. 1979) ("In this country the importance of accreditation is emphasized by the circumstance that, under orders of the State Supreme Courts or by legislation, *virtually all the states condition eligibility to sit for the bar examination on graduation from a law school accredited by the American Bar Association.*"). Cf. *Hawkins v. N.C. Dental Soc'y*, 355 F.2d 718, 720-24 (4th Cir. 1966) (holding that a professional membership society that was "clearly authorized . . . to influence, if not to control, state functions" was a state actor for Fourteenth Amendment Equal Protection Clause purposes) (relying on the white primary line of precedents).

⁷⁶¹ I learned this bit of doggerel by rote in high school in the mid-60's. I have been unable to trace its origin.