

- Section I -
The Current State of Affairs:
Our Inability to Curb Human Rights Abuses by Multinational Enterprises

Working Paper

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Please note: The authors of this paper have chosen to confine their inquiry to multinational enterprise activity in developing countries. This choice was made because the authors perceive that the economic conditions in these nations make them attractive locations for multinational enterprises to reduce their operating costs. This economic incentive, coupled with the perception by many developing countries that foreign direct investment is necessary to their economic development, in the opinions of the authors, can create the potential for serious human rights abuses at the hands of multinational enterprises. It is human rights abuses in this area which the authors set out to explore.

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1 – INTRODUCTION

Modern corporations are often multinational entities with great wealth, resources and information technology, putting them in a position of power within the states where they operate as well as in the international arena.¹ The revenues of many corporations now exceed the gross domestic product (“GDP”) of many independent nation-states.² For example, General Motors (“GM”) has a larger economy than all but seven countries;³ the largest fifteen corporations have revenues greater than all but thirteen countries;⁴ and fifty-one of the world’s one hundred largest economies are corporations.⁵ Many multinational enterprises (“MNEs”) have a greater influence on the governance of international trade and finance than most countries⁶ and have a greater influence on individuals living in developing countries than the government of these nations.⁷ Yet, many MNEs only use their power to influence issues such as international trade agreements, patent protection laws and national and international economic policies, that are directly correlated to their mandate of increasing profits for their shareholders.

In order to attract MNEs, many developing countries implement policies to ensure labour and other costs will remain low. Although such policies may lead to human rights abuses, many developing countries view multinationals’ presence in their country as essential for economic growth and thus, can be willing to disregard the fact that MNEs might violate human rights. Because corporations are profit driven, they often ignore or are wilfully blind to the adverse impact of their activities and policies. MNEs’ profit driven nature, combined with their limited liability, has created a problem in corporate accountability, namely, how to regulate the adverse impact that corporate activities may have on human rights around the world. Consequently, the problem of the lack of corporate accountability for human rights abuses has recently received much attention from governments, human rights organizations, business groups and the United Nations (“UN”).⁸

2 – THE PROBLEM: THE LACK OF CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES

The violation of human rights by corporations is nothing new. The earliest MNEs, such as the British and Dutch East India Trading Companies, and Canada’s Hudson Bay Company, allegedly abused

¹ Cristina Baez et al., “Multinational Enterprises and Human Rights” (1999/2000) 8 U. Miami Int’l & Comp. L. Rev 183 at I.

² Beth Stephens, “The Amorality of Profit: Transnational Corporations and Human Rights” (2002) 20 Berkeley J. Int’l L. 45 at 57.

³ Anthony Mak, “Comparison of Revenue among States and TNCs” (10 May 2000) online: Global Policy Forum <<http://www.globalpolicy.org/socecon/tncs/tncstat2.htm>>.

⁴ *Ibid.*

⁵ Sarah Anderson, John Cavanagh, “Top 200: The Rise of Corporate Global Power” online: Institute for Policy Studies <http://www.ips-dc.org/downloads/Top_200.pdf>.

⁶ *Supra* note 1 at s.I.

⁷ Logan Michael Breed, “Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad” (2002) 42 Va. J. Int’l L. 1005 at 1013.

⁸ *Supra* note 2 at 47.

their powers in order to exploit both human and natural resources.⁹ Such abuses triggered protests against the slave trade in 17th century England and product boycotts in the United States in the 18th and 19th century.¹⁰ More recently, human rights abuses by MNEs were reported during World War II. Ford, Siemens, Volkswagen, Daimler-Benz and BMW have been accused of using slave labour during the war.¹¹ For instance, Ford's German subsidiary is accused of having operated with more than half of its workers being slave labourers.¹² At present, numerous MNEs are accused of human rights abuses. Such abuses can be grouped into two major categories; the denial of negative human rights and the refusal to acknowledge positive human rights.¹³

Corporations can interfere with the negative rights of individuals living in countries where they conduct business that infringes the rights outlined in Part 3 of the *International Covenant on Civil and Political Rights* ("ICCPR"),¹⁴ including; the right to life, the right to be free from torture and inhuman treatment, the right to be free from slavery and forced labour, the right to liberty and security, the right to free association and the right to privacy. Allegations of violations of negative rights are rare, arguably because they are the most severe types of human rights infringements. Nonetheless, numerous corporations are alleged to have interfered with the negative rights of individuals, for instance:

- the now bankrupt Enron Power Corporation is accused of having harassed and assaulted peaceful protestors outside its Dabhol power plant in Maharashtra, India;¹⁵
- Exxon Mobil is alleged to have hired the Indonesia military to assault protesters at an Indonesia plant;¹⁶
- Royal Dutch Petroleum (Shell) is alleged to have recruited the Nigerian military, and reportedly provided them with weapons, money, vehicles and ammunition, to curb protestors in the Niger Delta that opposed Shell's activities in the area.¹⁷ Moreover, the Nigerian military is said to have imprisoned, killed and tortured large numbers of Nigerians to ease Shell's oil exploration;¹⁸

⁹ *Ibid.* at 49.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424 (D.N.J. 1999) at 432-33.

¹³ *Supra* note 1 at III-3-A.

¹⁴ *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by the UN General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

¹⁵ "The Enron Corporation Corporate Complicity in Human Rights Violations" (1999) online: Human Rights Watch <<http://www.hrw.org/reports/1999/enron/>>.

¹⁶ *Supra* note 7 at 1009.

¹⁷ *Ibid.*; *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir 2000).

¹⁸ *Ibid.*

- British Petroleum is accused of having contracted the Colombian armed forces to curtail protests at its operations in Colombia;¹⁹
- Unocal is alleged to have hired the Burmese military to force villagers to work on the Yagana gas pipeline project and to relocate villages in order build the pipeline.²⁰ In addition, the Burmese military is alleged to have killed, tortured and raped villagers living close to the pipeline project while being employed by Unocal;
- Chevron is suspected of having hired the Nigerian military to threaten, beat and jail individuals who opposed their activities;²¹
- Freeport-McMoRan is alleged to have employed the Indonesian military to crackdown on protestors opposing its gold mine in Irian Jaya;²² and
- United Fruit Company (now Chiquita Brands International) is alleged to have been complicit with the CIA in orchestrating a coup d'état in Guatemala in 1954 and for having used its influence to slow democratic development in Guatemala for more than 50 years.²³ In its operations in Panama, Chiquita is alleged to have killed at least one worker and of assaulting many more because workers complained to Panama's Labour Ministry about their poor working conditions.²⁴

Most MNEs accused of human rights abuses are said to violate positive human rights, namely the rights guaranteed under various instruments such as the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),²⁵ the *European Social Charter*,²⁶ the *Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights* (Protocol of San Salvador),²⁷ the *African [Banjul] Charter on Human and Peoples Rights*²⁸ and the Constitution of the World Health

¹⁹ *Supra* note 2 at 51.

²⁰ *Ibid.*; *Doe v. Unocal Corp.*, 110 F.Supp.2d 1294 (C.D. Cal 2000) at 1306.

²¹ "Corporations and Human Rights - Recent Human Rights Violations In Nigeria's Oil Producing Region" (23 February 1999) online: Human Rights Watch <<http://www.hrw.org/advocacy/corporations/nige-update.htm>>.

²² Pratap Chatterjee, "The Mining Menace of Freeport-McMoRan, Multinational Monitor" (1996) 17 *Multinational Monitor* 4; Australian Council for Overseas Aid [now Australian Council for International Development] "Trouble at Freeport" (1995) online: <<http://www.moles.org/ProjectUnderground/motherlode/freeport/acfoa.html>>.

²³ *Supra* note 2 at 51.

²⁴ "The forgotten victims of the banana war" (11 March 1999) online: International Confederation of Free Trade Unions Online <<http://www.hartford-hwp.com/archives/47/089.html>>.

²⁵ *International Covenant on Economic, Social and Cultural Rights*, Adopted and opened for signature, ratification and accession by the United Nation General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

²⁶ *European Social Charter*, Turin, 18.X.1961.

²⁷ *Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador)*, adopted in San Salvador on 17 November 1988.

²⁸ *African [Banjul] Charter on Human and Peoples Rights*, adopted 27 June 1981, entry into force 21 October 1986.

Organization (“WHO”).²⁹ These instruments safeguard rights such as; the right to work, the right to education, the right to health, the right to an adequate standard of living, the right to cultural life, the right to just and favourable work conditions, the right to fair wages and the right to safe and healthy working conditions.

MNEs often violate positive human rights by paying their workers very low wages, imposing compulsory overtime, physically, verbally and sexually abusing their workers, using child labour and causing widespread pollution in the areas where they operate. In contrast to many negative human rights, no positive human rights are deemed to have *jus cogens* status; in other words, they are not considered to be a law of the highest order that no country can violate. Instead, positive human rights are typically viewed as aspirations rather than as legally binding obligations.³⁰ Among the examples of MNEs accused of violating positive human rights are:

- Mars, Kraft General Foods and Hershey are reported to have links to cocoa farms in the Ivory Coast which use boys as young as 11 as slave labourers to harvest cocoa;³¹
- Gap, Disney, Nike, Levi Strauss among many others, have allegedly contracted with factories that pay workers extremely low wages, force workers to work unpaid overtime and use child labourers;³²
- Texaco is accused of having dumped millions of gallons of oil and billions of gallons of untreated toxic brine in the water and soil in Ecuador;³³
- Freeport-McMoRan is said to have dumped hundreds of tons of toxic mine tailings into local waterways destroying rivers, flooding surrounding forests and polluting lakes and ground water in the Irian Jaya region of Indonesia;³⁴
- Shell is reported to have devastated large areas of land, produced fires that burn around the clock and of having soaked groundwater in oil in its attempt to explore the oil reserves of Nigeria;³⁵
- Bechtel is reported to have spilled millions of gallons of toxic waste from its gold mine in Papua New Guinea into the riverways of the small nation;³⁶

²⁹ *Constitution of the World Health Organization*, 22 July 1946.

³⁰ *Supra* note 1 at III-3-B-3-b.

³¹ Steve Proulx, *Boycott*, (Montreal: Les Éditions des Intouchables, 2003) at 129; “Fair Trade Chocolate and Cocoa: The Sweet Solution to Abusive Child Labor and Poverty” online: Global Exchange <<http://www.globalexchange.org/campaigns/fairtrade/cocoa/>>.

³² *Ibid.* at 81, 114, 161 (Proulx); *supra* note 2 at 52; “The Gap’s Global Sweatshop” (November 2002) online: UNITE <http://www.behindthelabel.org/pdf/Gap_report.pdf>; “U.S. Retailers: Responsible for the Global Sweatshop Crisis” online: <<http://www.behindthelabel.org/pdf/Retailindus.pdf>>.

³³ *Supra* note 2 at 52; *Jota v. Texaco Inc.* 157 F.3d 153 (2d Cir. 1998).

³⁴ *Supra* note 2 at 52.

³⁵ *Ibid.*

- General Electric is accused of dumping more than 500 000kg of polychlorinated biphenyl (“PCBs”) into the Hudson river near Mechanicville and Fort Edward, New York, making this area one of the most polluted in the United States;³⁷
- Citigroup is accused of funding highly controversial projects which are said to be environmentally devastating, including petroleum digs in the Orinoco Delta in Venezuela, and the construction of gas pipelines in Ecuador and Cameroon;³⁸ and
- Coca Cola is alleged to have emptied drinking water reserves in Plachimada, India and in El Salvador in order to force citizens to purchase Coca-Cola beverages.³⁹

In response to allegations of human rights abuses, MNEs typically deny the allegations or assert that regardless of whether such human rights abuses took place, their presence in developing countries helps such countries move towards democracy and thus greater respect for human rights.⁴⁰ Even if foreign investment by MNEs in developing countries leads to respect for human rights over time, this brings little solace to individuals whose rights are currently being violated. The reality is that in many countries the presence of MNEs does nothing more than sustain authoritarian regimes, this being the case in Burma, Indonesia, Nigeria, Mozambique and China.⁴¹

3 – PRESENT DAY METHODS FOR HOLDING CORPORATIONS ACCOUNTABLE FOR THEIR HUMAN RIGHTS ABUSES

The concept of the corporation can be traced back to Roman law.⁴² The main characteristic of Roman corporations was that they had their own legal personality. In other words, Roman corporations had rights and duties separate from the rights and duties of their members.⁴³ Consequently, Roman corporations would continue to subsist even if their original members changed.⁴⁴ When English lawmakers were faced with the dilemma of how to treat individuals regrouped in a society, they decided to

³⁶ Andrea Buffa et al., “Bechtel: Profiting from Destruction why the Corporate Invasion of Iraq must be stopped” (June 2003) online: CorpWatch, Public Citizen and Global Exchange <<http://www.citizen.org/documents/profilebechtel.pdf>>.

³⁷ *Supra* note 31 at 121 (Proulx).

³⁸ *Ibid.* at 57.

³⁹ *Ibid.* at 63.

⁴⁰ Ariadne K. Sacharoff, “Multinationals in Host Countries: Can They be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?” (1998) 23 Brooklyn J. Int’l L. 927 at 928.

⁴¹ *Supra* note 1 at III-B-3-B-2.

⁴² *Supra* note 2 at 54.

⁴³ Proceedings Fourth Annual International Business Law Symposium, “Multinational Corporations and Cross Border Conflicts: Nationality, Veil Piercing and Successor Liability” (1995) 10 Fla. J. Int’l 221 at 254.

⁴⁴ Alfred F. Conard, “A Hundred Years of Uniform State Laws: The European Alternative to Uniformity in Corporation Laws” (1991) 89 Mich L. Rev 2150 at 2181.

adopt the corporate structure established by the Romans.⁴⁵ Thus, under the common law, corporations have rights and duties independent of the rights and duties of their individual members.

In other words, an association of persons who successfully apply for recognition as a corporation is treated in many respects as a person itself. For instance, a corporation has the right to own land, the right to possess money, the right to sue and be sued and the right to contract.⁴⁶ Although, the form of Roman corporations and common law corporations are similar, the limited liability of corporations, which is now viewed as the core element of the corporate form, developed in the early 19th century in the United States, and late in the 19th century in England.⁴⁷ The concept of a corporation's limited liability recognizes a distinction between the personal liability of the individual shareholders of a corporation and the liability of a corporation.⁴⁸ This means that where a corporation, for example, must pay damages as a result of a legal action, only the corporation is obliged to pay those damages, not the shareholders. Typically the shareholders are liable only for the amount they paid to acquire shares in the corporation, meaning a shareholder's exposure is generally limited to the value of their investment. This concept of limited liability also protects parent companies from liabilities incurred by their subsidiaries and moreover, protects subsidiaries from one another's liabilities.⁴⁹ The limited liability of corporations is further complicated by the perpetual existence of corporations and by the tremendous influence wielded by modern day corporations.

To curb some problems associated with the concept of limited liability and the perpetual existence of corporations, it has been suggested that the country in which a parent corporation is incorporated ought to police the MNE's actions at home and abroad, as well as the actions of its subsidiaries. For instance, Ralph Nader, Mark Green and Joel Seligman advocated that the United States adopt "limited life" charters,⁵⁰ whereby a corporation's charter would only exist for a specific amount of time. Upon a charter's expiry, an MNE would have to apply to have it renewed. Nader, Green and Seligman envisioned that the actions of limited charter corporations would be reviewed by a federal agency which would ensure that the MNE complied with environmental regulations, labour standard etc., before renewing the MNE's charter.⁵¹

While the idea certainly has merit, so much so that the United States Congress has held three hearings on the proposal, its feasibility is limited by the massive infrastructure which would be required to

⁴⁵ Phillip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press, 1993) at 3-7.

⁴⁶ *Supra* note 1 at 54.

⁴⁷ *Supra* note 4 at 7-19.

⁴⁸ *Supra* note 1 at 55.

⁴⁹ *Supra* note 1 at 55.

⁵⁰ Ralph Nader, Mark Green & Joel Seligman, *Constitutionalizing the Corporation: The Case for the Federal Chartering of Giant Corporations* (The Corporate Accountability Research Group, 1976); Ralph Nader, Mark Green & Joel Seligman, *Taming the Giant Corporation* (Norton, 1976).

⁵¹ *Ibid.*

conduct the monitoring and by the heavy governmental intrusion into private business affairs that would accompany it.⁵² Many people are uncomfortable with the government taking such a strong regulatory position on the social accountability of the business world. Even if the policy were to be adopted, a major challenge to its success would be whether a government would actually reprimand a corporation for its conduct abroad. Arguably, many governments would not punish an MNEs' foreign activities because policing a corporation's operations abroad would arguably intrude on other nation's sovereignty and would be tantamount to interfering in the domestic affairs of foreign states.

Nonetheless, it must be remembered that MNEs can be judicially and legislatively regulated as they are subject to the jurisdiction of the country where they are operate. Thus, MNEs can be held accountable for their actions through criminal law, regulations or civil liability. Therefore, the question is: why are human rights abuses at the hands of corporations not being stopped?

A – Judicial Remedies

i – Domestic Courts

Many domestic legal systems recognize that corporations can be held liable for their actions. The law of most countries allows MNEs to be held tortiously liable as well as criminally liable for wrongdoings. The notion of corporate criminal liability traces its roots to 17th century France. Yet, the concept of corporate criminal liability has only become widely recognized in the 20th century.⁵³ North American and European countries all recognize corporate criminal accountability, and the concept is slowly expanding through Asia and Latin America.⁵⁴ However, exceptions to corporate criminal responsibility persist. Argentina for instance still maintains that “*societas delinquere no protest*” or that corporations cannot be the author of a crime.⁵⁵

Even though corporations can be held accountable for their actions in theory, because MNEs are so powerful, the domestic government of some nations resist regulating them out of fear that such action will force MNEs out of their country causing their already poor economies to dwindle further.⁵⁶ Moreover, because corporations often have monopolies over vital sectors of the economy such as - telecommunications, information technology, pharmaceuticals, chemicals, transport, banking, insurance, oil production, motor vehicle production, gas, electricity, engineering and construction – the governments of developing nations fear that standing up to MNEs might have a negative impact on their country's

⁵² *Ibid.* at 617.

⁵³ Leonard Orland & Charles Cachera, “Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (Personnes Morales) Under the New French Criminal Code (Nouveau Code Pénal)” (1995) 11 Conn. J. Int'l L. 111 at 151.

⁵⁴ *Supra* note 2 at 65.

⁵⁵ *Supra* note 2 at 64.

⁵⁶ *Supra* note 1 at II-B-1.

access to the products and the services which the multinationals control.⁵⁷ Because the relative bargaining position and enforcement capabilities of the governments of most states in which multinationals abuse their power, are weak, MNEs are able to operate without fear that they will be held accountable for their actions through domestic criminal, civil or administrative sanctions. It is important to note that in countries where the government is powerful enough to regulate corporations, human rights abuses occur less frequently, and the abuses that do occur, tend to be less serious.

These problems are not the only challenges associated with seeking a judicial remedy against an MNE. When a corporation has a head office in one country, a subsidiary in another, and is operating in yet another country where the human rights violations are allegedly taking place, there are issues of forum, evidentiary complications, and difficulties in making out a cause of action. Typically, the greatest challenge is finding a court willing to assert jurisdiction over the alleged human rights violations.

Where *jus cogens* rights are violated a court may invoke the principle of universality to take jurisdiction. Under this principle, neither the location of the offence nor the nationality of the defendant is determinative of the forum where the case is to be heard. Instead, the very “nature of the offence confers jurisdiction on all states.”⁵⁸ However, universal jurisdiction is controversial and it can only be invoked in light of the gravest human rights infractions, such as piracy, slave trading, war crimes, crimes against humanity, genocide and torture.⁵⁹ In other words, the severity of the human rights violations which triggers universal jurisdiction means that courts typically cannot rely on it to take jurisdiction over the majority of human rights abuses attributable to MNEs.

There is one domestic court, which thanks to legislation can take jurisdiction over tort claims which have occurred outside its borders. The American *Alien Tort Claims Act*⁶⁰ (“ATCA”) gives jurisdiction to federal district courts over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁶¹

To bring a claim under the ATCA there must be i) an alien, ii) who has suffered a tort, which is iii) of the kind which violates international law.⁶² In the context of an ATCA claim, in order to determine if international law has been contravened, courts can look to “the writings of jurists on public law, the

⁵⁷ *Ibid.*

⁵⁸ Anita Ramasastry, “Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forces Labor Cases and Their Impacts on the Liability of Multinational Corporations” (2002) 20 Berkeley J. Int’l L. 91 at 154.

⁵⁹ *Ibid.*

⁶⁰ Although the ATCA was enacted in 1789, it remained virtually unused until the 1980s when the Second Circuit resurrected its use.

⁶¹ Tawny Aine Bridgeford, “Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Against Judicial Activism” (2003) 18 Am. U. Int’l L. Rev. 1009 at 1019-20 (footnote 37); see also *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992) at 499 (explaining that an ATCA requires “a claim by an alien, a tort, and a violation of international law”).

⁶² *Alien Tort Claims Act*, 28 U.S.C. §1350.

general usage and practice of nations, or judicial decisions on international law”⁶³ or to the principles of international law articulated by *erga omnes*⁶⁴ and *jus cogens*⁶⁵ norms. An ATCA claim is very flexible because American courts can take jurisdiction over it regardless of where the tort occurred, and regardless of the nationality of the plaintiff or the defendant.

Another aspect of the ATCA which makes it a promising tool for promoting social justice, is that plaintiffs have been successful in obtaining class certification for claims against MNEs. In 1998, a federal class action was filed in New Jersey “alleging that Ford had knowingly accepted economic benefits derived from the use of forced labour by its German subsidiary, Ford-Werke A.G. in Nazi Germany.”⁶⁶ The class included all people forced to work for Ford-Werke between 1941 and 1945. The case was ultimately dismissed because a variety of treaties between the Allied Powers and Germany barred this type of action.⁶⁷ The court in its dismissal recognized that Ford had used what amounted to slave labour. They also noted the company had “violate[d] customary international law” and furthermore “that although customary international law is sometimes referred to as the “law of nations” it nonetheless applies to private actors such as Ford in certain circumstances.”⁶⁸

In 1999, a class of alien garment workers living in the Commonwealth of the Northern Mariana Islands brought three actions against the garment companies who employed them. Those named in the suit included well-known labels; The Gap, J. Crew, Tommy Hilfiger, Levi Strauss and Wal-Mart. The three actions were the “first ever attempt to hold United States retailers accountable for mistreatment of workers in foreign-owned factories.”⁶⁹ The actions alleged the defendant firms participated in a “racketeering conspiracy” in addition to having violated numerous labour laws in both their factories and in the workers living areas.⁷⁰ A media storm ensued and, arguably on account of the terrible publicity, the actions were settled.⁷¹

Until recently the US Supreme Court had not heard any ATCA cases. Thus, there was no binding high court decision to guide the lower courts in their application of the ATCA.⁷² However, the Court turned its mind to the issue in their June 2004 decision *Sosa v. Álvarez-Machain*.⁷³ The Court’s decision came as a “relief to human rights organizations that had feared the court would accept the Bush

⁶³ *Supra* note 61 at 1023 (Bridgeford).

⁶⁴ *Ibid.*

⁶⁵ *Supra* note 58 at 155 (citing Article 64 of the *Vienna Convention on the Law of Treaties*, at footnote 263).

⁶⁶ *Ibid.* at 125.

⁶⁷ *Ibid.* (individual claims were to be pursued only through inter-governmental settlement).

⁶⁸ *Ibid.*

⁶⁹ Deborah J. Karet, “Privatizing Law on the Commonwealth of the Northern Mariana Islands: Is Litigation the Best Channel for Reforming the Garment Industry?” (2000) 48 *Buffalo L. Rev.* at 1047.

⁷⁰ Marc J. Monte, “Corporate Factory/Supplier Monitoring Programs and the Failure of International Law in Regulating Indian Factory Conditions” (2001) 26 *Brooklyn J. Int’l* 1125 at 1142.

⁷¹ *Ibid.*

⁷² *Supra* note 61 at 1053-54 (Bridgeford).

⁷³ *Sosa v. Álvarez-Machain*, 542 U.S. 692 (2004). [*Sosa*].

administration's invitation to narrow the application of the 215-year-old law"⁷⁴ at the behest of the business community.⁷⁵

In *Sosa*, a Mexican doctor, Humberto Álvarez-Machain, who was abducted from Mexico by the US Drug Enforcement Agency ("DEA") to stand trial in California for the murder of a DEA agent, wanted to use the ATCA to sue another Mexican man, José Francisco Sosa, who assisted in Dr. Álvarez-Machain's cross-border kidnapping. The Ninth Circuit permitted Dr. Álvarez-Machain to sue Mr. Sosa and found in favour of Dr. Álvarez-Machain, stating that cross border kidnapping was a violation of international law and that it was the type of injury for which a foreigner could use the ATCA to seek redress.

The Supreme Court unanimously overturned the Ninth Circuit decision, although only six judges signed on to the majority judgment penned by Justice Souter. Justice Souter's judgment was premised on the finding that Dr. Álvarez-Machain's "single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."⁷⁶

Although Dr. Álvarez-Machain lost his case at the Supreme Court, and although the case did not have an MNE as a defendant, the United States Supreme Court's judgment recognized the continuing vitality of the ATCA and preserved its authority to take jurisdiction over serious violations of international law that take place outside American borders. Justice Souter recognized the power the American courts wield under the ATCA and cautioned courts to be wary of the possible foreign policy implications their decisions may have, making a particular reference to ATCA claims pending against corporations that worked with the apartheid regime in South Africa.⁷⁷ It is likely the Court will have the opportunity to specifically address the liability of MNEs under the ATCA shortly, since many cases with MNE defendants are working their way up through the lower courts.

Justice Scalia, in spite of agreeing with the outcome in *Sosa*, wrote a concurring judgment criticizing the breadth of the ATCA. Justice Scalia's judgment frowned heavily on Justice Souter's reasons, stating they were a dangerous example of judicial activism.

It would be bad enough if there were some assurance that future conversions of perceived international norms into American law would be approved by this Court itself. (Though we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election.) But in this illegitimate lawmaking endeavour, the lower federal courts will be the principal actors; we review but a tiny fraction of their decisions. And no one thinks that all of them are eminently reasonable...⁷⁸

⁷⁴ Linda Greenhouse, "Human Rights Abuses Worldwide are Held to Fall Under US Courts" (30 June 2004) online: New York Times <<http://www.nytimes.com/2004/06/30/politics/30alien.html>>.

⁷⁵ Elliot J. Schrage, "Judging Corporate Accountability in the Global Economy" (2003) 42 Colum. J. Transnat'l L. 153 at 154.

⁷⁶ *Supra* note 73 at 757.

⁷⁷ *Ibid.* at 754.

⁷⁸ *Ibid.* at 765.

American law – the law made by the people’s democratically elected representatives – does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court.⁷⁹

Justice Scalia’s position highlights problems that could arise with lower courts rendering ATCA judgments without uniform guiding principles articulated by either clearer legislation or binding Supreme Court precedents.

Although the ATCA is a very promising means by which an MNE might eventually be held liable for human rights infractions, it is mildly discomfiting to think that a single domestic court is in the position to wield an instrument that has such far-reaching foreign policy implications.

ii – Regional Courts

In several global regions, courts with jurisdiction over numerous nations have come into existence. This paper will consider briefly how one brings a claim to the European Court of Human Rights⁸⁰ and to the Inter-American Commission on Human Rights.⁸¹ While neither body is new, both having been formed in the 1950s, their importance has grown dramatically in recent decades as each body has received an increased numbers of complaints.

The number of applications filed with the European Court of Human Rights (“ECHR”) began escalating in the 1980s and accelerated again in the 1990s. In 1980, 404 applications were registered with the European Commission on Human Rights; in 1997, 4750 were registered, while the unregistered files exceeded 12,000. A similar increase was experienced in the number of cases heard: in 1980 only 7 cases were heard and by 1997 that number had increased to 119. In an attempt to streamline and expedite the process for making applications and hearing cases, the part-time Commission and part-time Court were merged under Protocol 11 in 1998 to form a single full-time Court. The number of grievances filed has continued to grow – in 1998, 5979 applications were registered, and by 2001, 13,858 were registered.

Any contracting state to the *European Convention on Human Rights*⁸² (“Convention”) or any individual who feels their rights under that Convention have been violated may complain to the Court in

⁷⁹ *Ibid.* at 765.

⁸⁰ All information relating to the procedure for bringing a complaint at the European Court of Human Rights is taken from: “Notes for the guidance of persons wishing to apply to the European Court of Human Rights”, online: European Court of Human Rights <<http://www.echr.coe.int/NR/rdonlyres/23F65B04-5BB6-48DB-AFED-C47A906F092E/0/NoticeENG.pdf>>; “Historical Background”, online: European Court of Human Rights <<http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/>>.

⁸¹ All information relating to bringing a complaint at the Inter-American Commission of Human Rights is taken from: “What is the IACHR?”, online: Inter-American Commission of Human Rights <<http://www.cidh.oas.org/what.htm>>.

⁸² The *European Convention on Human Rights* was drafted by the Council of Europe, building on the United Nations *Universal Declaration of Human Rights*. It came into force in 1953. There were three bodies which enforced the Convention: the European Commission on Human Rights; the European Court of Human Rights; and the Committee of Ministers of the Council of Europe.

Strasbourg by making an application alleging the breach. Although legal counsel is recommended for making a complaint, it is not necessary; however if the application is approved and hearings are undertaken, legal counsel is required. The procedure before the Court is adversarial and is generally open to the public (except under exceptional circumstances). The documents held by the Court's Registry are also accessible to the public.

For an application to be successful, the applicant must have personally and directly suffered a violation of their rights at the hands of a state who has ratified the Convention or a Protocol to the Convention. The ECHR does not hear applications against private individuals or private organizations; it has jurisdiction strictly over public authorities (e.g. legislature, administrative authority, courts of law etc.). Furthermore, the applicant must show that they have exhausted all domestic remedies available to them, and the complaint must be brought within six months of receiving a final domestic decision. If all the domestic judicial remedies have not been exhausted, it is necessary for the plaintiff to demonstrate why those remedies are ineffective. The limitation periods of all jurisdictions involved must be adhered to. If these criteria are met the application is declared admissible and the judicial process begins.

For its part, the Inter-American Commission on Human Rights ("IACHR") is comprised of two bodies; the Commission which is headquartered in Washington, DC, and the Court which is located in San José, Costa Rica. The IACHR is an autonomous body of the Organization of American States that emerged from the *American Declaration of the Rights and Duties of Men* which was adopted in Bogotá, Columbia in 1948. The IACHR came into being in 1959 and by 1965 had the authority to investigate complaints regarding human rights violations. In 1969, the *American Convention on Human Rights* ("Convention") was adopted and it came into force in 1978. Presently more than 25 countries have ratified the Convention.

Any person, persons or non-governmental organization ("NGO") may present a petition to the Commission alleging a violation of the rights protected by the Convention. A complaint may be entered on behalf of a third-party. A complainant must show that they have exhausted all domestic legal remedies. If they have not exhausted all domestic remedies they must demonstrate that continuing to seek a remedy through their domestic legal system would not provide due process. The petition must be brought within six months of the final rendering of a domestic decision. If a complaint is lodged against a state that has ratified the Convention, then the Convention applies; if the alleged violator is not a signatory to the Convention, then the older *American Declaration of the Rights and Duties of Men* is used.

Attempting to bring a complaint to either the ECHR or the IACHR presents a serious challenge to an impoverished worker. Distance, education and language all present hurdles to bringing a complaint to the Courts, but perhaps most importantly, neither Court permits an individual to lodge a complaint against a corporation. Thus to be successful, a human rights abuse allegation against a corporation must somehow implicate the host nation in which the abuse occurred. Otherwise, neither of these Courts has jurisdiction over the issue.

B – Holding MNEs Accountable under International Law

As domestic courts and regional courts are limited in their capacity to curb human rights abuses by corporations, many feel international law should govern MNEs, because they are enterprises with a global reach. Unfortunately, international law does not offer a better solution to end corporate abuses of human rights as corporations are not recognised as an entity to which international law applies. Traditionally international law only regulated the relations between nation-states.⁸³ Thus, individuals, corporations and other organizations did not have standing under international law. An exception to this rule was that individuals, corporations and organizations were able to protect themselves against the arbitrary expropriation of their property by nation-states.⁸⁴ However, even this exception did not allow individuals, corporations or organizations who alleged a violation of their right to property to have standing in international tribunals and courts. Only nation states could make claims in the name of a corporation or an individual in the international forum.

Only after World War I, did individuals finally begin to accrue rights under international law.⁸⁵ After World War II and the Nuremberg Tribunal, international law evolved to recognize that individuals have rights and duties under international law. Consequently, at present, international law contemplates two types of actors who may be held responsible for human rights abuses: states and individuals.

Many commentators have suggested that international law needs to undergo a further transformation in order to recognize MNEs as subjects of international law so that they may be governed by the same principles that govern nation states and individuals. The recognition of corporations as subjects of international law would compel multinationals to respect established human rights.⁸⁶ Attempts to expand international law so that it may govern corporations have been made since the 1970s New International Economic Order movement.⁸⁷ Such attempts, to date, have had little success. For instance, there were proposals to include corporate defendants at the International Criminal Court. This never happened because disagreements arose over the complexities of trying non-natural persons and the impact that corporate criminal responsibility would have on public corporate entities, NGOs and associations.⁸⁸ Currently, international law attempts to protect individuals from human rights abuses at the hands of corporations by placing a duty on states to regulate corporations.⁸⁹ Thus, at present, international law does

⁸³ *Supra* note 2 at 71.

⁸⁴ *Supra* note 1 at III-A.

⁸⁵ *Supra* note 1 at III-A.

⁸⁶ *Supra* note 1 at III-B-2; Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" 111 *Yale L.J.* 443 (2001) at 489-511.

⁸⁷ *Ibid.* at III-A (Baez).

⁸⁸ *Supra* note 2 at 67.

⁸⁹ *Supra* note 1 at III-B-2-a.

not place duties and obligations directly on MNEs. Instead international law demands that nation-states take affirmative steps to prevent and punish conduct within their jurisdiction that violates human rights.

Moreover, it has been suggested that corporations be treated in a similar manner to states under international law, since MNEs exert an influence similar, if not greater than nation states.⁹⁰ Treating MNEs in the same way that international law treats states would resolve some of the problems associated with the unaccountability of corporations. Such an approach would aid in making corporations abide by international human rights law regardless of their geographical location or a country's ability to enforce the respect of human rights within its borders. However, treating corporations like nations under international law is not without problems. Treating corporations as nations is only feasible if the rights and duties of corporations under international law are universally recognised.⁹¹ As many developing nations are eager to attract foreign investments, situations might arise where a country would turn a blind eye to human rights infractions and attempt to silence those who wish to expose a corporation's human rights abuses.⁹² Consequently, only through the creation of institutions that would enforce corporations' obligations and duties would treating a corporation like a state under international law deliver results. As previously stated, the creation of an organization to monitor MNEs would be expensive. Furthermore, given the problems and highly critical perception of international organizations, especially the United Nations, the feasibility and the utility of the creation of an international body to monitor MNEs is questionable.

Another possibility is treating corporations like individuals under international law. Treating corporations like individuals might be a more logical than treating corporations as states, as corporations are usually considered legal "persons" under the law. The problem in treating corporations as individuals under international law is that it is unclear whether corporations would acquire rights under international human rights law in addition to duties, such as the duty to respect human rights, that international law would impose. If MNEs were to acquire rights under international law what would these rights be? Obviously, rights such as the right to life, the right to education and the right to health cannot be extended to corporations. However, some human rights could arguably be extended to corporations including property rights, the right not to be dealt with arbitrarily under the law, the right to access courts, the right to proper procedure and the right to freedom of expression.⁹³

Simply equating MNEs to either a state or an individual under international law is not the answer, although it may appear to be an attractive option at first glance. Consequently, the only effective way to make international law applicable to corporations is to recognize corporations as distinct subjects of international law with their own unique legal duties, obligations and rights.

⁹⁰ *Supra* note 86 at 461 (Ratner).

⁹¹ *Supra* note 1 at III-B-2-c.

⁹² *Ibid.* at III-B-2-a.

⁹³ *Supra* note 1 at III-C.

Problematically, transforming international law is no easy task. To accept corporations as subjects of international law will take time. Given that violations of human rights are egregious, time is of the essence in curbing these violations. Consequently, numerous international bodies have attempted to create standards to prevent human rights violations by corporations. The question is: are these international bodies effective in preventing MNEs from violating human rights in developing nations?

C – Holding MNEs Accountable Using International Enforcement Mechanisms

There are many bodies outside the traditional avenues of domestic and international law that have the power to influence an MNE's behaviour. Some offer quasi-judicial remedies which overcome some traditional barriers to a legal solution, however many are not accessible to private citizens since the rules governing admissibility to these international bodies would be difficult to satisfy for an impoverished, minimally educated worker from a developing nation. Furthermore, most of these bodies do not have the jurisdiction to address complaints against an MNE.

Nonetheless, some international bodies which have no power over an MNE, can still affect the economic environment in which an MNE does business. Bodies such as the World Bank or the International Monetary Fund ("IMF") can strongly influence a government's policies by stipulating conditions which must be satisfied in order to obtain financial assistance. These policies in turn affect investment activity in the country. If a government values the aid of either the World Bank or the IMF more than it values the contributions of an MNE to its national economy, a government may enact policies to secure World Bank or IMF assistance in spite of the risk of losing an MNE's business. The ability to exert this type of pressure ought to be viewed warily – a bank is an economic player, not democratically elected by, nor accountable to, the people of any nation. Heavy handed policies by unaccountable foreign interests, even if they are well-intentioned, may amount to a system of blackmail that corrupts a developing nation's right to self-determination and sovereignty.

This section will review some of the more influential international bodies, which operate under the umbrella of the United Nations and are in a position to advocate the promotion of human rights.

i - United Nations and the Office of the High Commissioner for Human Rights⁹⁴

There are many avenues for pursuing a human rights violation claim in the UN, however this paper will focus on two options offered by the Office of the High Commissioner for Human Rights. The first option is to bring a communication to one of the Office's treaty-monitoring bodies; the second option is to initiate a 1503 Procedure before the Commission on Human Rights or the Commission on the Status of

⁹⁴ "Fact Sheet No.7/Rev.1, Complaint Procedures" online: Office of the High Commissioner for Human Rights (United Nations) <<http://www.unhcr.ch/html/menu6/2/fs7.htm>>.

Women. The procedures are different because they deal with different types of complaints – the treaty monitoring bodies deal with individuals who are seeking redress, while the 1503 Procedure addresses systemic patterns and trends of human rights abuses in a particular country.

Individuals who feels their rights under the *International Covenant on Civil and Political Rights*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, or the *Convention on the Elimination of all Forms of Discrimination Against Women* have been violated, can bring a complaint before the treaty's Committee, a quasi-judicial body established as a part of each treaty. The Committee is made up of independent experts elected by state parties. The Commission's duty is to monitor the implementation of the rights outlined in the relevant treaty and to adjudicate complaints.

While there are details unique to applications under each treaty, there are also commonalities. Under all the aforementioned treaties a complaint, commonly called a "communication" or "petition", may only be brought against a State who has ratified the treaty in question and who has recognized the competence of the Committee to hear complaints. Any person whose rights under a specific treaty have been violated can bring a claim. Moreover, a claim may also be brought on behalf of another person. It is necessary to show that you have exhausted all domestic remedies, but there is no formal limitation on when you must bring your communication to one of the Committees.

The nature of the infractions alleged under a 1503 Procedure is quite different from those alleged to the treaty monitoring bodies. The 1503 Procedure generally looks to uncover systemic human rights violations in a state rather than looking to provide redress directly to victims of human rights abuses. A communication may be brought against any state; there is no requirement that the state facing an allegation have ratified any particular agreement or treaty. Any individual or group who claims to be a victim of the systemic abuse of human rights, or any person who has direct and reliable knowledge of such systemic abuse can initiate a 1503 Procedure. For a communication to be admissible it is necessary to show that all domestic remedies have been exhausted, and there is no official limitation period for bringing the complaint.

While the UN Office of the High Commissioner for Human Rights offers different avenues for an individual to make a human rights complaint, such complaints can still only be directed against a State. If a complainant tries to bring a communication against a nation-state which has chosen not to ratify the relevant treaty or if the state declines to recognize the Committee's authority, the action will be unsuccessful. The need for treaty ratification is overcome in a 1503 Procedure, however, this complaint process is only accessible for systemic human rights abuses; an individual cannot use it to seek a personal remedy. Of course these difficulties are moot if a person's rights are being infringed by a corporation, since the Office of the High Commissioner for Human Rights offers no recourse against private companies.

ii - International Monetary Fund⁹⁵ and the World Bank⁹⁶

The IMF is a specialized agency of the UN that was established in 1945. The World Bank was created at the same time as the IMF and their mandates are meant to complement one another. The IMF focuses primarily on issues of macroeconomic performance and financial sector policies, while the World Bank focuses on issues related to long-term development and poverty reduction. A third body, whose mandate was to promote trade liberalization was contemplated, but not created, until 1995 when the World Trade Organisation (“WTO”) emerged from the Uruguay Rounds.

To achieve its macroeconomic goals the IMF provides loans to countries which are contingent upon the recipient nation enacting policies that aim to correct balance payment problems. In requesting that a country enact a particular fiscal policy to achieve this goal, and by engaging in monitoring activities which range from observing and auditing to enforcing corporate governance standards, the IMF arguably has the ability to strongly influence the policies which a government adopts.

While placing conditions on a recipient nation might infringe on that country’s autonomy, the intrusion is cause for greater concern when we consider that the IMF is governed by member states whose voting power in the organisation is determined by the size of their respective economies. Thus prosperous nations in the IMF exercise much greater voting power as compared to the voting power of less prosperous nations. This power imbalance must be handled delicately. The predominance of voting power in the IMF lies with wealthy nations, who typically do not receive loans from the IMF. Therefore the policies they advocate for rarely affect them. Consequently, wealthy nations in the IMF are in a position to wield great power over the domestic affairs of client states.

The IMF’s sister organization, the World Bank, achieves its goal of promoting long term development and poverty reduction through a variety of initiatives, some of which might also lead to the disenfranchisement of developing nations. A notable example is the collaboration between the World Bank and the Organization of Economic Co-Operation and Development (“OECD”) which produces the Regional Roundtables on Corporate Governance to “disseminate best practices and increase the ownership of reform in developing countries and transition economies.”⁹⁷ This process involves producing a White Paper, which informs future efforts at policy design, implementation and enforcement. The procedure “assumes an inclusive approach building on close partnership with the most important constituents in the

⁹⁵ Information about the International Monetary Fund is drawn from: “What Is the International Monetary Fund?” online: International Monetary Fund (“IMF”) <<http://www.imf.org/external/pubs/ft/exrp/what.htm>>.

⁹⁶ Information about the World Bank is drawn from: “What is the World Bank?” online: <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040558~menuPK:34559~pagePK:51123644~piPK:329829~theSitePK:29708,00.html>>.

⁹⁷ “Corporate Governance Regional Roundtables” online: Organisation for Economic Cooperation and Development (“OECD”) <http://www.oecd.org/document/9/0,2340,en_2649_37439_2048457_1_1_1_37439,00.html>.

respective countries.”⁹⁸ However when examining the White Paper on Corporate Governance,⁹⁹ for example, the list of participants was comprehensive but by no means representative of all stakeholders. The “most important constituents” included representatives from the stock exchanges in Thailand, Kuala Lumpur, Mumbai and Shanghai, banks and consulting firms including Pricewaterhouse Cooper, Ernst & Young, Fidelity Investment Group, McKinsey & Co., UBS Warburg, and Deloitte and Touche, major companies such as Sony and Toyota, as well as various government officials and academics. However, no one represented any body that dealt with issues relating to the environment, workers rights or local economic concerns. Thus even initiatives which purport to give voice to all the players in developing nations, do not adequately consider the positions of all the relevant stakeholders.

These observations demonstrate that the IMF and the World Bank both have the ability to strongly influence the domestic policies which recipient nations adopt in the course of securing the bodies’ financial assistance. It also highlights that the agendas of the bodies are driven by wealthy states and interests that are rarely affected by the policies as they are not typically borrowers. While this power imbalance necessitates that the IMF and World Bank proceed with great caution, the concern is that these bodies are not accountable to any greater authority for their actions. It is troubling that there is no watchdog organisation ensuring that IMF and World Bank are accountable for the fiscal policies which they adopt, and which they encourage client states to adopt.

Equally however, there is an argument to be made that the IMF and World Bank could use this power to advocate for greater respect for human rights in developing countries. For example, a country’s loans could be contingent on the country’s ability to demonstrate an adherence to human rights and a respect for the environment. This would create an incentive for domestic governments to police MNEs who were operating within their borders to ensure that no corporation threatened the country’s loans. However, this creates another issue of accountability – why should international organisations, who are not elected and who are not accountable to the citizens of recipient nations, be in the position to dictate a country’s stance on human rights? And furthermore, who is in a position to criticize or reform the procedures undertaken by the IMF or World Bank in their pursuit of the laudable goal of promoting development? While there is potential for these organisations to take a stance on the issue of human rights abuses in developing countries, it would likely come at the cost of their integrity and at the cost of the recipient nation’s domestic sovereignty and democracy.

iii - World Trade Organization¹⁰⁰

⁹⁸ *Ibid.*

⁹⁹ “White Paper on Corporate Governance in Asia” online: Organisation for Economic Cooperation and Development (“OECD”) <<http://www.oecd.org/dataoecd/48/55/25778905.pdf>>.

¹⁰⁰ Information about the World Trade Organisation is drawn from: “Understanding the WTO” online: World Trade Organisation (“WTO”) <http://www.wto.org/english/thewto_e/what_is_e/tif_e/understanding_e.pdf>.

The WTO is the only international organization that deals with the rules governing trade between nations. Its goal is to “ensure that trade flows as smoothly, predictably and freely as possible.” In April 2004, 147 countries were members while another 30 countries were negotiating for entry. The WTO is the successor of the General Agreement on Trade and Tariffs (“GATT”); it arose out of the 1995 Uruguay Rounds.

The WTO achieves its mandate by negotiating trade agreements amongst its member states. These agreements are “essentially contracts, binding governments to keep their trade policies within agreed limits.” While the GATT dealt mainly with trade in goods, the WTO expanded the GATT’s mandate to include trade in services as well as trade in inventions, creations and designs. The engagement in the WTO takes place at the nation-to-nation level. Disputes arise when one country adopts a policy or takes action that other members feel breaks a WTO agreement, or when a country fails to honour its obligations under a WTO agreement. The WTO has a structured dispute resolution system, the Dispute Settlement Understanding, where issues are first heard by a panel, and can later be appealed to the Appellate Body. If a nation does not comply with a judgment handed down by the Appellate Body then sanctions may be imposed on the country that is in violation of an agreement. However, the Dispute Settlement Board is only accessible to WTO parties, and only WTO members can lodge a complaint against another WTO member state based on breaches of their trade agreements.

As another major arena for state-to-state negotiation and for international economic relations, one might query why the WTO has not taken a position on human rights such as labour standards. The issue of trade and labour standards has in fact been with the WTO since its inception; when the treaty creating the WTO was signed in April 1994, while most Ministers had an opinion on the issue, “the Chairman of that conference concluded there was no consensus among member governments at the time, and thus no basis for agreement on the issue.”¹⁰¹ Today there is a sharp divide on the issue between developed and developing nations; most developing nations

... see the issue of trade and labour standards as a guise for protectionism in developed-country markets. Developing-country officials have said that efforts to bring labour standards into the WTO represent a smokescreen for undermining the comparative advantage of lower-wage developing countries.¹⁰²

Furthermore, developing countries argue that “better working conditions and improved labour rights arise through economic growth.”¹⁰³ The consequence of adopting labour standards would therefore be that sanctions could be imposed against developing countries that could not adhere to labour standards, which “would merely perpetuate poverty and delay improvements in workplace standards.”¹⁰⁴

¹⁰¹ “Trade and Labour Standards: Subject of Intense Debate” online: World Trade Organisation (“WTO”) <http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm>.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

The present position of the WTO on trade and labour standards was adopted in Singapore in 1996, where Ministers stated that:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (“ILO”) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.¹⁰⁵

Thus while the WTO affirms that core labour standards are a necessity, they defer in that respect to the ILO’s efforts in that area.

iv. International Labour Organization¹⁰⁶

The ILO was created in 1919 to create an international standard for labour conditions. Presently the organization has 177 member states. The ILO sets minimum standards for: freedom of association; the right to organize; collective bargaining; abolition of forced labour; and equality of opportunity and treatment.¹⁰⁷ The ILO has a tripartite structure, unique in the UN, where employers’ and workers’ representatives have a voice alongside nation-state members.

The ILO standards are composed of Conventions, which are international treaties ratified by nation states, and Recommendations, which are non-binding positions which articulate guidelines. Compliance with ILO standards¹⁰⁸ is enforced through a regular supervision system as well as a special system of monitoring. The regular supervision system is based on the ratification of a labour standard and an obligation to submit to periodic reporting or to undertake specific measures to give effect to provisions. The special system of monitoring relates to specific complaints against a member state. Under Article 24¹⁰⁹ any national or international workers’ or employers’ organization may bring a representation claiming that a member state has failed to apply an ILO convention that it has ratified. Under Article 26¹¹⁰ a member state who has ratified the treaty may complain that another member state that has ratified the same treaty is

¹⁰⁵ *Ibid.*

¹⁰⁶ Information about the International Labour Organization is drawn from: “What are international labour standards?” online: International Labour Organization (“ILO”)

<<http://www.ilo.org/public/english/standards/norm/whatare/index.htm>>.

¹⁰⁷ “About the ILO” online: International Labour Organization (“ILO”)

<<http://www.ilo.org/public/english/about/index.htm>>.

¹⁰⁸ “How are international labour standards enforced?” online: International Labour Organization (“ILO”)

<<http://www.ilo.org/public/english/standards/norm/enforced/index.htm>>.

¹⁰⁹ “Article 24 Representation Procedure” online: International Labour Organization (“ILO”)

<<http://www.ilo.org/public/english/standards/norm/enforced/reprsnt/index.htm>>.

¹¹⁰ “Article 26 Complaints Procedure” online: International Labour Organization (“ILO”)

<<http://www.ilo.org/public/english/standards/norm/enforced/complnt/index.htm>>.

not in compliance. There are also Ad Hoc procedures¹¹¹ for bringing a complaint and for making complaints relating to the Freedom of Association.¹¹²

The ILO is a very promising avenue to lodge complaints, since it gives a legitimate voice to employers, employees and nations. Unfortunately, the ILO does not offer an avenue for making allegations against a specific corporation. If the human rights abuses are not rampant throughout a country, or throughout a particular industry within a country, the violation may be seen as an isolated event against which the ILO would not be entitled to take action.

D - Self-Governance

Today a prolific body of documents outline best-practices, principles and guidelines for how a corporation can accomplish goals such as the eradication internal corruption to ensuring that they are operating in a socially conscious manner. One of the earliest codes was created in 1977 by Reverend Leon Sullivan, a member of General Motors' board of directors.¹¹³ He proposed a code which would guide the company's operation in, and opposition to, apartheid South Africa. GM and Reverend Sullivan "accepted the premise that foreign businesses could play a beneficial role [in South Africa], but only if they actively opposed apartheid in their own workplaces, and ... on the national stage."¹¹⁴ What came to be known as the Sullivan Principles articulated the following.

1. Non-segregation of the races in all eating, comfort and work facilities.
2. Equal and fair employment practices for all employees.
3. Equal pay for all employees doing equal or comparable work for the same period of time.
4. Initiation of and development of training programs that will prepare, in substantial numbers, blacks and other nonwhites for supervisory, administrative, clerical, and technical jobs.
5. Increasing the number of blacks and other nonwhites in management and supervisory positions.
6. Improving the quality of life for blacks and other nonwhites outside the work environment in such areas as housing, transportation, school, recreation and health facilities.
7. Working to eliminate laws and customs that impede social, economic and political justice. *(Added in 1984.)*¹¹⁵

In spite of the adoption of these principles, Reverend Sullivan felt that GM's initiatives were not sufficiently impacting the apartheid government and two years after their adoption he motivated GM and

¹¹¹ "Ad Hoc Supervisory Mechanisms" online: International Labour Organization ("ILO") <http://www.ilo.org/public/english/standards/norm/enforced/ad_hoc/index.htm>.

¹¹² "Special Supervisory Mechanisms concerning Freedom of Association" online: International Labour Organization <<http://www.ilo.org/public/english/standards/norm/enforced/foa/index.htm>>.

¹¹³ Craig Forcece, "Globalizing Decency: Responsible Engagement in an Era of Economic Integration" (2002) 5 Yale H.R. & Dev. L.J. 1 at 23.

¹¹⁴ *Ibid.*

¹¹⁵ "The Sullivan Principles" online: Global Sullivan Principles <<http://www.revleonsullivan.org/principled/principles.htm>>.

more than 100 hundred other companies to leave South Africa.¹¹⁶ Twenty years later, in 1999, UN Secretary General Kofi Annan and Leon Sullivan re-launched the principles that underpinned the original Sullivan Principles as the “Global Sullivan Principles of Corporate Social Responsibility” which “call for multinational companies to play a much larger role in the advancement of human rights and social justice.”¹¹⁷ Today there are more than one hundred corporate governance codes adopted by various organizations in addition to those codes adopted by individual corporations.¹¹⁸

Recently the Organization for Economic Co-operation and Development (“OECD”) drafted guidelines entitled *Principles of Corporate Governance* promoting responsible corporate governance. The OECD is comprised of 30 member states whose commonalities are a self-described “commitment to a market economy and a pluralistic democracy.”¹¹⁹ Those “committed” countries are also wealthy countries; they produce two-thirds of the world’s goods and services.¹²⁰ The OECD also involves 70 non-member states. The OECD describes itself as a “forum to discuss, develop and refine economic and social policies.”¹²¹ While some of their work can develop into binding legal agreements, they are “also known for ‘soft law’ – non-binding instruments on difficult issues such as its Guidelines for multinational enterprises.”¹²²

The OECD’s *Principles of Corporate Governance*¹²³ (“Principles”) are exemplary of this “soft law” approach. The Principles are intended to assist governments and regulatory bodies to create and enforce effective rules to ensure optimal corporate governance. The Principles are “non-binding because their implementation must be adapted to different legal, economic and cultural circumstances.”¹²⁴ There is no body in the OECD that monitors compliance with any portion of the Principles and there is no body in the OECD working to see the Principles implemented in any country, whether an OECD member or not.

The Principles were originally published in 1999, and were widely adopted as a benchmark in OECD countries, amongst others, as well as by international bodies such as the World Bank. In 2002 governments called for a review to address the significant changes taking place in the corporate sector in

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Erik Berglof & Stijn Claessens, “Corporate Governance and Enforcement” online: World Bank Policy Working Research Paper No. 3409 <http://wdsbeta.worldbank.org/external/default/WDSContentServer/TW3P/IB/2004/10/06/000012009_20041006152130/additional/119519322_20041117160039.pdf>.

¹¹⁹ “Overview of the OECD” online: Organisation for Economic Cooperation and Development (“OECD”) <http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html>.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ “OECD Principles of Corporate Governance”, online: Organisation for Economic Cooperation and Development (“OECD”) <<http://www.oecd.org/dataoecd/32/18/31557724.pdf>>.

¹²⁴ “Frequently Asked Questions about the OECD Principles of Corporate Governance” online: Organisation for Economic Cooperation and Development (“OECD”) <http://www.oecd.org/faq/0,2583,en_2649_37439_31717413_1_1_1_37439,00.html>.

the fallout from major accounting scandals.¹²⁵ The review involved surveying corporate governance in OECD countries during 2002-2003, and that data was complemented with information gathered in various roundtable discussions and from public commentary.

The Principles devote Chapter 4 to *The Role of Stakeholders in Corporate Governance*.¹²⁶ The preamble to the section states that

The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises.¹²⁷

The provisions of the Chapter state that:

- A. The rights of stakeholders that are established by law or through mutual agreements are to be respected.
- B. Where stakeholder interests are protected by law, stakeholders should have the opportunity to obtain effective redress for violation of their rights.
- C. Performance-enhancing mechanisms for employee participation should be permitted to develop.
- D. Where stakeholders participate in the corporate governance process, they should have access to relevant, sufficient and reliable information on a timely and regular basis.
- E. Stakeholders, including individual employees and their representative bodies, should be able to freely communicate their concerns about illegal or unethical practices to the board and their rights should not be compromised for doing this.
- F. The corporate governance framework should be complemented by an effective, efficient insolvency framework and by effective enforcement of creditor rights.

While it is laudable that the OECD took a position on stakeholders, the section as it was originally drafted was criticized by various groups. For example the International Federation for Human Rights,¹²⁸ which represents 115 international human rights NGOs in 100 countries, was concerned about the lack of a definition for the term “stakeholder.” They proposed that the OECD adopt the definition used by the *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (“Norms”) which was adopted by the UN Subcommittee on Human Rights in May 2003. The Norms state that

... the term “stakeholder” includes stockholders, other owners, workers and their reps, as well as any other individual or group that is affected by the activities of transnational corporations or other

¹²⁵ “OECD Countries Agree New Corporate Governance Principles” online: Organisation for Economic Cooperation and Development (“OECD”)

<http://www.oecd.org/document/22/0,2340,en_2649_201185_31558102_1_1_1_1,00.html>.

¹²⁶ *Supra* note 123 at 23.

¹²⁷ *Ibid.*

¹²⁸ “Comments received from web consultations [on the OECD Principles of Corporate Governance]” online: Organisation for Economic Cooperation and Development (“OECD”)
<<http://www.oecd.org/dataoecd/38/22/27211386.pdf>>.

business enterprises. The term “stakeholder” shall be interpreted functionally in the light of the objectives of these Norms and includes indirect stakeholders when their interests are or will be substantially affected by the activities of the transnational corporation of business enterprise. In addition to parties directly affected by the activities or business enterprises, stakeholders can include parties which are indirectly affected by the activities of a transnational corporation or other business enterprises such as consumer groups, customers, governments, neighbouring communities, indigenous peoples and communities, non-government organizations, public and private lending institutions, suppliers, trade associations and others.¹²⁹

In its revisions the OECD did not adopt the Norms’ definition of “stakeholder,” or any other definition of the term.

Other people who offered feedback voiced concerns about the absence of a monitoring or compliance scheme. Comments by Shann Turnbull reflect many of the perceived shortcomings of the Principles with regard to stakeholders.

... [it] doesn’t provide guidelines or processes to assure that stakeholders are protected as required by law ... [and it] does not protect stakeholders not protected by law ... [and it] does not contain guidelines or processes to assure that stakeholders can obtain redress for violations of their rights.¹³⁰

So while it is promising that the OECD speaks of the ambiguous “stakeholder” it remains unclear who that person is and there is an absence of concrete steps for protecting the human rights of that “stakeholder.”

In spite of guidelines like the Principles being non-binding, it seems that self-enforced regulation is an option that is being adopted by a growing number of corporations who would like to improve their company’s position on corporate governance and social responsibility. As noted above, the original Sullivan Principles were brought to life by an individual working in a major MNE to ensure the company’s own political activism and social responsibility. This practice is very much alive and thriving. When President and CEO John M. Willson, of Canadian Placer Dome Inc., the world’s sixth largest gold mining company, spoke on the issue of corporate responsibility in the global marketplace, he explained his company’s new approach to their global business presence:

We believe that our Sustainability Policy is leading edge in our industry. This policy is the new model, which defines how Placer Dome understands and structures its role in society. Our Sustainability Policy sets out the criteria by which we expect to be judged, to which we will be held accountable. We are developing procedures to measure and verify our contribution to sustainability. We will adopt the "triple bottom line" of corporate reporting: financial results, environmental performance, and social contribution...

For this reason, we believe the new model of development will require that corporations enter into partnerships with stakeholders to achieve sustainability objectives. Host governments and communities are obvious partners. Others will be foreign aid agencies and the World Bank, playing a supporting rather than lead role in development. Still others may be nongovernmental organizations focused on environmental performance or social progress,

¹²⁹ *Ibid.*

¹³⁰ Shann Turnbull “Critique of OECD Principles of Corporate Governance” online: Henry Thornton <http://www.henrythornton.com/article.asp?article_id=2459>.

churches with their concerns for human well-being and research institutes with expertise in development.¹³¹

The adoption of voluntary codes relating to corporate social responsibility is also expanding to financial institutions. ABN Amro, Barclays, Citibank and WestLB have adopted the International Finance Corporation's¹³² guidelines for financing projects in emerging markets; the guidelines address issues like environmental assessment, natural habitats, indigenous peoples and child and forced labour.¹³³ The willingness of financial institutions to adopt these guidelines "comes as financial institutions around the world grow increasingly sensitive to reputational risk from participating in controversial transactions."¹³⁴

Companies in virtually all sectors of the economy have felt consumer backlash in response to socially unconscionable behaviour. LaSenza, a Canadian lingerie store, rapidly withdrew their business from Gina Form, a bra factory in Thailand, after an anti-sweatshop campaign targeted the LaSenza store in the Eaton Centre in Toronto.¹³⁵ Protestors distributed pamphlets explaining how La Senza, Jacob, The Gap and Victoria's Secret all purchased inventory from this particular factory, which had been identified in a report by the Thai National Human Rights Commission as having launched aggressive anti-union campaigns, dismissing numerous workers without cause and for intimidating their employees.

The Maquila Solidarity Network¹³⁶ had advocated for LaSenza to stay with the factory and for them to pressure the factory into improving working conditions; La Senza instead elected to sever relations with Gina Form. When The Gap was made aware of the problems with Gina Form, they launched two impromptu investigations of the factory, met with factory workers, and then approached management with a request that they resolve the dispute with their workers. This case highlights the degree of sensitivity that corporations are developing towards affiliations with companies that have socially irresponsible conduct, as well as showcasing the different ways a company can chose to handle a situation where the human rights of workers are allegedly being violated.

While self-regulated codes of conduct may be effective in assisting a company to adopt more socially conscious policies, to date they offer no recourse for a third-party to make a complaint against the company. Furthermore these codes are typically adopted by companies who have already turned their

¹³¹ John M. Willson, "Corporate Responsibility in the Global Marketplace" (1998) 2 Review 2 online: The North-South Institute and the Asia Pacific Foundation of Canada <<http://www.nsi-ins.ca/english/publications/review/v2n2/05.asp>>.

¹³² The International Finance Corporation is the private-sector arm of the World Bank.

¹³³ Demetri Sevastopulo "Four Banks adopt IFC agreement" Financial Times (6 April 2003) online: Three Gorges Probe <<http://www.threegorgesprobe.org/tgp/index.cfm?DSP=content&ContentID=6967>>.

¹³⁴ *Ibid.*

¹³⁵ Adria Vasil, "Dirty Lingerie – LaSenza and Jacob Cut Ties to Thai Bra Factory Despite Pleas From Activists to Stay Put" NOW (18-24 May 2003) online: NOW <http://www.nowtoronto.com/issues/2003-05--08/news_feature.php>.

¹³⁶ "About us" online: The Maquila Solidarity Network <<http://www.maquilasolidarity.org/aboutus.htm>>.

minds towards initiating change – a code of conduct is not likely to be adopted by a company who has no interest in changing their ways.

4 – CONCLUSION

The foregoing leaves no doubt that a void exists whereby it is tremendously difficult to hold MNEs operating in developing countries accountable for human rights abuses. The corporation's unique status at international law, the tremendous power imbalances stemming from disparity in wealth between developing nations, developed nations and many MNEs, as well as the competing and conflicting interests of the various stakeholders has created a sieve like system for capturing and holding accountable MNEs. It is hard to know where to look for an answer, although with the increasing pressures of globalization it becomes daily more evident that one is needed.