

# **Corporate Social Responsibility in the Global Economy: Canadian Domestic Law and Legal Processes as a Vehicle for Creating and Enforcing International Norms**

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Janis SARRA\*

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\* Assistant Dean and Associate Professor, UBC Faculty of Law. The author gratefully acknowledges the honour of receiving the Charles D. Gonthier Fellowship, 2003, awarded by the Canadian Institute for the Administration of Justice/L'Institut Canadien d'administration de la justice, which enabled the research for this project. Thanks also to Professors Ronald B. Davis and Karin Mickelson for comments on a draft of this article and to participants at the *Participatory Justice in a Global Economy: The New Rule of Law* conference, October 17, 2003, who provided helpful feedback on the ideas canvassed in this paper.

## **I. THE PLACE OF THE CORPORATION IN INTERNATIONAL LAW, PRIVATE CITIZEN OR PUBLIC ENTITY?**

For corporate law scholars, both doctrinal and theoretical research are taken from the starting point of the corporation as a separate legal personality, with perpetual existence, the ability to contract, an entity aimed solely at the generation of wealth through its economic activities. While viewed as largely engaged in private activity, the corporation, whether closely or widely held, private or an issuing corporation, is the beneficiary of a highly codified regime that enables it to operate in Canada. Similar enabling legislation in many jurisdictions allows corporations to operate internationally. Some of the debate in corporate law concerns the proper role of the law and the administration of justice with respect to the corporation and in particular, whether or not it is to be treated more as a private actor or as a legal construct granted certain rights and privileges in return for the socially desirable effects from its activities. There are also concerns about the special status granted to the persons who participate in its activity through the corporate form with respect to whether or not their privileges are being used in our society's best interests. One question that arises is whether our legal regime is giving these corporate actors the right messages about socially desirable behaviour.

The debates concerning these issues and the role of law and the administration of justice in providing the right messages are sufficiently complex when one is dealing with the role of domestic law in corporate social responsibility. However, once one must consider the issues in the context of a multinational enterprise (MNE) and the role of international law in providing appropriate incentives for socially responsible behaviour, the complexity expands. In addition, the change in the type of law from domestic law—which is primarily concerned with the regulation of a nation's citizens—to international law—which concerns relations between sovereign nations, not the regulation of those nations' citizens, including

its corporate citizens, requires a change in the way we think about the role of law and the administration of justice in the regulation of MNE activity. These changes are some of the reasons why a key question is the efficacy and limits of the rule of law in respect of the global activities of MNEs.

## **II. CROSSING BORDERS: DOES THE MNE LEAVE THE RULE OF LAW BEHIND?**

This article will first discuss the corporate form and the domestic legal regime that supports its existence. Two of the more crucial aspects of that regime are the separation of ownership and control, and the limitation of individual liability for corporate actors when corporate activity causes harms. The issue of corporate social responsibility must be assessed in the context of the domestic regime. This part then briefly reviews three conceptions of the proper role of the corporation in respect of social responsibility. They range from those that consider the only legitimate social goal to be the maximization of shareholder wealth to those that consider a corporation has a public duty to act in a socially responsible fashion. One cannot participate in this discussion without also discussing the normative features of various interpretations of the appropriate role of law in corporate regulation, including those norms that reside in the most neutral and enabling language.

Following this review, Part III then describes how the issues with respect to the corporate form are magnified when that corporation begins to operate in a multinational fashion. In a purely domestic system, the problem of limited liability for the corporation's agents is a problem of proper incentives for individuals in their management of the corporation. The vulnerability of the corporation's assets still serves as a constraint on decision-making by corporate managers, even under the strictest shareholder wealth maximization conception. If directors and officers subject the corporation's assets to legal liability through reckless or negligent acts, they may face personal liability for breach of their fiduciary duty. However, corporate affairs in a multinational operation can be arranged so that this risk is greatly reduced. The combination of the limited liability of the corporate form, and the general understanding of international law as inapplicable to an MNE's operations dramatically reduce the constraints on their managers in regard to respecting the environment, human, political or social rights in their operations outside the "home" country. The combination of these factors leads to at least four problems in this area: the problem of unlimited subsidiaries; the problem

of the reluctant host; the “Who, Me?” problem; and the problem of the race to the bottom of the market.

Finally, Part IV discusses the challenges for the administration of justice in the context of a global economy. Three issues appear to be relevant to this inquiry. Where can the voice of Corporate Social Responsibility for MNEs be heard in International Law? How can it be heard? Is there any remedial avenue available that can create appropriate incentives for the MNE’s management to adhere to some form of corporate social responsibility in their conduct of the MNE’s operations?

While there are not yet any final answers to these questions, one possible solution is enacting legislation that grants extra-territorial jurisdiction and creates enforceable remedies for harms caused by domestically registered corporations in their activities internationally. This could involve expanding the notion of corporate law fiduciary duty to encompass international law norms in respect of the environment, human, social and political rights. Any intentional or negligent breach of these norms would subject the MNE manager involved to sanctions similar to those imposed for breaches of fiduciary duty in a domestic setting. The missing element in the multinational context is the threat to corporate assets from legal liability that gives force to the claim the director breached the duty to act in the best interests of the corporation in a domestic context. The question is whether it can be replaced by a combination of consumer markets, markets for socially responsible investment and incentives from home countries to MNE’s to report on social responsibility factors, and to host countries to enter international accords that have a social responsibility element. The administration of justice is implicated in this potential regime as the forum in which failures to abide by international norms can be identified, and breaches of fiduciary duty declared and remedied.

#### **A. The Corporate Form and the Domestic Legal Regime**

The Canadian domestic legal regime delimits the rights and responsibilities of the corporation’s agents, offers some remedial protection and default control rights to its investors, and generally facilitates capitalization transactions of the corporation. In terms of shareholder investment and managerial control, some key features are that the statutes assign directors oversight and control of the operations of the corporation. Shareholders can exercise episodic voice in corporate affairs, but only indirectly, through the election of directors, advisory shareholder

resolutions, voting on management's resolutions and super-majority votes on changes to capital structure that affect the existing shareholders. In terms of the limited liability regime, a key feature is that shareholder liability is limited to the shareholder's total investment. Managers control the corporation's activity, but they have no general personal liability for harms caused by its activity. There are some exceptions, such as statutory liability for wages, domestic environmental damage and some torts, as well as liability under oppression remedy and derivative suits.

Hence the study of corporate law has been a study of the scope and limit of the corporation's activities, its efficiency in facilitating the generation of wealth, its capital and governance structure, its relationships with investors and other stakeholders, and consideration of the *ex ante* incentive effects created by particular policy choices in corporate and securities law. Unlike other jurisdictions, in Canada, there is remarkably little scholarship regarding corporate social responsibility.

## **B. Corporate Social Responsibility in the Domestic Context**

As a result, there is considerable disconnect between Canadian corporate law scholarship and the scholarship that engages issues of the corporation's role in a global society, including issues of international human rights protection and global sustainability. This disconnect is more significant than merely difference in scholarship focus. It concerns fundamental normative disagreements about the role of law and legal processes in corporate activity and markets generally, and disagreement regarding the economic and social objectives of corporate activity. A brief review of the various competing conceptions will be helpful in setting the context.

### **1. The Neutral Market and the Political Regulation of Social Responsibility**

Much corporate law scholarship is premised on the view that it is not grounded in any particular normative view of the corporation, but rather, involves observations about the effects of legislative intervention on the functioning of perfect markets, corrected for any outliers. Scholarship is also based on a notion of investors as rational actors, who are not socially situated individuals, with wealth maximization as their sole objective. Hence corporate law scholarship explores the law's role as enabling and efficiency enhancing. While this approach is clearly one that has made

normative choices regarding the role of the corporation and its investors, with all the attendant distributive effects, the scholarship rarely acknowledges that these are normative choices.

The result is that there is a separation in the discourse, in terms of both the laws that regulate corporate conduct and the judicial forum in which these issues are determined. Domestic human rights, labour law, community control of land and resource use issues are generally matters determined through the administrative law system. While administrative agencies and tribunals bring considerable expertise to their determination of these issues, the scope of the inquiry and the remedies ordered are subject to the limits of the statutory regime from which they derive their authority. Thus while standards have been set, the remedies are frequently aimed at addressing a particular individual harm, and only in a few instances are comprehensive remedies considered. The law's role in this respect is also to create incentives to restrain particular conduct. Statutory standards are coupled with the threat of sanction for violation of the standards and remedies for specific harms such as toxic spills, failure to pay minimum wages or provide healthy and safe working conditions and a host of other standards that reflect domestic public policy. While deterrence is frequently an objective of domestic remedial legislation, rarely does the law impose systemic preventive programs on corporate entities. Moreover, the remedial legislation is aimed at domestic harms and remedies, although in some cases, tribunals and courts draw their analysis of the scope of the rights protected from international norms and treaties.

In the domestic context, high deference to business judgments by the courts helps to foster economic activity and enhance the ability of corporations to compete in global capital and products markets. Public policy aimed at these objectives is evident in both the enabling structure of corporations statutes and the express aims of securities laws.<sup>1</sup> However, such deference can also facilitate *ex post* effects in terms of externalization of social and economic harms. The broadly accepted Anglo-American normative conception of the corporation is that shareholder wealth maximization is the sole objective of corporate activity and the measure against which directors and officers will be adjudged as to whether they

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<sup>1</sup> See for example, the purpose clause of the Ontario *Securities Act*, R.S.O. 1990, c. S.5, s. 1.1.

are acting “in the corporation’s best interests”.<sup>2</sup> Thus, aside from compliance with minimum standards set by environmental, social welfare, human rights and labour legislation, corporate conduct that results in harms to individuals and communities is considered within the range of “acceptable” corporate decision making. Moreover, some contractarian theorists have suggested that the corporation need not be engaged in socially responsible activity, because as a legal fiction, corporations are incapable of acting “morally”. Hence not only should the corporation’s activities be solely governed by its contractual relations, but if parties are unable to bargain protections, the corporation can engage in whatever activity it chooses.<sup>3</sup> The “social” value that corporations are to contribute is that in generating wealth for shareholders, the aggregate social welfare will increase.<sup>4</sup> While legal scholars acknowledge that corporate activity affects the interests of other stakeholders, they suggest that these interests should be protected either by contractual bargains, enforcement of implicit contracts or public laws that expressly limit the activities of corporations. Yet this approach ignores the problem of information asymmetries, lack of bargaining power and inability to enforce either explicit or implicit contracts.

While there is merit in the suggestion that remedial legislation be used as the policy instrument for advancing social equality and social justice, this ignores the persuasive economic and normative power that corporations can exercise over the political process and hence the development or retention of public laws that may protect corporate stakeholders from particular harms. Elsewhere, I have suggested that the normative underpinnings for this conception of the corporation, both residual rights theory and the nexus of contractual relations approach to corporate law,

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<sup>2</sup> The principal argument for this is that shareholders are the residual claimants to the value of the corporation’s assets, and hence, corporate decisions should be made in their interests.

<sup>3</sup> F. Easterbrook & D.R. Fischel, *The Economic Structure of the Law* (Cambridge: Harvard University Press, 1991); M.C. Jensen & W.H. Meckling, “Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure” (1976) 3 *Journal of Financial Economics* 305; J. Macey & G. Miller, “Corporate Stakeholders: A Contractual Perspective” (1993) 43 *U.T.L.J.* 401.

<sup>4</sup> H. Hansmann & R. Kraakman, “The End of History for Corporate Law” (2001) 89 *Geo. L.J.* 439.

ignore the economic and social interests in the corporation that run along a continuum.<sup>5</sup>

## 2. Three Conceptions of the Corporation and Social Responsibility

In the United States, the debate regarding corporate social responsibility has been protracted, with corporate law scholars positioning themselves at extreme ends of a debate regarding the normative role of the corporation. The genesis of the debate commenced in the 1930s in a debate conducted regarding for whom are corporate managers trustees.<sup>6</sup> The debate centred on whether corporations were purely private entities, or whether they were to be considered quasi-public, and thus whether managers have public as well as private obligations in their governance of the corporation. Anglo-American scholarship has primarily, although not exclusively, concluded that the sole objective of the corporation is to generate value, and that it is inappropriate for corporations to engage in any activities that can be broadly classified as socially responsible, as it detracts from its primary profit-making objectives. Scholars have suggested that while profit making solely for the benefit of shareholders should be undertaken within the confines of the law, that is the sole social obligation of corporate decision makers.<sup>7</sup> This view arises from a normative conception of the corporation as engaging in purely private activity. The market mechanism is viewed as the only appropriate means of determining the allocation of scarce resources to alternative uses.<sup>8</sup> It

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<sup>5</sup> J. Sarra, "Corporate Governance Reform, Recognition of Workers' Equitable Investments in the Firm" (1999) 32 *Canadian Business Law Journal* 384.

<sup>6</sup> A.A. Berle, "For Whom are Corporate Managers Trustees: A Note" (1932) 45 *Harvard Law Review* 1365; E.M. Dodd Jr., "For Whom are Corporate Managers Trustees" (1932) 45 *Harvard Law Review* 1145.

<sup>7</sup> See for example, M. Friedman, "The Social Responsibility of Business is to Increase Its Profits" *New York Times Magazine* (13 September 1970) 122 at 122 [hereinafter "The Social Responsibility of Business"]. Friedman suggests that the whole justification for shareholders electing corporate directors is that the executive is an agent serving the interests of his or her principals, the shareholders. See also M. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), where he suggests that social responsibility is fundamentally a subversive doctrine in a free society, and that the one and only social responsibility of business is to use resources to increase profits, as long as it engages in open and free competition without deception or fraud.

<sup>8</sup> Friedman argues that if corporate officers were to expand resources for social purposes, they would become civil servants while remaining employees of a private

also arises from the notion that corporations cannot serve as moral or social entities because their fundamental nature is a nexus of contractual relations with individuals entering multiple contracts, both implicit and express contracts, in their self-interests, and that corporations as inanimate objects are incapable of having moral or social obligations.<sup>9</sup>

This conception of the corporation fails to situate the corporation socially. Corporate activity is implicated in all aspects of economic, social and political activity. As citizens, we are exposed to corporate activity in every aspect of our lives. Health care is influenced by the choices made by corporations about research and development and the costs of services and equipment designed by corporations for health care providers. Accessibility to food and consumer goods is influenced by the pricing and import decisions of corporations. Most people in North America are either directly employed by corporations or by the spin-off businesses that support corporate activity. The safety of products such as cars, cleaning materials, construction materials, food and medication are all outputs of corporate decisions about risk and reward in their production decisions. Decisions to engage in production activity that is harmful to the local environment or to the health of the corporation's workers are frequently decisions assessing the cost and benefits of production, the risk of sanction by the state for non-compliant activities and the risk that any sanction will be upheld and enforced by the courts. Moreover, the current system allows corporations to externalize many of the costs of these decisions, thus redistributing the risk and costs of any harms on those employees, consumers or residents who engage with the corporation in all aspects of their daily lives. Hence while the generation and dissemination of profit may be a private activity, corporate conduct has a direct impact on a wide range of daily social activities by citizens and by communities. While there are legitimate issues of finite resources and questions of allocation, to leave those decisions solely to corporations ignores the distributive effects of those decisions. Quite aside from the questionable ability of the market to operate efficiently such that it can send the appropriate signals

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enterprise, and that the doctrine of social responsibility involves acceptance of the socialist view that political, not market, mechanisms are the appropriate means of determining the allocation of scarce resources to alternative uses: "The Social Responsibility of Business" *ibid.* at 123.

<sup>9</sup> D. Fischel, "The Corporate Governance Movement" (1982) 35 Vand. L. Rev. 1259 at 1273-1274.

regarding allocation of resources, the way in which harms are not costed within the corporation skews any information on what precisely is the optimal allocation of those resources. The public policy regime that enables corporations to operate needs to take better account of the corporation as socially situated.

Daniel Ostas has observed that leaving compliance for corporate conduct to public regulators encourages corporate officers to disregard the effect of behaviour that would engage their concern if they were acting purely as individuals.<sup>10</sup> He uses the example of a pharmaceutical company where the sole medical doctor on the research team refused to endorse a new drug that she believed was unsafe, citing ethical obligations under her professional code of ethics.<sup>11</sup> The company removed her from the research team and she claimed wrongful discharge. The Supreme Court of New Jersey, in endorsing the corporation's actions, defined corporate social responsibility solely as the duty to follow the law; it held that it is for public authorities, in this case the FDA, to provide the independent check on the corporation's activities.<sup>12</sup> Ostas observes that law's indeterminacy means that managerial discretion becomes unavoidable and that the courts increasingly defer to managerial judgment. Hence positive legal formalism provides an impractical guide to corporate social responsibility.<sup>13</sup> Managers both follow but also shape legal rules in respect of acceptable norms of corporate conduct, in their risk assessment, their litigation strategies and their capture of political processes that would seek to regulate or limit their activities.<sup>14</sup> Ostas suggests that these factors should lead to more ambitious thinking about corporate social responsibility in that corporate officers could work with governments to focus on long-term profitability achieved through improvement in the law in respect to such conduct, rather than on short-term gains promised by circumventing it. He also suggests that corporate managers need a vision of the law that guides

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<sup>10</sup> D. Ostas, "Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory" (2001) 38 Am. Bus. Law Journal 261.

<sup>11</sup> *Ibid.* at 266-267, discussing *Pierce v. Ortho Pharmaceuticals Corp.* 417 A.2d 505 (N.J. 1980).

<sup>12</sup> The trial court found for the corporation, the appellate court reversed and the Supreme Court of New Jersey reinstated the trial judgment. Ostas, *ibid.* at 266.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.* at 269-270, citing the work of free market economists with respect to the capture theory of regulation.

their exercise of discretion where socially responsible behaviour is not clearly specified at law.

The dominance of the current normative approach to corporate behaviour is giving way to a more nuanced and socially situated view of corporate activity. Yet even with this shift, the shareholder wealth maximization model continues to dominate choice of policy objectives and instruments in Anglo-American scholarship.

*i. Synergies between Social Responsibility and Shareholder Wealth Maximization*

There are three main streams of thought in the corporate law literature that depart from the dominant model. First, there may be synergies in creating long-term shareholder wealth maximization and engaging in socially responsible behaviour as the latter may produce value for shareholders in the long term from reduced liabilities, better consumer goodwill and fewer environmental remediation costs. This is a valid observation and one that has facilitated the development of socially responsible investment (SRI) funds, such as ISIS, primarily operating out of the U.K. and continental Europe.<sup>15</sup> These funds utilize particular social and economic benchmarks as signs of effective governance. They have policy analysts sitting on the trading floor with the financial experts, making decisions on ethical investments against criteria of environmental compliance, compliance with labour, employment and human rights standards and local securities law, as measures of effective stewardship of corporations and hence long term value maximization potential. In the US alone, it is estimated that SRI funds hold \$2 trillion in assets.<sup>16</sup> Those advocating SRI and its ethical screening view SRI as the primary vehicle through which to achieve corporate social responsibility, by ultimately positively influencing stock prices. The premise is that shareholders will simultaneously profit and through their investments promote social objectives, the notion of doing well financially by “doing social good”. In

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<sup>15</sup> ISIS Asset Management, <http://www.isisam.com>.

<sup>16</sup> Report on Socially Responsible Investing, <http://www.socialinvest.org/areas/research/trends/2001-trends.htm>. Cynthia Williams reports that by 1999, 9% of all assets under management in the US were in screened funds. C. Williams, “The Securities and Exchange Commission and Corporate Social Transparency” (1999) 112 Harvard Law Review 1197.

Canada, such funds are at a nascent stage, although some of the labour sponsored investment funds engage in similar social and environmental auditing prior to investing. These are important developments, because they link effective stewardship of the corporation with norms such as long-term sustainability and human rights that arguably can be broadly supported as norms that we as a society want to support. It also indicates that there is a market for SRI funds, in terms of investor preferences. There are, however, a number of critiques regarding the efficacy of SRI. There are problems of transparency in terms of the information base on which these decisions are being made and different conceptions of what it means to be in compliance with such norms.

Scholars have also challenged the notion that SRI means that investors will “do well by doing good”. Michael Knoll tracks SRI to turn of the century Quaker and other Christian initiatives screening investment for “sin” related activities, the shift through the 1960s to avoiding investment in war related activities, the 1980s in respect of screening for investment in the then repressive regime in South Africa to modern day screening which primarily screens for tobacco.<sup>17</sup> He examines the two principal claims by SRI proponents. The first is that SRI is at least as profitable and prudent an investment strategy and hence not more risky than strategies without a socially conscious component. In respect of this claim, he suggests that it may be true where markets are efficient, although this does not indicate that all SRI programs are costless.<sup>18</sup> The other claim is that through SRI, investors are improving society by disciplining unethical corporations.<sup>19</sup> Knoll suggests that whether or not ethical screening has a direct impact on targeted firms depends on the steepness of the demand curve for the corporation’s securities, and that there is a lack of empirical

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<sup>17</sup> M. Knoll, “Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investment” (2002) 57 Bus. Law 681 at 695. See also, the Social Investment Forum, as of 2001, <http://www.socialinvest.org/areas/research/trends/2001-trends.htm> (last accessed May 2002).

<sup>18</sup> Referring to situations where market prices accurately reflect available information and prices are unbiased predictors of future prices. He also observes that one must adjust for risk and that the screened portfolio must produce a higher return than an unscreened one in order to compensate for the added risk of not having a fully diversified portfolio. Knoll argues that where markets are inefficient, there is a lack of empirical support for these claims; *ibid.* at 694, 698.

<sup>19</sup> *Ibid.* at 642, 704.

evidence that it has a substantial impact on targeted firms' stock price and thus on their activities.<sup>20</sup>

According to the Social Investment Forum, as of 2001, 96% of all screened assets screened for tobacco, whereas less than 50% screen for human rights or labour standards.<sup>21</sup> This indicates that there are different conceptions of what it means to socially screen. Investors may or may not be aware of the scope of the screens that their funds utilize. While a screen may be avoiding investment in one type of activity, it may be directing additional investment dollars to firms that engage in repressive labour or human rights practices. Since many of the social screening agencies sell the screening as a commodity, there is little transparency in the scope of the screening and in the weights given to particular corporate conduct.

An approach that focuses solely on the synergies between shareholder wealth maximization and corporate socially responsible conduct highlights a troubling part of the debate about corporate social responsibility. In North America we have constructed an incentive and compensation system that ties bonus and earnings of senior executives to short-term earnings. Hence, the decision makers of the corporation are focused on short-term returns, which frequently diverge with long-term wealth maximization either for the corporation or the shareholders. Enron's conduct was evidence of this, prior to its self-implosion. As long as the corporation was generating generous short-term returns to its shareholders, no one, including its directors who were the beneficiaries of these returns, was scrutinizing the officers' conduct too closely. How we construct the economic incentives in the system determines the outcomes, in this case, a narrowing of the corporate focus to short-term wealth maximization.

*ii. The Corporation's Obligation to Take into Account All Stakeholder Interests*

The second broad approach is that in acting in the best interest of the corporation, directors and officers should take account of the interests of all those with investments or interest in the corporation. While scholars

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<sup>20</sup> Although in cases such as South Africa, he concedes that there was a correlation, but suggests that this is quite different from causation, *i.e.* causing South Africa to end its apartheid practices. *Ibid.* at 710.

<sup>21</sup> Social Investment Forum, *supra* note 17 at 710.

differ on whether this should be a direct fiduciary obligation to corporate stakeholders or an obligation to balance multiple interests or prejudice, the idea is to take account of these interests.<sup>22</sup> Some scholars advocating this broad approach suggest that the corporation must act as a moral community of interests and that managers should assume responsibility for a set of moral principles that facilitate economic activity by taking account of multiple interests, not privileging one group of interests over all others.<sup>23</sup> Recognition of such a moral obligation would necessitate the establishment of processes whereby basic principles of justice are developed with all relevant stakeholder groups, which then govern corporate decision making as an overall guide to the corporation's activities.<sup>24</sup> This view suggests that taking account of stakeholder interests is an imperative, rather than a discretionary power that is characteristic of

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<sup>22</sup> M. O'Connor, "Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers" (1991) 69 N.C.L. Rev. 1189; L.E. Mitchell, "Co-operation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Morality" (1995) 73 Texas Law Review 477 at 501-502; D. Millan, "Communitarianism in Corporate Law: Foundations and Law Reform Strategies" in L.E. Mitchell, ed., *Progressive Corporate Law* (1991). T. O'Neill, "Employees' Duty of Loyalty and the Corporate Constituency Debate" (1993) 25 Conn. L. Rev. 681 suggests that employers hold a unique power to inflict harm on their employees and hence they should owe a duty of loyalty to them. Scholars debate whether corporations should expend corporate resources either for philanthropic acts or acts that reduce harms to the community. Others have suggested a team production theory of the firm, recognizing employees and others who contribute firm-specific inputs such that the corporation must consider them constituents of the firm; M.M. Blair & L. Stout, "A Team Production Theory of the Corporation" (1999) 85 Va. L. Rev. 247. Consideration of multiple interests in corporate decision making, while not the accepted paradigm in North America, is central to a number of continental European and Asian countries, balancing objectives of generation of wealth with the interests of those diverse groups that contribute inputs to that generation of wealth. J. Cioffi, "Restructuring 'Germany Inc': The Politics of Company and Takeover Law Reform in Germany and the European Union" (2002) 24 Law & Policy 355; J. Sarra & M. Nakahigashi, "Balancing Social and Corporate Culture in the Global Economy: The Evolution of Japanese Corporate Culture and Norms" (2002) 24 Law & Policy 299.

<sup>23</sup> C.D. Stone, *Where the Law Ends: The Social Control of Corporate Behaviour* (New York: Harper and Row, 1975) at 103.

<sup>24</sup> M. Clarkson, "The Moral Dimension of Corporate Social Responsibility" in R.M. Coughlin et al., eds., *Morality, Rationality and Efficiency: New Perspectives on Socio-Economics* (Armonk: M.E. Sharpe, 1991) at 188; N. Bowie, "The Firm as a Moral Community" in R. Coughlin et al., *ibid.* 169.

US constituency statutes that do not allow any process or remedies to hold corporate officers accountable for the exercise of this discretion.<sup>25</sup>

In taking into account all stakeholder interests, presumably the corporation would be concerned with negative externalities from its activities, including those that cause social and economic harms. This approach is also helpful in that it seeks to internalize all costs of productive activity, including long term sustainability costs, adjustment costs for labour shedding and harms from consumer torts. The premise is that if these costs were internalized, the corporation would be more likely to engage in decisions that foster long term job skills development instead of labour shedding, human rights practices instead of harms caused by discrimination and environmentally sound practices to avoid the costs of harm and remediation that would be internalized to the corporation. The approach also has its challenges, one of which is how to ensure that corporate decision makers are accountable, given that they could justify any decision based on an expressed concern for the interests of a particular group.

Moreover, even though the current statutory language that requires directors and officers to act “in the best interests of the corporation” allows for this broader understanding of consideration of all interests implicated in the corporation, it is unclear as to who would have standing to advocate this interpretation before Canadian domestic courts and whether, given the entrenchment of shareholder primacy in the common law interpretation of this language, courts would be willing to revisit these notions absent legislative intervention. Interestingly, this is most likely to

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<sup>25</sup> Even where the US courts have recognized the ability of corporate directors and officers to consider stakeholder interests, they have generally found that this consideration must have a rational relationship to the maximization of shareholder value: *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* 506 A.2d 173 (Del. 1986); *Paramount Communications v. QVC Network*, 637 A.2d. 34 (Del. 1994). Carol Greenhouse has posed the question of how globalization has affected corporate culture, the explicit set of values that are capable of being consciously created by corporate managers as one element of human resource management and corporate wealth seeking activity. She suggests that rethinking the “local” in the context of global conditions raises new challenges for understanding notions of “scale” and that law’s network of jurisdictional boundaries limits our ability to use common law as a tool to analyze global versus local tensions. C.J. Greenhouse, “Figuring the Future: Issues of Time, Power and Agency in Ethnographic Problems of Scale” in B.C. Garth & A. Sarat, eds., *Justice and Power in Sociological Studies*, (Evanston: Northwestern University Press, 1998) at 108.

occur in the insolvency law context as the Supreme Court of Canada has granted leave on a case in which it will consider director and officer fiduciary obligation under corporations statutes when the corporation is financially distressed.<sup>26</sup> Under residual rights theory, at the point of insolvency, creditors, including employees, government claimants in respect of environmental remediation and tort claimants are the residual claimants to the firm's assets and hence there is likely a duty to consider their interests, or not to prejudice their interests, in acting in the best interests of the corporation.<sup>27</sup> Arguably, such an interpretation of best interests of corporation should occur much earlier in the corporation's financial life cycle. While the stakeholder conception of the corporation would formally recognize all those with an investment or interest in the corporation, it leaves unresolved the larger issue of whether or not corporations should be allowed to determine social and economic policy through their activities.

### *iii. The Corporation as Public Entity*

The third broad approach is that corporations are public creatures, even where privately held, and that they should be required by legislation to act in a socially responsible manner, with that standard to be set by reference to domestic or international human rights and other treaties and norms. There is little support for this conception of the corporation in Canada, but it forms some of the normative basis for conceptions of the corporation in Japan and some continental European and Pan-Pacific countries. Even within these jurisdictions, there is convergence pressure by Anglo-American capital for adoption of a shareholder-centric corporate model as a condition of further investment.<sup>28</sup>

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<sup>26</sup> *Peoples Department Stores Inc. (trustee of) v. Wise*, [2003] Q.J. No. 505 (C.A.), online: QL (QJ), overturning *Peoples Department Stores Inc. v. Wise*, [1998] Q.J. No. 3541 (Sup. Ct.), online: QL (QJ), application for leave to appeal granted without reasons [2003] S.C.C.A. No. 133, online: QL (SCCA).

<sup>27</sup> For a discussion, see J. Sarra, "Wise People, Fiduciary Obligation and Reviewable Transactions; Directors' Duties to Creditors" in *Annual Review of Insolvency Law* (Toronto: Carswell, 2004) 67.

<sup>28</sup> J. Gordon, "Pathways to Corporate Convergence? Two Steps on the Road to Shareholder Capitalism in Germany" (1999) 5 *Columbia J. Eur. L.* 219; Hansmann & Kraakman, *supra* note 4; J. Coffee, "The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications" (1999) 93 *Northwestern University Law Review* 641 at 650.

The recent efforts by community coalitions to call for revocation of corporate charters where the MNE has engaged in environmental and human rights harms raises this notion of the corporation as a public good.<sup>29</sup> Cohan has pointed out that in the late eighteenth and early nineteenth centuries, American corporations were chartered with the integral purpose of serving public interests, that the public interest purpose was the *quid pro quo* in exchange for the limited liability corporate status.<sup>30</sup> He suggests that there is a growing movement that is rediscovering that the interests of corporations historically go beyond the shareholder wealth-maximization paradigm that dominates today.

### 3. How Can You Tell If the Corporation Is Socially Responsible?

With the move to global capital markets, these issues have become more complex, engaging a host of new challenges for thinking about corporate governance, and ultimately, for thinking about any role of social responsibility. The increased access to capital through global financial markets and the ease with which corporate charters can be transferred to new jurisdictions has allowed corporations to increase their bargaining power in respect of where they locate. They bargain in both the home and host nations for tax concessions and relaxing of environmental and labour standards. Their bargaining power lies in the ease with which many MNEs can relocate some or all of their operations to jurisdictions with low cost human capital, lower labour and human rights standards and few if any environmental protections. As noted in the introduction, the general understanding of international law as an inappropriate means to limit MNE operations means that the constraints normally imposed on corporate decision makers in respect of their conduct are largely absent, creating a serious lack of accountability for their actions internationally. The challenge is thus to explore the scope and limits of any social responsibility corporations can or should have, the link this may have to

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<sup>29</sup> T. Linzey, "Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations" (1995) 13 Pace Envtl. L. Rev. 219. See also CorpWatch, <http://www.corpwatch.org/trac/headlines/2000/313.htm>.

<sup>30</sup> J.A. Cohan, "Environmental Rights of Indigenous Peoples under the *Alien Tort Claims Act*, the Public Trust Doctrine and Corporate Ethics, and Environmental Dispute Resolution" (2002) 20 UCLA J. Envtl. L. & Policy 133 at 169.

effective governance and the legal processes that should be devised to serve as constraints on particular MNE activity.

Effective governance has a number of elements that are loosely linked to a corporation being socially responsible. For example, the prohibitions on officer self-dealing conduct or the need for independence and transparency in audit procedures benefit the shareholders, but also the public in terms of increasing confidence in capital markets and the spin off positive social benefits that such an active market may bring. In this sense, there is a social or public component to effective governance.

Yet the current social responsibility debate within corporate law scholarship raises additional public policy issues. Specifically, the debate is whether corporate directors and officers have the ability to engage in conduct that promotes social, economic, gender and racial equality or whether this is somehow a breach of their fiduciary obligation to the corporation. Just as we as citizens are socially situated, so too is a corporation as a separate legal personality. This is not to suggest that the corporation has or should have attributes similar to personhood. However, it is necessary to acknowledge that with the introduction of the limited liability regime and notions of legal personality, the corporation derives considerable benefits from public policies facilitating its activities and limiting the scope of liability that can be placed on either its investors or its decision makers. Of course, one of the means by which the law exercises control over the social responsibility of these decision makers and thus, the corporation they control, is through the contours of the limits to limited liability. The law's power to credibly impose personal liability on the decision-makers directly is one of the contours. The other is the indirect imposition of liability when the decision-maker unreasonably subjects the corporation's assets to legal liability as a result of, for example, environmental damage.<sup>31</sup>

Christopher Stone has suggested that the threat of legal liability is highly conscripted because of the nature of the limited liability corporation.<sup>32</sup> He observes that law is primarily reactive and hence there is a time lag between harms caused by corporate conduct and the law's

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<sup>31</sup> *R. v. Bata Industries Ltd.* (1992), 9 O.R. (3d) 329 (Prov. Div.) at 362, remedy varied on appeal (1993), 14 O.R. (3d) 354 (Gen. Div.), varied (1995), 25 O.R. (3d) 321 (C.A.).

<sup>32</sup> Stone, *supra* note 23 at 104.

ability to react, often too late to remedy the harms. By encouraging corporate officers to rely solely on compliance with minimum legal standards, it creates incentives for managers to ignore a whole range of production and policy choices that may contribute to harms because they come within technical compliance of the law as it existed at the time the decision was made.

With respect to measuring corporate social responsibility in environmental protection, Douglas Kysar suggests that part of the dynamic of the move to international markets has been an underlying notion that the world has an unlimited supply of material inputs and an infinite natural capacity to absorb waste outputs.<sup>33</sup> He suggests that sheer growth in economic activity will face an ecological limit, and hence, in addition to efficient allocation of resources and the equitable distribution of wealth, economists need to be concerned with the sustainable maintenance of scale. By incorporating scale effects into legal analysis, Kysar argues that one can also rethink the existing distributive rules that tend to be discounted in current macro-economic analysis, using the issue of sustainability to address problems of unequal distribution of wealth.

#### 4. Going Global

The foregoing discussion highlights the current challenge. Corporations engage in wealth generating activity because of public laws and policies that act as enabling devices in this activity. Yet corporations also have the ability to contribute to political parties and hence to influence the political process regarding not only corporate law, but other laws that touch on their liabilities, such as labour or environmental law. Hence while it is argued that corporate law should not address social policy issues and that this is best left to legislatures and social welfare legislation, corporations are not prohibited from engaging in lobbying, political contributions and other measures that ensure these issues are not addressed in public policy. Moreover, some of the current challenges to sovereign nations and protection of domestic human rights and environmental norms are the result of political lobbying and consequent domestic adoption of policies of free trade, deregulation and dismantling of particular social safety nets.

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<sup>33</sup> D. Kysar, "Sustainability, Distribution and the Macroeconomic Analysis of Law" (2001) [unpublished, on file with author].

Increasingly, globalization poses particular challenges to the ability of domestic governments to enforce specific normative standards, particularly where corporations headquartered in the nation state have their economic activity elsewhere. It is increasingly evident that domestic law is incapable in itself of controlling the activities of MNEs, a concern where exportation of particular production activities creates harms in terms of human rights, health and safety or environmental standards.<sup>34</sup> It is this contradiction that must be exposed in order to determine the proper scope of corporate activity. If conceptually, the corporation is not a moral or social being within the construct of the separate legal personality, then arguably it should not have any ability to influence the election of the decision makers in respect of these issues and how these decisions are made. If on the other hand, the corporation is socially situated and should have a role in these normative debates, then how does one construct a paradigm that tempers the exercise of such powerful interests to the detriment of those with fewer resources, bargaining power and information? Are domestic attempts at regulating these activities ultimately futile given the mobility of capital and of the MNEs themselves? What will be the long term impact of “regulatory chill” in terms of both the willingness of MNEs to situate themselves in jurisdictions with few environmental standards and the inability of host or home nations to devise laws that protect their citizens from the harmful effects of unregulated environmentally harmful activity?<sup>35</sup> Moreover, how can one make adequate policy determinations in the absence of comprehensive

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<sup>34</sup> A.C. Cutler, “Private Authority and International Affairs” in C. Cutler et al., eds., *Private Authority and International Affairs* (Albany: State University of New York Press, 1999); S. Sassen, “The Spatial Organization of Information Industries: Implications for the Role of the State” in J.H. Mittelman, ed., *Globalization: Critical Reflections* (1996); R.B. Davis, “Investor Control of Multi-national Enterprises: A Market for Corporate Governance Based on Justice and Fairness?” in J. Sarra, ed., *Corporate Governance in Global Capital Markets* (Vancouver: University of British Columbia Press, 2003); C. Taylor, “A Modest Proposal: Statehood and Sovereignty in a Global Age” (1997) 18 Penn. J. Int’l Econ. Law 745; A. Aman Jr., “Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest” (1999) 6 Ind. J. Global Legal Stud. 397. Moreover, the ability of domestic jurisdictions to tax corporations to in turn provide social services to ameliorate the harms is limited by the multinational nature of the corporate activity.

<sup>35</sup> The WTO has suggested that regulatory chill hinders the competition for capital globally, where some nations attempt to enact stronger domestic environmental protection policies. World Trade Organization, *Trade and Environment* (1999).

data that documents the impact of deregulated production activity globally?

### C. How Do Those MNEs Do It Internationally

The issues are complex and at first glance appear daunting. MNEs have been implicated in nations that engage in repressive human right policies or police repression in order to engage in productive activity.<sup>36</sup> The historical atrocities in South Africa were one of the most glaring examples of this, but only one of many. MNEs have engaged in alleged human rights violations, activities harmful to the environment, child labour, anti-unionization activity, slavery and dangerous health and safety conditions.<sup>37</sup> While there may be normative disagreements about the scope of any of these activities that should be countenanced, it is fair to suggest that in the absence of a mechanism that allows for democratic development of public policy, there may be a role for home nations in ensuring that MNEs do not export the worst of environmental and labour practice where the host nation is incapable of setting its own policy.

At the same time, one has to confront the issue of arrogance of developed nations reflected in their wish to import wholesale their normative conceptions of human rights or environmental sustainability. While these debates vigorously occur among the international NGO communities and among nation states, corporations continue to engage in global activity, relatively unchecked and unscathed by these debates. Hence the question is whether there ought to be internally generated norms that could potentially complement the public policy debates of international comparative law scholars.

These issues become even more pressing as corporations move outward into other capital and production markets. It is estimated that

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<sup>36</sup> B. Freeman, Deputy Assistant Secretary of State for Democracy, “Human Rights and Labour” (Speech to the Third Warwick Corporate Citizenship Conference, June 10, 2000), [http://www.state.gov/www/policy\\_remarks/2000/00710\\_freeman\\_warwicku.html](http://www.state.gov/www/policy_remarks/2000/00710_freeman_warwicku.html). See also *Wiwa v. Royal Dutch Petroleum Co.* 226 F.3d. 88 (2nd Cir. 2000), that dealt with allegations that Shell Nigeria utilized police and military to quash opposition to its development activity; and *Doe v. UNOCAL Corp.* 248 F.3d 915 regarding alleged use of force to coerce residents to construct an oil pipeline.

<sup>37</sup> *Ibid.*

there are currently over 50,000 multinational enterprises.<sup>38</sup> A company like Unilever-Best has annual production and sales that exceed the GDP of 50 sovereign nations.<sup>39</sup> While foreign direct investment is heavily skewed towards developed countries, international capital is moving into developing and transitional countries at a rapid pace, often replacing more official development sources of capital into developing countries that carry with it minimum standards regarding labour or environmental protection.<sup>40</sup> Unlike developed countries, where there exists a framework for tempering the unchecked activities of corporations through employment standards, human rights and environmental law, many developing and transitional countries do not have the infrastructure to develop or enforce laws to address the multinational enterprise. Moreover, initiatives such as the OECD corporate governance guidelines are aimed primarily at creating legal and enforcement structures in these nations for equity capital investors.<sup>41</sup> Corporate codes of conduct are aimed at ensuring transparency of governance and financial reporting, and securities and credit enforcement regimes offer effective remedies for investors.<sup>42</sup> While these are essential to fostering investor confidence and thus healthy capital markets, they ignore the need for a host of other public policy measures that are needed to provide the appropriate balance in wealth creation and protection of those with interests in the corporation. That interest might be a direct one, in terms of investments made in labour or local infrastructure, or it may be an interest in the environmental and social impact of corporate activities on the local community and the environment. The OECD corporate governance guidelines advocate respecting domestic law

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<sup>38</sup> R.B. Davis, *supra* note 34; G. Yaron, "Canadian Institutional Shareholder Activism in an Era of Global Deregulation" in Sarra, ed., *supra* note 34, 111; L. Mabry, "Multinational Corporations and US Technology Policy: Rethinking the Concept of Corporate Nationality" (1999) 87 Geo. L.J. 563; UNCTAD, *World Investment Report* (New York, 1995).

<sup>39</sup> D.M. Branson, "The Very Uncertain Prospect of 'Global' Convergence in Corporate Governance" (2001) 34 Cornell International Law Journal 321.

<sup>40</sup> C. Williams, "Corporate Social Responsibility in an Era of Economic Globalization" (2002) U.C. Davis Law Review 705.

<sup>41</sup> OECD Principles for Corporate Governance, <http://www.oecd.ca>.

<sup>42</sup> The convergence pressure in respect of these property protections is facilitated by the importation of US experts in the design of systems and considerable pressure to have transition and developing nations adopt Anglo-American norms and legal structures without consideration of the other types of remedial protections that exist as a counterbalance in Anglo-American jurisdictions.

commitments to other stakeholder interests, but are silent on these issues where the domestic jurisdiction does not already have a developed notion of the corporation as socially situated. The growth of MNE activity across multiple jurisdictions and international trade law that facilitates free trade and limits use of principles such as the national treatment principle has diminished the domestic regulatory capability of the nation-state, raising troubling social and distributional issues.<sup>43</sup> The following part examines the specifics of the regulatory diminution.

### 1. Home, Host and the Four Problems of MNE Accountability

MNEs are organizations which, while created in one state, operate in several states through subsidiary corporate entities created in each country of operation, through contractual links in supply and delivery chains, and/or through licensing and franchise agreements. As private entities, MNEs are subject to the national law of the states in which they operate, and may also have been granted certain rights under treaties between states, rights that can be enforced in the courts of the applicable state. Certain treaties also provide for protection of investor rights against state action through binding international arbitration. Arbitration provides a dispute resolution mechanism for claims against the state by investors claiming the state regulatory or legislative actions harmed their investments. Thus a forum exists for private actors to hold public state actors accountable for decisions that harm equity investments. In contrast, however, there is no international forum in which these enterprises can be held accountable for their actions in breach of fundamental international law and conventions concerning human rights, the environment and

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<sup>43</sup> K. Van Wezel Stone, "Labor and the Global Economy: Four Approaches to Transnational Labor Regulation" (1995) 16 Mich. J. Int'l L 987. See also Workers in the Global Economy Project, "Report on Labor Rights—Women's Rights Advocacy Dialogue: Women's Rights and Labor Rights in Global Trade", September 1999; D. Weinberg, "Current Population Reports, A Brief Look at Post-War US Income Inequality"; "The State of Working America, 1998-99", <http://epinet.org/books/swa.html>; J. Burbank & R. Scott, "What the WTO means for Working Families", *Seattle Times* (December 2, 1999); F. Jameson, "Notes on Globalization as a Philosophical Issue" in F. Jameson & M. Miyoshi, *The Cultures of Globalization* (Durham: Duke University Press, 1998); F.L. Ansley, "Rethinking Law in Globalizing Labor Markets" (1998) 1 U. Penn. J. Emp. & Labor Law 2; F. Moccio, "On the Impact of Independent Contracting and Misclassification of Employees on New York State's Working Women and Families" (2000) Fineman Workshop, [unpublished, on file with the Feminist Legal Theory Project at Cornell Law School].

social/political rights. International law assigns this function to the courts of the various states, exercising their national jurisdiction over activities of the corporations that originate in or affect their territory.

Problems arise because of a number of factors, including the challenges posed by unlimited subsidiaries, reluctant host nations and the use of prudential doctrines such as *forum non conveniens* to fail to take jurisdiction for corporate harms internationally.

## 2. Unlimited Subsidiaries

There are two issues that arise when subsidiaries are involved. The first is that a subsidiary is provided with its own “legal personality”. Thus if a subsidiary is created to mine asbestos in South Africa, then that is the legal entity to which liability will attach in the first instance. If asbestos mining causes harm, then nothing automatically attaches liability on to the parent corporation for the acts of the subsidiary, irrespective of the ownership structure. Given this situation, the incentive on the parent is to leave as few assets in the subsidiary as possible. This leaves the miners with the unenviable task of establishing direct liability through a claim the parent failed to properly supervise the subsidiary or vicarious liability for the acts of one’s subsidiary.<sup>44</sup> Thus, parent corporations may be encouraged to transfer all of the subsidiaries’ surplus assets to themselves in order to limit the loss to the MNE overall. If they are successful in doing so, they will have lessened constraints on decisions to breach international norms.

Second, the use of unlimited subsidiaries as the vehicle for corporate activities internationally means that directors and officers of controlling parent corporations are not directly liable for the actions of the subsidiary even where they are the controlling mind of the subsidiary. The construction of domestic liability regimes, judicial reluctance to draw aside the corporate veil and the practice of shifting corporate assets from the subsidiary to the parent to shield the assets from remedial claims in the host nation, create considerable barriers to MNE accountability for international activities.

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<sup>44</sup> *Lubbe v. Cape*, [2000] 4 All E.R. 268 (H.L.) at 271.

### 3. The Reluctant Host

There is frequently reluctance of home and/or host governments to take action against MNEs because of their importance to the country's economy or their complicity as investors in or beneficiaries of the company's activities.<sup>45</sup> Hence while a separate legal entity has been formed for purposes of economic activity in the host nation, the host nation may be reluctant to enact standards that may protect its citizens during the subsidiary's value generating activity in the host nation. Those who may be harmed by its activities frequently do not have access to standards within their own nation or an enforcement mechanism in order to redress or prevent harms.

### 4. Who, Me?

Even where remedial laws are in place in the host nation, there is an inability of the host country to impose the full sanctions of its law on the responsible parties because the corporate structure insulates the controlling corporation (domiciled in the home country) from adverse consequences of regulatory action in the host country.

The home country may be unable to impose the full sanctions of its laws on the corporation controlling the MNE for harms arising in the host country because the MNE's corporate structure creates a separate corporation in the host country. That corporation is not ordinarily subject to the jurisdiction of the home country's courts for its actions in the host country. In some instances, there is the likelihood that the home country court, even where it finds it has the legal jurisdiction to hear a case against the MNE for the actions of its subsidiaries in another country, will exercise its discretion not to hear the case on the grounds of one or more of the prudential doctrines, such as *forum non conveniens*, state action, comity or public policy.

Finally, there is the difficulty of the lack of a forum capable of exercising jurisdiction over the MNEs on the basis of universality jurisdiction, other than under the *Alien Tort Claims Act* (ATCA) in the United States federal courts.<sup>46</sup> The *Alien Tort Claims Act* grants federal

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<sup>45</sup> Branson, *supra* note 39.

<sup>46</sup> 28 U.S.C.S. s. 1350 (1994). There is also the *Torture Victim Protection Act*, H.R. Rep. No. 367 (1992), establishing a cause of action for torture. This statute is not

jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”. It is largely a jurisdiction granting procedural statute, providing a federal forum in which foreign complainants can bring a tort action against a US based MNE for torts arising from violations of customary international law.<sup>47</sup>

However, in considering a claim under the *Alien Tort Claims Act* in the federal courts of the United States of America, plaintiffs would once again face the problems of subject-matter jurisdiction and *forum non conveniens*, with the additional problem of establishing personal jurisdiction over a foreign corporation in the US.<sup>48</sup> Subject matter jurisdiction has been taken under *ATCA* with respect to the actions of corporations “only for the most egregious violations of civil and political rights and for violations of international humanitarian law”.<sup>49</sup> Thus while the *ATCA* specifies that US courts will take jurisdiction over alien tort claims arising from a violation of the law of nations or a treaty of the United States, the courts have held that the “law of nations” is a vague concept and that it

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discussed here, however, to date, this has not proven an effective vehicle for redressing the claims of torture victims.

<sup>47</sup> A. Rosencranz & R. Campbell, “Foreign Environmental and Human Rights Suits against US Corporations in US Courts” (1999) 18 *Stan. Envtl. L.J.* 145.

<sup>48</sup> If a Canadian corporation has no contacts in the United States, or those contacts are conducted through subsidiaries, there may not be sufficient presence to establish jurisdiction—*Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174 (C.D. Cal. 2000) [hereinafter *Unocal*] although in another case, establishing an investor relations office in New York was sufficient to establish general personal jurisdiction—*Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2nd Cir. 2000) [hereinafter *Wiwa*], *cert. denied*, 69 U.S.L.W. 3628 (US Mar. 26, 2001) (No. 00-1168). J. Cohan, *supra* note 30, who argues for a collaborative community focused process between governmental, indigenous and corporate entities to try to find a common ground of information and mutual interest in the protection of human and environmental rights. H. Osofsky, “Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations (1997) 20 *Suffolk Transnational Law Review* 335 who argues that claims that environmental human rights are part of the law of nations under the *ATCA* are very strong in the context of indigenous peoples. He argues that these norms are at least as strong as torture and that while human rights norms will evolve over time, claims of extreme harm to indigenous peoples should be recognized and pursued now; *ibid.* at 382, 395.

<sup>49</sup> The Editors, “Developments in the Law—International Criminal Law: Part V Corporate Liability for Violations of International Human Rights Law” (2001) 114 *Harvard Law Review* 2025 at 2037. Cohan, *ibid.* observes that most cases granting jurisdiction are for violation of *jus cogens* norms, such as rape, torture, genocide and slave trading.

may include international norms of such fundamental importance, such as the right not to be tortured or to be subjected to slavery or cruel and inhuman punishment.<sup>50</sup> To date, there has been no remedy awarded against a US based MNE under the *ATCA*. Generally, the courts have refused to recognize environmental harms as a tort within the meaning of the statute, frequently dismissing such claims for lack of subject matter jurisdiction absent *jus cogens* abuses.<sup>51</sup>

John Christopher Anderson has documented how complicity between an MNE and a host nation creates harms.<sup>52</sup> He analyses the activities of US based Unocal, which entered into a joint venture gas drilling project in Burma (Myanmar) with SLORC, the ruling military body, and highlights ongoing alleged human rights abuses, forced labour, rape and acts of torture.<sup>53</sup> In contrast to other MNEs that have exited the country because of the repressive regime, Unocal has argued that it is staying to ameliorate the human rights violations.<sup>54</sup> Yet Anderson documents the scope and extent of human rights abuses being condoned by Unocal. A class action lawsuit by citizens of Burma against Unocal and two executives has been sanctioned to proceed under the US *Alien Tort Claims Act*, on the basis that Unocal has been complicit in human rights violations, including alleged violence, torture, rape and forced relocation in connection with the

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<sup>50</sup> *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995). Breed suggests that the *Kadic* judgment eliminated the state action requirement in certain cases when it found that the *ATCA* could be used against private individuals in certain circumstances of egregious harms: L.M. Breed, “Regulating Our 21st Century Ambassadors: A new Approach to Corporate Liability for Human Rights Violations Abroad” (2002) 42 Va. J. Int’l L. 1005 at 1016. He calls for a model in the United States that would allow the federal Department of Justice to bring actions against US corporations for international human rights abuses, similar to prosecutions under the *Foreign Corrupt Practice Act* which allows it to bring actions against corporations utilizing bribery to influence foreign officials; *Foreign Corrupt Practice Act*, Pub. L. No. 95-213, 91 Stat. 1494 (1977), as am. by *Omnibus Trade and Competitiveness Act of 1988*, 15 U.S.C. 78.

<sup>51</sup> Rosencranz & Campbell, *supra* note 47 at 155.

<sup>52</sup> J.C. Anderson, “Respecting Human Rights: Multinational Corporations Strike Out” (2000) 2 U. Pa. J. of Labor & Emp. Law 463 at 474-490.

<sup>53</sup> State Law and Order Restoration Council (SLORC), established when the military in Burma seized control in 1988 and changed its name to Myanmar. Anderson documents a series of repressive acts engaged in by the SLORC: *ibid.* at 463-465, 474-496.

<sup>54</sup> Unocal, “Our Position”, <http://www.unocal.com/responsibility/humanrights/hr1.htm> (last accessed July 2003).

pipeline project.<sup>55</sup> While the US government has now banned business operations in Burma, the ban applies only to new business and not existing business, thus excluding Unocal.<sup>56</sup> Anderson observes that to date, no US corporation has ever been held liable under the *ATCA* for benefiting from human rights abuses.

However, one case is currently pending that raises the possibility that environmental claims constitute a tort recognized under international law. This is a class action on behalf of 30,000 Indigenous people and farmers in the Ecuadorian Amazon Basin and 25,000 downstream residents of Peru for personal and environmental damages from Texaco for alleged toxic discharges that caused air, soil and water harms and considerable human health harms. It is the first case in which a US court granted jurisdiction to foreign indigenous peoples seeking damages for environmental tort claims.<sup>57</sup>

In Canada and other jurisdictions, there is no legislation similar to the *ATCA* and hence such a policy instrument, as limited as it is, does not exist to provide extra-territorial jurisdiction to hold MNEs accountable for their foreign harms.<sup>58</sup> The “Who, me” problem thus poses several critical challenges. The first is that there are no legal mechanisms in Canada that would allow Canadian citizens to challenge the harmful activities of our domestically registered MNEs internationally. Where there are no legal processes in the host nation for seeking either remedial or preventive remedies for corporate harms, those harmed are left without remedies and without any legal vehicle to seek to alter the corporation’s conduct. Sheer

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<sup>55</sup> *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997).

<sup>56</sup> Anderson, *supra* note 52 at 469.

<sup>57</sup> *Aguida v. Texaco, Inc.* 142 F.Supp.2d 534 (S.D.N.Y. 2001).

<sup>58</sup> Canada recently enacted the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, aimed at implementing the Rome Statute of the International Criminal Court in respect of genocide, crimes against humanity and war crimes, that grants extra-territorial jurisdiction to Canadian courts to hear and decide cases. This statute does not address the corporate conduct described in this paper. This act may be applicable to the most egregious harms. Crimes against humanity are defined in s. 7 as acts when committed as part of a widespread or systematic attack against any civilian population, including murder, enslavement, forcible transfer of population, torture, rape, persecution against any identifiable group on grounds of race, culture, gender or nationality, apartheid... Hence it covers some of the same acts as the *ATCA*. However, there have been no published cases to date under this legislation and hence its scope vis-a-vis corporations is unknown.

distance from the jurisdiction can give rise to a particular apathy or unwillingness among the citizens of the home nation to investigate or be concerned about child labour or dangerous working conditions in the host nation. The “Who, me” problem extends beyond the issue of exercise of consumer preference in dealing with products of the impugned corporation, it goes to the heart of the scope and limits of democratic processes and the willingness of domestic citizens to engage their legislators in pressure to implement legal mechanisms to govern the harmful activities of MNEs abroad.

#### 5. Racing to the Bottom of the Market

The absence of easily accessible methods of enforcing international law norms has seen some evidence that MNEs are exploiting the release of social responsibility constraints to the maximum. Recently, there have been a number of instances where individuals and groups are collaborating internationally to exert some pressure on corporations in terms of their accountability to larger groups in society. For example, in the manufacturing sector, the export of production and assembly work has carried with it issues regarding payment of living wages and working conditions that are hazardous to the health and safety of the workers. While the standards in respect of these concerns are relatively rigorous in developed countries, within a range of norms that protect basic health and safety, minimum wages and prohibitions against racial, gender and other discrimination, these standards either do not exist or are not enforced in many host nations. There are serious consequences both for the workers in the host nations, in terms of their long term health and well being, and for workers in developed countries where labour shedding has led to a downward spiral of economic and social harms.

The beneficiaries of these trends are the MNEs. The liberalization of labour markets has meant that in the home state, the MNE can exert considerable economic pressure to dismantle standards and make the home nation “more competitive” in a market in which the MNE has generated the competition. Failure to accede to these demands results in plant and industry closures and exportation of the economic activity elsewhere, where the host nation is so anxious for jobs and economic activity, that it undertakes to allow the corporation to operate relatively unfettered. This undermines the effective power of nations to regulate domestic labour law

and social policy.<sup>59</sup> This trend is complicated enormously by free trade treaties and the limits of national treatment doctrines in providing some balance to stakeholder interests engaged in corporate value generating activity.

Scholar Cynthia Williams has observed that particular features of globalization accentuate the problem of relying on law as an external constraint in addressing the relation of corporations to society, in particular, sovereign nations are unable to impose substantive limits on international economic actors.<sup>60</sup> She suggests that where there are laws in place, the high mobility of capital and the lack of an international sovereign means that there is a diminished capacity to tax and hence to spend money on social welfare programs that address the distributive harms caused by corporate activities.<sup>61</sup>

### **III. THE CHALLENGE OF MNE SOCIAL RESPONSIBILITY: THE GLOBAL ECONOMY AND THE ADMINISTRATION OF JUSTICE**

#### **A. Where Can You Hear the Voice of Corporate Social Responsibility?**

There are corporations in Canada and elsewhere that have adopted codes of corporate conduct and/or human rights codes for their operations in host nations, based on the domestic norms of their home jurisdiction or international norms. For example, Nexen Inc. helped to develop an International Code of Ethics for Canadian Business as a template for Canadian businesses to follow when conducting business domestically and abroad.<sup>62</sup> The Code suggests that business should take a leadership role through establishment of ethical business practices; and that while national governments have the prerogative to conduct their own affairs in accordance with their sovereign rights, all governments should comply

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<sup>59</sup> UN ESCOR Division for Social Policy and Development, *Report on the World Social Situation*, 1999, <http://www.un.org/esa/socdev/rwss97c0.htm>.

<sup>60</sup> Williams, *supra* note 40 at 724. In this, she is addressing both MNEs and capital market participants.

<sup>61</sup> *Ibid.*

<sup>62</sup> Nexen Inc., [http://www.nexeninc.com/Our\\_Compmitment/Corporate\\_Governance](http://www.nexeninc.com/Our_Compmitment/Corporate_Governance) (last accessed October 2003).

with international treaties and other agreements that they have committed to, including the areas of human rights and social justice. Its code also suggests that its business activities internationally should be consistent with its practices in Canada. The Code specifies that it values human rights and social justice; wealth maximization for all stakeholders; operation of a free market economy; public accountability by governments; a business environment that militates against bribery and corruption; equality of opportunity; protection of environmental quality and sound environmental stewardship; community benefits; good relationships with all stakeholders; and stability and continuous improvement within its operating environment. The Code further specifies that the corporation will engage in meaningful and transparent consultation with all stakeholders and attempt to integrate corporate activities with local communities as good corporate citizens; ensure activities are consistent with sound environmental management and conservation practices; provide meaningful opportunities for technology cooperation, training and capacity building within the host nation; support and respect the protection of international human rights within the corporation's sphere of influence; ensure the health and safety of workers is protected; strive for social justice and respect freedom of association and expression in the workplace; and ensure consistency with other universally accepted labour standards related to exploitation of child labour, forced labour and non-discrimination in employment.<sup>63</sup>

Clearly, the establishment of such codes of conduct by some MNEs is an important effort at corporate social responsibility by some domestically registered corporations, tied to standards that are set by democratic processes in the home nation. Their value may be in creating a climate in which corporate social responsibility is given voice. However, such codes continue to be voluntary and unenforceable, although they may give rise to reasonable expectations of investors concerning the conduct of the corporation that may provide grounds for an oppression application or other action for failure to implement the code in the home state. There is generally neither a requirement of mandatory disclosure concerning whether or not the codes are being complied with nor any internal or external monitoring of compliance. One question is whether or not investor markets or consumer markets will recognize and encourage such initiatives.

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<sup>63</sup> *Ibid.*

While these codes are voluntarily generated, many of them commit corporations to adhering to international standards developed by international organizations. For example, signatories to the Global Compact are committed to complying with the ILO Declaration on Fundamental Principles and Rights at Work, which calls for the abolition of child labour, the elimination of employment discrimination and the recognition of the right to collectively bargain working conditions.<sup>64</sup> The ILO itself plans an ambitious progress assessment and annual monitoring strategy, although the potential success of this as a strategy to create normative pressure on MNEs is not yet known, since the Declaration has only recently come into force.<sup>65</sup> Adoption by corporations of these principles may also create some normative pressure on them to comply with these principles. As will be discussed below, perhaps it is these codes that MNEs should be required to comply with in the preliminary stages of trying to enforce international standards for MNEs.

Concerns have been raised about voluntary codes of conduct and whether they are window dressing designed to appeal to consumer or investor preferences or to give the impression of social responsibility without any real commitment. Such charges have been aimed at corporations such as sportswear manufacturer Nike, in its hiring of a former United Nations ambassador to investigate its international operations and assess whether operations comply with the corporation's internal code of conduct.<sup>66</sup> This initiative was both lauded as socially responsible behaviour and criticized as a marketing technique. While there was disclosure of findings from this investigation, another report by an external auditor that indicated that the code was not being enforced in Nike's international operations was not disclosed until it was leaked to the media.<sup>67</sup>

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<sup>64</sup> International Labour Organization, *Declaration on Fundamental Principles and Rights at Work*, <http://www.ilo.org/public/english/standards> (last accessed October 2003).

<sup>65</sup> *Ibid.*

<sup>66</sup> Levi Strauss & Co., *Social Responsibility, Sourcing Guidelines (2001)*, <http://www.levistrauss.com/responsibility/conduct> (last accessed October 2003).

<sup>67</sup> S. Greenhouse, "Nike Shoe Plant in Vietnam is Called Unsafe for Workers" *The New York Times* (November 8, 1997) A1, reported that Ernst & Young Inc. had found unsafe conditions and illegal wages rates in Nike's Vietnamese shoe factory. Nike had failed to comply with its own code.

Hence, while there are some voluntary initiatives aimed at the social responsibility of MNEs, there is a continuing problem of disclosure and of enforceability that must be addressed even where one hears the voice of corporate social responsibility. Monitoring of compliance with voluntary codes is also a challenge, both internally for the MNE in respect of its subsidiary operations and externally in terms of access to information for investors, consumers and other interested parties. Unless such standards are enforceable, corporations can opt in or out of their own voluntary standards without any consequences, creating incentives to do so whenever it is convenient.

Another issue is what corporations have called the political and cultural sensitivities of the host nation. An example would be nations where women or particular racial groups are not given access to employment, or if they are, their compensation reflects highly discriminatory practices. Respecting the cultural norms of the host jurisdiction in such a case runs contrary to international human rights and is offensive to Canadian law regarding equality rights. The MNE's continued investment in the host nation that supports inequitable employment practices results in further dollars being invested to perpetuate gender and race discrimination. While it is important not to impose Western norms on other nations, it is appropriate to hold those nations to international norms set through democratic international efforts. The socio-cultural differences cannot be used, as they are now, to justify discriminatory and repressive labour practices and unaccountable environmental harms.

## **B. How Can the Voice Be Heard?**

If markets punish the MNE, then actions that trigger that punishment will become breaches of fiduciary duty. The problem is that reliable information about MNE activity is not available. As has been pointed out with respect to the attempts to control MNEs through the consumer market, meaningful standards of behaviour and reliable information about the compliance of the MNE with those standards in all aspects of its operations are extremely scarce.<sup>68</sup> This makes it harder for markets to

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<sup>68</sup> N. Roht-Arriaza, "Private Voluntary Standard-Setting, the International Organization of Standardization and International Environmental Lawmaking" (1995) 6 Yearbook of International Environmental Law 10 at 152-153, points out that the ISO 14000 standard requires neither public information on performance nor adherence to any particular standard, merely the implementation of certain management systems.

function efficiently. In addition, some of the lessons from the financial markets would indicate the need for international standards and credible, consistent reporting on compliance in order for a corporate governance market to work. As Stéphane Rousseau has pointed out, a regime of voluntary disclosure of corporate governance information makes it difficult to distinguish between accurate reporting and window dressing, and this may lead to an adverse selection problem.<sup>69</sup> That is, if the information that the investors have about the quality of corporate governance does not enable them to distinguish the corporations with good corporate governance from those with problematic governance, this difference will not be reflected in their prices.<sup>70</sup>

Corporate law tries to mitigate the problems for financial markets caused by asymmetric information by mandating regular disclosure of relevant financial information and regulating insider trading. However, in the area of corporate governance, and especially with respect to compliance with international norms of human rights, environmental, political and social rights, there is no highly developed regulatory scheme of disclosure and verification to mitigate the inability of investors to judge corporate quality.

### **C. Designing Incentives to Be Responsible Through Remedies**

One possible initiative is to require corporate reporting of a range of corporate activities that now need to be reported only where they affect the financial statement of the corporation. By enhancing the definition of materiality, corporations could be required to disclose transactions internationally and domestically that create particular social and environmental harms. While these may not affect the short term financial reporting of the MNE, they do have long term potential downside risks that investors and the public generally should be able to assess. While expression of investor preference is not an adequate mechanism in itself to temper the conduct of

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M. Shaughnessy, “The United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct” (2000) Col. J. Int’l Environmental Law & Policy 159 has reported the problem of voluntary codes lacking a legal mechanism through which to enforce compliance.

<sup>69</sup> S. Rousseau, “Canadian Corporate Governance Reform: In Search of a Role for Public Regulation” in Sarra, ed., *supra* note 34 at 3.

<sup>70</sup> G.A. Akerlof, “The Market for ‘Lemons’: Quality Uncertainty and the Market Mechanism” (1970) 84 The Quarterly Journal of Economics 488 at 490-491.

MNEs internationally, it could provide one tool in beginning to influence these corporate activities.

Scholar Faith Kahn has reflected on silence and power in corporate and securities law, analyzing the legislature, courts and the US Securities and Exchange Commission and the development of corporate philanthropy.<sup>71</sup> She observes that while the law and economics movement highlighted the private law contractual aspect of corporate law and its normative notions of efficiency, modern philanthropy law deals with how the corporation as a social institution engages with the culture and community that surrounds it, performing a distributive role. While corporate law has accommodated the notion of the socially active corporation, securities and corporate law fail to provide investors with the right to have disclosure about the social activities, positive and negative, of corporate activity, including corporate charitable and political contributions, and many employment and environmental practices. Kahn observes that limited social disclosure has signalled to investors that they are free to disregard the social effects of corporate practices.

Hence, the lack of disclosure creates problems for a consumer market for socially responsible behaviour, both in making investment determinations and in creating incentives to consider these issues as an investment or consumer criteria. Douglas Kysar has suggested that with very few exceptions, consumer product manufacturers are only ever legally required to disclose health and safety risks or other material attributes that inhere in the end product itself and that therefore threaten to harm or mislead the purchaser directly.<sup>72</sup> He observes that increasingly, consumers are demanding specific information about the manner in which goods are produced, such as whether they were developed using sweatshop labor, animal cruelty, unsustainable harvesting practices, genetically engineered ingredients, or other processes about which consumers express strong views and strong preferences.

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<sup>71</sup> F. Stevelman Kahn, "Legislatures, Courts and the SEC: Reflections on Silence and Power in Corporate and Securities Law" (1997) 41 *New York School Law Review* 3.

<sup>72</sup> D.A. Kysar, "Preferences for Processes: The Process-Product Distinction and the Regulation of Consumer Choice" [unpublished, draft paper on file with author], cited with permission.

However, Kysar notes that the impetus to regulate access to such information is taking the form of a conceptual distinction between processes and products in which the former are not considered a legitimate basis for distinction by either consumers or regulators, at least so long as such processes do not manifest themselves significantly in any physical characteristics of the actual end products.<sup>73</sup> Kysar notes that the common justification for these efforts to manage the consumer's information environment is a belief that lay individuals lack sufficient knowledge or cognitive capacity to evaluate the scientific, economic, or political significance of process information. He suggests that the growing impulse of policy-makers has been to restrict the decisional matrix of consumers to information concerning products only, both because such information is thought to bear more directly than process information on the risk and utility to be expected from the end product.<sup>74</sup> Joseph Spoerl has observed that preferences are not exogenous, derived from the nature of the individual. Rather, markets and individuals are co-dependent and preferences shape markets but these markets shape preferences. Hence corporate managers are shaping consumer preferences in the way in which they promote particular product choices and shape disclosure.<sup>75</sup> Another consideration is whether we wish to continue to have a system in which equity investor preferences or consumer preferences determine socially responsible behaviour. Kellye Testy has observed that there is a risk of

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<sup>73</sup> Kysar suggests that the process-product distinction has appeared most prominently in international trade negotiations, as member nations of the World Trade Organization have struggled to determine the extent to which foreign imports may be conditioned on compliance with domestic regulatory standards for processes and production methods, including rules regarding the voluntary or mandatory disclosure of process information by product manufacturers. Part of the issue is whether there is sufficient state interest to force or otherwise strictly regulate disclosure of information by manufacturers concerning production processes. *Ibid.* See also J.C. Anderson, "Respecting Human Rights: Multinational Corporations Strike Out" (2000) 2 U. Pa. J. Lab. & Emp. Law 463; C. Stone, *supra* note 23 who observes that consumer preferences as able to influence corporate social responsibility assumes that consumers know of the harms created by particular corporate practices, that they know where to apply pressure and are capable of applying pressure and that any pressure is translated into warranted changes in the corporation's behaviour. These assumptions are contestable.

<sup>74</sup> *Ibid.* He then considers arguments for and against the use of product labels and other means of down-streaming information regarding production processes to aid consumer decision-making.

<sup>75</sup> J. Spoerl, "The Social Responsibility of Business" (1997) 42 Am. J. Juris. 277 at 295-297; Ostas, *supra* note 10.

commodification of corporate social responsibility in pursuit of shareholder wealth, with these commodity preferences easily retracted if consumer preferences change.<sup>76</sup> Thus, mandating expanded reporting requirements alone may be insufficient to ensure greater corporate social responsibility since the preferences of consumers or investors for greater social responsibility will still govern the outcome, rather than the public policy in favour of compliance with international law norms of human rights, environmental protection and respect for social and political rights.

#### **D. Tempering the Conduct of MNEs**

Arguably, the challenge of MNE activity and socially responsible behaviour globally, while daunting, is not insurmountable. There may be a role for stakeholders, for collaborative initiatives that foster broader consensus on the meaning of corporate socially responsible behaviour, and a role for administrative justice in home nations taking responsibility for the global activities of their MNEs. I give three examples as illustration:

##### **1. Stakeholder Initiatives**

Recently, there have been a number of instances where individuals and groups are collaborating internationally to exert some pressure on corporations in terms of their accountability to larger groups in society. An example is the Coalition for Justice in the Maquiladoras, comprised of religious groups, labour unions, environmental and human rights groups committed to promoting socially responsible corporate practices in labour and human rights along the Mexican—US border.<sup>77</sup>

Legal scholar Claire Dickerson has suggested that the behaviour of multinational corporations indicates a growing willingness to recognize the rights of stakeholders other than shareholders.<sup>78</sup> She tracks this as a shift from the West-North focus on the norms of the individual to an East-South focus necessitated by globalization, with a growing emphasis on

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<sup>76</sup> K.Y. Testy, “Linking Progressive Corporate Law with Progressive Social Movements” (2002) 76 *Tulane Law Review* 1227.

<sup>77</sup> J. Perez-Lopez, “Promoting International Respect for Workers’ Rights Through Business Codes of Conduct” (1993) 17 *Fordham Int’l L.J.* 1.

<sup>78</sup> C. Dickerson, “Human Rights: The Emerging Norm of Corporate Social Responsibility” (2002) 76 *Tulane Law Review* 1431.

collective human rights. Dickerson uses the example of world wide negative publicity in 2001 aimed at the pharmaceutical companies when they resisted lowering the sale price of anti-HIV/AIDS drugs to ameliorate the pandemic that has taken over 16 million lives and infected an additional 33 million people in South Africa. Consumer groups, the United Nations and other organizations mounted sufficient pressure that the pharmaceutical countries agreed to lower their prices and to withdraw their suit regarding the South African law permitting manufacture of generic drugs.<sup>79</sup> In turn, Dickerson suggests that corporate behaviour casts its own social influence on society at large; thus when the behaviour conforms to international human rights norms, it reinforces those norms with all members of the community, including developed-country consumers. Dickerson observes that the emergence of norms in this unstructured, more broadly based process is being bolstered by the more formal codification process.

Broadly based movements such as the World Social Forum may also ultimately have an impact on corporate conduct.<sup>80</sup> Its focus is not on building global consensus or engaging in concerted efforts to enforce international norms through existing legal institutions. Rather it is aimed at creation of an international forum to allow discussion among broad groups of social, political and NGO actors; its strategy is one of information dissemination and policy debate, encouraging a climate for support of more individualized domestic and international enforcement strategies.

There is a valid critique of corporate responses to collective stakeholder pressure. This stems from the notion that corporations have as their objective the generation of surplus value and that any means of externalizing costs to generate this value is legitimate. Only external constraints temper this activity, and as discussed above, the mobility of capital has meant that external constraints are increasingly being diminished. Corporations respond to specific pressure regarding their

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<sup>79</sup> *Ibid.* See also Joint Communiqué from Secretary-General and Seven Leading Research-Based Pharmaceutical Companies on Access to HIV/AIDS Care and Treatment, SG/SM/7982, AIDS/34 (October 4, 2001), <http://www.un.org/News/Press/docs/2001/sghsm7982.doc.htm>; B. Barber, "Global Groups Seek AIDS Drugs for Poor Patients: Drug Firms Back Off from Patents" *Washington Times* (March 19, 2001) A13.

<sup>80</sup> World Social Forum, <http://www.wsf> (last accessed September 2003).

international activities only as far as they need to. Corporations may also adopt codes of conduct as a means of attracting capital from socially responsible investment funds, without a stronger normative commitment to implement these practices. Finally, the issue is whether such codes are adopted to facilitate the entry of corporations into new markets, where the host nation may be looking for a commitment to particular practices. Dickerson offers an optimistic response to this critique by suggesting that the motives of multinationals in their adoption of codes of conduct are irrelevant to the impact that such adoption entails, because the norms emerge through an unstructured process akin to democracy; and that as corporate behaviour begins to recognize the human rights of a collective whose individuals are relatively powerless, these will become norms.<sup>81</sup>

## 2. Collaborative Initiatives

There is also some potential for collaboration across government, corporations, financial institutions and NGOs. There are recent initiatives that may improve the quality and comparability of information available about an MNE's operations. The Coalition of Environmentally Responsible Economies (CERES) and the United Nations Environment Project (UNEP) have jointly convened an ambitious project, funded by UNEP, entitled the "Global Reporting Initiative" (GRI). The GRI has developed "Sustainability Reporting Guidelines" to be used by MNEs to provide information with respect to their economic, environmental and social performance globally. The purpose of the guidelines is summarized as follows:

This will encourage the creation of markets that can then punish breaches.

The GRI seeks to make sustainability reporting as routine and credible as financial reporting in terms of comparability, rigour, and verifiability.

...

A generally accepted framework for sustainability reporting will enable corporations, governments, NGOs, investors, labour, and other stakeholders to gauge the progress of organizations in their

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<sup>81</sup> Dickerson, *supra* note 78 at 231, citing Levi Strauss & Co. code of conduct that purports to regulate suppliers' labour practices. See Levi Strauss & Co., *supra* note 66.

implementation of voluntary initiatives and toward other practices supportive of sustainable development. At the same time, a common framework will provide the basis for benchmarking and identifying the best practices to support internal management decisions.<sup>82</sup>

GRI is creating a permanent organization to promote and develop the guidelines. The members of the permanent organization include the reporting corporations themselves, UNEP, non-governmental organizations, and some national government agencies. Although the present Guidelines provide for self-reporting, the GRI is attempting to obtain consensus on an appropriate set of rules addressing independent “verification” or “assurance” concerning any reports generated using the GRI Guidelines.

There are more than 2,000 companies currently voluntarily publishing environmental, social or sustainability reports.<sup>83</sup> The GRI’s *Sustainability Reporting Guidelines* are the result of a broad-based consultative process with multinational corporations, environmental groups, human rights, labour and government stakeholders. The GRI reports that it has consulted with more than 10,000 stakeholders in developing the Guidelines. It also reports that 194 corporations in the auto, utility, consumer products, pharmaceutical, telecommunication, energy and chemical sectors have adopted all or part of the guidelines.

Intuitively, the influence is likely to be interactive. With a growing number of Canadian corporations becoming signatories to the Global Reporting Initiative, there will be some normative pressure domestically to import similar standards of social and environmental reporting and accountability. Recent changes to corporations statutes in Canada may have created an enhanced means for investors to express preferences in terms of corporations adopting governance standards that take account of environmental protection, human rights and other basic standards.

However, reporting under these guidelines, as with many other such initiatives, is entirely voluntary. In addition, the reports themselves do not provide any standards against which to judge the types and levels of activities reported. They provide information about the trends in the various activities reported, and leave it to the individual investor to

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<sup>82</sup> “Global Reporting Initiative Overview” <http://www.Globalreporting.Org/AboutGRI/Overview.htm> (last accessed August 5, 2003).

<sup>83</sup> <http://www.globalreporting.org/about/faq.asp>.

determine whether sufficient progress is being made and whether the level of activity reported is acceptable or not. For example, the engineering reports concerning the state of environmental controls could be reported as an investment in environmental engineering by the parent corporation. There does not appear to be any mechanism that would require the corporation to link the commissioning of the report to its willingness to follow the report's recommendations.

Similarly, the initiatives of the UN Global Compact are aimed at encouraging voluntary corporate citizenship supporting nine principles drawn from the *Universal Declaration of Human Rights*, the *ILO Declaration on Fundamental Principles and Rights at Work* and the *Rio Declaration on Environment and Development*.<sup>84</sup> The objective is to create partnerships with private and public actors, premised entirely on voluntary compliance and notions of responsible corporate citizenship, including the protection of international human rights and greater environmental responsibility. Fifty MNEs committed themselves to the Global Compact when it was launched in 1999, although the commitment to stewardship is voluntary and there are no enforceable standards. Environmental groups and human rights organizations have viewed the Global Compact with a degree of skepticism because of its voluntary nature.<sup>85</sup>

It is not yet clear what the long-term impact of these collaborative efforts will be. Cooperation by MNEs may in many cases be contingent on the non-mandatory nature of participation. Yet the lack of enforceable standards and remedies for violations of codes of corporate conduct results in those harmed by MNE conduct not being able to seek redress for those harms. Moreover, it can sometimes be difficult to identify "international norms", for example, the Rio Declaration is a "soft law" instrument and with a few exceptions, its principles are non-legally binding. While the line between hard law and soft law does not detract from my argument, it

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<sup>84</sup> <http://www.unglobalcompact.org/content/AboutTheGC/TheNinePrinciples/thenine.htm> (last accessed October 1, 2003). *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, which provides human rights standards, including the rights of life, liberty, security of person, assembly and association, the right to vote, freedom of movement, freedom from unjust labour practices, etc. The Rio-Declaration specifies that human beings are at the centre of concern for sustainable development and that they are entitled to a healthy and productive life in harmony with nature, *Rio Declaration*, Principle 1, U.N. Doc. A/Conf.151/26 (vol. 1).

<sup>85</sup> Shaughnessy, *supra* note 68 at 171-172.

may pose additional challenges for recognition and enforcement of universally accepted norms.<sup>86</sup> At the same time, the substance of these voluntary codes suggests that some MNEs have, at least on paper, outpaced their domestic governments in their willingness to accept international principles as the basis of their conduct. While a more pessimistic view might suggest that voluntary adoption has been driven in part by a strategy of MNEs to reduce the likelihood of legislated standards, the public adoption of corporate codes endorsing international human rights standards and environmental norms, sets the stage for more formal codification of these standards.

### 3. The Role of the Administration of Justice in Home Nations in Taking Responsibility for Global Activities of their MNEs

This is a more contested notion. Ideally, there would be international mechanisms developed that would offer enforceable standards that would control particular corporate activity that violates internationally accepted norms of social responsibility. There would also be international consensus on a tribunal that could hear and decide cases alleging harms by MNEs for their activities in host nations, with processes designed to generate meaningful access for both those harmed and NGOs or other groups recognized by the tribunal as having *amicus curiae* or actual standing to seek remedies for particular harms. This is not likely to occur in the immediate future as there is not international consensus that an international mechanism to hold MNEs accountable is required or desired, nor is there consensus on the standards to which they should be held accountable for actions in host nations.

In the interim, there is the issue of a role for domestic legal processes in enforcing international standards for the activities of domestically registered MNEs abroad. Initial strategies could include enacting legislation that allows the home nation to take jurisdiction and to award remedies for MNE harms internationally; imposing fiduciary obligations on corporate directors and officers in respect of the corporation's international activities; or expanding the scope of materiality in corporate disclosures of their activities domestically and abroad.

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<sup>86</sup> Thanks to my colleague Professor Karin Mickelson for making this observation.

#### 4. Would Domestic Legislation Aimed at Extraterritorial Jurisdiction Assist?

If in going global, MNEs have left much of the rule of law behind, perhaps there should be domestic legislation aimed at imposing some level of responsibility on MNEs for their actions in foreign jurisdictions. As noted in Part III, the US *Alien Tort Claims Act* has proven an inadequate remedial tool because of subject matter jurisdiction and doctrines such as *forum non conveniens*. In designing a statutory regime, one can draw on failures of the US regime to conceptualize a framework that may address the problems raised in this paper.

I would propose a new domestic statute that grants Canadian courts extraterritorial jurisdiction for the international activities of domestically registered MNEs in respect of human rights, labour standards and environmental protection. Provisionally titled the Canada *MNE Standards of Global Conduct Act (MSGCA)*, it would set up a mandatory disclosure and compliance regime, measured against both international treaties and norms and the standards voluntarily adopted by the corporation.<sup>87</sup> Rather than a focus on torts with its attendant problems in terms of thresholds of causation and harm, the focus would be on enacting enforceable standards of corporate conduct. Ideally, there would be a democratically, nationally set standard of conduct that engaged standards such as the *Universal Declaration of Human Rights*, the *ILO Declaration of Fundamental Principles and Rights at Work* and the *Rio Declaration on Environment and Development*. MNEs with their home jurisdiction in Canada would be required to comply with these international standards.

The statute would contain language that would allow for the development of new international norms of conduct. In the context of the US *ATCA*, Hari Osofsky has suggested a standard for judging new norms as they emerge, specifically, that there must be wide declaratory recognition that the norm exists, such as uncontroversial UN resolutions, a preponderance of scholarly or judicial opinion or incorporation of the

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<sup>87</sup> I note parenthetically that corporations operating solely domestically should also be required to adopt codes of conduct, but in this paper do not address the legislative design problems associated with corporations that vary considerably in size and sophistication.

norms in many nations' statutes.<sup>88</sup> Allowance for recognition of new norms means that the courts are less likely to narrowly interpret the statutes.

Under the proposed *MNE Standards of Global Conduct Act*, MNEs would also be required to comply with standards that they have set in their own codes of conduct. While the statute would require adoption of a corporate code of conduct for any MNE registered in Canada regarding both its domestic and international conduct, the content of that code would be voluntary as long as it raised standards above the international norms referred to above. This requirement would have two effects. First, there would be a level of consistency and fairness in the standards set, with the international human rights, labour and environmental standards setting the baseline of conduct that is in turn enforceable in the home jurisdiction. Corporations would also be required to abide by the codes of conduct that they have adopted. This will create *ex ante* incentives for corporations to devise codes that they are prepared to adhere to, thus addressing the problem of codes being adopted purely for marketing purposes or to satisfy perceived investor preferences. The corporation would always be free not to adopt standards above the international baseline of human rights, environmental and labour standards, but even in those circumstances, there would be mandatory disclosure, monitoring and enforceable remedies for violation of the baseline standards. While directors and officers as agents of the corporation would still have due diligence defences available, there would be remedies against the corporation for failure to meet standards and for harms caused due to this failure. In some cases, where the directors and officers failed in their duties, liability could be imposed on them personally, a point discussed in the next section.

In order for such legislation to work, the *MNE Standards of Global Conduct Act* would specify a statutory pulling aside of the corporate veil for the limited purpose of hearing and deciding complaints concerning MNE activities in host nations in respect of human rights, labour standards or environmental harms. Otherwise, the problem of the unlimited subsidiaries would defeat any such legislative initiative. Canadian courts have already developed doctrines for such a pulling aside of the veil, but the legislation would have to go further in order to properly hold MNEs

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<sup>88</sup> Osofsky, *supra* note 48 at 368. Osofsky suggests that lack of geographical comprehensiveness, weak enforcement mechanisms or non-conforming state behaviour would not be a bar to recognition of new norms.

accountable for the actions of their subsidiaries. This would also address the problem of subsidiaries in host countries shifting assets continually to the parent to insulate themselves from claims for harms in the host country, as the MNE would be treated as one entity for the purpose of assessing the complaints and remedying any harms. It would still leave the problem of subsidiaries that are joint ventures of corporations registered domestically in several jurisdictions, but in such a case, the domestically registered corporation that is a joint partner or shareholder could be prohibited from investing or engaging in joint ventures where such standards are not being met, and held to a good faith and due diligence standard in determining whether or not it has fulfilled its obligations.

The *MNE Standards of Global Conduct Act* would of necessity have to have a liberal definition of who should be able to bring a claim against the corporation. As has been evident with the *Alien Tort Claims Act* in the United States, standing to bring claims is problematic, as is the issue of resources to pursue claims, particularly in light of the resources of the MNE. Under the *MNE Standards of Global Conduct Act*, any party that is directly implicated or harmed by the corporation's activities would have standing to bring a complaint, including citizens of the home or host nation. This would include investors, employees, in some cases creditors, and communities in host nations suffering the harms of the foreign activities of the domestically registered MNE. While the legislation should provide for intervenor status for human rights, environmental or labour groups or NGOs, either as parties with an interest or in an *amicus curiae* role, there would need to be at least one complainant with a direct interest in the MNE's activities. While the cost of pursuing such proceedings is likely to deter NGOs and advocacy groups pursuing frivolous claims, on balance, it would seem that there should be at least one directly involved complainant, in terms of due process and fairness. A key balance to this limitation would be a very liberal definition of "interest" in the corporation's activities, with the courts giving such remedial legislation an expansive, as opposed to narrow interpretation of "complainant". If "complainant" is defined and interpreted liberally, a major hurdle to enforcing the standards of the statute will be overcome.

Moreover, there should also be a mechanism for a public body to bring a complaint against a domestic corporation for its activities internationally. Similar to a privacy ombudsperson or a human rights commissioner, there could be a Director of MNE Standards of Conduct that would have standing to investigate and bring complaints under the *MNE Standards of Global Conduct Act*. This would ensure that resources and standing were

not a bar to enforcement of the legislation. Such positions have also historically acted as a normative check on the activities of corporations, because corporate officers understand that there are standards specified in the legislation and that there is an enforcement mechanism in place aimed at holding them accountable to such standards.

The Director of MNE Standards of Conduct could also engage a variety of dispute resolution mechanisms to resolve complaints and try to move those engaged in a complaint into a proactive and collaborative resolution. In this sense, pursuit of the complaints through the courts would be the mechanism utilized when it is evident that the corporation is unwilling to meet the legislative standards. In the absence of enforceable remedies, upheld by the courts, any legislation would not have the persuasive power necessary to temper the conduct of domestically registered MNEs internationally. Claire Dickerson has suggested that there be a good faith norm that is reflected in consultation and dialogue with developing country workers such that they can work towards some sort of consensus on working conditions and labour standards that reconcile the legitimate interests of workers and the corporations.<sup>89</sup> This notion of preventive mediation of interests is highly appealing. Yet there are serious barriers to such a process posed by information asymmetries, inequitable bargaining power and the lack of international enforceable norms. The statute would have to expressly address these barriers to effective resolution of disputes and to pursuing claims for remedies under the statute.

Enacting the *MNE Standards of Global Conduct Act* also raises the question of whether domestically registered MNEs would exit Canada. Is there a risk of exit? Of course, just as there is also a risk of exit with existing Canadian labour, human rights and environmental standards. However, Canadian registered corporations are also beneficiaries of a highly codified enabling regime, including a generous tax regime, securities legislation that encourages active capital markets, a corporate law regime that enables corporate activity and protects agents of the corporation in their good faith and duly diligent efforts to oversee and manage the corporation. These publicly regulated features of private wealth generating activity make Canada an attractive domestic jurisdiction

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<sup>89</sup> C. Dickerson, “Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing Country Workers” (2001) 53 Fla. L. Rev. 611 at 616.

for corporations. These features are not compromised by holding corporations accountable to international standards.

Resistance to enactment of legislation would of course be expected; the objective of corporate activity is to generate wealth efficiently, including lobbying politically for conditions that are most advantageous for the corporation. However, the objective of democratic processes is that as citizens, we are engaged in an ongoing challenge of finding the appropriate balance between various economic and social objectives and activities. Wealth creation is only one of many competing policy objectives, in addition to the health, safety, security and equality of Canadian citizens and a whole host of other public policy initiatives. Clearly, the move to global capital and products markets has shifted that balance, causing a redistribution of wealth away from citizens, both in terms of access to the benefits of global activities and in terms of harms to health and environment from those activities. The *MNE Standards of Global Conduct Act* would serve as a corrective device. It would have some distributive consequences, but the current policy choice not to enforce international standards also has distributive consequences. The proportional harms to citizens of host nations from the current imbalance that is the result of unaccountable corporate behaviour far exceeds any potential “harm” to corporate activity in imposing such standards and creating enforceable remedies. However, if numerous Canadian based MNEs have already adopted and are promoting the Global Compact, they have at least voluntarily already committed to these international standards. The legislation would codify these standards, raise other corporations up to these minimum standards and more importantly, provide a mechanism whereby the corporations would be held accountable to such standards.

Finally, there is likely to be the efficiency critique of such proposed legislation. Essentially, this critique would suggest that the *MNE Standards of Global Conduct Act* is unnecessary interference in the market, creating *ex ante* incentives for corporations to relocate in different domestic jurisdictions and to dismantle their existing voluntary codes of conduct because of the fear of being held accountable for these standards. However, if one analyses these arguments, they are claims that the legislation would impair efficiency because corporations that adopt standards of conduct do not want to be accountable for failing to implement them nor do they want to be accountable if they violate international law norms. Thus, the efficiency critique brings us back to first principles, which are the normative constraints we wish to impose on international corporate activity. In essence the critiques are normative

claims that the present lack of any real constraints on this activity is a preferable situation.

### **E. Imposing Fiduciary Obligations**

Instead of enacting my proposed statute, corporate law fiduciary duty could be expanded to encompass international law norms in respect of the environment, human, social and political rights. If these protections were considered baseline standards for corporate conduct in the home state of the corporation, it might act as a temper on breach of such standards by corporate managers in their decisions regarding corporate conduct in the host nations. Any intentional or negligent breach of these norms would subject the MNE manager involved to sanctions similar to those for breaches of fiduciary duty in a domestic setting. This may create the appropriate incentives for corporate directors and officers to engage in conduct that would meet the standards of the home nation in the corporation's dealings internationally. It would address the current missing element, that there is no threat or risk to corporate assets from conduct internationally that would be a breach of the duty to act in the best interests of the corporation domestically.

In addition to rethinking concepts of fiduciary obligation, or enacting extraterritorial legislation there are other strategies to be considered to address the challenges of corporate social responsibility globally.

### **F. Mandatory Reporting on Social and Environmental Activities**

One interim strategy is to mandate social, environmental and human rights reporting similar to that undertaken by GRI and CERES, instead of it remaining voluntary. While shareholder activism in respect of international human rights or labour norms was effectively quashed by corporate law language that prohibited expression of shareholder preference for any political or social cause, the 2001 amendments to the *Canada Business Corporations Act* now allow greater possibility for resolutions that address issues related to the corporation's activities. Some recent shareholder activity has also focused on human rights issues and a push for greater transparency in corporate decision making in respect of foreign labour practices.<sup>90</sup> A recent proposal regarding sweatshop

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<sup>90</sup> SHARE, "Labour Investors Gather Broad Support in Anti-Sweatshop Vote" 1 (Spring/Summer 2001) Prospectus 4, online: SHARE <http://www.share.ca> (under

employment practices garnered 36% of shareholder support at the corporation's annual meeting, the largest vote ever recorded in support of a social resolution submitted to a Canadian corporation.<sup>91</sup>

### **G. Supporting International Codes of Conduct Through Trade Preferences**

Another strategy that has found favour in the European Union is to encourage host nations to require socially responsible corporate behaviour from MNEs in their country through treaties incorporating this strategy. In this respect, the Commission of the European Union issued two communications dealing with globalization. The first is a communication setting out its approach to the issue of social governance and promotion of core labour standards in its trading relations with other states ("Core Labour Standards Communication").<sup>92</sup> In the communication, the Commission rejects sanctions as the appropriate method for promoting such standards. Instead, the Commission prefers strengthening the role of the ILO and its complaint mechanisms by providing technical assistance to the ILO.<sup>93</sup> The communication also approves of denying preferential access to EU markets to products from countries that permit violations of the ILO's core conventions.<sup>94</sup>

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"Newsletters", last accessed: June 1, 2003). Similarly, Real Assets Investment Management Inc. and Meritas Mutual Funds recently jointly filed a shareholder resolution with Calgary-based Enbridge Inc. calling on it to adopt a human rights policy. The shareholder proposal was withdrawn after Enbridge agreed to adopt the US-U.K. Voluntary Initiative on Security and Human Rights, and to engage in discussions with shareholders and human rights groups on how it will be implemented.

<sup>91</sup> SHARE, News Release, "Record Numbers Support Shareholder Resolution at The Bay on Sweatshops" (May 23, 2002), online: SHARE <http://www.share.ca> (under "News Releases", last accessed: June 1, 2003).

<sup>92</sup> Commission of the European Communities, *Promoting Core Labour Standards and Improving Social Governance in the Context of Globalization*, Communication to the Council, the European Parliament and the Economic and Social Committee, Communique COM (2001) 416 final (18/7, 2001).

<sup>93</sup> *Ibid.* at 14.

<sup>94</sup> *Ibid.* at 16-17.

The Commission also published a “Green Paper” on corporate social responsibility (“CSR”).<sup>95</sup> The Green Paper envisions the role of the European Union as that of promoting CSR through provision of a “framework” that provides transparency, coherence and best practices, and by assisting in the development of the appropriate evaluation and verification tools. The Green Paper does not discuss the European Parliament’s 1998 resolution concerning a model code of conduct for MNEs and the creation of a Monitoring Platform. The potential for the creation of such a model code is present in the proposed “framework” and it could arguably result from the consultation process following the issuance of the Green Paper.<sup>96</sup> However, the Commission was expressly refraining from making any concrete proposals in the Green Paper because the discussions concerning the role of the EU in corporate social responsibility were only at the preliminary stage.<sup>97</sup>

Following the consultation, the Commission issued a Communication to European Institutions and Member States setting out a proposed strategy on CSR for the Commission (“EU Communication”).<sup>98</sup> The EU Communication presented a definition of corporate social responsibility that emphasized its voluntary nature, its intimate links with sustainable development and its dimension of exceeding minimum legal standards.<sup>99</sup> It also recognized the global dimensions of CSR by referring to the need to develop an effective system of “global governance” including social and environmental dimensions. The EU Communication then went on to refer to globalization bringing “increased exposure to transboundary economic criminality, requiring an international response”.<sup>100</sup> However, the international response envisioned by the Commission is to follow the strategies of encouraging compliance with international standards, and using trade preferences to encourage compliance outlined in the Core

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<sup>95</sup> Commission of the European Communities, *Promoting a European Framework for Corporate Social Responsibility*, Green Paper COM (2001) 366 final (18/7, 2001).

<sup>96</sup> *Ibid.* at 22.

<sup>97</sup> *Ibid.* at 23.

<sup>98</sup> Commission of the European Communities, *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, Communication to European Institutions, Member States, Social Partners and other concerned parties COM(2002) 347 final (July 2, 2002).

<sup>99</sup> *Ibid.* at 5.

<sup>100</sup> *Ibid.* at 6.

Labour Standards Communication discussed above, and extending it to all areas of Corporate Social Responsibility.<sup>101</sup> The Commission also identified problems with transparency and comparability of standards for measuring CSR and, in response to this and other problems, created an EU Multi-stakeholder Forum on CSR which is to report in the summer of 2004 on a number of topics, including: the effectiveness and credibility of codes of conducts, to be based on internationally agreed principles, in particular the OECD guidelines for multinational enterprises; the development of commonly agreed guidelines and criteria for CSR measurement, reporting and assurance; the definition of commonly agreed guidelines for labeling schemes, supporting the ILO core conventions and environmental standards; and disclosure of pension and retail funds SRI policies.<sup>102</sup>

Thus, the issue is not only how international norms may play a role in domestic enforcement of particular codes of conduct, but whether investment and trading policy can be deployed to require particular standards of conduct in other jurisdictions regarding human rights and other protections that conform to Canadian understandings of essential freedoms. Is there likely to be compliance with such international standards in the absence of either domestic standards or an international forum that holds corporations accountable for particular kinds of harms?

#### **H. Domestic to International, International to Domestic Norms— Potential Synergies**

It would seem that multiple strategies are required to develop a model of corporate governance that addresses the full range of issues highlighted above. This requires engagement in international fora, with both governmental and NGO organizations and domestically in terms of laws that engage corporate activity.

The role of the judiciary is a challenging one. While limited by the scope of legislation or domestic jurisdiction, the courts do have a role in both domestic and international norms. For example, in insolvency law, there are growing numbers of cross-border insolvency restructurings and Canadian courts have recognized the need for co-operation and comity

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<sup>101</sup> *Ibid.* at 22-25.

<sup>102</sup> *Ibid.* at 17-18.

among jurisdictions. This presents a challenge in balancing domestic standards aimed at particular public policy objectives and the principle of comity, as well as consideration of the implications for access to justice for those who do not have the resources to enforce their claims in another jurisdiction.

## CONCLUSION

One of the primary objectives of the Canadian Institute for the Administration of Justice, which helpfully provided the research funding for this paper, is to foster debate and collaboration on the administration of justice. Too frequently, corporate law dismisses the issue of the administration of justice as a “public law issue” that does not engage the “private law” of corporate activity, capital markets and international trade and competition law. It is important to guard against the identification of international law norms with increasing shareholder wealth. It is important to recall that they are first and foremost public law norms that vindicate important human values, irrespective of their impact on shareholder wealth. A new vision of corporate law may include wealth redistribution, a reduction in subordination and discrimination based on race and gender, environmental justice and enhanced social democracy. The private law/public law distinction in the corporate law area is becoming increasingly blurred as corporate activities impose social and economic costs on individuals and communities. Similarly, the remedies available through the justice system to redress these harms or encourage particular standards of conduct increasingly engage both public and private law aspects of corporate governance. We need to enhance our understanding of these trends and begin to develop a corporate law regime more broadly responsive to the issues raised by increasingly global activity.

It is hoped that such an endeavour will also provide insights for how conflicts in norms would be resolved within the Canadian administrative justice system. This involves investigation into aspects of Canadian corporate law that may generate efforts by Canadian investors, workers and community members to import international norms or standards into Canadian corporate conduct. This would require not only consideration of recent statutory changes, but also some investigation into whether the courts or other dispute resolution fora are being utilized to place this on the public agenda. It also requires further conceptualization of the relationship between the courts as arbiters of public law and the increasing predominance of private arbitration, domestic and international, where

private binding dispute resolution impinges on or bypasses public law standards. This in turn necessitates deeper inquiry into the design of a dispute resolution framework within Canadian legal processes that may allow consideration of international norms and their impact on corporate activity domestically. It is only through an explicit vindication of the public law norms concerning basic human, social, environmental and political rights expressed in our international law in decisions concerning the governance of our domestic MNEs that the appropriate balance will be struck in the public versus private conception of the corporation.