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GOVERNANCE AND RESPONSIBILITY OF MULTINATIONAL ENTERPRISES: THE USE OF CODES OF CONDUCT AND LITIGATION TO CHANGE MULTINATIONAL ENTERPRISES' BEHAVIOR

By

MARIA FERNANDA MATACH

(Under the direction of Gabriel M. Wilner)

ABSTRACT

Today no regulation adequately makes multinational enterprises (MNEs) comply with minimum human rights, labor, and environmental standards. Although there are many international initiatives and corporate codes, they lack enforcement mechanisms sufficient to ensure compliance. Further, individuals attempting to litigate claims against MNEs have to overcome many obstacles, such as piercing the corporate veil and forum non conveniens dismissals.

A positive change will occur if developing countries jointly set minimum standards and focus on implementation and enforcement. It is also recommended that the international community support this process by exerting pressure on a country or MNE that is not complying with the minimum standards. Finally, it is very important to make litigation against MNEs an available remedy for individuals by providing adequate forums,

revising corporate law to prevent the evasion of responsibility by assertion of the separate entities principle, and applying a more sensitive forum non conveniens doctrine.

INDEX WORDS: Multinational enterprises, Codes of Conduct, Human rights, Labor standards, Environmental standards, Bribery, Litigation against multinationals, Corporate veil, Forum non conveniens.

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I. INTRODUCTION

As traditional enterprises have evolved and grown to become the complex group of enterprises known as multinational enterprises (MNEs), they have become principal actors in the international arena.[1] Unfortunately, there is no parallel between the growth of MNEs and the creation of new laws to regulate them. There is no binding international law for MNEs that could regulate their conduct and provide for liability.[2] Nevertheless, this does not mean that MNEs are not subject to any law. Under the sovereignty principle, a state has the right "to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies."[3] However, national laws are not always effective in controlling MNEs' operations.[4]

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[1] Jose Engracia Antunes, *The Liability of Polycorporate Enterprises*, 13 CONN. J. INT'L L. 197, 203-204 (1999).
[2] Tawny Aine Bridgeford, Note, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, *18* AM. U. INT'L L. REV. *1009*, 1015-16 (2003).
[3] Charter of Economic Rights and Duties of States, art.2 para. 2(b), G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, UN Doc. A/9631 (1974), *reprinted in* 14 ILM 251 (1975).
[4] Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123, 123 (1996).

Presently, MNEs play an important role in the global economy. In economic terms, they are as big as some countries,[5] in some cases even bigger,[6] and they mobilize a great deal of capital through their investments in different countries.[7] They have accumulated so much economic and political power that, in some instances, the host countries are not in an equal position to bargain.[8]

A MNE's wealth depends on its ability to access markets around the world so that it can take advantage of lower costs of labor and raw materials and of less restrictive laws.[9] In turn, foreign direct investment (FDI) by the MNE brings employment, technology, and capital to the host country.[10] Poor countries in need of FDI compete with each other to attract those investments; in order to gain a competitive advantage, they often lower their human rights and environmental standards and make exceptions in the application of their laws and regulations.[11] Not only are

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[5] *See* Antunes, *supra* note 1, at 203-204. For instance, the author points out that the annual revenue of Standard Oil equals the gross domestic product (GDP) of Denmark, and the annual revenue of IBM equals the GDP of Portugal and Norway.

[6] *See id.* For instance, the author mentions that the annual revenue of General Motors is higher than the GDP of Belgium. *See also* DETLEV F. VAGTS, WILLIAM S. DODGE & HAROLD HONGJU KOH, TRANSNATIONAL BUSINESS PROBLEMS, 201 (3d ed. 2003). The authors label the comparison between sales and GDP as misleading because "GDP is a measure of value added while sales are not". And under estimates of valued added, the authors shows that ExxonMobil is slightly larger than the economy of Pakistan, and General Motors is slightly larger than the economy of Peru.

[7] *Id.*

[8] Douglas M. Branson, *The Globalization of Corporate and Securities Law in the Twenty-First Century: The Social Responsibility of Large Multinational Corporations*, 16 TRANSNAT'L LAW. 121, 131 (2002).

[9] Elisa Westfield, Note, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075, 1080-81 (2002).

[10] *See* VAGTS, DODGE & KOH, *supra* note 6, at 204, analyzing the advantages and disadvantages of FDI.

[11] Meaghan Shaughenessy, *Human Rights and the Environment: The United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y 159, 161-62 (2000).

poor countries subject to pressure from other poor countries that engage in the race to the bottom, but they also fear the relocation of MNEs, a MNE power that acts as a "potent political force"[12] in the FDI allocation process. In sum, the concern is that both MNEs and poor countries may favor lower standards; the former because such standards improve production efficiency, the latter because the standards attract FDI.[13]

The debate concerning this issue started three decades ago,[14] but much has changed since then. In the beginning, host states were worried that MNEs were not observing local laws.[15] Now the interests are different, and host countries, eager to obtain FDI, are more lenient toward MNEs; as a result, "[MNEs] obey host country law, but they thereby ignore international standards."[16] Accordingly, it can be inferred that the interests of MNEs rarely match the interests of the general public, which in turn is not always represented by the host country governments.[17]

The issue is highly controversial and subject to improvements at the national and international levels, as well as in the private and public spheres. Two events occurred in the last decade that are significant towards establishing greater responsibility of MNEs. The first event is the

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[12] Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 466 (2001).
[13] Westfield, *supra* note 9, at 1081.
[14] Seymour J. Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship between International Legal Cooperation and Economic Development*, 10 AM. U.J. INT'L L. & POL'Y 1275, 1276 (1995).
[15] Sydney M. Cone, III, et al., *The Multinational Enterprise as Global Corporate Citizen*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 1, 26 (2001).
[16] *Id.*
[17] *See* Rubin, *supra* note 14, at 1278.

proliferation of codes of conduct for MNEs that will be analyzed in Part II. The second event is the wave of litigation that has taken place in the last years, pressing for greater imputation of liability on MNEs, which will be the object of study in Part III. In Part IV, five recommendations are proposed to achieve greater responsibility and accountability of MNEs. The proposals are based on gaps in the status quo, analyzed in Parts II and III, that impede adequate regulation of MNEs.

This thesis argues that an effective solution is possible only if host countries jointly raise their low standards. In addition, it is suggested that international organizations as well as MNE home countries can play an important role in this process by ensuring that each country is effectively enforcing the higher standards and MNEs are complying with host country laws, and by exerting pressure when they are not. It is also proposed, with the goal to promote the legal accountability of MNEs, that traditional concepts of corporate law be adapted to new challenges that are presented by MNEs, that host countries should ensure their nationals an adequate forum to litigate against MNEs, and that the forum non conveniens doctrines should employ a more sensitive criteria with attention to the special circumstances of each case.

II. CODES OF CONDUCT

Before beginning the analysis, some clarifications are necessary. Although the thesis refers to international standards in general, including human rights, labor, and environmental standards, the thesis will omit reference to specific environmental conventions to avoid a superficial analysis of an extensive issue. The paper will also omit reference to codes concerning specific sectors of industry[18] even thought the standards are more effectively addressed in a sector-by-sector basis; instead, the thesis will focus only on those codes and conventions that address MNEs or governments in general for the purpose of limiting the extension of the analysis.

A. Regulation from International Organizations

It can be found some regulation and initiatives, regarding the compliance of minimum standards and addressed to governments and/or MNEs, within the ambit of the United Nations, the Organization for the

[18] Examples of specific codes of conduct that were created within the ambit of the United Nations are The International Code of Marketing of Breastmilk Substitutes of 1981 by the World Health Organization (WHO) and the United Nations Children's Fund (UNICEF), and the International Code of Conduct on the Distribution and Use of Pesticides of 1985 by Food and Agriculture Organization (FAO), which was amended in 1989.

Economic Cooperation and Development, the International Labor Organizations, the World Bank, the International Monetary Fund, and the World Trade Organization.

1. Within the Ambit of the United Nations

The United Nations (UN) performed two works addressed to MNEs: the Draft Code and the Global Compact. Although the Draft Code is obsolete, it will be analyzed for its historic importance because it was the first initiative in this direction and it is the start point of the conflicts of interest between developed and developing countries that impede consensus on imposing standards of conduct to MNEs.

a. The Draft Code

In 1974, the UN reacted to the involvement of a MNE in the events that led to the coup d'etat in Chile by setting up the Commission on Transnational Corporations and the Information and Research Center on Transnational Corporations.[19] The action followed from the suggestions of a report by the Group of Eminent Persons, which had been established by the UN Secretary General and comprised representatives from developed

[19] Kari Tapiola, The Importance of Standards and Corporate Responsibilities: The Role of Voluntary Corporate Codes of Conduct 2 (OECD Conference, Paris, Sept. 20-21, 1999) *available at* http://www.oecd.org/dataoecd/9/4/2089872.pdf (last visited Aug. 5, 2004).

and developing nations.[20] The Commission had as a priority the formulation of the Code of Conduct for MNEs, and among other tasks, the enhancement of the bargaining power of poor countries in negotiations.[21]

The purposes of the Code included the following: "[to ensure] respect for national sovereignty, [to] establish policies of countries in which transnational corporations operate, … [to promote] the right of the host countries to regulate and monitor transnational corporations activities [,] to foster transnational corporations contributions to developmental goals [,] to prohibit subversion or interference in the internal affairs of countries and other inadmissible activities."[22]

However, in the course of negotiations, lack of consensus relating to the content of the Code, produced by conflicts of interest between rich and poor countries, made clear that a binding code was legally and politically infeasible.[23] Later, structural changes and different priorities made the Code obsolete.[24]

Developing countries initially viewed MNE activity as a way to impose the MNEs' home country policies and they wanted protection against that kind of invasion.[25] By the 1980s, however, their desire to obtain investments from MNEs superseded their wish to regulate MNEs.[26]

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[20] Rubin, *supra* note 14, at 1282.
[21] *Id.*
[22] *Id*. at 1287.
[23] Tapiola, *supra* note 19, at 2.
[24] *Id*.
[25] *Id.*
[26] *Id.*

The structure of MNEs has also undergone a major change "from hierarchies to networks"; MNEs now have their offices all over the world, home countries have lost their influence, the nationality of MNEs has diminished in importance, and host countries' fear of invasion of their policies has faded.[27]

In 1982, an incomplete draft was published and continuously revised until 1992 when negotiations were suspended.[28] Actually, the draft "has become a dead letter," and a copy of it is extremely difficult to obtain.[29]

b. The Global Compact

After the unsuccessful attempt by the UN to make a binding code of conduct for MNEs, the UN more recently developed the Global Compact 2000 (GC), by initiative of Secretary-General Kofi Annan, which invites corporations to support ten key principles in the areas of human rights, labor, environment and anti-corruption: to respect and support the protection of human rights; to make sure not to be complicit to human right abuses; to uphold freedom of association and recognition of the right to collective bargaining; to eliminate forced and compulsory labor; to

[27] *Id*. at 3.
[28] VAGTS, DODGE & KOH, *supra* note 6, at 205.
[29] Branson, *supra* note 8, at 136.

abolish child labor[30]; to eliminate discrimination in employment; to support the precautionary approach to environmental problems; to promote greater environmental responsibility; to encourage and develop the diffusion of environmental-friendly technologies; and to fight against all forms of corruption, including bribery and extortion.[31]

In order to participate, the Chief Executive Officer (CEO) of each MNE has to send a letter to the UN Secretary General expressing the MNE's support; the CEO should further implement changes to business operations such that the principles becomes part of the strategy, culture, and day-to-day operation of the MNE.[32] In addition, the company must publicly advocate the GC through press releases, speeches, etc., and publish in its annual reports the ways in which it is supporting the GC and its principles.[33]

In addition, the GC provides for annual Global Policy Dialogues, action-oriented meetings that focus on specific issues relating to

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[30] The four principles relating to labor standards are better known as the "core labor standards" in the international community due to their importance in this area. They were delineated in the World Summit on Social Development, which took place in Copenhagen in March of 1995. *See* Steve Charnovitz, *Trade, Employment and Labor Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate*, 11 TEMP. INT'L & COMP. L.J. 131, 133. (1997) (book review). A study conducted by the Organization for Economic Development and Cooperation (OECD) in 1996 found that the core labor standards enhance economic efficiency. *Id.* at 139-44.

[31] *See The Global Compact: The Ten Principles, at* http://www.unglobalcompact.org/Portal/Default.asp (last visited July 30, 2004).

[32] *See The Global Compact: How to Participate in the Global Compact, at* http://www.unglobalcompact.org/Portal/Default.asp (last visited July 30, 2004).

[33] *Id.*

globalization and corporate citizenship, which provide some guidance to MNEs the application of GC principles.[34]

The success of the GC relies completely on public accountability and the self-interest of the corporations. [35] It is not a binding instrument, it does not have mechanisms for the monitoring of the activity of corporations to ensure compliance of the corporations with their commitments, and it provides no sanctions for violations.[36] In order to ensure the enforcement of the GC, the UN can only persuade MNE executives to adopt the principles or use negative publicity against the MNEs.[37]

This UN initiative has been criticized for these weaknesses.[38] Human rights organizations generally have demanded mandatory compliance of the GC or monitoring of MNEs' performance.[39] The Secretary General of Amnesty International has said that, to gain credibility, the GC should at least implement independent monitoring and make public the results.[40] Critics also point out that many of the MNEs that are committed to the GC were involved in abuses in the past; the MNEs nevertheless continue to benefit from the good name of the UN, which should not be permitted.[41]

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[34] *Id.*
[35] *See The Global Compact: What Is the Global Compact? at* http://www.unglobalcompact.org/Portal/Default.asp (last visited July 30, 2004).
[36] Westfield, *supra* note 9, at 1091.
[37] *Id.*
[38] Shaughenessy, *supra* note 11, at 161.
[39] *Id.*
[40] *Id.*
[41] *Id.*

Nonetheless, the most important value of the GC resided in its cooperative nature; the Compact involve the cooperation of corporations, governments, labor organizations and non-governmental organizations (NGOs).

2. Within the Ambit of the Organization for the Economic Cooperation and Development

In the 1970s, the Organization for the Economic Cooperation and Development (OECD) prepared a parallel work to the UN Code, the Guidelines for MNEs, which was approved in 1976.[42] The Guidelines were later revised in 2000 incorporating standards that had been developed in the previous two decades.[43] Advancing the interests of developed countries, which are the only members of the OECD and which also are home countries of most MNEs, the Guidelines primarily aimed to achieve the following goals: to improve the climate for investment, to prevent discrimination against MNEs, to ensure that MNEs operate in harmony with the governments of host countries, and to strengthen the mutual confidence between MNEs and host country governments.[44]

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[42] VAGTS, DODGE & KOH, *supra* note 6, at 205.

[43] Among the changes of the revision, the updated Guidelines promote the elimination of child labor and forced labor; the environmental section now encourages MNEs to improve their environmental performance; and there are two new chapters on consumer interests and on combating bribery.

[44] *Guidelines for Multinational Enterprises*, OECD, 10 (June 27, 2000), *available at* http://www.olis.oecd.org/olis/2000doc.nsf/4f7adc214b91a685c12569fa005d0ee7/c125692700623b

The principles promoted by the OECD, which correspond to the policies enunciated in its Guidelines, are as follows: to contribute to sustainable development, to respect human rights, to encourage human capital formation, to promote self-regulatory practices, to abstain from any improper involvement in political activities, and to respect local laws.[45] The principles also advocate more extensive disclosure to achieve greater transparency in business, to combat bribery, and to support the core labor standards.[46] In addition, they encourage the use of environmental-friendly practices and protect consumer interests.[47] Finally, they require MNEs to comply with the competition and taxation laws of host countries.[48]

The Guidelines are "*recommendations* addressed by governments to multinational enterprises."[49] They provide voluntary standards; however, follow-up mechanisms substitute for the lack of binding obligations.[50] The OECD provides for regular reviews and discussions of cases with recommendations from the Committee on International Investment and MNE.[51]

74c125695400540788/$FILE/00082259.DOC (last visited Nov.24, 2004), *reprinted in* 40 I.L.M. 237 (2001) [hereinafter OECD Guidelines].

[45] *Id*. at 12-13, *reprinted in* 40 I.L.M. at 240.

[46] *Id.* at 15-20, *reprinted in* 40 I.L.M. at 240-46. It requires disclosure of information not only of the MNE financial situation and performance, but also non-financial information such as environmental and social reporting.

[47] *Id*. at 18-19, *reprinted in* 40 I.L.M. at 243-45.

[48] *Id*. at 23-24, *reprinted in* 40 I.L.M. at 246.

[49] *Id*. at 12, *reprinted in* 40 I.L.M. at 237.

[50] Tapiola, *supra* note 19, at 2.

[51] *Id.* In the recommendations made by the Committee the name of the MNE involved cannot be specified.

3. *Within the Ambit of the International Labor Organization*

In 1977, the International Labor Organization (ILO) adopted the Tripartite Declaration on Multinational Enterprises and Social Policy,[52] which would constitute the social and employment chapter of the UN Code.[53] Under the Tripartite Declaration, MNEs must guarantee the rights to union activity and collective bargaining.[54] The Tripartite Declaration is also deals with health and safety issues, employment policy, training, equality, and job security.[55] And as the OECD Guidelines, this Declaration provides only "guidelines" to MNEs, governments, and employers' and worker's organizations.[56]

In order to monitor the compliance of the Tripartite Declaration, the ILO conducts periodic surveys and the results are submitted to the ILO Governing Body for further discussion.[57]

In case of disagreement about the application of the Tripartite Declaration, the governments can submit a request for interpretation to the ILO.[58]

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[52] *Tripartite Declaration on Multinational Enterprises and Social Policy*, ILO (Nov. 1977) (amended Nov. 2000) [hereinafter ILO Tripartite Declaration] *available at* http://www.ilo.org/public/english/employment/multi/download/english.pdf (last visited Aug. 6, 2004).
[53] Tapiola, *supra* note 19, at 2.
[54] ILO Tripartite Declaration, *supra* note 52, at 8-10.
[55] *Id.* at 4-8.
[56] *Id.* at v.
[57] *Id.*
[58] *Id.*

In 1998, the International Labor Conference adopted the ILO Declaration on Fundamental Principles and Rights at Work and its follow-up mechanism, which specify the way in which countries must apply the "core labor standards",[59] particularly highlighting the need to develop promotional measures to support governments in their task. [60]

More interestingly, the 1998 Declaration is addressed to governments instead of MNEs, placing the responsibility on states to adopt the necessary regulations in their domestic laws in order to make MNEs comply with the 1998 Declaration's guidelines.[61] The 1998 Declaration nevertheless is a voluntary instrument despite efforts by unions and developing countries to make it binding.[62] Although it places duties on states, it provides no sanctions for violations.[63]

Although the ILO principles are not corporate policies, in the long run, it is expected that they will attain that status as governments incorporate the principles into their domestic law ensuring that companies which operate within the states' territories comply with the principles. [64]

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[59] *See supra* note 30 and accompanying text.
[60] Westfield, *supra* note 9, at 1192. The *ILO Declaration on Fundamental Principles and Rights at Work* (June 1998) *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT (last visited Aug. 6, 2004); Follow-up to the Declaration (June 1988) available *at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONFOLLOWUP (last visited Aug. 6, 2004).
[61] Tapiola, *supra* note 19, at 4.
[62] *Id.*
[63] Westfield, *supra* note 9, at 1192.
[64] *Id.*

ILO's labor standards further have achieved general approbation because they are established with the participation of unions, companies, and local governments of developed and developing countries,[65] and all of the organization's conventions have been approved by at least two-thirds of its delegates. [66]

4. Within Financial Organizations: the International Monetary Fund and the World Bank

Both the International Monetary Fund (IMF) and the World Bank (WB) are extremely active in developing countries, although they have been accused of having a "friendly" attitude towards MNEs since they promote globalization and the reduction of obstacles impeding MNE activity.[67] For instance, during the Asian financial crisis, the IMF formulated a detailed program that included a commitment of the Asian countries "to regulate merchant banks, to eliminate various restrictions on foreign ownership of domestic corporations, to permit foreign banks to establish subsidiaries in the country, and to eliminate quotas, subsidies and other practices that were inconsistent with the rules of the GATT/WTO system."[68]

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[65] *Id*. at 1196.
[66] Charnovitz, *supra* note 30, at 136.
[67] *Id.*
[68] VAGTS, DODGE & KOH, *supra* note 6, at 182.

Critics considered the measures to be too intrusive, exceeding the main function of the IMF, which is to balance payment adjustments.[69] Advocates argued that the measures were necessary to obtain structural changes of the evils that had caused the Asian crisis, such as "crony capitalism, corruption, and weak regulation".[70]

In reality, the IMF and the WB are able to exert great financial pressure because countries that need loan reimbursements have to commit to the institutions' programs, which have been labeled as "the Golden Straitjacket" by Thomas Friedman.[71] The programs mainly require from the governments: fiscal austerity, privatization of public enterprises, modernization of economic laws, and elimination of corruption.[72] The conditions of the programs are primarily economic in character; they omit any reference to human rights, labor, or environmental standards.[73]

5. *Within the World Trade Organization*

The relationship between trade and labor standards was part of the debate of the first Ministerial Conference of the World Trade Organization

[69] *Id.*
[70] *Id.*
[71] Branson, *supra* note 8, at 136-37.
[72] *Id.* at 137.
[73] *Id.*

(WTO) in Singapore in 1996.[74] Later, in 1999, the issue was again part of the agenda in the WTO Seattle talks.[75]

The WTO has high enforcement potential because it can force states to comply with minimum standards "[b]y withholding most favored nation status or participation in multinational trade agreements."[76] However, the different interests held by developed and developing nations, as in the UN process, proved to be an obstacle against the achievement of consent and the introduction minimum standards in the agenda. In Singapore, the United States supported the introduction of minimum standards, India and other developing countries opposed such standards, and the EU remained divided.[77] Trade ministers from Macau and Uganda stated that the introduction of labor standards to the WTO would have negative effects on the economy of poor countries.[78] Developing countries did not trust developed countries; they saw the attempt to introduce minimum standards as a "protectionism" measure that would favor rich countries at the expense of poor countries.[79] Since the proposal for labor standards came from the United States, the Clinton Administration's repeated anti-trade actions may have been a reason for these concerns.[80]

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[74] Westfield, *supra* note 9, at 1076-77.
[75] *Id.* at 1077.
[76] Branson, *supra* note 8, at 138.
[77] Westfield, *supra* note 9, at 1077.
[78] Charnovitz, *supra* note 30, at 144.
[79] *Id.*
[80] *Id.* at 155.

The result of the Singapore Conference was a broad declaration that the WTO would "explore ways of enhancing cooperat[ion] with the ILO."[81] Subsequently, WTO Director-General Renato Ruggiero clarified that the reference about the ILO only allows the WTO Secretariat to exchange information between the organizations.[82] In particular, the trade ministers refused to establish a committee in trade and labor similar to the Committee on Trade and Environment, which was created in 1994 to analyze the relationship between trade and environmental agreements.[83]

Although it can be inferred from the WTO Singapore Declaration that "the Ministerial did not consider the WTO a competent body capable to set labor standards,"[84] a positive change can be expected in the future if the ILO take a more active role in enforcing labor standards. Indeed, even though human rights and labor standards are not actually part of the WTO agenda, among the issues included in the fourth WTO Ministerial Conference in Doha of 2001 were the relationship between environment and trade, as well as greater transparency in government.[85]

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[81] Singapore Ministerial Declaration, *36 I.L.M. 220*, para 4. (1997) (adopted on Dec. 13, 1996).
[82] Charnovitz, *supra* note 30, at 157-58.
[83] *Id*. at 162.
[84] Id. at 156.
[85] VAGTS, DODGE & KOH, *supra* note 6, at 115.

B. Efforts to Combat Bribery and Achieve Greater Transparency in Transnational Business

Legislation to combat bribery and achieve greater transparency is essential in order to ensure that the enforcement of human rights, labor, and environmental standards is effective; otherwise, it will be easy for MNEs to circumvent the legal system.

Corruption commonly affects developed as well as developing countries, although in the latter the degree of corruption is higher because weak legal systems, which is common in poor countries, contribute to it.[86] The consequences of corrupt practices can be very dramatic. Many deaths occurred around the world "due to the convergence of negligence, inexperience, and corruption."[87]

Bribery is the most common and major form of corruption. It can be defined as "the conferral of a benefit to a public official in exchange for abuse or misuse of that official's office."[88] And particularly, "transnational bribery occurs when a businessperson from one country (the "home" country) bribes a public official of another country (the "host" country)."[89]

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[86] Philip M. Nichols, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery*, 20 MICH. J. INT'L L. 451, 462 (1999).
[87] Philip M. Nichols, *Fighting International Corruption & Bribery in the 21st Century: The Myth of Anti-bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 627 (2000).
[88] Nichols, *supra* note 86, at 453.
[89] *Id.*

International organizations have become concerned about the possible consequences of transnational bribery[90] and some organizations have reacted by asking their member states to enact legislation criminalizing transnational bribery.[91] Examples of these initiatives are the UN Declaration Against Corruption and Bribery in International Commercial Transactions,[92] the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[93] the Inter-American Convention Against Corruption,[94] and the Convention on the Fight Against Corruption Involving Officials of the European Union Communities or Officials of Member States of the European Union.[95]

For instance, the Inter-American Convention requires its members to allow the extradition of bribe-taking and bribe-giving officials,[96] to criminalize the officials' assets that cannot be justified in relation to their salaries during their terms,[97] and to ban the use of the bank secrecy defense in the course of investigations.[98] The OECD Convention requires its members to assist each other in investigations and to allow the

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[90] *See id.* (providing an analysis of the effects of bribery).

[91] The proposed legislation would criminalize bribery conducted abroad made by individual or a corporate nationals of the country that enacted the law. Therefore, if a businessperson violated the bribery laws, that businessperson could be tried in the courts of his or her home country.

[92] G.A. Res. 51/191, U.N. GAOR, 51st Sess., Annex, Agenda Item 12, U.N. Doc. A/RES/51/191 (1996).

[93] OECD, DAFFE/IME/BR(97)20 (1997), *reprinted in* 37 I.L.M. 1.(1998), and available at http://www.olis.oecd.org/olis/1997doc.nsf/43bb6130e5e86e5fc12569fa005d004c/5005eebd0c0be05880256754005d2ba0/$FILE/04E81240.DOC (last visited Nov. 24, 2004)

[94] Inter-American Convention Against Corruption, *reprinted in* 35 I.L.M. 724 (1996), *available at* http://www.oas.org/main/main.asp?sLang=E&sLink=../../documents/eng/documents.asp. (last visited Nov. 24, 2004).

[95] 1997 O.J. (C 195) 2-11.

[96] *See* Inter-American Convention, art. XIII, 35 I.L.M. at 731 (extradition).

[97] *See id.*, art. IX, 35 I.L.M. at 730 (illicit enrichment).

[98] *See id.*, art. XVI, 35 I.L.M. at 732 (bank secrecy laws).

extradition of violators.[99] The OECD has been the most successful initiative because, under the threat of its sanctions, almost all of its members have enacted legislation to combat transnational bribery, and such legislation is imminent in the remaining member states.[100]

In addition, the World Bank and the International Monetary Fund are actively dealing with corruption, threatening to stop financial aid to bribe-soliciting countries.[101] The WTO also has created a Working Group on Transparency in Government Procurement[102] that is preparing a draft for an agreement on transparency in government procurement.[103]

Even the International Chamber of Commerce had adopted in 1996 the Rules of Conduct to Combat Extortion and Bribery, a voluntary code of corporate conduct. The Rules proscribe the demand or acceptance of any bribe or kickback, request companies to control payments by their agents, and require the maintenance of financial records to prevent the hiding of illicit payments or secret funds.[104]

Recently, this concern has also reached the ambit of the Global Compact. At the Leader Summit of June 24, 2004, UN Secretary-General Kofi Annan declared "[A]t your urging, and after extensive consultations

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[99] *See* OECD Convention, arts. 9 (mutual legal assistance), 10 (extradition), *reprinted in* 37 I.L.M. at 6.
[100] Nichols, *supra* note 87, at 638-39.
[101] *Id*. at 635-36.
[102] *See* Ministerial Conference, Singapore Ministerial Declaration, WT/MIN(96)/DEC P 21, at 7 (Dec. 13, 1996) (creating the Working Group).
[103] *See* Nichols, *supra* note 87, at 636 n.47.
[104] *See* Int' Chamber of Com., Extortion and Bribery in International Business Transactions, arts. 1, 2, 4, *available at* http://www.iccwbo.org/home/statements rules/rules/1999/briberydoc99.asp (last visited Aug. 10, 2004).

with all participants that yielded overwhelming expressions of support, the Global Compact henceforth will include a tenth principle, against corruption, reflecting the recently adopted United Nations convention on that subject." [105] The tenth principle states, "Businesses should work against corruption in all its forms, including extortion and bribery."[106]

C. Corporate Codes of Conduct

In the 1990s, MNEs started voluntarily adopting their own corporate codes in reaction to the public demand for greater responsibility.[107] Although these codes are merely self-regulation instruments, and MNEs strongly advocate against binding codes, the spotlight effect acts as a potent motivator of compliance.

1. The Spotlight Effect

Today there is a general interest in international business and MNE behavior, and as a natural consequence, MNEs are much more sensitive to public pressure of any kind. When companies invest abroad, they not only bring their capital and technology to the host country but also their brand

[105] *See* The Global Compact: Transparency and the Fight Against Corruption, *available at* http://www.unglobalcompact.org/Portal/Default.asp (last visited Aug. 10, 2004)
[106] *Id.*
[107] Westfield, *supra* note 9, at 1098.

names, reputations, and international images.[108] If they are caught engaging in bad conduct, activist groups and the international media jump into action with negative campaigns that can greatly affect a company, especially if the company is involved in consumer products.[109] As Bob Hass, former CEO of Levi Strauss, once emphasized, "In today's world, a TV exposure on working conditions can undo years of effort to build brand loyalty." [110]

Consumers will not buy a product that was made in violation of human rights, labor, and environmental standards.[111] A Corporate Edge survey showed that "fifty eight percent of the consumers polled said they would boycott a brand if they knew that a company was employing children that make its product."[112] At this level, fifty-eight percent can represent the loss of tons of money.

MNEs may stop doing business with abusive suppliers, and require the suppliers to comply with their own corporate codes of conduct.[113] Some MNEs have even withdrawn their operations from countries that violate human rights and labor conditions.[114] The MNEs do this not because the morality of MNEs has changed, but because it is now in the

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[108] VAGTS, DODGE & KOH, *supra* note 6, at 217.
[109] *Id.* at 217-18.
[110] R. Mitchell & M. Oneal, *Managing by Values,* BUS. WK., Sept. 12, 1996, at 40.
[111] *See* Shaughenessy, *supra* note 11, at 162.
[112] *Id.* at 171.
[113] *Id.*
[114] Westfield, *supra* note 9, at 1098.

MNEs' economic benefit to do so. They are learning that what is at stake is their "social license to operate."[115]

It is undoubted that in the current economy, in competition among MNEs, market behavior has become a deciding factor.[116] Once MNEs have agreed to comply with corporate codes, they will be forced to do it by the market, not by the law[117]. For instance, a California consumer sued Nike under the California's Unfair Competition Law for making false statements in its corporate code in regard to its labor practices abroad.[118]

The spotlight effect also balances "the fiduciary duties owed by officers and directors, which mandates maximization of shareholder wealth, to the exclusion of all other values," [119] because MNEs still need to support human and labor rights and environmental-friendly practices; otherwise, a bad reputation in these areas could affect the shareholders' wealth.

Nevertheless, MNEs do not always have a motivation to comply with the corporate codes since they all lack the legal mechanisms to enforce the codes, and if a MNE does not sell products directly to consumers, it is

[115] Bennett Freeman et al., *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 423, 440 (2001).
[116] Tapiola*, supra* note 19, at 3.
[117] VAGTS, DOUGLAS & KOH, *supra* note 6, at 218.
[118] *See* Kasky v. Nike, Inc., 537 U.S. 1099 (2003).
[119] Constance Z. Wagner, *Corporate Social Responsibility In The Multinational*, 33 GEO. WASH. INT'L L. REV. 1063, 1070 (2001) (book review).

not subject to sufficient exposure to care about maintaining a good reputation.[120]

The issue ultimately turns on a MNE's skill at promotion and marketing.[121] The adoption of codes of conduct is used as a public relations tool by many MNEs, creating a dichotomy between what they claim they do and what they really do.[122] Many MNEs have adopted their own codes following a scandal in an effort to restore their public images.[123] Public relations specialists can change "the public perception of MNEs" with a highly publicized program that advocates to global responsibility. [124] Skeptics claim that codes do little to improve human rights;[125] they assert that many MNEs "don't do anything with the [codes]; they simply paste them on the walls to impress employees, customers, suppliers and the public." [126]

2. MNEs' Opposition to Binding Codes

On the other hand, MNEs contend that they are not only influenced by consumer expectations; rather, they have another motivating interest

[120] Shaughenessy, *supra* note 11, at 163.
[121] *Id.*
[122] *Id.*
[123] Id. For instance, the author mentions Levi Strauss, Sears, J.C. Penney, Wall-Mart, Phillips-Van Heusen, The Gap, Nike, Reebok, and Timberland, as companies that adopted their own corporate codes after negative publicity of forced labor in China and child labor in Southeast Asia.
[124] Westfield, *supra* note 9, at 1100.
[125] *Id.*
[126] Shaughenessy, *supra* note 11, at 163.

related to their recruiter efforts, in gaining a good reputation.[127] They admit that no company would emphasize that its only interest rests in maximizing profits because companies are recruiting everywhere and nobody wants to work for a bad company.[128] Companies strongly maintain that they take a lot of pride when they work with high standards, which bring value to the company.[129]

However, MNEs continue to oppose any attempts to make corporate codes binding, arguing, "[S]omething that is good investment towards the value creating potential of the company will be regarded as a cost, an expense that needs to be minimized."[130] MNEs further argue that if the codes are mandatory, it would limit their ability to adapt their standards to varying competitive conditions in the different markets, which can place them at a disadvantage to MNEs that do not comply with the mandatory codes or to domestic companies that only comply with the low standards of host countries.[131] They also fear that the creation of governmental organs to monitor their compliance with the codes "would lead to bureaucratic administration replacing market mechanisms."[132] MNE executives emphasize that more can be achieved by promoting voluntary

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[127] Cone, III et al., *supra* note 15, at 12-14.
[128] *Id.*
[129] *Id.*
[130] Nevenka Pergar, Board Member, AKTIVA Invest, The Corporate Social Responsibility and the OECD Guidelines for Multinational Enterprises 4, (OECD Forum 2004, May 12, 2004) *available at* http://www.oecd.org/dataoecd/61/39/31824304.pdf (last visited Oct. 5, 2004).
[131] Westfield, *supra* note 9, at 1196.
[132] *Id.* at 1197.

codes of conduct and by encouraging enterprises to be a role model for the other MNEs.[133]

D. Challenges

There are three obstacles that impede the effectiveness of international regulations and corporate codes: the lack of consensus on minimum standards, the lack of enforcement and monitoring mechanisms and the controversy whether MNEs can be actors of international law.

1. Consensus on Minimum Standards

An adequate way for a MNE to avoid bad publicity and litigation is to make sure that the best possible standards apply wherever the MNE operates, at home as well as abroad.[134] Nevertheless, that would be an unrealistic solution due to differences in the standards adopted in the home country and in the host country.[135]

Host countries often have deliberately adopted lower standards to attract investment, and MNEs take advantage of this race to the bottom in order to remain competitive and to maximize their profits. [136]

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[133] Pergar, *supra* note 130, at 3-4.
[134] Ward, *supra* note 12, at 466.
[135] *Id.* at 468.
[136] Wagner, *supra* note 119, at 1064.

There is a need to set minimum standards in order to level the playing field. Such standards will not be produced by the market alone.[137] An internationally coordinated approach would be necessary to ensure that regulation is effective, at least creating general consensus in the minimum standards.[138]

Moreover, the standards generally found in international or corporate codes are too broad to be applied, and in some cases, there is no consensus about the exact standards. For instance, it is not clear yet if MNEs should have an active role doing good things or if they simply should avoid doing wrong.[139] There is general consensus that MNEs should not be complicit to human right violations but the type of behavior which will make MNEs complicit is unsettled.[140] There is a great need to be more specific about what these standards are to ensure compliance.

2. Enforcement and Monitoring Mechanisms

Since all of the corporate codes developed by international organizations have a promotional rather than normative character, mainly

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[137] Tapiola, *supra* note 19, at 5.
[138] Ward, *supra* note 12, at 470-71.
[139] Cone, III et al., *supra* note 15, at 12-14.
[140] *See* Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339 (2001) for a distinction between direct complicity, beneficial complicity, and silent complicity. The authors argue that MNEs not only are complicit to human rights violations when they directly participate in the abuse, or indirectly benefit from the profits that derivate from the abuses, but also when they know about the violation and remain silent. The authors suggest that MNEs have a moral duty in circumstances when they could have influenced the agents of the violation.

conceived as guidelines or models for MNEs corporate codes, they entrust the enforcement of the corporate codes to the MNEs themselves.[141] The delegation of enforcement to the MNEs themselves provides no guarantee that there will be any compliance at all; and even if MNEs comply, they may adopt different degrees of compliance with their codes, which will lead to a consisting lowering of standards because MNE that lose business "by applying more powerful enforcement mechanisms will be replaced by companies with less effective enforcement procedures."[142]

The corporate codes are essentially "statement[s] of intent"; only if they are enforced and monitored they become real rules.[143] It is important that the monitoring function is external to the company and that the results are made public. If that information is available to the public, consumers and investors will be able to make smart decisions in the way they want to spend or invest their money,[144] and public exposure can be an incentive for MNEs to do their best to comply with their codes.

3. Placement of MNEs as Actors of the International Law

In order to make a valid claim that MNEs do not comply with international law, it first has to be determined whether international law

[141] Shaughenessy, *supra* note 11, at 164.
[142] *Id.*
[143] Tapiola, *supra* note 19, at 5.
[144] Westfield, *supra* note 9, at 1102.

can impose rights and duties on MNEs, as is done the case with states.[145] The genesis of this phenomenon may be found in the privatization process, where there has been a shift of roles; MNEs have started doing what the government used to do, and as a consequence, now the complaints are directed against MNEs in the same way that they used to be directed against governments for human rights violations.[146] Confronted with the passive attitude of the states, "individuals are taking the law in their own hands"[147] trying to hold MNEs responsible, and supporting the creation of greater MNE rights and obligations.[148] Through these efforts, individuals are bringing international law into the domestic arena, and the international law is becoming "privatized" because private actors (individuals and MNEs) are becoming both agents and subjects of international law.[149]

Affirmative support for the view of MNEs as actors under international law is particularly reasonable in consideration of the precedents in that direction.[150] For instance, many international environmental law treaties hold "polluters" liable for the environmental harm that they cause, and the new international regime on bribery places

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[145] Cone, III et al., *supra* note 15, at 26.
[146] *Id.* at 4.
[147] Joel R. Paul, *Holding Multinational Corporations Responsible Under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285, 289 (2001).
[148] *Id.*
[149] *Id*. at 290.
[150] Cone, III et al., *supra* note 15, at 26-27.

duties on corporations.[151] MNEs also already have certain rights at the international level, such as the right to seek arbitration under bilateral investment agreements, and the right to assert claims against a government for violations of free speech or other human rights.[152]

Although the development of greater MNEs duties under international law is highly desirable and certainly possible in the future, the solutions proposed by this thesis will focus on the regulation of MNEs by national laws because domestic regulation is a prerequisite to international consensus on the development of international regulation.

[151] *Id.*
[152] *Id.* at 27.

III. LITIGATION AGAINST MULTINATIONAL ENTERPRISES

Although MNEs actually have some rights and duties under international law, no international forum exists that can hold a MNE accountable for its business activities.[153] The only way to do this is through the judicial system of local governments, where the violation took place or where the parent company is located, for violations of international law which have been incorporated into domestic laws or into treaties signed by the country where the forum is located.[154]

In the last few years, there has been a wave of claims against parent companies for the conduct of their subsidiaries abroad.[155] After all, each state "has the authority to control the way in which its nationals interact with other states,"[156] and each state can regulate the activity of its corporations abroad by enacting extraterritorial laws.[157]

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[153] Bridgeford, *supra* note 2, at 1015-16.
[154] *Id.*
[155] Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation,* 24 HASTINGS INT'L & COMP. L. REV. 401, 403 (2001).
[156] *Id.*
[157] *Id.*

A. The Value of Litigation Against MNEs

Litigation against MNEs for their conduct abroad, as well as regulation, is an important factor in modifying the conduct of MNEs.[158] It is in the MNEs' own interest to avoid litigation due to the likely drop in share price as a result of the threat of liability.[159] Litigation also levels the playing field since it reaches not only public brands but also those companies that are not harmed by a bad reputation since they don't have consumer products. [160] In addition, litigation is a solution against the claim that corporate codes are used as a public relations tool because it can uncover discrepancies between what MNEs say they do and what they really do.[161] Finally, the general public pays extremely close attention to such cases, which undoubtedly can trigger an adverse impact on the reputation of the brands involved, which in turn can motivate a change in business practices.[162]

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[158] VAGTS DODGE & KOH, *supra* note 6, at 218.
[159] Ward, *supra* note 12, at 464.
[160] Westfield*, supra* note 9, at 1101.
[161] Ward, *supra* note 12, at 465.
[162] *Id.* at 464-66.

B. The Type of Litigation and Its Causes

The MNEs' immortality, wealth, and size make them attractive defendants. [163] Some actions are initiated for human rights abuses or exploitation of workers; others focus on environmental damage or lack of respect and harm done to the culture of indigenous populations.[164] Other claims are based on lack of transparency and non-compliance with domestic and international laws.[165]

In some cases, litigation against a parent company for the acts of its subsidiary abroad happens simply because the subsidiary responsible for the damages no longer exists and the only way to recover damages is to go after the parent company.[166] The Holocaust and World War II cases present such a situation since the events happened more than fifty years ago, and the MNEs involved are the only responsible parties still available for suit.[167]

However, in most cases, this litigation occurs due to differences between the legal systems of the home country and the host country, as well as governance deficiencies in the latter.[168] Among the differences in legal systems, some home countries offer the possibility of a higher

[163] Paul, *supra* note 147, at 292.
[164] *Id.* at 289.
[165] *Id.*
[166] Ward, *supra* note 12, at 463.
[167] Paul, *supra* note 147, at 291.
[168] Ward, *supra* note 12, at 462-63.

recovery.[169] For instance, the United States, the home of many MNEs, is the most attractive forum in which to litigate because of the many procedural advantages that it offers, such as broad discovery, contingent fee arrangements, and the possibility of a civil jury.[170]

The advantages that are offered by the U.S. legal system not only are pro-plaintiff; in some instances, they make possible litigation of claims for which the plaintiff would have no remedy in other forums. The right to trial by jury is also favorable to the plaintiff since American jurors come from very different backgrounds than professional judges and they tend to be more sensitive to the plaintiff's claims.[171] Furthermore, juries generally give bigger awards than judges.[172] The contingent fee, whereby the lawyer will only be paid a portion of the award if he wins the case, moreover makes possible litigation by poor plaintiffs and by the risk-adverse plaintiff who then would have nothing to lose.[173] Finally, procedural rules permit plaintiff to assert vague claims, with little evidence, and later substantiate his claim through the use of the broad

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[169] *Id.* at 462.
[170] Donna Solen, *Forum Non Conveniens and the International Plaintiff*, 9 FLA. J. INT'L L. 343, 343 (1994).
[171] Daniel J. Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141, 147 (1998).
[172] *Id.*
[173] *Id.* at 148; *see also* Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications*, 24 HASTINGS INT'L & COMP. L. REV. 381, 393-94 (2001); *see also* Stephens, *supra* note 155, at 411-12 (examining law firms' interests and the way they face this kind of lawsuit).

discovery rules,[174] which make available information that otherwise would be out of the plaintiff's reach. [175]

In contrast, host countries often lack the financial and legal resources necessary to guarantee justice in a particular case. One typical example is the unavailability of class action suits, which is an American device that "offers a means of disposing of sometimes hundreds of thousands of claims in one trial, with the sole remaining issue being proof of damages."[176] In the Aguinda case,[177] for example, thousands of Ecuadorian indigenous people sued Texaco in the United States because class actions suits are unavailable in Ecuador.[178]

Nevertheless, a major problem remains the fact that plaintiffs are intimidated to look for justice in their own forums because developing countries are blemished with corruption.[179] Although MNEs could try to avoid litigation by applying good standards; they also could simply relocate their plants to host countries where the risk of liability is smaller.[180] Due to the economic interests involved, the threat of relocation can corrupt the administration of justice in host countries and further diminished the protection afforded to host countries nationals. In some

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[174] American rules of discovery are not permitted in most countries. For instance, article 23 of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *reprinted in* 8 I.L.M. 37 (1969), allows signatories countries to refuse cooperation in American style discovery.
[175] Dorward, *supra* note 171, at 148-49. *See also* Mattei & Lena, *supra* note 173, at 391-92.
[176] Mattei & Lena, *supra* note 173, at 394-95.
[177] Aguinda v. Texaco, Inc., 303 F.3d 470 (S.D.N.Y. 2002).
[178] Ward, *supra* note 12, at 464.
[179] *Id.* at 463.
[180] *Id.* at 466.

cases, the lack of impartiality is more evident when the government is involved in MNE operations, acting as a business partner of a MNE.[181]

C. Obstacles

Although litigation is a useful way to influence MNEs to operate with care, a plaintiff has to overcome many hurdles.[182] First, if a subsidiary no longer exists or does not have enough assets, it can be very difficult to reach the parent company under the "separate entities" principle. Second, the plaintiff has to litigate in a forum with both subject matter and personal jurisdiction over the defendant; in addition, if the judgment has to be enforced in another forum, the plaintiff has to determine whether the second forum will recognize the jurisdiction and decision of the first forum.[183] Third, even if a common law forum has jurisdiction, the case still can be dismissed under forum non conveniens grounds. A defendant also may assert non-justiciability, whereby a judge may dismiss a case if it finds that a judicial decision would interfere with the authority of the political branches.[184] In the end, a plaintiff may have no legal remedies due to all these obstacles.

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[181] *Id.* at 463.
[182] *See* Mattei & Lena, *supra* note 173, at 385-87. Although the authors refer to limitations to litigation in U.S. forums, most of the limitations apply to any forum, except the forum non conveniens doctrine which is only typical of common law systems.
[183] *Id.*
[184] *Id.*

1. Limits of Traditional Corporate Law

Corporate law has undergone substantial evolution. Commercial activity originally was only regulated by the laws of commerce and the company was identified with the owner of the business, who was personally liable for all of the debts of the company. [185] The modern corporate law of most Western countries employs the separate entity principle, which recognizes that that the corporation and its shareholders are separate juridical entities, and the debts and liabilities of the corporation are separate from the debts and liabilities of its shareholders.[186]

Moreover, the concept of the limited liability makes shareholders liable for the corporate debts only to the extent of their investment.[187] It is remarkable the fact that the limit liability doctrine was created latter and is different from the separate entity principle.[188] The concept was developed for political reasons as an incentive for investments through the insulation of shareholders from the risks of business.[189] In that time, only individuals were able to be shareholders; subsequently, when

[185] *See* Antunes, *supra* note 1, at 219 (1999), (offering a more complete overview of the evolution of corporations).
[186] 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, 301 (2001).
[187] David S. Bakst, *Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive*, 19 B.C. INT'L & COMP. L. REV. 323, 323 (1996).
[188] Blumberg, *supra* note 186, at 301-02.
[189] *Id.*

shareholders expanded to include corporations, corporate law extended the same principles to corporate groups.[190] Indeed, the liability insulation is the reason that many companies have chosen to expand their business through the formation of subsidiaries instead of branches.[191]

Nevertheless, the traditional concept of a corporate entity differs from the reality of modern corporations.[192] While the public views each MNE as one firm, the law regards each MNE as several entities that comprise a corporate group.[193] The dichotomy impedes the imposition of liability on MNEs because under the law each subsidiary entity is responsible for its own obligations,[194] an advantage that has been abused by MNE through the creation of multiple entities within each corporate group.

However, the law has not been completely blind to this situation; to prevent manipulation by MNEs in an attempt to evade the liability, corporate law has started to treat the different entities of a corporate group as a single enterprise in areas such as taxation, labor, bribery, antitrust, etc.[195] Nevertheless, the approaches adopted by different legal systems to adapt the law to the new realities have differed and are far from perfect.

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[190] *Id.*
[191] Antunes, *supra* note 1, at 219.
[192] Blumberg, *supra* note 186, at 303.
[193] *Id.*
[194] *Id.* at 304.
[195] *See id*. 311-16 (offering a more detailed description of those laws).

a. Comparative Law

In most common and civil law countries, limited liability is the rule; only under exceptional circumstances will it be set aside to pierce the corporate veil.[196] The doctrine has been applied with mixed results due to difficulties in determining the line between liability and non-liability, however, and this has led to complete unpredictability in the resolution of cases.[197]

As a revolutionary approach, the EU proposed the "economic unit theory" which imposes unlimited liability on the parent company for the actions of its subsidiary depending on the amount of corporate control.[198] EU courts treat the different entities as one enterprise if they are under the control and management of the same shareholders.[199] The theory's weakness resides in the rigidity of its approach, which exposes parent companies to the possibility of constant litigation and forecloses the chance of exoneration even in cases where the parent company clearly was not at fault.[200]

Some legal systems have resolved these problems by adopting a dualist approach.[201] For instance, the German system distinguishes

[196] Antunes, *supra* note 1, at 215.
[197] *Id.* at 216.
[198] *Id.* at 217-19.
[199] Bask, *note* 187, at 339.
[200] Antunes, *supra* note 1, at 219-21.
[201] *Id.* at 221-23. The countries with this dualist system are Germany, Brazil, and Portugal.

between "contractual groups" and "factual groups." In the first group, a contract recognizes the parent control, and the parent company will always be liable for the debts of its subsidiary.[202] On the other hand, in the second group, the parent exercises de facto control and is held liable only when the corporate debts originated from situations where the parent has effectively exercised control.[203] The problem is that the reality of the organizational structures of specific companies does not always converge with the legal models.[204]

None of these approaches works without failure. Their common failure is to oversimplify a complex issue which requires a flexible legal system that analyzes each situation case-by-case.[205]

b. *The Doctrine of the Corporate Veil*

MNEs "operating through a parent/subsidiary hierarchical infrastructure, can create corporate layers and a presence dispersed through numerous states,"[206] which can facilitate the insulation of liability of a MNE because in most Western countries the corporate law sees as

[202] *Id.*
[203] *Id.*
[204] *Id*. at 223-27.
[205] *Id*. at 227-28.
[206] Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31, 62 (2000).

many entities as are found in an enterprise, and each entity is only liable for the conduct of its own officers and employees.[207]

Nevertheless, courts have overridden this general rule under exceptional circumstances by piercing the corporate veil to make the parent company responsible for the acts of its subsidiaries.[208] The rationale for this practice recognizes that "a corporation will be looked upon as a legal entity as a general rule . . . but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons." [209]

Courts have pierced the corporate veil when they have found that the parent company owns and controls the subsidiary to the extent that the subsidiary is relegated to the status of a mere instrument or "alter ego" of the parent.[210] Other reasons that have justified the exception are fraud, misrepresentation, undercapitalization, and lack of corporate forms.[211] However, courts have not always agreed that each reason alone is strong enough to pierce the corporate veil.[212]

There is general consensus that the main analysis should focus on the level of control exerted by the parent, that is, the extent to which the

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[207] Phillip I. Blumberg, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVITH International Congress of Comparative Law*, 50 AM. J. COMP. L. 493, 495 (2002).
[208] Bakst, *supra* note 187, at 323.
[209] *Id.*
[210] *Id.* at 326-27.
[211] *Id.* at 326-32.
[212] *Id.*

parent has had a direct intervention in the daily activity of its subsidiary.[213] It is not enough that the parent owns the subsidiary or has an ability to control it because, in order to make the parent liable, the parent has to actually exercise control.[214]

The Indian Court reached this conclusion in the Bhopal Case when it decided to lift the corporate veil of Union Carbide Corporation (UCC).[215] In 1984 a leak of lethal gas from a pesticide factory in Bhopal caused injuries to more than 200,000 people and the death of 200 people. The pesticide factory belonged to Union Carbide India, Ltd., (UCI) a company incorporated in India with the following ownership: 50.9% by UCC, an American company; 22% by the Indian government; and 27.1% publicly held.[216] The Indian court concluded that UCC had control over UCI because there was no doubt that (1) UCC held the majority of the share capital of UCI at all times and (2) UCC had the total voting power over UCI at all times, controlling not only the Board of Directors of UCI but also its management. Therefore, the court concluded it was permissible to pierce the corporate veil and make UCC responsible for the tort, especially considering that the assets of UCI were insufficient to meet the claims.[217]

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[213] *Id.* at 333-37.
[214] *Id.*
[215] Union Carbide Corp. v. Union of India (Madya Pradesh H.C.), No. 26/88 (1988).
[216] The Indian government enacted the Bhopal Gas Leak Disaster Act, which gave the government exclusive authority to represent the victims of the Bhopal disaster in any court. Before the case had been tried in India, it indeed had been brought in U.S. courts where it was dismissed under forum non conveniens grounds.
[217] The case was settled in February 1989, when UCC agreed to pay $470 million to the government of India for all civil and criminal claims.

Nevertheless, courts rarely pierce the corporate veil because the social benefits of the limited liability doctrine outweigh its costs.[218] As previously mentioned, the main goal of the doctrine of limited liability is to reduce financial risks for shareholders in order to encourage more risk-taking investments in the market. [219] Following this policy, courts have rejected the argument that it should pierce the corporate veil simply because the parent organized the subsidiary with the intent of limiting its own liability, stating that there is nothing illegal about using the corporate form to limit liability.[220]

The frequent use of the limited liability doctrine to shield the liability of a MNE is reproachable because usually MNEs are wholly controlled by their parent companies.[221] It is often between the top executives that the major decisions are taken to establish the policies and strategies, and to supervise and approve the subsidiaries' operations abroad.[222]

2. Jurisdiction Issues

In the European Union, the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters establishes

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[218] PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 125-33 (1993).
[219] Bakst, *supra* note 187, at 337.
[220] *Id.*
[221] Malcom J. Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re Union Carbide, Alfaro, Sequihua, and Aguinda*, 36 TEX. INT'L L.J. 299, 316 (2001).
[222] *Id.*

general principles of jurisdiction that focus on the domicile of the defendant, the place of incorporation of the corporation, or the location of the events at issue in the lawsuit.[223] Under the Brussels Convention, aside from suit against the defendant in the forum of his domicile, the litigation can only take place in a forum if the event took place there.[224] Although English courts used to ignore the domicile principle, dismissing under forum non conveniens grounds when the alternative court was in a country which was not a member of the European Union,[225] a ruling of the European Court of Justice four years ago established that the domicile principle has to be applied "even if the plaintiff is domiciled in a non-member country."[226]

In the United States, the basis for jurisdiction is more liberal and was established by two landmark cases.[227] In *International Shoe Co. v. Washington*,[228] the Supreme Court established that "minimum contacts" were enough to establish jurisdiction over an absent defendant; nevertheless, its exercise should comply with "traditional notions of fair

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[223] *See* Stephens, *supra* note 155, at 410; *see also* Brussels Convention on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters of 1968, *reprinted in* 8 I.L.M. 229 (1969), which it has been its consolidated and updated version is European Communities: Convention On Jurisdiction And Enforcement Of Judgment In Civil And Commercial Matters, and the protocol of 1971, following the 1989 accession of Spain and Portugal, published July 28, 1990, 29 I.L.M. 1413 (1990).
[224] Stephens, *supra* note 155, at 410.
[225] Ward, *supra* note 12, at 461.
[226] *Id.* (referring to Group Josi Reinsurance Co. SA v. Universal Gen. Ins. Co., Case C-412/98, J, Ct. of Justice of the European Communities, July 13, 2000), *available at* http://europa.eu.int/cj/en/act/0022en.htm (last visited Oct. 5, 2004)).
[227] *See* Dorward, *supra* note 171, at 144-46, (distinguishing between specific jurisdiction and general jurisdiction).
[228] 326 U.S. 310 (1945).

play and substantial justice" in order to respect constitutional due process.[229] Subsequently, in *Asahi Metal Industry Co. v. California*,[230] the court held that jurisdiction should be exercised in a "reasonable" manner. The U.S. rules permit litigation in the United States against defendants who are transient, if they are served during their stay, and against foreign corporations that are doing business in the United States.[231] Moreover, U.S. jurisdiction principles do "not require a finding of a connection between the events at issue and the U.S."[232] Nevertheless, U.S. courts will have to take into account, before accepting jurisdiction, the fact that it is very unlikely that most courts of the world would enforce judgments from United States against non-American defendants for events that happened abroad.[233]

Although the broad U.S. rules may offer extensive jurisdiction in comparison with most Western countries, some countries have jurisdictional principles that may seem too excessive even in comparison to the American view.[234] For instance, in France, citizens can bring

[229] *Id.* at 316.
[230] 480 U.S. 102 (1987).
[231] Stephens, *supra* note 155, at 409.
[232] *Id.* at 409.
[233] Mattei & Lena, *supra* note 173, at 399-400. The authors are not only considering the broad American jurisdictional principles but also other aspects of U.S. litigation that may be seen violations of the standards of due process in most non-American legal systems.
[234] Stephens, *supra* note 155, at 410.

litigation against any defendants for any cause. Some countries also allow lawsuits against a defendant whose property is located in the forum.[235]

Not only must courts have personal jurisdiction over the defendant to hear the case, they also must have subject matter jurisdiction. The plaintiff must assert "claims cognizable in the particular court system;"[236] in other words, the claims must "fall within recognized causes of action."[237]

In the human rights area, the U.S. Alien Tort Statute provides that "[d]istrict 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."[238] The act provides a foreign plaintiff with a federal forum for torts that are violations of customary international law committed in anyplace around the world.[239] Its importance resides in the fact that most violations of human rights are committed by the victims' governments, sometimes in conjunction with MNEs, and therefore, foreign plaintiffs may find it impossible to bring actions at home.[240]

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[235] *Id.* at 410-11. The last principle is known as the "Swedish umbrella rule," which warns "[D]on't leave your umbrella in Sweden, or you may find yourself subject to suit in Swedish courts for any and all claims." *Id.*
[236] *Id.* at 403-04.
[237] *Id.* at 404.
[238] 28 U.S.C. 1350 (2000).
[239] Shaughnessy, *supra* note 11, at 165.
[240] John F. Carella, *Comment, Of Foreign Plaintiffs and Proper Fora: Forum Non Conveniens and ATCA Class Actions*, 2003 U CHI LEGAL F 717, 718.

An example of this type of suit is *Wiwa v. Royal Dutch Petroleum Co.*,[241] in which Shell was accused of instigating the Nigerian government to torture and kill local leaders who opposed oil exploitation. Another case is *Doe v. Unocal Corp.*,[242] in which Unocal was accused of aiding and abetting the de facto government of Burma in its human rights violations (forced relocation of villagers, confiscation of property, forced labor, and rape of women) during the construction of a pipeline.

The statute has been strictly construed permitting consideration only of violations of human rights that are universally condemned such as torture, murder, genocide, and slavery.[243] It remains to be seen if in the future the scope of the statute will be extended to labor and environmental violations, which may be possible once the international community has reached consensus regarding standards in those areas.

3. The Forum Non Conveniens Doctrine

The doctrine of forum non conveniens is another obstacle faced by foreign plaintiffs trying to litigate in common law countries that are home countries of the MNEs.[244] The doctrine basically allows the court to refuse to hear the case, even when it has subject matter and personal

[241] 532 U.S. 941 (2001).
[242] 963 F. Supp. 880 (C.D.Cal.1997).
[243] Shaughnessy, *supra* note 11, at 165-66.
[244] Solen, *supra* note 170, at 343.

jurisdiction, when there is another place more appropriate to litigate, such as in the country where the events occurred.[245]

The doctrine developed in the United States to counter-balance the broad American standards that established personal jurisdiction.[246] The doctrine arose as an exception to the requirement that a court must hear a case once jurisdiction has been established, when "the plaintiff's forum choice was so egregiously inappropriate as to appear motivated by a desire to vex and harass the defendant."[247]

However, the modern American doctrine leans towards a more discretionary facet established by two key cases at the federal level: *Gulf Oil Corp. v. Gilbert*[248] and *Piper Aircraft Co. v. Reyno.*[249]

In the Gulf Oil case, the Supreme Court emphasized that the doctrine leaves much to the discretion of the court.[250] It also created a balancing test, whereby a court takes into account private interests of the litigant as well as public interests of the court and community.[251] Among the private interests, the court mentioned the cost of attendance of willing witnesses, availability of compulsatory processes to ensure cooperation by unwilling witnesses, access to sources of proof, and enforceability of the

[245] Ward, *supra* note 12, at 460.
[246] Reed, *supra* note 206, at 35-36.
[247] *Id.* at 38.
[248] 330 U.S. 501, 504 (1947)
[249] 454 U.S. 235 (1981)
[250] *Gulf Oil*, 330 U.S. at 508.
[251] *Id.* at 508-09.

judgment.[252] Among the public interests, the court included the administrative difficulties of overburdened courts and the interest of the country where the violation occurred to have the case heard at home.[253] The Gulf Oil case also established a presumption in favor of the plaintiff, declaring that the plaintiff's choice of forum should rarely be disturbed unless the balance of interests is strongly in favor of the defendant.[254]

Years later, in the Piper Aircraft case, the Supreme Court reinforced what it already had said in the Gulf Oil case with respect to the discretion of the court, declaring that the court's decision can only be reversed when there is a clear abuse of discretion,[255] eliminating almost any chance to appeal a dismissal based on forum non conveniens grounds. Moreover, after this, "appellate courts have little power to create uniformity,"[256] and since the balance of interest is left to the court's discretion, there is great uncertainty concerning how a court is going to apply the doctrine in each particular case.

While the Gulf Oil case involved only U.S. citizens, the Piper Aircraft case involved foreign plaintiffs,[257] a reason why the court probably ruled that the presumption in favor of the plaintiff deserves less deference when

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[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Piper Aircraft*, 454 U.S. at 257.
[256] Dorward, *supra* note 158, at 166.
[257] The Piper Aircraft case involved an airplane crash, where eight Scottish people died, and their families filed the action against the U.S. airplane manufactory.

the plaintiff is an alien. [258] The court also stated that the plaintiff will not defeat a forum non conveniens dismissal by merely showing that the law that would be applied in the foreign forum is less favorable to the plaintiff.[259]

Probably the most important public interest is the interest of the foreign country in having its local controversies heard at home, which is known as "judicial comity." It is basically an act of deference from the court to the foreign country.[260] The court has to decide if "there is sufficient local interest in the foreign forum to justify having the case decided there."[261] From the court's perspective, to retain jurisdiction in those cases would be seen as an act of imperialism whereby a sovereign imposed its own standards and rules on the country where the appropriate forum is located.[262] However, it is ironic that the American court in the Bhopal case[263] gave great weight to this interest, while the Indian government showed a clear interest in having the case heard in the United States.[264] The American court hardly showed respect for India's interest.

At the U.S. state level, the doctrine has not always been used in the same way as at the federal level, but in the last few years, there has been

[258] *Piper Aircraft*, 454 U.S. at 256.
[259] *Id.* at 247.
[260] Solen, *supra* note 170, at 350.
[261] *Id.*
[262] Reed, *supra* note 193, at 67.
[263] *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, 634 F.Supp. 842 (1986).
[264] Reed, *supra* note 206, at 70.

greater adherence to the federal approach.[265] *In Dow Chemical Co. v. Castro Alfaro,*[266] eighty-two Costa Rican plantation workers brought an action in Texas claiming that they had suffered personal injuries, including sterility and cancer, caused by their exposure to a pesticide manufactured by Dow Chemical Company and Shell Oil, both U.S.-based multinational companies. The pesticide had been banned in the United States more than a decade previously because of the dangerous consequences to human health. The Texas Supreme Court held that forum non conveniens would not be a bar to wrongful death and personal injury actions arising in a foreign state.[267] Nevertheless, shortly after this case, the Texas legislature enacted a bill that overruled the case as a result of strong lobbying by the corporate sector.[268]

On the other hand, Australian courts have upheld the original goal of the forum non conveniens doctrine by dismissing only those cases that do not belong to its courts, and applying the doctrine only in exceptional circumstances.[269] England[270] and Ireland have adopted the same discretionary American approach, which places them in clear conflict with the principles set out in the Brussels Convention.[271]

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[265] *Id.* at 54.
[266] 786 S.W.2d 674 (Tex. 1990).
[267] *See id.* at 675-79.
[268] Reed, *supra* note 206, at 56-57.
[269] *Id.* at 57.
[270] *See id.* at 82-89 for further analysis of the development of the doctrine in English courts.
[271] *Id.* at 84-85.

The doctrine is used to combat forum shopping exercised by some lawyers to take advantage of higher awards.[272] However, the practice of dismissing cases to prevent forum shopping is questionable because the lawyers are only trying to do their job effectively by choosing the most favorable forum for their clients.[273] Moreover, in certain circumstances under the special circumstances of the case the lawyers have no real choice of an alternative forum for their clients.[274]

Unfortunately, the Anglo-American doctrine is used by MNEs to escape liability for their conduct abroad, leaving some foreign plaintiffs with no other remedy, since substantial and procedural differences between forums, not to mention the corruption factor, can make the litigation possible only in the forum in which the litigation had been dismissed. In fact, only a very small percentage of cases are pursued in foreign forums once they have been dismissed.[275] MNE lawyers spend much time and money on their arguments to have a case dismissed because they know that once the case is dismissed, the lawsuit is practically over.[276]

It is very controversial when this doctrine is invoked by MNEs against foreign plaintiffs since it seems that injuries done by corporations of the

[272] *Id.* at 72-75.
[273] *Id.* at 74.
[274] *Id.*
[275] Solen, *supra* note 170, at 350-51.
[276] *Id.*

forum to foreign nationals abroad are not the forum's problem.[277] There is no doubt that courts exercise open discrimination against foreign plaintiffs.[278] By dismissing such cases on the forum non conveniens ground, common law courts are closing their eyes to corporate malpractice, negligence, and harmful conduct. For instance, it should be of great concern that some MNEs sell to foreign poor countries products that have been prohibited in their home countries, using these developing countries as the "industrial world's garbage can."[279] There are also claims that MNEs engage in systematic degradation of the environment, or do not act with reasonable care when they use production plants that emit levels of sulfur dioxide at many times above what is acceptable under their home country laws.[280] Even worse are the accusations against MNEs that act in concert with governments that violate human rights.[281] Such MNE conduct will continue because the MNE's wrongdoings are not punished by their home countries or by the host countries, [282] allowing MNEs to benefit from the "best of both worlds."[283] These concerns have been clearly expressed by the Dow Chemical court:

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[277] Reed, *supra* note 206, at 52.
[278] *Id.* at 60.
[279] *Id.* at 62.
[280] Gibney & Emerick, *supra* note 4, at 139.
[281] Demian Betz, *Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict-Ridden Nations: An Argument Against Exporting Federal Jurisdiction for the Purpose of Regulating Corporate Behavior Abroad*, 14 DEPAUL BUS. L.J. 163, 163 (2001).
[282] The circumstances for not punishing MNE's wrongdoings in poor countries vary from lack of effective legal system, corruption, dependency to FDC of MNEs, etc.
[283] Rogge, *supra* note 221, at 301 (2001).

> Some United States multinational corporations will undoubtedly continue to endanger human life and the environment with such activities until the economic consequences of these actions are such that it becomes unprofitable to operate in this manner. When a court dismisses a case against a United States multinational corporation, it often removes the most effective restraint on corporate misconduct ... In the absence of meaningful tort liability in the United States for their actions, some will continue to operate without adequate regard for the human and environmental costs of their actions. This result cannot be allowed ...[284]

Although it is the responsibility of host countries to fashion regulations that include acceptable standards, and to provide courts that allow its citizens to legitimately sue MNEs, the race to the bottom in which they are engaged makes the responsibility an illusion.[285] In their competition to attract investments, "the government that offers the lowest potential tort and environmental liability wins."[286] MNEs avoid countries with rigorous regulations, and are able to shop for jurisdictions that lack standards or have low standards, where individuals have limited

[284] *Dow Chemical*, 786 S.W.2d at 689.
[285] Reed, *supra* note 206, at 71.
[286] *Id*. at 62.

access to courts.[287] This lack of a legal infrastructure translates into lower costs and bigger profits for MNEs.

To avoid the difficulties in overcoming the separate legal entities principle and the forum non conveniens dismissal, plaintiff's lawyers have started to make allegations that focus on the actions of the parent itself, as the entity that set the policies and supervised the operations of its subsidiary.[288] This strategy was used in the Aguinda case, in which it was alleged that the operational decisions that caused the injuries in Ecuador were made in Texaco's headquarters in New York.[289]

In order to reduce the discretionary power of U.S. courts to dismiss cases under the forum non conveniens doctrine, governments in Latin America have enacted laws[290] that eliminate the subject-matter jurisdiction of cases against American MNEs in Latin American courts.[291] With this strategy, they try to help their nationals to gain access to U.S. courts by making their local forum unavailable and thereby lessening the possibility of dismissal under forum non conveniens grounds in U.S. courts.[292]

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[287] Rogge, *supra* note 221, at 306.
[288] Ward, *supra* note 12, at 460.
[289] Rogge, *supra* note 221, at 308.
[290] These laws are called *Ley de Defensa de los Derechos Procesales de Nacionales y Residentes* (Law in Defense of the Procedural Rights of Nationals and Residents) or a close variation thereof.
[291] Scott Holwick, *Transnational Corporate Behavior and Its Disparate and Unjust Effects on the Indigenous Cultures and the Environment of Developing Nations: Jota v. Texaco, A Case Study*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 183, 209-10 (2000).
[292] *Id.* Among the countries which have enacted this laws are Costa Rica, Ecuador, Guatemala, Honduras, and Nicaragua.

IV. RECOMMENDATIONS

A. *Developing Countries Should Jointly Raise Their Standards*[293]

It is very tempting to dream of an international convention, whereby all of the countries of the world would adopt the same standards. Nevertheless, the experiences of the UN and WTO have demonstrated that it is impossible for rich and poor countries to reach consensus because of their different interests and circumstances. Therefore, a more realistic solution is a convention among developing countries; because they share the same interests, they may more quickly reach a consensus on minimum standards.

The advantages of the suggested solution become clearer if two other proposals are discharged: first, that MNEs should control the setting of minimum standards, and second, that home countries

The first proposal favoring standard-setting by MNEs is based on the argument that they have so much economic and political power that it is their moral duty to provoke the setting of minimum standards, influencing

[293] This recommendation was developed after a suggestion by Professor Wilner during the oral presentation of this thesis in Graduate Seminar II, on April 5, 2004.

not only host countries but also others MNEs.[294] Although few MNEs would admit that they are only interested in making profits, it would be unrealistic to believe that MNEs have to opt between adopting the best practice and taking advantage of lower standards.[295]

For instance, Lewis Strauss (Lewis) was the first company to adopt a corporate code that afterwards served as a model for other MNE corporate codes.[296] In 1993, following the guidance of its corporate code, the company closed its plants in China in response to reports of human rights abuses in that country.[297] No other company followed this action, and while they continued to benefit from the lower standards in China, Lewis lost a core market.[298] Three years later, Lewis revised its code, deleting the provision that mandated the termination of business in countries in which there are human rights abuses.[299] Shortly thereafter, Lewis reopened again its plants in China.[300]

The experience of Lewis shows that even the willingness of a MNE to do the right thing is not enough.[301] If they try to adopt higher standards, they are destined to fail competitively.[302] While there still are countries with lower standards, there will always be a MNE that takes advantage of

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[294] Shaughnessy, supra note 11, at 162.
[295] Ward, *supra* note 12, at 453.
[296] Wagner, *supra* note 119, at 1066.
[297] *Id.*
[298] *Id*. at 166-67.
[299] *Id.* at 167.
[300] *Id.*
[301] *Id.* at 165.
[302] *Id.* at 163.

such standards. Therefore, an effective solution must come from host countries.

Some scholars have suggested a second proposal, whereby home countries legislate extraterritorial regulations for their MNEs which would be applicable at home as well as abroad.[303] The problem with this approach is that the regulation of higher standards by home countries will place their MNEs operating abroad at a competitive disadvantage with respect to other MNEs, which are not subject to those standards by their governments.[304] In addition, extraterritorial legislation could be seen as an invasive practice of the home countries by host countries that deliberately choose low standards; host countries could even claim that home countries are not respecting their sovereign rights.[305] After all, "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[306]

Having demonstrated the weaknesses of these proposals, it is clear that the only effective and legitimate way to ensure an effective resolution of the lack of standards or low standards is for host countries to set minimum standards. The Treaty of Versailles of 1919 declared, "The failure of any nation to adopt humane conditions of labour is an obstacle

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[303] *See generally* Gibney & Emerick, *supra* note 4.
[304] *Id.* at 141.
[305] *Id*. at 144-45.
[306] *Id.* at 128 (quoting American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909)).

in the way of other nations which desire to improve the conditions in their own countries."[307] Although the treaty referred only to labor standards, the statement could also be extended to human rights and environmental standards. Individual states would not unilaterally adopt higher standards because they would lose investments in favor of those states that maintained low standards. However if all of the states agreed to raise standards, then it would be a win-win situation for every state since each state would compete to attract investment from an equal position thereby ensuring a level playing field.

This argument further supported by the reality that if host countries do not protect their labor force, the human rights of their nationals, and their environment, why should anyone else do it? After all, an inherent duty of any state is the protection of its nationals. Moreover, the threat of MNE relocation, which is the main fear of poor countries, would be eliminated if all of the poor countries together adopt higher standards. Finally, poor countries again would hold the balance of power which is now in the powerful hands of MNEs.

In this context, it is essential that the same standards apply to MNEs as well as to domestic corporations; such practice would be in accordance

[307] Treaty of Versailles, June 28, 1919, 225 Consol. T.S. 188, pt. XIII pmbl., 112 B.F.S.P. 1, amended on several occasions and current revision reprinted in ILO, Constitution of the International Labour Organization and Standing Orders of the International Labour Conference 5-24 (1980).

with the notion of "national treatment" which imprints most trade and investment liberalization.[308]

B. Emphasis on Enforcement Mechanisms

There are three types of enforcement mechanisms: internal self-enforcement, vertical enforcement, and horizontal enforcement.[309] Internal self-enforcement, executed by the state itself, is the most important type of enforcement since violations generally occur within a state.[310] Vertical enforcement is controlled by intergovernmental organizations that can influence a government to end violations.[311] Lastly, horizontal enforcement is done by other states that can exert pressure against a violator.[312]

The proposed approach will center mainly on internal self-enforcement, but since it is known that certain governments could not be trusted to comply with these standards, they need exterior pressures. Vertical and horizontal enforcement thus can help to ensure the governments' compliance.

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[308] Ward, *supra* note 12, at 473; Pergar, *supra* note 130, at 3.
[309] *See* HENRY J. STEINER, DETLEV F. VAGTS & HAROLD HONGJU KOH, TRANSNATIONAL LEGAL PROBLEMS 638- 39 (4th ed. 1994).
[310] *Id.* at 638.
[311] *Id.*
[312] *Id*. at 639.

1. Internal Self-Enforcement: The Monitoring and Enforcement of Corporate Codes Should Be Mainly in the Charge of National Authorities

Regulations concerning a specific issue require both norm enunciation and an enforcement mechanism.[313] Once developing countries have agreed to adopt minimum standards, and assuming that developed countries continue to maintain their higher standards, the countries should compile their standards in a national model code, which would serve as a guideline for voluntary corporate codes. Therefore, corporations would be free to adopt their own codes as long as they incorporated the minimum standards. The proposed solution thereby would avoid any controversy about "binding" codes. Three decades of experience have shown that conflicts of interest make a "binding" legal instrument for MNEs an illusory goal, but if MNEs and national authorities focus on the effectiveness of the codes, "it may blur the distinction between a voluntary and a binding code."[314] Once corporations have adopted their codes, local authorities thus should assure compliance with the codes by providing incentives and by monitoring them MNE activity.

Governments should reward corporations that comply with their codes with preferences for government contracts and financial assistance in their trade and exports. Governments also should reprove corporations

[313] Stephens, *supra* note 155, at 402-03.
[314] Rubin, *supra* note 14, at 1286.

that do not comply by the removal of financial assistance, as well as the threat of liability under national laws. This approach inspired two U.S. bills: the Good Corporate Citizenship and Federal Procurement Incentives Act of 1997 and the Corporate Code of Conduct Act of 2001.[315]

One way to monitor MNEs would be to require mandatory disclosure not only of MNE financial information but also of "the social, political, environmental and human rights implications of their actions."[316] Public reports will put the MNEs under great social pressure to comply with their codes and to act with great care, and will be welcomed by "consumers and the investment community [who] will be able to effectively and equitably determine MNEs' ethical standards that deserve their financial patronage."[317] Finally, it will enhance transparency and make easier the eradication of bribery at corporate levels.

To ensure the enforcement of mandatory disclosure laws, the laws must provide sanctions for misleading disclosure and for non-disclosure, which can expose companies to greater liabilities and can act as another powerful motivation for a change in business practices.[318]

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[315] *See* Westfield, *supra* note 9, at 1104-05, for a description of both bills. Although they did not pass successfully through the U.S. Congress, they both serve as models for this approach. *Id.*

[316] Cynthia Williams, *Codes of Conduct and Transparency*, 24 HASTINGS INT'L & COMP. L. REV. 415, 415 (2001). The requirement of greater disclosure is the type of approach taken by many organizations, such as the OEDC in its Guidelines for MNE in an attempt to achieve more transparency.

[317] Westfield, *supra* note 9, at 1108.

[318] Williams, *supra* note 316, at 421.

2. Vertical and Horizontal Enforcement: Support by the International Community

The support of the international community can ensure a higher degree of compliance by developing states and MNEs. On the ambit of vertical enforcement, one mechanism to exercise pressure for implementing minimum standards could be "conditional lending by international financial institutions."[319] This process could be effective if it is supported by institutions such as the World Bank or the International Monetary Fund, which could incorporate these human rights, labor, and environmental standards as one condition more in the their "Golden Straitjacket." In particular, the IMF, which has substantial powers, even more than the WTO, could exercise pressure on developing countries to comply with its conditions.[320] Nevertheless, only the European Bank for Reconstruction and Development is considering the inclusion of labor standards as a prerequisite for financial loans.[321]

International organizations also can introduce a system of information and research to measure the degree of compliance of governments and MNEs in particular. They could use the results to exert pressure on violators by taking the measures that are among their faculties. For instance, the IMF or the WB could deny financial help to

[319] Charnovitz, *supra* note 30, at 150.
[320] VAGTS, DODGE & KOH, *supra* note 6, at 181.
[321] Charnovitz, *supra* note 30, at 150.

violators-governments, the WTO could impose a ban on the trade of products from violators-governments or violators-MNE, and the ILO, the UN and other non-governmental organizations could use bad publicity against MNE that do not comply with minimum standards.

Horizontal enforcement could include the requirement the governments of developed and developing countries consent to boycott products made by lower standards. The British Labour Party and Trades Union Congress already had proposed this approach at the World Economic Conference of 1927, recommending an international convention whereby all member would agree to boycott goods made under lower conditions than those promoted by the ILO Conventions.[322]

Moreover, the ILO should take a more aggressive role in its mission to promote labor standards, such as implementing the trade controls established by new conventions.[323] It could demand that governments not trade in goods made in violation of their labor standards, a technique which is already used in the environmental area.[324] It is important to realize that "[t] his measure is not an economic sanction against a target country, but rather a trade control on odious products."[325]

Another useful practice is the Generalized System of Preferences (GSP), under "which industrial countries provide duty-free treatment to

[322] VAGTS, DODGE & KOH, *supra* note 6, at 188.
[323] Charnovitz, *supra* note 30, at 162.
[324] *Id.*
[325] *Id.* at 163.

certain products from developing countries." [326] The United States and the European Union have put this system into practice, emphasizing labor conditions.[327] Once the U.S. GSP was established, it gave preferences to the beneficiary countries for ten years.[328] When in 1984 it extended the period for eight and a half years, it introduced a new category of countries which were excluded from GSP benefits "if such country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country."[329]

The United States also used this kind of mechanism to influence foreign nation to adopt minimum labor standards in the Caribbean Basin Economic Recovery Act,[330] which commands the President to consider if the workers in a country are afforded "reasonable workplace conditions and enjoy the right to organize and bargain collectively" when giving trade benefits to Caribbean countries.[331] Minimum labor standards were also considered in the Overseas Private Investment Corporation Act,[332] which

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[326] *Id.* at 151.
[327] *Id.* For instance, in 1996 the EU terminated GSP benefits for Burma due to its forced labor practices.
[328] Trade Act of 1974, 19 U.S.C. 2319. (1974).
[329] Gibney & Emerick, *supra* note 4, at 137 (citing The Trade and Tariff Act of 1984, 19 U.S.C. 2101*).* Section 503 of the Act clarified that "internationally recognized worker rights" included: (1) the right of association; (2) the right to organize and bargain collectively; (3) a prohibition on the use of any form of forced or compulsory labor; (4) a minimum age for the employment of children; and (5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.
[330] 19 U.S.C. 2701-2706 (1984).
[331] Gibney & Emerick, *supra* note 4, at 137.
[332] 22 U.S.C. 2191-2200 (1969).

improves "U.S. development assistance programs by insuring and/or facilitating private initiatives."[333]

C. Modernization of Corporate Law

In order to achieve greater accountability of MNEs, it is necessary to revise the traditional concepts of corporate law worldwide. The relations among the different enterprises inside a MNE vary from MNE to MNE, and even in the same MNE, the relations may differ depending on the kind of decision to be made.[334] It seems that the best way to determine whether a parent should be held liable for its subsidiaries is by establishing in each case whether the control of the parent was effectively exercised.[335] This approach permits a flexible system; in addition, the burden of proof should be placed on the parent.[336]

What seems pretty obvious is that the greater the parent is involved in the day-to-day control of the subsidiary, the greater its liability should be.[337] A proposed flexible system should take into account many factors that ultimately will determine the kind and degree of liability of a MNE in

[333] Gibney & Emerick, *supra* note 4, at 138.
[334] Antunes, *supra* note 1, at 228-29.
[335] *Id.*
[336] *Id.*
[337] Ward, *supra* note 12, at 459.

each concrete case.[338] Some factors that have been proposed are the following:

(i) The ties of the MNE with the host government. The more influence a corporation has in the government, the larger are its duties in the area of human rights -a duty of private actors and states not to be complicit to the violation of human rights.[339]

(ii) The control of the MNE over the population affected. The more control a corporation has over individuals, the more duties it has towards them.[340] The MNE will have higher duties if it has a direct impact upon the physical and mental health and well-being of the people.[341]

(iii) The influence of the MNE with respect to who is actually doing the violation -if is a subsidiary, a supplier, etc.[342]

All these considerations converge with what Phillip I. Blumberg had in mind when he stated, "[E]nterprise law is a product of the modern age, an age in which the law is increasingly concerned with multifactor factual analysis, rather than with transcendental legal constructs."[343]

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[338] Antunes, *supra* note 1, at 228-29.
[339] Cone, III, et al., *supra* note 15, at 27-29.
[340] *Id.*
[341] *Id.* at 29.
[342] *Id.* at 27-29.
[343] Blumberg, *supra* note 218, at 253.

D. Host Countries Should Ensure an Impartial Forum to Its Nationals

Host countries should take strong steps to strengthen their judicial systems to provide their citizens with adequate forums to pursue their legitimate claims. To achieve that goal, changes have to be made in the following areas:

(i) In the structure of courts in order to offer impartial courts.

(ii) In the civil and criminal legislation to provide effective causes of action for violations of minimum standards, ensuring the accountability of corporations and a just indemnification for victims.

(iii) In the procedural legislation to facilitate litigation by the plaintiff, such as importing U.S. mechanisms such as contingent fees and class actions.

These changes will require an important structural modification of most legal systems and governments will have to contribute substantial financial resources to effect the modification, but such action is necessary and worthwhile.

One alternative method to ensure that citizens with have an adequate forum would be to import the dispute resolution clause between MNEs and host governments which is included in most bilateral investment agreements. In the clause, the MNE would agree to submit to the

jurisdiction of an international court of justice or arbitration tribunal whenever nationals of the host country raise a claim to that court for violations of the minimum standards by the particular MNE. This clause could be included in each bilateral investment agreements. It would be an effective way to submit such claims to neutral courts, which have nothing to do with the MNE or the host country, and it would be specially useful for developing countries that have a weak judicial system. However, the cost of litigation can be higher under this approach, and governments should find a way to lessen the burden on plaintiffs by creating a fund, requiring MNEs to contribute liability insurance or other financial assistance.

E. A Sensitive Forum Non Conveniens Doctrine

As was stated above, host countries should provide their nationals with an adequate forum to avoid forcing their nationals to litigate in other countries.[344] Nevertheless, in those exceptional cases where the plaintiff is litigating abroad, home countries should offer impartial courts to the foreign plaintiff, who may be left without any other remedy, instead of automatically protecting their MNEs with controversial mechanisms such as the doctrine of forum non conveniens.

[344] Ward, *supra* note 12, at 468.

The model to be followed by common law courts should be the action taken by some American judges, who have departed from the Piper Aircraft standard, showing sensitivity to the particular circumstances of the foreign plaintiff.[345] These courts considered whether in the particular case justice could be done by the alternative forum. For instance, some courts considered if the lack of class actions in the foreign forum would impede the litigation, and if the corruption of the foreign government would impede an adequate resolution of the case to the extent to make the foreign forum inadequate.[346] In addition, many courts dismissed the case under the forum non conveniens ground subject to certain conditions such as the submission of the MNE to the jurisdiction of the foreign court.[347]

[345] Dorward, *supra* note 171, at 162.
[346] *See* Carella, *supra* note 240, at 723-728, for an extended analysis of these considerations by many courts.
[347] In the Bhopal case, the U.S. court subjected the dismissal to the condition that Union Carbide Corporation submit to the jurisdiction of the Indian Court. The same approach was taken by the Court of Appeals in the Aguinda case, where the case was remanded to the District Court, which was obligated to reopen it and to at least subject the dismissal to the submission of jurisdiction of Texaco to Ecuadorian courts. After considering the results of the report of the Department of State about the high level of corruption and the political instability of Ecuador, the District Court also asked the Ecuador governments for additional submissions on whether the foreign courts would be able to hear the case with independence and impartiality if the case were heard there.

V. CONCLUSION

Society demands greater corporate accountability. MNEs have to learn that they cannot act with impunity because if they engage in abusive practices or violate environmental standards, they will have to confront negative publicity and liability; in the end, it is in their own interest to be careful.

The solution to the problem of MNE responsibility should be an internationally coordinated approach, where the main responsibility must be on host countries to agree to raise their low standards and to enact legislation that will effectively enforce the new standards. In addition, the support and pressure exerted by international organizations and developed countries will be necessary to ensure that all developing countries are doing their best to comply with their commitments, and that MNEs are complying with local laws.

Furthermore, traditional concepts of corporate law need to be modernized worldwide to avoid the impunity of MNEs that hide under the corporate veil. This thesis proposed a flexible system that will analyze the different factors of each case to satisfactorily determine corporate responsibility.

Moreover, impartial courts should be available to potential plaintiffs to ensure that justice will be done, as well as to encourage MNEs to engage in positive changes in business behavior. Host countries should strengthen their procedural and substantive laws to effectively deal with this type of litigation and to provide its nationals with an adequate forum, either national or international. Home countries additionally should open the doors of their courts to foreign plaintiffs that are left with no remedy.

If these recommendations are implemented, then the values of our global society will put the well-being of individuals over economic interests. In the words of Halina Ward, "Encouraging global corporate responsibility then becomes part of efforts to put a human face on the global economy." [348]

[348] Ward, *supra* note 12, at 453.

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