

TOWARDS A MORE REALISTIC VISION OF CORPORATE SOCIAL  
RESPONSIBILITY THROUGH THE LENS OF THE *LEX MERCATORIA*

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*Globalization has led to a shift in power away from states and towards the private sector, which has resulted in multinational corporations taking a place among the most powerful international actors. This phenomenon has had many positive consequences, but it has also resulted in human rights, labor, and environmental abuses in developing nations. Such abuses are inconsistent with the way these multinationals behave at home and have led to a subsequent call for increased corporate social responsibility (“CSR”) through enforceable norms. Though there is substantial agreement as to the contents of CSR norms, there is little such accord where enforcement is concerned. Some have suggested that binding CSR norms will ultimately emerge from multinational corporations themselves along the lines of the *lex mercatoria*. This article seeks to counter that argument by suggesting that, even if the traditional narrative of the *lex mercatoria* is true—an assertion upon which considerable doubt has been cast—modern multinational corporations are not likely to take the lead in developing and enforcing such norms. This is because, while *lex mercatoria* norms tend to increase profits and reduce liability, CSR norms tend to shrink margins and expose corporations to an additional form of liability. From this assertion, the article concludes that political and macroeconomic developments are likely to overtake legal and normative developments, particularly those emanating from the corporate suite, in leading to corporate responsiveness to a broader community of stakeholders.*

I. INTRODUCTION

When an American court hears a medical malpractice tort claim, it applies the professional standard of care to the doctor’s actions to

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determine liability.<sup>1</sup> This standard requires the court to look into the prevailing practice of doctors who are similarly situated to the defendant to determine whether or not the doctor-defendant was negligent in a particular case. Centuries from now, when legal historians look back at the widespread application of the professional standard of care as applied to doctors in the United States of America, they are unlikely to conclude a multi-state, American *lex doctoria* created independently binding legal norms governing a doctors' treatment of patients, despite the prevalence of different state courts using the doctor's custom to determine legal liability. Rather, these historians will conclude that twenty-first century courts applied the legal standard of reasonableness, looking into the custom of doctors as factual matter to support their legal argument, as was indeed the case.

Yet the existence of mercantile custom and the explicit insertion of that custom into medieval mercantile disputes have led to the conclusion that there was an international *lex mercatoria* that created independently binding legal obligations. Some scholars have even gone so far as to use the concept of the *lex mercatoria* to characterize norms of corporate social responsibility ("CSR"). This paper argues that, even if the prevailing characterization of *the lex mercatoria* is historically accurate, an extension of this characterization to norms of corporate social responsibility is unfounded. To characterize corporate social responsibility norms as a new *lex mercatoria* is to ignore the stubbornness of the shareholder primacy model of the corporation as well as the practical effects of CSR norms on a given corporation.

Where actual implementation is concerned, market-driven CSR norms have been the most successful in shaping corporate behavior. This is mainly because multinational corporations find themselves outside the reach of home country laws,<sup>2</sup> host country laws,<sup>3</sup> and international law. These corporate actors generally adhere to the

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1. See, e.g., FLA. STAT. § 766.102(1) (2012) (defining the professional standard of care as: "The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."); *Bearce v. Bowers*, 587 S.W.2d 217, 218 (Tex. App. 1979), (citing *Bowles v. Bourdon*, 219 S.W.2d 779, 785 (Tex. 1949)) ("In order for this [medical malpractice] suit to have reached the jury, Bearce was required to present competent evidence by a doctor of the same school of practice as Dr. Bowers that the treatment complained of was negligence . . . . Therefore it was necessary for Bearce to establish through a medical expert a professional standard of care so the jury could determine whether Dr. Bowers' treatment deviated from that standard so as to constitute negligence or malpractice.").

2. "Home country" refers to the country where the multinational corporation is incorporated.

3. "Host country" refers to the country in which the multinational corporation operates.

shareholder primacy model of the corporation in which managers' only goal is to maximize shareholder returns. Some scholars view the success of market-driven CSR norms to suggest that the larger world of corporate social responsibility is properly seen as a new *lex mercatoria*.<sup>4</sup> Under this characterization, CSR norms will become so widespread that they crystallize into independently binding legal norms later applied by government-sanctioned courts.<sup>5</sup> The application of modern market-driven CSR norms, as well as the respective natures of *lex mercatoria* and CSR norms more broadly, makes it unlikely that this optimistic phenomenon will materialize.

Because ancient *lex mercatoria* norms fall directly in line with a corporation's desire to maximize profits and minimize liability and CSR norms tend to cut into profits and expose the corporation to new forms of liability, the marketplace embraced the former but will reject the latter to the extent that it impedes shareholder value. Nonetheless, exploring the contrast between the *lex mercatoria* and corporate social responsibility remains a useful exercise. Such exploration helps to illuminate both the need for binding CSR norms and the fact that such norms are more likely to come from the broader international community than from within the executive suite.

Part II describes the varying interpretations of the *lex mercatoria* and ultimately characterizes it as a blank canvas upon which scholars and commentators may paint their own desires for the concept. Part III describes the history, evolution, and enforcement mechanisms for establishing corporate social responsibility norms, as well as their respective merits and shortcomings. Part IV looks at the application of market-driven CSR norms and concludes that, though they have been the most successful in coercively binding corporations to norms of corporate social responsibility on a large scale, such market-driven CSR norms are better explained by the shareholder primacy model of the corporation than a deviation from that model in favor of social responsibility. Market-driven CSR norms tend to emerge in the presence of a consumer base that explicitly values corporate social responsibility over low price, in the wake of an egregious and widely publicized CSR atrocity, or both, and as such are likely to be adopted by

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4. See Reza Banakar, *Reflexive Legitimacy in International Arbitration*, in EMERGING LEGAL CERTAINTY: EMPIRICAL STUDIES ON THE GLOBALIZATION OF LAW 347, 374-79 (Volkmar Gessner & Ali Cem Budak eds., 1998); Joe W. Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J.L. & PUB. POL'Y 334, 357 (2009); Ralph G. Steinhardt, *Soft Law, Hard Markets: Competitive Self-Interest and the Emergence of Human Rights Responsibilities for Multinational Corporations*, 33 BROOK. J. INT'L L. 933, 951 (2008). But see Eric Engle, *Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations*, 40 WILLAMETTE L. REV. 103, 118-20 (2004).

5. See sources cited *supra* note 4.

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a small minority of corporate actors. Part V argues that, because of a dubious historical foundation and opposite financial and economic consequences, CSR norms are not likely to develop along the supposed lines of the *lex mercatoria*. Instead, Part VI asserts a continued need for the international community to develop coercive, binding CSR norms to deal with the worst abusers and suggests that macroeconomic and political developments are likely to overtake legal developments and in the creation of binding CSR norms. Part VII concludes.

II. THE BLANK CANVAS THAT IS THE *LEX MERCATORIA*

*Lex mercatoria*, or “the law merchant,” refers to a set of mercantile customs that began voluntarily within the merchant community but eventually crystallized into binding norms.<sup>6</sup> The concept of the *lex mercatoria* is one of the most obscure concepts in international law. In fact, only two certainties surrounding the *lex mercatoria* and its history truly exist. The first certainty is that “[i]nternational trade is in some measure a constant thing.”<sup>7</sup> The story of the *lex mercatoria* has its roots in medieval Europe, but it is a matter of historical fact that the Europeans traded with the Arabs during the Crusades and “before the Arabs came the Romans, and before the Romans the Greeks, and before the Greeks the Phoenicians.”<sup>8</sup> As long as human beings have been able to travel across borders they have engaged in international commerce.

The second certainty is that cross-border merchants had a set of customs through which they dealt with one another, and this set of customs became known as the *lex mercatoria*. Indeed, the concept of *lex mercatoria* is recognized in The Hague and Vienna Conventions on the International Sale of Goods<sup>9</sup> and is explicitly incorporated into the United States’ Uniform Commercial Code.<sup>10</sup> More recently, the concept of *lex mercatoria* has played a central gap-filling role in international arbitration.<sup>11</sup> The application of *lex mercatoria* is seen as preferable to national law because of the uncertainty and one-sidedness inherent in

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6. Christine Stammel, *Back to the Courtroom? Developments in the London Reinsurance Market*, in EMERGING LEGAL CERTAINTY, *supra* note 4, at 84-85.

7. WYNDAM ANSTIS BEWES, THE ROMANCE OF THE LAW MERCHANT: BEING AN INTRODUCTION TO THE STUDY OF INTERNATIONAL AND COMMERCIAL LAW WITH SOME ACCOUNT OF THE COMMERCE AND FAIRS OF THE MIDDLE AGES 1-2 (Fred B. Rothman & Co. 1986).

8. *Id.* at 2.

9. Berthold Goldman, *The Applicable Law: General Principles of Law – the Lex Mercatoria*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113, 113 (Julian D.M. Lew ed., 1987); Karyn S. Weinberg, *Equity in International Arbitration: How Fair is “Fair”? A Study of Lex Mercatoria and Amiable Composition*, 12 B.U. INT’L L.J. 227, 229 (1994).

10. U.C.C. § 1-103(b) (2011) (“Unless displaced by the particular provisions of this chapter, the principles of law and equity, including the law merchant . . .”).

11. Weinberg, *supra* note 9, at 252.

the latter.<sup>12</sup> These two certainties, the existence of ancient international trade and the fact that a body of law came to govern that trade, are clear, but drawing a logical connection between these certainties and characterizing that connection has proven to be highly problematic. Attempts over many centuries to characterize the *lex mercatoria* have been so disparate that the concept has essentially become a blank slate upon which scholars and practitioners project their beliefs about the nature of international trade and the regulation of such trade.

### A. The Character of *Lex Mercatoria*

The centuries-old debate surrounding the *lex mercatoria* has been riddled with ambiguities regarding the definition, importance, contents, and current state of the concept.

#### 1. *Definitional Ambiguity*

An American court has defined the concept not as a set of laws, but rather principles and custom that result from “general convenience” and “a common sense of justice.”<sup>13</sup> One scholar defined *lex mercatoria* as the sum total of customary international law, interstate, and state law relating to international trade.<sup>14</sup> Still another views it as a set of general principles of commercial law, which operates in a similar fashion as “general principles of law recognized by civilized nations” as described in Article 38(1) of the Statute of the International Court of Justice.<sup>15</sup>

#### 2. *Ambiguity in Attributed Importance*

With such definitional ambiguity, it should come as no surprise that there is disagreement regarding the importance of the *lex mercatoria*. On one end of the spectrum lies the notion that *lex mercatoria* is an inexorable part of transnational commercial law because domestic laws were not written with international trade in mind and are too deeply intertwined with a national culture, history, and values system to serve as the governing principles for international relationships.<sup>16</sup> On the other end of the spectrum lies the belief that *lex mercatoria* simply does not exist as a historical matter.<sup>17</sup>

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12. *Id.*

13. *Bank of Conway v. Stary*, 200 N.W. 505, 508-09 (N.D. 1924).

14. Goldman, *supra* note 9, at 113.

15. Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747, 749-50 (1985).

16. Tom Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 36 (Thomas E. Carbonneau ed., rev. ed. 1998).

17. Georges R. Delaume, *The Myth of the Lex Mercatoria and State Contracts*, in LEX MERCATORIA AND ARBITRATION, *supra* note 16, at 130-31.

2012 CORPORATE SOCIAL RESPONSIBILITY THROUGH *LEX MERCATORIA* 553*3. Diverging Lists of the Lex Mercatoria's Elements*

The prevailing wisdom among scholars is that it is impossible to produce an exhaustive list of the elements making up the *lex mercatoria*.<sup>18</sup> However, this has not stopped such scholars from attempting to do so. Some lists are relatively short,<sup>19</sup> and some are quite long,<sup>20</sup> but, in the end, any purportedly complete, substantive list

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18. *E.g.*, Lando, *supra* note 15, at 749.

19. Note, *General Principles of Law in International Commercial Arbitration*, 101 HARV. L. REV. 1816, 1826-33 (1988) (listing elements of *lex mercatoria* as: 1. A sovereign government may make and be bound by contractual agreements with foreign private parties; 2. The corporate veil may be pierced to prevent a beneficial owner from escaping contractual liability; 3. Force majeure justifies non-performance of a contract such that the loss is borne fairly by the parties; 4. Contracts that seriously violate bonos mores or international public policy are invalid; 5. Equitable compensation constitutes the primary remedy for damages; 6. The right of property and of acquired vested rights is generally inviolable—a State may not effect a taking without equitable compensation; 7. A party may not receive unjust enrichment).

20. The Rt. Hon. Lord Justice Michael Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, in LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE 174-77 (Maarten Bos & Ian Brownlie eds., 1987) (listing the elements of *lex mercatoria* as: “1. A general principle that contracts should prima facie be enforced according to their terms: *pacta sunt servanda*. The emphasis given to this maxim in the literature suggests that it is regarded, not so much as one of the rules of the *lex mercatoria*, but as the fundamental principle of the entire system; 2. The first general principle is qualified at least in respect of certain long-term contracts, by an exception akin to ‘*rebus sic stantibus*.’ The interaction of the principle and the exception has yet to be fully worked out; 3. The first general principle may also be subject to the concept of *abus de droit*, and to a rule that unfair and unconscionable contracts and clauses should not be enforced; 4. There may be a doctrine of *culpa in contrahendo*; 5. A contract should be performed in good faith; 6. A contract obtained by bribes or other dishonest means is void, or at least unenforceable. So too if the contract creates a fictitious transactions designed to achieve an illegal object; 7. A State entity cannot be permitted to evade the enforcement of its obligations by denying its own capacity to make a binding agreement to arbitrate, or by asserting that the agreement is unenforceable for want of procedural formalities to which the entity is subject; 8. The controlling interest of a group of companies is regarded as contracting on behalf of all members of the group, at least so far as concerns an agreement to arbitrate; 9. If unforeseen difficulties intervene in the performance of a contract, the parties should negotiate in good faith to overcome them, even if the contract contains no revision clause; 10. ‘Gold clause’ agreements are valid and enforceable. Perhaps in some cases either as gold clause or a ‘hardship’ revision clause may be implied; 11. One party is entitled to treat itself as discharged from its obligations if the other has committed a breach, but only if the breach is substantial; 12. No party can be allowed by its own act to bring about a non-performance of a condition precedent to its own obligation; 13. A tribunal is not bound by the characterization of the contract ascribed to it by the parties; 14. Damages for breach of contract are limited to the foreseeable consequences of the breach; 15. A party which has suffered a breach of contract must take reasonable steps to mitigate its loss; 16. Damages for non-delivery are calculated by reference to the market price of the goods and the price at which the buyer has purchased equivalent goods in replacement; 17. A party must act promptly to enforce its rights, on pain of losing them by waiver. This may be an instance of a more general rule, that each party must act in a diligent and practical manner to safeguard its own interests; 18. A debtor may in certain

of the contents of *lex mercatoria* is likely to be more reflective of the list creator's perspective than the *lex mercatoria* itself.

#### 4. Differing Conceptions of the Lex Mercatoria's Current State

The uncertainty that shrouds *lex mercatoria* also extends to the current state of the concept as well. One scholar sees the *lex mercatoria* primarily as an historical concept now controlled by positive law and accordingly "well settled."<sup>21</sup> Others see it as an ever-present, ever-evolving concept.<sup>22</sup> And still another views it as a complete illusion.<sup>23</sup> In sum, there is virtually no agreement surrounding the *lex mercatoria*, as reflected in the concept's definition, importance, substantive contents, and current state. There is similar discord surrounding the *lex mercatoria*'s history.

### B. The History of Lex Mercatoria

To the extent that there is any common wisdom surrounding the history of *lex mercatoria*, that wisdom says that it came about in Italy in the central part of the Middle Ages and was founded on Roman and canon law.<sup>24</sup> Then, around the turn of the seventeenth century, European courts began to recognize a "novel principle"; mercantile custom could actually create an independent, binding legal obligation irrespective of relevant positive law.<sup>25</sup> Thus, what once was voluntary custom became binding law in and of itself. There are, however, credible and widely read historical accounts that both extend and limit this prevailing historical narrative.

#### 1. Extending the Traditional Narrative

One historical characterization extends the traditional narrative around the *lex mercatoria* by asserting that it pre-existed the middle ages and began at least as early as the writing of the Hebrew Bible. Bewes's *The Romance of the Law Merchant* first advanced this view.<sup>26</sup> Bewes believed that by the time medieval Europeans began to incorporate the *lex mercatoria* into their own customs, that body of mercantile custom was already "centuries standing" in the Arab

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circumstances set off his own cross-claims to extinguish or diminish his liability to the creditor; 19. Contracts should be construed according to the principle *ut res magis valeat quam pereat*; 20. Failure by one party to respond to a letter written to it by the other is regarded as evidence of assent to its terms").

21. See FILIP DE LY, *INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA* 208 (1992).

22. *Id.*, at 213 (describing the work of Berthold Goldman).

23. Keith Hight, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613, 623 (1989).

24. BEWES, *supra* note 7, at 1.

25. J. H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295, 295-98 (1979).

26. BEWES, *supra* note 7, at 2.

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world.<sup>27</sup> Bewes uses both historical accounts and the prevalence of Arabic in the English language of commerce as evidence of medieval European trade with the East,<sup>28</sup> and he uses the first certainty surrounding the *lex mercatoria* – that “[i]nternational trade is in some measure a constant thing” – as evidence that mercantile customs long pre-existed such trade.<sup>29</sup> Bewes goes so far as to ask whether it was not possible that “the practice of insurance existed [in ancient times] but left little trace,”<sup>30</sup> but ultimately resigns himself to the notion that, while the West is indebted to the East for some of its mercantile law, “how much [it] shall perhaps never know.”<sup>31</sup>

### 2. Questioning the Extent of the Traditional Narrative

Another, more tempered, conception of the *lex mercatoria* questions the traditional narrative by suggesting that different cultures recognized the concept at different times. According to this version of the *lex mercatoria*, Medieval Northern Europeans were familiar with the term, but sixteenth century Italian Merchants were not.<sup>32</sup> While the proponent of this argument cited many Northern European references to *lex mercatoria* as such, he was unable to find a single reference to *lex mercatoria* in Benvenuto Stracca’s *De mercatura*, which is as surprising as it is revealing.<sup>33</sup> Written in 1553, *De mercatura* is thought to be the first comprehensive treaty on commercial law.<sup>34</sup> If the *lex mercatoria* was as important and omnipresent as the prevailing narrative suggests, it almost certainly would have been mentioned in the seminal sixteenth century European treatise on commercial law. This is especially true when one considers that an Italian wrote this treatise, whose countrymen supposedly played a crucial role in the *lex mercatoria*’s dissemination throughout Europe.<sup>35</sup> More basically, cross-border universality is an integral characteristic of the *lex mercatoria*. Thus its notable absence in *De mercatura* calls into question *lex mercatoria*’s existence more generally.

### 3. Denying the Traditional Narrative

The final historical characterization of the *lex mercatoria* takes the opposite position of Bewes’s and argues that the *lex mercatoria* is

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27. *Id.* at 8.

28. *Id.* at 10.

29. *Id.* at 1-2.

30. *Id.* at 63.

31. *Id.* at vi.

32. Charles Donahue, Jr., *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica*, 5 CHI. J. INT’L L. 21, 27 (2004).

33. *Id.*

34. *Id.*

35. *Id.* at 27-28.

essentially an historical fiction propagated by those seeking to romanticize the merchant class. One scholar notes that “[m]uch early writing on the [*lex mercatoria*] was characterized by an ideological, almost mystical zeal. It was advocatory rather than descriptive or analytical.”<sup>36</sup> In fact, the Right Honourable Sir Richard Atkin, in his Forward to Bewes’ *Romance of the Law Merchant* lamented that merchants were not associated with notions of romance and celebrated Bewes’s book’s potential to “not only create an interest in the past, but give a vision of the romance that attends the commerce of the present.”<sup>37</sup>

One scholar took a purely historical approach to the issue and came to the conclusion that the *lex mercatoria*, as understood today, is mostly the product of legend.<sup>38</sup> According to this author, the *lex mercatoria* was not a body of mercantile laws but rather an expedited process utilized by men who understood the inefficiencies of traditional courts and mutually agreed to avoid those inefficiencies.<sup>39</sup> He bases this argument on, *inter alia*, an examination of the oldest English treatise on *lex mercatoria*, published in the late thirteenth century, which states that the only difference between *lex mercatoria* and the common law are the speed of the process, the liability of pledges to answer, and the denial of wager of law as a means of establishing a negative.<sup>40</sup> According to this scholar, the *lex mercatoria* did not create any new obligations, but was merely a convenient way to discharge pre-existing obligations.<sup>41</sup> Contrary to the popular narrative, “[m]ercantile customs were either local facts [to be proved as such] or they were the common law of England,” and the speedy procedural aspects of the *lex mercatoria* were never adopted by English courts.<sup>42</sup>

Upon an examination of the debate surrounding the nature and history of the *lex mercatoria*, the concept seems more like a Rorschach test where scholars and practitioners project their own views of international commercial law than a concrete historical and sociological phenomenon from which similarly concrete lessons may be drawn. The *lex mercatoria* can be a millennia old mercantile tradition still operating as the central animating force of international commercial law today, an historical relic of mercantile convenience with no contemporary relevance, or anything in between. Depending upon what one wishes to

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36. Celia Wasserstein Fassberg, *Lex Mercatoria—Hoist with its Own Petard?*, 5 CHI. J. INT'L L. 67, 68 (2004).

37. The Right Honourable Sir Richard Atkin, *Forward* to BEWES, *supra* note 7, at iv.

38. See Baker, *supra* note 25, at 320-22.

39. *Id.* at 300, 303.

40. *Id.* at 300 (discussing LEX MERCATORIA as printed in THE LITTLE RED BOOK OF BRISTOL 57-58 (F. B. Bickley ed., Bristol 1900, vol. I)).

41. *Id.* at 303.

42. *Id.* at 321.

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assert about the *lex mercatoria*, he or she can find a plethora of scholarly and legal writing to support that preferred position.

## III. AN OVERVIEW OF CORPORATE SOCIAL RESPONSIBILITY

Unlike the *lex mercatoria*, the principle of corporate social responsibility (“CSR”) has both a clear history and relatively straightforward contents. The debate surrounding CSR instead lies in how the international community can ensure that corporations live up to the widely agreed upon principles of corporate social responsibility. More than any single incident of corporate misbehavior, macroeconomic forces accompanying globalization led to the widespread acceptance of the need for workable CSR norms. Between 1990 and 1997, the amount of capital spent abroad increased by over five hundred percent.<sup>43</sup> This increase came largely as a result of the proliferation of information technology and its ability to allow corporations to benefit from global supply chains like never before.<sup>44</sup>

While this phenomenon has led to benefits for the developing world in terms of a closing knowledge and resource gap,<sup>45</sup> it has also given multinational corporations unprecedented power relative to the countries in which they operate. Because MNCs’ resources tend to dwarf those of their host countries,<sup>46</sup> they tend to behave in ways that fall below standards of their domestic counterparts in dealing with the communities where they do business.<sup>47</sup> This seemingly perpetual asymmetry between multinational corporations and developing countries has led to an increased risk of corporate abuses abroad. As a result, the international community has worked hard to define the contents of corporate social responsibility and compel corporate and sovereign stakeholders to accept those contents both nominally and in practice.

**A. History of Corporate Social Responsibility**

The notion that corporate action could be considered an international criminal offense originated after the end of World War

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43. See Joseph Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT’L L. REV. 451, 474 (2007).

44. See, e.g., *Data, Data Everywhere*, THE ECONOMIST, Feb. 25, 2010, <http://www.economist.com/node/15557443>.

45. STIGLITZ, *supra* note 43, at 453.

46. See *id.* at 476 (noting that “[t]he annual revenues of General Motors are greater than the GDP of more than 148 countries; while Wal-Mart’s revenues exceed the combined GDP of sub-Saharan Africa, excluding South Africa and Nigeria”).

47. See *id.* at 476-79.

II.<sup>48</sup> At the Subsequent Nuremburg Trials held in 1945 and 1946 and conducted by a United States military commission, corporate officers of the I.G. Farben trust, the Flick trust, and the Krupp firm were indicted for crimes against humanity, war crimes, complicity in the crime of mass murder, and aiding and abetting the inhumane acts performed by the S.S.<sup>49</sup> In the United Kingdom in 1946, a British Military Tribunal convicted businessmen Karl Weinbacher and Bruno Tesch for aiding and abetting murder for their manufacture of gas used in Nazi concentration camps.<sup>50</sup> There, what was once thought a politically and legally neutral act, namely the manufacture and sale of a commodity, became an act through which indirect criminal liability could run.<sup>51</sup> Though the Nuremburg Trials were an important first step towards internationally recognized and enforced rules on corporate social responsibility, corporate actors continued to act with relative impunity for the next half-century.<sup>52</sup>

Unlike international human rights more generally, new legal norms dealing with corporations did not immediately begin to emerge following the Nuremburg Trials. Nonetheless, the idea that corporations should consider stakeholders other than its shareholders soon took hold. Less than a decade after the Nuremburg Trials, economist Howard Bowen coined the term “corporate social responsibility.”<sup>53</sup> According to Bowen, the notion of corporate social responsibility was not antithetical to the shareholder primacy model because he was convinced that economic benefits would flow from a corporation’s introduction of broader societal goals into its decision making process.<sup>54</sup>

Bowen’s work, combined with a marked increase in international trade, ultimately led to early efforts at corporate social responsibility in the form international treaties and domestic legislation. These early efforts were the result of developing countries’ worries that their national control would be diluted by the introduction of foreign direct

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48. See Wolfgang Kaleck & Miriam Saage-Maa, *Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges*, 8 J. INT'L CRIM. JUST. 699, 701 (2010).

49. See TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, vols. 6 (Flick), 7-8 (I.G. Farben), 9 (Krupp). Nuremberg (1951), available at [http://www.loc.gov/rr/frd/Military\\_Law/NTs\\_war-criminals.html](http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html).

50. United Nations War Crimes Comm'n, *The Zyklon B Case: Trial of Bruno Tesch and Two Others*, 1 L. REP. OF TRIALS OF WAR CRIMINALS 93, 93-102 (1947), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-1.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf).

51. *Id.* at 102.

52. See Kaleck & Saage-Maa, *supra* note 48, at 702.

53. Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT'L L. 41, 48-49 (2010).

54. *Id.*

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investment but still saw such investment as the only means towards economic progress.<sup>55</sup> This early period is exemplified by the United Nations Conference on Trade and Development's (UNCTAD's) Voluntary Code of Conduct for Transnational Corporations, the first of many voluntary codes of conduct, created in the early 1970's.<sup>56</sup>

Because these early efforts at CSR were not particularly effective in shaping corporate behavior, the 1980's and 1990's were characterized by "a self-regulating, profit-maximizing, shareholder-focused brand of corporate governance."<sup>57</sup> This period was fraught with ecological and social calamities that eventually led to increased pressure for a more binding brand of corporate social responsibility. Some well-known examples of corporate malfeasance that took place during this period include Unocal's criminal behavior in Myanmar, the Bhopal disaster in India, the Exxon Valdez oil spill, and Nike's widespread use of "sweatshops" in Asia.<sup>58</sup> These atrocities were handled in an ad hoc fashion, with tactics ranging from public pressure in the case of Nike,<sup>59</sup> to federal liability in the Ninth Circuit in the case of Unocal.<sup>60</sup> While the debate as to precisely how to create and enforce CSR norms that meaningfully affect corporate behavior continues, the need for such norms was painfully clear by the turn of the twenty-first century.

## B. Character of Corporate Social Responsibility

### 1. Defining Corporate Social Responsibility

Strictly speaking, no legally authoritative definition of corporate social responsibility exists.<sup>61</sup> However, a survey of several definitions demonstrates a common understanding as to the general nature of the concept. The United Nations Industrial Development Organization defines CSR as "the way a company achieves balance or integration of economic, environmental and social imperatives while at the same time addressing shareholder expectations."<sup>62</sup> The Canadian government notes that CSR applies to firms operating at home and abroad, and that a key feature of CSR lies in the way a corporation engages with its shareholders, employees, customers, suppliers, governments, NGOs and

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55. *Id.* at 49.

56. *Id.*

57. *Id.* at 50.

58. *Id.* at 51; Kaleck & Saage-Maa, *supra* note 48, at 702.

59. See *Nike FAQs*, GLOBAL EXCHANGE, <http://www.globalexchange.org/sweatfree/nike/faq> (last visited Oct. 5, 2011).

60. *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002).

61. MICHAEL KERR, RICHARD JANDA, & CHIP PITTS, CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS 5 (Chip Pitts ed. 2009).

62. *What is CSR?: Defining the Concept*, UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION, <http://www.unido.org/index.php?id=o72054> (last visited Apr. 15, 2012).

IGOs.<sup>63</sup> The European Commission largely echoes the United Nation's definition in its focus on social and environmental concerns but explicitly describes CSR as a voluntary concept.<sup>64</sup> The Department of Business, Innovation, and Skills of Great Britain adds a cost-benefit analysis to the European Commission's definition when it describes CSR as "voluntary actions that business can take, over and above compliance with minimum legal requirements" with the aim of "maximising [economic, social, and environmental] benefits and minimizing the downsides."<sup>65</sup> Broadly speaking, corporate social responsibility encompasses what John Elkington referred to as "the triple bottom line" of "people, planet, and profit."<sup>66</sup> In pursuing corporate social responsibility, corporations should consider the social and ecological impact of their business practices without ceasing to be a profit-generating entity.

## 2. *The UN's Ten Principles of CSR*

The most comprehensive and legally significant instrument detailing the contents of CSR is the United Nations Global Compact's Ten Principles of Corporate Social Responsibility.<sup>67</sup> The Ten Principles were officially launched on July 26, 2000 and have been endorsed by over 8,000 entities, including 135 countries,<sup>68</sup> making the Ten Principles the most widely acceded to voluntary CSR initiative in the world.<sup>69</sup> The Ten Principles are drawn from several multilateral treaties including the Universal Declaration of Human Rights, the International Labor Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.<sup>70</sup> Reference to these treaties not only bolsters the legal

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63. *Corporate Social Responsibility*, INDUSTRY CANADA, <http://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/home> (last visited Oct. 7, 2011).

64. Commission of the European Communities, *Green Paper: Promoting a European Framework for Corporate Social Responsibility*, ¶ 1, COM (2001) 366 final (July 18, 2001), available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0366en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366en01.pdf).

65. DEP'T FOR BUS. INNOVATION & SKILLS, CORPORATE RESPONSIBILITY REPORT 5 (2009), available at <http://www.bis.gov.uk/files/file50312.pdf>.

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

67. *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited, Oct. 7, 2011) (hereinafter *Ten Principles*).

68. *UN Global Compact Participants*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last visited, Oct. 7, 2011).

69. *Overview of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited, Oct. 7, 2011).

70. *Ten Principles*, *supra* note 67; see also Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); ILO Declaration on

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significance of the Ten Principles but also reminds states of their already existing obligations to human rights, labor rights, the environment, and non-corrupt business practices.

Where human rights are concerned, the United Nations Ten Principles of Corporate Social Responsibility states that corporations should support the protection of internationally recognized human rights and ensure that they are not complicit in the violation of such rights.<sup>71</sup> Regarding labor rights, the Ten Principles calls for business to uphold the freedom of association and the right to collective bargaining, eliminate all forms of compulsory, forced, and child labor, and eliminate all forms of discrimination in employment.<sup>72</sup> With respect to the environment, the Ten Principles state that businesses should take a precautionary approach to the environment that seeks to promote greater environmental responsibility and diffuse environmentally friendly technologies.<sup>73</sup> Finally, the Ten Principles clearly states that corporations “should work against corruption in all its forms, including extortion and bribery.”<sup>74</sup>

In sum, while the Ten Principles are nominally agreed upon, the breadth of agreement may result from the fact that they are voluntary and bind neither nation states nor corporations. In addition, the widespread agreement fails to even address the question of how these principles should be implemented. Indeed, where enforcement is concerned, the debate surrounding CSR begins to appear similar to that surrounding the *lex mercatoria*. There is such a wide spectrum of views on the enforcement of CSR norms – ranging from a purely voluntary approach to CSR to the establishment of corporate criminal liability in the International Criminal Court – that a proponent of any position can find ample support for that position in academic literature.<sup>75</sup>

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Fundamental Principles and Rights at Work and Annex, June 18, 1998, 37 I.L.M. 1233; United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (June 14, 1992); United Nations Convention Against Corruption, G.A. Res. 58/4; U.N. Doc. A/RES/58/4, (Oct. 31, 2003).

71. *Ten Principles*, *supra* note 67.

72. *Id.*

73. *Id.*

74. *Id.*

75. See, e.g., Eric Engle, *Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?*, 40 WILLAMETTE L. REV. 103, 106 (2004) (exploring “(1) marketplace activism (influence over or via capital structure and sales of the corporation), (2) internal self-regulation (codes of conduct), and (3) shareholder activism”); Mordechai Kremnitzer, *A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law*, 8 J. INT’L CRIM. JUST. 909, 910 (2010) (claiming “full justification to impose on corporations the rules of international law applicable to natural persons, especially the most basic ones concerning genocide, crimes against humanity and war crimes, and to regard them as accountable for respecting these rules”).

The key distinction between the disagreement surrounding corporate social responsibility and that surrounding the *lex mercatoria* is that the former consists of complementary options while the latter consists of mutually exclusive versions of the same story. The existence of voluntary CSR norms does not impede other efforts to shape corporate behavior, such as economic sanctions or civil liability. Each method of ensuring corporate compliance with internationally recognized social norms supplements the others. Conversely, the *lex mercatoria* is either an historical phenomenon in which voluntary norms were codified into binding law or is not. It is either in a state of flux or is totally settled. Thus, when considering the debate around methods for implementing CSR norms, one should view the debate as a menu of options and not a choice between competing views on the same subject.

### C. Implementation of Corporate Social Responsibility Norms

Each option advanced as a means toward implementing corporate social responsibility norms seeks to balance practical efficacy with political feasibility, and each approach inevitably favors one over the other. The range of policy options can be divided into four categories: international regulation, domestic regulation, civil liability, and market-driven self-regulation.<sup>76</sup> A brief description of each category is warranted to provide the context in which market-driven norms of corporate social responsibility exist and to illustrate the practical difficulty in imposing binding norms of corporate social responsibility upon corporations.

#### 1. International Regulation

As a means for creating binding CSR norms, international regulation is the most ambitious and legally challenging option. Proponents have therefore been unsuccessful in creating binding norms. The most ambitious of all international corporate regulations is international corporate criminal liability.<sup>77</sup> To establish such liability, Article 5 of the Rome Statute would have to be amended to expand ICC

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76. See generally Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in NON-STATE ACTORS AND HUMAN RIGHTS 177 (Philip Alston ed., 2005).

77. See, e.g., Kremnitzer, *supra* note 75, at 910; Joanna Kyriakakis, *Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare*, 19 CRIM. L.F., 115, 150 (2008) ("Arguments in favour of the better regulation of multinational corporations in their global activities, such as those outlined above, might support a reform of the ICC to include corporations in its jurisdiction in furtherance of the stated objectives of the Court, and so it is with such questions that the future reformers of the ICC Statute should be concerned.").

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jurisdiction to include legal, as well as natural persons.<sup>78</sup> This approach has not been successful, not only because of a lack of political will in developed countries to expose their corporations to such liability,<sup>79</sup> but also because international human rights law has developed according to the notion of state primacy in which states bear primary responsibility for the protection of the human rights of their citizens.<sup>80</sup> Furthermore, this approach is antithetical to the shareholder primacy model of the corporation, which states that a corporation's duty is to maximize shareholder profit.<sup>81</sup> Shareholder primacy is more than a dominant theoretical model for the corporation; it is seen by some as legal requirement for boards of directors in the United States of America.<sup>82</sup>

As a result of these doctrinal challenges, most of the international efforts consist of voluntary norms for corporations and multilateral agreements directed at states, exemplified by the UN's Global Compact discussed above.<sup>83</sup> While internationally developed sets of CSR norms represent an important part of the discussion, as they are indeed one option, in practice they create little opportunity for binding norms.

A third approach to international regulation of multinational corporations comes in the form of multilateral treaties, which avoid the complication of state primacy plaguing voluntary codes of corporate conduct, as they are aimed directly at states. The four most prescient treaties to CSR are those explicitly referenced by the Ten Principles: the Universal Declaration of Human Rights, the International Labor Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.<sup>84</sup> These treaties fail to result in binding norms emanating from the host state for precisely the same reason that corporate social responsibility is a problem in the first place – namely that host governments lack the capacity to protect their

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78. See Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, 2187 U.N.T.S. 90, available at <http://untreaty.un.org/cod/icc/statute/rome.htm>.

79. See Jordan Sundell, Note, *Ill-Gotten Gains: The Case for International Corporate Criminal Liability*, 20 MINN. J. INT'L L. 648, 676 (2011) (describing significant political challenges).

80. Steinhardt, *supra* note 4, at 933.

81. *Id.*

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

83. *Ten Principles*, *supra* note 67.

84. See *id.*

citizens from corporate abuses. Thus, where these multilateral treaties are needed most, the relevant state parties do not enforce them.

## 2. Domestic Criminal Regulation

In addition to calls for international regulation of MNCs, developed nations have used domestic mechanisms, including judicial action and legislation, to affect the actions of corporations doing business abroad. For example, a Dutch criminal court convicted businessman Frans van Anraat of aiding and abetting war crimes for supplying the Iraqi government with chemicals needed to manufacture mustard gas used against the Kurdish population.<sup>85</sup> More recently, the Hamburg Consumer Protection Agency filed charges of unfair competition in Heilbronn district court claiming that German discount retailer Lidl falsely advertised its products by claiming that it provided fair labor conditions to its workers in Bangladesh when an investigation uncovered that the claim was far from true.<sup>86</sup>

Domestic regulation of multinational corporations has also taken the form of legislation and executive orders, and some go so far as to call for developed countries to apply its corporate laws to the local parent companies of corporations operating overseas.<sup>87</sup> While this approach has not gained political traction, domestic legislation has been successful to a certain degree in regulating the actions of multinational corporations. The most important and successful example of such legislation is the United States' Foreign Corrupt Practices Act, which makes it illegal for any corporation that is publicly traded in the United States to bribe a foreign official.<sup>88</sup> This effort, initially seen as a hindrance to American multinationals, has become a model global standard.<sup>89</sup>

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85. *Public Prosecutor v. Van Anraat*, L<sup>JN</sup> AU8685, The Hague District Court, 23 Dec. 2005 at 13; BA6734, Gerechtshof's-Gravenhage, 2200050906-2, judgment of 5 Sept. 2007.

86. *Consumer complaint demands fair working conditions*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, <http://www.ecchr.de/index.php/lidl-case/articles/consumer-complaint-demands-fair-working-conditions.html> (last visited Oct. 12, 2011).

87. See, e.g., Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT'L L. 899, 903 (2008).

88. *Foreign Corrupt Practices Act of 1977*, 15 U.S.C. §§ 78dd-1 et seq (1998).

89. Angel Gurría, OECD Sec'y Gen., *Towards Coherence in International Economic Law: Perspectives at the 50th Anniversary of the OECD* (Mar. 23, 2011), available at [http://www.oecd.org/document/44/0,3746,en\\_21571361\\_44315115\\_47472044\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/44/0,3746,en_21571361_44315115_47472044_1_1_1_1,00.html) ("The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which is based on the U.S. Foreign Corrupt Practices Act, has outlawed foreign bribery in 38 countries. OECD's recognized 'gold standard' and strict monitoring mechanism puts key competitors closer in line with best practices."); Letter from Citizens for Responsibility and Ethics in Washington to the U.S. House of Representatives (Jan. 12, 2012), available at <http://www.scribd.com/doc/78161873/CREW-Foreign-Corrupt-Practices-Act-FCPA-Letter-to-Congress-01-12-12>

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The executive branch also has a role to play in ensuring compliance with human rights norms abroad. This role takes the form of trade sanctions, the most coercive method of ensuring compliance.<sup>90</sup> These trade sanctions commonly occur when a developed country, regional organization, or inter-governmental organization learns of widespread human rights violations occurring in a country and impose trade sanctions upon that entire nation.<sup>91</sup> These sanctions can be implemented quickly and at little or no cost,<sup>92</sup> but they have also been criticized for stifling a state's ability to pursue other human rights objectives.<sup>93</sup> In short, domestic regulation of multinational corporations are highly effective where they have been forcefully implemented, but such regulation is sparse and ad-hoc in nature, making them unacceptable for proponents of universally binding norms.

### 3. Domestic Civil Regulation

The third category of enforcement mechanisms for corporate social responsibility norms is a regime of civil liability. The Alien Tort Claims Act ("ATCA") in the United States exemplifies this regime.<sup>94</sup> The ACTA was enacted as part of the Judiciary Act of 1789 and vests original jurisdiction in United States District Court allowing an alien to bring a claim for the violation of the law of nations or a United States treaty.<sup>95</sup> In 1980, the United States Court of Appeals for the Second Circuit held that the ATCA could be invoked for human rights violations in *Filartiga v. Peña-Irala*.<sup>96</sup> There, the court held that a Paraguayan government official violated the Act when he tortured a citizen of Paraguay.<sup>97</sup> Then, in 1997, the Northern District of California held that a corporation could be brought to court under the ATCA when it found that Unocal was complicit in human rights abuses perpetrated by Myanmar's

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(describing the FCPA as having led to a "leadership role in curbing corruption both at home and abroad").

90. See Olufemi Amao, *Trade Sanctions, Human Rights and Multinational Corporations: The EU-ACP Context*, 32 HASTINGS INT'L & COMP. L. REV. 379, 382 (2009).

91. See, e.g., Exec. Order No. 12532, 50 Fed. Reg. 36,861 (Sept. 9, 1985) (imposing trade sanctions on South Africa in response to apartheid); Sudan Peace Act of 2002, Pub. L. No. 107-245, 116 Stat. 1504 (2002) (imposing trade sanctions in Sudan in response to violence perpetrated by the government).

92. Amao, *supra* note 90, at 394.

93. *Id.* at 386.

94. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1350).

95. *Id.*

96. *Filartiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

97. *Id.*

military on its behalf.<sup>98</sup> The Ninth Circuit later affirmed the case, opening the statute for use to enforce corporate social responsibility.<sup>99</sup>

However, in the 2004 landmark case of *Sosa v. Alvarez-Machain*, the United States Supreme Court defined the jurisdiction of the ATCA quite narrowly.<sup>100</sup> There, the Court held that the ATCA was jurisdictional in nature but was meant to be immediately operable upon passage.<sup>101</sup> Looking to the legislative history of the statute, the court found that it was meant to create a common law cause of action for piracy, violation of safe conducts, and infringement on the rights of ambassadors.<sup>102</sup> It held that new causes of action could arise under the common law if the norm that was allegedly violated was of sufficient universality and specificity such that it mirrored the three eighteenth century norms contemplated by Congress.<sup>103</sup>

Though a United States Circuit court has held that the ATCA can apply to corporations in the post-*Sosa* era,<sup>104</sup> the final disposition is pending before the Supreme Court. Moreover, even if successful on the merits, its reach appears to be limited to violations of international law norms approaching, if not reaching, the status of *jus cogens*. Moreover, even if the plaintiff is able to establish a violation of sufficient gravity to be covered by the ATCA, he or she must properly serve the defendant with process in the United States and overcome an almost certain *forum non-conveniens* challenge – both significant obstacles in themselves.<sup>105</sup> While there are alternatives to the ATCA, they all pose significantly greater jurisdictional challenges than the American statute, making the ATCA the strongest option for challenging corporate human rights violations in civil court.<sup>106</sup> Because the civil realm is limited only to the gravest violations of human rights and is subject to significant jurisdictional challenges, it is not a practicable option for enforcing corporate social responsibility on a global level.

#### 4. Market-Based Regulation

The final class of CSR enforcement mechanisms comes from the marketplace itself and is the direct focus of this paper. Examples of a

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98. *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 884 (C.D. Cal. 1997).

99. *Doe I v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002).

100. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 710 (2004).

101. *Id.* at 710, 725.

102. *Id.* at 724.

103. *Id.* at 725.

104. *See Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1074 (9th Cir. 2006).

105. Bahareh Mostajeelean, Note, *Foreign Alternatives to the Alien Tort Claims Act: The Success (or Is It Failure?) of Bringing Civil Suits Against Multinational Corporations That Commit Human Rights Violations*, 40 GEO. WASH. INT'L L. REV. 497, 502-03 (2008).

106. *See id.* at 505-14 (including the Brussels Convention, the United Kingdom's common law judicial system, and France's Civil Code as potential legal sources that could be used to bring a MNC to court for violations of human rights).

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market-driven approach to corporate social responsibility include rights-sensitive branding, unilateral codes of conduct, voluntary submission to auditing, and shareholder pressure.<sup>107</sup> Although this category of norms has the strongest practical foundation, the reach of these efforts is fairly narrow and actual compliance with the underlying norms is mixed, even when the efforts are successfully implemented.

The basis of the advocacy for a market-based regime of CSR norms is an apparent absence of alternatives that do not offend international human rights law, corporate law, or both.<sup>108</sup> Externally imposed CSR norms offend the traditional notion of shareholder primacy “by requiring management to develop an expertise in human rights law and exercise *de facto* control over abuses generally committed by governments, raising costs without raising revenues.”<sup>109</sup> These top-down norms similarly offend the notion of state primacy in human rights law, the idea that states have the primary responsibility to protect human rights, absent extraordinary circumstances defined by national agreement.<sup>110</sup> These points are relatively straightforward but nonetheless bear repeating. The fundamental nature of shareholder primacy and state primacy in corporate and international human rights law, respectively, cannot be overstated. A market-driven approach accordingly seeks to avoid the problem arising from shareholder primacy altogether and make the state primacy model largely irrelevant. At present, it is the most practical and realistic of all approaches.

## 4a. Rights-Sensitive Branding

The first subset of market-driven CSR norms is rights-sensitive branding, which seeks to attract “a profitable contingent of consumers [who are willing to] pay a premium for some assurance that the goods they purchase are not produced or marketed in violation of the rights of workers and communities.”<sup>111</sup> Some prominent examples of rights-sensitive branding include Starbucks’ “fair trade” coffee, Chiquita’s “ethical banana” (marketed in Europe), and the well known “Kimberly Process” aimed at reducing the prevalence of conflict diamonds on the world market.<sup>112</sup> While these efforts prove that some consumers are willing to pay higher retail prices for goods they believe to be manufactured and marketed in a way that is consistent with these

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107. Steinhardt, *supra* note 76, at 180-85.

108. See Steinhardt, *supra* note 4, at 933-34.

109. *Id.* at 933.

110. *Id.* at 933-34.

111. Steinhardt, *supra* note 76, at 181.

112. *Id.* at 181-82.

consumers' ideals, "translation into corporate practice [has been] episodic at best."<sup>113</sup>

#### 4b. Unilateral Codes of Conduct

In a similar vein, corporations seeking to show their customers that they hold themselves to high standards when it comes to human rights, labor rights, and environmental protection may adopt unilateral codes of conduct. Firms as diverse as Royal Dutch Shell, Nike, and Liz Claiborne have adopted these unilateral codes of conduct.<sup>114</sup> Critics of these codes argue that they are little more than public relations strategies or attempts to preempt host countries from issuing tougher regulation.<sup>115</sup> However, empirical studies show these unilateral codes have led to real change, especially when coupled with external monitoring mechanisms.<sup>116</sup> Unilateral codes of conduct are especially effective when they are implemented by a company high on the supply chain that extends the code to suppliers as a condition of doing business.<sup>117</sup> However, there is no way to enforce these codes of conduct, and frequently, it is impossible to know if the corporations advancing these codes are even attempting to comply with them.

#### 4c. Social Accountability Auditing & Certification

The third subcategory of market-driven CSR norms is social accountability auditing and certification, which occurs when a corporation partners with an NGO to develop verifiable standards in the workplace and submits itself to periodic auditing to ensure that the corporation in fact meets those standards.<sup>118</sup> This approach seeks to remedy some of the deficiencies in ensuring compliance associated with declaratory unilateral codes of conduct. The SA 8000, developed by Social Accountability International and seeking compliance with standards in child labor, forced labor, health and safety, freedom of association, freedom from discrimination, disciplinary practices, work hours, compensation, and management systems, serves as a prime

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113. *Id.* at 182.

114. *Id.* at 183.

115. Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 *IND. J. GLOBAL LEGAL STUD.* 617, 619 (2011).

116. See, e.g., Richard Locke et al., *Does Monitoring Improve Labor Standards? Lessons from Nike* 19, 37-38 (Corporate Soc. Responsibility Initiative, John F. Kennedy Sch. of Gov't, Harvard Univ., Working Paper No. 24, 2006); Anne Landman, *Absolving Your Sins and CYA: Corporations Embrace Voluntary Codes of Conduct*, *PR WATCH* (Sept. 4, 2001), <http://www.prwatch.org/node/7724>.

117. See Larry Cata Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 *ILSA J. INT'L & COMP. L.* 499, 509-10 (2008) (using Gap, Inc. as an example).

118. Steinhardt, *supra* note 76, at 184.

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example.<sup>119</sup> Participants in this system voluntarily submit to announced and unannounced surveillance audits to ensure compliance.<sup>120</sup> Other examples include the ISO 14001 and the ISO 9000, which seek compliance with environmental standards and quality control norms, respectively.<sup>121</sup> However, these accountability audits are only as good as the auditors themselves. The Enron debacle, in which Arthur Andersen, Enron's accountant, actively worked to conceal fraud and destroy evidence, is a striking example of the limitations on relying upon accounting measures to ensure compliance.<sup>122</sup> The Arthur Andersen scandal shows the degree to which corporations can manipulate their records to dictate the outcome of an audit.

## 4d. Ethical Investment by Shareholders

The final category of market-based mechanisms to promote compliance with corporate social responsibility norms is ethical investment organizations through which interested shareholders and institutional investors apply shareholder pressure to coerce corporations into heeding social norms.<sup>123</sup> This form of market-based pressure is the purest of all four, as it falls directly in line with the shareholder primacy model of the corporation. In this instance, corporations pursue CSR norms not because they feel a duty to third party stakeholders, but because their own shareholders have demanded it. The most famous example of such shareholder pressure is the Norwegian Government Pension Fund.<sup>124</sup> The second largest pension fund with assets in excess of \$300 billion,<sup>125</sup> the Norwegian Fund has used its formidable economic sway to disinvest from Singapore Technologies because of the "large degree of probability" that it was producing anti-personnel mines through a subsidiary,<sup>126</sup> and to exclude Kerr-McGee from its portfolio for actions taken off the coast of the non-self-governing territory of Western Sahara.<sup>127</sup> Similarly, certain investment vehicles like the FTSE4GOOD Index series have been created to measure the performance of companies that meet globally recognized CSR norms so that "consultants, asset owners, fund

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119. See SOC. ACCOUNTABILITY INT'L, SOCIAL ACCOUNTABILITY 8000, at 5-8 (2008), available at [http://www.sa-intl.org/\\_data/n\\_0001/resources/live/2008StdEnglishFinal.pdf](http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf).

120. *Id.* at 10.

121. Steinhardt, *supra* note 76, at 184.

122. See Gary J. Aguirre, *The Enron Decision: Closing the Fraud-Free Zone on Errant Gatekeepers?*, 28 DEL. J. CORP. L. 447, 447 (2003).

123. Steinhardt, *supra* note 76, at 184-85.

124. See Simon Chesterman, *The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations—The Case of Norway's Sovereign Wealth Fund*, 23 AM. U. INT'L L. REV. 577, 582 (2008).

125. *Id.*

126. *Id.* at 584.

127. *Id.* at 591.

managers, investment banks, stock exchanges and brokers [can assess] or creat[e] responsible investment products.”<sup>128</sup> In the end, however, “[t]hese indices are necessarily partial, because they include only ‘high impact’ and only particular areas of corporate responsibility, some of which have little to do with human rights.”<sup>129</sup>

Because these market-driven approaches to binding corporate social responsibility norms are enforced by the marketplace and not by governments, they have been met with considerably more practical success than their more coercive counterparts. This has led some to argue that the best hope for binding CSR norms comes not from governments but from corporations themselves.

#### *5. The Argument That Market-Driven Norms Are a New Lex Mercatoria*

The strongest proponents of a market-driven approach to corporate social responsibility argue that CSR can and should be seen as a new *lex mercatoria*.<sup>130</sup> The argument, advanced most notably by Professor Ralph G. Steinhardt, is that the true character of the *lex mercatoria* is highly representative of the aspirations that proponents of enforceable corporate social responsibility norms have for the future of the concept.<sup>131</sup> According to Professor Steinhardt, the *lex mercatoria* “blurred the distinction between self-interest and altruism,” was transnational in scope, grounded in good faith, reflective of market practices, and ultimately codified into binding legal norms.<sup>132</sup> Steinhardt argues that corporate social responsibility and the *lex mercatoria* share the same “genetic marker” implying that corporate social responsibility will evolve in much the same way as the *lex mercatoria*.<sup>133</sup> Thus, Steinhardt predicts that the seemingly soft notions of corporate social responsibility will evolve into hard legal norms because a merchant’s self-interest will depend on his respect for the interests of others. Thus, at the core of this private law ultimately rests public values.<sup>134</sup>

Professor Steinhardt is right in arguing that corporations have in fact submitted voluntarily to CSR norms without the help of governments and that “the justifications for this ‘human rights

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128. *FTSE4GOOD Index Series*, FTSE: THE INDEX COMPANY, [http://www.ftse.com/Indices/FTSE4Good\\_Index\\_Series/index.jsp](http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp) (last visited, Oct. 17, 2011).

129. Steinhardt, *supra* note 76, at 185 n.14.

130. See, e.g., Steinhardt, *supra* note 4, at 947-48; Pitts, *supra* note 4, at 357; Engle, *supra* note 4, at 118.

131. See Steinhardt, *supra* note 76, at 223; Steinhardt, *supra* note 4, at 950.

132. Steinhardt, *supra* note 76, at 223-24.

133. *Id.* at 225.

134. *Id.*

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entrepreneurialism' are multiple and mutually reinforcing."<sup>135</sup> However, this author argues that rather than developing as a result of an emerging understanding among merchants that respect for CSR norms is essential to collective mercantile success, binding norms of corporate social responsibility will result from pressures entirely outside the corporate suite and will ultimately come in the form of clauses in bilateral investment treaties. A close examination of existing CSR norms shows that rather than blurring self-interest and altruism in a way that derogates from the shareholder primacy model, every current example of market-driven CSR can be easily explained by simple self-interest on the part of the corporation.

## IV. MARKET-DRIVEN CSR: SELF INTEREST IS A PRECONDITION FOR ALTRUISM

Proponents of corporate social responsibility as a new *lex mercatoria* offer the notion that the *lex mercatoria* "effectively blurred the distinction between self-interest and altruism" in support of their position.<sup>136</sup> The idea behind this argument is that merchants have historically been willing to bind themselves to *lex mercatoria* norms that favored the general interest, and they can accordingly be expected to bind themselves in a similar fashion to corporate social responsibility norms in the future.

Professor Steinhardt himself admits that, while the benefits of *lex mercatoria* norms flowed primarily to the mercantile community itself, the benefits of corporate social responsibility norms flow to a "labour force or a society or even an idea."<sup>137</sup> Yet Professor Steinhardt and other proponents maintain that *lex mercatoria* and CSR norms are sufficiently similar such that CSR norms will develop into a new *lex mercatoria*. A closer look into the types of corporations and situations that have given rise to voluntary CSR norms suggests that the shareholder primacy model is alive and well and that short-term corporate self-interest is the most natural explanation for the development of market-driven CSR norms.

Current examples of market-driven CSR further suggest that such norms are not likely to develop outside of three specific, and relatively rare, scenarios. These scenarios include servicing the "right" customer base, atoning for a prior CSR atrocity, or servicing the "right" customer base after a CSR atrocity.

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135. Steinhardt, *supra* note 4, at 937.

136. Steinhardt, *supra* note 76, at 223.

137. *Id.* at 225.

### A. Servicing the “Right” Customer Base

The first scenario involves corporations that are dealing in branded goods and servicing a customer base that is not price sensitive and highly values-sensitive. The second scenario consists of companies dealing in low-cost goods or commodities that are atoning for an egregious and widely publicized CSR-related disaster within the industry. The third scenario is actually a combination of the first two and occurs when a significant and widely publicized CSR disaster occurs in an industry that services non-price sensitive, highly values-sensitive customers. Though this third class is quite small, it is there where the most meaningful CSR norms have developed. Because these three scenarios are more easily explained by the shareholder primacy model than by a sudden shift towards altruism, the empirical claim that MNC's have in fact increased compliance with CSR norms does little in the way of advancing the notion that CSR norms are capable of fully developing into binding law, from the bottom up, along the supposed line of the *lex mercatoria*.

The first scenario results in voluntary codes of conduct and rights sensitive branding lines coming from companies like Starbucks,<sup>138</sup> Jonathan's Organics,<sup>139</sup> Avon Cosmetics,<sup>140</sup> Ben & Jerry's,<sup>141</sup> and Whole Foods Market.<sup>142</sup> The first thing to note about these examples is that they are all premium brands. If one were to line up all of a grocery store's coffee, produce, and ice cream by price per ounce, Starbucks, Jonathan's Organics, and Ben & Jerry's products would all be at or near the expensive end of the line. Customers buying high-end goods such as these are willing to pay a premium for their product. Thus, the economic effects of adhering to CSR norms are passed from the firm to the consumer where they are happily accepted. Moreover, these high-end goods providers are competing with other high-end goods providers. Ben & Jerry's competes with Häagen-Dazs; Starbucks competes with Seattle's Best. Because a significant segment of the affluent consumer group values social responsibility above price,<sup>143</sup> companies selling high-end, branded goods are able to gain market share through their adoption and promotion of their adoption of CSR codes.

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138. See *Products: Coffee*, FAIR TRADE USA, <http://fairtradeusa.org/products-partners/coffee> (last visited Oct. 26, 2011).

139. See *Products: Fruits & Vegetables*, FAIR TRADE USA, <http://fairtradeusa.org/products-partners/fruits-vegetables> (last visited Oct. 26, 2011).

140. See *Products: Body Care*, FAIR TRADE USA, <http://fairtradeusa.org/products-partners/body-care> (last visited Oct. 26, 2011).

141. See *Products: Cocoa*, FAIR TRADE USA, <http://fairtradeusa.org/products-partners/cocoa> (last visited Oct. 26, 2011).

142. See *Products: Wine*, FAIR TRADE USA, <http://fairtradeusa.org/products-partners/wine> (last visited Oct. 26, 2011).

143. See Steinhardt, *supra* note 76, at 181.

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The implementation of market-based CSR norms under this first scenario does indeed have positive consequences for those outside of the firm, but to call the adoption of these norms “altruistic” goes too far. A company develops a rights-sensitive branding line for a high-end product in order to gain share of a market whose consumers are already willing to accept a higher price; it is a wholly self-interested decision.

### **B. Atoning For a Prior Atrocity**

The second scenario under which corporations aggressively adopt CSR norms, namely corporations in an industry marred by egregious and well-publicized human rights or environmental disasters, is equally self-interested. The most significant examples of this phenomenon can be seen in Shell Nigeria,<sup>144</sup> Exxon Mobil,<sup>145</sup> and Union Carbide, who were responsible for the atrocities committed against the Ogoni people, the Exxon-Valdez oil spill, and the Bhopal disaster, respectively.

Whereas the first class of corporate actors undertake CSR initiatives to attract new customers by going above and beyond the industry standard when it comes to corporate social responsibility, this second class seeks to retain existing customers by proving that the current industry standard is acceptable to the broader public when it comes to CSR. The firms in this second class are primarily seeking to restore their reputational accountability so that they can continue to be competitive.<sup>146</sup> The measures taken under the second scenario are even less altruistic than those taken under the first, as the corporation sees them as being necessary for survival rather than a marketing strategy designed to gain market share. Moreover, the actions taken by this class more commonly take the form of charity and community support, rather than norms designed to regulate business practices.<sup>147</sup>

### **C. Atoning For a Prior Atrocity in the Minds of the “Right” Consumer**

Finally, there are certain scenarios where human rights atrocities surface in an industry supplying goods to affluent consumers who are more concerned with the assurance that their values are reflected in the products they consume than about the price they must pay for the goods themselves. The two key examples of this third scenario involve the

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144. See *Environment and Society*, SHELL NIGERIA, [http://www.shell.com.ng/home/content/nga/environment\\_society/](http://www.shell.com.ng/home/content/nga/environment_society/) (last visited Oct. 26, 2011).

145. See *Safety & Environment*, EXXON MOBIL, <http://www.exxonmobil.com/Corporate/safety.aspx> (last visited Oct. 26, 2011).

146. Jackson, *supra* note 53, at 91 (noting that this system of reputational accountability is only effective when coupled with a system of civil liability).

147. See, e.g., SHELL NIGERIA, *supra* note 144 (focusing on education and healthcare in the region).

diamond industry and the textiles industry and have resulted in some of the most robust examples of enforceable CSR norms to date.

The Kimberly Process was created in response to news in the 1990's that a large number of diamonds bought in the developing world were being used to fund conflicts in African nations such as Sierra Leone, Liberia, and Angola.<sup>148</sup> The egregious nature of the African conflicts led the United Nations to announce the launch of the Kimberly Process in 2002.<sup>149</sup> The Kimberly Process, which went into effect on January 1, 2003, requires that each participating country track each exported diamond back to the mine from which it came or to the source of import by implementing national laws that ensure compliance, designate import and export authorities, establish control systems, provide certificates for each diamond, ensure that diamonds are shipped in tamper-resistant containers, and collect relevant data on their activities.<sup>150</sup> The Process has been highly successful in reducing the prevalence of conflict diamonds to less than 1 percent of the global market.<sup>151</sup> Similarly, the apparel industry has responded to harsh criticism regarding labor conditions at suppliers' factories by developing robust CSR schemes. For example, Nike employs a team of around 100 inspectors who grade suppliers on labor standards and work with managers to address issues as they arise.<sup>152</sup> Similar programs have been implemented by Gap, Inc.<sup>153</sup> (the parent company of Gap, Old Navy, and Banana Republic Clothing lines), as well as Levi Strauss, Co.<sup>154</sup> Like the Kimberly Process, these initiatives have been quite successful in shaping corporate behavior.

A proponent of CSR as a new *lex mercatoria* might argue that the Kimberly Process and the changes in the garment manufacturing industry are particularly salient examples of corporate altruism. In actuality these examples merely point out that the two already-mentioned forces of CSR – a non-price sensitive, highly values-sensitive consumer base and the presence of a well-publicized CSR atrocity – are more potent together than they are alone. Purchasers of diamonds and branded clothing generally have a high level of disposable income and

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148. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-978, CONFLICT DIAMONDS: AGENCY ACTIONS NEEDED TO ENHANCE IMPLEMENTATION OF THE CLEAN DIAMOND TRADE ACT 1-2 (2006) [hereinafter GAO Report].

149. Tina Muscarella Gooch, *Conflict Diamonds or Illicit Diamonds: Should the Difference Matter to the Kimberley Process Certification Scheme?*, 48 NAT. RESOURCES J. 189, 193 (2008).

150. GAO Report, *supra* note 148, at 9.

151. Vivienne Walt, *Diamonds Aren't Forever*, FORTUNE, Dec. 7, 2006, [http://money.cnn.com/magazines/fortune/fortune\\_archive/2006/12/11/8395442/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2006/12/11/8395442/index.htm).

152. *Nike's New Game Plan for Sweatshops*, BLOOMBERG BUSINESSWEEK (Sept. 20, 2004), [http://www.businessweek.com/magazine/content/04\\_38/b3900011\\_mz001.htm](http://www.businessweek.com/magazine/content/04_38/b3900011_mz001.htm).

153. Backer, *supra* note 117, at 511.

154. Steinhart, *supra* note 76, at 183.

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are likely to be aware of, and bothered by, the idea that their purchases are fueling bloody African conflicts or unconscionable labor conditions. Diamond and branded textile producers are under constant pressure outside the corporate suite to improve their practices as a result of reports of conflict diamonds and sweatshops. The directors and managers inside the corporation know that their consumers are more likely to walk away from their product as a result of these corporate abuses than for having to pay a marginal premium to ensure that such abuses do not occur.

None of this is to say that the above-mentioned efforts are negative, or even unimpressive. Much of the beauty of the free market capitalist system can be found in these “win-win” situations, and such scenarios should be sought after and implemented at every turn. But altruism is defined as the “disinterested and selfless concern for the well-being of others,”<sup>155</sup> and accordingly, current examples of market-driven corporate social responsibility fail to fit the definition. They are all driven primarily by corporate self-interest and can be explained using the shareholder primacy model of the corporation.

One cannot look at an action from the outside and decide if it is self-interested or altruistic. Not all actions with a positive social effect are altruistic, just as not all actions with a negative social impact are in the corporation’s self-interest. To decide whether a corporation’s decision is altruistic or self-interested, one must look into the circumstances surrounding the decision and characterize the decision with reference to those circumstances. Here, the requisite circumstances appear to be a corporation looking to gain market share in a segment actively seeking CSR, the presence of a widely reported disaster within a given industry, or both. As such, self-interest appears to be a precondition for altruism in the corporate context. These three scenarios will never make up more than a small corner of all global business, ensuring that adherence to CSR norms such that those norms are effectively binding will remain primarily the responsibility of those outside the corporation.

V. CORPORATE SOCIAL RESPONSIBILITY IS NOT A NEW *LEX MERCATORIA*

Even apart from the fact that all current examples of market-driven CSR are more easily explained through the shareholder primacy model of the corporation than by a novel introduction of altruism into that model, there are two important conceptual flaws to the argument that corporate social responsibility shares a common fate with the *lex mercatoria*. The first is that the entire argument rests upon a premise that is far from certain – namely that *lex mercatoria* norms developed

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155. *Definition of Altruism*, in OXFORD ENGLISH DICTIONARY, available at <http://oxforddictionaries.com/definition/altruism>.

exactly in the way that the traditional narrative suggests – an assertion upon which considerable doubt has been cast. Also, *lex mercatoria* and corporate social responsibility norms have the opposite practical effect on firms with respect to effect on the price of goods sold, ease of business administration, and changes in exposure to liability. These flaws suggest that what Professor Steinhardt referred to as a shared genetic marker is much more superficial, and that corporate social responsibility norms are not likely to develop in the same fashion as the supposedly ancient and independently-binding norms of the *lex mercatoria*.

### A. A Narrow View of History

Upon surveying the historical landscape of the *lex mercatoria*,<sup>156</sup> two basic historical characterizations emerge. The first is that the *lex mercatoria* began as a set of medieval mercantile customs, but at a certain point in the sixteenth century, courts began to recognize these customs as binding – even if applying the common law directly would lead a different result.<sup>157</sup> The second is that what is called the *lex mercatoria* actually refers to an extrajudicial practice through which educated men, each of whom saw the other as a relative equal, settled disputes. Mercantile customs were local facts to be proved as such,<sup>158</sup> and when the law, as applied to the particular facts of a case, led to a particular result, governmentally sanctioned courts reached that result.

The difference between these two arguments is one of causation. Under the first argument – the traditional view of the *lex mercatoria* – the existence of reliable, equitable, and workable mercantile custom actually caused that custom to be codified into law. Judges actively and explicitly incorporated mercantile custom into the common law and applied it as such to the parties before it. Under the second, alternative view of the *lex mercatoria*, this causal relationship does not exist. The *lex mercatoria* is more properly considered an alternative dispute resolution mechanism, or even a means of extrajudicial settlement, than an independent body of law. If the so-called *lex mercatoria* is merely an example of an extrajudicial settlement mechanism or a court applying facts to law, it is wholly irrelevant to the modern issue of corporate social responsibility.<sup>159</sup> The argument that CSR should be

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156. See *supra* Part II.B.

157. Baker, *supra* note 25, at 297.

158. *Id.* at 321.

159. This article is not about which historical characterization is correct; the argument that CSR norms should be seen as a new *lex mercatoria* fails on independent economic and financial grounds. It is worth noting, however, that the alternative history of the *lex mercatoria* is on stronger logical footing than the traditional view. The strongest argument in favor of the traditional view appears to be that mercantile laws were found to be so similar in so many jurisdictions for such a long time. This is indeed a remarkable

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seen as a new *lex mercatoria* only makes sense if the traditional historical view of the *lex mercatoria* is ontologically accurate.

Thus, the argument that corporate social responsibility is properly viewed as a new *lex mercatoria* is built upon an unsound foundation. But even if one is willing to concede the historical portion, the overall argument still crumbles. The desired norms of corporate social responsibility and the identified norms of the *lex mercatoria* are foundationally different, such that while the latter were economically destined not only to emerge, but to bind the stakeholders, the former will almost certainly require substantial outside pressure before they become binding.

### B. Polar Opposite Business Effects

*Lex mercatoria* norms benefitted merchants by reducing liability and lowering overhead costs, which in turn allowed them to lower prices and satisfy consumers. On the other hand, CSR norms expose corporations to a new form of liability and raise overhead costs, which lead to an increase in aggregate prices, making all but the most well-off and socially conscious consumers unhappy. If one accepts that corporations are primarily profit-maximizing, liability-minimizing entities (which, as Section IV, *infra* suggests, is the case), it is easy to see how *lex mercatoria* norms developed without any governmental pressure. It is also easy to see why CSR norms are not likely to develop in the same way.

#### 1. *Lex Mercatoria Norms Reduce Liability*

The two primary characteristics of *lex mercatoria* norms are “good faith and dispatch.”<sup>160</sup> This focus on equity and expeditiousness served in no small part to make the merchant’s business easier to run from a purely practical standpoint, which ultimately reduced the cost of goods sold. Several examples of identified *lex mercatoria* norms prove this point.

One such example is the *lex mercatoria* norm that stated that each partner in a partnership was an agent for the partnership and could thus bind the partnership even when acting alone.<sup>161</sup> This allowed each partner to conduct business on behalf of the partnership without the other’s presence. Partners could cover twice the area in the same

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fact, but this author believes that such universality is most simply explained not by courts adopting custom as independently-binding law for the first and only time, but by: 1) Medieval merchants of different nations met with each other at trade fairs as a matter of historical fact; and 2) economic efficiency is equally apparent to educated people of reason, regardless of nationality, and the merchant was among the most well off class of medieval and ancient society.

160. BEWES, *supra* note 7, at 19.

161. *Id.* at 20.

amount of time rather than duplicating all of their efforts due to a legal requirement that both partners accede to every transaction undertaken by the partnership.

Similarly, the *lex mercatoria* said that an employee of the merchant was but a “piece of machinery causing legal relations between his principle and the third person,” having “no independent rights or liabilities of his own.”<sup>162</sup> This *lex mercatoria* norm performed a similar function to the preceding norm, except that it allowed for an employee to do business on behalf of the merchant rather than allowing a single partner to do business on behalf of the entire partnership. Thus, where the Roman law imposed an economically inefficient burden on merchants, *lex mercatoria* norms were created and mutually agreed upon in order to bypass that legal burden, lower overhead costs, lower the cost of goods sold, and increase profits.

## 2. CSR Norms Increase Liability

Conversely, violations of corporate social responsibility norms almost always arise out of perceived impediments to easy business administration. Sadly, these impediments underlie every instance of egregious CSR abuses. Royal Dutch Shell's actions in Nigeria illustrate the problem, though unfortunately there is no shortage of historical examples.

*Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Development Company* are three lawsuits brought against the Dutch oil company for complicity in the summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, assault and battery, and infliction of emotional distress performed by the Nigerian government against the Ogoni people.<sup>163</sup> Royal Dutch Shell began drilling for oil in the Ogoni area of Nigeria in 1958.<sup>164</sup> This drilling led to the severe contamination of the water and agricultural land relied upon by the region for survival.<sup>165</sup> For many years, the Ogoni people staged protests against Shell's activities in the region, which the Nigerian government repeatedly quashed through violent means.<sup>166</sup> The violence perpetrated by the Nigerian government for Royal Dutch Shell's benefit culminated in 1995 when “the company and its subsidiary colluded with the Nigerian government to bring about the arrest and execution of the Ogoni 9,” who were hanged after a military trial premised upon obviously

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162. *Id.* at 21.

163. *Wiwa et al. v. Royal Dutch Petroleum et al.*, CENTER FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum> (last visited Oct. 20, 2011).

164. *Id.*

165. *Id.*

166. *Id.*

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trumped up charges.<sup>167</sup> Royal Dutch Shell was brought before a United States District Court for violations of the ATCA and settled their case for \$15.5 million.<sup>168</sup>

It is difficult to argue that Royal Dutch Shell would have saved money had they acceded to the demands of the Ogoni people. For some perspective, in 1997, Royal Dutch Shell was exporting 899,000 barrels of oil per day out of Nigeria.<sup>169</sup> Using 1997's average oil price of \$18.97 per barrel,<sup>170</sup> Royal Dutch Shell exported \$6,224,720,950 worth of oil from Nigeria in 1997, or \$17,054,030 per day. Thus, the \$15,500,000 settlement paid to the Ogoni, when converted into 1997 dollars,<sup>171</sup> amounts to 68 percent of one day's worth of Nigerian oil production. To satisfy the concerns of the Ogoni people in Nigeria, Royal Dutch Shell would have had to either reduce the pace of extraction such that environmental degradation was eliminated, or, if that was not feasible, stop production altogether. Either way, meeting CSR standards in this particular case would have entailed an increase in overhead cost coupled with a decrease in volume, thereby narrowing profit margins by much more than the ultimate cost of settlement.

### 3. *Following Lex Mercatoria Norms Leads to Lower Prices*

Inexorably connected to *lex mercatoria's* and CSR's effect on cost of goods sold is their effect of the ultimate price of goods sold. Specific *lex mercatoria* norms, such as those allowing a single partner to bind the partnership and an employee to act solely as an agent of the merchant, not only reduce overhead cost but also allowed efficiencies to be passed on to customers in the form of lower prices in order to increase market share. Similarly, the expedited process favored by the *lex mercatoria*, used in medieval commercial courts, and, according to the traditional narrative, adopted by traditional courts, served to minimize the costs of disputes. To be clear; merchants could choose to utilize these savings to pad their profits rather than lower their prices, but the aggregate effect of competition suggests that, when all firms in an industry are able to enjoy the same set of savings, they will compete with each other on price over the long term.

### 4. *Following CSR Norms Leads to Higher Prices*

Contrast the economic results of adherence to *lex mercatoria* norms with that of modern adhering to modern CSR norms, which is

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167. *Id.*

168. *Id.*

169. INT'L BUS. PUBL'NS, USA, DOING BUSINESS AND INVESTING IN NIGERIA GUIDE: VOLUME 1 STRATEGIC AND PRACTICAL INFORMATION 113 (2011).

170. *History of Illinois Basin Posted Crude Oil Prices*, IOGA.COM, [http://www.ioga.com/Special/crudeoil\\_Hist.htm](http://www.ioga.com/Special/crudeoil_Hist.htm) (last visited, Oct. 20, 2011).

171. \$11,693,494.68, using 2.38% inflation.

ultimately to raise prices. When a company changes its business practices to respect more fully the human rights of the population, the labor rights of workers, and the environment, it must inevitably spend money to make these changes. Corporations can either take these additional costs out of their profits or they can pass them onto consumers. Absent market pressure to take the former course, corporations, as profit-maximizing entities, are likely to do the latter. Some have argued that respecting labor rights will ultimately result in increased productivity and that respecting human rights and the environment will lead to a stable market.<sup>172</sup> While true, these savings can only begin to be realized after the corporate culture has changed and employees and the host country's society at large respond to that change. Most companies take a shorter view and see CSR norms as drivers of increased costs.

#### 5. *Lex Mercatoria Norms Limit Potential Liability*

The final foundational difference between *lex mercatoria* norms and CSR norms is that the former reduces liability while the latter increases liability. The limited partnership is supposedly a creation of the *lex mercatoria* and illustrates this difference. The limited partnership, in which a general partner is fully exposed to personal liability while the limited partner is exposed to liability only up to his investment, was created to avoid the prohibition on usury while simultaneously allowing the limited partner to control, and thereby reduce, his exposure to liability.<sup>173</sup> Similarly, the *lex mercatoria* norm allowing for interest to be charged under the head of damages on an unpaid account,<sup>174</sup> as well as the norm stating that an unpaid vendor has a lien on the goods sold against the original buyer, even if that good has been passed to a subpurchaser,<sup>175</sup> serve primarily to ensure that liability for the good sold remained with the purchaser and not the seller. Together, they represent a reduction in liability from the perspective of the merchant.

#### 6. *CSR Norms Expose Corporations to New Forms of Liability*

CSR norms lead to the opposite result of increased liability because ascension to CSR norms represents a corporation's de facto acceptance of new forms of liability. Where before corporations were able to act with impunity when taking environmental and humanitarian shortcuts,

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172. See, e.g., Denis G. Arnold & Laura P. Hartman, *Beyond Sweatshops: Positive Deviancy and Global Labor Practices*, 14 BUS. ETHICS 206, 222 (2005); ASIAN DEV BANK, CORE LABOR STANDARDS 11 (2006), available at <http://ap-irnet.ilobkk.or.th/resources/core-labor-standards-handbook-1/>.

173. BEWES, *supra* note 7, at 77.

174. *Id.* at 23.

175. *Id.* at 20.

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acceptance of binding CSR norms constitutes acceptance on the part of the corporation that of a requirement to take on liability for a class of wrongs that were not previously likely to result in such liability. Given that the primary function of a corporation is to shield the individuals running the corporation from liability, it comes as no surprise that corporations were quick to adopt liability-minimizing *lex mercatoria* norms and have resisted the imposition of liability-increasing CSR norms.

Simply put, corporations are creatures seeking to minimize liability and maximize profitability. Even outside the question of whether efforts to minimize liability and maximize profit are the *only* efforts that a corporation should seek to undertake, it is undeniable that maximizing profits and minimizing liabilities is the corporation's natural predisposition. These fundamental differences explain why *lex mercatoria* norms developed from within the mercantile community and why binding CSR norms will only come as the result of outside pressure. Because of these foundational differences with respect to cost of goods sold, price, and exposure to liability universally binding CSR norms will only result from outside pressure, making them nothing like the *lex mercatoria*.

#### VI. LESSONS TO DRAW FROM THE CONTRAST BETWEEN CSR AND THE *LEX MERCATORIA*

The argument advanced above is not necessarily a defeatist one, and resigning oneself to the position that corporations are profit-maximizing entities does not automatically suggest that they are incapable of benefitting non-shareholders. Quite to the contrary, the vast majority of the daily actions of world's corporations do not even touch on issues of corporate social responsibility, and every example of enforced adherence to voluntary CSR norms shows that companies are more than willing to behave responsibly when they see such behavior as being in their self-interest.

Nonetheless, because multinational corporations operating in developing countries, especially those providing discount goods and serving commodity markets, are prone to corporate abuses, the need remains for binding CSR norms. Ongoing efforts, both public and private, have certainly shrunk the universe of corporate abusers, but they have not eliminated it altogether. While Professor Steinhardt is entirely correct in noting that the source of binding CSR norms does not lie in international human rights law or corporate law, he is wrong to argue that it lies in the corporations themselves. Instead, binding CSR norms are most likely to take the form of clauses in bilateral investment treaties (BITs) or in the practice of law enforcement and regulatory bodies in host countries. These changes will likely result from macroeconomic and political developments giving host countries increased bargaining power relative to multinational corporations.

They will not emerge out of new customary legal norms emanating from multinational corporations.

Currently, bilateral investment treaties are drafted in favor of developed countries.<sup>176</sup> This is because developing nations see themselves in competition with each other to attract foreign investment. As a result, developing nations tend to sacrifice their own interests in improved labor standards or environmental quality in the hopes that they will attract enough additional investment to make up for those sacrifices.<sup>177</sup> This has led to a race to the bottom, leaving all developing countries worse off and creating the assumption that host governments are not likely to play a positive role in the realm of corporate social responsibility.<sup>178</sup> However, there is evidence to suggest that, at least over the medium or long term, several factors will combine to improve the relative bargaining power of host countries to a point where they will insert CSR provisions into bilateral investment treaties thereby creating CSR norms that are both binding and enforceable. Additionally, the local laws of host countries will be enforced in a way that holds corporations accountable for their labor and environmental practices. Both of these phenomena would essentially be the result of increased host country bargaining power. The major factors potentially leading to this potential increase are summarized below.

#### A. Increasing Demand for Commodities

The first factor leading to increased host country bargaining power is the rapidly increasing demand for commodities. As evidence of this demand increase, in 2010, cotton prices rose 92 percent,<sup>179</sup> coffee prices rose 65 percent,<sup>180</sup> and copper prices rose 30 percent.<sup>181</sup> This increasing demand comes in part from futures trading and global drought and

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176. See Stiglitz, *supra* note 43, at 490; Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARVARD INT'L L. J. 435, 437 (2009) ("These concerns about the integrity of investment treaty arbitration are worthy of consideration. Unfair treatment of respondent states on the basis of whether they are part of the developed or developing world raises tangible issues about the legitimacy and long-term viability of arbitration. Similarly, if participants believe that a dispute's outcome depends in some part upon whether an arbitrator comes from the developing or developed world, they may question the procedural integrity of arbitration.")

177. Stiglitz, *supra* note 43, at 490.

178. Darren M. Springer, *Reimagining the WTO: Application of the New Deal as Means of Remediating Emerging Global Issues*, 29 VT. L. REV. 1067, 1083 (2005).

179. Liam Plevin & Matt Wirz, *Companies Stock Up as Commodity Prices Rise*, WALL ST. J., Feb. 3, 2011, <http://online.wsj.com/article/SB10001424052748704775604576120533736097682.html>.

180. *Why Are Commodity Prices Rising? Let Me Count the Ways*, SEEKING ALPHA (Jan. 17, 2011), <http://seekingalpha.com/article/246895-why-are-commodity-prices-rising-let-me-count-the-ways>.

181. *Id.*

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flooding,<sup>182</sup> but the primary driver of this global phenomenon comes from a growing middle class in developing countries such as Brazil, India, and China.<sup>183</sup> This trend is only accelerating. According to numbers compiled by the United Nations and Goldman Sachs, by 2030 China will have 1.4 billion middle class consumers and India will have 1.07 billion.<sup>184</sup> During the same time period, the middle classes of the United States and Western Europe will be 365 million and 414 million, respectively.<sup>185</sup>

This demographic and macroeconomic shift benefits developing countries because “[h]igher commodity prices act like a consumption tax, transferring income from households and companies which use the resources to companies and countries that produce them.”<sup>186</sup> The majority of commodities are produced in developing countries. For example, 58.5 percent of the world’s refined copper, 51.2 percent of the world’s aluminum, and 58.4 percent of the world’s grains are produced in the developing world.<sup>187</sup>

Thus, both the fact of rising commodity prices and its cause – a growing middle class in developing countries – suggest that developing nations will have increased bargaining power at the negotiating table. The argument that a multinational corporation who does not feel that it is getting favorable enough terms can simply move to another developing country and secure these terms is becoming a much less tenable one. Over time, developing countries will come to appreciate

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182. *Id.*

183. See Nick Trevethan, *Analysis: World Commodity Prices Poised to Gain on Rising Yuan*, REUTERS, Jan. 12, 2011, <http://www.reuters.com/article/2011/01/13/us-china-commodities-yuan-idUSTRE70C0U2201101113> (noting that “[t]he volume of unwrought copper was about the same in the two years, but the value of those imports rose 44 percent in 2010,” and that “China consumed over 7.5 million tonnes of copper in 2010, according to Reuters calculations, almost 40 percent of the world’s refined output”); Paul Krugman, *Commodities: This Time is Different*, N.Y. TIMES (Jan. 29, 2011), <http://krugman.blogs.nytimes.com/2011/01/29/commodities-this-time-is-different/> (“[I]t’s clear from news coverage that Chinese demand is driving the markets. As I and others have been pointing out, we’ve got a bifurcated world right now, with advanced economies still depressed but emerging economies in an inflationary boom; commodity prices are reflecting the boom part of the picture.”).

184. Kenneth Rapoza, *Within A Generation, China Middle Class Four Times Larger Than America’s*, FORBES (Sept. 5, 2011), <http://www.forbes.com/sites/kenrapoza/2011/09/05/within-a-generation-china-middle-class-four-times-larger-than-americas/>.

185. *Id.*

186. *Back With a Vengeance: Rising Commodity Prices Both Reflect and Threaten the World’s Economic Recovery*, THE ECONOMIST, Jan. 20, 2011, <http://www.economist.com/node/17969925>.

187. UNITED NATIONS CONFERENCE ON TRADE AND DEV., PRODUCTION AND INTERNATIONAL TRADE OF COMMODITIES 75 (2004), available at [www.unctad.org/en/docs/gdscsir20041c5\\_en.pdf](http://www.unctad.org/en/docs/gdscsir20041c5_en.pdf).

this trend and use it as a bargaining chip in negotiations with home countries and MNCs themselves.

### B. The Persistence of the “Obsolescing Bargain”

The second factor leading host countries to a greater voice in CSR compliance applies equally to the resource extraction and manufacturing context and can be found in “the obsolescing bargain,” an idea developed by Raymond Vernon in the early 1970’s.<sup>188</sup> The obsolescing bargain says that, although MNCs have an initial bargaining advantage over their host country, over time, the former’s bargaining power weakens vis-à-vis the latter.<sup>189</sup> This change in relative bargaining power is the result of several shifts that take place as a MNC’s foreign direct investment matures.

Initially, a high level of uncertainty characterizes an MNC’s relationship with a host country. Then, as the MNC begins to enjoy success in the newly exploited market, the perception that the MNC’s high returns are justified by the risk weakens substantially, and the host country will be less willing to offer the MNC such favorable terms as the relationship progresses.<sup>190</sup> As the MNC constructs immovable assets in the host country, the MNC’s ability to cease operations there diminishes significantly due to the “sunk costs” represented by plants, offices, and the development of human capital.<sup>191</sup> Over time, changes within the host country itself lead to a shift in the relative bargaining positions of the MNC and the host government. Essentially, the economic development that results from foreign direct investment leads to increasing demands for social services.<sup>192</sup> Under the initial contract between the MNC and the host government, the corporation is able to keep the bulk of its profits, leading to rapidly expanding corporate coffers coupled with only a modest increase in government revenue.<sup>193</sup> This situation leads to dramatically increased pressure on the host government to secure more favorable terms vis-à-vis the MNC in the future.

To support this theory, an empirical, longitudinal study found that the MNC’s proportion of foreign ownership fell over time, regardless of the existence of a colonial relationship between the host and home

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188. See generally RAYMOND VERNON, *SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES* (1971).

189. Robin F. Hansen, *Multinational Enterprise Pursuit of Minimized Liability: Law, International Business Theory and the Prestige Oil Spill*, 26 *BERKELEY J. INT'L L.* 410, 447 (2008).

190. Barbara Jenkins, *Reexamining the “Obsolescing Bargain”: A Study of Canada’s National Energy Program*, 40 *INT'L ORG.* 139, 141 (1986).

191. See Hansen, *supra* note 189, at 447.

192. Jenkins, *supra* note 190, at 141.

193. See *id.*

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countries or the identity of the home country.<sup>194</sup> However, this study found that the size of the firm was negatively correlated with foreign ownership – the larger the firm, the more control the home country retained over the venture.<sup>195</sup> This suggests that a larger size results in an increase in leverage over the host government that outweighs the pressures of sunk costs upon the MNC. On balance though, time is evidently on the side of the host country when it comes to relative bargaining power.

### C. Self-Determination in the Developing World

Lastly, the Arab Spring has the potential to lead to the establishment of governments in the developing world that are less willing to acquiesce to the demands of developed nations and more responsive to the people. This final factor is more aspirational and less economically inevitable than the first two but nonetheless has the potential to play a major role in the proliferation of effectively binding CSR norms. At their fullest potential, the democratic uprisings in the Middle East and North Africa represent a new era in the developing world – one in which the popular will of the people overcomes the self-interested decisions of despots like Hosni Mubarak and Muammar Ghaddafi.<sup>196</sup> When dealing with governments who respond to the needs of its citizens, MNCs likely will be forced to account for the host country conditions that norms of corporate social responsibility are meant to address. In countries where these uprisings lead to stable institutions, the Arab Spring may successfully pressure host governments to secure more favorable terms for their citizens and pass and enforce laws and regulations passed domestically.

Increased demand for commodities (including labor), the steady long term effect of the obsolescing bargain, and the new emergence of popular governance in the developing world will all lead to greater bargaining power on the part of host government vis-à-vis MNCs and their home governments. Taken together these three factors may lead to an insistence on the part of host governments that their citizens are protected to a degree never before seen. These phenomena would allow for the regulation of multinational corporations without a need to derogate from the state primacy model of international human rights law or the shareholder primacy model of corporate law.

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194. Sushil Vachani, *Enhancing the Obsolescing Bargain Theory: A Longitudinal Study of Foreign Ownership of U.S. and European Multinationals*, 26 J. INT'L BUS. STUD. 159, 174 (1995).

195. *Id.* at 175.

196. See generally Lisa Anderson, *Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt, and Libya*, 90 FOREIGN AFF., no. 3, May-June 2011, at 2, 2-6.

This development, if it is to occur at all, is likely to be a gradual one. Renegotiation of bilateral investment treaties is not an every day occurrence, and the transformation of a society towards democratic governance is even rarer. Such a tectonic shift will undoubtedly take time. When one considers the severe doctrinal barriers to creating non-contractual binding legal norms, however, the relative efficacy and efficiency of the introduction of contractually based or domestically enforced norms begin to seem both more appealing and more realistic.

While the already-tried mechanisms for ensuring corporate compliance with widely-accepted CSR norms have done an outstanding job shaping corporate behavior around the edges, the most serious violators will almost certainly respond only to coercive, binding, and enforceable measures. Over the medium and long term, these coercive measures are much more likely to come in the form of BIT clauses or domestic regulation driven by macroeconomic and political factors than through the emergence of new, independently binding legal norms, especially those devised and implemented by MNCs themselves and then adopted by governmentally-sanctioned courts.

#### VII. CONCLUDING REMARKS

The principle of equity lies at the heart of the *lex mercatoria* norms. Even if *lex mercatoria* norms did not create independently binding legal norms in a traditional court, the principles emerged organically as a direct result of the fact that the mercantile community saw each other as equals and treated each other accordingly. They saw equity as a goal to be sought in and of itself throughout the mercantile community. Today, a different economic paradigm prevails in which parties seek only achieve the best result possible for themselves. That result is deemed equitable, regardless of the actual contents or broader consequences of the agreement, because it was created as the result of a bargain in the free market, which is viewed as a sort of natural state. This creates a community that looks nothing like the mercantile community in which *lex mercatoria* norms developed; if medieval merchants dealt with one another then the way that many multinational corporations deal with developing nations today, *lex mercatoria* norms may not have developed at all.

In the end, medieval merchants developed *lex mercatoria* norms because it helped their bottom line and minimized potential liability. They allowed themselves to be bound by the norms because they saw each other as relative equals. Because neither of these conditions exist with regards to developing nations and the worst corporate abusers, enforceable norms of corporate social responsibility will ultimately develop outside of the corporate suite and be implemented independently of the corporation itself. To argue otherwise is to romanticize the corporation and to ignore the need for outside pressure

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in order for meaningful norms to develop. A more realistic approach must prevail.