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# FROM MORAL OBLIGATION TO INTERNATIONAL LAW: DISCLOSURE SYSTEMS, MARKETS AND THE REGULATION OF MULTINATIONAL CORPORATIONS

LARRY CATÁ BACKER

ARTICLES

# FROM MORAL OBLIGATION TO INTERNATIONAL LAW: DISCLOSURE SYSTEMS, MARKETS AND THE REGULATION OF MULTINATIONAL CORPORATIONS

LARRY CATÁ BACKER*

**Abstract:** *It is well known that soft international law has begun to provide incentives for the management of a values-based behavior structure for multinational corporations. This paper will argue that hard international law can serve as a vehicle for the enhancement of a market environment in which corporate stakeholders, and principally consumers and investors, might incorporate information about corporate "social" behavior in their consumption and investment decisions. Specifically, a mandatory system of transparency and disclosure at the international level may provide an efficient means of creating incentives for "moral" behavior without the need to incorporate any one version of appropriate manifestations of social responsibility on corporate entities. International law can thus institutionalize, within a rule of law context, important incentives for appropriate behavior without incorporating any particular set of "public" values and provide a legal framework through which stakeholders can manage the "public" or "social" behavior of multinational corporations. The paper starts with a contextualization of the regulatory problem: the extent of the responsibility of corporate actors for the working conditions of indirect employees. Neither domestic nor international law has been much help. Law has taken only some very tentative steps to recognize or further the rise of this moral sense of obligation. The rise of the much-touted corporate social responsibility movement has resulted in the proliferation of a number of responses at every level of governance. But virtually all of these responses have been in the form of "soft law," usually voluntary codes that are not enforceable by any political organization, each reflecting the values of their proponents or stakeholders. Still, the obligation can be given legal effect through contract and enforced through regimes of monitoring and disclosure. The paper then considers the way in which hard international law might enhance this framework in which markets determine the substance of appropriate behavior which corporations are willing to embrace. For the purpose,*

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* Visiting Professor of Law, Tulane Law School; Director, Consortium for Peace & Ethics, Washington, D.C.; Professor of Law, Pennsylvania State University. The author can be contacted at lcb911@gmail.com. My thanks to the staff of the Georgetown International Law Journal for mounting an excellent symposium, from which all in attendance profited greatly. This essay profited from the excellent work of my research assistant, Augusto Molina (Penn State '09).

*the paper proposes the creation of a global system of disclosure and transparency. The object of these mandates would not be to establish a definitive set of behaviors, but rather to establish a framework within which corporate stakeholders—consumers, investors, labor, and others—could adjust their relationships on the basis of the behavior disclosed. The paper ends by pointing to the sources for such international lawmaking that already exist.*

## I. INTRODUCTION

The topic of the Georgetown Journal of International Law's 2008 symposium was how international law can influence international business to work toward "public" goals, for example reducing corruption and protecting the environment, when entering into international transactions.[1] The object of the symposium was to get its participants to consider if international law could provide incentives (either positive or negative) for international business to consider "public" goals?[2] This essay argues that, at least in one important respect, the answer is yes—international law provides an important, though limited, framework for regulating the behavior of economic entities. The purpose of this essay is to provide a preliminary sketch of a plausible approach to international regulation. More specifically, the essay suggests that international law can provide a better framework for the management of a values-based behavior structure for multinational corporations without mandating any particular sety of values.[3] Indeed, international law ought to serve as a vehicle for the enhancement of a market environment in which corporate stakeholders, and principally consumers and investors, might incorporate information about corporate "social" behavior in their consumption and investment decisions.[4] The contours of social responsibility would thus shift from a focus on governmental regulation to private choice, informed by the products of

1. *See* Georgetown Law Center, Georgetown Journal of International Law, Symposium, *Global Responsibility: Myth or Reality?* (2008), http://www.law.georgetown.edu/journals/gjil/symposium08.html (last visited Feb. 14, 2008).

2. *Id.*

3. *See, e.g.*, Fleur Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Theory*, 19 MELB. U. L. REV. 893 (1994).

4. Thomas Friedman recently reminded us that even the most complex and globally significant economic activities are the product of individual decisions of large numbers of key stakeholders. *See* THOMAS L. FRIEDMAN, THE WORLD IS FLAT 3.0: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 441-476 (2007) (on the way corporations cope in this environment).

markets for information and values.[5] Without incorporating any particular set of "public" values, international law can make it easier for people to manage the "public" or "social" behavior of multinational corporations through a mandatory regime of global reporting.[6] The heart of any such international regulation would be a mandatory system of information gathering, monitoring and disclosure. Using public or political power to compel the generation and distribution of information to key internal and external enterprise constituencies may serve as the most efficient means of articulating and applying rules for "moral" behavior without the need to incorporate any one version of appropriate manifestations of social responsibility on corporate entities. Markets might provide a more legitimate framework for substanive governance than the mandatory impositions of any one state in the form of positive substantive law. Law serves a more subtle purpose—to create a framework for private governance consistent with overarching objectives that form the essence of the system of disclosure itself.[7] Through systems of monitoring and disclosure, international law can create incentives for appropriate entity behavior without actually mandating any specific version of that behavior. This essay essentially posits another form of new governance.[8]

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5. For a discussion of the characteristics of the socially responsible consumer that is still important, see Frederick E., Webster Jr., *Determining the Characteristics of the Socially Conscious Consumer*, 2 J. CONSUMER RES. 188, 196 (1975).

6. *See* STEVEN LYDENBERG, CORPORATIONS AND THE PUBLIC INTEREST: GUIDING THE INVISIBLE HAND 57-79 (2005) (positing need for disclosure system as a necessary form of private market intervention); *but see* Allison M. Snyder, *Holding Multinational Corporations Accountable: Is Non-Financial Disclosure The Answer?*, 2007 COLUM. BUS. L. REV. 565, 606-610 (2007) (suggesting that current efforts do not overcome perceived problems).

7. "In Foucault's usage, government refers to the art of shaping, guiding, and correcting how individuals conduct themselves. Foucault described a shift in the eighteenth century from sovereign imposition of the law to government, which is not about imposing law but using tactics-of which law is just one-to arrange things to achieve ends like managing the population." Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid The Promise Of Numbers*, 26 YALE L. & POL'Y REV. 1, 7 (2007).

8. As John Conley and Cynthia Williams suggest,

> "the democratic state is in the midst of a shift to a 'post-regulatory' model characterized by a weakening of top-down governmental regulation in favor of a diffusion of rights and responsibilities among governments, private companies, NGOs, and other interested parties. Power, in other words, is to be spread and shared. This is precisely what the CSR movement seems to be demanding and, up to a point, producing. But the critics of the new governance question the processes, or lack thereof, for selecting those who will share this diffused power, and ask how these people and institutions will be held accountable. These turn out to be questions that CSR protagonists are asking of themselves, with no consensus about the answers."

The essay starts by posing a problem that will serve as the basis for the analysis—the responsibility of corporate actors for the working conditions of indirect employees, that is of the employees of an entity hired to produce products or deliver services to another party.[9] This problem nicely frames the regulatory issues for both business and law. The law does not appear to compel any sort of responsibility for the working conditions of indirect employees. Law is particularly unhelpful where the indirect employees are employed in a country other than that of the indirect employer.[10] Recent efforts to create mandatory legal obligations touching on corporate social responsibility in the international level have been forcefully rebuffed, principally by representatives of developed states.[11] There has been a strong objection to the use of law, and especially international law, to privilege one set of behavior norms over others in a context in which there is no consensus over appropriate conduct norms for economic entities.

However, while in the recent past there might not have been even a moral obligation extending to such employees, contemporary standards suggest otherwise—there may now be a moral obligation of some kind to indirect employees. This moral obligation might be derived from a variety of sources, both secular and religious, but it is not grounded in law enforceable by any state. Other non-binding sources of moral obligation might include human rights declarations from international organizations and supra-national human rights organiza-

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John M. Conley and Cynthia L. Williams, *Engage, Embed, And Embellish: Theory Versus Practice In The Corporate Social Responsibility Movement* 31 J. CORP. L. 1, 6 (2005).

9. The subject of the responsibility of enterprises for indirect employees has been a lively one. *See, e.g.*, Joannes Paulus PP.II, *Laborem exercens* § 17 (Sept. 14, 1981), http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html ("[t]he concept of indirect employer includes both persons and institutions of various kinds, and also collective labour contracts and the *principles* of conduct which are laid down by these persons and institutions and which determine the whole socioeconomic *system* or are its result."). In the context of multinational enterprises, the issue of indirect employees is usually considered a part of "supply chain" management issues. The issues have become quite elaborate. The Supply Chain Council, a large trade organization, has developed the Supply-Chain Operations Reference-Model (SCOR) Overview materials, http://www.supply-chain.org/cs/root/about_us/about_us (last visited Feb. 25, 2008).

10. *See* Tania Voon, *Multinational Enterprises and State Sovereignty Under International Law*, 21 ADEL. L. REV. 219, 232 (1999).

11. *See* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 308 (2006) [hereinafter Backer, *U.N. Norms*].

tions.[12] Yet, even in the absence of enforceable standards written into hard law, moral obligations can be enforced. Under the private law of contract, for example, the principal parties can bind themselves voluntarily to behavior standards they might deem proper.[13] The nature and extent of that obligation may be dependent on the values of the stakeholders or the normative system under which all actors operate. Similarly, the parties might agree to certain behaviors in order to receive a certification of compliance with "good" behavior issued by a reputable third party in the business of making such certifications.[14] Those obligations are usually enforced privately as well—through mandatory agreements to disclose information and permit the monitoring of behavior.

Such moral obligations, and the methodologies of enforcement, are coming to be institutionalized in private regulatory efforts, principally in corporate ethics and behavior codes.[15] But institutionalization is not law. Virtually all of these responses have been in the form of "soft law," usually voluntary codes that are not enforceable by any political organization.[16] Indeed, the rise of this much-touted corporate social responsibility movement has resulted in the proliferation of a number of

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12. *See, e.g.*, Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393, 398-405 (2006). These soft law (nonbinding) instruments might even have hard law implications from time to time. *See* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation Of Human Rights Treaties*, 107 COLUM. L. REV. 628, 666 (2007). "Courts have also used treaties as bridges to incorporate soft law norms drawn from Human Rights Committee decisions, reports of United Nations agencies, and nonbinding human rights declarations." *Id.* at 667.

13. *See* Eric Engle, *Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?*, 40 WILLIAMETTE L. REV. 103, 118-19 (2004); Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739, 1779 (2007) [hereinafter Backer, *Wal-Mart as Global Legislator*].

14. *See* Li-Wen Lin, *Corporate Social Accountability Standards In The Global Supply Chain: Resistance, Reconsideration, And Resolution In China*, 15 CARDOZO J. INT'L & COMP. L. 321, 344-46 (2007).

15. *See, e.g.*, Organization for Economic Development and Cooperation, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2000), *available at* http://www.oecd.org/document/28/0,3343,fr_2649_34889_2397532_1_1_1_1,00.html (follow the "English" hyperlink) [hereinafter OECD Guidelines]. *See also* Fiona McLeay, *Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of a Larger Puzzle*, *in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 219 (Olivier de Schutter ed., 2006); Illias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L. J. 309, 311 (2004). *See generally* PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW (1995).

16. *See* C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L. Q. 850 (1989); Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL

responses at every level of governance.[17] The soft law character of these efforts suggests deficiencies.[18] And there is no institutionalized procedure for enforcement.[19] Moreover, the proliferation of these private forms of regulating moral behavior poses a more fundamental substantive problem. These voluntary codes tend to be written in the most general terms, permitting a tremendous variation of behavior that can be claimed to be consistent with the form or substance of these codes.[20] For those who are looking for both certainty and consistency, the private elaboration of susbtantive behavior exacerbates the problem of uniform standards.

The problem of indirect employees, then, suggests the overlapping dimensions of the problem posed by any effort to formally regulate the behavior of economic entities across borders through law: the disjunction between moral obligations across borders in the construction of economic relationships across such borders, the multiple sources of values informing regulatory policy even within states, and the difficulties of transposing moral obligation into a substantive law of corporate social responsibility that effectively reaches across borders. Yet, despite these limits, it may be possible to construct a plausible system of mandatory regulation at the international level that adds value to economic activity without threatening the contemporary system of market based globalization. The foundation of that regulatory system is tied to monitoring, disclosure and reporting. These serve as both the aplication of an enforcement mechanics common to the private law of contract, and as the essence of modern soft regulation through the disciplines of informed choice.[21] From out of the means by which

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LEGAL STUD. 401, 405-06 (2001); Claire Moore Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 611, 649 (2001).

17. *See* JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 7-58 (2006).

18. For a taste of the critique, see, e.g., Blackett, *supra* note 16; Heidi S. Bloomfield, *'Sweating' the International Garment Industry: A Critique of the Presidential Task Force's Workplace Codes of Conduct and Monitoring System*, 22 HASTINGS INT'L & COMP L REV 567 (1999) (discussing more generally problems of enforcement and monitoring in voluntary codes of conduct for multilateral corporations).

19. For these reasons, some prominent elements of civil society have been skeptical of the value of a voluntary or private law based social responsibility regime. *See, e.g.*, Christian Aid, *Behind the Mask: The Real Face of Corporate Social Responsibility*, Jan. 21, 2004, http://www.christian-aid.org.uk (accessed Jan. 23, 2008).

20. *See, e.g.*, Michael Hopkins, *Corporate Social Responsibility Around the World*, 2 ONLINE J. OF ETHICS 1 (1998), *available at* http://www.stthom.edu/Public/index.asp?page_ID=3222 (follow "Corporate Social Responsibility Around the World by Michael Hopkins").

21. *See, e.g.*, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004). Scott Burris, Michael Kempa & Clifford

moral obligations are enforced among private parties may come a framework for creating a plausible hard law at the international level. This framework would provide incentives (either positive or negative) for international business to consider "public" goals without actually mandating those goals in any specific form—the market would make that determination. These incentives can be provided through law, but in a way that retains a strong sensitivity to the current market bias of globalization—and to the privileging of private arrangements among stakeholders principally involved in economic transactions.

For this purpose of providing incentives through law while retaining sensitivity to market bias, this essay posits a global system of monitoring and disclosure and transparency, of monitoring and surveillance. The object of these disclosure mandates would not be to establish a definitive set of behaviors, but rather to establish a framework within which corporate stakeholders—consumers, investors, labor, and others—could adjust their relationships on the basis of the behavior disclosed. In a sense, then, monitoring regimes can serve as a framework for incorporating moral obligations within a legal structure of relationships between economic actors, without hardwiring any particular set of ethical standards in law. It avoids both the problem of state intervention in corporate regulation and the difficulties of direct shareholder intervention in corporate activity.[22] Instead, market actors would help determine the taste for certain behaviors by doing what they ordinarily do—buy and sell shares, products, and engage in commercial transactions. For those in search of avenues for the implementation of corporate social responsibility at a transnational level, international agreements for transparency, disclosure and information dissemina-

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Shearing, *Changes In Governance: A Cross-Disciplinary Review Of Current Scholarship*, 41 AKRON L. REV. 1 (2008).

> Complexity, diversity, and particularity drive accounts of governance today. The structure of governance is most commonly described in network terms. Writers point to phenomena as diverse as the Internet, public-private partnerships, markets, informal policy networks at the international level, and 'whole of government' initiatives as examples of networked governance in action. Though there are differences in how the network metaphor is used, network accounts of governance tend to emphasize the importance of information flow as a means and measure of good governance. Those that have, and can use, information are at a significant advantage over those that are cut off from information or unable to gather or use it effectively. *Id.* at 4.

22. *See, e.g.*, Eric Engle, *What You Don't Know Can Hurt You: Human Rights, Shareholder Activism And SEC Reporting Requirements*, 57 SYRACUSE L. REV. 63 (2006) (on limitations on shareholder activism and a proposal to change securities laws to require expanded disclosure).

tion might be more effective as a means of hardwiring ethical obligations in the relationships between economic enterprises, than commanding obedience to any set of such obligations.

The essay then suggests that this sort of mandatory regulatory regime is *plausible* as international "hard" law for five reasons. First, a mandatory global monitoring system is plausible because it only requires of economic enterprises actions (the gathering and dissemination of information) that have been well internalized by the great majority of these entities. Economic entities harvest, use and report information all the time—for example to government regulators, to investors, and to consumers. This is not so much a new task as a modification of a core activity of business. Second, the sort of social disclosure to be targeted under international monitoring regimes is already being provided in large respect through private contract, for example in the context of supplier chain arrangements.[23] Third, information gathering has been a task long assigned to international and transnational public actors. This sort of regulatory activity is something well suited to that sort of organization. Moreover, the activity itself is something that can be originated at the international level and enforced at the level of the nation state. It invites the sort of partnership that might make states leery of the seepage of power up to the supra national level less concerned on that score. Fourth, international instruments already contain monitoring provisions. Thus, the international community already has the skill set necessary to draft this sort of hard law (as do the nation states that must approve such endeavors). Fifth, a number of frameworks that detail the sort of information that might plausibly be gathered and disclosed have already been developed by global civil society and public actors. The global community has been doing this, they know how to do this, and there is no objection in principle to the task of information gathering and disclosure.

The essay thus suggests a critical refocusing of the current discussion of the way that international law for the regulation of multinationals ought to be utilitized. The focus ought to turn away from the cultivation of systems of substantive norms to a more supervisory role in the construction of markets within which stakeholders can more readily assess their involvement. For that purpose, much of what has been

23. For a recent example involving Gap, Inc., see Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA J. OF INT'L & COMP. L. (forthcoming 2007-2008), *available at* http://lcbackerblog.blogspot.com/2007/10/multinational-corporations-as-objects.html [Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*].

produced at the international level, even those efforts recently discredited, could contribute to the form such systems take. For example, the disclosure portions of the now abandoned *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* ("*Norms*")[24] might provide useful insights for an international law of disclosure.[25] The *Norms* suggest the structure of an international disclosure system that is market driven. That system is based on an integrated system of public and private law. Though the *Norms* sought to impose a global system of substantive behavior norms on economic enterprises, its enforcement mechanics could be useful in structuring an international law system of disclosure that avoids substantive or values regulation. Monitoring under the *Norms* was based on contractual obligations to report on certain identified performance items. Those obligations ran to a number of public and private actors that could enforce those requirements. That sort of system, limited to

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24. *See* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. On Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/L.8 (Aug. 7, 2003) (*draft resolution prepared by* Alfonso Martinez et al.) (subsequently revised), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/6b10e6a7e6f3b747c1256d8100211a60?Opendocument; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. On Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?OpenDocument [hereinafter *Norms* 2003]. This is discussed in some detail in an earlier work. *See* Backer, *U.N. Norms*, *supra* note 11, at 287. For a discussion of the Norms by one of its principal architects, see David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

25. Of course, this essay is not the first place to suggest some form of this approach. For earlier work from other perspectives, see, e.g., Allen L. White, *Why We Need Global Standards for Corporate Disclosure*, 69(3) L. & Contemp. Probs. 167 (2006) (on the need for global disclosure standards); David Detomasi, *International Institutions and the Case for Corporate Governance: Toward a Distributive Governance Framework?*, 8(4) GLOBAL GOVERNANCE 421 (2002); Deborah Doane, *Market Failure: the Case for Mandatory Social and Environmental Reporting*, NEW ECONOMICS FOUNDATION, London (2002) (arguing for mandatory disclosure regimes); Claire Moore Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 611 (2001) (suggesting an international framework for good faith in relationships between direct and indirect employers and employees in developing labor standards); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (suggesting the need to broaden the scope of disclosure for publicly traded companies); Anthony Scaperlanda, *Multinational Enterprises and the Global Market*, 27(2) J. OF ECON. ISSUES 605-616 (1993) (suggesting an international organization for multinational enterprises). Each of these and others provide valuable insights. I hope to contribute to that dialog here from a different perspective.

the provision of information—the scope and content of which to be determined in international law—might provide a basis for public regulation. The form of that reporting, and perhaps even its content, is also being developed.

Yet initiatives developed by the global civil society community are also important in the elaboration of international law based monitoring and disclosure systems. The development of a variety of approaches to the so-called triple bottom line reporting already serves as a framework for disclosure—and for thinking about the sorts of facts and efforts that might be privileged by other stakeholders (other than merely profit performance).[26] Efforts undertaken by the Global Reporting Initiative to elaborate a system of surveillance and reporting, for example, can provide a basis for even a simple mechnics of moniotiring and disclosure.[27] Industry as well has begun to develop the notions of broadened disclosure into profitable lines of business.[28] Other efforts involved public and private partnerships.[29] The object is not so much to

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26. *See, e.g.*, ANDREW W. SAVITZ AND KARL WEBER, THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO (2006) (popularizing account of the broadened approach to reporting and defense that such a system makes economic sense for businesses); JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS 2 (1998) (introducing the triple bottom line concept and defining it to include economic, environmental and social considerations).

27. *See* Global Reporting Initiative, *Sustainability Reporting Guidelines*, Version 3.0 (2000-2006), http://www.globalreporting.org/ReportingFramework/G3Guidelines/; then follow "G3 Guidelines."

28. *See, e.g.*, Cristi L. Ford, *New Governance, Compliance, And Principles-Based Securities Regulation*, 45 AM. BUS. L. J. 1, 59-60 (2008); *see also, e.g.*, BetterManagement.com, Triple Bottom Line Reporting: A Strategic Introduction to Economic, Environmental and Social Performance Measurement (audio seminar) (July 13, 205), http://www.bettermanagement.com/seminars/seminar.aspx?L=12031, *and* Better Management.com, Triple Bottom Line Reporting: A Strategic Introduction to Economic, Environmental and Social Performance Measurement (audio seminar), http://www.bettermanagement.com/seminars/seminar.aspx?l=12032. Better Management is in business "to improve the leadership and decision making skills of business and government executives around the world. We address critical business management issues through online resources such as business articles and webcasts, in combination with BetterManagement LIVE Business Conferences." BetterManagement.com, about us, http://www.bettermanagement.com/whatis.aspx.

29. *See, e.g.*, Dahle Suggett & Ben Goodsir, *Triple Bottom Line Measurement and Reporting in Australia: Making It Tangible* (Jan. 6, 2002), *available at* http://www.allenconsult.com.au/publications/download.php?id=199&type=pdf&file=1 (part 1) and http://www.allenconsult.com.au/publications/download.php?id=199&type=pdf&file=2 (part 2) (business practices for being transparent and accountable through the use of 'triple bottom line' measurement and reporting). This project "was funded and supported by a range of public-sector departments and private-sector organisations, with the Prime Minister's Community Business Partnership as the

provide a working system of disclosure as to suggest its viability even with the resources and materials available today.

This essay critically assesses the viability of such a system in the context of markets driven economic globalization. It also suggests that such a system will work at the economic level only to the extent that it can be promoted as a mechanics to global market efficiency, avoids making substantive or values driven behavior choices, limits enforcement to the compliance with the information gathering and reporting requirements of the international framework and vests enforcement at the nation-state or private level. By thus avoiding a public choice for private values, and by fostering a global dialog on those values in which all elements of civil society might participate, a harmonized international system of monitoring and diclosure has the potential to provide a public law based flexible system through which to construct a market oriented basis for legal regulation of the behavior of multinational corporations that serves both the desires to ground regulation in public law and the necessity of vesting the power to determine the content of that behavior on the choices of non-governmental actors. Such systems of disclosure provide a structured and enforceable "opportunity to make corporate codes more consequential as instruments of ethical competition. It is now for those companies and stakeholders to decide what they will make of that opportunity."[30]

## II. MORAL OBLIGATION AND CORPORATE SOCIAL RESPONSIBILITY

### A. *The Foundations of Moral Obligation and Corporate Social Responsibility for Economic Entities*

The twenty first century has witnessed a great change in the debate about the scope of appropriate conduct in economic activity. From a singular belief in the strict separation of public and private law, and in the vesting of values (policy) objectives to public and individual (or institutional) wealth maximizing goals to the private, public institutions have sought to engage in market transactions, even of a sovereign

main sponsor. Its purpose was to explore current strands of thought and action in Australian companies about triple bottom line measurement and reporting, and to document existing and emerging practices. An international perspective was also included with input from companies in the United Kingdom." *Id.* at iii.

30. Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253, 294 (2005).

character[31] and private entities have acquired traditionally public functions.[32] The old boundaries, once so strong as to appear natural, have begun to be blurred. That blurring has produced a certain tension in the regulation of behavior, as law seeks to catch up to reality.

Traditionally the sole concern of academics and policy makers, the ethics of business conduct was once confined to issues of fraud and corruption. But, especially in its contemporary form as an increasingly elaborate system of behavior rules for business commonly known as corporate social responsibility,[33] the revolution in the ethics of business conduct,[34] and the relationship of such conduct rules to law,[35] has become a concern at quite modest levels of economic activity. Thus, for example, recently the ethicist Randy Cohen, whose column appears weekly in the New York Times Magazine, was asked about the bounds of appropriate business conduct in the conduct of a modest business with operations across borders.[36] The problem posed was both simple and to some extent served as a foundation for the problem posed in this paper:

> To afford to start a new business, I must use low cost foreign manufacturers, some of whom likely maintain unsafe working conditions. It is difficult to be certain from here. In the relevant country, many workers doing the tasks I'll require receive low wages and face serious health problems including chronic

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31. *See, e.g.*, David E. Pozen, *Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom*, 19 J.L. & POL. 253, 256 (2003); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83 (2003); Michael J. Trebilcock, Ron Daniels & Malcolm Thorburn, *Government by Voucher*, 80 B.U. L. REV. 205 (2000).

32. On the benefits and perils of privatizing governmental functions, see Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L. REV. 1 (1997); *see also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

33. *See, e.g.*, Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 AM. BUS. L.J. 261, 263 (2001); John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. Corp. L. 1 (2005); Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309 (2004).

34. For the U.S., see, e.g., Newberg, *supra* note 30, at 261-62 (describing the structure and content of various types of codes); Richard W. Painter, *Lawyers' Rules, Auditors' Rules and the Psychology of Concealment*, 84 MINN. L. REV. 1399 (2000). For the European variant, see Stefan Grundmann, *The Structure of European Company Law: From Crisis to Boom*, 5 EUR. BUS. ORG. L. REV. 601 (2004).

35. In the context of voluntary codes, the relation to law provides the framework for elaborating the appropriate behavior norms. *See, e.g.* OECD Guidelines, *supra* note 15.

36. *See* Randy Cohen, *The Right Hires*, THE N.Y. TIMES MAGAZINE, Jan. 13, 2008, at 18.

> colds, fever, stomach disorders, chest pains, and tuberculosis. Is it wrong to start my business in this way? (Name withheld New York).[37]

This was a problem that would not have existed even twenty years ago. Certainly, from a legal perspective, there would be no problem at all. Consider the nature of the transactions: one enterprise is seeking to buy a product from another enterprise. From the perspective of law, the focus is on the commodity to be acquired. The legal documents memorializing the agreement between the parties would reflect that focus. The principal terms of a complete agreement between the parties would center on the usual issues of contract: (1) the amount of product ordered, (2) the price of the good, (3) delivery terms, (4) payment terms, (5) representations and guarantees about the suitability of the product, and (6) remedies for breach. As autonomous entities responsible to their principal stakeholders (investors) and competing for larger and more profitable shares of the markets they serve (firm consumers), neither would have invested much time or thought to the methods, objects or conditions through which either met their respective obligations under the contract.

Profit maximization in this narrow sense, not values, was the touchstone of economic relations.[38] That understanding drove the law of economic relations. To the extent values mattered, they did so only at the margins. Businesses were entitled to presume that their counterparts also acted within some sort of acceptable moral parameters (at least acceptable within the society and culture in which they operated). Only when it was apparent that this was not the case—when a business *knew* that a potential relationship involved entanglement with a company known to have a bad reputation—would the contracting party be bound to think through the effects of entering into a relationship with that badly reputed firm. These notions were tightly bound up with the law of fiduciary duty in the United States and served as a foundation for appropriate behavior among business enterprise managers.[39]

And so, a quarter century or so ago, the ethical answer might have

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37. *Id.*

38. *See, e.g.*, Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993). *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133–34 (1962).

39. *See* Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125 (Del. 1963) ("absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists").

been simple: there is no positive moral obligation to ensure that the parties with which one contracts treat their own workers decently. Indeed there is a moral obligation, grounded in respect for the autonomy of individuals and the entities they create, to avoid interfering with the affairs of people and entities with which one has only a limited and specific relation—in this case to purchase goods. The limits of their economic relations define and limit the extent of their moral obligations. However, were the contracting parties to become aware of conditions that violated standards of conduct that were meaningful to that party—for example, a party seeking to manufacture goods through another entity discovers that the entity treated their workers so badly that the workers sickened—then, as a result of that knowledge, action might be required.[40] But there was no positive obligation to find out, nor an obligation to broaden the scope of contractual relations in contracts for goods to include, this social component. The scope of liability, thus was quite narrow.[41]

But today, the answer is different—both as a matter of values, and increasingly, as a matter of law. Mr. Cohen suggests that change, and also its limitations, in his response.

> It is your moral obligation to see that those who work for you even indirectly—those from whose labor you profit, receive decent treatment. While wages and working conditions vary internationally, nobody's idea of "decent" encompasses "chronic colds, fever, stomach disorders, chest pains and tuberculosis," even in developing nations even where people badly need jobs. . . .[42]

And so, the ethical answer to the question is different in 2008. Economic relationships may now be judged by a different standard. This standard now rejects the traditional basis of decision—that economic decisions must be based on welfare maximization tied to a

40. *See, e.g.*, Shirley Lung, *Exploiting The Joint Employer Doctrine: Providing A Break For Sweatshop Garment Workers*, 34 LOY. U. CHI. L. J. 291, 311 (2003) (looking at possible development of joint employee doctrine; "Thwarted by the futility of seeking recovery from marginal contractors, workers have pursued an array of strategies to affix liability on apparel manufacturers for substandard working conditions.").

41. For an interesting discussion, see Philip Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493 (2002).

42. *See* Cohen, *supra* note 36.

maximization of the value of the objects produced by the enterprise—as overly narrow. Instead, the economics of the transactions must be understood in the context of all of the factors of the production of objects (labor and capital) and measures efficiency and wealth production from the perspective of individual stakeholders.[43] Under this framework, the obligations of economic actors may not be disregarded by outsourcing any aspect of production.[44] Moral obligation, understood within the framework of one or another source of a values based economics, suggests not only the appropriate conduct, but also points to the economic value of that conduct for both parties.[45] Ensuring the labor conditions of the supplier's employees increases the welfare of the primary stakeholders in the production of the goods.[46] That this result is not compelled by public law should be of little effect. It intimates, instead, that private values maximizing choices might have to be memorialized in contract rather than in law. This is a result that has been recognized in recent attempts in international law to provide a framework for the regulation of the conduct of multinational corporations.[47] And in this case, private obligation and advantage converges in the requirement that the purchaser ensure minimally acceptable labor conditions of his supplier's operations.

But why is it immoral, that is, from where can a business legitimately draw a conclusion of the immorality of a particular action? The answer is not necessarily self-evident. Nor is it easily susceptible to a single response. Still, in contemporary discourse, there are several potential sources of an answer to the question. In the non-Muslim world, for instance, Jews and Catholics, for example, might suggest faith grounded reasons. For Jews it might be based on moral ramifications of Godliness elaborated in Leviticus, Numbers and Deuteronomy and implemented through the Talmud. Catholics might understand this obligation

43. For example, for the National Australia Bank, "CSR is about making a contribution to society through creating value, both short and long-term, for our shareholders, customers, employees and other key stakeholders, and it reflects our understanding of the role financial institutions play in the strength and sustainability of the communities in which we operate." National Bank of Australia, Sustainability Review, http://www.nabgroup.com/0,,76548,00.html.

44. *See, e.g.*, Jordan Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2002).

45. *See, e.g.*, DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY (2005).

46. *See, e.g.*, Drusilla K. Brown, Alan V. Deardorff, & Robert M. Stern, *The Effects of Multinational Production on Wages and Working Conditions in Developing Countries* NBER Working Paper No. W9669 (May 2003), *available at* http://ssrn.com/abstract=403640.

47. *See* Backer, *U.N. Norms, supra* note 11, at 292.

through a different elaboration of Godliness, grounded in the meaning of the Incarnation, Passion and Resurrection.[48] Both might extract from faith in a particular vision of God and God's relationship with humanity a set of precepts and conduct norms inherent in people seeking a closer relation to God—love of neighbor as the groundnorm of a values maximizing social and economic order.[49] Under these regimes, it is almost self-evident that there is a "moral obligation to see that those who work for you even indirectly."[50] Indeed, Catholic social thought has suggested that economic entities have moral obligations to people generally[51] and to indirect employees.[52]

Yet, one does not need the comfort of faith to arrive at a similar conclusion. The last half of the 20th century has seen the rise of values based economics.[53] Socio-economics,[54] and particularly so-called binary economics, have infused economic analysis with social justice values.[55] From either it might be possible to derive the idea that an economic theory that privileges *objects* of production (in the form of wealth or production or consumption) subordinates *people* to things distorts both the meaning and the measurement of welfare maximization. To correct that distortion, the focus of analysis must either focus on people rather than the objects of their consumption or must at least privilege labor and capital equally. In either case, economic relationships that take no account of the conditions of labor used to produce objects (or render services) would not be welfare maximizing in the sense in which such terms ought to be understood, and thus would be inefficient.

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48. *See generally* Larry Catá Backer, *Values Economics and Theology: The Contribution of Catholic Social Thought and Its Implications for Legal Regulatory Systems*, LAW AT THE END OF THE DAY, Jan. 12, 2008, http://lcbackerblog.blogspot.com/2008/01/values-economics-and-theology.html (discussing recent developments in Catholic social thought and economic theory).

49. *Id.*

50. *See* Cohen, *supra* note 36.

51. *See, e.g.*, Michael Novak, *A Philosophy of Economics*, 1 U. ST. THOMAS L. J. 791 (2004).

52. *See* Joannes Paulus PP.II, Laborem Exercens § 16-17 (1981), *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html.

53. For an example aimed at a popular audience, see JOEL LEFKOWITZ, ETHICS AND VALUES IN INDUSTRIAL-ORGANIZATIONAL PSYCHOLOGY (2003). *See also* ETHICS AND ECONOMIC AFFAIRS (Alan Lewis & Karl-Erik Warneryd eds. 1994).

54. *See generally* essays in MORALITY, RATIONALITY, AND EFFICIENCY: NEW PERSPECTIVES ON SOCIO-ECONOMICS (Richard M. Coughlin ed., 1991).

55. *See generally* LOUIS O. KELSO & MORTIMER J. ADLER, THE CAPITALIST MANIFESTO (1958); LOUIS O. KELSO & MORTIMER J. ADLER, THE NEW CAPITALISTS: A PROPOSAL TO FREE ECONOMIC GROWTH FROM THE SLAVERY OF SAVINGS (2000); Robert Ashford, *The Socio-Economic Foundation of Corporate Law and Corporate Social Responsibility*, 76 TUL. L. REV. 1187 (2002).

Law has taken a few short steps to privilege—or at least to acknowledge—this position shift. Corporate social responsibility has exploded as a regulatory issue in the 20th century.[56] And it has become a matter of interest to public regulators, especially outside of the United States.[57] Starting as an issue of the extent of the charitable obligations of economic entities—effectively an issue tied to the extent to which juridical entities might be able to act like natural persons—corporate social responsibility now serves as a proxy for a dynamic set of complex and self-referencing norms significantly affecting the way in which economic entities engage in economic transactions.[58] That transformation has paralleled the debates within economics over its own scope and character. Just as values economics has shifted the basis for understanding the nature and measurement of economic value for welfare maximization purposes, so has corporate theory begun to suggest an alternative to the traditional view that economic entities are inward looking institutions with obligations running only to its shareholders.[59] Corporate social responsibility suggests a theory of enterprise operation grounded in the treatment of economic entities as institutional individuals with obligations to all other individuals with which it engages in transactions or interactions.[60] Enterprise liability, piercing the corporate veil theories, extended jurisdictional theories, and extended notions of fiduciary duty are all tentative legal steps in the direction of extended obligation. But these are tentative steps indeed.[61] And there has been a substantial scholarly effort to urge the

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56. "The modern CSR movement has, however, been given extra momentum by more fundamental and wide-ranging concerns about the international economic system, how it is run and the role of corporations within it." JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 18 (2006).

57. *See, e.g.*, European Commission Directorate General for Employment and Social Affairs, *Corporate Social Responsibility: National Public Policies in the European Union* (Jan. 2004), *available at* http://ec.europa.eu/employment_social/publications/2004/ke1103005_en.pdf.

58. *See* Backer, *U.N. Norms*, *supra* note 11, at 298.

59. "Overall, the CSR movement has brought about a change in emphasis in the debate about multinationals. Reflecting a shift from a 'state-centred' to a 'market-dominated' world, greater prominence is now given to 'people-centred' (as opposed to 'state-centred') concerns." ZERK, *supra* note 56, at 23.

60. *See* Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 184-86 (1997). For an interesting twist on this notion grounded on a contractarian theory of the enterprise, *see* Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1194-96 (1991).

61. *See generally* PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW (2d ed. 2007).

extension of the power of hard international law, principally human rights law, to the actvities of economic actors.[62] But these efforts are still limited in effect.[63]

### B. *The Difficulties of Transposing Moral Obligation into a Substantive Law of Corporate Social Responsibility*

It was not for nothing that the ethicist suggested moral rather than legal obligation as the basis of the suggested behavior. One of the great problems of translating values into positive law is the lack of consensus, sometimes intense, of both a particular system of values that ought to be transposed into law,[64] and an understanding of the meaning of corporate social responsibility as the policy rubric through which such transposition is to be measured.[65] As a consequence, the ethical insights of the problem posed above has given rise to the institutionalization of a wide variety of approaches to the problem of the responsibility of corporate actors beyond the narrow group of direct financial stakeholders. Soft law, the private law of contract, and the private choices of groups of stakeholders, more broadly defined, has served as the foundation of the regulation of corporate social responsibility.[66] Moral obligation is not directly tied to the political infrastructure of

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62. *See, e.g.*, Jordan Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2002); Sara Joseph, *Taming the Leviathans: Multinational Enterprises and Human Rights*, 46 NETHERLANDS INT'L L. REV. 171 (1999); JANET DINE, COMPANIES, INTERNATIONAL TRADE AND HUMAN RIGHTS (2005); Maria McFarland Sanchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 FORDHAM INT'L L.J. 1663, (2004); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 11 YALE L.J. 443, 475-86 (2001).

63. *See* Andrew J. Wilson, *Beyond Unocal: Conceptual Problems in Using International Norms To Hold Transnational Corporations Liable Under the Alien Tort Claims Act*, *in* TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 43 (Olivier de Schutter ed., 2006).

64. These disagreements are commonly exposed in reports meant to reach non-academic or elite audiences. *See, e.g.*, Betsy Adkins, *Is Corporate Social Responsibility Responsible?*, FORBES, Nov. 28, 2006, *available at* http://www.forbes.com/2006/11/16/leadership-philanthropy-charity-lead-citizen-cx_ba_1128directorship.html,

65. *See, e.g.*, Halina Ward, *Globalisation, Corporate Responsibility, and Legal Ethics*, 1 U. ST. THOMAS L. J. 813, 817 (2004). For an interesting critique from the perspective of an author highly suspicious of the move away from traditional corporate values that nicely evidences the extent and emotional impact of the debate, see JAROL B. MANHEIM, BIZ-WAR AND THE OUT-OF-POWER ELITE: THE PROGRESSIVE-LEFT ATTACK ON THE CORPORATION (2004).

66. This has served, of course, as the basis for much of the work of the Organization for Economic Development and Cooperation. *See* Bill Witherell, *Corporate Governance and Responsibility: Foundations of Market Integrity*, OECD Observer, No. 234 (Oct. 2002), *available at* http://www.oecd.org/dataoecd/39/43/1840502.pdf (last visited Feb. 24, 2008).

global governance. But the leap from soft to hard law, at either the domestic or international level, has been difficult.[67]

In working through the basis of moral obligation, it became clear that there are a number of competing, and not necessarily consistent, frameworks for the elaboration of values systems governing moral conduct. There is no consensus on the legitimacy of moral obligation, even in its form as values-based economics, in either its secular or theological forms, as a basis for domestic, much less international legislation. There is still a strong element that rejects the idea of values in economic theory and in its use to justify any sort of imposition of non-profit maximizing obligations (narrowly confined to direct participants in the economic enterprise) on such enterprises.[68] Even among those for whom values economics is legitimate, there is a wide range of views about the constitution of the values to be applied.[69]

Moreover, there is no consensus on the extent of the obligations of economic entities.[70] The traditional position in the West, solidified over the last half century, is that a corporation has an obligation to its principal stakeholders.[71] In the United States, that usually is limited substantially to shareholders;[72] in other countries it may be expanded to include other actors closely connected with ownership stakes in the

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67. For a sample of the arguments seeking to find a principled method of justification for that leap within the current legal framework, see NICOLA M.C.P. JAGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 8-9 (2002); Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises, in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 75, 78-79 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 394 (2005).

68. For the classic exposition, see generally MILTON FRIEDMAN, MILTON, CAPITALISM AND FREEDOM (2002).

69. *See* Larry Catá Backer, *Values Economics and Theology: The Contribution of Catholic Social Thought and its Implications for Legal Regulatory Systems*, LAW AT THE END OF THE DAY, Jan. 12, 2008, *available at* http://lcbackerblog.blogspot.com/2008/01/values-economics-and-theology.html (accessed Feb. 3, 2008).

70. *See* John H. Dunning, *Towards a New Paradigm of Development: Implications for the Determinants of International Business Activity*, 15 TRANSNAT'L CORPS. 173 & N. 1 (2006). For a discussion from a traditional economics perspective, see, e.g., JOE B. STEVENS, THE ECONOMICS OF COLLECTIVE CHOICE 75-94 (1993).

71. *See, e.g.*, JAMES POST, LEE PRESTON, & SYBILLE SACHS, REDEFINING THE CORPORATION: STAKEHOLDER MANAGEMENT AND ORGANIZATIONAL WEALTH (2002).

72. *See* Lyman Johnson & David Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846, 848 (1989) (discussing the origin of the label shareholder primacy); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253-54 & nn.15-16 (1999) (listing scholarly literature supporting this view of shareholder primacy). On the approach of the Delaware courts, see, e.g., Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate*

company.[73] Beyond that circle of privileged actors, the corporation is believed to have no obligation, unless that obligation is specially defined by law or contract. But law ought not to extend the obligations of corporations beyond the requirement to maximize the wealth of its shareholders except in special circumstances. The law of fiduciary duty in the United States recognizes both this duty and its limits.[74] Shareholder welfare maximization is mandatory; the welfare interests of others is permitted as long as it can be justified in terms of shareholder welfare interests.[75] The progressive position has a number of variations. One important variation posits that corporations ought to be legally obligated to maximize the welfare of a broadly defined group of stakeholders. These can include any number of groups—from labor, to consumers, local residents near corporate operational sites, trade partners, suppliers and others.[76] Another suggests that economic entities have social obligations at least co-extensive with their social, political and policy effects on the places where they operate or where their actions can be felt.[77] At its broadest, adherents of this perspective posit very little distinction between public and private collectives, and their

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*Life and Corporate Law*, 68 TEX. L. REV. 865 (1990); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201.

73. "It is logically impossible to maximize in more than one dimension at the same time unless the dimensions are 'monotonic transformations' of one another. . . . The result [of instructing a manager to maximize more than one] will be confusion and lack of purpose that will fundamentally handicap the firm in its competition for survival." Michael C. Jensen, *Value Maximization, Stakeholder Theory and the Corporate Objective Function*, 14 J. APPL. CORP. FIN. 8, 10-11 (2001).

74. *See generally* ABA Comm. on Corp. Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253 (1989). *See also* Thomas A. Smith, *The Efficient Norm for Corporate Law: A Neotraditional Interpretation of Fiduciary Duty*, 98 MICH. L. REV. 214 (1999); Faith Stevelman Kahn, *Transparency and Accountability: Rethinking Corporate Fiduciary Law's Relevance to Corporate Disclosure*, 34 GA. L. REV. 505, 524 (2000).

75. "[A] corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain." American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 2.01 (1994) (The Objective and Conduct of the Corporation).

76. *See, e.g.*, Lisa M. Fairfax, *Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771 (2007); Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 647 (2006) (citing Merrick Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1156 (1932)); Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 87, 89-93 (2005).

77. *See, e.g.*, Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389 (2002); Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309 (2003).

respective obligations to individuals.[78]

Given these foundational differences in a theory of the nature of the responsibility of corporations,[79] it comes as no surprise that there appears to be no consensus on a framework for transposition. The website of the Australian Prime Minister's Community Business Partnership correctly notes both the common understanding in this respect and the difficulties it presents for turning definition into legislative program.[80] They note a cluster of related commonly used definitions of corporate social responsibility. One is "[t]he commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life."[81] Another is "[t]he integration of business operations and values whereby the interests of all stakeholders including customers, employees and investors, and the environment are reflected in the company's policies and actions."[82] The Brazilian NGO, Instituto Ethos, has developed a more elabore definition, one that specifically draws out the blurring of the public and private roles of

78. *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The Realization of Economic, Social, and Cultural Rights: The Relationship Between the Enjoyment of Human Rights, in Particular, International Labour and Trade Union Rights, and the Working Methods and Activities of Transnational Corporations*, U.N. Doc. E/CN.4/Sub.2/1995/11 (July 24, 1995) (*prepared by* The Secretary-General), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/716804351e67ab3c802566b2004f1cbf?Opendocument. The "increased locational mobility of TNC's and their monopolistic and oligopolistic tendencies have increased the bargaining power of TNC's and have been associated with a loss of decision-making capacity by States, especially in developing countries." *Id.* ¶ 99.

79. "Unfortunately, there is no consensus definition; in fact, CSR has suffered numerous and contradictory characterizations." Brian W. Husted & David B. Allen, *Corporate Social Responsibility in the Multinational Enterprise: Strategic and Institutional Approaches*, 37 J. INT'L BUS. STUD. 838, 839 (2006). *See also* Elisabet Garriga & Domènec Melé, *Corporate Social Responsibility Theories: Mapping the Territory*, 53 J. BUS. ETHICS 51 (2004).

80. They note, for example, that "[i]t is not possible to define corporate social responsibility precisely. The language surrounding the concept of CSR is still evolving and can be confusing—especially when reduced to acronyms! For example, CSR is linked to (and in some cases used interchangeably with) related terms and ideas such as corporate sustainability (CS), corporate citizenship (CC), corporate social investment (CSI), the triple bottom line (TBL), socially responsible investment (SRI), business sustainability and corporate governance." The Prime Minister's Community Business Partnership, Australia, http://www.partnerships.gov.au/csr/index.htm (last visited Jan. 25, 2008).

81. WORLD BUS. COUNCIL FOR SUSTAINABLE DEV., CORPORATE SOCIAL RESPONSIBILITY: THE WBCSD'S JOURNEY 2 (2002), *available at* http://wbcsd.org/DocRoot/I0NYLirijYoHBDflunP5/csr2002.pdf.

82. The Corporate Social Responsibility Newswire—About Us, http://www.csrwire.com/about (last visited Feb. 23, 2008).

economic entities.[83] The World Economic Forum has also advanced its own definition of corporate social responsibility as corporate citizenship.[84] Academic institutions have also sought to participate in the construction of meaning.[85] Many economic entities use their own definitions.[86]

But differences even at the margin can translate into substantial differences in an enterprise's approach to its corporate social responsi-

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83. *See* Instituto Ethos, Vision, http://www.ethos.org.br/DesktopDefault.aspx?TabID=3891&Alias=ethosEnglish&Lang=pt-BR (last visited Feb. 25, 2008):

> When companies adopt a socially responsible behavior, they become powerful agents of change to build, along with governments and civil society, a better world. This behavior is characterized by an ethical coherence in their actions and relationships with the various publics with which they interact, contributing to the continuous development of peoples, communities, and the relationships between themselves and the environment. *Id.*

84. WORLD ECON. FORUM, GLOBAL CORPORATE CITIZENSHIP: THE LEADERSHIP CHALLENGE FOR CEOS AND BOARDS (2003), *available at* http://www.weforum.org/pdf/GCCI/GCC_CEOstatement.pdf.

85. *See, e.g.*, Boston College Center for Corporate Citizenship – What is Corporate Citizenship?, http://www.bcccc.net/index.cfm?fuseaction=Page.viewPage&pageID=567 (last visited Feb. 19, 2008).

86. For a review of the definitions used by a number of economic enterprises, see, e.g., Boston College Center for Corporate Citizenship–Corporate Social Responsibility Statements: *Defining Corporate Citizenship and Social Responsibility*, http://www.bcccc.net/index.cfm?fuseaction=Page.viewPage&pageId=596&parentID=477 (last visited Jan. 28, 2008). Starbucks, for example, has sought to blend principles of CSR into its core mission statement:

> Establish Starbucks as the premier purveyor of the finest coffee in the world while maintaining our uncompromising principles as we grow. The following six guiding principles will help us measure the appropriateness of our decisions: Provide a great work environment and treat each other with respect and dignity. Embrace diversity as an essential component in the way we do business. Apply the highest standards of excellence to the purchasing, roasting and fresh delivery of our coffee. Develop enthusiastically satisfied customers all of the time. Contribute positively to our communities and our environment. Recognize that profitability is essential to our future success. Starbucks is committed to a role of environmental leadership in all facets of our business. We fulfill this mission by a commitment to: Understanding of environmental issues and sharing information with our partners. Starbucks is committed to a role of environmental leadership in all facets of our business. We fulfill this mission by a commitment to: Understanding of environmental issues and sharing information with our partners. Developing innovative and flexible solutions to bring about change. Striving to buy, sell and use environmentally friendly products. Recognizing that fiscal responsibility is essential to our environmental future. Instilling environmental responsibility as a corporate value. Measuring and monitoring our progress for each project. Encouraging all partners to share in our mission.

*See* Starbucks.com, Starbucks Mission Statement, http://www.starbucks.com/aboutus/environment.asp (last visited May 31, 2008).

bility as a matter of institutional practices. Even vaguely worded voluntary efforts with a substantive focus on which there may be general agreement can lack precise meaning. John Ruggie noted that "Many of the GC's principles cannot be defined at this time with the precision required for a viable code of conduct. No consensus exists on what 'the precautionary principle' is—that in the face of environmental uncertainty the bias should favor avoiding risk–even though it was enshrined at the 1992 Rio Conference."[87] This failure to agree on the basics extends to foundational concepts as well. Ruggie noted that "no consensus exists, even among advocates, on where to draw the boundaries around corporate "non-complicity" in human rights abuses."[88] Moreover, "the ambiguity of goals in the CSR area may motivate the CSR department to model itself after other areas within the firm that are perceived as more successful."[89] It tends to lead to a "difficulty in identifying the program's specific economic and social objectives."[90]

Yet simple statements of CSR principles do not necessarily eliminate this difficulty. The approach of the Sony Group perhaps provides a good example. Sony provides a simple formulation of its CSR principles.[91] But even this simple statement belies a complexity hinted at by the implementation chart provided to aid in the interpretation of this simple statement.[92] These include three not necessarily consonant core

87. John Gerard Ruggie, Symposium, *Trade, Sustainability and Global Governance*, Keynote Address, 27 COLUM. J. ENVTL. L. 297, 304 (2002).

88. *Id.*

89. Brian W. Husted & David B. Allen, *Corporate Social Responsibility in the Multinational Enterprise: Strategic and Institutional Approaches*, 37 J. INT'L BUS. STUD. 838, 842 (2006) (citing a study of Mexico's Cemex corporation).

90. *Id.* (citing J. Salazar, La Responsabilidad Social de la Empresa: Teoría y Evidencia para México (2006) (Ph.D. dissertation, Universidad Autonoma de Nuevo Leon) ("Given the inability to articulate such goals, CSR organizations within firms will look to economically successful counterparts in production, marketing, and other areas to structure their activities.").

91. Sony's Views on Corporate Social Responsibility, http://www.sony.net/SonyInfo/Environment/about/index.html.

> The core responsibility of the Sony Group to society is to pursue the enhancement of corporate value through innovation and sound business practices. The Sony Group recognizes that its businesses have direct and indirect impact on the societies in which it operates. Sound business practices require that business decisions give due consideration to the interests of Sony stakeholders, including shareholders, customers, employees, suppliers, business partners, local communities and other organizations. The Sony Group will endeavor to conduct its business accordingly. *Id.*

92. *See id.*

objectives (contributing to a sustainable society, increasing corporate value, and earning the trust of stakeholders), implemented in three potentially interconnected ways (innovation, sound business practices, and stakeholder communication), all targeted to eight stakeholder groups (shareholders, customers, employees, Sony, suppliers, business partners, local communities and other organizations).[93]

But corporate efforts to articulate CSR standards can also lead to complexity that makes implementation perhaps even more problematic. The Hitachi Group perhaps nicely exemplifies each of these elements of dynamism, behavior, ambiguity and complexity.[94] The Hitachi Group's corporate social responsibility matrix is organized through its "CSR Concept."[95] That "CSR Concept" is based on a "fundamental credo," and a "CSR Policy" connected together by the Hitachi mission statement:

> Based on the founding concepts stated in our fundamental credo, the Hitachi Group's mission is to "contribute to the solution of fundamental global issues, and to pursue the realization of a better and more prosperous global society utilizing the collective strengths of the Hitachi Group, characterized by its knowledge and technology." This also defines our CSR vision. To fulfill this mission, we formulated the "CSR Policy of the Hitachi Group" in March 2005 as a Group-wide policy, and are building a structure for global CSR promotion.[96]

The Hitachi "fundamental credo" provides the values basis of its behavior code: "The basic credo of Hitachi is to further elevate its founding concepts of harmony, sincerity and pioneering spirit, to instill a resolute pride in being a member of Hitachi, and thereby to contribute to society through the development of superior, original technology and products."[97] These concepts tie the entirety to its surroundings. "Deeply aware that a business enterprise is itself a member of society, Hitachi is also resolved to strive as a good citizen of

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93. *See id.*

94. *See* HITACHI GROUP, CORPORATE SOCIAL RESPONSIBILITY REPORT 2007 (2007), *available at* http://www.hitachi.com/csr/csr_images/khoukoku2007.pdf.

95. The Hitachi Group's corporate social responsibility matrix is organized through its "CSR Concept." *Id.* at 14.

96. *Id.* at 14.

97. *Id.* at 14 (discussing Hitachi's Fundamental Credo, Adopted June 1983, revised September 1996).

the community towards the realization of a truly prosperous society and, to this end, to conduct its corporate activities in a fair and open manner, promote harmony with the natural environment, and engage vigorously in activities that contribute to social progress."[98]

From this high theory, the "CSR Policy of the Hitachi Group",[99] then reduces itself to eight numbered implementation goals: "1. Commitment to Corporate Social Responsibility (CSR); 2. Contribution to Society through Our Business; 3. Disclosure of Information and Stakeholder Engagement; 4. Corporate Ethics and Human Rights; 5. Environmental Conservation; 6. Corporate Citizenship Activities; 7. Working Environment 8. Responsible Partnership with Business Partners." The interpretive flexibility these provide permit the company to continue to say it adheres to strong policies of corporate social responsibility, while leaving it substantially free to determine the manner in which that commitment is to be implemented. The key to that flexibility, though, for purposes of consumer and investor relations—as well as for credibility with the media as a legitimating force[100]—is that Hitachi can more strongly argue that it has both embraced corporate social responsibility and that it is actually achieving its objectives as interpreted by it. Hitachi Group is by no means unique.[101]

Moreover, as anyone familiar with issues of statutory interpretation are well aware, even commonly understood terms can give rise to ambiguity.[102] For example, the definition of stakeholders, the articulation of the relationship between these stakeholders (among each other and between them and the enterprise), or the formulation of the objectives of the enterprise itself can produce significant variation in the implementation of corporate social responsibility programs. Consider by way of example an obligation to adhere to labor standards.[103] If

98. *Id.* at 14.

99. *Id.*

100. For a discussion of the critical role of the media—print, electronic, and video—in legitimating perceptions of "truth," "reality" and "significance" see, Backer, *Wal-Mart as Global Legislator, supra* note 13.

101. A similar analysis is possible for other corporate efforts to define and implement CSR. *See, e.g.*, Starbucks Mission Statement, available http://www.starbucks.com/aboutus/environment.asp, supra, note 103.

102. *See generally* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION (2000). (A basic text on the legislative process and the rules, sometimes binding, sometimes not, that courts and legislatures have created to interpret statutory text).

103. The formulation for adherence to labor standards varies, sometimes considerably. For an assessment of a number of the variations in corporate CSR codes, including provisions on

corporate social responsibility is understood to mean a strict adherence to local law, then in states where labor protections are weak, the obligations of corporations are correspondingly small, and vice versa. If the corporate social obligation also includes an obligation to refrain from interference in the political affairs of a host country then the multinational corporation would have a positive obligation to avoid any action that might contribute to the strengthening of host country labor laws. But if the obligation is to adhere to a standard to provide a living wage to local employees, then several questions arise[104]—does that require the corporation to ignore the local legal structure and import its own notions of wages?[105] Does the obligation then extend to a duty on the part of the corporation to lobby for higher legal wages with the host country government? Can that lobbying obligation be harmonized with the non-interference duty? Does the obligation with respect to wages extend to indirect employees? Moreover, as the Hitachi Group CSR effort suggests, these definitions are general enough to produce a multitude of ambiguity—a charge often leveled by social and human

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labor, see, MAQUILA SOLIDARITY NETWORK, TRANSPARENCY REPORT CARD 2006, PART III INDIVIDUAL COMPANY REPORT CARDS, http://en.maquilasolidarity.org/sites/maquilasolidarity.org/files/RevealingClothing_CompanyReportCards.pdf.

104. Certain NGO's have made the issue of adoption of a living wage standard rather than a compliance with local law standard, a basis for multinational corporation CSR codes.

> Oxfam International and a number of other civil society organisations and trade unions are committed to encouraging sports companies to uphold all relevant International Labour Organisation (ILO) conventions and ensure that workers employed in company supply chains are paid a living wage. Oxfam International defines a living wage as one which for a full-time working week (without overtime) would be enough for a family to meet its basic needs and allow a small amount for discretionary spending.

Oxfam International, Tim Connor & Kelly Dent, *Labour rights and sportswear production in Asia* (2006), *available at* http://www.oxfam.org/en/files/offside_labor_report.

105. For a discussion of some of the conceptual issues in formulating and implementing a living wage standard, see, David Steele, *The 'Living Wage' Clause in the ETI Base Code—How to Implement it?* (June 2000), http://www.ethicaltrade.org/Z/lib/2000/06/livwage/index.shtml. But implementation is never easy. "While the company's commitment to a living wage was never in question, methodological challenges raised by implementation were by no means undemanding. Numerous different conceptual approaches and methodologies have been proposed to calculate a living wage—taking into account geographically specific data on household expenditure (e.g., food, housing, healthcare, education, transportation, childcare) for varying family sizes and places of residence." World Business Council for Sustainable Development, *Case Study, Novartis: Implementing a Living Wage Globally, available at* http://www.wbcsd.org/includes/getTarget.asp?type=d&id=MjQ2ODc.

rights NGOs.[106] For example, it is not clear whether the social obligations suggest local or global standards of society, and it is less clear how the standards apply where there may be conflicts among equally privileged stakeholders.

Even if there were consensus on the value of corporate social responsibility in general and its particular manifestation, there is no consensus on the locus of regulatory power.[107] Many states continue to adhere to the view that only political states ought to remain the

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106. "These codes have been effective in changing some corporations' conduct, but they have shortcomings. They are typically written without consultation with the workers most affected, many of whom are not even aware of their company's code. They are usually written in vague language which looks good in corporate brochures but avoids some of the stickier human rights issues, such as how to do business in a country that bars labor unions, restricts the rights of women, guards company facilities with abusive soldiers, or uses joint-venture revenue to fund military abuses. With notable exceptions, the codes generally give independent organizations no formal role in monitoring compliance. They commonly address only workplace issues and the conduct of subcontractors, not broader societal concerns." HUMAN RIGHTS WATCH, WORLD REPORT 2001, INTRODUCTION, VOLUNTARY CODES OF CONDUCT, *available at* http://www.hrw.org/wr2k1/intro/intro04.html. For a discussion of differences in NGO approaches to CSR, see, e.g., Jonathan P. Doh and Terrance R. Guay, *Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective*, 43 J. MGT. STUD. 47 (2006), *available at* http://ssrn.com/abstract=875049.

107. For a discussion in the context of the failure of the *Norms*, see, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶¶ 54-69, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) (*prepared by* John Ruggie), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement. Instructive is the response by a group of influential elements of civil society to the John Ruggie's Interim Report on the failure of the *Norms*:

> We encourage you to expand your analysis of legal issues and consider developments in international law since the adoption of the Universal Declaration of Human Rights and the increasing relevance of human rights and humanitarian law to non-state actors. We strongly encourage you to take into consideration the growing body of legal jurisprudence and doctrine concerning the direct applicability of international law to private actors . . . . We respectfully call on you, as you embark on the next phase of your mandate, to build on existing efforts and to move beyond existing frameworks and the *status quo*. In particular we hope you will give further consideration to the question of "what the law should be," and we hope that you will not hesitate to make recommendations about the means by which appropriate legal standards might be elaborated, adopted and, eventually, implemented.

Letter from Ninety Two Non-Governmental Organizations and Fifteen Individuals, to Professor John Ruggie, Special Representative on Human Rights and Transnational Corporations and other Business Enterprises (May 18, 2006), *available at* http://www.reports-and-materials.org/Joint-NGO-comments-on-Ruggie-interim-report-18-May-2006.doc.

privileged site for economic regulation. Though they might come together for the purpose of effecting conventions and other forms of particular purpose positive international law, they have little stomach for the creation of an autonomous government like institution at the supra national level to which might be conveyed executive, legislative and judicial authority. The United States in particular, has been reluctant to cede to any supranational entity any sort of mandatory regulatory power over economic entities.[108] And it is likely that the Americans would be hostile to the idea of the creation of an autonomous governmental apparatus at the international level charged with the development and enforcement of substantive corporate behavior standards. Ironically, the People's Republic of China might share the same concerns, though from a different political point of view—the fear of re-colonization from abroad by devolution of power away from Beijing.[109]

Still, it appears that there might be some movement to identify a framework that might contribute to a plausible international system for the regulaton of economic activity. There is little question that the global order has been moving toward the realization of regimes founded on the principles of free movement of capital, open borders for investment, and reduced barriers for the movement of goods, people and services between states,[110] even if elements of that order do not like

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108. The United States made its position clear in its opposition to the Norms. *See, e.g,* Memorandum from U.S. Mission to Int'l Orgs., *Memorandum to Mr. Dzidek Kedzia, Chief of Research and Right to Development Branch, Office of the United Nations High Commissioner for Human Rights, re: Note Verbale from the OHCHR of August 3, 2004* (GVA 2537) (Sept. 30, 2004), *available at* http://web.archive.org/web/20050310070407/http://www.ohchr.org/english/issues/globalization/business/docs/us.pdf ("the United States believes that it is not the appropriate role of the United Nations to serve as a forum for the creation "norms" that are based on flawed assumptions, that divert attention from the true source of human rights violations and that lack any cognizable foundation in international law."). The position of the United States has been that the "focus of the United Nations should be on assisting States in developing and enforcing national law as well as on assisting States to implement their international obligations in a manner that promotes respect for and ensures the protection of all human rights." *Id.*

109. "While formally recognizing international organizations as subjects of international law, it has denied that they are 'supranational' or are political entities in the same sense as sovereign states. For this reason, China prefers to use bilateral mechanisms for the resolution of interstate or intrastate conflict." Ann Kent, *China's International Socialization: The Role of International Organizations*, 8 GLOBAL GOVERNANCE 343 (2002) ("Its Marxist principles and political culture continue to shape its particular motivations, perceptions, and responses to international organizations. In particular, the doctrine of self-reliance and a fierce defense of sovereignty, if less egregious than in the Maoist years, remain constant influences underlying policy responses").

110. For the classic, see, e.g., THOMAS FRIEDMAN, THE LEXIS AND THE OLIVE TREE (2000). For a later defense, see, JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2005); MARTIN WOLF, WHY GLOBALIZATION WORKS (2d ed., 2005).

what they see.[111] Economic actors that operate among more than one territorially bounded state have proliferated. The acceptance of the autonomous legal personality of economic actors operating in certain forms—corporations, certain partnerships, limited liability companies, joint ventures or business trusts—has strengthened the legitimacy and authority of these actors. Multinational economic enterprises, especially those with separate juridical personality, have begun to operate independent of the jurisdiction in which they were chartered. Taking advantage of the power to own other economic enterprises, themselves autonomous and independent, global business enterprises have begun to regulate themselves, treating national regulation as a factor in their production and as an item affecting their aggregate objectives—wealth maximization.[112]

The academic literature is littered with studies of the failure of any one or group of territorially bounded nation states to regulate the activity of economic actors in a world order that privileges the free movement of capital and calls for change.[113] The nature and scope of the failures are easy enough to summarize. Current political, ideological, cultural and historical differences between states have tended to impede the construction of consensus on the meaning of corporate social responsibility or even the values framework within which such corporate social responsibility might be elaborated.[114] States with a recent history and vivid memory of a colonial experience may be suspicious of values frameworks or corporate regulatory movements that may effectively deny them the power to establish and protect local values, methods, understandings, or even the privilege of newly empowered local elites.[115] Political values among developing states have

111. *See, e.g.*, JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK (2007); ERIC TOUSSAINT YOUR MONEY OR YOUR LIFE: THE TYRANNY OF GLOBAL FINANCE (2005); FIDEL CASTRO RUZ, DE SEATTLE AL 11 DE SEPTIEMBRE 185 (2002); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 53 (2002); RICHARD FALK, PREDATORY GLOBALIZATION: A CRITIQUE 48-63 (1999); GEORGE SOROS, THE CRISIS OF GLOBAL CAPITALISM 128 (1998).

112. *See* Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41 TULSA L. REV. 541 (2006).

113. For an excellent example, see, e.g., PHILIP BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY (1993).

114. This was made clear, for example, in the context of the battles over what would become the *Norms*. *See* discussion in Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006).

115. For a discussion, see Janet Dine, *Human Rights and Company Law*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 209, 209-11 (Michael K. Addo ed., 1999).

imbued notions of corporate responsibility with an obligation of developed states to aid positively in the development of historically exploited or subordinated states.[116] The exportation of those values is particularly sensitive where such developing states reject the notion that private economic activity is separable from political activities of the home states of these economic entities.[117] The result is the creation of a market for substantive regulation as states impose their own views through regulations that extend to the limits of their territory.[118] And economic entities have been able to take advantage of these tensions to liberate themselves from adherence to a globally consistent, politically legitimate, set of conduct norms.

The lack of political consensus, however, ought not to be regarded as the failure of values, or even of the futility of defining corporate social responsibility at the global level. Rather, the lack of political consensus might indicate that political institutions might not be the appropriate vehicle for the elaboration of regulatory systems based on such substantive notions. As such, the absence of political regulation does not mean the absence of action with regulatory effect. Rather it might suggest the possibility of substantive regulation devolving to non-political actors. Especially with respect to economic decisions—even economic decisions with significant collateral effects in the social, political, and cultural sectors—the contemporary governing ideology privileges markets. Markets in this sense can be conceived of as spaces within which organized individual decision-making may be effectuated and from which its aggregate effects can be felt among all of the decision-makers participating in the market. While markets privilege the values on which individuals act, states can play a critical role in the management of markets. States play a crucial role in maintaining the integrity of markets by providing a framework within which individual decisions can be made with confidence. A successful regulatory scheme, then,

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116. For a discussion in the context of the projections of values through non-governmental organizations, see, e.g., WILLIAM EASTERLY, THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD (2007).

117. *See generally* Tania Voon, *Multinational Enterprises and State Sovereignty Under International Law*, 21 ADEL. L. REV. 219, 232 (1999); Joseph Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors and the Struggle for Peoples' Rights in Africa*, 18 AM. U. INT'L. L. REV. 851, 895 (2003).

118. *See* PHILIP ALCOTT, THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE 60 (2002) ("Legal systems and legal services have become commodities in international trade, as legal experience is transferred from one country to another. It is now possible to get an economic advantage in international trade by ensuring that your trading partner's legal system is more like your legal system than like that of your competitors.").

might seek to move regulatory power up to the international level and simultaneously out to the market (private choice).

Lack of consensus thus marks the core of the critical components of any substantive global regulatory framework for corporate social responsibility. Without a sense of the nature of the values to be incorporated into governance structures there can be little direction in law. Without a sense of the scope or nature of the obligations of economic entities there can be no confidence in the legitimate boundaries of corporate regulation. Without consensus on the locus of legitimate regulatory power at the supra-national level, it is difficult to successfully construct a unified system of law consistently applied across borders.

Yet, within dissonance is a consensus of sorts. This consensus, built around the legitimacy of markets as a site for individual choice, and information as the lubricant that contributes to the functioning of markets, may provide the grounding on which a mandatory international system of regulation can be built—as a mechanism to enhance markets and market based choices by all stakeholders in economic transactions.[119] Effectively, a successful (and plausibly necessary) regulatory approach at the international level may lie in exploiting the substantively "soft" hard law of surveillance.[120] It is to the possibilities of using international law as the framework for the creation of global systems of monitoring, and through monitoring, regulating corporate social responsibility, that this paper turns to next.

## III. SURVEILLANCE AS THE BASIS OF AN INTERNATIONAL LAW OF ECONOMIC REGULATION IN A MARKET DRIVEN GLOBALIZED WORLD ORDER

A lack of consensus on these critical points of legislative legitimacy need not doom the project of corporate social responsibility as a matter of international legal regulation. If it does not, then to what sort of legislative framework might it lead? This brings us back to the problem considered by Mr. Cohen, and an interrogation of its resolution by the

119. The stakeholder based and thus market driven focus of any corporate social responsibility regulatory framework is already evident in the way in which economic entities produce their own corporate social responsibility reports. Starbucks, Inc., for example, states that "The content for this 24-page report was determined by a materiality assessment in which we prioritized issues according to significance to external stakeholders and to Starbucks." STARBUCKS, INC., CORPORATE SOCIAL RESPONSIBILITY 2006 ANNUAL REPORT, ABRIDGED REPORT, http://www.starbucks.com/aboutus/csrannualreport.asp (last visited Feb. 19, 2008).

120. Larry Catá Backer, *Thoughts on the 24th Cambridge International Symposium on Economic Crime: On Surveillance, Seizure and Interruption*, LAW AT THE END OF THE DAY (Sept. 24, 2006), http://lcbackerblog.blogspot.com/2006/09/thoughts-on-24th-cambridge.html.

ethicist.[121] It is one thing to suggest a set of morals based behavior norms applicable to business, but it is quite another to enforce such moral obligations in the absence of legal compulsion. Yet despite the lack of legal compulsion, individuals have a substitute, the adequacy of which has been the subject of some debate.[122] That substitute, and the mechanics of morality, is monitoring. Mr. Cohen suggests that at a minimum, proceeding with this sort of business relationship would require monitoring—implementing the purchaser's duty to participate in the development of the legal and economic relationships between the product supplier and the purchaser. For this purpose, monitoring might be done directly, or as Mr. Cohen suggests through certain middlemen—government or elements of civil society—to ensure fairness in hiring and working conditions.[123] If that is not viable, it might make most sense to avoid foreign entanglements and hire labor domestically. Mr. Cohen summarizes the consequences of this approach to the problem: "What you may not do is simply throw up your hands at working conditions overseas or fob off this duty on those with whom you contract. You must strive to learn whose sweat provides your equity and how it is extracted."[124]

Mr. Cohen's reply implies correctly that the extent of the moral obligation to monitor is broader than the legal obligation—extending to at least some entities with which an actor engages. Mr. Cohen, though, rightly understands that, for the moment at least, the moral obligation he identifies can be effectuated only through extra legal means. Mr. Cohen identifies the growing and increasingly powerful networks of social actors who monitor economic activity.[125] These entities can share the fruits of their monitoring with economic enterprises to help them meet their ethical obligations. That was the point of Mr. Cohen's advice. At the same time they can be used against

121. *See* Cohen, *supra* note 36; *see also supra* note 37 and accompanying text.

122. On the value of private recourse in the corporate social responsibility field, see, e.g., Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, *supra* note 23.

123. Cohen, *supra* note 36.

124. *Id.*

125. And indeed, elements of civil society have been instrumental in the move to the imposition of moral obligation. "For the International Business Leaders' Forum, the focus on human rights owed most to NGOs having left companies 'no hiding place' . . . Human Rights Watch drafted large parts of the US-UK Voluntary Principles on MNC conduct in conflict states. One business representative acknowledged that all the multinationals 'now getting it right' in respect of business ethics had passed through the 'painful stimuli' of acute NGO pressure." RICHARD YOUNGS, INTERNATIONAL DEMOCRACY AND THE WEST: THE ROLE OF GOVERNMENTS, CIVIL SOCIETY, AND MULTINATIONAL BUSINESS 164 (2004).

economic enterprises that fail to meet their moral obligations. That is a point I have made elsewhere with respect to both the suppliers of Gap, Inc.,[126] Apple, Inc.,[127] and Walmart.[128]

This turn to information as a proxy for moral choice in law is being reflected, if somewhat tepidly, in the courts. The Delaware courts have suggested that the extent of the legal obligation is inward looking—economic entities have an obligation to monitor the conduct of their own agents. Thus, for example, the law of fiduciaries has moved from a basis in presumptions of goodness and moral conduct to its opposite. As a consequence, the corporate law, at least, has begun to construct a series of positive obligations imposed on economic entities in connection with certain conduct. The touchstone of this set of positive obligations is surveillance.[129]

And indeed, the obligations to monitor for bad conduct are being extended to the agents of economic enterprises—lawyers and accountants in the context of the American securities laws, for example.[130] Simultaneously, governments are increasingly willing to use law to impose monitoring, reporting and disclosure requirements more gen-

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126. *See* Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation, supra* note 23.

127. *See* Larry Catá Backer, *Corporate Social Responsibility and Voluntary Codes: Apple, Its Stakeholders, and Its Chinese Laborers*, LAW AT THE END OF THE DAY, June 16, 2006, http://lcbackerblog.blogspot.com/2006/06/corporate-social-responsibility-and.html.

128. *See* Backer, *Wal-Mart as Global Legislator, supra* note 13, at 1762-82.

129. The Delaware Supreme Court has most recently articulated the standard as follows:

> We hold that *Caremark* articulates the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.

Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (citations omitted).

130. *See, e.g.*, Larry Catá Backer, *The Duty to Monitor: Emerging Obligations of Outside Lawyers and Auditors to Detect and Report Corporate Wrongdoing Beyond the Federal Securities Laws*, 77 ST. JOHN'S L. REV. 919 (2003). For the practice in the U.K., see Cynthia A. Williams & John M. Conley, *Triumph or Tragedy? The Curious Path of Corporate Disclosure Reform in the U.K.*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 317 (2007).

erally.[131] Governments themselves are increasingly subject to monitoring and assessment regimes—for example through the World Bank's programs.[132] Monitoring has begun to be accepted, in some respect, even within the the framework of voluntary codes of conduct embraced by entities in the wake of the corporate social responsibility revolution.[133] There is a general sense among some scolars that monitoring, disclosure and markets produce strong benefits that ought to be enforced by states.[134] And tied to monitoring is a new emphasis on liability for reporting. In the case of indirect employees, for example, the California courts have sought to hold the indirect employer liable where it has distributed false or misleading information about the working conditions of its indirect employees.[135]

The key to the shift, then, is not the elaboration of a particular

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131. For a discussion, see generally Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301 (2006); William Mock, *On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1069 (1999).

132. Descriptions of the World Bank's various monitoring programs are available at http://go.worldbank.org/F8TP90F2I0 (last visited Mar. 21, 2008).

133. *See, e.g.*, OECD, THE OECD GUIDELINES FOR MULTINATIONAL CORPORATIONS (2000); Erin Burnett & James Mahon Jr., *Monitoring Compliance with International Labor Standards*, 44 CHALLENGE 51 (2002) ("Making their compliance credible may be crucial to protecting corporate and brand image among consumers in media-rich societies. . . . In response to this need, a new business of code monitoring has arisen, mostly since the mid-1990s, involving a variety of arrangements to audit overseas production facilities.").

134. As Roberta Prentice has argued:

> Empirical evidence also supports the theory that mandatory disclosure improves the monitoring capability of third parties, reduces the costs for investors, and thereby lowers the price for firms that raise capital. Higher disclosure requirements can even lead to increased venture capital financing, given that venture capitalists can foresee their ability to cash out of prudent investments on more favorable terms under such a regime. . . . Transnational empirical research similarly supports mandatory disclosure, as it indicates that countries that require disclosure enable their companies to attract investors and therefore have deeper and broader capital markets. Similarly, companies from low-disclosure jurisdictions that list on exchanges with higher disclosure requirements tend to benefit substantially. These empirical studies strongly suggest that mandatory disclosure works, both because it is mandatory and because it generally results in increased disclosure.

Roberta A. Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 822-823 (2006).

135. *See, e.g.*, Kasky v. Nike, Inc., 45 P.3d 243, 262 (Cal. 2002) (holding that Nike's public statements defending its subcontractors' labor practices constituted commercial speech subject to regulation for false and misleading content).

morality. It is focused on the production and use of information. Information can serve as both a commodity and the currency of a governmentality[136] linking public obligation and private behavior disciplining choice.[137] Information can force choices (for individual action) even when the moral foundation of those choices remains contested (in the community). The contemporary issue is not whether an entity has an obligation, moral or legal, to monitor; the question is what is the scope and nature of that monitoring obligation. If under the traditional standards all entities were to mind their own business, under the new regime all people appear to serve as each other's keepers. That new basis of relationship suggests that personal autonomy is less important as a value governing social and economic relationships. An implication of that change in the value of personal autonomy in social ordering may be that moral obligations are communal and not individual. The more important implication, however, is that moral obligations, as communal obligations that may trump individual desire, impose an obligation on individuals to monitor

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136. I draw here on Michel Foucault's development of a theory of governmentality; that is of the conception of governance as a nexus of power relations; that is a tactics of governance and not the boundaries within which such tactics are deployed. Governmentality is "at once internal and external to the state, since it is the tactics of government which make possible the continual definition and redefinition of what is within the competence of the state and what is not, the public versus the private, and so on; thus the state can only be understood in its survival and its limits on the basis of the general tactics of governmentality" Michel Foucault, *Governmentality, in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87-104, 103 (Graham Burchell, Colin Gordon, & Peter Miller, eds., 1991). *See generally* MITCHELL M. DEAN, GOVERNMENTALITY: POWER AND RULE IN MODERN SOCIETY (1999). These notions have some strong parallels, ironically enough, to the law and economics conceptions of the corporation as a nexus of contract (power) relations among its critical stakeholders, among which is the state. For the classic statements of this idea; *see, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989); Thomas S. Ulen, *The Coasean Firm in Law and Economics*, 18 J. CORP. L. 301, 318-28 (1993).

137. Thomas Lemke nicely captures the idea:

> Foucault's discussion of neo-liberal governmentality shows that the so-called "retreat of the state" is in fact a prolongation of government, neo-liberalism is not the end but a transformation of politics, that restructures the power relations in society. What we observe today is not a diminishment or a reduction of state sovereignty and planning capacities but a displacement from formal to informal techniques of government and the appearance of new actors on the scene of government (e.g. NGOs), that indicate fundamental transformations in statehood and a new relation between state and civil society actors.

THOMAS LEMKE, FOUCAULT, GOVERNMENTALITY, AND CRITIQUE, paper presented at the Rethinking Marxism Conference, University of Amherst (MA), September 21-24, 2000, at 11 (copy on file with author).

compliance with those communal obligations.[138]

It follows that the connection between moral and legal accountability is never entirely consistent. There is an obligation to know, and that obligation may be effected through the ordering of private relations, that is through the law of contract. Yet law does not prejudge the choices made from knowledge. Thus moral accountability should affect economic choices, even where legal constraints are indifferent to the outcome of those choices. So the choice itself is not specifically predetermined through law. Still, even this sort of moral obligation, grounded in a legally cognizable obligation to monitor, when not backed by consequences, tends to be easier to evade—or postpone. Thus, the person who sought Cohen's advice was reported to have eventually "hired an outfit in Uttar Pradesh [India] whose labor conditions are unknown to him. If the project advances he vows to travel to India to inspect the manufacturing facilities."[139]

This is an interesting result. On the one hand, the purchaser chose to adhere to the traditional model—he hired a supplier whose labor practices are unknown to him. Because the practices are unknown the purchaser can, under traditional models, assume the best until he knows otherwise. On the other hand, the purchaser appears (by implication) to have avoided hiring any outfit that might have been known to him to have labor policies that resulted in physical injury to the supplier's workers. That advances the broadly understood social responsibility project, but within the traditional framework of economic relationships. Yet the most important aspect of the purchaser's conduct was the last—that the purchaser intended to go to India at some point and inspect the operations of the supplier for himself. This represents a deviation from the traditional model. It is more than an acknowledgement of moral obligation—it is a suggestion that moral obligation will be imposed as a basis for arranging the relationships between supplier and purchaser. Yet it will be the substantive values of the employer—mediated through his understandng of norms acceptable to his investors and customers—rather than those of a political state, that will be the basis of arrangements beween importer and Indian supplier.

Here, I suggest, lies the kernal of the approach to a plausible international system, in which substance is privatized, and decision

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138. *See* Larry Catá Backer, *The Duty to Monitor: Emerging Obligations of Outside Lawyers and Auditors to Detect and Report Corporate Wrongdoing Beyond the Federal Securities Laws*, 77 ST. JOHN'S L. REV. 919 (2003), *reprinted in* 53 DEF. L. J. 671 (2004).

139. Cohen, *supra* note 36.

making power devolved to consumers and investors, and the international political community oversees a market for information in which those decisions (in the aggregate) may police the substance of economic behavior. For Cohen's industrialist, moral obligation became binding becase it might affect the profitability of his business. His choice of the form of that substantive morality was grounded in his sense of the tastes of his stakeholders. The lack of consensus on substance, then, clearly permits a certain margin of appreciation on individual choice.[140] And, indeed, in two critical respects there is a consensus of sorts that might point in the direction of regulatory plausibility at the international level. First, there is something of a consensus on the use of markets to express such individual choice collectively, at least among powerful elites within the developed world. This rough consensus guides and reinforces even the soft law efforts of domestic and international organizations—from the Organization for Economic Development and Cooperation to the United Nation's Global Compact Program.[141]

Second, there is a rough consensus that markets work best on the basis of a constant set of useful information. This, certainly, is the animating notion of the American securities laws.[142] The scholarship of the relationships between properly functioning markets and information is well established and authoritative.[143] In the financial markets, information serves to assure fairness and opportunity—to preserve the

140. On margins of appreciation as a regulatory device permitting legislative discretion in a principled framework, and its critique, see, e.g., Larry Catá Backer, *Inscribing Judicial Preferences into Our Basic Law: The Political Jurisprudence of European Margins of Appreciation as Constitutional Jurisprudence in the U.S.*, 7 TULSA COMP. & INT'L L.J.327 (2000).

141. Welcome to the United Nations Global Compact, http://www.unglobalcompact.org/ (last visited Feb. 1, 2008) ("The Global Compact is a framework for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, the environment and anti-corruption." United Nations Global Compact—What is the Global Compact?, http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Feb. 1, 2008)). It should be remembered that "A Global Compact, incorporating fifty of the world's largest MNCs, was established by Kofi Annan, UN Secretary-General, at Davos in 1999, committing these companies to in-house monitoring and cooperation with the United Nations on social projects in developing host countries." YOUNGS, *supra* note 125, at 85. Thus, public-private cooperation on an entity-to-entity level is already being practiced at the highest levels.

142. For a discussion in the current regulatory context, see John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229 (2007).

143. On the importance of information and its relationship to market integrity, see, Basic Inc. v. Levinson, 485 U.S. 224, 243-247 (1988). *See also* Harold S. Bloomenthal and Samuel Wolff, 10B INT'L CAP. MARKETS & SEC. REG. § 39A:28 ("The main obligation to be fulfilled by listed companies will be the correct supply of information to different regulators of the securities

integrity of that form of activity. More generally, information serves as a means of monitoring the objects of market activity, and serving as a basis for the expression of individual judgment through changes in the relationship between the actor and the object. Information permits the investor to make investment decisions, or for the consumer to make purchasing decisions. For those investors and consumers, the information received informs judgment on the basis of the application of the actor's own set of moral and values judgments. In the aggregate, those moral or values judgments then have an effect on the object—the economic enterprise.[144] In this way, information and the effects it produces at both the micro level (individual choice) and the macro level (aggregate action) can serve as a basis for social and values based control of economic activity. For this purpose, the role of the state—or of the community of states seeking to act with global effect—would focus on regulation through surveillance rather than through the imposition of a single site of values or a particular framework of substantive governance.

Among the most important integrity-maintaining functions for markets is the provision of information. This is understood by even the more conservative elements of the organized transnational business community. For example, the fourth Principle of the World Economic Forum's Framework for Action on corporate social responsibility is transparency.[145] It is at the heart of most of the private social responsibility arrangements between multinaitonal organizations and their suppliers, or between entities and certifying agencies.[146]

Some states have begun tentatively to enhance reporting regimes

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markets in order to make public all relevant elements of the current situation, evolution and perspectives of those companies.").

144. "Reflecting the prominence of NGO campaigns, by 2000 four out of ten global consumers claimed to have boycotted a company on ethical grounds." YOUNGS, *supra* note 125, at 164.

145. That principle provides:

> "BE TRANSPARENT ABOUT IT: Build confidence by communicating consistently with different stakeholders about the company's principles, policies and practices in a transparent manner, within the bounds of commercial confidentiality. One of the most consistent demands that companies are facing from different stakeholders, ranging from institutional investors to social and environmental activists, is to be more transparent about their wider economic, social and environmental performance."

World Economic Forum, *Global Corporate Citizenship: The Leadership Challenge for CEOs and Boards*, http://www.weforum.org/pdf/GCCI/GCC_CEOstatement.pdf (last visited Jan. 26, 2008).

146. *See, e.g.*, Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, *supra* note 23.

beyond the traditional focus on financial matters.[147] But information is itself a complex subject.[148] It is both a thing and a choice. It is a fact and a determination of privileged focus.[149] Information has to be produced, its truthfulness and completeness verified, and it must be delivered to those who can make use of it. The state is in a unique position to ensure these three objectives. That, indeed, is the basis for the system institutionalized through the federal securities laws in the management of financial markets in the United States. The ideology and value of disclosure is well known and has served as the basis of economic regulation in the United States.[150] The benefits of disclosure are easily translated to the global stage. International systems of disclosure avoid the territorial limitations of domestic law. And by its appearance of neutrality, it avoids the difficulties of legislating in substantive areas over which there is little consensus and little hope of future consensus.[151]

The central notion, thus, is that only the obligation to report is legally required. Only that obligation can be enforced by the state. For some, that is fatal to any use of indirect regulatory devices to change business behavior. For others, the shifting of substantive power to the market (that is to the aggregate investment and consumption decisions of stakeholders) is also a fatal flaw—the political collective ought to be making those choices. But in a world in which, as I have suggested, there is no consensus on either values choices that are made or the political will to concede power to a global authority to make and enforce such values choices effectively, then indirect regulation, leveraging the incentives of the market, may serve as the only effective means to a

147. *See, e.g.*, Lucien J. Dhooge, *Beyond Volunteerism: Social Disclosure and France's Nouvelles Regulations Economiques*, 21 ARIZ. J. INT'L & COMP. L. 441 (2004).

148. For a discussion, see MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1975) (Alan Sheridan, trans. 1979).

149. *Id.*

150. Among the many possible articulations of this idea, see, e.g., the official public version: "Often referred to as the 'truth in securities' law, the Securities Act of 1933 has two basic objectives: require that investors receive financial and other significant information concerning securities being offered for public sale; and prohibit deceit, misrepresentations, and other fraud in the sale of securities." Securities and Exchange Commission Website, The Laws that Govern the Securities Industry, The Securities Act of 1933, http://sec.gov/about/laws.shtml (last visited May 31, 2008).

151. Indeed, the great risk of such systems is that the contests for control of the substance of global economic entity behavior regulation will be converted to battles over the form and content of monitoring and disclosure, where the latter would stand as a proxy for the former. That difficulty could be ameliorated either by providing multiple different forms of disclosure—for example by allowing an entity to choose among a number of approved disclosure systems developed by public or civil society elements, or to choose its own and explain its rationale for the choice. *See infra* note 205 and accompanying text for a discussion of disclosure systems.

regulatory framework for corporate social responsibility on a global scale.

What might be plausible, then, by way of regulation is both modest and dependant on substantial inter connection with both the private (market) and national regulatory spheres. But the important thing is that international hard regulation is plausible, attainable, and would benefit all of the actors subject to its rules. Plausibility is supported for five principle reasons. First, the principle actors have already internalized both the value and process of monitoring, disclosure and communication. Second, economic enterprises have begun to harvest and disclose a large amount of information on their corporate behavior so that the focus of information gathering is also something with respect to which these entities have become familiar. Third, governments have been expanding the breadth of their information harvesting and disclosure regimes. Fourth, international organizations have long been tasked with the management of information—there is experience in the crafting of international instruments that have as their object a monitoring and disclosure element. Fifth, elements of both civil society and business have begun to develop quite sophisticated systems of disclosure. As a consequence, the idea of regulation, even hard regulation of the type proposed, seems plausible, as explained more fully below.

The first point, that the principle actors have already internalized the values and process of monitoring, disclosure and communication, is well known and hard to dispute.[152] Regimes of financial reporting and disclosure are basic to the regulatory regimes of virtually every state. Privately held companies are usually required to report information as well, to shareholders, lenders and the state. Companies have begun to internalize the voluntary triple bottom line reporting methodologies (economic, social and environmental reporting) popularized through international civil society.[153] And calls from academics for greater reporting have become common.[154] "Although the SEC does not require disclo-

152. For the United States, see, e.g., Larry Catá Backer, *The Duty to Monitor: Emerging Obligations of Outside Lawyers and Auditors to Detect and Report Corporate Wrongdoing Beyond the Federal Securities Laws*, 77 ST. JOHN'S L. REV. 919 (2003), *reprinted in* 53(4) DEFENSE L.J. 671 (2004).

153. "A widely accepted new 'triple bottom line' emerged for international companies, encompassing financial, environmental, and social performance." RICHARD YOUNGS, INTERNATIONAL DEMOCRACY AND THE WEST: THE ROLE OF GOVERNMENTS, CIVIL SOCIETY, AND MULTINATIONAL BUSINESS 85 (2004). For a popularizing version of these notions of reporting and corporate advantage, see ANDREW W. SAVITZ (WITH KARL WEBER), THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL AND ENVIRONMENTAL SUCCESS-AND HOW YOU CAN TOO (2006).

154. For a well developed suggestion along those lines, see, e.g., David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41 (1999)

sure of information related to human rights, overseas labor, and related social issues, [multinational enterprises] have already been voluntarily releasing such information, primarily in an effort to improve public relations and attract consumers and investors."[155] Still, it is one thing to embrace a voluntary code and it is quite another to have third parties monitor compliance. "Once a corporate code is drafted and accepted by a corporation, the next challenge is to see that it is adequately enforced. For obvious reasons, many corporations do not want to submit their voluntary codes to monitoring by an outside source."[156]

The second point, that economic enterprises have begun to harvest and disclose a large amount of information on their corporate behavior, well beyond what is required by domestic law, has become an important basis in the explosion of the business of voluntary corporate social responsibility. The regulatory effects of indirect regulation, and of moral obligation, tied to aggregate market behavior, are increasingly well accepted by market actors.[157] Economic actors have also come to understand the profit maximizing value of such regimes, when appropriately deployed. Research has begun to suggest that stakeholders do significantly express their preferences for corporate social responsibility.[158] I have suggested, for example, the construction of elaborate systems of supplier regulation that have been developed by large multinationals in the apparel and consumer products sectors, and the way those systems have been used by the multinationals, NGOs, the media, consumers and investors for their respective benefit.[159] The fact that empirical evidence suggests that only small numbers of consumers are significantly motivated

155. Rachel Cherington, *Securities Laws and Corporate Social Responsibility: Toward an Expanded Use of Rule 10b-5*, 25 U. PA. J. INT'L ECON. L. 1439, 1441-42 (2004)

156. Adrianne Speas, Comment, *Sexual Harassment in Mexico: Is NAFTA Enough?*, 12 WTR L. & BUS. REV. AM. 83, 105 (2006) ("In fact, the OECD survey found that only three of 107 corporations' codes mention monitoring by independent auditors or bodies, and forty-one do not mention a monitoring system at all.").

157. *See, e.g.*, Organization for Economic Cooperation and Development, *The Importance of Standards and Corporate Responsibilities—The Role of Voluntary Corporate Codes of Conduct* (1999), *available at* http://www.oecd.org/dataoecd/9/4/2089872.pdf.

158. *See* Lois A. Mohr and Deborah J. Webb, *Do Consumers Expect Companies to Be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior*, 35 J. CONS. AFF. 45 (2001). The authors conclude that "While the majority of the respondents are not committed to SRCB [socially responsible consumer behavior], most have at least occasionally made a purchase decision based on such principles. Only a handful appear completely disinterested or opposed." *Id.*

159. For an elaboration of this theory, see Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, *supra* note 23; Backer, *Wal-Mart as Global Legislator*, *supra* note 13.

by non-financial concerns has not dampened the trend.[160]

The third point, that governments have been expanding the breadth of their information harvesting and disclosure regimes, has been the subject of increasing attention for its economic and human rights consequences. Especially since the events of September 11, 2001 in the United States, and the Irish Republican terror campaigns in London earlier, states have been expanding the scope of their monitoring activities.[161] As new behaviors requiring regulation are targeted, monitoring and reporting are expanded in the service of that substantive regulation. Thus, for example, monitoring has become an integral part of the fight against money laundering and bribery, producing sophisticated regimes of information harvesting and disclosure at both the national[162] and international levels.[163] The fight against pedophilia has generated its own forms of surveillance similar in form to those used against international terrorist networks.[164]

Fourth, two key points, that international organizations have long been tasked with the management of information, and that there is experience in the crafting of international instruments that have as their object a monitoring and disclosure element, are less well developed but important. The techniques for such a system of surveillance are already available at the international level. The global political community has started thinking about the ways in which monitoring can be institutionalized through law. The focus on information management at the international level affects all sectors, from the management of information in the fight against terrorism, crime and corruption,[165] to the regulation of financial markets and financial actors. Information

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160. *See, e.g.*, THE CO-OPERATIVE BANK, THE ETHICAL CONSUMERISM REPORT 2005 6 (Dec. 12, 2005), *available at* http://www.co-operativebank.co.uk/images/pdf/coopEthicalConsumerismReport2005.pdf (last visited Feb. 1, 2008).

161. *See generally, e.g.*, PETER CHALK AND WILLIAM ROSENAU, CONFRONTING 'THE ENEMY WITHIN': SECURITY INTELLIGENCE, THE POLICE, AND COUNTERTERRORISM IN FOUR DEMOCRACIES (2004); JOHN E. MCGRATH, LOVING BIG BROTHER: PERFORMANCE, PRIVACY, AND SURVEILLANCE SPACE (2004); SURVEILLANCE AS SOCIAL SORTING: PRIVACY, RISK, AND DIGITAL DISCRIMINATION (David Lyon, ed., 2002).

162. For some of the relevant provisions, see discussion *infra* at notes 181-183.

163. *See, e.g.*, Peter W. Schroth, *The United States and the Int'l Bribery Conventions*, 50 AM. J. COMP. L. 593, 601-04 (2002).

164. *See British police smash global pedophile ring*, USA TODAY (June 18, 2007), *available at* http://www.usatoday.com/news/world/2007-06-18-sting_N.htm ("Authorities said they used surveillance tactics normally used against terrorism suspects and drug traffickers to infiltrate the pedophile ring at its highest level.").

165. *See, e.g.*, Duncan B, Hollis, *Why States Need an International Law for Information Operations*, 11 LEWIS AND CLARK L. REV. (2006)

management has been a key feature of the construction of global efforts aimed at combating financial fraud, without compromising the ability of states to set their own peculiar versions of the substantive rules of finance.

Unlike those efforts, the United Nations had sought to regulate the substantive behavior of multinational corporations. That effort produced the now abandoned *Norms*[166] in favor of the voluntary and broadly conceived Global Compact project.[167] A short walk through the monitoring mechanics of the *Norms* provides useful insights for creating global disclosure structures.[168]

The *Norms* in its substantive and monitoring aspects made use of the market aspects of contemporary globalization. It was grounded in private contract—obliging economic entities to incorporate into their contracts with stakeholders a large group of international norms: "Each transnational corporation or other business enterprise shall apply and incorporate these norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the *Norms*."[169] Those contract obligations are then made enforceable by a large group of actors, and are subject to an ongoing responsibility to disclose performance information relating to their contractual obligations. The obligations are public, the performance is private and the enforcement is shared among a group of private and public actors. Yet the governance project represented by the *Norms* contained what might be the seeds of a method of internationalizing the manage-

166. *See Norms* 2003, *supra* note 24.

167. *See* United Nations, U.N. Global Compact available at http://www.unglobalcompact.org/ (accessed Feb. 1, 2008). The Global Compact project represents a significant return to systems of voluntary compliance with very broadly identified substantive norms loosely based on international best practices. It retained the general normative framework of the *Norms* without embracing its specificity or systems. *See* Surya Deva, *Global Compact: A Critique Of The U.N.'S 'Public-Private' Partnership For Promoting Corporate Citizenship*, 34 SYRACUSE J. INT'L L. & COM. 107, 129-144 (2006).

168. For this purpose, the commentaries developed to explain the application of the *Norms* will be useful. *See* U. N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Sub-Comm'n on Promotion & Prot. of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003) [hereinafter, *Commentary 2003*], *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/293378ff2003ceb0c1256d7900310d90/$FILE/G0316018.doc.

169. *Norms* 2003, *supra* note 24, ¶15.

ment of information about corporate conduct, and through that management, bringing some discipline to the regulation of economic behavior on a global scale. As such, it may serve as a useful template for the framework for a global law of disclosure and transparency.

Although the *Norms* focused on the development of a substantive framework of regulation, it also contained a series of provisions on disclosure, the structure of which might prove useful as the basis for developing an international disclosure system that enhances the power of global actors to seek to maximize the power of individual actors to influence corporate behavior. The *Norms* sought to create a system of self monitoring and reporting similar to that which serves as the basis for financial reporting among publicly held corporations. "Transnational corporations and other business enterprises shall enhance the transparency of their activities by disclosing timely, relevant, regular and reliable information regarding their activities, structure, financial situation and performance."[170] But the concept was substantially expanded in scope—both as to the information to be disclosed, and the actors who might rely on such disclosures. For that purpose, the *Norms* relied on the construction of a fused system of public and private law. Public law created the framework of the obligation to report. Private law created a specific web of obligation between private actors with respect to the obligations.

The *Norms* sought to regularize monitoring of the activities of multinational corporations as a critical method for enforcing the substantive behavior norms imposed on such entities through the *Norms*. Monitoring was based on the creation of a web of reporting and observing involving states, international actors, and elements of civil society.[171] The *Commentary* suggests the broad scope of this provision, and the critical role it was meant to play. Monitoring and implementation of the *Norms* would have required "amplification and interpretation of intergovernmental, regional, national and local standards with regard to the conduct of transnational corporations."[172] For this purpose, the United Nations would have taken the leading role through its treaty bodies and specialized agencies.[173] When originally conceived, this portion of the monitoring regime sparked substantial criticism from developed states, which suggested that international organizations in general, and the United Nations in particular, were incapable

170. *Commentary 2003, supra* note 168, ¶ 15 cmt. (d).

171. *Norms* 2003, *supra* note 24, ¶16.

172. *Commentary 2003, supra* note 168, ¶ 16 cmt. (a).

173. *See Commentary 2003, supra* note 168, ¶ 16 cmt. (b).

of serving effectively in any enforcement role.[174] But the *Commentary* also suggested that much of the information gathering could be delegated to "non-governmental organizations, unions, individuals and others."[175] A system of mutual private monitoring and reporting is the object, one that focuses on the economic entity and that also permits relevant stakeholders broad authority to gather information related to compliance with the *Norms*.

> Transnational corporations and other business enterprises shall ensure that the monitoring process is transparent, for example by making available to relevant stakeholders the workplaces observed, remediation efforts undertaken and other results of monitoring. They shall further ensure that any monitoring seeks to obtain and incorporate input from relevant stakeholders. Further, they shall ensure such monitoring by their contractors, subcontractors, suppliers, licensees, distributors, and any other natural or legal persons with whom they have entered into any agreement, to the extent possible.[176]

In a way that mirrored the Sarbanes Oxley Act's monitoring systems rules,[177] a monitored enterprise would have been responsible for the construction of monitoring systems that would have provided "legitimate and confidential avenues through which workers can file complaints with regard to violations of these *Norms*."[178] The monitored entity would have been given "an opportunity to respond."[179] The results of the annual assessments of *Norms* compliance, which served as the principal method of transmission of the information gathered, would have to be "made available to stakeholders to the same extent as the annual report of the transnational corporation or other business enterprise."[180] The similarity to financial reporting under national securities laws was quite conscious.[181] And, like the environmental

174. These are described in Backer, *U.N. Norms*, *supra* note 11.

175. *Commentary 2003*, *supra* note 168, ¶ 16 cmt. (b).

176. *Commentary 2003*, *supra* note 168, ¶ 16 cmt. (d).

177. *See* Sarbanes-Oxley Act of 2002 § 404, 15 U.S.C. § 7262 (Supp. III 2004).

178. *Commentary 2003*, *supra* note 168, ¶ 16 cmt. (e).

179. *Id.* cmt. (d).

180. *Commentary 2003*, *supra* note 168, ¶ 16 cmt. (g).

181. "These Norms shall be monitored and implemented through amplification and interpretation of intergovernmental, regional, national and local standards with regard to the conduct of transnational corporations and other business enterprises." Commentary 2003, *supra* note 168, ¶ 16, cmt. (a).

reporting regimes of many jurisdictions, the *Norms* would have imposed a further obligation to provide impact statements prior to the commencement of any "major initiative or project."[182]

A broadly defined group of stakeholders had a privileged position with respect to this information system: "The term 'stakeholder' includes stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises."[183] For the benefit of these stakeholders, "[e]ach transnational corporation or other business enterprise shall disseminate its internal rules of operation or similar measures, as well as implementation procedures, and make them available to all relevant stakeholders."[184]

Enforcement was to be effected at either under the public law of state actors or pursuant to private enforcement. Paragraph 17 of the *Norms* required states to "establish and reinforce the necessary legal and administrative framework for ensuring that the *Norms* . . . are implemented" by covered economic enterprises.[185] The *Commentary* suggested that states would have been required to disseminate the *Norms* to the populace "and using them as a model for legislation or administrative provisions."[186] Paragraph 18 of the *Norms* envisioned a global system of private enforcement elaborated through contract actions the remedies for which would be provided under state law.[187] "In connection with determining damages, in regard to criminal sanctions, and in all other respects, these *Norms* shall be applied by national courts and/or international tribunals, pursuant to national and international law."[188] The model would have been the European Union's jurisprudence for the provision of national remedies for violations of Community Law.[189]

The monitoring provisions of the *Norms* suggest the plausibility of writing an international hard law of global disclosure. Its critical insight was the construction of a form of governance sharing—private parties through contract, the international community through framework legislation, and member states through their court systems and their

182. *Commentary 2003, supra* note 168, ¶ 16 cmt. (i).

183. *Norms* 2003, *supra* note 24, ¶ 22.

184. *Commentary 2003, supra* note 168, ¶ 15 cmt. (a).

185. *Norms* 2003, *supra* note 24, ¶ 17.

186. *Commentary 2003, supra* note 168, ¶ 17 cmt. (a).

187. *Norms* 2003, *supra* note 24, ¶ 18.

188. *Id.*

189. *See, e.g.*, Rewe Zentralfinanz EG v. Landswirtschaftskammer Fur das Saarland, Case 33/76, [1976] ECR 1989.

obligation to enforce international law *Norms* and contracts.

Still, the *Norms* failed—and the *Norms* failed for a number of reasons.[190] First, the *Norms* focused on the imposition of a values based system of behaviors at the international level when no international consensus existed with respect to such values or behaviors. Second, the lines of authority and enforcement were blurred. It was not clear whether states or the United Nations organs were to have authority over the standards. It was also not clear the extent to which states could apply their own law. Because much of the behaviors were to be regulated through contract, the regulatory power of enterprises themselves were enhanced but in an undefined way. Better put, the *Norms* appeared to vest virtually everyone with an ambiguously defined right to seek monetary and equitable remedies against economic actors all over the world. In any case, it was not clear whether or to what extent the *Norms* would have conflicted with strongly legitimate and deeply held notions of corporate governance in the developed world.[191]

The fifth point, that elements of both civil society and business have begun to develop quite sophisticated systems of disclosure, takes us from conception to implementation. What would an internationally mandated system of disclosure look like? The *Norms* do not provide much help in that regard. Though no specific form of regulation is proposed, the major features of such an international framework can be sketched out. A few of the key features of an international system of disclosure might include the following: (1) a limited scope for interna-

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190. For a critique of the *Norms* reflecting the United States position on the use of international law to enforce substantive standards directly against multinational enterprises, see The Special Representative of the Secretary General, *Report of the Special Representative of the Secretary-General 9SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, "Business and Human Rights: Mapping International Standards or Responsibility and Accountability for Corporate Acts," delivered to the General Assembly*, U.N. Doc. A/HRC/4/035 (February 9 2007), *available at* http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf. The interim report on the failure of the *Norms* was released in 2006. *See* The Special Representative of the Secretary General, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, delivered to the U.N. Econ. & Soc. Council [ECOSOC]*, U.N. Doc. E/CN.4/2006/97 (February 22, 2006), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement. The *Norms* were also criticized by elements of the business community. *See John Ruggie Releases Interim Report on the Promotion and Protection of Human Rights*, THE U.N.-BUSINESS FOCAL POINT, April 2006, http://www.enewsbuilder.net/focalpoint/e_article000554328.cfm?x=b11,0,w (last visited March 28, 2008).

191. For a discussion of the nature of those conflicts, see generally Backer, *U.N. Norms*, *supra* note 11.

tional law, (2) disclosure that targets information rather than compliance with substantive standards, (3) remedies provided under domestic law that are limited to compelling disclosure (and possibly the awarding of attorneys fees), and (4) universal jurisdiction.

### 1. A Limited Scope for International Law

A successful program of hard law making at the international level must necessarily internalize the key lessons of the failure of the *Norms*. Yet, the internationalization of the reasons for the failure of the *Norms* does not necessarily point only to the U.N.'s Global Compact and John Ruggie's rationalizations in support of that all voluntary and substantive behavior oriented approach.[192] Hard law at the international level is plausible as long as such efforts avoid any attempt to legislate values or behavior expectations. The last twenty years has seen the proliferation of a large number of voluntary codes of behavior. All of them are similar but differ in substantial enough respects to indicate that even among like-minded people there is no consensus with respect to behavior. And a significant number of states do not believe that it is the role of public organizations to mandate what they would characterize as moral rather than legal behavior or values. Information ought to *appear* neutral. That will require some sensitivity to the choice of information privileged. Neutrality might best be preserved through a system in which the judgments proceeding from disclosure are made privately rather than by state organs. State neutrality is strengthened when the regulatory power is asserted by corporate stakeholders rather than by agents of the state. To that extent, information itself becomes a commodity that might enhance profits or market share. But it also creates the great potential of abuse—either by companies eager to control the flow of information out (for which the state must serve as a means of enforcing appropriate disclosure) or by entities seeking to hide violations. The latter situation is already common within private systems of monitoring, especially by multinational corporations of their overseas suppliers.[193] A universal system of monitoring will only increase the difficulties and pose an administrative challenge for courts.

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192. *See* John Ruggie, Remarks, Annual Plenary on Voluntary Principles on Security & Human Rights, Harvard University and United Nations, in Washington, D.C. (May 7, 2007).

193. *See, e.g., Secrets, Lies and Sweatshops*, BUSINESS WEEK Nov. 27, 2006, available at http://www.businessweek.com/magazine/content/06_48/b4011001.htm ("For more than a decade, major American retailers and name brands have answered accusations that they exploit 'sweatshop' labor with elaborate codes of conduct and on-site monitoring. But in China many factories have just gotten better at concealing abuses.").

To gather information, or to mandate its collection and dissemination, does not suggest or mandate behavior, even behavior implied by the sort of information privileged with collection. An information regulatory regime also is similar to a pattern of regulation that is well within the comfort levels of most developed states. All such states have developed disclosure and transparency system with respect to the regulation of their financial markets. International law here would merely seek to broaden the regulatory patterns already a well established and legitimate method of market regulation within domestic law. But of course, control of information gathering is hardly neutral.[194] And the privileging of the dissemination of information about operations in addition to the traditional information related to financial performance—a disclosure geared to the narrowly defined interests of shareholders and creditors—will have a tendency to influence corporate behavior. Information is incentive. Spotlighting one aspect of operations over others will tend to focus corporate resources on the matters spotlighted and less on operations with respect to which information does not have to be provided. No corporation would like to disclose information that would make it appear in a bad light. However, the measure of that bad light would not be determined by the state. Instead, that determination would be made by the company in relation to its assessment of the desires of its stakeholders. Though law would not directly compel behavior, the effect of disclosure should have that effect.

### 2. Disclosure That Targets Information Rather Than Compliance With Substantive Standards

The real substantive contribution in international law, and it is by no means a small one, would be with respect to the content of the information required. There are several models that can be followed. The simplest is merely to require a company to disclose the extent of its disclosure—or to disclsose why it chooses not to disclose. For example, the international system might not specify any particular form or content for disclosure, but require every company to explain why it has chosen to disclose the information it has chosen to make public. This alternative, though, while easiest on the corporation, would tend to be of limited use. Better, perhaps, would be to choose a substantive set of disclosure items—perhaps drawn from one or another emerging sys-

194. *See, e.g.*, David Lyon, *Surveillance in Cyberspace: The Internet, Personal Data, and Social Control*, 109 QUEEN'S QUARTERLY 345 (2002).

tem of disclosure[195]—and then require a corporation to disclose or to explain why it has chosen not to disclose. Recent changes to American securtities law provide a useful pattern of regulation in this regard. For example, under the Sarbanes-Oxley Act,[196] publicly held companies were not obligated to adopt an ethics code for senior financial officers, but rather were required to disclose whether or not they had adopted such a code.[197] The object was not to impose ethics codes but to create a legal framework within which stakeholders could negotiate the extent and terms of such codes.[198] The state chose the objective—ethics codes—but the entities affected were not required to adopt them, just to report their choice to the market, and private actors were free to use the information as they liked in arranging their relationships. Other states, or state connected entities, have adopted similar "if not why not" approaches to disclosure.[199] Likewise, the international system could choose the objectives—reporting on certain conduct or operations—but leaving it to the entities to report or to explain why they would not, and permitting private actors to use that information in determining the consequences.

Alternatively, particular information might be sought. The least complex model would require information on the basis of one or another form of disclosure already developed as "soft law" by the international community or elements of civil society. Mandatory disclosure would be limited to a discussion of the election and compliance with the system chosen. At its simplest, this might require little more than to require disclosure of compliance with obligations set forth in one or another of the voluntary codes currently developed. More flexible would be a system under which every entity could choose the disclosure regime which it will use from out of a set of permitted alternatives. The difficulty, of course, would be a critical loss of consis-

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195. *See supra* notes 171-180, 195-201 and accompanying text.

196. *See* Sarbanes-Oxley Act of 2002 § 404, 15 U.S.C. § 7262 (Supp. III 2004).

197. *Id.* § 406.

198. *See* Larry Catá Backer, *The Sarbanes-Oxley Act: Federalizing Norms for Officers, Lawyer and Accountant Behavior*, 76 ST. JOHN'S L. REV. 897 (2002).

199. For example, "Effective 'if not, why not' reporting practices involve: identifying the Recommendations the company has not followed; explaining why the company has not followed the relevant Recommendation; explaining how its practices accord with the 'spirit' of the relevant Principle, that the company understands the relevant issues and has considered the impact of its alternative approach." Australian Securities Exchange, ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* 6 (2d Ed, 2007), *available at* http://asx.ice4.interactiveinvestor.com.au/ASX0701/Corporate%20Governance%20Principles/EN/body.aspx?z=1&p=-1&v=1&uid=,.

tency in formation provided by entities. More elaborate disclosure might also add the requirement that the reporting entity explain the reasons for choosing the particular disclosure regime embraced.

As another alternative, and subject to supervision by a well represented international organization, the formulation of the content of information could be devolved to an organization—either a public or private entity (for example the Organization for Economic Development and Cooperation,[200] the International Organization of Securities Commission,[201] or some other entity) with the necessary legitimacy within the global community, to develop standards and maintain standards. The European Union has undertaken this form of framework legislation with respect to certain technical directives elaborating the internal market.[202] The last alternative is the most elaborate—the information scheme could be elaborated by something similar to the American Securities and Exchange Commission,[203] or other right to information access framework.[204] The benefit would be that regulatory authority would be unified. The detriments might include the creation of too elaborate a bureaucracy at the international level and too great a devolution of power up. There is also a danger that what might start as a simple disclosure rules system could become as byzantine as those under modern financial disclosure rules, when such power is devolved to a public body. Yet, it is important to remember that most securities regulatory bodies do not have much experience with non-financial disclosure systems, though some have sought to expand the role of the SEC in this regard.[205]

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200. For general information about the Organization for Economic Development and Cooperation (OECD), see About the OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited March 28, 2008).

201. For general information about the International Organization of Securities Commissions (IOSC), see General Information on IOSCO, http://www.iosco.org/about/ (last visited March 28, 2008).

202. *See*, Kristina K. Herrmann, Note, *Corporate Social Responsibility And Sustainable Development: The European Union Initiative As A Case Study*, 11 IND. J. GLOBAL LEGAL STUD. 205 (2005).

203. For general information about the Securities and Exchange Commission, see The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, http://www.sec.gov/about/whatwedo.shtml (last visited March 28, 2008).

204. *See* Abdallah Simaika, Note, *The Value Of Information: Alternatives To Liability In Influencing Corporate Behavior Overseas* 38 COLUM. J.L. & SOC. PROBS. 321 (2005) (disclosure scheme modeled on existing U.S. right to know legislation).

205. *See, e.g.*, Eric Engle, *What You Don't Know Can Hurt You: Human Rights, Shareholder Activism And SEC Reporting Requirements*, 57 SYRACUSE L. REV. 63, 84-86 (2006) ("Currently, the SEC does not generally require disclosure of compliance with foreign or international human rights or labor laws, though that may change as an increasing number of investors find such information relevant to their investment decisions due to the risks of tort liability, insurance costs or

But the wealth of disclosure suggestions elaborated by elements of civil society can provide a basis for benchmarking what sorts of information might be extracted from economic entities. For example, the methodology and framework for reporting within the general parameters of understandings of the meaning of "corporate social responsibility" have begun to be addressed in significant detail by the NGO community, and prominently among them the Global Reporting Initiative "GRI".[206] Describing the GRI efforts, Jayne Barnard noted that the initiative "achieves three objectives: (1) greater transparency; (2) consistency over time; and (3) comparability across industries and firms."[207] Barnard also points to perhaps one of the most important benefits of uniform global reporting regimes, like that offered through GRI: it "also enables the development of transferable expertise. Employees familiar with disclosure protocols such as the GRI can carry that expertise from company to company. By taking away excuses such as 'we can't figure out how to report this,' the GRI has provided an important link in facilitating and advancing change."[208]

The collective project that is GRI, however, is hardly isolated.[209] The triple bottom line framework for internal monitoring and reporting is becoming better known to multi national corporations,[210] though it is not without its critics.[211] One of its principal elaborators, John Elking-

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nationalization of foreign held corporate assets."). *See also* Rachel Cherington, *Securities Laws and Corporate Social Responsibility: Toward an Expanded Use of Rule 10b-5*, 25 U. PA. J. INT'L ECON. L. 1439, 1441-42 (2004); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1204 (1999).

206. *See* Global Reporting Initiative, About GRI, http://www.globalreporting.org/AboutGRI/ (last visited Jan. 22, 2008).

207. Jayne W. Barnard, *Corporate Boards and the New Environmentalism*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 291, 302-303 (2007).

208. *Id.*

209. *See, e.g.*, Business for Social Responsibility, CSR Reporting, http://www.bsr.org/consulting/reporting.cfm (last visited Feb. 23, 2008) ("Business for Social Responsibility (BSR) provides a wide range of assistance to companies engaged in corporate social responsibility (CSR) reporting"). They listed among their clients ChevronTexaco, Chiquita, Ford Motor Company, Gap, Inc., Home Depot, HP, IBM, McDonald's, UPS. *Id.*

210. *See, e.g.*, JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (1998); Jayne W. Barnard, *Corporate Boards and the New Environmentalism*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 291, 302-303 (2007); Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 IOWA J. CORP. L. 1, 24 (2005) (exploring origins of the concept.

211. *See, e.g.*, Wayne Norman & Chris MacDonald, *Getting to the Bottom of 'Triple Bottom Line,'* 14 BUS. ETHICS Q. 243 (2004). For interesting analysis, see essays in THE TRIPLE BOTTOM LINE, DOES

ton, has brought his method of social and economic reporting to the marketplace.[212] It's best practices guides have been distributed through its internet site.[213]

But for our purposes, regulating disclosure at the global level may have substantial substantive value as well. The technical focus of surveillance is on information—but choices about the kind of information that ought to be gathered, the form to be taken for information gathering, the persons or institutions to which information is to be reported, and the judgments to be made from the information gathered, can have a significant effect on those involved in the process.[214] Control of the framework of information gathering, itself, can indirectly further a values based governance program.[215] The choices about what sorts of information is important enough to gather and what sort of information is not, the kind of stakeholders given rights with respect to information gathered and those excluded, the authority to punish failures to gather or distribute information and the private consequences of such failures (for example civil suits or delisting from national exchanges), all can significantly shape behavior and define the scope of corporate social responsibility as actually practiced. The regulation of disclosure thus permits international political involvement in the development of understanding about the values that ought to be furthered and the framework within which economic enterprises ought to behave, while avoiding the difficulties of substantive legislation in a world community deeply divided about those issues. At the same time, the international community, like states and civil society actors, remain free to compete for the advancement of their values agenda among those individu-

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IT ALL ADD UP?: ASSESSING THE SUSTAINABILITY OF BUSINESS AND CSR (Adrian Henriques and Julie Richardson, eds. 2004).

212. Elkington co-founded SustainAbility, a London consulting firm in 1987. *See* SustainAbility, About Us, John Elkington, http://www.sustainability.com/about/profile.asp?id=7. SustainAbility "advises clients on the risks and opportunities associated with corporate responsibility and sustainable development. Working at the interface between market forces and societal expectations, we seek solutions to social and environmental challenges that deliver long term value." SustainAbility, Home, http://www.sustainability.com/.

213. *See* SustainAbility, Tomorrow's Value: The Global Reporters 2006 Survey of Corporate Sustainability Reporting Overview (2006) http://www.sustainability.com/downloads_public/insight_reports/reporting_flyer.pdf.

214. I have discussed this in some detail elsewhere. *See* Larry Catá Backer, *Global Panopticism: Surveillance Lawmaking by Corporations, States, and Other Entities*, 13 IND. J. GLOBAL LEGAL STUD. (forthcoming 2007).

215. *See, e.g.*, Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role Of Private Contracting In Global Governance*, 54 U.C.L.A. L. REV. 913 (2007).

als and entities who constitute the principal stakeholders of economic enterprises.[216]

For example, where an enterprise is required to disclose the labor conditions affecting its suppliers, it may have a greater incentive to focus on issues of supplier labor conditions than it would if it were only required to report on matters of the condition of directed employed labor. The choice to require such reporting also suggests a judgment—that there is an obligation between an employer and indirectly employed labor.[217] It also permits the use of that information to convince critical stakeholders—investors and consumers—to care about the information and base their own purchasing decisions on an assessment of that information. This shifts power from managers, whose preferences usually determine corporate behavior,[218] to other stakeholders in the enterprise.[219] Information, thus, can serve as a source of behavior regulation.

### 3. Remedies Provided Under Domestic Law, Remedies Limited To Compelling Disclosure And The Relationship Of States To The International Disclosure Regime

Interntional legislation might also consider a number of other important aspects of regulating disclosure. One would touch on the relationship of states to the international disclosure regime. Again, importing a practice of the European Union, it might be prudent to construct a system in which national courts would be solely responsible for enforcing the international law of disclosure as part of their national law.[220] In that context, national courts could provide national

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216. For an example, see Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, *supra* note 23.

217. And this is a critical point in the model. The power to privilege information will tend to affect the information matrix within which consumer and investor decisions will tend to be made. This has real effect. A consequence of privileging information about environmental activity might affect consumer behavior in significant ways. See Douglas Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 537-38 (2004).

218. *See, e.g.*, Michael P. Vandenbergh, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 78-80 (2003)

219. Indeed, some scholarship has argued that mandatory disclosure is important precisely because of its power shifting consequences. *See*, Manuel A. Utset, *Towards a Bargaining Theory of the Firm*, 80 CORNELL L. REV. 540, 598-99 (1995).

220. For a description of the system, and its discontents, see, e.g., MALCOLM A. JARVIS, THE APPLICATION OF EC LAW BY NATIONAL COURTS: THE FREE MOVEMENT OF GOODS 1-5 (1998).

remedies as long as they are wholly effective.[221] Perhaps the International Court of Justice courld serve in a capacity similar to that served by the European Court of Justice.[222] Alternatively, another public international body might be designated for this purpose.[223] Indeed, the utility of national courts in transnational litigation has become a subject of greater scholarly interest, especially on their role in addressing global harms.[224] That would permit some flexibility in domestic law within the international framework that limits remedies to an obligation to disclose. Thus, for example, where a national court orders disclosure as a remedy for violation of the global disclosure norm, such disclosure might reveal a substantive violation. That substantive violation would be subject to domestic law and domestic remedies, but not under the international law based monitoring framework itself. The hope, of course, in some quarters, might be that a uniform global disclosure system can provide an incentive for domestic legislation on corporate social responsibility and ultimately help create a consensus on universal norms for the regulation of the social responsibility of international economic actors.

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221. For an example of the classic jurisprudence under this regime, see Von Colson and Kamann v. Land Nordrhein-Westfalen Case 14/83, [1984] ECR 1891; Marshall v. Southampton and South West Hampshire Area Health Authority, Case C-271/91, [1993] ECR I-4367.

222. The European Communities Treaty vests the European Court of Justice with responsibility for ensuring "that in the interpretation and application of this Treaty the law is observed." Treaty Establishing the European Economic Community of March 25, 1957, 298 U.N.T.S. 11, 4 EUR.Y.B. 412 (as amended), art. 220. The European Union came into existence on November 1, 1993, 1993 O.J. (L. 293) 61, upon the ratification by the member states of the Treaty on the European Union. Treaty of the European Union of February 7, 1992, 1992 O.J. (C 224) 1 (hereinafter Maastricht Treaty or the TEU).

223. A number of such bodies have begun acquiring this sort of quasi-judicial experience. The Organization for Economic Cooperation and Development, for example, has begun to develop just such mechanisms.

> Several intergovernmental initiatives recently have focused not only on promulgating standards for companies, but also on ways to enhance accountability for compliance. For example, due to civil society demands, anyone can now bring a complaint against a multinational firm operating within the OECD Guidelines' sphere to the attention of a National Contact Point (NCP)—a non-judicial review procedure. Some NCPs have also become more transparent about the details of complaints and conclusions, permitting greater social tracking of corporate conduct, although the NCPs' overall performance remains highly uneven. And the OECD Investment Committee has expanded its oversight of the NCPs, providing another opportunity to review their treatment of complaints.

*Business and Human Rights, supra* note 190, ¶ 50.

224. *See* Hannah Buxbaum, *Transnational Regulatory Litigation,* 46 VA. J. INT'L L. 252 (2006).

### 4. Universal Jurisdiction

Universal jurisdiction might merit consideration as well.[225] One of the great impediments to the private regulation of transnational economic enterprises has been the difficulty sometimes of obtaining a competent court to hear a case against an enterprise. Universal jurisdiction might serve to ameliorate that concern. In return, of course, the stakes would have to be quite focused. Remedies might have to be limited to compliance with discourse requirements. Damages might be available, but only as a matter of domestic law. Some states might provide for such damages, other might not. But those differences might have to be tolerated in order to obtain consensus on the creation of an international information disclosure framework in positive law.

Universal jurisdiction and limited remedies to be available only through national courts may be critical to the acceptability of any international law effort. Business is leery of additional legal regulation of its substantive conduct. But business is accustomed to providing information. A uniform system of information (beyond financial disclosure) would reduce their transaction costs, an important consideration in the functioning of markets.[226] A system of universal jurisdiction would permit stakeholders to make use of the most effective forum for the vindication of their rights to information. But the national courts would be limited under the *international* law scheme to orders requiring the provisions of information and ancillary enforcement powers. These remedies could be applied only under national law rules. That avoids substantial international intrusion into the judicial function of national courts and avoids the need to construct another international judicial instrumentality (both of which might be substantially objectionable to the global business community). National governments, of course, would be free to enact additional remedies. But that would be a matter of domestic substantive law.

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225. On universal jurisdictions, see generally ERROL MENDES AND OZAY MEHMET GLOBAL GOVERNANCE, ECONOMY AND LAW: WAITING FOR JUSTICE 43-45 (2003); Darren Hawkins, *Universal Jurisdiction for Human Rights: From Legal Principle to Limited Reality*, 9 GLOBAL GOVERNANCE 347 (2003).

226. *See, e.g.*, Jeanne L. Schroeder, *The End Of The Market: A Psychoanalysis Of Law And Economics*, 112 HARV. L. REV. 483, 553 (1998) ("In order to develop a Coasean definition of perfect information, one must keep in mind the definition of transaction costs. In a perfect market, information is not merely perfect; it must also be complete and symmetrical. Each participant in the market must have perfect information not merely 'about the market generally' but also about 'each party's position within it.' That is, everyone must not only know what everyone else knows but what everyone else is thinking as well.").

The direct and indirect aims of such a reporting system become clear. International law can serve to build a single framework for a global system of information monitoring and disclosure by economic entities. Multinational economic actors cannot be required to report on their global activities, unless the power to regulate such disclosure is shifted up to the international level. Nor is it likely that a uniform system of reporting on matters, other than those narrowly required under traditional models of financial reporting, can be uniformly adopted at the state level. But the absence of consensus on the nature of the norms of behavior that should apply to economic actors beyond profit maximization for shareholders and truthful and complete financial disclosure, suggests a narrow framework for international lawmaking.[227] Information production is both narrow and neutral enough. But it does provide a significant advance—requiring entities that would otherwise not disclose to become more transparent. Though that would be the extent of formal legal obligation, the provision of information could have significant effects in the market. Information can be used to affect the actions of an enterprise's stakeholders—consumers, investors, suppliers, lenders and the like. Each of them would respond to the information produced on the basis of the values that dictate their own conduct.[228] Information, then, might broaden the sensitivity of enterprises to socially responsible behavior, not because the state or another level of public governance demands it, but because the market does.[229]

## IV. CONCLUSION

John Ruggie recently noted that,

> Legal compliance is the third path for the social articulation of human rights, including by setting legal standards of corporate

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227. This is in line with the thinking of the new governance paradigm in which the state retains a command function but asserts it more diffusely. *See* Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1059 (2003).

228. *See* Ed Petkus, Jr. & Robert B. Woodruff, *A Model of the Socially Responsible Decision-Making Process in Marketing: Linking Decision Makers and Stakeholders*, *in* PROCEEDINGS OF THE WINTER 1992 AMERICAN MARKETING ASSOCIATION 154-161 (Chris T. Allen et al., eds., 1992); Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, 34 BUSINESS HORIZONS 39-48 (1991), *available at* http://www.cbe.wwu.edu/dunn/rprnts.pyramidofcsr.pdf (last visited Feb. 21, 2008).

229. For its application in the context of product certification, see, e.g., Errol Meidinger, *Multi-Interest Self Governance Through Global Product Certification Programs*, Legal Studies Research Paper Series, Paper No. 2006-016, *available at* http://ssrn.com/abstract=917956.

> responsibility for human rights. Legal compliance may be seen as the apex of a pyramid that has standards of appropriateness as its broad social base, and the calculus of consequentialism as the middle layer. Causal arrows can move in both directions, from the bottom up and from the top down. Moreover, the balance between the three spheres can shift over time, depending on circumstances.[230]

He noted that in a world order that still is attached to the primacy of the state system, enforcement at the international level is still a concern to any legitimate law making at the supa-national level.[231] He reminds us that no less than Amartya Sens has warned of the limitations of legislating values and behavior.[232] This leads Ruggie to a defense of a system of private networks of voluntary codes of behavior norms.[233] There is still room at the international law making level for systems that might help to foster communities of shared responsibility. While private networks may be the appropriate basis for values behavior norm making, what Ruggie calls legal compliance at the international level may be indispensable for the further elaboration of those private market and collective based systems.

It seems, then, that the initial intuition that monitoring is an effective means of enforcing moral obligations undertaken between parties[234] can serve as the basis for an international framework for the positive regulation of multinational corporations that both respects the principle of market primacy and the necessity of international regulation. Moral perspective is most likely to successfully find some expression in law through the construction of legally enforceable monitoring systems

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230. Ruggie, Remarks, *supra* note 192.

231. *Id.*

232. Some have suggested that "social relations are historically and logically prior and that economic exchanges are always embedded in social relations and structured by normative expectations. Hence, 'markets' consist of the competitive strategies and practices of social groups and actors, which may be dysfunctional or at best disruptive. . . ." William W. Bratton, Joseph McCahery, Sol Picciotto, & Colin Scott, *Introduction: Regulatory Competition and Institutional Evolution, in* INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES 1, 3 (William W. Bratton, ed., 1996). For a perspective from Amartya Sens approach to development economics (AMARTYA SENS, DEVELOPMENT AS FREEDOM (Knopf Press 1999)), see SABINA ALKIRE, VALUING FREEDOMS: SEN'S CAPABILITY APPROACH AND POVERTY REDUCTION (Oxford University Press 2002).

233. *See* Ruggie, Remarks, *supra* note 192.

234. *See* Cohen, *supra* note 36.

rather than through direct regulation of ethical obligations.[235] American lawmakers understood this implicitly in the construction of the federal securities laws in the 1930s. The great idea under-girding those statutory systems was surveillance—systems of mandatory disclosure to both the state and to principal stakeholder communities (in the case of the federal securities law the investor community). Indeed, that system has become extremely useful in molding behavior beyond the original scope of those statutes. It has become a means through which disclosure is used to indirectly legislate behavior.[236] In a sense, then, monitoring regimes can serve as a framework for incorporating moral obligations within a legal structure of relationships between economic actors, without hardwiring any particular set of ethical standards in law. For those in search of avenues for the implementation of corporate social responsibility at a transnational level, international agreements for transparency, disclosure and information dissemination might be more effective as a means of hardwiring ethical obligations in the relationships between economic enterprises, than commanding obedience to any set of such obligations.

This short essay has suggested that the path to the attainment of socially positive goals might not always be reached by what appears to be the most direct method. Legislating corporate social responsibility, even in the context of a values-based understanding of economic theory, is problematic. There is no consensus on the legitimacy of values-based economics, in either its secular or theological forms. There is still a strong element that rejects the idea of values in economic theory and in its use to justify any sort of imposition of non-profit maximizing obligations (narrowly confined to direct participants in the economic enterprise) on such enterprises. Even among those for whom values economics is legitimate, there is a wide range of views about the constitution of the values to be applied.

Even if there were consensus on the value of corporate social responsibility in general and its particular manifestation, there is no consensus on the locus of regulatory power. Many states continue to adhere to the view that States ought to remain the privileged site for economic regulation. Though they might come together for the pur-

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235. For a discussion of the parameters of these surveillance regulations, see Larry Catá Backer, *Global Panopticism: Surveillance Lawmaking by Corporations, States, and Other Entities*, 13 IND. J. GLOBAL LEGAL STUD. (forthcoming 2007).

236. *See* Larry Catá Backer, *The Surveillance State: Monitoring as Regulation, Information as Power*, LAW AT THE END OF THE DAY (Dec. 21, 2007), http://lcbackerblog.blogspot.com/2007/12/surveillace-state-monitoring-as.html.

pose of effecting conventions and other forms of particular purpose positive international law, they have little stomach for the creation of an autonomous government like institution at the supra national level to which might be conveyed executive, legislative and judicial authority. For that reason alone, for example, the latest and fairly mild version of international regulation of multinational corporations was successfully opposed by a large number of nation-states. Moreover, the imposition on a global basis of any one substantive value system (as international law) would be inconsistent with the markets and private choice orientation of the current framework for global economic regulation. On the other hand, imposition of substantive value systems as economic regulation resulting in multile regimes of corporate social responsibility when imposed by a territorial state would be consistent with the global economic order. In that context, regulation serves as a commodity that might attract or repel inbound business or might produce an exodus of economic activity.[237]

But substantive regulation is not the only method for meeting the objective of imposing social responsibility obligations on economic enterprises whose business crosses national borders. Surveillance has risen as an increasingly effective method of indirect regulation. The technical focus of surveillance is on information—but choices about the kind of information that ought to be gathered, the form to be taken for information gathering, the persons or institutions to which information is to be reported, and the judgments to be made from the information gathered, can have a significant effect on those involved in the process. The effect on behavior would not be controlled by the state (or the international community as substantive legislator). Instead, information would provide the principal direct and indirect stakeholders of economic entities—shareholders, lenders, suppliers, customers, trade creditors, labor and others—with the opportunity to act on their own values in their relationship with economic entities.

The market, effectively, would serve as the mechanism through which the aggregate of participants would effectively impose values on themselves by their economic choices. Values-based behavior would be

237. Regulatory competition is well understood in some legislative sectors—for example the market for state chartering in the United States. *See, e.g.*, Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987); *see also* Mark J. Loewenstein, *Delaware as Demon: Twenty-Five Years After Professor Cary's Polemic*, 71 U. COLO. L. REV. 497 (2000). For a short discussion in a broader context, see Larry Catá Backer, *Wal-Mart and Economic Due Process*, LAW AT THE END OF THE DAY (Jan. 22, 2007), http://lcbackerblog.blogspot.com/2007/01/wal-mart-and-economic-due-process.html.

dependent on what the principal participants think is important. The critical element that international law would add is the framework within which information is produced and choices can be made.[238] And control of the content of the values that are privileged would depend on the power to convince the critical stakeholders of the correctness of a value system put forward. In this context, values, like law, would be subject to the market, in this case the market for ideas (of values). In this market, private actors—churches, philosophers, social scientists, ethicists, and others—would have a primary role in seeking to offer product (values systems touching on matters of corporate social responsibility) and to market those products to the critical stakeholders. Domestic and international organizations can continue to play the traditional roles—memorializing consensus *Norms* and putting forward articulations of those *Norms* for greater distribution and consumption in the elaboration of the contemporary system of customary international law. But to move beyond that role would not likely be successful. And, of course, these ideas have served as the cornerstone of the highly successful financial markets regulation in the United States since the early 1930s.

The techniques for such a system of surveillance are already available at the international level. Much of the form of such a system can be extracted from the recently proposed Convention on the regulation of multinational enterprises. The general parameters for the form of reporting and the content of the reports have begun to be developed through the efforts of significant segments of civil society.[239] Governments have increasingly demanded more internal monitoring and reporting, even with respect to matters that are not strictly financial. The European Commission has sought voluntary reporting under the triple bottom line principles.[240] Broad disclosure beyond the narrow concept of traditional financial reporting serves as the thrust of the Sarbanes-Oxley Act Section 404,[241] is at the core of the Foreign Corrupt

238. The use of market tinged behavior in this way has, of course, something of a short pedigree. *See, e.g.*, sources cited *supra* note 25.

239. *See, e.g.*, Global Reporting Initiative, About Us, 2008, http://www.globalreporting.org/Home (last visited Jan. 22, 2008); *see also supra* note 206 and accompanying text.

240. *See Commission Recommendation of 30 May 2001 on the Recognition, Measurement, and Disclosure of Environmental Issues in the Annual Accounts and Annual Reports of Companies*, 2001 O.J. (L 156) 33 (June 13, 2001); *see also, e.g.*, Wayne Norman & Chris MacDonald, *Getting to the Bottom of 'Triple Bottom Line,'* 14 BUS. ETHICS Q. 243 (2004).

241. Sarbanes-Oxley Act of 2002 §404, 15 U.S.C. §7262 (Supp. III 2004). For an overview, see Management's Report on Internal Control over Financial Reporting, 71 Fed. Reg. 77,635 (Dec. 27, 2006).

Practices Act,[242] and the anti-money laundering and anti-terrorism controls of many states.[243] At any rate, internal monitoring and reporting has become an integral part of enterprise operation.

This system will work at the economic level only to the extent that it can be promoted as a mechanics to global market efficiency, avoids making substantive or values driven behavior choices, limits enforcement to the compliance with the information gathering and reporting requirements of the international framework and vests enforcement at the nation-state or private level.[244] The feasibility of such a program of reporting can be evidenced by the encouragement of such programs in places like Australia.[245] The self-enforcing character of these monitoring systems can be deepened by the imposition of national rules requiring national exchanges to enact rules making compliance with such international reporting programs mandatory. Enforcement of monitoring compliance can be delegated to national securities law agencies—like the American Securities and Exchange Commission and its counterparts—or to the international association of securities regulatory agencies or left to private parties, for example civil society actors. Templates for public and private enforcement are already well established in developing countries. With the critical addition of worldwide jurisdiction for the enforcement of the reporting requirements, and recourse to national courts for the vindication of rights to information, the system is complete. In this way global systems move from government to governance. "The art of government depends upon the development of a specific mode of knowledge, dominated by statistics.

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242. *See, e.g.*, Andrea Dahms & Nicolas Mitchell, *Foreign Corrupt Practices Act*, 44 AM. CRIM. L. REV. 605 (2007).

243. For a discussion and criticism of American efforts, see, e.g., Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 J. CORP. L. 267, 271 (2004). The United Kingdom's version is set forth in The Money Laundering Regulation 2003 No. 3075, art. 3.1 (U.K.). *See* Nicole M. Healy, *The Impact of September 11th on Anti-Money Laundering Efforts, and the European Union and Commonwealth Gatekeeper Initiatives*, 36 INT'L L. 733 (2002).

244. In this respect, John Coffee's insights about enforcement intensity in financial systems is likely relevant: "The better hypothesis appears to be that enforcement intensity varies with the level of retail ownership in the jurisdiction. If so, this is an example of reverse causality, with developments in the market shaping the evolution of law, not the reverse." John C. Coffee, Jr., *Law And The Market: The Impact Of Enforcement*, 156 U. PA. L. REV. 229, 309 (2007).

245. *See, e.g.*, AUSTRALIAN STOCK EXCHANGE CORPORATE GOVERNANCE COUNCIL, PRINCIPLES OF GOOD CORPORATE GOVERNANCE AND BEST PRACTICE RECOMMENDATIONS (2003); Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Austl.); Paul von Nessen, *Corporate Governance in Australia: Converging with International Developments*, 15 AUSTL. J. CORP. L. 189, 199-207 (2003); Andrew Cassidy & Larelle Chapple, *Australia's Corporate Disclosure Regime: Lessons from the U.S. Model*, 15 AUSTL. J. CORP. L. 81 (2003).

Only through statistics is one able to rationally consider the abilities and fluctuations of the population, and thus form a coherent basis for intervening in it."[246] The same is true for the management of economic enterprises, dependent, as they are, on their customers and investors. With information comes an ability to judge. Judgment permits action, which in the aggregate can be substantial. The rest can be left to the market.[247]

246. Nathan Moore, *Nova Law: William S. Burroughs And The Logic Of Control,* 19 LAW & LIT. 435, 447 (2007).

247. *See* CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 245-271 (1999).