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Taking Multinational Corporate Codes of Conduct to the Next Level

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I. INTRODUCTION

In 1997, Professor Oscar Schachter of Columbia University Law School predicted a continuing decline of the nation-state and a continuing emergence of new structures and norms to regulate transnational activities.¹ His prediction captured many demonstrable features of our evolving

* Professor of Law, George Washington University. The author extends his thanks to Professors Steve Charnovitz and Steve Schooner for very helpful comments, and to José E. Arvelo-Vélez for superb research assistance.

¹ Oscar O. Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 23 (1997):

Global enterprise and communication networks will continue to produce rules and procedures for transnational activities, many of which, like the *lex mercatoria*, will have only a limited link to national and international law. We can expect a greater mix and overlap of public and private international law with the line between them rather blurred. Movements toward democracy—liberal or populist—manifested through civil society will also influence international responses and add to human rights law and to principles of collective recognition. There will probably be new international “persons” and new conceptions of property and equity entering into international law. State may be declining in power, but the horizons of international law continue to expand.

international society. States *are* declining in their role as the predominant structure for ordering transnational relations, although in my view the phenomenon is one where states are continuing to do what they have always done—they are just not keeping up with the surge in transnational commercial, financial, service, health and informational relations.

Rather than address broadly the issue of whether and how nations are in decline as the means for ordering transnational relations, this essay focuses on one feature of the emerging transnational normative regime: codes of conduct, often relating to labor, environmental or human rights issues, that seek to constrain socially undesirable behavior of transnational, non-state actors. Such codes of conduct typically focus on the multinational corporation (MNC),² by which is meant a corporation with affiliated business operations in more than one country,³ with a particular eye to the activities of MNCs in the developing world, where governments are often unwilling or unable to regulate MNCs effectively. Codes of conduct of this type should be distinguished from private transnational codes that corporations find useful in efficiently selling goods and services across borders, such as the International Chamber of Commerce's Incoterms⁴ or UCP,⁵ or in protecting the security of such

² There are variants to this term, such as transnational corporation (TNC) or multinational enterprise (MNE)

³ For a brief discussion of what constitutes an "MNC," see PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 12-15 (1995).

⁴ INTERNATIONAL CHAMBER OF COMMERCE, *INCOTERMS 2000: ICC OFFICIAL RULES FOR THE INTERPRETATION OF TRADE TERMS* (1998); see Jan Ramberg, *ICC Guide to Incoterms 2000: Understanding and Practical Use* (1999).

⁵ International Chamber of Commerce, *Uniform Customs and Practices for Documentary Credits (UCP 500)* (1993); see Charles del Busto, *ICC Guide to Documentary Credit Operations for the UCP500* (1994).

transactions, such as standards to enhance the security of digital or Internet transactions.⁶ The latter are codes of conduct developed by private actors (and that are sometimes incorporated legally into their relations through contractual clauses)⁷ and are certainly a critical component of transnational private behavior, but they raise less concerns regarding adherence to the codes because MNCs are effective in maintaining, refining, and self-policing such codes, it being in their direct economic interest to do so.⁸

The non-state actor codes of conduct at issue in this essay, by contrast, are ones that corporations do not perceive as facilitating business transactions, at least not directly. Rather, these codes of conduct seek to promote socially-responsible MNC conduct, largely in the developing world, so as to prevent harm or mistreatment of persons or things caused by MNC operations (*e.g.*, the existence of unhealthy worker conditions in an MNC factory). Such harm or mistreatment need not be a core concern for the corporate actor; indeed, the MNC—in theory fundamentally driven to

⁶ See, *e.g.*, International Chamber of Commerce, General Usage for International Digitally Ensured Commerce (1977), at <http://www.iccwbo.org/home/guidec/guidec_one/guidec.asp>; William F. Fox Jr., *The International Chamber of Commerce's GUIDEDEC Principles: Private-Sector Rules for Digital Signatures*, 35 INT'L LAW. 71 (2001).

⁷ Oscar Schachter principally spoke to this sort of transnational law in his discussion of the impact of global capitalism. Schachter, *supra* note 1, at 10-12 (“Such law tends to reflect economic power and private interests and to escape scrutiny in light of community values.”). While Schachter also addressed the impact of non-governmental organizations or civil society groups on the development of international law, *id.* at 13-14, he did not directly address the issue of various corporate and civil society stakeholders developing codes of conduct that implement international law. This essay seeks to carry his discussion further by addressing that topic.

⁸ For a general discussion of private sector codes of conduct, see Virginia Haufler, *Private Sector International Regimes*, in NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM 212 (Richard A. Higgott et al. eds., 2000).

maximize its profits although in practice driven by various factors⁹—may benefit far more by inflicting the harm or mistreatment than by engaging in socially-responsible behavior. Only in reaction to outrage and discontent by other actors (governments, non-governmental organizations, or “civil society” groups) might the MNC see a value in developing a code of conduct that, if adhered to, would reduce the harm or mistreatment the MNC inflicts on others.¹⁰

Due to a vacuum of governmental regulation of MNCs in the developing world, these codes—a form of private regulation—has emerged to deal with the adverse social effects of MNC activity. For example, perhaps the best-known code of conduct for MNCs was developed with respect to MNC activity in South Africa in the 1980’s, commonly referred to as the “Sullivan Principles.”¹¹ Created in 1977 by the Reverend Leon H. Sullivan, a Philadelphia pastor who was a member of General Motors Board of Trustees, the Sullivan Principles arose due to increasingly strident public criticism of Western MNCs with operations in South Africa, where the government was actively engaged in a system of apartheid, in which non-whites were systematically denied basic civil and political rights, and denied fundamental employment, education, and housing opportunities. In response, leading MNCs pledged themselves to the Sullivan Principles, which consisted of six principles (later amplified in 1978) for how MNCs operating in South Africa should conduct themselves with respect to apartheid. For example, one principle called for no racial segregation in

⁹ See Michael K. Addo, *Human Rights and Transnational Corporations—An Introduction*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 15 (Michael K. Addo ed., 1999) [hereinafter HUMAN RIGHTS STANDARDS].

¹⁰ See, e.g., EMEKA A. DURUIGBO, MULTINATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY AND COMPLIANCE ISSUES IN THE PETROLEUM INDUSTRY 106-117 (2003).

¹¹ Sullivan Principles for U.S. Corporations Operating in South Africa, 24 I.L.M. 1494 (1985) (hereinafter “Sullivan Principles”).

eating, comfort, and work facilities, while another called for increasing the number of non-whites in management and supervisory positions.¹² MNCs were called upon to pledge themselves voluntarily to the Sullivan Principles and over the course of the fifteen years that they existed (until South Africa abandoned apartheid) some 150 MNCs made such pledges.¹³ The initial Sullivan Principles spawned a more general code in 1999, known as the Global Sullivan Principles of Social Responsibility.¹⁴ That code also contains eight principles whereby MNCs pledge, among other things, to “[r]espect our employees’ voluntary freedom of association”; “[c]ompensate our employees to enable them to meet at least their basic needs”; and “[p]rovide a safe and healthy workplace; protect human health and the environment; and promote sustainable development.”¹⁵ Hundreds of MNCs (including ChevronTexaco, Coca-Cola, and General Motors) and other entities, such as local governments and educational institutions, have pledged themselves to these principles.¹⁶ Such MNCs typically then assert that they have revised their internal policies so as to

¹² *Id.*, principles 1, 5.

¹³ For an analysis for the Sullivan Principles and their success, see S. Prakash Sethi & Oliver F. Williams, *Creating and Implementing Global Codes of Conduct: An Assessment of the Sullivan Principles as a Role Model for Developing International Codes of Conduct—Lessons Learned and Unlearned*, 105 BUS. & SOC’Y REV. 169 (2000); S. PRAKASH SETHI, SETTING GLOBAL STANDARDS 95-109 (2003).

¹⁴ Global Sullivan Principles of Social Responsibility (1999), at <http://www.globalsullivanprinciples.org/principles.htm>.

¹⁵ *Id.*

¹⁶ Companies and Organizations Endorsing the Global Sullivan Principles (Oct. 9, 2002), at http://www.globalsullivanprinciples.org/Endorser_list_Oct9.PDF.

be in accordance with the principles.¹⁷

The two broad tendencies observed by Oscar Schachter with respect to the decline of the nation-state may be discerned within the dynamic by which codes—such as the Sullivan Principles—are formed.¹⁸ Multinational corporations inherently emphasize the free market as the primary means of organizing transnational corporate behavior; for them, government control and interference may be necessary in some respects, but should be kept at an absolute minimum. Consequently, to the extent that new principles based on “socially desirable behavior” are to be applied to corporate conduct, MNCs are far more attracted to codes that are self-applied, that are tailored to the MNC’s unique situation, and that are not dictated by government regulation. Civil society groups, in an ideal world, might press for greater governmental regulation of MNCs, but they too are skeptical about the efficacy of government involvement, not because they distrust government interference generally, but because they doubt they can achieve their goals through government power.¹⁹ Such groups note that governments in the developed world resist regulating MNCs abroad, and if pressed to issue regulations, might set lower standards than may be achieved

¹⁷ See, e.g., Proctor & Gamble, *2003 Sustainability Report: Linking Opportunity with Responsibility* 25 (2003) (“We have reviewed and revised our policies to make sure we are aligned with the Global Sullivan Principles.”), available at http://www.pg.com/company/our_commitment/sustainability.jhtml;jsessionid=23JXSG4ALAX21QFIAJ1SZOWAVABHMLHC#.

¹⁸ Schachter, *supra* note 1, at 21-22.

¹⁹ See Robin Broad & John Cavanagh, *The Corporate Accountability Movement: Lessons and Opportunities*, 23:2 FLETCHER FORUM WORLD AFF. 151, 167 (1999) (“With governments less willing or able to take on the problems of global corporations, [non-governmental organizations in the 1990s] have attempted to harness their own growing countervailing power and have pressed for new forms of enforcement of new rules that do not depend on governments.”).

in voluntary codes. Further, civil society groups are aware that governments in the developing world often lack the capacity or the will to regulate MNCs; indeed, authoritarian or non-democratic regimes may be uninterested in addressing broad social concerns. Instead, civil society groups stress the need for codes that foster greater participatory democracy within the corporate structure, whereby workers are able to unionize to seek better wages and working conditions, and whereby consumers and shareholders of the corporation are made aware of corporate conduct and are empowered to act if such conduct deviates from acceptable behavior. Moreover, in crafting such codes, both MNCs and civil society groups favor mechanisms for non-governmental monitoring of corporate behavior and certification of good corporate behavior. Thus, neither side (Schachter labels the two tendencies as being the “right” and the “left”) is particularly focused on the role of government and, indeed, both sides “have had some influence in weakening the autonomy of states.”²⁰

This essay proceeds in Part II by briefly summarizing the rise of these codes of conduct, with particular attention to certain highly visible examples, such as the United Nations Global Compact, the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, and the International Organisation for Standardisation (ISO) environmental management system standards. Part III notes the many criticisms that have been levied against such codes and speculates that, over the long term, such codes may not survive in their present form. Part IV suggests a new approach to thinking about these codes, one that might enhance their legitimacy, effectiveness, and credibility. In essence, this essay urges that greater thought be given by all stakeholders to an increased role for governments in the development and implementation of such codes. While transforming the codes wholesale into binding law is not politically feasible at this

²⁰ *Id.* at 22.

time, and may never be economically desirable, other means of governmental involvement should be considered. For instance, governments can play a better role in bringing stakeholders together to form such codes and do better at identifying what types of codes are effective and which are not. Governments might do better at using national laws and regulations to make adherence to such codes more attractive, such as by using the codes to help reduce regulatory uncertainty and as “safe harbors” for MNCs against criminal or civil penalties. At the same time, governments might use national laws to regulate better MNC use of the codes, such as by compelling disclosure of information about MNC adherence to the code. The role of governments would not be one of state control of corporate activity but, rather, one of helping empower the individual autonomy of corporations within certain bounds of justice, fairness, and equity.

II. THE RISE OF NON-STATE ACTOR CODES

A. *The Impetus for Such Codes.*

The activities of MNCs provide significant benefits in creating wealth in states where they operate, through creation of jobs, production of goods and services, efficient use of technology, labor and capital, development of export markets, and concomitant growth in gross domestic product by exporting states.²¹ While much of the increased MNC activity of the 1990’s²² was among states of

²¹ See, e.g., ROBERT GILPIN, *THE CHALLENGE OF GLOBAL CAPITALISM* 172-78 (2000).

²² The explosion of MNC activity in the 1990’s may be seen whether one looks at MNC sales, foreign employment, or foreign investment. For example, from 1990 to 2000, sales by the one hundred largest MNCs rose from \$3.2 trillion to nearly \$4.8 trillion and employment of

the developed world, a portion included the movement of MNC operations to the developed world to take advantage of a cheaper supply of labor and other resources.²³ Indeed, though the story of the 1970's and 1980's may have been one of developing countries seeking to nationalize or expropriate foreign investment as a means of stemming post-colonial economic "neo-colonization,"²⁴ the story of the 1990's was one of developing states realizing the great benefits of attracting foreign investment and technology, so as to develop export economies of their own.²⁵

At the same time, concerns have arisen from this increased MNC activity in the developing world. One aspect of the investment in developing countries is a greater willingness of developing countries to allow MNCs to own or manage projects in key public sectors, such as energy, telecommunications, transport, water, and sanitation. While there may be benefits from privatizing decision-making in such sectors, it means that core societal needs and natural resources are largely controlled by entities that governments may not have the capacity to hold accountable for customer

persons outside the MNC's home country rose from 24 million to 54 million, while from 1996 to 2000 the value of cross-border mergers and acquisitions rose from \$94 billion to an astounding \$866 billion. *See* UN CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *WORLD INVESTMENT REPORT: 2002: TRANSNATIONAL CORPORATIONS AND EXPORT COMPETITIVENESS* xv, 12, 90 (2002).

²³ For example, the number of cross-border mergers and acquisitions in developing countries increased during 1995-1999 by fifty percent. *See* WORLD BANK, *GLOBAL DEVELOPMENT FINANCE 2001: BUILDING COALITIONS FOR EFFECTIVE DEVELOPMENT FINANCE* 40-41 (2001).

²⁴ *See* CYNTHIA DAY WALLACE, *THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL* 36-37, 70-71 (2002).

²⁵ *Id.* at 42-45.

service and compliance with local laws.²⁶ Some observers assert that the distribution of wealth generated by MNCs when they operate in developing countries has been largely skewed in favor of the MNCs (and their shareholders) and against laborers.²⁷ Moreover, the working conditions for laborers for MNCs in developing countries are often very poor: laborers have difficulty unionizing; factory conditions generally are unhealthful; child labor is common.²⁸ Environmental standards in developing states tend to be low or unenforced, often allowing relatively unchecked emissions of air pollutants and toxic materials.

One response to such concerns is to argue that MNCs are simply taking advantage of favorable business climates found in other countries; if those countries wish to impose higher minimum wage rates or better working conditions, they are free to do so. Some developing states have established labor and environmental laws to protect local resources, but they often lack the resources to enforce them, and MNCs take advantage of such lack of enforcement.²⁹ Further, host

²⁶ See Theodore Panayotou, *The Role of the Private Sector in Sustainable Infrastructure Development*, in BRIDGES TO SUSTAINABILITY: BUSINESS AND GOVERNMENT WORKING TOGETHER FOR A BETTER ENVIRONMENT 46, 60 (Luis Gomez-Echeverri ed., 1997), available at <http://www.yale.edu/environment/publications/bulletin/101pdfs/101panayotou.pdf>.

²⁷ See SETHI, *supra* note 13, at 5-7.

²⁸ ELLIOT J. SCHRAGE, REPORT OF THE UNIVERSITY OF IOWA CENTER FOR HUMAN RIGHTS TO THE U.S. DEP'T OF STATE, PROMOTING INTERNATIONAL WORKER RIGHTS THROUGH PRIVATE VOLUNTARY INITIATIVES: PUBLIC RELATIONS OR PUBLIC POLICY? 5-6 (Jan. 2004) [hereinafter SCHRAGE], available at <http://www.cfr.org/pdf/Schrage-DOS.pdf>.

²⁹ For example, a recent report prepared by the staffs of the UN Development Programme, the UN Environment Programme, the World Bank, and the World Resources Institute found that, in regulating MNCs, governmental

command and control regulation has many limitations. Its success rests on vigorous and timely enforcement. This is difficult in countries where state authority is weak, budgets are constrained, or technical capacity is low. The rigidity of these regulations is also a

countries sensitive to the adverse social affects of MNC activity may be in a weak position if creating better laws or enforcing existing laws results in movement of MNCs to other countries.³⁰ Finally, the response assumes that the host government is sensitive to the interests of its nationals; while such an assumption may be valid in democratic states, in more authoritarian or non-democratic states the interests of the government may not coincide with those of its people.³¹ Ironically, while MNCs have emerged and thrived from the establishment of strong developed-state economies that are based on democracy, the rule of law, and independent judiciaries, some MNCs are taking advantage of the absence of such conditions in developing countries. By way of example, Nike Inc.—with \$9.5 billion in revenues, it is the largest global marketer of athletic footwear, apparel and equipment—outsources 97 percent of its footwear products to factories in four countries: China, Indonesia, Thailand, and Vietnam. Those countries are all characterized by highly repressive and corrupt governmental regimes that provide little if any enforcement of their own labor and environmental laws.³²

problem. Many companies and policy-makers contend that standard government regulation doesn't leave them the flexibility to fix environmental problems in the most efficient ways and doesn't encourage improvements beyond those specified by law.

UN DEVELOPMENT PROGRAMME ET AL., *WORLD RESOURCES: 2002-2004: DECISIONS FOR THE EARTH: BALANCE, VOICE, AND POWER* 108 (2003).

³⁰ *See, e.g., id.* (“Nor do traditional regulations address the governance challenges posed by the increasing globalization of corporate activity. In the face of competition to attract business, some nations are less willing or able to regulate transnational corporations effectively. In this case, transnationals largely regulate themselves, with little accountability to communities or consumers for their impacts”) John Parkinson, *The Socially Responsible Company*, in *HUMAN RIGHTS STANDARDS*, *supra* note 9, at 57 (“the proposition that [MNCs] need do no more than obey local laws will in many cases be morally unappealing. In the absence of mandatory international standards, again the need for self-regulation is indicated.”).

³¹ *See Addo, supra* note 9, at 24.

³² *SETHI, supra* note 13, at 154.

In short, MNCs operating in developing countries have done what one would expect them to do in a free market; seek out the least expensive means of conducting operations so as to maximize profits. The problem is that, in doing so, they have been viewed as inflicting unacceptable harm and mistreatment. As human rights, labor rights, and environmental rights continue to advance within the global consciousness, the practices of many MNCs in developing countries have been regarded as out of step with social expectations. This gap, in turn, has led to strident criticism of MNC activity, and sometimes to consumer backlash whereby MNCs are faced with demands for products certified as having been produced without adverse social consequences.³³

MNCs themselves recognize this divergence of MNC operations from social expectations, and consequently many have embraced the movement toward voluntary codes of conduct that inculcate key norms in the fields of labor, human rights, consumer protection, anticorruption, and the environment. To date, these codes have taken many shapes and sizes, but they generally can be characterized as follows. The codes are voluntary in nature; MNCs are not forced to adopt the codes but, rather, pledge themselves to the code because they see it as in their interests to do so. The codes typically consist of a series of principles, standards or guidelines, which may be broad and aspirational in nature or may be more detailed and operational in nature. In developing the norms contained in the codes, the codes may draw on or refer to international law norms (particularly in the field of international labor or environmental law, or human rights law), may focus on MNC adherence to local laws, and/or may call for adherence to norms articulated solely in the code itself. A code might be developed ad hoc for a specific company (sometimes referred to as an “operational”

³³ See Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Standards Through Private Initiatives*, 30 LAW & POL’Y INT’L BUS. 111 (1998).

or “internal” code). Alternatively, a code might be developed for a class of companies in a particular field (e.g., the apparel or extractive industries) or for companies generally (sometimes referred to as “model” or “external” codes) which can then, in turn, lead to the creation of associated operational codes.³⁴ The codes might be drafted solely by private sector entities, usually bringing together a range of stakeholders, such as labor groups, environmental groups, religious groups, and corporate groups. Alternatively, the codes might be drafted under the auspices of governments or by government representatives working through international organizations, although even then relevant stakeholders are typically a part of the drafting process.

Once a code is established, typically an MNC is expected to pledge itself publicly to the code and develop internal corporate rules or policies based on the code. MNC managers are then trained to comply with those rules or policies in corporate decision-making and operations. While the codes normally call upon the MNC to make public its decision to adhere to the code, further transparency regarding corporate adherence to the code may not be required. Different techniques of monitoring,

³⁴ For detailed studies of codes of conduct adopted within certain broad industry sectors, with particular attention to comparison of “external” codes with the “internal” codes that they spawn, see WORLD BANK GROUP CORPORATE SOCIAL RESPONSIBILITY PRACTICE, COMPANY CODES OF CONDUCT AND INTERNATIONAL STANDARDS: ANALYTICAL COMPARISON: PART I OF II (Oct. 2003), *available at* <http://www.worldbank.org/html/fpd/privatesector/csr/doc/Company%20Codes%20of%20Conduct.pdf>; OECD, *Codes of Corporate Conduct: Expanded Review of Their Contents* (May 2001), *available at* <http://www.oecd.org/dataoecd/57/24/1922656.pdf>; Andrew Wilson & Chris Gribben, *Business Responses to Human Rights* (Apr. 2000), *available at* [http://www.acbas.org/Web/AshAcbas.nsf/pdfs/Response/\\$file/Response.PDF](http://www.acbas.org/Web/AshAcbas.nsf/pdfs/Response/$file/Response.PDF); Michael Urminsky, ed., *Self-Regulation in the Workplace: Codes of Conduct; Social Labeling and Socially Responsible Investment* 9-34 (undated working paper), *available at* <http://www.ilo.org/public/english/employment/multi/download/wp1mcc.pdf>; Janelle Diller, *A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives*, 138 INT’L LABOUR REV. 99, 112-17 (1999).

verification, audits, or certification might be an element of a particular code,³⁵ but in any event the codes often do not require such steps by an entity external to the MNC. Since the codes are voluntary, MNCs are not exposed to any criminal or civil penalties in the event that they fail to abide by the codes (they remain, of course, exposed to penalties if the MNC violates relevant national laws). Thus, the codes are not enforced by governments.

A difficult problem with the codes concerns corporate structures. In many instances, an MNC may engage in business with a foreign government or a foreign company over whom the MNC does not exercise any corporate control. In such instances, the MNC may have adopted a particular code for itself, but have no power to impose the code on its partners. (Indeed, less-than-scrupulous MNCs may structure their business relations so as to take advantage of the lack of corporate control over partners.) Some codes seek to address this problem by calling upon MNCs only to engage in commercial relations with partners, suppliers, or distributors that either adhere to a code or whose conduct is compatible with the code.³⁶ For example, “sourcing guidelines” of a buyer might specify the workplace requirements of other enterprises in the supply chain.³⁷ Yet even MNCs that are interested in promoting a code with their partners may find it difficult to do so. Success may turn on factors outside the control of the MNC, such as the geographic concentration of production markets; the narrowness of the supply base; the degree of vertical integration within an industry and of overlap

³⁵ See OECD, *Making Codes of Corporate Conduct Work: Management Control Systems and Corporate Responsibility* (Feb. 2001), available at <http://www.oecd.org/dataoecd/45/29/1922806.pdf>.

³⁶ See, e.g., *infra* note 80 and accompanying text.

³⁷ See Diller, *supra* note 34, at 103.

with other industries; and the overall concentration of the global market.³⁸

Since the codes are voluntary in nature, the codes are not written to impose constraints that MNCs would find onerous; instead, the codes are crafted to promote conduct that entails some costs to the MNC, but costs that are outweighed by the benefits to the MNCs. The costs to MNCs include the basic expenses involved both in altering internal corporate rules and policies, training personnel regarding the new policies, and pursuing any internal or external associated monitoring, verification, audits, or certification, and in internalizing costs that had previously been externalized (e.g., paying higher wages, avoiding environmental harms, etc.). The benefits to MNCs can potentially take various forms. Arguably there will be some internal cost savings achieved, such as from more efficient use of resources (e.g., achieved when pursuing waste reduction), or from having a healthier and thus more productive work force. Cost savings may also arise if adherence to such a code allows the MNC to save on insurance premiums or have access to capital at lower rates, if insurers or lenders are concerned about possible adverse consequences of MNC activities. To the extent that the code is adopted by an MNC's competitors, then the code may assist in creating a level playing field for the MNC so that its good corporate conduct does not put it at a competitive disadvantage. Finally, by adhering to such a code, the MNC may enjoy an enhanced public image, thus avoiding shareholder dissatisfaction with management, consumer boycotts of MNC goods or services, labor unrest, and undesirable regulation by either its host or home governments.³⁹

Over the past thirty years, with the rise of MNC activities in the developing world, these

³⁸ SCHRAGE, *supra* note 28, at 173-75.

³⁹ See, e.g., Simon Williams, *How Principles Benefit the Bottom Line: The Experience of the Co-operative Bank*, in HUMAN RIGHTS STANDARDS, *supra* note 9, at 63.

codes have proliferated.⁴⁰ The next section provides a brief *tour de table* of some of the more interesting transnational codes of conduct that have emerged, along with some of the criticisms of those codes.

B. *Selected Codes of Conduct.*

UN Draft Code of Conduct for Transnational Corporations. Any discussion of the emergence of corporate codes of conduct should probably begin with either the Sullivan Principles (discuss above) or the failed effort by the United Nations from the late 1970's to the early 1990's to develop a broad code of conduct for MNCs. In 1972, the U.N. Economic and Social Council (ECOSOC) requested the Secretary-General to appoint a group of eminent persons to study the impact of multinational corporations on the world economy and to submit recommendations for appropriate international action.⁴¹ The group recommended that ECOSOC establish an institution to study MNCs.⁴² To that end, in 1974 ECOSOC adopted resolutions to establish both a UN inter-governmental commission and a UN center on transnational corporations.⁴³ Those entities embarked

⁴⁰ For a compendium containing short descriptions of several codes, see U.S. COUNCIL FOR INTERNATIONAL BUSINESS CORPORATE RESPONSIBILITY COMMITTEE, UCSIB COMPENDIUM OF CORPORATE RESPONSIBILITY INITIATIVES (2002). For an internet site with links to information relating to various codes, see <http://www.business-humanrights.org/Categories/Principles>.

⁴¹ See E.S.C. Res. 1721 (LIII) (July 28, 1972).

⁴² See U.N. Dep't of Econ. & Soc. Aff., *The Impact of Multinational Corporations on Development and on International Relations*, UN Doc. E/5500/Rev.1, ST/ESA/6, UN Sales No. E.74.II.A.5, at 6-12 (1974).

⁴³ See E.S.C. Res. 1908 (LVII) (Aug. 2, 1974); E.S.C. Res. 1913 (LVII) (Dec. 5, 1974).

on the creation of a code of conduct on transnational corporations. Over the course of fifteen years, various drafts of the code were formulated,⁴⁴ with the most recent in 1990.

The 1990 draft code was divided into four parts on the activities of MNCs, the treatment of MNCs, intergovernmental cooperation, and implementation of the code.⁴⁵ With respect to the activities of MNCs, the draft code set forth (1) various general rules (e.g., respect for local laws and cultural traditions, respect for human rights, and avoiding corruption); (2) certain economic, financial and social rules (e.g., acceptance of the ILO Tripartite Declaration discussed below and adherence to national laws on consumer protection and the environment); and (3) rules on disclosure of information. In the section on treatment of MNCs, the code contained certain rights of host states but also protections to be accorded to MNCs, such as the right to fair and equitable treatment. The code urged intergovernmental cooperation at all levels in the form of exchanges of information and consultations. Finally, the code called upon states to disseminate the code, follow it within their territories, and report to the United Nations on their implementation. The UN Commission on transnational corporations, in turn, would receive such reports and periodically assess such implementation.

The 1990 draft, however, was never finalized and never adopted by the UN General Assembly due to serious disagreements among states that reflected in large part the resistance at that time of developing states to “economic neo-colonization.” The draft code’s focus on not just the conduct of MNCs but also the rights of host states led to sharp disagreement over the legal standard

⁴⁴ See, e.g., Draft UN Code of Conduct on Transnational Corporations, May 1983, 23 I.L.M. 626 (1984); Draft UN Code of Conduct on Transnational Corporations, UN Doc. E/1988/39/Add.1 (Feb. 1, 1988).

⁴⁵ E.S.C. Doc. E/1990/94, annex (June 12, 1990).

for expropriation of MNC property by a host state, as well as on issues such as the definition of “MNC” (e.g., whether state-owned enterprises should be excluded), the jurisdiction of states, and the legal status of the code.⁴⁶ With respect to MNC conduct, strongly-polarized positions developed in which developing states pressed for detailed and mandatory rules on MNC conduct, whereas developed states preferred more general language to which MNCs would voluntarily adhere.⁴⁷ Developing states emphasized reliance on host country national laws and regulations and resisted having the code impose constraints on host governments. By contrast, developed states regarded developing country national laws as often too complex or inadequate, and advocated having the code refer to international law as the relevant body of law.⁴⁸ Yet views within the developing world were not monolithic, due largely to their differing levels of development.⁴⁹

In the end, the draft code provided a template of sorts for codes that followed,⁵⁰ but did not itself achieve a UN imprimatur and has not been adopted by MNCs. By 1994, the United Nations had significantly downgraded the UN inter-governmental commission and had terminated the UN center on transnational corporations.⁵¹

⁴⁶ CYNTHIA DAY WALLACE, *THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL* 1082 (2002).

⁴⁷ Paul Lansing & Alex Rosaria, *An Analysis of the United Nations Proposed Code of Conduct of Transnational Corporations*, 14 *WORLD COMPETITION* 35, 40 (1991).

⁴⁸ *Id.* at 41-42; Barbara A. Frey, *Legal and Ethical Responses of Transnational Corporations in the Protection of Human Rights*, 6 *MINN. J. GLOBAL TRADE* 153, 167 (1997).

⁴⁹ Lansing & Rosaria, *supra* note 47, at 45.

⁵⁰ WALLACE, *supra* note 46, at 1083-84.

⁵¹ The commission was integrated into the structure of the UN Conference on Trade and Development and renamed the Commission on International Investment and Transnational

1977 ILO Tripartite Declaration of Principles. With a broad code of conduct for MNCs was not possible within the U.N. system, other codes that avoided addressing the rights of host states and that pursued standards in specific fields, such as international labor law, international human rights law, and international health law,⁵² met with more success. With respect to international labor law, most standard-setting undertaken by the International Labour Organisation (ILO) has occurred in the context of developing binding treaties, although through a 1998 non-binding declaration the ILO arguably is moving in a direction of emphasizing certain core “principles” (freedom of association, freedom from forced labor and from child labor, and non-discrimination in employment) as opposed to labor “rights.”⁵³ In 1977, however, the ILO Governing Body adopted a tripartite (government, employer, worker) Declaration of Principles to guide MNEs and other stakeholders in the development of policies directed toward social progress.⁵⁴

The declaration calls for MNCs to pursue policies that promote equal opportunity, security,

Corporations. *See* E.S. C. Res. 1994/1 (July 14, 1994).

⁵² *See, e.g.,* Kathryn Sikkink, *Codes of Conduct for TNCs: The Case of WHO/UNICEF Code*, 40 INT’L ORG. 815 (1986). The WHO/UNICEF International Code of Marketing of Breastmilk Substitutes, which was adopted by the World Health Assembly in 1981, *see* WHA Res. 34/22 (1981), bans all promotion of bottle feeding and sets out requirements for labeling and information on infant feeding.

⁵³ *See* ILO International Labour Conference, Declaration on Fundamental Principles and Rights at Work (June 1998) [hereinafter ILO Declaration on Fundamental Principles], *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_page_name=DECLARATIONTEXT. For criticism of this trend, *see* Philip Alston, “Core Labour Standards” and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 457 (2004).

⁵⁴ International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977), 17 I.L.M. 422 (1978), *available at* <http://www.ilo.org/public/english/employment/multi/tridecl/index.htm>.

and collective bargaining in employment, and that preclude arbitrary dismissal, strike-breaking, and other unfair practices. In doing so, the declaration calls for MNCs and others not only to obey local laws and practices,⁵⁵ but also to respect the Universal Declaration of Human Rights,⁵⁶ the International Covenant on Civil and Political Rights,⁵⁷ the International Covenant on Economic, Social and Cultural Rights,⁵⁸ and the ILO's Constitution⁵⁹ and 1998 declaration on fundamental principles and rights at work.⁶⁰ The Tripartite Declaration, however, is not legally binding, nor is it subject to the reporting and monitoring systems for ILO conventions and recommendations adopted by the ILO conference of the parties.⁶¹ While there is a procedure requiring governments to reply to queries regarding implementation of the Declaration, and the possibility of dispute settlement before the ILO Governing Body, the efficacy of such procedures appears doubtful.⁶²

As for the Declaration's overall effectiveness, some observers see the Declaration as "still a 'good' instrument, kept relevant by periodic surveys of the effect given to the Declaration by

⁵⁵ *Id.* at para. 8.

⁵⁶ Universal Declaration of Human Rights, G.A. Res. 217A (III) (Dec. 10, 1948).

⁵⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (ICCPR).

⁵⁸ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

⁵⁹ Constitution of the International Labor Organization, Oct. 9, 1946, 15 U.N.T.S. 35, 62 Stat. 3485.

⁶⁰ ILO Declaration on Fundamental Principles, *supra* note 53.

⁶¹ Virginia A. Leary, *Nonbinding Accords in the Field of Labor*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 247, 250 (Edith Brown Weiss, ed. 1997).

⁶² *See id.*, at 252-53.

governments and by employers' and worker's organizations"⁶³ Others are less impressed, and not that the Declaration may suffer from a lack of institutional support. Professor Leary concludes:

The Declaration could be an important instrument if it were publicized and promoted by the ILO and made better known to groups such as human rights and aid groups concerned with issues relating to multinational enterprises. Trade unions have been the only constituency referring to the Declaration and their efforts do not seem to have been particularly effective.⁶⁴

2003 UN Sub-Commission on Human Rights Code on TNCs. In the field of human rights, the UN Sub-Commission on the Promotion and Protection of Human Rights⁶⁵ recently adopted a code on the responsibilities of transnational corporations.⁶⁶ The code recognizes that states have the primary responsibility for the promotion and protection of human rights, but also asserts that MNCs have such obligations as well.⁶⁷ The code then sets forth six types of rights or obligations that MNCs must observe: (1) right to equal opportunity and non-discriminatory treatment; (2) right to security

⁶³ WALLACE, *supra* note 46, at 1081.

⁶⁴ Leary, *supra* note 61, at 254.

⁶⁵ The sub-commission is a subsidiary organ of the UN Commission on Human Rights, whose twenty-six members are nominated by states and elected by the Commission, but who serve in their personal capacities.

⁶⁶ Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), *available at* www.unhcr.ch/html/menu2/2/55sub/55sub.htm.

⁶⁷ *Id.*, pt. A.

of persons; (3) rights of workers, such as against forced labor or child labor, remuneration that ensures an adequate standard of living, and right to collective bargaining; (4) respect for national sovereignty (e.g., refraining from bribery) and human rights (e.g., right to food and drinking water); (5) obligations with regard to consumer protection; and (6) obligations with regard to environmental protection, such as complying with relevant national and international laws.⁶⁸

One interesting component of this code is that it contains several provisions relating to implementation. The code states that MNCs “shall” adopt “internal rules of operation in compliance” with the code and shall periodically report on implementation, and shall incorporate the code into their contracts with suppliers, distributors, licensees, and others.⁶⁹ Further, the code states that TNCs shall be subject to transparent and independent monitoring and verification by the United Nations and “other international and national mechanisms already in existence or yet to be created”.⁷⁰ The code provides that states “should” establish the legal framework necessary for implementing the code.⁷¹ Moreover, MNCs “shall provide prompt effective and adequate reparation to those persons” adversely affected by failure to comply with the norms.⁷²

Supporters of the code have heralded the code as a “landmark step” and even as the “first

⁶⁸ *Id.*, pts. B-G.

⁶⁹ *Id.*, pt. H, para. 15.

⁷⁰ *Id.*, para. 16

⁷¹ *Id.*, para. 17.

⁷² *Id.*, para. 18.

nonvoluntary initiative accepted at the international level.”⁷³ Initial enthusiasm for the code, however, has been muted. The Commission on Human Rights (which, unlike the Sub-Commission, consists of representatives of governments) took note of the code, but in its recommendation to the UN Economic and Social Council affirmed that the code “has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard.”⁷⁴ Major international business organizations have criticized the code as an inappropriate effort to “privative” vague human rights standards, in a manner that will invite “highly subjective, politicized claims.”⁷⁵

OECD Guidelines for MNEs. MNC codes of conduct need not be developed through the United Nations or its specialized agencies: smaller groupings of states, such as the twenty-five member European Union,⁷⁶ or even individual states,⁷⁷ have also pursued such codes. Codes drafted by smaller groups of states may allow for greater specificity than more global codes, since they are usually negotiated among governments with similar attitudes (*e.g.*, among a group of developed

⁷³ David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AJIL 901, 903 (2004).

⁷⁴ Human Rights Commission Res. 2004/116 (Apr. 20, 2004).

⁷⁵ International Chamber of Commerce & International Organisation of Employers, Joint Views of the IOE and ICC on the Draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (undated), at www.iccwbo.org.

⁷⁶ See *Resolution on EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct*, Europ. Parl. Res. A4-0508/98 (1998).

⁷⁷ For a discussion of the Model Business Principles developed by the U.S. government during the Clinton Administration, see Frey, *supra* note 48, at 172-73.

states). While they are more limited in geographic scope, they can be highly relevant if the principal concern is the conduct of MNCs based in such a bloc of states.

For example, in June 1976, the Council of Ministers of the thirty-three member Organization of Economic Cooperation and Development (OECD) adopted a declaration on international investment and multinational enterprises, to which was annexed a set of guidelines for multinational enterprises.⁷⁸ The guidelines basically establish recommended standards for good conduct for all MNEs operating in or from OECD countries, including practices relating to taxation, financing, and information disclosure. Further, the guidelines contain an “employment and industrial relations” section prohibiting discrimination in the employment or promotion of personnel, establishing a general standard that MNEs should “respect the right of their employees to be represented by trade unions,” and containing other protections for laborers.⁷⁹ The guidelines also include a section on “environmental protection” stating that MNEs should “take due account of the need to protect the environment and avoid creating environmentally related health problems” and setting forth various means for doing so.⁸⁰ The most recent revision of the guidelines, adopted in 2000, augments these protections by including a new general policy stating that MNEs should “[r]espect the human rights

⁷⁸ Organization for Economic Cooperation and Development, *Guidelines for Multinational Enterprises*, 15 I.L.M. 969 (1976); see Daniel J. Plaine, *The OECD Guidelines for Multinational Enterprises*, 11 INT’L LAW. 339 (1977). The OECD periodically reviews and occasionally revises the guidelines. For the current guidelines, see OECD, *The OECD Guidelines for Multinational Enterprises: Revision 2000*, pt. 1, § II, para. 2 (2000) [hereinafter *OECD Guidelines*], available at <http://www.oecd.org/daf/investment/guidelines/index.htm>; see also OECD, *The OECD Guidelines for Multinational Enterprises* (4th ed. 2000) (OECD publication explaining the nature, scope, and operation of the guidelines).

⁷⁹ *OECD Guidelines*, *supra* note 78, pt. 1, § IV.

⁸⁰ *Id.*, §V.

of those affected by their activities consistent with the host government's international obligations and commitments."⁸¹ Further, the 2000 guidelines address the vexing problem of corporate structure by calling upon MNCs to "[e]ncourage, where practicable, business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the *Guidelines*."⁸² New recommendations are added on the elimination of child labor and forced labor⁸³ and on improving internal environmental management and contingency planning for environmental impacts.⁸⁴ The sections on disclosure and transparency are updated to encourage social and environmental accountability.⁸⁵ Finally, the 2000 guidelines add new sections on combating corruption and consumer protection.⁸⁶

As noted above, the guidelines do reference international law by calling for respect for human rights "consistent with the host government's international obligations and commitments."⁸⁷ The guidelines, however, are not legally mandatory either on OECD governments or on OECD-based companies. Rather, the declaration containing the guidelines represents a political commitment on the part of OECD governments to foster such corporate conduct, and they reflect the values and aspirations of OECD members. Both corporate and labor groups were involved in the drafting of the

⁸¹ *Id.*, §II, para. 2

⁸² *Id.*, § I, para. 10.

⁸³ *Id.*, § IV, para. 1(b), (c).

⁸⁴ *Id.*, § V, paras. 1, 5.

⁸⁵ *Id.*, §III, paras. 2, 4-5; §4, para. 1(b), (c).

⁸⁶ *Id.*, §§ VI, VII.

⁸⁷ *Id.*, §II, para. 2.

guidelines and thus they have enjoyed the general support of both communities.⁸⁸ Each OECD member has a “national contact point” (usually part of a government agency) charged with promoting the guidelines within the member state and gathering information on adherence to them.⁸⁹ Disputes concerning the guidelines can and have been referred to the OECD’s Committee on Investment and Multinational Enterprises (CIME), a political body with no means of enforcing its decisions.

The guidelines have met with mixed success. On the one hand, the guidelines have been used by labor groups to pressure MNCs, sometimes through use of the OECD or cooperative national governments (although in many instances the pressure concerns MNC activities in the developed world).⁹⁰ According to the most recent OECD report on the guidelines, the guidelines “now rank among the world’s foremost corporate responsibility instruments,” are “cited by heads of state and in the world business press,” and are referenced at 25,000 Internet pages.⁹¹ For some observers, the guidelines “have represented the most successful multilateral instrument to date” addressing the

⁸⁸ Joachim Karl, *The OECD Guidelines for Multinational Enterprises*, in HUMAN RIGHTS STANDARDS, *supra* note 9, 89 at 90. Corporate groups provide the views through the OECD Business and Industry Advisory Committee (BIAC), while labor groups provide their views through the OECD Trade Union Advisory Committee (TUAC).

⁸⁹ For example, the national contact point for the United States is the director or the U.S. Department of State’s Office of Investment Affairs. The list of national contact points is available at <http://www.oecd.org>.

⁹⁰ See JOHN M. KLINE, INTERNATIONAL CODES AND MULTINATIONAL BUSINESS 76-83(1985).

⁹¹ ANNUAL REPORT ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: ENHANCING THE ROLE OF BUSINESS IN THE FIGHT AGAINST CORRUPTION 25 (Dec. 2003).

conduct of MNCs in the field of foreign investment.⁹² On the other hand, the OECD report itself noted sixty-four instances of alleged non-observance of the guidelines by MNCs that had been filed with national contact points, principally on matters concerning employment and industrial relations.⁹³ While it may still be too early to tell whether the 2000 revision will improve matters, some observers of the initial guidelines found that “the OECD Member countries had no intention of sacrificing their own control to follow the moral force behind those guidelines.”⁹⁴

1999 UN Global Compact. In 1999, UN Secretary-General Kofi Annan announced his intention to create a UN-sponsored forum between the United Nations and the transnational business community—known as the “Global Compact”—intended to promote good corporate practices in the area of human rights, labor, and the environment.⁹⁵ The principles set forth in the Global Compact are similar to the Sullivan Principles, and draw upon the Universal Declaration on Human Rights, the ILO 1998 fundamental principles on rights at work, and the Rio Declaration on Environment and Development.⁹⁶ The Global Compact is far less detailed than the ILO tripartite declaration, the UN Sub-Commission on Human Rights code, or the OECD guidelines discussed above, but the principal

⁹² WALLACE, *supra* note 46, at 1080.

⁹³ *Id.* at 17-20.

⁹⁴ Lansing & Rosaria, *supra* note 47, at 38; see John Kline, *Entrapment of Opportunity: Stretching a Corporate Response to International Codes of Conducts*, 2 COLUM. J. WORLD BUS. 6, 7 (1980).

⁹⁵ Secretary-General Kofi Annan, Address at the World Economic Forum in Davos, Switzerland (Jan. 31, 1999), U.N. Doc SG/SM/6448 (1999).

⁹⁶ Rio Declaration on Environment and Development, 31 I.L.M. 874 (1992).

objective of the Global Compact should be seen as taking those codes to another level, by inviting MNCs to join in the efforts of governments, international organizations, and non-governmental organizations in projects that advance social and economic development.

The Global Compact principles state that businesses should: (1) “support and respect the protection of internationally proclaimed human rights within their sphere of influence”; (2) “[m]ake sure they are not complicit in human right abuses”; (3) “uphold the freedom of association and the effective recognition of the right to collective bargaining”; (4) eliminate “all forms of forced and compulsory labor”; (5) abolish child labor; (6) eliminate “discrimination in respect of employment and occupation”; (7) “support a precautionary approach to environmental challenges”; (8) “[u]ndertake initiatives to promote greater environmental responsibility”; (9) “[e]ncourage the development and diffusion of environmentally friendly technologies”; and (10) “work against all forms of corruption, including extortion and bribery”.⁹⁷

The Secretary-General called upon leading companies to embrace these principles as part of their corporate practices and to join in the efforts of governments, international organizations, and non-governmental organizations in advancing social and economic development. To participate, a company’s chief executive officer must send a letter (and endorsed by the company’s board of directors) to the Secretary-General expressing support for the Global Compact. The company is then expected to change its business operations so that the Global Compact principles become part of its culture, day-to-day operations, and public communications. Moreover, the company is expected to

⁹⁷ The principles and other information about the Global Compact may be found at <<http://www.unglobalcompact.org>>. While there were initially only nine principles, at the Global Compact Leaders Summit in New York in June 2004 the tenth principle on working against corruption was added.

publish in its annual report a description of the ways in which it is supporting the Global Compact, such as by undertaking partnership projects with UN agencies or civil-society organizations.⁹⁸ The progress of participating companies will be posted on a U.N. Internet site along with comments by civil society groups. By 2000, various companies—including BP, Daimler Chrysler, Dupont, Nike, Novartis, Rio Tinto, and Shell—had announced their acceptance of the Global Compact, and as of 2004 several hundred had joined.

The Global Compact is a voluntary initiative: there is no legal obligation placed upon the companies and no enforcement of such obligations, although companies must make submissions to the United Nations that are then shared publicly. Instead of imposing legally binding obligations, the Global Compact is, according to the United Nations, “designed to stimulate change and to promote good corporate citizenship and encourage innovative solutions and partnerships.”⁹⁹

Critics, however, including many developing states, note that the lack of monitoring let alone enforcement provides little confidence that by joining the Global Compact, corporations will comply with its principles.¹⁰⁰ Indeed, critics believe that through the Global Compact major corporations may simply “bluewash” their misconduct; that is, corporations would join the initiative and achieve a public relations gain through association with the United Nations, but in the end would not

⁹⁸ See UN Global Compact Office, *How the Global Compact Works: Mission, Actors And Engagement Mechanisms* (2003). The concept of promoting partnerships among stakeholders was also a key element of the World Summit on Sustainable Development that took place in Johannesburg, South Africa in August/September 2002.

⁹⁹ UN Global Compact, *Frequently Asked Questions* (undated), at <http://www.unglobalcompact.org/Portal/Default.asp>.

¹⁰⁰ See, e.g., Text of a Letter Addressed to Kofi Anan, Secretary-General of the United Nations by a Group of Eminent Scholars and NGO Representatives from Around the World (July 20, 2000), *reprinted in* SETHI, *supra* note 13, at 126.

significantly change their conduct.¹⁰¹ Other corporations who join the Global Compact may already be conducting themselves properly; there may even be adverse selection whereby corporations with the least need to change are the ones who join. One observer characterizes the criticisms as finding that “the Global Compact at best will be a gold old boys club and at worst a support group in which like-minded corporations will share their experiences and encourage each other to do better next time.”¹⁰²

Codes Developed within the Private Sector. The codes discussed above were developed principally by states acting through international organizations. There are also numerous codes of conduct that have been established solely or principally in the private sector. In many instances, such codes are the product of a single civil society group— such as Amnesty International’s *Human Rights Principles for Companies*¹⁰³ or the Workers Rights Consortium’s *Model Code of Conduct*¹⁰⁴—or of a particular company to regulate its own activities.¹⁰⁵

¹⁰¹ See Betty King, *The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations*, 34 CORNELL INT’L L.J. 481, 481-82; DURUIGBO, *supra* note 10, at 152-53; SETHI, *supra* note 15, at 115-19.

¹⁰² SETHI, *supra* note 13, at 120.

¹⁰³ Amnesty International, *Human Rights Principles for Companies* (Jan. 1, 1998), available at <http://web.amnesty.org/library/index/ENGACT700011998>.

¹⁰⁴ Workers Rights Consortium, *Model Code of Conduct* (), available at http://www.workersrights.org/wrc_coc.pdf. The consortium is a non-profit organization created by college and university administrations, students and labor rights experts to assist in the enforcement of the code. The code seeks to protect workers in factories producing clothing and other goods bearing college and university names.

¹⁰⁵ See, e.g., Reebok Int’l Ltd., *Our Commitment to Human Rights* (2003) (setting forth the footwear company’s human rights, health and safety, labor, and wage standards, as well as the company’s means for implementing and monitoring them), available at http://www.reebok.com/Static/global/initiatives/rights/pdf/ReebokHR_OurCommitment.pdf; see

One well-known code developed within the private sector for addressing adverse social impacts is the environmental management system (EMS) standards of the International Organisation for Standardisation (ISO). The ISO is a non-governmental organization based in Geneva whose members are national standards institutes from 146 states. While its members are not national governments, many of the institutes are part of the governmental structure of their countries or are mandated by their government.¹⁰⁶ The ISO has focused on voluntary international standards both for a wide range of products (such as standardization of screw threads) and for activities in producing goods and services (such as quality management).¹⁰⁷ Since ISO standards are developed by consensus and are market-driven—where there is a need for MNCs (or others involved in transnational business) to have a standard then the ISO pursues one—they appear to be used by many MNCs worldwide. To date, the ISO has developed more than 12,000 standards, meaning documents containing technical specifications or rules to ensure that products or services across an industry are

also Frey, *supra* note 48, at 177-80 (discussing internal codes adopted by companies such as Wal-Mart); Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 674-83 (same) .

¹⁰⁶ The ISO is comprised mostly of independent standardization entities representing their respective countries of origin. For example, the United States is represented by the non-governmental American National Standards Institute (“ANSI”) which is based in New York, although various federal and state government agencies are ANSI members. *See* <http://www.ansi.org>. Several countries are represented at the ISO by governmental organizations. For example, Canada’s Standard’s Council is a Crown corporation responsible to Parliament. *See* <http://www.scc.ca>. Mexico’s Dirección Nacional de Normas is attached to the ministry for the economy. *See* <http://www.economia.gob.mx>. Morocco’s Service de Normalisation Industrielle is attached to the ministry of commerce and industry. Non-state actors are nevertheless dominant in the ISO standard-setting process.

¹⁰⁷ *See* DAVID HOYLE, ISO 9000 QUALITY SYSTEMS HANDBOOK (3d ed. 1998)

in conformance.¹⁰⁸

The ISO environmental management system standards issued in 1996,¹⁰⁹ known as the ISO 14000 series, calls upon a company to establish and make publicly available an environmental policy suitable to the company's size and the environmental impact of its operations. That policy must include compliance with local law and a general commitment to prevent pollution, but the ISO 14000 series does not prescribe specific standards that must be met (e.g., permissible toxic releases). Further, the company must adopt procedures to assess and document the environmental impacts of the company's operations (such assessments need not be made public), and employees must be trained in those procedures. Internal monitoring must occur, as well as either internal or external audits. Companies may seek certification of conformance with the ISO code,¹¹⁰ and certain external

¹⁰⁸ See Paulette L. Stenzel, *Can the ISO 14000 Series Environmental Management Standards Provide a Viable Alternative to Government Regulation?*, 37 AM. BUS. L.J. 237, 241 (2000).

¹⁰⁹ INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, ISO 14000 ENVIRONMENTAL MANAGEMENT (2d ed. 2001). The standards are periodically revised, including a revision underway at the time of this writing. See Tod M. Robinson, *Standards Organization Works to Finalize Rules Related to Environmental Management*, 27 BNA INT'L ENV. RPTR. 642 (2004).

One influential forerunner to the ISO 14000 Series were the principles developed by the Coalition for Environmentally Responsible Economies (CERES), a group of environmentalists, investors, economics, and governments convened by the Social Investment Management Forum in 1989. CERES developed a set of ten principles of corporate responsibility (originally called the "Valdez Principles") which a modest number of MNCs then adopted. For the principles, see <http://www.ceres.org/our_work/principles.htm>. For background, see J. Andy Smith, III, *The CERES Principles: A Voluntary Code for Corporate Environmental Responsibility*, 18 YALE J. INT'L L. 307 (1993). A third voluntary program for companies that includes standards for environmental management, as well as reporting and auditing, is the European Union's Eco-Management and Audit System (EMAS), which includes a compliance verification system. See 1993 O.J. (L168/1). Some 2,000 companies at present participate in EMAS. For information, see <http://www.europa.eu.int/comm/environment/emas/index_en.htm>.

¹¹⁰ ISO standard 14001 is the central standard and the only one in the series for which a company can be certified. The remaining standards support 14001 or simply provide guidance.

certification bodies exist to that end. The ISO 14000 series provides guidance for such audits, such as methodology and auditor qualifications, and also guidance on labeling goods and services as environment-friendly.¹¹¹

As of December 2003, more than 66,000 ISO 14001 registrations had been completed worldwide.¹¹² Supporters laud the ISO approach as more “systematic, preventive and holistic” than the types of command-and-control environmental regulation found in many states, which arguably is piecemeal, uncoordinated, and focuses on remedies once harm has been done.¹¹³ Some observers believe that ISO certification can help MNCs penetrate international markets.¹¹⁴

The ISO 14000 series, however, also has its critics. As noted above, the standards do not actually set any specific requirements; they simply call for a “management systems approach” that may or may not lead to environmentally-friendly results. While the standards call upon company’s

¹¹¹ The significance of the ISO 14000 series for MNCs may be reflected in the veritable cottage industry of handbooks designed to walk companies through the standards and certification process. *See* A.J. EDWARDS, ISO 14001 ENVIRONMENTAL CERTIFICATION STEP BY STEP (rev. ed. 2004); DENNIS R. SASSEVILLE ET AL., ISO 14000 ANSWER BOOK: ENVIRONMENTAL MANAGEMENT FOR THE WORLD MARKET (1997); KEN WHITELAW, ISO 14001 ENVIRONMENTAL SYSTEMS HANDBOOK (2d ed., 2004); MATS ZACKRISSON ET AL., MEASURING YOUR COMPANY’S ENVIRONMENTAL IMPACT: TEMPLATES & TOOLS FOR A COMPLETE ISO 14001 INITIAL REVIEW (2004).

¹¹² ISO, THE ISO SURVEY OF ISO 9001:2000 AND ISO 14001 CERTIFICATES 27 (2003), available at <http://www.iso.org>.

¹¹³ *See* Stenzel, *supra* note 108, at 256-57 (indicating why businesses support the ISO approach); *see also* Paula C. Murray, *Inching Toward Regulation Reform—ISO 14000: Much Ado About Nothing or a Reinvention Tool?*, 37 AM. BUS. L.J. 35 (1999) (seeing the ISO 14000 series as a means for evolutionary change).

¹¹⁴ *See, e.g.*, Meaghan M. Lynch, *ISO Certification: Opening Doors to New Markets in Mexico*, BUS. STANDARDS, May/June 1999, at 18 [any more recent reports in this or other business journals?]

to adhere to local laws, those laws may be poor or non-existent or unenforced. The ISO 14000 series does not call upon company's to adhere to relevant international instruments, such as treaties on ozone depletion, biological diversity, or hazardous wastes, nor non-binding international instruments, such as OECD or UN Environment Program (UNEP) guidelines. Further, while the standards may prompt greater gathering and dissemination of information within the corporate structure on adverse environmental effects, there is no requirement of release of such information to the public, nor a requirement of an external audit, such that there is really no way of monitoring externally if the company is acting in accordance with the standards nor how it is reacting with adverse environmental effects are uncovered.¹¹⁵ Some critics note that the standards were negotiated in theory with all stakeholders present (*e.g.*, business, consumer, and environmental representatives), but in reality the better-financed major business entities and developed states dominated the negotiations, at the expense of smaller enterprises, non-governmental organizations and developing states.¹¹⁶ At the same time, some developing states may be enthusiastic about the ISO 14000 series because they are weak enough that developing state companies can readily comply and be regarded as environment-friendly, thus avoiding potential consumer-driven trade sanctions in developed

¹¹⁵ See generally RIVA KRUT & HARRIS GLECKMAN, *ISO 14001: A MISSED OPPORTUNITY FOR GLOBAL SUSTAINABLE DEVELOPMENT* (1998); Naomi Roht-Arriaza, *Compliance with Private Voluntary Agreements: The Example of the International Organization for Standardization's ISO 14000 Environmental Management and Related Standards*, 29 *STUD. TRANSNAT'L LEGAL POL'Y* 205 (1997); Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 *ECOLOGY L.Q.* 479 (1995); Naomi Roht-Arriaza, *Private Voluntary Standard-Setting, the International Organization for Standardization and International Environmental Lawmaking*, 7 *Y.B. INT'L ENV'T'L L.* 149 (1996); Stenzel, *supra* note 108, at 283-87.

¹¹⁶ See, *e.g.*, Roht-Arriaza, *supra* note 115, at 208.

states.¹¹⁷

Codes Focused on Certain Industries. Because certain sectors of the transnational economy have been susceptible to sharp criticism of their activities, codes have been developed by stakeholders within those sectors tailored to their particular needs. For example, companies in the extractive industries (i.e., oil extraction and mining) have had enormous impacts on the communities in which they operate.¹¹⁸ As a result, these companies have been in the spotlight of activist efforts to promote transnational corporate responsibility¹¹⁹ and also exposed to violent acts that seek to disrupt their operations, which have led to aggressive security counter-measures. Over the course of 2000, the governments of the United States and the United Kingdom, certain companies in the extractive and energy sectors, and certain nongovernmental organizations met to discuss means for companies in those sectors to protect and promote human rights when pursuing corporate security.¹²⁰ In December 2000, the participants announced an initiative—the Voluntary Principles on Security and Human Rights—to guide such companies toward ensuring respect for human rights and

¹¹⁷ *Id.* at 209.

¹¹⁸ See DURUIGBO, *supra* note 10, at xv.

¹¹⁹ See, e.g., Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (1999) (alleging complicity of oil companies in Nigerian human rights violations), available at <http://www.hrw.org/reports/1999/nigeria>.

¹²⁰ Participants in the process included BP, Chevron, Conoco, Freeport McMoran, Rio Tinto, Shell, Texaco, Amnesty International, Fund for Peace, Human Rights Watch, International Alert, Lawyers Committee for Human Rights, Business for Social Responsibility, Council on Economic Priorities, Prince of Wales Business Leaders Forum, and the International Federation of Chemical, Energy, Mine and General Workers' Unions. See U.S. Dep't of State Press Release on Voluntary Principles on Security and Human Rights: Statement by the Governments of the United States of America and the United Kingdom (Dec. 20, 2000), at http://www.state.gov/www/global/human_rights/001220_stat_principles.html.

fundamental freedoms while at the same time maintaining the safety and security of corporate operations.¹²¹

The preamble to the Voluntary Principles states that they are guided by those set forth in the Universal Declaration of Human Rights and contained in international humanitarian law. The Voluntary Principles are then divided into three sections: risk assessment, companies' relations with public security, and their relations with private security. The first section notes that assessing risk in the states where a company operates is critical not just for the security of company personnel and assets, but also for the promotion and protection of human rights. The principles call upon companies to assess a series of risk factors (*e.g.*, the risk of transferring lethal equipment to public and private security forces) based on credible information from a broad range of perspectives, including civil society knowledgeable about local conditions. The second section calls upon companies to "use their influence" with public security services so as not to (1) use the services of individuals credibly implicated in human rights abuses; (2) use force unless "strictly necessary and to an extent proportional to the threat"; and (3) violate the rights of individuals when they are exercising the rights of freedom of association and peaceful assembly, the right to engage in collective bargaining, or other related rights.¹²² The third section calls for companies to follow similar principles with respect to private security providers, and further urges them to include such

¹²¹ U.S. State Department Fact Sheet, Voluntary Principles on Security and Human Rights (Feb. 20, 2001), at <http://www.state.gov/g/drl/rls/2931.htm>, reprinted in 24 HASTINGS INT'L & COMP. L. REV. 441-49 (2001). For background on the negotiations and a discussion of the principles by U.S. government participants, see Bennett Freeman, Maria B. Pica, and Christopher N. Camponovo, *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT'L & COMP. L.J. 423 (2001).

¹²² *Id.*

principles in contracts with such providers (thus allowing termination of the contract if the principles are not followed).

A U.S. government official heralded the Voluntary Principles as significant not just because they provide a basis for a global standard on security and human rights in the oil, mining and energy sector, but also because they form a foundation for further dialogue between industry in that sector and civil society.¹²³ Whether the principles will have a significant influence remains to be seen, but they appear to be taken into account by MNCs in pursuing new extractive projects. For example, in the 1990's, enormous natural gas reserves were located off the shore of the Indonesian province of Papua (formerly known as Irian Jaya), which occupies the western half of the tropical island of New Guinea. Indonesia decided to develop the gas reserves by removing the gas from its location, processing the gas into liquefied natural gas (LNG), and then transporting it. The U.K./U.S. oil and gas company BP became a principal shareholder in (and the operator of) this project—known as the Tangguh LNG Project¹²⁴—but BP was concerned that it might face considerable criticism for

¹²³ U.S. Dep't of State Press Release on Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights, and Labor; E. Anthony Wayne, Assistant Secretary for Economic and Business Affairs; and David G. Carpenter, Assistant Secretary for Diplomatic Security, Press Briefing on Voluntary Principles on Security and Human Rights (Dec. 20, 2000), at http://www.state.gov/www/policy_remarks/2000/001220_koh_hr.html (“For almost a year, officials from eight companies, corporate responsibilities and human rights groups, the State Department and the British Foreign Office, sat side by side in a team effort to develop these Principles. That dialogue is only beginning and will continue into the coming new year.”)

¹²⁴ For background, see <http://www.bp.com/subsection.do?categoryId=755&contentId=2016171>. The Tangguh project is located in the Bintuni Bay region of the Bird's Head area of Papua. According to news reports, the bay is large and pristine bay, with perhaps the largest mangrove forest in the world, and with one of its most varied marine ecosystems. The communities surrounding the bay are small, isolated villages of up to 100 families. See Manuela Saragosa, *Oil Giant Gets Indonesia Warning*, BBC News Service (updated Mar. 12, 2003), at <http://news.bbc.co.uk/1/hi/business/2841311.stm>.

potential adverse effects of the project in Papua.¹²⁵

Consequently, BP participated in the drafting of the Voluntary Principles and then publicly stated its adherence as a matter of corporate policy to the standards set forth therein.¹²⁶ Moreover, BP established a Tangguh Independent Advisory Panel to provide external advice to senior BP decision-makers. Chaired by former U.S. Senator George Mitchell, the panel was charged, among other things, with advising on the project's effects on the local community, and on the impact on political, economic, and social conditions in Indonesia generally and in Papua in particular.¹²⁷ Since its inception in 2001, the panel has met with a wide variety of Indonesians, from government officials down to directly affected Papuans, and has provided public reports to BP on its findings and recommendations. Among other things, the second annual report concluded that BP was committed to abide by the Voluntary Principles and had met that commitment, and offered recommendations

¹²⁵ In particular, BP may have been interested in avoiding the criticisms leveled against the U.S.-based company Freeport McMoran, which has been operating the world's richest gold and copper mine in Papua since the 1970s. Among other things, Freeport McMoran has been charged with relying excessively on the Indonesian military for security services and engaging in environmentally-poor practices. *See, e.g.*, *Beanal v. Freeport McMoran*, 197 F.3d 161 (5th Cir. 1999) (dismissing a case brought against Freeport McMoran for an international environmental tort under the Alien Tort Claims Act).

¹²⁶ *See* BP, Conflict and Security (undated), *at* <http://www.bp.com/genericarticle.do?categoryId=2011558&contentId=2016988>.

BP also states that it "supports the principles set forth in the UN Universal Declaration of Human Rights and will respect the 2000 International Labour Organisation 'Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy' and the 2000 OECD 'Guidelines for Multinational Enterprises'." *See* BP, Ethical Conduct (undated), *at* <http://www.bp.com/genericarticle.do?categoryId=27&contentId=2000422>.

¹²⁷ *See* Tangguh Independent Advisory Panel, First Annual Report on Tangguh LNG Project, 5 (Oct. 2002), *at* http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/T/Tangguh_Advisory_Panel_first_report_HRIA_1740.pdf.

for further use of the Voluntary Principles with respect to certain aspects of the project.¹²⁸

III. WHETHER THE CODES WILL WITHER

As indicated in the prior section, several voluntary codes of conduct for MNCs have emerged in recent years that seek to ameliorate adverse societal effects of MNC activity, especially in the developing world. Based on the reports and literature surrounding these codes, these codes do appear to be helping to reshape cultural attitudes within at least some MNCs, by raising corporate awareness of potentially adverse MNC activity in the developing world and creating benchmarks by which external groups may measure MNC behavior.¹²⁹ One recent study of codes relating to international labor rights focused on case studies of four different industries across four different geographic regions and concluded, among other things, that such codes “have the potential to generate direct improvements in the conditions of workers and communities in the global supply chains of major industries.”¹³⁰ Code enthusiasts hope that MNCs will increasingly see the benefits of upholding key societal values and thereby enrich the environment in which they operate. Such optimism regarding the codes may be warranted; the “arc” of their use by MNCs is, on its face, fairly impressive given the minimal MNC attention given to such issues thirty years ago.

¹²⁸ Tangguh Independent Advisory Panel, Second Annual Report on Tangguh LNG Project 3, 18 (Nov. 2003), at http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/T/TIAP_Second_Annual_Report_updated_23_12_03.pdf.

¹²⁹ See, e.g., Steven R. Ratner *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 532-533 (2001).

¹³⁰ SCHRAGE, *supra* note 28, at xii.

At the same time, such codes have their critics, and the critics have been articulate and aggressive in voicing their concerns. In particular, the voluntary nature of the codes leads many observers to see the codes as largely or potentially MNC public relations ploys.¹³¹ On this account, MNCs may purport to follow such codes, but do so only with varying degrees of seriousness. Notwithstanding anecdotal success stories,¹³² for the critics there remain too many instances of adverse social effects of MNC activity¹³³ to conclude that voluntary codes in their present form alone are the solution. As Janelle Diller of the International Labour Organization notes

Even if transnational private initiative can present a sustainable “high road” for business conduct amidst the complexities of global transactions over time, claims by enterprises and other actors concerning social improvements achieved through private initiatives are not easily categorized, evaluated or compared. Some controversy may thus be inevitable. These initiatives operate across diverse economic, political and legal contexts, without standard

¹³¹ See, e.g., John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 489 (2000); Ratner, *supra* note 129, at 532.

¹³² See, e.g., Anderson, *supra* note 131, at 486 (discussing successes at Levi Strauss, Mattel, and Nike).

¹³³ See, e.g., William H. Meyer & Boyka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT’L L.J. 501, 503 (2001) (recounting conflicting empirical studies regarding MNC concern for civil-political rights and socioeconomic welfare in developing states); SETHI, *supra* note 13, at 15-38 (providing a study of news reports regarding adverse societal effects of MNC activities in developing states). A non-governmental organization called the Business & Human Rights Resource Centre—a collaborative partnership between Amnesty International sections and certain academic institutions—maintains an extensive internet site with links to reports regarding adverse MNC activity. See <http://www.business-humanrights.org/Home>

reference points or generally accepted methods of development, implementation or assessment. A number of implications therefore arise from limitations inherent in the way such initiatives are developed, implemented and ultimately assessed.¹³⁴

Over time, if the codes remain in nature as they presently are, while demands for social and environmental justice increase, the codes may lose much of their legitimacy.¹³⁵ Consumers, shareholders, and other stakeholders may not feel that adoption of a code has any significance; that the code is disingenuous. At best, current criticisms may persist; at worst, if demands for greater corporate responsibility increase, the notion of allowing the “fox” to guard the “hen-house” may fall into severe disrepute, such that the codes wither in meaning, if not in form.¹³⁶

The unease with voluntary codes of conduct has led to calls for transforming the codes into binding law, both at the international and national level.¹³⁷ Some treaties already exist designed to reign in corporate misconduct: ranging from ILO treaties and regulations (some dating to the early twentieth century) to recent initiatives concerning corporate bribery of officials¹³⁸ and corporate

¹³⁴ Diller, *supra* note 34, at 101.

¹³⁵ See SCHRAGE, *supra* note 28, at 165.

¹³⁶ See Mark Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse*, 24 U. MIAMI INTER-AM. L. REV. 399 (1992-1993).

¹³⁷ See, e.g., DURUIGBO, *supra* note 10, at 156 (“To ensure that harmful business activities are eliminated, limited or punished, a strong regulatory and enforcement network under international law is called for.”)

¹³⁸ See UN Convention Against Corruption, GA Res. 58/4, annex (Oct. 31, 2003), available at http://untreaty.un.org/English/notpubl/Corruption_E.pdf; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, OECD Doc. DAFFE/IME/BR(97)20, 37 I.L.M. 1 (1998), available at

exports of tobacco.¹³⁹ One can imagine aggressively pursuing the transformation of the existing voluntary codes into treaty law, either on a broad scale or in selected areas, with appropriate enforcement or monitoring mechanisms.¹⁴⁰ One can also imagine adopting new national “command and control” legislation codifying and developing such norms,¹⁴¹ and further can imagine urging international and national courts to use the codes as though they expressed rules of law.¹⁴² If over time this is the fate of voluntary corporate codes, then as they wither away, the codes will be viewed as simply stepping stones in the crystallization of law.

There are, however, reasons to doubt that such a movement toward binding law will succeed, at least in the near term. Many of the binding treaties on issues addressing corporate conduct have secured low rates of ratification, such as several of the ILO treaties. There remain considerable differences of views among blocs of states—and not just between North and the South—regarding

<http://www.oecd.org>; OAS Inter-American Convention Against Corruption, Mar. 29, 1996, OAS Doc. B-58, 35 I.L.M. 724 (1996), *available at* <http://www.oas.org>; Council of Europe Criminal Law Convention on Corruption, Jan. 27, 1999, ETS No. 173, 38 I.L.M. 505 (1999); Organization of African Unity Convention on Preventing and Combating Corruption, July 11, 2003, *available at* <http://www.africa-union.org>.

¹³⁹ Framework Convention on Tobacco Control, May 21, 2003, 42 I.L.M. 518 (2003), *available at* <<http://www.who.int/tobacco>>. The FCTC was adopted by WHA Res. 56.1 (May 21, 2003).

¹⁴⁰ Ratner, *supra* note 129, at 538-40.

¹⁴¹ *See, e.g.*, Anderson, *supra* note 131, at 500-504 (calling for enactment in the United States of a federal “Foreign Human Rights Abuse Act” as well as revocation of corporate charters by the several states of the United States when MNCs act improperly). In 1989-91, Congress considered but did not adopt legislation that would formulate a code of conduct for U.S. corporations doing business in the Soviet Union and in China. *See* Frey, *supra* note 48, at 170-71.

¹⁴² *See, e.g.*, Weissbrodt & Kruger, *supra* note 73, at 919-21.

the development of such conventions, which suggests that successes in crafting new agreements will be difficult. National legislation remains a possibility, but developed states are wary of adopting constraints on their MNCs that place them at a competitive disadvantage. Unless the enactment of national laws can be coordinated among blocs of states, the development of such laws will likely prove problematic. Perhaps most importantly, MNCs—who remain powerful actors to whom governments pay heed will resist such transformation into binding law. Indeed, the reason voluntary codes were adopted to begin with was because of the political obstacles and legal complications in regulating non-state entities who operate across borders, and because of a desire to preserve some level of flexibility in the regulation of such actors as well as promote true “internalization” of values by MNCs. Those same factors will continue to make direct regulation of MNC activity problematic.

This essay suggests that far greater attention should be given, at least in the near term, to a middle way, one that falls between simple reliance on voluntary codes as they are currently structured and, alternatively, pursuing their transformation into binding law. The middle way would seek to bring governments more actively back into the process of promoting good corporate conduct, but would do so by both reinforcing the value and benefits of the voluntary codes to MNCs and holding MNCs to the codes to which they have subscribed. In other words, while these codes may reflect an aspect of the decline of the nation-state, a fertile area for buttressing the codes—for ensuring their survival and effectiveness—may well lie in more creative use of the power of nation-states.

IV. TAKING THE CODES SERIOUSLY

Rather than view “command-and-control” laws as the next best step in addressing MNC conduct, policy-makers should consider a range of governmental initiatives that reinforce the value and benefits of the voluntary codes to MNCs (in other words, creating “carrots”), while at the same time holding MNCs to the codes to which they have subscribed (creating “sticks”). At the heart of this approach is the notion that MNCs are not required to adopt a particular code; the code remains a voluntary set of normative constraints that the MNC may embrace or not as it wishes. However, governments can pursue legislative and administrative initiatives that make adoption of a code more attractive to MNCs, while at the same time pursuing initiatives that increase the likelihood that the MNC will adhere to the code it has voluntarily adopted. To be effective, government policy should balance the use of “carrots” and “sticks.” If only carrots are created, more MNCs may be pulled into the adoption of corporate codes, but with spotty adherence. If only sticks are created, MNCs may view the adoption of codes as undesirable burdens.

Among the “carrots” that governments might pursue that reinforce the value and benefits of the voluntary codes to MNCs are the following.

Getting stakeholders together. Governments should pay more attention to the possibility of lending their weight to convening groups of stakeholders in a particular problem area, for the purpose of having them develop a voluntary code deemed appropriate by all. As seen in discussion above of the Voluntary Principles for extractive industries, governments can have a catalytic effect in bringing diverse groups together and pressing them to negotiate an appropriate code. MNCs in a particular industry or region may find such government participation useful if they anticipate recurrent attacks by civil society groups on their activities, and if government involvement can help

bring such groups to the table in a manner that the MNCs see as constructive.¹⁴³ Civil society groups may also welcome such government involvement, since governments, as regulators, have influential relationships with MNCs and can press MNCs to participate in the development of a meaningful code.

Setting a code for the codes. One of the principal attractions for MNCs to voluntary codes is that such codes provide considerable flexibility for the MNC in developing its own internal code of conduct; different types of codes can be developed for different industries and MNCs within industries, tailored to their particular needs and capabilities. While such flexibility can and should be maintained, it should also be possible to develop better standards for what an internal MNC code should look like (a “code for codes”), and governments—again acting as a facilitator of stakeholder interests—may be in the best position to do so. A minimalist code for codes might look something like the UN Global Compact—simply calling for MNCs to adhere to codes that address certain core issues, such as labor, human rights, environmental harm, and corruption, or it might look like the OECD Guidelines—elaborating on the standards that any MNC code should include (e.g., a commitment to abide by national laws in states where the MNC operates). But a minimalist code for codes might contain other features common to all existing internal MNC codes, such as calling for MNCs, if they subscribe to a code, to publicly adopt it in writing and to train employees in the code. A more ambitious code for codes could address further procedural aspects that any MNC code should include, such as providing employees with a mechanism (e.g., a hotline or helpline) to surface concerns about corporate compliance with the MNC code. Even more ambitious still would be a code for codes that clarified the different means by which an MNC could achieve transparency

¹⁴³ See SCHRAGE, *supra* note 28, at 178-79.

regarding its adherence to the code, the means by which such adherence might be monitored, verified, audited, or certified, both internally and externally, and standards for what would constitute true independent scrutiny by qualified persons.¹⁴⁴ Indeed, the code for codes might indicate different “tiers” of scrutiny, from least rigorous to most rigorous, such that MNCs who adopt a code could indicate where they fall on a spectrum of scrutiny, thus perhaps inducing higher levels of oversight.¹⁴⁵

The overall purpose of such a code for codes would not be to require MNCs to adopt any particular code but, rather, to provide a “quality control” template (or the “standard reference points”) that would reduce the likelihood of sham MNC codes. If such a template helped guide shareholders, consumers, and others in determining whether a code adopted by an MNC was a legitimate effort to achieve good corporate conduct, then MNCs may find adoption to stronger and more effective codes in their interest. Indeed, a logical next step might be for governments to endorse particular MNC codes as meeting the requirements of the code for codes, thus helping to differentiate codes that fall short.¹⁴⁶

Leniency from regulators. Governments are regulators of MNCs in various ways, ranging

¹⁴⁴ For a list of criteria and suggested framework for an auditing procedure, see SETHI, *supra* note 13, at 205-06, 210-14.

¹⁴⁵ One model the governments might build upon is that set by Social Accountability International (SAI), a U.S.-based, nonprofit organization. SAI’s mission is to develop, implement and oversee voluntary and verifiable social accountability standards. SAI has adopted its own set of social accountability standards, known as SA-8000 (which mimic the approach taken by the ISO to setting standards), which focus in part on “social auditing.” For information, see <http://www.sa-intl.org/index.htm>.

¹⁴⁶ *See, e.g.*, SCHRAGE, *supra* note 28, at 177 (“The United States should use its prestige and credibility to serve as an honest broker to endorse or ‘qualify’ serious [private voluntary initiatives] that address labor standards violations.”)

from securities disclosure laws to occupational safety laws to environmental protection laws, and so on. In many countries, such regulation of MNCs operates only territorially; governments do not generally seek to regulate extraterritorially unless MNC actions abroad have some effect within the government's territory.¹⁴⁷ In some instances, however, governments do regulate the conduct of MNCs abroad,¹⁴⁸ and in any event regulators may be granted considerable discretion when interpreting their mandate to regulate. As such, governments should consider whether by statute, regulation, or administrative rule more can be done to use voluntary codes as a device for favorable treatment to an MNC. To the extent that the regulator uses adherence to a voluntary code as a means for accordng an MNC favorable treatment, then the MNC will view adherence to the code as more attractive.

One relevant concept in this regard is the idea of "safe harbors."¹⁴⁹ Where there is a general standard to which an MNC is exposed under national law, and then a more specific rule that tells an MNC that it has met the standard, then that more specific rule operates as a "safe harbor"; an MNC

¹⁴⁷ In the United States, "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). However, U.S. courts presume that Congress has *not* exercised this power, unless Congress manifests an intent to reach acts performed outside U.S. territory. Thus, the normal presumption by U.S. courts is that U.S. statutes apply only to acts performed within U.S. territory. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (holding that a U.S. immigration statute does not apply extraterritorially); *Smith v. United States*, 507 U.S. 197, 209 (1993) (holding that the Federal Tort Claims Act does not apply extraterritorially).

¹⁴⁸ *See, e.g.*, Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977), as amended (expressly focusing on bribery occurring outside the United States); ____ U.S.C. § ____ (prohibiting the import of goods made with convict labor).

¹⁴⁹ *See, e.g.*, Peter Swire, *Safe Harbors and a Proposal to Improve the Community Reinvestment Act*, 79 VA. L. REV. 349 (1993); Note, "Safe Harbor" As Tax Reform: Taxpayer Election of Lease Treatment, 95 HARV. L. REV. 1648 (1982).

can rely on following the rule as a means for satisfying the standard. Where government regulators have the power to hold MNCs to certain standards regarding their conduct abroad, then by establishing adherence to a voluntary code as a means for meeting that standard provides the MNC with a safe harbor, and concomitantly augments the value of having and adhering to such a code.

Certain factors that in general make a safe harbor more attractive¹⁵⁰ may be present with respect to voluntary codes for MNCs, depending on the national laws to which the safe harbor applies. If a national legal system is imposing a relatively vague standard on MNC activity abroad, the MNC may find it difficult to ensure full compliance with the standard if there are numerous MNC transactions at issue and if there is great uncertainty regarding how to comply with the standard. Further, the MNC may face high costs if it were to pre-clear its activities with regulators and high costs if its conduct is found non-conforming. In such situations, adoption of an internal MNC code that meets conditions acceptable to the regulator may be very attractive to the MNC as a safe harbor. Obviously, the government may wish to consider setting certain conditions regarding what codes would be regarded as acceptable, as discussed in the prior sub-section.

Leniency in criminal prosecution. The same concept may be employed with respect to leniency in criminal prosecution, assuming that there are national criminal laws regulating MNC conduct abroad.¹⁵¹ For example, in November 1991, the U.S. Sentencing Commission issued

¹⁵⁰ See Swire, *supra* note 149, at 369-78.

¹⁵¹ Criminal statutes also often are not extraterritorial in nature, although in the United States the presumption against extraterritoriality appears somewhat weaker for federal criminal statutes as a class. See *United States v. Bowman*, 260 U.S. 94, 98 (1922) (finding that the presumption did not apply to “criminal statutes which are, as a class, not logically dependent on their locality for the Government’s jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if

Guidelines for Organizations,¹⁵² which are used by U.S. Attorneys in weighing whether to charge the organization and used by judges in sentencing an organization. For organizations that evince “an effective program to prevent and detect violations of law,” the guidelines provide for a lesser punishment even if a violation transpires. Such a program must include the organization establishing “compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.”¹⁵³ Governments should consider whether, for criminal statutes relating to MNC activity abroad, the MNC’s voluntary adoption of a corporate code merits leniency in charging and sentencing. Again, by doing so, governments would serve to buttress the value and benefit to an MNC in adopting a meaningful code.

Leniency with respect to civil claims. Governments could also consider a similar approach with respect to civil suits against MNCs for misconduct abroad.¹⁵⁴ To the extent that a government’s national law allows civil suits for such conduct,¹⁵⁵ then the government might encourage courts to view an MNC’s adoption of a voluntary code as a basis for certain evidentiary presumptions or for

committed by its own nationals, officers or agents.”).

¹⁵² See U.S. Federal Sentencing Guidelines §8C2.5(f) (2002), available at <http://www.ussc.gov/2002guid/CHAP8.htm>.

¹⁵³ *Id.*, §8A1.2, commentary at K(1).

¹⁵⁴ Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT’L L. 153, 169-73 (2003).

¹⁵⁵ In the United States, numerous suits have been filed against MNCs under Alien Tort Claims Act, 28 U.S.C. § 1350 (2000), although to date with limited success. See, e.g., *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (finding that the environmental agreements upon which the claim was pled did not provide discernable standards for identifying international environmental torts); see also Torture Victim Protection Act, 28 U.S.C. §1350 note (2000) (which provides a civil remedy to persons who suffer torture or extrajudicial killing by, or under authority of, a foreign government).

mitigation of damages. Such encouragement might take the form of a statute, regulation, or overall statement of policy, or might take the form of friend-of-the-court interventions by the government in particular civil suits as claims arise.¹⁵⁶

For instance, while the Nigerian Senate recently adopted a resolution ordering Shell Petroleum Development Company of Nigeria to pay \$1.5 billion as compensation for environmental degradation, health problems, and loss of livelihood,¹⁵⁷ an alternative—and likely more constructive—approach to a civil compensation scheme would seek to promote good MNC behavior in advance of harm occurring, by developing a civil penalty scheme in which voluntary codes feature as a potential means of limiting MNC liability. Again, if carefully constructed, such leniency would encourage MNCs to adhere to the voluntary code, thereby decreasing the likelihood that harm will occur.

Government procurement and financing. Governments should consider including in their regulations and policies on procurement of goods and services a role for MNC adherence to voluntary codes. For example, the U.S. Federal Acquisition Regulations relating to suspension or

¹⁵⁶ See Schrage, *supra* note 154, at 172. Interventions by governments in cases *ad hoc* would allow for individualized assessments of the voluntary code adopted by the MNC, but also risks politicizing the view taken by a government, with the government's attitude potentially turning more on the country where the alleged abuse occurred or the government's relationship with the defending MNC, and less on the MNC's adherence to a code and the quality of that code. For example, the U.S. government's experience in appearing *ad hoc* before U.S. courts to address whether foreign governments should be immune from suit proved to be one where the U.S. government did not engage in consistent behavior and ultimately one that the U.S. government did not welcome, thus leading to the creation of an overall standard for U.S. courts to follow in the form of the 1976 Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441 (d), 1602–1611 (2000).

¹⁵⁷ See John Yarney, *Shell Rejects Nigerian Senate Order to Pay Compensation for Environmental Damage*, 27 INT'L ENV. REP. 708 (2004).

debarment of a government contractor for irresponsible behavior recognize as a mitigating factor “[w]hether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.”¹⁵⁸ Individual U.S. government agencies then supplement the FAR to set forth their expectations regarding ethics and conduct of those from whom they procure goods and services.¹⁵⁹ It would be a natural extension of such requirements for government agencies engaged in commercial relations with MNCs to require that the MNC adopt a voluntary code of a type determined by the government to be appropriate and effective. Similarly, government decision-making with respect to financing of development projects—whether financed directly by governments or through international financial institutions—might look for ways to make adoption of and adherence to a voluntary code a condition of such financing.¹⁶⁰

Such “carrots” would be helpful in pulling MNCs into codes, but governments should also

¹⁵⁸ Federal Acquisition Regulations, FAR Reg. 9.401-1(a)(1) (2001). *available at* <http://farsite.hill.af.mil/VFFARa.HTM>.

¹⁵⁹ *See, e.g.*, Dep’t of Defense Federal Acquisition Regulations, DFAR Reg. 203.7000 (1998) (setting forth certain principles for standards of conduct and internal control systems), *available at* <http://farsite.hill.af.mil/vfdfarspdf.htm>.

¹⁶⁰ The 2002 “Monterrey Consensus” urged financial institutions to foster innovative developmental financing approaches as a means of promoting good corporate citizenship. Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002, UN Doc. A/CONF.198/11, para. 23 (2002), *available at* <http://www.un.org/esa/ffd/0302finalMonterreyConsensus.pdf>. The Monterrey Conference was the first U.N.-hosted conference to address key financial and development issues, and was attended by heads of state, government ministers, leaders from the private sector and civil society, and senior officials of all the major inter-governmental financial, trade, economic, and monetary organizations.

consider steps that might be taken to ensure that the codes adopted by MNCs are effective in conditioning MNC behavior. Among the “sticks” that governments might pursue to make it more likely that the MNC will adhere to the code it has voluntarily adopted are the following.

Promoting transparency. Through government laws, regulations, or administrative rules, governments might require that, when MNCs adopt an internal code of conduct, they divulge publicly information about what the code says, who is trained in the code and how, and information on whether and how the code is monitored and audited. Such disclosure of information might be required as part of laws that allow corporations to form or securities laws that require corporations to divulge information pertinent to shareholder decision-making. While such disclosure may be burdensome to an MNC, it also serves the objective of accountability of the MNCs to its shareholders, and makes “more effective the market mechanisms that steer companies towards responsible conduct”¹⁶¹

Promoting truth-in-advertising. To the extent that MNCs are using their adherence to voluntary codes as a means of assuaging public concerns about their activities abroad, then MNCs should be prepared to have those claims scrutinized as a matter of consumer protection laws. Such scrutiny could take the form of periodic investigations by government consumer protection offices. Additionally, governments might consider opening the court-room doors to civil claims whereby private attorneys-general pursue judicial review of MNC claims. For example, when Nike Corporation allegedly made false statements of fact about its labor practices and about working

¹⁶¹ See Parkinson, *supra* note 30, at 59; see also Diller, *supra* note 34, at 119 (“Not infrequently, a code launched with much publicity in an industrialized country is unknown, unavailable or untranslated at producing facilities . . .”).

conditions in factories that made its products, the Supreme Court of California found that such statements could violate California statutes on false advertising and unfair competition laws, and that such statements were not protected free speech.¹⁶²

Promoting oversight processes. As has been previously noted, existing codes containing various levels of oversight, which may consist of internal or external monitoring, verification, audits, or certifications. While requiring MNCs to adopt a particular form of oversight would likely run afoul of the inherent flexibility of the code approach, governments might nevertheless endorse as a part of the code on codes discussed above criteria for desirable oversight techniques. Moreover, governments through national laws, regulations, or administrative rules could license persons performing such functions, thereby ensuring higher quality auditors and certifiers. As governments gain increasing experience with use of non-governmental monitors on matters such as maritime safety¹⁶³ and port security,¹⁶⁴ governments should move toward developing appropriate normative

¹⁶² *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 946 (2002) (“Because the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker’s own business operations for the purpose of promoting sales of its products, we conclude that these messages are commercial speech for purposes of applying state laws barring false and misleading commercial messages.”)

¹⁶³ Non-governmental entities are used to certify vessel compliance with various regulations promulgated under the Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319, 1340 U.N.T.S. 184, and its 1978 protocol, 17 I.L.M. 546, 1341 U.N.T.S. 3.

¹⁶⁴ For example, IMO regulations enacted in 2002 as amendments to chapter V and chapter XI (now renumbered as chapter XI-1) of the International Convention for the Safety of Life at Sea (SOLAS) International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 UST 47, 1184 UNTS 276, provides that states shall disfavor entry of vessels to ports where the vessels have not obtained an “International Ship Security Certificate” issued by authorized non-governmental shipping societies. *See* IMO Doc. SOLAS/CONF.5/32, annex (Dec. 12, 2002) (containing Resolution 1 of the December 2002 conference, which contains in its annex the amendments), *at* <<http://www.dcmnr.gov.ie/files/marsecXI-2.pdf>>.

structures for ensuring the integrity of such monitors, including those used by MNCs to validate adherence to voluntary codes.

V. CONCLUSION

A U.S. government representative recently noted that the

promise of rich governments to give 0.7 percent of their gross domestic product to poorer countries remains not only a promise, it is a relic, its actual dollars now dwarfed by significantly larger sums of private capital flows. Far-flung colonial empires have been replaced by corporations, the borderless empires of which are more suited to the nimble responses in a world that demands them.¹⁶⁵

This rise of MNCs as globally dominant economic forces has been characterized by an extensive movement of capital, goods and services across borders, which gives MNCs enormous influence on the working conditions of their laborers in developing countries and on the environmental effects of their operations without any countervailing power exercised by nation-states. A central question is whether globalization of the markets that has occurred over the past thirty years is sustainable without a better normative structure—whether such MNC dominance will increasingly trigger

¹⁶⁵ King, *supra* note 101, at 484.

backlashes by laborers, consumers, and other stakeholders because the benefits of MNC activity are distributed too unequally. While it is true that capitalism, at its core, entails freedom to pursue economic self-interest, it is equally true that capitalism in developed states only survived the challenge of socialist and communist movements by developing a distributive system of social benefits that was perceived as equitable, fair, and just.

Existing voluntary codes may preclude such backlashes, but they may also be seen as inadequate, leading to demands for greater government regulation MNCs. In the long-term, MNCs may be best served by finding ways to make voluntary codes more meaningful and effective. In that regard, this essay suggests that greater attention should be given to the role of governments in augmenting such codes, and to that end suggests several “carrots” and “sticks” that governments might deploy. Such devices may prove politically difficult or impossible for some governments, but to the extent they can be achieved, they may help promote a synergy between government regulation and MNC self-regulation, one that will help ease the frictions associated with the decline of the nation-state so presciently observed by Oscar Schachter.