

TIGHTENING THE TOOTHLESS VISE: CODES OF CONDUCT AND THE AMERICAN MULTINATIONAL ENTERPRISE

MARK B. BAKER*

It is worth noting that the generation currently entering the workforce—dot-com kids, gen-xers, essentially those under the age of 30—have never experienced real war¹. They have never experienced the terror of having peers fight against a dominant world power, nor the specter of annihilation through the use of fission or fusion. And though the two-week surge over Sadaam Hussein in Operation Desert Storm was formidable, it can hardly be described as a nation-immobilizing event like World War II and Vietnam. The threat of traditional war seems to be subsiding,² but unfortunately that does not mean relief. There is a new war being fought, dealing with entities potentially more economically powerful than Stalin's Soviet Union,³ and with more broad-based political influence than The Third Reich⁴. The entities, known as Multinational Enterprises (MNEs)⁵ have become this generation's surrogate of a dominant world power, and because of the advent of economic globalization through trade, information technology, and the like, their potential strength is nothing short of awesome.

This may appear like a blessing, that dominance is being manifested through corporations rather than war-like dictators. But we know how to deal with dictators. We know how to deal with traditional warfare. From economic sanctions to forceful actions, the procedures to combat individual

* Associate Professor, International Business Law, The University of Texas at Austin- McCombs School of Business, B.B.A. University of Miami, J.D. Southern Methodist University. The author gratefully acknowledges the invaluable assistance of Anne Grodin, J.D. candidate, UT-Austin as well as David Lawrence, J.D. candidate, UT-Austin

¹ This is not to say that the events of September 11, 2001; (occurring after the submission of this article), are to be taken lightly; yet, one can effectively argue that such occurrences (and the subsequent U.S. response) do not constitute war in the traditional sense. On the other hand, it now appears that terroristic threats will become part of the landscape, similar to the presence of crime, and will require increased personal vigilance.

² With the fall of the Iron Curtain, traditional warfare seems to be sharply on the wane. No longer is the response to a nation's antagonistic behavior mobilization of the armed forces. Instead, we have come to rely on both national and international agencies to do such things as facilitate discussions among nation leaders to come to an amicable—yet, often solutionless—agreement. In addition, with the rise of the Internet and, thus, wired nations, the traditional economy has shifted. We have become extensively more global in the way we view everything from politics to shopping, and thus traditional warfare is that much more foreign (as well as impactive) to us.

³ See Joseph Stalin Biography, available at <http://www.biography.com/cgi-bin/biomain.cgi>. Stalin came to power in 1924, and in 1928 initiated his first "five year plan" which focused on collectivizing private agriculture into a central state controlled system of farms. This process sent many peasant farmers into poverty, but eventually established Russia as a world economic power. *Id.*

⁴ While Adolf Hitler's Reich certainly was a dominant power, controlling the majority of Europe (for a short time), today MNEs have some sort of contact on virtually every continent. Thus, while Hitler's power may have been stronger, and more concentrated; MNEs are more widespread, and thus have the possibility to rival The Reich's strength.

⁵ They are also known as Multinational Corporations (MNCs) and Transnational Corporations (TNCs).

and governmental misbehavior have been in place for centuries. The more difficult question is, how do we control the *new* world powers? How do we control MNEs, who by definition do business in and thus affect the economies of several different countries at once?⁶

A number of ideas have been proposed, and some enacted, regarding MNE control, which essentially have put the MNE in a somewhat precarious (and generally defensive) position. Like Harrison Ford in "Indiana Jones and the Temple of Doom,"⁷ MNEs are caught in a doorless room with the walls closing in upon them.⁸ These walls are the functional equivalent of pressures to "do good," coming from transnational organizations, non-governmental organizations (NGOs), national legislation, anti-capitalist factions, the public, and even MNEs themselves, via concerned shareholder groups. This article posits that while there have been several possibilities raised as to how to regulate MNEs, those possibilities are essentially "toothless" – they are actually empty sanctions, which have had no real effect on reducing the activities of MNEs which have been perceived as negative.

This article addresses the widespread – and somewhat frightening – impact that MNEs have on the world, and summarizes the various ways in which we have attempted to minimize their seemingly unrestrained authority. Part I illustrates the awesome power of the MNE, how that power has been augmented in recent years, and why groups worldwide have been fighting to bridle that power. Part II surveys the various attempts – both current and proposed – that have been made by various local, national and international groups, and notes that these proposals serve as pressure points which constrict the MNEs from many different angles to adhere to certain

⁶ An interesting tangential issue is whether or not we should control these MNEs. Traditional free market economists feel that neither national nor international governmental organizations should be controlling MNEs; they believe the market will best sort out any problems associated with MNEs. Their reasoning is as follows: the reason that MNEs are so powerful and large is because consumers are buying their products and services. Thus, clearly the consumers are voicing their opinion, via their wallets, that the large, powerful MNE is worthy of their business. When the MNE acts in a manner displeasing to the consumer, they will stop buying the products, thus telling the MNE to amend its behavior. While this market analysis seems sound on paper, it is arguable that part of the reason governments aren't willing to sign on to this laissez-faire attitude toward MNEs is out of pure fear. What if the consumer doesn't indirectly regulate the MNE behavior? Could MNEs become so large and powerful as to usurp all traditional governmental structures?

⁷ *INDIANA JONES AND THE TEMPLE OF DOOM* (Paramount Pictures 1984). In that famous scene, Indiana Jones is enclosed in a "booby trap" within the depths of an Asian palace. While the chamber within which Indiana Jones and his co-hort Short Round are trapped is a doorless room, instead of walls closing in upon them, they experience sharp spikes descending from the ceiling and ascending from the floor. This author imagines the sensation to be quite similar.

⁸ Note that the "good guys" in these scenarios always seem to escape unscathed – two things may be noted here (a) the MNEs are not necessarily the good guys and (b) they may not escape!

principles. However, as Part II will argue, these pressure points are essentially "toothless," meaning they stand for lofty and substantial goals, but because of their lack of sanctions both on paper and in practice, the proposals put virtually no pressure on the MNE to comply. Finally, Part III will conclude with the argument that the world must admit to the fact that controlling MNEs with traditional methods is futile, and to overcome MNE dominance and control their behavior, new methods must be proposed and adopted.

I. MULTINATIONAL ENTERPRISES

A. THE POWER OF THE MNE

It used to be that the big corporations were those that outgrew their mom-and-pop corner-store roots and expanded to do business in multiple states.⁹ Today that model has all but disappeared, giving rise to huge multinational enterprises with presence not just in multiple states, but on multiple continents.¹⁰ Indeed, one can argue that the MNE has become super-powerful, exceeding all expectations and predictions of business growth.

Globalization is the key to understanding MNE power. Globalization is the growing interdependence of the people of the world.¹¹ According to one author, the phenomenon has two distinct features: (1) the increased visibility of MNEs in the economy; and (2) the internationalization of financial markets and their unprecedented influence on allocation of resources within and across firms.¹² This globalization comes in two forms:

⁹ See KWAMENA ACQUAAH, *INTERNATIONAL REGULATION OF TRANSNATIONAL CORPORATIONS: THE NEW REALITY* 45 (1986). The modern MNE began to emerge after World War II, when U.S. investors scrambled to war-torn Europe to establish ventures abroad rather than continue with the traditional import/export model. Thus developed a corporation with multiple bases of operation, a hallmark of an MNE. In addition, the surge of technology in the late twentieth century allowed corporations to quickly transmit information and money, thus enlarging the scope of an MNE's access. *Id.*

¹⁰ For example, Exxon Mobil, which is currently ranked first on Fortune Magazine's famous Fortune500 List, which ranks companies based on revenue, currently operates in more than 200 countries. See Exxon Mobil's website, at <http://www.exxonmobil.com/opsmap> (last visited May 28, 2001).

¹¹ See The International Labor Organization International Training Centre, at <http://www.ilo.it/english/actrav/telearn/global/ilo/code/main.htm> (last visited Mar. 31, 2001).

¹² See Aseem Prakash, 4 *IND. GLOBAL LEGAL STUD.* 575, 576 (1997) (reviewing GREEN AND GLOBAL: A REVIEW OF TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATIONS IN A GLOBAL ECONOMY 322 (David Vogel ed., 1995); DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 319 (1994); STEPHAN SCHMIDHEINY & FEDERICO J.L. ZORRAQUIN *FINANCING CHANGE: THE FINANCIAL COMMUNITY, ECO-EFFICIENCY, AND SUSTAINABLE DEVELOPMENT* 211 (1996)). Prakash argues that these characteristics of globalization have caused MNEs to treat the world as a whole as a large borderless economic entity rather than as a group of single economic entities separated by national borders. *Id.*

international business practices globalization and globalization of human rights. While both have expanded exponentially in the past 25 years,¹³ they were completely unconnected until the mid 1980s, when national and international trade regulations began to address human rights as being linked with international business practices.¹⁴ Since the union of these two facets of globalization, and due to technological advances, especially in communications, the globalization movement has soared.¹⁵ Because of increased technology, MNEs are able to spread their corporate wings beyond the limited scope of their jurisdiction of incorporation, and thus shift operations such as production to areas in which costs are low and legal standards for such things as labor and the environment have not been established.¹⁶ Therefore, workers in these low-cost production areas have

¹³ See Institute for Global Communications (IGC), *Blood, Sweat & Shears: Corporate Codes of Conduct*, at <http://www.igc.org/trac/feature/sweatshops/codes.html> (last visited Mar. 31, 2001).

¹⁴ See Lance Compa & Tashia Hinchliffe-Darricarrere, *Doing Business in China and Latin America: Development in Comparative and International Labor Law: Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 667 (1995). See also James Goldsmith, *The Winners and the Losers*, in *THE CASE AGAINST THE GLOBAL ECONOMY: AND FOR A TURN TOWARD THE LOCAL* 172 (Jerry Mander & Edward Goldsmith eds., 1996). David Ricardo, a nineteenth century British economist, theorized that specialization and comparative advantage were interrelated. Thus, to maximize this interrelation, a nation must specialize in those activities in which it can excel, in order to ensure the greatest possible comparative advantage to other nations. If every nation proceeded by this theory, Ricardo argued, then international trade would grow tremendously, because nations would export surpluses and import all products except those in which they specialize. This would therefore increase both efficiency and productivity. *Id.* However, as Compa and Hinchliffe-Darricarrere note, this economic model is not possible in today's society because of the principle of global free trade, which has been and is continuing to be maximized by such entities as the WTO, the EU and NAFTA, is that "anything can be manufactured anywhere in the world and sold anywhere else." The authors further note that Ricardo's policy is innately flawed because it eliminates competition: MNEs are constantly looking to manufacture in a third world nation versus the developed world, and because globalization posits that anything can be made anywhere, MNEs will necessarily manufacture in the third world nation where transaction costs and labor are considerably lower. If the MNE decides, against simple economic policy, to manufacture in the developed nation, it will be at a significant competitive disadvantage. Thus, today's global free trade economic policy "makes you rich if you eliminate your national workforce and transfer production abroad and ... bankrupts you if you continue to employ your own people." *Id.*

¹⁵ See Goldsmith, *The Winners and the Losers*, in *THE CASE AGAINST THE GLOBAL ECONOMY: AND FOR A TURN TOWARD THE LOCAL* 172 (Jerry Mander & Edward Goldsmith eds., 1996). Goldsmith notes that in the first half of the 1990's over 4 billion people from nations such as China, India, Vietnam, Bangladesh, and the former Soviet Union suddenly entered the global economy. He attributes such growth to changing political systems, as well as an increase in technological accessibility in the noted nations. *Id.*

¹⁶ *Id.* at 173. Goldsmith offers the following example to illustrate the competitive pressures compelling MNEs to shift production to developing nations: "In most developed nations, an average manufacturing company pays its employees, including social costs, an amount equal to 25 to 30 percent of sales. If such company decides to keep only its head office and sales force in its home country while transferring its production to a low cost area, it will save about 20 percent of sales volume. Thus, a company with sales of \$500 million will increase its pretax

little if any protection from exploitation by the MNE in the form of extremely low wages and suffocatingly long hours. The workers are also harmed by another effect of globalization, mainly the undermining of workers and unions.¹⁷ Because workers for any one particular MNE are generally so dispersed around the world, the possibility of organizing to lobby for such things as higher wages and improved working conditions is all but eliminated. Further, because restrictions on MNEs vary so widely from country to country, workers have trouble organizing to fight for a particular benefit: what workers in Southeast Asia want may be different from what workers in Central America desire. This dissipation of solidarity among MNE employees is a direct result of globalization.¹⁸

In addition to globalization via economics and human rights, regional integration has contributed to this global outlook. Organizations such as the European Union and agreements such as NAFTA have succeeded in uniting nations and furthering the global model versus the sovereign model.¹⁹ The result is increased power to those who function best in a global, as opposed to a sovereign, regime: namely, MNEs.

The structure of the MNE has also contributed to its power. MNEs, in their operations overseas, typically subcontract portions of their production process to smaller firms, thus distancing themselves from accountability for the operation. Usually, that distancing is a direct result of the type of work subcontracted, which is typically labor-intensive and arguably the most exploitive, and therefore the MNE can claim high profits from – but no knowledge of – the exploitive subcontracted work.

While MNEs may vary greatly in their methods of operation and organization, the characteristics they do share are those that enabled them to grow to such powerful stature. MNEs typically can be characterized by their

profits by up to \$100 million every year. If, on the other hand, it decides to maintain its production at home, the enterprise will be unable to compete with lost-cost imports and will perish." *Id.*

¹⁷ See *id.* at 175. When MNEs have the opportunity to move production operations to developing nations with a less expensive supply of labor, laborers in the developed home country lose bargaining leverage. Goldsmith argues that MNEs have the ultimate "upper-hand" in this situation – they can undermine the workers in the developed home country, because they can move production to less costly, and arguably less demanding laborers, if labor unions at home demand more than the MNE is willing to provide. *Id.*

¹⁸ Addressing labor concerns may become a region-specific process, where laborers in each particular area in which the MNE operates will lobby for concerns particular to the corresponding culture in which the laborers are located. While this may be viewed by some as a more efficient process by which a corporation can address labor concerns, it may allow MNEs to justify actions by pointing to the culture in which they occur instead of pressuring MNEs to import a more humane and "developed" standardized method of treatment throughout the world.

¹⁹ See David M. Trubek, Jim Mosher, & Jeffrey S. Rothstein, *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 LAW & SOC. INQUIRY 1187, 1188 (2000).

managerial skills, their access to and control of technological information, and their ability to attract talent.²⁰ Thus because these attributes tend to perpetuate, the MNE's power has perpetuated as well. Essentially, one can argue that which has made MNEs big will only make them bigger.

What has enabled MNEs to continue this managerial and structural dominance, though, is money. MNE power comes from its wealth, and that wealth is staggering. Of the world's top 100 economies, more than half are corporations.²¹ Further, the top 25 MNEs are richer than approximately 170 nations.²² Thus, if the world operated in a purely capitalistic sense, DaimlerChrysler might actually be able to purchase the economies of Israel and Pakistan.²³ Smaller countries, especially underdeveloped nations with the lowest GDPs, are unable to cope with the power of MNEs. Their infrastructure is not developed, therefore MNEs are able to come in and exploit the cheaper labor and resources to generate huge profits.²⁴ In addition, the attraction of capital investment from an MNE coming into an extremely poor nation is so great that it could be argued that political leaders in poor nations would be abusing their discretion if they *did not* allow their nation to be infiltrated by an MNE.²⁵ Thus the cycle continues: MNEs enter a third-world country, and use the resources and labor to generate huge profits, which in turn makes them attractive to other third world countries.

²⁰ See ACQUAAR, *supra* note 9, at 43-44, 46, 48. It is necessary to note that these characteristics are not exclusive to MNEs, as they are shared by other large successful organizations such as governments, armed forces and non-profit groups. However, while MNEs share these characteristics with other organizations, MNEs are differentiated from these other groups by their global activity and their area-specific method of operation – MNEs operate under the dictates of the area as opposed to operating under a standard policy in all areas.

²¹ See Douglas S. Morrin, *People Before Profits: Pursuing Corporate Accountability for Labor Rights Violations Abroad Through the Alien Tort Claims Act*, 20 B.C. THIRD WORLD L.J. 427 (2000) (reviewing RUSSELL MOKHIBER & ROBERT WEISSMAN, *CORPORATE PREDATORS: THE HUNT FOR MEGA-PROFITS AND THE ATTACK ON DEMOCRACY* (1999)).

²² See David C. Korten, *The Failures of Bretton Woods*, in *THE CASE AGAINST THE GLOBAL ECONOMY AND FOR A TURN TOWARD THE LOCAL* 20, 26 (Jerry Mander & Edward Goldsmith eds., 1996).

²³ See Institute for Policy Studies, at <http://www.ips-de.org/reports/top200.htm> (last visited Aug. 12, 2001). According to Anderson and Cavanagh's report on the top 200 corporations, in 1999 DaimlerChrysler had sales of \$159,985.7 million, which is greater than the combined GDPs of Israel (\$99,068 M) and Pakistan (\$59,880 M) for the same period. *Id.* Based on these numbers, it is possible to argue that DaimlerChrysler has the financial ability to purchase the economies of both Israel and Pakistan.

²⁴ See Ryan P. Toftoy, *Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing it?*, 15 ARIZ. J. INT'L & COMP. L. 905, 906 (1998).

²⁵ See *id.* Southeast Asia has been particularly targeted, as MNEs enter those typically emaciated markets with promises of increased employment, better living conditions, and higher wages.*Id.*

This cycle, unless interrupted, will continue to augment the wealth of the MNE, and its power.²⁶

The increased wealth has served as a bargaining chip, allowing MNEs to dominate not just economic but also political structures of individual nations and transnational organizations.²⁷ In the past 50 years, MNEs have forced the liberalization of trade structures to facilitate global trading of their goods,²⁸ relocated production to underdeveloped nations to lower costs and raise profit margins,²⁹ consolidated internationally to form massive entities in spite of antitrust regulations,³⁰ and successfully lobbied for increased support – and decreased regulation – from international organizations such as the UN and the WTO.³¹ All of these actions are arguably within the MNE realm of corporate responsibility, for as economist Milton Friedman stated, “[t]here is one and only one social responsibility of business...to increase its profits.”³²

The power that MNEs have manifested in the less developed world has brought them benefits at home as well. Just as their wealth allows them

²⁶ It is necessary, however, to note that MNE presence in developing countries provides many benefits to the governments and peoples of those nations. MNEs provide employment for the citizens, revenue for the economy, and western cultural influence for those that are so interested.

²⁷ Note, whether MNE wealth has grown because of increased dominance or whether the dominance is an outgrowth of the wealth is a chicken and egg problem that need not be determined. The reality is that MNEs are extremely wealthy, and they continue to use that wealth to overpower nations. See Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603, 605 (2000). As Lu notes, because the MNEs are so powerful in relation to their host countries, “[MNEs] are uniquely placed in a position where virtually every operating decision and investment practice has potentially significant human rights consequences.” *Id.*

²⁸ See Goldsmith, *supra* note 15. MNEs have increased their power over governments through what can be seen as global blackmail: governments are so fearful of losing the enormous capital investment that an MNE can bring, that they have no choice but to ease national trade regulations, labor standards, and even tax structures. *Id.*

²⁹ See Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 48-54 (1999). Blackett notes this as a counterargument in reference to Labor Law scholar Brian Langille's theory that third world nations are essentially in a race to the bottom when it comes to trade regulations. Blackett counters that because of forced liberalization of trade structures, third world nations aren't racing to the bottom so much as they're being forced to settle there. *Id.*

³⁰ An excellent example of this is the formation of DaimlerChrysler, which is ranked first on Forbes Magazine's International 800 list. For an in-depth look at DaimlerChrysler and how it exemplifies globalization, see Linda A. Mabry, *Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 GEO. L.J. 563, 629 (1999).

³¹ See *infra* Part II.

³² Milton Friedman, *Social Responsibility of Business*, N.Y. TIMES, Sept. 13, 1970, §6 at 32. Friedman also stated, in a famous interview conducted by Playboy Magazine, that he would never purchase stock from a corporation that took action to stop such social harms as pollution out of sense of social responsibility.

to arguably manipulate the governments of third-world countries, so does it allow them to effectuate change in their home State. Because these States often have stricter regulations than developing countries concerning labor, human rights, and the like, the developed world is at a market disadvantage in attracting its own MNEs to have production bases at home versus overseas. Thus, MNEs may have the upper hand in coaxing their own States to lessen its restrictions to attract the MNEs' business.³³

MNEs have been bargaining with individual states as well. States that seek the employment and capital investment that comes with MNE production centers have offered significant tax incentives for MNEs to remain domestic.³⁴ In addition, legislators from these states are reluctant to vote for initiatives that will further regulate MNEs domestically, lest the MNEs move operations abroad.³⁵ As Douglas Morrin correctly notes, "political attempts for corporate accountability have largely failed due to the dominant bargaining position of [MNEs]."³⁶

B. CONCERNS ABOUT THE EFFECTS OF MNE POWER

The growth of MNEs has ignited passions as well as much debate and concern. In order to better understand the dynamics of the situation, one might inquire into various areas of concern, namely the environment, child labor standards, inequality of income, and sovereignty.

³³ It is arguable that the American public would not allow such abating of restrictions, especially when it comes to such things as wages, working conditions, etc. Perhaps the United States has consciously attempted to circumvent this bad sentiment by joining such international entities such as the WTO to aid in the balance between what third world countries offer investors and what the U.S. can offer, without alarming the public.

³⁴ See Morrin, *supra* note 21, at 428-29. MNEs have substantial bargaining leverage in these situations (as well as in others) that enable them to get what they want out of individual states. MNEs can shop for the most favorable state in which to locate, and typically present states with great incentives to give them favorable treatment, as an MNE offers many benefits such as employment and economic stimulation.

³⁵ See *id.* Morrin argues that MNE political influence has allowed them to operate domestically without fearing any real regulation, while pressuring legislators to continue to take an easy stand on regulation in fear that the MNEs may move more of their operations abroad, thus harming the domestic economy. This cycle of broad and powerful domestic political influence continues to perpetuate the vastly unregulated international MNE operations.

³⁶ See *id.* If MNEs continue to dominate regulatory decision making at home and abroad, MNEs will continue to operate without concern for the often negative effects of their actions. Absent other effective regulatory forces, MNEs will continue to operate unchecked, thus the need for innovative and effective methods of control.

1. The Environment

Since the late 1960s, protection and preservation of the environment has been on the platform of nearly every social activist group in the world. Fears about exploitation of natural resources, pollution of water sources, and general environmental disregard have fueled these activist groups to focus their attention not merely on environmental clean up but on environmental responsibility.³⁷

Corporate abuse of the environment began with the imposition of colonial rule upon third world countries, which, together with the introduction of new crops, industrial enterprises, and increased global market participation, altered the societies of third world countries.³⁸ Under the guise of "modernization" of the third world, corporations took advantage of the lack of environmental restrictions in less-developed nations and used the vast resources to their advantage.³⁹ Because of the extremely low transaction costs combined with the staggeringly inexpensive labor, corporations found it extremely profitable to manufacture in the underdeveloped world and export to the developed.⁴⁰ While this practice led to higher profits for MNEs, it was not done without considerable cost.

Resources in third world countries are rapidly disappearing, arguably due mainly to corporate abuses.⁴¹ Further, one can argue MNEs

³⁷ Current technology has made it increasingly easier to be involved in the environment. For example, The Sierra Club, like many other organizations, now has an Internet website where members and non-members can access various information on becoming environmentally active. For more information, visit The Sierra Club website, at <http://whistler.sierraclub.org:8080/takeaction/index.jsp> (last visited July 16, 2001).

³⁸ See Martin Khor, *Global Economy and the Third World*, in *THE CASE AGAINST GLOBAL ECONOMY AND FOR A TURN TOWARD THE LOCAL* 47, 48-49 (Jerry Mander & Edward Goldsmith eds., 1996). Khor observes that corporations impact cultures as well as their environment - Corporate influx brought along a "western" influence, completely changing the lifestyles of the developing world. *Id.*

³⁹ See *id.* Khor notes that while MNE's benefited from operating in third world countries, the developing host countries typically experienced cultural and economic change forced upon them by the MNEs. While it is arguable whether this is actually a negative effect, Khor asserts that the host countries invariably became increasingly dependant on the MNEs for this new economy and culture to survive, particularly when the countries reached an effective point of no return, after which it is impossible to revert back to the way things were before MNE presence.

⁴⁰ See *id.* Khor posits that the cost savings experienced by the MNEs correspond to the costs incurred by the host countries to build infrastructure and support for the business operations. These investments were forced upon the host countries, thus lending more support to the argument that the host countries were nearly completely dependant on the MNEs.

⁴¹ See *id.* As a consequence of the shift in third world countries from their once self-sufficient economic model to the export and import model thrust upon them by the MNEs, the host countries have increasingly exported their natural resources and native crops, thus more rapidly depleting these natural resources.

are seen by many as "preeminent agents of environmental degradation."⁴² The facts linking environmental abuses directly to industry, and thus to some degree MNEs, are staggering. One fifth of the world's population breathes air that is more poisonous than World Health Organization standards, and in places like Mexico City, an entire generation of children may have serious medical problems as a direct consequence of lead poisoning.⁴³ Global warming is an issue as well: the 1980s were one degree Fahrenheit warmer than the 1880s, which while seemingly negligible, is quite remarkable when considering that in the last ten thousand years, the earth's temperature has not changed more than 4 degrees.⁴⁴ The notable change in that 100 year span? Industrialization.⁴⁵ Tropical forests have already been 55 percent destroyed, and ecologists estimate that at least 5,000 species are becoming extinct each year, a rate ten thousand times as high as in pre-human times.⁴⁶ MNEs have become immense in both size and prosperity, and that has come at the expense of the environment.⁴⁷ As one scholar notes, in the past 50 years, corporate expansion through economic globalization has succeeded in "fill[ing] up the available environmental space of the planet."⁴⁸

Thus, although natural resources are for the most part replenishable, the speed and scope of MNE exploitation of these resources may make it impractical for that natural process to occur. Corporate giants, by their very nature, are more concerned with economic prosperity than with

⁴² See Prakash, *supra* note 12. The author notes that this is because such environmental tragedies as the Bhopal incident have painted MNEs as environmentally uninterested. In addition, MNE predominance in pollution-filled industries and their proliferation in pollution-filled nations have furthered this view of these corporate actors. It must be noted that their proliferation in pollution-filled nations may be due to those nations' low or non-existent environmental regulations on MNEs, thus it is an attractive venue for production. *Id.*

⁴³ See Population Matters, at <http://www.popinfo.org/issues/enviro05.htm> (last visited May 28, 2001). According to the Population Matters website, breathing air in Mexico City is the equivalent of smoking two packs of cigarettes a day.

⁴⁴ See The Antarctica Project, at <http://www.asoc.org/currentpress/1208post.htm> (last visited May 28, 2001). This same study determined that most of the hottest temperatures in the past 100 years were recorded in the late 1980's and early 1990's. *Id.*

⁴⁵ The late 1800's and most of the 1900's saw an increase in the industrial economy, which has been attributed with more environmental effect than the previous agriculturally centered economy.

⁴⁶ The environment is arguably in a state of crisis, and cannot reasonably sustain itself under these pressures. If no action is taken soon, it is not unreasonable to forecast complete environmental annihilation in the near future.

⁴⁷ See Edward Goldsmith, *Global Trade and the Environment*, in *THE CASE AGAINST GLOBAL ECONOMY AND FOR A TURN TOWARD THE LOCAL* 78 (Jerry Mander & Edward Goldsmith eds., 1996).

⁴⁸ See Korten, *supra* note 22, at 22. Korten argues that market economics in a "full world" result in fierce competition for the remaining environmental space whereby wealthy individuals and entities (such as MNEs) win, and thus control, the fate of the environment. He argues that this accelerates the destruction of the ecosystem and diminishes the regenerative capabilities of the environment.

environmental preservation, and have long clung to the idea that wealth should be attained before the environment can be addressed.⁴⁹ However, MNEs, like most profit-maximizing entities, will only internalize the external costs of their activities if it is either (1) profitable to do so; or (2) required by some sort of governing body.⁵⁰ Thus, when there is a void concerning environmental regulations for MNEs, there is necessarily a void in MNE environmental policy.

One reason for this lack of environmental policy is simply a function of market economics. Increased environmental responsibility necessarily lessens profits. Thus, corporations that are more environmentally conscionable may not survive in the market because their wares are priced higher to reflect their increased costs.⁵¹ The marketplace is therefore providing an incentive to misuse the environment, an incentive that can only be reversed by an outside market influence that forces "bottom line" producers to become environmentally responsible. And, as one author argues, because MNEs will pit government against government to continually lower environmental standards, the result is a race to the bottom, where the bottom is total environmental annihilation.⁵²

That market incentive, however, is somewhat balanced by the environment itself. Because of the speed and vastness of MNE globalization, the competition between MNEs for natural resources is quite high. Thus, when the natural resources abate, so may the profits.⁵³ However, while this may seem like an argument against all regulation, for without

⁴⁹ See *id.* at 25. Korten further states that since corporations are solely concerned with economic prosperity, governments must exert pressure on corporations to internalize the environmental costs of their operations. This presents an interesting issue for MNEs that are operating in areas where the governments are unwilling to exert these pressures. *Id.* This lack of regulation in developing countries enables MNEs to operate without concern for the environment, thus the increasing global environmental devastation.

⁵⁰ See Prakash, *supra* note 12. The article avers that penalties imposed for internalizing these externalities must be severe enough to make an impact. For instance, if the penalties imposed cost less than the expected gain by continuing the act, MNEs will most likely tip the scales in favor of paying the penalty.

⁵¹ See Patricia Romano, *Sustainable Development: A Strategy That Reflects the Effects of Globalization on the International Power Structure*, 23 HOUS. J. INT'L L. 91, 98 (2000).

⁵² See PRAKASH, *supra* note 12, at 581. Prakash argues that MNEs have incentives to relocate to the developing nation having the most lax pollution standards thus causing the developing countries to progressively lower their standards in an effort to win MNE presence. Without outside environmental regulation, such competition could reasonably result in a race with the ultimate finish line being the bottom – in this case, a state completely void of any environmental regulation. *Id.*

⁵³ See *id.* Accepting this argument necessarily means that MNEs have a stake in the environment and thus must internalize the environmental costs of their operations. For example, a corporation dependant on trees (such as a paper manufacturer) must operate in a manner that conserves trees and must take action to replenish the supply of trees in order to sustain a goal of long-term success.

regulation MNEs will soon be forced to control themselves, the argument is fundamentally flawed. By allowing for a lack of regulation and waiting for MNEs to have to respond, we may be permanently sacrificing the environment.⁵⁴

A nation exemplifying environmental demise at the hands of MNE industrialization is Taiwan.⁵⁵ The nation of Taiwan has been overtaken by corporate rule. Forests have been ruined due to massive building projects, and the landscape has been eroded as a result of roads built solely to facilitate logging and agricultural development. In order to maximize free trade, fertilizer use tripled, leading to soil acidification and contaminated groundwater. Twenty percent of farmland is polluted by industrial wastewater, and thirty percent of the rice grown is contaminated with toxic heavy metals. Air pollution has risen considerably, and asthma has quadrupled from 1985-1996.⁵⁶

2. Child Labor Standards

The term "child labor" is quite broad, encompassing potentially innumerable people and activities. However, as it is used in the human rights context, the term refers to children who work instead of attending school as required by law or perform work under hazardous conditions.⁵⁷

A recent International Labor Organization estimate is that more than 250 million children between the ages of 5 and 14 are workers in

⁵⁴ See *id.* at 583. "Free trade advocates want to limit the use of regulations as barriers to trade, while environmentalists and consumer advocates want to prevent trade agreements from serving as barriers to regulation. While the trade community worries about an upsurge of "eco-protectionism"--the justification of trade barriers on environmental grounds--consumer and environmental organizations fear that trade liberalization will weaken both their own country's regulatory standards and those of their nation's trading partners." *Id.* (summarizing from DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 3 (1995)). The time it takes to restore the environment is so long that nothing short of disaster may occur--i.e. cutting down a rainforest; it may take 100 or more years to regenerate, during which time the soil erodes, temperatures climb, etc. *Id.*

⁵⁵ See Goldsmith, *supra* note 47, at 79.

⁵⁶ See *id.* at 80. Cancer has become the leading cause of death in Taiwan, and the number of cancer related deaths has doubled since 1965. Goldsmith primarily attributes this, as well as the increase of asthma, to the increased air pollution.

⁵⁷ See Business for Social Responsibility, at <http://www.bsr.org/resourcecenter/index.html> (last visited May 28, 2001).

developing nations.⁵⁸ Of those, 50-60 million work under hazardous conditions.⁵⁹

These figures do not go unnoticed. Child labor could possibly be the one globalization issue that both attracts the most media attention and elicits the most consumer response. When an MNE is accused of employing child labor in any facet of its operation, that MNE risks being lambasted by the media for being concerned about profits rather than human rights, and may face more harm in the marketplace as a result of reduced consumer purchasing.

Notable in the child labor discussion was the media attention surrounding Kathy Lee Gifford and the line of clothing that bears her name.⁶⁰ Gifford was painted by the media and public alike as a hypocrite, praising children on the air while at the same time working them to the bone in southeast Asia.⁶¹ In response, Gifford subsequently chose to adopt the child labor issue as her personal crusade, speaking out in various media and even testifying before Congress where she pressed child labor awareness and reform.⁶²

While child labor is an enormous issue within itself, and in a sense beyond the scope of this paper, it is worth noting that it is an issue about which the public is becoming increasingly concerned, with MNEs serving as the prime target.⁶³ Nearly every corporate code of conduct examined by this author contained a clause similar to this one from the Reebok code:

⁵⁸ See Kebebew Ashagrie, *Statistics on Working Children and Hazardous Child Labour in Brief* (1998), available at <http://www.ilo.org/public/english/standards/ipecc/simpoc/stats/child/stats.htm>. According to Ashagrie, nearly one-half of these child laborers (120 Million) work full-time, while the rest combine work with school or other economic activity.

⁵⁹ See *id.* Ashagrie notes that "a very high proportion of the children were physically injured or fell ill while working. These [injuries] included punctures, broken or complete loss of body parts, burns and skin disease, eye and hearing impairment, respiratory and gastro-intestinal illnesses, fever, headaches from excessive heat in the fields or in factories." *Id.* Ashagrie attributes the high incidence of injury to the fact that children are less mentally mature and less aware of the potential risks inherent in the workplace.

⁶⁰ See Jill C. Strogiludis, *The Refugee Act of 1980: An Empty Promise to Exploited Children*, 29 J. MARSHALL L. REV. 995, 1006 (1996). Kathy Lee Gifford is most recently famous for her role as co-host of the television show "Live With Regis and Kathy Lee."

⁶¹ See *id.* As an example of the irony surrounding Kathy Lee Gifford, it is noted that as co-host of a national television show, Ms. Gifford was well known to frequently comment about her own children and made various references to her concern for children.

⁶² See *id.* at n.64. While Gifford's reputation in the area of child labor violations is indeed suspect, the publicity surrounding it has been helpful in bringing the issue to the attention of the media and the public at large.

⁶³ See Business for Social Responsibility, *supra* note 57. The Business for Social Responsibility website has guidelines for MNEs to follow in implementing a program to combat child labor. The guidelines are as follows: "(1) Adopt or adapt a code of conduct; (2) Ensure that suppliers and employees understand code provisions; (3) Monitor compliance with the code of conduct; (4) reduce the use of subcontractors; (5) Contribute to efforts to provide services to working children." *Id.*

"Reebok will not work with business partners that use child labor. The term 'child' generally refers to a person who is younger than 15 (or 14 where the law of the country of manufacture allows) or younger than the age for completing compulsory education in the country of manufacture where such age is higher than 15."⁶⁴ Various codes specifically address the need for education in third world countries, and some MNEs actually subsidize the education of children.⁶⁵ However, because globalization may actually be increasing poverty in third world countries,⁶⁶ forcing children to go to school rather than working to earn money for their families could be increasingly detrimental to the family and community, usurping the ability of children to work to provide basic necessities within the familiar economic structure.

3. *Inequality of Income*

One of the problems with MNE globalization is the issue of income inequality. Although globalization theoretically purports to help equalize wealth, in reality, it has increased the gap between the rich and the poor.⁶⁷

⁶⁴ See Margery Gordon, *Advantage Reebok*, CORPORATE COUNSEL, May 2001, at 87.

⁶⁵ See *id.* See also Business for Social Responsibility, *supra* note 57. There have been several positive initiatives by MNEs, transnational organizations, and NGOs to attempt to implement these child labor sections of the codes. For instance, Nike and Saga Sports (Nike's only Pakistani soccer ball contractor) have created a positive environment for children by paying tuition for former child workers to attend school, and hiring family members of legal age to ensure the family can survive without the child's income. Reebok, whose soccer balls are also manufactured in Pakistan, ensures that each soccer ball is labeled with the phrase "Guarantee: Manufactured without child labor." This guarantee ensures the following: "(1) All production, including stitching, must take place inside the facility in which all work is performed by workers at least fifteen years old (the legal working age in Pakistan); (2) External monitoring ensures that children under 15 are not entering the workplace and that soccer ball panels are not leaving the factory to be stitched by children in stitching centers or homes; and (3) Support for educational or vocational training is provided for children in the soccer ball manufacturing region of Pakistan. Finally, the Bangladesh Garment Manufacturers and Exporters Association (BGMEA) has joined forces with the ILO to combat an ancillary issue in the realm of child labor: ensuring that there are schools to which the children who are ousted from the factories can go. If child labor is distasteful because it usurps a child's ability for education, education must be made available for those children not permitted to work. The BGMEA established that no child (under 14 years of age) can be terminated from employment until an appropriate educational facility is provided. According to reports, as of Spring 1998, this initiative has enabled more than 10,000 former child workers to attend school. *Id.*

⁶⁶ Globalization may ultimately result in a net loss to developing nations, as the benefits are outweighed by the harms caused from globalization. For example, the costs associated with forced capital investment to attract MNEs, environmental devastation, depletion of natural resources and the increased dependency on the MNEs are arguably larger than the limited benefits provided by MNE presence. See *infra*.

⁶⁷ The wealth created by MNE presence in developing nations is centralized in the hands of the powerful few, while never really reaching the masses of people affected by the operations of MNEs. This wealth centralization increases the wealth of the powerful while perpetuating the poverty of the majority of people, thus causing an increasing gap between the rich and the poor.

While one article posits that this increased gap may serve to cause political unrest within nations and thus disrupt the stability on which MNEs rely in order to thrive,⁶⁸ this author disagrees. Those who are harmed by the inequality of income necessarily do not have the resources or the structure of a well-functioning government behind them to effectively fight an MNE. As noted supra, governments are fearful of angering MNEs, lest they leave and take their capital investments with them. One author notes that this issue of inequality of income is a drain of resources from the south to the north.⁶⁹ He observes that industrialized nations, while comprising only one-fifth of the world's population, consume more than four-fifths of the world's resources.⁷⁰ Because of this, the industrialized nations are draining the third world nations of their resources – both natural and human – and therefore industrialized nations are becoming richer at the expense of third world nations, who are becoming poorer.⁷¹

One of the contributors of the disparity in income between developed and developing nations (at least in the short run) may be the World Bank's Structural Adjustment Program loans (SAPs).⁷² To get a loan

⁶⁸ See Ralph Nader & Lori Wallach, *GATT, NAFTA and the Subversion of the Democratic Process*, in *THE CASE AGAINST GLOBAL ECONOMY AND FOR A TURN TOWARD THE LOCAL* 92, 99, 107 (Jerry Mander & Edward Goldsmith eds., 1996).

⁶⁹ See Khor, *supra* note 38, at 54. Khor argues that natural resources are being diverted from the southern developing nations to the northern industrial nations for their use in luxury items that will ultimately be enjoyed by northern people. He asserts that the result is an ever-increasing inequality of resources between the north and south, becoming "the ultimate environmental and social tragedy of our age." *Id.*

⁷⁰ See *id.* Not only does this practice result in income inequality, Khor also asserts that the practice of extracting these resources has resulted in environmental devastation. *Id.* This necessarily increases the cost of MNE presence, (which will be borne by the developing nations) thus further increasing the already noted income inequality between the north and south.

⁷¹ See *id.* at 54-55. Khor notes that this transfer of resources can happen in three channels. First, there is the transfer of physical resources such as lumber and ores. Exporting these resources is extremely profitable for MNEs doing business in third world countries, and thus the availability of the resources for basic necessities such as shelter is extremely rare and extremely expensive. Second is the transfer of financial resources such as commodities, which are low in price and continue to decline, meaning a fall of living standards and reduction in employment opportunities. Third, when the resources are being harvested, it is usually because of development projects funded by foreign loans. These projects rarely produce enough capital to repay the loans, and thus the debt is incurred by the impoverished third world nations themselves. *Id.*

⁷² See Jerry Mander, *Facing the Rising Tide*, in *THE CASE AGAINST GLOBAL ECONOMY AND FOR A TURN TOWARD THE LOCAL* 3, 13 (Jerry Mander & Edward Goldsmith eds., 1996) (paraphrasing from Walden Bello, *Structural Adjustment Programs, "Success" for Whom?*, in *THE CASE AGAINST GLOBAL ECONOMY AND FOR A TURN TOWARD THE LOCAL* 285 (Jerry Mander & Edward Goldsmith eds., 1996)). The World Bank and the International Monetary Fund together initiated the Structural Adjustment Program to provide loans to debtor third world countries. These loans initially were to be used to pay off the creditor banks, which usually were located in the developed world. The long-range strategy behind these loans was to increase the efficiency and growth of the third world economies. *Id.*

of this sort, a nation must agree to follow an imposed free market/free trade ideology, which, as one scholar notes, typically means accepting the following: (1) removal of protective tariffs, which directly endanger local industry; (2) removal of rules controlling foreign investment, which ushers in the foreign domination of local industry; (3) conversion of self-sufficient, small-scale diverse agriculture to corporate export-oriented monocultures, which make it more difficult for local populations to eat; (4) elimination of price controls but the imposition of wage controls; (5) drastic reduction in social and health services; (6) aggressive privatization of government agencies, which renders social services inaccessible to the poor; and (7) ending of popular "import substitution" programs that encouraged local people toward diverse local production and self-sufficiency.⁷³

Perhaps the largest indication of income inequality can be seen simply by comparing the GNP of third world countries with the annual sales of MNEs. As stated *supra*, but worth repeating, the top 25 MNEs are richer than approximately 170 nations.⁷⁴ Further, because none of the top 25 MNEs are based in third world countries, that wealth is concentrated in industrial nations.⁷⁵ Thus globalization, which in reality has meant the growth of MNEs, cannot possibly place the economies of the world on an even playing field, for the financial gains of MNEs is flowing back into the wealthy industrial nations at the expense of the poor third world nations.

As a possible solution to the disparity in income between industrial and third world nations, some scholars have encouraged a return to local rather than global efforts. Prior to globalization, when community goods were produced for and consumed by the community itself, inequality of income was not an issue, for the wealth of a person and, therefore, a community was based more on fulfilling needs and demands. Thus, by exploiting the local resources and keeping that exploitation within the community, the needs and demands were met.⁷⁶ One scholar takes this concept further, arguing that by communities creating their own currencies, they can circumvent the underlying tenets of conventional currency, such as

⁷³ See *id.* While the alleged goal of the SAP loans was laudable, in reality the loans served as a mechanism to remove the developed world from the risky investments in the developing nations, ultimately benefiting the developed world at the expense of the developing world.

⁷⁴ See Korten, *supra* note 22.

⁷⁵ See Toftoy, *supra* note 24. Of the top 200 corporations, 82 are located in the United States, 41 are located in Japan, 20 are located in Germany, and 17 are located in France. *Id.*

⁷⁶ This is not to say that widespread poverty didn't exist before globalization, for it certainly did, but prior to globalization, high poverty levels could be attributed to uncontrollable events such as droughts, disease, floods, etc., rather than entities such as MNEs and transnational organizations.

scarcity and fostering of competition.⁷⁷ With non-traditional currency, the economy would be more encompassing than a traditional economy: while traditional economies devalue certain services and resources, a local community currency would take into account those goods and services valuable to that particular community.⁷⁸

4. Sovereignty

Even groups that seemingly attempt to combat the power of the MNE have come under attack for doing a poor job. Transnational organizations such as the UN and WTO, who were chartered as groups focusing on worldwide rights and economic growth, have been chastised for their inability to effectively deal with the power of MNEs.⁷⁹ This was recently seen in Seattle, where WTO talks came to a halt because of radical, and at some times violent, protests regarding what protestors saw as WTO's lackluster attempt at MNE control.⁸⁰

The combination of the increased role of transnational corporations and the increased wealth of the MNE produces a shocking result in light of world political history: for the first time in more than 500 years, sovereignty is on the wane.⁸¹ The world is becoming a borderless entity, and corporate globalization is the culprit.

Arguably the General Agreement on Tariffs and Trade (GATT) best demonstrates this dissipation of sovereignty. While the premise of GATT started simply as a means to alleviate protectionist barriers, it developed into an agreement, which because of backing by the World Trade

⁷⁷ See Susan Meeker-Lowry, *Community Money: the Potential of Local Currency*, in *THE CASE AGAINST THE GLOBAL ECONOMY AND FOR A TURN TOWARD THE LOCAL* 446, 458 (Jerry Mander & Edward Goldsmith eds., 1996). Meeker-Lowry defines community currency as currencies that "can be spent only in the community or region where they are issued." *Id.* She contends that such currency helps revitalize local economies by encouraging wealth to remain within the community.

⁷⁸ See *id.* With community currency, Meeker-Lowry asserts local skills and trades increase in value, thus enabling local economies to return to a self-sufficient status not dependent on large multi-national corporations for their existence. *Id.*

⁷⁹ See United Nations Charter, at <http://www.un.org/aboutun/charter/index.html> (last visited July 3, 2001). According to the UN charter, the United Nations is (among other things) determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." *Id.*

⁸⁰ See CorpWatch, at <http://www.igc.org/trac/issues/wto/background/1999/6-shiva.html> (last visited June 19, 2001). According to CorpWatch, 50,000 citizens protested in Seattle for four days, eventually leading to a breakdown in the conference. *Id.* These numbers are significant, as they show that a large number of people consider the MNE issue a serious problem that needs to be addressed, and that these groups feel dissatisfied with the current attempts to regulate MNEs.

⁸¹ See KENICHI OMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* 7 (Free Press 1995). The nation state emerged in the 1700's and continued to dominate until the end of the Cold War, when the global economy began to dominate.

Organization, with a huge and virtually unchecked scope.⁸² As noted by Ralph Nader, a leader in the area of consumer and environmental activism, under GATT, "many decisions that affect billions of people are no longer to be made by local and national governments."⁸³ The WTO, via GATT, controls the decision-making as it relates to trade, however there is virtually no appeals process available. Moreover, because trade is a facet of corporate enterprise, MNEs are more than willing to support GATT and its facilitation of trade, in spite of its consequences on sovereignty. The WTO arguably would rather deal with corporations than governments. Thus, while corporate globalization has been increasing MNE power, it has been eliminating boundaries as well as sovereign governments.⁸⁴

This economic globalization via corporate entities has sparked controversy from within a multitude of associations, from small, unknown public activist groups to massive transnational organizations. While they all have different agendas ranging from environmental concerns to child labor, the underlying tenet is that MNEs must be controlled. Thus, both public and private groups have attempted – thus far in vain (see section II *infra*) – to tame the MNE.

MNEs are not unaware of this pressure. They have attempted to act proactively by implementing internal codes of conduct outlining corporate policies and values, and enumerating what is considered acceptable behavior.

⁸² See Mark B. Baker, *Flying Over the Judicial Hump: A Human Rights Drama Featuring Burma, The Commonwealth of Massachusetts, The WTO, and the Federal Courts*, 32 LAW AND POL'Y INT'L BUS. 51, 52 (2000).

⁸³ See Ralph Nader & Lori Wallach, *supra* note 68, at 92, 93. Nader and Wallach describe the process of challenging WTO actions as follows: "if challenged by any WTO member nation, [decisions] would be deferred to a group of unelected bureaucrats sitting behind closed doors in Geneva. The bureaucrats can decide whether or not the people in California can prevent the destruction of their last virgin forests or determine whether European countries have the right to ban the use of dangerous biotech hormones in meat. Moreover, once these secret tribunals issue their edicts, no external appeal are possible; worldwide conformity is required." *Id.*

⁸⁴ This author wonders whether the future holds boundaries not determined by national and conventional standards, but delineated by MNEs. It is difficult to imagine a world without conventional boundaries, but if the globalization trend continues, and MNEs continue to grow at the expense of sovereignty, arguably a world either boundary-less or with non-traditional boundaries would exist.

II. PRESSURES ON THE MNE AND WHY THEY ARE TOOTHLESS

As previously noted, the aforementioned "pressure points" emanate from a variety of sources. Part II will serve as an overview of the nature and effect of such efforts.

A. U.S. FEDERAL GOVERNMENT ATTEMPTS

The U.S. federal government has attempted – in its rather convoluted way – to control MNEs through a variety of means. From current and proposed legislation to administrative agency regulations, the national government has either directly assailed or helped facilitate attacks on the MNE. One such attack, which has been gaining momentum within the past five years, involves holding MNEs liable under the Alien Tort Claims Act (ATCA).⁸⁵

1. *Alien Tort Claims Act*

The ATCA is a provision providing both a federal cause of action and a federal forum for aliens by giving district courts "...original jurisdiction of any civil action by an alien for a tort...committed in violation of the law of nations or a treaty of the United States."⁸⁶ For jurisdiction to vest under the ATCA, a plaintiff must (1) be an alien, (2) claim a tort violation, and (3) prove that the tort is in violation of the law of nations or treaties of the United States.⁸⁷ Courts have had a difficult time with the third requirement, which has forced them to determine the meaning of "law of nations," or as it is more commonly known, "customary international law."

Customary international law is a nebulous and evolving concept, referring to basic international norms of civilized society.⁸⁸ Blackstone's definition states that it is "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the

⁸⁵ Alien Tort Claims Act, 28 U.S.C.A. §1350 (1789).

⁸⁶ See *id.* The Alien Tort Claims Act was adopted by the first Congress in the Judiciary Act of 1789.

⁸⁷ See Sarah Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1562 (1998) (reviewing HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Lance A. Compa & Stephan F. Diamond, eds., 1996)). Cleveland asserts that the ATCA has contributed to the rise of transnational public law litigation, particularly in the realm of human rights enforcement. *Id.* at 1561.

⁸⁸ See Pia Zara Thandhani, *Regulating Corporate Human Rights Abuses: Is Unocal the Answer?*, 42 WM. & MARY L. REV. 619, 622-23 (2000).

world."⁸⁹ Like the underlying natural law which weaves its way through United States constitutional law, customary international law is quite subjective, which has led to inconsistencies in the law, and rather vague guidelines for potential plaintiffs.⁹⁰ Proving that a tort is a violation of customary international law is an onerous task, and because that proof is a requirement for jurisdiction under the ATCA, the ATCA went largely unused for the first two centuries of its existence.⁹¹

It is generally acknowledged that the fundamental precipitator of the ATCA is found in a 1980 Court of Appeals for the Second Circuit decision, *Filartiga v. Pena-Irala*.⁹² In *Filartiga*, the court held that an alien had standing to bring a tort claim against a foreign defendant in U.S. courts.⁹³ Although the event occurred on foreign soil and did not have direct U.S. foreign policy implications, the Second Circuit found the ATCA applicable because the act at issue, torture of a Paraguayan citizen by a Paraguayan official, violated customary international law. The decision referred to action by a "state official," which has evolved into an illusive requirement

⁸⁹ See *id.* at 626. Thandhani describes contemporary international law as "having an established core, the classical system which incorporates a predominantly statist view of international law, and a modern expansion at the periphery, corresponding to developments, largely in human rights and environmental protection areas." *Id.*

⁹⁰ See *id.* at 629. See also Cleveland, *supra* note 87. In *Kadic v. Karadni*, 70 F.3d 232, 240-44 (2d Cir. 1995), the court noted that claims actionable under the ATCA should at least include those enumerated in the Restatement (Third) of Foreign Relations Law of the United States. The Restatement lists several abuses conventionally determined to be rights recognized by customary international law, including: genocide; slavery or slave trade; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and a consistent pattern or gross violations of internationally recognized human rights. In actual ATCA-litigated cases, claims considered have included summary execution, genocide and war crimes, disappearance, arbitrary detention, and cruel, inhuman or degrading treatment. *Id.*

⁹¹ See Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 B.Y.U. L. REV. 1139, 1152-54 (1999). See also Cleveland, *supra* note 87. While the ATCA was rarely used during the first 150 years of its life, the 1980 decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), restored it as a valid cause of action. Soon after *Filartiga*, the ATCA was nearly rendered void in 1984 by *Tel-Oren v. Libyan Arab Republic*, 470 U.S. 1003 (1985), which held that the ATCA was not an appropriate statute for establishing a cause of action for modern customary international law. However, in 1991 Congress revived the ATCA via the Torture Victim Protection Act of 1991, when it made clear that the ATCA was intended as a cause of action for those harmed by violations of the law of nations. Currently the scope of the ATCA is being explored, especially in the realm of potential defendants who are or could be subject to the Act. As of now, the statute has been used in cases with defendants who are natural persons, state officials, private individuals, and most notably, corporations. *Id.*

⁹² See Cleveland, *supra* note 87, at 1563. The ATCA was the source of limited litigation during the first 150 years of its existence; however, such litigation did not bring out the potential of the ATCA as the vehicle for human rights enforcement as did the seminal case, *Filartiga*, in 1980.

⁹³ See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In that case, relatives of a Paraguayan citizen allegedly murdered by a Paraguayan official successfully sued the official for torture in the United States. *Id.*

of "state action," whether it be overt state action or under "color of law."⁹⁴ Although the statute is silent as to the issue, the different Circuit Courts have split on their interpretation of it, with some mandating that plaintiffs prove the tort was committed by a state official or one acting under color of authority, whereas others disregard the supposed state action requirement completely.⁹⁵ These latter Circuit Courts circumvent the requirement by allowing suits as against private defendants who acted in concert with foreign states and/or officials. It is through this line of reasoning that many of the more publicized cases involving ATCA liability have been successfully tried.⁹⁶

This line of reasoning has also been the impetus for ATCA claims against MNEs. By showing that the MNE committed a violation of customary international law and did so by working in concert with a foreign government and thus under "color of law," alien plaintiffs have succeeded in imposing tort liability on MNEs.⁹⁷ However, recently a District Court raised the stakes by suggesting that tort liability might be imposed via the ATCA on a private MNE for purely private actions.⁹⁸ That case, *National Coalition Government of Burma v. Unocal Inc.*, held that Unocal was liable for human rights violations committed by the Burmese government because

⁹⁴ See Cleveland, *supra* note 87. Most courts read the color of law requirement as one not of the statute but one of customary international law itself. While that requirement curbed ATCA litigation against non-state actors for a time, in recent years courts have found jurisdiction over private defendants – mainly corporations – who have engaged with the state jointly in acts that violate customary international law. However, courts have held this color of law requirement as applicable only to certain customary international law violations: torture, summary execution and disappearance, cruel, inhuman or degrading treatment, arbitrary detention, and systematic race discrimination. Thus, by negative implication, there is no state action requirement for claims of piracy, slavery, or slave trading. *Id.*

⁹⁵ See Ariadne K. Sacharoff, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, 23 BROOK. J. INT'L L. 927, 941-43 (1998).

⁹⁶ See Jeremy A. Rabkin, *International Justice: Suing for Human Rights Isn't Justice*, ASIAN WALL ST. J., Jan. 3, 2001, at 6. Defendants sued under the ATCA include former Chinese premier Li Peng for compensation for Tianenman Square victims as well as German and Swiss banks for expropriation of Jewish funds during the Holocaust. Perhaps the most striking point of the ATCA, especially in light of the suits against the German and Swiss banks, is that corporations are being sued for wrongs they committed decades ago. *Id.*

⁹⁷ See Thandhani, *supra* note 88, at 621. The state action requirement that was implied in *Filartiga* has been interpreted differently throughout the federal courts system, with some seeing it as a necessary requirement, and others reading it out of ATCA litigation entirely. See *Filartiga*, 630 F.2d.

⁹⁸ See *id.* at 620-21. This suggestion, if accepted and followed by the entire federal courts system, would be the farthest extension of liability under the ATCA and will allow the ATCA to become an extremely powerful method to hold MNEs and other private actors liable for human rights violations.

Unocal "knew of, authorized, acquiesced in, or ratified"⁹⁹ the Burmese government's human rights abuses. While this case involved state action, the court's dicta commented that holding a private individual liable absent state action for human rights violations would not be inconsistent with the ATCA.¹⁰⁰

Thus, the floodgates have opened for private individuals (MNEs) to be held tortiously liable under the ATCA for human rights abuses. However, the courts have attempted to draw a line – albeit fuzzy at best – on the type of conduct for which MNEs are responsible. *Kadic v. Karadzic*, the predecessor to the Unocal decision, held when human rights abuses are committed in the arena of genocide and war crimes, a private actor can be held responsible, even with a lack of state action.¹⁰¹ However, when those same abuses are committed without genocide and/or war crimes, a state actor – whether direct or indirect via color of law – is required. The Second Circuit specifically noted that slave trade would be an ATCA-actionable violation regardless of state action.¹⁰² While it may seem like a difficult burden for plaintiffs to prove slave trade in order to impose ATCA jurisdiction upon an MNE, the *Unocal* plaintiffs successfully argued that while Unocal did not overtly participate in slave trade, they "knowingly accepted the benefit of and approved the use of forced labor,"¹⁰³ and thus were held liable.

A cursory reading of these cases might lead one to be quite concerned about their effect on the actions of MNEs. Arguably, the ATCA's threat of liability for MNEs as private actors is pressure enough to force MNEs to control their behavior as to human rights in foreign nations. However, in the opinion of some, it does little to nothing to coerce good behavior from MNEs, and may actually be less efficient in doing so than are other alternatives.¹⁰⁴

⁹⁹ See *National Coalition Government of Burma v. Unocal Inc.*, 176 F.R.D. 329, 334 (C.D. Ca. 1997). The plaintiffs in this case alleged that the Burmese government engaged in human rights abuses against them, such as torture, forced labor, and confiscation of property, all of which they asserted were violations of international and California law. The plaintiffs further claimed that Unocal was liable for these violations because of their position as joint venturer or implied partner in a project under which the plaintiffs were employed. *Id.*

¹⁰⁰ See *Thandhani*, *supra* note 88, at 633; see also *Unocal*, 176 F.R.D. at 348-49. The *Unocal* court stated, "Even in the absence of state action, Unocal could conceivably be liable for certain violations of international law." *Id.*

¹⁰¹ See *Boyd*, *supra* note 91, at 1243.

¹⁰² See *id.* at 1239. The difference in treatment within the federal court system shows the importance of forum shopping in this area of litigation.

¹⁰³ See *Unocal*, 176 F.R.D. at 349.

¹⁰⁴ See Jack Epstein, *Ecuadorans Wage Legal Battle Against US Oil Company: In Country's Oil-Rich Oriente Region, Indians and colonists file class-action lawsuit against Texaco*, CHRISTIAN SCI. MONITOR, Sept. 12, 1995, at 10. Epstein argues that activists should not use the ATCA to

First of all, from a practical standpoint, oppressive and sweeping corporate abuses will harm a corporation with or without the ATCA. For instance, the Exxon-Valdez oil spill created such public distaste for the Exxon Corporation that their stock and goodwill was affected before any ATCA violation was filed.¹⁰⁵

Second, an ATCA claim can, by definition, only be filed by an alien. Thus, we are attempting to control U.S.-based MNEs through citizens of other countries. Not only is this functionally inefficient – having to rely on aliens in each country in which MNEs do business to submit themselves to litigation in the name of human rights – but also potentially a source of embarrassment. The sovereignty of the United States is undermined by having to rely on aliens in order to police U.S. MNEs.¹⁰⁶

Finally, since the ATCA by definition only confers jurisdiction over alien plaintiffs, questions arise as to the ability of the ATCA to control foreign MNEs. In *Unocal*, Unocal's French associate, Total S.A. was dismissed from the suit for lack of jurisdiction.¹⁰⁷ Thus far, alien corporations are free from ATCA liability. Therefore, with the surge of globalization and relative analogous incorporation provisions in alternate jurisdictions, it would appear easy for an MNE to reincorporate in a foreign jurisdiction to thwart ATCA liability.¹⁰⁸

try to thwart bad corporate behavior, because corporations "rarely can achieve wholesale changes in a country's policies or laws," thus activists may better use their energies elsewhere to effect a more positive outlook on their cause. *Id.*

¹⁰⁵ See Patrick Lee, *Pension Funds Pressure Exxon on Environment; Energy: California managers were among those seeking stronger action. The firm made no promises*, L.A. TIMES, Apr. 5, 1990, at D-1. See *supra* discussion of general public sentiment regarding behavior of MNEs.

¹⁰⁶ See Boyd, *supra* note 91, at 1198. The ultimate irony in this situation is that the ATCA is providing a forum for alien plaintiffs to seek redress against violators of human rights, yet similar means are not available to effectively regulate MNEs when there is no alien plaintiff to file suit.

¹⁰⁷ See Thandani, *supra* note 88, at 638. Thandani contends Total S.A. could have been liable for human rights violations under the concept of "universal jurisdiction." *Id.*

¹⁰⁸ But see John C. Coffee Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U. L. REV. 641, 651, 656 (1999). Coffee states that U.S. corporations have the advantage of forum shopping for the state which has the most favorable corporation laws, whereas foreign corporations, located in countries which typically don't have a federal system, are unable to do so. One possible conclusion is that while it may be easy to relocate to another nation to avoid ATCA liability, the ease of returning may be misleading. Thus, as always, a corporation must weigh the possibility of ATCA liability if incorporated in the United States against the lessened mobility of incorporating in a foreign jurisdiction. *Id.*

2. Corporate Code of Conduct Act

Congress has not been immune to the issue of MNE accountability.¹⁰⁹ In June of 2000, Representative Cynthia McKinney, a Georgia Democrat, introduced the "Corporate Code of Conduct Act."¹¹⁰ The Act sets out principles and guidelines for MNEs to follow, rewards compliance with preferences for government contracts, and punishes noncompliance with the withdrawal of taxpayer-financed assistance and liability under U.S. courts.¹¹¹ The Act, which was promulgated in the shadow of Seattle and Washington D.C. protests over globalization, was tabled, and as of February 18, 2001, has yet to be reintroduced.

The Act is separated into six sections, with sections three and four encompassing the bulk of the Act's substance.¹¹² Section three requires that U.S. MNEs institute a corporate code of conduct, which at a minimum requires the MNE to: (1) provide a safe and healthy workplace; (2) ensure fair employment, including prohibition of the use of child and forced labor, prohibition of discrimination based upon race, gender, national origin, or religious beliefs, respect for freedom of association and the right to organize independently and bargain collectively, and the payment of a living wage to all workers; (3) prohibit mandatory overtime work by employees under age 18; (4) prohibit the practice of pregnancy testing of employees, including forced usage of birth control, and the dismissal or discrimination of employees based on pregnancy; (5) prohibit retaliation against any employee who conveys information relating to a violation or alleged violation of any fair employment requirement of this Code; (6) promote specified good governance and good business practices; (7) maintain a corporate culture that respects free expression consistent with workplace, encourages good corporate citizenship, makes a positive contribution to the communities in which the U.S. national operates, and promotes ethical conduct by all

¹⁰⁹ See Foreign Corrupt Practices Act, 15 U.S.C.A. §78dd-1 (1977). In 1977, and again amended in 1988, Congress passed the Foreign Corrupt Practices Act. While it is strong legislation and has deterrent factors, it punishes MNEs only for bribery of a foreign official. One may hold the view that the bad behavior of MNEs transcends the confines of that Act.

¹¹⁰ Corporate Code of Conduct Act, H.R. 4596, 106th Cong. (2000). The Corporate Code of Conduct Act was designed to establish strict guidelines for corporations in terms of labor rights, human rights and environmental protection based on U.S. and internationally recognized standards. *Id.*

¹¹¹ See Cynthia McKinney, *No More Corporate Welfare for Corporate Citizens*, at <http://www.house.gov/mckinney/news/pr6700.htm> (last visited Oct. 15, 2001). Congresswoman McKinney has been actively involved in other areas of international human rights, communicating her opposition to the WTO and her opposition to granting Permanent Normal Trade Relations to China.

¹¹² See H.R. 4596.

employees; (8) comply with internationally recognized worker rights and core labor standards; (9) uphold responsible environmental protection standards; (10) require partners, suppliers and subcontractors of the U.S. national (including any security forces) to adopt and adhere to these principles; (11) require full public disclosure of specified information; and (12) implement and monitor compliance with these principles through a self-financing program internal to the business that meets certain requirements.¹¹³

Section four establishes preferences for those MNEs in compliance, requiring: (1) Federal agency heads to give preference in the award of contracts to entities adopting and enforcing such Code; (2) the Secretary of Commerce to give preference to such entities that are also U.S. exporters with introduction to contacts in foreign countries, and in coordinating trade missions; (3) the Overseas Private Investment Corporation and the Trade and Development Agency to give such entities preference in providing financing and issuing investment insurance, reinsurance, and guaranties under the Foreign Assistance Act of 1961; and (4) the Export-Import Bank to give such entities preference in providing guarantees, insurance, and credit, and in participating in extensions of credit.

To its credit, the Act attempts to control that which has in the past been at issue. First of all, its reach addresses the problem of MNEs controlling subsidiaries in foreign countries, namely subcontractors and affiliates.¹¹⁴ By applying the requirements of the Act to any U.S. national that "employs more than 20 persons in a foreign country, either directly or through subsidiaries, subcontractors, affiliates, joint ventures, partners or licensees," the Act has attempted to close a loophole which many MNEs have either purposefully or unwittingly utilized.¹¹⁵ In addition, the Act touches on those issues which have been activist targets for decades, including environmental responsibility and child labor regulations.¹¹⁶

Assuming, arguendo, the bill is reintroduced and garners support, how effective can it be? A close review of its provisions might lead one to believe that in all actuality, the bill haphazardly attempts to control MNEs through a series of toothless regulations. For example, the requirements of the Act can easily be adopted "on paper" to gain the benefits of the bill. The Act requires that each MNE have a code enumerating the above-mentioned requirements, and that the MNE "take the necessary steps to implement the Code." Nowhere does the Act specify the time period in which this Code

¹¹³ See *id.*

¹¹⁴ See Cristina Baez, Michele Dearing, Margaret Delatour, & Christine Dixon, *Multinational Enterprises and Human Rights*, 8 Y.B. OF INT'L LAW 183, 244 (1999-2000).

¹¹⁵ See H.R. 4596.

¹¹⁶ See *id.*

must be implemented in order to gain the benefits of Section four of the Act, and the Act is equally silent as to what "necessary steps" entails. Thus, ignoring the obvious unethical undertones, an MNE could garner benefits from the Act simply by producing a document that mirrors section three of the Act, and reporting to the appropriate governing body¹¹⁷ every so often that it is "taking the necessary steps to implement the Code."¹¹⁸

Realistically, even if the bill is reintroduced, its chances for passage are remote at best. At the date of introduction (June 7, 2000), it had thirty-two co-sponsors: thirty-one Democrats, one Independent and zero Republicans.¹¹⁹ Of those thirty-two co-sponsors, all are still in congress after the 2000 election, but, with the balance of power shifted toward Republicans, it is unlikely that this bill will be high on the agenda of many legislators. To the bill's credit, however, it has gotten the message out, albeit weakly, that MNEs are a concern among lawmakers, which may spark heightened scrutiny from within MNEs, as well as from other sources.¹²⁰

3. *Model Business Principles*

The U.S. executive branch has also attempted to regulate MNEs. The Clinton Administration promulgated the Model Business Principles, in part to appease those upset at Clinton's proposed (and later passed) renewal of the People's Republic of China's status as a Most Favored Nation (MFN).¹²¹ The Model Business Principles, distributed in May 1995 and

¹¹⁷ This author thinks the appropriate governing body would be the Dept. of Commerce.

¹¹⁸ See H.R. 4596. While this may seem like a cynical approach to lawmaking, this is exactly the approach needed in order to ensure that regulations are appropriately controlling MNEs.

¹¹⁹ The original co-sponsors of the Act are: Carson (D-IN), DeFazio (D-OR), Evans (D-IL), Filner (D-CA), Jackson (D-IL), Kucinich (D-OH), Meek (D-FL), Mink (D-HI), Nadler (D-NY), Owens (D-NY), Payne (D-NJ), Sanders (I-VT), Stark (D-CA), and Wynn (D-MD). Those that joined later as co-sponsors are: Hinchey (D-NY), Lee (D-CA), Underwood (D-GU), Fattah (D-PA), Phelps (D-IL), Abercrombie (D-HI), Conyers (D-MI), Davis (D-IL), Lantos (D-CA), Brown (D-FL), Clay (D-MO), Brady (D-PA), Falemavaega (D-AS), Kaptur (D-OH), Jackson-Lee (D-TX), Maloney (D-NY), McGovern (D-MA), and Thompson (D-MS).

¹²⁰ HR 4596 is not the sole legislative focus of those trying to control MNE behavior. Senator Robert Torricelli (D-NJ) has considered legislation specifically regarding worker's rights in China. Torricelli's introduction of the Ten Worker's Rights Principles for U.S. business in China has been overshadowed considerably, however, by his China Nonproliferation Act, a bill cosponsored by Fred Thompson (R-TN) regarding regulation of weapons of mass destruction in China. As of May, 2001, the bill has not moved further in either the house or the senate. See China Nonproliferation Act, H.R. 4836, 106th Cong. (2000).

¹²¹ See Vladimir N. Pregelj, *RL30225: Most-Favored-Nation Status for the Peoples Republic of China*, Congressional Research Service, at http://www.cniss.org/nle/inter-12.html#_1_2 (last visited July 3, 2001). Pregelj notes that Most-Favored-Nation status provides a country with normal trade relations with the United States. Under this treatment, the United States will agree not to attach punitive tariffs to trade with the country receiving the treatment conditioned upon the other country's similar agreement and continuing fulfillment of other conditions. China's continued Most-

administered by the Department of Commerce, address MNE behavior by encouraging MNEs to establish codes of conduct. The Principles suggest certain guidelines that MNEs should include within those codes, such as encouraging workplace health and safety and discouraging child and forced labor, but the Principles do nothing to either incentivize the proposals or sanction their non-adoption. Since their adoption in 1995, the Model Business Principles have been virtually non-existent in the political arena, and even with the renewal of China's MFN status in 2000, they did not resurface.¹²² Thus, their ability to pressure MNEs into compliance is miniscule at best.¹²³ Although it may be mere speculation, one might presuppose that the Bush administration will not move forward with the Principles.

4. FTC Regulation

Given the ineffective actions of the U.S. government in this arena, at least one scholar has argued that other agencies within the executive, most notably the Federal Trade Commission (FTC), should take responsibility for overseeing and controlling MNEs.¹²⁴ The argument is as follows: by using its established body of deceptive advertising law, the FTC could regulate MNE behavior via their codes of conduct; their codes would be seen as promotional, and thus held to the standard of traditional advertisements.¹²⁵

avored-Nation status has created controversy due mainly to China's dismal human rights record.
Id.

¹²² Since 1995, there have been no references to the statutes of the Model Business Principles. Neither the media nor the government itself has reported on them, and this author can only assume that they have been all but abandoned.

¹²³ Perhaps one reason for the lackluster administration of the Model Business Principles is the fact that their development is left to the Department of Commerce. While the Department of Commerce did implement the "Best Global Practices" program to promote the Model Business Principles abroad, the program has all but disappeared. Its website, formerly at <http://www.ita.doc.gov/bgp>, is no longer available, and a search of the Department of Commerce website for both the Model Business Principles and the Best Global Practices has returned nothing.

¹²⁴ See generally Lu, *supra* note 27.

¹²⁵ See Toftoy, *supra* note 24, at 911. The FTC isn't the only method the U.S. could use to control MNEs via trade laws. Currently U.S. trade law provides several incentive programs for MNEs. The U.S. Generalized System of Preferences, 19 U.S.C. §§2461, 2462(b)(7) (1994), attempts to encourage economic development in certain designated countries by allowing MNEs who import from those nations to receive duty-free tariff treatment. However, the Trade and Tariff Act of 1984 made GSP eligibility for MNEs conditional: the MNE must follow certain enumerated guidelines relating to "worker rights" to qualify. Another area of incentivization through trade is the Overseas Private Investment Corporation (OPIC), 22 U.S.C. §§2191, 2191(a) (1994). This provision encourages private investment in certain developing countries by insuring those investors against potential political risks. However, to reap the benefit of the law, the investments must, like the GSP, respect worker rights. While incentivization can be a powerful

While this seems like a creative and noteworthy solution, it is subject to criticism, both in its logistics and its practicability. Logistically, the FTC neither has the resources nor the manpower to police MNE codes of conduct.¹²⁶ As noted, MNEs are dominant within the United States, and thus the FTC, a relatively miniscule division of the executive branch,¹²⁷ is not capable of reviewing and regulating even a fraction of the codes out there. Therefore, by enacting such a regulation, it might be the equivalent of enacting no regulation at all – because of the potential lack of manpower, the probability of any one MNE being audited might be rather small. Practically, the proposal to regulate MNEs through the FTC would also fail. The FTC by definition is purely an U.S. executive board agency.¹²⁸ Thus, its jurisdiction extends only as far as those MNEs incorporated within the United States. Again, given the ease of reincorporation in alternate non-U.S. jurisdictions,¹²⁹ MNEs have the ability to forum shop, and by relocating they could essentially avoid the FTC regulation completely.

5. U.S. State and Local Government Attempts

MNEs are feeling pressures from state and local governments as well. Governments, at the response of constituents and lobbyists, are continually raising the bar on MNE standards of conduct, and thus MNEs are being forced to answer not just to governments in jurisdictions in which they do business, but also those in which both shareholders and stakeholders

tool to control MNEs, it must also be noted that these incentives vest only in certain presidentially-designated nations, and tools for enforcement for both GSP and OPIC are virtually non-existent. Incentives via OPIC and GSP also prove taxing on the designated nations: if they change labor standards to comply with the regulations, they risk losing current large MNEs who can afford to manufacture without complying with the worker rights standards. But if they don't comply, they risk losing MNEs who won't invest unless the country complies. Because the large MNEs have such economic power over developing countries (*see supra*), this causes the U.S. incentivization programs to simply crumble under the weight of MNE dollars. In addition, these regulations have a poor track record in effecting change – both have been in effect since the mid-1980s, and today, nearly 20 years later, abuses are still rampant. Finally, as argued *supra*, unilateral sanctions controlling U.S. and not foreign MNEs can only have a limited effect on the problem.

¹²⁶ See generally David A. Balto, *Article: Antitrust Enforcement in the Clinton Administration*, 9 CORNELL J. L. & PUB. POL'Y 61 (1999). Balto discusses the history of antitrust enforcement during the Reagan, Bush and Clinton administrations the various points of focus for each.

¹²⁷ See FTC website, at <http://www.ftc.gov> (last visited May 28, 2001). According to the FTC website, the mission of the FTC is "to ensure that the nation's markets function competitively, and are vigorous, efficient, and free of undue restrictions." *Id.*

¹²⁸ See Balto, *supra* note 126.

¹²⁹ See Coffee, *supra* note 108.

reside.¹³⁰ And because the MNE by definition has tentacles in virtually every state in the union (in addition to foreign nations), the tangled web of regulations of which the MNE must be aware and by which it must abide is quite overwhelming.

Perhaps the regulations that received the most media attention in the last few years have been the state and local laws concerning the nation of Burma.¹³¹ Governments, most notably the state of Massachusetts, enacted legislation which forbid state and local government contracts to those companies that do business in Burma because of that nation's repeated human rights abuses.¹³² The result was that several large MNEs retreated from Burma.¹³³ The United States Supreme Court declared the Massachusetts-Burma law unconstitutional in May of 2000, basing its decision primarily on preemption by national power.¹³⁴

However, the shadow cast upon state and local government's ability to control MNEs has not lasted long. State and local governments are trying a different angle. Rather than enticing MNEs to retreat from nations through economic advantages (such as government contracts), some actors are attempting to improve MNE behavior by holding MNEs accountable – via civil liability principles – for not living up to their personal corporate codes of conduct.¹³⁵

¹³⁰ For a discussion of how corporate policy and practice is affected by both the shareholder and stakeholder models, see Transcript, *Corporate Citizenship: A Conversation Among the Law, Business, and Academia*, 84 MARQ. L. REV. 723, 733-737 (2000).

¹³¹ See Baker, *supra* note 82, at 55. Burma – officially the Union of Myanmar – is located in Southeast Asia, bordered by Bangladesh, China, India, Laos, Thailand, the Andaman Sea, and the Bay of Bengal. Burma has attracted significant attention due to its poor human rights record. *Id.*

¹³² See *id.* at 92-93. The 1996 Massachusetts legislation prohibited all state agencies from procuring goods or services from entities listed on a "restricted purchase list" – this list included every entity that was found to be "doing business with Burma (Myanmar)." *Id.*

¹³³ See *id.* at 93-94. Companies that retreated from Burma include Apple Computer, Eastman Kodak, Philips Electronics, Hewlett-Packard, J. Crew, Levi-Strauss, Motorola, and Walt Disney. *Id.* Fear of loss of government contracts in Massachusetts and several other states and municipalities most likely was not the sole reason for MNE retreat. Because of the high level of publicity of the law, even MNEs that don't rely on government contracts probably retreated from Burma because of fears that the media publicity, if not lack of government contracts, would devour them.

¹³⁴ See Baker, *supra* note 82, at 103-104. The Supreme Court held that the Massachusetts law interfered with the discretion of the President to determine the appropriate actions to take with regard to Burma, overstepped the limited sanctions envisioned by Congress, and conflicted with Presidential authority set out in federal law. *Id.*

¹³⁵ See Gordon, *supra* note 64, at 86. Plaintiffs in these suits claim that corporate codes of conduct are enforceable pledges to act in a manner such as not to exploit workers or harm the environment. They feel that whenever a corporation promises to act in a particular manner, their subsequent failure to do so should be treated as a breach of a promise and sanctioned as such. *Id.*

In California, a private citizen is suing MNE Nike on behalf of all California residents under the California Business and Professions Code.¹³⁶ The suit, one of many filed under the code in 1998 and 1999, attempts to hold MNEs liable for actions that violate their internal corporate codes of conduct.¹³⁷ More specifically, the suits pray that the courts classify the codes of conduct as promotional pledges, and thus if the MNE does not meet its standards, those commitments are legally enforceable.¹³⁸ As of May 2001, the lower courts have refused to classify the corporate codes as commercial speech, instead designating the speech as public debate and thus protected by the First Amendment.¹³⁹

The suits being filed under the California Business and Professions Code may arguably be doing more harm than good for corporate/MNE responsibility. If the plaintiffs in these suits prevail, thus requiring MNEs (at least in California) to specifically abide by their codes of conduct under fear of civil liability, MNEs may very likely respond by either eliminating their codes altogether, or making their codes so general in nature as to eliminate the possibility of civil liability. In addition, because MNEs are not required by any governmental body to adopt codes of conduct, and therefore not every MNE has done so, success of the suits will mean that there will be no incentive for MNEs to enumerate their policies on human rights, the environment, and the like. Of course, proponents for holding MNEs responsible for statements in their codes of conduct will argue as follows: one, the populace will not stand for such generality, and two, eliminating the codes altogether would be a public relations disaster for the MNEs – the media would converge on MNEs that eliminate their codes. However, in reality, it is inefficient to force MNEs to adopt corporate codes of conduct by a chain of events (no doubt taking years to process) of first imposing a threat of civil liability, then allowing the codes to lapse, and finally using the media to poison MNEs within the minds of consumers and therefore forcing the MNEs to adopt and abide by corporate codes of conduct. The easier method clearly would be for the California courts to refuse to find corporate codes of conduct as binding on the MNE.

¹³⁶ See *id.* Albert Meyerhoff, Jr. – a partner with the plaintiff's law firm Milberg Weiss Bershad Hynes and Lerach – is representing the class in its suit against Nike. His views on corporate codes of conduct are represented as follows: "when companies create codes of conduct, those are more than words. Those commitments are legally enforceable." *Id.*

¹³⁷ See *id.* While Nike has been the target of the majority of these suits, its close market competitor Reebok has escaped relatively unscathed. Gordon attributes the difference to Reebok's proactive stance of promulgating and rigorously enforcing its own code of conduct internally. *Id.*

¹³⁸ See *id.*

¹³⁹ See *id.* Appellate Briefs have been filed with the California Supreme Court, however, as of May 2001 oral argument has yet to be scheduled.

B. TRANSNATIONAL ORGANIZATION ATTEMPTS

The issue of controlling MNE behavior has been especially burdensome for transnational organizations: not only are they attempting to protect the interests of their member countries, (typically Western countries with high numbers of MNEs), but they, as world groups, are also being pressured to protect the interests of smaller countries, third-world nations who are being exploited. Of the various transnational groups, those that have placed the most pressure on regulating MNEs have been the Organization for Economic Cooperation and Development (OECD) and the United Nations (UN). In addition, multi-country "conglomerates" such as the European Union (EU), and the Organization of American States (OAS) are following their example.

1. *Organization for Economic Cooperation and Development*

With two sectors devoted to regulating corporate behavior, the OECD, an organization of 30 member nations,¹⁴⁰ has made strides in addressing the issue, which seems appropriate for an organization committed to encouraging economic strength in the international marketplace.¹⁴¹ The first sector focuses on corporate bribery of public officials, an area also addressed by OAS, *infra*. The second deals with corporate governance.

Historically, MNEs have been accused of bribing public officials in countries yearning for economic growth.¹⁴² Traditionally, the MNE bribes come in the form of payouts to public officials for things such as lessening country regulations on the MNE, and the reward, in addition to cash in the pocket of the public official, is the MNE's presence in the nation, which sparks economic growth.¹⁴³ Because this practice leads to public officials

¹⁴⁰ See generally OECD website, at <http://www.oecd.org> (last visited Mar. 31, 2001). The OECD member countries include Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, The United States, and The United Kingdom. *Id.*

¹⁴¹ See *id.* According to the website, the OECD is an organization providing governments with a setting in which to discuss, develop and perfect economic and social policy. Membership in the OECD requires a commitment to a market economy and pluralistic democracy. *Id.*

¹⁴² See Mark B. Baker, *Private Codes of Corporate Conduct: Should The Fox Guard The Henhouse?*, 24 U. MIAMI INTER-AM. L. REV. 399, 403 (1993). In some developing countries, bribery of public officials is reaching the level of an accepted business practice, with some MNEs hiring local "agents" that specialize in bribing public officials to ensure that the MNE is granted favorable treatment. *Id.*

¹⁴³ See *id.* While the host countries typically are hungry for the presence of an MNE, they also typically lack the information, capital, technology and skilled labor supply to provide much in

ignoring environmental and even human rights violations, as well as greatly distorting economic and market forces, the OECD has determined that the practice must be curbed through some sort of regulation.¹⁴⁴

In 1976, the OECD adopted the Declaration on International Investment and Multinational Enterprises with the OECD Guidelines against bribery annexed to the Declaration.¹⁴⁵ However, the members debated for two decades as to whether criminalization of bribery should be included.¹⁴⁶ Thus, the 1976 Declaration remained comprised simply of guidelines, and its impact – aside from the fact that it unearthed the issue – was negligible.¹⁴⁷ The OECD in 1994 revisited the issue, adopting a Recommendation on Bribery in International Business Transactions.¹⁴⁸ The Recommendation, which urged member nations to curb MNE bribery of foreign public officials, instructed execution via the OECD Committee on International and Multilateral Enterprises and its Working Group on Bribery in International Business Transactions.¹⁴⁹ These two bodies, as per the Recommendation, were to monitor the Recommendation's implementation, and subsequently they proposed that member nations adopt anti-bribery laws modeled upon the FCPA.¹⁵⁰ This Convention was eventually signed in 1997 by 29 member nations.¹⁵¹

However, the Convention, like the OAS Convention (*infra*), is not self-executing.¹⁵² It simply contains guidelines for member nations to enact FCPA-like legislation.¹⁵³ In addition, the Convention requires five

the way of leverage for bargaining, thus providing even more of an advantage to the MNE seeking to locate there.

¹⁴⁴ See *id.* As often noted, many developing countries do not have an organized system of legal regulation in place, thus making it even easier to allow MNEs to operate without regard for the environment or labor and human rights.

¹⁴⁵ See Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VAND. J. TRANSNAT'L L. 877, 922-23 (2000).

¹⁴⁶ See *id.* This author wonders why it took 20 years for the member nations of the OECD to finally decide to criminalize bribery of public officials, particularly when such actions were already criminalized in some of the individual member nations.

¹⁴⁷ See *id.* The declaration stated that enterprises should "not render – and they should not be solicited or expected to render – any bribe or other improper benefit, direct or indirect, to any servant or holder of public office." *Id.* at 922.

¹⁴⁸ See *id.* The Recommendation compelled the member nations to take "effective measures to deter, prevent and combat bribery of foreign public officials in connection with international business transactions." *Id.*

¹⁴⁹ See *id.*

¹⁵⁰ See *id.* See generally Foreign Corrupt Practices Act, 15 U.S.C.A. §78dd-1 (1977). See Sacheroff, *supra* note 95.

¹⁵¹ See Ala'i, *supra* note 145, at 923. In 1997 there were only 29 member nations, as the Slovak Republic did not join until 2000.

¹⁵² See *id.* at 918-19.

¹⁵³ See *id.*

provisions in order for a nation's legislation to be conforming.¹⁵⁴ First, the legislation must criminalize bribery of public officials.¹⁵⁵ Second, it must provide mechanisms for seizure of the bribe and any property relating to the bribe.¹⁵⁶ Third, if the offense is committed within the nation's borders, the legislation must affirmatively establish jurisdiction over the bribery.¹⁵⁷ Fourth, extradition for the bribery of a foreign public official must be so provided, and fifth, foreign public official bribery must have a comparable range of penalties as domestic public official bribery.¹⁵⁸ While these five requirements may seem onerous, as of June 2000, twenty-three countries had passed conforming legislation.¹⁵⁹

The OECD Convention is surprisingly better than most transnational organizations in providing for monitoring of the nations' compliance. The Committee on International and Multilateral Enterprises oversees the Convention by both assessing the enacted legislation to ensure its conformity, and evaluating the legislation in practice via the Working Group on Bribery in International Business Transactions.¹⁶⁰ Yet, the OECD Convention, with all of its strengths, still falls short of providing comprehensive regulatory control of MNEs. First, the Convention only addresses bribery. While bribery is an issue that can lead to additional MNE abuses, it is not the sole gateway – abuses can and do occur without bribery of public officials. Thus, the OECD Convention essentially attacks only one facet of the suspect operations of the MNE. Second, the attack on bribery is weak at best, for it affects not the entire globe, but only the select nations that both are members of the OECD and have complied with the Convention. Thus, as of April 2001, 29 of 30 nations have signed onto the Convention,¹⁶¹ and of those 29, only 25 have adopted implementing legislation.¹⁶² In essence, barely 15% of the world is committed to regulating MNEs, and at that, only one relatively small aspect of their potentially adverse actions.¹⁶³

¹⁵⁴ See *id.* at 919-920.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *id.* at 922.

¹⁶¹ See OECD website, at <http://www.oecd.org/dataoecd/11/1/2481211.htm>. The only nation that hasn't yet signed onto the Convention is New Zealand.

¹⁶² See *id.* The four nations that haven't yet adopted enacting legislation are Brazil, Chile, Portugal, and Turkey.

¹⁶³ See *id.* The OECD website details the actions taken pursuant to the Declaration by each individual member nation.

The Corporate Governance division also faces hurdles in its attempt to influence MNEs. In 1998, the Business Sector Advisory Group on Corporate Governance Issues reported to the OECD on suggestions for OECD work in international corporate governance issues.¹⁶⁴ The report specifically recommends that the OECD "(1) encourage Member countries to adapt their corporate governance regulatory frameworks to changing competitive and market forces; (2) formulate minimum international standards of corporate governance designed to promote fairness, transparency, accountability and responsibility; (3) issue suggested guidelines for voluntary 'best practices' for boards to improve accountability, as well as encompass board independence; (4) encourage common principles for addressing the comparability, reliability, and enforcement of corporate disclosure; and (5) emphasise the impact which changes in corporate governance practices would have on society at large, and on the need to clarify responsibilities between the public and private sector."¹⁶⁵ These are suggestions for the OECD to act. As of February 2001, they have yet to do so.¹⁶⁶

Even if the OECD acted, as explained above, those actions most likely would be limited in impact, simply due to the nature of the OECD – an organization consisting of 30 rather wealthy nations. Encouraging equal treatment of corporations throughout OECD member nations would have little to no effect on an MNE's exploitation of non-OECD member nations, for the above recommendations barely scratch the surface of that issue. Further, by simply encouraging the OECD to adopt "*voluntary* 'best practices' for boards to improve accountability,"¹⁶⁷ the OECD, via their Business Sector Advisory Group, has chosen to make corporate accountability merely a minor issue.

2. United Nations

Perhaps the transnational organization which endures the greatest (and most constant) pressure to act in this area is the United Nations. In addition to having the largest membership of any transnational organization, among its main roles are human rights protection and economic and social

¹⁶⁴ See OECD website, at <http://www.oecd.org/media/release/nw98-35a.htm> (last visited Mar. 31, 2001).

¹⁶⁵ See *id.* While encouraging the member nations to take more actions, the report specifically requests that member nations not take any actions which would unduly interfere with market mechanics.

¹⁶⁶ To clarify, there is nothing on the OECD website that shows any progress toward this initiative.

¹⁶⁷ See Jayne Elizabeth Zanglein, *From Wall Street Walk to Wall Street Talk: The Changing Face of Corporate Governance*, 11 DEPAUL BUS. L. J. 43, 119-120 (1998).

development.¹⁶⁸ Thus, non-governmental organizations, member states, and even the public have been demanding that the UN address the MNE issue for more than 25 years. However, arguably, nothing substantial has surfaced yet from the UN that actually provides a tangible solution to the problem.

The first regulation passed by the UN in this arena was Resolution 3514, passed in 1975.¹⁶⁹ Entitled "Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved," it condemned corrupt corporate practices such as bribery of public officials, and encouraged countries which incorporate MNEs, as well as those who host them, to adopt legislation to curb the practices.¹⁷⁰ In order to further address the issue, the UN Commission on Transnational Corporations formed the Ad Hoc Intergovernmental Working Group on Corrupt Practices.¹⁷¹ The Group focused primarily on corruption and bribery, and by 1980 drafted a proposal, later formalized in the International Agreement on Illicit Payments which criminalized bribery payments as well as solicitation and acceptance.¹⁷² The Agreement was adopted by the UN Economic and Social Council, then forwarded to the UN General Assembly but was not adopted.¹⁷³

After more than 20 years of inaction, the UN adopted the United Nations Declaration Against Corruption and Bribery in International Commercial transactions in 1996.¹⁷⁴ The Declaration calls for enforcement

¹⁶⁸ See UN Charter on UN Website, at <http://www.un.org/aboutun/charter/index.html> (last visited Mar. 31, 2001). According to the UN charter Preamble, the goals of the United Nations include preventing war, preserving fundamental human rights, establishing conditions to enable the rule of law to govern, and promoting social progress. The means specified to achieve these goals included practicing tolerance and living together in peace, uniting strength to maintain peace and order, preventing the use of armed forces unless doing so is in the common interest, and employing international machinery to promote economic and social advancement of all peoples. *Id.*

¹⁶⁹ See Ala'i, *supra* note 145 at 910-11. At this same time, the UN General Assembly called upon home and host countries to adopt legislation to prevent and punish corrupt practices as they occurred. *Id.*

¹⁷⁰ See *id.* Specifically, the Resolution condemned "all corrupt practices, including bribery, by transnational and other corporations, their intermediaries and others involved, in violation of the laws and regulations of host countries." *Id.* at 910-11.

¹⁷¹ See *id.* at 911-12. This group met regularly between the years 1976 and 1980. *Id.*

¹⁷² See *id.* This group concluded, "that to successfully combat corruption & bribery in international commercial transactions, 'international action' was necessary." *Id.*

¹⁷³ See *id.* at 912-13. At the time the Agreement was forwarded to the UN General Assembly, India introduced a draft decision which obligated the "United Nations Conference on an International Agreement on Illicit Payments to be convened only after the closure of the United Nations Conference on a Code of Conduct on Transnational Corporations." Many Northern nations opposed the Code of Conduct, thus neither the Code nor the Agreement was passed. *Id.*

¹⁷⁴ See *id.* at 915-16. While the Declaration was non-binding, Ala'i argues that it was a success in that it reflects the success of the anti-corruption campaign and the post-Cold War anti-corruption discourse. *Id.*

of current bribery laws and even references the OAS and OECD conventions as examples of how member states can comply.

The Declaration is seen by some to be a substitute for the still unadopted 1980 Agreement, but in reality, it hardly passes muster. The Declaration is non-binding, meaning that UN member states are not required to adopt the legislation, and even if they do adopt it, they are not required to comply.¹⁷⁵ While it might be argued that if the Declaration were binding, it would have never been adopted, a non-binding Declaration is analogous to one that was never adopted in the first place: neither force any regulations at all upon nations to comply with international standards.¹⁷⁶

The UN similarly has addressed the issue of MNE control by focusing on international codes of conduct. The first Code attempt, the Code of Conduct on Transnational Corporations, was originally proposed as a caveat to passage of the 1980 Agreement,¹⁷⁷ but neither the Code nor the attached Agreement was adopted. The mid-1990s brought the Code to the forefront once again, and the UN adopted a similar provision, the Code of Conduct for Public Officials, attempting to focus on bribery of public officials in MNE-host countries.¹⁷⁸

However, like the Declaration, this Code is also non-binding, thus it is essentially toothless. Further, it contains a built-in disincentive: UN member nations attempting to comply with the Code potentially could find themselves at an economic disadvantage to other developing nations who ignore public official bribery in order to entice MNE investment. Recently there has been talk within the UN to make the Code binding,¹⁷⁹ but as of March 2001, nothing has been adopted.

¹⁷⁵ See *id.* at 916. The Declaration addresses both active and passive bribery, asking Member Nations to take action to combat *all forms* of "corruption, bribery, and related illicit practices in international transactions." *Id.*

¹⁷⁶ Although it would be quite meritorious of MNEs to voluntarily abide by issues enumerated in the Declaration in spite of its non-binding nature, this author thinks that the MNEs themselves were most likely the impetus behind the individual nations' adoption of a non-binding declaration. With strong lobbying efforts, this author thinks that enough pressure was put on the UN member nations that the nations essentially force the UN to make the Declaration non-binding to win support for the Declaration.

¹⁷⁷ See Ala'i, *supra* note 145, at 910-11.

¹⁷⁸ See Compa & Hinchliffe-Darricarrere, *supra* note 14, at 669-71. A section of the UN, The International Labour Organization (ILO), has also drafted a code of conduct. Entitled "Tripartite Declaration of Principles Concerning Multinational Enterprises of Social Policy," the code is similar to that of the OECD in that it focuses on more than simply bribery of public officials. The ILO code, in contrast, further extends to such issues as subcontracting and job creation, and emphasizes national sovereignty as a primary goal for all parties to the Declaration. Like the OECD provision, the ILO code is virtually unenforceable, for it includes no sanctions for misbehavior by signatories. *Id.*

¹⁷⁹ See Danielle Knight, *Development: UN Pushes for Legally Binding Corporate Code*, INTER PRESS SERVICE, June 29, 2000, quoting Peter Utting, research coordinator at the UN Research

In addition to declarations and codes, the UN has initiated related programs dealing with the MNE-control issue. In January of 1999, the UN attempted to entice good behavior through positive reinforcement. The program, the Global Compact, targets world business leaders through the "Nine Principles"¹⁸⁰ which implore corporations to self-regulate for workers' rights and environmental responsibility and against human rights abuses.¹⁸¹ As an incentive for MNEs to adopt the Global Compact, the UN has followed such initiatives as the RUGMARK Campaign, *infra*, by allowing adopting MNEs to brand their products with the UN seal and logo, signifying compliance with the nine principles.¹⁸²

Obtaining the use of the UN seal and logo, and thus the market benefits of being recognized as a UN-approved corporation, is relatively easy. The only requirement of complying MNEs is to post on a UN website

Institute for Social Development as saying "While multinational corporations would prefer to comply through voluntary initiatives, the public interest can only be fully served through stronger regulation and monitoring." *Id.*

¹⁸⁰ See UN Global Compact website, at <http://www.unglobalcompact.org/gc/unweb.nsf/webprintview/thenine.htm> (last visited Feb. 12, 2001). The Global Compact's nine principles consist of the Secretary-General asking world business to: (1) support and respect the protection of international human rights within their sphere of influence; (2) make sure their own corporations are not complicit in human rights abuses; (3) uphold freedom of association and the effective recognition of the right to collective bargaining; (4) uphold the elimination of all forms of forced and compulsory labour; (5) uphold the effective abolition of child labour [sic]; (6) uphold the elimination of discrimination in respect of employment and occupation; (7) support a precautionary approach to environmental challenges; (8) undertake initiatives to promote greater environmental responsibility; (9) encourage the development and diffusion of environmentally friendly technologies. *Id.*

¹⁸¹ See *id.* See also CorpWatch website, at <http://www.corpwatch.org/headlines/2000/307.html> (last visited Feb. 12, 2001) (quoting Debi Barker, deputy director of the International Forum on Globalization). At least one NGO has expressed concern that the United Nations is focusing on corporations. The International Forum on Globalization notes that the UN was created to "promote peace, human rights, the environment, social justice, livelihoods and democracy," and that by creating the Global Compact and thus focusing on corporate behavior, the UN is being coerced by MNEs via globalization, and thus straying from its mandate. *Id.*

¹⁸² See CorpWatch website, at <http://www.corpwatch.org/trac/headlines/2000/250.html> (last visited Feb. 12, 2001). As of July 2000, the following corporations have officially signed the UN Global Compact: Nike, Shell, mining company Rio Tinto, Bayer, Dupont, Ericsson, Healthon/WebMD, and Unilever. *Id.* See UN Global Compact website, at <http://www.unglobalcompact.org/gc/UNWeb.nsf/content/awards.htm> (last visited Feb. 12, 2001). The United Nations Environment Programme attempted to fortify compliance with the nine principles of the Global Compact by presenting environmentally compliant companies with the "Millennium Business Award for Environmental Achievement." Given in May of 2000, the 12 companies receiving the award were: Aluminum Bahrain, Bahia Sul Cellulose S.A., International Forest Products Ltd., HiPP, BSES, Nesher-Israel Cement Enterprises Ltd., Tokyo Electric Power Company, Altos Hornos de Mexico S.A., Cervesur, Rohner Textile AG, Siam Compressor Industry Co. Ltd., and The Beacon Press. There are two issues apparent here: One, these companies are not typically recognizable names, thus this UN award can't possibly have as much of an impact as if it were given to a famous, household-named MNE; Second, and perhaps more disturbing, is that the corporations that are behaving in a socially responsible manner are virtually unknown to the general public – the public is familiar with, and thus patronizes potentially irresponsible MNEs. *Id.*

steps that they are taking to comply with the nine principles.¹⁸³ Noticeably missing from the requirements is the enactment of a code of conduct and minimum standards.¹⁸⁴ Opponents argue that because the requirements are so lax, corporations will be able to benefit from the UN approval without taking affirmative steps to end corruption, environmental contamination, and labor exploitation.¹⁸⁵ In addition, the Compact specifically eliminates mandatory participation and enforcement mechanisms.¹⁸⁶ Just as with other UN initiatives, it is certainly plausible that if strict compliance were required, arguably the Compact would have few, if any, signatories. Thus the problem is fundamentally circular – if regulations are enforced, no MNEs will sign on, if they are not enforced, the regulations are essentially illusory, and if the regulations are required, UN member-nations will not adopt them.

3. European Union

Several regional transnational organizations have attempted to address the problem as well. The European Union (EU)¹⁸⁷ has developed a Code of Conduct, but it is extremely narrow in scope, addressing only arms exports.¹⁸⁸ The EU Committee on Development and Cooperation drafted a proposal for the EU to adopt a Code of Conduct similar to those of the ILO and OECD, noted *supra*, but the report was tabled in December of 1998, and as of March 2001, it has not been reintroduced.¹⁸⁹

¹⁸³ See UN Global Compact website, at <http://www.unglobalcompact.org/gc/unweb.nsf/content/participate.htm> (last visited July 3, 2001). Specifically, the website states that one of the requirements for participating in the Global Compact program is to "provide, once a year, a concrete example of progress made or a lesson learned in implementing the principles, for posting on the Global Compact website." *Id.*

¹⁸⁴ Opponents note that the Compact "binds the signers to a declaration of principles rather than a legal code of conduct." And even the UN itself has conceded that some American companies have refused to sign the Compact for fear of binding themselves.

¹⁸⁵ See CorpWatch website, at <http://www.corpwatch.org/trac/headlines/2000/246.htm> (last visited Mar. 19, 2001).

¹⁸⁶ See Joe Lauria, *Kofi Annan: Letting the World Hear Africa's Troubled Voice*, BOSTON GLOBE, Apr. 22, 2001, at E2.

¹⁸⁷ See European Union Online, at <http://www.europa.eu.int> (last visited May 28, 2001). The European Union has fifteen member states: Belgium, Germany, France, Italy, Luxembourg, The Netherlands, Denmark, Ireland, The United Kingdom, Greece, Spain, Portugal, Austria, Finland, and Sweden. *Id.* The EU has been in existence formally for less than 15 years, however, its predecessors date back to 1952 when the Treaty Establishing the European Coal and Steel Community was signed and entered into force. Later, in 1958 the European Community was formed, thus laying the foundation for the current European Union, perhaps the strongest power in both political and economic influence in Europe. *Id.*

¹⁸⁸ See Federation of American Scientists, at <http://www.fas.org/asmp/campaigns/code/eucode.html> (last visited Mar. 19, 2001).

¹⁸⁹ See Richard Howitt (Rapporteur), *Report on EU Standards for European Enterprises Operating in Developing Countries: Toward a European Code of Conduct* (1998) (on file with Author). The report recognizes the issues of MNE corruption and exploitation, and attempts to resolve the issues by encouraging industry and individual private codes of conduct. The report regulates the codes by asking the EU to require minimum standards for the private codes and

However, the EU has addressed individual subjects of public concern, namely workers' rights. Part of the 1992 Maastricht Treaty¹⁹⁰ was the "Social Chapter," which lists certain rights that EU member nations must respect, including: (1) freedom of movement; (2) employment and fair remuneration; (3) living and working conditions; (4) social protection; (5) freedom of association and collective bargaining; (6) vocational training; (7) equal pay for men and women; (8) information, and collective bargaining; (9) workplace health and safety; (10) protection of children; (11) protection of the elderly; and (12) protection of the disabled.¹⁹¹ While it is notable that these rights must be respected, the most important aspect of the Social Chapter is that it established a mechanism for increased attention to some of these issues. While labor rights provisions not dealing specifically with health and safety were subject to mandatory unanimity upon voting, currently under the Social Chapter, all labor rights initiatives, most notably those relating to working conditions and sex equality, are subject to a qualified majority voting of EU members, and thus are more easily enacted.¹⁹²

The EU has also attempted to increase labor rights via incentives. However, instead of focusing on providing incentives for MNEs to behave accordingly, the EU has instead focused on the third world nations themselves. Under the EU Generalized System of Preferences (GSP), nations that apply ILO standards receive special preferences and trade benefits.¹⁹³

The EU is known to be the most sophisticated and respected transnational organization today, and thus their policies for controlling MNEs are slightly more developed than other similar organizations.¹⁹⁴ However, their initiatives still fall short of eliciting any real control over

regulates the codes by asking the EU to require minimum standards for the private codes and contemplates a monitoring system via a board comprised of independent experts, business officials, and representatives from human rights and environmental NGOs. *Id.*

¹⁹⁰ See European Union Online, *supra* note 188. The Maastricht Treaty is the instrument that formally founded the EU as it now exists. However, European countries have been formally organized together since 1952, first as the European Coal and Steel Community (since 1952), then as the European Community (since 1958). *Id.*

¹⁹¹ See Cleveland, *supra* note 87, at 1542-43.

¹⁹² See *id.* As Cleveland notes, the unanimity requirement that existed prior to the Social Chapter was problematic because the United Kingdom repeatedly blocked initiatives in the areas of labor rights other than those concerning health and safety. Thus, Cleveland asserts, under the current Social Chapter qualified majority voting system, adoption of trans-European workplace rights is more possible than it once was. *Id.*

¹⁹³ See *id.* at 1544. The EU invoked the GSP provision to terminate GSP benefits to Burma, sending a signal that the GSP benefits (and lack thereof) may serve as a strong mechanism to encourage countries to facilitate fundamental human rights. *Id.*

¹⁹⁴ See *id.* at 1542. Cleveland contends that of all the regional transnational organizations, the European Union and its Social Chapter are the most sophisticated.

MNEs. This can be seen most clearly with their GSP policy, which in theory incentivizes a nation. What the EU fails to recognize is that no matter what trade incentives and preferences it can give to third world countries, the money offered by MNEs may be much more. As noted *supra*, MNEs are extremely wealthy, having more money than the majority of nations of the world. Thus, although the EU has the advantage of being a conglomerate of several extremely wealthy and powerful nations, MNEs have a great amount of capital available to them, and as evidenced by this article, considerably less restrictions on their ability to disperse that money among third world nations.

4. *Organization of American States*

The OAS, a partnership of 35 American nations whose goal is to further representative democracy, took a step toward abolishing bribery of public officials by approving the Inter-American Convention Against Corruption.¹⁹⁵ This 1996 convention was noteworthy not just because it acknowledged the problem of bribery as being unacceptable behavior by MNEs, but it actually criminalized the act.¹⁹⁶ By signing the act, member nations agreed to "prevent, detect, punish and eradicate" bribery of public officials.¹⁹⁷ Thus, as one author reasons, "the OAS Convention is not grounded principally on trade or economic development concerns, but on morality and the need to preserve and protect democratic institutions."¹⁹⁸ The Convention requires that member states prohibit both "Transnational Bribery" and "Illicit Enrichment," by adopting criminal legislation.

While the Convention's view of bribery and corruption as being immoral is ground-breaking in the transnational organization arena, its implementation of this view falls well short of even being noteworthy. The Convention is not self-executing and thus is subject to ratification and

¹⁹⁵ See Ala'i, *supra* note 145, at 918-919.

¹⁹⁶ See *id.* at 919. It is important to note that the OAS Convention is the first of its kind to encompass the northern and southern hemispheres, meaning its signatories are both industrialized and developing nations.

¹⁹⁷ See *id.* The following "Acts of Corruption" are prohibited: (1) Soliciting or accepting any article or monetary value of other benefit by a government official; (2) Offering or granting any such article or benefit; (3) Any act or omission by a government official in the discharge of his official duties for the purpose of illicitly obtaining benefits for himself or a third party; (4) Fraudulent use or concealment of property derived from any of the Acts of Corruption; and (5) Participating in or conspiring to commit any of the Acts of Corruption. *Id.*

¹⁹⁸ See *id.* (quoting from David A. Gantz, *Globalization Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 NW. J. INT'L L. & BUS. 457, 468 (1998)). Ala'i finds this moralistic standpoint notable as it is a "departure from the current trend which emphasizes the economic dimension of the issue." *Id.*

implementation.¹⁹⁹ As of May, 2001, not all of the countries have ratified the 1996 Convention (notably rejecting ratification is the United States), and of the countries ratifying the Convention, not one of them has taken any steps toward implementation,²⁰⁰ which, under the Convention, is perfectly acceptable – the convention sets no deadline for implementation.²⁰¹ Thus the OAS Convention's good intentions towards combating bribery and criminalizing corruption seem to have been eviscerated due to the terms of the Convention itself. While one could argue that the countries that have ratified would not have done so if there were concrete deadlines for implementation, that argument is transparent, for a policy ratified simply for the sake of ratification cannot possibly further that policy in the slightest.

C. NON-GOVERNMENTAL ORGANIZATIONS

In addition to the transnational organizations that have looked at controlling MNE behavior, several non-governmental organizations (NGOs) also have focused on the problem. Many of them have introduced their own codes of conduct, ranging from models created in an attempt to entice MNEs to follow suit, to codes which are designed to act like enforceable regulations.

Some of the NGO codes that have actually been adopted use a product-labeling scheme, coaxing MNEs to adopt the code by providing the incentive of having labels on their products to alert consumers that they are in compliance with higher corporate standards.²⁰² The most notable of the codes include The Sullivan Principles, The MacBride Principles, Social Accountability 8000, the RUGMARK Campaign, FIFA, and The Apparel Industry Partnership Workplace Code of Conduct.²⁰³

¹⁹⁹ See *id.*

²⁰⁰ See *id.* It is notable that the United States has rejected ratification of the Convention.

²⁰¹ See *id.*

²⁰² See Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111, 113 (1998).

²⁰³ See *id.* at 124. See also Compa & Hinchliffe-Darricarrere, *supra* note 14, at 672-73. Several other, less popular, private codes have been introduced over the last two decades. The Slepak Principles also were introduced for those MNEs doing business in the former Soviet Union, but the principles dissolved during the breakup of the Soviet Union and were never adopted. The Miller Principles attempted to control forced labor issues within China, but with the advent of increased trade between the U.S. and China, the Miller Principles never garnered much support. The Maquiladora Code focuses solely on the maquiladora factory zone along the U.S.-Mexico border. The code, officially named the Maquiladora Standards of Conduct attempts to entice U.S. manufacturers to provide safe, healthy working conditions and adequate wages for factory workers in the region. However, few corporations have signed on to the Code.

1. *The Sullivan Principles*

The Sullivan Principles²⁰⁴ were created in the late 1970s as a way to eradicate apartheid in South Africa through the efforts of U.S. MNEs.²⁰⁵ Those U.S. MNEs that signed onto the principles²⁰⁶ committed themselves to such initiatives as desegregating the workplace, increasing the number of blacks in managerial positions, improving technical training of blacks and non-whites, and establishing a minimum pay rate based on a living wage. In addition, signatories of the Principles were required to pay several thousand dollars in annual dues to aid in enforcement provisions. While the Principles did not single-handedly end apartheid in South Africa, they did aid in desegregating many enterprises.²⁰⁷ While the Principles only affected U.S. MNEs, they inspired other nations to adopt similar provisions. This evidence of nations following U.S. initiatives is the prime argument for those who believe strict US sanctions on U.S. MNEs is the most promising course of action for controlling MNEs.²⁰⁸ However, while other nations followed the U.S. in 1980s apartheid-driven South Africa, there is no evidence that they

²⁰⁴ While this author notes that the Sullivan Principles were not in actuality a product-labeling scheme but rather a scheme to join corporations in a fight against apartheid, among other injustices, the Sullivan Principles and more traditional product-labeling schemes act in the same way to mobilize the private sector, rather than the public, against injustice. *Id.*

²⁰⁵ See Liubicic, *supra* note 202, at 122-123. The Sullivan Principles were created in 1977 by Reverend Leon Sullivan, a Baptist minister who also sat on the Board of Directors of General Motors Corporation. *Id.*

²⁰⁶ See Jorge F. Perez-Lopez, *Promoting International Respect for Workers' Rights Through Business Codes of Conduct*, 17 *FORDHAM INT'L L.J.* 1963, 1970-71 (1996). At its height, the Sullivan Principles had more than 150 signatories, all who agreed to the Sullivan Principles' six aspects: (1) Nonsegregation of the races in all company facilities; (2) equal and fair employment practices for all employees; (3) equal pay for equal work; (4) development of training programs to prepare Blacks and other coloreds for supervisory, administrative, clerical, and technical jobs; (5) increasing the number of Blacks and other coloreds in management positions; and (6) improving the quality of life for employees outside the work environment. *Id.*

²⁰⁷ See *id.* Of the 150 signatories, approximately 95% ended discrimination within their workplaces, and accounted for 90% of the blacks employed by U.S. corporations in South Africa. In addition, more than 2/3 of the signatories offered scholarships to nonwhites and nonwhite managers increased by 30%. *Id.* See *id.* at 1971-72. See also Liubicic, *supra* note 202, at 123. While the Principles seem to have been successful, because they did not meet their goal of ending apartheid, in 1987 Reverend Sullivan himself, the architect of the Principles and a member of the General Motors Board of Directors, denounced them as unsuccessful. However, other analysts state that "the Sullivan Principles adopted in 1976 were a major influence in the South African government's creation of the Wiehahn and Reikert Commissions," commissions which inspired growth of the black trade union movement. *Id.*

²⁰⁸ See Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 *U. PA. J. INT'L ECON. L.* 61, 66 (2001).

have followed suit in any initiative since, thus unilateral sanctions may again only serve to economically disadvantage U.S. MNEs.²⁰⁹

2. The MacBride Principles

The MacBride Principles are similar to the Sullivan Principles, but focus on Catholic workers in Northern Ireland. Signatories of the MacBride Principles are required to "promot[e] hiring, training, and advancement on a non-sectarian basis."²¹⁰ As of the mid-1990s, nearly half of the U.S. MNEs with operations in Northern Ireland had signed on to the Principles.²¹¹

3. Social Accountability 8000

Another certification program, Social Accountability 8000,²¹² is broader than both the Sullivan and MacBride Principles. It provides for minimum standards in certain areas,²¹³ and requires monitors by outside firms²¹⁴. Notably, the program does not provide for public disclosure of code violations, encouraging the signatories themselves to disclose their violations.²¹⁵ As of March 2001, only 9 U.S. MNEs have been certified.²¹⁶

²⁰⁹ See *supra* note 203 (discussion of lack of corporate signatories to NGO codes such as Social Accountability 8000).

²¹⁰ See Liubicic, *supra* note 202, at 124 (quoting Barbara F. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 175 (1993)). "The MacBride Principles also called for a ban on 'provocative, sectarian, or political emblems from the workplace,' and adequate security to protect employees from sectarian violence." *Id.*

²¹¹ See *id.* Several U.S. state and local governments have encouraged MNEs to sign on to the MacBride Principles by requiring that public pension funds acknowledge MNE participation in the Principles for investment decisions. *Id.*

²¹² See *id.* at 127. Social Accountability 8000 was created by the Council on Economic Priorities Accreditation Association (CEPAA) in 1997. *Id.*

²¹³ See *id.* MNE performance is measured in nine areas: child labor, forced labor, occupational health and safety, freedom of association, discrimination, disciplinary practices, working hours, compensation, and management. *Id.*

²¹⁴ See *id.* The monitors are CEPAA-accredited firms familiar with the issues specific to the corresponding work sites. The signatories may choose any firm to monitor their compliance, with the only requirement being that the firm has been accredited by the CEPAA. *Id.*

²¹⁵ See *id.* When one considers that the signatory firms have the ability to choose the monitoring firms and the ability to prevent the chosen firm from disclosing rule violations, it is difficult to comprehend the effectiveness of Social Accountability 8000.

²¹⁶ See Social Accountability International, at http://www.sa-intl.org/sa_8000_signatory_members.htm (last visited Mar. 19, 2001). The nine signatories are Amana SA, Avon Products, Cutter & Buck, Dole Food, Eileen Fisher, Otto Versand, Promodes (a subsidiary of Carrefour), Toys R Us, and United Nations Office of Project Services. *Id.* Although no survey has been conducted to determine consumer behavior in reaction to SA 8000, there are seriously doubts that many, if any, consumers are aware of this program.

4. RUGMARK

RUGMARK is a product-labeling scheme that focuses specifically on the rug and carpet industry of South Asia, which historically has been rampant with child labor abuses. RUGMARK signatories pay fees to the RUGMARK Foundation to cover monitoring costs.²¹⁷ Those who have signed on to the RUGMARK initiative are permitted to label their products as being part of the RUGMARK campaign. Unlike the Sullivan Principles, MacBride Principles, and Social Accountability 8000, RUGMARK is not a unilateral U.S. program but a worldwide initiative.²¹⁸ In the U.S., the RUGMARK campaign is administered by the International Labor Rights Fund.

5. FIFA

FIFA,²¹⁹ the international soccer organization, controls its logo by only allowing it to be placed on soccer merchandise if that merchandise was manufactured according to FIFA's enumerated quality standards.²²⁰ Although the standards are not original, they actually require that MNEs comply with certain ILO conventions relating to child labor, minimum wage payment, etc.²²¹ FIFA has provided for monitoring through an independent monitoring group, the International Confederation of Free Trade Unions.²²²

²¹⁷ See RUGMARK, at <http://www.rugmark.com> (last visited Mar. 19, 2001). In the United States, RUGMARK licensees pay 1.75% of the export costs of their RUGMARK carpets on a quarterly basis. As of September 2000, there are more than 193 retailers of RUGMARK carpets in the United States. *Id.*

²¹⁸ See *id.* The program has been extremely successful in Germany, where carpet and rug wholesalers and retailers are asked to buy only those items manufactured under RUGMARK standards. They may then use this fact as a way to advertise and promote their business as one that solely sells RUGMARK-certified products. *Id.*

²¹⁹ The Federation Internationale de Football Association.

²²⁰ See Liubicic, *supra* note 202, at 130-31. There are other incentives for complying with FIFA's regulations – the logo on the soccer balls signifies that the ball is of regulation size, weight and durability. *Id.* A soccer ball manufacturer wishing to sell its balls would obviously desire to have this logo as it connotes that the ball is appropriate for play. The benefits received from publicizing that the ball was manufactured under fair standards are likewise desirable, yet arguably not as necessary in the market to achieve sales.

²²¹ See *id.* In order to affix the FIFA label to their balls, manufacturers must not only pledge that they comply with the labor standards, but also certify that their contractors and sub-contractors are in compliance. The labor standards include "banning child labor and forced labor, ensuring non-discrimination in employment, guaranteeing collective bargaining rights, and ensuring payment of a minimum wage." *Id.*

²²² See *id.* The International Confederation of Free Trade Unions is a Brussels-based organization. *Id.*

6. Apparel Industry Partnership Workplace Code

The Apparel Industry Partnership Workplace Code focuses on sweatshop conditions in factories operated by or associated with U.S. apparel industry MNEs.²²³ In addition to requiring signatories to rid their workplaces of discriminatory practices, child labor, harassment, forced labor and the like, signatories must comply with the Code's enforcement procedures, which includes monitoring for compliance.²²⁴ Perhaps because of the strict monitoring provisions (see *supra*), the Code stalled in negotiations, and gave way to the creation of the Free Labor Association (FLA).²²⁵

7. Free Labor Association

The FLA is still in development, expecting to certify its first MNE signatories in 2002.²²⁶ Certified MNEs will be able to attach the FLA certification mark to their apparel, signifying to consumers that the apparel was manufactured under high labor standards.²²⁷ The FLA code requires both internal and external monitoring, attempting to fortify the mark behind strict guidelines for compliance.²²⁸ The FLA code also attempts to eliminate

²²³ See *id.* at 125-26. The Apparel Industry Partnership (AIP) – formed in 1996 as a coalition of U.S. labor, consumer, industry and human rights representatives – promulgated the Workforce Code of Conduct in 1997. *Id.*

²²⁴ See *id.* The monitoring provisions include scrutiny of contractors, subcontractors and suppliers. This scrutiny is performed by independent external monitors which includes local as well as for-profit NGOs committed to improving human rights and labor abuses. *Id.*

²²⁵ See *id.* at 126. The FLA is a non-profit organization whose goal is to oversee both implementation of the Apparel Industry Code and monitor those MNEs who have adopted the Code. *Id.*

²²⁶ See Maria Gillen, *The Apparel Industry Partnership's Free Labor Association: A Solution to the Overseas Sweatshop Problem or the Emperor's New Clothes?*, 32 N.Y.U. J. INT'L L. & POL. 1059, 1088 (2000). The Free Labor Association – run by a board of directors comprised of six industry representatives, six Labor representatives, and one university representative – was created by what remained of the AIP in 1998 as a non-profit group charged with overseeing the implementation of the AIP Workplace Code of Conduct and certifying its signatories. *Id.*

²²⁷ See *id.* at 1103. Gillen questions the effectiveness of the labeling scheme because under the FLA a signatory may, to an extent, choose the products it wishes to have labeled. She believes that such ability to pick and choose products to be labeled allows a signatory to benefit from a "spillover" effect where a signatory can enjoy the benefit of all its products being associated with the few that are actually properly labeled – a signatory can have one product labeled and consumers may assume that all its products are labeled, thus maximizing the benefit of the label from a limited commitment. *Id.*

²²⁸ See *id.* at 1088. A "company wishing to participate in the FLA must submit detailed plans for internal and external monitoring programs to the FLA for approval. The monitoring plan must specify the company's applicable facilities and those facilities it deems 'de minimis'; its applicable brands; and detailed information about the monitoring process, including frequency of

the problem of subcontractor liability, holding MNEs accountable for the FLA guidelines of their direct manufacturing facilities as well as subcontracting facilities.²²⁹

These NGO product-labeling solutions seem to have had much more success than traditional national and transnational proposals. However, there remain significant drawbacks to the NGO codes. Primarily, they are extremely industry and/or nation specific, and consequently are very narrow in focus. Therefore, in order to control MNEs as a whole, this method of private codes is quite inefficient. In order to successfully control MNEs under an NGO model, it would be necessary to regulate each industry, nation, and more. This could potentially create a system in which we are controlling MNEs through what resembles a railroad bridge—planks and ties connect the NGO codes, but it is very easy for MNEs who do not fit into the narrow focus of the NGO codes to fall through the cracks, whether by happenstance or intention.²³⁰

8. Caux Roundtable

Other NGOs have steered away from product labeling schemes, concentrating instead on principles of business ethics and morals to control the issue. One such organization, the Caux Roundtable,²³¹ is an international NGO comprised of business leaders devoted to using business ethics to effectuate global change.²³² The group composed a set of business principles which address not only general responsibilities of businesses to the world (i.e. human rights and environmental concerns) but also general responsibilities of business to stakeholders, including customers, suppliers, and the like.²³³

of on-site visits, a description of the employees responsible for internal monitoring, and sample reporting forms." *Id.*

²²⁹ *See id.*

²³⁰ *See id.* at 1081-82. Gillen also notes that the codes ban child labor, but don't address the issue that by banning children from US MNE manufacturing facilities, the codes may actually be forcing children into worse situations. That issue is beyond the scope of this article. *Id.*

²³¹ *See* Caux Roundtable, at <http://www.cauxroundtable.org/english.htm> (last visited Mar. 31, 2001). The Caux Roundtable was created in 1986 by Frederik Philips, former President of Philips Electronics, and Oliver Giscard d'Estaing, Vice-Chairman of INSEAD. Its main focus is on global corporate responsibility in reducing social and economic threats to world peace and stability. *Id.*

²³² *See id.* The Caux Roundtable principles stem from two basic ethical ideals: "kyosei" and "human dignity." Kyosei is a Japanese concept under which living and working together for the common good enables "cooperation and mutual respect to coexist with healthy and fair competition." *Id.* The term "human dignity" as it is used, refers to the inherent value of each person as an individual and not simply as a tool to use in fulfilling the purposes of others. *Id.*

²³³ *See id.* The general principles include: (1) the responsibilities of businesses; (2) the economic and social impact of business; (3) business behavior; (4) respect for rules; (5) support for multilateral trade; (6) respect for the environment; and (7) avoidance of illicit operations. The

D. PUBLIC, SHAREHOLDER AND MEDIA PRESSURES

One of the largest factions putting pressure on MNEs to change their behavior has been the general public. General moralistic sentiment among the public has brought MNE misconduct into the limelight and has forced some MNEs to take action, either by changing their practices or hiding them.

Public groups have attacked MNEs through various means. With the advent of the Internet and email as avenues of communication, email and website activism has become quite popular. Several activist groups depend on email alerts to mobilize members and disseminate messages, mainly because of the advantages inherent in Internet transmission – cheaper cost and quicker output.²³⁴ In addition, activist groups can quickly join forces via the Internet to attack a specific MNE or transnational organization, causing a greater impact on the attacked entity.²³⁵

While typical activist groups such as Greenpeace and Amnesty International have always attempted to change corporate behavior,²³⁶ new (and very diverse) groups have emerged to voice their opinion. MNEs have learned to deal with pressure from the traditional groups, but the new groups are causing quite a stir. An example of the same is the mobilization of French farmers, who, via blockades, protested such MNEs as Disney²³⁷ and McDonald's²³⁸ in an attempt to "invite the powerful to obey morality and good sense."²³⁹

Industry groupings are not the only atypical factions cropping up. MNEs are finding themselves being held accountable by their very own shareholders, who are demanding reduction and elimination of corporate abuses. Shareholders have formed coalitions to leverage their stock value

stakeholder principles address the following stakeholders: (1) customers; (2) employees; (3) owners/investors; (4) suppliers; (5) competitors; (6) communities. *Id.*

²³⁴ See CorpWatch, at <http://www.corpwatch.org/trac/corner/worldnews/other/294.html> (last visited Mar. 31, 2001).

²³⁵ See *id.* When the Multilateral Agreement on Investment (MAI) was being debated, worldwide activist groups joined via the Internet to create a campaign to stop the negotiations. The MAI, which would've supported MNEs through legal and economic advantages, dissolved under the pressure of the alliance of more than 600 citizens' groups all united via the Internet. *Id.*

²³⁶ See Greenpeace USA, at <http://www.greenpeace.org/interact.html> (last visited Aug. 13, 2001) for a brief overview of their current action issues, which include issues concerning Bush's Global Missile Defense plan, degradation of the oceans, the Kyoto Treaty, and global warming. See also Amnesty International, at <http://www.web.amnesty.org/flash/40th/splash.html> (last visited Aug. 13, 2001) for an overview of Amnesty International and its 40-year history.

²³⁷ See CorpWatch, at <http://www.igc.org/trac/corner/alert/disney.html> (last visited Aug. 13, 2001) for a discussion of alleged labor rights violations committed by Disney in such areas as Haiti, Thailand and Burma.

²³⁸ See CorpWatch, at <http://www.corpwatch.com/trac/corner/worldnews/other/461.htm> (last visited Mar. 31, 2001).

²³⁹ See CorpWatch, at <http://www.corpwatch.org/trac/corner/worldnews/other/461.htm> (last visited Mar. 31, 2001) (quoting *Le Figaro*).

and garner the attention of the corporation.²⁴⁰ Essentially, the MNEs are facing pressures from within, in the form of stockholder activism. The rise of such typically non-activist interest groups can do nothing but force MNEs to take notice, for these interest groups are reflective of a general public sentiment that MNEs are irresponsible, and constitute a force probably more powerful than the factioned, left-wing sentiment groups from previous decades. Whether or not the MNEs will modify their behavior under the pressure of these smaller faction groups is yet to be seen.

In addition to pressures from citizen groups, the media has succeeded in pressuring MNEs to comply with general moralistic sentiments of human rights and environmental awareness.²⁴¹ None of these activist groups would be known without the persistence of the media, which tends to view corporate misbehavior as extremely newsworthy. Corporate abuses routinely dominate the headlines, causing fear among MNEs – with the media seeing themselves as a watchdog for MNE misbehavior, MNEs could experience the wrath of consumers and therefore corresponding declines in profits.²⁴²

While this public moralistic sentiment can be seen as a positive force for recognizing the deplorable behaviors of corporate actors, it may in reality have a far greater “bark than bite.” Yes, consumer pressure is an important facet of MNE decisions, but in reality that pressure may not have had a large impetus in effectuating change. Companies like Nike and Kathy Lee Gifford apparel have been exposed in recent years as promoting child

²⁴⁰ See CorpWatch, at <http://www.corpwatch.org/trac/headlines/2000/313.htm> (last visited Mar. 31, 2001). See also CorpWatch, at <http://www.corpwatch.org/trac/headlines/2000/108.htm> (last visited Mar. 31, 2001); CorpWatch, at http://www.corpwatch.org/trac/corner/worldnews/other_356.htm (last visited Mar. 31, 2001). One such coalition, consisting of more than 300 churches and synagogues, has amassed more than one million shares of ExxonMobil stock, allowing it to participate in shareholder meetings, submit resolutions, and voice concerns over company actions. The group, at the July 2000, shareholder meeting, claimed victory by more than doubling the previous percentage of shareholders voting for environmental-related reforms to the ExxonMobil business strategy, exemplifying the power that such shareholder coalitions can have over MNE policies and procedures. At the April 2000 BP Amoco shareholder's meeting, an environmental resolution garnered more than 13.5% of the proxy votes, one of the largest vote percentages ever recorded to hold an MNE environmentally liable. While neither the ExxonMobil or the BP Amoco vote totals are enough by themselves to force change among the MNEs from within the corporation, they exemplify a growing trend for shareholders to hold the corporation liable not just for typical business decisions but for ethical and moral business decisions as well. Finally, at an April 1999 Occidental Petroleum Corporation shareholders meeting, nearly 13% voted to appoint an independent task force to explore the impact on the company of negative publicity stemming from protests by U'Wa tribe members over the MNE's Colombian drilling plans. *Id.*

²⁴¹ Perhaps the pressures exerted by the media are strongest, as the media, in some form, reaches almost everyone and can potentially steer the public sentiment.

²⁴² This author conducted a rough Westlaw search of the term “corporate abuse” since January 1, 2000, and more than 400 news articles surfaced. With varying search terms, that number is without a doubt much higher.

labor and substandard working conditions,²⁴³ yet both companies are still in business.²⁴⁴ It is doubtful whether the average consumer will pass up an opportunity to buy an item under such a brand if that item is less expensive, or more popular, than the brand who operates with ethical and moral principles.²⁴⁵

E. INTERNAL CODES OF CONDUCT

As a result of these pressures, most MNEs have developed internal codes of conduct, in an attempt to lessen concerns from outside sources.²⁴⁶ These internal codes come in many forms and from many sources, and they address everything from environmental regulatory procedures to public official bribery to general corporate responsibility.²⁴⁷ They are "dream" documents for MNE public relations officers,²⁴⁸ and have prompted action

²⁴³ See Stephen Franklin, *Perspective On the Record: Charles Kernaghan, Labor Activist*, CHI. TRIB., Feb. 6, 2000, at 3 (an interview with a representative from the National Labor Committee, the group that exposed the sweatshop conditions under which Kathy Lee Gifford's clothing was made, and the group that is currently attacking Nike by encouraging college campuses whose apparel is sponsored by Nike to demand better working conditions under which that apparel is produced).

²⁴⁴ This is true as of August 12, 2001.

²⁴⁵ See Debora L. Span, *The Spotlight and the Bottom Line: How Multinationals Export Human Rights*, FOREIGN AFFAIRS, Mar.-Apr. 1998, at 7, 9 (remarking that brand, price & quality are valued more by consumers from industrialized nations than news of substandard conditions in foreign manufacturing arenas).

²⁴⁶ See Janet S. Adams, Armen Tashchian, & Ted H. Stone, *Codes of Ethics as Signals for Ethical Behavior*, J. BUS. ETHICS, Feb. 1, 2001, at 199211.

²⁴⁷ See Lockheed Martin website, at <http://www.lockheedmartin.com> (last visited May 28, 2001). Lockheed Martin's approach is typical. The company has a booklet enumerating and expanding on six principles it deems important in striving for ethical behavior. In a July 1999 letter from its Chief Executive and Chief Operating officers, Lockheed Martin states the following: "While maintaining sensitivity to the diverse social and cultural settings in which we conduct our business, Lockheed Martin aims to set the standard for ethical conduct at all of our localities throughout the world. We will achieve this through behavior in accordance with six virtues: Honesty, Integrity, Respect, Trust, Responsibility, and Citizenship." *Id.* The letter goes on to define the six virtues: "Honesty: to be truthful in all our endeavors; to be honest and forthright with one another and with our customers, communities, suppliers, and shareholders. Integrity: to say what we mean, to deliver what we promise, and to stand for what is right. Respect: to treat one another with dignity and fairness, appreciating the diversity of our workforce and the uniqueness of each employee. Trust: to build confidence through teamwork and open, candid communication. Responsibility: to speak up - without fear of retribution - and report concerns in the workplace, including violations of laws, regulations, and company policies, and seek clarification and guidance whenever there is doubt. Citizenship: to obey the laws of the countries in which we do business and to do our part to make the communities in which we live and work better." *Id.*

²⁴⁸ See Nomi Morris, *Saving the Brand Name*, MACLEAN'S, Dec. 11, 1995, at 30. Because of the increased public concern about corporate behavior, public relations officers are scrambling to promote their MNEs as proactive. One author commented that a company accused of exploiting child labor in violation of human rights "ranks somewhere up there with toxic dumping or unsafe products in the list of evils that can blacken the image of a successful corporation." *Id.*

from within MNE circles. Indeed, several groups have formed solely to promote MNE codes as a method of MNEs acting proactively to solve the problem.²⁴⁹ Yet the codes are still simply paper regulations, and MNEs have done little to prove that their corporate responsibility extends beyond them.

Codes of conduct are as varied as the corporations that adopt them. They range from rather complete documents to one-page statements focusing on the company's ethical standards and responsibilities.²⁵⁰ These one-page codes are generally akin to mission statements, consisting more of broad principles of conduct rather than specific guidelines to action.²⁵¹

While codes of conduct are continually gaining momentum as necessities for business operations, there is continuing criticism of their effectiveness.²⁵² In fact, the hallmark of these codes is that they are voluntary.²⁵³ MNEs voluntarily create and adopt these codes as a memorialization of internal regulatory procedure. Nonetheless, because of their voluntary nature, they are vastly unregulated as to their content, their enforcement, and consequently, their impact.

Not only are these internal codes varied in scope and length, but they are also extremely diverse in content. While most address the major issues of human rights and the environment, some are quite specific in the behavior that they do and do not tolerate.²⁵⁴ Thus, in theory, the MNEs with more specific ethics requirements, by creating and adopting a code with

²⁴⁹ See *infra*, discussion of Ethical Officers Association.

²⁵⁰ See Vernice R. Palmer, *Initiating a Corporate Compliance Program*, 178 PLI/CORP 67, 74 (2000). The Department of Labor has defined corporate codes of conduct as "policy statements that define ethical standards for companies. Corporations voluntarily develop such codes to inform consumers about the principles that they follow in the production of the goods and services they manufacture or sell. Corporate codes of conduct usually address many workplace issues - including child labor - and, according to some observers, are part of a broader movement toward social responsibility." *Id.*

²⁵¹ See John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 485-86 (2000). However, some codes have specific action statements. For example, Reebok's code directs the MNE to withdraw from operations in countries that violate human rights, and Levi Strauss's code enumerates the same restriction. Levi Strauss' commitment to this principle was seen recently in its withdrawal from Burma following reports of widespread human rights abuses. *Id.*

²⁵² See Jane C. Hong, Note, *Enforcement of Corporate Codes of Conduct: Finding a Private Right of Action for International Laborers Against MNCs for Labor Rights Violations*, 19 WIS. INT'L L.J. 41, 48 (2000).

²⁵³ See Vernice R. Palmer, *Initiating a Corporate Compliance Program*, 1178 PLI/CORP 67, 75. There are a few industries that require codes of conduct. Investment companies and their investment advisors are required to adopt a written code of ethics as per 15 U.S.C. §80a-17j and 17 C.F.R. § 270.17j.-1(b). In addition, government contractors are required to maintain codes as evidence they are responsible companies as proscribed by law. *Id.*

²⁵⁴ For example, Lockheed Martin's code contains 23 separate sections with directives as general as "Promote a Positive Work Environment" and as specific as "Know the Rules About Employing Former Government Officials." See Lockheed Martin website, at http://www.lockheedmartin.com/about/ethics/coe_toc.html (last visited May 28, 2001)

higher standards, may be putting themselves at a distinct competitive disadvantage as compared to companies with broader codes. This diversity in content has been a constant source of contention for critics, who claim that a lack of content uniformity allows for MNEs to gain a competitive edge under the guise of acting ethically.²⁵⁵

Arguably the single-most point of contention concerning MNE internal codes of conduct revolves around the issue of enforcement.²⁵⁶ Several MNEs have attempted to fortify their codes by implementing elaborate schemes for enforcement. Indeed, one such company, toy manufacturer Mattel, has attempted to ensure enforceability by hiring an independent monitoring organization.²⁵⁷ However, most MNEs haven't ventured this far, and have instead relied on promises of internal monitoring. Internal monitoring, though, is open to severe criticism, for it "smells of the fox minding the chicken coop, and serious questions arise regarding the extent to which code violations will be disclosed."²⁵⁸ Finally, even if an MNE has established internal monitoring, very rarely has it taken the extra step in providing an adequate remedy for the abuse.²⁵⁹

Critics are equally concerned about the impact of such codes, and whether they realistically change corporate behavior. While reports of successes are encouraging²⁶⁰, unfortunately such proactive behavior seems

²⁵⁵ See Anderson, *supra* note 251, at 490. Anderson poses this problem in the framework of a hypothetical: "For example, Oil Company A might adopt a code prohibiting business activities in a country such as Burma, while Oil Company B simply promises to meet the highest ethical standards in all of its business activities. This situation allows Oil Company B to profit despite Burmese atrocities, while placing Oil Company A at a competitive disadvantage, and accomplishing little with respect to furthering human rights." *Id.*

²⁵⁶ See Palmer, *supra* note 253, at 72. The Department of Labor, in its study of the apparel industry, stated that "monitoring is critical to the success of a code of conduct: it also gives the code credibility in the eyes of consumers and other interested parties." Palmer, in a Practising Law Institute guideline for creating a corporate code of conduct, enumerated nine principles corporations should follow in creating enforcement procedures: (1) Internal reporting mechanisms; (2) Internal audit compliance surveys; (3) employee questionnaires; (4) anonymity for "whistle-blowers;" (5) requests of outside third parties; (6) integrity; (7) foreign factory monitoring, especially those owned by third parties from which the company imports wholesale goods; (8) director review; (9) review and revision of current legal developments in the area. *Id.*

²⁵⁷ See Anderson, *supra* note 251, at 486-87.

²⁵⁸ See Cleveland, *supra* note 87.

²⁵⁹ See Compa & Hinchliffe-Darricarrere, *supra* note 14, at 675-77. Levi Strauss & Co. is an exception to the general rule about lack of enforcement and remedy for internal codes of conduct. The company has an elaborate internal monitoring system consisting of questionnaires designed to pervade every aspect of its code. The system includes surprise auditing by internal officers. While the internal monitoring system is criticized as enabling MNEs to sweep abuses under the proverbial rug, Levi Strauss & Co. has resisted the temptation, voluntarily reforming business practices with more than 100 worldwide suppliers, ending business relationships with more than 30 business partners, and even discontinuing business entirely in countries such as China and Burma, which perpetually violate human rights. *Id.*

²⁶⁰ See Tofloy, *supra* note 24, at 908

to be the exception rather than the rule. More often come accounts of sweatshop conditions, child labor abuses, miniscule wage payments, and public official bribery.²⁶¹ For instance, Nike has had a corporate code of conduct in effect since 1992, and yet there has been considerable news in recent years concerning Nike's factory conditions in third-world countries.²⁶² Thus, the impact of an MNE adopting such a code on its actual activities need not ensure success and in fact the mere existence of the code itself may be substantially denuded by its activities. As one business ethicist stated, "too many companies don't do anything with the [codes]; they simply paste them on the wall to impress employees, customers, suppliers and the public."²⁶³

Several private groups are trying to raise the bar on corporate ethical standards. One such organization, the Ethical Officers Association (EOA) is a non-profit organization consisting of ethics officers²⁶⁴ of more than 700 national and international corporations, from smaller entities such as Savannah Electric to large MNEs such as DaimlerChrysler Corporation.²⁶⁵ The EOA hosts professional development courses as well as conferences and forums, all designed to further ethics within corporate environments.²⁶⁶

Perhaps it is organizations such as the EOA which can unify and standardize corporate codes to make them more effective. However, EOA membership is still voluntary, and its members control its agenda. In addition, there is very little to which a signatory must agree for membership in the EOA.²⁶⁷ So again the issue of a toothless remedy surfaces – corporations can have the benefit of joining a group which appears to be actively promoting ethically responsible behavior, but in actuality does nothing concrete to effectuate positive global change by MNE actors.²⁶⁸

²⁶¹ See generally *id.*

²⁶² See *Id.*

²⁶³ See Lu, *supra* note 27, at 606.

²⁶⁴ Also known as ethics ombudsmen.

²⁶⁵ See Ethical Officers Association, at <http://www.coa.org> (last visited Mar. 3, 2001).

²⁶⁶ See *id.* The vision statement of the EOA is as follows: "A professional association for ethics officers and the organizations for which they work, that provides for sharing of ideas and best practices, continuing education and professional development, is international in scope and with national and local opportunities for peer-to-peer exchange." *Id.*

²⁶⁷ See *id.* To be a member of the EOA, in addition to dues, one must adopt or be in the process of adopting an internal corporate compliance program in accord with the core values of the EOA (integrity, confidentiality and collegiality) and the mission statement of the EOA ("The EOA is dedicated to promoting ethical business practices and serving as a global forum for the exchange for information and strategies among organizations and individuals responsible for ethics, compliance and business conduct programs."). *Id.*

²⁶⁸ According to the EOA's membership application, "All organizations seeking membership in the EOA are closely monitored to ensure they adhere to our membership qualification guidelines." *Id.* However, the only membership qualification guideline is for members "to have an internal

III. CONCLUSION

During the 1960's and 1970's it was not uncommon for social protestors to chant the refrain "The Whole World is Watching." Although the context was different, one can easily argue that it would be foolish for the modern Multinational to ignore that clarion call to action.

As has been clearly enumerated in this article, the Multinational Enterprise poses challenges heretofore unknown and demands solutions yet to be determined. These great leviathans sail on the seas of commerce virtually untrammelled and woe be it the vessel that intersects their path. As they proceed with their growth and power one must wonder if the rules by which the sovereigns of this planet have established can remain unaltered.

As the world observes the MNE it becomes patently obvious that a paradigm shift is upon us. This paper has clearly established that the MNE is subject to myriad pressures from a relatively inexhaustive list of sources. The result is akin to being in a vise in which the device is inexorably tightened, ostensibly resulting in some change of behavior.

However, this paper has, at its core, relied on the argument that MNEs are being pressured by a toothless vise, forced into compliance with nebulous standards of "being good" and "acting responsibly" with the threat of weak punishment at best. Like an errant child being banished to a room full of video games, the weak sanctions in place have done and will continue to do little to encourage MNEs to become socially responsible.

The challenge remains to restructure the vise so that it contains a sharpened set of teeth. Indeed, one might argue that in addition we must aggregate the diverse set of pressure points into a small number of much more powerful instruments. It is the opinion of the author that NGO's and Regional Trade Organizations may prove the most effective source of control of such.

Whatever the ultimate outcome, shifting power on this planet from political sovereigns to private economic organizations will be unsettling at best and will continue to be the subject of inquiry and great controversy. At this juncture, what will ultimately transpire as a result of this shift is a matter

ethics/compliance program already in effect or ... in the process of developing one," and nowhere does the EOA state exactly how that monitoring process is implemented.

of pure conjecture. However, one might easily surmise that the economic and political landscape in which we live will forever be altered.