The Evolution and Endpoint of Responsibility: The FCPA, SOX, Leftist Leaders, Gratuitous Promises, and a Novel CSR Code

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Multinational corporations (MNC) have emerged as engines of global development. Over the past fifty years, exponential increases have occurred in the number of multinational corporations, the value of multinationals’ investments in foreign countries, and the amount of multinationals’ wealth.¹ MNCs in developed states have taken advantage of well educated and inexpensive labor in East Asia and, more recently, South East Asia, allowing them to cut costs and generate higher profit margins.² The end of the Cold War ushered previously closed economies across Eastern Europe, the former Soviet Union, and China into the global economy, affording multinationals access to untapped markets.³ Trade liberalization, engineered by the World Trade Organization (WTO) and its member states, has fostered new business relationships and eased corporate access to markets, goods, and services. Foreign direct investment (FDI), defined as “a lasting interest by a resident entity in one economy . . . in an entity resident in an economy other than that of the investor,” has grown exponentially.⁴ In 1989 global FDI stood

¹ See Earl H. Fry, North American Economic Integration: Policy Options, 9 POLICY PAPERS ON THE AMERICAS 8, 2 (2003) (estimating also that, in 2002, approximately 65,000 multinationals operated 850,000 subsidiaries around the world); Beth Stephens, The Amorality of Profit: Transnational Corporations and Human Rights, 20 BERKELEY J. INT’L L. 45, 52 (2002) (highlighting that, while nineteen countries had revenues than General Motors and only three corporations were among the world’s twenty-eight largest economic entities in 1991, in 2000 only seven countries had revenues greater than General Motors and fifteen corporations were among the world’s twenty-eight largest economic entities); Inward FDI Flows (1970-2005), in UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2005: TRANSNATIONAL CORPORATIONS AND THE INTERNATIONALIZATION OF R&D (2005) (reporting that in 1970 FDI worldwide totaled $13.4 billion whereas in 1985 it totaled $58.0 billion and in 2005 totaled $916.3 billion, down from a high of $1.4 trillion in 2000); see also Paul Hirst & Grahame Thompson, Globalization in Question (Polity Press 2d ed. 1999) (discussing how, between 1945 and the present, the world economy has become more closely integrated).


³ See Joseph E. Stiglitz, Globalization and its Discontents 180-94 (2003) (discussing how a transition to market economies has had positive and negative effects on the economies of former communist states); Peter Wilkin, Revising the Democratic Revolution – Into the Americas, 24 THIRD WORLD Q. 655, 656 (2003). One hundred and thirteen countries joined the World Trade Organization at its inception in 1995. One-hundred fifty states are now members.

just below $200 billion.\footnote{Inward FDI Flows by Host Region and Economy (1970-2005), in United Nations Conference on Trade and Development, World Investment Report 2006: FDI from Developing and Transition Economies: Implications for Development (2006).} Seven years later FDI had doubled to just below $400 billion, and then more than tripled to $1.1 trillion by the year 2000.\footnote{Id.} While only ten countries’ FDI totals surpassed $10 billion in 1985, corporations in thirty three countries invested over $10 billion abroad in the year 2000.\footnote{Dicken, supra note 2, at 56.}

The wealth that corporations have enjoyed has not existed in isolation. Rather, greater corporate wealth has translated directly into greater corporate power that corporations have exercised in both positive and negative manners. Greater corporate power has cultivated unprecedented advances in health and education over the past forty years.\footnote{Stiglitz, supra note 3, at 248.} Corporations have developed new medicines, quickened and eased travel and the movement of people\footnote{Dicken, supra note 2, at 91-93 (discussing how rapid modernization of transportation systems has contributed to economic globalization).}, provided employment to millions, and generally have assisted in raising the standard of living worldwide.\footnote{Stiglitz, supra note 3, at 248.} Corporations also have helped to spawn rapid technological development, particularly in the area of communications. Fiber optic systems and the internet have revolutionized the speed at which ideas and knowledge can flow within countries and across oceans\footnote{Dicken, supra note 2, at 95.}, forging a synergistic feedback loop between corporations and technology that has propagated a wealth of new technologies and fed corporate power.\footnote{Id. at 95.}

At the same time, expanding corporate power and the spread of multinational corporations have been associated with a host of problems. The wealth that multinationals have
brought to some countries has bypassed many other countries. In some cases, the activities of multinational corporations in developing countries have retarded economic growth. Multinationals also have been accused of committing a variety of human rights violations, such as carrying out extra-judicious killings and employing child labor. Corporate activities in developing countries also have been attributed to more general economic and social problems, such as environmental degradation, dangerous work conditions, and the deepening of poverty. However, in contrast to developed states, developing states have enjoyed limited success in combating the economic and social harms that have flowed from increased corporate power and that have penetrated their borders. A number of factors – including weak domestic and

13 While this paper is concerned with the overall growth of FDI as that growth informs corporate power, rather than with an analysis of whether and to what extent FDI is evenly distributed and contributes to or hinders growth in certain countries, it is important to note that FDI flows to developing countries are not even and that growth stemming from the internationalization of corporations has bypassed many countries. While countries such as Thailand, Singapore, and Peru have enjoyed large amounts of capital inflows and impressive growth, countries throughout Africa, Central America, South America, Central Asia, Southeast Asia, the Middle East, and the Pacific Rim have seen relatively stagnant and even decreasing FDI totals and have not shared in the economic growth and poverty reduction that many other countries have enjoyed. See Inward FDI Flows by Host Region and Economy (1970-2005), supra note ___.

14 See e.g. Ronaldo Munck, Neoliberalism, Necessitarianism and Latin America: there is no alternative (TINA), 24 THIRD WORLD Q. 495, 501-03 (2003) (discussing how the collapse of Argentina’s economy in 2001 is largely attributable to the neoliberal prescriptions and the rapid influx of multinational corporations through privatization of the economy).


16 In the United States, for example, from 1897 to 1934 the United States Supreme Court struck down numerous state laws regulating working conditions under the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. The Supreme Court’s rulings held that the states cannot use their police powers to enact legislation that interferes with employers’ and employees’ rights to contract. As examples, the Supreme Court invalidated a New York statute forbidding employment in bakeries for more than 60 hours a week, struck down labor legislation forbidding discrimination by employers for union activity and prohibiting employers from requiring employees to sign “yellow dog” contracts, and ruled that a federal statute prescribing minimum wages for women violated due process. Many of the issues that the courts refused to address – unhealthy working conditions, discrimination, and wages – are problems plaguing developing countries. In 1937, however, the Court reversed fifty years of precedence. After its landmark opinion in West Coast Hotel Co. v. Parrish, the Supreme Court began upholding as constitutional legislation that protected workers’ rights and consumers’ rights and that interfered with the previously unfettered rights of business. Statutes that set a state minimum wage for women, prohibited the shipment in interstate commerce of “filled milk”, fixed maximum fees for employment agencies, and regulated opticians were now held to be constitutional. Since 1937, the judiciary and legislators have established huge bodies
international legal institutions, non-responsive heads of state, the “race to the bottom”\textsuperscript{17}, and
developed countries’ economic dominance – have made it difficult for developing states to
effectively address the social problems that accompany MNCs into developing states.\textsuperscript{18} The
inability of many developing states to manage these problems has sparked calls for a code of
social responsibility that is capable of regulating the social effects of corporate activities.\textsuperscript{19}

Countries and corporations have begun responding to cries for a CSR code. The United
States and Member States of the European Union (EU), the Organisation for Economic Co-
operation and Development (OECD), the United Nations (UN), and the International Labor
Organization (ILO) have developed codes that place non-binding corporate social responsibilities
on corporations.\textsuperscript{20} In addition, many corporations have voluntarily drafted and adopted their
own social codes of conduct, though, similar to measures drafted by intergovernmental
organizations, codes drafted by MNCs are not legally binding.\textsuperscript{21} Because existing CSR measures
are unenforceable, the debate on whether to draft and how to structure a binding code of
corporate social responsibility continues. This article enters that debate. It discusses a series of
events and circumstances, occurring domestically within the United States, domestically within
other countries, and within the international community, which, when viewed in light of one
another, suggest that a coalescing body of forces is propelling states and corporations towards

\textsuperscript{17} Andrew T. Guzman, \textit{Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties}, 38 VA. J. Int’l L. 639, 671-74 (1998). Discussions on bilateral investment treaties often refer to a “race to the bottom.” Competition over foreign direct investment (FDI) can be fierce. This competition prompts countries to offer increasingly attractive incentives to corporations in order to receive investment funds. Thus, country A may allow company XYZ to repatriate profits. Country B may then allow company XYZ to repatriate profits and may lower taxation of profits to 2%. In turn, country A lowers taxation to 1% and frees company XYZ from pollution controls. This competition for FDI via added concessions will continue until the costs of such concessions exceeds their benefits.


\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{See infra} notes 200, 206, 209, 212.

\textsuperscript{21} \textit{See infra} notes 222, 223, 224, 225.
creating an enforceable code of corporate social responsibility. After demonstrating that a coalescing body of forces is leading towards the placement of binding social responsibilities upon corporations, this article offers an organizational framework for developing a CSR code.

The article’s first section examines corruption and bribery. It discusses some of the problems that corruption creates in developed states and charts the evolution of U.S. and international measures to combat corruption; measures which have placed greater and greater responsibilities upon corporations. The article’s second section takes a similar approach, first discussing the broad concerns over corporate governance that have surfaced over the past decade and then discussing how the Sarbanes-Oxley Act, and similar measures in Europe, have addressed these concerns.

After charting the United States’ and European Union’s progression of placing greater and greater responsibilities upon corporations, the article analyzes a different but equally influential force that likely will add further momentum towards the development of a CSR code. The article’s third section explains how the rise of leftism in Latin America, and the accompanying push of many Latin American countries towards socialist-oriented policies, is consistent with the development of a code of corporate social responsibility and may contribute to the creation of a CSR code. Next, the article’s fourth section discusses the various rights abuses and social harms that have accompanied the spread of MNCs through developing states. This section then analyses the various corporate social responsibility measures that both the international community and multinational corporations have adopted to regulate these problems. The paper’s fifth section begins by explaining why the CSR measures that states, international governmental organizations (IGO), and multinational have enacted cannot successfully regulate corporate activity, and that are discussed in the article’s fourth section. This section then
proposes a new and potentially useful framework for developing a CSR code in an effort to advance the dialogue on how to regulate multinational corporations. Last, the sixth and final section ties together the information presented in previous sections, summarizes how that information supports the article’s thesis, and draws some conclusions.

I. Corruption: Problems and Responses

While corruption is more rampant and pernicious in developing countries, it also produces serious problems in developed states. When the magnitude of multinational corporations’ bribery of foreign officials came to light in the United States in the 1970s, Congress passed the Foreign Corrupt Practices Act to curb corruption. In 1998 the U.S. adopted its second round of amendments to the FCPA, enlarging the Act’s jurisdiction and expanding its substantive provisions. By the end of the 1990s and the start of the twenty-first century states worldwide had joined the battle against bribery, ratifying several different anti-corruption treaties. Analysis of the evolution of anti-corruption measures reveals that, over time, states have placed greater and greater responsibilities on corporations and have cut more deeply into corporate power. This progression of imposing greater responsibilities on corporations, when viewed in light of other events such as enactment of the Sarbanes-Oxley Act, the rise of leftism in Latin America, and the development of non-binding CSR codes, suggests that a binding code of corporate social responsibility lies on the horizon.

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22 In developing states, corruption’s effects are more varied and acute. Corruption not only undermines effective business practices, but also corrodes political institution, leading to tainted judiciaries, vote buying, venal police forces more concerned with collecting bribes than pursuing criminals, and ineffective rule of law, with dangerous and often catastrophic consequences. In-depth discussion of the effects of corruption in developing states is not directly related to the thesis of this paper and is beyond the scope of this paper. For a detailed analysis of the effects of corruption on developing states, see Tim Harford, Why Poor Countries are Poor, 37 REASON 32, 36 (2006); Senyo Adjubolosoo, Economic Underdevelopment in Africa: The Validity of the Corruption Argument, Review of 11 HUM. FACTOR STUD. 90, 97 (2005); Yan Sun, Corruption, Growth, and Reform: The Chinese Enigma, CURRENT HISTORY 257, 261 (2005); Robert Zuzowski, Corruption in Post-Communist Europe: Immortality Breeds Poverty, 30 J. OF SOC. POL. AND ECON. STUD. 9, 12-15 (2005).
A. Problems Caused by Corruption

Corruption breeds a host of problems. When multinational corporations offer bribes to foreign officials in order to obtain contracts or secure more relaxed regulations, their venal activities undermine effective business practices. Bribery “can damage a company's image, lead to costly lawsuits, cause the cancellation of contracts, and result in the appropriation of valuable assets overseas.” Bribery also inflates operating expenses, creating new costs companies would not absorb if they obtained business legally, and wastes valuable resources. Instead of devoting earnings to research and development, new production techniques, or shareholder dividends, companies paying bribes redirect profits into foreign officials’ pockets. A “race to the bottom” ensues. Officials demand greater and greater sums. Corporations, competing with one another for business, pay larger and larger bribes in order to access markets and obtain favorable treatment until the marginal benefit of new payments decreases to zero. Such behavior is not good for business.

In 1976, more than four hundred U.S. companies admitted to paying over $300 million in bribes to foreign officials during the first half of the 1970s. Gulf Oil Corporation admitted to bribes in various countries, including $4 million to the governing political party in South Korea; General Tire & Rubber Company admitted to bribes in Algeria, Mexico and Venezuela; and

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24 Id. at 5.
26 Id.at 70-71.
28 Cf. Guzman, supra note 17, at 671-74. Although Guzman discusses the race to the bottom in the context of bilateral treaties, the concept is transferable to the spiraling effects of corruption.
Exxon Corporation disclosed bribes in fifteen countries, including $19 million in Italy alone.  

Most dramatically, the SEC discovered that Lockheed Aircraft Corporation, at that time the largest defense contractor in the United States, had been engaged in a pattern of bribery involving prime ministers, presidents, and other high-ranking political figures in several countries.  

By the end of 1976, updated studies revealed that four hundred and fifty U.S. companies had paid over $450 million in bribes since the start of the decade.  

The pervasiveness of corruption sparked government action. In 1977, officially recognizing that “corporate bribery is bad business” and that it affects “the very stability of business overseas” as well as “our domestic competitive climate,” the United States Congress passed the Foreign Corrupt Practices Act to reign in corruption.  

B. The U.S. Response to Corruption: The Foreign Corrupt Practices Act  

The Foreign Corrupt Practices Act is comprised of two general sections: one that establishes accounting and controls regulations and another that fixes rules prohibiting the bribery of foreign officials. While the FCPA was first passed in 1977, amendments in 1988 and 1998 refined the Act and broadened its scope. Comparison of the 1977 version of the FCPA
with the 1998 version reveals that the United States has placed greater and greater responsibilities on corporations.

1. 1977: The FCPA at the Time of its Passage

The first portion of the Foreign Corrupt Practices Act creates record keeping and internal controls standards. Since its inception, this part of the FCPA has required issuers with a class of securities registered under the Securities and Exchange Acts to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”

Records which must be maintained are defined broadly to include “accounts, correspondence, memorandums, tapes, disks, paper, books, and other documents or transcribed information of any type . . . .” Both qualitative omissions, such as an omission of questionable payments to a foreign official, and qualitative omissions, such as mischaracterization of a payment, are proscribed under the record keeping provision. Since 1977, the FCPA also has required issuers to “devise and maintain a system of internal accounting controls” that is designed to improve corporate accountability and ensure that corporate directors, officers, and shareholders can detect and prevent the unlawful use of an issuer’s assets. If an issuer knowingly circumvents or fails to implement a system of internal accounting controls, then that issuer has violated the Act.

The accounting and control provisions, one of the first federal laws to mandate compliance with corporate governance standards, have created a framework for tenacious

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36 15 U.S.C. §78m(b)(2)(A); see 15 U.S.C. §78m(b)(7) (defining “reasonable detail” as “such level of detail… as would satisfy prudent officials in the conduct of their own affairs.”).
38 CRUVER, supra note 30, at 26-27.
39 15 U.S.C. §78m(b)(2)(B). The Act specifically states that issuers must “provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles . . . ; and (iii) access to assets is permitted only in accordance with management's general or specific authorization . . . .”
oversight of corporate activities and have allowed the SEC to detect, investigate, and prosecute acts of bribery.\footnote{Schroth, supra note 31, at 600 (noting that these are the first laws requiring corporate compliance with corporate governance standards and giving the SEC the ability to regulate the internal management of domestic corporations).} For example, in 1996 the SEC brought an action against Montedison, an Italian industrial conglomerate whose shares are traded domestically within the United States.\footnote{SEC v. Montedison, SpA., FCPA Civil Enforcement Actions by the Securities and Exchange Commission, available at http://www.usdoj.gov/criminal/fraud/fcpa/Appendices/Appendix%20b.pdf.} The SEC alleged that Montedison had violated the record keeping provision through its disguise of several hundred million dollars in bribes to Italian politicians.\footnote{Id.} Five years later Montedison settled with the SEC, agreeing to pay a $300,000 fine.\footnote{Id.} Similarly, in 1997 the SEC filed a complaint against Triton Indonesia, a subsidiary of Triton Energy Corporation, alleging that Triton “failed to devise and maintain an adequate system of internal accounting controls.”\footnote{SEC v. Triton Energy Corporation, SEC Litigation Release No. 15226, Feb. 27, 1997, available at http://www.sec.gov/litigation/litreleases/lr15266.txt.} Triton agreed to a final judgment that enjoins it from violating the FCPA and exacts a $300,000 fine.\footnote{Id.} More recently, the SEC issued a cease-and-desist order and levied a $100,000 fine against Chiquita Brands as a result of internal control violations by its Colombian subsidiary, Banadex.\footnote{In re Chiquita Brands International, Inc., FCPA Civil Enforcement Actions by the Securities and Exchange Commission, available at http://www.usdoj.gov/criminal/fraud/fcpa/Appendices/Appendix%20b.pdf.}

While the accounting and controls measures have helped to curtail bribery, the heart of the FCPA lies in its anti-bribery provisions. Since 1977, Congress has applied the FCPA’s anti-bribery provisions to both “issuers” and “domestic concerns.”\footnote{STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 7 (ABA Publishing, 2005).} An issuer is defined as any entity that must register under Section 12 of the Securities and Exchange Act or that must file...
reports under Section 15(d) of that Act.\textsuperscript{49} Domestic concerns include U.S. nationals; a juridical entity organized under U.S. law or with its principal place of business within the United States; and any officer, agent, employee, or stockholder of a domestic concern.\textsuperscript{50} Under this definition, a domestic concern employed by a foreign entity or subsidiary is amenable to the anti-bribery provisions while his or her principal or employer is not.\textsuperscript{51}

Although Congress expanded the FCPA in 1998, drafting new provisions that deepen the government’s regulation of corporations, since 1977 Congress has required the government to establish the same five, general elements in order to demonstrate a violation of the Act. First, the entity making a payment must be acting corruptly.\textsuperscript{52} While the Act does not define the term “corruptly”, the Eighth Circuit has declared that, for purposes of the FCPA, a corrupt act is “intended to induce the recipient to misuse his official position or to influence someone else to do so” or is “done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.”\textsuperscript{53}

Second, the entity must use the mail or any other means of interstate commerce in furtherance of an offer, payment, or promise to pay anything of value.\textsuperscript{54} Cases not involving the FCPA have held that, under the federal mail fraud statute, a use of the mail that is merely “incident to an essential part of the scheme” constitutes use of the mail.\textsuperscript{55} More directly, a citizen of the United States who traveled to Nigeria with six gold watches intended as bribes for Nigerian officials made use of interstate commerce when offering a bribe in violation of the Act.\textsuperscript{56} These

\textsuperscript{50} DEMING, supra note 48, at 8-9.
\textsuperscript{51} Id. at 9.
\textsuperscript{52} 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).
\textsuperscript{53} United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1992).
\textsuperscript{54} 15 U.S.C. § 78dd-1(a); § 78dd-2(a).
expansive definitions of the use of mail and interstate commerce have the effect of imposing heightened responsibilities upon corporations.

The third element of the anti-bribery section requires an offer, payment, or promise of value to be made to any: foreign official, foreign political party, party official, or foreign candidate for political office.\(^{57}\) This element is satisfied if an issuer or domestic concern makes an offer, payment, or promise of value while knowing that a portion of its offer or payment, although not being used to bribe a foreign official, will be re-given or re-promised to a foreign official, foreign political party, foreign party official, or foreign candidate for political office.\(^{58}\) Thus, the third element of the anti-bribery section imposes vicarious liability on issuers and domestic concerns. It allows the government to hold issuers and domestic concerns responsible for the acts of third parties, who are not amenable to suit under the Act, if issuers or domestic concerns make payments to third parties that they know third parties will use to commit bribery. The requisite knowledge for vicarious liability exists if an issuer or domestic concern is aware that a third party is committing bribery, has a firm belief that bribery is substantially certain to occur, or perceives a high probability that bribery will take place.\(^{59}\)

Vicarious liability demands greater corporate responsibility, compelling more scrupulous oversight of a parent company’s subsidiaries, agents, and affiliates and allowing the government to hold multinationals accountable when they fail to discharge their supervisory obligations. For example, in 2004 the SEC lodged a complaint against Vetco Gray, Inc., a foreign corporation based in Zurich, Switzerland that is publicly traded in the U.S.\(^{60}\) The complaint alleged that Vetco Gray was vicariously liable for payments it made to its foreign subsidiaries because it

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knew that its foreign subsidiaries used those payments to secure oil contracts in Nigeria, Angola, and Kazakhstan through bribery. 61 Vecto Gray agreed to a $5.9 million settlement the day the SEC filed its complaint in District Court. 62 Similarly, if an issuer or domestic concern makes a payment to a foreign sales agent while consciously disregarding information suggesting the agent will use that money to make an improper payment, the issuer or domestic concern likely has violated the Act. 63

Since 1977, the fourth element of the anti-bribery regulations has required payments to be made for the purpose of: influencing an official act or decision; inducing the official to do or not do any act in violation of his lawful duty; or inducing an official to use his power to affect a governmental act or decision. 64 The act or decision for which the illicit payment is made need not be connected to the foreign official’s state or government. Rather, pursuant to the Act’s broad language, if an issuer or domestic concern makes a payment to a foreign official for the purpose of influencing the U.S. government or a private enterprise, and if all other elements of the Act are met, then that payment would fall within the Act’s proscription. 65

Fifth, in order to establish a violation of the FCPA the government must prove that payment was offered in order to assist in the obtaining or retaining of business for any person. 66 Once again, sweeping statutory language geared towards placing new responsibilities upon corporations – language that prohibits payments designed to assist any person’s securing of business – has made it easier to address “the concern of Congress with the immorality,
inefficiency, and unethical character of bribery . . . .”67 Two cases illustrate this point. First, in *SEC v. Monsanto*, the SEC concluded that the defendant’s authorization of $50,000 in illicit payments from an Indonesian consulting firm to a senior Indonesian official in exchange for repeal of legislation that had adversely affected the defendant’s business constituted a payment offered to assist in obtaining business.68 Similarly, in *United States v. Kay* the Fifth Circuit declared that “Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person.”69 The court specifically held that bribes paid to customs officials in order to receive reduced customs and tax rates fall within the Act’s proscribed conduct.70

2. 1998: FCPA’s Most Recent Amendments Heighten Regulation

In 1998, Congress amended the Foreign Corrupt Practices Act to conform the Act to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).71 The 1998 amendments expanded the Act’s jurisdiction and broadened its substantive provisions, permitting the government to investigate and prosecute more instances of corruption. This enlargement of the FCPA constitutes an acknowledgement that deeper, more extensive measures are necessary to regulate corporate activities and is consistent with the U.S. government’s and the international community’s pattern of placing greater and greater responsibilities upon multinational corporations.

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69 Kay, supra note 67, at 755.
70 Id. at 755.
71 CRUVER, supra note 30, at 74.
The 1998 amendments made four radical changes to the Foreign Corrupt Practices Act. First, the amendments greatly enlarged the Act’s jurisdiction, both over U.S. nationals and over foreign persons. With regard to U.S. nationals, the Act added a new subsection stating that:

> “[i]t shall also be unlawful for any issuer organized under the laws of the United States . . . or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of . . . subsection (a) . . . for the purposes set forth therein, irrespective of whether such issuer . . . officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce . . .”72 (emphasis added).

As described above, this new subsection stretches the FCPA’s nationality jurisdiction. Now, all payments made by issuers and persons acting on behalf of issuers are amenable to scrutiny, investigation, and prosecution regardless of whether the issuer or person acting on the issuer’s behalf used the mails or interstate commerce in any way.73 Accordingly, if a corporate executive acting on behalf of a corporation, while in a foreign county, were to orally offer to fly a foreign official and his or her family to Spain for a vacation in exchange for the foreign official’s opposition to a new minimum wage law, the executive’s offer would constitute an illegal bribe under the Act even though the official neither made the offer in the United States nor utilized the mail or interstate commerce.74

The 1998 amendments not only expanded nationality jurisdiction, but also added a new section that revolutionizes the Act’s extraterritorial jurisdiction. Before 1998, the only foreign entities that the United States could assert jurisdiction over for purposes of the FCPA were

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72 15 U.S.C. §§ 78dd-1(g), 78dd-2(g), 78dd-3(g).
73 See id.
74 See id.
foreign issuers organized under U.S. law and persons acting on their behalf. After the 1998 amendments, the United States now may exercise jurisdiction over any person who violates the Act’s substantive provisions while in the territory of the United States. Congress adopted this amendment to combat many corporations’ practice of using foreign agents and subsidiaries to make illicit payments to foreign officials. This expansion of the government’s jurisdiction under the FCPA is consistent with the trend that the United States and the international community have followed – an evolution of the law that is placing greater and greater responsibilities on corporations.

A recent action by the SEC against an Indonesian national demonstrates the effect of the Act’s expanded jurisdiction after the 1998 amendments. In 2001, the SEC and the Department of Justice filed a joint civil injunction in U.S. District Court against KPMG Siddharta Siddharta & Harsono (KPMG-SSH), and Indonesia accounting firm, and against Sonny Harsono, a partner in the firm. The complaint alleged that Mr. Harsono agreed to make a payment of $75,000 to an Indonesian tax official in order to reduce the official’s assessment of taxes that one of KPMG-SSH’s clients owed to the Indonesian government. While prosecution of Mr. Hasorno would have been impossible before the 1998 amendments, after the 1998 amendments the SEC was able to exercise jurisdiction over Mr. Harsono because he was “a person other than an issuer . . . within the meaning of the FCPA.”

The 1998 amendments also broadened the Act’s substantive provisions in two important ways. First, whereas the FCPA previously limited its prohibitions to payments made for the

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77 Brown, supra note 41, at 293.
79 Id.
80 Id.
purpose of “influencing” or “inducing” an “act or decision,” the FCPA now also proscribes payments made for the purpose of “securing any improper advantage.”81 This language captures a greater range of conduct than the 1977 version of the FCPA, making it difficult for entities subject to the Act’s jurisdiction to contend that payments or offers were made for a legal purpose. For example, after the 1998 amendments payments made to a foreign official in order to have the first opportunity to submit a bid for a government contract, or in order to arrange a favorable location for a factory, likely would be made for the purpose of “securing any improper advantage” and constitute a violation of the Act.82

In addition, while the Act always has prohibited illicit payments to foreign officials, the 1998 amendments expanded the definition of “foreign official” to include “any officer or employee . . . of a public international organization, or any person acting in an official capacity or on behalf of any such . . . public international organization.”83 By defining “foreign official” to include officers and employees of international organizations, Congress and the OECD have recognized the growing role that international organizations play in world affairs and the susceptibility of such officials to bribery by multinational corporations. This new definition outlaws a greater number of payments, prohibits corporations from offering bribes to a greater number of people, and is consistent with Congress’ trend towards demanding greater corporate responsibility.

C. International Anti-Corruption Measures: Common Problems, Different Responses

The international community has joined the fight against corruption. Over the past ten years several IGOs have drafted and implemented conventions outlawing corruption. The

82 Id.
OECD, recognizing that “bribery . . . raises serious moral and political concerns, undermines . . . economic development, and distorts competitive conditions,” created the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Likewise, the Inter-American Convention Against Corruption (IA Convention), ratified by thirty three Latin American and Caribbean states, stresses that “fighting corruption strengthens democratic institutions and prevents distortions in the economy.” The Council of Europe Criminal Law Convention on Corruption (CoE Convention), ratified by fifty two countries, and the United Nations Convention Against Corruption (UN Convention), which one hundred forty countries have signed though only fifty one have ratified, express similar concerns over corruption.

Each of these international conventions requires signatories to accept intrusions into their national sovereignty in order to enjoy the benefits of strong intergovernmental structures capable of fighting cross-border corruption. The OECD Convention, for example, requires states to “provide prompt and effective legal assistance” to one another. Signatories must cooperate with criminal investigations, non-criminal investigations, and other proceedings involving offenses that fall within the scope of the Convention. Both the UN Convention and the IA Convention incorporate comparable duties. The UN Convention obliges states to furnish one another with as much legal assistance as each state’s domestic laws allow. Article XIV of the

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88 OECD Convention, supra note 84, at art. 9.
89 Id. at art. 9.
90 U.N. Convention, supra note 87, at art. 46.
IA Convention employs similar language, but also requires Parties to provide “mutual technical cooperation”, which includes sharing knowledge of how to fight corruption most effectively.\textsuperscript{91} Thus, the IA Convention goes a step beyond the OECD and UN in this regard, compelling both \textit{ex post facto} and \textit{ex ante} legal assistance. Collectively, these provisions demonstrate that countries throughout the world are willing to closely regulate the activities of multinational corporations operating within their borders and are willing to place greater responsibilities for combating corruption upon corporations.

Each of these international conventions also requires signatory states to establish systems for monitoring compliance.\textsuperscript{92} The UN Convention, for example, creates a “Conference of the States Parties to the Convention,” which must develop processes for reviewing compliance with the Convention and for exchanging ideas on how to further the Convention’s goals.\textsuperscript{93} Likewise, the OECD states agree to carry out “a programme of systematic follow-up to monitor and promote the full implementation of this Convention.”\textsuperscript{94} The CoE Convention simply states that signatory states “shall monitor the implementation of this Convention by the Parties” while the Follow-up on the Inter-American Convention Against Corruption and its Program for Cooperation require signatories to periodically review compliance with the IA Convention.\textsuperscript{95} Monitoring systems, absent from the FCPA, illustrate the international community’s commitment to fighting the harms associated with corruption and its willingness to closely monitor the activities of multinational corporations.

\begin{footnotesize}
\begin{enumerate}
\item IA Convention, \textit{supra} note 85, at art. XIV.
\item U.N. Convention, \textit{supra} note 87, at art. 63; CoE Convention, \textit{supra} note 86, at art. 24; OECD Convention, \textit{supra} note 114, at art. 12; Follow-up on the Inter-American Convention Against Corruption and its Program for Cooperation AG/RES. 1784 (XXXI-O/01), \textit{reprinted} in 41 I.L.M. 244 (2002).
\item U.N. Convention, \textit{supra} note 87, at art. 63.
\item OECD Convention, \textit{supra} note 84, at art. 12.
\item CoE Convention, \textit{supra} note 116, at art. 86; Follow-up on the Inter-American Convention Against Corruption and its Program for Cooperation AG/RES. 1784 (XXXI-O/01), \textit{reprinted} in 41 I.L.M. 244 (2002).
\end{enumerate}
\end{footnotesize}
D. Conclusion: Progressive Placement of Heightened Responsibilities on Corporations

Corruption undermines efficient business practices and wastes valuable resources. Efforts to combat corruption have gradually intensified. The United States initially outlawed corporate bribery of foreign officials in 1977 with passage of the FCPA. Since then, the U.S. has placed greater and greater anti-corruption responsibilities on corporations, expanding the government’s jurisdiction over both U.S. nationals and foreign persons and enlarging the Act’s substantive provisions. States worldwide have followed the U.S. government’s lead through adoption of multilateral anti-corruption treaties which, in some cases, exceed the FCPA’s exacting standards. Analysis of the evolution of these anti-corruption measures reveals that, over time, states have placed greater and greater responsibilities on corporations and have cut more and more deeply into corporate power. When the evolution of anti-corruption measures is viewed in light of the development of heightened corporate governance standards, and in light of events such as the rise of leftism in Latin America and the passage of non-binding CSR measures by IGOs and multinational corporations, the creation of a corporate social responsibility code appears on the horizon.

IV. Behind SOX: Reasons for Imposing Even More Corporate Responsibility

At the start of the 21st century broad, fundamental problems with the governance of corporations captured the attention of the United States government and the international community. While responses to corruption placed greater responsibilities upon corporations, measures to combat corporate governance problems expanded the breadth of corporate responsibilities even further. The Sarbanes-Oxley Act, and similar measures developed by the United Kingdom and the European Union, regulate systems of corporate governance and management. Analysis of these corporate governance measures, when viewed in light of the
evolution of anti-corruption legislation, the rise of leftism in Latin America, and the development of non-binding CSR measures by states and corporations, reveals that the international community is moving towards developing a binding code of corporate social responsibility.

A. Broad Corporate Governance Problems

Broad corporate governance problems at the beginning of the twenty-first century undermined democratic institutions and weakened confidence in the U.S. economy. While these corporate governance problems varied in character and severity, combined they contributed to losses in investment portfolios, the closure of many businesses, and the weakening of both the U.S. and the global economy.

The primary corporate governance problem at the start of the twenty-first century was deceitful accounting practices, exemplified by Enron though employed by many other large multinational corporations. While Enron experienced tremendous growth during the 1990s and the early part of the twenty-first century, it obtained much of its profits through fraudulently constructed transactions. Enron fabricated special purpose entities as part of its corporate structure in order to improve its financial appearance to investors. These special purpose entities operated as partnerships with outside interests, allowing Enron to treat these creations as independent entities that it could remove from its consolidated balance sheet in order to hide

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97 See J.R. Romanko, The Way We Live Now: 6-9-02: Salient Facts; Down from the Peaks, N.Y TIMES, June 6, 2002, at 34 (citing an unemployment rate in April, 2002, of 6% compared to 3.9% in April, 2000); Daniel Altman, U.S. Jobless Rate Increases to 6.4%, Highest in 9 Years, N.Y. TIMES, July 4, 2003, at A1; Scott Bernard Nelson, Fed Holds Rates Steady – For Now Revises Stance, Calls U.S. Economy Fragile, BOSTON GLOBE, Aug. 14, 2002, at D1 (quoting the federal reserve as saying “[T]he softening in the growth of aggregate demand that emerged this spring has been prolonged in large measure by weakness in financial markets and heightened uncertainty related to problems in corporate reporting and governance.”).
98 Enron Corporation began as a natural gas company, expanded its operations worldwide, pressed into other industries, and was touted as a model for the new, competitive, fast-moving corporate America.
Arthur Anderson, Enron’s auditors, approved these “creative compliance” techniques that were calculated to impassion investors and deceive the public. Shortly after Enron filed for bankruptcy, investigations revealed that Enron had been operating with $13.15 billion in debt and an additional $27 billion in liabilities concealed by these special purpose entities. Enron’s collapse was not an isolated incident. In 2002, WorldCom admitted that it had overstated its earnings by $11 billion and declared bankruptcy while claiming $110 billion in assets, the largest bankruptcy in American history. Similar events unfolded at Global Crossing, a company that invested in fiber optic cables and filed for bankruptcy in January, 2002 with billions of dollars in assets and liabilities. Authorities also uncovered hidden transactions and veiled debts that lay outside the balance sheet of Adelphia Inc., a prominent cable company.

Another serious corporate governance problem was many corporations’ method of selecting outside auditors. Before SOX, a company’s chief financial officer (CFO) usually chose an outside accounting firm to audit the company. However, most big accounting firms not only performed audits, but also earned significant revenue through consulting. By 1998, Wall Street’s major accounting firms garnered only 38% of their revenue through audits. This transformation practically revolutionized auditing firms into “consulting companies that did a

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100 Peter T. Muchlinski, Enron and Beyond: Multinational Corporate Groups and the Internationalization of Governance Disclosure Regimes, 37 CONN. L. REV. 725, 730 (2005). Enron's use and proliferation of SPEs grew out of SEC guidelines stating that corporations can treat SPEs independently under accounting practices if an owner of a company that does business with the SPE contributes an equity investment of at least 3% of the SPE’s assets and if the independent owner maintains control over the SPE.
103 SKEEL, supra note 99, at 176.
104 Shirley, supra note 102, at 504.
105 Id. at 504.
106 SKEEL, supra note 99, at 179.
107 Id. at 166-67.
little auditing on the side,”\textsuperscript{108} forking an arrangement that reposed considerable power in CFOs. Whereas CFOs once hesitated to discharge auditors who might not have approved certain corporate structures and transactions out of fear that such a discharge would provoke closer analysis of accounts, concern among investors, and a market backlash, CFOs now enjoyed leverage to threaten curtailment of consulting business if auditors refused to approve questionable transactions.\textsuperscript{109} As auditors grew reluctant to investigate suspect accounting practices, the balance of power shifted heavily towards CFOs, in turn allowing corporations to employ deceitful accounting techniques.

A final corporate governance problem that drew attention in recent years was the increased power vested in large corporations’ chief executive officers (CEOs). Huge increases in executive compensation during the final decades of the twentieth century are a clear manifestation of this heightened executive power. While CEOs of S&P 500 companies earned thirty times more than non-managerial workers in 1970, by 1996 those same CEOs were making two hundred and ten times more than the average worker, with the gap widening even further in recent years.\textsuperscript{110} The significance of these figures does not lie in the sheer difference in pay. Rather, the importance of these figures also stems from the fact that, unlike professional athletes, actors, and others whose salaries also have grown considerably in recent years, CEOs “essentially set their own compensation.”\textsuperscript{111}

\textsuperscript{108} \textit{Id.} at 166-67 (noting that in 2000 and 2001, Arthur Anderson, Enron’s now defunct accounting firm, earned $25 million a year from Enron for its consulting services and an additional $25 million for audits).

\textsuperscript{109} \textit{Id.} at 166-67.

\textsuperscript{110} Randall S. Thomas, \textit{Should Directors Reduce Executive Pay?}, 54 HASTINGS L.J. 437, 440-41 (2003); David Leonhardt, \textit{The Imperial Chief Executive is Suddenly in the Cross Hairs}, N.Y. TIMES, June 24, 2002, at A1 (stating that top CEOs made approximately 410 times what the average worker was paid in 2001); Ken Belson, \textit{Executive Pay: A Special Report; Learning How to Talk Salary in Japan}, N.Y. TIMES, April 7, 2002, at 12 (highlighting that executives in Japan make approximately 12 times what the average worker is paid in Japan, whereas executives in the United States made approximately 180 times what the average worker is paid in the U.S.).

These varied questionable corporate governance practices prompted close scrutiny of corporate activities, undermined confidence in corporations, and hurt corporate earnings. As concerns grew, these broad corporate governance problems not only affected individual corporations, but also hurt private citizens and the entire economy.\textsuperscript{112} In July 2002, as the negative impacts of poor corporate governance were spreading across the United States\textsuperscript{113}, Congress approved the Sarbanes-Oxley Act “to address the systemic and structural weaknesses affecting our capital markets which were revealed by repeated failures . . . in recent months and years” and “[to] increase corporate responsibility.”\textsuperscript{114}

B. The Sarbanes-Oxley Act: A New Code of Corporate Responsibility

The Sarbanes-Oxley Act has been heralded as “the most significant piece of securities legislation since the 1930s.”\textsuperscript{115} It has redefined the rules for publicly traded companies and has instituted broad, sweeping changes in corporate governance and accounting practices.\textsuperscript{116} More specifically, auditor controls, certification procedures, and internal controls requirements have placed greater responsibilities on corporations.\textsuperscript{117}

\textsuperscript{112} See Brian Kim, Sarbanes Oxley Act, 40 HARV. J. ON LEGIS. 235, 237 (2003) (noting that twenty thousand Enron executives lost $1.2 billion from their 401(k) plans during Enron’s dissolution); John Paul Lucci, Enron: The Bankruptcy Heard Round the World and the International Ricochet of Sarbanes-Oxley, 67 ALB. L. REV. 211, 212 (2003) (following WorldCom’s accounting scandal, upwards of twenty-thousand WorldCom employees lost their jobs); Ethan G. Zelizer, The Sarbanes-Oxley Act: Accounting for Corporate Corruption?, 15 LOY. CONSUMER L. REV. 27, 30 (2002) (estimating that financial scandals involving Enron, WorldCom, and other companies cost at that time cost shareholders $460 billion); see also SEN, supra note 15, at 94 (explaining how that unemployment’s negative effects spread far beyond loss of income).

\textsuperscript{113} See Romanko, supra note 97 at 34 (citing an unemployment in April, 2002, of 6% compared to 3.9% in April, 2000); Altman, supra note 97, at A1; Nelson, supra note 97, at D1 (quoting the federal reserve as saying “[T]he softening in the growth of aggregate demand that emerged this spring has been prolonged in large measure by weakness in financial markets and heightened uncertainty related to problems in corporate reporting and governance.”).

\textsuperscript{114} S. REP. NO. 107-205 (2002).


\textsuperscript{117} See THOMAS E. HARTMAN, THE COST OF BEING PUBLIC IN THE ERA OF SARBANES-OXLEY 3 (2005) (discussing a survey of corporate executives which reveals that a large majority of executives regard SOX’s corporate governance and public disclosure reforms as “too strict”, as companies with an annual revenue under $1 billion experienced a
One way in which SOX has tightened oversight of corporations is through its regulation of audit committees. Until recently, most audit committees convened infrequently and did little more than rubber stamp the auditor’s work. Many audit committee members even appeared to be personally tied to their companies’ CEOs. Sarbanes-Oxley enlarged the SEC’s authority to regulate the structure, scope, and tasks of audit committees by requiring corporations to develop independent audit committees. After the passage of SOX, audit committee members cannot hold any position within the company other than their positions as members of the audit committee. Likewise, audit committee members may not “accept any consulting, advisory, or other compensatory fee from the issuer” nor “be an affiliated person of the issuer or any subsidiary thereof.” SOX gives each audit committee plenary responsibility for appointing, overseeing, and setting compensation for its corporation’s public accounting firm. It also requires each audit committee to craft a procedure for funneling employee suspicions and complaints of questionable accounting practices to the attention of corporate officers. Furthermore, each audit committee must have at least one member who is a “financial expert,” or explain its reasons for not having such a “financial expert.” Collectively, these provisions


118 MOELLER, supra note 116, at 59.
119 Id. at 59.
122 Id. at 776, Section 301.
123 Id. at 776, Section 301.
124 Id. at 776, Section 301.
125 Id. at 790, Section 407. To qualify as a financial expert one must have experience auditing “comparable issuers”, “experience with internal accounting controls”, and “an understanding of audit committee functions.
force corporations to adopt new procedures and organizational structures in order to ensure the independence of their audit committees.

The Sarbanes-Oxley Act’s regulation of audit committees creates a new framework for corporate governance. Section 201 of SOX has a similar effect. It prohibits a corporation’s external auditors from providing additional, non-audit services, including bookkeeping, financial information systems design, appraisals, investment advice, and “any other service that the Board determines, by regulation, is impermissible.”126 This provision requires corporations to adopt measures that hopefully can guarantee their auditors’ independence, in turn weakening corporate power through the imposition of tighter regulations and greater corporate responsibilities.

Similarly, the Sarbanes-Oxley Act’s certification provision mandates closer regulation of corporate materials. This provision requires each issuer’s principal executive and principal financial officer(s) to certify that he or she has reviewed each annual or quarterly report and that, based on the officer’s knowledge, all material facts in the statement are true, no material facts are omitted, and all financial information is correct “in all material respects.”127 By forcing corporate officers to attest to their knowledge of their corporation’s financial condition, the certification provision undercuts an executive’s ability to claim ignorance of faulty financial statements and exacts greater corporate responsibility.

The Sarbanes-Oxley Act’s internal controls provisions impose SOX’s deepest, most comprehensive regulations, clearly demonstrating the trend towards placing greater and greater responsibilities on corporations.128 Pursuant to Section 302, each principal executive and

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126 Id. at 771-72, Section 201.
127 Id. at 777, Section 302.
128 See 68 Fed. Reg. 36636 (June 18, 2003) (defining internal controls as “a process designed by, or under the supervision of…principal executive and financial officers…and effected by the…board of directors…to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles . . . .”)
principal financial officer must confirm that he or she has designed internal controls.\textsuperscript{129} These controls must ensure that the principal executives and principal officers have knowledge of material information about the corporation and its subsidiaries.\textsuperscript{130} Principal executives and principal officers also must confirm that they have evaluated the effectiveness of the controls that they created.\textsuperscript{131} In addition, Section 302 requires each principal executive and principal officer to confirm that he or she, or another officer, has disclosed any significant cause for alarm over the adequacy of the controls.\textsuperscript{132}

While section 302 requires officers and executives to create internal controls, section 404 requires corporate management to assess the effectiveness of those controls. Pursuant to Section 404, corporate management must: 1) state in their annual reports management’s responsibility for “establishing and maintaining an adequate internal control structure;” 2) assess the effectiveness of the internal controls in their annual reports; and 3) have their public accounting firms “attest to, and report on” management’s assessment.\textsuperscript{133}

A comparison of the FCPA’s internal controls provisions and the Sarbanes-Oxley Act’s internal controls provisions reveals the trend towards placing more extensive responsibilities on corporations. The FCPA’s internal controls provision, initially drafted thirty years ago, simply declares that issuers must design and maintain internal controls, but does not require evaluation and analysis.\textsuperscript{134} Conversely, sections 302 and 404 of SOX collectively require corporate executives to state their responsibility for designing internal controls, to invent such controls, to

\textsuperscript{129} SOX, supra note 121, at 777, Section 302/

\textsuperscript{130} Id. at 777, Section 302

\textsuperscript{131} Id. at 777, Section 302.

\textsuperscript{132} Id. at 777, Section 302; see also Final Rule: Certification of Disclosure in Companies’ Quarterly and Annual Reports, Securities Act and Exchange Release Nos. 33-8124, 34-46427, IC-25722, 67 Fed. Reg. 57,726 (Aug. 29, 2002) (specifying that CEOs and CFOs may not delegate their Section 302 duties to any subordinate).

\textsuperscript{133} SOX, supra note 121, at 789, Section 404.

\textsuperscript{134} 15 U.S.C. §78m(b)(2)(B).
assess and evaluate these controls, and to draw conclusions about their effectiveness.\textsuperscript{135}

Similarly, the FCPA places responsibility for internal controls upon the corporation in general\textsuperscript{136}, whereas SOX specifically charges executive officers with internal controls duties.\textsuperscript{137} Thus, internal controls have been transformed from a recitation of general duties lodged upon the corporation as a whole to a statement of specific responsibilities\textsuperscript{138} imposed on corporate executives in particular.

Although the audit committee, certification, and internal control provisions have placed the greatest responsibilities on corporations, other sections of SOX also have set new standards for corporate governance. Corporations must “disclose whether or not, and if not, the reason therefor,” they have “adopted a code of ethics for senior financial officers, applicable to its principal financial officer and comptroller or principal accounting officer, or persons performing similar functions.”\textsuperscript{139} This portion of SOX charts new regulatory territory, placing an ethics standard upon corporations. In addition, pursuant to section 402, corporations no longer may “extend or maintain credit . . . in the form of a personal loan to or for any director or executive officer,” whether done directly or indirectly through a subsidiary.\textsuperscript{140} Again, by proscribing corporate loans to executive officers, including loans through foreign subsidiaries, Congress has fashioned new corporate responsibilities. Finally, Section 806 of Sarbanes-Oxley prohibits corporations and their constituents from discharging, demoting, suspending, harassing, threatening, or otherwise discriminating against any employee who provides any information regarding conduct by corporations that may violate either any SEC rule or regulation or any

\begin{footnotesize}
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\item SOX, \textit{supra} note 121, at 777, Section 301; 789, Section 404.
\item 15 U.S.C. §78m(b)(2)(B).
\item SOX, \textit{supra} note 121, at 777, Section 301; 789, Section 404.
\item See 68 Fed Reg. 36636 (adopting rules for the implementation of Section 404).
\item SOX, \textit{supra} note 121, at 789, Section 406; \textit{see also} MOELLER, \textit{supra} note 116, at 71-79 (discussing the efforts of many corporations to establish corporate wide ethics programs in order to increase external legitimacy, the risk environments that corporations face, the need for an ethics program, and how to establish such a program).
\item SOX, \textit{supra} note 121, at 787, Section 402.
\end{enumerate}
\end{footnotesize}
federal law involving fraud against shareholders. Section 806 also furnishes civil remedies for an employee who alleges discrimination under this section and subsequently is sued by his or her employer.\footnote{Id. at Section 806.} Section 806 federalizes state law statutes protecting whistle blowers.\footnote{Karmel, supra note 120, at 867.} It shifts power from the corporation to constituents of the corporation, including low-level employees, a change that is consistent with calls for corporations to assume a new set of corporate social responsibilities to their employees, communities, and environments.

\section*{C. Corporate Governance Measures in Other Countries}

Similar to how many countries followed the U.S. government’s lead in developing anti-corruption treaties to combat bribery of foreign public officials, two years after enactment of the Sarbanes-Oxley Act, the United Kingdom and the European Union passed new corporate governance measures. The United Kingdom’s Companies (Audit, Investigation, and Enterprise) Act of 2004 (the Companies Act) severs close ties between corporations and auditing firms.\footnote{Companies (Audit, Investigations, and Community Enterprise) Act of 2004, art. 7, available at http://www.opsi.gov.uk/acts/acts2004/40027--b.htm\#7 [hereinafter Companies Act].} Although it does not forbid auditors from performing non-audit services like section 201 of SOX, the Companies Act does empower the Secretary of State to pass regulations requiring corporations to disclose any non-audit services that auditors provide.\footnote{Id. at art. 7.} The Companies Act also confers auditors with unfettered access to company accounts and allows auditors to require corporate executives and officers to provide them with any information needed for the performance of their duties.\footnote{Id. at art. 8.} In addition, the Companies Act includes a certification provision, pursuant to which each corporate director must state in his or her report that, “so far as the director is aware, there is no relevant audit information of which the company’s auditors are
unaware” and that the director has taken all necessary measures for making himself or herself “aware of any relevant audit information” and for establishing “that the company's auditors are aware of [such] information.”

While the above regulations place new responsibilities on corporations, other provisions within the Companies Act also demonstrate the common progression in the U.S., U.K., and EU towards creating a heightened regulatory environment. The Companies Act sets additional requirements for the recognition of supervisory audit bodies, permits the Secretary of State to make grants to any entities that investigate departures from accounting standards, and, with approval by the Secretary of State, empowers individual investigators to compel the production of documents during investigations.

The European Union also has adopted measures that place greater responsibilities on corporations. EU Council Directive 2006/43 (the Directive) includes several provisions that affirm that auditors must operate independently of their audited corporations. The Directive requires member States to ensure that auditors and audit firms do not perform audits when the auditor and the corporation have “any direct or indirect financial, business, employment or other relationship.” The Directive also prohibits owners and shareholders from intervening “in the execution of a statutory audit in any way which jeopardises the independence and objectivity of the statutory auditor.” In addition, the Directive requires member states to “ensure that all statutory auditors and audit firms are subject to a system of quality assurance” that meets criteria designed to ensure the independence of these quality assurance systems.

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146 Id. at art. 9.
147 Id. at arts. 1, 16, 21.
149 Id. at art. 24.
150 Id. at art. 29.
Although not discussed earlier, section 101 of SOX establishes a non-profit organization, the Public Company Accounting Oversight Board, “to oversee audit of public companies . . . in order to protect the interests of investors . . . .”\textsuperscript{151} The Directive mandates the creation of a similar body, calling for “a system of public oversight for statutory auditors and audit forms,” which “shall be transparent” and “shall have ultimate responsibility for . . . the approval and registration of statutory auditors and audit firms, the adoption of standards on professional ethics . . . and . . . investigative and disciplinary systems.”\textsuperscript{152} By passing the Directive and adopting these measures, the EU has followed the lead of the United States and the United Kingdom in placing greater and greater responsibilities upon corporations in member States.

D. Conclusion: Continued Progressive Placement of Heightened Responsibilities upon Corporations

In response to the broad corporate governance problems that arose in the United States during the beginning of the twenty-first century, Congress passed the Sarbanes-Oxley Act. Sarbanes-Oxley establishes a host of new measures that regulate the structure and governance of corporations. Although less prescriptive than SOX, the Companies Act and the Directive also create new corporate governance standards. When compared to the FCPA and other anti-corruption measures, SOX places greater responsibilities on corporations and slices more deeply into corporate power. Thus, starting from the FCPA’s inception in 1977 and continuing to the adoption of SOX in 2002, U.S. regulation of corporate activities has escalated gradually. A similar trend exists internationally. This evolution of placing greater and greater binding responsibilities on corporations, when viewed in light of events such as the growth of leftism in Latin America, corporate rights abuses, and the passage of non-binding CSR codes, suggests

\textsuperscript{151} SOX, \textit{supra} note 121, at 750, Section 101.
that, over time, the international community will develop a binding corporate social
responsibility code to govern the social impacts of corporate activities.

III. The Growth of Leftist Governments in Latin America: Aiding the Development of
Corporate Social Responsibilities

Following a wave of democratization in Latin America during the 1980s, many countries
in Latin America adopted neoliberal economic policies during the 1990s. Neoliberal policies
can generally be defined as measures that reduce a country’s economic protections and open a
country’s economy to the international marketplace free of government interference. Such
policies were advocated by the International Monetary Fund, World Bank, and other leading
international economic institutions recommended for developing countries during the 1990s.
In many cases, these economic institutions conditioned loans and assistance on countries’
willingness to adopt austere macroeconomic fiscal policies, rapidly privatize state-owned
businesses, and quickly liberalize capital markets. Accordingly, many Latin American
countries followed neoliberal mandates, curtailing the provision of social services, quickly
liberalizing capital markets, and privatizing huge, state-owned industries.

These measures proved successful for several years, helping to produce economic growth
throughout Latin America. Drawn by inexpensive and well educated labor, corporations

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153 THOMAS E. SKIDMORE & PETER H. SMITH, MODERN LATIN AMERICA 59 (2d ed., 1989) (highlighting the election
of civilian presidents in Peru, Argentina, and Brazil during the 1980s and citing Chile as the only “major exception”
to the general rule that Latin America had democratized by 1985).
154 STIGLITZ, supra note 3, at 6-8, 74.
155 Id. at 6-8.
156 Id., at 53.
157 Sergio Cabrera Morales, Las Noventa: Hacia la Segunda Década Perdida, in GLOBALIZACIÓN, EXCLUSIÓN Y
158 AUGUSTO DE LA TORRE ET AL., CAPITAL MARKET DEVELOPMENT: WHITHER LATIN AMERICA 8, 18 (2006),
available at http://www.nber.org/books/IASE05/delatorre-et-al5-23-06.pdf
159 SYBIL RHODES, SOCIAL MOVEMENTS AND FREE-MARKET CAPITALISM IN LATIN AMERICA 26-29 (2006)
(discussing the rapid privatization of state-owned businesses, particularly the telecommunications industry, in Latin
America during the 1990s)
160 See STIGLITZ, supra note 3, at 53 (stating that neoliberal policies initially sparked growth in Latin America); Gross Domestic Product by Host Region and Economy (1970-2005), in UNITED NATIONS CONFERENCE ON TRADE
began to invest heavily in Latin America during the 1990s. In 1990, inward FDI to Latin American countries totaled just over $10 billion. The expanding presence of foreign corporations in Latin America during the 1990s was at least partly attributable to the enactment of neoliberal reforms in Latin America, particularly the rapid privatization of many formerly state-run industries. In Brazil, for example, over one hundred state-owned companies were privatized during the 1990s, creating privatization revenues of $61.5 billion. Similarly, the privatization of approximately one hundred companies in Argentina during the 1990s resulted in approximately $23 billion in privatization revenues.

However, even while neoliberal policies were drawing foreign investment and triggering economic growth, they began to fail. By the end of the 1990s, sluggish and in many cases negative economic growth had spread throughout Latin America. The neoliberal reforms that flooded countries in Latin America with FDI and MNCs received some of the blame for this continental economic downturn. Partly as a result of this downturn, leftist leaders have come to power in Latin America. The resurgence of leftist leaders and socialist policies began with

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161 Inward FDI Flows by Host Region and Economy (1970-2005), supra note 5.
162 Id.
163 Germano Mendes de Paula et al., Economic Liberalization and Changes in Corporate Control in Latin America, 44 THE DEVELOPING ECONS. 467, 485-87 (2002).
164 Id. at 477-78.
165 Id. at 477-78.
166 See http://www.latin-focus.com/latinfocus/countries (showing statistics indicating that: GDP failed to grow in Brazil between 1995 and 2002; Argentina’s economy was stagnant during 2001 and during the first quarter of 2002 its annual economic growth rate declined 16%; and between the middle of 1998 and the middle of 1999, Venezuela went from experiencing moderately positive to moderately negative economic growth).
168 Consider that Hugo Chavez was elected President of Venezuela shortly after the country went from experiencing moderately positive to moderately negative economic growth; that Luiz Inácio Lula da Silva was elected President of Brazil after a 7 year period during which, after rising and then falling, Brazil’s GDP remained constant; and that Argentina elected Nestor Kirchner after it experienced economic collapse.
the election of Hugo Chavez in Venezuela in 1999 and since has spread to eight countries in Central and South America. The degree to which these countries lean towards socialist policies and values differs greatly. However, each of these countries has denounced neoliberal policies that allow MNCs to generate tremendous economic wealth without placing upon them commensurate social duties. Each of these countries also has adopted socialist-oriented policies that demonstrate their concern with maintaining control over their economies, protecting workers’ rights, safeguarding national resources, and countering perceived U.S. dominance in the region.

Venezuela’s citizens elected Hugo Chavez as their President in 1999. Since taking office, Chavez has spent billions of dollars on education and health care and has made “life increasingly miserable for foreign – above all American – companies.” Most recently, Chavez announced plans to nationalize Venezuela’s telecommunications and electricity industries and to transform Venezuela into a socialist country. Venezuela generally is considered the most extreme left-leaning country in Latin America, with Chavez being called by Jorge Castañeda, the former Foreign Minister of Mexico under President Vicente Fox and current professor at New York University, a populist leader who “does very little for the poor of his own country” and

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170 See generally Castaneda, supra note 167.
171 Panizza, supra note 167, at 727; see generally Ratner, supra note 18.
172 While this article is concerned with Venezuela’s approach towards economic and social rights since Chavez came to power, rather than with the country’s approach towards political rights, it is important to note that Venezuela has been criticized by states, international organizations, and commentators, including the Organization of American States, for depriving people of their liberty, treating extra-judicial execution of peasants with impunity, and generally failing to protect political rights. See IACHR, Press Release: IACHR Reports on the Situation of Human Rights at the Conclusion of Its Session, No. 35/05, Oct. 28, 2005.
173 See Christian Parenti, Hugo Chavez and Petro Populism, NATION, Apr. 11, 2005, at 17. (stating that Venezuela has spent billions on social programs that have allowed 1.3 million people to learn to read, provided medical care to millions, and improved infrastructure); Castaneda, supra note 167.
175 See Castaneda, supra note 167.
who pursues “big-time spending, authoritarian governance and militant anti-Americanism.”"176 Nonetheless, because protecting Venezuelan interests from U.S. dominance is a primary goal of the Chavez government, Chavez could hold tremendous influence in the region if he moderates his anti-U.S. stance and pursues a CSR code that protects the economic and social rights of his country’s citizens from the activities of U.S. and European multinational corporations.

Lula Inácio Lula da Silva was elected President of Brazil in 2002, the first left-wing Brazilian president since 1970.177 Lula has developed socialist policies “without rejecting the precepts of capitalism.”178 His party leadership relies on input from local-level councils to shape its national agenda and his government is responsive to the Landless Rural Worker’s Movement, the world’s largest movement of the rural poor and a strong advocate of agrarian reform. Lula also has weakened Brazil’s ties with the United States and has strengthened Brazil’s ties with other developing countries such as China, India, and South Africa, hoping to act as a counterweight to U.S. influence.179 These policies demonstrate that, although Brazil is deeply integrated into the global economy and unquestionably is a capitalist county, Brazil’s government is concerned with protecting the social rights of its citizens and with projecting its left-leaning perspective into the international community. Because development of a CSR code would help Brazil’s government to achieve these goals, the rise of Lula’s leftist government in Brazil strengthens the likelihood that the international community will develop a code of corporate social responsibility.

177 Panizza, supra note 167, at 716.
Nestor Kirchner was elected President of Argentina in 2002, following the former president’s resignation in 2001 and the country’s economic collapse. Kirchner initially challenged the IMF, stating that foreign investors would only receive thirty percent of the debt that Argentina owed them. Later Kirchner changed his position, announcing that Argentina would pay off its debt early, and, in January 2006, made the country’s last payment. Argentina’s debt payment, which demonstrated its willingness to work within the existing international economic system, pleased foreign investors. However, Argentina also is wary of neoliberal dictates, opposes a free-trade agreement, and has aligned closely with Venezuela. This pattern of behavior demonstrates that Argentina accepts the importance of foreign investment from multinational corporations for the growth of its economy. However, this pattern of behavior also shows that Argentina is unhappy with the neoliberal agenda and is willing to challenge that agenda, including the benefits that neoliberalism bestows on MNCs, in order to protect the rights of its people. Because a code of corporate social responsibility has the potential to protect Argentines from the social harms of neoliberal policies and expanding corporate power, the election of Nestor Kirchner’s leftist government strengthens the likelihood that Argentina will endorse and the international community will develop a CSR code.

Bolivia recently elected Evo Morales as President. During his campaign, Morales promised a departure from twenty years of neoliberal reforms that failed to pull Bolivia from poverty and a turn towards socialist-oriented policies. Since taking office, Morales has

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180 Panizza, supra note 167, at 717.
182 Larry Rohter, As Argentina’s Debt Dwindle, President’s Power Grows Steadily, N.Y. TIMES, Jan. 3, 2006, at A1; Colon McMahon, For Argentina, Debt Cut is Payback Time, CHI. TRIB., Jan. 13, 2006, at C5.
184 Daphne Eviatar, Liberating Pachamama: Corporate Greed, Bolivia, and Peasant Resistance, 38:2 Dissent 22, 25 (2006); Mark Weisbrot & Luis Sandoval, Bolivia’s Challenges 6 (2006) (stating that Bolivia is South America’s poorest country, with an average per capita income of $2,800 as compared to an average of $8,200 in all of Latin America, with 64% of Bolivians living below the poverty line).
nationalized Bolivia’s oil and gas industry, ordering troops to occupy foreign-run oil and gas fields. To the dismay of foreign companies, Morales has indicated that he may nationalize other sectors, such as the mining and forest industries. Morales, an Amyara Indian and past leader of the coca union, also has championed the rights of the poor and of indigenous people. He has declared that coca, widely used in Bolivia as a mild medicinal herb, should be treated as a legitimate product. He also has fought the exploitation of Bolivia’s natural resources by foreign multinationals. Bolivia’s ratification of a CSR code that governs the conduct of multinationals operating within its borders would further the government’s socialist objectives while allowing it to enjoy the benefits of foreign investment; benefits that Bolivia has not eschewed completely. Accordingly, the election of Morales furthers the likelihood that developed states, developing states, and multinationals will develop a CSR code.

Other countries in South and Central America also have elected leftist leaders in recent years, partly as a response to failed neoliberal policies. Ecuador’s recently elected president, Rafael Correa, has taken a hard stance against foreign corporate interests and is expected to support socialist-oriented policies. In November, 2006, Nicaragua elected Daniel Ortega, a left-leaning politician, a former leader of the communist Sandinista National Liberation Front during the 1980’s, and a former president of the county, as its new President. Peru, Chile, and

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186 Tyler Bridges, *Farmers’ Fears Highlight Growing Rift with Morales*, MIAMI HERALD, June 14, 2006 (noting that foreign mining companies, such as Apex Silver, Coeur d’Alne and Newmont, together have invested $750 million in Bolivia, at least part of which they stand to lose upon nationalization); see also Todd Benson, *Bolivia Moves to More State Control*, TORONTO STAR, Jan. 20, 2007, at D4 (noting that Evo Morales recently announced that Bolivia will move ahead with plans to nationalize the mining industry).
187 Steve Boggan, *Coca is a Way of Life*, THE GUARDIAN (LONDON), Feb. 9, 2006, at 8; Eviatar, supra note 184, at 26-27.
Uruguay also have elected centre-left leaders over the past few years. The election of these leftward leaning governments that support socialist-oriented policies could add momentum to the push for greater corporate social responsibility and bolster efforts to develop a CSR code.

D. Conclusion

Neoliberalism initially sparked economic growth in many Latin American countries, but the pace and depth of reforms eventually undermined development. As a result, leftist leaders critical of Washington’s prescriptions and supportive of socialist-oriented policies have come to power in Latin America over the past decade. To varying degrees, these leaders have pursued policies that benefit lower classes and workers. Leaders in these left-leaning countries also have protected their domestic industries from the influence of foreign MNCs, in some cases going so far as to nationalize major sectors of their economy. Although these leaders have not also pursued the development of a code of social responsibility, their efforts to protect their workers and their economies from the harms that have accompanied the growth of FDI and the spread of multinationals in Latin America are consistent with the goals behind development of a CSR code. Accordingly, the rise of leftism in Latin America, when viewed in light of the trend towards placing greater responsibilities upon corporations, and in light of the adoption of non-binding CSR codes by IGOs and MNCs, holds promise to advance efforts to develop a code of corporate social responsibility.

190 Latin America, 2006, WASHINGTON TIMES, Dec. 30, 2006, at A12 (noting that both Michelle Bachelet, who recently was elected President of Chile, and Alan Garcia, who was elected as President of Peru, have pursued free-trade agreements with the United States); Castaneda, supra note 167 (noting that Tabare Vazquez, who was elected President of Uruguay in 2004, has both denounced neoliberalism and explored the possibility of a free-trade agreement with the United States).
IV. Corporate Abuses of Economic and Social Rights, the Failure of the Rule of Law, and Non-binding CSR Measures as Means of Protecting Economic and Social Rights

Over the past decade, on various occasions and in various countries, the activities of multinational corporations have been associated with human rights abuses. In order to redress these abuses, the international community has drafted a number of non-binding human rights obligations that set various standards for corporate conduct. Likewise, multinational corporations have voluntarily drafted and adopted non-binding codes of social conduct. These measures demonstrate that states and corporations worldwide understand that unchecked corporate power has created social problems. Even more importantly, these measures show that states are willing to place social responsibilities upon MNCs and that multinationals are willing to accept social obligations.

A. Concerns Over Rights Abuses and the Failure of the Rule of Law

Multinational corporations have been accused of violating civil and political rights; economic, social, and cultural rights; and environmental rights. For example, it was alleged that U.S. parent company Unocal and its French subsidiary knew that the Burmese government was using slave labor, raping women, confiscating property, and uprooting communities in order to assist Unocal’s construction of a gas pipeline.191 Local forces in Nigeria hired by Shell carried out large-scale, extrajudicial killings and destroyed villages in order to secure Shell’s investment in the country.192 In India, Dabhol Power Corporation (majority owned by Enron) hired police forces who arbitrarily detained non-violent protestors.193 A subcontractor of the Gap in El

Salvador employed workers in “sweatshop conditions.” British Petroleum has admitted to contracting with Columbia’s military for protection of its oil operations in Columbia with disregard for whether Columbia’s military would safeguard basic human rights. Children worldwide are engaged in labor. Other violations by corporations include exposing workers to sulfur dioxide in Peru and dumping waste into the waters of Ecuador and Indonesia. These are not isolated instances of misconduct, but rather samples drawn from a larger pool of human rights violations. However, at the present only states and, in a few instances, individuals are treated as having human rights obligations.

B. International Organizations’ Non-binding Corporate Social Responsibility Measures

Concern over human rights abuses associated with corporate activity has prompted states to develop non-binding codes of corporate social responsibility. The traditional stakeholder governance style of European companies, under which corporations consider their relationships with employees, consumers, and the environment when making decisions, has made Europe a natural leader in attempts to more closely regulate the social impacts of corporate activity. In 1999, the European Parliament adopted a “Code of conduct for European enterprises in developing countries” (the Code). While the Code does not establish specific, binding corporate social responsibilities, it does erect the foundation for enforceable regulations.

195 Stephens, supra note 1, at 52.
198 Ratner, supra note 18, at 462-65.
200 Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, 1999 O.J. (C 104) 180 [hereinafter EU Code].
Code recommends that the EU endorse “existing minimum applicable international standards” that the ILO, UN, and OECD have set for regulating the social impacts of corporate activities and it calls on the EU to work with these organizations “to ensure more powerful and effective monitoring and enforcement mechanisms.”

Provisions also stress that an EU CSR code should protect the rights of indigenous peoples and should create social labels for products – labels that several EU countries already require. A paper issued by the Commission of European Communities in 2001 (the Green Paper) supplements the Code, noting that “[c]orporate social responsibility should . . . not . . . substitute for social rights or environmental standards, including the development of new . . . legislation.”

The United States also has assented to non-binding measures that place greater social responsibilities on corporations, recently signing the Voluntary Principles on Security and Human Rights (the Voluntary Principles) with the United Kingdom. The Voluntary Principles establish high CSR standards for businesses in the extractive and energy sectors to follow and tout the constructive role that businesses can play in protecting social rights. The Voluntary Principles suggest that businesses in the extractive and energy industries should: establish procedures for assessing the risk that either the corporation, its agents, or its host country might commit a human rights violation; take measures to ensure that public security forces provided by the host government for the benefit of the corporation do not commit a human rights violation; and take measures to ensure that private security forces hired by the corporation for the benefit of the corporation do not commit a human rights violation.

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201 Id. at arts. 12, 29. Relevant standards cover human rights, labor, and the environment.
202 Id. at arts. 7, 12, 14.
205 Id.
International organizations also have begun to develop non-binding CSR codes. All of the OECD countries plus nine non-member countries have signed the OECD Guidelines for Multinational Corporations (the Guidelines). The Guidelines do not establish legally binding duties, but rather strongly encourage corporations to voluntarily adopt certain standards. They suggest that “enterprises should . . . respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”

Enterprises also should “[r]espect” employees’ freedom to join trade unions, “[c]ontribute” to the “abolition of child labor”, and end workplace discrimination. Other terms enounce high environmental, corruption, and consumer protection standards that corporations should follow.

In two separate documents, the Global Compact (the Compact) and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms), the United Nations also has furnished corporate social responsibility guidelines. The Compact “asks companies to embrace, support and enact within their sphere of influence” ten core human rights, labor, environmental, and anti-corruption values that are derived from international treaties. While the Compact states lofty goals, its lack of specificity and enforceability are serious problems that detract from its effectiveness. These weaknesses, common to CSR codes developed by IGOs and corporations alike, have sparked “a trend towards holding companies accountable through legal rules for the human rights and environmental

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207 Id. at 241-42.
208 Id. at 243-45.
210 Id.
impact of their policies,” an idea echoed in the UN Norms. The UN Norms begin by asserting that, although “[s]tates have the primary responsibility . . . to protect human rights, transnational corporations and other business entities, as organs of society” under the Universal Declaration of Human Rights, must also secure human rights “[w]ithin their respective spheres of activity and influence . . . .” Using legally binding language, the Norms declare that corporations “shall” ensure non-discriminatory treatment, security of persons, workers’ rights, respect for human rights and national sovereignty, and environmental protections. However, states have not yet adopted the Norms and the Norms currently are not in force.

Lastly, while the ILO enjoys a long history of protecting worker’s rights, in recent years it has imposed greater corporate social responsibilities directly on employers. For example, the Tripartite Convention of 1976 compels states to generate consultations between governments, employers, and workers in order to resolve labor issues, striking an important balance between these three entities. More recently adopted, the 1995 Mines Convention places weighty responsibilities upon employers, requiring employers to “eliminate risks” and to “ensure that the mine . . . provide[s] conditions for safe operation and a healthy working

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213 Id. at 2-14.
environment.\textsuperscript{217} Recognizing that undeveloped laws in host countries may fail to protect employees, the Mines Convention also provides that, “where appropriate,” employers must supplement national standards with “technical standards, guidelines or codes of practice.”\textsuperscript{218} Likewise, the 2001 Agriculture Convention declares that employers “have a duty to ensure the safety and health of workers in every aspect related to work” and emphasizes the importance of consultations between governments, employers, and workers that can fulfill and further the Tripartite Declaration.\textsuperscript{219}

\textbf{C. Voluntary Corporate Codes of Conduct}

Finally, growing numbers of corporations are drafting and implementing voluntary, self-imposed codes of conduct. The Sullivan Principles, created by Reverend Leon H. Sullivan in 1977 and adopted by corporations worldwide during the 1980s, was developed to help guide ethical corporate activities in South Africa during apartheid and was one of the first CSR codes that multinational corporations voluntarily adopted.\textsuperscript{220} Since adoption of the Sullivan Principles, hundreds of MNCs have written and passed their own CSR codes.\textsuperscript{221} The approaches these codes take and the terms they include vary greatly. While some codes merely announce good practices to which the corporation should aspire, others describe specific human rights principles.

For example, Royal Dutch Shell’s CSR code merely recognizes broad business principles, such as the company’s aim to “be good neighbors” to local communities, to “respect

\textsuperscript{218} \textit{Id.} at 211.
\textsuperscript{220} Henry J. Richardson III, \textit{Reverend Leon Sullivan’s Race, Principles, and International Law: A Comment}, TEMPLE INT’L AND COMP. L.J. 55, 58, 61 (describing how the Sullivan Principle made corporations responsible for extending to their black workers in South Africa “the same rights, treatment, advancement, and employment benefits as would be basically required in the United States under its constitutional equal protection standards,” and made corporations responsible for undertaking infrastructure projects for the benefit of their workers).
the human rights of [its] employees,” and to “conduct business as responsible corporate members of society.”

Likewise, YUM! Brands Inc., owner of Pizza Hut, Taco Bell, and Kentucky Fried Chicken, has a loosely worded Supplier Code of Conduct which states that “suppliers are expected to ensure that their workers have safe and healthy working conditions” and that suppliers “should not use workers under the legal age for employment for the type of work being performed.” Conversely, The Gap’s Vendor Code of Conduct contains eight articles that set specific standards for its vendors and factories, outlawing discrimination based on “race, color, gender, nationality, religion, age, maternity, or marital status” in a manner that largely comports with articles 2 and 23 of the Universal Declaration of Human Rights, and prohibiting “involuntary labor of any kind” in a manner that largely comports with article 8 of the International Covenant on Civil and Political Rights. Although less detailed than The Gap’s Code of Vendor Conduct, Adidas’ CSR code also promulgates specific standards, stating that “[b]usiness partners must not employ children who are less than 15 years old” and that “[w]ages must equal or exceed the minimum wage required by law or the prevailing industry wage, whichever is higher.”

D. Conclusion

Attention on human rights abuses associated with the activities of multinational corporations has increased over the past decade. Corporations have been censured for participation in and failure to prevent extra-judicial killings, environmental degradation, the

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violation of basic labor rights, and other human rights abuses. In response, international organizations and multinational corporations have adopted a variety of different measures to help prevent human rights violations by corporations. Both the process of developing these CSR measures, including discussions on how to structure a CSR code, which social duties corporations should be required to accept, and how to word those duties, and subsequent analysis of the effectiveness of measures adopted by MNCs and IGOs have furthered the dialogue on whether and how to place social responsibilities upon corporations. Through this process of drafting and analyzing CSR measures, states have formally recognized that MNCs must assume social responsibilities. Likewise, many MNCs have accepted that the extent of their power and their ability to abuse that power warrant social accountability. When viewed in light of the trend towards placing greater and greater responsibilities on corporations, beginning with the FCPA and extending to SOX, and in light of the rise of leftism in Latin America, the adoption of CSR codes by international organizations and multinational corporations suggests the international community is moving towards developing a binding code of corporate social responsibility.

V. The Final Frontier: A Code of Corporate Social Responsibility

Although a series of events and circumstances have pushed the international community in the direction of establishing a binding code of corporate social responsibility that can hold MNCs accountable for the harmful impacts of their activities, designing such a code will be a difficult task. Countless hurdles, some higher than others, complicate and block the development of a legally binding CSR code: ambiguity on the extent of MNCs’ responsibilities under international law226; disagreement over the degree to which corporations may pursue goals other than profit maximization227; corporate resistance to costly, new CSR regulations228; the

226 See Ratner, supra note 18, at 511-13; Backer, supra note 214, at 299.
227 See Ratner, supra note 18, at 511-13; Backer, supra note 214, at 299.
reluctance of developed states to impose CSR regulations on their multinationals; many
developing states’ resistance to measures that might hurt their competitiveness as a destination
for FDI vis a vis other countries; and still other obstacles as well. As countries, IGOs, and
scholars debate over whether the creation of a binding CSR code is both palatable and possible
and, if it is palatable and possible, over the organizational structure that such a code such take,
they must consider and balance the hurdles and competing interests that are complicating efforts
to develop a CSR code.

Below, I propose a framework for an enforceable code of corporate social responsibility.
This framework is not meant to analyze and offer a resolution for the entire body of problems
that countries, corporations, and civil societies will encounter as they try to construct a binding
CSR code. However, this framework does present a new and potentially useful method for
developing and implementing an enforceable code of corporate social responsibility.

A. Weaknesses of Existing Corporate Social Responsibility Measures

The social responsibility measures that countries and corporations have adopted in recent
years are praiseworthy. These measures recognize that corporations not only have a
responsibility to maximize profits for shareholders, but also have a responsibility to protect their
workers, communities, and surrounding environment. Nonetheless, existing CSR measures bear
a number of weaknesses that limit their effectiveness.

The voluntary guidelines that the European Union, United States, United Nations, and the
OECD have enacted are unenforceable. Countries and corporations that sign onto these

\[\text{\footnotesize 228 Sorcha MacLeod, Corporate Social Responsibility Within the European Union Framework, 23 Wis. Int’l L.J. 541, 551-52 (2005).}\\
\text{\footnotesize 229 Backer, supra note 214, at 381-83.}\\
\text{\footnotesize 230 Guzman, supra note 17, at 671-74.}\\
\text{\footnotesize 231 See EU Code, supra note 200; Green Paper, supra note 203; Voluntary Principles, supra note 204; OECD}\\
\text{\footnotesize Guidelines, supra note 206; Global Compact, supra note 209; U.N. Norms, supra note 212.}\\
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measures do not accept legally binding obligations. Thus, countries and corporations can become signatories to these voluntary measures in order to curry political capital, and then choose the degree to which they will abide by their gratuitous promises. In addition, the codes developed by countries and IGOs are universally binding, applying identical standards equally to all countries regardless of a country’s particular culture, needs, and resources.232 Such an approach eschews reality in favor of utopian, largely western standards that corporations in many states would be unable to fulfill.

For example, it is naive to believe that a CSR code could exact western employment discrimination standards from foreign subsidiaries of U.S. parent firms that operate in Saudi Arabia or that a CSR code could eradicate the use of child labor in Africa and Asia. If employment discrimination was outlawed universally and discrimination against women in Saudi Arabia occurred, the code’s enforcement body would face two choices. It could prosecute transgressing MNCs, a daunting task that surely would offend Saudi sovereignty and societal values, or it could exculpate corporations in Saudi Arabia, in turn undermining the enforcement body’s authority and the code’s legitimacy.233 Neither option is appealing. Furthermore, a code demanding universal compliance with one set of norms could cause more harm than good. “In the poorest nations an abrupt halt to child labor is likely to cause children to suffer acute poverty and hunger,” and may push children into black market labor and prostitution.234 Placing stringent, western environmental standards on developing countries, standards that many developed states have only begun to follow in the last thirty years, would solve one social

232 See EU Code, supra note 200; OECD Guidelines, supra note 206; U.N. Norms, supra note 212.
233 Consider that the U.N. and international community have failed to prevent mass killings in recent years in Bosnia, Rwanda, Somalia, Iraq, Lebanon, and Darfur. See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 56 (2d ed., 2001)
problem, environmental externalities, but would also retard economic growth, in turn creating other problems and damaging citizens’ livelihoods.235

Codes developed by corporations pose even greater enforcement difficulties. These guidelines are not only self-drafted and self-adopted, but also self-enforced, leaving implementation, monitoring, and enforcement responsibilities to corporations in a perverse concentration of power.236 In addition, voluntarily adopted corporate codes only apply to the small percentage of MNCs that adopt them,237 offer a moral platform for egregious rights abuses,238 and may fail to regulate a parent company’s foreign subsidiaries or may only regulate a parent company’s foreign subsidiaries.239

B. Proposed Framework for a Creating a Binding Code of Corporate Social Responsibility

Analysis of the problems that undermine the effectiveness of existing CSR measures reveals that, while a CSR code must be legally binding in order to effectively regulate the social impacts of corporate activities, a code also must remain flexible in order to prevent self-implosion. Below, I propose a two-level framework, an implementation process, and an enforcement mechanism that states and multinationals can build upon to construct a code of corporate social responsibility that is legally binding, pliant, and ultimately effective at holding MNCs legally accountable for the social impacts of their activities.

236 Sean D. Murphy, Taking Multinational Corporate Codes of Conduct to the Next Level, 43 COLUM. J. TRANSNAT’L L. 389, 401 (2005).
239 Murphy, supra note 236, at 401; see e.g. Gap Inc. Code of Vendor Conduct, supra note 224; Adidas Group, Workplace Standards, supra note 224; The Coca Cola Company, Supplier Guiding Principles, available at http://www.thecoca-colacompany.com/citizenship/supplier_guiding_principles.html.
1. **Level One: Establishing a Baseline**

The first level of a new CSR code should state general, non-binding human rights standards. These standards should be phrased as pragmatic ethical obligations that MNCs should strive to follow and states should promote. Level one standards could be modeled after standards in the Global Compact, though should include more details than the Compact’s ten general principles. Specific terms and binding language used in the UN Norms should be avoided. Provisions should offer definitions of common political and bodily (e.g. slavery, rape, extrajudicial killings), labor (e.g. wages, child labor, occupational safety, and sweatshop conditions), social (e.g. indigenous people) and environmental (e.g. water and air pollution, damming) responsibilities that corporations should accept. Articulating baseline human rights standards should further dialogue on and facilitate agreement on what constitutes multinational corporations’ human rights duties. Establishing basic, non-binding responsibilities also should provide structure for the development of state-tailored, binding CSR codes in the second level of the proposed framework.

2. **Level Two: Binding State Specific Codes**

Level two should provide the code’s substantive, binding terms. Because OECD countries are the source of a large majority of the world’s multinational corporations and foreign direct investment, I suggest that one representative from an OECD country be matched with one delegate from each non-OECD ratifying host state. Together, through input from multinational corporations and civil society, these teams of two should fix legally binding

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240 Global Compact, *supra* note 212.
corporate social responsibility codes that are based on level one’s standards. These codes should regulate the activities of multinational corporations operating in each host country and should be tailored to each host country’s unique needs, culture, and resources. All terms in these country specific codes must employ enforceable, binding language (“MNCs shall…”), clearly informing states and MNCs that noncompliance will result in penalties.

By tailoring obligatory terms to the dynamics of each country, the code would be able to accommodate different conceptions of what a worker needs to enjoy an adequate standard of living, what actions are discriminatory, and what amounts to grease payments or bribes. If child labor is needed in a given country to help feed and shelter families, that country’s team of two may permit child labor under certain conditions that perhaps demand parental permission, prohibit overtime, and require MNCs to hire independent managers who solely monitor the treatment of child workers. Countries experiencing rampant corporate corruption can enact extremely stringent bribery laws while permitting more generic occupational safety standards because their governments already provide adequate occupational safety regulations. Thus, the need for industry specific standards is obviated. Instead, the code would provide for country specific standards that allow each state to concentrate on those industries and those aspects of industries most in need of regulation. At the same time, the code would use mandatory language that would make adherence to country specific standards legally binding.

Some may assert that this approach will provide a platform for states to set weak standards for multinational corporations. However, a realistic approach tailored to states’ unique resources, societies, histories, cultures, and needs is vital. Compliance with modest but

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244 See Basu, supra note 234, at 491 (noting that “parents do not typically send their children to work out of sloth but rather out of desperation.”).
245 See Id. at 496 (emphasizing the need for democratization of international organizations in order to account for the interests of developing states).
realizable standards is better than disregard for unattainable ideals. Moreover, the code can prevent OECD countries from advocating for more lenient obligations by pairing together OECD and host state representatives whose countries have relatively few investment connections and thus little interest in collusion. Every three years the teams of two should evaluate the customized country codes. If a new government has begun enforcing anti-discrimination laws, the teams can increase MNCs’ anti-discrimination obligations. If a society’s expectations regarding what constitutes an adequate living standard have changed, the team of two can increase MNCs’ minimum wage or employment benefit duties.

Others may contend that host states competing for FDI would not sign a treaty that mandates tighter regulation of MNC activity and, in turn, hurts their competitiveness vis a vis other countries. However, I believe a code can encourage ratification by imposing an investment freeze that prohibits ratifying states from pursuing new investments in non-ratifying countries. An investment freeze would sidestep problems that citizens of developing states face when corporations withdraw capital in response to human rights violations. Even more importantly, a freeze would goad states into ratifying the code through fear of stagnant foreign investment. As more and more states ratify the code, non-ratifying states would become increasingly isolated. Faced with the choice of deeper isolation or renewed investments, many states would choose to ratify the treaty with the understanding that its sovereignty, culture, economy, and needs will not be unduly jeopardized. Over time, an investment freeze not only may halt the race to the bottom, but also could trigger a race to the top. Still, the details of an investment freeze would need refinement in order to prevent the loss of investment opportunities for states that ratify the code. Perhaps implementation of the freeze should begin after fifty

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246 Guzman, supra note 17, at 671-74.
states have ratified the code, or should be limited to certain sectors of each non-ratifying state’s economy.

3. The Code Committee

An executive body should oversee the code’s procedural niceties, implementation, monitoring, and enforcement. I suggest that the new CSR code create a Code Committee to handle these tasks. The Committee could consist of 11 members representing the four major stakeholder groups, elected by ratifying states every few years, with one vote per state. I would suggest that four members hail from OECD states, three from developing states, and two each from MNCs and NGOs.

The Committee could be charged with a variety of tasks. It could approve all OECD and host country “team of two” representatives in order to guard against collusion between OECD and host country states and secure the appointment of disinterested representatives from all ratifying countries. The Committee also initially could field complaints from states, MNCs, and civil society alleging that a country’s level two CSR code is inefficacious or inappropriate, with the Committee either resolving the issue amicably or referring it to a tribunal. Amendments to procedural matters, such as the process for selecting country representatives, committee members, and tribunal members, and amendments to substantive matters, such as increases in level one’s baseline standards, could be approved by the committee, provided that eight or nine committee members sanction each amendment. As the code is drafted and implemented, additional responsibilities would be conferred upon the committee.

4. Enforcement

As mentioned earlier, states’ level two human rights obligations must be legally binding and enforceable. Unenforceable obligations lack the capacity to punish code violations and
foment true change, perhaps galvanizing MNCs around shared norms but failing to ensure that
practice follows speech.\textsuperscript{247} Empowering a tribunal with the authority to enforce a CSR code will
deter corporate violations, promote responsible corporate activity, and provide reparations for the
injured. Consistent and fair enforcement of a code’s terms will increase a code’s legitimacy,
preventing the emasculation and loss of authority that plague many international treaties.

Any entity, including individuals, NGOs, businesses, and states, should be allowed to
bring complaints against a corporation alleging that a corporation violated its level two corporate
social responsibilities. The code should require alleged infringements to initially be brought
before the representative of the host state where the supposed violation occurred and that
representative’s OECD counterpart. The team of two should enter into a dialogue with the MNC
accused of violating its legal duties and should attempt to resolve the situation amicably, with the
understanding that many MNCs do not intend to violate human rights and that, especially when
violations may have been committed by contractors or licensees, many MNCs may have been
unaware that violations were occurring.\textsuperscript{248} Some violations, such as minimum wage violations
or occupational safety hazards, could be corrected quickly without taking the MNCS to a
tribunal. Other violations, such as pollution of rivers and waterways, may require long-term
strategic action, though resolution would be possible without referral to a tribunal through
ongoing collaboration between stakeholders.\textsuperscript{249} This initial process is fashioned after the
OECD’s national contact points system.\textsuperscript{250} It would be an efficient, cost-effective, and fair
method of settling many complaints, especially baseless claims, minor infractions, and violations

\textsuperscript{247} Elisa Westfield, \textit{Globalization, Governance, and Multinational Corporations: Corporate Codes of Conduct in
\textsuperscript{248} See Ratner, \textit{supra} note 18, at 518-520 (noting that corporations can have varying level of knowledge of rights
abuses based on how much control parents have over their subsidiaries).
\textsuperscript{249} See e.g. Voluntary Principles, \textit{supra} note 204 (establishing a voluntary guide that encourages collaboration
between the extractive industry sector and host states).
\textsuperscript{250} OECD Guidelines, \textit{supra} note 206, at Part 2: Implementation Procedures of the OECD Guidelines for
Multinational Corporations, art. I.
that corporations admit to committing but also demonstrate a clear interest in correcting. Every six months the country representatives should report to the Committee on the corporation’s progress toward achieving full code compliance.

Some cases, however, will present complicated facts, sharp disagreements and hostilities, or gross human rights violations. Such cases, if unable to be resolved effectively through the informal enforcement process described in the preceding paragraph, should be referred to a tribunal established by the CSR code for the purpose of adjudicating alleged code violations. Each ratifying country could nominate one judge who, after the Code Committee’s approval, would be available to serve on tribunals. Seven such judges could sit on a given case, perhaps three nominated by the host state, three by the complainant, and one by the home state to ensure fair representation, with the majority’s holding deciding the case. All MNCs incorporated in ratifying states would be amenable to the court’s jurisdiction, allowing the court to collect money judgments from MNCs and grant injunctive relief.

Beyond these details the Code Committee will need to fine tune the judicial process considerably and resolve difficult questions. May the Code Committee or a tribunal override the OECD and host state representatives’ enforcement decisions and either place a claim onto the court’s docket or release a case from court back to the representatives? On how many tribunals may a single judge serve? How should court proceedings be drafted? Would appeals be possible? What types of damages would be available? May the court levy creative remedies, perhaps requiring a MNC to provide education for child laborers? May tribunals issue advisory opinions?
C. Conclusion

Existing corporate social responsibility codes have weaknesses, such as a lack of enforceability and a one-size-fits-all approach, that limit their effectiveness. Because of these weaknesses, a new organizational framework for structuring a code of corporate social responsibility is needed. The dual level approach presented in this section provides such a framework. This approach allows each country to place legally binding duties on corporations that operate within its borders while also permitting each country to tailor those CSR duties to its individual culture, needs, and resources. The code committee and enforcement mechanisms strengthen the proposed framework and further its ability to regulate the social effects of corporate activities. Admittedly, this framework is not a panacea and leaves many questions unanswered. However, the goal of this section is not to propose a final solution for how to structure a CSR code. Rather, the goal of this section is to advance the discussion on how to place corporate social responsibilities on multinational corporations. This framework, and its dual level approach, should further that goal.

IV. Summary

Over the past thirty years, the United States and the international community slowly have placed greater and greater responsibilities upon corporations. First, a pandemic of corporate bribery prompted the U.S. to pass the Foreign Corrupt Practices Act in 1977, and to expand the act’s jurisdiction and substantive provisions in 1998, placing a series of anti-bribery responsibilities upon corporations. As the international community began to accept that bribery undermines effective business practices and economic development, it too drafted measures that outlaw corporate bribery of foreign officials. Soon after the U.S. and the international community developed anti-corruption measures, a series of corporate governance problems in
the United States led to the passage of the Sarbanes-Oxley Act. Sarbanes-Oxley places a large body of new regulations upon corporations and demands even greater corporate responsibility. Likewise, the U.K. and the EU have grown concerned with corporate governance problems and have passed measures that impose greater responsibilities upon corporations in order to solve such problems.

While states worldwide have been placing heightened responsibilities upon corporations, there has been a concomitant rise of leftist governments throughout Latin America that support socialist-oriented policies. Although these governments have not pursued the development of a code of social responsibility, their efforts to protect their workers and their economies from the harms that have accompanied the growth of FDI and the spread of multinationals in Latin America are consistent with both the trend towards placing greater responsibilities upon corporations and the goals behind efforts to develop a CSR code. At the same time, the international community and multinational corporations have drafted a number of non-binding measures which, stemming from the trend towards placing greater and greater responsibilities upon corporations, impose a new type of responsibility upon corporations – social responsibility for employees, communities, the environment, and society. However, because measures that the international community and MNCs have adopted lack legal enforceability, if states, the international community, MNCs, and civil society truly wish to regulate the social problems that have accompanied expanding corporate power into developing countries, these entities must work towards developing a binding code of corporate social responsibility. Judging by the placement of greater responsibilities upon corporations, the rise of leftist leaders in Latin America, and the development non-binding CSR measures, much of the world is deeply interested in developing such an enforceable CSR code.
This article offers a dual level framework for developing such a code, including an administrative code committee and an enforcement body. The proposed structure works toward the creation and enforcement of realistic country-tailored codes, rather than towards the creation of utopian ideals that are strong on paper but weak in practice. As the