

**THE EVOLUTION AND ENDPOINT OF RESPONSIBILITY: THE FCPA,  
SOX, SOCIALIST-ORIENTED GOVERNMENTS, GRATUITOUS  
PROMISES, AND A NOVEL CSR CODE**

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Multinational corporations (MNC) have emerged as engines of global development. Over the past fifty years, the number of multinational corporations, the value of multinationals' investments in foreign countries, and the amount of multinationals' wealth have increased dramatically.<sup>1</sup> MNCs in developed countries have taken advantage of well educated and inexpensive labor in developing countries, allowing them to cut costs and generate higher profit margins.<sup>2</sup> The end of the Cold War ushered previously closed economies across Eastern Europe, the former Soviet Union, and China into the global economy, opening untapped markets.<sup>3</sup> Trade liberalization, engineered by the World Trade Organization (WTO) and its member states, has fostered new business relationships and eased corporate access to markets, goods, and services. Foreign direct investment (FDI), defined as "a lasting interest by a resident entity in one economy... in an entity resident in an economy other than that of the investor," has grown exponentially.<sup>4</sup> In 1989, global FDI stood just below \$200 billion.<sup>5</sup> Seven

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1. See Earl H. Fry, *North American Economic Integration: Policy Options*, 9 POLICY PAPERS ON THE AMERICAS 8, 2 (2003) (estimating also that, in 2002, approximately 65,000 multinationals operated 850,000 subsidiaries around the world); Beth Stephens, *The Amoral of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 57 (2002) (highlighting that, while nineteen countries had revenues greater than General Motors and only three corporations were among the world's twenty-eight largest economic entities in 1991, in 2000 only seven countries had revenues greater than General Motors and fifteen corporations were among the world's twenty-eight largest economic entities); *Inward FDI Flows by Host Region and Economy (1970-2005)*, in UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2005: TRANSNATIONAL CORPORATIONS AND THE INTERNATIONALIZATION OF R&D (2005) (reporting that in 1970 FDI worldwide totaled \$13.4 billion whereas in 1985 it totaled \$58.0 billion and in 2005 totaled \$945 billion, down from a high of \$ 1.4 trillion in 2000); see also PAUL HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION* (Polity Press 2d ed. 1999) (discussing how, between 1945 and the present, the world economy has become more closely integrated).

2. PETER DICKEN, *GLOBAL SHIFT: RESHAPING THE GLOBAL ECONOMIC MAP IN THE 21<sup>ST</sup> CENTURY* 26-51 (4th ed. 2003).

3. See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 180-94 (2003) (discussing how a transition to market economies has had positive and negative effects on the economies of former communist states); Peter Wilkin, *Revising the Democratic Revolution – Into the Americas*, 24 THIRD WORLD Q. 655, 656 (2003). One hundred and thirteen countries joined the World Trade Organization at its inception in 1995. One-hundred fifty states are now members.

4. ORG. ECON. COOPERATION & DEV., *OECD BENCHMARK DEFINITION OF FOREIGN DIRECT*

years later FDI doubled to just below \$400 billion, and by the year 2000 reached \$1.1 trillion.<sup>6</sup> While only ten countries' FDI totals surpassed \$10 billion in 1985, corporations in thirty three countries invested over \$10 billion abroad in the year 2000.<sup>7</sup>

The wealth corporations have enjoyed has not existed in isolation. Rather, greater corporate wealth has produced greater corporate power that corporations have exercised in both positive and negative manners.

Greater corporate power has cultivated unprecedented advances in health and education over the past forty years.<sup>8</sup> Corporations have developed new medicines, revolutionized transportation<sup>9</sup>, provided employment to millions, and generally have assisted in raising the standard of living worldwide.<sup>10</sup> Corporations also have contributed to rapid technological development, particularly in the area of communications. Fiber optic systems and the internet have revolutionized the speed at which ideas and knowledge can flow within countries and across oceans,<sup>11</sup> forging a synergistic relationship between corporations and technology that has propagated new technologies and fed corporate power.<sup>12</sup>

At the same time, greater corporate power has been associated with a host of problems. The wealth multinationals have brought to some countries has bypassed many other countries.<sup>13</sup> In some cases, the activities of multinational corporations in developing countries have retarded economic growth.<sup>14</sup> Multinationals have been accused of committing various human rights violations, such as carrying out extra-judicial killings and employing child labor.<sup>15</sup> Corporate activities in

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INVESTMENT 7 (3d ed. 1996), available at <http://www.oecd.org/dataoecd/10/16/2090148.pdf>

5. *Inward FDI Flows by Host Region and Economy (1970-2005)*, *supra* note 1.

6. *Id.*

7. DICKEN, *supra* note 2, at 56.

8. STIGLITZ, *supra* note 3, at 248.

9. DICKEN, *supra* note 2, at 91-93 (discussing how rapid modernization of transportation systems has contributed to economic globalization).

10. STIGLITZ, *supra* note 3, at 248.

11. DICKEN, *supra* note 2, at 95.

12. *Id.*

13. While this paper is concerned with the overall growth of FDI as that growth informs corporate power, rather than with an analysis of whether and to what extent FDI is evenly distributed and contributes to or hinders growth in certain countries, it is important to note that FDI flows to developing countries are not even and that growth stemming from the internationalization of corporations has bypassed many countries. While countries such as Thailand, Singapore, and Peru have enjoyed large amounts of capital inflows and impressive growth, countries throughout Africa, Central America, South America, Central Asia, Southeast Asia, the Middle East, and the Pacific Rim have seen relatively stagnant and even decreasing FDI totals, and have not shared in the economic growth and poverty reduction that many other countries have enjoyed. See *Inward FDI Flows by Host Region and Economy (1970-2005)*, *supra* note 1.

14. See, e.g., Ronaldo Munck, *Neoliberalism, Necessitarianism and Alternatives in Latin America: there is no alternative (TINA)?*, 24 *THIRD WORLD Q.* 495, 501-03 (2003) (discussing how the collapse of Argentina's economy in 2001 is largely attributable to the neoliberal prescriptions and the rapid influx of multinational corporations through privatization of the economy).

15. See e.g., James Glanz & Sabrina Tavernise, *Security Firm Faces Criminal Charges in Iraq*, *N.Y. TIMES*, Sept. 23, 2007.

developing countries have been associated with environmental degradation, dangerous work conditions, and mistreatment of indigenous people.<sup>16</sup> However, in contrast to developed states, developing states have not successfully combated the harms that have flowed from increased corporate power.<sup>17</sup> A number of factors – including weak domestic and international legal institutions, non-responsive heads of state, the “race to the bottom,”<sup>18</sup> and developed countries’ economic dominance – have prevented developing states from effectively addressing the negative economic and social impacts of corporate activities.<sup>19</sup>

The inability of many developing states to manage these problems has sparked calls for a code of social responsibility that is able to regulate multinational corporations.<sup>20</sup> Countries and corporations have responded to these cries. The United States and member States of the European Union (EU), the Organisation for Economic Co-operation and Development (OECD), the United

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16. See Sarah M. Hall, *Multinational Corporations' Post-UNOCAL Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401, 416-17 (2002); Douglass Cassel, *International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? Corporate Initiatives: A Second Human Rights Revolution*, 19 FORDHAM INT'L L. J. 1963, 1964-66 (1996); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 128 (Anchor Books 1999) (stating that the rationale of the market mechanism, by which corporations operate, is geared to private goods, like clothes and food, rather than public goods, like the environment).

17. In the United States, for example, from 1897 to 1934 the United States Supreme Court struck down numerous state laws regulating working conditions under the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. The Supreme Court's rulings held that the states cannot use their police powers to enact legislation that interferes with employers' and employees' rights to contract. As examples, the Supreme Court invalidated a New York statute forbidding employment in bakeries for more than 60 hours a week, struck down labor legislation forbidding discrimination by employers for union activity and prohibiting employers from requiring employees to sign “yellow dog” contracts, and ruled that a federal statute prescribing minimum wages for women violated due process. Many of the issues that the courts refused to address – unhealthy working conditions, discrimination, and wages – are problems plaguing developing countries. In 1937, however, the Court reversed fifty years of precedence. After its landmark opinion in *West Coast Hotel Co. v. Parrish*, the Supreme Court began upholding as constitutional legislation that protected workers' rights and consumers' rights and that interfered with the previously unfettered rights of business. Statutes that set a state minimum wage for women, prohibited the shipment in interstate commerce of “filled milk”, fixed maximum fees for employment agencies, and regulated opticians were now held to be constitutional. Since 1937, the judiciary and legislators have established huge bodies of law that protect workers and consumers and that regulate corporate power. See JESSE H. CHOPER ET AL, *CONSTITUTIONAL LAW* 274-304 (9th ed. West Publishing, 2001).

18. Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 671-74 (1998). Discussions on bilateral investment treaties often refer to a “race to the bottom.” Competition over foreign direct investment (FDI) can be fierce. This competition prompts countries to offer increasingly attractive incentives to corporations in order to receive FDI. Thus, country A may allow company XYZ to repatriate profits. Country B may then allow company XYZ to repatriate profits and may lower taxation of profits to 2%. In turn, country A lowers taxation to 1% and frees company XYZ from pollution controls. This competition for FDI via added concessions will continue until the costs of such concessions exceeds their benefits.

19. See generally Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

20. *Id.* at 448.

Nations (UN), and the International Labor Organization (ILO) have developed codes that place non-binding social responsibilities on corporations.<sup>21</sup> In addition, many corporations voluntarily have drafted and adopted their own codes of conduct, though, similar to measures drafted by intergovernmental organizations (IGO), these codes are not legally binding.<sup>22</sup>

Because existing codes of conduct have limited ability to prevent and redress corporate human rights abuses, the debate on whether to draft and how to structure a binding corporate social responsibility (CSR) code continues. This article enters that debate. It discusses events and circumstances occurring within the United States, other countries, and the international community which, when viewed in light of one another, suggest that states and corporations are moving towards creating an enforceable code of corporate social responsibility. After discussing these forces, this article offers an organizational framework for developing a CSR code.

The article's first section examines corruption and bribery. It discusses problems corruption creates in developed states and charts the evolution of U.S. and international measures to combat corruption; measures which have placed greater responsibilities upon corporations. The article's second section takes a similar approach, first discussing broad corporate governance concerns that surfaced over the past decade and then considering how the Sarbanes-Oxley Act (SOX), and similar measures in Europe, have addressed these concerns.

After charting how the United States and European Union have placed greater responsibilities upon corporations, the article analyzes a different force contributing to the development of a CSR code. The article's third section explains how the rise of socialist-oriented (SO) governments in Latin America will advance progress towards a code of corporate social responsibility. Next, the article's fourth section discusses human rights abuses and social harms that have accompanied the spread of MNCs through developing states. This section then analyses the various CSR measures the international community and multinational corporations have adopted to counter these harms. The paper's fifth section explains why the CSR measures that states, intergovernmental organizations, and multinationals have enacted cannot successfully regulate corporate activity and proposes a new and potentially useful framework for developing a CSR code. Last, the sixth and final section ties together the information presented in previous sections, summarizes how that information supports the article's thesis, and draws conclusions.

#### I. CORRUPTION: PROBLEMS AND RESPONSES

While corruption is more pervasive in developing countries, it also produces serious problems in developed states.<sup>23</sup> When the magnitude of multinational

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21. See *infra* notes 205, 212, 215, 218.

22. See *infra* notes 229, 230, 231, 232.

23. In developing states, corruption's effects are more varied and acute than in developed states. Corruption undermines effective business practices and corrodes political institutions, leading to tainted judiciaries, vote buying, venal police more concerned with collecting bribes than pursuing criminals,

corporations' bribery of foreign officials came to light in the United States during the 1970s, Congress passed the Foreign Corrupt Practices Act (FCPA or the Act). In 1998, the U.S. adopted a second round of amendments to the FCPA, enlarging its jurisdiction and expanding its substance. By the turn of the century, states worldwide had joined the battle against bribery, ratifying several anti-corruption treaties. Analysis of how anti-corruption measures have evolved reveals that, over time, states have placed greater responsibilities on corporations and have cut more deeply into corporate power. This trend of imposing greater responsibilities on corporations, when viewed in light of other events such as enactment of the Sarbanes-Oxley Act, the rise of SO governments in Latin America, and the development of non-binding CSR codes, suggests a binding code of corporate social responsibility lies on the horizon.

#### A. Problems Caused by Corruption

Corruption breeds various problems. When multinational corporations bribe foreign officials to obtain contracts or secure more relaxed regulations, their venal activities undermine effective business practices.<sup>24</sup> Bribery "can damage a company's image, lead to costly lawsuits, cause the cancellation of contracts, and result in the appropriation of valuable assets overseas."<sup>25</sup> Bribery also inflates operating expenses, creating new costs companies would not absorb if they obtained business legally, and wastes valuable resources.<sup>26</sup> Instead of devoting earnings to research and development, infrastructure, or shareholder dividends, companies that pay bribes direct profits into foreign officials' pockets.<sup>27</sup> As is common in other regulatory contexts, a "race to the bottom" ensues.<sup>28</sup> Officials demand greater and greater sums. Corporations, competing with one another for business, pay larger and larger bribes for access to markets and favorable treatment until the marginal benefit of new payments decreases to zero.<sup>29</sup> Such behavior is not good for business.

In 1976, more than four hundred U.S. companies admitted to paying over \$300 million in bribes to foreign officials during the first half of the 1970s.<sup>30</sup> Gulf Oil Corporation admitted to paying bribes in various countries, including \$4

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and weak rule of law. In-depth discussion of the effects of corruption in developing states is beyond the scope of this paper. For a detailed analysis, see Tim Harford, *Why Poor Countries are Poor*, 37 REASON 32, 36 (2006); Robert Zuzowski, *Corruption in Post-Communist Europe: Immorality Breeds Poverty*, 30 J. OF SOC. POL. AND ECON. STUD. 9, 12-15 (2005).

24. See H.R. REP. NO. 95-640, at 4-5 (1977).

25. *Id.* at 5.

26. Steven R. Salbu, *Information Technology in the War Against International Bribery and Corruption: The Next Frontier of Institutional Reform*, 28 HARV. J. ON LEGIS. 67, 70-71 (2001).

27. *Id.* at 70-71.

28. Cf. Sol Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment*, 19 U. PA. J. INT'L ECON. L. 731, 751 (1998) (stating that smaller countries with weaker economies often feel pressured to offer incentives that they cannot afford).

29. Cf. Guzman, *supra* note 18, at 671-74. Although Guzman discusses the race to the bottom in the context of bilateral treaties, the concept applies to the spiraling effects of corruption.

30. H.R. REP. NO. 95-640, at 4

million to the governing political party in South Korea; General Tire & Rubber Company admitted to bribes in Algeria, Mexico and Venezuela; and Exxon Corporation disclosed bribes in fifteen countries, including \$19 million in Italy alone.<sup>31</sup> Most dramatically, the SEC discovered that Lockheed Aircraft Corporation, at that time the largest defense contractor in the United States, had been bribing prime ministers, presidents, and other high-ranking political figures in several countries.<sup>32</sup> By the end of 1976, updated studies revealed four hundred and fifty U.S. companies had paid over \$450 million in bribes since the decade began.<sup>33</sup>

This pervasive corruption sparked government action. In 1977, officially recognizing that “corporate bribery is bad business” and that it affects “the very stability of business overseas” as well as “our domestic competitive climate,”<sup>34</sup> the United States Congress passed the Foreign Corrupt Practices Act to reign in corruption.<sup>35</sup>

#### *B. The U.S. Response to Corruption: The Foreign Corrupt Practices Act*

The Foreign Corrupt Practices Act consists of two general sections: one that establishes record keeping and internal controls regulations and another that prohibits bribery of foreign officials. While the FCPA was first passed in 1977, amendments in 1988<sup>36</sup> and 1998 refined the Act and broadened its scope. Comparison of the 1977 and 1998 versions reveals the United States has placed greater and greater responsibilities on corporations.

##### **1. The FCPA at the Time of its Passage**

The first section of the FCPA creates record keeping and internal controls standards. Since the Act’s inception, this section has required issuers with securities registered under the Securities and Exchange Acts to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly

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31. DONALD R. CRUVER, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE* 4 (2d ed. 1999).

32. *Id.* at 4-5; Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593, 595-96 (2002).

33. CRUVER, *supra* note 31, at 3.

34. FOREIGN CORRUPT PRACTICES AND DOMESTIC AND FOREIGN INVESTMENT IMPROVED DISCLOSURE ACTS OF 1977, REPORT OF THE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, S. REP. NO. 95-114, at 4, *available at* <http://www.usdoj.gov/criminal/fraud/fcpa/1977sen.htm> [hereinafter S. REP. NO. 95-114].

35. Pub L. No. 95-213, 91 Stat. 1494; 15 U.S.C. §§ 78m, 78dd-1, 78dd-2.

36. Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 189-92 (1994). The 1988 amendments made several changes to the Act. Some changes moderated the FCPA’s anti-bribery restrictions, such as inclusion of an affirmative defense allowing a corporation to avoid prosecution if its payments to a foreign official are allowed under the written laws of that foreign official’s country. Other amendments made the Act more punitive, such as a significant fine increase. While these amendments are notable, this paper does not discuss the 1988 amendments. Rather, this paper is concerned with the 1998 amendments, as those amendments not only expanded the FCPA’s scope more significantly, but also are the most recent amendments and, as such, inform the trend towards imposing greater responsibilities upon corporations.

reflect the transactions and dispositions of the assets of the issuer.”<sup>37</sup> The Act broadly defines records to include “accounts, correspondence, memorandums, tapes, disks, paper, books, and other documents or transcribed information of any type....”<sup>38</sup> Both qualitative omissions, such as omission of a questionable payment to a foreign official, and qualitative omissions, such as mischaracterization of a payment, are proscribed under the record keeping provision.<sup>39</sup> Since 1977, the FCPA also has required issuers to “devise and maintain a system of internal accounting controls” in order to improve corporate accountability and allow corporate directors, officers, and shareholders to detect and prevent the unlawful use of an issuer’s assets.<sup>40</sup> An issuer violates this provision if it knowingly circumvents or fails to implement a system of internal accounting controls.<sup>41</sup>

The accounting and control provisions, one of the first federal laws to mandate compliance with corporate governance standards, have allowed the SEC to detect, investigate, and prosecute bribery.<sup>42</sup> For example, in 1996 the SEC brought an action against Montedison, an Italian industrial conglomerate whose shares are traded domestically within the United States.<sup>43</sup> The SEC alleged Montedison violated the record keeping provision by disguising several hundred million dollars in bribes to Italian politicians.<sup>44</sup> Five years later Montedison settled with the SEC, agreeing to pay a \$300,000 fine.<sup>45</sup> Similarly, in 1997 the SEC filed a complaint against Triton Indonesia, a subsidiary of Triton Energy Corporation, alleging it “failed to devise and maintain an adequate system of internal accounting controls.”<sup>46</sup> Triton agreed to a final judgment that enjoins it from violating the FCPA and exacts a \$300,000 fine.<sup>47</sup> More recently, the SEC issued a cease-and-

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37. 15 U.S.C. §78m(b)(2)(A); *see also* 15 U.S.C. §78m(b)(7) (defining “reasonable detail” as “such level of detail... as would satisfy prudent officials in the conduct of their own affairs.”).

38. 15 U.S.C. §78c(a)(37).

39. CRUVER, *supra* note 31, at 26-27.

40. 15 U.S.C. §78m(b)(2)(B). The Act specifically states that issuers must “provide reasonable assurances that: (i) transactions are executed in accordance with management’s general or specific authorization; (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles . . . ; and (iii) access to assets is permitted only in accordance with management’s general or specific authorization . . . .”

41. 15 U.S.C. §78m(b)(5).

42. Schroth, *supra* note 32, at 599-601 (noting that these are the first laws requiring corporate compliance with corporate governance standards, and giving the SEC the ability to regulate the internal management of domestic corporations); *see also* H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 7, 9-16 (1998) (dubbing the FCPA “a significant expansion of the SEC’s regulatory authority over the internal management of public corporations subject to the Commission’s jurisdiction.”).

43. SEC v. Montedison, Litigation Release No. 16948, Accounting and Auditing Enforcement Release No. 1380 (March 30, 2001) *available at* <http://www.sec.gov/litigation/litreleases/lr16948.htm>.

44. *Id.*

45. *Id.*

46. SEC v. Triton Energy Corp., Litigation Release No. 15266, Accounting and Auditing Enforcement Release No. 890 (Feb. 27, 1997) *available at* <http://www.sec.gov/litigation/litreleases/lr15266.txt>.

47. *Id.*

desist order and levied a \$100,000 fine against Chiquita Brands as a result of internal control violations by its Colombian subsidiary, Banadex.<sup>48</sup>

While the record keeping and internal controls measures have helped to combat bribery, the heart of the FCPA lies in its anti-bribery provisions. Since 1977, Congress has applied the FCPA's anti-bribery provisions to both "issuers" and "domestic concerns."<sup>49</sup> An issuer is any entity that must register under Section 12 of the Securities and Exchange Act or that must file reports under Section 15(d) of that Act.<sup>50</sup> Domestic concerns include U.S. nationals; a juridical entity organized under U.S. law or with its principal place of business within the United States; and any officer, agent, employee, or stockholder of a domestic concern.<sup>51</sup> Under this definition, a domestic concern employed by a foreign entity or subsidiary is amenable to suit under the anti-bribery provisions while his or her principal or employer is not.<sup>52</sup>

Although Congress expanded the FCPA in 1998, since 1977 Congress has required the government to prove the same five, general elements to establish a violation of the Act. First, the entity making a payment must act corruptly.<sup>53</sup> While the Act does not define the term "corruptly", the Eighth Circuit has stated that, for purposes of the FCPA, a corrupt act is "intended to induce the recipient to misuse his official position or to influence someone else to do so" or is "done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means."<sup>54</sup>

Second, the entity must use the mail or any other means of interstate commerce in furtherance of an offer, payment, or promise to pay anything of value.<sup>55</sup> Cases not involving the FCPA have held that, under the federal mail fraud statute, a use of the mail that is merely "incident to an essential part of the scheme" constitutes use of the mail.<sup>56</sup> More directly, a United States citizen who traveled to Nigeria with six gold watches intended as bribes for Nigerian officials made use of interstate commerce.<sup>57</sup> These expansive definitions impose heightened responsibilities upon corporations.

The third element the government must establish is an offer, payment, or promise of value made to any foreign official, foreign political party, party official,

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48. In re Chiquita Brands International, Inc., FCPA Civil Enforcement Actions by the Securities and Exchange Commission at 3, *available at* <http://www.usdoj.gov/criminal/fraud/fcpa/append/ix/appendixb.pdf>.

49. STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 7* (ABA Publishing, 2005).

50. 15 U.S.C. §78dd-1(a).

51. DEMING, *supra* note 49, at 8-9.

52. *Id.* at 9.

53. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

54. *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991).

55. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

56. *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989).

57. *Alder v. Federal Republic of Nigeria*, 1998 U.S. Dist. LEXIS 23419 (S.D. Cal. 1998), *affirmed* 219 F.3d 869, 878 (9th Cir. 2000).



or foreign candidate for political office.<sup>58</sup> This element is satisfied if an issuer or domestic concern knows that a portion of an offer, payment, or promise of value, although not directly being used to bribe a foreign official, will be re-given or re-promised to a foreign official, foreign political party, foreign party official, or foreign candidate for political office.<sup>59</sup> Thus, this element imposes vicarious liability on issuers and domestic concerns, holding issuers and domestic concerns responsible for the acts of third parties who are not amenable to suit under the Act. For purposes of vicarious liability, knowledge exists if an issuer or domestic concern is aware a third party is committing bribery, firmly believes that bribery is substantially certain to occur, or perceives a high probability that bribery will occur.<sup>60</sup>

Vicarious liability demands greater corporate responsibility; compels more scrupulous oversight of a parent company's subsidiaries, agents, and affiliates; and holds multinationals accountable when they fail to discharge their obligations. For example, in 2004 the SEC lodged a complaint against Vetco Gray, Inc., a foreign corporation traded publicly in the U.S.<sup>61</sup> The complaint alleged Vecto Gray was vicariously liable for payments it made to its foreign subsidiaries because it knew the subsidiaries used the payments to secure oil contracts in Nigeria, Angola, and Kazakhstan through bribery.<sup>62</sup> Vecto Gray agreed to a \$5.9 million settlement the day the SEC filed its complaint in Federal District Court.<sup>63</sup> Similarly, if an issuer or domestic concern makes a payment to a foreign sales agent while consciously disregarding information suggesting the agent will use that money to make an improper payment, the issuer or domestic concern likely has violated the Act's vicarious liability provision.<sup>64</sup>

Since 1977, the fourth element of the anti-bribery regulations has required payments to be made for the purpose of influencing an official act or decision; inducing the official to do any act in violation of his lawful duty; or inducing an official to use his power to affect a government act or decision.<sup>65</sup> The issuer or domestic concern need not offer payment for the purpose of influencing the foreign official's own government. Rather, pursuant to the Act's broad language, if an issuer or domestic concern pays a foreign official for the purpose of influencing the U.S. government or a private enterprise, and if all other elements are met, that payment would violate the Act.<sup>66</sup>

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58. 15 U.S.C. §§ 78dd-1(a)(1)(2), 78dd-2(a)(1)(2).

59. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3).

60. 15 U.S.C. §§ 78dd-1(h)(3), 78dd-2(h)(3).

61. SEC v. ABB Ltd, Complaint at 2, July 6, 2004, available at <http://sec.gov/litigation/complaints/comp18775.pdf>.

62. *Id.*

63. SEC Sues ABB Ltd. in Foreign Bribery Case, Litigation Release No. 18775, July 6, 2004, available at <http://sec.gov/litigation/litreleases/lr18775.htm>.

64. DEMING, *supra* note 49, at 33.

65. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

66. DEMING, *supra* note 49, at 14.

Fifth, to establish a violation of the FCPA the government must prove the issuer or domestic concern, in offering a payment, sought to obtain or retain business for any person.<sup>67</sup> This sweeping language has made it easier to address “the concern of Congress with the immorality, inefficiency, and unethical character of bribery....”<sup>68</sup> Two cases illustrate this point. First, in *SEC v. Monsanto*, the SEC concluded that Monsanto’s authorization of \$50,000 in illicit payments from an Indonesian consulting firm to a senior Indonesian official, in exchange for repeal of legislation that had adversely affected Monsanto’s business, constituted a payment offered to assist in obtaining business.<sup>69</sup> Similarly, in *United States v. Kay* the Fifth Circuit stated that “Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person.”<sup>70</sup> The court held that bribes paid to customs officials in order to receive reduced customs and tax rates fall within the Act’s proscription if “the bribery was intended to produce an effect-here, through tax savings-that would ‘assist in obtaining or retaining business.’”<sup>71</sup>

## 2. The 1998 Amendments

In 1998, Congress amended the FCPA to conform to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).<sup>72</sup> The 1998 amendments broadened the Act’s jurisdiction and substance, permitting the government to investigate and prosecute more acts of corruption. This enlargement reflects acknowledgement that deeper, more extensive measures are necessary to regulate corporate activities, and comports with the United States’ and international community’s pattern of placing greater responsibilities upon multinational corporations.

The 1998 amendments made three important changes to the Foreign Corrupt Practices Act. First, the amendments greatly enlarged the Act’s jurisdiction over U.S. nationals and foreign persons. With regard to U.S. nationals, the Act added a new subsection stating that:

“[i]t shall also be unlawful for any issuer organized under the laws of the United States... or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, *to corruptly do any act outside the United States* in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of... subsection (a)... for the purposes set forth therein, *irrespective of*

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67. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

68. *U.S. v. Kay*, 359 F.3d 738, 749 (5th Cir. 2004).

69. *SEC v. Monsanto Company*, SEC Sues Monsanto Company for Paying a Bribe, Litigation Release No. 19023 (Jan. 6, 2005) available at <http://www.sec.gov/litigation/litreleases/lr19023.htm>.

70. *Kay*, *supra* note 68, at 755.

71. *Id.* at 756.

72. CRUVER, *supra* note 31, at 74.

*whether such issuer... officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce....*<sup>73</sup> (emphasis added).

This subsection expands the FCPA's nationality jurisdiction. Now, the SEC can investigate and prosecute issuers and persons acting on behalf of issuers regardless of whether the mails or interstate commerce are used in any way.<sup>74</sup> Accordingly, if a corporate executive acting on behalf of an issuer, while in a foreign county, orally offered to fly a foreign official and his family to Spain for vacation in exchange for the foreign official's opposition to a new minimum wage law, the executive's offer would violate the Act even though he neither made the offer in the United States nor utilized the mail or interstate commerce.<sup>75</sup>

The 1998 amendments also broadened the Act's jurisdiction over foreign persons. Before 1998, foreign issuers organized under U.S. law were the only foreign entities over whom the United States could assert jurisdiction.<sup>76</sup> Since the amendments, the U.S. can exercise jurisdiction over any person who violates the Act while in U.S. territory.<sup>77</sup> This expansion strengthens the SEC's ability to combat corruption<sup>78</sup> and is consistent with the United States' and international community's trend of placing greater responsibilities on corporations.

A recent SEC action against an Indonesian national illustrates the Act's expanded jurisdiction. In 2001, the SEC and the Department of Justice filed a joint civil injunction in U.S. District Court against KPMG Siddharta Siddharta & Harsono (KPMG-SSH), an Indonesian accounting firm, and against Sonny Harsono, a partner in the firm.<sup>79</sup> The complaint alleged Mr. Harsono agreed to pay an Indonesian tax official \$75,000 in order to reduce the official's tax assessment against one of KPMG-SSH's clients.<sup>80</sup> Soon after it initiated an action, the SEC entered an uncontested final judgment against the defendants.<sup>81</sup>

The 1998 amendments also broadened the Act's substance in two important ways. First, whereas the FCPA previously was limited to payments made for the purpose of "influencing" or "inducing" an "act or decision," it now also proscribes payments made for the purpose of "securing any improper advantage."<sup>82</sup> This language captures more conduct than the 1977 version and helps to prevent false claims that a corporation made payments for a legal purpose. For example, payments made to have the first bid on a government contract, or to arrange a

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73. 15 U.S.C. §§ 78dd-1(g); *see also* 78dd-2(i), 78dd-3(a).

74. *See id.*

75. *See id.*

76. Pub L. No. 95-213, 91 Stat. 1494.

77. 15 U.S.C. § 78dd-3.

78. *See Brown, supra* note 42, at 19, 29-30.

79. United States & SEC v. KPMG Siddharta Siddharta & Harsono, Litigation Release No. 17127 (Sept. 12, 2001) available at <http://www.sec.gov/litigation/litreleases/lr17127.htm>.

80. *Id.*

81. *Id.*

82. 15 U.S.C. §§ 78dd-1(a)(3)(A)(iii), 78dd-2(a)(3)(A)(iii), 78dd-3(a)(3)(A)(iii).

favorable location for a factory, likely would be made for the purpose of “securing any improper advantage” and violate the Act.<sup>83</sup>

Second, while the Act always has prohibited payments to foreign officials, the 1998 amendments expanded the definition of “foreign official” to include “any officer or employee... of a public international organization, or any person acting in an official capacity or on behalf of any such... public international organization.”<sup>84</sup> By defining “foreign official” to include representatives of international organizations, Congress has recognized that international organizations play a vital role and their officials are susceptible to bribery.

### *C. International Anti-Corruption Measures*

The international community has joined the fight against corruption. Over the past ten years, several IGOs have implemented anti-bribery conventions. The OECD, recognizing that “bribery... raises serious moral and political concerns, undermines... economic development, and distorts international competitive conditions,” drafted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>85</sup> Likewise, the Inter-American Convention Against Corruption (IA Convention), ratified by thirty three Latin American and Caribbean states, stresses that “fighting corruption strengthens democratic institutions and prevents distortions in the economy.”<sup>86</sup> The Council of Europe Criminal Law Convention on Corruption (CoE Convention), ratified by fifty two countries,<sup>87</sup> and the United Nations Convention Against Corruption (UN Convention), which one hundred forty countries have signed though only fifty one have ratified, express similar concerns.<sup>88</sup> Regulations in these conventions in some ways exceed regulations in the FCPA.

Each of these conventions requires signatories to cooperate in fighting corruption. The OECD Convention requires states to “provide prompt and effective legal assistance” to one another.<sup>89</sup> Signatories must cooperate with criminal investigations, non-criminal investigations, and other proceedings that fall within the scope of the Convention.<sup>90</sup> The UN Convention and the IA Convention incorporate similar duties. The UN Convention obliges states to furnish one another with as much legal assistance as their domestic laws allow.<sup>91</sup> Article XIV of the IA Convention requires Parties to provide “mutual technical cooperation”,

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83. *Id.*

84. 15 U.S.C. §§ 78dd-1(f), 78dd-2(h)(2), 78dd-3(f).

85. Convention on Combating Bribery of Foreign Officials in International Business Transactions pmb., Dec. 18, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1 [hereinafter OECD Convention].

86. Inter-American Convention Against Corruption pmb., Mar. 29, 1996, 35 I.L.M. 724 [hereinafter IA Convention].

87. Council of Europe Criminal Law Convention on Corruption, Jan. 27, 1999, 38 I.L.M. 505 [hereinafter CoE Convention].

88. United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003), reprinted in 43 I.L.M. 37 (2004), available at <http://www.unodc.org/unodc/en/treaties/CAC/index.html> [hereinafter U.N. Convention].

89. OECD Convention, *supra* note 85, at art. 9.

90. *Id.*

91. U.N. Convention, *supra* note 88, at art. 46.

which includes sharing knowledge of how to fight corruption most effectively.<sup>92</sup> Collectively, these provisions demonstrate that countries worldwide are committed to closely regulating multinationals' activities within their borders.

Each of these conventions also requires signatories to establish systems for monitoring compliance.<sup>93</sup> OECD states must create "a programme of systematic follow-up to monitor and promote full implementation of the Convention."<sup>94</sup> The UN Convention creates a "Conference of the States Parties to the Convention," which must develop processes for reviewing compliance and exchanging ideas on how to further the Convention's goals.<sup>95</sup> The CoE Convention simply requires signatories to "monitor the implementation of th[e] Convention," while the Follow-up on the Inter-American Convention Against Corruption and its Program for Cooperation require signatories to review compliance with the IA Convention periodically.<sup>96</sup> These monitoring systems, absent from the FCPA, illustrate the international community's commitment to fighting corruption and regulating MNCs more closely.

#### D. Conclusion

Corruption undermines efficient business practices and wastes valuable resources. Efforts to combat corruption have intensified gradually. The United States first outlawed corporate bribery of foreign officials in 1977 with passage of the FCPA. Since then, the U.S. has placed greater and greater anti-corruption responsibilities on corporations, broadening the Act's jurisdiction and expanding its substance. States worldwide have followed suit, adopting treaties which, in some areas, exceed the FCPA's exacting standards. When the evolution of anti-corruption measures is viewed in light of the development of heightened corporate governance standards, and in light of events such as the rise of socialist-oriented governments in Latin America and the passage of non-binding CSR measures, the creation of a corporate social responsibility code appears on the horizon.

## II. BEHIND SOX: REASONS FOR IMPOSING EVEN MORE CORPORATE RESPONSIBILITY

At the start of the 21<sup>st</sup> century, broad corporate governance problems captured the attention of the United States and the international community. Responses to these problems, such as the Sarbanes-Oxley Act and similar measures developed by the United Kingdom and the European Union, established new corporate governance and management systems, and placed greater responsibilities upon corporations. Analysis of these corporate governance regulations, when viewed in

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92. IA Convention, *supra* note 86, at art. XIV.

93. U.N. Convention, *supra* note 88, at art. 63; CoE Convention, *supra* note 87, at art. 24; OECD Convention, *supra* note 85, at art. 12; Follow-up on the Inter-American Convention Against Corruption and its Program for Cooperation AG/RES. 1784 (XXXI-O/01), *reprinted* in 41 I.L.M. 244 (2002).

94. OECD Convention, *supra* note 85, at art. 12.

95. U.N. Convention, *supra* note 88, at art. 63.

96. CoE Convention, *supra* note 87, at art. 24; Follow-up on the Inter-American Convention Against Corruption and its Program for Cooperation AG/RES. 1784 (XXXI-O/01), *reprinted* in 41 I.L.M. 244 (2002).

light of the evolution of anti-corruption legislation, the rise of socialist-oriented governments in Latin America, and the development of non-binding CSR measures, reveals the international community is moving towards a binding CSR code.

A. *Broad Corporate Governance Problems*

Corporate governance problems at the beginning of the twenty-first century undermined democratic institutions and weakened confidence in the U.S. economy.<sup>97</sup> While these problems varied in character and severity, combined they contributed to investment losses, the closure of many businesses, and the weakening of the U.S. and global economies.<sup>98</sup>

The main corporate governance problem was deceitful accounting practices, such as those employed by Enron and other corporations.<sup>99</sup> While Enron grew tremendously during the 1990s and early part of the twenty-first century, it obtained much of its profits through fraudulently constructed transactions.<sup>100</sup> To improve its financial appearance to investors, Enron fabricated special purpose entities that operated as partnerships with outside interests, allowing Enron to treat them as independent entities, remove them from its consolidated balance sheet, and hide losses.<sup>101</sup> Arthur Anderson, Enron's auditors, approved these "creative compliance" techniques that were designed to impassion investors and deceive the public.<sup>102</sup> Shortly after Enron filed for bankruptcy, investigations revealed these entities were concealing \$13.15 billion in debt and an additional \$27 billion in liabilities.<sup>103</sup> Enron's collapse was not an isolated incident. In 2002, WorldCom admitted it had overstated its earnings by \$11 billion and declared bankruptcy while claiming \$110 billion in assets, the largest bankruptcy in American

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97. Justin O'Brien, *Governing the Corporation: Regulation and Corporate Governance in an Age of Scandal and Global Markets*, in GOVERNING THE CORPORATION 3 (Justin O'Brien ed., 2005).

98. See J.R. Romanko, *The Way We Live Now: 6-9-02: Salient Facts; Down from the Peaks*, N.Y. TIMES, June 6, 2002, at 34 (citing an unemployment rate in April, 2002, of 6% compared to 3.9% in April, 2000); Daniel Altman, *U.S. Jobless Rate Increases to 6.4%, Highest in 9 Years*, N.Y. TIMES, July 4, 2003, at A1; Scott Bernard Nelson, *Fed Holds Rates Steady – For Now Revises Stance, Calls U.S. Economy Fragile*, BOSTON GLOBE, Aug. 14, 2002, at D1 (quoting the federal reserve as saying, "[t]he softening in the growth of aggregate demand that emerged this spring has been prolonged in large measure by weakness in financial markets and heightened uncertainty related to problems in corporate reporting and governance.").

99. Enron Corporation began as a natural gas company, expanded its operations worldwide, pressed into other industries, and was touted as a model for the new, competitive, corporate America.

100. DAVID SKEEL, *ICARUS IN THE BOARDROOM: THE FUNDAMENTAL FLAWS IN CORPORATE AMERICA AND WHERE THEY CAME FROM* 175-76 (Oxford University Press, 2005).

101. Peter T. Muchlinski, *Enron and Beyond: Multinational Corporate Groups and the Internationalization of Governance and Disclosure Regimes*, 37 CONN. L. REV. 725, 730-31 (2005). Enron's use and proliferation of SPEs grew out of SEC guidelines stating that corporations can treat SPEs independently under accounting practices if an owner of a company that does business with the SPE contributes an equity investment of at least 3% of the SPE's assets and if the independent owner maintains control over the SPE.

102. Doreen McBarnet, *After Enron: Corporate Governance, Creative Compliance and the Uses of Corporate Social Responsibility*, in GOVERNING THE CORPORATION 209 (Justin O'Brien ed., 2005).

103. Jonathan Shirley, *International Law and the Ramifications of the Sarbanes-Oxley Act of 2002*, 27 B.C. INT'L & COMP. L. REV. 501, 502-03 (2004).

history.<sup>104</sup> Similar events unfolded at Global Crossing, a company that invested in fiber optic cables and filed for bankruptcy in January, 2002 with billions of dollars in assets and liabilities.<sup>105</sup> Authorities also uncovered hidden transactions and veiled debts outside the balance sheet of Adelphia Inc., a prominent cable company.<sup>106</sup>

Another serious corporate governance problem for many corporations was their auditor selection processes. Before SOX, a company's chief financial officer (CFO) usually chose an outside accounting firm to audit the company.<sup>107</sup> However, most big accounting firms not only performed audits, but also earned significant revenue through consulting. By 1998, Wall Street's major accounting firms garnered only 38% of their revenue through audits.<sup>108</sup> This change practically transformed auditing firms into "consulting companies that did a little auditing on the side,"<sup>109</sup> in an arrangement that reposed considerable power in CFOs. Whereas CFOs previously hesitated to discharge auditors who did not approve certain corporate structures and transactions out of fear that discharge would prompt closer analysis of accounts, concern among investors, and market backlash, by the year 2000 CFOs could threaten to cut consulting business if auditors refused to approve questionable transactions.<sup>110</sup> As auditors grew reluctant to investigate suspect accounting practices, the balance of power shifted heavily towards CFOs and their corporations.

A final corporate governance problem that has drawn attention in recent years is vast increases in executive compensation. While CEOs of S&P 500 companies earned thirty times more than non-managerial workers in 1970, by 1996 those same CEOs were earning two hundred and ten times more than the average worker, with the gap widening further in recent years.<sup>111</sup> The significance of these figures does not lie in the sheer difference in pay. Rather, their importance also stems from the fact that, unlike professional athletes, actors, and others whose salaries also have grown considerably in recent years, CEOs "essentially set their own compensation."<sup>112</sup>

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104. SKEEL, *supra* note 100, at 175-76.

105. Shirley, *supra* note 103, at 503-04.

106. *Id.* at 504.

107. SKEEL, *supra* note 100, at 179.

108. *Id.* at 166-67.

109. *Id.* (noting that in 2000 and 2001, Arthur Anderson, Enron's now defunct accounting firm, earned \$25 million a year from Enron for its consulting services and an additional \$25 million for audits).

110. *Id.*

111. Randall S. Thomas, *Should Directors Reduce Executive Pay?*, 54 HASTINGS L.J. 437, 440-41 (2003); David Leonhardt, *The Imperial Chief Executive is Suddenly in the Cross Hairs*, N.Y. TIMES, June 24, 2002, at A1 (stating that top CEOs made approximately 410 times what the average worker was paid in 2001); Ken Belson, *Executive Pay: A Special Report; Learning How to Talk About Salary in Japan*, N.Y. TIMES, April 7, 2002, at 12 (highlighting that executives in Japan make approximately 12 times what the average worker is paid in Japan, whereas executives in the United States made approximately 180 times what the average worker is paid in the U.S.).

112. Stephen M. Bainbride, Book Note, 83 TEX. L. REV. 1615, 1619 (2005) (reviewing LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE*

These practices prompted close scrutiny of corporate activities, undermined confidence in corporations, and hurt corporate earnings. As concerns grew, corporate ills damaged private citizens and the economy.<sup>113</sup> In July 2002, as the negative impacts of poor corporate governance were spreading across the United States,<sup>114</sup> Congress passed the Sarbanes-Oxley Act “to address the systemic and structural weaknesses affecting our capital markets which were revealed by repeated failures... in recent months and years,” and “[to] increase corporate responsibility.”<sup>115</sup>

*B. The Sarbanes-Oxley Act: A New Code of Corporate Responsibility*

The Sarbanes-Oxley Act has been heralded as “the most significant piece of securities legislation since the 1930s.”<sup>116</sup> It has redefined the rules for publicly traded companies, instituting sweeping changes in corporate governance and accounting practices.<sup>117</sup> More specifically, auditor controls, certification procedures, and internal controls requirements have placed greater responsibilities on corporations.<sup>118</sup>

One way SOX has tightened oversight of corporations is through stricter regulation of audit committees. Until recently, most audit committees convened

COMPENSATION (2004)).

113. See Brian Kim, *Sarbanes Oxley Act*, 40 HARV. J. ON LEGIS. 235, 237 (2003) (noting that twenty thousand Enron executives lost \$1.2 billion from their 401(k) plans during Enron’s dissolution); John Paul Lucci, *Enron: The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley*, 67 ALB. L. REV. 211, 212 (2003) (“[f]inancial scandals involving WorldCom, Qwest, Global Crossing, Tyco, and Enron ultimately cost shareholders \$460 billion.”); Ethan G. Zelizer, *The Sarbanes-Oxley Act: Accounting for Corporate Corruption?*, 15 LOY. CONSUMER L. REV. 27, 30 (2002) (stating that WorldCom’s accounting and governance problems resulted in the loss of 20,000 jobs); see also SEN, *supra* note 16, at 94 (explaining that unemployment’s negative effects spread far beyond loss of income).

114. See Romanko, *supra* note 98 at 34 (citing an unemployment rate in April, 2002, of 6% compared to 3.9% in April, 2000); Altman, *supra* note 98, at A1; Nelson, *supra* note 98, at D1 (quoting the federal reserve as saying “[T]he softening in the growth of aggregate demand that emerged this spring has been prolonged in large measure by weakness in financial markets and heightened uncertainty related to problems in corporate reporting and governance.”).

115. S. REP. NO. 107-205 (2002).

116. SEC. & EXCH. COMM’N, STUDY PURSUANT TO SECTION 108(D) OF THE SARBANES-OXLEY ACT OF 2002 ON THE ADOPTION BY THE UNITED STATES FINANCIAL REPORTING SYSTEM OF A PRINCIPLES-BASED ACCOUNTING SYSTEM, *available at* <http://www.sec.gov/news/studies/principlesbasedstand.htm#2>.

117. ROBERT R. MOELLER, SARBANES-OXLEY AND THE NEW INTERNAL AUDITING RULES 3 (2004).

118. See THOMAS E. HARTMAN, THE COST OF BEING PUBLIC IN THE ERA OF SARBANES-OXLEY 3 (2006) (discussing a survey of corporate executives which reveals that a large majority of executives regard SOX’s corporate governance and public disclosure reforms as “too strict”, as companies with an annual revenue under \$1 billion experienced a 174% increase in “the cost of being public” from 2001-2005); Jonathan Treadway, *New Regulations Affecting the Banking Industry: Problems with Potential Application of Selected Provisions of the Sarbanes-Oxley Act of 2002 to Small, Non-Public Banking Organizations*, 8 N.C. BANKING INST. 165, 183 (2004) (describing how many small banking firms have decided not to go public because of the extra expenses that accompany SOX’s pervasive regulations); William J. Carney, *The Costs of Being Public After Sarbanes-Oxley: The Irony of “Going Private”*, 55 EMORY L.J. 141, 141 (2005) (stating that section 404 compliance cost an average of \$823,200 in 2004).



infrequently and merely rubber stamped the auditor's work.<sup>119</sup> Many audit committee members even appeared personally tied to their companies' CEOs.<sup>120</sup> Sarbanes-Oxley changed this relationship by requiring corporations to develop independent audit committees.<sup>121</sup> Now, under Section 301, audit committee members cannot hold any position within a company other than their position as a member of the audit committee.<sup>122</sup> Likewise, audit committee members may not "accept any consulting, advisory, or other compensatory fee from the issuer" nor "be an affiliated person of the issuer" or its subsidiaries.<sup>123</sup> Each audit committee has plenary responsibility for appointing, overseeing, and setting compensation for its corporation's public accounting firm.<sup>124</sup> Also, each audit committee must craft a procedure for funneling employees' complaints of questionable accounting practices to corporate officers.<sup>125</sup> Furthermore, each audit committee must have at least one "financial expert," or explain its reasons for not doing so.<sup>126</sup>

In addition, Section 201 of SOX prohibits external auditors from providing additional, non-audit services, including bookkeeping, financial information systems design, appraisals, investment advice, and "any other service that the Board determines, by regulation, is impermissible."<sup>127</sup> Collectively, Sections 201 and 301 create a new corporate governance framework and place new responsibilities on corporations.

The Sarbanes-Oxley Act's certification provision also tightens regulation of corporations. This provision requires each issuer's principal executive and principal financial officer(s) to certify that he or she has reviewed each annual or quarterly report and that, based on the officer's knowledge, all material facts in the report are true, no material facts are omitted, and all financial information is correct "in all material respects."<sup>128</sup> By forcing corporate officers to certify their corporation's financial condition, this provision undercuts an executive's ability to claim ignorance of faulty financial statements and exacts greater corporate responsibility.

The Sarbanes-Oxley Act's internal controls provisions impose SOX's deepest, most comprehensive regulations.<sup>129</sup> Pursuant to Section 302, each

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119. MOELLER, *supra* note 117, at 59.

120. *Id.* at 59.

121. Roberta S. Karmel, *The Securities and Exchange Commission Goes Abroad To Regulate Corporate Governance*, 33 STETSON L. REV. 849, 873 (2004).

122. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 776 § 301 (2002) (codified in scattered sections of 1, 15, 18, 28, and 29 U.S.C.A.) [hereinafter SOX].

123. *Id.* at 776, § 301.

124. *Id.*

125. *Id.*

126. *Id.* at 790, § 407. To qualify as a financial expert one must have experience auditing "comparable issuers", "experience with internal accounting controls", and "an understanding of audit committee functions."

127. *Id.* at 771-72, § 201.

128. *Id.* at 777, § 302.

129. See 68 Fed. Reg. 36636 (June 18, 2003) (defining internal controls as "a process designed by, or under the supervision of . . . principal executive and financial officers . . . and effected by the . . .

principal executive and principal financial officer must confirm that he or she has designed internal controls.<sup>130</sup> These controls must ensure the principal executives and principal officers know material financial information about the corporation and its subsidiaries.<sup>131</sup> Principal executives and principal officers also must confirm they have evaluated the effectiveness of these controls.<sup>132</sup> In addition, Section 302 requires each principal executive and principal officer to confirm that any significant cause for alarm over the adequacy of the controls has been disclosed.<sup>133</sup>

In addition, pursuant to Section 404, corporate management must: 1) state in their annual reports management's responsibility for "establishing and maintaining an adequate internal control structure;" 2) assess the effectiveness of the internal controls in their annual reports; and 3) have their public accounting firms "attest to, and report on" management's assessment.<sup>134</sup>

Comparison of the FCPA's and SOX's internal controls provisions reveals the trend towards placing greater responsibilities on corporations. The FCPA's internal controls provisions, initially drafted thirty years ago, simply declare that issuers must design and maintain internal controls, but does not require evaluation or analysis.<sup>135</sup> Conversely, sections 302 and 404 of SOX together require corporate executives to state their responsibility for designing internal controls, to create such controls, to assess and evaluate these controls, and to draw conclusions about their effectiveness.<sup>136</sup> While the FCPA places responsibility for internal controls upon the corporation in general,<sup>137</sup> SOX specifically charges executive officers with internal controls duties.<sup>138</sup> Thus, internal controls have been transformed from a recitation of general duties lodged upon the corporation as a whole to a statement of specific duties<sup>139</sup> imposed on corporate executives in particular.

Although the audit committee, certification, and internal controls provisions have placed the greatest responsibilities on corporations, other sections of SOX have had a similar effect. An ethics provision requires corporations to "disclose whether or not, and if not, the reason therefor," they have "adopted a code of ethics

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board of directors . . . to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles . . .").

130. SOX at 777, § 302.

131. *Id.*

132. *Id.*

133. *Id.*; see also Final Rule: Certification of Disclosure in Companies' Quarterly and Annual Reports, Securities Act and Exchange Release Nos. 33-8124, 34-46427, IC-25722, 67 Fed. Reg. 57,726 (Aug. 29, 2002) (specifying that CEOs and CFOs may not delegate their Section 302 duties to any subordinate).

134. SOX at 789, § 404.

135. 15 U.S.C. §78m(b)(2)(B).

136. SOX at 777, § 301; SOX at 789 § 404.

137. 15 U.S.C. §78m(b)(2)(B).

138. SOX at 777, § 301; SOX at 789 § 404.

139. See 68 Fed Reg. 36636 (adopting rules for the implementation of Section 404).

for senior financial officers.”<sup>140</sup> In addition, pursuant to section 402, corporations no longer may “extend or maintain credit... in the form of a personal loan to... any director or executive officer,” even if done indirectly through a subsidiary.<sup>141</sup> This proscription creates new corporate responsibilities. Finally, Section 806 of Sarbanes-Oxley prohibits corporations and their constituents from discharging, demoting, suspending, harassing, threatening, or otherwise discriminating against any employee who informs the government of corporate conduct that may violate an SEC regulation or a federal law involving fraud against shareholders. This section also provides civil remedies to employees who allege discrimination and subsequently are sued by their employer,<sup>142</sup> federalizing state statutes protecting whistle blowers.<sup>143</sup> Section 806 shifts power from the corporation to its constituents, a change that is consistent with calls for corporations to assume a new set of corporate social responsibilities to their employees, communities, and environments.

### C. Corporate Governance Measures in Other Countries

Two years after enactment of SOX, the United Kingdom and the European Union passed new corporate governance measures. These regulations, consistent with U.S. regulations, impose greater responsibilities upon corporations.

The United Kingdom’s Companies (Audit, Investigation, and Enterprise) Act of 2004 (the Companies Act) severs close ties between corporations and auditing firms.<sup>144</sup> Although it does not forbid auditors from performing non-audit services like section 201 of SOX, it does empower the Secretary of State to pass regulations requiring corporations to disclose auditors’ non-audit services.<sup>145</sup> The Companies Act also gives auditors unfettered access to company accounts, and allows them to require corporate executives to provide them with any information needed to perform their duties<sup>146</sup> In addition, pursuant to the Companies Act’s certification provision, each corporate director must state in his director’s report that, “so far as [he] is aware, there is no relevant audit information of which the company’s auditors are unaware.” The director also must certify he has taken all measures necessary for making himself “aware of any relevant audit information” and for establishing “that the company’s auditors are aware of [such] information.”<sup>147</sup> Other provisions set criteria for recognizing supervisory audit bodies, permit the Secretary of State to make grants to entities that issue accounting standards or investigate departures from accounting standards, and, with approval by the

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140. SOX at 789, § 406; *see also* MOELLER, *supra* note 117, at 71-79 (discussing the efforts of many corporations to establish corporate wide ethics programs in order to increase external legitimacy, the risk environments that corporations face, the need for an ethics program, and how to establish such a program).

141. SOX at 787, § 402.

142. *Id.* at § 806.

143. Karmel, *supra* note 121, at 867.

144. Companies (Audit, Investigations, and Community Enterprise) Act of 2004, art. 7, *available at* <http://www.opsi.gov.uk/acts/acts2004/40027--b.htm#7> [hereinafter Companies Act].

145. *Id.*

146. *Id.* at art. 8.

147. *Id.* at art. 9.

Secretary of State, empower individual investigators to compel the production of documents during investigations.<sup>148</sup>

The European Union also has adopted measures that place greater responsibilities on corporations. EU Council Directive 2006/43 (the Directive) includes several provisions affirming that auditors must operate independently of their employers. Member States must prohibit auditors from auditing companies with whom they have “any direct or indirect financial, business, employment or other relationship.”<sup>149</sup> Also, owners and shareholders may not intervene “in the execution of a statutory audit in any way which jeopardises the independence and objectivity of the statutory auditor.”<sup>150</sup> In addition, the Directive requires member states to “ensure that all statutory auditors and audit firms are subject to a system of quality assurance” that operates independent of the auditors and audit firms.

Section 101 of SOX establishes a non-profit organization, the Public Company Accounting Oversight Board, “to oversee audit of public companies... in order to protect the interests of investors....”<sup>151</sup> The Directive mandates the creation of a similar body. It calls for “a system of public oversight for statutory auditors and audit firms,” which will “apply to all statutory auditors and audit firms” and “have ultimate responsibility for... the approval and registration of statutory auditors and audit firms, the adoption of standards on professional ethics... and... investigative and disciplinary systems.”<sup>152</sup> By adopting these measures, the EU has followed the lead of the United States in placing greater responsibilities upon corporations.

*D. Conclusion: Continued Progressive Placement of Heightened Responsibilities upon Corporations*

Congress passed the Sarbanes-Oxley Act in response to corporate governance problems that arose in the United States during recent years. SOX tightens corporate structures, strengthens corporate governance, and places greater responsibilities on corporations than does the FCPA. Thus, U.S. regulation of corporate activities has escalated gradually and a similar trend exists internationally. Although less prescriptive than SOX, the Companies Act and the Directive also create new corporate governance standards. This evolution of placing greater responsibilities on corporations, when viewed in light of events such as the rise of socialist-oriented governments in Latin America, corporate rights abuses, and the passage of non-binding CSR codes, suggests the international community will develop a binding CSR code to govern the social impacts of corporate activities.

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148. *Id.* at arts. 1, 16, 21.

149. Council Directive 2006/43, art. 22, 2006 O.J. (L 157) 87 (EC).

150. *Id.* at art. 24.

151. SOX at 750, § 101.

152. Council Directive 2006/43, *supra* note 149, at art. 32.

## III. THE GROWTH OF SOCIALIST-ORIENTED GOVERNMENTS IN LATIN AMERICA

Following a wave of democratization in Latin America during the 1980s, many countries in Latin America adopted neoliberal economic policies.<sup>153</sup> Neoliberal policies reduce a country's economic protections and open its economy to the international marketplace with minimal government interference.<sup>154</sup> Such policies were recommended for developing countries by the International Monetary Fund, World Bank, and other leading international economic institutions during the 1990s.<sup>155</sup> In many cases, these institutions conditioned loans and assistance on countries' willingness to adopt austere macroeconomic fiscal policies, rapidly privatize state-owned businesses, and quickly liberalize capital markets.<sup>156</sup> Many Latin American countries followed these neoliberal mandates, curtailing social services,<sup>157</sup> removing restraints from capital markets,<sup>158</sup> and privatizing huge, state-owned industries.<sup>159</sup>

These measures succeeded for several years and helped to produce economic growth throughout Latin America.<sup>160</sup> Corporations invested heavily in Latin America during the 1990s. In 1990, inward FDI to Latin American countries totaled just over \$10 billion.<sup>161</sup> Ten years later, inward FDI had jumped to \$114 billion.<sup>162</sup> This spread of foreign corporations was partly attributable to neoliberal reforms, particularly rapid privatization of many state-run industries.<sup>163</sup> In Brazil, for example, over one hundred state-owned companies with a value of \$61.5 billion were privatized during the 1990s.<sup>164</sup> Similarly, one hundred companies with a value of approximately \$23 billion were privatized in Argentina during the 1990s.<sup>165</sup>

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153. THOMAS E. SKIDMORE & PETER H. SMITH, *MODERN LATIN AMERICA* 59 (2d ed., 1989) (highlighting the election of civilian presidents in Peru, Argentina, and Brazil during the 1980s and citing Chile as the only "major exception" to the general rule that Latin America had democratized by 1985).

154. STIGLITZ, *supra* note 3, at 6-8, 74.

155. *Id.* at 6-8.

156. *Id.*, at 53.

157. Sergio Cabrera Morales, *Las Noventa: Hacia la Segunda Década Perdida*, in *GLOBALIZACIÓN, EXCLUSIÓN Y DEMOCRACIA EN AMÉRICA LATINA* 169-170 (Heinz Dieterich ed., 1997).

158. AUGUSTO DE LA TORRE ET AL., *CAPITAL MARKET DEVELOPMENT: WHITHER LATIN AMERICA* 8, 18 (2006), available at <http://www.nber.org/books/IASE05/delatorre-et-al5-23-06.pdf>.

159. SYBIL RHODES, *SOCIAL MOVEMENTS AND FREE-MARKET CAPITALISM IN LATIN AMERICA* 26-29 (2006) (discussing the rapid privatization of state-owned businesses, particularly the telecommunications industry, in Latin America during the 1990s).

160. See STIGLITZ, *supra* note 3, at 53 (stating that neoliberal policies initially sparked growth in Latin America); *Gross Domestic Product by Host Region and Economy (1970-2005)*, in UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *WORLD INVESTMENT REPORT 2005: TRANSNATIONAL CORPORATIONS AND THE INTERNATIONALIZATION OF R&D* (2005).

161. *Inward FDI Flows by Host Region and Economy (1970-2005)*, *supra* note 5.

162. *Id.*

163. Germano Mendes de Paula et al., *Economic Liberalization and Changes in Corporate Control in Latin America*, 44 *THE DEVELOPING ECONOMS* 467, 485-87 (2002).

164. *Id.* at 477-78.

165. *Id.*

However, soon after neoliberal policies produced growth in Latin America, they began to fail. The neoliberal prescription of cutting social spending in order to maintain macroeconomic health destroyed the social service infrastructures of many countries.<sup>166</sup> By the end of the 1990s, sluggish and in many cases negative economic growth had spread throughout the area.<sup>167</sup> Neoliberal reforms and extensive FDI received some blame for this economic downturn,<sup>168</sup> enabling leaders who espoused socialist-oriented policies to assume power in Latin America.<sup>169</sup> This trend began with the election of Hugo Chavez in Venezuela in 1999, and since has spread to eight countries in Central and South America.<sup>170</sup> The degree to which these countries follow socialist policies and values differs greatly.<sup>171</sup> However, each has adopted SO policies that show their interest in countering perceived U.S. dominance in the region, protecting workers' rights, safeguarding national resources, and maintaining control over their economies.<sup>172</sup>

Venezuela elected Hugo Chavez as President in 1999.<sup>173</sup> Since taking office, Chavez has spent billions of dollars on education and health care, and has made "life increasingly miserable for foreign – above all American – companies."<sup>174</sup> Most recently, Chavez announced plans to nationalize Venezuela's telecommunications and electricity industries, and to transform Venezuela into a socialist country.<sup>175</sup> Venezuela generally is considered the most SO country in

166. Anthony Hall, *From Fome Zero to Bolsa Familia, Social Policies and Poverty Alleviation Under Lula*, 38 J. LATIN AMER. STUDIES 689 (2006).

167. See Latin Focus Consensus Forecast, available at: <http://www.latin-focus.com/latinfocus/countries> (showing statistics indicating that GDP failed to grow in Brazil between 1995 and 2002; Argentina's economy was stagnant during 2001 and, during the first quarter of 2002, its annual economic growth rate declined 16%; and between the middle of 1998 and the middle of 1999, Venezuela went from experiencing moderately positive to moderately negative economic growth, and by 2003 was experiencing sharp negative growth before its economy recovered).

168. Francisco Panizza, *Unarmed Utopia Revisited: The Resurgence of Left-of-Centre Politics in Latin America*, 53 POL. STUD. 716, 727 (2005); Jorge Castañeda, *Latin America's Left Turn*, 85:3 FOREIGN AFF. 28 (2006).

169. Consider that Hugo Chavez was elected President of Venezuela shortly after the country went from experiencing moderately positive to moderately negative economic growth; that Luiz Inácio Lula da Silva was elected President of Brazil after a 7 year period during which, after rising and then falling, Brazil's GDP remained constant; and that Argentina elected Nestor Kirchner after it experienced economic collapse.

170. Castañeda, *supra* note 168; Chris Kraul, *Ecuador's New President Targets Foreign Debt Relief*, L.A. TIMES, Jan. 16, 2007, at A6.

171. See generally Castañeda, *supra* note 168.

172. Panizza, *supra* note 168, at 727.

173. While this article is concerned with economic and social rights in Venezuela since Chavez came to power, rather than with political rights, it is important to note Venezuela has been criticized by states and international organizations, including the Organization of American States, for depriving people of their liberty, condoning extra-judicial killings, and generally failing to protect political rights. See IACHR, Press Release: IACHR Reports on the Situation of Human Rights at the Conclusion of Its Session, No. 35/05, Oct. 28, 2005.

174. See Christian Parenti, *Hugo Chavez and Petro Populism*, NATION, Apr. 11, 2005, at 17 (stating Venezuela has spent billions on social programs that have taught 1.3 million people to read, provided medical care to millions, and improved infrastructure); Castañeda, *supra* note 168.

175. Simon Romero, *Chavez Begins New Term Vowing Socialism*, N.Y. TIMES, Jan. 11, 2007, at

Latin America; Jorge Castañeda, the Foreign Minister of Mexico under President Vicente Fox and current professor at New York University, has called Chavez a populist leader who “does very little for the poor of his own country”<sup>176</sup> and who pursues “big-time spending, authoritarian governance and militant anti-Americanism.”<sup>177</sup> However, if Chavez moderates his stance and redirects his focus on protecting social and economic rights towards development of a CSR code, a change which seems more likely since Venezuelans rejected a referendum that would have given Chavez greater constitutional powers, he could wield tremendous influence in the region. Such pragmatism would advance efforts toward placing social responsibilities upon corporations.

Luiz Inácio Lula da Silva was elected President of Brazil in 2002, the first left-wing Brazilian president since 1970.<sup>178</sup> Lula has developed socialist policies “without rejecting the precepts of capitalism.”<sup>179</sup> Local-level councils provide input that shape his party’s national agenda, and his government supports the Landless Rural Worker’s Movement, the world’s largest movement of rural poor and a strong advocate of agrarian reform. Lula also has weakened ties with the United States and strengthened ties with other developing countries such as China, India, and South Africa, hoping to counter U.S. influence in the region.<sup>180</sup> Thus, although Brazil follows capitalist ideology, its government also is concerned with protecting its citizens’ social rights and projecting its socialist perspective into the international community.<sup>181</sup> Because a CSR code would help Brazil’s government achieve these goals, Lula’s rise strengthens the likelihood that the international community will develop a code of corporate social responsibility.

Nestor Kirchner was elected President of Argentina in 2002, following the former president’s resignation in 2001 and the country’s economic collapse.<sup>182</sup> Kirchner initially challenged the IMF, stating that foreign investors would receive only a small portion of the debt Argentina owed them because he wanted to conserve funds for social programs.<sup>183</sup> Kirchner later changed his position, announcing Argentina would pay its debt early, and, in January 2006, made the

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A16.

176. See Castañeda, *supra* note 168.

177. Jorge G. Castañeda, *Good Neighbor Policy*, N.Y. TIMES, May 4, 2006, at A31.

178. Panizza, *supra* note 168, at 716.

179. *The Region’s Leftward Shift: Identifying, Denying, and Interpreting Divisions*, LATIN AM. WKLY REP., Jan. 31, 2006.

180. Kenneth Rapoza, *Brazil Moves to Form “Bloc” Against U.S.: Seeks “South-South” Cooperation*, WASHINGTON TIMES, Nov. 4, 2003, at A15.

181. See Simon Romero, *Brazil’s Objections Slow Chavez’s Plans for Regional Bank*, N.Y. TIMES, July 22, 2007, at A12 (noting that Brazil has sought to diminish the clout of a Bank of the South, and calling Lula a “longtime socialist who embraced market friendly policies once in power . . .”); Hall, *supra* note 166 (discussing how Brazil’s enthusiasm for social safety nets has followed the failure of neoliberal policies and the accompanying destruction of social infrastructure).

182. Panizza, *supra* note 168, at 717.

183. Colin McMahon, *Tension Builds as Argentina Tries to Renegotiate its Defaulted Debt*, CHI. TRIB., Sept. 1, 2004; Todd Benson, *Argentina Starting Drive to Emerge from Fault*, N.Y. TIMES, Jan. 12, 2005, at C4.

country's last payment.<sup>184</sup> Argentina's debt payment showed its willingness to work within the existing international economic system and pleased foreign investors. However, Argentina is wary of neoliberal dictates, opposes a free-trade agreement, and in some instances has aligned closely with Venezuela.<sup>185</sup> Thus, Argentina accepts that foreign investment is necessary for long-term economic growth, though it also questions and challenges the neoliberal agenda. The new President of Argentina, Cristina Kirchner, has continued many of the same policies that her husband developed. Because a CSR code could protect Argentines from the activities of MNCs and soften neoliberal policies, the election of Kirchner's government strengthens the likelihood that Argentina will endorse and the international community will develop a CSR code.

Bolivia recently elected Evo Morales as President. During his campaign, Morales promised to depart from twenty years of neoliberal reforms that failed to pull Bolivia from poverty, and to turn towards socialist-oriented policies.<sup>186</sup> Since taking office, Morales has nationalized Bolivia's oil and gas industry, ordering troops to occupy foreign-run fields.<sup>187</sup> Morales has indicated he may nationalize other sectors as well, such as the mining and forest industries.<sup>188</sup> An Amyara Indian and past leader of the coca union, Morales also has championed the rights of the poor and of indigenous people. He has declared that coca, widely used in Bolivia as a mild medicinal herb, should be treated as a legitimate product, rather than as an illicit drug. He also has fought multinationals' exploitation of Bolivia's natural resources.<sup>189</sup> Bolivia's ratification of a CSR code that governs the conduct of MNCs operating within its borders would further its socialist objectives while providing it with foreign investment. Accordingly, the election of Morales furthers the likelihood that developed states, developing states, and multinationals will adopt a CSR code.

Other countries in Central and South America also have elected SO leaders in recent years. Ecuador's recently elected president, Rafael Correa, has challenged foreign corporate interests and supported socialist-oriented policies.<sup>190</sup> For

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184. Larry Rohter, *As Argentina's Debt Dwindles, President's Power Grows Steadily*, N.Y. TIMES, Jan. 3, 2006, at A1; Colon McMahon, *For Argentina, Debt Cut is Payback Time*, CHI. TRIB., Jan. 13, 2006, at C5.

185. Moises Naim, *The Lost Continent*, 157 FOREIGN POL'Y, 40 (2006).

186. Daphne Eviatar, *Liberating Pachamama: Corporate Greed, Bolivia, and Peasant Resistance*, 38:2 DISSENT 22, 25 (2006); MARK WEISBRODT & LUIS SANDOVAL, BOLIVIA'S CHALLENGES 6 (2006) (stating that Bolivia is South America's poorest country, with an average per capita income of \$2,800 as compared to an average of \$8,200 in all of Latin America, with 64% of Bolivians living below the poverty line).

187. Hector E. Schamis, *Populism, Socialism, and Democratic Institutions*, 17:4 J. OF DEMOCRACY 20, 32 (2006).

188. Tyler Bridges, *Farmers' Fears Highlight Growing Rift with Morales*, MIAMI HERALD, June 14, 2006 (noting that foreign mining companies, such as Apex Silver, Coeur d'Alne and Newmont, together have invested \$750 million in Bolivia, at least part of which they stand to lose upon nationalization).

189. Eviatar, *supra* note 186, at 26-27.

190. Chris Kraul, *Ecuador's New President Targets Foreign Debt Relief*, L.A. TIMES, Jan. 16, 2007, at A6.



example, a recent election for Ecuador's constituent assembly gave Correa "a clear mandate to write a new constitution reflecting '21<sup>st</sup> century socialism,'"<sup>191</sup> and Correa opposes a free trade agreement with the United States.<sup>192</sup> In November, 2006, Nicaragua elected Daniel Ortega, an SO politician, leader of the communist Sandinista National Liberation Front during the 1980's, and former president of the country, as its new President.<sup>193</sup> Peru, Chile, and Uruguay also have elected centre-left leaders over the past few years.<sup>194</sup> The election of these governments should further efforts to develop a CSR code.

Leaders critical of neoliberal prescriptions and supportive of SO policies have come to power in Latin America over the past decade. To varying degrees, they have pursued policies that benefit lower classes and workers, have protected their domestic industries from the influence of foreign MNCs and, in some cases, have nationalized major sectors of their economies. Their efforts to combat the harms that have accompanied the growth of FDI and spread of MNCs in Latin America are consistent with the goals of a CSR code. Accordingly, the rise of SO governments in Latin America, when viewed in light of the trend towards placing greater responsibilities upon corporations, and in light of the adoption of non-binding CSR codes by IGOS and MNCs, should advance development of a code of corporate social responsibility.

#### IV. CORPORATE ABUSES OF ECONOMIC AND SOCIAL RIGHTS, THE FAILURE OF THE RULE OF LAW, AND NON-BINDING CSR MEASURES AS MEANS OF PROTECTING ECONOMIC AND SOCIAL RIGHTS

Multinational corporations have been accused of committing human rights abuses on various occasions and in various countries over the past decade. The international community has drafted several non-binding corporate human rights obligations to address these abuses. Likewise, MNCs voluntarily have drafted and adopted non-binding codes of social conduct. These measures demonstrate that states and corporations worldwide understand that the absence of an enforceable regulatory framework for MNCs has created problems. Even more importantly, these measures show states are willing to place social responsibilities on MNCs, and MNCs are willing to accept such obligations.

##### A. *Concerns Over Rights Abuses and the Failure of the Rule of Law*

Multinational corporations have been accused of violating civil and political rights; economic, social, and cultural rights; and environmental rights. For example, it was alleged that U.S. parent company Unocal and its French subsidiary

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191. *Ecuador: Correa's Victory*, THE ECONOMIST, Oct. 6, 2007.

192. *Correa Plans Many Changes: Ecuador is Not Anti-American, New Leader Says*, S. FLORIDA SUN SENTINEL, Oct. 3, 2007 at 25A.

193. Adam Thompson, *Long Road Back to Power*, FIN. TIMES Jan. 8, 2007, at 32.

194. *Latin America, 2006*, WASHINGTON TIMES, Dec. 30, 2006, at A12 (noting that both Michelle Bachelet, who recently was elected President of Chile, and Alan García, who was elected as President of Peru, have pursued free-trade agreements with the United States); Castaneda, *supra* note 168 (noting that Tabare Vazquez, who was elected President of Uruguay in 2004, has both denounced neoliberalism and explored the possibility of a free-trade agreement with the United States).

knew the Burmese government was using slave labor, raping women, confiscating property, and uprooting communities in order to assist Unocal's construction of a gas pipeline.<sup>195</sup> Local forces in Nigeria hired by Shell carried out large-scale, extra-judicial killings and destroyed villages in order to secure Shell's investment in the country.<sup>196</sup> In India, Dabhol Power Corporation (majority owned by Enron) hired police forces who arbitrarily detained non-violent protestors.<sup>197</sup> A subcontractor of the Gap in El Salvador employed workers in sweatshop conditions.<sup>198</sup> British Petroleum admitted to hiring Columbia's military to protect its oil operations in the country, with disregard for whether the military also would protect basic human rights.<sup>199</sup> Children worldwide are engaged in labor.<sup>200</sup> Most recently, Blackwater USA has been accused of opening fire without provocation while providing private security services in Iraq, killing 17 citizens.<sup>201</sup> Other violations include exposing workers to sulfur dioxide in Peru and dumping waste into the waters of Ecuador and Indonesia.<sup>202</sup> These are not isolated instances of misconduct, but rather samples drawn from a larger pool of human rights violations. However, at the present only states, and in a few instances individuals, are treated as having human rights obligations.<sup>203</sup>

*B. Intergovernmental Organizations' Non-binding Corporate Social Responsibility Measures*

Concern over human rights abuses associated with corporate activities has prompted states to develop non-binding CSR codes. The stakeholder governance style of European companies, under which corporations consider relationships with employees, consumers, and the environment when making decisions, has made Europe a natural leader in this process.<sup>204</sup> In 1999, the European Parliament adopted a "Code of conduct for European enterprises in developing countries" (the Code).<sup>205</sup> While the Code does not establish specific, binding corporate social responsibilities, it does erect the foundation for enforceable regulations. The Code

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195. Hall, *supra* note 16, at 416-17.

196. Cassel, *supra* note 16, at 1965-68.

197. Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 513-14 (2000).

198. Cassel, *supra* note 16, at 1968-69.

199. Stephens, *supra* note 1, at 52.

200. James J. Silk & Meron Makonnen, *Economic Exploitation of Children: A Role for International Human Rights Law?*, ST. LOUIS U. PUBLIC L. REV. 359, 359 (2003).

201. John M. Broder, *State Dept. Plans Tighter Control of Security Firm*, N.Y. TIMES, Oct. 6, 2007, at A1.

202. Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Concepts and Procedural Problems*, 50 AM. J. COMP. L. 493, 514-16 (2002); Stephens, *supra* note 1, at 53.

203. Ratner, *supra* note 19, at 462-65.

204. Cynthia A. Williams & John M. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L. J. 493, 498 (2005). Europe's stakeholder governance orientation is in contrast to the shareholder orientation U.S. companies follow, which centers on maximizing shareholder wealth.

205. Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, 1999 O.J. (C 104) 180 [hereinafter EU Code].

recommends the EU endorse “existing minimum applicable international standards” the ILO, UN, and OECD have set for regulating the social impacts of corporate activities, and calls on the EU to work with these organizations “to ensure more powerful and effective monitoring and enforcement mechanisms.”<sup>206</sup> Provisions also stress that an EU CSR code should protect the rights of indigenous peoples and create social labels for products.<sup>207</sup> A paper the Commission of European Communities issued in 2001 (the Green Paper) supplements the Code, declaring that “[c]orporate social responsibility should... not... substitute for social rights or environmental standards, including the development of new... legislation.”<sup>208</sup>

The United States also has adopted non-binding measures that place greater social responsibilities on corporations. It recently signed the Voluntary Principles on Security and Human Rights (the Voluntary Principles) with the United Kingdom. The Voluntary Principles establish high CSR standards for businesses in the extractive and energy sectors and tout the constructive role businesses can play in protecting social rights.<sup>209</sup> The Voluntary Principles ask businesses in the extractive and energy sectors to establish procedures for assessing the risk that the corporation, its agents, or its host country might commit a human rights violation; to ensure that public security forces the government provides for the corporation’s benefit do not commit human rights violations; and to “record and report any credible allegations of human rights abuses by public security in their areas of operation to appropriate host government authorities.”<sup>210</sup>

More recently, in response to allegations that Blackwater USA opened fire without provocation while providing private security services in Iraq, killing 17 citizens, the U.S. State Department announced new policies that would ensure tighter control of the company. According to these measures, State Department monitors must accompany all Blackwater convoys in and around Baghdad, all Blackwater vehicles must be equipped with State Department video cameras, and recordings of all radio transmissions between Blackwater convoys and military and civilian agencies supervising those convoys in Iraq must be saved.<sup>211</sup>

Intergovernmental organizations also have begun to develop non-binding CSR codes. Every OECD country plus nine non-member countries have signed the OECD Guidelines for Multinational Corporations (the Guidelines). The Guidelines encourage corporations to voluntarily adopt certain standards. They suggest that “enterprises should... respect the human rights of those affected by their activities consistent with the host government’s international obligations and

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206. *Id.* at arts. 12, 29. Relevant standards cover human rights, labor, and the environment.

207. *Id.* at arts. 7, 12, 14.

208. *Green Paper: Promoting a European Framework for Corporate Social Responsibility*, at 22, COM (201) 366 final [hereinafter *Green Paper*].

209. U.S. Department of State Fact Sheet, Voluntary Principles on Security and Human Rights (Feb. 20, 2001), available at <http://www.state.gov/g/drl/rls/2931.htm> [hereinafter Voluntary Principles].

210. *Id.*

211. Broder, *supra* note 201.

commitments.<sup>212</sup> Enterprises also should “[r]espect” employees’ freedom to join trade unions, “[c]ontribute” to the “abolition of child labor”, and end workplace discrimination.<sup>213</sup> Other terms enounce high environmental, corruption, and consumer protection standards that corporations should follow.<sup>214</sup>

In two separate documents, the Global Compact (the Compact) and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms), the United Nations also has announced CSR guidelines. The Compact “asks companies to embrace, support and enact within their sphere of influence” ten core human rights, labor, environmental, and anti-corruption values that are derived from international treaties.<sup>215</sup> While the Compact states lofty goals, its vagueness and lack of enforceability undermine its effectiveness.<sup>216</sup> These weaknesses, common to CSR codes that IGOs and corporations develop, have strengthened calls for “holding companies accountable through legal rules for the human rights and environmental impact of their policies,” an idea echoed in the UN Norms.<sup>217</sup> The UN Norms assert that, although “[s]tates have the primary responsibility... to protect human rights, transnational corporations and other business entities, as organs of society” under the Universal Declaration of Human Rights, must also secure human rights “[w]ithin their respective spheres of activity and influence....”<sup>218</sup> Using legally binding language, the Norms declare that corporations “shall” ensure non-discriminatory treatment, security of persons, workers’ rights, respect for human rights and national sovereignty, and environmental protections.<sup>219</sup> However, states have not yet adopted the Norms, and they are not in force.<sup>220</sup>

212. OECD Guidelines for Multinational Corporation: Revision 2000, art. 2(2), June 27, 2000, 40 I.L.M. 237, 240 available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> [hereinafter OECD Guidelines].

213. *Id.* at art. 4.

214. *Id.* at arts. 5-7.

215. UNITED NATIONS, GLOBAL COMPACT, TEN PRINCIPLES, available at <http://www.unglobalcompact.org> (Feb. 3, 2007) [hereinafter Global Compact]. The Ten Principles are pulled from the Universal Declaration of Human Rights, The ILO’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN Convention Against Corruption.

216. *Id.*

217. United Nations High Commissioner for Human Rights Mary Robinson, Address at University of Tubingen Second Global Ethic Lecture (Jan. 22, 2002), available at [http://www.weltethos.org/st\\_9\\_xx/9\\_144.htm](http://www.weltethos.org/st_9_xx/9_144.htm).

218. See, U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Promotion and Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *UN Norms*].

219. *Id.* at 2-14.

220. See Office High Comm’r Human Rights, *Human Rights Resolution 2005/69*, U.N. Doc. E/CN.4/RES/2005/69 (Apr. 20, 2005) (requesting “the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises, for an initial period of two years . . . [t]o identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights); Larry Cata Backer, *Multinational Corporations, Transnational Law: The*

Finally, while the ILO always has protected worker's rights,<sup>221</sup> in recent years it has imposed more corporate social responsibilities directly on employers. For example, the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy establishes a comprehensive framework of employment promotion, training, wage, workplace safety and security, and collective bargaining standards for MNCs in developing countries to follow, with the goal of "encourag[ing] the positive contributions which multinational enterprises can make to economic and social progress..."<sup>222</sup> More recently adopted, the ILO Declaration on Fundamental Principles and Rights at Work "[d]eclares that all Members... have an obligation... to respect, to promote and to realize, in good faith the principles concerning the fundamental rights of ILO Conventions."<sup>223</sup> These rights include "freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation."<sup>224</sup>

The 1995 Mines Convention requires employers to "eliminate risks" and to "ensure that the mine... provide[s] conditions for safe operation and a healthy working environment."<sup>225</sup> Recognizing that undeveloped laws in host countries may not protect employees, the Mines Convention also provides that, "where appropriate," employers must supplement national standards with "technical standards, guidelines or codes of practice."<sup>226</sup> Likewise, under the 2001 Agriculture Convention, employers must "ensure the safety and health of workers in every aspect related to work."

### C. Voluntary Corporate Codes of Conduct

Finally, many corporations have drafted and implemented voluntary, self-imposed codes of conduct. The Sullivan Principles, one of the first CSR codes

*United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUMAN RIGHTS L. REV. 287, 298 (2006).

221. See, e.g., Constitution of the International Labor Organization, June 28, 1919, 49 Stat. 2712, 15 U.N.T.S. 35; Convention Concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, 68 U.N.T.S. 17; Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257.

222. International Labor Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labor Office, 204th Sess., Nov. 1977, as revised by the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ILO, 279th Sess., Nov. 17, 2000 [hereinafter Tripartite Declaration], available at <http://www.ilo.org/public/english/employment/multi/download/english.pdf>.

223. International Labor Organization, Declaration on Fundamental Principles and Rights at Work and Its Follow-Up, adopted by the International Labor Conference, 86th Sess., 18 June 1998, art. 2 [hereinafter ILO Declaration on Rights at Work], available at [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static\\_jump?var\\_language=EN&var\\_pagename=DECLARATIONTEXT](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT).

224. *Id.*

225. Convention Concerning Safety and Health in Mines, June 22, 1995, arts. 6-7, S. TREATY DOC. NO. 106-8 (1999), 2029 U.N.T.S. 209, 212 [hereinafter Mines Convention].

226. *Id.* at 211.

MNCs voluntarily adopted, was developed to help promote ethical corporate behavior in South Africa during apartheid.<sup>227</sup> Since formation of the Sullivan Principles, many MNCs have written and passed their own CSR codes.<sup>228</sup> These codes vary greatly. While some merely describe good practices to which the corporation should aspire, others state specific human rights principles.

Royal Dutch Shell's CSR code states broad principles, emphasizing the importance of "be[ing] good neighbors" to local communities, "respect[ing] the human rights of [its] employees", and "conduct[ing] business as responsible corporate members of society."<sup>229</sup> Similarly, YUM! Brands Inc, owner of Pizza Hut, Taco Bell, and Kentucky Fried Chicken, has a loosely worded Supplier Code of Conduct stating that suppliers "are expected to ensure that their workers have safe and healthy working conditions" and "should not use workers under the legal age for employment for the type of work being performed."<sup>230</sup> Conversely, The Gap's Vendor Code of Conduct contains eight articles that set specific standards for its vendors and factories. Its code outlaws discrimination based on "race, color, gender, nationality, religion, age, maternity, or marital status" in a manner that largely comports with articles 2 and 23 of the Universal Declaration of Human Rights, and prohibits "involuntary labor of any kind" in a manner that largely comports with article 8 of the International Covenant on Civil and Political Rights.<sup>231</sup> Although less detailed than The Gap's Code of Vendor Conduct, Adidas' Workplace Standards specifically state that "[b]usiness partners must not employ children who are less than 15 years old" and that "[w]ages must equal or exceed the minimum wage required by law or the prevailing industry wage, whichever is higher."<sup>232</sup>

#### D. Conclusion

Attention on human rights abuses associated with the activities of multinational corporations has increased over the past decade. Corporations have been censured for participation in and failure to prevent extra-judicial killings, environmental degradation, labor rights violations, and other human rights abuses.

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227. Henry J. Richardson III, *Reverend Leon Sullivan's Race, Principles, and International Law: A Comment*, 15 TEMPLE INT'L AND COMP. L.J. 55, 57-61 (describing how the Sullivan Principles required corporations to give their black workers in South Africa "the same rights, treatment, advancement, and employment benefits as would be basically required in the United States under its constitutional equal protection standards," and required corporations to undertake infrastructure projects for the benefit of their workers).

228. Natasha Rossell Jaffe & Jordan D. Weiss, *The Self-Regulating Corporation: How Corporate Codes Can Save Our Children*, 11 FORDHAM J. CORP. & FIN. L. 893, 909-10 (2006).

229. Shell Code of Conduct, available at [http://www.shell.com/static/envirosoc-en/downloads/making\\_it\\_happen/our\\_commitments\\_and\\_standards/code\\_of\\_conduct/english.pdf](http://www.shell.com/static/envirosoc-en/downloads/making_it_happen/our_commitments_and_standards/code_of_conduct/english.pdf).

230. YUM! Brands, Inc., Supplier Code of Conduct, available at <http://www.pizzahut.com/SupplierCode.aspx>.

231. International Covenant on Civil and Political Rights, Dec. 19. 1966, art. 8(3), 999 U.N.T.S. 171; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Resolutions, Part I, U.N. Doc. A/810 (1948); Gap Inc. Code of Vendor Conduct, Arts. III, IV, available at [http://www.gapinc.com/public/documents/code\\_vendor\\_conduct.pdf](http://www.gapinc.com/public/documents/code_vendor_conduct.pdf).

232. Adidas Group, Workplace Standards, available at [http://www.adidas-group.com/en/sustainability/Overview/our\\_standards/standards\\_of\\_engagement.asp](http://www.adidas-group.com/en/sustainability/Overview/our_standards/standards_of_engagement.asp).

In response, IGOs and MNCs have accepted that corporations should be held accountable to citizens of developing countries for their actions and have adopted non-binding CSR measures. The process of developing and analyzing these measures has furthered dialogue on the form a CSR code should take. When viewed in light of the trend towards placing greater responsibilities on corporations, beginning with the FCPA and extending to SOX, and in light of the rise of SO governments in Latin America, the adoption of CSR codes by intergovernmental organizations and MNCs suggests the international community is moving towards developing a binding code of corporate social responsibility.

#### V. THE FINAL FRONTIER: A CODE OF CORPORATE SOCIAL RESPONSIBILITY

Although the international community is moving toward creating a binding CSR code, designing such a code will be difficult. Various hurdles complicate and block its development. These hurdles include MNCs' ambiguous responsibilities under international law,<sup>233</sup> disagreement over the degree to which corporations may pursue goals other than maximizing profit,<sup>234</sup> corporate resistance to costly CSR regulations,<sup>235</sup> developed states' reluctance to impose CSR regulations on their multinationals,<sup>236</sup> many developing states' resistance to measures that might hurt their competitiveness as a destination for FDI vis a vis other states,<sup>237</sup> and still other obstacles as well. As countries, IGOs, and scholars debate whether a binding CSR code is both palatable and possible, and disagree over the structure such a code should take, they must balance the competing interests that complicate development a CSR code.

Below, I propose a framework for an enforceable CSR code. This framework does not analyze and resolve every problem countries, corporations, and civil society organizations will encounter as they construct a binding CSR code. However, this framework does present a novel, potentially useful structure for developing and implementing an enforceable code of corporate social responsibility.

##### A. *Weaknesses of Existing Corporate Social Responsibility Measures*

The social responsibility measures countries and corporations have adopted in recent years are praiseworthy. They recognize that corporations not only have a responsibility to maximize profits, but also to protect their workers, communities, and surrounding environments. Nonetheless, various weaknesses limit the effectiveness of existing CSR measures.

The voluntary guidelines that states and IGOs have enacted are unenforceable.<sup>238</sup> Countries and corporations that sign these measures do not

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233. See Ratner, *supra* note 19, at 511.

234. See Backer, *supra* note 220, at 298-99.

235. Sorcha MacLeod, *Corporate Social Responsibility Within the European Union Framework*, 23 WIS. INT'L L.J. 541, 551-52 (2005).

236. Backer, *supra* note 220, at 381-83.

237. Guzman, *supra* note 18, at 671-74.

238. See EU Code, *supra* note 205; *Green Paper*, *supra* note 208; *Voluntary Principles*, *supra* note 209; *OECD Guidelines*, *supra* note 212; *Global Compact*, *supra* note 215; *U.N. Norms*, *supra* note 218.

accept binding obligations. Thus, countries and corporations can sign to curry political capital, and then choose the degree to which they will abide by their gratuitous promises. Furthermore, these codes are universal, applying identical standards to all countries regardless of each country's particular culture, needs, and resources.<sup>239</sup> This approach eschews reality in favor of utopian, largely western measures that corporations in many states cannot fulfill.

For example, it is naive to believe that foreign subsidiaries of U.S. firms operating in Saudi Arabia could comply with western employment discrimination standards, or that a CSR code could eradicate child labor in Africa and Asia. If employment discrimination were outlawed universally and discrimination against women in Saudi Arabia occurred, the code's enforcement body would face two unappealing choices: it could prosecute the transgressing MNC, offending Saudi sovereignty and values, or it could exculpate the MNC, undermining the enforcement body's authority and legitimacy.<sup>240</sup> Furthermore, universal compliance could cause more harm than good. "In the poorest nations an abrupt halt to child labor is likely to cause children to suffer acute poverty and hunger," and may push children into black market labor and prostitution.<sup>241</sup> Placing stringent, western environmental standards on developing countries, standards many developed states have begun to follow only during the last ten years, would protect the environment while retarding economic growth.<sup>242</sup>

Corporations' CSR codes pose even greater enforcement difficulties. These guidelines not only are self-drafted and self-adopted, but also self-enforced, leaving corporations to implement, monitor, and enforce them in a perverse concentration of power.<sup>243</sup> Moreover, voluntary corporate codes apply only to the small percentage of MNCs that create them, offer a moral platform for egregious rights abuses,<sup>244</sup> and either may not reach foreign subsidiaries or only reach foreign subsidiaries.<sup>245</sup>

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239. See EU Code, *supra* note 205; OECD Guidelines, *supra* note 212; *U.N. Norms*, *supra* note 218.

240. Consider that the U.N. and international community have failed to prevent mass killings in recent years in Bosnia, Rwanda, Somalia, Iraq, Lebanon, and Darfur. See STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 56 (2d ed., 2001).

241. Kaushik Basu, *Compacts, Conventions, and Codes: Initiatives for Higher International Labor Standards*, 34 CORNELL INT'L L. J. 487, 491 (2001).

242. Tracy M. Schmidt, *Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations' "Norms" Provide the Required Means?*, 36 CAL. W. INT'L L. J. 217, 220-21 (2005).

243. Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 401 (2005).

244. Richardson, *supra* note 227, at 58, 62.

245. Murphy, *supra* note 243, at 401; see e.g. Gap Inc. Code of Vendor Conduct, *supra* note 231; Adidas Group, Workplace Standards, *supra* note 232; The Coca Cola Company, Supplier Guiding Principles, available at [http://www.thecocacola.com/citizenship/supplier\\_guiding\\_principles.html](http://www.thecocacola.com/citizenship/supplier_guiding_principles.html).



*B. Proposed Framework for a Creating a Binding Code of Corporate Social Responsibility*

Analysis of the problems with existing CSR measures reveals that, while a CSR code must be legally binding to regulate corporations effectively, a code also must remain flexible to prevent self-implosion. Below, I propose a two-level framework, an implementation process, and an enforcement mechanism that can be used to construct a CSR code that is binding, pliant, and effective at holding MNCs legally accountable for the social impacts of their activities.

**1. Level One: Non-Binding, Universal Human Rights Standards**

The first level of a CSR code should state baseline, non-binding human rights standards. These standards should be phrased as aspirations that MNCs should strive to follow and states should promote. Level one standards could be modeled after the Global Compact, though should include more details than the Compact's ten general principles.<sup>246</sup> Level one should avoid the specific terms and binding language the UN Norms employ.<sup>247</sup> Provisions should define common political and bodily (e.g. slavery, rape, extrajudicial killings), labor (e.g. wages, child labor, occupational safety), social (e.g. indigenous people) and environmental (e.g. water and air pollution, damming) human rights standards. Articulating baseline standards will further dialogue and agreement on MNCs' human rights duties and provide structure for developing state-tailored, enforceable responsibilities in the second level of the proposed framework.<sup>248</sup>

**2. Level Two: Binding, State Specific Codes**

Level two should contain the code's substantive, binding terms. Because OECD countries produce a large majority of the world's multinational corporations and FDI, I suggest matching one representative from an OECD country with one representative from each non-OECD, ratifying host state (host state).<sup>249</sup> Together, through input from MNCs and civil society, these teams of two should adopt legally binding CSR duties based on level one's standards. These duties should regulate the activities of MNCs operating in each host state and should be tailored to each host state's unique needs, culture, and resources. This level must use enforceable, binding language ("MNCs shall..."), clearly informing states and MNCs that noncompliance will result in penalties.

By tailoring binding measures to each country's dynamics, the code would account for different conceptions of an adequate standard of living, discrimination, and bribery. If child labor is needed in a given country to help feed and shelter families, that country's team of two may permit it under certain conditions that

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246. Global Compact, *supra* note 215.

247. *U.N. Norms*, *supra* note 218.

248. Bennett Freeman et al., *A New Approach To Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT'L. COMP. L. REV. 423, 433-35 (2001).

249. *Outward FDI Flows (1970-2005)*, in UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2005: TRANSNATIONAL CORPORATIONS AND THE INTERNATIONALIZATION OF R&D (2005) (reporting that, in 2005, 83% of all FDI came from developed countries).

perhaps demand parental permission, prohibit overtime, and require MNCs to hire independent managers who monitor the treatment of children.<sup>250</sup> Countries plagued by corruption can enact stringent bribery laws while permitting generic occupational safety standards because their governments already address that issue. Thus, industry specific standards are not needed. Instead, country specific standards would provide flexibility while, at the same time, mandatory language would make adherence to these standards legally binding.

Some may contend flexibility will provide a platform for countries to set weak standards. However, a realistic approach tailored to each state's unique history, resources, cultures, and needs is vital; compliance with modest but realizable standards is better than disregard for unattainable ideals.<sup>251</sup> Moreover, the code can prevent the watering down of human rights duties by pairing together OECD and host state representatives whose countries have few investment connections, and thus little interest in collusion. Every few years the teams of two should evaluate the customized duties. If tighter child labor laws are needed, the government can enact such measures; if the cost of living has increased, the teams can raise minimum wages.

Others may contend host states competing for FDI would not ratify a code that regulates MNCs more closely and, in turn, hurts their competitiveness vis a vis other countries.<sup>252</sup> However, a code can encourage ratification through an investment freeze that prohibits ratifying states from making new investments in non-ratifying countries. An investment freeze would goad states that have not ratified the treaty to ratify it through fear of stagnant foreign investment. As more states ratify, non-ratifying states would become increasingly isolated. Faced with either isolation or integration, many states would choose integration and ratify the code knowing their sovereignty, cultures, economy, and needs would not be jeopardized. Still, the details of an investment freeze would need refinement to prevent ratifying states from losing investment opportunities. Perhaps the freeze should be implemented after fifty states have ratified the code, or limited to certain sectors of each non-ratifying state's economy.

### 3. The Code Committee

An executive body should oversee the code's procedural niceties, implementation, monitoring, and enforcement. I suggest creating a code committee to handle these tasks. The committee could consist of 11 members representing the four major stakeholder groups – corporations, developed countries, developing countries, and civil society – and could be elected by ratifying states every few years, with one vote per state. Four members should hail from OECD states, three from developing states, and two each from MNCs and

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250. See Basu, *supra* note 241, at 491 (noting that “[p]arents do not typically send their children to work out of sloth but rather out of desperation.”).

251. See *Id.* at 496 (emphasizing the need for democratization of international organizations in order to account for the interests of developing states).

252. Guzman, *supra* note 18, at 671-74.

NGOs. This arrangement would balance power within the committee and prevent an individual stakeholder group from assuming control.

The committee could be charged with various tasks. It could approve all OECD and host state “teams of two” in order to combat collusion between OECD countries and host states and ensure representatives are disinterested. The committee also could field complaints about countries’ level two codes, such as allegations that a code is watered down or ignored, and either resolve the issue amicably or refer it to a tribunal. Amendments to procedural matters, such as the process for selecting country representatives, committee members, and tribunal members, and amendments to substantive matters, such as increases in level one’s baseline standards, could be approved by a majority vote of the committee. As the code is drafted and implemented, additional responsibilities would be conferred upon the committee.

#### 4. Enforcement

States’ level two human rights obligations must be legally binding and enforceable. Unenforceable obligations lack capacity to punish violations and foment change; perhaps galvanizing MNCs around shared norms, but failing to ensure that practice follows speech.<sup>253</sup> Empowering a tribunal with enforcement authority will deter violations, promote responsible corporate activity, and compensate the injured. Moreover, consistent and fair enforcement will increase the code’s legitimacy, preventing the emasculation and loss of authority that plague many international treaties.

Any entity, including individuals, NGOs, businesses, and states, should be allowed to bring a complaint alleging a corporation violated its level two corporate social responsibilities. The code should require complaints to be brought initially before the representative of the host state where the supposed violation occurred and that representative’s OECD counterpart. Because MNCs often do not intend to violate human rights and, especially when violations are committed by contractors or licensees, MNCs may not be aware that violations are occurring, the team of two should discuss the situation with the MNC and attempt to resolve it amicably.<sup>254</sup> If the MNC accepts responsibility and works with the team of two in creating and implementing a solution, referral to a tribunal would not be necessary.<sup>255</sup> This initial, non-confrontational process is fashioned after the OECD’s national contact points system.<sup>256</sup> It would be an efficient, cost-effective, and fair method of settling many complaints, especially baseless claims, minor infractions, and violations corporations are willing to address. The country

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253. Elisa Westfield, *Globalization, Governance, and Multinational Corporations: Corporate Codes of Conduct in the 21st Century*, 42 VA. INT’L L.J. 1075, 1078 (2002).

254. See Ratner, *supra* note 19, at 518-520 (noting that corporations can have varying levels of knowledge of rights abuses based on how much control parents have over their subsidiaries).

255. See e.g., Voluntary Principles, *supra* note 209 (establishing a voluntary guide that encourages collaboration between the extractive industry and host states).

256. OECD Guidelines, *supra* note 212, at Part 2: Implementation Procedures of the OECD Guidelines for Multinational Corporations, art. I.

representatives should report to the committee every six months on the corporation's compliance with remedial measures.

In some cases, however, human rights violations may be especially egregious, the corporation may deny responsibility, or the team of two may disagree on an appropriate resolution. An informal enforcement process would not be adequate in such instances. Instead, the complaint should be referred to a tribunal that adjudicates alleged code violations. Each ratifying country could nominate one judge who, after receiving the committee's approval, would be available to serve on tribunals. Seven judges could decide each case by majority vote; perhaps two nominated by the host state, two by the home state, two by the complainant, and one by the MNC, to ensure fair representation. All MNCs incorporated as businesses in ratifying states would be subject to the court's jurisdiction, allowing the court to collect money judgments from MNCs and grant injunctive relief.

Beyond these details, the committee would need to fine tune the judicial process and resolve difficult questions. May the committee or a tribunal override the OECD and host state representatives' enforcement decisions, either placing a claim on the tribunal's docket or releasing a case from tribunal back to the representatives? On how many tribunals may a single judge serve? How should tribunal proceedings be drafted? Would appeals be possible? What types of damages would be available? May tribunals enforce creative remedies, such as requiring a MNC to provide education for child laborers? May tribunals issue advisory opinions?

### *C. Conclusion*

Existing CSR codes have weaknesses, such as a lack of enforceability and a universal application, that limit their effectiveness. These weaknesses require a new framework for structuring a CSR code. The dual level approach presented in this section provides such a framework, placing legally binding duties on corporations while tailoring those duties to each country's individual culture, needs, and resources. The code committee and enforcement mechanisms strengthen the proposed framework's ability to regulate the social effects of corporate activities. Admittedly, this framework is not a panacea and leaves many questions unanswered. However, this section's goal is not to propose a final solution for structuring a CSR code. Rather, it is to contribute to the discussion on how to place corporate social responsibilities on multinational corporations.

## VI. SUMMARY AND CONCLUSION

Over the past thirty years, as corporations have amassed wealth and power, the United States and the international community slowly have responded by placing greater responsibilities on corporations. First, a pandemic of corporate bribery prompted the United States to pass the Foreign Corrupt Practices Act in 1977, and to expand the act's jurisdiction and substance in 1998, placing various anti-bribery responsibilities on corporations. The international community followed suit, drafting similar measures. Soon after the U.S. and international community developed anti-corruption measures, corporate governance problems in the United States led to passage of the Sarbanes-Oxley Act. Sarbanes-Oxley places new duties on corporations, tightens regulations, and demands even greater

corporate responsibility. The U.K. and the EU also have grown concerned with corporate governance problems, and have adopted measures similar to SOX to solve these problems.

While states worldwide have been placing heightened responsibilities on corporations, governments throughout Latin America have adopted socialist-oriented policies. Their efforts to protect their workers and economies from harms that have accompanied the spread of multinationals in Latin America are consistent with interest in greater corporate social responsibility and a CSR code. At the same time, the international community and multinational corporations have drafted various non-binding measures that are rooted in the FCPA's and SOX's trend towards placing greater responsibilities on corporations, though these measures impose a new type of responsibility on MNCs – social responsibility for employees, communities, the environment, and society.

Although existing CSR measures are commendable, they also are unenforceable. If states, the international community, MNCs, and civil society truly wish to regulate the social problems that have accompanied corporations into developing countries, these stakeholders must work together to overcome weaknesses in existing measures and to develop a binding CSR code. This article offers a dual level framework for constructing such a code that hopefully can contribute to the dialogue on how to ensure that, as corporate power grows, corporate responsibility for workers, communities, and the environment will grow as well.