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“Better the Devil You Know”: Home State Approaches to Promoting Transnational Corporate Accountability

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ABSTRACT:

Liberal International Relations theory provides a dynamic account of lawmaking, implementation and enforcement at the individual, State, and international levels. In many respects, that account is reflected in the recent global effort to enhance business respect for human rights. However, in the area of State involvement and regulation, the business and human rights (BHR) effort has been extremely lacking. This article argues that while past efforts to enhance corporate respect for human rights at the individual and international levels have been absolutely critical and will continue to be so in the future, the era of State restraint must – and likely will – soon come to an end. Significantly, the role of the “home States” – the States of incorporation of some of the most powerful business actors – will be critical in future endeavors. While the “host States” upon whose territory violations are committed are the primary duty-bearers under international human rights law, home States nevertheless enjoy a disproportionate capacity to promote corporate accountability in the short to medium term. Moreover, several proposals for State regulation of the extraterritorial conduct of business entities based in capital exporting States (“home State regulations”) have emerged in recent years.

This article hopes to encourage actors – policymakers, advocates, and business leaders – at both the international and domestic levels to recognize and embrace the potential for a dynamic interaction between individual actors, States, and international bodies in the area of corporate responsibility, particularly through home State regulation of businesses that promotes respect for human rights. It first describes recent developments in the dynamic individual and international-level approaches to the articulation and regulation of business responsibilities in the area of human rights. It demonstrates that it is time for State actors to enter the arena as well, as neither the international nor the individual level can legitimately and effectively constrain the actions of businesses, alone or in tandem with one another. It goes on to prove that “home State regulation” of businesses that operate transnationally is both legitimate and desirable from an international legal standpoint, and may even be obligatory in certain situations. It then lays out the key issues that are likely to arise in any attempt by a home State to regulate the activities of businesses domiciled on its territory in accordance with human rights principles. Finally, with an eye to the content of past proposals for “home State regulation” and to similar extraterritorial governance regimes in the US, EU, and elsewhere, the paper will offer some broad recommendations that any actor in the BHR debate should consider when developing such regulatory efforts.

Liberal international theory suggests that “[t]he levers of progressive change in the international system lie in State-society relations – the plethora of ways in which domestic institutions interact with individuals and groups in domestic and transnational society.” If this is true, then it is incumbent upon every concerned observer to consider how to best bring State power to bear in order to address this truly international dilemma. If “the global rule of law depends on the domestic rule of law” – if international order emerges from a dynamic relationship between individual actors, States, and international institutions, then we must encourage efforts by the “home States” of the most powerful businesses – the “devils they know” and to whose authority they are most accustomed to submitting – as an intermediate step on the path to effective global governance over transnational business activity.

2 Id at 248.
3 Id.
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INTRODUCTION

In her article entitled “Liberal Theory of International Relations,” Anne-Marie Slaughter contends that Liberal international relations theory provides a dynamic account of lawmaking, implementation and enforcement at the individual, State, and international levels.\(^4\) In many respects, that account is reflected in the recent global effort to enhance business respect for human rights. As predicted by the Liberal account, actors at the individual level are playing an extremely important role in the articulation (and rejection) of standards for corporate behavior. Specifically, the proliferation of corporate codes of conduct and various voluntary reporting initiatives reflect the capacity of individuals and groups operating in transnational society to make rules governing themselves. Also as predicted by the Liberal account, international actors have had a significant role to play. For example, international actors have engaged in the articulation and interpretation of the fundamental human rights norms (in the form of the UDHR and core human rights treaties) now sought to be applied to business activity; they have developed a host of “soft law” initiatives directed specifically at business actors; and they have recently designated a Special Representative to the Secretary General for Business and Human Rights to articulate a future course for international action. All these initiatives reflect the international level’s ability to serve as a forum for critique of the self-governing efforts of individual corporate actors and for refinement and strengthening of those efforts.

However, the Liberal theory would suggest that the State should also play a critical role in articulation, implementation, and enforcement of legal norms that enhance international order. State involvement need not supplant the valuable roles that individual and international efforts have played – for example, by ignoring the innovation contained in numerous corporate codes of conduct or by disregarding the already established body of international human rights. Rather,

States have a valuable role to play in articulating the preferences of powerful segments of their populations and in employing their implementation and enforcement capacities to advance certain of these efforts. Yet it is here, in the area of State involvement and regulation, that the business and human rights (BHR) effort has been most lacking to date. A host of factors have led to the reluctance of many of the world’s most powerful States to refrain from making any effort to regulate the activities of business entities over whom they could potentially exercise significant control – at least where the negative effects of their business activities are not felt by the populations which those States represent. In some respects, this hesitance may reflect the fact that the dominant individuals and groups in those States have not yet developed a preference (at least not a strong one) for enhanced corporate responsibility. Liberal theory would suggest that if this is the case, “then the key to international order lies in shaping those preferences and regulating the individual and collective ability to achieve them.”

This article argues that while past efforts to enhance corporate respect for human rights at the individual and international levels have been critical and will continue to be important in the future, the era of State restraint must – and likely will – soon come to an end. Whether international order increases in the area of corporate behavior (particularly if that order is to be founded on human rights principles) will depend upon action by the one actor that has thus far been lacking in significant part in the business and human rights effort. Certainly, it is time for the State to enter the fray. Recent reports issued by the United Nations Secretary General’s Special Representative of the Secretary General for Business and Human Rights,\(^6\) suggest that the Human Rights Council will be urged to say as much in the near future.\(^7\) Yet future action at

\(^5\) Id at 244.
\(^6\) For more detailed information on Ruggie’s mandate, see section D infra.
the international level will necessarily be geared towards all three levels of actors on the BHR stage. Moreover, its attention at the State level may very well be geared in large part towards the primary duty-bearers – those States which, perceiving a need to choose between development and prosperity and individual rights, have abdicated their responsibilities to protect their own citizens in the short term. Certainly, these States hold the primary responsibility for respecting and protecting their citizens’ human rights when they are placed in jeopardy by business activity. However, their motivations for doing so are weak and their capacity to regulate effectively is frequently lacking.

Yet there is one particular set of State actors who enjoy a disproportionate capacity to drive the BHR movement in the short to medium term; States that actors at the international level have addressed only minimally to date. These are the home States: the States of incorporation of the most powerful business actors on the planet. They are also traditionally the sources of the most powerful interests in favor of limited State engagement in the BHR arena. They are the drivers of economic liberalism and free-market capitalism. Yet numerous signs exist that their populations are becoming increasingly receptive to the notion that business activity should be constrained to protect fundamental human rights, regardless of where that business activity occurs. One by one, the governments of capital-exporting States have been confronted with legislative proposals for some degree of regulation over the extraterritorial activities of businesses. Many have failed; yet several have subsequently reemerged, and others have actually succeeded. Moreover, as the most prominent of business actors find themselves compelled by consumer pressure to take human rights into account, their opposition to “bottom line” regulation of all businesses, regardless of their public visibility, might be expected to
diminish. Slowly but surely, proposals for State regulation of the extraterritorial conduct of business entities based in capital exporting States (hereinafter “home State regulations”) have been gaining broader popular acceptance.

This article hopes to encourage actors – policymakers, advocates, and business leaders – at both the international and domestic levels to recognize and embrace the potential for a dynamic interaction between individual actors, States, and international bodies in the area of corporate responsibility, specifically through home State regulation of businesses in order to promote their respect for human rights. It will first describe recent developments in the dynamic individual and international-level approaches to the articulation and regulation of business responsibilities in the area of human rights. It will demonstrate that it is time for State actors to enter the arena as well, as neither the international nor the individual level can legitimately and effectively constrain the actions of businesses, alone or in tandem with one another. It will go on to prove that “home State regulation” of businesses that operate transnationally is both legitimate and desirable from an international legal standpoint, and may even be obligatory in certain situations. Finally, it will lay out the key issues that are likely to arise in any attempt by a home State to regulate the activities of businesses domiciled on its territory in accordance with human rights principles. With an eye to the content of past (largely unsuccessful) proposals for “home State regulation” and existing experiences with similar extraterritorial governance regimes in the US, EU, and elsewhere, it will offer some broad recommendations that any actor in the BHR debate – at the international, State, or individual level – should consider when evaluating such regulatory efforts. In order to be worthwhile, such proposals must be effective at securing their intended goals. They must not be easily evaded, they must bring about positive change in the method of business operations, and they must be compatible with the efforts of other States to
regulate the same activities. Moreover, if they are to stand any chance of succeeding, such proposals must be able to secure the approval of both NGOs seeking to bring the weight of the world’s most powerful State to bear for the good of human rights worldwide, as well as business leaders who adamantly oppose measures that may imperil the efficiency, entrepreneurship, and flexibility that currently characterize the global business climate.

If, as Liberal international theory suggests, “[t]he levers of progressive change in the international system lie in State-society relations – the plethora of ways in which domestic institutions interact with individuals and groups in domestic and transnational society,”\(^8\) then it is incumbent upon every concerned observer of the BHR movement to consider, in anticipation of Professor Ruggie’s final report, how individuals and States can best be motivated to bring State power to bear for the good of human rights in the coming years. It is the State that gives every business entity life; as such, the State has the power to condition business’s power to exist in the global marketplace upon the fulfillment of popularly agreed-upon obligations. Business representatives are often far more familiar with domestic rather than international regulation, and the populations who determine State policies are often reluctant to relinquish control over their own to international actors. It has been said that “the global rule of law depends on the domestic rule of law”\(^9\) – that international order emerges from a dynamic relationship between individual actors, States, and international institutions. If this is true, then we must encourage efforts by the “home States” of the most powerful businesses – the “devils they know” and to whose authority they are most accustomed to submitting – as an intermediate step on the path to effective global governance over transnational business activity.

\(^{8}\) Id at 248.
\(^{9}\) Id.
PART I: THE BUSINESS AND HUMAN RIGHTS MOVEMENT – FROM REAGAN TO RUGGIE

A. THE PERSISTENT DILEMMA: GLOBALIZATION AND HUMAN RIGHTS

Over the course of the last 30 years, the power of businesses has experienced an enormous expansion. Driven by the phenomenon of globalization – with its primary emphasis on the worldwide promotion of free enterprise, deregulation, trade liberalization, and foreign investment – this expansion of business has enabled both the rise of transnational and multinational corporations and the growth of purely domestic business entities that nevertheless play a major role in the global economy. We now live in a world in which the biggest company is larger, in terms of revenue, than all but the thirty richest nations.\(^\text{10}\) In many communities, the degree of impact of businesses on the lives of people has begun to rival that of the State.

However, despite the fact that businesses exert a strong and ever-increasing influence over aspects of the lives of a significant portion of the world’s population, those entities remain free, in many circumstances, to disregard the human rights of the individuals whom their activities impact without facing any threat of sanction. While the home States of many capital-exporting countries such as the United States have strong regulatory controls in place to protect their nationals from exploitation by business activity, those domestic regulations typically apply only within the territorial borders of the State and do not apply in foreign jurisdictions in which their national corporations participate in transnational production chains, contracting with suppliers, selling their products, or pursuing other investment opportunities.\(^\text{11}\) Motivated primarily, if not solely, by the desire to maximize profits, and bound by a fiduciary duty to their

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stakeholders but not to the local communities in which they operate, many businesses diversify their operations, locating income-generating assets in more than one country. In their search for the most inexpensive manufacturing sites, these businesses are inevitably drawn to countries in which labor can be acquired most cheaply and in which labor, health, and other basic human rights are non-existent or unenforced. Recent documentation by NGOs such as Human Rights Watch demonstrates that the negative impacts on human rights that result from business activity undertaken in such situations are widespread – affecting the full range of rights – and occur in a wide range of countries, industries, and contexts. Moreover, the groups of individuals impacted are diverse, including employees, consumers, and surrounding communities. Certainly, the States in which these denials of human rights occur have failed to uphold their responsibility under international human rights law to prevent such abuses from occurring and to hold perpetrators to account when they do take place. However, given the lack of an effective international enforcement regime, it often seems as if little can be done to compel such States to modify their behavior. The result is a situation in which many victims of human rights abuses directly or indirectly caused by business activity face significant obstacles to justice and businesses are effectively left free to continue negatively impacting human rights with impunity.

As trade liberalization, privatization, and deregulation have fostered the growth of business power, several observers have lamented that the nation-State as an organizational entity

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16 Id.
is declining in power and an inappropriate target of future efforts to increase business respect for human rights. The universe of businesses with operations spanning more than one country (hereinafter, transnational corporations, or TNCs), consists of more than 60,000 firms and more than 800,000 subsidiaries, not including the millions of suppliers, subcontractors, and distributors that constitute their production chains. For these entities, scattered as they are across the globe, “territory is not the cardinal organizing principle or national interests the core driver.” Yet traditional State methods of regulating corporate activity remain largely national, creating a situation in which many believe that domestic law’s ability to impose human rights norms has been effectively thwarted.

Yet the increasing power and mobility of corporations is hardly a phenomenon that State actors are powerless to address. While, the structure of does TNCs allow them to move their operations between worldwide facilities, making them slippery regulatory targets, their innovative structure is not the sole factor explaining why TNCs enjoy such a high degree of freedom from State regulation. Rather, domestic political systems have either chosen to relinquish their control over businesses that operate in a global space or have simply neglected to exert that control in the first place. Many business leaders have enormous economic and political power, which allow them to exercise political influence disproportionate to their numbers and to encourage favorable regulatory schemes in the States best positioned to control

18 Ruggie, Exceptionalism, 14.
19 *Id* at 5.
20 Stephens, *supra* n. __ at 54.
21 Claudio Grossman and Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT’L. L. & POL’Y L., 8 (1993) (“The fact that they have multiple production facilities means that TNCs can evade State power and the constraints of national regulatory schemes by moving their operations between their different facilities and the world.” ).
Certainly, these include both host States, the governments of which are powerfully motivated by the desire to create an attractive environment for foreign investment, and which respond by reducing regulatory controls or declining to enforce those already in place. Yet business actors also exert powerful influences in home States, which often take deliberate steps to structure the relations between their domestic investors and their foreign hosts in ways that heavily favor the former. The influence of business actors on State policies is similarly reflected at the international level, where capital-exporting States are often unwilling to support mechanisms that would constrain the actions of their own nationals abroad. The concomitant effect of the political and economic force of business actors has thus far resulted in a situation in which TNCs operating in capital-importing countries are frequently able to impinge upon the human rights of those countries’ citizens with virtual impunity.

22 Stephens, supra n. ___ at 58; See also Surya Deva, Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should “Bell the Cat?, 5 MELBOURNE J. IN’TL L. 37 (2004).

23 Erin Elizabeth Macek, Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights, 2002 11 MINN. J. INT’L TRADE 101, 103-4 (“in order to attract investment, many nations, particularly developing ones, will acquiesce to a corporation’s needs. For example, many of these nations will establish a corporate-friendly legal environment...because of their size and power, TNCs have the potential to influence a country’s social and economic policies.”)

24 Stephens, supra n. ___ at 58 (“Economic power carries with it a growing political clout. Corporations play influential direct and indirect roles in negotiations over issues ranging from trade agreements to international patent protections to national and international economic policy.”); Deva, supra n., at ___ (stating that home States have been reluctant to regulate the extraterritorial activities of their MNEs for reasons including a lack of political will, higher priority placed on the creation of an investment-friendly environment, succumbing to pressure from powerful corporate interests, or action in connivance with MNCs); see also John Ruggie, Exceptionalism, at 12 (“The rights enjoyed by transnational corporations have increased manifold over the past two decades, as a result of multilateral trade agreements, bilateral investment pacts and domestic liberalization – often urged by external actors, including States and the international financial institutions. Moreover, corporate influence on global rule making is well documented.” Ruggie cites the examples of pharmaceutical and entertainment industries pushing the WTO intellectual property rights agenda and Motorola writing its own patents into International Telecommunications Union standards.).

25 For example, the United Nations’ Global Compact was made a voluntary initiative because corporations would not accept a binding commitment. Stephens, supra n. ___ at 81 (citing Irwin Arieff, UN: One Year Later Global Compact Has Little to Show, Reuters, July 27, 2001 (U.N. Assistant Secretary-General Michael Doyle “acknowledged the program’s [voluntary] form was in part dictated by a recognition that the corporate world was unwilling to accept binding global standards on corporate governance.”)). See also response of the United States of America to the report by John Ruggie, presented to the UN Human Rights Council, 28 March 2007, Geneva, available online at http://www.business-humanrights.org/Documents/RuggieHRC2007, stressing its continued support for voluntary social corporate responsibility initiatives.
B. THE WORLD’S RESPONSE: THE CORPORATE SOCIAL RESPONSIBILITY (CSR) MOVEMENT

Faced with vociferous opposition on the part of the business community to calls to respect human rights throughout their global operations and reluctance on the part of States to employ their regulatory power to that end, human rights activists long ago embarked on a mission to bring other sources of power to bear on business activity, including international law, public and consumer opinion, and even the power of other businesses. While many of these efforts have been extremely valuable, and have arguably improved the expectations and behavior of many business entities worldwide with respect to human rights, they have been imperfect and at best apply to only a fraction of TNCs.

1. International Legal Efforts

As originally conceived, human rights obligations, as articulated in the UDHR and the core human rights treaties\(^\text{26}\) were intended to serve as limitations on State power alone; non-State actors such as TNCs were not considered direct subjects of international human rights law. However, the increasing power and flexibility of businesses – and primarily TNCs – has led many scholars to call for the progressive development of human rights law so that it can effectively address their actions.\(^\text{27}\)

At the international level, efforts to directly address transnational business conduct first materialized with the establishment of the United Nations Centre on Transnational Corporations (CTC) in 1974, a body that sought, among other goals, to draft a Code of Conduct for TNCs that would in part oblige businesses to respect human rights in their activities. However, the CTC quickly found itself mired in the Cold War-era political battle between capitalist countries of the

\(^\text{26}\) Universal Declaration of Human Rights, (get list)
\(^\text{27}\) Philip Alston, *Non-State Actors and Human Rights* (2005) at 19 (“an international human rights regime which is not capable of effectively addressing situations in which powerful corporate actors are involved in major human rights violations, or of ensuring that private actors are held responsible, will not only lose credibility in the years ahead, but will render itself unnecessarily irrelevant in relation to important issues”).
West and those representing the “New Economic Order.” Work on the Code was eventually abandoned under pressure from President Reagan, and the CTC itself was dissolved in 1993.

However, more general efforts at the UN to directly apply human rights law to corporations continued. In 2003, following six years of deliberations, the UN Sub-Commission for the Promotion and Protection of Human Rights, through its Working Group on the Working Methods and Activities of Transnational Corporations, proposed a set of draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.” The draft Norms represented the Working Group’s effort “to contribute to a harmonization of the substance of regulatory approaches” to setting standards and rules for business conduct. Comprised of 23 articles, the Norms set out human rights principles for companies in areas deriving from criminal and humanitarian law, human rights law (specifically, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and consumer protection and environmental law. Although they were embedded in a non-binding “soft-law” document, the Norms claimed that international human rights law currently and directly obligates all businesses to respect the broad array of human rights, at least within their “sphere of influence.”

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28 The CTC’s work on the Code of Conduct came to be vociferously opposed by Western countries, in large part because the Code purported to exclude State-owned (and thus, Soviet) businesses from its coverage.
30 Id.
33 UN Norms, supra n. __, Preamble, 3d and 4th Recital. Although they recognized that “States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and promote human rights,” the drafters of the Norms relied on language in the preamble of the UDHR (language reflected in the preambles of the ICCPR and ICESCR) to State that “transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set out in the [UDHR],” and that such business enterprises, including their officers, employees, and agents, “are obligated to respect generally recognized
Although the draft Norms were received with great enthusiasm by many NGOs, they encountered strong resistance from businesses and many governments. The Norms’ opponents roundly criticized the claims that businesses are directly liable under international law for anything other than violations of international criminal law, businesses are bound to respect human rights obligations regardless of whether the States in which they operate are parties to the treaties recognizing those rights, and a business’s human rights obligations are defined by its “sphere of influence,” an ambiguous term with questionable legal meaning. The opposition to the Norms from governments and powerful business entities, such as the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE), was so strong that they were not adopted by the Commission on Human Rights, and to date have no legal effect.  

2. “Soft-Law” Efforts

In the early 1990s, with the CTC’s work stalled and State actors unwilling to exert power over the activities of TNCs, many proponents of business respect for human rights proposed alternative “soft-law” initiatives, primarily in the form of voluntary and non-binding guidelines, ethical principles, and codes of conduct, generally categorized under the heading of Corporate Social Responsibility (CSR). Today, a multitude of such initiatives exist simultaneously.

Efforts at the intergovernmental level are currently led by the UN Global Compact, a voluntary initiative established in 2000 with over 2,300 participating businesses that seeks to convince participants to implement ten principles touching on human rights, labor responsibilities and norms contained in United Nations treaties and other international instruments.” The Norms did not define the term “sphere of influence.”

standards, and environmental and anti-corruption practices within their “sphere of influence” through sharing and disseminating good practices.\(^{35}\) Also at the intergovernmental level are the codes of conduct promulgated by the Organisation for Economic Cooperation and Development (OECD) and International Labor Organization (ILO)\(^ {36}\) and the performance standards established by the International Finance Corporation.\(^ {37}\) Many major banks adhere to a set of “Equator Principles” that mirror the IFC standards in making project finance loans.\(^ {38}\) Some of these initiatives go beyond articulating standards for companies and attempt to enhance business accountability by providing individual complaint mechanisms or ombudsmen.\(^ {39}\)

In addition to intergovernmental initiatives, other initiatives supported by national governments and industry groups seek to regulate business activity in specific operational contexts.\(^ {40}\) Some of these initiatives go beyond articulating general business practice standards

\(^{35}\) The Global Compact asks businesses to “respect the protection of international human rights within their sphere of influence,” “make sure their own corporations are not complicit in human rights abuses,” and to respect the four fundamental labor rights principles adopted by the ILO: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced and compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation. http://www.unglobalcompact.org/.

\(^{36}\) The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy proclaims that all parties, including multinational enterprises, “should respect the Universal Declaration of Human Rights and the corresponding international Covenants.” (Tripartite Declaration, para. 8.) The OECD Guidelines for Multinational Enterprises recommends that firms “respect the human rights of those affected by their activities consistent with the host government’s obligations and commitments”\(^ {44}\) – the commentary expressly indicating that these include the host State’s international commitments. (OECD Guidelines, General Policies II.2. (Revised 2000) The commentary notes the Universal Declaration “and other human rights obligations.”

\(^{37}\) The IFC’s performance standards include some human rights elements that companies are required to meet in order to obtain investment funding. The IFC occasionally requires companies to complete impact assessments that include human rights components.

\(^{38}\) See also, Ruggie, The Evolving International Agenda, at 21-23.

\(^{39}\) For example, the OECD created complaint mechanisms – called “National Contact Points” – to which individuals may bring complaints against businesses ascribing to the OECD Guidelines, and tasked its Investment Committee with overseeing NCP performance. National Contact Points for the OECD Guidelines for Multinational Enterprises, available at http://www.oecd.org/document/3/0,3343,en_2649_34889_1933116_1_1_1_1,00.html. An ombudsman monitors business compliance with IFC standards and can hear complaints from those adversely affected by IFC-funded projects. See Office of the Compliance Advisor Ombudsman, available at http://www.cao-ombudsman.org/.


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and certify third-party monitors to audit business operations for compliance with those standards.\textsuperscript{41} Certification institutions have developed that purport to verify that a product’s entire production and distribution cycle meets prescribed standards.\textsuperscript{42} Finally, one unique CSR organization, the Global Reporting Initiative, has embarked upon an effort to provide a common framework for voluntary reporting of the economic, environmental, and social impact of entity-wide activity so that business performance can be made more accessible and easily comparable.\textsuperscript{43} The GRI guidelines are currently applied by over 1000 companies worldwide.\textsuperscript{44}

Finally, many individual businesses have engaged in self-regulation, in which they have adopted their own codes of conduct: typically voluntary, written commitments by a business that it will observe certain standards (sometimes based on human rights instruments) in its relations with employees and customers.\textsuperscript{45} Others have developed supplier codes according to which they purport to compel the same behavior from their business partners in countries in which human rights standards are weak or unenforced. Increasingly, some particularly prominent businesses

\textsuperscript{41} The Extractive Industries Transparency Initiative (EITI) is a voluntary initiative among governments in which participants promote public reporting of the various payments businesses in the extractive industry make to host governments. \url{http://eitransparency.org/}. The Fair Labor Association (FLA) monitors the performance of participants’ supply chains in adhering to a set of workplace standards and compels remediation when violations are reported. \url{http://www.fairlabor.org/}. Other examples of such reporting and monitoring schemes include the SA8000 program sponsored by the Council on Economic Principles Accreditation Agency, the Clean Clothes Campaign (CCC), and the Workers Rights Consortium. \textit{See} Sabel, O’Rourke, and Fung, Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace, World Bank Human Development Network, Social Protection Unit, \textit{Social Protection Discussion Paper Series} No. 0011 (2000) at 3.

\textsuperscript{42} The Kimberly Process Certification Scheme, which attempts to prevent trade in conflict diamonds, is one such global certification mechanism. Participating States have passed legislation prohibiting trade in diamonds from businesses that have not met specific packaging, certification, and chain of custody warranty requirements, supervised by a monitoring mechanism. \textit{See} Ruggie, Exceptionalism, \textit{supra} n. __, at 13. \textit{See} Gary Gereffi, Ronie Garcia-Johnson and Erika Sasser, \textit{The NGO-Industrial Complex}, in \textit{Foreign Policy}, 125 (July/August 2001).

\textsuperscript{43} See Global Reporting Initiative at \url{www.globalreporting.org}, specifically its Sustainability Reporting Guidelines (2002), available at \url{http://www.peat.net/Mosk/GRI_guidelines.pdf}, pp. 51-54. GRI provides three different “levels” of reporting (A, B, or C) depending on the content and scope of information included. If a company submits its report for external auditing, it may add a “+” to its self-declared level. The third generation of guidelines, GRI\textsuperscript{G3}, was published in October 2006. Available at \url{http://www.globalreporting.org/ReportingFramework/G3Online/}.

\textsuperscript{44} at \url{www.globalreporting.org}.

\textsuperscript{45} \textit{Alston, supra} n. __, at __.
have mimicked the practice of the independent monitoring initiatives and have allowed consulting and accounting firms and local NGOs to verify that their facilities are acting in accordance with their codes of conduct through social performance audits.\textsuperscript{46} Some have publicly announced sanctioning or severing ties with suppliers who failed to abide by their codes.\textsuperscript{47}

C. THE SHORTCOMINGS OF EXISTING CSR INITIATIVES

While the failed exercise of the Norms has been described by some as one “engulfed by its own doctrinal excesses,”\textsuperscript{48} the alternative soft law initiatives to which businesses have ascribed remain lamentably weak. Certainly, they demonstrate promising attention on the part of governments, civil society actors, and businesses themselves to human rights obligations incurred in the context of business activities. The innovative solutions that businesses have developed to address the challenges of effective social monitoring demonstrate that firms definitely possess the capacity to evaluate their own performance regarding human rights as well as that of their subsidiaries, subcontractors, and other partners.\textsuperscript{49} Moreover, CSR pledges by businesses do play an important role in providing targets for external pressure and scrutiny by NGOs, consumers, and media sources when companies breach their commitments. However, from a human rights perspective, all of these soft law initiatives are insufficient in that they are rarely geared towards protection of the full scope of human rights. Several initiatives are industry-specific, and tend to focus on an emblematic set of rights impacts naturally associated with that business activity.\textsuperscript{50} These initiatives may overlook systemic human rights impacts to

\textsuperscript{46} Sabel, O’Rourke, and Fung, Ratcheting Labor Standards, at 3.
\textsuperscript{47} \textit{Id}.
\textsuperscript{48} Ruggie, Interim Report, \textit{supra} n. \_\_ at 15.
\textsuperscript{49} Sabel, O’Rourke, and Fung, Ratcheting Labor Standards, at 5, citing Gereffi, 1996, Helper and Sako, 1995, Sako 1996; Abernathy et al. 1999. Sabel et al note that “leading firms in various industries go to extraordinary lengths to qualify their sub-contractors. The ISO family of standards (ISO 9000 for manufacturing, ISO 14000 for environmental practices) on which several of the voluntary codes...are modeled, measure just this ability.”
\textsuperscript{50} Examples include the Kimberly Process, Clean Clothes Campaign and FLA.
which businesses contribute or deliberately ignore major human rights impacts that their adherents are simply unprepared to address. Those initiatives that are comprehensive in that they address business actors in all industries do not address the full spectrum of human rights. In many other arrangements, and particularly in individual codes of conduct, businesses are free to choose their own definitions and standards of human rights, ignoring those articulated at the international level.

Secondly, these initiatives rely on the voluntary participation of host governments or businesses for their effectiveness, with the result that the worst offenders and those who come under little or no media scrutiny feel no pressure to alter their offending practices. It is no coincidence that the most progressive business participants in the CSR movement are highly visible companies with well-recognized brand names, the ones that are highly vulnerable to public attack. However, they represent but a slim minority of the universe of business interests operating transnationally; those are less visible or struggling to remain competitive have no incentive to follow suit. Even worse, socially responsible companies may be placed at an economic disadvantage when their poorly scrutinized competitors continue to abuse human rights with impunity.

Finally, and most importantly, these initiatives do not provide strong supervisory or enforcement mechanisms except in exceptional instances. As Macklem notes, “the incentive on a firm to implement a code is far weaker than the incentive to promulgate one, and the incentive to educate its workers and other affective parties about the code is far weaker than the incentive

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51 The OECD and ILO codes of conduct only address human rights relevant to their organizations’ particular mandates, while the Global Compact has distilled the universe of human rights to ten vague principles.  
52 As of 2006, the FLA had only 18 members, only 10 countries had implemented the EITI’s provisions, and only 16 companies had committed to participation in the VPs.  
54 Misol, supra n.  at 6.
to publicize its presence to its customers and consumers.” As one might suspect, therefore, very few businesses that participate in SRI funds conduct the recommended human rights impact assessments regularly or comprehensively, and businesses outside independent monitoring associations like the FLA have no incentive to provide independent external assurance that they or their suppliers are adhering to their own commitments. Even those rare arrangements that purport to monitor compliance and sanction offenders are weak; for example, the overall performance of the OECD NCPs has been described as “highly uneven.” As a result, businesses are often free to join such initiatives without facing any significant pressure to actually implement the practices they aim to promote. Although public watchdogs in the form of NGOs, consumer groups, and the news media may compensate for weak supervisory mechanisms in liberal States with high degrees of freedom of movement and speech, the ability of the “public” to expose wrongdoing by business actors may be nonexistent in more repressive developing countries. Most troubling of all, several commentators have noted that even the most effective supervisory mechanisms adopted to date – those that make use of third party monitoring and auditing – can be evaded or ineffective at realistically evaluating business’ compliance with their own commitments. As several have noted, and as NGO reports have

55 Macklem at 285-86.
56 A Wal-Mart company recently attorney Stated that its supplier code of conduct “does not create certain rights and obligations on behalf of Wal-Mart.” Alston notes that this Statement leaves unanswered the question of just what promises to workers and consumers the company’s code is intended to convey, and how the public can be assured that the promise is being kept. (Alston, “The Not-A-Cat Syndrome” supra note __ at X (citing Josh Gerstein, “Novel Legal Challenge to Wal-Mart Appears to be Faltering on Coast,” http://www.nysun.com/article/45009).
59 Macklem, supra n. __, at 284-285, (“Some sectors, such as those that rely on informal, atypical, part-time, or short-term employment, and industries, such as agriculture, may be more difficult than others to monitor effectively.”). Sabel et al, supra n. __ at 3 note that “an unscrupulous company, or one that is simply indifferent to
proven, “in the absence of effective means of reporting non-compliance, provisions for monitoring and training, and incentives for managerial compliance, a corporate code is ‘at best a form of public relations for powerful multinationals and at worst a misleading seal of approval affixed by those with no legitimate claim to judge these matters.’”

D. JOHN RUGGIE’S MANDATE AND THE FUTURE OF STRENGTHENED CSR INITIATIVES

In 2005, in the wake of the controversy surrounding the Draft Norms, the Commission on Human Rights decided to pursue an alternative approach to addressing the intersection between business and human rights. In resolution 2005/69, the Commission requested the UN Secretary General to appoint a Special Representative (SRSG) on the issue of “human rights and transnational corporations and other business enterprises.” He did so later that year, selecting John Ruggie, a Harvard professor and the former Assistant Secretary General of the UN who was the primary architect of the Global Compact. Ruggie’s mandate, which extends from July 2005-July 2008, obliges him (a) to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights; (b) to elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation; (c) to research and clarify the implications for transnational

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60 Macklem, supra n. __, at 285-86 (citing Sabel, O’Rourke, and Fung, supra n. __ at 3). See, for example Human Rights Watch, “Democratic Republic of Congo: The Curse of Gold” (2005), available online at http://www.hrw.org/reports/2005/drc0505/drc0505.pdf (revealing that AngloGold Ashanti, one of the world’s largest gold producers and a business which at the time had a cutting-edge corporate code of conduct in place that included human rights standards and public commitment to CSR, had in fact been providing logistical and financial support to a brutal armed faction in the Democratic Republic of Congo, in a flagrant violation of its own public commitments).

61 Ruggie’s mandate originally extended from July 2005-July 2007, but at his request, it was later extended by one year. See Ruggie, Interim Report, supra n. __.
corporations and other business enterprises of concepts such as “complicity” and “sphere of influence”; (d) to develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises; and (e) to compile a compendium of best practices of States and transnational corporations and other business enterprises.62

Since his appointment in 2005, Professor Ruggie has published several studies and reports with significant implications for the future of the BHR effort at the UN.63 Thus far, he has made several significant contributions to the effort to clarify the current status of business’s legal obligations with respect to human rights,64 and several Statements suggesting that he rejects and will adopt a considerably more conservative approach to human rights law than the Norms.65 However, while Ruggie has assured the NGO community that in reaching his recommendations for the Human Rights Council, he will be “guided by the objective of building a stronger international human rights regime to govern the activities of all actors, including corporations, through means that promise to be effective and are achievable,” he simultaneously urged caution regarding the likelihood of immediate progress in the area of traditional intergovernmental solutions for bringing business conduct into conformity with human rights. Said Ruggie,

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62 On 25 July 2005, the Economic and Social Council adopted decision 2006/273 approving the Commission’s request. On 28 July 2005, the Secretary-General appointed John Ruggie as his Special Representative.
63 These include the Links to materials authored by Ruggie or relevant to his mandate are available at the Business and Human Rights Resource Center, at http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative/ They include Ruggie, Interim Report, supra n. __ and Ruggie, Mapping International Standards, supra n. __.
64 These include conducting a “mapping” of international standards of business responsibility and accountability, conducting a survey of governments and Fortune Global 500 Firms regarding their internal policies relevant to human rights, and investigating variations in business recognition of human rights responsibilities in various regions and industries.
65 In one report, Ruggie characterized the Norms as an exercise that contained “exaggerated legal claims and conceptual ambiguities.” After restating the concerns raised by businesses and States, Ruggie concluded that “the flaws of the Norms make that effort a distraction from rather than a basis for moving the Special Representative’s mandate forward. Indeed, in the Special Representative’s view the divisive debate over the Norms obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights.” Ruggie, Interim Report, supra n. __ at 8-9.
“We can all agree that Statements of principles, soft law declarations, and international treaty instruments will play a role in the future evolution of the human rights regime, as they have done in the past. But we also need to acknowledge that progress on that front is slow at best...It is also worth noting that...corporations are subject to multiple sources of authority higher than themselves, including home and host States, shareholders, broader market forces, and their more informal social licenses to operate. All can and need to be mobilized in devising an effective response to business-related human rights challenges. Therefore I have resolved one issue regarding my recommendations to the Human Rights Council: I will not submit a final report that limits itself to solutions that may – or may not – materialize a quarter-century hence. We need progress now. That is how I interpret taking the victims’ perspective seriously.”

In these and other Statements, Ruggie has already signaled that the content of the recommendations he will present to the Human Rights Council in mid-2008 will be significantly more conservative than those embodied in the Norms in terms of directly applying international human rights obligations to businesses. However, he has also clearly indicated his willingness to consider other avenues for strengthening the international human rights regime – ones that would increase the accountability of business actors for their conduct in the short to medium term. Additionally, while acknowledging that TNC activity increasingly occurs in what is best characterized as a “global public domain,” Ruggie has rejected the claim that that space is “an adversary of or substitute for States.” Rather, he has speculated that the “biggest challenge” facing the BHR movement “may be bringing such efforts to a scale where they truly can move markets. For that to occur, it appears that States will need to structure business incentives and disincentives more proactively, while accountability practices must become more deeply embedded within market mechanisms themselves.” As a first step then, he has speculated that “it seems more promising in the first instance to expand the international regime horizontally, by

66 Response of John Ruggie to Open Letter from NGOs, (15 October 2007), available at http://www.escr-net.org/usr_doc/ESCR-Net_Open_Letter_(2).pdf, see especially p. 4. For the text of the letter to which Ruggie was responding, see Open Letter to John Ruggie (10 October 2007) endorsed by more than 150 NGOs, available at http://www.fidh.org/spip.php?article4776 (in part urging Ruggie to offer public support for the initiation of a process that would lead to the adoption of an instrument such as a UN declaration outlining standards on business and human rights, leading to the adoption of an authoritative instrument).
seeking to further clarify and progressively codify the duties of States to protect human rights against corporate violations: individually, as host and home States, as well as collectively through the ‘international cooperation’ requirement of several UN human rights treaties.”

To be sure, many of Ruggie’s recommendations involving the roles and responsibilities of State actors will be addressed to those States whose citizens have been the targets of human rights abuse by business, but who have failed to take action to prevent such abuses or provide remedies when they do. While he has expressed doubt that there currently exists a general obligation under international law for States to protect against extraterritorial violations of human rights by businesses headquartered within their territorial jurisdiction, he has nevertheless signaled that such extraterritorial regulation is permissible under international law, and that it may be desirable in some circumstances. As the following section will demonstrate, such “home State” extraterritorial regulation may already be legally obligatory in certain situations; it may become more generally obligatory as the law of State responsibility develops progressively in the coming years; it is certainly permissible under international law; and, at any rate, its exercise may be necessary if the State system is ever to adequately respond to the challenges posed to human rights by transnational business activity.

69 Id at 28.
70 Ruggie has confirmed that international law (both human rights treaties and customary international law) firmly establishes that States have a duty to protect against third party abuses of human rights, including by business entities, within their jurisdiction. Ruggie, “The Evolving International Agenda,” at 13. Ruggie has cited favorably to the Human Rights Committee’s General Comment 31, which confirms that under the ICCPR, States can breach Covenant obligations where they permit or fail “to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.” (Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. HRI/GEN/1/Rev.8 at 233 para. 8 (Mar. 29, 2004). The duty to protect applies to all substantive rights recognized by the treaties that private parties are capable of abusing.
71 Ruggie, “The Evolving International Agenda,” supra note __, at 16 (“In general, international law permits a State to exercise extraterritorial jurisdiction provided there is a recognized basis: where the actor or victim is a national, where the acts have substantial adverse effects on the State, or where specific international crimes are involved. Extraterritorial jurisdiction must also meet an overall reasonableness test, which includes non-intervention in other States’ internal affairs. Debate continues over precisely when the protection of human rights justifies extraterritorial jurisdiction.”)
PART II: INTERNATIONAL LAW AND THE CASE FOR HOME STATE HUMAN RIGHTS REGULATION

The history of the BHR movement to date suggests that in the coming years the business and human rights effort stands to gain the most from the increased participation of the State in promoting corporate accountability and enforcing obligations on business actors. Certainly, actors at the international level will have a vital role to play in guiding such State activity, as will individual business and NGO actors whose input on the format and content of those standards will be critical. Indeed, as Slaughter has argued, “[f]rom a Liberal perspective, a – if not the – primary function of public international law is not to create international institutions to perform functions that individual States cannot form by themselves, but rather to influence and improve the functioning of domestic institutions.” However, the remainder of this article will consider various legal and theoretical considerations associated with the ability – and potential obligation – of States to increase their regulation of business actors in a manner that has the capacity to effectively and comprehensively increase business respect for human rights. Moreover, it will consider methods by which such State-based initiatives could assuage the most pressing concerns of the business community, developing countries, and the State governments upon whose cooperation such initiatives depend.

A. LEGAL JUSTIFICATIONS FOR EXTRATERRITORIAL REGULATION

Extraterritorial regulation, broadly defined, occurs when a State exercises its jurisdiction to prescribe in order to dictate standards governing persons, property, or conduct which occur

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72 Specifically, Ruggie has described the role of international instruments in the near future as “carefully crafted precision tools complimenting and augmenting existing institutional capacities.” Ruggie, The Evolving International Agenda, 28.

outside its territory.\textsuperscript{74} International law traditionally permits States to exercise extraterritorial jurisdiction in one of three different situations: (1) the entity being regulated is a national of the State (principle of active personality), (2) the activity being regulated will have a significant impact on the territory of the regulating State\textsuperscript{75} or (3) the activity that has occurred is a particularly heinous one that meets with universal reprobation and may be prosecuted by any State in the name of the international community (principle of universality).\textsuperscript{76} Regulations imposed by a home State over the extraterritorial activities of businesses domiciled in its territory would fall under first of these bases, the active personality principle, one that has been widely recognized as an acceptable basis for extraterritorial regulation.\textsuperscript{77}

Historically, international legal theorists were reluctant to encourage extraterritorial regulation by States. It was believed that the exercise of jurisdiction by a State outside its own borders would violate the principle of equal and exclusive sovereignty of States over their respective territories.\textsuperscript{78} However, this concern is arguably limited to extraterritorial regulations that are based solely on national interest rather than designed to address issues in the interest of the international community as a whole. Indeed, over the course of the last several decades, international law has witnessed the proliferation of treaties calling for the implementation of

\textsuperscript{74} Extraterritorial jurisdiction to prescribe is often paired with jurisdiction to adjudicate so that the State can address violations of those standards in its own courts, either in the civil or criminal context. See Olivier De Schutter, Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations, Background Paper for seminar organized in collaboration with the Office of the High Commissioner for Human Rights in Brussels on 2-4 November 2006, available at http://www.business-humanrights.org/Links/Repository/775593, at 9. See also Surya Deva, Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should “Bell the Cat”? 5 MELBOURNE J. INT’L L. 37, 39 (2004).

\textsuperscript{75} According to the protective principle, otherwise known as the “effects doctrine.”

\textsuperscript{76} De Schutter, supra n. __., at 23-24.

\textsuperscript{77} Id at 23. De Schutter notes that this variety of extraterritorial jurisdiction has even been extended beyond nationality to permanent residency in certain situations.

\textsuperscript{78} Deva, supra n. __., at 46-47.
extraterritorial regulations by States in the pursuit of a common international objective.\textsuperscript{79} Thus, when a State’s regulations operate extraterritorially in order to impose human rights obligations on TNCs, they seek to advance an international rather than a national objective, and are therefore unlikely to be seen as objectionable under international law.\textsuperscript{80} Thus, some scholars have claimed that extraterritorial regulation by States of corporations which have their “nationality” abroad is permissible under international law, particularly where those regulations deal with human rights violations.\textsuperscript{81} However, while the international legal permissibility of a home State’s regulation of the activities of its corporations abroad has been widely acknowledged, it is less clear whether States have an obligation to control the actions of their corporations abroad under the doctrine of State responsibility.

Certainly, States have an obligation to prevent violations of human rights by persons (including corporations) on their own territory.\textsuperscript{82} Moreover, States are legally obliged to establish their jurisdiction over corporations present in their territory that are accused of having committed a few international crimes of the gravest nature – such as war crimes, crimes against humanity, torture, and forced disappearances – if the State in which the crime occurred is unwilling or unable to prosecute.\textsuperscript{83} De Schutter argues that this jurisdiction should be provided for in legislation establishing the home State’s ability to prosecute its national corporations

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\item \textsuperscript{79} See, e.g., International Convention for the Suppression of Financing of Terrorism, Adopted by UN General Assembly resolution 54/109 of 25 February 2000.
\item \textsuperscript{80} Deva, \textit{supra} n. __, at 48. See Louis Henkin, \textbf{THE RIGHTS OF MAN TODAY} (1979), 27-30 (discussing the universal acceptance of human rights).
\item \textsuperscript{81} De Schutter, \textit{supra} n. __, at 24.
\item \textsuperscript{82} For example, under the ICCPR, States can breach Covenant obligations where they permit or fail “to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.” Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. HRI/GEN/1/Rev.8 at 233 para. 8 (Mar. 29, 2004). The duty to protect applies to all substantive rights recognized by the treaties that private parties are capable of abusing.
\item \textsuperscript{83} De Schutter, \textit{supra} n. __, at 18 (Claiming that under the obligation of international cooperation in the punishment of persons guilty of international crimes, at least in situations where the host State on the territory of which such crimes have been committed is unable to effectively engage the criminal liability of the corporation involved, the State in which a corporation is domiciled will be required to prosecute, particularly because a corporation, unlike an individual, cannot be extradited).
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accused of such behavior. Yet while such international-level crimes inevitably involve large-scale abuses of human rights, it is far less clear whether States are obligated to exercise jurisdiction corporations domiciled on their territory in order to redress or prevent the commission of other human rights abuses not amounting to international crimes.

Some authors have argued that under the doctrine of effective control, “States have an obligation to seek to influence extraterritorial situations to the extent that they may exercise influence in fact.” Certain provisions of the core human rights treaties and interpretations by their governing bodies lend credence to these claims of progressive development, and suggest that an obligation of international cooperation is slowly developing, at least in the context of economic, social and cultural rights. For example, the Committee on the Elimination of Racial Discrimination (CERD Committee) recently encouraged Canada, whose corporations had reportedly adversely impacted the rights of indigenous peoples in other companies, to “take appropriate legislative or administrative measures” to prevent such acts, explore ways to hold corporations “accountable,” and to State provide information on the measures it had taken to

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84 Id. Note that in the United States, the Alien Tort Claims Act has been interpreted by the US Federal Courts to provide jurisdiction over enterprises either incorporated in the United States or having a continuous business relationship with the United States, where foreigners, victims of violations of international law, seek damages form enterprises which have committed those violation or are complicit in violations committed by State agents (28 USC section 1350; see John Doe I v. Unocal Corp., 395 F.3d 932, 945-946 (9th Cir. 2002) (complicity of Unocal with human rights abuses committed by the Burmese military).

85 M. Sornarajah, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (Cambridge University Press, 2nd ed., 2004, chapter 4 (suggesting that the scope of States’ international responsibility for human rights violations by third parties should depend on the degree of their effective power to control those actors).

86 Article 2(1) of the ICESCR calls on States parties to the Covenant to undertake to “take steps, individually and through international assistance and cooperation, especially economic and technical, with a view to achieving progressively the full realization” of the rights recognized in the Covenant. ICESCR, supra n. __. Note that Article 11(1) of the Covenant also mentions the notion of international cooperation. Additionally, the UN Committee on Economic, Social, and Cultural Rights (ESCR Committee) has suggested that “States parties have to respect the enjoyment of the right to health in other countries, and prevent third parties from violating the rights in other countries, if they are able to influence these parties by way of legal or other political means.” UN Committee on Economic, Social, and Cultural Rights, General Comment No. 15 (2002), “The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights), U.N. Doc. E/C/12/2002/11 (26 November 2002), para. 31; see also De Schutter, supra n. __, at 20.
achieve these goals in its next periodic report. Additionally, the International Commission of Jurists, has articulated its belief that, States are have a responsibility to exercise due diligence in seeking to prevent non-State actors (including corporations) under their effective control from committing violations of economic, social, and cultural rights. These provisions, interpretations, and comments suggest that even if current international law does not make States responsible for the private acts of their nationals abroad, regulation by those States of corporations domiciled in their territory in an effort to prevent them from violating human rights abroad may be both acceptable and even strongly recommended.

B. PRACTICAL JUSTIFICATIONS FOR EXTRATERRITORIAL REGULATION

1. Common Use of Legislation by States to Regulate Corporate Conduct

As Chief Justice Marshall expressed in 1819, “a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.” Since the development of the modern business entity, governments have held corporations, “mere creature[s] of law,” accountable for their actions through a combination of criminal, civil, or administrative sanctions. As Stephens argues, “examples of such regulation, from legislation restricting companies’ ability to discriminate or pollute at home, to laws prohibiting corrupt practices by corporations abroad, are too numerous to leave any room for doubting the legitimacy of government efforts to advance social policies in part by regulating corporate behavior.”

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90 Id.
it is clear that there is nothing problematic, from a technical standpoint, about the imposition of extraterritorial human rights responsibilities on corporate entities by the States of their domicile.

More often, many States make use of extraterritorial legislation in order to address problematic transnational conduct. For example, De Schutter notes that the EU has encouraged Member States to exercise extraterritorial jurisdiction if a terrorist act has been committed by or for the benefit of a legal person established in their territory or if human trafficking offenses have been committed by or for the benefit of a legal person established in their territory; the same is true in situations involving sexual exploitation of children and child pornography. Additionally, Member States of the EU are required to exercise jurisdiction over civil claims filed against natural or legal persons domiciled on their territory, regardless of the nationality of the plaintiff seeking redress, and despite the fact that other forums may be available and more appropriate locations for the suit. Deva notes that Australia has enacted several laws with extraterritorial application. In the United States, examples of statutes conferring extraterritorial jurisdiction include the Securities Act of 1933 and the Securities Exchange Act of 1934, which have been construed to cover transactions initiated within the U.S. but executed abroad when the transaction has significant contact or effects within the U.S.,

93 Council Regulation (EC) No. 44/2201 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in commercial matters. The European Paliament’s resolution on the Commission Green Paper on Promoting a European framework for Corporate Social Responsibility called on the Member States to pass extraterritorial legislation for human rights violations by European multinationals in developing countries pursuant to this Regulation. COM(2001) 336 – C5-0161/2002-2002/2069(COS) (30 June 2002). See De Schutter, supra n. __, at 6. Note that without the extraterritorial legislation establishing norms for European multinationals acting abroad, the Regulation merely establishes adjudicative and not prescriptive jurisdiction. Member States’ courts will often apply the law of the place in which the human rights violation occurred in such cases.
94 Deva, supra n. __, 47 (citing examples dealing with trade with Cuba, Child Sex Tourism, Environmental Protection, and criminal offenses against Australians).
95 15 U.S.C. §§ 77a et seq.
96 15 U.S.C. §§ 78a et seq.
even when brought by foreign plaintiffs. Additionally, the Foreign Corrupt Practices Act of 1977 (FCPA) prohibits U.S. individuals and any corporation with its principal place of business in the United State or organized under US laws from directly or indirectly offering, promising, authorizing, or making a corrupt payment of money or anything else of value to a foreign official, even if the prohibited conduct occurred entirely outside the United States. The FCPA also includes accounting provisions which require U.S. and foreign companies that issue securities registered with the SEC to maintain specific recordkeeping standards and internal accounting controls, as well as to “ensure” that any subsidiary or joint venture in which they have more than a 50% ownership interest adheres to the accounting provisions and to make a “good faith” effort to ensure that all other subsidiaries and joint ventures do so as well.

To be sure, the mere fact that States have enacted extraterritorial regulations over some corporate conduct abroad does not automatically lead to the conclusion that they will do so to protect human rights abroad. Although U.S. law contains a veritable web of employment and social protections that apply on U.S. soil, nearly all of them stop at the border. Those that do extend extraterritorially do so only for the protection of American citizens working for American employers abroad, with few exceptions. Turley has argued that the US courts are much more likely to apply a “market statute” (dealing with antitrust or securities laws, for example)

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97 See, e.g., SEC v. Kasser, 548 F.2d 109, 114 (3d Cir.), cert. denied, 431 U.S. 938 (1977). U.S. courts will exercise jurisdiction over the claims of non-U.S. nationals in such situations when there has been substantial activity in the U.S. which was not merely preparatory to the fraud but rather cause the non-U.S. purchasers’ losses. See e.g., In re Royal Ahold N.V. Sec. & ERISA Lit., 351 F.Supp. 2d 334 (D. Md. 2004).


100 15 U.S.C. §§ 78m(b) and 78m(b)(6).

101 For example, Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq), which prohibits discrimination in employment applies extraterritorially, but only to U.S. citizens employed by outside U.S. firms. The same is true for the Age Discrimination in Employment Act (29 U.S.C. §§ 621-634 (ADEA) and the Americans with Disabilities Act (42 U.S.C. §§ 12101 et seq. However, other labor statutes like the Equal Pay Act, the Fair Labor Standards Act, and the Labor Management Relations Act, have no extraterritorial application whatsoever. See PROSKAUER ON INTERNATIONAL LITIGATION AND ARBITRATION (September 2007) available at http://www.proskauerguide.com, Ch. 25, Section III., “Extraterritoriality and U.S. Employment Law.”

102 Id.
extraterritorially than a “non-market statute” (dealing with environmental or labor law). However, the fact remains that the law of the US, like that of the EU, Australia, and other States, is no stranger to extraterritorial regulation of corporate activity, and business entities incorporated in those States are certainly accustomed to complying with certain dictates of their home States in their overseas operations.

2. Frequent Inability/Unwillingness of Host States to Address Corporate Human Rights Violations

In addition to home State familiarity with and capacity to engage in extraterritorial corporate conduct, the frequent incapacity of host States to effectively address that conduct gives rise to an additional justification for home State regulation: the “enforcement gap” that exists abroad. As M.B. Baker has argued, many underdeveloped nations express a need for investment that so great that their leaders would arguably “be abusing their discretion if they did not allow their nation to be infiltrated by a TNC.” Deva notes that host State inability to regulate corporations may result from the phenomenon of the “race to the bottom,” arising from the competition between States for investment, as well as from the fact that TNCs often have the power to directly influence a country’s social and economic policies. Additionally, developing countries may suffer from a lack of financial and legal resources and capacity so as to make effective regulation impossible even if the government has the political will to do so. Finally, even if host States make a legitimate attempt to regulate the conduct of business actors on their territories, they may be legally unable to actually influence their behavior or to impose

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106 Ward, supra n. __ at 463.
an effective deterrent. Deva notes that corporate behavior is most directly affected through regulation of a parent rather than a subsidiary organization. However, host States will be able to exercise jurisdiction only over the subsidiary, an entity which may have very little in terms of assets and may not be responsible for establishing policies that lead its parent corporation to engage in conduct that gives rise to human rights abuses.\textsuperscript{107}

Rather than being unable to effectively regulate corporate conduct on their territories, some States might be extremely reluctant to do so. Ward argues that most of the litigation that has occurred to date regarding business conduct in foreign countries raises issues concerning the governance of the host countries.\textsuperscript{108} Stephens adds that if the home State government is complicit in human rights abuses involving a TNC, its capacity to regulate becomes irrelevant.\textsuperscript{109} The fact that the plaintiffs in these cases have argued that they fear persecution should they complain at home bolsters the argument that a source of regulation over corporations that act transnationally other than the State in which they operate may be necessary if human rights abuses are to be prevented.

3. Inability of Actors other than the State to Comprehensively Address Corporate Human Rights Violations in the Short or Medium Term

In the face of frequent unwillingness or inability on the part of host States to effectively regulate TNC conduct in order to protect the human rights of their citizens, home States are likely to be the only actors with the capacity to enforce consistent corporate

\textsuperscript{107} Deva, supra n. __, at 51. Deva cites to the example of the litigation surrounding the industrial accident in Bhopal, India in 1984, in which plaintiffs who sued in US courts were able to secure jurisdiction over the parent corporation (US-based Union Carbide) and to hold it accountable for harms caused by its Indian subsidiary in, Union Carbide India Ltd. However, the US courts dismissed the action in favor of litigation of the issue in the Indian courts in 1987. Since that time, the Indian courts have been unable to effectively enforce criminal proceedings against the parent company.

\textsuperscript{108} Ward, supra n. __, at 463.

\textsuperscript{109} Stephens, supra n. __ at 82.
compliance. On the one hand, Ruggie and others have acknowledged that “the formal international governance system tends to operate on the basis of the lowest and slowest common denominator,” and that an effective international enforcement mechanism for addressing BHR concerns is a goal that will likely take decades to come to fruition.\textsuperscript{110} Moreover, Ruggie has conceded that even if international efforts enjoy the power of legitimacy, persuasion, expertise, or utility, “they lack the basis and means to compel.”\textsuperscript{111} Thus, “with rare exceptions, authority in global governance...remains largely horizontal in character.”\textsuperscript{112} On the other hand, as demonstrated above, voluntary, soft-law efforts suffer from the “Achilles heel” of “underdeveloped accountability mechanisms.”\textsuperscript{113}

If improvement is to be sought in the performance of businesses with respect to human rights, some sort of coercive power must be brought to bear on the full range of businesses engaging in transnational activity. NGOs and consumer groups have done an admirable job of outing some of the worst offenders in recent years, but their efforts to identify corporate misconduct are often thwarted by the secrecy with which they conduct their affairs. Sabel et al have suggested that without greater transparency and disclosure from corporate actors, any attempt to systematically improve their performance will be doomed to failure.\textsuperscript{114} They emphasize that requiring businesses to make such critical disclosures as factory locations, the results of labor standards audits and performance rankings and outcomes, and monitoring methodologies will, if nothing else, provide a useful guide to action and will enable other actors at the international and individual levels to bring their power to bear against corporations much

\textsuperscript{110} Ruggie, “American Exceptionalism,” \textit{supra} n. ___ at 14.
\textsuperscript{111} \textit{Id} at 27.
\textsuperscript{112} \textit{Id}.
\textsuperscript{113} Ruggie, “The Evolving International Agenda,” at 25.
\textsuperscript{114} Sabel et al, \textit{supra} n. ___, at 14.
more effectively than at present. As in the absence of international action, the only entities that can compel such transparency from all businesses (as opposed to only the most brand-sensitive firms, which may be susceptible to public pressure) are States. In addition to their capacity to compel corporations to disclose information about their activities, States have the power to impose sanctions and incentives on those firms that refuse to participate and “to punish those who lag behind in performance and refuse to adopt minimal improvement measures.”

As Ward confirms, “[t]he threat of liability has the potential to be a powerful motivator of business change....Law, so long as its content is sufficiently clear, can be a more effective driver of change than voluntary initiatives that rely on strong peer group pressure from within individual industry sectors to bring laggards on board.”

Certainly, if the entire range of businesses operating in the entire range of capital-importing countries are to be held to account for their behavior, and if the innovative monitoring and auditing solutions contained in some voluntary mechanisms are to be made sufficiently credible, the coercive power of the home State must be employed – even if minimally so – against them.

C. RISKS POSED BY HOME STATE EXTRATERRITORIAL REGULATION

It appears home State extraterritorial regulation of corporate activity is both legally permissible (and potentially beginning to become obligatory) and practically necessary if businesses are to be expected to respect human rights in their operations worldwide. However, regardless of the permissibility and desirability of home State regulation, there are several risks involved in the deployment of the regulatory power of a given State outside its own territory. Any regulatory scheme attempting to deal with TNC activity abroad must be designed with these

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115 Id.
116 Id at 12 and 15.
117 Ward, supra n. __ at 466.
concerns in mind. If left unaddressed, as they have in some past proposals for home State regulation, these risks can doom the entire project to failure. However, as will be demonstrated below, they are not as problematic as some actors have suggested. Moreover, as will be demonstrated in Part III, they can be mitigated through careful statutory design.

1. Impinging upon the Sovereignty of the Host State

One primary concern often raised by the opponents of extraterritorial regulation is its potential to impinge upon the sovereignty of the host States in which TNCs operate. These States may invoke the principle of non-interference in the internal affairs of other States contained in the UN Charter as a legal basis for their opposition to home State “interference.” Moreover, some host States may argue that regulatory efforts are merely western efforts to impose higher labor and environmental standards upon them in an effort to prevent the spread of jobs to their countries. These arguments from sovereignty may carry some weight in home States as well as host States. Even in the presence of clear statutory language authorizing the application of corporate regulations to their activities abroad, home State audiences may accept arguments that they have no business dictating the standards of treatment that foreigners should enjoy at the hands of subsidiaries organized under their foreign laws. They too will argue that it is the sole responsibility of the host State to safeguard its citizens’ human rights.

118 De Schutter, supra n. __, at 7. The author notes the possibility that some States will react negatively to the “hegemonic implications of such extraterritorial statutes, fearing that they will allow industrialized States to reach situations occurring on [their] territory...and further worsen the imbalance of power characteristic of the current State of international relations.”

119 Stephens, supra n. __, at 83.

120 For example, in declining to extend U.S. antitrust protections to foreign plaintiffs affected by anticompetitive behavior that had only foreign, and not domestic, effects, the Supreme Court in F. Hoffman-La Roche Ltd. v. Empagran S.A. said, “Why should America’s law supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or Japanese customers from...conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?...If America’s...policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legislative imperialism, through legislative fiat.” 123 S. Ct. 2359 (2004); see De Schutter, supra n. __, at 4.
However, even if such arguments are legitimate in the antitrust or securities context, when such extraterritorial regulations are based upon human rights norms established at the international level and endorsed by every single nation, such arguments deriving from sovereignty carry far less force. The core human rights treaties have enjoyed widespread ratification, and the Universal Declaration of Human Rights is often considered to have become customary international law. Moreover, Schachter has argued that a State’s promotion of human rights abroad can be seen as advancing an “international policy” and as implicitly less controversial than the extraterritorial imposition of a “national policy,” regardless of whether some State have not ratified all of the core human rights conventions on which those regulations are based. 121 Thus, so long as extraterritorial regulatory efforts by home States are phrased in human rights terms, their drafters should be able to mitigate such sovereignty-related concerns.

2. Lack of Political Will

Possibly the greatest risk involved in any attempt to enact extraterritorial regulation is that there will be insufficient political will to adopt the regulations in the first instance, and thereafter to fund and effectively administer a regulatory scheme with the potential to actually affect corporate conduct. 122 This lack of enthusiasm often results from the fact that the most powerful interest groups in home State constituencies (which are often intimately connected to business interests with transnational scope), as well as the general public, place a higher priority on the creation of an investment-friendly environment and the generation of wealth than on the protection of the human rights of non-citizens. Gibney and Emerick have argued that the United States has been historically reluctant to apply its own law in situations in which agents of the

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121 Schachter, INTERNATIONAL LAW IN THEORY AND IN PRACTICE (1991) at 335-345.
122 Copenhagen Consultation Summary Report, supra n. __, at 2 (“Participants raised the issues of government capacity, funding, and political will, explaining that even the strongest regulations “in form” will be ineffective in substance without these elements.”).
United States – or even the US government itself – “pursues activities that might bring about ‘negative effects’ in other countries.”

Certainly, the reaction of several major capital-exporting States to Ruggie’s work suggests that they are not yet enthusiastic about the prospect of applying binding rules to corporations, particularly at the international level. The United States in particular has expressed enthusiasm for business and human rights programs, but only so long as they remain voluntary. One can only expect that this reluctance would be amplified in a capital-exporting State considering unilaterally adopting such regulations, as any regulation that actually altered TNC behavior would likely place the corporations domiciled in that State at a disadvantage relative to every competitor domiciled in a different State.

While the hurdle of garnering sufficient political will to support the adoption of extraterritorial regulations by host States may be a very difficult one to overcome, the task is certainly not an impossible one. There are signs that some host States have begun to recognize that their interests and those of their citizens may be served by litigation in their home States. Moreover, it appears that political will for extraterritorial regulations is increasing in home countries worldwide. In the United States, the histories of legislative measures such as the Foreign Corrupt Practices Act and the Sarbanes-Oxley Act of 2002 have been encouraging in

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123 Gibney and Emerick, supra n. __, at 141-142.
124 See, e.g. response of the United States of America to the report by John Ruggie, presented to the UN Human Rights Council, 28 March 2007, Geneva, available online at http://www.business-humanrights.org/Documents/RuggieHRC2007. The United States responded that it “remains committed to promoting voluntary corporate social responsibility initiatives in a variety of sectors throughout the world. We believe that these voluntary initiatives are a positive complement to rule of law and can also help foster human dignity and improved working conditions, environmental safeguards, and good governance.”
125 Stevens, supra n. __, at 85. In one recent case brought against an English corporation in England regarding human rights abuses it allegedly committed while operating in South Africa, the courts proved willing to allow the case to proceed in England, in recognition of the fact that only the English system had the capacity in that instance to enable the claim to proceed and to make the defendant’s assets available for the satisfaction of any judgment rendered. In the Lubbe case, the plaintiffs would not have been able to afford legal representation in South Africa, and the corporation at issue had removed all its assets from South Africa before the plaintiffs brought suit. Lubbe v. Cape plc, 4 E.R. 268 (2000).
this respect. Both schemes, designed as responses to corporate misdeeds,\textsuperscript{127} have managed to withstand stringent opposition from business actors who claim that required compliance with their requirements – even in overseas operations by their subsidiaries – puts US corporations at a competitive disadvantage to their foreign counterparts.\textsuperscript{128} Moreover, statistical data confirms this trend. For example, a Program on International Policy Attitudes (PIPA) poll conducted in October 1999 in America revealed that 93% of respondents believed that "countries that are part of international trade agreements should be required to maintain minimum standards for working conditions," and 88 percent of the respondents agreed (of which, 67 percent strongly agreed) that "American companies that operate in other countries should be expected to abide by [United States] environmental standards."\textsuperscript{129} A poll conducted in the United Kingdom in 2001 reached similar conclusions.\textsuperscript{130} Even more encouraging, as a result of growing recognition of the need to regulate the extraterritorial practices of TNCs, several European States have begun to encourage

\textsuperscript{127} Political will to enact the FCPA was generated by the SEC’s discovery, in the wake of the Watergate Scandals, that many public companies maintained “slush funds” form which illegal campaign contributions were being made inside the United States and illegal bribes were being paid to foreign officials. Many American businesses complained in the wake of the FCPA that the statute placed them at a disadvantage relative to their foreign competitors. Proposed Legislative History, International Anti-Bribery Act of 1998. Available at http://www.usdoj.gov/criminal/fraud/ftcahistory/1998/amends/leghistory.html. Sarbanes-Oxley was enacted in response to several major corporate and accounting scandals involving companies including Enron, Tyco International, Adelphia, Peregrine Systems and WorldCom, which shook public confidence in the nation’s securities markets.

\textsuperscript{128} Id. Many American businesses complained in the wake of the FCPA that the statute placed them at a disadvantage relative to their foreign competitors. However, public support of the statute remained sufficiently strong to prevent its repeal, and the government’s enforcement of its provisions has become increasingly rigorous in recent years. Similarly, public opinion has not turned against Sarbanes-Oxley over the course of its first five years of existence sufficiently to allow its repeal.

\textsuperscript{129} Corporate Code of Conduct Act

\textsuperscript{130} The MORI poll found that 92% of the British public believed that “multinational companies should meet the highest human health, animal welfare and environmental standards wherever they are operating,” and that between 87% and 92% believed that governments should protect the environment, employment conditions and health - even when it conflicts with the interests of multinationals. MORI poll conducted between 20-25th September 2001. For more information, see: www.mori.com/polls/2001/globalisation.shtml; see also Friends of the Earth, “Press Release: New Bill Calls for Corporate Responsibility.” (12 June 2002), available online at http://www.foe.co.uk/resource/press_releases/20020612123459.html.
or to require companies to engage in some form of social reporting.\textsuperscript{131} Thus, although the task of generating political will in favor of home State regulation may be a challenging one, it appears that it is far from impossible. However, the examples of the FCPA and Sarbanes-Oxley suggest that drafters of such extraterritorial regulations should make a concerted effort to avoid burdening business actors any more than absolutely necessary to improve their human rights performance, lest they encounter unnecessary opposition on inconvenience grounds.

3. \textit{Unintended Consequences of Regulation}

The legacies of past efforts to regulate transnational business conduct reveal another troubling risk associated with that endeavor: the flexibility of the global investment environment makes TNCs a slippery target of regulatory activity. As De Schutter cautions, “any time that States impose discretionary regulations on companies that can be avoided by relocating or restructuring their activities, they will have an incentive to do so.”\textsuperscript{132} Deva notes that TNCs “can easily shift their activities, resources, or operations to States with fewer regulatory burdens, including human rights obligations.”\textsuperscript{133} De Schutter notes that companies have certainly proven their willingness to flee from stringent regulatory regimes throughout history: “the Delaware effect,” demonstrates that US businesses will rush to incorporate in the single State with the most favorable regulatory scheme for businesses; and long-standing practice of flying “flags of convenience” on vessels demonstrates that businesses will be similarly likely to scour the globe

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{131} Ruggie, \textit{American Exceptionalism}, \textit{supra} n. \textsuperscript{__} at 14 (“Governments are slowly entering the fray. Several OECD countries – the UK, France, Netherlands, Sweden, and Belgium among them – have begun to encourage or require companies to engage in one form or another of social reporting, and the EU is also developing policy on the subject.”).
\item \textsuperscript{132} De Schutter, \textit{supra} n. \textsuperscript{__}, at 34.
\item \textsuperscript{133} Deva, \textit{supra} n. \textsuperscript{__}, at 64.
\end{enumerate}
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for its least stringent regulatory regimes.\textsuperscript{134} More recently, a 2007 report endorsed by New York City Mayor Michael Bloomberg and U.S. Senator Charles Schumer expresses concern that the implementation of Sarbanes-Oxley, which resulted in increased compliance costs for affected companies, has contributed significantly to the reduction of the New York financial market’s global competitiveness and has given businesses an incentive to shift their activity from Wall Street to London.\textsuperscript{135}

To be sure, several authors caution that fears concerning the mobility of TNC operations are often overblown. Attempts to bring the activities of TNCs in line with human rights will often affect more static industries (manufacturing, extractives, food and beverages, and agriculture, for example) rather than their more mobile counterparts (like the financial sector at which Sarbanes-Oxley is aimed). C. D. Wallace notes that for many companies, “once production plants have been established in a particular locale, it is rarely expedient for headquarters suddenly to uproot such facilities and transplant them elsewhere simply because conditions have become less favorable than they were at the time of entry.”\textsuperscript{136} Sabel et al agree that “firms will prefer to comply with labor regulations when it is not too costly to do so” rather than relocating and recreating supplier relationships.\textsuperscript{137} Thus, so long as policymakers remain

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\item \textsuperscript{135} Michael R. Bloomberg and Charles E. Schumer, “Sustaining New York’s and the US’ Global Financial Services Leadership,” (2007) at 87, available at \url{http://www.senate.gov/~schumer/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20_FINAL.pdf}. (Stating that 55% of respondents to a senior corporate executive survey believed that Sarbanes-Oxley will have a “strong” or “somewhat negative” impact on their institutions, and that some respondents suggested that compliance costs were one of the most important reasons why many non-US companies that would otherwise qualify to list on US exchanges nevertheless avoid US markets).
\item \textsuperscript{136} C. D. Wallace, \textit{LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE: NATIONAL REGULATORY TECHNIQUES AND THE PROSPECTS FOR INTERNATIONAL CONTROLS}, (The Hague: Marinus Nijhoff, 1982) at 34; see also Macklem, \textit{supra} n. __.
\item \textsuperscript{137} Sabel et al, \textit{supra} n. __, at ?.
\end{itemize}
mindful of the threat of relocation and minimize compliance costs, the regulation of business entities with transnational operations should nevertheless be possible.

However, even if firms and subsidiaries do not relocate in the face of attempted regulation, there is another sort of threat that may arise. As Sabel et al note,

“[W]hen authorities impose prohibitions or performance requirements upon distant and complexly interconnected producers, enforcement officers can easily thwart the aims of regulators. For example, regulatory demands may drive firms from the formal to the informal sector in their efforts to avoid costly compliance, and thus make further abuses harder to detect, much less to correct.”

Although the threat of “deformalization” may be extremely difficult to mitigate, there are some regulatory approaches that actually provide incentives for a parent company to closely monitor the practices of its subsidiaries, rather than motivating it to turn a blind eye to their actions. Yet this section demonstrates that the risks of “relocations of convenience,” and increased reliance on the informal sector to avoid monitoring of practices are serious ones in the context of transnational business activity – ones that must be dealt with if any system of home State regulation is actually to improve the conduct of businesses with respect to human rights.

4. Possibility of Inconsistent/Overlapping Standards for Business Conduct

One final risk of extraterritorial regulation often cited by its detractors is the potential for simultaneous State efforts to impose human rights obligations on TNCs to result in wildly diverging and overlapping standards for business conduct. Deva has cautioned that “as States are notoriously inconsistent in their respect for and enforcement of international human rights, it would be unrealistic to expect that a majority of States would show any greater ‘consistency’ in enforcing human rights obligations on [TNCs].”

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138 Sabel et al, supra n. __, at 7.
139 See Section III(A) infra.
140 Deva, supra n. __, at 64.
confirm this risk for some observers, as its drafters articulated several human rights “that States [had] not recognized or [were] still debating at the global level.”

In several respects, past proposals for such extraterritorial regulations that have come before the legislatures of the US and Australia demonstrate this tendency. Additionally, Ruggie has noted concerns that even if the human rights standards adopted in varying States’ legislations are the same, the differing approaches to corporate liability taken by the different legal systems of the world will necessarily result in the adoption of differing degrees of liability for human rights abuses by businesses.

Ruggie has expressed concern that because a given TNC may be “present” in many different host and home countries at once, it may face significant uncertainty regarding what claims may be brought against it for its conduct (and where), as well as the standards to which it will be held.

Despite the negative aspects of such risks inherent in a “unilateral” approaches to TNC regulation, such an approach may actually result in positive outcomes from a Liberal perspective. An uncertain terrain for business conduct could very well generate significant support from the business community and others for increased international involvement in the regulation of corporate behavior. Ruggie has acknowledged this potential, stating, “[a]s this scenario of expanding corporate liability unfolds, the uncertainty created by national variations in how international standards are applied in practice may become increasingly problematic for all parties and generate a demand for greater harmonization.”

Moreover, the post-enactment history of the FCPA in the US demonstrates that one State’s decision to regulate extraterritorial corporate activity may give rise to such a global

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142 See Section III(B)(2)-(3) infra. Although both Codes of Conduct included human rights language, neither one would have required businesses to adhere to the rights enumerated in all eight of the “core” human rights treaties.
143 Id at 18.
144 Id at 9.
145 Id at 18.
“domino effect.” While many businesses initially advocated for the repeal of the FCPA, their strategy changed radically in the 1980s, when they began to lobby Congress, urging it to take steps internationally to “level the playing field.” Thus, in 1988, in the face of significant pressure from businesses domiciled in the United States, Congress specifically directed the Executive Branch to actively encourage other countries to enact legislation similar to the FCPA. The results of these efforts were several domestic and regional instruments aimed at combating the bribery of foreign officials enacted around the globe, culminating in the UN Convention against Corruption (which became effective in 2005).

Although there still exist some variations in the different conventions’ approaches with to anti-bribery legislation, the experience of the FCPA demonstrates that the combination of one State’s unilateral regulatory action and diplomatic efforts can provide a powerful impetus for international coordination. Additionally, as will be discussed below, States can draft their extraterritorial legislation in such a way as to minimize the potential for such conflicting standards to emerge.

D. CONCLUSION

In short, despite the fact that extraterritorial regulation does pose several risks requiring consideration, “given the lack of an effective international regulatory system and the difficulties host countries face when trying to impose standards on the corporations acting within their

146 Proposed Legislative History, supra n. __; see also Lisa Misol, supra n. __, at 8.
147 Id.
150 See Section III(A)(2) infra.
territory, home country regulation may be the best short-term alternative.”\textsuperscript{151} Moreover, as the example of the FCPA has demonstrated, unilateral action by one or a few States to address a transnational phenomenon may provide a powerful impetus for cooperation by the greater international community, leading to a situation from which a truly comprehensive regime can emerge. True, there are several real risks posed by any attempt to implement extraterritorial regulations on corporate activity. However, as Part III will demonstrate, these risks can be mitigated during the drafting process, and as the above paragraphs have shown, they are not so significant as to undermine the real potential for extraterritorial home State regulation to significantly impact the way that TNCs operate abroad with respect to human rights.

\textbf{PART III: COERCING RESPECT – DESIGNING EFFECTIVE HOME STATE REGULATIONS}

Those seeking to begin the arduous task of designing and implementing legislation that could fairly and efficiently increase business respect for human rights in the coming years may stand to benefit from this brief review of State-centric corporate regulatory schemes. In the very recent past, tentative proposals for extraterritorial regulation of corporate activity in conformance with human rights obligations have emerged in several capital-exporting countries, including the United States, Australia, England, France, Sweden, and the Netherlands. Moreover, several major NGOs have begun to actively encourage major home States to consider regulating the extraterritorial activities of their corporate nationals. This section will attempt to identify the major concerns that these and future proposals for extraterritorial regulation of corporate behavior will need to consider if they are to be affective, accessible, and at all likely to pass contemporary political muster.

\textsuperscript{151} Stephens, supra n. __, at 83.
A. MAJOR DESIGN CONSIDERATIONS

1. Nature of Regulation: Foreign Direct Liability vs. Parent-based Regulation

The first and most critically important determination in designing any scheme intended to regulate the overseas activity of a business present or domiciled in a home State is that of the type of regulation that will be imposed. There are two primary varieties of business regulations with extraterritorial effect: foreign direct liability and parent-based extraterritorial regulation.\(^\text{152}\) The former involves a home State holding a parent corporation directly responsible for the actions of the foreign subsidiaries or other business affiliates of corporations domiciled or present in its territory.\(^\text{153}\) A State attempting to implement extraterritorial jurisdiction under this model would merely have to enact a statute prohibiting its corporations from violating any of an enumerated list of human rights in the course of their activities abroad.

While the simplicity of such a regulation may be desirable, foreign direct liability gives rise to several major procedural issues, particularly relating to the ability of home States to enforce such obligations against parent corporations for failure to adhere to the regulations. Should a foreign subsidiary fail to adhere to the regulations – of whatever nature – established by the home State, an attempt to sanction the parent corporation could be susceptible to jurisdictional challenges under the *forum non conveniens* doctrine, under which many courts in common law countries have refused to hear a case that would be more appropriately tried elsewhere.\(^\text{154}\) Moreover, even if host State courts retain jurisdiction over a parent company, it

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\(^{152}\) De Schutter, *supra* n. __, at 31.

\(^{153}\) *Id* at 35. One particularly well-known example of foreign direct liability is the *Unocal* case, in which a California-based parent oil company was charged under the Alien Tort Claims Act (28 U.S.C. § 1350 (2000)) for violations of international criminal law committed in Burma by its subsidiary and a joint venture in which it was a member. *Unocal* settled before a final judgment was rendered. *John Doe I v. Unocal Corp.* Nos. 00-56603, 00-56628, 00-57195, 2002 WL 31063976 (9th Cir. 2002).

\(^{154}\) Ward, *supra* n. __, at 460-461. Note, however, that this doctrine can be waived statutorily, as has been done in the EU’s Brussels Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. It establishes a general principle that defendants can be sued in the courts of the EU member State in which they are domiciled, even if the plaintiff is domiciled in a non-member country.
may be difficult to establish its legal responsibility for the foreign harms, as under the “separate personality” doctrine, parent companies will not be held liable for the acts of its subsidiaries merely because they enjoy a parent-subsidiary relationship.\footnote{Anderson v. Abbott, 321 U.S. 349, 362 (1944); see De Schutter, supra n. \_\_ at 43.} In order for a parent company to incur responsibility, its subsidiary will have to have been so closely controlled by the parent company that it can be said to have been the “alter ego” of the parent\footnote{Chicago, M & St. P.R. Co. v. Minneapolis Civic and Commerce Assn., 247 U.S. 490, 501 (1918).} or it will have to have been acting in that particular instance as the “agent” of the parent company.\footnote{When the parent company controls the subsidiary and where both parties agree that the subsidiary is acting as the agent. (Bowoto v. Chevron Texaco, No C 00-2506 SI, 2004 US Dis LEXIS 4603 (ND Cal, 2004).}  

In order to overcome difficulties relating to the “separate personality” doctrine, a home State could adopt legislation establishing a presumption that acts committed by a subsidiary or joint venture will be treated as if they were committed by the parent, such that the parent will incur indirect liability for harms they cause.\footnote{De Schutter, supra note \_\_ at 41.  Stephens notes that large TNCs already put great effort into structuring their operations so as to avoid incurring responsibilities for the behavior of their subsidiaries. Stephens, supra n. \_\_ at 88 (noting that in Wiwa, in a US court determined that it had jurisdiction over Royal Dutch Petroleum, jurisdiction was premised on a handful of direct contacts between Royal Dutch and New York State rather than the plaintiffs’ argument that Shell USA was the “alter ego” of Royal Dutch. “The Shell components had clearly put tremendous efforts into structuring their operations in such a way as to isolate themselves from the responsibilities of other members of their corporate family – an effort that might have worked but for the direct contacts between the parent company and New York.”)} Yet whether or not this presumption is established, one major problem remains with all foreign direct liability schemes when they are imposed in isolation of other measures. Although such regulations may effectively prevent parent corporations from directly engaging in human rights violations abroad, they create a disincentive on parent companies to monitor the behavior of their subsidiaries and an incentive to diversify their foreign operations, creating semi-independent subsidiaries that can continue to engage in behavior prohibited by the home State with impunity.\footnote{De Schutter, supra note \_\_ at 41.  Stephens notes that large TNCs already put great effort into structuring their operations so as to avoid incurring responsibilities for the behavior of their subsidiaries. Stephens, supra n. \_\_ at 88 (noting that in Wiwa, in a US court determined that it had jurisdiction over Royal Dutch Petroleum, jurisdiction was premised on a handful of direct contacts between Royal Dutch and New York State rather than the plaintiffs’ argument that Shell USA was the “alter ego” of Royal Dutch. “The Shell components had clearly put tremendous efforts into structuring their operations in such a way as to isolate themselves from the responsibilities of other members of their corporate family – an effort that might have worked but for the direct contacts between the parent company and New York.”)} 

Yet one additional mechanism exists that allows home States to implement legislation establishing prohibiting certain conduct by their businesses abroad, but that nevertheless prevents
parent corporations from merely relinquishing control over their subsidiaries in response: “parent-based regulations.”

Either as part of a foreign direct liability scheme or independently of any other regulation, a home State could impose various “due diligence” obligations on parent corporations in a position to “control” their business partners, requiring them to monitor the behavior of their business subsidiaries, joint ventures, and/or suppliers. In this way, a parent corporation could be held liable (1) for failing to engage in such due diligence monitoring in the first place and/or (2) for failing to prevent subsidiaries from engaging in prohibited behavior, unless the parent can prove that it was unable to prevent that behavior despite having attempted to compel their compliance.

Under a parent-based regulation regime, parent corporations could also be required to exercise due diligence with respect to their sub-contractors, private security forces, and others, and at a minimum, to include provisions relating to respect for human rights in all contractual agreements into which they enter.

Accordingly, home States seeking to design regulatory schemes for TNCs should focus first and foremost on establishing parent-based obligations for corporations domiciled in their territory. Home States could begin by imposing simple monitoring responsibilities on parent corporations, requiring them to perform due diligence on the operations of their subsidiaries, joint ventures, and even suppliers; to report on those programs using certified guidelines or principles; to make their reports publicly accessible; and to submit to occasional audits by independent third parties, the results of which would also be made available to the public. Should a State wish to go further, it could combine such monitoring obligations with foreign direct liability, which would necessarily include a statutory presumption of control by the parent corporation. As parent corporations would be obliged under the monitoring obligations to make

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160 De Schutter, supra n. __, at 44.
161 Id.
162 Id.
themselves aware of the practices of their business partners, such a foreign direct liability scheme would not lend itself to the evasive strategies identified above. However, foreign direct liability would not be necessary to render the scheme at least somewhat effective in the short run.

The experience of FCPA in the US illustrates some of the benefits of adopting a regulatory framework to monitor the behavior of TNCs based in a given home State, and additionally demonstrates that the “due diligence” obligation inherent in a parent-based regulatory scheme may carry some compliance costs, but not of a prohibitively high nature. The FCPA establishes parent-based accounting regulations designed to ensure that all businesses listed with the SEC conduct their operations and those of their subsidiaries and joint ventures in such a way as to minimize the potential for corrupt payments to occur. It further establishes foreign direct liability, allowing the parent company to be held liable if it directly makes improper payments or authorizes its subsidiaries to do so, or if its subsidiaries that make improper payments are merely alter egos, are dependent entities with no will of their own, or were acting as agents of the parent. In order to prevent running afoul of the FCPA, businesses are recommended to push compliance principles from the highest management throughout the enterprise, establish meaningful controls and oversight, regularly audit the compliance program and company books and records, regularly train employees in compliance, encourage whistle blowing, enter into agreements with consultants or other business partners including provisions to ensure their awareness of and commitment not to violate the FCPA, and to perform due diligence on all agents, consultants, joint venture partners and other business partners prior to engaging in business with them.163

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163 Proskauer Rose LLP, PROSKAUER ON INTERNATIONAL LITIGATION AND ARBITRATION, supra n. __, at Ch. 27: Foreign Corrupt Practices Act.
Moreover, under parent-based regulatory schemes like the FCPA, the U.S. government is able to set minimum standards for business conduct in the anti-bribery provisions, and yet businesses are encouraged to bring their own innovation to bear in designing and implementing internal controls that will allow them to effectively satisfy the regulations in the most efficient and least costly way possible. Further, the scheme does not restrict businesses from implementing policies that exceed the bare minimum dictated by the statute. In this way, the FCPA functions much like Sabel, O’Rourke, and Fung’s proposed “Ratcheted Labor Standards” (RLS) scheme, in which they propose that governments formulate minimum labor standards, promulgate them through national legislation, and then require firms operating in their jurisdictions to conduct independent monitoring (perhaps through government-certified third-party monitoring agencies) and to report wages, workforce profiles, environmental labor and management systems, and other elements of social performance to that certified monitor, who then ranks the overall performance of firms and then makes that data publicly available.164 The only role that governments would need to play would be to first establish the scheme, and then regularly sanction businesses that fail to participate or those whose performance falls below the statutory minimum, and occasionally to perform independent audits on companies to ensure that the monitoring programs they have established for themselves are effective.165 The burden on the State imposed by such a regulatory scheme is thus minimal, which would increase its potential to be politically palatable. Truly, the efficiency, flexibility, and potential effectiveness of a parent-based regulatory scheme similar to the FCPA appears to have the potential to begin to bring TNC conduct more closely in line with international human rights principles, all without risking the negative consequences attending alternative approaches.

164 Sabel, O’Rourke, and Fung, Ratcheting Labor Standards, at 3.
165 See Sabel et al., supra n. __.
2. Minimizing Potential Conflicts

Particularly given the number and variety of States that have already considered or are in the process of adopting various extraterritorial controls over TNCs, it is especially important that drafters make every attempt to draft such legislation so as to minimize any potential conflicts that may occur between the laws of different home and host States as applied to a single TNC. Two kinds of conflicts are particularly likely to arise in this context: conflicts between a TNC’s home State and the host State in which it acts; and conflicts between two different “home States” who both seek to extraterritorially regulate the same TNC.

As discussed above, one primary step that States can take in order to minimize the potential for conflict between their initiatives and others adopted worldwide would be to ground the language and requirements of their regulations in the language of internationally agreed-upon human rights treaties. Although States’ interpretations of what businesses are required to do in order to avoid violating those human rights in their activities abroad may differ, grounding their regulations in human rights language still serves as an important first step that should signal to a State’s enforcement mechanisms that all interpretations of those regulations should occur with international cooperation in mind. This would also provide an opportunity for the various human rights treaty bodies to at least indirectly inform the interpretation of such requirements.

De Schutter provides several additional recommendations for home States seeking to pass legislation that will minimize the potential for such conflicts.\textsuperscript{166} First, home States should always adopt a principle of reasonableness in the application of their regulations to a TNC. Secondly, they can provide exemptions to their regulations, and provide that no conduct that is required by a host State will be deemed unlawful by a host State. Finally, they can incorporate

\textsuperscript{166} Id at 46.
flexibility and discretion (for example, as to the format of reporting in which corporations engage in order to fulfill their responsibilities) into their regulations, so as not to actively prevent the adoption by businesses in a variety of States of a particularly popular and effective reporting format. For example, the Global Reporting Initiative, a Dutch NGO, has developed a purportedly comprehensive set of “Sustainability Reporting Guidelines,” which it hopes will become a common standard for CSR reporting.\footnote{See Global Reporting Initiative (GRI) Sustainability Reporting Guidelines, 51-54 (2002), available at http://www.epeat.net/Docs/GRI_guidelines.pdf.}

B. PAST AND PRESENT SCHEMES FOR HOME STATE EXTRATERRITORIAL REGULATION – IDENTIFYING BEST PRACTICES AND POTENTIAL PITFALLS

Beginning in the context of global opposition to Apartheid in the 1980s and particularly over the course of the past decades, several capital-exporting governments have begun to consider (and in some cases, to adopt) extraterritorial home State regulations intended to strengthen existing CSR regimes. The following section will briefly review a few of the most notable of such regulatory efforts and identify strong and weak aspects of each. Hopefully, the effort will provide some guidance to those seeking a model on which to base future home State regulations.

1. The Sullivan Principles and the Comprehensive Anti-Apartheid Act of 1986 (USA)

In 1977, amidst an international outcry over the evils of the Apartheid system in South Africa, several U.S.-based businesses with investments in South Africa agreed to participate in a voluntary initiative known as the Sullivan Principles.\footnote{The Sullivan Principles were designed by the Reverent Leon H. Sullivan, a pastor and member of the board of directors of General Motors Corporation. De George, Richard T, “Sullivan-Type Principles for U.S. Multinationals in Emerging Economies” 18 U. PA. J. INTL ECON. L. 1193 (1997).} Under the scheme, which had 146 participants by 1983, businesses agreed to adhere to a code of conduct in the course of operating
In order to assure compliance, the participants were required to complete a 55-page questionnaire – which required a financial audit – at regular intervals and to submit an administration fee to an independent monitoring organization which rigorously evaluated participants’ responses. In a groundbreaking move, in an effort to force all businesses operating in South Africa – and not merely the most visible ones – to participate in the Sullivan scheme, the US Congress passed the Comprehensive Anti-Apartheid Act of 198, which required all American corporations employing more than 25 people in South Africa to comply with a code of conduct based on the original Principles. Both the State Department and the Reagan administration opposed the move from voluntary to mandatory initiative that the Anti-Apartheid Act represented, but Congress persisted, and was able to override Reagan’s veto.

While the Sullivan Principles and Comprehensive Anti-Apartheid Act are important precedents for the BHR movement, the unique context from which they emerged should not be forgotten. Clearly, the Principles and Act dealt with only one country, were motivated by a strong reaction against Apartheid by the general population of the United States, and were specifically intended to dramatically alter social relations in South Africa. Thus, the potential for international conflict posed by the Principles and Act was intentionally high, as was the burden placed on participating businesses. Some actors specifically decried the government’s decision to require all companies to fill out a specific worksheet that businesses perceived as burdensome.

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169 The code of conduct required businesses operating in South Africa to desegregate their facilities, provide equal opportunities for all employees, administer pay in a non-discriminatory fashion, establish a minimum wage and salary structure taking employees’ and their families’ needs into account, to increase the representation of those disadvantaged by Apartheid in key positions, to recognize the right of all employees to self-organization, and to take reasonable steps to improve the quality of employees’ lives outside the work environment. Mark Gibney and R. David Emerick, “The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards,” 10 Temp. Int’l & Comp. L.J. 123 (1996), at 138-139 and fn. 93.

170 In 1983, the monitoring body went so far as to drop 30 signatories from the program as a sanction for failure to comply with the reporting requirements. Companies dropped from the list of Sullivan participants subsequently found themselves subject to divestment initiatives taking place across the country in protest of South Africa’s apartheid policy and also faced general critiques from investors and depressed stock and securities values.

and costly, particularly because it could not be completed without the assistance of accountants. Moreover, the Code of Conduct was a relatively minor provision in the Act’s larger scheme of severe sanctions against South Africa, including a ban on all new investment there. In fact, it appears, in the context of the investment ban that accompanied the Code of Conduct, that the Act was primarily intended to dissuade American businesses from operating in South Africa, and only incidentally intended to improve the performance of those businesses which insisted upon remaining there. Despite their weaknesses, however, the Principles and Act demonstrate experience of the Sullivan Principles demonstrates that it is possible to generate sufficient political will in the United States to motivate Congress to establish a mandatory home State regulatory scheme for TNCs. In making reporting on social performance mandatory for all companies operating in a particular foreign country and pledging to impartially review and monitor their performance, the US Congress set an important precedent for the BHR movement that should not be forgotten.

2. Proposed Corporate Code of Conduct Act (USA)

In June 2000, Representative Cynthia McKinney introduced a bill in the U.S. House of Representatives, entitled the Corporate Code of Conduct Act, which would have established a home State regulatory regime in the United States. The Act called for all businesses organized under the laws of the United States employing 20 or more persons in a foreign country, either directly or through subsidiaries, subcontractors, joint ventures, or other partners, to observe a wide range of human rights obligations. In setting minimum standards for corporate conduct abroad, the Act included some specific provisions – relating to workplace health and safety, establishing prohibitions on practices including the use of child or forced labor, and mandating

that businesses honor the right to collective bargaining – but also generally required them to “respect minimum international human rights standards and uphold responsible environmental... practices.”\footnote{\textit{Id}, § 3(b)}  The content of obligations relating to these “minimum human rights standards” was to be deduced by reference to a list of international conventions to which the United States is a party.\footnote{\textit{Id} § 3(b)(4)(B), and (b)(6).}  Additionally, the act required all covered corporations to promote “good governance and good business practices,” and to comply not only with all internationally recognized environmental standards but also with “all Federal environmental laws for similar operations that would be applicable to the national of the United States if the operations of the national were located in the United States.”\footnote{\textit{Id} § 3(a) and 3(b).}  The Act required that businesses require all partners, suppliers, and subcontractors (including security forces) to adopt and adhere to the same principles under terms of contract.  It further required covered businesses to make full public disclosure of “information relating to location and address, corporate name, applicable financial agreements, worker rights practices and labor standards, working conditions, environmental performance, and applicable investments of partners, suppliers, subsidiaries, contractors, and subcontractors of the national of the United States (including any security forces of the national).  All covered businesses were required to implement and monitor compliance with the Act “through a self-financing program internal to the business that is designed to prevent and detect conduct that is not in compliance with such principles by any employee of the national of the United States, or any employee of the partner, supplier, or subcontractor of the national.”\footnote{\textit{Id}, § 3(a) and 3(b), The Act provided several key components of such a program as well.}  Enforcement of the Act was to be predicated mainly on the provision of trade privileges to those covered businesses

\textit{Id}, § 3(b)
in compliance with the act and the suspension of such privileges to those not in compliance.\textsuperscript{177} Thus, all covered businesses receiving investment assistance from the United States or entering into contracts with executive agencies would be required to submit an annual report to various government officials (and also make the report available to the public), containing a description of its monitoring program and its progress toward full compliance with the Act.\textsuperscript{178}

In terms of enforcement, the Bill provided that beginning two years after the passage of the Act, any person in violation of any provision of the Act (presumably including the reporting requirements) would be liable for civil damages to any individual aggrieved by that violation. Additionally, the Act further provided that any person could petition the government to investigate a covered business for non compliance, or the government could launch such an investigation on its own initiative.\textsuperscript{179} Federal officials would provide an opportunity for any interested party to present information concerning such investigations, including at public hearings. Decisions on such petitions would be made public, and would be reviewable by a federal court. Finally, several key government officials would be mandated to submit an annual report to Congress (which would also be made public) containing a compilation of reports received from all covered businesses over the course of the past year and of petitions submitted to the government in the previous year, along with an analysis of the extent to which each covered business was in compliance with the Code of Conduct.\textsuperscript{180} Regrettably, although the Bill was co-sponsored by at least 30 other US Representatives in addition to Rep. McKinney, it died in committee and was never put to a vote.

\begin{footnotesize}
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\item \textsuperscript{177} Id § 4.
\item \textsuperscript{178} Id § 7(a).
\item \textsuperscript{179} Id, § 5.
\item \textsuperscript{180} Id § 7(b).
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While many aspects of the Bill are extremely admirable from a human rights advocate’s standpoint, it seems as if it may have attempted to accomplish too much, too soon. Not only did the Bill purport to hold US businesses to internationally-recognized human rights and environmental standards; it further required them to obey US environmental laws in all of their activities abroad. Certainly, these requirements might go far beyond the laws enacted in host States, and may present a potential source of international conflict. In exceeding internationally agreed-upon environmental standards, the Bill would have given rise to a risk that US businesses would have been held to considerably higher standards than their foreign competitors even if their home countries were to begin requiring them to respect international human rights in their operations as well.

Moreover, the Bill not only created a reporting scheme for covered businesses, but would have created a complaints mechanism within the US government as well. The resources that any government would have to devote in order to create a body that could collect and review all business reports, as well as to investigate all non-frivolous petitions (as the Act required), hold hearings, and reach decisions on such petitions would have been significant. While such a government body is a necessary component of the ideal home State extraterritorial regime, it may not have been an appropriate first step for the United States. Had the Bill proposed to review businesses’ compliance with the Act by requiring businesses to submit to independent audits (and potentially occasional ones by government-appointed auditors) and merely required the government to receive complaints about non-participants, it could have accomplished many of its goals in a less cumbersome fashion. Finally, the U.S. Bill highlights one significant drawback of the unilateral home State regulatory approach: the while the Bill was phrased in human rights language, thus reducing the potential for international conflict, it made no
references to the core human rights treaties not ratified by the United States at the time (most notably the ICESCR and CEDAW). ¹⁸¹

Despite these drawbacks, the many virtues of the Bill should be highlighted. Its reporting and disclosure requirements, and particularly its promise to make all reports available to the public, would have been extremely valuable. Moreover, its mandatory reporting requirements and pledge to sanction all businesses found not to be in compliance with the terms of the Act would have brought the United States’ enforcement capacity to bear on recalcitrant actors, correcting the key weakness of voluntary CSR initiatives, while providing NGOs, consumers, and shareholders with key information allowing them to independently evaluate businesses’ performance. The Act would have provided incentives for participating businesses as well as sanctions, and would have allowed US businesses to design their own strategies for compliance with the requirements of the Act rather than imposing a particular scheme on them. In many respects, then, McKinney’s Corporate Code of Conduct Act serves as a valuable first attempt at implementing home State regulations in the United States.

3. Proposed Corporate Code of Conduct Bill 2000 (Australia)

In September 2000, just months after the McKinney Bill was first introduced in the United States, the Australian Senate was presented with a strikingly similar Corporate Code of Conduct Bill by Senator Vikki Bourne. ¹⁸² The Australian Bill purported to regulate corporations incorporated within the Commonwealth employing or engaging the services of 100 or more

¹⁸¹ According to the Bill, “The term “minimum international human rights standards” means standards contained in the following United Nations instruments relating to international human rights: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime of Genocide, the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, and the International Convention on the Elimination of All Forms of Racial Discrimination.” Id. § 3(c)(3).

¹⁸² Corporate Code of Conduct Bill 2000 (Cth) in the Australian Senate, introduced on Sept. 6, 2000.
persons in a country other than Australia, as well as those corporations’ holding concerns, subsidiary concerns, and sister concerns.\textsuperscript{183} The Bill required covered corporations to comply with enumerated international standards relating to the environment, health and safety, employment, and human rights.\textsuperscript{184} Notably, in defining the content of international employment standards for corporations, the Bill adopted verbatim definitions of “basic needs” and “minimum international labor standards” from the McKinney Bill.\textsuperscript{185} However, the Bill’s human rights standards were significantly narrower than those in the McKinney bill; whereas the latter required corporations to “respect minimum international human rights standards,” the Australian Bill merely forbade corporations from discriminating against workers on a variety of bases.\textsuperscript{186} The Bill also obliged Australian corporations working abroad to conform with Australian consumer health and safety standards, as well as those of the host country, and included more sophisticated environmental standards than the US Bill, requiring firms to adopt a “precautionary principle” in their operations abroad.\textsuperscript{187}

In terms of enforcement, the Bill required corporations to submit an annual compliance report to the Australian Securities and Investment Commission (ASIC), which would then prepare a comprehensive report to be forwarded to Parliament. Individual corporate reports were

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\textsuperscript{183} \textit{Id} § 4.  \\
\textsuperscript{184} \textit{Id} §§ 7-10.  Covered corporations would be required to take all reasonable measures to prevent its activities causing any material adverse effect on the environment and monitor the environmental impact of its activities, promote the health and safety of its employees, not benefit from forced labor, not benefit from the labor of children under 14 years of age, pay its workers a “living wage, not dismiss workers for reasons of illness or accident, allow workers to associate and bargain collectively, allow workers to submit complaints to ‘independent authorities,’ observe minimum international labor standards, refrain from discriminating against persons in relation to employment on the basis of race, color, sex, sexuality, religion, political opinion, national extraction or social origin, observe the tax laws of the host country, ensure that its products meet Australian and host country standards for consumer health and safety, and to refrain from misleading or deceptive conduct. Report on the Corporate Code of Conduct Bill 2000, Parliamentary Joint Statutory Committee on Corporations and Securities (hereinafter Committee Report), June 2001, at 4. In many instances, these standards were far more specific than those in the McKinney bill (for example, forbidding more than five consecutive hours of work without a break of at least 20 minutes). \textit{Id} § 8(2)(c).  \\
\textsuperscript{185} See Deva, \textit{supra} n. __, at 53.  \\
\textsuperscript{186} \textit{Id} § 10.  \\
\textsuperscript{187} Deva, \textit{supra} n. __ at 53. \textit{See Australian Bill § 7(2)(g).}  \\
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to include financial results for the past year information about the corporate structure, the number of employees employed in each foreign country in which the corporation was operating, their total remuneration, an environmental impact Statement prepared by an independent auditor, Statements of foreseeable risk factors that could arise as a result of the corporation’s activities abroad, of any contraventions of standards or laws relating to the environment, employment, health and safety, and human rights in foreign countries, and of the corporation’s social, ethical, and environmental policies, as well as any other relevant information.\textsuperscript{188} Failure to submit such a report without reasonable excuse was made an offense punishable by fine, and executive officers who knew about or were negligent with respect to that failure could be punished by a fine. Additionally, any person aggrieved by a corporation’s contravention of the bill, including associations or groups seeking to protect the public interest, could initiate a civil action in Federal Court against those corporations and their executive officers; alternatively, the government could impose fines and civil penalties.

While the Australian Bill, like its counterpart in the U.S., never became law, it was thoroughly considered by a Parliamentary Committee at a series of hearings and in a final report, providing valuable information on the reaction of other public representatives to the Bill’s proposals. In short, the Australian parliamentary committee that rejected the Bill found it to be “unnecessary,” “impracticable,” and “unworkable.”\textsuperscript{189} The Committee found that regulating the many corporations covered by the Bill would place a “heavy burden” on the Australian Securities and Investment Commission.\textsuperscript{190} Additionally, it felt that the Bill’s reporting requirements would be both “onerous and expensive” for Australian businesses, even if their

\textsuperscript{188} Id. § 14(2).
\textsuperscript{190} Id at 40.
duties could be further clarified through additional regulations. (43) These beliefs, along with the Committee’s conviction that there had been no systemic failure of Australian businesses operating abroad to respect human rights, convinced it that the supposed benefits that would have been derived from the reporting regime would not compensate for the costs it would impose. (44).

To be sure, some of the Committee’s concerns were understandable. To the extent that the Bill required Australian corporations working abroad to conform to Australian consumer health and safety standards, as well as those of the host country, the Bill posed the same risks of extraterritorial conflict as the McKinney Bill. Even more troubling, insofar as the Bill purported to apply to “the holding companies of Australian corporations,” it may have invited excessive potential for international conflict. The Committee was particularly troubled by this provision, as it could have led to an attempt by Australia to regulate the parent corporation of every subsidiary in Australia (for example, General Motors).191 This sort of a provision, rather than minimizing the Bill’s potential to generate international conflict, radically increased it. The inclusion of a provision exempting a corporation from compliance with the Act if doing so would cause it to violate the law of the host country,192 would have helped to mitigate the potential for such conflicts. Many expressed concern about the Bill’s purported application only to corporations employing 100 or more people outside Australia. Some claimed that this number was far too high, and others claimed that it was arbitrary.193 Others noted that the presence of a personnel-based threshold itself was a mistake, as corporations would be able to sub-contract its activities overseas so as to fall below the minimum threshold.194 These criticisms were

191 Id at 10.
192 For example, if host country law forbade corporations from hiring members of a separatist movement.
193 Id at 11. For example, Amnesty International Australia suggested that the threshold be lowered to 50.
194 Id at 12.
compounded by the fact that the Bill did not specify if the number of foreign employees employed by subsidiaries would be taken into account in determining if a business met the “100 employee” threshold. Finally, the Bill made no provisions for requiring Australian corporations to ensure the adherence of their sub-contractors to the code, further encouraging attempts at evasion by covered corporations.\textsuperscript{195}

Perhaps most troubling from an enforcement standpoint is the fact that the Bill included no provisions that would have assured the veracity of reports submitted by corporations. The Bill did not require corporations to conduct independent audits of their human rights practices (only of environmental practices), it did not specify guidelines for company reports, it did not purport to subject any corporation to a review of its compliance with the Bill other than through complaints that a corporation had not submitted one at all or as part of an allegation that the corporation had engaged in practices giving rise to specific harm. Moreover, the Bill did not specifically include provisions for the public disclosure of the information contained in businesses’ reports. The Bill’s failure to promote transparency in this respect would have unnecessarily sacrificed the potential for individuals and NGOs to participate in the regulatory scheme. Finally, from a human rights standpoint, the Bill was seriously flawed insofar as it addressed only labor, employment, non-discrimination, and environmental rights, rather than requiring businesses to comply with the universe of human rights as represented by the UDHR.

While these weaknesses reveal the immense difficulties inherent in crafting an effective home State regulatory scheme, the Australian Bill nevertheless represents an important and valuable contribution to the BHR debate. Particularly encouraging is the fact that the drafters of the Australian Bill were clearly inspired by the McKinney Bill in the United States. Their decision to adopt verbatim definitions of key terms from the McKinney Bill and to mirror many

\textsuperscript{195} Id at 12.
of Australian Bill’s provisions on its US counterpart demonstrate the potential for States with the political will to regulate their corporations’ extraterritorial activities to do so in a way that respects and promotes other countries’ efforts to do the same. Like the experience of the FCPA, that of the US and Australian bills demonstrates the potential for a dynamic dialogue between States-level and individual-level actors to result in an effective scheme for regulating transnational activity for the benefit of human rights.

4. The French “New Economic Regulations” Law

Following the failed attempts in the United States and Australia to enact comprehensive “Codes of Conduct” for their corporations, in 2001, the French Parliament enacted a law that merely mandated all French corporations to report on their social and environmental sustainability. The “New Economic Regulations” law (nouvelles régulations économiques, or NRE), while predominantly concerned with financial issues, also required corporations to disclose their “triple bottom line” performance, including required disclosure by the company on its policies and positions on “human rights, local impacts, and dialogue with stakeholders.”

While some heralded the French legislation as a breakthrough in CSR, other observers were less impressed. Particularly glaring is the law’s silence as to whether or not a company must report on its international operations or merely its domestic ones. Additionally, while it called for the use of performance indicators in social and environmental reporting, the NRE did not designate an official key performance indicator (KPI), require auditing, or provide for sanctions for non-compliance. A final especially troubling aspect of the French scheme is its lack of enforcement capacity. While the NRE represents an important first step on the path of

effective home State regulation, it is unlikely to significantly improve the human rights performance of French corporations.

5. The UK Corporate Responsibility Bill and Companies Act 2006

In 2000, at the same time that the United States and Australian legislatures were considering the proposed corporate conduct bills, UK Prime Minister Tony Blair challenged the UK’s top 350 companies to produce social and environmental reports by the end of 2001. However, Blair’s efforts to demonstrate the superiority of the voluntary approach to CSR reporting backfired, as three quarters of those companies ignored his challenge. Thus, in June 2002, a coalition of human rights, environmental, and development organizations launched a private members Corporate Responsibility Bill, which would make social, financial, and environmental reporting (the “triple bottom line”) mandatory, require companies to consult on large projects, place duties on directors and companies, provide remedies and rights of redress for people negatively impacted by business activities, and establish a new regulatory body to oversee environmental and social standards. While the Bill initially appeared to enjoy fairly widespread support from MPs, it eventually encountered some hostility, and was finally watered-down and integrated into the Companies Act 2006, a major reform of UK company law that began to enter into effect in 2007.

Section 417 of the new Companies Act requires that all “quoted” companies, i.e. those listed on the main market of the London Stock Exchange and a few others must produce an

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197 “Richer and Greener” - Speech by The Prime Minister, to CBI / Green Alliance Conference on the Environment, Tuesday 24th October, 2000.
200 This includes the FTSE 100 Index, but not some sub-markets like the Alternative Investment Market. Note also that publicly-owned companies are not covered by the requirement.
annual “business review” report\(^{201}\) beginning in October 2007 and thereafter depending on a given company’s financial year. The business review must include “information about (i) environmental matters (including the impact of a company’s business on the environment), (ii) the company’s employees, and (iii) social and community issues, including information about any policies of the company in relation to those matters and [their] effectiveness,” as well as “information about persons with whom the company has contractual or other arrangements which are essential to the business of the company.” The Act requires that this “business review” include analysis using financial key performance indicators, and, where appropriate, analysis using other key performance indicators, including information relating to environmental matters and employee matters.\(^{202}\) The Act does not establish any additional guidelines for preparing “business reviews” other than vaguely defining the information they should contain. Several NGOs have already criticized this provision of the Act for its weak supervisory and enforcement controls. In response, the Government agreed to review the sufficiency of social and environmental reporting under the Act in 2009.

To the extent that the new Companies Act makes social and economic reporting as commonplace as financial reporting for UK companies, it represents a success for the CSR movement. However, in order to effectively impact upon the actual behavior of UK businesses abroad, the Act will have to be modified and strengthened in several ways when it comes up for review in 2009. At that time, advocates should call for references to be made to the body of international human rights instruments in defining requirements for social performance. The Act should further be modified to specify some specific guidelines for reporting suggesting performance indicators like those in the GRI G3 Guidelines. Additionally, the Act could require

\(^{201}\) Unless they fall under the “small companies” regime.

\(^{202}\) The Act defines “key performance indicators” as factors by reference to which the development, performance or position of the company’s business can be measured effectively.
corporations to conduct independent audits of their human rights and environmental practices and allow independent government audits to occur, with penalties for those who fail to engage in adequate reporting. Finally, the Act should make provisions for public disclosure of the contents of such reports and of human rights audits, in order to enable non-State actors to contribute to the effort to monitor corporations’ compliance. Should the Act be strengthened along these lines in 2009, the UK’s effort to engage the State in the CSR effort could prove to be a groundbreaking advance and pave the way for other capital-exporting countries to do the same.

6. Swedish Mandatory Reporting Requirements

In November 2007, the Swedish government became the next actor to adopt binding CSR reporting requirements, but in a unique context. In recognition of the fact that State-owned companies play a very significant role in Sweden’s economy, the Government will begin to require all 55 State-owned companies to file an annual sustainability report beginning in 2009. Yet rather than leaving the companies free to design their own reporting formats, the government will require them to utilize the GRI G3 Guidelines. All State-owned companies will be required to prepare an annual sustainability report, including among other disclosures a report on the company’s policies and international conventions, such as the UN Global Compact, to which it has subscribed, and a report on the company’s performance relative to selected performance indicators. The government has also indicated that sustainability reports must be “quality assured” by independent scrutiny and assurance (presumably, internal audits). Finally, the government will make an assessment of State-owned companies’ compliance with the reporting

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204 Id.
205 Id.
requirements and include it in its annual report to the Swedish parliament on State-owned companies. 206

While the Swedish initiative is confined to State-owned companies, it presents an exciting new effort by a home State to “lead by example” in the CSR effort. In requiring that covered companies use the GRI G3 Guidelines, the government’s approach dramatically improves the potential for coordinated international efforts and reduces the potential for international conflict. So long as State-owned companies’ reports and the result of “quality assurance” reviews are made available to the general public, the combination of supervisory and enforcement mechanisms contained in the government’s program greatly increase its potential to result in accurate reporting and to promote better extraterritorial conduct. While any attempt to transpose the government’s program onto private businesses will necessarily have to include sanctions for companies that refuse to comply, the effort by the Swedish government is a valuable first step for that country, one that will likely spread to the private sector in the not-too-distant future. Here, the Swedish government has clearly placed privately owned companies on alert that they may soon find themselves subject to clearer demands for reporting and accountability. 207

7. Conclusion

As this brief survey of recent State-level attempts to advance the extraterritorial human rights performance of TNCs has demonstrated, any exercise that aims to balance the desire to protect human rights with the desire of politically powerful businesses to evade costly regulatory schemes will necessarily be a complicated one. The experience of efforts in Europe, Australia, and the United States to find a politically tenable solution to the weaknesses of the voluntary CSR regime seems to reveal an increasing preference for a two-step approach. The first step is

206 Id.
207 Id.
for governments to impose mandatory reporting obligations on corporations that attempt to avoid being unnecessarily burdensome and also mitigate the potential for international conflict to the greatest degree possible. Requiring the GRI G3 Guidelines is one promising technique, although other universally acceptable standards may well emerge in the years to come. This paper argues that mandatory reporting should be paired with mandatory public disclosures of such reports, as well as mandatory audits by independent third parties, to guarantee transparency, at regular intervals. Additionally, mandatory reporting should be paired with incentives to comply, such as preferential treatment by government entities, as well as sanctions for non-compliance and for exceptionally poor behavior. Moreover, mandatory reporting requirements can be paired with minimum standards for business behavior, derived from human rights obligations. Parent corporations could be sanctioned for falling below such minimum standards, and should be obligated to ensure that their subsidiaries and joint ventures abide by them, as well as to make good faith efforts to ensure that their suppliers and sub-contractors similarly adhere to the standards.

While from a human rights standpoint it may be desirable to make parent corporations liable for the failure of their subsidiaries and other partners to abide by minimum labor standards, advocates should take care to recognize that it may not be politically feasible to impose such a liability scheme on corporations as a first step. This derivative liability – paired, of course, with an obligation for parent companies to monitor the behavior of their subsidiaries – might be more appropriately imposed in addition to monitoring requirements as a second step, once the practice of social and environmental monitoring by businesses has become commonplace. The experience of the failed bills in Australia and the United States demonstrate that ambitious proposals, while certainly admirable, cannot improve business respect for human rights if they
lack the political support to become law. Increasing the human rights responsibilities on businesses may by necessity prove to be a gradual endeavor, and the actions of the governments of the UK, France, and Sweden demonstrate how this gradual improvement may be accomplished.

CONCLUSION

As this paper has demonstrated, the history of the BHR movement thus far has been largely driven by actors other than the State. While creative and successful solutions for promoting responsible business activity have emerged, their lack of enforcement capacity has thus far allowed recalcitrant businesses and those lacking prominent public profiles to continue to engage in activity that violates human rights with near impunity.

One critical variety of initiatives with the potential to effectively address this accountability gap is home State extraterritorial regulation of TNCs. Not only does international law permit the exercise of such jurisdiction; it may make its exercise increasingly obligatory as human rights law continues to develop and to strengthen the home State duty to regulate transnational business entities beyond its territorial borders. Moreover, there is a practical need for home States, which have considerably more power vis-à-vis TNCs than the average capital-importing country, to control the activities of their corporations when host States prove unwilling or unable to do so. The recent emergence of tentative proposals for State-based regimes in countries spanning the globe demonstrates that the future of corporate accountability is likely to include a reemergence of State-centered proposals for extraterritorial regulation of corporate conduct. While a host of considerations must be taken into account by any responsible drafter of such legislation, the experience of several of these proposals has demonstrated that it is possible for such proposals to pass political muster, to promote responsible conduct by the entire
corporate family of TNCs in their global operations, and to do so without imposing overly burdensome requirements, all in a way that promotes international cooperation, harnesses the ingenuity of TNCs themselves in designing effective solution, and facilitates the participation of public watchdogs in the regulatory endeavor. Experience demonstrates that the populations of these “home States” have increasingly begun to acknowledge that they will have a critical role to play in the coming years as all actors in the BHR arena work to address a truly international dilemma, to rectify the weaknesses of the global marketplace, and to protect the human rights of those for whom globalization has been less of a blessing than a curse.