

CORPORATE ACCOUNTABILITY: ACHIEVING INTERNAL SELF-GOVERNANCE THROUGH SUSTAINABILITY REPORTS

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INTRODUCTION

Recent financial scandals, as well as public reaction to social and environmental impacts of corporate activity, have increased pressure for corporate accountability. In response to the pressure for socially accountable behavior, consumers have seen a growth of companies that advertise social responsibility and include socially responsible behavior in their mission statements.¹ But regulation is necessary to ensure that

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¹ The Body Shop and Ben & Jerry's both encompass social and environmental goals in their mission statements. The Body Shop's mission statement is "[t]o dedicate our business to the pursuit of social and environmental change; [t]o creatively balance the financial and human needs of our stakeholders: employees, customers, franchisees, suppliers and shareholders; [t]o courageously ensure that our business is ecologically sustainable: meeting the needs of the present without compromising the future; [t]o meaningfully contribute to local, national and international communities in which we trade, by adopting a code of conduct which ensures care, honesty, fairness and respect; [t]o passionately campaign for the protection of the environment, human and civil rights, and against animal testing within the cosmetics and toiletries

conduct matches a company's statements. Due to the inability of the U.S. Legislature and the international community to create a comprehensive mechanism to regulate and enforce corporate behavior, corporations and nongovernmental organizations ("NGOs") have responded to pressure for greater accountability by developing private codes of conduct to internally regulate corporate activity. Initially, U.S. companies adopted voluntary codes of conduct as a self-regulatory mechanism to avoid antitrust prosecution in the 1960s.² Today, pressure on corporate accountability extends beyond antitrust issues and includes behavior relating to financial, environmental, and social issues.

To operate efficiently, to maintain a positive public image, and to avoid civil and criminal liability, companies need to understand and respond to pressure for greater transparency.³ Adopting sustainability reports may be a way for companies to meet these demands. *Sustainable* is a popular buzzword that lacks a structured definition, but includes the integration of social, environmental, and economic factors to obtain a long-term solution that addresses these factors. Sustainability reports look at the social, economic, and environmental aspects of a company's operations to determine if a company can operate with long-term viability while minimizing the negative impacts of its operations. Since problems are multi-faceted, a sustainable solution requires more than one avenue (international law, the judiciary, regulatory agencies, or the legis-

industry; [t]o tirelessly work to narrow the gap between principle and practice, whilst making fun, passion and care part of our daily lives." The Body Shop International PLC, *Our Reason for Being: Mission Statement*, available at http://www.thebodyshop.com/web/tbsgl/about_reason.jsp (last visited Feb. 9, 2004) [hereinafter The Body Shop Mission Statement]. Ben and Jerry's mission statement is comprised of three parts: a product mission; an economic mission; and a social mission. Ben & Jerry's Homemade Holdings, Inc., *Our Mission Statement*, available at http://www.benjerry.com/our_company/our_mission/ (last visited Feb. 9, 2004) [hereinafter Ben & Jerry's Mission Statement]. In addition, both companies actively pursue actions that further their social ideals. The Body Shop supports community trade, often using indigenous groups practicing their traditional crafts as suppliers; is against animal testing in cosmetic products; is involved in several campaigns to defend human rights; and works to produce products that have a limited environmental impact, as well as advocating for environmental causes such as supporting the development of renewable energy. The Body Shop Mission Statement, *supra*. Ben & Jerry's uses packing techniques that minimize environmental impacts; minimizes energy use in its production; actively promotes sustainable agriculture; promotes causes like building of community play-spaces for children; and has an ice-cream flavor that highlights its campaign to fight global warming. Ben & Jerry's Mission Statement, *supra*.

² See Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 649-51 (1995) (finding that self-regulation through corporate compliance programs is key to avoiding criminal liability).

³ Warren Bailey, Address at External Risk in International Business, Johnson Graduate School of Management (Oct. 29, 2002) (notes on file with author).

lature) to get a solution.⁴ One avenue by itself cannot provide for a sustainable solution.⁵ An effective response must be comprehensive and all actors need to participate.⁶ With an effective sustainability report, companies can avoid criticism of their business practices and expand their business potential by appearing socially and environmentally conscious.⁷

This note will explore international and domestic actors and their possible role in working toward the goal of socially responsible corporate behavior. After exploring the various actors, this note will analyze self-regulation through sustainability reports as a way to achieve corporate accountability. Part I looks at the history of codes of conduct and government reaction to corporate activity, both of which are usually in response to specific corporate scandals. Part II examines the pressure from various stakeholders—the public (consumers and investors), NGOs, the judiciary, the legislature, and the international community—in reaction to corporate behavior. All stakeholders need to participate for companies to achieve socially responsible behavior, as an individual response fails to provide an adequate solution.

In response to the various pressures, some corporations implement sustainability reports. Part III analyzes sustainability reports to determine their impact on company operations. Though the reports are not legally binding and often lack an outside enforcement mechanism, they signify a company's attempt to change its policies. This attempt can create a favorable public perception and may limit litigation. To be effective, a sustainable report requires a collective response by regulatory agencies, the judiciary, and the legislature, as well as an international consensus of what behavior is acceptable. With external enforcement, sustainability reports can achieve corporate accountability. Independent review of company activities, which a NGO can do, is the best way to check behavior.

⁴ See generally John C. Dernbach, *Toward a National Sustainable Development Strategy*, 10 BUFF. ENVTL. L.J. 69 (2003).

⁵ *Id.*

⁶ Kofi Annan, *Global Compact Can Achieve its Goals Only if Large Companies Join Initiative, Secretary-General Tells Meeting of CEOs*, DAVOS, Jan. 30, 2004 [hereinafter Annan 2004] ("If businesses were willing to work together with the United Nations and other partners, such as global labour and civil society, then we could find solutions which no actor alone can produce; and if there were indeed willingness to learn and conduct a dialogue, then we could move from confrontation to cooperation.").

⁷ See Mark B. Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?*, 24 U. MIAMI INTER-AM. L. REV. 399, 431 n.167 (1993).

I. HISTORY OF CORPORATE CODES OF CONDUCT

Today, legislative and public pressure is usually in response to major headlines highlighting corporate scandals.⁸ Codes of conduct first became prevalent in the 1950s and 1960s, as corporations began to see codes as a way to avoid antitrust prosecution.⁹ When the public focused their attention on foreign bribery scandals in the 1970s,¹⁰ Congress passed the Foreign Corrupt Practices Act of 1977 (“FCPA”),¹¹ which regulates the foreign activities of U.S. companies.¹² In response to the Securities and Exchange Commission’s (“SEC”) voluntary disclosure program and the FCPA’s directives for internal controls, companies developed codes of conduct to limit criminal liability for internal behavior.¹³ Insider-trading scandals during the 1980s brought about more

⁸ See Walsh & Pyrich, *supra* note 2, at 650–62; see also Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1578–98 (1990). See generally Michael S. Baram, *Multinational Corporations, Private Codes, and Technology Transfer for Sustainable Development*, 24 ENVTL. L. 33 (1994).

⁹ See Walsh & Pyrich, *supra* note 2, at 649–50.

¹⁰ Investigations into bribery originated with Watergate—the Special Prosecutor charged corporations of illegally using funds during the 1972 presidential campaign. Pitt & Groskaufmanis, *supra* note 8, at 1582. The Securities Exchange Commission (SEC) got involved and initiated a voluntary disclosure program for questionable payments. *Id.* The SEC also made internal investigations and publicly disclosed the results. *Id.* These disclosures captured public attention, and “[i]n the wake of public disclosures about payments made to foreign officials by American-based companies, three foreign governments collapsed, American relations with some of its western allies became strained, and a monarchy was weakened.” *Id.* See also Peter W. Schroth, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVth International Congress of Comparative Law: Section V: The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593, 599–608 (2002), for an overview of bribery laws.

¹¹ Pub. L. No. 95-213, 91 Stat. 1494, 1498 (codified at 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78ff, 78m (1988)).

¹² The FCPA applies to subsidiaries of U.S. corporations. *Id.* As the world became aware of corruption, other countries passed such statutes. The Organization of Economic Cooperation and Development (“OECD”) responded by passing the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, OECD Doc. DAF/IME/BR(97)16/FINAL, 37 I.L.M. 1 (1997), at <http://www.oecd.org/daf/nocorruption/20nov1e.htm>. The Organization of American States passed the Inter-American Convention against Corruption, OAS Doc. OEA/Ser.K/XXIV.1CICOR/doc.14/96, 35 I.L.M. 724 (1996), at <http://www.oas.org/juridico/english/treaties/b-58.html>. The Council of Europe passed the Criminal Law Convention on Corruption of the Council of Europe. Criminal Law Convention on Corruption *opened for signature* Jan. 27, 1999, Preamble, Europ. T.S. No. 173; see also Phillip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT’L & COMP. L. REV. 297, 315 (2001). In addition, the U.N. General Assembly currently has an ad-hoc committee examining the possibility of a future U.N. convention against corruption. See generally United Nations, *Ad Hoc Committee on the Negotiation of a Convention against Corruption*, available at http://www.unodc.org/unodc/en/crime_cicp_convention_corruption_docs.html (last modified Nov. 21, 2003) (containing records of the sessions of the ad hoc committee).

¹³ See Pitt & Groskaufmanis, *supra* note 8, at 1585.

legislative reform.¹⁴ Congress, believing that the current codes of conduct were insufficient, passed the Insider Trading and Securities Fraud Enforcement Act of 1988.¹⁵ Fraud in the defense industry¹⁶ led to the Defense Industry Initiatives on Business Ethics and Conduct,¹⁷ which contains a set of principles that companies agree to adopt and enforce as codes of conduct and a voluntary disclosure program.¹⁸ When the public began to increasingly focus on environmental problems, the Environmental Protection Agency introduced the Environmental Auditing Policy Statement¹⁹ in 1986 as a way to ensure that companies comply with environmental laws.²⁰ In the latest round of financial fraud and misstatements, Congress reacted to public outrage by passing the Sarbanes-Oxley Act of 2002,²¹ which contains comprehensive guidelines for the financial statements of public companies.²²

The most comprehensive approach to self-regulation regarding social impacts began in 1977, when twelve U.S. companies reacted to apartheid in South Africa by developing a private code of conduct known

¹⁴ See *id.* at 1587–93. Though Congress has regulated insider trading since creating the SEC, Congress developed new regulations in response to scandals in the 1980s. *Id.* at 1587–90. The wave of insider trading scandals emerged with an anonymous letter to the Merrill Lynch compliance department, regarding activities of two employees; this letter led to a “domino” effect of prosecutions and investigations into different inside trading activities throughout the decade. *Id.*

¹⁵ Pub. L. No. 100-704, 102 Stat. 4677 (codified at 15 U.S.C. §§ 78c, 78o, 78t-1, 78u, 78u-1, 78f, 78kk, 80b-4a (1988)); Pitt & Groskaufmanis, *supra* note 8, at 1587–90.

¹⁶ After publicity over \$600 toilet seats, President Regan established the Packard Commission to investigate into defense contractor abuses. *Rattling the Pentagon*, L.A. TIMES, March 5, 1986 (home edition), at 2, 4. In a 1986 poll, respondents thought the government could save 45 cents of every defense dollar by eliminating waste and fraud. Charlie Gofen, *Crying Foul Over Defense Spending; Poll of Hawks, Doves and Others Shows Perception of Waste and Fraud*, WASH. POST, Aug. 19, 1986, at A1. Sixty-five percent of the respondents thought fraud and waste comprised more of the defense budget compared to 10 to 20 years prior, and 56% felt that there was more waste in defense spending compared to the private sector. *Id.*

¹⁷ 48 C.F.R. § 203.7000 (1988). The Initiative requires that “[g]overnment contractors must conduct themselves with the highest degree of integrity and honesty. Contractors should have standards of conduct and internal control systems that (1) Are suitable to the size of the company and the extent of their involvement in Government contracting; (2) Promote such standards; (3) Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts; and (4) Ensure corrective measures are promptly instituted and carried out. *Id.* The Initiative was adopted after a study by the Packard Commission. Pitt & Groskaufmanis, *supra* note 8, at 1594–95

¹⁸ *Id.* at 1594–95.

¹⁹ 51 Fed. Reg. 25,004, 25,006 (July 9, 1986).

²⁰ See Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1244–45 (1998).

²¹ Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of titles 11, 15, 18, 28, and 29 of the U.S. code).

²² See Recent Legislation, *Corporate Law—Congress Passes Corporate and Accounting Fraud Legislation*, 116 HARV. L. REV. 728 (2002).

as the Sullivan Principles.²³ The Sullivan Principles demonstrate the positive impact that a code of conduct can have when civil society, companies, and the legislature work together to confront a social problem. By 1986, 150 corporations had joined the Sullivan Principles, which called for nondiscriminatory practices in wages, health, housing, transportation, and job advancement opportunities.²⁴ Required dues from the signers funded an outside audit procedure, which the accounting firm Arthur Little conducted.²⁵ Congress codified the Sullivan Principles in the Comprehensive Anti-Apartheid Act of 1986,²⁶ which required any company with more than 25 employees to adopt the Sullivan Principles.²⁷ Civil society also played an integral role, through boycotts and investment decisions, in pressuring the South African government to eliminate apartheid.²⁸ The role of the Sullivan Principles in corporate activities, however, continues. Currently, several plaintiffs have filed class actions lawsuits against many companies on behalf of black South Africans for discriminatory practices during apartheid, the outcomes of which have yet to be determined.²⁹

II. PRESSURE AND RESPONSE

Though their reasons for pressure vary, corporations face pressure from consumers, investors, NGOs, the judiciary, and the legislature. The international community is a collective force that can also influence activity. Increasing scrutiny of non-economic externalities makes ethical conduct a vital aspect of company operations regardless of whether a legal duty exists.³⁰

²³ The Sullivan Statement of Principles (4th amplification), Nov. 8, 1984, 24 I.L.M. 1496 (1985); Elisa Westfield, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075, 1092 (2002).

²⁴ See Westfield, *supra* note 23, at 1092; William B.T. Mock, *Corporate Transparency and Human Rights*, 8 TULSA J. COMP. & INT'L L. 15, 21 (2000).

²⁵ See Mock, *supra* note 24, at 21.

²⁶ Pub. L. No. 99-440, 100 Stat. 1086 (codified at 22 U.S.C. 5001 (1988 & Supp. III 1991) (repealed by Pub. L. 103-149, 4(a)(1)(2), Nov. 23, 1993, 107 Stat. 1504 (as of the date on which the President certified to the Congress that an interim government, elected on a nonracial basis through free and fair elections, had taken office in South Africa)).

²⁷ See Westfield, *supra* note 23, at 1092-94.

²⁸ See *Big Stores Surprised by Anti-Apartheid Group Boycott*, DAILY NEWS REC., Jan. 8, 1987, at 9.

²⁹ See, e.g., *In re S. African Apartheid Litig.*, 2003 U.S. Dist. LEXIS 13797 (S.D.N.Y. May 21, 2003); John S. Friedman, *Paying for Apartheid; Comment; American Companies Being Sued*, THE NATION, June 2, 2003, at 7; Bruce Zagaris, *2 Class Actions Against 34 Multinational Companies Claim Damages for Apartheid Support*, 19 INT'L ENFORCEMENT LAW REPORTER 7 (2003).

³⁰ See Baker, *supra* note 7, at 408-09.

A. THE PUBLIC

While corporations are an integral part of the economy, the public can be hostile toward corporate activity. The public increasingly focuses on the social and environmental impacts of corporate activity, in addition to criminal accountability. The public has two different views of a corporation's role in society—either a corporation's duty is to shareholders and thus its role is to maximize shareholder profits, or it has duties to other constituencies in society besides shareholders and thus it needs to act in the interest of all constituencies.

1. Consumers

Consumers can influence business activities through their purchasing power. If consumer desire for corporate responsibility is strong enough, consumer-purchasing patterns will reflect this belief.³¹ When this occurs, companies need to address the social and environmental concerns of investors to maximize profits.³² Pressure for social responsibility can “influence the climate of opinion and collectively bring continuing pressures leading to step-by-step improvement of corporate standards.”³³ Today, with increasing consumer awareness, “[m]arket economics [can be] harnessed to support social responsibility, rather than being allowed to serve as the barrier”³⁴ The media plays an important role in forming and shaping public opinions by reporting on corporate behavior and the NGO reactions to corporate behavior.³⁵ Media publicity has the greatest impact on companies whose sales heavily depend on brand image and company goodwill.³⁶

With an increase in consumer awareness and pressure for accountability, companies are now more responsive to protests and boycotts, and are increasingly protective of a positive public image. For example, companies such as Levi Strauss have pulled their product out of countries with gross human rights violations and restricted investments in countries with known human rights abuses.³⁷ The actions of Levi's are a

³¹ When consumer behavior is strong enough, “corporations seeking to maximize their performance are under pressure to comply.” Blumberg, *supra* note 12, at 319.

³² *See id.*

³³ *Id.* at 319.

³⁴ *Id.*

³⁵ Some evidence suggests that corporations improve worker conditions after receiving media attention. Claire Moore Dickerson, *Human Rights: The Emerging Norm of Corporate Social Responsibility*, 76 TUL. L. REV. 1431, 1437–38 (2002).

³⁶ Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 674–75 (1995).

³⁷ *Human Rights: Ethical Shopping*, THE ECONOMIST, June 3, 1995, at 35 (reporting on a reduction of investments in Saipan factories after conditions were found unacceptable); William Beaver, *Levi's Is Leaving China*, 38 BUS. HORIZONS 2, Mar. 1, 1995 (reporting that Levi's ended business dealings with China due to human right violations); Kathryn L. Boyd,

result of increasing public awareness of human rights abuses and public pressure on U.S. companies to avoid forced labor.³⁸ Consumers are also increasingly concerned with worker conditions, given publicity about overseas sweatshops.³⁹ In a 1999 study, in response to sweatshop labor concerns, 76 percent of the respondents would pay a higher price for a product that a company did not make in a sweatshop.⁴⁰ Eighty-one percent of respondents felt that U.S. companies should uphold U.S. environmental standards in countries with less stringent laws purely on moral grounds.⁴¹ In addition, 86 percent (69 percent strongly) of respondents felt that U.S. companies should abide by U.S. health and safety standards for foreign workers on moral grounds.⁴²

In response to an active public campaign about worker conditions, Nike has become increasingly interested in maintaining a positive image and has begun to address worker conditions.⁴³ Nike developed a code of conduct regarding worker conditions and initiated a public campaign highlighting the positive conditions in its factories.⁴⁴ But actions do not always follow publicity. The NGO CorpWatch filed suit in California court against Nike in 1998 for false advertising in its treatment of Vietnamese workers.⁴⁵ In state court, the issue turned on free speech.

Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level, 1999 BYU L. REV. 1139, 1143.

³⁸ See David Moberg, *Bringing Down Niketown: Consumers Can Help, but Only Unions and Labor Laws Will End Sweatshops*, NATION, June 7, 1999, at 15.

³⁹ See *id.*

⁴⁰ Program on International Policy Attitudes, *Americans on Globalization: A Study of U.S. Public Attitudes* (Mar. 28, 2000), at http://www.pipa.org/OnlineReports/Globalization/executive_summary.html. The study does note that consumer behavior may not correspond to responses. *Id.* But the fact that respondents would be willing to support higher prices for non-sweatshop labor indicates that “if the US were to require imported products to be made in non-sweatshop conditions and Americans were to hear that, as a result, the costs of products were somewhat higher, most Americans would probably find this unobjectionable.” *Id.* Other polls indicate similar attitudes toward sweatshop labor, for example, “[a] November 1999 study by Marymount University’s Center for Ethical Concerns also found that Americans would pay more for non-sweatshop garments. In that poll, 86% said that would be ‘willing to pay up to \$1 more for a \$20 garment guaranteed to be made in a legitimate shop.’” *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See Allen Jenkins, *What Would You Do? Nike v. Kasky Case Puts Public Relations Campaigns under New Scrutiny*, COMM. WORLD, April 1, 2003, at 14; Moberg, *supra* note 38 (“No company wants to become the next Nike, which—despite its elaborate public relations response—has been dogged for most of the decade by well-documented charges that its closely controlled contractors pay subminimum wages, prefer countries with regimes that suppress labor organizing, expose workers to hazardous conditions, demand long working hours and even physically abuse employees at Nike’s Southeast Asian factories.”); Patrick Harverson & Robert Corzine, *In Defense of International Reputations*, FIN. TIMES (London), Oct. 31, 1997, at 16.

⁴⁴ See Dickerson, *supra* note 35, at 1432-33.

⁴⁵ *Kasky v. Nike Inc.*, 45 P.3d 243 (2002), *cert. granted*, 537 U.S. 1099 (Jan. 10, 2003), *cert. dismissed*, 123 S. Ct. 2554 (June 26, 2003) (dismissal of certiorari due to violation of the

The California Supreme Court held that the company's public relations campaign violated California's strict ban on false advertising because Nike intended for the public relations campaign on worker conditions to "maintain and increase its sales and profits."⁴⁶ These events signify the impact that public pressure can have on companies and the litigation potential in response to demands for social accountability. Corporate response to human rights campaigns represent a "new corporate social responsibility—a concept that is descriptive and normative, and is based on the will of a community far broader than the narrow commercial-corporate arena in which corporations have traditionally been thought to operate."⁴⁷

2. *Investors*

Profits or social reasons can motivate investors. Both types of investors may want companies to adopt more sustainable practices. Investors motivated by economic returns may advocate for accountability if it can increase dividends. In the past, religious orders or NGOs would buy a few shares of stock and propose corporate resolutions protecting human rights and labor rights, which seldom passed.⁴⁸ Today, institutional investors are making such demands.⁴⁹ In the wake of recent financial scandals,⁵⁰ companies can address investor concerns about financial accountability by developing an ethical business code.⁵¹ Richard Francis, head of the NGO Association of Chartered Certified Accountants in Australia and New Zealand, argues that an ethical code of conduct makes business sense, as businesses can minimize internal risks like fraud.⁵² Francis also notes that investors value and invest in companies with transparency and highly ethical standards that protect executives from

final decision doctrine, no standing by either party to invoke the court, and a premature adjudication of a novel constitutional question); see David G. Savage, *Justices to Hear Nike Free-Speech Claim: The Shoemaker Says its Public Statements are Shielded; Critics Say They are Advertising. The Case May Become Landmark in 1st Amendment Law*. L.A. TIMES, Jan. 11, 2003 (Saturday Home Edition), at C1. For an overview of Nike's campaign to protect its image and the Kasky suit that resulted, see Jenkins, *supra* note 43.

⁴⁶ *Kasky*, 45 P.3d at 258.

⁴⁷ Dickerson, *supra* note 35, at 1433 (footnotes omitted).

⁴⁸ Compa & Hinchliffe-Darricarrère, *supra* note 36, at 675.

⁴⁹ *Id.*

⁵⁰ See William F. Dietrich, *Legal and Ethical Issues for Attorneys Dealing with Financial Data: Heightened Scrutiny after the Enron and Andersen Debacle*, 1325 PRAC. L. INST. 925, 934 (2002) ("Even if few statutory or regulatory changes result from the Enron debacle, the SEC and the market will be more watchful of attorneys' roles related to financial statements.").

⁵¹ See *Ethical Code of Conduct for CFOs a Must, Says ACCA* (press release) (Oct. 22, 2002), at <http://www.accaglobal.com/news/releases/696082>.

⁵² *Id.* Total senior executive Jean-Pierre Cordier states "Investors want the best possible investment. Even if ethics is not their cup of tea, they consider companies that take into account good ethical principles to be well managed." Gumbel, *infra* note 58.

liability.⁵³ Socially responsible companies can protect their reputation in media reports and among consumers.⁵⁴ Reputation is important, as even the threat of a lawsuit in social or environmental areas can cause share prices to drop.⁵⁵

Social investing is a type of investment activity that invests in socially accountable companies, as social as well as economic reasons motivate investors.⁵⁶ While the market performance of these funds is debatable,⁵⁷ social investing is a growing trend among investors, after mainstreaming during the 1980s South African boycott.⁵⁸ “With more refined screening criteria built around corporate transparency and accountability, social investing could become a player in the process—and fulfill its promise to encourage more socially and environmentally responsible corporate behavior.”⁵⁹

B. NGOs

NGOs use a variety of methods to pressure companies to change their conduct. Media campaigns can bring awareness to issues and can mobilize public action.⁶⁰ The “real or perceived unethical conduct” by multinational companies can influence public relations.⁶¹ NGOs also report on company behavior that may be problematic. Enron is an example of the various problems that can arise when a company has limited transparency. Besides the financial fraud that led to its ultimate collapse,⁶² the NGO Human Rights Watch issued a report in 1999 accusing the company of “complicity in human rights violations” through its subsidiary’s

⁵³ Gumbel, *infra* note 58. See also Michelle Chan-Fishel, *After Enron: How Accounting and SEC Reform Can Promote Corporate Accountability While Restoring Public Confidence*, 32 ENVTL. L. REP. 10967, *19 (2002).

⁵⁴ Examples of corporate responses include improvements of working conditions after receiving media attention, voluntary compliance with the OECD Convention, and selling anti-HIV/AIDS medication to developing countries at a reduced price due to pressure from negative media coverage. Dickerson, *supra* note 35, at 1437–41.

⁵⁵ Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT’L & COMP. L. REV. 451, 464–65 (2001).

⁵⁶ For an overview of what is social investing and the type of investments, see <http://www.socialfunds.com>.

⁵⁷ Compare Jon Entine, Commentary, *The Backlash of Social Investing*, CHI. TRIB., Oct. 14, 2002, at CN19 (“[S]creened companies do not outperform the market.”) with Melissa Allison, *Manufacturers Make Cleaner Air*, CHI. TRIB., Oct. 15, 2002, at N1 (“Over the past five years, the stocks of environmental leaders in almost every industrial sector outperformed their non-environmentally conscious counterparts by 300 to 3,000 basis points a year.”).

⁵⁸ See Entine, *supra* note 57. In Europe, about \$40 billion is invested in these funds. Peter Gumbel, *Total Clean Up*, TIME, Jan. 26, 2004 (Bonus Edition), at A10.

⁵⁹ Entine, *supra* note 57.

⁶⁰ See Klaus M. Leisinger, *Business Forum: Multinationals and the Third World; Sell Solutions, Not Just Products*, N.Y. TIMES, Feb. 21, 1988, § 3 (Late City Final Edition), at 3.

⁶¹ *Id.*

⁶² See Dietrich, *supra* note 50.

work in building an electrical power plant in India.⁶³ The report accused Enron of directly benefiting from the human rights violations by the India state government of Maharashtra.⁶⁴ Human Rights Watch believes that the Maharashtra government suppressed local freedom of expression and peaceful assembly, as well as arbitrarily detained, threatened, and used excessive force against residents.⁶⁵ Human Rights Watch also accused Enron of paying and materially supporting state forces that committed human rights abuses by using the state police to protect the plant site and allowing the police to use company helicopters to monitor and harass local activists.⁶⁶ Further accusations include the failure to respond to complaints that the contractors threatened or attacked local villagers that opposed the project.⁶⁷ Enron, however, did not respond to questions about the human rights violations.

Companies often develop codes in response to public pressure and NGO demands. For example, Starbucks developed a code of conduct in 1995 for working conditions at their Guatemalan supplier plantations.⁶⁸ Starbucks developed its code in collaboration with the U.S.-Guatemala Labor Education Project, a coalition of religious, labor, and environmental organizations in Washington.⁶⁹ When the NGO first approached Starbucks, the president declined to meet with the members, and cited CARE as Starbucks' "social cause."⁷⁰ The coalition began a public campaign, which included passing out pamphlets in front of stores, and drafted a code of conduct for Starbucks to adopt.⁷¹ Starbucks and the U.S.-Guatemala Labor Education Project began communicating, and "[t]he Project became convinced that Starbucks' social responsibility concern was genuine, and Starbucks was reassured that the Project was not a 'company-buster' but sincerely interested in improving labor rights and working conditions in Guatemala."⁷² The code of conduct developed with the Project represents the company's transition from funding mere social causes to incorporating the social impacts of its operations into company policies. Starbucks now has a comprehensive code of con-

⁶³ Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations*, at <http://www.hrw.org/reports/1999/enron/> (last visited Feb. 9, 2004).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Compa & Hinchliffe-Darricarrère, *supra* note 36, at 683–85.

⁶⁹ See *id.* at 683.

⁷⁰ See *id.* at 683–84. Operating in over 60 countries, "CARE is one of the world's largest private international humanitarian organizations, committed to helping families in poor communities improve their lives and achieve lasting victories over poverty." CARE, *About CARE*, at <http://www.careusa.org/about/index.asp> (last visited Feb. 9, 2004).

⁷¹ Compa & Hinchliffe-Darricarrère, *supra* note 36, at 684.

⁷² *Id.* at 685.

duct, the Corporate Responsibility Annual Report, which covers worker rights as well other aspects of its operation that relate to socially responsible behavior.⁷³ Starbucks first published this report in 2001.⁷⁴

NGOs are also active in litigation, bringing lawsuits against companies for issues ranging from false advertising to human rights violations.⁷⁵ NGOs can financially pressure companies by initiating consumer boycotts. Other ways of exerting economic influence arise through stock exchange listings and disclosure requirements, minority shareholder resolutions, and pressure from investment funds.⁷⁶ When companies agree to work with NGO demands, the NGO can audit compliance.

Some issue-oriented NGOs specifically deal with corporate codes, while other NGOs include corporate accountability as a part of their activities.⁷⁷ Social Accountability International is a human rights organization dedicated to improving workplaces and communities by developing and implementing socially responsible corporate standards.⁷⁸ To ensure compliance, the organization calls for independent auditors to monitor the voluntary standards.⁷⁹ The Foundation for Taxpayer and Consumer Rights is currently creating a corporate accountability agenda to prevent financial fraud in order to protect consumers, taxpayers, pensioners, and investors.⁸⁰ Human Rights Watch, which has offices throughout the globe, has a special division on corporations and human rights.⁸¹

The Fair Labor Association (“FLA”) is a NGO that has developed a workplace code of conduct to eliminate sweatshops in the U.S. and abroad.⁸² The FLA code focuses on employee rights issues, such as forced labor, child labor, harassment or abuse, nondiscrimination, freedom of association, collective bargaining, wages and benefits, hours of

⁷³ Starbucks, *Corporate Social Responsibility, Annual Report* (2002), available at http://www.starbucks.com/aboutus/CSR_FY02_AR.pdf. The certified public accounting firm Moss Adams conducted an independent verification of the 2002 Report. *Id.* at 2, 32.

⁷⁴ *Id.* at 2. The goal of the Report is “to provide transparency on [its] business practices, measurements of [its] performance and benchmarks for future reporting.” *Id.*

⁷⁵ See *supra* note 43–47 & accompanying text.

⁷⁶ Ward, *supra* note 55, at 465–66.

⁷⁷ See David Petrsek, *Corporate Legal Accountability and Human Rights—Beyond Voluntarism*, at http://www.ethicalcorp.com/content_print.asp?ContentID=55.

⁷⁸ Social Accountability International (intro website); at <http://www.cepaa.org> (last visited Feb. 9, 2004).

⁷⁹ *Id.*

⁸⁰ See Foundation for Taxpayer and Consumer Rights, *Corporate Accountability*, at <http://www.consumerwatchdog.org/corporate> (last visited Feb. 9, 2004). The Enron collapse and following corporate frauds triggered the organization’s push for corporate accountability. *Id.*

⁸¹ Human Rights Watch, *Corporations & Human Rights*, at <http://hrw.org/doc/?t=corporations>.

⁸² Fair Labor Association, *Workplace Code of Conduct*, at <http://www.fairlabor.org/html/CodeOfConduct/index.html> [hereinafter FLA Workplace].

work, and overtime compensation.⁸³ A company that adopts the FLA code accepts external monitoring of contractor factories.⁸⁴ To ensure higher industry standards and to obtain consumer confidence that products, regardless of the contractors or suppliers, are made using humane standards, the FLA states:

Any Company that determines to adopt the Workplace Code of Conduct shall, in addition to complying with all applicable laws of the country of manufacture, comply with and support the Workplace Code of Conduct in accordance with the attached Principles of Monitoring and shall apply the higher standard in cases of differences or conflicts. Any Company that determines to adopt the Workplace Code of Conduct also shall require its licensees and contractors and, in the case of a retailer, its suppliers to comply with applicable local laws and with this Code in accordance with the attached Principles of Monitoring and to apply the higher standard in cases of difference of conflicts.⁸⁵

The FLA's board of directors reflects a partnership between industry and civil society. The members include Daniel R. Gluckman from Akin Gump Strauss Hauer & Feld LLP as Chair of the Board, and representatives from Reebok International Ltd., Princeton University, the National Council of Churches, the National Consumers League, Phillips Van Heusen Corp., Adidas-Salomon, the University of Notre Dame, Nike Inc., Levi Strauss & Co., the Lawyers Committee for Human Rights, the National Organization of Women Legal Defense and Education Fund, the Orville H. Schell Center for Human Rights, the University of North Carolina-Chapel Hill, and Liz Claiborne.⁸⁶

C. THE JUDICIARY

Tribunals in either the home country (the company headquarters) or the host country (where production occurs) can regulate corporate activity. The judiciary in the home country is an important enforcement mechanism, as violations like unfair labor practices often occur in host countries that lack an accountable government or lack the resources that

⁸³ *Id.*

⁸⁴ For a comprehensive overview of FLA's monitoring program, see Fair Labor Association, *Monitoring Guidance and Compliance Benchmarks*, at <http://www.fairlabor.org/html/monitoringtext.html>.

⁸⁵ FLA Workplace, *supra* note 82.

⁸⁶ FLA, Board of Directors, at <http://www.fairlabor.org/html/affiliates/board.html>.

are necessary for effective enforcement.⁸⁷ The legal evolution of corporate accountability follows the development of holding individuals criminally responsible for serious human rights abuses since holding states accountable for human rights violations was an inadequate way to achieve accountability.⁸⁸ A problem with judicial activity is how to hold a corporation accountable, given the corporate structure.⁸⁹

Though the judiciary has helped foster conditions that allow for economic growth, courts have also played with the idea that corporations have a social responsibility. In *Theodora Holding Corp. v. Henderson*, a shareholder sued for loss of income from the board of directors' decision to make charitable contributions.⁹⁰ The Delaware Court of Chancery stated "unless corporations carry an increasing share of the burden of supporting charitable and educational causes that the business advantages now reposed in corporations by law may well prove to be unacceptable to the representatives of an aroused public."⁹¹ But charitable contributions must be reasonable, which the court determined to be within the federal tax deduction for charitable gifts in the Internal Revenue Code.⁹² The court reasoned that the "relatively small loss of immediate income" to shareholders "is far out-weighed by the overall benefits flowing from the placing of such gift in channels where it serves to benefit those in need . . . thereby benefiting [shareholders] in the long run."⁹³

Since production occurs in the host country, the host country has jurisdiction over production activities. Nicaragua recently enacted a law, entitled "Emergency Law for Banana Workers Injured by Usage of DBCP-Based Manufactured Pesticides," which allows Nicaraguan workers to sue foreign companies that used DBCP, which is a pesticide.⁹⁴

⁸⁷ See Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 82 (2002).

⁸⁸ See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 464 (2001).

⁸⁹ For a discussion of cases in the United States, England, Canada, and Australia, see Ward, *supra* note 55, at 456–58. *But see* Baker, *supra* note 7, at 400, 414–15 (finding that private codes are an effective method to overcome public law limitations in order to make multi-national corporations ethically accountable and to balance corporate negotiations with developing countries).

⁹⁰ 257 A.2d 398, 399 (Del. Ch. 1969).

⁹¹ *Id.* at 404.

⁹² *Id.* at 405.

⁹³ *Id.*

⁹⁴ Ley Especial para la Tramitacion de Juicios Promovidos por las Personas Afectadas por el Uso de Pesticidas Fabricados a Base de DBCP, Ley No. 364, G.D.O. No 12, del 17 de Encero del 2001. The law requires corporate defendants to put up a US\$100,000 bond within three months of being served with a suit regarding DBCP, a pesticide used in banana-growing regions. *Id.* at Art. 4; David Gonzalez with Samuel Lowenberg, *Banana Workers Get Day in Court*, N.Y. TIMES, Jan. 18, 2003, at 1. Field workers in Central America, the Caribbean, Africa, and the Philippines complain of sterility, cancer, and birth defects in children resulting from exposure to DBCP. Gonzalez, *supra*. As a result of the Nicaragua law, over 400 cases

The Environmental Protection Agency suspended the use of DBCP in the U.S. in 1979 after studies showed that it increased the risk of cancer and caused sterility and genetic damage.⁹⁵ Today, foreign workers on banana plantations that supply American markets are exposed to DBCP.⁹⁶ Using the Nicaragua law, a Nicaraguan judge in December 2002 ordered three U.S. companies (Dow Chemical Company, Shell Oil, and Standard Fruit Company) to pay \$490 million to 583 banana workers for exposing them to DBCP.⁹⁷ But the litigation and enforcement potential of foreign suits is limited given the desire of countries to attract foreign investment.⁹⁸ Further, such countries often lack an effective legal system or the laws necessary to bring litigation.⁹⁹

The home country judiciary may also be a way to achieve accountability. The U.S. judiciary has been hesitant to hold companies accountable for overseas actions, but a recent interpretation of the 1789 Alien Tort Claims Act ("ATCA") has opened the door for such cases.¹⁰⁰ *Doe v. Unocal*¹⁰¹ is the first United States case to find that a U.S. corporation may be accountable for foreign human rights abuses.¹⁰² The Ninth Circuit held that there was sufficient evidence to hold Unocal liable for aiding and abetting with the human rights abuses that the Myanmar military committed in furtherance of a joint oil pipeline project between Unocal and the Myanmar government.¹⁰³ The court held the aiding and abetting

have been filed on behalf of 7,000 plaintiffs, against foreign companies for compensation over \$9.6 billion. *Id.*

⁹⁵ 44 Fed. Reg. 65,169 (1979); EPA, Technology Transfer Network Air Toxics Website, 1,2-Dibromo-3-Chloropropane (DBCP), at <http://www.epa.gov/cgi-bin/epaprintonly.cgi>.

⁹⁶ Gonzalez, *supra* note 94.

⁹⁷ Franco v. Dow Chemical, 3d Civil Court (Dec. 11, 2002) (unpublished); see *Lawyer: Nicaraguan Judge Orders U.S. Companies to Pay \$490 Million to Banana Workers Affected by Pesticide*, ASSOCIATED PRESS, Dec. 14, 2002, available at WL, APWIRESPLUS. Dole admitted that it increased its legal reserves by over \$10 million because of the lawsuits. Gonzalez, *supra* note 94.

⁹⁸ Companies also lobby foreign government officials. Dow Chemical Company, Shell Oil, and Dole have been working with the Bush administration to pressure Nicaragua to repeal the law. Gonzalez, *supra* note 94 ("The companies 'implied that they would do everything short of declaring war,' a senior Nicaraguan official said.").

⁹⁹ This insight stems from my own personal experience.

¹⁰⁰ "The district courts shall have original jurisdiction of 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." 28 U.S.C. § 1350 (1789). Compare *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that a violation of customary international law gives rise to cause of action and jurisdiction because customary international law is part of domestic law) with *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring) (finding that customary law does not give rise to a cause of action and therefore ATCA does not give both a cause of action and jurisdiction).

¹⁰¹ *Doe v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002).

¹⁰² See generally David I. Becker, *A Call for the Codification of the Unocal Doctrine*, 32 CORNELL INT'L L.J. 183 (1999).

¹⁰³ See *Unocal*, U.S. App. LEXIS 19263 at 32-38.

standard for liability to be “knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime.”¹⁰⁴ The court remanded the decision to determine whether Unocal intended to facilitate commission of the crimes of forced labor, murder, and rape.¹⁰⁵ *Unocal* creates the potential to hold other corporations accountable for foreign activities. Courts could hold corporations liable for violating human right *norms* like genocide, torture, and slavery; these are crimes that by definition apply to private actors.¹⁰⁶ Corporations could also be liable for human right *violations* when they act with public officials.¹⁰⁷ The problem is that *Unocal* lacks specific guidelines for companies to tailor their actions to avoid liability, especially when they operate in a country with a government that actively disregards human rights.¹⁰⁸ But with cases against companies like Citigroup, Shell, Ford, and IBM,¹⁰⁹ the judiciary will further define the doctrine’s exact scope unless corporate pressure causes the legislature to repeal the ATCA.¹¹⁰

Complainants also use class action lawsuits to hold companies accountable for foreign and domestic activities. NGOs and concerned individuals have filed class action lawsuits against companies for violating “[n]on-traditional economic and property rights, environmental rights, as well as cultural and social rights.”¹¹¹ Included in the class action category are lawsuits against companies like Daimler-Chrysler, Deutsche Bank, BMW, and Volkswagen for their participation with the Nazi government during the Holocaust.¹¹² Plaintiffs have also filed lawsuits for reparations from companies that profited from slavery.¹¹³ As previously

¹⁰⁴ *Id.* at 36.

¹⁰⁵ *Id.* at 83.

¹⁰⁶ See Stephens, *supra* note 87, at 86–87.

¹⁰⁷ *Id.*

¹⁰⁸ See Becker, *supra* note 87, at 206–07.

¹⁰⁹ These companies are being sued for apartheid-era activities. Friedman, *supra* note 29; Zagaris, *supra* note 29.

¹¹⁰ Jenna Greene, *Gathering Storm, Suits that Claim Overseas Abuse are Putting U.S. Executives on Alert and their Lawyers on Call*, LEGAL TIMES, July 21, 2003, at 1. For further discussion on corporate lobbying to repeal the ACTA, see *infra* note 118.

¹¹¹ Boyd, *supra* note 20, at 1169.

¹¹² In response to the pending suits, some companies have announced plans to contribute to a German government fund designed to compensate Holocaust victims and their heirs. See *id.* For an overview of the Holocaust-era lawsuits, which led to settlements for many victims and their heirs, see Michael J. Bazylar & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOKLYN J. INT’L L. 683 (2003).

¹¹³ Ira J. Hadnot, *Slave Descendants Bound and Determined to be ‘Made Whole Again’*, KNIGHT RIDDER/TRIBUNE NEWS SERVICE, Sept. 5, 2002 (noting that reparation advocates disagree if money would go to individuals or social programs and critics point out that there is no fair way to determine what payments should be); Al Swanson, *Commentary: Reparations Suits Fuel Debate*, U.P.I., Jan. 8, 2004. Since March 2002, five federal lawsuits have been filed against banks and tobacco and cotton companies for reparations for 35 million descendants of African slaves. Swanson, *supra*. One class action suit is based on a 2002 ordinance of the

discussed, class actions are also pending against 34 multi-national companies for racial practices during apartheid.¹¹⁴

Given the potential litigation impact, companies and corporate lobbying groups are interested in minimizing legal action. The National Foreign Trade Council (“NFTC”) had a closed-door seminar for its members, which includes companies with pending class action lawsuits.¹¹⁵ The NFTC vice-president discovered that many of the general counsel from major corporations at the seminar were not fully aware of their potential liability under the ATCA.¹¹⁶ To limit the reach of liability, groups such as the U.S. Chamber of Commerce, the National Association of Manufacturers, and the NFTC are currently lobbying Congress to change the ATCA.¹¹⁷ Though these lobbying groups may be powerful in Congress, many recognize that the ATCA and class action lawsuits are part of the broader globalization policy debate.¹¹⁸ Partner Robert Meyer of the law firm Foley & Lardner warns, “The breadth of the lawsuits and the number of companies sued have made a lot more people pay attention [But t]he plaintiffs lawyers have tried to push too far. It could be counterproductive for them.”¹¹⁹ The problem is determining a strategy to combat these suits.¹²⁰ Competitive Enterprise Institute’s President Fred Smith at a U.S. Chamber of Commerce forum stated that “[t]he moral framing of this issue has been disastrous for us. [The perception

Chicago City Council, entitled the “Chicago Slave Era Disclosure Act.” Swanson, *supra*; Hadnot, *supra* (noting that other cities like Atlanta and Dallas have passed resolutions that encourage a federal inquiry into reparations). Lawyers like Alexander Pires, who won a \$1 billion settlement for black framers that the U.S. government denied loans; Richard Scruggs, who got a \$368.5 billion settlement against tobacco companies; and Jonnie Cochran. Hadnot, *supra*.

¹¹⁴ See *supra* note 108 and accompanying text. “The complaints claim that the banks provided the funding that kept the apartheid government in power; that without oil, the police and military could not have functioned and the economy would have collapsed; that vehicle manufacturers supplied military vehicles and that technology companies supplied the resources for the national identity system. Companies were targeted not simply for doing business in South Africa but for allegedly supporting the apartheid system and profiting from crimes against humanity.” Friedman, *supra* note 29.

¹¹⁵ Jim Washer, *United States: Clean Up Your Act*, ENERGY COMPASS, Feb. 6, 2003, available at LEXIS, News Library, EINTL File; see also Jenna Greene, *supra* note 110. (“Business advocates nationwide are sounding the alarm about the once-obscure 1789 statutes now being invoked to hold multinational corporations liable for human rights abuses committed by government officials around the world.”).

¹¹⁶ See Washer, *supra* note 115.

¹¹⁷ Greene, *supra* note 110.

¹¹⁸ But this has not stopped some people in government from trying to prevent application of the ATCA to corporate activity. In May, President Bush signed Executive Order 13303, which prohibits judicial process against oil companies in Iraq. Opponents allege that President Bush is trying to circumvent litigation under the ATCA. Jenny B. Davis, *Old Law Bares its Teeth: Alien Tort Claims Act Bites International Firms*, 89 A.B.A. J. 20 (Oct. 2003).

¹¹⁹ Greene, *supra* note 110.

¹²⁰ *Id.* Covington & Burling partner Stuart Eizenstat argues “once you open up [a] statue, you never know how it’s going to come out. . . [it] could even get tighter.” *Id.*

is] we want to make money, and they want human rights. We have yet to find an effective argument to counter [this perception].”¹²¹ Given public anger over the financial scandals, the public “might find a new target if politicians and their corporate sponsors try to tamper with a law that is currently being used, however expansively, to hold such corporations to account.”¹²²

Whether or not a country has adequate laws to enforce corporate accountability, the judiciary is not, by itself, an adequate check. A domestic legal system has inherent limitations on international enforcement.¹²³ Professor Steven Ratner argues that the “exclusive or excessive focus on [domestic law] would be mistaken, because American principles of state action, which were developed in U.S. civil rights law and have proved critical in corporate ATCA cases, cannot simply be transferred to the international arena.”¹²⁴ The corporate structure is a major barrier to jurisdiction and limits liability.¹²⁵ Under the current liability rules, shareholders are not liable for corporate activities unless a court pierces the corporate veil.¹²⁶ Dismissing cases under the *forum non conveniens* also prevents adjudication of foreign activities.¹²⁷

¹²¹ *Id.* National Foreign Trade Council president William Reinsch adds “[T]hese are enormously sympathetic plaintiffs, people who have had terrible things happen to them. It’s difficult for judges to dismiss the cases” *Id.*

¹²² Washer, *supra* note 115; Greene, *supra* note 110 (“Labor and human rights activists, religious groups, environmental organizations, and plaintiff lawyers are mobilized to defend the statute, which they say often provides the only means of redress for victims of atrocities overseas.”).

¹²³ See Blumberg, *supra* note 12, at 298.

¹²⁴ Ratner, *supra* note 88, at 450 (arguing that international law should be used to regulate corporate activity). For an opposing view, see David T. Griswold, *Foreigners Use Obscure Law to Go After U.S. Companies*, INVESTOR’S BUSINESS DAILY (Feb. 5, 2003) (“Misuse of the Alien Tort Claims Act constitutes bad law, bad economics and bad foreign policy. The law was never intended to confer a new private right of action to aliens Hundreds of millions of poor people around the world will find it more difficult to escape poverty.”).

¹²⁵ See Blumberg, *supra* note 12 at 299 (finding that though a suit can be brought against the American parent corporation to enable jurisdiction, this brings with it the “high cost of the difficulties of establishing either the vicarious liability of the parent corporation for the actions of the subsidiary or the direct participation of the parent in the activity”).

¹²⁶ See FRANKLIN A. GEVURTZ, CORPORATION LAW 69–111 (2000). Courts have pierced the veil and held shareholders, directors, and officers accountable for corporate activities in the following circumstances: “1) Undercapitalization[;] 2) Failure to observe corporate formalities[;] 3) Non-payment of dividends[;] 4) Insolvency of the corporation “at the time” . . . [;] 5) Siphoning of corporate funds by the dominate shareholder[;] 6) Non-functioning of other officers and directors besides the defendant[;] 7) Absence of corporate records[;] 8) Non-participation in corporate affairs by the shareholders other than the defendant[.]” *Id.* at 71–72 (footnote omitted).

¹²⁷ See Anita Bernstein, *Conjoining International Human Rights Law with Enterprise Liability for Accidents*, 40 WASHBURN L.J. 382, 401–02 (2001).

D. THE LEGISLATURE

Congress has the power to regulate business activity.¹²⁸ But the legislature is generally hesitant to endorse private codes of conduct unless public attention highlights an issue that a code could address.¹²⁹ The failure to generate enough political support inhibits legislation for overall corporate reform.¹³⁰ Congress did introduce but failed to pass the Transparency and Responsibility for U.S. Trade Health Act of 2001, which would have imposed international environmental, labor, and human rights standards on U.S. corporations with the sanction of denying access to government trade programs.¹³¹

The legislative pattern of corrective legislation is a bandage approach to specific problems and fails to comprehensively prevent all types of corporate misbehavior. Given the recent scandals, the Senate, in a 97-0 vote, approved the Criminal Fraud Accountability Act of 2002, an accounting reform and corporate responsibility bill.¹³² Nevertheless, the magnitude and number of recent financial scandals has led to dialogue among some policymakers to look beyond corrective legislation and to focus on structural changes.¹³³

E. THE INTERNATIONAL COMMUNITY

An international code could be an effective way to regulate global practices, and many argue that this would be the best route to ensure corporate transparency, especially as major corporations operate in more than one country.¹³⁴ An effective code would need to include enforcement mechanisms, set specific standards, and cover all aspects of a company's operation. However, the political difficulty of getting nations to

¹²⁸ Congress' power to regulate corporations stems from the Commerce Clause in the Constitution. U.S. CONST. ART. I, § 8, cl. 3.

¹²⁹ See *supra* footnotes 7–20 and accompanying text.; see generally Westfield, *supra* note 23, at 1096–98.

¹³⁰ See Blumberg, *supra* note 12, at 315–16 (“It is likely that scandals of similar magnitude [as the illegal foreign campaign contributions and bribery of public officials] will be required before legislative reforms become a realistic possibility.”).

¹³¹ H.R. 460, 107th Cong. (2001).

¹³² The bill enhances penalties in white-collar crime for securities laws, shredding documents and obstruction of justice, and increases protection for whistleblowers. S. 2010, 107th Cong. (2002).

¹³³ See Chan-Fishel, *supra* note 53.

¹³⁴ See Baram, *supra* note 8, at 55–65 (noting that most companies fail to transfer environmental aspects of their codes in developed countries to their operations in developing countries); William H. Meyer & Boyka Stefanova, Symposium, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT’L L.J. 501, 506–07 (2001); Kofi Annan, *Sec-Gen Proposes Global Compact on Human Rights, Labour, Environment, in World Economic Forum Address*, Feb. 2, 1999 [hereinafter Annan 1999].

ratify an effective international code hinders this method.¹³⁵ In the 1970s, international organizations drafted, but seldom adopted, voluntary codes of conduct, including the never-adopted U.N. Code of Conduct for Transnational Corporations.¹³⁶ Though not adopted, the drafts are useful as they provide a framework and highlight the important issues. A comprehensive regulation on specific areas like environmental conduct would be difficult to develop given the policy and economic considerations of different countries.¹³⁷

Even if countries develop effective guidelines, regulation and enforcement is another hurdle. The U.N. Global Compact, launched in 1999, attempts to internationally regulate behavior.¹³⁸ The Global Compact is a code of conduct with nine principles that relate to human rights, labor, and the environment that companies can voluntarily adopt.¹³⁹ The code, however, lacks enforcement mechanisms and sanctions.¹⁴⁰

The International Labor Organization (“ILO”) also drafted a code of conduct—the Tripartite Declaration of Principles Concerning Multinational Enterprises of Social Policy.¹⁴¹ The ILO code is more comprehensive than the U.N. Global Compact, regulating issues such as subcontracting and job creation, but compliance is voluntary and it lacks enforcement sanctions.¹⁴²

¹³⁵ Peggy Rodgers Kalas, *The Implication of Jota v. Texaco and the Accountability of Transnational Corporations*, 12 PACE INT’L L. REV 47, 64–67 (2000).

¹³⁶ The U.N. Code of Conduct for Transnational Corporations focuses on corporate actions in developing countries, and includes issues regarding general human rights and the fair treatment of workers. See Stephens, *supra* note 87, at 79.

¹³⁷ *Id.* at 66–67.

¹³⁸ See U.N. GLOBAL COMPACT, at <http://www.unglobalcompact.org> (last visited Feb. 9, 2004). U.N. Secretary General Annan states that the Global Compact is “a useful platform for business, labor and civil society to conduct a dialogue. . . . It has helped break down barriers and overcome confrontation, as the different groups of actors have learned to listen to each other and to act together. The Compact has also helped to bridge the historical divide between the UN and business by giving many UN organizations a gateway to partnerships with business.” Annan 2004, *supra* note 6.

¹³⁹ The nine principles of the Global Compact are: 1) support the protection of international human rights within their sphere of influence; 2) make sure their own corporations are not complicit in human rights abuses; 3) uphold freedom of association and recognize the right to collective bargaining; 4) uphold the elimination of forced labor; 5) uphold the effective abolition of child labor; 6) uphold the elimination of discrimination in respect of employment and occupation; 7) support a precautionary approach to environmental challenges; 8) encourage the development and diffusion of environmentally friendly technologies; and 9) undertake initiatives to promote greater environmental responsibility. U.N. GLOBAL COMPACT, *supra* note 138.

¹⁴⁰ *Id.*

¹⁴¹ TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES OF SOCIAL POLICY, at <http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/triparti.htm> (last visited Nov. 16, 2003).

¹⁴² *Id.*

In response to concerns of corporate activity in national political affairs, the Organization for Economic Co-operation and Development (“OECD”) established Guidelines for Multinational Enterprises in 1976.¹⁴³ The Guidelines recognize the right of labor to organize and bargain collectively (it requires employers to provide facilities and information to union representatives, including financial and strategic information), ban employment discrimination, require advance notice for layoffs, and prevent management interference with the right to organize.¹⁴⁴ Though the Guidelines lack an enforcement mechanism, workers and unions have successfully resolved disputes through the OECD.¹⁴⁵

Though the international community has failed to implement an effective code, momentum may be growing. International organizations, including the World Trade Organization, have begun discussions on the social and environmental impacts of their activities, and the World Bank is developing projects that relate specifically to environmental impact.¹⁴⁶ If public pressure continues and political will is strong enough, using the international community may be the way to develop guidelines for accountable corporate behavior.

III. SUSTAINABILITY REPORTS

Sustainability reports are the most comprehensive code of conduct. Corporations or independent NGOs can develop these codes, and collaboration between the two often produces an effective code. Though voluntary, codes of conduct manifest a company’s desire to act within the law or to a higher standard of conduct. The basic problem is that the codes are voluntary and often lack an external enforcement mechanism. Sustainability reports are broad and vary, but they usually include factors relating to transparency such as social, environmental, and financial issues.¹⁴⁷ The reports also address specific issues of a company’s operations like resource use, philanthropy, worker conditions, and interaction between the company and the surrounding community.¹⁴⁸ For the most part, sustainability reports are not ground-breaking changes in behavior. The reports have mainstream acceptance—major corporations have

¹⁴³ OECD, *Declaration on International Investment and Multinational Enterprises* in DUNCAN C. CAMPBELL & RICHARD L. ROWAN, *MULTINATIONAL ENTERPRISES AND THE OECD INDUSTRIAL RELATIONS GUIDELINES* 243 (1983).

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See* Elisa Westfield, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT’L L. 1075, 1077 (2002); Ratner, *supra* note 88, at 537–38.

¹⁴⁷ Richard Osborne, *World Class Citizenship: Sustainability Reports Help Companies Make Their Case*, INDUS. WK., Oct. 2002, available at LEXIS, News Library (quoting Jon Entine).

¹⁴⁸ *Id.*

adopted them and they have international recognition. Though sustainability reports are gaining support in the U.S., stronger public pressure in Europe leads European companies to be more willing to implement these codes.¹⁴⁹ Ninety-two of the Britain's top 100 companies publish information about their environmental or social policies.¹⁵⁰ Support is also strong in Japan, where 72 percent of the top 100 companies have sustainability reports.¹⁵¹

A standardized sustainability report does not exist. But a standardized report would be ineffective, as a company needs to tailor its report to the important factors in its operation. Typically, a sustainability report is comprised of three parts: a) a broad statement defining the relationship between ethical conduct and the corporation's long-term goals; b) specific issues, which depend on what the company determines to be important given the industry; and c) an enforcement and compliance provision.¹⁵² The code should also be appropriate to the industry and corporate culture.¹⁵³ The codes can also address internal conduct or the conduct of an industry like the Rugmark code, which covers rug production.¹⁵⁴

Four main international frameworks set the general standard for sustainable reports: the U.N. Global Compact, the AccountAbility 1000, Social Accountability 8000, and Sustainable Reporting Guidelines developed by the Global Reporting Initiative.¹⁵⁵ The Guidelines are the fastest growing of the four, and companies such as Procter & Gamble, General Motors, and Nokia use them.¹⁵⁶ The Guidelines look at the social, economic, and environmental aspects of activities, products, and services.¹⁵⁷ The Institute of Social and Ethical AccountAbility runs the AccountAbility 1000.¹⁵⁸ The AccountAbility 1000 helps businesses de-

¹⁴⁹ See Gumbel, *supra* note 58, at A10. ("Across Europe, corporate social responsibility and sustainable development are hot trends that have spawned a fast-growing industry of consultants, accountants, and legal and p.r. specialists.")

¹⁵⁰ *Id.*

¹⁵¹ See Julie Macken, *Trick or Treat*, AUSTL. FIN. REV., Oct. 11, 2002, available at LEXIS, News Library, AFREVV.

¹⁵² See Baker, *supra* note 7, at 423–24; Pitt & Groskaufmanis, *supra* note 8, at 1641–45.

¹⁵³ See Pyrich & Walsh, *supra* note 2, at 645. By tailoring a program to the particular industry, the code will "cover legal issues and questions particular to that field of business." *Id.* at 687.

¹⁵⁴ See Mock, *supra* note 24, at 22–23. Rugmark began through a coalition of Indian carpet industry representatives, the South Asian Coalition on Child Servitude, and the Indo-German Promotion Council. Compa & Hinchliffe-Darricarrère, *supra* note 36, at 674. The Rugmark Foundation monitors the companies, which includes surprise visits by Foundation inspectors. See *id.* Retailers can advertise the label to consumers. See *id.*

¹⁵⁵ See Macken, *supra* note 151.

¹⁵⁶ *Id.*

¹⁵⁷ Global Reporting Initiative, *Sustainability Reporting Guidelines 2002*, available at <http://www.globalreporting.org/guidelines/2002/introla.asp>.

¹⁵⁸ ACCOUNTABILITY, at <http://www.accountability.org.uk> (last visited Feb. 9, 2004).

fine their goals and targets, measures their progress against targets, generates audits, reports on performance, and has feedback mechanisms.¹⁵⁹ Social Accountability 8000 relates to labor standards and audits company operations.¹⁶⁰ The U.N. Global Compact covers human rights, labor, and environmental issues.¹⁶¹

Though a code ultimately may not shield a company from legal liability, a code signifies a corporation's "desire to cooperate" with the public, the judiciary, and regulatory agencies.¹⁶² Companies should incorporate legal obligations, whether formal or informal, into their codes as a defense to possible legal action.¹⁶³ Given the corporate structure, it is important that sustainability reports address internal decision-makers and relations with contractors and suppliers.¹⁶⁴ The relationship with contractors and suppliers is especially important when the contractors and suppliers use labor in developing countries, as these countries may have lax standards or have limited enforcement capabilities.

A. COMPANIES WITH SUSTAINABILITY REPORTS

Currently, almost half of the 100 largest companies in the world have adopted some form of a sustainability report.¹⁶⁵ Brenda Pulley, the vice-president of corporate and government relations of Alcan Inc., a company that issued its first sustainability report in May 2002, notes that the report "helps [to] quantify what the company is doing to accomplish its sustainability goals. It really is our journey to sustainability. This is part of being transparent."¹⁶⁶ Companies usually publicize that they have adopted a sustainability report—they issue press releases relating to their reports and usually post the reports on their web sites.

¹⁵⁹ *Id.*

¹⁶⁰ The Social Accountability 8000 audits and certifies companies in their labor practice in nine key areas: child labor, forced labor, health and safety, free association and collective bargaining, discrimination discipline, working hours, compensation and management systems. See SOCIAL ACCOUNTABILITY 8000, at <http://www.cepaa.org> (last visited on Feb. 9, 2004).

¹⁶¹ See *supra* note 138–40 and accompanying text.

¹⁶² Baker, *supra* note 7, at 430.

¹⁶³ See Pitt & Groskaufmanis, *supra* note 8, at 1639–40.

¹⁶⁴ See Ratner, *supra* note 57, at 532.

¹⁶⁵ *CSR Network Survey Focuses on Environmental and Social Reporting, Corporate Reporting*, Bus. & ENV'T, July 1, 2003 [hereinafter *Survey*]. Over 25% of these companies had stated their position on human rights. *Id.*

¹⁶⁶ Osborne, *supra* note 147, at 1–2. Alcan's sustainability report has seven factors: "[i]ntegrating economic, environmental and social considerations into business planning[; r]educing the company's 'environmental footprint'[; o]utlining challenges in managing industrial and manufacturing processes[; d]emonstrating how its products enhance the quality of life[; e]nsuring high standards of leadership[; s]trengthening relationships with stakeholders[; d]emonstrating integrity in day-to-day operations." *Id.*

Ciba-Geigy recently developed an internal report specifically relating to the use of its pesticide product in a sub-Saharan African country.¹⁶⁷ The company's report, which targets pesticide use, promotes its social responsibilities in a developing country.¹⁶⁸ Though Klaus Leisinger, the director of third world relations at Ciba-Geigy, admits that the project is below the company's average profit, the cost of adopting a code with environmental protection beyond the host country's legally permissible level represents a "corporate policy [that] allows for extending profit expectations over the longer term in third world projects."¹⁶⁹ Leisinger also states, "in recognizing their special responsibilities and working sensitively in developing countries, multinationals can expect a smoother and more sustained market development in the long run. In other words, good ethics is good business."¹⁷⁰

B. BENEFICIAL ELEMENTS

The two key beneficial elements of a code of conduct on company operations involve its impact on the public and judiciary. In order for the judiciary to be a persuasive factor in a corporation's decision to implement a code, a legal duty needs to exist. As discussed, companies have legal duties like prohibitions against money laundering and corruption.¹⁷¹ Social responsibility lawsuits pose a new type of legal duty. Some would argue that legal norms are being extended from human rights conventions and are emerging as norms to regulate corporate behavior.¹⁷²

1. *Consumers and Investors*

When a code of conduct is responsive to NGO criticism, the NGO is less likely to publicize negative reports about company operations. Since public relations influence consumer purchases, companies want to minimize negative publicity. By incorporating business goals into a report, a company can ensure investors that economic success is still the main company goal.¹⁷³ Sustainability reports can also inform investors of cor-

¹⁶⁷ See Leisinger, *supra* note 60.

¹⁶⁸ The analysis involved creating an "organizational infrastructure—including reporting lines and job descriptions—so that all of those involved, within and without Ciba-Geigy, knew exactly what part they played in the project." *Id.* The company also "trained local farm workers to use our product, oversaw the pesticide's safe application and began an educational project that eventually reached 40,000 farmers." *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *supra* footnotes 9–29 and accompanying text.

¹⁷² See Ratner, *supra* note 88.

¹⁷³ See Baker, *supra* note 7, at 423 ("[T]he message conveyed is that the corporate officers have determined that, over the long-term, the interests of the shareholders will be enhanced—if their managers act ethically. . . [the] codes define the means [the companies] are willing to employ without significantly altering the ultimate goals of the entity.").

porate strategy. The SEC could make adoption of a report a prerequisite to a company's listing on the stock exchange.¹⁷⁴ In 2000, Britain passed legislation requiring pension funds to publish the percentage of their portfolio that they make in socially responsible investments.¹⁷⁵

2. *Potential Litigation Impact*

Though a code of conduct is not legally binding, it signifies a company's intent to stay within legal bounds.¹⁷⁶ It can provide a defense that a company acted within its code's regulations.¹⁷⁷ Nevertheless, codes lack a legal framework in which to function, as courts have not fully addressed the impact of codes in holding a corporation legally accountable for its actions.¹⁷⁸ Courts have used compliance codes as a factor to determine the degree of liability.¹⁷⁹ Courts should give weight to comprehensive sustainability reports, because under traditional notions of criminal liability, courts should not penalize companies that do not willfully commit wrongful acts.¹⁸⁰

Even if courts do not accept codes of conduct as a defense to or to mitigate liability, the codes can reduce potential litigation.¹⁸¹ By interacting with the NGOs that criticize the company, NGOs will be less

¹⁷⁴ On November 4, 2003, in response to the recent financial scandals, the SEC approved new rules for the NYSE and Nasdaq Stock Market that strengthen corporate governance standards. SEC, *SEC Approves NYSE, NASDAQ Strengthening of Corporate Governance Standards for Listed Companies*, at <http://www.sec.gov/new/press/2003-150.htm>. SEC Chairman William Donaldson said that the new rules "are at the core of a broad movement by our markets to enhance the corporate governance practices of the companies traded on them. . . . Investors will recognize significant benefits from these actions today and long into the future." *Id.* NYSE Section 303A(10) requires companies to adopt and disclose a code of business conduct and ethics that includes compliance provisions for directors, officers, and employees. SEC, *NASD and NYSE Rulemaking: Relating to Corporate Governance*, Release No. 34-48748 (Nov. 4, 2003). SEC changes regarding corporate governance continue. On January 14, 2004, the SEC voted to propose three regulatory initiatives to protect mutual fund investors, which is in response to recent scandals in the mutual fund industry. SEC, *SEC Proposes New Investment Company Governance Requirements, New Investment Advisor Codes of Ethics Requirements, and New Confirmation and Point of Sale Disclosure Requirements*, at <http://www.sec.gov/news/press/2004-5.html>.

¹⁷⁵ See Macken, *supra* note 151.

¹⁷⁶ See Pitt & Groskaufmanis, *supra* note 8, at 1634-35.

¹⁷⁷ See *id.* at 1645.

¹⁷⁸ See *id.* at 1644.

¹⁷⁹ See Pyrich & Walsh, *supra* note 2, at 666 (noting that once a corporation violates the law, prosecutors have discretion to determine if they will bring charges).

¹⁸⁰ See *id.* at 677.

¹⁸¹ See *id.* at 662, 666-71 (noting that the codes do not protect a corporation from liability, but rather offer rewards to corporations with comprehensive and enforced codes). Though the codes of conduct do not guarantee that corporations will be protected "from prosecution, the defense effectively discourages overzealous prosecutors from pursuing morally blameless actors. In sum, legal recognition of a corporate compliance defense will result in long-term savings both for the corporations that receive the benefit of the defense and for the law enforcement bodies responsible for corporate oversight." *Id.* at 684.

likely to file misconduct claims if a code of conduct is acceptable to their environmental or social demands. Corporations may also avoid litigation from regulatory agencies. The Department of Justice considers self-regulation when it determines whether it will prosecute.¹⁸² Ultimately, a company cannot avoid litigation by self-regulation.¹⁸³ But developing and enforcing sustainability reports is a way to detect potential problems and a way to correct conduct accordingly.

As more companies adopt codes of conduct and as the number of lawsuits filed against companies increases, judicial guidelines will define more clearly the legal impact of a code of conduct. The NGO International Labor Rights Fund filed a federal suit in 2001 against ExxonMobil, alleging ATCA violations for Exxon Mobils activities in Indonesia.¹⁸⁴ In June 2002, ExxonMobil adopted the Voluntary Principles on Security and Human Rights program, which the State Department developed in conjunction with the British Foreign and Commonwealth Office, the Dutch Ministry of Foreign Affairs, multinational oil and mining companies, and human rights organizations including Human Rights Watch. Though the alleged abuses occurred before ExxonMobil adopted a code of conduct relating to human rights issues, it will be interesting to see what, if any, the adoption will have on the court's analysis.

C. EXTERNAL REVIEW

Since a code of conduct is a private creation, enforcement capability is limited to a company's willingness to enforce its behavior standards. Conduct does not always follow statements, which makes review of activities key to ensure compliance. A code's impact beyond being a public relations ploy depends upon the strength of enforcement and oversight. A staff that oversees the code can ensure that the company follows and will adapt the code to future circumstances.¹⁸⁵ But independent external review that monitors compliance is the best way to ensure that a code is effective and to ensure transparency.¹⁸⁶ Like the Sullivan

¹⁸² U.S. Department of Justice, Office of the Deputy Attorney General, *Principles of the Federal Prosecution of Business Organizations* (Jan. 20, 2003) (noting factors that a prosecutor will look at to determine "whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents").

¹⁸³ See Pyrich & Walsh, *supra* note 2, at 679.

¹⁸⁴ The suit was filed on June 11, 2001. Terry Collingsworth, *Lawsuit Says Exxon Aided Rights Abuses*, N.Y. TIMES, (June 21, 2001), at C1.

¹⁸⁵ See Pyrich & Walsh, *supra* note 2, at 681 (noting that devoting staff to ensure compliance with codes is an additional expense).

¹⁸⁶ Between 2000 and 2003, the percentage of 100 largest corporations that had independent assessment of their sustainability reports increased from 8 to 18%. *Survey*, *supra* note 165 (noting that 76% of companies with independent assessment are European).

Principles, companies can establish an independent external review to audit compliance.¹⁸⁷ This would ideally be through a certified accrediting NGO. Today, Unocal's web site states that its impact in foreign countries allows it to "introduce modern values and concepts."¹⁸⁸ Further, "Unocal is able to raise concerns about human rights issues and privately present [its] views."¹⁸⁹ But a statement or report by itself does not provide information on whether a company is abiding by its statements and whether its actions actually have a positive impact.¹⁹⁰ The Association of Chartered Certified Accountants' proposal for corporate governance reform includes an independent audit mechanism.¹⁹¹

An independent certification program that targets a specific industry and independently reviews a company's policies and activities is the best way to ensure that a company maintains its sustainable promises. The Forest Stewardship Council ("FSC") is a certified accrediting group that acts as an external mechanism to ensure that companies harvest timber at a sustainable level.¹⁹² Home Depot changed its policy on old-growth timber after intense NGO pressure; in 1999, Home Depot initiated a forest policy in collaboration with the FSC.¹⁹³ Though NGOs recognized that Home Depot was working to meet their demands for more sustainable timber harvesting projects, the groups were not satisfied.¹⁹⁴ In response, Home Depot increased the amount of FSC certified products, issued reports on its progress, and introduced a new sustainable policy in January 2003.¹⁹⁵ Market forces can also challenge a company to change its policies. Home Depot also faced pressure from its biggest competitor, Lowe's Co. Lowe's decisions on its forestry practices and promise to

¹⁸⁷ See Mock, *supra* note 24, at 24.

¹⁸⁸ Unocal Corporation, *Business and Human Rights*, at <http://www.unocal.com/responsibility/humanrights/hr4.htm> (last visited Feb. 9, 2004).

¹⁸⁹ *Id.*

¹⁹⁰ See Gumbel, *supra* note 58 ("The big question . . . is whether all this marks a tangible change in the way corporations behave or whether it's simply 'greenwash,' an elaborate public relations exercise designed to make firms appear more sensitive than they really are.").

¹⁹¹ See Association of Chartered Certified Accountants, *Audit Committee Reform a Top Priority for Companies*, says ACCA (July 15, 2002), at <http://www.accaglobal.com/news/releases/591115> (stating that the independent audit committee should "recommend to shareholders the appointment of auditors who have served for more than a defined period (five to seven years), publish annual reviews of the independence of the external auditors, [and] . . . publish annual reports of the Committee's work, including risk management and internal control reviews").

¹⁹² Karen Jacobs, *Home Depot Adopts New Wood Purchasing Policy*, REUTERS NEWSERVICE, Jan. 2, 2003, available at <http://www.ran.org/news/newsitem.php?id=611>; see generally Errol E. Meidinger, *The New Environmental Law: Forest Certification*, 10 BUFF. ENV'T'L L.J. 211 (2003).

¹⁹³ Jacobs, *supra* note 192; The Home Depot Inc., *Wood Purchasing Policy*, available at <http://www.homedepot.com>.

¹⁹⁴ Harry R. Weber, *Home Depot Retooling Timber Policy, but Criticisms Still Persist*, ASSOCIATED PRESS, Jan. 2, 2003.

¹⁹⁵ See Jacobs, *supra* note 192; Weber, *supra* note.

phase out timber purchase from endangered forests placed pressure on Home Depot to comply with the FSC's demands.¹⁹⁶

D. PROBLEMS

Since the codes are privately enforced and agencies or statutes do not regulate them, their influence and potential effect will inevitably vary. Companies often develop the codes internally, which raises issues of what aspects the code will cover and if the code will address problematic areas. The codes should cover all aspects of operations and extend to contractors and suppliers, regardless of their location. Moreover, the lack of legal enforcement of codes causes some critics to consider them mere public relation ploys with little practical effect.¹⁹⁷ Though Unocal's web site now boasts its beneficial social and environmental behavior,¹⁹⁸ one cannot tell by merely reading the statements if the company has in fact changed its operations and is more accountable.

Critics also cite the costs to develop and implement the reports as another downfall. But the benefits may outweigh the costs if the reports influence consumer purchases and investment decisions. Companies need to know the implications of adopting a code of conduct, specifically with regard to profit and its ability to mitigate litigation. Though sustainability reports represent a desire to do well, they need to be beneficial to company operations.

Though companies often develop codes in response to NGO pressure, NGO pressure may not be justified. NGOs may not represent public, especially consumer, opinion about how a company should operate. NGOs may also not give an accurate description of a company's policies or operations. This is part of another problem—to whom are NGOs accountable? Negative publicity may not reflect reality or may ignore beneficial aspects of a company's operations. Lawsuits are costly and time-consuming, and companies may settle lawsuits to avoid these expenses, which in turn can increase the number of lawsuits in the future.

CONCLUSION

The potential for socially accountable corporate behavior is entering a new era as major corporations have begun to develop their own codes of conduct, often in collaboration with NGOs. Codes of conduct are a "natural result of legal and social pressures for the proper control and supervision of corporate agents. By adopting programs for preventing,

¹⁹⁶ See Jacobs, *supra* note 192; Associated Press, *supra* note 192.

¹⁹⁷ See Baker, *supra* note 7, at 417; Pitt & Groskaufmanis, *supra* note 8, at 1560 ("Adopting a code of conduct is tantamount to a commitment to engage in corporate self-regulation.").

¹⁹⁸ Unocal, *Unocal Corporate Responsibility*, available at <http://www.unocal.com/responsibility/index.htm> (last visited Feb. 5, 2004).

detecting, and reporting wrongdoing, corporations [recognize] the responsibilities inherent in their position in society.”¹⁹⁹ But more work is necessary to ensure the goal of accountability. The multiple aspects of the problem along with the international realm of actors create difficulties in developing a comprehensive international regulatory and enforcement mechanism. Accountability, however, is possible. Once an international consensus establishes general guidelines of acceptable corporate behavior, the next step is to target specific industries and companies to pressure them to enact their own codes of conduct to monitor behavior.²⁰⁰ Many companies have already implemented codes of conduct in response to such pressure. Continuing this process is both desirable and achievable. Sustainability reports are simply a more comprehensive code of conduct that addresses all aspects of a company’s operations.

Companies need a reason to develop an effective code and to ensure that the code remains effective in addressing all areas of concern. Sustainability reports need to produce a positive benefit to the company, which could be through limiting liability or the granting of a government benefit. “Companies violating their duties could face sanctions ranging from mere publication of a list of companies whose practices appear to fall below acceptable standards, to loss of particular benefits, such as preferential loans for overseas investments or permits for the import or export of commodities, up to criminal fines.”²⁰¹ Governments could also develop a regulatory scheme to comprehensively monitor companies incorporated in their country.

Labeling of products is an offshoot from codes of conduct. Labeling can increase consumer awareness about a company policy. A label can also target a specific segment of consumers that want to buy socially responsible products and are willing to pay a higher price for such products.²⁰² Industry groups, often cooperating with NGOs, can certify products that are of a certain standard (like the Rugmark label).²⁰³

¹⁹⁹ Pyrich & Walsh, *supra* note 2, at 690–91 (finding that legal recognition of codes of conduct is a necessary growth of the law in order to recognize corporations that are choosing to stay within legal bounds).

²⁰⁰ On June 24, 2004, the U.N. is holding a summit meeting on the Global Compact at its headquarters to address corporate responsibility issues and how it can be more effective in the future. Annan 2004, *supra* note 6. Annan states that to “tackle root problems,” the summit will need to address questions such as “can corporate performance help to overcome government deficiencies[;] how can corporate performance have a positive influence on government policy-making[;] how can we scale up promising solutions and achieve greater systemic change[;] how can we bring the financial community on board so that they recognize that a commitment to positive change can reduce risks[;] how do we need to change the mission and operations of the Compact to make us more effective in our undertaking.” *Id.*

²⁰¹ Pyrich & Walsh, *supra* note 2, at 534.

²⁰² See *supra* footnotes 41–43 and accompanying text.

²⁰³ See Ratner, *supra* note 88, at 531–32.

Both companies and governments have a role to play given political and economic interests.²⁰⁴ As precedent from judicial recognition of codes develops, it can help establish clearer guidelines on how to limit corporate liability. Regardless of whether a company develops a code of conduct, the code will only be as effective as its initial aim and its enforcement. Though voluntary, sustainability reports signify a positive reaction and a way to develop transparency, thereby helping to prevent corporate scandals and ensuring better business practices globally.²⁰⁵

²⁰⁴ See *id.* at 545.

²⁰⁵ In his address at the 1999 World Economic Forum in Switzerland, the U.N. Secretary General noted to his audience, "Many of you are big investors, employers and producers in dozens of different countries across the world. That power brings with it great opportunities—and great responsibilities. You can uphold human rights and decent labour and environmental standards directly, by your own conduct of your own business. . . . You can make sure that in your own corporate practices you uphold and respect human rights; and that you are not yourselves complicit in human rights abuses." Annan 1999, *supra* note 124.