

# The Value of Information: Alternatives to Liability in Influencing Corporate Behavior Overseas

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*Globalization is both a powerful and ubiquitous force in the contemporary world. Its influence can be felt both in developed nations, who extend their economic borders to transverse the globe, and in the developing world, whose natural and human resources are often relentlessly exploited to serve a growing global demand for affordable goods. As human rights organizations draw international attention to the mistreatment of workers in developing nations, multinational corporations, often U.S. corporations, seem increasingly to blame for abusive labor practices and human rights violations abroad. This Note examines the problem of holding corporations accountable for their activities overseas. After examining and evaluating both international and U.S. domestic approaches to the regulation of corporate conduct abroad, this Note explores the possibility of an international disclosure scheme modeled on existing U.S. right-to-know legislation. An international right-to-know regime would combine initiatives from the era of corporate self-regulation with the galvanizing potential of widely disseminated information and the coercive power of the state. While not entirely free of transaction costs, an international right-to-know has significant potential to effectively address the human and labor rights abuses of corporations in a novel way.*

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## I. INTRODUCTION

Recent regional and international free trade initiatives, involving an ever-increasing number of participants and producing far-reaching consequences, formalize a process of globalization. The increasing number of multinational corporations (“MNCs”) is both a product of and a contributor to globalization. There are now over 60,000 multinational corporations with more than 450,000 subsidiaries throughout the world.<sup>1</sup> According to *Forbes* magazine, the one hundred largest U.S.-based multinationals took in \$1.44 trillion in combined revenue from overseas operations in 2000.<sup>2</sup>

The dialogue on globalization has evolved to include technical issues related to trade liberalization, but free trade initiatives have remained largely silent on the labor and human rights obligations of MNCs operating outside their home states.<sup>3</sup> Problems traceable to the conduct of MNCs receive sporadic, but sensational, coverage in the media.<sup>4</sup> Reports on sweatshop labor, below-subsistence level wages, and other poor working conditions ignite public interest in the conduct of MNCs abroad.

Efforts to address the behavior of MNCs have used, until recently, three major strategies: voluntary international codes of conduct, liability regimes in the companies’ home states, and domestic legislation aimed at imposing standards on MNCs operating abroad. These diverse strategies have failed to create a coherent framework to regulate corporate behavior around the world. Due to novel forms of corporate organization, the perpe-

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1. VIRGINIA HAUFLE, *A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY* vii (foreword) (2001).

2. International Right to Know — What is IRTK?, at [http://www.irtk.org/what\\_is\\_irtk.html](http://www.irtk.org/what_is_irtk.html) (last visited Jan. 3, 2004); see also <http://www.forbes.com/forbes/2001/0723/136tab2.html> (last visited Jan. 9, 2005).

3. Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT’L ECON. L. 61 (2001). Commenting on the protestors of the November 30, 1999 meeting of the World Trade Organization (WTO) in Seattle, Summers remarks, “The root of their protest was that the WTO, in developing its rules and procedures for promoting free trade, had not given adequate, if any consideration to labor rights, environmental problems, or human rights.” *Id.*

4. See *An International Right to Know*, N.Y. TIMES, Jan. 25, 2003, at A18 (“Globalization has brought new scrutiny to the practices of multinational corporations. Environmental, labor and human rights groups are using lawsuits, good-conduct labels, public protests and other methods to force or shame companies into better behavior.”).

trator of a human rights violation somewhere in the developing world may not be the corporation itself, but a subcontractor.<sup>5</sup>

This Note examines the problem of creating accountability for MNC conduct abroad. Part II examines the international community's response to the problem of labor and human rights abuses perpetrated by MNCs and their subsidiaries or subcontractors overseas. While there have been attempts to regulate corporate behavior abroad, the international response to the problem has lacked the will, consensus, and enforcement mechanisms necessary to effect meaningful change. Part III discusses the various efforts to hold corporations accountable at the domestic level both in home and host states. Despite creative legal efforts, litigation targeting MNCs for human and labor rights abuses committed abroad have been entirely unsuccessful.<sup>6</sup> Also discussed are "corporate codes of conduct" — the MNCs' response to the claim that they are incapable of adequate self-policing. Part IV develops a potential alternate approach to the corporate misconduct problem, namely the advent of an international right to know ("IRTK") based on domestic right to know laws already operative in the United States. An IRTK foregoes any attempt at creating liability or reaching international consensus, instead relying on the value of corporate reputation as the principal motivating factor. This Note concludes that an international right to know would be the most feasible and least painful way for companies to address the serious issue of labor and human rights abuses in developing countries.

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5. HAUFLER, *supra* note 1, at 55–56.

6. One commentary describes the state of the litigation as follows:

To date, no corporation has been held liable under the ATCA, and most cases have been dismissed at early stages due to various deficiencies in the claims. The only ATCA suits that have thus far been concluded successfully have been those brought against former foreign government officials or agents alleged to have committed acts of torture.

MARTIN LUTZ & SARA ROBINSON, THE ALIEN TORT CLAIMS ACT AND OTHER REPUTATIONAL AND FINANCIAL RISKS ARISING IN CONNECTION WITH OVERSEAS CORPORATE CONDUCT — PIPER RUDNICK 2 (2003).

## II. INTERNATIONAL REMEDIES AND LIMITS

### A. DEFINITIONS

Before exploring international legal remedies and their limits vis-à-vis the issue of MNC behavior abroad, a few definitional issues bear clarification. This Note uses the terms “human rights” and “labor rights” synonymously. The apparent conflation of the terms is not accidental and reflects a trend in legal scholarship. As Steven Ratner notes, “Today, most states view labor rights as a subset of human rights, and, in particular, of economic and social rights.”<sup>7</sup> James A. Gross, author of *Workers’ Rights as Human Rights*, makes the point that the international human rights movement and some labor organizations have not thought of workers rights as human rights until relatively recently. Gross posits that “this lack of attention has contributed to workers being seen as expendable in worldwide economic development . . . .”<sup>8</sup>

As treated in this Note, human rights, of which labor rights can be treated as a subset or analog, comprise “fundamental principles that allow the individual to lead a dignified life, free from abuse and violations and allow the freedom to express independent beliefs. The basic building block for international law on human rights is the Universal Declaration of Human Rights . . . .”<sup>9</sup> Finally, the “behavior of MNCs” referenced throughout is analogous to the term “corporate social responsibility” (“CSR”), which in turn can be defined simply as “business

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7. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 479 (2001) (citing VIRGINIA A. LEARY, *The Paradox of Workers’ Rights as Human Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 22 (Lance A. Compa & Stephen F. Diamond eds., 1996)).

8. James A. Gross, *A Long Overdue Beginning: The Promotion of Workers’ Rights as Human Rights*, in WORKERS’ RIGHTS AS HUMAN RIGHTS 3 (James A. Gross ed., 2003) (citing LEARY, *supra* note 7, at 3).

9. Edward E. Potter, *A Pragmatic Assessment from the Employers’ Perspective*, in WORKERS’ RIGHTS AS HUMAN RIGHTS 118 (James A. Gross ed., 2003). *But see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, (defining human rights as “freedom, immunities, and benefits which, according to widely accepted contemporary values, every human being should enjoy in the society in which he or she lives”) (citing AM. LAW INST., RESTATEMENT OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 701, Comment, Vol. 2, 152 (1986)).

practices based on ethical values and respect for workers, communities and the environment.”<sup>10</sup>

## B. THE INTERNATIONAL LABOR ORGANIZATION

The basic reference point for most international labor lawyers is the International Labor Organization (“ILO”).<sup>11</sup> With membership comprising government, employer and employee representatives from 175 countries, the ILO has developed 184 conventions on various aspects of work and employment.<sup>12</sup> Of particular interest are the core Conventions of the ILO<sup>13</sup> and the ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (“Tripartite Declaration”).

The ILO’s Tripartite Declaration established voluntary guidelines for corporations regarding employment, training, working conditions, and industrial relations.<sup>14</sup> As with the core ILO Conventions, however, the Tripartite Declaration relies on individual governments to ratify and then implement its provisions.<sup>15</sup> In fact, the ILO conventions do not operate directly on MNCs at all. Even if the governments of developing nations were to ratify it, the convention would still have to be implemented through domestic legislation for corporations to be bound. The problem of international law’s application to governments rather than directly to private actors is a theme throughout international law.<sup>16</sup>

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10. Corporate Social Responsibility — A Role for the Government: The Issue at Hand, available at [www.csrpolicies.org/CSRRoleGov/CSR\\_Issue/csr\\_issue.html](http://www.csrpolicies.org/CSRRoleGov/CSR_Issue/csr_issue.html) (Jan. 3, 2004).

11. Potter, *supra* note 9, at 118. See also Lee Sweptson, *Closing the Gap between International Law and U.S. Labor Law*, in *WORKERS’ RIGHTS AS HUMAN RIGHTS* 53, 54 (James A. Gross ed., 2003) (“The international legal context in which we are operating is that the labor law of most of the world is based on ILO standards.”).

12. KIMBERLY ANN ELLIOT & RICHARD B. FREEMAN, *CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION?* 94 (2003)

13. See Rory Sullivan & Des Hogan, *The Business Case for Human Rights — The Amnesty International Perspective*, in *COMMERCIAL LAW AND HUMAN RIGHTS* 69, 70 n.3 (Stephen Bottomley & David Kinley eds., 2002). The core Conventions on labor rights are Conventions 29 (forced labor), 87 (freedom of association and protection of the right to organize), 98 (right to organize and collective bargaining), 100 (equal remuneration), 105 (abolition of forced labor), 111 (on discrimination), 138 (minimum age of workers) and 156 (equal opportunities and equal treatment for men and women workers), together with ILO Conventions 182, 190 (child labor) and 169 (the rights of indigenous and tribal peoples).

14. HAUFLER, *supra* note 1, at 17.

15. *Id.*

16. See Robert McCorquodale, *Human Rights and Global Business*, in *COMMERCIAL LAW AND HUMAN RIGHTS* 89, 92 (Stephen Bottomley & David Kinley eds., 2002) (“Interna-

This feature of international law has repeatedly halted several lawsuits filed against MNCs for violations cognizable under the Alien Tort Claims Act (“ATCA”)<sup>17</sup> from going forward.

In conjunction with the problems of application, the ILO is limited in its effectiveness by its lack of enforcement authority.<sup>18</sup> As Terry Collingsworth of the International Labor Rights Fund (“ILRF”) observes, “[W]ithout any real enforcement power, the ILO is left trying to persuade countries that have already turned a blind eye to the atrocities in Burma, including France and Japan, to overturn their longstanding refusal to consider economic boycotts based on human rights issues.”<sup>19</sup> This lack of enforcement power, coupled with the basic limitation imposed by the conventions’ applications to governments and not to private actors, means that the ILO Tripartite Declaration did not have much of a direct effect. It did, however, lay the groundwork for later international efforts.<sup>20</sup>

### C. THE UNITED NATIONS GLOBAL COMPACT

Hailed as “probably the most significant initiative”<sup>21</sup> in promoting industry self-regulation in the area of human and labor rights conduct, the Global Compact “attempts to persuade business leaders to adopt and apply ten basic principles in the fields of human rights, labor standards, and the environment.”<sup>22</sup> These

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tional human rights law is founded on a state-based framework. States alone, in the form of governments and other state institutions, have obligations under international human rights law.”).

17. See, e.g., Terry Collingsworth, *Boundaries in the Field of Human Rights: The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 197–98 (2002) (citing *Filartiga v. Pena-Irala* 630 F.2d 876 (1980)). Collingsworth writes that the ATCA requires state action before liability is found. Based in international law, the statute covers the behavior of states and not that of individuals. “A few courts have dealt with this by parsing the question and holding that for a limited category of jus cogens norms, no state action is required, but for all other actionable international law violations under the ATCA, state action must be established.” *But see* *Kadic v. Karadzic* 70 F.3d 232, 240 (2d Cir. 1995) (where “the Second Circuit clarified that ‘certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.’”).

18. Gross, *supra* note 8, at 16.

19. Collingsworth, *supra* note 17, at 184.

20. HAUFLER, *supra* note 1, at 17.

21. *Id.* at 29.

22. Global Reporting Initiative — About the UN Global Compact, at [www.globalreporting.org/portal/default.asp](http://www.globalreporting.org/portal/default.asp) (last visited Feb. 15, 2005).

ten principles are derived from the bedrock documents of international human rights law, including the Universal Declaration of Human Rights (“UDHR”), the ILO’s Declaration on Fundamental Principles, and the Rio Principles on Environment and Development.<sup>23</sup> Of the ten principles, the four relevant to the discussion on labor rights are (1) the preservation of freedom of association and the right to collective bargaining; (2) the elimination of all forms of forced and compulsory labor; (3) the abolition of child labor; and (4) the elimination of discrimination in respect to employment and occupation.<sup>24</sup>

Like the ILO conventions and the Tripartite Declaration, the Global Compact is not a regulatory instrument.<sup>25</sup> That is, the Global Compact does not contain any enforcement provisions to monitor the behavior or compliance of MNCs. Instead, the Global Compact “relies on public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based.”<sup>26</sup> MNCs deliver information to civil society via a website, which will provide a report of corporate achievements.<sup>27</sup> As the entire mechanism is voluntary, however, there is no guarantee as to the quality or quantity of the information posted. Despite its sweeping scope and UN Secretary General Kofi Annan’s personal involvement, some authors have criticized the Global Compact for its “failure . . . to set reasonable and well-defined limits on the human rights responsibilities of companies.”<sup>28</sup>

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23. UN Global Compact — What is the Global Compact, *available at* [www.unglobalcompact.org/Portal/Default.asp](http://www.unglobalcompact.org/Portal/Default.asp) (last visited Jan. 3, 2004).

24. *Id.*

25. *Id.*

26. *Id.*

27. Ronie Garcia-Johnson, *Road From Rio*, 7/1/02 F. APPLIED RES. & PUB. POL’Y 613, *available at* 2002 WL 101550416.

28. Daniel Litvin, *Needed: A Global Business Code of Conduct*, FOREIGN POLICY, November/December 2003, at 68.

D. THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (“OECD”) GUIDELINES FOR MULTINATIONAL ENTERPRISES (“MNES”)

Similar in object to the Global Compact, the OECD Guidelines aim fundamentally to create a global code of conduct for businesses. “More specifically, guidelines are concerned with public disclosure information by MNEs (Multinational Enterprises) about their structure and activities . . . the rights of workers to organize and bargain collectively, and with environmental protection.”<sup>29</sup>

Again, like the Global Compact, the Guidelines are voluntary and there is neither an enforcement mechanism currently in place, nor one envisioned for the near future.<sup>30</sup> Instead, the Guidelines rely on the commitment of governments and the eventual passage of implementing legislation in member states.<sup>31</sup> Unlike the Global Compact, however, the Guidelines suffer from the additional handicap of being particularly vague in their enunciation of corporate duties and in their identification of the intended beneficiaries of responsible corporate behavior.<sup>32</sup> Nor do the Guidelines provide any guidance as to the ways in which MNCs can measure or report their behavior. Thus, the likelihood that governments would pass implementing legislation creating codes of conduct under the Guidelines is further diminished by the indefinite language used in the document. The value of the

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29. Stephen Bottomley, *Corporations and Human Rights*, in COMMERCIAL LAW AND HUMAN RIGHTS 47, 59 (Stephen Bottomley & David Kinley eds., 2002).

30. *Id.* (citing A. FATOUROS, THE OECD GUIDELINES IN A GLOBALISATION WORLD 7, (OECD 1999)).

31. Organisation for Economic Co-Operation and Development — Guidelines for Multinational Enterprises: What’s New, available at [www.oecd.org/topic/0,2686,en\\_2649\\_34889\\_1\\_1\\_1\\_37439,00.html](http://www.oecd.org/topic/0,2686,en_2649_34889_1_1_1_37439,00.html) (last visited Jan. 3, 2004) (“While observance of the Guidelines is voluntary for businesses, adhering governments are committed to promoting them and to making them influential among companies operating in or from their territories.”).

32. Ratner has commented that,

The OECD Guidelines state that corporations should ‘[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.’ At the same time, the Guidelines go no further than this statement and give corporations no sense of what rights are included and how broadly the group of ‘those affected by their activities’ extends.

See Ratner, *supra* note 7, at 487 (citing OECD Guidelines 2000 § II.2., available at [www.oecd.org](http://www.oecd.org)).

OECD Guidelines is not their practical utility, but their influence on later documents and movements.<sup>33</sup>

The persistence of certain problems such as enforcement, precision, and authority in the above-mentioned international instruments begs the question of why international organizations bother to create such documents. Dinah Shelton theorizes that such “soft law” instruments are created because they can be adopted quickly by a larger number of negotiating states (since the instruments are non-binding) and they can be rapidly amended or replaced if they fail to meet the needs of the negotiating parties. Shelton adds that if the facility of adoption and amendment is really the motivating reason behind the adoption of such soft law instruments on the international level, “we would expect to see more soft law on the global than the regional level, and that appears to be the case.”<sup>34</sup>

## E. REGIONAL BLOCS

### 1. *The European Union (“EU”)*

While not a revolutionary improvement on the efforts of international organizations in the area of MNC responsibility, regional organizations have contributed instruments that have fared better than those of their international counterparts. As Ronie Garcia-Johnson observes, “with few exceptions — like the European Code of Conduct for European Enterprises Operating in Developing Countries — states have not worked to address the substantive problem of multinational corporations . . . and accountability.”<sup>35</sup> The reason why the European Code of Conduct escapes Garcia-Johnson’s criticism stems from the greater degree of specificity in the EU instrument as compared with its international analogs. While the Code of Conduct is still voluntary, the strategy it adopts “focuses on ‘objective evaluation methods and validation tools such as social labels’ as well as social and envi-

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33. HAUFLER, *supra* note 1, at 17.

34. Dinah Shelton, *Law, Non-Law and the Problem of “Soft Law,”* in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 1, 12–13 (Dinah Shelton ed., 2000), *cited in* INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 91 (Dunoff et al. eds., 2002).

35. Garcia-Johnson, *supra* note 27.

ronmental reports.”<sup>36</sup> By using more concrete evaluation techniques, the Code of Conduct aims at attracting the participation of more businesses. As an added inducement, the Code of Conduct “is also designed to promote socially responsible investing (“SRI”).”<sup>37</sup> Businesses who hope to benefit from the social labeling endorsement of the EU would therefore have an incentive to give more serious consideration to the Code of Conduct.

## 2. *The North-American Free Trade Agreement (“NAFTA”)*

Lending further support to the idea that “smaller groups of states have been able to negotiate and implement rules governing corporate behavior,”<sup>38</sup> the side agreements to NAFTA deal specifically with social and environmental issues associated with free trade between Mexico, Canada, and the United States. Like the EU Code of Conduct, however, the NAFTA side agreement on labor — the North American Agreement on Labor Cooperation (“NAALC”) — represents but a modest improvement on the model developed at the international level.<sup>39</sup>

The most serious criticism leveled at the NAALC relates to the fact that the instrument creates no new obligations for the member countries. Article 3(1) reads, in relevant part, “Each party shall promote compliance with and effectively enforce its labor law through appropriate government action . . . .”<sup>40</sup> Thus, each member state is obligated to implement its own laws, but is not held to a higher legal standard.<sup>41</sup> Complainants could still file actions against a member state for failure to enforce that state’s own laws, but it is unclear whether the mechanisms in place for pursuing such claims would actually carry repercussions for the member state. For example, of the eleven rights protected under

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36. Corporate Social Responsibility — A Role for the Government: What are governments doing?, available at [http://www.csrpolicies.org/CSRRoleGov/CSR\\_WhatGovDoing/csr\\_whatgovdoing.html](http://www.csrpolicies.org/CSRRoleGov/CSR_WhatGovDoing/csr_whatgovdoing.html).

37. *Id.*

38. HAUFLER, *supra* note 1, at 18.

39. Interview with Mark Barenberg, Professor of Law, Columbia Law School, New York, NY (Oct. 2, 2003).

40. North American Agreement on Labor Cooperation, Sept. 13, 1993, Art. 3(1) [hereinafter NAALC].

41. Barenberg, *supra* note 39.

the NAALC,<sup>42</sup> only violations of the prohibitions on child labor, minimum wage requirements, or occupational safety and health requirements can result in arbitration and sanctions against the member state. The question, then, is whether a violation of one of these three rights by, for example, the United States, would result in remedies to the victim superior to those already provided by the U.S. Labor Relations Board.<sup>43</sup>

## F. THE LIMITS OF INTERNATIONAL LAW

The limitations of the agreements and conventions outlined above suggest that any attempt at changing MNC behavior at the international level will be challenging and demanding. As one commentator put it, “the UN, ILO, and OECD all attempted to develop comprehensive frameworks for corporate behavior, but these early initiatives had little impact.”<sup>44</sup> The results proffered by the two regional organizations surveyed above do not indicate a measurably stronger future for agreements or for conventions at the regional level either. Rather, the problems associated with finding a solution on the international level consistently involve two themes: (1) enforcement and (2) the limits to and ambiguity in application of these instruments.

### 1. *Enforcement of International Law Instruments*

The Executive Director of Human Rights Watch has remarked that “the key current question is not creating new rights, but enforcing existing rights. Neither the ILO nor any other international body has enforcement powers such as those possessed by a national legal system.”<sup>45</sup> Besides the explanations offered by Dinah Shelton as to the advantages of soft law instruments and their concomitant enforcement disadvantages, two major reasons

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42. See NAALC, Annex 1: Labor Principles, available at <http://www.naalc.org/english/aggrement9.shtml> (last visited Jan. 26, 2005). The rights include freedom of association; collective bargaining rights; the right to strike; anti-discrimination rights/equal pay for men and women; migrant worker rights; prohibitions on forced labor; prohibitions on child labor; minimum wage guarantees; occupational safety and health requirements; compensation in case of occupational injuries and illnesses; protection of migrant workers.

43. Barenberg, *supra* note 39.

44. HAUFLER, *supra* note 1, at 29.

45. Gross, *supra* note 8, at 16.

why international instruments such as those mentioned above lack enforcement power relate to the signatories' lack of will and the difficulty in building consensus as to the standards to be applied.

Steven Ratner writes that "most governments appear to remain somewhat ambivalent about accepting corporate duties, and, in particular, duties that corporations might have toward individuals in states where they operate."<sup>46</sup> Governments might be concerned about creating unmanageable responsibilities for their MNCs, thereby driving business out of their nations and to non-signatory nations. James Gross offers another equally relevant explanation: "[I]n great part, fears of inroads on national sovereignty block the creation and implementation of effective international enforcement measures."<sup>47</sup> In particular, these fears might be most acute in developing nations, where lack of representation in the negotiating process or forced implementation of burdensome regulations might be pervasive.<sup>48</sup> The World Bank reports that "there is increasing anecdotal evidence that the tools of CSR may come to be viewed as non-tariff barriers to trade or an unwelcome imposition of 'foreign' concerns."<sup>49</sup>

ILO convention statistics indicate that building consensus on CSR issues is an arduous task. "Over two-thirds of ILO members have ratified fewer than 25 percent of the outstanding conventions, and only six countries have ratified more than 50 percent of the conventions."<sup>50</sup> Besides the low level of ratification of ILO conventions, one could also look to the multitude of international law instruments available on the subject of CSR as evidence of the panoply of opinions as to what constitutes CSR and how to achieve it. Indeed, beyond the conventions and agreements mentioned thus far, it bears noting that the international community

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46. Ratner, *supra* note 7, at 488.

47. Gross, *supra* note 8, at 16.

48. Similar experiences characterized the negotiating process of other international conventions, such as the Montreal Protocol on Substances that Deplete the Ozone Layer (aimed at reducing chlorofluoro carbon, or CFC production). For a discussion of the North-South issues that hindered the process and the subsequent accommodations made for developing nations, see generally INTERNATIONAL LAW NORMS, ACTORS, PROCESS, *supra* note 35.

49. TOM FOX, ET AL., PUBLIC SECTOR ROLES IN STRENGTHENING CORPORATE SOCIAL RESPONSIBILITY: A BASELINE STUDY 20 (The World Bank 2002).

50. Thomas B. Moorhead, *U.S. Labor Law Serves Us Well*, in WORKERS' RIGHTS AS HUMAN RIGHTS 136, 140 (James A. Gross ed., 2003).

has produced numerous voluntary reporting organizations and mechanisms aimed at providing MNCs a forum through which to provide information to the public on CSR.<sup>51</sup> The lack of consensus as to the primacy of any one of these instruments or initiatives demonstrates the difficulty in achieving enforceability of a unitary international regime directed at the behavior of MNCs.

## 2. *The Limits in Application and the Ambiguity of International Instruments*

With the exception of a narrow range of offenses such as “crimes against humanity,” international human rights law is only binding on national governments — business entities cannot be bound by such laws unless national governments adopt and implement international law through domestic legislation.<sup>52</sup> An example of the state-based model is found in the NAALC, which repeatedly mentions the obligations of “each party” to the principles agreed to by member countries.<sup>53</sup> International law’s emphasis on state-based frameworks for addressing international concerns has limited the effectiveness of CSR efforts and has meant that there are currently no binding international human rights obligations placed directly on MNCs.<sup>54</sup> As will be discussed further below, the state-based or state action requirements of international law present hurdles at both the domestic and international levels, and stymie any attempt at filing actions under the ATCA against MNCs.

The state-based model has forced commentators and scholars to ponder whether international obligations have any real meaning at the domestic level. Edward Potter asks, “[A]re the eight fundamental ILO conventions or the four principles of the ILO Declaration considered to be human rights that have implications under US law?”<sup>55</sup> Indeed, questioning the relevance of international labor law to domestic concerns merely reinforces the general consensus that labor law is still an issue overwhelmingly

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51. These voluntary reporting initiatives include the ISO 14000 Series, Responsible Care, Accountability 1000, Social Accountability 8000 and the Global Sullivan Principles. These initiatives are discussed further in Part II.

52. Sullivan & Hogan, *supra* note 13, at 79.

53. NAALC, *supra* note 40.

54. McCorquodale, *supra* note 16, at 94.

55. Potter, *supra* note 9, at 119.

faced and addressed at the national level.<sup>56</sup> James Atleson writes, “most American labor lawyers have not read, or perhaps even heard of the ILO’s standards, let alone the relevant UN documents such as the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; or the International Covenant on Economic, Social, and Cultural Rights.”<sup>57</sup> The possibility that international law is truly less relevant than domestic law to labor law generally and to the effort to create some form of CSR warrants an examination of domestic attempts at a remedy to abusive MNC behavior.

### III. DOMESTIC REMEDIES AND LIMITS

As mentioned in Part I, one of the complicating characteristics of the globalized MNC is the novel form of corporate organization involving subcontracting work to contractors throughout the world.<sup>58</sup> The practice of subcontracting and the long supply chains that result from it create problems in determining the real perpetrator of a labor or human rights abuse and deciding under which jurisdiction the actor falls. Unfortunately, as Virginia Haufler points out, “the only certain solutions to the problems raised by outsourcing are either to have national enforcement of internationally accepted standards, or to stop the practice of outsourcing entirely. The former is only slightly more likely than the latter.”<sup>59</sup>

Given the relative failure of international efforts at creating a coherent framework within which to address CSR and the seemingly inevitably local nature of labor law, the domestic sphere appears to be the more suitable forum for the creation of a solution.<sup>60</sup> Focusing on domestic endeavors, the key areas of activity

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56. Thus, James Atleson writes that “despite the history of attempts to set international standards for labor and employment, legal regimes are nevertheless intensely local in character . . . labor law is basically national just as labor is still primarily based nationally.” James Atleson, *An Injury to One . . .*, in *WORKERS’ RIGHTS AS HUMAN RIGHTS* 160, 162 (James A. Gross ed., 2003).

57. *Id.*

58. According to Haufler, “Major companies buy products from literally tens of thousands of subcontractors in developed and developing countries alike.” HAUFLER, *supra* note 1, at vii (foreword).

59. *Id.* at 117.

60. McCorquodale observes that “in most circumstances, the state that is most likely to be able to take effective action in relation to placing international human rights obliga-

include efforts aimed at creating liability schemes in the United States; the domestic efforts of developing nations; and corporate codes of conduct implemented by companies in developed nations.

### A. LIABILITY SCHEMES IN THE UNITED STATES

#### 1. *Jurisdictional Issues and International Law*

Before considering the American liability schemes contrived for MNCs, it is worth considering the jurisdictional principles implicated by U.S. efforts to hold MNCs and their partners liable for actions overseas. Under the nationality principle of jurisdiction, a state may exercise jurisdiction over the conduct of its nationals located outside its borders, including corporate nationals, so long as the exercise of jurisdiction does not require a breach of the host state's laws.<sup>61</sup> The territorial principle of jurisdiction, though not as expansive and therefore not as applicable as the nationality principle, does have some relevance. The territorial principle allows a state "to make law applicable to all persons and property within its territory."<sup>62</sup> Under the effects doctrine, enunciated in *United States v. Aluminum Co. of America*,<sup>63</sup> courts in the United States interpreted the territorial principle by looking to see whether the conduct outside of the forum state had an effect in the forum state such that jurisdiction was merited.<sup>64</sup>

It is not difficult to imagine the critiques of American efforts at regulating or imposing liability on MNCs premised on either the nationality principle or the territorial principle. A primary example of these critiques is the international response to U.S. passage of the Helms-Burton Act in 1996. The Helms-Burton Act aimed at strengthening U.S. sanctions on Cuba by discouraging foreign investment in Cuba. Condemnation of the Act came from

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tions on [MNCs] is the state in which the parent corporation of a [MNC] is incorporated." McCorquodale, *supra* note 16, at 99.

61. *Id.* For an example of the exercise of the nationality principle of prescriptive jurisdiction, see *Blackmer v. United States*, 284 U.S. 421, 436 (1932) (where the Supreme Court ruled that U.S. laws applied to a U.S. citizen resident in France, stating, "[b]y virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country"). INTERNATIONAL LAW NORMS, ACTORS, PROCESS, *supra* note 35, at 350.

62. INTERNATIONAL LAW NORMS, ACTORS, PROCESS, *supra* note 34, at 334.

63. 148 F.2d 416 (2d Cir. 1945).

64. INTERNATIONAL LAW NORMS, ACTORS, PROCESS, *supra* note 34, at 338.

nearly every major international body capable of comment, including the United Nations, the Organization of American States (“OAS”), the governments of the European Community (“EC”), and the WTO.<sup>65</sup> The EC complained that “[t]he EC’s problem with the U.S. legislation concerns not its objectives, but the *extra-territorial means* chosen to achieve those objectives . . . .”<sup>66</sup> One leading scholar, McCorquodale, notes that efforts by countries such as the United States to regulate the subsidiaries of MNCs have met with opposition, particularly where such regulation relates to the foreign policy goals of the regulating state.<sup>67</sup>

Criticism of the United States’ exercise of jurisdiction in the context of international trade has not altogether prohibited or stigmatized the practice. “For example, the Sullivan Principles applied to United States corporations employing more than 25 people operating in Apartheid South Africa, and the MacBride Principles set employment standards for corporations for corporations operating in Northern Ireland.”<sup>68</sup> International sensitivity regarding the exercise of U.S. jurisdiction in regulation and liability actions directed at MNCs can create a harsh environment for the evaluation of such initiatives.

## 2. *The Racketeer Influenced and Corrupt Organizations Act (“RICO”)*<sup>69</sup>

Lawsuits filed against MNCs for violations of RICO are not the principal tools used by U.S. activists in their attempts to impose liability on corporations. Nevertheless, the statute presents a creative and expansive alternative for those seeking to sue corporations for alleged misconduct. Examples of RICO actions include the 1999 action against Wal-Mart, The Gap, Limited Inc., Sears, Dayton Hudson, and other clothing retailers accusing them of “a ‘racketeering conspiracy’ to use indentured labor to produce clothing in Saipan (the Northern Marianas Islands).”<sup>70</sup>

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65. *Id.* at 359.

66. “Statement by the Representative of the European Communities and their Member States at the Dispute Settlement Body of the WTO,” in INTERNATIONAL LAW NORMS, ACTORS, PROCESS, *supra* note 34, at 361.

67. McCorquodale, *supra* note 16, at 100.

68. *Id.*

69. 18 U.S.C. § 1961 (1970).

70. HAUFLER, *supra* note 1, at 66.

The case of *Sinaltrainal and Gil v. The Coca-Cola Company*<sup>71</sup> provides a more recent example. The *Sinaltrainal* court commented that “RICO is an expansive statute, broadly construed to reach a wide array of activity . . . . Courts have concluded that this broad construction does not include international schemes largely unrelated to the United States.”<sup>72</sup> While the court’s commentary in *Sinaltrainal* seems to sound RICO’s death knell in the international sphere, the court was careful to add, “[h]owever, these cases do not prohibit all extraterritorial application of RICO. In determining whether RICO applies extraterritorially, allegations must meet either the ‘conduct’ test or the ‘effect’ test.”<sup>73</sup> The court explains that the conduct test applies when conduct within the United States directly causes a foreign injury. The effect test is simply the “effects doctrine” described above, where foreign conduct has substantial effects within the United States.<sup>74</sup> Thus, while courts have yet to find corporations liable for conduct taking place abroad, it remains to be seen whether the door left open by the court in *Sinaltrainal* will lead to any successful suits against MNCs.

### 3. *The Alien Tort Claims Act (“ATCA”)*<sup>75</sup>

The ATCA was passed by the first Congress of the United States as part of the Judiciary Act of 1789. The statute grants district courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>76</sup> The ATCA remained virtually unused for nearly 200 years until the Second Circuit decided *Filartiga v. Pena-Irala*<sup>77</sup> in 1980.<sup>78</sup> *Filartiga* involved a suit against the former Inspector General of Police in Asuncion, Paraguay for the torture and killing of Joelito Filartiga on March 29, 1976.<sup>79</sup>

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71. 256 F. Supp. 2d 1345 (2003).

72. *Id.* at 1359 (citing *Butte Mining PLC v. Smith*, 76 F.3d 1046 (2d Cir. 1996); *Brink’s Mat Ltd. v. Diamond*, 906 F.2d 1519 (11th Cir. 1990); *Jose v. M/V Fir Grove*, 801 F. Supp. 349, 357 (D. Or. 1991)).

73. *Id.*

74. *Id.*

75. 28 U.S.C. § 1350 (1948).

76. *Id.*

77. 630 F.2d 876 (2d Cir. 1980)

78. INTERNATIONAL LAW NORMS, ACTORS, PROCESS, *supra* note 34, at 304.

79. *Filartiga*, 630 F.2d at 878.

The court ultimately found Pena-Irala liable, and in the process encouraged numerous other lawsuits based on the ATCA.

Among those encouraged by *Filartiga* were plaintiffs “bringing ATCA claims against multinational corporations for their alleged complicity in human rights abuses committed in connection with their operations outside the United States.”<sup>80</sup> The first such suit involved the Unocal Corporation<sup>81</sup> for alleged complicity in forced labor imposed by the Burmese military on villages surrounding Unocal’s oil pipeline in Myanmar. While the Unocal case ultimately led to a settlement between the oil corporation and the Myanmar villagers who sued it, “to date, no corporation has been held liable under the ATCA, and most cases have been dismissed at early stages due to various deficiencies in the claims.”<sup>82</sup> The main problem facing ATCA claimants is that the “law of nations” cited in the statute “does not reach private, nonstate conduct”<sup>83</sup> even though “U.S. federal courts have held that private companies can be held liable for a violation of the ‘law of nations’ where they have acted in complicity with individuals or groups operating under ‘color of law.’”<sup>84</sup>

The Supreme Court’s recent decision in *Alvarez-Machain* clarified the circumstances under which the ATCA creates a private cause of action for foreigners in the United States.<sup>85</sup> While the Supreme Court ruled that aliens may sue in U.S. courts for wrongs committed abroad, it cautioned that the ATCA would provide an avenue only for those who were victims of serious human rights abuses.<sup>86</sup> In addition, the Court noted that the human rights at issue in a particular ATCA case must be clearly defined and broadly accepted.<sup>87</sup> One indication as to just how high a bar the Court was setting comes from the fact that the plaintiff in the case, Dr. Alvarez-Machain, though complaining of abduction and unlawful detention, nevertheless did not prevail

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80. LUTZ & ROBINSON, *supra* note 6, at 2.

81. 27 F. Supp. 2d 1174 (C.D. Cal. 1998).

82. LUTZ & ROBINSON, *supra* note 6, at 2.

83. Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985).

84. LUTZ & ROBINSON, *supra* note 6, at 2.

85. MAYER, BROWN, ROWE & MAW LLP, SUPREME COURT DOCKET REPORT OCTOBER TERM 2003—NUMBER 5 1.

86. See ACLU Summary of the 2003 Supreme Court Term, available at <http://www.aclu.org/Files/getfile.cfm?id=16207> (last visited Jan. 26, 2005).

87. *Id.*

before the Court.<sup>88</sup> Notwithstanding this result, the fear of enhanced rights under the ATCA may have prompted several business organizations to lobby Congress seeking legislation that would limit the scope of the ATCA in lawsuits directed against MNCs.<sup>89</sup> Thus, while the ATCA has failed to date to produce results for those seeking to hold MNCs liable for overseas human rights and labor rights violations, the concern shown by the business community regarding the statute heartens those activists who still harbor hope of enhanced remedies.

#### 4. *Enforcing International Labor Law in the United States as Customary International Law*

In addition to RICO and the ATCA, customary international law (“CIL”) presents another possible vehicle for the enforcement of international labor rights. The theory is that “[i]nternational law is part of our law, and . . . where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .”<sup>90</sup> Under this approach, CIL becomes a part of the federal common law of the United States and is superior to all state and prior federal statutes.

In the area of labor rights, CIL includes prohibitions on genocide, slavery, murder, kidnapping, torture, and systematic racial discrimination.<sup>91</sup> The difficulty in recognizing labor rights as a part of CIL is that not all legal systems view the violation of these rights as severe human rights violations.<sup>92</sup> Furthermore, many labor rights deemed important at the international level, such as the right to unionize, the prohibition on child labor, and antidiscrimination protections are not considered CIL in the United States.<sup>93</sup> All of these factors lead Potter to conclude that “at the present time, it is doubtful that workplace human rights

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88. *Id.*

89. LUTZ & ROBINSON, *supra* note 6, at 2–3.

90. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

91. *Beanal v. Freeport McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986)), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

92. Potter, *supra* note 9, at 122.

93. *Id.* at 121.

issues would be considered to be customary international law by the courts.”<sup>94</sup>

Indeed, the ambiguous nature of CIL, including the fact that it is not codified law and is difficult to circumscribe, makes it an unattractive choice for U.S. courts choosing among relevant precedent. The question that emerges from the collective inability to hold MNCs accountable in their home states is whether activists and complainants might have better luck in the host countries where MNCs and their partners set up operations.

### B. SEEKING CSR IN DEVELOPING NATIONS

Some claim that focusing on CSR or demanding justice in developed nations misses the point of deterring labor and human rights abuses in developing nations.<sup>95</sup> The real problem, under this view, is that developing nations are too busy competing with one another to attract foreign direct investment (“FDI”), and none of these nations wish to appear to place burdensome requirements on foreign corporations.<sup>96</sup>

In examining the responses of developing nations to human and labor rights abuses, the experience of the international environmental movement is particularly instructive. According to one study of voluntary environmental reporting, firms based in Japan and in developing nations (especially in Asia) rarely report on compliance with environmental standards, and in Africa, only nine of the top 165 South African companies issued environmental reports capable of independent audit.<sup>97</sup>

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94. *Id.* at 122.

95. See HAUFLE, *supra* note 1, at 121 (“The problems of labor in the developing world, for instance, cannot be resolved entirely by business because the real issue is the lack of recourse in weak or politically repressive regimes.”). Litvin agrees that “companies cannot simply ignore these [labor and human rights abuses], but limits to their responsibilities need to be set. At the root of these problems is the failure of states to protect adequately the rights of citizens.” Litvin, *supra* note 29, at 69.

96. International Right to Know — Questions about IRTK, at [http://www.irtk.org/q\\_a.html](http://www.irtk.org/q_a.html) (last visited Jan. 3, 2004).

97. Gary Rischitelli, *Developing a Global Right to Know*, 2 ILSA J. INT’L & COMP. L. 99, 109 (1995) (citing *Industry Group Urges Public Reporting on Environment*, 17 INT’L ENVTL. REP. (BNA) No. 6, at 329 (Apr. 6, 1994); *Only Nine of 165 Top Firms Disclosed Environmental Figures that Could be Audited* 17 INT’L ENVTL. REP. (BNA) No. 8, at 372 (Apr. 20, 1994)); see also Fox et al., *supra* note 50, at 15 (“[S]ocial and environmental reporting by companies, or so-called ‘triple bottom line’ reporting on environmental, social, and economic impact has attracted government attention in many high-income countries,

The forecast for developing nations is not entirely bleak. Some social and environmental labeling programs have taken root in developing as well as in developed nations. A prime example is the RUGMARK program developed largely by civil society in India “in response to consumer awareness of child labor in the South Asian carpet industry.”<sup>98</sup> Overall, however, developing nations appear overwhelmed by the competitive pressures involved in attracting much-needed FDI and lack many of the democratic and legal institutions required for adequate enforcement of human and labor rights in their territories.

### C. CORPORATE CODES OF CONDUCT AND OTHER SELF-REGULATION

Despite the failure of both international and domestic efforts to hold corporations accountable for their conduct overseas, some MNCs have taken measures to address their conduct abroad. Responding to the increasing level of media assaults and lawsuits directed against them, and perhaps hoping to stave off government regulation of their activities outside their home states, some MNCs have chosen to adopt a voluntary code of conduct. A corporate code of conduct (“CCC”) is essentially corporate self-regulation whereby companies voluntarily create a set of guidelines that go beyond the current regulatory environment or establish new standards where government rules or standards are lacking.<sup>99</sup> Many CCCs contain voluntary reporting provisions under which a corporation pledges to report to the public, via a corporate website or its annual report, on the state of its human and labor rights practices worldwide.<sup>100</sup>

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although it is difficult to find examples of developing country public sector action in this area.”).

98. FOX ET AL., *supra* note 49, at 21 (Box 34). RUGMARK, a global NGO, works with carpet producers and importers to that sell only carpets that are not the product of illegal child labor. By agreeing to RUGMARK’s guidelines and agreeing to random inspections of carpet looms, manufacturers can affix the RUGMARK label to their carpets. The label in turn assures consumers of the providence of the carpet being purchased and that a portion of the proceeds of the carpet sale will go to the rehabilitation and education of former child weavers (see <http://www.rugmark.org/about.htm>).

99. HAUFLER, *supra* note 1, at 8.

100. An example is BMW AG’s “Sustainable Value Report 2003/2004,” available at [http://www.bmwgroup.com/e/0\\_0\\_www\\_bmwgroup\\_com/5\\_verantwortun/5\\_4\\_](http://www.bmwgroup.com/e/0_0_www_bmwgroup_com/5_verantwortun/5_4_)

As with most of the initiatives discussed thus far, the CCC movement has yielded some measure of positive results. Some activists have gone so far as to acknowledge that “the development of public reporting is part of a larger trend towards greater transparency on all aspects of corporate social responsibility.”<sup>101</sup> The CCCs of certain companies, such as Reebok and Adidas-Solomon, have stood out as model examples and have earned the respect of certain labor advocates.<sup>102</sup> Since the advent of CCCs, however, critics have cited recurring problems with industry self-regulation. Among these issues are corporate legal structures; the process of developing and enforcing CCCs; and the low participation rates and lack of enforceability of CCCs.

### 1. *Corporate Legal Structures*

Before examining the actual CCCs of corporations for evidence of their shortcomings, it is helpful to explore the structure of corporate law in common-law countries “like the United States, Canada, the United Kingdom and Australia for problems of industry self-regulation.”<sup>103</sup> In this regard, some scholars have criticized civil society’s reliance on the monitoring power of shareholders over the actions of corporate leaders. Stephen Bottomley notes that in common law countries, directors of corporations owe duties to the shareholders of the company.<sup>104</sup> Problems arise, however, in the case of corporate groups, where the shareholders of a corporation are not individuals, but other corporations within the group.<sup>105</sup> Bottomley concludes that this legal structure “therefore works against the possibility of corporations being managed with regard to the interests or rights of corporate outsiders [the shareholders].”<sup>106</sup> Ironically, then, the primacy of shareholders in corporate leadership works against “outside” scrutiny of corporate behavior.

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publikationen/5\_4\_1\_umweltberich03/pdf/9131SVR\_E\_Gesamt.pdf (last visited Jan. 3, 2004).

101. Sullivan & Hogan, *supra* note 13, at 84.

102. HAUFLE, *supra* note 1, at 60–61.

103. Bottomley, *supra* note 29, at 53.

104. *Id.*

105. *Id.*

106. *Id.* at 53–54 (footnote omitted).

Another corporate structure problem is the separation of ownership of the corporation from its effective control. Although the directors of a corporation are held *de facto* accountable by the shareholders, the shareholders have little *de jure* control over the day-to-day operational decisions made by the firm.<sup>107</sup> Clearly, the potential for labor rights abuses exists as much, if not more, in the daily activities of large firms as it does in the more abstract strategic or planning levels of corporations.

## 2. *Developing and Enforcing CCCs*

Corporations' creation and enforcement of CCCs has attracted the attention of labor rights activists. Specifically, commentators have complained that by developing CCCs internally, corporations suffer from an absence of public input in selecting and prioritizing the focal points of CCCs.<sup>108</sup> Indeed, the problem of democratic input might be particularly severe in light of the fate of the Clinton Administration's effort to create "Model Business Principles" for U.S. firms to graft onto their CCCs. Excessive democratic input in the form of government involvement helped seal the fate of the Clinton Administration's efforts to create Model Business Principles.<sup>109</sup> According to Virginia Haufler, these principles "were never widely adopted . . . in part because businesses viewed them as too much a product of government."<sup>110</sup>

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107. *Id.* at 54.

108. See, e.g., Ronald Jeurissen, *L'avenir de la responsabilité sociale de l'entreprise*, LE MONDE, May 27, 2003. « En assumant des responsabilités publiques, donc en finançant la santé, l'éducation ou le system sanitaire, les entreprises peuvent aussi se faire une réputation méritée de bonne citoyenneté. Mais leurs efforts pour le bien commun peuvent souffrir d'un manque de coordination et de définition de priorités, ainsi que d'une absence de contrôle démocratique . . . La nouvelle question qui se pose est donc de savoir qui coordonne la responsabilité sociale de l'entreprise. » [In assuming public sector responsibilities and thus financing healthcare or education, companies can create positive reputations as good citizens. Their efforts for the common good can, however, suffer from a lack of coordination, an inability to prioritize and the absence of a democratic control mechanism. The key question, then, is who makes and coordinates decisions regarding corporate social responsibility?]

109. HAUFLER, *supra* note 1, at 62.

110. *Id.*

### 3. *The Low Participation Rates and Non-Enforceability of CCCs*

The CCC trend of the 1990s may have involved high profile firms like Nike, Shell, and ExxonMobil, but critics maintain that it did not include enough participants on industry-wide levels to matter. Daniel Litvin writes that “only a tiny proportion of the world’s 50,000-plus [MNCs] explicitly include respect for human rights in their codes of conduct, and among those that do, not many can claim to have honored this commitment in every aspect of their operations.”<sup>111</sup> Indeed, without a legal obligation to adopt CCCs, it is difficult to understand why a company lucky enough to have escaped media attention by virtue of its size or stealth would ever create and implement a CCC.

The low participation levels of MNCs in the creation of CCCs is but one prong of the widespread academic dissatisfaction with the codes. A second issue that arises in connection with the CCC movement is that of accountability. Amnesty International observed that “while such codes [of conduct] may have a role to play in defining minimum standards of corporate behavior, they are non-binding and can all too easily be flouted by less scrupulous organizations.”<sup>112</sup> Further aggravating the problem of the non-enforceability of CCCs is the lack of information available on corporate compliance with the codes. Although many MNCs routinely provide information through websites or other reports, as mentioned above, there are no requirements pertaining to the type or quantity of information supplied. Any information supplied by MNCs is also difficult to verify because, in most cases, the corporations are single-handedly gathering and disseminating the data.<sup>113</sup>

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111. Litvin, *supra* note 28, at 69. *See also*, Bottomley, *supra* note 30, at 58 (citing Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT’L L. 663, 681 (1995) (“[O]ne review of international corporate codes of conduct concludes that ‘most multinational corporations have not issued human and labor rights codes of conduct, preferring to tersely maintain that they obey the laws of the countries where they do business.’”).

112. Bottomley, *supra* note 29, at 77.

113. *Id.*

#### D. VOLUNTARY REPORTING ORGANIZATIONS

The rise of CCCs in the 1990s brought a concomitant surge in the number of voluntary reporting organizations (VROs) involved in assisting corporations to meet their newfound responsibilities. Originally developed in the field of environmental protection and compliance, schemes such as the International Standard Organization's ISO 14000 standards and the analogous Responsible Care standards began emerging as consistent frameworks that corporations could reference in designing CCCs. The Global Sullivan Principles and the MacBride Principles also debuted as credible reference points for companies interested in adopting well-respected approaches to internationally recognized problems.<sup>114</sup>

As VROs became popular, they established a presence "in industries from coffee and hospitality to bananas and mining."<sup>115</sup> As a result of this popularity, corporations were suddenly faced with the surprising task of choosing which set of guidelines and which organization's stamp of approval would be both the most

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114. The ISO is a leading international organization in the development of environmental management procedures. The ISO 14000 standards focus on corporate environmental management systems and operating practices, products, and services. The standards are not an all-or-nothing system; companies can choose to adopt any or all of the standards (see <http://www.globalreporting.org/about/initiatives.asp>). The American Chemistry Council developed the Responsible Care Guiding Principles in order to create an ethical code of conduct for the chemistry industry. The Guiding Principles they developed are voluntary, but companies choosing to become members must adopt all principles, implement a Responsible Care management system, utilize third party verification of the management system, track and publicly report performance along a series of criteria (economic, environmental, health and safety, and societal indicators), and put into place a Security Code to enhance security through the chemistry supply process (see <http://www.americanchemistry.com/>). Under the Global Sullivan Principles, companies maintain their existing CCCs but supplement them using the Sullivan Principles. Companies adhering to the Sullivan Principles must provide an annual report on the Global Sullivan Principles website (see <http://globalsullivanprinciples.org/principles.htm>). The Sullivan Principles are more philosophical than are the ISO 14000 or Responsible Care standards — using general statements more often than specific directives for corporations. The MacBride Principles consist of nine employment and affirmative action principles for US companies doing business in Northern Ireland. The main thrust of the principles is to increase the participation of individuals from under-represented religious groups in the global workforce. The U.S. Congress passed the MacBride Principles as part of the Omnibus Appropriations Act for Fiscal Year 1999. The MacBride law mandates that recipients of U.S. contributions to the International Fund for Ireland (IFI) must be in compliance with the MacBride Principles (see <http://www.irishnationalcaucus.org/pages/MacBride/MacBride%20Principles%20The%20Essence.htm>).

115. Garcia-Johnson, *supra* note 27.

respected and the least burdensome. It is ironic that the very organizations that emerged from the chaos of inconsistent CCCs in an effort to standardize them also became lost in a sea of competing frameworks and guidelines.<sup>116</sup> Ultimately, the field of voluntary reporting in the labor realm fizzled to the point where commentators reported that “voluntary right-to-know initiatives have . . . failed to produce uniform and complete information.”<sup>117</sup>

#### E. THE FIASCO OF PRIVATE SECTOR INITIATIVES?

The experience of reporting organizations in the area of CCCs demonstrates the problems endemic in reliance on industry self-regulation and on market mechanisms to produce the “best” frameworks and reporting organizations. The lack of a democratic input mechanism, indicating the areas of corporate conduct about which the public wants information prevents CCCs from serving a truly valuable civil society function.<sup>118</sup> A further obstacle is the total lack of information flowing from some firms.<sup>119</sup>

Faced with the inability of market mechanisms to produce public goods, the World Bank suggests that governments step up to the challenge — not by regulating corporations wholesale, but rather by obligating corporate disclosure and helping to establish standards of corporate reporting.<sup>120</sup> As President George W. Bush remarked, “[S]elf-regulation [of companies] is important, but it is

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116. As Garcia-Johnson put it, the Business Council for Sustainable Development raced to create the ISO 14000 standards because they were “concerned about a proliferation of environmental management systems.” *Id.*

117. International Right to Know — Questions about IRTK, *supra* note 96.

118. Jeurissen, *supra* note 108. « Les difficultés de définition d’objectifs et de coordination constituent les principaux talons d’Achille de la responsabilité sociale de l’entreprise. Ils illustrent le problème classique de l’inaptitude des marchés à produire des biens publics, auquel le monde de la responsabilité sociale a apporté peu de solutions, à l’exception cependant du reporting sur la durabilité et du dialogue multipartite. » [Difficulties in defining objectives and in coordination of efforts constitute the main problems facing corporate social responsibility. These issues underscore the classic inability of markets to adequately provide public goods. Corporate social responsibility in turn has yielded little in the way of solutions to this market failure, with the exception of reporting and multi-party dialogue.]

119. Rischitelli, *supra* note 97, at 116–17 (Citing a 1992 Friends of the Earth survey of forty-three MNCs headquartered in the United Kingdom where only eleven of the surveyed firms agreed to provide the information and noting that “domestic laws compelling disclosure are necessary because many companies refuse to release data voluntarily.”)

120. FOX ET AL., *supra* note 49, at 7.

not enough.”<sup>121</sup> Amnesty International suggests that legislation be used as a “backstop” to bolster and add structure to the corporate initiatives already taking place in the area of CCCs and reporting.<sup>122</sup>

With few exceptions, however, states have not worked to fill the structural and directional void still in existence despite the onslaught of corporate reporting initiatives.<sup>123</sup> The U.S. in particular “lags behind in discussing whether government can or should play any role in promoting global corporate social responsibility.”<sup>124</sup> Based on the information problems associated with CCCs and reporting mechanisms, and the poor track record of governments in helping solve these problems, the question becomes one of determining not only what government action would be effective, but also what level of government involvement is realistic.

#### IV. THE INTERNATIONAL RIGHT TO KNOW

The 1984 chemical disaster in Bhopal, India, in which forty tons of lethal gas leaked out of a Union Carbide plant and killed thousands of people, served as the impetus for the passage of domestic right-to-know legislation in the United States. The Emergency Planning and Community Right to Know Act of 1986 (“EPCRA”),<sup>125</sup> the main piece of right-to-know legislation passed in response to Bhopal, requires companies to disclose information about the chemicals they use, store, and release in their facili-

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121. International Right to Know — International Right to Know: Empowering Communities Through Corporate Transparency, at [www.irtk.org/irtkreport.pdf](http://www.irtk.org/irtkreport.pdf) (last visited Jan. 3, 2004) (quoting President George W. Bush on the need to regulate U.S. corporations, July 9, 2002).

122. Sullivan & Hogan, *supra* note 13, at 86–87.

123. Garcia-Johnson, *supra* note 27, writes,

The only actor that has lagged behind in this story is the state. This should not be surprising since governments of many countries have worked very hard in the last decade to pull back their efforts, not to extend them, either within or beyond their borders...states have not worked to address the substantive problem of multinational corporations and jurisdiction, or multinational corporations and accountability, and they have not systematically tried to build institutional mechanisms that would more effectively or constructively channel the diverse preferences of nongovernmental organizations and multinational corporations.

124. Corporate Social Responsibility — A Role for the Government: What are governments doing?, *supra* note 36.

125. 42 U.S.C. § 11001 (1986)

ties.<sup>126</sup> Ironically, even though the EPCRA was inspired by an accident at a U.S.-owned facility overseas, it does not apply outside U.S. territory.<sup>127</sup>

Incidents involving U.S. firms operating overseas have not been limited to environmental catastrophes. Critics have observed that “[t]oo often, American companies have been implicated in environmental abuses, human rights violations, and poor labor practices. These abuses by American companies doing business abroad have compromised America’s reputation around the world.”<sup>128</sup> Partially in response to these events and in an effort to alleviate the chaotic state of corporate initiatives in the area, approximately 200 non-governmental associations (“NGOs”)<sup>129</sup> combined their resources to promote the creation of an IRTK.

#### A. HOW IRTK WORKS

At its core, IRTK would require companies based in the United States or those raising capital in U.S. financial markets, their subsidiaries, and major contractors to disclose information on their overseas operations, including not just environmental data, but also data related to human and labor rights conditions.<sup>130</sup> The model for the disclosure process of IRTK is the EPCRA’s toxic release inventory (“TRI”). The TRI compiles raw data on chemical agents used by companies into a central data-

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126. International Right to Know — What is IRTK?, *supra* note 2.

127. *Id.* (“The Bhopal accident led to the creation of U.S. law requiring disclosure in some key areas, but even these laws do not apply to the Bhopal case, or any U.S. company’s operations abroad.”).

128. International Right to Know — What is IRTK?, *supra* note 2.

129. See International Right to Know — What is IRTK?, *supra* note 2. (Key members of the coalition include the American Federation of Labor - Congress of Industrial Organizations (AFL-CIO), Amnesty International USA, Oxfam America, the Sierra Club and the Lawyers Committee for Human Rights.).

130. *Enviro Policy: Disclosure Needed for U.S. Multinationals*, 10 Greenwire No. 9 (Jan. 23, 2003). Specifically, under IRTK, American companies and companies listed on any of the U.S. stock exchanges with annual revenues of \$25 million or more will be required to disclose key environmental, labor, and human rights information about their operations abroad, such as (1) information on the use of child labor; (2) environmental data on pollution; (3) any dangerous chemicals employees are exposed to; (4) data on sexual harassment and discrimination in the workplace; (5) any secret agreements with security forces such as foreign militaries; and (6) the number of workers covered by collective bargaining agreements. See International Right to Know — International Right to Know, available at [www.irtk.org](http://www.irtk.org) (last visited Jan. 3, 2004).

base. The IRTK would similarly rely on a central database — in this case, a website maintained by the U.S. Department of State — to store information on MNCs and would require companies to submit data electronically so as to minimize transaction costs.<sup>131</sup>

Unlike the EPCRA, however, any legislation implementing the goals of IRTK would not create a private cause of action under which individuals could sue corporations for failure to report or for providing incorrect data. Rather, the success or failure of IRTK would depend exclusively on public reaction to information published by companies in the centralized database.<sup>132</sup> Activist reliance on this potential “shame factor” is nothing new. The ILO promoted its standards through investigations and reports and thus harnessed the power of public pressure and potential corporate embarrassment as its enforcement mechanisms.<sup>133</sup> The novelty of the IRTK is the requirement that *all* companies of a certain size engaged in overseas operations release information on those activities. Combined with mandatory disclosure, the power of shame as an incentive for changing corporate behavior becomes almost unparalleled. “[C]harges leveled against companies [would] be adjudicated in the court of public opinion, where mitigating details count for little . . . .”<sup>134</sup>

#### B. BEYOND PUBLIC SHAME: SOCIALLY RESPONSIBLE INVESTING AND THE NEW SHAREHOLDER ACTIVISM

Can anything more than diffuse public opinion be employed to affect MNC behavior abroad? In the environmental context, one scholar has noted that “[i]f made available, information should drive individuals to make the correct economic and political decisions concerning industry’s use of toxic substances.”<sup>135</sup> Indeed,

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131. International Right to Know — International Right to Know, *at* [www.irtk.org](http://www.irtk.org) (last visited Jan. 3, 2004).

132. See International Right to Know — What is IRTK?, *supra* note 2 (“American corporations would still be able to conduct their operations like any other company. The difference would be that the American people — and the local communities in which the corporations operate — would have a right to know basic facts about the impact of company operations.”).

133. Atleson, *supra* note 56, at 161.

134. Litvin, *supra* note 28, at 71.

135. Margaret C. Liu, *Form Information to Action: Right-To-Know Laws in the European Community*, 1992 U. CHI. LEGAL F. 335, 336 (1992).

concerted consumer action in the United States today exists not only at the purchasing level, but also at the investment level. While mobilizing both levels of public action will be essential to the success of IRTK, investment-level initiatives have more recently become well-organized and promising resources for IRTK advocates.

According to most sources, one of every eight dollars invested in the United States is placed in a so-called “socially responsible fund,” creating a pool of approximately \$2 trillion in “ethical investment” in the United States today.<sup>136</sup> Servicing this burgeoning industry is a growing number of firms that provide investment-rating services. These ratings take into account issues of corporate responsibility, such as companies’ social and environmental policies.<sup>137</sup> The rise of these rating agencies has increased the importance of non-financial data to investors, making non-financial reporting by companies “indispensable to assign[ing] company value and future prospects.”<sup>138</sup> A similar trend helped bolster the efforts of environmental activists shortly after the passage of the EPCRA, where “statistical analyses show that investors use TRI data in setting their valuations of companies.”<sup>139</sup>

As the popularity of socially responsible investment increases, consumers are finding their power over companies increasing not only as purchasers of the goods produced by these firms, but also as stakeholders in the firms themselves.<sup>140</sup> A recent example is New York City’s public pension fund, which filed a shareholder resolution asking the Freeport-McMoRan company to disclose information about its security arrangements with the Indonesian military at its mining facilities in Papua, Indonesia.<sup>141</sup> Similarly, in April 1999, Disney committed to auditing the labor practices of 15,000 of its overseas subcontractors after shareholders at-

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136. See PETER FRANKENTHAL & FRANCES HOUSE, HUMAN RIGHTS: IS IT ANY OF YOUR BUSINESS? 64–66 (2000), cited in Sullivan & Hogan, *supra* note 13, at 78, n. 16; see also HAUFLE, *supra* note 1, at 23.

137. LUTZ & ROBINSON, *supra* note 6, at 4 (referring to corporate social responsibility rating agencies worldwide, such as Innovest Strategic Value Advisors, KLD Research & Analytics and Oekom Research).

138. Mark Moody-Stuart, *The Measure of a Good Company*, INT’L HERALD TRIBUNE, Jan. 25, 2003, available at <http://www.iht.com> (last visited Jan. 3, 2004).

139. International Right to Know — What is IRTK?, *supra* note 2.

140. HAUFLE, *supra* note 1, at 11.

141. LUTZ & ROBINSON, *supra* note 6, at 5.

tempted, but failed, to pass a shareholder resolution on the issue.<sup>142</sup> Aware of the potential for stakeholder activism, some NGOs have gone so far as to purchase shares in publicly held companies with the aim of challenging the firms' environmental and social policies at shareholder meetings.<sup>143</sup> Most importantly, shareholders are now "exerting increasing pressure on business leaders to force disclosure with respect to a variety of sensitive governance issues, such as human rights and labor practices . . . ."<sup>144</sup>

### C. A POSITIVE CONTEXT FOR IRTK

The strong potential for public activism in support of a prospective IRTK law is not the only premise upon which proponents base their optimism for future legislation. Supporters of IRTK also look to the EPCRA and other existing right-to-know laws as examples of the power information could potentially have in altering the behavior of companies. The success of laws analogous to IRTK, such as the Foreign Corrupt Practices Act ("FCPA"),<sup>145</sup> suggests that legislators can conceive laws applicable to American practices outside of U.S. territory. Finally, efforts at adopting IRTK legislation in countries around the world and even in the United States indicate not only widespread interest in such legislation, but also that the inducement of the public will be required to introduce it to legislative bodies.

#### 1. *The Success of Right-to-Know Legislation in the United States*

The right-to-know provisions introduced by the EPCRA, like any right-to-know legislation, "perform an indispensable educational role by letting people know what is happening in and to their environment, paving the way for the public to participate in related decision-making."<sup>146</sup> The database relied upon to carry out this "educational role" has been credited with most of the tri-

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142. HAUFLER, *supra* note 1, at 67.

143. LUTZ & ROBINSON, *supra* note 6, at 5.

144. *Id.*

145. 15 U.S.C. § 78 (1977).

146. Neil A. F. Popovic, *The Right to Participate in Decisions That Affect the Environment*, 10 PACE ENVTL. L. REV. 683, 696 (1993).

umphs of right-to-know laws. According to the *New York Times*, in the first decade of the EPCRA's toxic release inventory, there was a fifty percent drop in emissions from companies.<sup>147</sup> Davis Wascow of Friends of the Earth concurs that the TRI "has been extremely effective."<sup>148</sup>

By mandating disclosure, the EPCRA put equal pressure on all American corporations to scrutinize their own environmental behavior and created, in the TRI, a valuable feedback mechanism to empower citizens in the policing of companies. The EPCRA also created the structures and mechanisms upon which future IRTK legislation can build in order to accomplish in the human and labor rights arena what right-to-know laws helped effect in the environmental protection arena.

## 2. *The Foreign Corrupt Practices Act ("FCPA")*

Enacted in 1977, the FCPA criminalized bribing foreign officials by U.S. corporations. The FCPA developed because of public outrage over what was once a common practice in international business.<sup>149</sup> Although the statute contained a provision creating a private cause of action,<sup>150</sup> a reporting mechanism was the primary enforcement strategy for the FCPA, which required companies to better track expenses and payments.<sup>151</sup> The legislation is widely credited with bringing the practice of bribery of foreign officials "to a virtual standstill."<sup>152</sup>

The United States did not rely on or content itself with its own statute to combat what amounted to a worldwide problem of brib-

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147. *An International Right to Know*, *supra* note 4, at A18. *See also*, International Right to Know — International Right to Know: Empowering Communities Through Corporate Transparency, *supra* note 124, at 5 ("In 1995, the Chemical Manufacturers Association lauded TRI as a 'very successful venture.'").

148. *Enviro Policy: Disclosure Needed for U.S. Multinationals*, *supra* note 133.

149. *See* Lectric Law Library at <http://www.lectlaw.com/files/bur21.htm> ("Investigations by the SEC in the mid-1970's revealed that over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials in order to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties.").

150. 15 U.S.C. § 78dd-2(c) (1977).

151. International Right to Know — What is IRTK?, *supra* note 2.

152. *Id.*

ery.<sup>153</sup> Rather, through the concerted and diligent efforts of U.S. lobbyists, the UN, IMF, World Bank, and especially the OECD have each followed the American lead in this field in working to stamp out the practice.<sup>154</sup> The OECD's initiatives in this area are perhaps the most well known and comprehensive: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).<sup>155</sup> The IRTK movement cites broad adoption of the FCPA around the world as proof that if pushed to higher standards of accountability, the American business community has the capacity to pressure other countries to adopt similar reporting requirements.<sup>156</sup> The IRTK movement cites the FCPA as proving two more important points: first, enforcing a law involving U.S. corporations outside of U.S. territory is possible and second, criminal prosecutions are not necessary to change behavior.<sup>157</sup>

Steven Ratner asks, “[W]hy, if corporations can be regulated to reduce the incidence of corruption, they have not been regulated to reduce the incidence of human rights abuses.”<sup>158</sup> Though Ratner's question is largely rhetorical, he does suggest an answer: “the clear interest of corporations from states that banned bribery in creating an international regime that would eliminate their competitive disadvantage — [is] a factor missing from the human rights dynamic.”<sup>159</sup> Creating this “clear interest” for American corporations is precisely what the IRTK seeks to do.

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153. International Right to Know — International Right to Know: Empowering Communities Through Corporate Transparency, *supra* note 124, at 7 (“Since passing the FCPA, the U.S. has promoted a strong anti-bribery treaty, which will ensure that European and other companies behave as honestly as their American counterparts.”).

154. Ratner, *supra* note 7, at 482 (citing IMF, Revised Code of Good Practices on Fiscal Transparency, at <http://www.imf.org/external/np/fad/trans/code.htm#code>; World Bank Group, Supporting International Efforts to Reduce Corruption, available at <http://www1.worldbank.org/publicsector/anticorrupt/supporting.htm> (last visited Jan. 3, 2004)).

155. McCorquodale, *supra* note 16, at 95.

156. International Right to Know — What is IRTK?, *supra* note 2.

157. *Id.* The report goes on to mention that in the first eighteen years of the FCPA, there were only sixteen prosecutions for bribery.

158. Ratner, *supra* note 7, at 483.

159. *Id.*

### 3. *Developing an International Right to Know in the United States*

Former Congresswoman Cynthia McKinney, Congressman Bernie Sanders, and Congressman George Miller have all proposed legislation featuring aspects of the IRTK agenda. In particular, McKinney's bill<sup>160</sup> required disclosure by all American MNCs of the following:

- The location of all corporate facilities abroad, including subsidiaries, subcontractors, affiliates, joint ventures, partners, suppliers, or licensees.
- Any financial arrangements and investments of subsidiaries and subcontractors.
- Worker Rights practices and labor standards in the above locations, including any violations of labor laws.
- The age, gender and number of employees in each facility.
- Wages paid to employees.
- The existence of security arrangements with state police and military or paramilitary forces.
- The human rights policy of the host country.

While McKinney's bill is no longer up for serious consideration, the initiatives she and the above-mentioned Congressmen spearheaded continue to attract attention in the United States and elsewhere<sup>161</sup> and have encouraged several grassroots IRTK movements.

In California, two NGOs, the Nautilus Institute and the National Heritage Institute, have started the California Global Corporate Accountability Project ("CAP").<sup>162</sup> This group proposes amending the Securities and Exchange Commission mandatory

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160. H.R. 460, 107th Cong. § 1 (2001). McKinney also proposed another bill on corporate accountability, H.R. 2782, 107th Cong. § 1 (2001), requiring U.S.-based corporations with more than twenty employees overseas to enact a code of conduct that would also apply to the companies' subsidiaries, subcontractors, affiliates, joint ventures, partners and licensees.

161. Sullivan & Hogan, *supra* note 13, at 80.

162. National Heritage Institute — Beyond Good Deeds: Case Studies and a New Policy Agenda for Corporate Accountability (Executive Summary) 8, available at <http://www.n-h-i.org/Projects/PeopleGlobalResources/CorpAccount/EXECUTIVE/%20SUMMARY.pdf> (last visited Jan. 3, 2004).

disclosure rules<sup>163</sup> for listed corporations to include “a list of the countries where the corporation has facilities or operations; data on compliance with occupational health and safety, anti-bribery, labor rights, and anti-discrimination laws; and security arrangements with state or private police and military forces.”<sup>164</sup> Other efforts include an initiative to create further ethical investment requirements for CalPERs, the California State pension fund,<sup>165</sup> and a movement to set more stringent guidelines for California’s procurement of goods and services<sup>166</sup> similar to those set out in the Living Wage Law of New York City.<sup>167</sup>

IRTK initiatives in California and in the House of Representatives are not unique on the international level. Efforts in France and the United Kingdom show similar, if not greater, promise in creating an international right to know in these countries.

#### 4. *IRTK Initiatives Outside the United States*

##### *a. France*

On May 15, 2001, as part of Article 64 of the New Economic Regulations,<sup>168</sup> the French parliament amended the original 1967 corporations law to require French companies with more than 300 employees to produce an annual report on the social and environmental consequences of their operations, including those abroad.<sup>169</sup> Specifically, the law requires information on total

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163. Securities Act of 1933, ch. 38, Tit.1, § 1, 17 CFR 230. See 17 CFR 230.405 for a definition of “material.”

164. National Heritage Institute — Beyond Good Deeds: Case Studies and a New Policy Agenda for Corporate Accountability (Executive Summary), available at <http://www.n-h-i.org/beyondgooddeeds.html> (last visited Jan. 3, 2004).

165. CalPERS is the third largest pension fund in the world, investing in 1600 companies and holding \$150 billion in assets. See <http://www.calpers.ca.gov/> (last visited Jan. 9, 2005). Although CalPERs adopted the Global Sullivan Principles in 1999, CAP wants to expand the human and labor rights criteria screened for investment. *Id.*

166. CAP indicates that as the fifth largest economy in the world, California purchases \$3 billion in goods and services each year. California already has requirements that the state not purchase from a contractor who employs child labor. *Id.*

167. NYC Administrative Code § 6-124 (2003).

168. J.O. Numéro 44 du 21 février 2002, page 3360.

169. *Questions-réponses*, LE MONDE, Nov. 27, 2001. « En France, l'article 64 de la loi sur les nouvelles régulations économiques (NRE) adoptée le 15 mai 2001, impose aux entreprises de rendre compte dans leur rapport annuel des conséquences sociales et environnementales de leur activité. Ce texte est applicable aux entreprises cotées au premier marché pour leur rapport 2001, et pour les autres en 2002. Un décret

workforce size, hours worked by employees, and wages paid, the status of collective bargaining agreements, health and safety conditions, and the extent of sub-contracting.<sup>170</sup> Additionally, French companies are required to detail how they consider the territorial impact of their activities, how they promote the key provisions of the fundamental conventions of the ILO to their subcontractors and subsidiaries, and how their foreign subsidiaries take into account the impact of their activities on regional development and local populations.<sup>171</sup>

As the Corporate Social Responsibility Campaign reports, the French law aims at empowering “shareholders by giving them the right to have information on a company’s financial, social and environmental performance.”<sup>172</sup> The law does not create increased liability for corporations through a private cause of action, nor does it describe how the reporting on the qualitative and quantitative social indicators it sets out should be accomplished. While this lack of specificity can certainly be viewed as a drawback, it was also probably vital in getting the legislation enacted in the first place.

### *b. The United Kingdom*

The United Kingdom’s efforts have been more modest compared to those of France. As a result of a 1995 amendment to the Pensions Act, UK pension funds are now required to disclose whether they take social, environmental and ethical issues into account.<sup>173</sup> Though this language may seem too tame and vague to have much effect, the World Bank notes that the amendment “has been instrumental in encouraging the growth of Socially Re-

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d’application devrait préciser la nature des informations publiées. » [In France, Article 64 of the New Economic Regulations (NRE) (adopted May 15, 2001), requires corporations to provide a summary in their annual reports of the social and environmental impact of their economic activities. The law applies to the 2001 annual reports of companies listed on the premier marché, and to the 2002 annual reports of all other companies. An amendment to the regulation is expected to specify what information the law requires companies to include in their annual reports.]

170. Article 1er, *supra* note 168.

171. *Id.*

172. Corporate Social Responsibility Campaign — The European Business Campaign for Corporate Social Responsibility, at [www.csrcampaign.org/publications/France\\_page366.aspx](http://www.csrcampaign.org/publications/France_page366.aspx) (last visited Jan. 3, 2004).

173. FOX ET AL., *supra* note 49.

sponsible Investment, which in turn encourages industry to be more proactive on corporate social responsibility issues.”<sup>174</sup>

In total, the World Bank concludes that “social and environmental reporting by companies, or so-called ‘triple bottom line’ reporting on environmental, social, and economic impact has attracted government attention in many high-income countries . . . ”<sup>175</sup> Indeed, the interest in international right to know and other reporting schemes on the part of governments in developed nations is an encouraging trend for IRTK proponents. Inevitably, however, critiques of IRTK have prevented MNCs and legislators from wholeheartedly embracing the movement.

#### D. THE LOGISTICAL OBSTACLES TO AN INTERNATIONAL RIGHT TO KNOW

##### 1. *Domestic Legislation: Creating a Competitive Disadvantage?*

The most immediate complaint made by MNCs considering IRTK is the argument that forcing American companies to abide by disclosure requirements while the rest of the world is not similarly obligated to do so would put U.S. firms at a competitive disadvantage. As Daniel Litvin notes, however, it is in the interest of almost all firms to have an obligatory disclosure requirement even if the reporting rules apply only to American corporations at first. “High-profile multinationals . . . have been made symbols of corporate greed and callousness while less familiar firms often get away with worse sins.”<sup>176</sup> As mentioned above, the advent of reporting requirements in the United States could also create a real incentive for American firms to seek global adoption of similar rules, as in the case of the FCPA. Finally, it is worth noting that the IRTK applies not only to American firms, but also to any corporations seeking public access to U.S. capital markets. The result of this broader application is that the number of firms targeted may no longer place American firms at as much of a competitive disadvantage compared with their foreign counterparts.

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174. *Id.*

175. *Id.*

176. Litvin, *supra* note 28, at 71.

## 2. *The Costs of IRTK*

Estimates of the actual costs of producing an IRTK-compliant report vary dramatically depending on the size of the corporation.<sup>177</sup> Moreover, many complain that the costs of monitoring and later reporting on the social performance of branch offices, subsidiaries, joint venture partners, and contractors could prove prohibitive.<sup>178</sup> While there is no question that an IRTK would impose costs on corporations, it is worth noting the two major benefits such legislation could offer.

Firstly, as Haufler notes, in the context of corporate codes, “The internal process of developing a code can be an educational effort that imparts values throughout the organization and gives management more ownership of the policy.”<sup>179</sup> Thus, “[t]he two to three months that it takes to make a total social assessment of a company is also a process that will often lead to change and improvement . . . .”<sup>180</sup>

Secondly, the “potential competitive advantage of trustworthy companies is becoming clearer . . . . Benefits include reduced cost of capital, retention of longer-term investors, distinctive brands and strong reputations.”<sup>181</sup> In this light, it is worth considering

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177. SustainAbility, Ltd. reports that of twenty-three companies surveyed, nine companies provided figures for the costs of reporting . . . from \$105,000 to \$3,000,000 with an average of \$607,000. These were large multinational companies, with revenues ranging from \$1–\$170 billion. Excluding Shell [the \$3 million reporting figure] from the analysis, the range decreases to \$105,000–\$1 million, and the average falls to \$308,000. See SustainAbility Ltd.—Sustainable Development: What is it?, at [www.sustainability.com/philosophy/what-is-sustainable-development.asp](http://www.sustainability.com/philosophy/what-is-sustainable-development.asp) (last visited Jan. 3, 2004). SEAAAR [Social and Ethical Accounting, Auditing and Reporting] companies report costs ranging from C\$100,000 (VanCity) through US\$750,000 (The Body Shop) per cycle. In the case of companies the size of BP or Shell, however, the costs can be significantly greater. SustainAbility Ltd. — Sustainable Development: What is it?, available at [www.sustainability.com/philosophy/what-is-sustainable-development.asp](http://www.sustainability.com/philosophy/what-is-sustainable-development.asp) (last visited Jan. 3, 2004).

178. HAUFLER, *supra* note 1, at 78.

179. *Id.* at 72.

180. Corporate Social Responsibility Campaign — The European Business Campaign for Corporate Social Responsibility, *supra* note 172.

181. Moody-Stuart, *supra* note 138; see also, Anne Salmon, *Les bénéfices secondaires du business éthique*, LE MONDE, Nov. 25, 2003. « Au sommet de leur hégémonie sur la scène de la mondialisation économique, les grandes firmes internationales de l'Ouest entendent délivrer un message fort, sinon toujours très clair: une conduite socialement responsable et éthiquement irréprochable paye. » [At the height of their hegemony in the international, globalized marketplace, the large multinational corporations of the West

the costs to firms of not reporting on their labor and human rights compliance: “in the eyes of many, the business dictum ‘you can’t manage what you don’t measure’ has become ‘if you don’t measure, you don’t care.’”<sup>182</sup>

### 3. *The Manageability of Information*

Central to the effectiveness of any reporting-based right-to-know scheme is the quality and comprehensibility of the information it provides. “Regarding government responses to right-to-know requests, the information has to be accessible, understandable, relevant, accurate and timely if it is to help the public participate . . . .”<sup>183</sup> In the case of the EPCRA’s toxic release inventory, however, commentators have criticized the system for providing mounds of raw, unrefined data with little instruction on its effective use. “Because most ordinary citizens have difficulty processing complex probability-based risk assessment, the public opinion approach is, in essence, heavily dependent on community outrage. Community outrage is hardly an appropriate foundation on which to regulate important aspects of public health and safety.”<sup>184</sup>

The IRTK scheme avoids the pitfalls of the toxic release inventory by providing web-based access to basic information. Unlike data on chemicals, exposure levels and risk analysis, information on human and labor rights issues is mostly qualitative and consequently can be easier to parse.

### 4. *Toward A Common Reporting Standard*

A final obstacle, as mentioned earlier, is the proliferation of voluntary reporting organizations and certifying institutions offering independent mechanisms for satisfaction of legislative reporting requirements, such as those requirements contained in an international right to know. In the field of environmental regulation, the EPCRA helped give a *raison d’être* to schemes

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are making a strong, if not very clear statement: socially and ethically responsible corporate behavior pays.]

182. Moody-Stuart, *supra* note 138.

183. Popovic, *supra* note 146, at 698.

184. Rischitelli, *supra* note 97, at 113.

such as the ISO 14000, Responsible Care and others. With labor and human rights disclosure, a similar phenomenon has produced an equally daunting number of reporting standards. As the IRTK in its present state does not include common methodology that companies can reference in their disclosure efforts, a unifying standard of reporting is clearly needed — one that adds credibility and consistency, and aids comparability of the information provided.<sup>185</sup>

#### E. THE GLOBAL REPORTING INITIATIVE

“Some observers say that the Global Reporting Initiative (“GRI”) is the answer to the problem of proliferating environmental and social reports . . . .”<sup>186</sup> Indeed, internationally, commentators generally agree that the GRI is rapidly becoming the standard of reference in corporate reporting.<sup>187</sup> In part, the framework’s popularity stems from its credibility as a UN-sponsored instrument, broad applicability, and widespread adoption by high profile MNCs.

According to the Global Reporting Initiative, the guidelines it provides “are the result of a transparent, consensus-driven global consultation process, involving hundreds of stakeholders from around the world, and [are] built on a foundation of support by leading corporations, non-governmental organizations, labor groups, governments, and others.”<sup>188</sup> The organization also claims to maintain independence from MNCs and consumers of MNC reports through its diverse sources of funding, which in-

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185. See Global Reporting Initiative — Frequently Asked Questions: “Why do we need the Sustainability Reporting Guidelines?,” at [www.globalreporting.org/about/faq.asp](http://www.globalreporting.org/about/faq.asp) (last visited Jan. 15, 2005).

186. Garcia-Johnson, *supra* note 27.

187. Jeurissen, *supra* note 108. « La Global Reporting Initiative (GRI) sponsorisée par l'ONU est en train d'en devenir le standard international . . . . Un reporting plus standardise contribuera a rendre leurs performances transparentes et comparables. » [The Global Reporting Initiative (GRI), sponsored by the UN is on its way to becoming *the* international standard . . . . A more standardized reporting scheme would make the behavior of corporations more transparent and easily comparable.]

188. Global Reporting Initiative — Frequently Asked Questions: “What makes the GRI the right choice for sustainability reporting?,” at <http://www.globalreporting.org/about/faq2.asp#Q4> (last visited Jan. 3, 2004).

clude “a mix of governments, companies, foundations, and multi-lateral organisations.”<sup>189</sup>

In order to provide broad applicability, the organization maintains “levels” of reporting. Under this system, organizations that are new to the GRI participate in the system without assuming all of the reporting requirements of older members.<sup>190</sup> Furthermore, sector supplements and technical protocols have been developed to tailor the reporting regime to individual industries and relevant reporting criteria.<sup>191</sup> Finally, unlike other global reporting schemes, the GRI governs all types of organizations, not just MNCs, and is designed to complement already developed (but not yet legally existing) reporting frameworks such as IRTK.<sup>192</sup>

To date, 636 organizations have published reports with the GRI, including Adidas-Solomon, Chevron Texaco, Nike, and Shell.<sup>193</sup> Of the top thirty targets of socially responsible investments, twenty are reporters with the Initiative.<sup>194</sup> At the government level, some industrial country governments (though no developing governments) have even filed reports with the Initiative. Though relatively small in number, the profile of participants in the GRI scheme suggests the regime’s potential to strengthen and add structure to any IRTK initiative in the United States.

### 1. *Potential Drawbacks to the GRI*

Like IRTK and similar reporting schemes, the GRI does not evaluate the accuracy of reports nor does it contain any enforcement mechanisms. With the help of third parties or specially designed monitoring organizations, these shortcomings can be

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189. *Id.*

190. See Global Reporting Initiative — Frequently Asked Questions: “What is ‘incremental’ reporting?,” at <http://www.globalreporting.org/about/faq3.asp#Q5> (last visited Feb. 14, 2005).

191. *Id.*

192. See Global Reporting Initiative — GRI and Other CSR Tools, at <http://www.globalreporting.org/about/initiatives.asp> (last visited Feb. 14, 2005).

193. See Global Reporting Initiative — Frequently Asked Questions: “Who has published reports based on the GRI guidelines?,” at <http://www.globalreporting.org/about/faq2.asp#Q6> (last visited February 16, 2005).

194. See Global Reporting Initiative, *GRI reporters draw heavy SRI investment in Europe*, available at <http://www.globalreporting.org/news/updates/article.asp?ArticleID=266> (last visited Feb. 14, 2005).

gradually overcome. Without taking affirmative steps to verify submitted data, however, the GRI will be of limited impact.

Another concern involves the participation of developing nations in the formulation and conduct of a global reporting scheme. Although the GRI claims to receive input from a geographically diverse membership and committee, “developing nations need to be reassured that whatever reporting requirement or global code of conduct is created is not a rich world conspiracy to exclude them from Western markets but rather a means of ensuring the capital inflows they need.”<sup>195</sup> As evidenced by the environmental initiative to limit CFC production, the involvement and approval of developing nations is crucial to the success of any effort involving activities in developing nations.

## V. CONCLUSION

International regimes aimed at creating greater accountability of MNC activities abroad face similar obstacles of non-enforceability or ambiguity. The proliferation of international organizations and schemes dedicated to creating codes of conduct and reporting mechanisms has only further detracted from the credibility and effectiveness of the international response to MNC operations overseas.

Domestically, activists and victims of corporate misconduct outside of the United States have focused on creating liability schemes with which to police corporate behavior. These attempts have failed partly because of the United States’ poor record in integrating international human rights law into U.S. domestic law and also because of the state-centrist nature of international legal obligations.

The trend of creating corporate codes of conduct has been more useful in illustrating MNC recognition of activist pressure than in creating a tangible means of addressing corporate social and environmental behavior. Corporate codes prove reporting and disclosure to be the most valuable pieces in the accountability puzzle, but codes also demonstrate that without the participation of government in mandating disclosure and setting ground rules as to the content of reports, such reporting is not very useful.

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195. Litvin, *supra* note 28, at 72.

The international right to know combines elements of the reporting system developed under the corporate code wave of the 1990s with the coercive power of the state. The successes of domestic environmental right-to-know legislation and individual country's experiments with variants of IRTK suggest the suitability and practicality of a similar scheme in the United States. Combined with the standardized and credible reporting mechanisms offered by the GRI, the international right to know could assist in creating consequences for MNC behavior.