Social Responsibility in Corporate Investment

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SOCIAL RESPONSIBILITY IN CORPORATE INVESTMENT

I. INTRODUCTION AND THEME

In our increasingly globalized economy, many transnational and multinational enterprises have sought to take advantage of investment opportunities in foreign nations, often in less developed countries. This can be a good opportunity for both the foreign investor and the host country, if properly managed and directed. In the last several decades, however, corporate investors have fallen under intense scrutiny for social problems they have caused or been directly or indirectly involved in. These have involved reports of abuse of labor, mistreatment of local inhabitants, misappropriation of land and resources, and crimes. Corporate involvement in these abuses can stem from either a corporate investor turning a blind eye to what the host government is doing to pave the way for its investment (complicity), or from the corporation’s direct involvement.

Several efforts have emerged in the last few years to heighten the social consciousness of corporate investors in their host countries. This is generally nicknamed Corporate Social Responsibility ("CSR"). In developing countries especially, it seems host governments are increasingly less interested in controlling human rights and other abuses through stricter government regulation. Because of this, less traditional approaches toward CSR have inevitably emerged. These have generally taken the form of either new international standards (issued by international organizations) or internal corporate codes of behavior (corporate self-policing). I am addressing these less traditional approaches in this paper. I also consider implications based on current trends in CSR affecting the U.S. and Korea, yet I do this primarily as "talking points" in this conference (see Annex attached).  

II. PHILOSOPHY AND DEFINITION OF CORPORATE SOCIAL WELFARE

Abraham Kuyper (1837-1920), a Dutch philosopher and statesman, believed that society was basically divided into separate realms, or institutions, as part of the created order of life, with each having different jurisdictional spheres of activities, although these sometimes overlapped. His theory, called "sphere sovereignty" ("subsidiarity" to others) included such basic institutions as the family, the State (government) and the Church, and included various other spheres such as: academia, business, art, etc. – each distinct in function and design. This sort of categorization is well-accepted by many, including this author. In addition, some

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1 I also do this for the sake of brevity.

2 See Kent A. Van Til, Subsidiarity and Sphere-Sovereignty: a Match Made in . . . ?, 69 THEOLOGICAL STUDIES, No. 3, 610, 623-25 (2008) [hereinafter Van Til]. “Subsidiarity” is a similar term more in the Catholic tradition, and the two terms have some distinctions; i.e., in terms of a more hierarchical view of structures (in subsidiarity) versus a horizontal view (in sphere sovereignty). See id. at 626-27 (containing also comments from Herman Dooyeweerd (1894–1977)).
thinkers place in the highest grouping of spheres (right up there with the State, Church, and family) the many organically and naturally forming social associations, including business enterprises, trade associations, and corporations. They posit that a primary role in the sphere of corporations (businesses) is not only the generation of wealth, but of social welfare itself. The idea is that business enterprises, as income and wealth generators, have a duty as good stewards to improve communities and their general welfare.

Definitions of CSR or social “welfare” are hard to pin down. The instruments discussed below, however, offer a collection of subjects that may fit that definition. These range for instance, from human rights, labor, environment and anti-corruption subjects to more specialized duties such as accounting practices, and assisting with positive community development projects. An interesting feature of most CSR standards is their focus on both the positive (pro-active) approach to CSR, including assisting with things like educational and building programs, as well as the negative (“thou shall not”) approach, such as not violating basic human rights. Both approaches exist in various strategies for CSR. I believe it is helpful to keep in mind the basic difference between negative and positive approaches to CSR when assessing the success of businesses. It is fair to say, at a minimum, businesses cannot violate basic human rights (to the extent these can actually be determined), so there should be no serious debate about avoiding harmful, negative conduct.

III. SOURCES AND APPROACHES TO IMPLEMENTING CORPORATE SOCIAL RESPONSIBILITY

Three primary sources of standards have emerged to deal with a corporation’s responsibility to society. These are: 1) national laws and regulatory legal structures; 2) codes and guidelines developed by international organizations (OECD, U.N., etc.); and 3) voluntary, internal corporate codes of conduct, developed by the corporations themselves, including the industry and trade associations to which they belong (a kind of self-policing mechanism).

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3 See id; see also Providence Foundation, Reformation Report, News of the National Transformation Network, (Jan. 2010) (noting business and banks as having primary roles in social welfare; email diagram on file with the author); and see McDowell & Belles, Liberating the Nations (1995) 4-5 (civil associations).
4 Id.; see also Van Til, supra note 2.
5 The U.N. Global Compact (Global Compact, or GC) names ten principles under the first four subjects mentioned above, while the OECD Guidelines has a list of eight total subject areas (adding Consumer Interests, Science & Technology, Competition, and Taxation to the same initial four). See discussion infra.
This paper will look primarily at the second and somewhat, the third sources indicated above, but with a particular emphasis on human rights issues in CSR. Both represent more innovative, recent approaches, and each is a form of voluntarism. The effectiveness of the second and third approaches derive more from their influence and the sense of impact a corporation’s reputation can have in a given industry or community. With very little commitment in developing countries toward a stricter regulatory approach, this trend toward alternative approaches is understandable. It may even be somewhat effective. Corporations clearly understand how reputations can affect income and “the bottom line.”

A. STANDARDS, CODES FROM INTERNATIONAL ORGANIZATIONS

Two well-known international organization codes are the United Nations Global Compact (Global Compact, or GC), and the OECD Guidelines for Multinational Enterprises (OECD Guidelines). I give some detailed analysis on each. A third has developed, which the first two now also refer to or rely upon: the Guiding Principles on Business and Human Rights, Implementing the U.N. “Protect, Respect and Remedy” Framework (Guiding Principles).


The GC provides a set of standards for companies to follow, but includes in its participation other important actors (“stakeholders”) who agree to those standards and commit to their propagation and enforcement. Examples include NGOs, business associations, unions, academic institutions, and government actors or municipalities. Participants sign on, and may contribute, to indicate their commitment.

The GC has had over 8,700 participants since 2000 including 6,400 which are businesses. About forty percent of the businesses are small and medium-sized enterprises; while 162 are ranked among the largest in the world (i.e., in the Financial Times Global 500 list).

8 They contain no real sanction for violations at a government level. In fact, the international standards in the second set above are designed to help achieve models and practices that corporations are expected to implement internally, in their own corporate codes of conduct. Id.
10 I give this just a brief mention below.
12 Id. at 1.
The Global Compact consists of ten general principles on corporate social conduct, clustered into four main types of responsibilities: human rights, labor, the environment, and anti-corruption.\textsuperscript{13}

The ten Principles, in condensed form, and in their clusters, are as follows:

**Human Rights**
- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
- Principle 2: make sure that they are not complicit in human rights abuses.

**Labour**
- Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labour;
- Principle 5: the effective abolition of child labour; and
- Principle 6: the elimination of discrimination in respect of employment and occupation.

**Environment**
- Principle 7: Businesses should support a precautionary approach to environmental challenges;
- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies.

**Anti-Corruption**
- Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

In the area of human rights especially, the Global Compact takes a two-pronged approach: 1) It seeks to educate businesses on human rights and how those rights are relevant to business, and 2) it seeks to engage and train businesses in what they can do to protect, or not infringe, human rights (a kind of check on bad/negative conduct), but the GC goes on to promote additional social services (a kind of positive approach to societal improvements).\textsuperscript{14} To accomplish

\textsuperscript{13} These are derived from the following sources of corresponding international law: The Universal Declaration of Human Rights; The International Labour Organization's Declaration on Fundamental Principles and Rights at Work; The Rio Declaration on Environment and Development; and The United Nations Convention Against Corruption.

\textsuperscript{14} Note on GCBHR, \textit{supra} note 11, at 1.
this, the GC offers a variety of tools, sharing information, surveys, case studies and scenarios for management and others, available on its website. A “systematic management approach” (versus a sporadic one) seems to be the aim of the effort. This would inevitably require CEO and Board level efforts in a company. ¹⁵ The GC’s strength seems to be its interest in getting companies to share real concerns and ideas that actually work. ¹⁶ It also involves partnerships with numerous international human rights and business interests to produce its shared products and tools. ¹⁷

Beyond this, and since the GC has no direct enforcement mechanisms, it offers some other softer constraints. For instance, participants are required to report on their improvements under the Communication on Progress (COP) policy. ¹⁸ If they fail to do so, they will be removed from the list of Global Compact Participants. ¹⁹ Of course this requires some administrative structure. Apparently, the GC has that, including an Office with an Executive Director, a Board, and various country (local) networks around the world. ²⁰

According to the Global Compact’s own research, human rights and corruption remain the biggest areas in which corporations need to improve. ²¹ As the primary focus in this paper is the area of human rights, I am focusing on Compact Principles 1 and 2 above, which deal directly with that.

a) Compact Principle 1: Respect and Support for Human Rights

The separate web link for this Principle provides several items of information and links to still other sources and tools. ²² One section of that site gives a list of several negative things corporations should not do, including of interest to me: i) “ensuring that they do not use directly or indirectly forced labour or child labour,” ii) “preventing the forcible displacement of individuals, groups or communities,” iii) “working to protect the economic livelihood of local communities.” ²³ Companies are to use “due diligence,” in ensuring they don’t violate human rights. ²⁴

The GC, and Compact Principle 1 are not altogether clear as to what constitutes human rights. They do refer to the Universal Declaration of Human Rights (1948) as the foundation of Principles 1 and 2, and suggest adherence to the

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¹⁵Id. at 1-3.
¹⁶Id.
¹⁷Id. at 2 (mentioning the Business Leaders Initiative on Human Rights [BLIHR], International Business Leaders Forum [IBLF], the Danish Institute for Human Rights, and Maplecroft, researchers).
¹⁹As of 2009 the GC had “de-listed” 400 companies—at least an embarrassment if not a measurable constraint to enhance corporate compliance with human rights. See Note on GBCHR, supra note 11, at 1.
²⁰Id. at 3; see also GC, Governance, http://www.unglobalcompact.org/AboutTheGC/stages_of_development.html (last updated Apr. 30, 2011).
²¹Note on GCBHR, supra note 11, at 1.
²²See supra note 6.
²³Id.
²⁴Id.
International Bill of Rights and core ILO Conventions, at a minimum. However, these are not always well-contextualized for business situations (the ILO Conventions are less deficient in that way). It now appears, however, the U.N. is attempting to more clearly delineate a single-source code of conduct for companies; namely, the “Guiding Principles” (see above, Section I.A.), and it has adopted this into Compact Principle 1. In the words of the Special Representative of the U.N. Secretary-General (SRSG) on issues of human rights: “The UN Guiding Principles, provide an authoritative global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity . . . [and] clarify the meaning of the corporate responsibility to respect human rights, which is also a key component of Global Compact Principle 1 . . . .” This incorporation is intended to infuse Compact Principle 1 with clearer standards.

b) **Compact Principle 2: No Complicity in Human Rights Violations**

According to Principle 2, complicity generally consists of 2 elements:

1. An act or omission (failure to act) by a company, or individual representing a company, that “helps” (facilitates, legitimizes, assists, encourages, etc.) another, in some way, to carry out a human rights abuse, and

2. The knowledge by the company that its act or omission could provide such help.

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25 Compact Principle 1, supra note 6.
26 Still many egregious human rights violations are just not that hard to spot, and can be distilled in natural law/rights verbiage, as simply not harming your neighbor. See J. BUDZISZEWSKI, WRITTEN ON THE HEART, THE CASE FOR NATURAL LAW 61-63 (1997).
29 SRSG, supra note 28.
30 Id. I have a short comment on the Guiding Principles below.
31 See GC, Global Compact Principle Two, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html (last updated Jan. 10, 2011) [hereinafter Compact Principle 2]. One of the greatest concerns in the Human Rights area is the “complicity” of corporations in human rights abuses by the governments of the countries where they are investing. I experienced this first hand in research involving Korean companies investing in Cambodia and South East Asia, and in which people were summarily displaced from “homes” without much thought and sometimes with violence. See situations in Annex; Ji-Sook Lee, Moving Beyond Misconceptions, A critical review of Korean investment in Cambodia, 33-34 (2011) [hereinafter Ji-Sook Lee], available at http://kh.boell.org/downloads/A_Study_on_Korean_Investment_in_Cambodia--_Moving_Beyond_Misconceptions1.pdf
Complicity is not limited to situations where a company could be held legally liable for the involvement in a human rights abuse. A company can violate the Principle in several ways: i) “Direct complicity” — when a company provides goods or services that it knows will be used to carry out the abuse; ii) “Beneficial complicity” — when a company benefits from human rights abuses even if it did not positively assist or cause them; iii) “Silent complicity” — when the company is silent or inactive in the face of systematic or continuous human rights abuse” (emphasis changed). All of these are problematic. Silent Complicity is controversial and probably least likely to result in a company’s legal liability. However, Beneficial and Silent Complicity are all too common, and are arguably just as reprehensible as Direct Complicity in the view of many (including this author), since they are so insidious.

Compact Principle 2 recommends companies engage in due diligence to investigate the possibility of any complicity, and to reduce instances of it. This necessitates a systematic approach. For instance, a company using security forces should be assured its security is not violating human rights, including in the community. Complicity will continue to be one of the hottest issues in CSR thinking going ahead, especially in countries which are weak in the rule of law.

2. OECD Guidelines for Multinational Enterprises (2011)

The OECD Guidelines for Multinational Enterprises (Guidelines) were recently amended in 2011, from their prior version and review in 2000.

The Guidelines are “recommendations” from OECD country governments to multinational enterprises operating in those and other countries. In the Guidelines’ own words, the recommendations “provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards.” While the standards are not binding per se, the Guidelines do offer an administrative structure and mechanism for their implementation, which seems to be an advantage over the Global Compact discussed above. The communication is definitely government to enterprise, which sets it apart from the Global Compact, and in that sense, gives it greater inherent impact.
The Guidelines are annexed to another instrument, the recent OECD Declaration on International Investment and Multinational Enterprises (“Declaration,” May 25, 2011), adhered to by all OECD members and a group of about eight others (collectively called the “adhering governments,” and a total of forty-two in number).40

The “Investment Committee” (IC) of the OECD is overall responsible to ensure the Guidelines are implemented. It reports to the OECD Council for that purpose, but it also oversees the unique implementation mechanisms in each adhering country, which are called, “National Contact Points” (NCPs).41 The NCPs thus are responsible for implementing the Guidelines in their particular countries, and are assisted by, and also report to, the IC.42

The Guidelines are framed in two parts. Part I is substantive and entitled, “Recommendations for responsible business conduct in a global context.” Part II is the “Implementation Procedures of the OECD Guidelines for Multinational Enterprises.”43

a) **Part I, Recommendations for responsible business conduct in a global context.**

Within Part I, there are a series of more generalized standards: Concepts and Principles (I); General Policies (II); and Disclosure requirements (III). After this, the Guidelines provide recommendations on eight discreet subject areas, including: Human Rights (IV); Employment and Industrial Relations (V); Environment (VI); Combating Bribery, etc. (VII); Consumer Interests (VIII); Science and Technology (IX); Competition (X); and Taxation (XI).44

The Guidelines reflect a general principle of an “independent” obligation of Multinational Enterprises (MNEs) to ensure they are acting responsibly in their foreign investments. In short, this means that regardless of the host government’s conduct, the MNE must independently ensure that it is abiding by international human rights standards.45

Specifically, MNE’s are requested to avoid “adverse impacts” on the societies in which they operate (these can mean anything from human rights and

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40 Id. Foreword, at 3, Declaration, at 7. This means the adhering governments include at least eight others beyond the OECD membership for purposes of the Guidelines as well. These other adherents include Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania. Id., Declaration, at 7 n.1.
41 Id. Part II, at 68, 77 (¶ 4).
42 Id. More details on this mechanism of implementation are below.
43 These come pursuant to the Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises (hereinafter Amend. of Decision). Id. at 5, 67.
44 See id. Table of Contents, at 5.
45 Id. ¶ 37, at 32.
environmental violations to various forms of corruption), and the adverse impacts to be avoided can be either ones that an MNE may directly or even indirectly cause in a society (in the latter instance, such as through problems in its supply chain).  

As a result, the MNE is expected to use its economic and positional leverage to keep its suppliers in check with socially responsible standards. As a private “enforcement mechanism,” a MNE may even have to “disengage” one of its suppliers who cannot or will not comply with the expected standards contained in the Guidelines. If a supplier is non-compliant, this expectation can have a serious potential impact on the supplier, and this threat of disengagement is intended to improve socially responsible behavior. 

One anomaly of the Guidelines (as with other standards also), involves the question of obeying domestic law. The general concept or principle to be followed is that if the Guidelines and domestic law conflict on standards, the MNE should not be put into the position of violating domestic law. The Guidelines say “[o]beying domestic law is the first obligation of enterprises.” While laudable in some respects, the problem with this principle is its implicit assumption that the domestic laws of a given country are in accord with acceptable international standards of human rights. What if they are not? Should the MNE violate human rights because it is following the domestic law of a particular state (or the laws and rules of a municipality of a state)? The answers to these questions should surely be “no.” When conflicts arise in trying to resolve these tensions, the Guidelines advise the parties (MNEs, governments, others) to seek resolution through arbitration and similar international dispute resolution methods. It thereby incorporates external dispute resolution avenues for adverse impacts.

The General Policies information (subpart II) is divided into activities MNEs “should” pursue, and those they are further “encouraged” to pursue. The former group includes contributing to sustainable economic development; respecting human rights; refraining from seeking special exemptions or privileges in their operations; self-regulating; conducting due diligence assessments of their activities in terms of causing adverse impacts; avoiding directly or indirectly causing adverse

47 Id. ¶ 22, at 25.
48 Id. ¶ 10, at 18.
49 For OECD countries, that may be the case, but not always at every level of society, and is likely not the case in many non-adhering countries.
impacts and mitigating even indirect situations, including by monitoring their supply chain and subcontractors.\textsuperscript{51}

The due diligence standard in assessing adverse impacts is that which allows the enterprise to “identify, prevent, and mitigate” these, and to account for how they will address potential adverse impacts.\textsuperscript{52} Adverse impacts of concern are those that are either “caused or contributed to by the enterprise,” and the term “contributed to” signifies a “substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions.”\textsuperscript{53} This includes structuring of the supply chain through such activities as licensing, franchising, or subcontracting.\textsuperscript{54} Solutions to problems in the supply chain can range anywhere from mitigation efforts with the supplier, suspension of the relationship, or, if all else fails, disengagement of the supplier.\textsuperscript{55}

“Disclosure” to the public (subpart III) of social responsibility information is encouraged as well (i.e., value statements and corporate codes of conduct should be readily disclosed). The Guidelines employ a standard of “materiality” to determine what an enterprise should disclose.\textsuperscript{56}

“Human Rights” are covered specifically in subpart IV of Part I, and I turn to that now.\textsuperscript{57} Six main responsibilities are delineated (here in paraphrase):

1. Respecting human rights (i.e., not infringing them) and including addressing any adverse impacts directly or indirectly caused by the company.
2. Avoiding either causing or “contributing to” adverse human rights impacts.
4. Having a policy committed to human rights.
5. Carrying out due diligence assessments on human rights (as part of a total risk management System).
6. Remediating (i.e., remedying) any adverse impacts the enterprise has been involved with.\textsuperscript{58}

\textsuperscript{51} Id. Part I, subpart II, General Policies, A, at 19-20. The MNE is also “encouraged” to seek dialogue on how to better address supply chain management. Id. General Policies, B, ¶ 2, at 20.
\textsuperscript{52} Commentary on General Policies, ¶ 14, at 23.
\textsuperscript{53} Id.
\textsuperscript{54} Id. ¶ 17, at 24.
\textsuperscript{55} Id. ¶ 22, at 25 (also called “appropriate responses”).
\textsuperscript{56} Id. subpart III, Disclosures, ¶ 30, at 29 (disclosures are also divided between what should be disclosed and what is only encouraged for disclosure; id. at 27).
\textsuperscript{57} In a related area to this author’s interest, Chapter V., Employment and Industrial Relations, ¶ 1. c) asks enterprises to “[c]ontribute to the effective abolition of child labour,” including its worst forms. Id. at 35.
\textsuperscript{58} Id. subpart IV, at 31.
The basis of human rights recommendations in the Guidelines derives in large part from the recent set of international standards in the U.N. Framework for Business and Human Rights, “Protect, Respect, and Remedy,” as effectuated through the Guiding Principles for Implementation (discussed above); this framework is thus presumably part of the entire OECD Guidelines. In essence, an enterprise is expected to uphold the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social, and Cultural Rights, and the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

The Guidelines urge enterprises to make statements on their policy of human rights, and to make such statements available to the public as part of their internal codes of conduct. As to enterprises taking remedial actions for causing or contributing to adverse impacts, the Guidelines are non-specific, but urge enterprises to establish a process called, “operational level grievance mechanisms.”

b) **Part II, Implementation Procedures of the OECD Guidelines for MNEs**

Thus far, the Guidelines reveal some informal means of implementation. For instance, since recommendations in the Guidelines are coming directly from governments to enterprises in the OECD system, they have some color of state support behind them. Enterprises are also urged to use their leverage and if necessary even disengage non-compliant entities in their supply chain (which is a form of economic sanction), and to take other remedial steps if they can. But the centerpiece of implementation is a mechanism calling for the establishment of National Contact Points (NCPs) in each adhering country. In fact Part II, Implementation, deals with this mechanism primarily, and also with the obligations

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59 Part I, para. 36, Commentary on Human Rights, specifically suggests this incorporation. *Id.* at 31. Incorporation of the Guiding Principles in the GC was discussed above in section 1. See also section 3 infra.

60 *Id.* ¶ 39, at 32.

61 *Id.* Disclosure, ¶¶ 33-34, at 29-30. According to Chapter VII, Combatting Bribery, Bribe Solicitation and Extortion, enterprises are also requested not to promise undue pecuniary or other advantages to public officials, and not to accept their solicitation from public officials; this includes even “small facilitation payments,” when, or if, illegal. *Id.* at 47-48. Corruption is of course often directly related to violations of human rights.

62 *Id.* ¶ 46, at 34.

63 Part II contains three main elements: the Amendment of the Decision of the Council on the OECD Guidelines for MNEs (which sets up the implementation system involving “National Contact Points” and the “Investment Committee”); Procedural Guidance section for the NCPs and IC to follow; and a Commentary on the Implementation Procedures [hereinafter Commt. on Impl. P.]. See *id.* at 67, 71, 77.

64 Commt. on Impl. P., ¶ 7, at 78.

65 *See Guidelines*, Part I, Commentary on General Policies, ¶ 22, at 25; Commentary on Human Rights, ¶¶ 42-43.
of the Investment Committee (IC) related to implementation (its oversight work, for instance, with the NCPs).  

\[i\) Information on NCPs\]

In short, NCPs serve a four-fold purpose: 1) developing institutional arrangements (relationships); 2) giving information and promoting the Guidelines; 3) implementing the Guidelines in specific instances; and 4) reporting on their work. NCPs are appointed by each adhering government to the Guidelines, and it is up to each State to constitute the NCPs in a manner that best fits their purpose (a flexible design). NCPs may consist of private enterprise representatives, government officials, NGOs and others under an appropriate mix according to the needs of each State.

NCPs have something known as “functional equivalency,” requiring them to have core criteria of “visibility, accessibility, transparency, and accountability” in their operations. In a sense, NCPs serve as a kind of quasi-administrative-judicial body. They are clearly not a judicial body, but help resolve disputes and perform important administrative functions.

The implementation process begins when an NCP becomes aware of “specific instances” involving the need for clarification or misunderstandings concerning the implementation of the Guidelines. “Specific instances” signify some kind of conflict or controversy among stakeholders and interested parties.

\[Implementation in “Specific Instances:”\] The following outlines the “specific instance procedure” to be taken by the NCP in a given situation.

- The NCP makes an “initial assessment” of the issues raised to see if the issues “merit further examination.” The NCP has three months to conduct this initial assessment on the need of further examination, although the time can be extended. It must determine if the issues raised are “bona fide and relevant to implementation of the Guidelines.”

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67 Part II, Procedural Guidance, A.- D., at 71-74; see also Commot. on Impl. P., ¶ 8, at 78.
68 Amend. of Dec., ¶ 1, at 68.
69 Id.
70 Part II, Commot. on Impl. P., ¶ 9, at 78-79.
71 See Amend. of Dec., ¶ 1, at 68.
72 Procedural Guidance, § I.C., at 72-73; Commot. on Impl. P., ¶ 20, at 81. A “specific instance” might occur, for example, if an enterprise and the residents of a village have a grievance over the use of land, resources, or labor.
73 Id.; Commot. on Impl. P., ¶ 26, at 83.
74 Commot. on Impl. P., ¶ 25, at 82-83, ¶ 40, at 86-87.
75 Id. ¶¶ 25, 40.
If the NCP finds the issues do not merit further investigation, it will issue a statement to that effect and notify the parties (i.e., dismiss the matter). This indication can be made public, if prudent to do so.\textsuperscript{76}

If, on the other hand, the NCP finds the issues raised do merit further consideration, the NCP will “offer [its] good offices” and engage in “consultations” (discussions) with the parties in attempts to hopefully resolve the issue.\textsuperscript{77}

During this stage of extending its “good offices,”\textsuperscript{78} the NCP may: a) seek advice from a variety of sources, including experts in business; b) consult with the relevant NCP in another country (or countries) involved, such as when the host country NCP raises concerns in the investor’s home country, in hopes of resolving any issues; c) seek the help of the Investment Committee; and d) assist the parties in non-adversarial dispute resolution through mediation or conciliation.\textsuperscript{79} The goal of the NCP in this phase is simply to help the parties reach an agreement; NCPs in each country involved in an investment dispute are encouraged to communicate with each other to resolve it.\textsuperscript{80}

If the parties reach an amicable agreement, the NCP issues a “report” to that effect, and may follow up with the parties to ensure the agreement is adhered to. The report should be made public unless imprudent to do so, and only upon first consulting with the parties.\textsuperscript{81}

If an agreement is NOT reached, or if a party will not participate in the process in good faith, the NCP will issue a statement, and make recommendations on the proper implementation of the Guidelines (if it deems that appropriate).\textsuperscript{82} The statement should be made public, unless that would be imprudent, and may be

\textsuperscript{76} Id. ¶¶ 27, 32, at 83-84.
\textsuperscript{77} Id. ¶ 28, at 83; Procedural Guidance, ¶ I.C.-2., at 72. This indication may also be published. Comm't. on Impl. P., ¶ 33, at 84.
\textsuperscript{78} The use of these processes does not bar any parallel proceedings between parties, whether in court or otherwise. Comm’t. on Impl. P., ¶ 26, at 83.
\textsuperscript{79} Procedural Guidance, ¶ I.C.-2., at 72-73; Comm’t. on Impl. P., ¶ 23, at 82, ¶¶ 28-29, at 84.
\textsuperscript{80} Comm't. on Impl. P., ¶ 23, at 82, ¶ 34, at 84.
\textsuperscript{81} Procedural Guidance, ¶ I.C.-3b.); Comm’t. on Impl. P., ¶ 34, at 84.
\textsuperscript{82} Comm't. on Impl. P., ¶ 35, at 84 (this sounds something almost akin to an administrative decision or ruling). In the actual sequence, if an agreement is not reached within a chosen time frame, the NCP is supposed to consult first with the parties to see if there is any value to continuing the proceedings. If the NCP concludes in the negative, then it should “conclude the proceedings,” and then issue a “statement.” Id. ¶ 40.2., at 87.
used to guide governments in their activities on the matter. The NCP has three months after concluding the proceedings to issue its statement.

The NCP generally is expected to conclude the above proceedings within twelve months after receiving the “specific instance.”

The NCPs will make annual reports to the Investment Committee, including a re-cap on their “specific instance proceedings” in that year. Interestingly, as shown above, proceedings themselves are typically confidential (protecting identities and so forth), but proceeding results should be made available to the public whenever possible, thus indicating slightly competing values.

Analysis of NCPs: An interesting aspect of the NCPs is that they are intended to have a bi-directional impact. Implicitly in this, an NCP’s influence may extend to countries not adhering to the Guidelines. In the first instance, NCPs are expected to keep in check their own national enterprises, which are investing in another country. Involved with this is the influence NCPs are likely to have with actors (government and non-government) in the host countries where their national enterprises are investing. In fact the Commentary on Implementation Procedures specifically indicates the NCP of the investor’s home country should work with the NCPs of any host countries in which the enterprise is engaged.

In addition to this, the home country NCP is expected to extend its communications to host countries that are not even countries adhering to the Guidelines. For instance, an NCP in country A can have an impact not only on the enterprises originating out of its country, but on the government institutions and others in the host country B, whether or not country B is an adhering member to the Guidelines.

In the other (“incoming”) direction, an NCP is expected to check on proper implementation of the Guidelines when its country is hosting outside investors. This should create a very broad swath of influence for NCPs and is aimed at greater implementation of the Guidelines. The suggestion is that NCP-to-NCP communications, (and thus a sort of quasi-government-to-government-sponsored

83 Id. ¶¶ 37-38, at 85-86.
84 Id. ¶ 40.3, at 87.
85 Id. ¶ 41, at 87.
86 Id. ¶ 42, at 87.
87 Id. ¶¶ 31-32, at 84, ¶ 38, at 86.
89 Comm. on Impl. P., ¶ 17, at 80, ¶¶ 23-24 at 82. Paragraph 17 speaks of NCPs responding to three specific groups: i) other NCPs; ii) business and labor organizations, the public, and NGOs; and iii) inquiries of non-adhering countries. Implicitly, such inquiries can surface in the context of a “specific instance” in another country. Id. ¶ 17.
90 Supra note 88.
91 Comm. on Impl. P., ¶¶ 23-24, at 82.
dialogue), is likely more effective in resolving “specific instances” in implementing the Guidelines than might otherwise have been seen in something like the U.N. Global Compact (above).

ii) Role of the Investment Committee (IC)

“The Investment Committee is the OECD body responsible for overseeing the functioning of the Guidelines.” As noted, it receives annual reports from the NCPs, and like the NCPs can also make recommendations on the Guidelines; it may advise NCPs, and may also seek advice from experts. The IC itself reports to the OECD Council, but its reports are more informational and administrative rather than steps toward some sort of international sanctions, and it has no appellate authority over NCPs. The IC has specific, and greater, authority to engage with non-adhering countries to address matters under the Guidelines.

Importantly, the IC also has administrative oversight of the NCPs to ensure (if necessary) they are doing their job, and that is intended to help with implementation closest to the source. The IC is also expected to foster a uniform understanding, multilaterally among concerned governments. An OECD Secretariat is also intended to serve as a valuable resource to the IC, to in turn assist the NCPs with implementation in areas such as information and reporting.

It remains to be seen just how effective the NCPs and the IC will turn out to be, as this implementation system goes forward. In the Korean context, there have already been criticisms because its NCP is mostly made up of government officials who have not investigated real abuses in other countries. (See Annex hereto.)


These seem to be stand-alone principles for corporations to consider. Interestingly, both the UN Global Compact (1. above), and the OECD Guidelines (2.

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92 Comm. on Impl. P., ¶ 4, at 77.
93 Id. ¶ II Commentary on the Procedural Guidance for the IC, ¶ 43-46, 50, at 87-88.
94 Amend. of Dec., ¶ II.7, at 69; Comm. on Impl. P., ¶ 3 at 77. The IC is not a judicial or quasi-judicial body, and cannot challenge conclusions of an NCP; it may provide clarifications to NCPs. Comm. on Impl. P., ¶¶ 44-45, at 88.
95 Comm. on Impl. P., ¶ 5, at 78; ¶ II.49, at 89 (sponsoring “Roundtables,” and including non-adhering countries).
96 Id. ¶ 47, at 88.
97 Id. ¶ 48.
98 Procedural Guidance., ¶ II.5, at 75. The Secretariat can assist in setting up conciliation as necessary. Id.
99 Supra note 27.
above) make direct reference to and incorporate the Guiding Principles into their source documents for human rights.\textsuperscript{100}

In content, the Guiding Principles are uniquely split into two realms of duty, for States and Corporations (parts I and II respectively). A part III, “Access to Remedies,” emphasizes access for victims of “business-related human rights abuse” to both State and non-State remedies.\textsuperscript{101} Beyond that, the actual principles are not in substance very different than those already discussed in instruments above, and so for sake of brevity, I will not analyze them at this time.

B. INTERNAL CORPORATE CODES OF CONDUCT

Since the early 1990s a move has begun among several American and international business enterprises to develop their own codes of socially responsible conduct, and also requiring their business partners (suppliers, joint ventures, etc.) to engage in the same ethical practices. Separate codes are often devised for these companies’ business partners, and most of this information is available online.

These internal codes have the advantage of the private sector policing itself, and this can stave off overly-intrusive regulatory efforts from the government sector.\textsuperscript{102} These internal codes of corporate conduct are also typically short, simple, and easy to understand. Some say that socially responsible corporate behavior, especially if known to the public, can improve a company’s bottom line. Although that assumption is often challenged,\textsuperscript{103} it intuitively makes sense and this seems to be the growing trend in consumer markets (sophisticated consumers are learning how to check to see if the products they buy are from companies that are socially responsible, including in their labor practices and honoring of human rights).\textsuperscript{104}

In still other cases, several companies have simply decided they should insist on socially responsible conduct because it is the right thing to do, and can help improve people’s lives and make the world better and more just. This seems to fit the idea of welfare-oriented business as a true institutional responsibility, as I outlined in the Introduction. Such companies say they aspire to improve conditions in the world, hoping to be a positive influence, sounding very sensible and sincere.

\textsuperscript{100} The GC incorporates in Compact Principle 1 with its SRSG website link (see supra note 28), and the OECD Guidelines incorporate in Part I, subpart IV. Human Rights, ¶ 36, at 31.
\textsuperscript{101} Guiding Principles, supra note 27; see id. part III, Access to Remedies, Principles 25-31.
\textsuperscript{102} The international instruments discussed above realize this and encourage internal corporate codes, as working in tandem with their own standards. See GC, Compact Principle 1, supra note 6, Due diligence, ¶ 1, and see OECD Guidelines, Part I, subpart III. Disclosure, ¶ 34, at 30.
\textsuperscript{103} See David Vogel, supra note 9; Aneel Karnani, The Case Against Corporate Social Responsibility, WALL ST. J., (June 14, 2012) (arguing that companies will choose profit over CSR if a choice has to be made; but not addressing the basic (negative) proscription against companies involved in infringing human rights in international contexts).
\textsuperscript{104} See Global Compact Principle 1, supra note 6, Addressing consumer concerns; see infra part C.
The implementing mechanism of the internal corporate code approach is mainly economic, and contains at least these assumptions: 1) suppliers and business partners of ethical enterprises know they are going to have to keep their ship in shape if they are going keep the enterprise’s business; 2) this growing movement has exerted a kind of “socially responsibility” peer influence on other companies to get on board with everyone else; it is assumed that companies know the consuming public is increasingly savvy about socially responsible corporate conduct, and that consumers are increasingly more hostile and perturbed about violations of human rights involving corporations; 3) in some areas in the West, government and international scrutiny of corporations (including from lawsuits), is increasing, and companies would rather move toward greater compliance with international standards than be subject to investigations and suits.

Some of the common features in the content of these codes include their heavy emphasis on labor and employment issues (child labor and the right to organize), the environment, and corporate honesty and integrity. They often speak of encouraging positive, social welfare projects (educational initiatives, etc.). Hotlines for whistle-blowing are usually established. Of course, the corporate codes require vendors and partners to follow suit as much as possible, and impose monitoring, auditing and correction procedures, and ultimately dismissal from the relationship if the third-party partners do not improve on their identified areas of concern.105 Some companies, such as GAP Inc., say they employ and specifically train monitors/auditors for this purpose, and conduct numerous audits to enforce their codes.106 I have not yet seen any codes that directly mention prohibition of very specific human rights abuses (outside of labor issues), such as village land grabbing, violence, nor complicity in those sorts of things, although these exist (see Annex). Instead these codes often make only very generic references to abiding by international human rights standards, including in the supply chain.107

For this article, I have examined a few of the better-known companies having codes. Most of the information is self-explanatory and available online, so I make only a few additional comments about them, for sake of brevity:

1. **Levi Strauss & Co. Global Sourcing and Operating Guidelines**

Levi Strauss is one of the earliest companies to start a code of conduct, in 1991. It has two parts: the Country Assessment Guidelines, dealing with country

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105 See examples infra.

106 See infra, text ex. 3.

107 This absence is not all that surprising since companies intent on pushing their corporate codes would seem least likely to engage in such misconduct, and thus to even mention it. Nevertheless, the lack of concrete examples like this in the codes is troublesome and may ignore real issues in the supply chain. In some cases, companies may develop codes more for public relations, and so might prefer less specific codes.
conditions as a whole, and the Business Partner Terms of Engagement (TOE), dealing with contractors in over fifty countries.108 The age of work is fifteen. A business relationship is severed if a contractor fails to meet its “corrective plan of action commitment.”109

2. Sara Lee’s Global Standards for Business Partners

Sara Lee has a separate webpage for human rights.110 It also has specific provisions on corporate corruption, and forbids certain forms of entertainment at sexually oriented venues such as brothels in order to gain a business advantage—to its credit.111 The work age is fifteen. A hotline is established. Sara Lee uses a “Mirror Test” with its business partners to make sure they are asking the right questions to “do the right thing” (part of its slogan).112

3. Gap Inc.’s Code of Vendor Conduct (COVC)

Gap evidently has a group of “Social Responsibility Specialists” to work with factory compliance.113 It boasts in 2010 of concluding over 2,500 audits at over 1,200 facilities with its partners, and specifies the right to make surprise audits of its partners.114 Its COVC has four themes: Compliance with Laws, Environment, Labor, and Working Conditions (including specifications for factory dormitories).115

C. THE SAVVY CONSUMER

As part of an added layer to keep companies in check on social responsibility and human rights, some non-profits and others dedicated to CSR are developing phone apps to check a company’s social responsibility score before buying their products. Systems typically work by scanning a product’s bar code with an iPhone or Android, for instance, and then getting a wireless generated score, A+ to F, based on high, medium, or low risk of violations, under a set of categories, including trafficking.116 The applications are seeking to check through the product’s

109 Id.
111 Id.
112 Id.
114 Id.
115 Id.
supply chain, at the three largest input points, in generating the score (which is a daunting task).\(^{117}\)

The idea of giving consumers access to this information could have a powerful and profound influence on spending choices and on social responsibility efforts. Obviously, manufacturers and suppliers will have plenty of incentive to make sure they are not getting scored low on their CSR, and if they are, to take immediate action. Even so, it remains to be seen whether consumers in a pinch financially, or in a hurry, or even having very limited choices on some goods, will actually change their buying habits to favor socially responsible suppliers.\(^ {118}\) Still, some consumers probably will, and their numbers are likely to increase. That may be enough to put pressure on some suppliers, especially as consumer access to CSR information will increasingly be right at their fingertips.

IV. IMPLICATIONS IN THE U.S. AND KOREAN CONTEXTS, EMERGING TRENDS

Information here is covered mainly in our talking points in the Annex. In short, in the United States, some states are taking a legislative approach to require corporations to report on their CSR compliance. California has led the way, with a law taking effect earlier this year.\(^ {119}\) In addition, a new Supreme Court case is likely to restrict the ability of complainants to use the Alien Tort Statute to hold foreign corporations liable for human rights infractions occurring overseas.\(^ {120}\)

In Korea, some corporations are being scolded for apparent apathy (or possibly knowing involvement) in human rights abuses involving workers and land ownership in countries where they are investing, with connection to their investments. In one situation in India, in which workers were injured, POSCO representatives reportedly said, “So what? That is something the government did.”\(^ {121}\) Korean investors should understand that human rights abuses associated with their investments are not something they can ignore, nor may they shirk international standards Korea has already agreed to. A continuing attitude of indifference is only going to harm the international reputation of Korean companies in the end.

\(^{117}\) Id.
\(^{118}\) See supra note 103.
\(^{119}\) California Transparency in Supply Chains Act of 2010 (SB 657); see Annex infra. Other state and federal initiatives are also underway. See Vince Farhat (Holland and Knight), et al., Responding to California’s Transparency in Supply Chains Act, LEXOLOGY (April 25, 2012), http://www.lexology.com/library/detail.aspx?g=079c5338-0b56-4bff-98cc-64078df99933 (general information, federal legislation); See Beata K. Spuhler (Drinker, Biddle, & Reath), Preparing for Compliance with the California Transparency in Supply Chains Act of 2010, CORPORATE COMPLIANCE INSIGHTS (Sept. 30, 2011), http://www.corporatecomplianceinsights.com/preparing-for-compliance-with-the-california-transparency-in-supply-chains-act-of-2010/ (general information, other states; i.e., N.Y. (H.R. 2759)).
\(^{120}\) See Annex.
\(^{121}\) Student translation and paraphrase, involving expropriation of lands associated with an investment. See Annex.
V. CONCLUSION

Traditional approaches to CSR involving government regulation in host (developing) countries seems to be diminishing at this time, as these countries often seem starved for foreign investment, and are reluctant to scare off investors through over-regulation. Ironically, in the United States (and in other developed countries), a trend is emerging in the opposite direction, and includes heightened government scrutiny of corporations. Specifically, increasing legislative initiatives are requiring corporate compliance with CSR standards, including reporting efforts. In a sense, this is public legislation designed to stimulate private corporations to get their own ships in order.

Simultaneously, the decline in government regulation within host countries has spawned new efforts by several International Organizations (U.N., OECD, and others) in developing uniform standards, guidelines, and principles for corporations to adhere to. Again, this strives to impress enterprises to steer their ethical ships in the right direction. Some have taken that urging seriously, and led the way in developing internal corporate codes; others may do that more for show and image than out of a serious commitment. Some hope to gain financially by being socially responsible, although the success of that idea is still questionable in the short run, at least. Few codes, if any, indicate specific investment-related human rights abuses to be avoided, although abuses exist.

In terms of pro-active (positive), social responsibility activities companies might get involved in (such as charitable contributions and projects), it is not clear these are adding revenue immediately. But companies are free to do these and are encouraged to do so, especially when sensible. In terms of avoiding negative conduct in CSR, such as direct or indirect involvement in real human rights abuses, this is totally unacceptable, and not subject to any serious debate. A separate, and still debatable issue, is agreeing on what should constitute real human rights, but that exceeds the scope of this article. And yet some conduct, such as violence and stealing against innocent individuals to support investments is just more intuitively and clearly wrong.

A great deal of current CSR effort banks on public perception, especially the growing importance of consumers. Certainly, consumer awareness of corporate irresponsibility seems to be increasing (again especially in the West). Yet as some have noted, this may not have much impact on consumers’ actual spending habits, often impacted more by convenience and brand concerns. Still, efforts to tie consumer altruism to actual purchases are a growing trend, enhanced by cell phone technology in conjunction with the legislative reporting requirements noted above. It will be interesting to see how this impacts spending and CSR in decades ahead.
ANNEX: TALKING POINTS ON ISSUES IN KOREA AND THE UNITED STATES

I. SOUTH KOREA

- Samsung’s Ethical Code of Conduct is generic, saying it is a “socially responsible corporate citizen,” and respects local communities. (See Principles 4-4, 5-1, 2, 3 http://www.samsung.com/us/aboutsamsung/sustainability/sustainablemanagement/download/SamsungValueCode_ofConduct.pdf.) Some in Korea are expressing concerns over how its NCP is performing. (See Jung-Hoon Lee, “No corporation can exist without human rights management,” HANKYOREH 21 (Sept. 3, 2010), http://h21.hani.co.kr/arti/cover/cover_general/28061.html (student translations).)

- POSCO’s issues in Orissa India: should conflicts with civilians over land use be of any concern to POSCO, if the government inflicted casualties on Indians? (Or “So what?” says POSCO.) (See POSCO is truly against NCP, APIL (Oct. 9, 2012, 5:58 PM), http://www.apil.or.kr/1197 (unofficial translation).)

- Youngone (Korean Co.) in Bangladesh, involving similar violence against workers. What is a company’s duty in situations like this? On April 29, 2011, the Korean House for International Solidarity, presented this and other cases at its forum. (See Overseas companies, local workers and residents frequent disputes, YUNJIYEON (Mar. 30, 2011, 5:24 PM) (unofficial English translation), http://cast.jinbo.net/news/view.php?board=news&nid=61349&page=166.)

- MH Ethanol (Korean Co.) case in Cambodia: contaminated water, and the use of force by the government to evict residents; the investment failed. (See id.; see also Ji-Sook Lee, supra note 31 (including also a Kenertec mining case study).)


II. UNITED STATES

- California Transparency in Supply Chains Act (S.B. 657). This law requires retailers and manufacturers with annual global revenues over $100 million, and which are “doing business” in California, to disclose their “efforts to combat human trafficking and forced labor in their own supply chains.” (See Sphuler, supra note 119.) This information must be posted on a company’s website, if it has one (id.). Consider the great reach of the Act even to several non-California corporations, given this information: 1) A company is “doing business” in California not only if it is a California resident, but simply if it meets small
threshold amounts in annual sales, property, or compensation in California. 2) The Act is likely to affect numerous companies below the $100 million threshold simply if they are in the supply chain of those above it.