Corporate Social Responsibility:
An Evolving Global Business Phenomenon

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Brian W. Burkett
John D. R. Craig
Sonia Regenbogen
Mathias Link
Stephanie Montgomery-Graham
S. Jodi Gallagher

Heenan Blaikie

Montréal
1250 René-Lévesque Blvd. West
Suite 2500
Montréal, Québec
Canada H3B 4Y1
Telephone (514) 846-1212
Fax (514) 846-3427

Toronto
P.O. Box 185, Suite 2600
South Tower, Royal Bank Plaza
Toronto, Ontario
Canada M5J 2J4
Telephone (416) 360-6336
Fax (416) 360-8425

Vancouver
1055 West Hastings Street
Suite 2200
Vancouver, British Columbia
Canada V6E 2E9
Telephone (604) 669-0011
Fax (604) 669-5101

Heenan Blaikie maintains the following additional offices throughout Canada:

Québec, Trois-Rivières, Sherbrooke, Ottawa, Calgary and Kelowna

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I. INTRODUCTION

Over the past decade, corporate social responsibility ("CSR") has grown from a buzz phrase to a global business phenomenon. Critics indict CSR as being nothing more than an expensive public relations exercise that diverts scarce resources from a corporation's bottom line. Proponents of CSR point out that adopting a "triple-bottom line" approach which takes social and environmental, as well as fiscal performance, into account yields long-term, tangible rewards for a corporation.

The long-standing debate over whether a convincing business case exists for CSR implementation is the principal focus of this paper. To set the stage for this discussion, we first provide an overview of CSR, including a classification scheme of the major types of codes of conduct. Second, we trace the history of the development of CSR as a reaction to concerns over trade liberalization and the increasing power of multinational enterprises ("MNEs"). Third, we summarize the five major supra-national initiatives relating to CSR, including the controversial United Nations' Draft Norms. Fourth, we provide a snapshot of the state of CSR commitment in two representative jurisdictions, Canada and the United Kingdom, to establish the current trends and limitations in the CSR field. Lastly, we delve into the business case for CSR. High profile CSR failures, as well as successful corporate vanguards, have raised the profile of CSR within the business community. It is clear that for social and environmental performance considerations to become part of the fabric of mainstream corporate decision-making, solid evidence is needed that CSR implementation supports competitiveness and improves the financial performance of the business – whether in the short- or long-term.

II. CSR: AN OVERVIEW

A number of terms are used interchangeably when describing efforts to manage the social and environmental "footprint" left by a corporation's operations – e.g. "corporate sustainability", "citizenship" "stewardship", or even simply "responsible business". The Conference Board of Canada has developed a comprehensive model of CSR which encompasses five pillars of activity: governance/management practices; human resource management; community investment; environment; health and safety; and human rights[1]. Just as broadly conceived, the International Organization of Employers ("IOE") defines CSR as "initiatives by companies voluntarily integrating social and environmental concerns in their business operations and in their interaction with their stakeholders". [2]

The IOE definition recognizes, first, that CSR is voluntary corporate action and goes beyond simple legal compliance with domestic laws. Second, the definition views CSR as being a core aspect of business activities throughout a company and thirdly, recognizes CSR as a means of engagement with stakeholders in the various spheres in which a company operates.

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[1] D. Greenall, "National Corporate Social Responsibility Report: Managing Risks, Leveraging Opportunities" (Ottawa: The Conference Board of Canada, 2004) at p. 38, online: Conference Board of Canada <http://www.conferenceboard.ca> (date accessed: 11 September 2006).

[2] International Organisation of Employers, "Corporate Social Responsibility: An IOE Approach" (Position Paper) at p. 2, online: International Organisation of Employers http://www.ioe-emp.org/en/ioe-papers/position-papers/index.html (date accessed: 13 September 2006).

CSR includes compliance with domestic laws, even if those laws are poorly enforced; adherence to international standards; and adoption of voluntary codes of conduct.[3]

[3] R. Jenkins, "Corporate Codes of Conduct, Self Regulation in a Global Economy," Technology, Business and Society Programme Paper, Number 2 (Geneva: United Nations Research Institute for Social Development, April 2001) at p. 1, online: United Nations Research Institute for Social Development <http://www.unrisd.org> (date accessed: 13 September 2006) [Jenkins].

A. Classification of Codes of Conduct

Codes of conduct, the primary instrument through which CSR is implemented, are defined by the Organization for Economic Co-operation and Development (the "OECD") as "commitments voluntarily made by companies, associations and other business entities which put forth standards and principles for the conduct of business activities in the marketplace". Although a variety of classification schemes have been formulated[4], codes of conduct can generally be classified into five main types:

i. Company Codes

These are codes that are adopted voluntarily by companies. They can relate to a company's head office operations, as in Shell's Statement of General Business Principles[5], or be applied specifically to an MNE's suppliers, as in the case of Levi Strauss' Global Sourcing and Operating Guidelines[6].

ii. Trade Association Codes

Trade association codes are adopted by a group of firms in a particular industry, and like company codes, they tend to be voluntary. Trade association codes may be adopted by groups of firms based in developing countries, as in the case of the British Toy and Hobby Association Code of Conduct,[7] or by developing countries, such as the Bangladesh Garment Manufacturers

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[4] *Ibid.* at p. 20. The OECD distinguishes between four types of codes: company codes, business association codes, codes involving partnerships of stakeholders, and those created by international organizations. The IOE groups the codes into six categories: business initiated, UN and inter-governmental, NGO led, Government led, Commercial initiatives and Company initiatives. See "Corporate Social Responsibility: an IOE Approach", *supra* note 2.

[5] See Shell Canada, online: < http://www.shell.com/home/Framework?siteId=ca-en&FC2=/ca-en/html/iwgen/leftnavs/zzz_lhn2_2_1.html&FC3=/ca-en/html/iwgen/about_shell/how_we_work/principles_shared/business_principles.html> (date accessed: 13 September 2006).

[6] See Levi Strauss & Co., online: <http://www.levistrauss.com/Downloads/GSOG.pdf> (date accessed: 13 September 2006).

[7] See British Toy and Hobby Association, online: <http://www.btha.co.uk/membership/code_conduct.php> (date accessed: 13 September 2006).

and Exporters Association Code[8] and the Kenya Flower Council Code[9]. A prominent Canadian example of a trade association code is the Retail Council of Canada's Responsible Trading Guidelines, which address labour standards and human rights issues on an industry-wide scale for retailers involved in the sourcing of finished goods for sale[10].

iii. Multi-Stakeholder Codes

A number of multi-stakeholder CSR initiatives have emerged in response to the criticism that codes of conduct which are unilaterally designed and implemented by companies tend to be weak and are often aimed at public relations rather than substantial improvements in social performance[11]. Multi-stakeholder initiatives bring businesses together with NGOs, worker organizations (and in some cases government representatives) to play active roles in designing and implementing a CSR standard, along with being bound to a variety of reporting, auditing, monitoring and certification systems.

Multi-stakeholder initiatives may be organized within a specific industry, or cut across a variety of sectors. The UK's Ethical Trade Initiative (the "ETI") Base Code[12] is an example of such a multi-stakeholder approach, as are Project Sigma UK, Social Accountability International / Social Accountability 8000 (SA8000)[13], the Fair Labour Association (FLA)[14], Worldwide Responsible Apparel Production (WRAP)[15], AccountAbility 1000 (AA1000)[16], Global Reporting Initiative (GRI)[17] and the European-based Clean Clothes Campaign (CCC)[18].

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[8] See Bangladesh Garment Manufacturers and Exporters Association, online: <http://www.bgmea.com> (date accessed: 13 September 2006).
[9] See Kenya Flower Council, online: <http://www.kenyaflowers.co.ke> (date accessed: 13 September 2006).
[10] See Retail Council of Canada, online: <http://www.retailcouncil.org/crart/rtr.asp> (date accessed: 13 September 2006).
[11] P. Utting, "Regulating Business Via Multistakeholder Initiatives: A Preliminary Assessment" (Geneva: United Nations Research Institute for Social Development, 2001) at p. 1, online: United Nations Research Institute for Social Development <http://www.unrisd.org> (date accessed: 13 September 2006) [Utting].
[12] See Ethical Trading Initiative, online: <http://www.ethicaltrade.org/Z/lib/base/index.shtml> (date accessed: 13 September 2006).
[13] See Social Accountability International, online: <http://www.sa-intl.org> (date accessed: 13 September 2006).
[14] See Fair Labor Association, online: <http://www.fairlabor.org> (date accessed: 13 September 2006).
[15] See Worldwide Responsible Apparel Production, online: <http://www.wrapapparel.org> (date accessed: 13 September 2006).

Generally speaking, worker organizations view multi-stakeholder initiatives as being preferable to individually-designed company codes of conduct for a number of reasons. This is due to the fact that multi-stakeholder codes:

- are usually more comprehensive and more consistent with International Labour Organization Conventions;
- create a forum to explore and test audit methodologies and implementation of specific controversial code provisions;
- tend to include better defined methods and procedures for internal monitoring and external verification of compliance with code provisions;
- often require adoption of ongoing management systems by supplier to provide verifiable evidence of code compliance;
- require reporting of compliance within the multi-stakeholder initiative and/or to the public; and
- usually create a third-party complaint mechanism regarding violation of the code[19]

Critics of multi-stakeholder initiatives point out that company participation has not yet reached a critical mass in many industries, so such initiatives do not represent an effective replacement for national or international binding regulation of CSR. Moreover, the number of competing initiatives in a single sector can detract from their effectiveness, the participation of worker organizations has been marginalized in some initiatives, and poor monitoring mechanisms have been adopted by some groups[20]. Despite these criticisms, multi-stakeholder initiatives have emerged as one of the dominant private sector approaches to CSR in recent years.

iv. Model Codes

Model codes are designed to provide a benchmark of what a particular organization regards as good corporate citizenship. They are not generally applied in practice, but intended as

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[16] See AccountAbility, online: <http://www.accountability.org.uk> (date accessed: 13 September 2006).
[17] See Global Reporting Initiative, online: <http://www.globalreporting.org> (date accessed: 13 September 2006).
[18] See Clean Clothes Campaign, online: <http://www.cleanclothes.org> (date accessed: 13 September 2006).
[19] Maquila Solidarity Network, "Year End Review: Emerging Trends in Codes, Monitoring and Verification" in *Memo: Codes Update Number 13* (Toronto: Maquila Solidarity Network, December 2002/January 2003), online: Maquila Solidarity Network <http://www.maquilasolidarity.org> (date accessed: 13 September 2006).
[20] See Utting, *supra* note 11.

a guide for companies and trade associations that are contemplating adopting voluntary measures. Model codes have been proposed both by trade unions, such as the ICFTU's Basic Code of Labour Practice[21], and by NGOs, such as Amnesty International's Human Rights Guidelines for Companies[22]. A variation on a model code is the International Chamber of Commerce's Guidebook for Responsible Business Conduct[23], which supplies practical suggestions to companies on how to approach CSR issues and help position their own voluntary codes within the existing framework of generic business principles, government codes of conduct, and broader social values[24].

v. Intergovernmental Codes

Intergovernmental codes are negotiated at an international level by national governments and date back to the 1970s, when both the OECD Guidelines for Multinational Enterprises and the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises were adopted. Other intergovernmental codes (many of which are discussed in greater detail elsewhere in this paper) are the UN Norms of Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, the Global Sullivan Principles[25] and the UN Global Compact[26].

III. THE MODERN HISTORY OF CSR

[21] See International Confederation of Free Trade Unions, online: <http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/icftuco.htm> (date accessed: 13 September 2006).
[22] See Amnesty International, online: < http://web.amnesty.org/library/index/engACT700011998?open&of=eng-398 > (date accessed: 13 September 2006).
[23] See International Chamber of Commerce, online: <http://www.iccwbo.org> (date accessed: 13 September 2006).
[24] Council of the Bars and Law Societies of the European Union, "CSR Corporate Social Responsibility and the Role of the Legal Profession: A Guide for European Lawyers Advising on Corporate Social Responsibility Issues" (Brussels: Council of the Bars and Law Societies of the European Union, September 2003) at p. 19, online: Council of the Bars and Law Societies of the European Union <http://www.ccbe.org/doc/En/guidelines_csr_en.pdf > (date accessed: 13 September 2006).
[25] See Global Sullivan Principles, online: <http://globalsullivanprinciples.org/principles.htm> (date accessed: 13 September 2006).
[26] See Global Compact, online: <http://www.unglobalcompact.org> (date accessed: 13 September 2006).

To thoroughly appreciate the significance of current CSR trends, we must inquire into the dynamics of how and why CSR developed. The rise of MNEs, the dynamics of trade liberalization, its differing impact upon developed and developing areas of the world, and the birth of the anti-globalization movement have fostered society's demand for CSR and increased corporate accountability.

A. The Rise of Multinational Enterprises & CSR

MNEs, firms headquartered in one place with control over income-generating assets in other political jurisdictions, date back as far as 2000 B.C. to the Assyrian Kingdom.[27] MNEs in the form of state-sponsored trading companies grew in power during the period of European colonization in the seventeenth century.[28] The increased flow of international trade and technological advancements during the Industrial Revolution in the nineteenth century enabled a single company to coordinate a transnational production process: raw materials were taken from one country, processed in another and shipped to the place where the finished product was sold. From the 1880s, the numbers and scale of MNEs grew rapidly.

By 1914, a range of products were produced by multinational manufacturing including chemicals, pharmaceuticals, electricals, machinery, automobiles, tires, foodstuffs and cigarettes. The outbreak of World War I, however, greatly destabilized the burgeoning globalization trend and triggered a shift towards trade protectionism. The economic shock of the Great Depression, from 1929 onwards, halted the overall growth of foreign direct investment and saw the first global economy disintegrate. Many MNEs, however, continued to operate and grew in organizational complexity during the interwar years. MNEs tended to functional in more "national" ways during this period by entering into cartel agreements which restricted the flow of international trade and maintained prices in conditions of overcapacity, as well as developing their "local" identities to cope with increased competition in their host economies.[29]

i. Post World War II

The international economic order established following World War II was originally intended to be driven by three major international organizations: the World Bank, the International Monetary Fund and the International Trade Organization (the "ITO"). However, the failure of the United States to ratify the ITO's economic charter meant that international

[27] Geoffrey Jones, *Multinationals and Global Capitalism: From the Nineteen to the Twenty-First Century* (Oxford: Oxford University Press, 2004) at p. 16 ["Jones"].
[28] *Ibid.* at p. 17.
[29] *Ibid.* at pp. 20-31.

trade rules would be governed for the next forty years by a more ad hoc arrangement, namely the General Agreement on Tariff and Trade (the "GATT"). The ITO had contemplated provisions for the protection of investment and the control of restrictive business practices, including ones dealing with labour standards, but as these did not come within the umbrella of the GATT, the post-war system left the activities of international business largely unregulated[30].

It is also important to note that while the various Conventions of the ILO, especially from the period of the Declaration of Philadelphia in 1944 onwards, placed certain obligations on governments to regulate national corporations and to impose controls on foreign corporations that operated within their territories, these Conventions still did not address the regulation of *international* business.

ii. Late 1960's to mid 1970's

As a means of filling the void in regulating transnational business, twenty-two developing countries passed legislation controlling transnational corporate activities in the late 1960s and early 1970s[31].

In the mid-1970s, the first efforts emerged to develop and implement international standards for corporate behaviour. In 1974, the United Nations established its Centre on Transnational Corporations, which led to the development of a Draft Code of Conduct on Transnational Corporations (the "UNCTC"). Unfortunately, due to both the change in attitude of developing governments in the late 1970s, who shifted their emphasis toward attracting rather than regulating MNEs and foreign investment, and the rejection of the UNCTC by the United States, the Code was never agreed upon.

In 1976, the OECD adopted its Declaration on International Investment and Multinational Enterprise. The voluntary, non-binding Declaration represented an attempt by

[30] Jenkins, *supra* note 3 at p. 1.
[31] *Ibid.*

governments of the developed world to respond to the growing criticism of MNEs from the developing world. The OECD Declaration will be discussed in greater detail below.

iii. Late 1970's to Late 1980's

Regulation of transnational entities by developing countries was significantly curtailed beginning in the late 1970s and into the 1980s. This was a product of a general shift toward market-based policies and away from state intervention in both developed and developing countries. Sectors which had been closed to foreign capital began to open up; first, the manufacturing sector, and then (partly as a result of privatization) public utilities and natural resources. Most countries were also abandoning restrictions on foreign ownership, which had previously required MNEs either to enter into 50/50 joint ventures with local companies, or limited MNE ownership of subsidiaries to a minority stake.

At the same time as the trend towards liberalization and deregulation of national and international policies began, a complimentary trend toward voluntary corporate codes of conduct also started to emerge. These codes were adopted, particularly by American MNEs, in response to negative publicity arising from bribery and questionable payment scandals at the time. Anti-bribery codes would continue to be promulgated until the mid-1980s, when public pressure for the adoption of such codes had sufficiently decreased.

iv. Early 1990's: the Arrival of CSR and the Modern Corporate Code of Conduct

The second wave of corporate codes of conduct began in the early 1990s. However, these codes of conduct were very different from the international codes that had been proposed in the 1970s.

The international codes of the 1970s were seen as an attempt to redress the balance in the growing power of MNEs and national states, particularly in developing countries, where MNEs invested. The codes emerged from a perception that the growth of giant international companies posed a threat to the sovereignty of small, poor states. International regulation was thought to be necessary in order to ensure that developing countries would share in the gains from the growth of international corporate activity[32].

Corporate codes of conduct, on the other hand, are voluntary initiatives that have been adopted by the business sector itself. These codes range from vague declarations of business principles applicable to international operations, to more substantive efforts at self-regulation.

The recent wave of corporate codes has tended to focus on the impact of MNEs in two main areas: social conditions and the environment. In 2000, the OECD inventory of 246 corporate codes of conduct revealed that 60% of the codes referred to labour standards and 59% to environmental stewardship. In contrast with the voluntary codes of the 1970s and early 1980s, only 23% of codes in the 1990s addressed the issue of bribery.

Modern codes of conduct are part of a much wider debate concerning the impact of globalization on labour and the environment, which is also reflected in the call for social and environmental clauses within the WTO, and in trade agreements such as NAFTA. Whereas support for codes in the 1970s arose mainly from developing countries and their governments, support for modern codes of conduct has largely come from the developed world. Hence, international trade unions, developmental and environmental non-governmental organizations ("NGOs"), and the corporate sector itself, have all contributed to the demand for codes of conduct for international business.

Finally, whereas in the 1970s emphasis was focused on the activities of MNEs and their subsidiaries, in the 1990's, responsibility for the labour and environmental practices of MNE suppliers and sub-contractors was added as an integral component of an MNE's code of conduct.

B. Trade Liberalization, the Development Gap & Anti-Globalization

With the rise of the MNE in the 1950s, 60s, and 70s, an accountability gap began to emerge between the voluntary international labour standards set by the International Labour

[32] *Ibid.* at p. 6.

Organization ("ILO"), and domestic labour and social rights legislation. The importance and influence of the multinational corporate employer grew exponentially compared to that of worker organizations and even governments, both of which remained tied to their domestic jurisdictions. National and even regional legal systems addressing labour standards were not sufficient to regulate MNEs now operating on a global scale.

Globalization began to intensify in the 1980s and 90s due to factors such as financial deregulation, changes in transport technologies and communications. In 2006, corporations have a much greater flexibility to locate different parts of their value-added activities in various parts of the world. Production of goods and services has become internationalized at a deeper level than in the past. The latest wave of globalization has resulted in a small number of global giants occupying dominant positions in many industries.

The control of MNEs transportation, processing and marketing stages of production, combined with the economic resources at the disposal of leading MNEs, have led to a significant concentration of power in corporate hands.[33] For example, General Motors, Wal-Mart, ExxonMobil Corp., and Ford Motor have been stated to have larger economies than countries such as Israel, Singapore, Poland, South Africa, Indonesia and Thailand; of the 100 largest economies in the world, 51 are corporations; the sales of the top 200 corporations are equivalent to 27.5 percent of world economic activity while these corporations employ only 0.78 of the world's workforce[34].

Concerns have arisen that a substantial part of the world's population is being left out of the globalization process. State deregulation and the offering of incentives to MNEs has meant that there is often a significant disparity between the laws and living conditions of the country in which the MNE's headquarters are located and the countries in which parts of the production process occur. While human indicators such as life expectancy improved in North America,

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[33] Jones, *supra* note 27 at p. 288.
[34] Sarah Anderson and John Cavanagh, "Top 200: The Rise of Corporate Global Power" (Washington: Institute for Policy Studies, 2000), online: Institute for Policy Studies <http://www.ips-dc.org/reports/top200text.htm> (date accessed: 13 September 2006).

Europe, Japan and some East and Southeast Asian economies made income gains, 24% of the world's population continues to live in severe poverty.

Such concerns led to the ILO's establishment of the World Commission on the Social Dimension of Globalization, which released its final report on the economic and social aspects of globalization in February 2004 entitled *A Fair Globalization: Creating Opportunities for All*.[35] The report acknowledges the immense positive potential for globalization to open societies and economies to a greater exchange of goods, ideas and knowledge, as well as promoting greater sensitivity to the inequities of poverty, gender discrimination, child labour and environmental degradation around the globe. The report also recognizes, however, that deep-seated and persistent imbalances exist in the current workings of the global economy which are "ethically unacceptable and politically unsustainable".[36] The report calls for an "urgent rethink" of current policies and institutions of global governance to more equitably distribute the social gains being made possible by globalization. In December 2004, the UN General Assembly adopted by consensus a resolution[37] recognizing the work of the World Commission and calling upon member states to fully consider the report's recommendations. Further efforts following up on the World Commission's report are contemplated by various United Nations' bodies.

i. A Crisis in Confidence: the Anti-Globalization Movement

Concerns regarding the social and economic inequities of globalization arise not only at the international level, but locally and regionally. The perceived inability of local communities around the world to prevent MNEs from damaging their interests by overwhelming local firms, depleting local resources or making decisions on local employment from distant headquarters has sparked a crisis of confidence in corporations that is clearly international in scope. What has become known as the "anti-globalization movement" is diverse and includes environmental

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[35] World Commission on the Social Dimension of Globalization, "A Fair Globalization, Creating Opportunities for All" (Geneva: International Labour Office, 2004), online: International Labour Office <http://www.ilo.org/public/english/wcsdg/index1.htm> (date accessed: 13 September 2006).
[36] *Ibid.* at p. 3.
[37] Adopted by the 59th Session of the UN General Assembly as Resolution A/RES/57/59, "A Fair Globalization, Creating Opportunities for All," Report of the World Commission on the Social Dimension of Globalization.

organizations, religious groups, human rights activists, and groups dedicated to fair labour and economic policies.[38]

Proponents of the anti-globalization movement oppose NAFTA, the FTAA, the Summit of the Americas Process and the World Trade Organization ("WTO"). The movement is motivated by values such as social and environmental justice, democratic participation and human rights. It is a criticism against excessive materialism and the concentration of economic power. Multinational corporations are seen to reflect alien cultures and interests which become a threat to the identity and independence of people in the countries where they operate.

The ideological challenge of anti-globalization has fuelled increasing public demand for substantive measures to address social dimensions issues. The highest profile anti-globalization protest in Canada was in opposition to the third Summit of the Americas held in Quebec City during April 2001. More than 25,000 anti-globalization protesters gathered to oppose the Summit's alleged failure to adequately address social issues including labour and environmental standards.[39] These anti-globalization protests are, in part, a response to a perceived sense of powerlessness on the part of individuals who desire the accountability of large multinational corporations who wield enormous economic power but are not seen to be subject to democratic processes.[40]

Leaders within targeted international institutions are responding to the demands of the anti-globalization movement in a variety of ways. The World Bank now aims to achieve "sustainable development in a dynamic economy", while members of a panel appointed by the United States Congress have openly criticized International Monetary Fund ("IMF") policies.[41] Increasing pressure to adhere to more rigorous labour and environmental standards has caused

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[38] Duncan Green and Matthew Griffith, "Globalization and its Discontents" (2002), 78:1 *International Affairs* 49 at p. 55.

[39] See "Reports on Quebec City Globalization Protests", online: Organic Consumers Association http://www.organicconsumers.org/corp/quebecreports.cfm#Police (date accessed: 14 September 2006).

[40] Eric Stein, "International Integration and Democracy: No Love at First Sight" (2001), 95:3 Am. J. Intl L. 489.

[41] Ibrahim J. Gassama, "Confronting Globalization: Lessons from the Banana Wars and the Seattle Protests" (2002), 81 Or. L. Rev. 707 at p. 731.

companies to implement ethical measures, and ultimately has encouraged the new phenomenon of CSR. MNEs are now aware, more than ever before, of the need to account for their labour practices, if for no other reason than to prevent the binding regulation of international business from becoming a reality.[42]

IV. SUPRA-NATIONAL CSR INITIATIVES

At the international level, the OECD, the ILO and the UN have all attempted to create frameworks to promote and/or regulate CSR. In addition, the International Standards Organization ("ISO") is in the process of developing a guidance document on CSR.

A. The OECD Guidelines for Multinational Enterprises

The *Guidelines for Multinational Enterprises* (the "Guidelines") were originally adopted in 1976 by the OECD as one element of its *Declaration on International Investment and Multinational Enterprises* (the "OECD Declaration"). The Guidelines were last revised in June 2000.

The aim of the Guidelines is to help MNEs operate in harmony with government policies and societal expectations. In keeping with the notion of CSR, and to promote the contribution of business to social development and the promotion of basic worker rights, the Guidelines provide voluntary principles for responsible business conduct in fields such as employment, industrial relations, human rights, environment, competition, information disclosure and taxation, combating bribery and consumer protection. For example, the Employment and Industrial Relations Guideline sets out a framework for MNE behaviour, "within the law, regulations and prevailing labour relations and employment practices, in each of the countries in which they operate". Under the Disclosure of Information section, MNEs should provide, "a sufficient body of factual information on the structure, activities and policies of the enterprise as a whole", and so provide

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[42] Jill Murray, "Corporate Codes of Conduct and Labour Standards" (Geneva: International Labour Office), online: International Labour Office, International Training Centre <http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/guide/jill.htm> (date accessed: 13 September 2006) [Murray].

at least annually not only financial statements, but also, “other pertinent information”, including organizational information[43].

An OECD Member country is required to establish a National Contact Point, usually in the form of an official within the Member country’s trade or finance ministry, to promote the Guidelines, deal with inquiries, and help to solve problems that might arise between business and labour. A complaints procedure exists through the Committee on International Investment and Multinational Enterprises, where disputes are usually dealt with through “clarifications” of the Guidelines: “clarifications are general and hypothetical explanatory statements, which do not accept or reject the truth of any given factual situation and do not pass judgment on anybody’s conduct”. This nature of this process acts as a severe limitation on the practical enforcement powers of the Committee[44]. If a National Contact Point finds that a company has violated the Guidelines and refuses to remedy the situation, the appellants and the Contact Point have no sanctioning power other than to publicize the violation[45].

B. The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

[43] *Ibid*. at p. 9.
[44] *Ibid*. at p. 10.
[45] Kerkow U., Martens J. & T. Schmitt, “The Limits of Voluntarism: Corporate Self-Regulation, Multistakeholder Initiatives and the Role of Civil Society” (Bonn/Berlin: World Economy, Ecology & Development Association, 2003) at p. 18, online: Corporate Accountability <www.corporate-accountability.org/eng/documents/2003/limits_of_voluntarism.pdf> (date accessed: 13 September 2006).

The ILO adopted a Tripartite Declaration of Principles Concerning MNEs and Social Policy (the "ILO Tripartite Declaration") in 1977, which was updated in 2000, to take into account the 1998 ILO Declaration of Fundamental Principles and Rights at Work.[46] The ILO Tripartite Declaration's aim is to "…encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise."[47] Compliance with the ILO Tripartite Declaration's guiding principles is voluntary, and is not intended to affect obligations arising from the ratification of ILO Conventions[48].

The ILO Tripartite Declaration calls on Member states to ratify ILO Conventions 87 (Freedom of Association and Protection of the Right to Organize), 98 (Right to Organize and Collective Bargaining), 111 (Discrimination) and 122 (Employment Policy) and to apply the principles of these Conventions, along with Recommendations 111 (Discrimination), 119 (Termination of Employment) and 122 (Employment Policy).

Although the ILO Committee on Multinational Enterprises may interpret the terms of the ILO Declaration, and receive reports from Member countries on its application, it appears that the ILO Tripartite Declaration cannot be used to redress the misuse of MNE power, even when such power is used in breach of the Declaration itself.[49] Instead, disputes are referred to the Committee for an "interpretation" of the ILO Declaration; however, the Committee lacks the power to sanction a breach. Like the OECD Guidelines, the impact of the ILO Declaration on the global business community has arguably been relatively limited.[50]

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[46] Adopted at the International Labour Conference, Geneva, June 18, 1998.

[47] See Article II of the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th Session (Geneva, November 2000), online: International Labour Office <http://www.ilo.org/ilolex/english/iloquerymtn1.htm> (date accessed: 13 September 2006).

[48] Article VII states that the ILO Tripartite Declaration "…sets out principles in the fields of employment, training, conditions of work and life and industrial relations which governments, employers' and workers' organizations and multinational enterprises are recommended to observe on a voluntary basis; its provisions shall not limit or otherwise affect obligations arising out of ratification of any ILO Convention."

[49] Murray, *supra* note 42 at p. 12.

[50] Jenkins, *supra* note 3 at p. 4.

C. The United Nations' Global Compact

At the World Economic Forum in 1999, UN Secretary General Kofi Annan proposed a "Global Compact" between the UN and the international business community to help realize his vision of the private sector contributing to a more sustainable and inclusive global economy. The Global Compact, which is now endorsed by most national governments, a variety of unions and NGOs, in addition to 2,500 companies in 90 countries, challenges world business leaders to voluntarily "embrace and enact" within their sphere of influence ten core principles on human rights, labour, the environment and anti-corruption. Drawn from the *Universal Declaration of Human Rights*[51]*,* the *ILO Declaration on Fundamental Principles and Rights at Work,* the *Rio Declaration on Environment and Development*[52]*,* and the *United Nations Convention Against Torture*[53]*,* the core principles are:

Human Rights:

(1) Businesses should support and respect the protection of internationally proclaimed human rights; and
(2) make sure that they are not complicit in human rights abuses

Labour Standards:

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

Environment:

(7) Businesses should support a precautionary approach to environmental challenges;
(8) Undertake initiatives to promote greater environmental responsibility; and
(9) Encourage the development and diffusion of environmentally friendly technologies

Anti-Corruption:

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[51] Adopted by the United Nations' General Assembly as Res. 217A (III), U.N. Doc A/810 at 71 (1948).
[52] UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).
[53] *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987).

(10) Businesses should work against all forms of corruption, including extortion and bribery[54]

Notably, the Global Compact is not a regulatory instrument to "police" corporate conduct, nor is it a binding set of regulations or a corporate code of conduct. Instead, the goal of the initiative is to advance the ten core principles through the "self-enlightened engagement of its participants."

In June 2004, more than 500 CEOs, government officials and various heads of labour and civil society groups gathered at the first Global Compact Leaders Summit in New York. Some 20 major investment companies, including Credit Suisse Group, Deutsche Bank, Goldman Sachs, HSBC and Morgan Stanley, endorsed connecting financial markets to environmental, social and governance criteria and agreed to invite other actors in the financial world to make these factors standard components in the analysis of profitability and investment decision making.

Participating corporations must provide their stakeholders with a Communications on Progress ("CoP") detailing with their success in implementing the UNGC's ten principles and must file it with the UNGC Office. The results of the first official checkpoint for participating companies to submit CoPs were announced on July 15, 2005. Only 38% of corporations complied with the reporting deadline. Those who failed to submit a report may be removed from the list of active participants until a CoP is received by the UNGC Office.

In his closing comments at the New York Leaders Summit, UN Secretary General Kofi Annan called for a strategic review of the Global Compact and the development of a new governance framework that would transition the initiative from its initial phase of experimentation to one of greater focus, transparency and sustained impact. Over the next year, the Global Compact Office conducted extensive consultations on potential refinements to the initiative, and in September 2005 announced a new governance framework. Although key

[54] See M. Keay, "Towards Global Corporate Responsibility," Sustainable Development Programme Briefing Paper No. 3 (London: Royal Institute of International Affairs, April 2002); See also G. Kell, "The Global Compact: Origins, Operations, Progress, Challenges" *Journal of Corporate Citizenship*, Issue 11 (Autumn 2003), online: Greenleaf Publishing <http://www.greenleaf-publishing.com/jcc/jcc11.htm> (date accessed: 13 September 2006).

elements such as the core principles, objectives and voluntary nature of the initiative will remain unchanged, efforts will be made to promote greater ownership by participants and other stakeholders within a coherent organizational structure. Governance functions will be shared by six entities with differentiated tasks: a triennial Leaders Summit (next scheduled for June 2007), a Board (which was appointed as of April 2006), Local Networks, an annual Local Networks Forum, the Global Compact Office and an Inter-Agency Team. In addition, a non-profit foundation has been established to ensure the initiative's financial sustainability.[55]

Despite the strong criticism levied at the UN for warming relations with MNEs and doing more to enhance the image and legitimacy of big business than actually improving social and environmental performance standards[56], the Global Compact appears to be an effective tool in raising the profile of global CSR issues and maintaining public attention on a broad spectrum of spheres of corporate decision-making. A McKinsey & Company study recently concluded that since its inception, the Global Compact has had "noticeable, incremental impact on companies, the UN, governments and other civil society actors and has built a strong base for future results" by facilitating partnership projects between private corporations and the UN, accelerating policy change within corporations, inspiring champions for corporate reform, and establishing itself as the largest voluntary corporate initiative network of its kind.[57] The new Global Compact governance framework announced in September 2005 attempts to address the McKinsey & Company report's criticisms regarding the initiative's inconsistent participation rates, long-term legitimacy and real-world impact.

Recently, the UN Global Compact has made significant progress. Nearly 800 international business leaders and representatives of government and civil society participated in the two-day UN Global Compact Summit, held in Shanghai, China in November 2005.

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[55] The Global Compact Governance, online: <http://www.unglobalcompact.org/AboutTheGC/stages_of_development.html> (date accessed: 14 September 2006).

[56] P. Utting, "The Global Compact and Civil Society: Averting a Collision Course," forthcoming in United Nations Research Institute for Social Development News, No. 25.

[57] McKinsey & Company, "Assessing the Global Compact's Impact" (May 2004) at p. 2, online: <http://www.wwf.dk/db/files/imp_ass.pdf#search=%22%E2%80%9CAssessing%20the%20Global%20Compact%E2%80%99s%20Impact%E2%80%9D%20McKinsey%20%22 > (date accessed: 13 September 2006).

Participants of the Summit endorsed a 15-point "Shanghai Declaration" which includes statements on the role of business in society, actions for responsible business and the role of governments. The declaration read as follows:

> We, the participants of the UN Global Compact Summit: China, agree to the following statements:
>
> **Role of Business in Society**
>
> 1) Expanding global commerce is shaping relations and deepening interdependencies between states, cultures and people. Economic openness and advances in technology, science and communications have led to the globalization of business and, thus, to a fundamental shift in the pattern of economic activities and opportunities.
>
> 2) The ongoing transformation and expansion of markets around the world remains an uneven and fragile process. Due to the expanding reach of business, embedding universal principles in the global marketplace has become an imperative for creating more robust and equitable markets. Responsible business practices lead to social and economic inclusion, helping to advance international cooperation, peace and development.
>
> 3) Business can be an influential and practical force for good. The contribution of business to society is multi-faceted – from creating employment and income, providing technical skills and social benefits, strengthening management, to bringing market based solutions to pressing social and environmental problems, and upholding universal principles. Responsible businesses have proven to be a positive force in spurring development and improving human conditions.
>
> 4) Responsible business practices as advanced by the UN Global Compact can significantly strengthen business operations. Proactive corporate policies and practices that respect human rights and ensure safe and decent workplace conditions, environmental protection and good corporate governance create more sustainable value and benefits for workers, communities and society at large. They also enable business to attract and retain skilled workers, save costs, enhance productivity, create trust and positive reputation with stakeholders, and build brands.
>
> 5) The financial community is increasingly connecting environmental, social and governance performance to a company's overall valuation, thereby placing a premium on businesses that responsibly manage such risks and opportunities.
>
> **Actions for Responsible Business**

6) We, the participants of the UN Global Compact Summit: China, commit to continuously advance the implementation of the UN Global Compact and its principles. We will strive to give concrete meaning to a principle-based change approach in our operations. On our part, this requires ongoing efforts and partnerships with other actors of society, as well as willingness to learn, engagement in dialogues and dedication to practical actions.

7) We commit to build on best practices and to form alliances and collaborative efforts with like-minded businesses, including between foreign and local companies and within industry sectors.

8) We recognize the promise of cross-sectoral approaches to overcoming societal challenges and will form alliances and partnerships with actors in other sectors of society, such as not-for-profit organizations and educational institutions, to share experiences and knowledge regarding the implementation of the UN Global Compact.

9) We commit to carry-out educational and outreach efforts to ensure the integrity and safety of the workplace, as well as to inform employees about workers' rights, including the right for employee voices to be heard.

10) We commit to addressing key environmental challenges by taking action, where practical, in areas such as research, innovation, sustainable consumption and production, clean technologies, cooperation, education and self-regulation that can positively address the environmental degradation and damage to the planet's life support systems brought by human activity.

11) We commit to implement transparency in transactions, to develop no-bribe policies and to support a culture of good corporate governance.

12) We will ensure that supply chain capacities are built to effectively implement the UN Global Compact.

13) We commit to become proactive in critical areas where our voices and competencies can substantively contribute to the solutions of priority challenges, such as HIV/AIDS and other critical health concerns, and community engagement for sustainable and long-term development.

The Role of Governments

14) We recognize that business-led efforts can only be sustained and brought to scale if public institutions, the rule of law, and transparent and predictable regulatory

efforts support responsible business practices. We ask Government to actively encourage principled corporate practices and promote accountability and transparency. Government can reinforce responsible business through educational support, incentives that reward good practices and disincentives to minimize negative behaviour.

15) We recognize that the wider benefits of responsible business practices can only materialize if Governments provide for and strengthen a multilateral trading system that is open, fair and non-discriminatory, and if they further improve the international financial regime by putting in place a healthy and orderly trading financial environment conducive to growth and development. We are especially concerned that protectionism and inward-orientation could deny developing countries the ability to take full advantage of trading opportunities where they enjoy a comparative advantage. We call upon Governments to show global responsibility by bringing the Doha round of trade negotiations to a successful conclusion – only then can business fully contribute to poverty reduction and harmonious development. We also call upon Governments that have not yet done so to ratify or accede to the United Nations Convention against Corruption as a matter of high priority.[58]

In recent months, the Global Compact Office has published a guidance document to explain the purpose and operation of country networks, a practical guide to assist participating companies prepare progress reports, and in coordination with other international groups, has released "A Guide for Integrating Human Rights into Business Management".[59]

In April 2006 the Global Compact launched its "Principles for Responsible Investment", which are now endorsed by leading institutional investors from 16 countries, representing more than $2 trillion in assets owned. The Secretary-General, Kofi Annan, stated, "Developed by leading institutional investors, the Principles provide a framework for achieving better long-term investment returns and more sustainable markets. I invite institutional investors and their financial partners everywhere to adopt these Principles." The Principles, which are voluntary, include six overarching principles and a set of 35 possible actions that institutional investors can

[58] The Global Compact, News Release, "UN Global Compact Announces Shanghai Declaration" (1 December 2005), online: The Global Compact <hhttp://www.unglobalcompact.org/NewsAndEvents/news_archives/news_2005.html> (date accessed: 13 September 2006).

[59] The Global Compact, Final report released May 2006, online: The Global Compact <http://www.unglobalcompact.org/Issues/human_rights/index.html> (date accessed: 14 September 2006).

take to integrate environmental, social and corporate governance considerations into their investment activities. The Principles state:

> As institutional investors, we have a duty to act in the best long-term interests of our beneficiaries. In this fiduciary role, we believe that environmental, social, and corporate governance (ESG) issues can affect the performance of investment portfolios (to varying degrees across companies, sectors, regions, asset classes and through time). We also recognise that applying these Principles may better align investors with broader objectives of society. Therefore, where consistent with our fiduciary responsibilities, we commit to the following:
>
> 1) We will incorporate ESG issues into investment analysis and decision-making processes.
> 2) We will be active owners and incorporate ESG issues into our ownership policies and practices.
> 3) We will seek appropriate disclosure on ESG issues by the entities in which we invest.
> 4) We will promote acceptance and implementation of the Principles within the investment industry.
> 5) We will work together to enhance our effectiveness in implementing the Principles.
> 6) We will each report on our activities and progress towards implementing the Principles.[60]

Finally, in April 2006, Klaus M. Leisinger, the Special Advisor to the Secretary General on the Global Compact, published a paper entitled "On Corporate Responsibility for Human Rights". The paper addressed three questions, namely: "What is a fair definition of a company's 'sphere of influence'? How should a company competing with integrity define 'complicity'? And, last but not least, what corporate deliverables can be reasonably expected in the context of the economic, social and cultural human rights?"[61]

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[60] The Global Compact, News Release, "United Nations Secretary-General Launches 'Principles for Responsible Investment' " (27 April 2006), online: The Global Compact <http://www.unglobalcompact.org/NewsAndEvents/news_archives/2006_04_27.html > (date accessed: 13 September 2006).

[61] Klaus M. Leisinger, "On Corporate Responsibility for Human Rights" (The Global Compact, 2006) at p. 13, online: The Global Compact <http://www.unglobalcompact.org/docs/news_events/9.6/corpresforhr_kl.pdf> (date accessed: 13 September 2006).

The next Global Compact Leaders Summit is scheduled to take place in June 2007.

D. UN Draft Norms

After a four year consultative process, the UN Commission on Human Rights' Sub-Commission on the Promotion and Protection of Human Rights adopted the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (the "UN Draft Norms") in August 2003. Distilled from existing international instruments and principles, the UN Draft Norms address the human rights responsibilities of business "within their sphere of influence" including non-discrimination, ensuring safe and healthy work environments, adequate remuneration, freedom of association, freedom from forced labour and child labour, environmental protection, and maintaining transparency. The UN Norms call on companies to be subject to periodic monitoring and verification by the UN or independent agencies, implying a level of enforcement that goes significantly further than the voluntary compliance and reporting encouraged by the UNGC. In contrast to purely voluntary initiatives that focus on MNE's "commitment" to CSR, the UN Draft Norms are the first attempt to establish an international framework for mandatory CSR standards applicable to all businesses. Currently, the UN Draft Norms are not legally enforceable, but have the status of a draft proposal, meaning that they can be subject to review and consideration by the UN Commission on Human Rights.

At the behest of the UN Commission on Human Rights (the "UN Commission"), the High Commissioner of Human Rights conducted extensive stakeholder consultations and studied the existing initiatives and standards relating to the human rights responsibilities of transnational corporations. The High Commissioner's February 2005 report noted broad-based support by NGOs and worker organizations for creating a universal declaration of human rights standards applicable to business. Other reactions to the UN Drafts Norms were mixed. The US government objected to the norms being applied to non-state actors, while the IOE and International Chamber of Commerce expressed concern about the trend of "privatizing" human rights. In contrast, the members of the European-based Business Leaders' Initiative on Human Rights, chaired by former Irish President Mary Robinson, undertook to "road-test" the content of the UN Draft Norms until the end of 2006 within their organizations.

Building on the High Commissioner's report, the UN Commission on Human Rights adopted a resolution on April 20, 2005 requesting that the UN Secretary General appoint a Special Representative on business enterprises and human rights. On July 27, 2005, Professor John Ruggie of the United States, who previously served as Assistant Secretary-General to the UN and Special Advisor to the Secretary-General on the Global Compact, was appointed to the Special Representative role.[62] Special Representative Ruggie's mandate includes identifying and clarifying standards of corporate responsibility relating to human rights, elaborating the regulatory role of states in this context, developing methodologies for undertaking human rights impact assessments, and compiling a compendium of best practices.

The Special Representative released the "Draft Interim Report of the Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises" in February 2006 and the final report is due in 2007[63]. In his Interim Report, the Special Representative strongly criticized the UN Draft Norms. He noted that the Norms contain useful elements, such as a summary of rights that may be affected by business and a collation of source documents from international human rights instruments. However, the Special Representative stated that the Norms exercise became "engulfed by its own doctrinal excesses", made exaggerated legal claims and created confusion because of conceptual ambiguities. He further stated that the Norms are said to merely restate existing international legal principles, but that at the same time they claim to be the first initiative at the international level that is non-

[62] United Nations, Press Release SG/A/934, "Secretary General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations and Other Business Enterprises" (28 July 2005), online: United Nations <http://www.un.org/News/Press/docs/2005/sga934.doc.htm> (date accessed: 13 September 2006).
[63] John Ruggie, "Draft Interim Report of the Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises" (February 2006), online: Business for Social Responsibility <http://www.bsr.org/meta/BSR_Ruggie-Interim-Report_200603.pdf> (date accessed: 13 September 2006).

voluntary. The Special Representative noted that there are no generally accepted legal principles that directly bind business, with the exception of certain war crimes and crimes against humanity, and that there is therefore little authoritative basis in international law for asserting that the provisions of the Norms are binding on corporations. Finally, the Special Representative stated that "the divisive debate over the Norms obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions."

The Special Representative is also conducting a survey of the Fortune Global 500 companies. While the Special Representative had only received about 80 responses at the time of the Interim Report, nearly eight out of ten companies stated that they have an explicit set of principles or management practices regarding the human rights dimensions of their operations. Further, by a ratio of two-to-one, human rights are included as part of an overall corporate social responsibility code or principles, rather than being free standing. The Special Representative also noted that three quarters of the companies cite ILO declarations or conventions in their policies, 62% cite the Universal Declaration on Human Rights, 57% cite the UN Global Compact, and 40% cite the OECD Guidelines for Multinational Enterprises. Finally, almost nine out of ten companies say they have systems of internal reporting and compliance in place in connection with their human rights policies, while seven out of ten say they engage in external reporting.

i. Responses to the Special Representative's Draft Interim Report

Business for Social Responsibility President and CEO, Aron Cramer, praised the Special Representative's Interim Report as a "remarkable feat" and a "useful service to those wishing to understand complex questions at the heart of the business and human rights debate." Cramer also noted,

> … whatever one's views about the Draft UN Norms, the SRSG points to their usefulness in sketching out basic definitions and boundaries of the debate. At the same time, he also notes how they have come to be bogged down in attempts to establish new forms of accountability for private

> actors – an effort the Human Rights Commission was ill-equipped to resolve.[64]

However, the Special Representative's critique of the Norms has drawn some criticism. Karsten Nowrot, from the Transnational Economic Law Research Center at Martin-Luther-University in Germany criticized the Special Representative's negative assessment, concluding that the harsh language employed by the Special Representative was unnecessary and regrettable, and was likely to lead to a further polarization of the debate regarding the Norms.[65]

E. ISO 26000

The International Standards Organization (ISO), made of up of a network of international standards institutes of some 146 countries (most widely known for its ISO 9000 standard regarding quality management and ISO 14000 standard regarding environmental management) is developing an ISO standard in the field of social responsibility.

The objective is to produce "a guidance document" for use by business and other organizations, which is understandable and usable by non-specialists to assist organizations in effectively addressing their social responsibilities in various cultures, societies and environments. Importantly, the proposed standard, to be denominated ISO 26000, is not to be a specification document against which conformity can be assessed.

The ISO process is moving swiftly. ISO's Technical Management Board decided in June 2004 to proceed with the development of a CSR standard and made a proposal to Member Bodies in October 2004, which was accepted. A Memorandum of Understanding was reached with the ILO to ensure that the resulting ISO standard is consistent with and complements

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[64] Aron Cramer, "Business for Social Responsibility Commentary: Interim Report of the Special Representative on Business and Human Rights" (March 2006), online: Business for Social Responsibility <http://www.bsr.org/meta/BSR_Ruggie-Interim-Report_BSR-Comments_200603.pdf> (date accessed: 13 September 2006).

[65] Karsten Nowrot, "The 2006 Interim Report of the UN Special Representative on Human Rights and Transnational Corporations: Breakthrough or Further Polarization?" (March 2006), online: The Transnational Economic Law Research Center <http://www2.jura.uni-halle.de/telc/PolicyPaper20.pdf> (date accessed: 13 September 2006).

international ILO labour standards. A partnership was formed with the Global Reporting Initiative, a multi-stakeholder CSR reporting institute based in the Netherlands. In March 2005, a Working Group of Social Responsibility held its first meeting in Brazil to begin developing the ISO 26000 standard. A total of 225 experts from 43 ISO member countries and 24 liaison organizations participated in the meeting, which focused on process and timeline issues. A second Working Group meeting was held in September 2005 in Bangkok, Thailand. A total of 340 people participated in the meeting, which had three main objectives: 1) to reach agreement on the design specification for the proposed guidance standard; 2) to reach agreement on the establishment of Task Groups to write the guidance standard; and 3) to reach agreement on the process to select Task Group leaders. All of the objectives were met. The third Working Group meeting was held May 15th to 19th, 2006 in Lisbon, Portugal. The first committee draft of ISO 26000 is scheduled to be circulated by the end of 2006, and the second working draft is to be circulated before the next Working Group meeting in Sydney, Australia in early 2007. The target date for publication of ISO 26000 is the first quarter of 2009.[66]

V. CSR IN ACTION

CSR is far from a theoretical issue relegated to UN meeting rooms in Geneva. Evidence suggests that CSR engagement is gaining momentum in nations around the globe. As an illustration, we provide a snapshot of recent CSR developments in three representative jurisdictions, the United Kingdom, Europe and Canada. Momentum is still building in Canada and Europe on the topic of CSR, whereas the UK is an established leader on the global CSR stage.

A. CSR across the Pond – Recent Developments in the United Kingdom and Europe

i. United Kingdom

[66] International Organization for Standardization, "Drafting progresses of future ISO 26000 standard on social responsibility" (24 May 2006) http://www.iso.org/iso/en/commcentre/pressreleases/2006/Ref1010.html (date accessed: 15 September 2006).

The UK continues to lead the way in CSR innovation and implementation. KMPG estimates that 70% of that country's 100 largest corporations issue stand-alone CSR reports, a considerable increase from the 50% rate observed in 2002. The only country with a higher rate of CSR reporting was Japan, with 80%. The commitment of UK corporations to CSR issues goes beyond merely issuing reports, however. When the Global 100: Most Sustainable Corporations in the World ranking was released in January 2005 during the World Economic Forum in Davos, Switzerland, more than a third of the list was comprised of UK corporations. In 2006, 30 of the 100 companies on the list were from the United Kingdom.[67]

These results may be due, in part, to the leadership of Tony Blair's Labour Government in putting CSR on the government policy agenda. The UK introduced a dedicated Minister of Corporate Social Responsibility in 2000, a position currently held by MP Malcolm Wicks within the Department of Trade and Industry. In recent years, the UK government has launched a series of measures to encourage greater corporate transparency and CSR engagement, including:

- in 1998, approving pension disclosure legislation requiring all trustees of U.K. pension funds to disclose "the extent to which social, environmental or ethical considerations are taken into account in the selection, retention and realization of investments". The regulations implementing this change came into effect in 2000;
- partnering with AccountAbility and the British Chamber of Commerce, to launch a "CSR Academy" in 2004 to act as a resource for UK companies of all sizes. One tool of the Academy is a CSR Competency Framework to assist businesses with practical CSR issues;
- launching a new website dedicated to CSR (www.csr.gov.uk) and in May 2004, publishing *Corporate Social Responsibility – A Government Update* to provide a comprehensive update of progress made against its goals and setting out future challenges;

[67] See Global 100, online: <http://www.global100.org> (date accessed 14 September 2006).

The UK government passed the Operating and Financial Review regulations, which would have made CSR reporting mandatory as part of ongoing corporate law reform. Under the new Operating and Financial Review regulations, the 1,300 UK quoted corporations would have had to report on social and environmental issues that had a material impact on their performance and future prospects starting in April 2006. However, in December 2005, the UK abolished the regulations. The government cited concerns with placing an unreasonable burden on British corporations. It is not yet clear what course of action the UK government will take to fill the demand for CSR reporting that was to be addressed by the Operating and Financial Review regulations.

Nonetheless, the UK's initiatives have acted as catalysts for socially-responsible investing ("SRI") to move towards the mainstream in the UK. Whereas traditional investment strategies focus almost exclusively on economic and financial performance, SRI also prioritizes the social, ethical and environmental implications of a company's operations. In the UK, a leading SRI index is FTSE4Good, which was launched in 2001 by FTSE, one of the leading global index providers jointly owned by the Financial Times and the London Stock Exchange.[68] Companies meeting the FSTE4Good criteria are regularly added to the index. By using the FTSE4Good Index Series as a reference point, investors have the security of knowing that all companies in the series are managing their social, ethical and environmental risks and are best placed to capitalize on the benefits of responsible business practice.[69]

The selection criteria by which corporations are assessed for inclusion on its index are: evidence a company is working toward environmental sustainability, developing positive relationships with its stakeholders and committing to uphold and support universal human rights.[70] Companies are reviewed every six months to ensure they continue to meet the index's

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[68] "Shareholders Acting Up" *The Economist* (31 July 2001).
[69] FTSE, *FTSE4Good Index Series 2004-2005, The Impact of New Criteria and Future Direction*, at p. 4-2, online: FTSE <http://www.ftse.com/ftse4good/index.jsp> (date accessed: 13 September 2006) [FTSE, *Impact of New Criteria*].
[70] See Co-operative Bank Financial Advisors, online: <http://www.cbfa.co.uk/servlet/Satellite?cid=1067254738929&pagename=CBFA%2FPage%2FtplPageStandard&c=Page> (date accessed: 13 September 2006).

qualification criteria. Those who fail to meet the requirements are deleted from the index. For instance, Nestlé, was for a time excluded from the index because of its marketing strategy in marketing breast milk substitutes.[71]

In 2005, FTSE4Good released a report entitled *FTSE4Good Index Series 2004-2005, The Impact of New Criteria and Future Direction.*[72] The report details evidence of changes in companies' corporate responsibility practices and the role of the FTSE4Good engagement programme. After the first review of the FTSE4Good Index Series, there were just over 700 companies in the index in 2001. Despite the introduction of increasingly tougher inclusion criteria, there are now over 900 companies included in the FTSE4Good index as of March 2005.[73] This number is constantly increasing.[74] More importantly, analysis of the performance of the FTSE4Good Global index over the past five years when compared directly with the UK's FTSE100 index shows the two indices moving in a fairly close relationship but also indicates periods when the FTSE4Good index outperformed the traditional FTSE100.[75] This result was no doubt surprising to skeptics who believe that SRI can only be achieved at the expense of good investment returns.

The success of the FTSE4Good index is one signal of the increasing interest in SRI in the UK over the last decade. In the UK, investment in ethical funds rose by 1,750% between 1989 and 2000, to £3.7 billion ($5.5 billion).[76] The Ethical Investment Research Service reports that by 2004, screened SRI mutual fund assets in the UK totaled £4.5 billion pounds.[77] More than 50 SRI funds now exist in the UK, some with stricter criteria than others. Investors' interest in SRI

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[71] FTSE, News Release, "FTSE lifts first exclusion in FTSE4Good criteria" (8 March 2004), online: FTSE <http://www.ftse.com/Media_Centre/Press_Releases/2004/20040308_FTSE_lifts_first_exclusion_in_FTSE4Good_criteria.doc > (date accessed: 13 September 2006).
[72] FTSE, *Impact of New Criteria*, *supra* note 69.
[73] *Ibid*, at p. 5-1.
[74] From March to September 2006, 24 companies joined the index (4 from the UK) and nine were deleted, primarily for failure to comply with FTSE4Good's environmental criteria. Online: <http://www.ftse.com/Indices/FTSE4Good_Index_Series/Index_Reviews.jsp> (date accessed: 14 September 2006).
[75] See Money Extra, online: <http://www.moneyworld.co.uk/guides/ethical-investments-011464.html#N1012D> (date accessed: 13 September 2006).
[76] "Shareholders Acting Up" *supra* note 68.
[77] Russell Sparkes, *SRI: A Global Revolution* (New York: John Wiley & Sons, 2003).

is expected to continue, along with the corporate world's increasing interest in harnessing these investment dollars.

FTSE4Good continues to promote corporate social responsibility. In November 2005, FTSE released a report entitled "Rewarding Virtue: Effective Board Action on Corporate Responsibility".[78] The report focuses on integrating CSR initiatives into corporate governance. The report makes a number of broad recommendations, including:

1) Set values and standards – Be clear about the terms of the corporate responsibility contract, set explicit standards and values for the business;
2) Think strategically about corporate responsibility – Understand the problems in your markets, and design a business model that avoids them;
3) Be constructive about regulation – Support both self-regulation and government intervention to correct structural problems in markets;
4) Align performance management – Reward responsible success over the long-term, and not just meet financial targets over the short-term;
5) Create a culture and integrity – Set the right tone at the top and cultivate the right values in the corporate culture; and
6) Use internal control to secure responsibility – Safeguard the company's standards with robust internal audit and control systems.

The report elaborates on these recommendations and suggests that corporations include a report on the company's governance of corporate responsibilities in its report on corporate governance.

ii. Europe

In Europe, the European Commission has supported many CSR initiatives. Most recently, it sponsored the launch of a new European Alliance, the aim of which is to help Europe become recognized as a "pole of excellence" on CSR. The European Alliance is structured as a partnership that will be open to all European enterprises and it is targeting multinational companies as well as small and medium enterprises. It is not a legal instrument and is not to be

[78] FTSE, "Rewarding Virtue: Effective Board Action on Corporate Responsibility" (November 2005), online: FTSE <http://www.ftse.com/Indices/FTSE4Good_Index_Series/Downloads/rewardingvirtue.pdf> (date accessed: 13 September 2006).

signed by enterprises. The European Alliance's priorities include: 1) raising awareness and improving knowledge on CSR and reporting on its achievements, 2) helping to bring into the mainstream and develop open coalitions of cooperation, and 3) ensuring an enabling environment for CSR. The European Commission has re-iterated its position that CSR should remain voluntary.

In March 2006, the European Commission published a communication on CSR entitled "Implementing the Partnership for Growth and Jobs: Making Europe a pole of excellence on CSR". In addition to supporting the launch of the new European Alliance, the report called on European enterprises to "move up a gear" and strengthen their commitment to CSR. The report further states that in further promoting CSR, the European Commission will focus on:

1) Awareness-raising and best practice exchange,
2) Support to multi-stakeholder initiatives,
3) Cooperation with member states,
4) Consumer information and transparency,
5) Research,
6) Education,
7) Small and medium enterprises, and
8) The international dimension of CSR.[79]

Before supporting the European Alliance, the European Commission laid the groundwork for CSR in Europe. At the Lisbon Summit in 2000, when setting the strategic goals for Europe, the European Council made an appeal for corporate social responsibility in Europe. The European Commission later published a green paper in July 2001 entitled "Promoting a European Framework for Corporate Social Responsibility". Following public consultations regarding the green paper, the European Commission proposed a CSR strategy in its July 2002 communication "Corporate Social Responsibility: A business contribution to Sustainable Development". As recommended by this communication, the European Multi-stakeholder Forum was launched in

[79] European Commission, "Implementing the Partnership for Growth and Jobs: Making Europe a pole of excellence on CSR" (22 March 2006), online: European Commission <http://ec.europa.eu/employment_social/soc-dial/csr/index.htm> (date accessed: 13 September 2006).

October 2002 and produced its final report in July 2004.[80] As a part of the process of producing the final report, four theme-based round tables took place regarding:

1) Improving knowledge about CSR and facilitating the exchange of experience and good practice;
2) Fostering CSR among SMEs;
3) Diversity, convergence and transparency of CSR practices and tools;
4) Development aspects of CSR.

The final report built on the conclusions from these four round table themes and made numerous recommendations aimed at raising awareness and improving knowledge on CSR, developing the capacities and competences to help mainstream CSR and ensuring an enabling environment for CSR.

B. CSR Here at Home – Recent Developments in Canada

CSR in Canada, at least in relation to labour and social standards, is still largely in its infancy. While the Canadian government has endorsed the OECD Guidelines and the Global Compact, and is a leader on the ISO standard initiative, it lags behind with regard to corporate social responsibility and multi-stakeholder engagement strategies such as those found in Europe. This may in part be attributed to the fact that the regulation of business and labour relations in Canada, with certain exceptions, are areas of provincial jurisdiction, which makes it difficult for the federal government to initiate a comprehensive national CSR strategy.

North American interest in corporate accountability has accelerated in recent years, however, due to high profile corporate governance scandals and a number of effective media campaigns by NGOs aimed at raising public awareness of supplier chain issues and questionable corporate conduct. A new awareness of CSR initiatives, tools and benefits appears to be emerging in Canada.

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[80] European Commission, "European Multistakeholder Forum on CSR: Final Results & Recommendations" (29 June 2004), online: European Commission <http://ec.europa.eu/enterprise/csr/documents/29062004/EMSF_final_report.pdf > (date accessed: 13 September 2006).

According to KPMG, CSR reporting by Canadian businesses has increased dramatically since 2002. Canada now ranks 3rd among the 16 nations included in the study, compared with its 11th place ranking in 2002. Since 2003, the participation of Canadian businesses in the Global Compact has quadrupled, from 8 participants in 2003, to 38 in 2006.

Corporate interest in CSR may stem, in part, from the growth of socially responsible investing during the 1990s and the early part of this decade. The Social Investment Organization ("SIO") estimates that as of 2004, $65.46 billion in assets in Canada are managed according to socially responsible guidelines. This figure represents a 31% increase since 2000[81]. As critics point out, however, the amount of assets currently invested according to socially responsible criteria represents a small fraction (approximately 3.3%) of the retail mutual fund market and the institutional investment market in Canada. Although public interest in SRI is growing and the ethical investment market shows great potential, it has not yet become mainstream.

To date, approximately 72 SRI-screened mutual funds and labour-sponsored funds now exist in Canada and an SRI index, the Jantzi Social Index ("JSI") was created in January 2000 by Michael Jantzi Research Inc.[82] The JSI is a socially screened, common stock index modeled on the Standard & Poor's/Toronto Stock Exchange 60. The JSI consists of 60 Canadian companies that, like the FTSE4Good screening criteria, must pass a set of broadly-based social and environmental screens. Jantzi Research Inc. created the JSI to be a benchmark for money managers and other investors against which they are able to measure the performance of socially screened portfolios.

An advisory committee sets the screening criteria to be used by the JSI in the evaluation of Canadian companies. The assessment entails assessing companies with the use of exclusionary and qualitative screens. The exclusionary screens ensure that no company with significant involvement in the production of nuclear power, tobacco products, or weapons-related

[81] Social Investment Organization, *Canadian Social Investment Review 2004: A Comprehensive Survey of Socially Responsible Investing in Canada,* (Toronto: Social Investment Organization, April 2005), online: Social Investment Organization <http://www.socialinvestment.ca/publications.htm> (date accessed: 13 September 2006).
[82] See Jantzi Research Inc., online: <http://www.jantziresearch.com> (date accessed: 13 September 2006).

contracting is a part of the JSI. The qualitative screens look at the business practices of a company, its community involvement, diversity of employees, its employee relations, a company's environmental, and international human rights record, and its product safety. The exclusionary screens and qualitative screens are used to identify those companies whose records were largely negative or positive in these areas so they could be excluded or included. Some of the Canadian companies on the index include Alcan Inc., Bank of Montreal, BCE Inc., Canadian Tire Corporation, Loblaw Companies Limited, Nortel Networks Corporation, Petro-Canada, Research in Motion, Shoppers Drug Mart Corporation, TELUS Corporation and TransAlta Corporation. Since its launch on January 1, 2000 through December 31, 2005, the JSI has increased in value by 6.95% annually, outperforming both the S&P/TSX 60 (which increased in value by 5.93% annually) and the S&P/TSX Composite (which increased in value by 6.66% annually).[83]

Although the profile of CSR is gaining ground in Canada, as illustrated by the increasing interest in SRI, much work remains to be done. In 2005, Canadian Business for Social Responsibility ("CBSR"), a leading non-profit, national membership organization of Canadian companies, concluded that it would be premature for a Global Compact country network to be established in Canada, partly due to lack of awareness and commitment by the private sector.[84] In order to increase awareness, CBSR conducted a three city "road-show" to promote the benefits of Canadian companies participating in the UN Global Compact. The "road-show" had stops in Toronto, Calgary and Vancouver in early May 2006. The CBSR Annual Summit will take place on November 1, 2006.

The Canadian federal government is also working to address this awareness deficit. Drawing on the expertise of a multi-stakeholder advisory group, the government released its

[83] Jantzi Research Inc., News Release, "Jantzi Social Index Still Going Strong After 6 Years" (7 February 2006), online: Jantzi Research Inc. <http://www.jantzisocialindex.com/index.asp?section=9&level_2=0&level_3 =0&pr_id=105> (date accessed: 13 September 2006).

[84] CBSR, "The United Nations Global Compact in Canada: Exploring the Feasibility of a UNGC Network in Canada" (Toronto, 2005), online: Canadian Business for Social Responsibility <http://www.cbsr.ca/cbsrsupport/reportpapers.htm> (date accessed 13 September 2006).

consultation draft of a *CSR Implementation Guide for Canadian Business* in 2005. The final version of the Guide was released in April 2006. The Guide, which is intended to serve as a reference guide of best practices, sets out a six-stage implementation framework aimed at assisting Canadian businesses in the development and implementation of effective CSR strategies. Some of the novel aspects of the CSR Guide include its focus on the particular needs and economic realities of small business and its detailed look at alternative engagement strategies for First Nations (i.e. aboriginal) stakeholders.

CSR appears to be gaining momentum in Canada. Stratos Inc., a sustainability consultancy, released a report entitled "Gaining Momentum: Corporate Sustainability Reporting in Canada". The report is based on a national survey of corporate reporting practices conducted in 2005. The survey found that 70% of companies on the Toronto Stock Exchange Composite Index now disclose sustainability information, up from 35% five years ago. Stratos Inc. identified 114 Canadian companies that publish corporate sustainability reports or incorporate such information into their annual reports. However, the report noted that reporting with respect to human rights is still lagging in Canada. Six out of fifteen resource companies with reported overseas operations presented no sustainability information. The report also ranks corporations on their sustainability reporting. The top five companies in Stratos Inc.'s ranking are: VanCity, TELUS, BC Hydro, Suncor and BCE Inc.[85]

A survey conducted by Ipsos Reid and Canadian Business for Social Responsibility and released on April 26, 2006 also shows that CSR is gaining ground in Canada. The poll, which surveyed 141 CSR leaders in major Canadian businesses and 1,003 Canadian citizens, found that 68% of Canadians pay attention to issues related to CSR. The poll also found that three-quarters of leading Canadian companies are actively engaged in CSR activities. However, Canadian consumers are generally unaware of companies' initiatives. Only 33% of consumers surveyed

[85] Stratos Inc., "Gaining Momentum: Corporate Sustainability Reporting in Canada" (15 March 2006), online: Stratos Inc. <http://www.stratos-sts.com/pages/publica014.htm> (date accessed 13 September 2006).

said they know of a Canadian company that has "made an explicit commitment to CSR". Thus, there is a gap between the practices of Canadian companies and consumer perception.[86]

Through the efforts of the Canadian government, CBSR, various NGOs and other stakeholders, CSR is likely to continue to gain profile in the coming years in Canada.

VI. THE BUSINESS CASE FOR CSR

Common wisdom states that the purpose of any corporation is to make money. The *Canada Business Corporation Act,* like all corporate statutes in the commonwealth, holds that it is the duty of the directors and officers of the corporation to act honestly and in good faith with a view to the best interests of the corporation.[87] A corporation's duties lie with its shareholders, rather than the public at large or the community in which it operates. In recent years, however, both the public at large and various stakeholders of corporations have come to expect more of businesses. Perhaps some increased awareness of corporate activities and interest in corporate governance issues can be attributed to recent high-profile accounting scandals involving companies like WorldCom and Enron. In any event, there is now more interest by the public in a corporation's commitment to social and ethical behaviour.

The public is increasingly looking to the private sector to respond to social and environmental issues. For instance, a 2004 American Cone Corporate Citizenship Study found that 80% of Americans say that corporate support of causes wins their trust in that company, a 21% increase since 1997. The study also found that in response to learning about a company's negative corporate citizenship practices, 90% would consider switching to another company, 80% would refuse to invest in it, 75% would refuse to work at that company, and 73% would

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[86] Ipsos Reid, News Release, "Corporate Social Responsibility (CSR) in Canada" (20 April 2006), online: Ipsos Reid <http://www.ipsos-na.com/news/pressrelease.cfm?id=3054> (date accessed: 13 September 2006).
[87] *CBCA*, R.S.C. 1985, c. C-44 , s.122.

boycott that company's products.[88] Likewise, within Canada, a Conference Board of Canada Survey indicated that the vast majority or 77% of Canadians are more likely to invest in, 81% are more likely to buy from and 79% of Canadians would prefer to work for companies they view as socially responsible.[89] We see similar consumer concerns around the world. A 1999 study by Fleishman Hillard surveyed about 4000 Europeans aged 15 or older and found that 86% would be more likely to purchase a product from a company engaged in activities to help improve society.[90] Similarly, in the United States, nearly two-thirds of Americans, totaling approximately 130 million consumers, report they would be likely to switch brands or retailers associated with a good cause.[91]

That said, however, appeals to emotive reasoning to justify corporate social responsibility are not sufficiently persuasive. Many companies are used to being accountable only to their immediate shareholders rather than the larger network of stakeholders in which they operate. The current corporate paradigm which has existed since the time of Henry Ford is not always immediately responsive to the intangible and unquantifiable data of corporate social responsibility. Before considering the business case *in favour* of CSR, we consider several arguments that there exists a business case *against* CSR implementation. The following arguments *against* CSR will be considered: first, that CSR is simply a public relations exercise with little substance and no proven payoff for the corporation; second, that engaging in socially and ethically responsible corporate citizenship makes companies vulnerable to negative attention; and finally, that triple bottom line reporting is imprecise and immeasurable.

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[88] Cone Inc., News Release, "Multi-Year Study Finds 21% Increase in Americans who say Corporate Support of Social Issues is Important in Building Trust" (8 December 2004), online: Cone Inc. <http://www.coneinc.com/Pages/pr_30.html> (date accessed: 13 September 2006).

[89] Susan Flynn, "Winning with Integrity: The Business Case for Corporate Social Responsibility" (Greenland, NH: Tidewatch Consulting), online: Canadian Business for Social Responsibility <http://www.cbsr.bc.ca/cbsrsupport/reportpapers.htm> (date accessed: 13 September 2006).

[90] Fleishman Hillard, "Consumers Demand Companies with a Conscience" (London: Fleishman Hillard Europe, 1999) as cited in Simon Zadek, *The Civil Corporation*, (London: Earthscan Publications, Inc., 2001) at p. 59 [Zadek].

[91] Zadek, *ibid.* at p. 59.

A. General Arguments Against the Business Case for CSR

i. CSR is All PR

An argument often heard in response to those groups and individuals promoting CSR practices is that since CSR is not strictly regulated and no concrete standards exist against which CSR-compliant companies may be compared, companies can simply say they are CSR-compliant and there is little way of assessing the veracity of their statements. Stakeholders and the public cannot know for certain whether the company is indeed socially and ethically responsible. Some individuals critical of the lack of international regulation to ensure corporate adherence to CSR suggest that by openly committing themselves to CSR, it allows some corporations to make almost no commitment whatsoever.[92] All the while, the company is benefiting from the public recognition it is getting as being a CSR-compliant company.

Indeed, it is a legitimate criticism of CSR that its meaning is not entirely clear nor is there consensus internationally on what CSR means to various companies. That said, however, sometimes it is useful by way of contrast to look at what CSR is *not*. There are two different kinds of CSR practice which will better illustrate what CSR is about, each at the extreme ends of a CSR continuum.[93]

One kind of CSR, referred to as "Borrowed Virtue CSR" is feared by profitable non-CSR compliant companies. Borrowed Virtue CSR raises social welfare but also reduces the profits of the corporation.[94] A good example of this kind of CSR practice is straightforward cash donations to charity. This kind of corporate philanthropy is not integrated into the way in which the firm operates or manages its people. Not only that, most cash donations probably represent a corporate tax write-off to the donating corporation. This kind of CSR is called "Borrowed Virtue" because it is charity with other people's money; managers of the corporation are indulging their charitable instincts at the expense of its shareholders. It is the vicariously

[92] Wayne Norman and Chris MacDonald, "Getting to the Bottom of the 'Triple Bottom Line'" (April 2004), 14:2 *Business Ethics Quarterly* at p. 13 [Norman and MacDonald].
[93] "The Union of Concerted Executives" *The Economist* (22 January 2005) at p. 8.
[94] *Ibid.*

charitable CEO who is spending the money of individuals who have put him or her in a position of trust to safeguard their investment with the company. Shareholders may expect to spend their money on causes of their own choosing, rather than having the company's managers do so on their behalf. While corporations may benefit in some small way from this kind of CSR – for instance as advertising through sponsoring high profile events - this is probably CSR for purely public relations reasons, as critics of CSR allege.

At the other end of the CSR spectrum are CSR practices which are inherent to a company's corporate culture and decision-making. The company is able to earn high profits while, at the same time, advancing the public good. Such a company may have a reputation for dealing honestly with its employees, suppliers and its customers. This is win-win CSR and can many times be attributed simply to good management. A good example of this kind of win-win CSR is practiced by on-line business-services company, salesforce.com. The head of this enterprise adopts the view that good corporate citizenship can attract and motivate employees.[95] The company encourages its employees to devote its time at the company's expense to charitable undertakings, provides flexibility in working hours to its employees and generally aligns the culture of the organization with good causes. In this way, good management benefits the company as well as the community in which it operates and the employees who run it. This kind of CSR is not simply an exercise in public relations and is the very type of CSR many advocates of socially and ethically responsible corporations want to advance.

[95] *Ibid.*

ii. CSR Brings Unwanted Publicity - *Kasky v. Nike*

Opponents of CSR argue that CSR "best practices" simply make a company vulnerable to unwanted negative publicity, as was the case with Nike nearly a decade ago. In October 1996, the CBS television news program "48 Hours" aired a story in which allegations of labour standards violations were alleged against sportswear and athletic shoes giant, Nike Inc. The alleged labour violations were that workers in factories manufacturing Nike products in Indonesia and Vietnam were paid less than the applicable minimum wage laws, required to work overtime, subject to physical, verbal and sexual abuse, and exposed to toxic chemicals, noise, heat and dust without adequate safety equipment, in violations of local health and safety regulations.[96] Nike denied the allegations and commissioned a review of its operations by former United Nations Ambassador Andrew Young.[97] When Ambassador Young concluded that the allegations against Nike were largely false, Nike publicized the results asserting that its investments promoted economic and political benefits for workers, and that Nike did its best to assure fair pay and treatment of its employees. Nike products did not appear in any of these statements nor did the advertisements urge customers to purchase Nike products.[98]

In 1998, a California resident named Mark Kasky sued Nike under California's Unfair Competition Law[99] and False Advertising Law[100] on behalf of the citizens of California. The claims were of negligence, not fraud, by Nike. There was no allegation that Kasky nor any other citizen of California had been harmed or purchased Nike products in reliance on false statements when purchasing Nike products. Under both the Unfair Competition Law and False Advertising Law, an individual can assume the role of a "private attorney general" and sue to stop any company from communicating in a manner that may have a "tendency to confuse" a Californian consumer, even where the statements are true. The scope of these laws is very broad. Under the

[96] *Kasky v. Nike* 45 P. 3d 243, 263 (Cal. 2003) cert. granted, 537 U.S. 1099 (2003), and cert. dismissed, 123 S. Crt. 2554 (2003).
[97] Thomas C. Goldstein, "Nike v. Kasky and the Defamation of 'Commercial Speech'" (2002-2003) CATO Supreme Court Review, (James L. Swanson, ed., 2003) at p. 65.
[98] *Ibid.*
[99] Cal. Bus. & Prof. Code § 17200 (West 2002).
[100] Cal. Bus. & Prof. Code § 17500 (West 2002).

Unfair Competition Law, unfair competition is any "unlawful…business act or practice". Under the False Advertising Law, the plaintiff need not allege fraud, nor demonstrate any actual damage. Most disconcerting to multi-national businesses is that a plaintiff can seek disgorgement of profits allegedly generated by the unfair competitive activities of a corporation.

The lawsuit made its way through various American courts over the course of five years until it eventually reached the U.S. Supreme Court. Because the case became a contested First Amendment issue, the U.S. Supreme Court held that it would be premature to decide the novel constitutional questions in a piecemeal fashion and declined to do so. The U.S. Supreme Court ultimately directed the case back to the lower courts, observing that the First Amendment protection of speech that is both commercial and non-commercial remains unclear. Following the Supreme Court's decision, the California laws remain the same. Kasky and Nike settled out of court in 2003 and Nike agreed to donate USD $1.5 million to the Fair Labour Association, an organization promoting fair labour standards internationally.[101]

Following *Nike v. Kasky*, the number of US corporations publishing CSR reports dropped 20%.[102] As would be expected, there was a reluctance on the part of corporations to voluntarily report to the public and to stakeholders for fear of litigation in response.

There can be no doubt that despite all of its CSR initiatives following the settlement, Nike remains a symbol of exploitation for many anti-globalization campaigners. This is unfortunate for a company that has received much of the criticism on behalf of the entire footwear industry and may continue to find it difficult to convince public-interest groups that it is indeed socially and ethically responsible. For instance, Nike reports that in its 2005 financial year, it contributed

[101] William Baue, "The Implications of the Nike and Kasky Settlement on CSR Reporting" (18 September 2003), online: Social Funds <http://www.socialfunds.com/news/article.cgi/1222.html> (date accessed: 13 September 2006) [Baue].
[102] Michele Sutton, "Between a Rock and a Judicial Hard Place: Corporate Social Responsibility Reporting and Potential Legal Liability Under Kasky v. Nike" (2004), 72 UMKC Law Rev. 1159.

$46.1 million to non-profit organizations and community partners around the world.[103] When it comes to globalization issues, Nike seems to believe its best contribution may be to offer loans to those who start small businesses in developing countries. In its 2004 fiscal year, the company distributed $3 million to Mercy Corps in Uzbekistan, Tajikistan and Kazakhstan, and $2 million to World Vision in the Asia-Pacific region.[104]

The Nike litigation may serve as an impetus for other MNEs to investigate their labour practices and make their public reporting practices more rigorous. In May 2005, following a three and one half year hiatus from its social and ethical reporting, Nike released a CSR report accompanied by publication of a list of the more than 700 contract factories making Nike products worldwide.[105] This is quite an important step because this makes Nike the first company in the global footwear and clothing industry to disclose its supplier base for its primary product lines. Nike reports that it did so because it believes the potential benefits to the industry and factory workers outweigh the possible competitive risks. Scott Nova, the executive director of the Workers Rights Consortium, a labour rights advocacy group, commends Nike for taking the lead in the industry in releasing its list.[106] The goal, of course, is that Nike's publication of the list of factories making its products will prompt other companies to follow suit and ultimately lead to greater visibility into shared suppliers and more efficient monitoring overall.

Notwithstanding the risks highlighted by the Nike case, corporations are likely to continue releasing CSR reports into the public domain. In its brief before the U.S. Supreme Court, Domini Social Investments, manager of the Domini Social Equity Fund, argued that companies will continue to tell their side of the CSR story because they have a real market incentive to do so – quite simply, companies want to attract new capital and new consumers.[107]

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[103] Nike Inc., "Community Giving: Narrowing our Focus, broadening our reach" (January 2006), online: Nike Inc. <http://www.nike.com/nikebiz/nikebiz.jhtml;bsessionid=CCLHBTDXIMS5SCQFTBFCF4YKAWMB2IZB?page=26&item=giving> (date accessed: 13 September 2006).
[104] *Ibid.*
[105] Lisa Roner, "The Nike Factory Challenge" (16 May 2005), online: Ethical Corporation <http://www.ethicalcorp.com/content_list.asp?m=s> (date accessed: 13 September 2006).
[106] *Ibid.*
[107] Baue, *supra* note 101.

This corporate information is demanded by consumers, federal regulators, non-profit organizations, socially responsible investors and research organizations interested in socially responsible companies.

iii. Triple Bottom Line Reporting is Immeasurable

From the perspective of those in favour of creating a business case for CSR, perhaps the most discouraging realization is the radically different value system and paradigm that typically governs business practices. Quite simply, the advocates of CSR tend to speak a different language from those individuals running MNEs. Whereas the CSR literature tends to use qualitative data, corporations used to financial reporting tend to rely on measurable, quantitative data. In particular, there are difficulties in the notion of the “Triple Bottom Line” advocated by individuals interested in promoting socially and ethically responsible business practices within corporations.

The phrase "triple bottom line" was coined by John Elkington, co-founder of SustainAbility, in his 1998 book *Cannibals with Forks: the Triple Bottom Line of 21st Century Business*.[108] Triple bottom line accounting (also called "3BL") is the idea that a corporation's ultimate success or failure can and should be measured not just by the traditional financial bottom line, but also by its social, ethical and environmental performance.[109] 3BL accounting is a management tool that responds to all stakeholder demands that companies be accountable to, and substantiate their membership in society. The term "triple bottom line" has gained acceptance in the last decade as companies as significant as AT&T, Dow Chemicals and Shell have used 3BL terminology in their press releases, annual reports, and other publicly disclosed documents.[110] Advocates of 3BL reporting suggest that making sustainability issues a key component of a company's business strategy delivers the potential of very real bottom-line benefits, including: productivity improvements, cost savings, risk reduction, human resources gains, increased reputation and an enhanced social licence to operate.[111] Additionally, other companies following the 3BL approach indicate that the insights that come from sustainable business practice give opportunities to reshape strategies for competitive advantage and growth.

Despite the importance of taking all three bottom lines seriously – social, ethical and environmental – there is no accepted or even proposed methodology on how to use the data on social performance to calculate some kind of net social bottom line.[112] Whereas the traditional financial bottom line is calculated by subtracting the corporation's expenses from its revenue, it is unclear what the 3BL version of this calculation should look like. Moreover, it is even less clear what sort of units should be used to measure the concepts expressed.[113] The kind of raw data that 3BL reporting collects as indications of social and ethical performance do not seem to fit into general measurable categories in the quantifiable accounting language familiar to corporations. For

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[108] John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (Gabriola Island, BC: New Society Publishers, 1998) [Elkington].
[109] Norman and MacDonald, *supra* note 92.
[110] *Ibid.* at p. 2.
[111] PriceWaterhouseCoopers, "Integral Business: Integrating Sustainability and Business Strategy" (2003), online: <http://www.pwcglobal.com> (date accessed 13 September 2006).
[112] Norman and MacDonald, *supra* note 92 at p. 7.
[113] *Ibid.* at p. 8.

instance, if we find that a corporation has 15% of its corporate directors are women, 6% of its management are visible minorities, it had been fined twice this year for toxic emissions and had three sexual harassment lawsuits launched against it, it is unclear how to calculate this information into a traditional accounting straightforward subtraction of "bads" from "goods" to arrive at a bottom line. In other words, critics argue that "if it can't be measured, it can't be managed".

The business community and certainly the public at large have tended to see the financial bottom line as the hardest of realities, representing the objective truth of impartial markets.[114] However, as accounting scandals emerge, it becomes increasingly clear that accounting concepts are unique to the profession, comprised of standards that change over time. Because accounting inevitably involves judgment and compromises, the financial bottom line turns out to be influenced by subjective interpretations. For instance, CA Magazine, which governs chartered accountancy, questions whether Generally Accepted Accounting Principals ("GAAP") which govern all financial statements presented in annual reports, suggests that GAAP are not as uncontroversial as some may think. Indeed, some question whether GAAP can render the fairest presentation of an organization's financial profile.[115]

Unlike American GAAP, Canadian GAAP is known to leave far more room for creativity in accounting and financial statement presentation by Canadian accountants and auditors. As an example of the flexibility in certain GAAP standards, in 2001, the Ontario Securities Commission conducted a review of accounting and revenue recognition practices of Toronto Stock Exchange-listed technology companies. The review uncovered "a need for significant improvement in the nature and extent of disclosure".[116] Thus, the traditional bottom line accounting may, in fact, be

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[114] Elkington, *supra* note 108 at p. 76

[115] Gérard Bérubé, "Off the Record: GAAP's Standard Role" *CA Magazine* (August 1997), online: Chartered Accountant Magazine <http://www.camagazine.com/index.cfm/ci_id/7406/la_id/1.htm> (date accessed: 13 September 2006).

[116] Ontario Securities Commission, Staff Notice 52-701 - Initial Report on Staff's Review of Revenue Recognition, (Toronto: Ontario Securities Commission, Corporate Finance Branch, February 2001), online: Ontario Securities Commission <http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/sn_20010309_52-701.pdf> (date accessed: 13 September 2006).

less objective and quantifiable than it first appears. Perhaps the financial bottom line paradigm and the 3BL paradigm are not as incompatible as they may at first appear.

B. Elements of the Business Case for CSR

i. Consumer Demand

Developing the business case for CSR starts with the simple proposition that companies need to respond to consumer demand. Vancouver City Savings Credit Union ("VanCity") is Canada's largest credit union with total consolidated assets of $10.5 billion.[117] VanCity notes that while the strictly values-based person who is willing to forego some return on his or her investment to support CSR initiatives is rare, the company believes that people look at what a company is doing as a proxy for how it will treat its customers.[118]

Some consumers simply prefer to support ethically manufactured goods for their own personal reasons. Product labeling is another way to encourage companies to act ethically by making it profitable to do so.[119] Labeling products means affixing a recognizable symbol to a product so that a consumer knows that the product was manufactured or produced according to certain ethical standards. A good example of labeling is the "rugmark" which indicates to consumers that luxury rugs from India were not made with child labour.[120] Another example of labeling is the "FIFA" mark on soccer balls. FIFA and representatives of the international trade union movement, including the International Confederation of Free Trade Unions, the International Textile, Garment and Leather Workers Federation, and the International Federation of Commercial, Clerical, Professional and Technical Employees have agreed on a "Code of Labour

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[117] See Vancity, online: <http://www.vancity.com/MyCommunity/AboutUs/>" (date accessed: 13 September 2006).
[118] Sustainable Development Canada and International Affairs, *Corporate Social Responsibility: Lessons Learned* at p. 15, online: Natural Resources Canada <http://www.nrcan.gc.ca/sd-dd/pubs/csr-rse/csr_e.html> (date accessed: 13 September 2006) [*Corporate Social Responsibility: Lessons Learned*] at p. 37.
[119] Eric Engle, "Corporate Social Responsibility: Market – Based Remedies for International Human Rights Violations?" (2004), 40 Williamette L. Rev. 103 at p. 110 [Engle].
[120] Lance Compa and Tashia Hinchcliffe Dacarricarrere, "Enforcing International Labour Rights through Corporate Codes of Conduct" (1995), 33 Colum J. Transnat'l L. 663 at pp. 674-83.

Practice" for the production of soccer balls carrying the FIFA authorized marks, in a continuing effort to eliminate the use of child labour.[121]

ii. Enhanced Corporate Reputation and Brand Image

According to a study on the corporate effects of CSR completed jointly by several federal ministries in Canada, good corporate performance in relation to CSR can build a positive reputation while poor performance can damage brand value.[122] A single percentage improvement in the public's perception of a corporation's CSR practices is reported to result in a one-tenth of one percent increase in retail customer satisfaction figures.[123] For companies such as VanCity, CSR is part of their brand image and has allowed them to tap into a growing demand for values-based products or services. For companies like Syncrude and Teck Cominco, good corporate reputation is an important driver of business since many business benefits flow from a good reputation. For both of these companies CSR helped them build good relations with their various stakeholders which, in turn, helped them, as resource companies, maintain a social licence to operate.[124]

A number of studies have suggested a large and continuously expanding market for the products and services of companies perceived to be socially responsible companies. Of course, companies must provide products and services that meet the consumer's key buying criteria first - including price, quality, availability, safety and convenience. However, there appears to be a growing desire on the part of consumers to buy certain products because they are "sweat-shop free" or "child-labour-free" clothing, have a lower environmental impact or the absence of genetically modified ingredients. A 2001 Hill & Knowlton/Harris Interactive poll showed that 79% of Americans take corporate citizenship into account when deciding whether to buy a particular company's product - 36% of Americans consider corporate citizenship an important

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[121] "Labour Code of Footballs" (3 September 1996), online: Clean Clothes Campaign <http://www.cleanclothes.org/codes/fifa.htm> (date accessed: 13 September 2006).

[122] *Corporate Social Responsibility: Lessons Learned*, *supra* note 118 at p. 35.

[123] British Telecom, "Our Business Case" *Social and Environment Report 2005*, online: <http://www.btplc.com/Societyandenvironment/PDF/2005/index.htm> (date accessed: 17 September 2006).

[124] *Ibid*.

factor when making purchasing decisions.[125] Similarly, a 2001 Environics Monitor shows factors influencing public impressions of companies were: social responsibility (49%), brand quality/reputation (40%), business fundamentals (32%).[126]

iii. Earning a Social License to Operate

Many companies have realized that in recent times, the notion of who constitutes a stakeholder is rapidly expanding, as are the expectations of those stakeholders. Whereas in the recent past stakeholders tended to mean governments, shareholders and employees, stakeholders now include entities such as environmental organizations, activist groups, communities, suppliers, and special interest groups.[127] These stakeholder groups want to be made aware of the business and performance of companies in addition to being involved in the setting of social and environmental performance objectives of corporations. Companies can no longer afford to ignore the communities in which they propose to do business. Companies are under pressure to demonstrate their relevance to society and to respect and protect values important to local and international communities.

Given these changing expectations of stakeholder involvement in companies, for resources companies, in particular, good corporate citizenship determines its social licence to operate and expand. Failing to obtain community support or attracting the ire of the non-governmental community can increase costs by holding up approvals in lengthy public hearings. Syncrude Canada Ltd. is the world's largest producer of synthetic crude from oil sands, supplying Canada with 13% of its petroleum needs. Syncrude estimates that its failure to proactively engage local residents in one of its development applications cost the company $1.5 million in delays and wasted efforts at development plans in the early 1990s.[128] Teck Cominco is a natural resource company whose principal activities are mining, smelting and refining. Cominco notes that its

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[125] "Overview of Corporate Social Responsibility," online: Better Management <http://www.bettermanagement.com/library/library.aspx?l=12351> (date accessed: 13 September 2006).
[126] *Ibid.*
[127] *Corporate Social Responsibility: Lessons Learned*, *supra* note 118 at p. 38.
[128] *Ibid.* at p. 35.

attempts to build trust with communities living near its Pend Oreille mine development significantly decreased the level of conflict. By contrast, a nearby mine that failed to invest in developing relations with its local communities and non-governmental organizations paid the price. The mine was challenged via a lawsuit even after permits to operate the mine had been granted by the relevant regulatory authorities. The mining company in question ultimately invested seven years and $30 million in a mine that never even opened.[129]

Shell Canada Limited is one of the largest integrated petroleum companies in Canada, producing natural gas, natural gas liquids as well as being the country's largest producer of sulphur.[130] As a resource company, Shell is aware of potential negative attention it can attract. Shell is committed to CSR principles including enforcing a supplier code of ethics and in the Spring of 2005 was added to the Jantzi Social Index.[131] Shell supports the Athabasca Oil Sands Project which works to sustain local communities in various ways. Through the oil sands project, Shell ensures local job creation and helps to build local business capacity. In the Regional Municipality of Wood Buffalo, the project has granted more than $150 million in contracts to local business.[132] Approximately $50 million, or one third of these Wood Buffalo contracts, have been awarded to Aboriginal companies.

Companies are beginning to realize that failing to invest time and resources in understanding the interests of various stakeholders can lead to project delays or even project cancellations, public relations disasters as Nike encountered, and damaged corporate reputations. In recognition of the business advantages of community involvement, Canadian Pacific Railway ("CPR") and the Federation of Canadian Municipalities have recently agreed upon a joint dispute resolution model to facilitate community involvement in CPR planned infrastructure projects and also to engage residents of a community in which CPR operates to resolve emerging concerns.[133]

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[129] *Ibid.* at p. 35.
[130] See Shell Canada, online: <http://www.shell.ca> (date accessed: 13 September 2006).
[131] *Ibid.*
[132] *Ibid.*
[133] See Strategis, online: < http://strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/en/sf05982e.html > (date accessed: 15 September 2006).

Contentious issues arise when municipalities, recreational, residential and commercial interests are located in close proximity to railway operations. Occasionally disputes arise relating to issues such as railway noise and commotion, railway/road crossings, or the aesthetic appearance of railway facilities. In the past, the process for resolution of such issues was discretionary, often proceeding to third-party mediation, regulatory agencies or the courts. In some cases issues remain intractable for extended periods. As a result of this measure, CPR is helping to avoid the intervention of the courts and the imposition of government regulations which can add to the cost of doing business.

iv. CSR Results in Improved Reputation with Investors

There is a small but growing trend in various investment communities to use environmental and social performance factors to evaluate a company's suitability for investment. It makes sense that the number one determinant of a company's financial performance is the quality of its management. A company's performance on "sustainability issues" is an excellent proxy for management quality for two reasons. First of all, environmental and social governance issues are the most complex challenges facing government today. Therefore, success in high complexity areas implies an ability to excel in other business areas as well. Second, in the aftermath of the corporate scandals of WorldCom, Enron, Tyco and Adelphia, we live in a time with high levels of market uncertainty. Those companies that can navigate their way through these complex waters successfully are likely to be well-managed companies and a good choice for investment. According to Matthew Kiernan, Executive Managing Director of Innovest Strategic Advisors, CSR behaviour is a proxy and a leading indicator for three typically underweighted drivers critical to future profitability potential: corporate agility or adaptability, the durability of a firm's competitive advantage, and the quality of its strategic management. [134]

In terms of capital markets, churches, pension funds, universities and foundations that oppose human rights abuses have the ability to disinvest in unethical companies.[135] This is a huge incentive for companies to respond to capital markets. Prudent bankers may be unwilling to invest in companies that tolerate human rights abuses which lead to political unrest, increase the risk of war and can lead to the nationalization of investment.[136] Corporations that tolerate human rights abuses not only risk capital flight by individual and institutional investors, they also risk the growing ability of activist groups to target corporations that are not socially responsible through public demonstrations, exposes, boycotts, and importantly, shareholders resolutions.

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[134] *Corporate Social Responsibility: Lessons Learned*, *supra* note 118 at p. 36.

[135] Penny Shepherd, "A History of Ethical Investment" (London: UK Social Investment Forum, May 2001), online: UK Social Investment Forum <http://www.uksif.org/Z/Z/Z/lib/2001/05/art-ps-histupd/index.shtml> (date accessed: 13 September 2006).

[136] Engle, *supra* note 119.

The growth of socially responsible investing means that companies with strong CSR performance will benefit from increased access to capital that may not have otherwise been available to them. In 2001, the Social Investment Forum generated a report on socially responsible investing within the United States.[137] In 2003, a total of $2.16 trillion was invested in professionally managed portfolios using responsible investment strategies that define socially responsible investing in the United States.[138] One out of every nine dollars in professional investment in the United States was involved in socially responsible investing.[139] The 2005 version of the Social Investment Forum's report revealed that a total of $2.29 trillion was invested in socially responsible investing in the United States, while one out of every ten dollars in professional investment in the United States was involved in socially responsible investing. The report also found that SRI assets rose more than 258 percent from $639 billion in 1995 to $2.29 trillion in 2005, while the general category of assets under professional management increased by just less than 249 percent. Finally, the report noted that mainstream money managers are increasingly incorporating social and environmental factors into their investing.[140] Clearly, an investment in CSR can pay off in improved access to capital.

While CSR continues to gain ground internationally, a debate remains as to whether a real connection exists between socially responsible business practices and positive financial performance. Studies examining this link have appeared as of late, including a 2002 DePaul University study. This study showed that overall financial performance of the 2001 Business Ethics Best Citizen companies was significantly better than that of the remaining companies in the S&P 500 Index, based on the 2001 BusinessWeek ranking of total financial performance.[141] The ranking was based on eight statistical criteria, including total return, sales growth, and profit growth over the one-year and three-year periods, as well as net profit margins and return on

[137] Social Investment Forum Industry Research Program, "2003 Report on Socially Responsible Investment Trends in the United States" (Washington: Social Investment Forum Foundation and Social Investment Forum, Ltd., 2003).
[138] *Ibid*. at p. 7.
[139] *Ibid*. at p. 7.
[140] Social Investment Forum Industry Research Program, "2005 Report on Socially Responsible Investment Trends in the United States – 10 Year Review" (Washington: Social Investment Forum Industry Research Program, 2006).
[141] William Baue, "Business Ethics' 100 Best Corporate Citizens Outperform S&P 500" (29 April 2002), online: Social Funds <http://www.socialfunds.com/news/article.cgi/article832.html> (date accessed: 13 September 2006).

equity. The best corporate citizens scored ten percentile points higher that the mean ranking of the remainder of the S&P 500 companies.[142] Furthermore, an index of the 2006 Global 100: Most Sustainable Corporations in the World outperformed the MSCI World Index from 2000 to 2005. The 2006 Global 100 increased in value by 10% over the five year period, while the MSCI World Index increased by only 3%. The Global 100: Most Sustainable Corporations in the World identifies the most sustainable companies in the World according to Corporate Knights Inc. and Innovest Strategic Value Advisors Inc., based on performance on environmental, social, and governance issues.[143] This type of data supports the existence of a strong business case for CSR implementation.

v. Improved Employee Recruitment and Retention

According to a 1999 Mercer/Angus Reid poll of 307 Canadian CEOs on business issues warranting their attention, executives were consistently worried about attracting and retaining top talent, high-caliber employees.[144] The CEOs in the study recognized that this goal was harder to accomplish now than it was five years earlier, and 23% of the CEOs ranked this as their number one priority.[145] In fact, the issue of talent attraction and retention received the second highest number of votes, second only to the priority of improving profitability. [146]

It has been estimated that recruiting new employees costs a company upwards approximately $4000.[147] This figure includes posting job advertisements, agency costs, the costs associated with internet postings, developing and implementing a sourcing strategy, the cost of candidate screening and doing interviews, to name a few of the expenses incurred in employee

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142 *Ibid.*
143 See The Global 100: Most Sustainable Corporations in the World, online: <http://www.global100.org> (date accessed: 13 September 2006).
144 William Mercer, *Beyond the Bottom Line: What CEOs are Thinking* (Toronto: William Mercer Company, 1999).
145 Bob Willard, *The Sustainabililty Advantage* (Gabriola Island, BC: New Society Publishers, 2002) at p. 23 [Willard].
146 *Ibid.* at p. 23
147 Yves Lermusiaux, "Economic Consequences of Reducing Cost per Hire," Taleo Talent Management, online: http://www.taleo.com/research/articles/strategic/economic-consequences-reducing-cost-per-hire-16.html (date accessed: 14 September 2006).

recruitment. Companies perceived to have strong CSR commitments oftentimes find it easier to retain employees once hired.[148] This may be attributable to the fact that being CSR-compliant is a sign of a more attractive and employee-focused corporate culture. In any event, retention of employees inevitably results in a reduction in turnover and training costs for CSR-compliant companies. KPMG together with the Canadian Advanced Technology Alliance estimated that the cost of replacing a departed worker is at least $25,000.[149] According to *Business Week*, the cost is more akin to $50,000.[150]

Recent studies suggest that companies with a positive CSR history have an easier time attracting and retaining high quality employees in tight labour markets. In 1999, the World Resources Institute and the Initiative for Social Innovation Through Business conducted a study to look at what was important to recent MBA graduates in looking for employment following their degree.[151] The researchers found that graduates look at corporate values in addition to other criteria such as salaries and job responsibilities in determining where to work.

A related point is that CSR compliant companies that are also interested in the governance of the company and benefit from increased employee morale and productivity. Company efforts to improve working conditions, lessen environmental impacts or increase employee involvement in decision-making often lead to increased productivity and reduced error rate.[152] Syncrude observed that its good employment practices and safety record demonstrate to its employees that the company cares, and this ultimately leads to improved labour productivity.[153] Likewise, Team Depot, the employee volunteer program at Home Depot, is part of a larger corporate donations program that helps to reinforce the teamwork culture that is a signature of the company's success as a retailer.[154] Team Depot gives employees the

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[148] "Overview of Corporate Social Responsibility", *supra* note 125.
[149] KPMG, News Release, "KPMG alliance to offer talent retention tool to high tech employers" (5 May 1999) as cited in Willard, *supra* note 145 at p. 28.
[150] Robert McNatt, "Why Your Workers Might Jump Ship" *Business Week Online* (1 March 1999) at p. 8.
[151] Natural Resources Canada, "Business Case for CSR: Key Drivers and Benefits," online: Natural Resources Canada <http://www.nrcan-rncan.gc.ca/sd-dd/pubs/csr-rse/p6_e.html> (date accessed: 13 September 2006).
[152] "Overview of Corporate Social Responsibility", *supra* note 125.
[153] *Corporate Social Responsibility: Lessons Learned*, *supra* note 118 at p. 36
[154] *Ibid.* at p. 36.

opportunity to demonstrate leadership skills that they may not otherwise have a chance to showcase in their daily duties.

vi. Increased Access in the Competition for Resources and Capital

A good social and environmental management track record and a clear willingness to work with stakeholders and address their concerns can enhance the success of bids for those companies competing with others for access to resources. This is particularly the case for those companies involved with energy, mineral and forest resources. Teck Cominco believes that companies with good reputations will in future have more opportunities than their competitors with respect to access to resources and to project opportunities.[155] In fact, Teck Cominco's good reputation for negotiating and honouring agreements with indigenous groups and communities has helped it in accessing mineral rights in new areas.[156]

Weyerhaeuser Canada is a second example of a company with increased access to resources as a result of socially responsible corporate behaviour. Weyerhaeuser is an international forest products company that grows and harvests trees, produces and sells forest products like logs, wood chips, pulp, paper and packaging, operates a business to collect and recycle wastepaper, boxes, newsprint, builds homes, and develops land.[157] Weyerhaeuser recently acquired MacMillan Bloedel, another forest products company, and attributes the uneventful nature of the acquisition process, in part, to the reputation it had earned through its CSR commitments.

With the recent launch of the UN Global Compact's "Principles for Responsible Investment", socially responsible investment will likely increase in the near future. Thus, socially responsible corporations may enjoy increased access to capital. Leading financial institutions from 16 countries, representing more than $2 trillion in assets owned, signed the

[155] *Ibid.* at p. 37.
[156] *Ibid.* at p. 37.
[157] *Ibid.* at p. 15.

Principles. The Secretary-General, Kofi Annan, asked institutional investors worldwide to adopt the Principles.

vii. Expedited Regulatory Approval and Improved Relations with Regulators

According to a Canadian corporate social responsibility report, those companies that demonstrate that they are engaging in ongoing CSR practices can develop better relations with regulatory agencies ultimately leading to less red tape and scrutiny.[158] Many jurisdictions are starting to reward companies that have proven they are socially and environmentally responsible. These companies are rewarded for the CSR-compliant behaviour with less paperwork, fewer inspections, and expedited treatment when these companies are applying for governmental permits and permissions. For instance, Home Depot has a number of community involvements that it believes have helped the company to obtain permits to open new stores. Home Depot gives back to the communities in which it operates by providing staff time and expertise and building materials to build and repair affordable housing. In conjunction with Habitat for Humanity, the company provides similar services for those communities in which natural disasters have occurred.[159]

Similarly, Husky Injection Molding, a manufacturer of plastic products, recently expanded into Vermont, U.S.A. Vermont is known to have a particularly tough regulatory environment. The company believes that by demonstrating its *Purpose and Values*, it had an easier time obtaining permits that might not otherwise have been the case.[160] Companies like Syncrude and Teck Cominco observe that the increased trust and respect they have developed with regulators has help to make regulatory processes more effective and efficient.[161]

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[158] *Ibid.* at p. 40.
[159] Home Depot, *2005 Annual Report,* online: Home Depot <http://ir.homedepot.com/downloads/HD_2005_AR.pdf> (date accessed: 14 September 2006).
[160] *Corporate Social Responsibility: Lessons Learned*, *supra* note 118 at p. 40.
[161] *Ibid.* at p. 40.

It makes sense that companies that are able to satisfy or even surpass regulatory compliance requirements are given more latitude by both national and local government entities. For instance, in the United States, federal and state agencies governing environmental and workplace regulations have formal programs in place that recognize and reward companies that have taken proactive measures to reduce adverse environmental, health and safety impacts.[162] These regulatory-compliant companies often encounter fewer inspections and less paperwork. These companies may also be given preference or "fast-track" treatment when applying for operating permits, zoning variances or other forms of governmental permission.

viii. Reduced Operating Costs

Some CSR initiatives can reduce a company's operating costs dramatically. Many recycling initiatives cut waste-disposal costs and generate further income by selling recycled materials. For example, initiatives aimed at improving environmental performance can lower costs. DuPont Canada is a company located in Mississauga, Ontario. DuPont produces nylon, industrial yarn, synthetic fibers, polymer resins, packaging films, automotive finishes, crop protection products, and industrial chemicals.[163] DuPont has reaped the financial benefits of waste and energy intensity reductions. For example, a partnership between DuPont Canada and Collins and Aikman, an important customer of DuPont Canada, resulted in the establishment of recycle "loops" for "fluff" type waste. The project team conducted a comprehensive environmental assessment that alerted the DuPont team to an opportunity to divert 9 tonnes of "fluff" waste through recycling, annually. Costs reductions total approximately $15,000 annually.[164]

In the human resources area, companies like Starbucks that adhere to employee codes of conduct and treat their employees well reap the financial rewards many times over. Starbucks,

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[162] See Better Management, online: <http://www.Bettermanagement.com> (date accessed: 13 September 2006).
[163] Five Winds International, *CSR Case Study Dupont Canada: Realizing Sustainable Growth* at p. 2, online: Five Winds International <http://www.fivewinds.com/uploadedfiles_shared/CSRDupont.pdf> (date accessed: 13 September 2006).
[164] *Ibid*.

for instance, has been praised for its generous employee benefits and its commitment, unusual in the industry, to provide full benefits to both full and part-time employees. For this reason, amongst others, Starbucks was recognized by *Fortune Magazine* as one of the top 100 companies to work for in the United States.[165] Providing benefits, as well as paying attention to flexible scheduling and other work-life programs may reduce absenteeism and increase employee retention. This often saves companies money through increased productivity and reduction of hiring and training costs, which are a key cost of operating a business.

ix. CSR is Just the "Right Thing to Do"

There are some companies that have built their reputation around being socially responsible and have a loyal customer base for having done so. Chiquita Brands International, Inc. is the world's top banana producer, and is a leader in CSR. Chiquita has institutionalized CSR practice into its management structure by committing to rigorous labor and environmental standards, continued participation in international certification programs, industry-leading labor agreements, and by producing candid sustainability reports.[166] Chiquita has a Vice President-level Corporate Responsibility Officer, and a steering committee of managers that meets monthly to coordinate and guide corporate responsibility efforts. Chiquita complies with the SA8000 labor standard and the Rainforest Alliance's Better Banana Project standard, an international certification program concerned with improving environmental and social standards on banana farms.[167] In the Corporate Responsibility section of its 2005 Annual Report, Chiquita states that while its corporate responsibility efforts have required considerable investment, it believes that its efforts have also had a favourable net impact on operating costs and productivity. From

[165] CNN, "Fortune Best 100 Companies to Work For, 2006", online: <http://money.cnn.com/magazines/fortune/bestcompanies/full_list/> (date accessed 14 September 2006).
[166] Chiquita Brand International, Chiquita Responsibility Reports, 2000 to 2005, online: Chiquita Brand International <http://www.chiquita.com/corpres/CRReports.asp> (date accessed: 13 September 2006).
[167] Mark Thomsen, "Chiquita Certified as Better Banana" (16 November 2000), online: Social Funds <http://www.socialfunds.com/news/article.cgi/428.html> (date accessed: 13 September 2006).

1995 to 2005, productivity on Chiquita-owned banana farms has increased 27% while the cost per box has decreased by 12%, despite significant increase in input costs.[168]

Another example of a company that has made its brand reputation by being socially responsible is Ben & Jerry's Ice Cream. In their mission statement Ben & Jerry's says that it aims to make, distribute & sell the finest quality all natural ice cream incorporating wholesome, natural ingredients while promoting business practices that respect the earth and the environment.[169] Ben & Jerry's also tries to operate the company in a way that actively recognizes the central role that business plays in society by initiating ways to improve the quality of life locally, nationally & internationally. Ben & Jerry's contributes a minimum of $1.1 million annually through employee-led initiatives in corporate philanthropy.[170] One of the most successful programs at both Ben & Jerry's plants is their program to sell corrugated ingredient boxes into a secondary market for resale. The cardboard generated $72,590 in revenue, which more than covered the solid waste costs for both manufacturing sites.[171]

The Body Shop is another example of a corporation that has built its brand image around being socially responsible. In fact, on its website, rather than calling itself an "ethical corporation", The Body Shop bills itself as "a force for positive social and environmental change".[172] The Webpage announces that it is against animal testing, supports community trade, activates self-esteem, protects human rights and protects our planet. The Body Shop's founder, Dame Anita Roddick, founded The Body Shop in Brighton, England in 1976. The Body Shop's

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168 Chiquita Brands International Inc., 2005 Annual Report: Corporate Responsibility, online: <http://www.chiquita.com/corpres/AR%20reports/CR%20Pages%20from%202005annual.pdf> (date accessed: 13 September 2006).

169 Ben &Jerry's, online: <http://www.benjerry.com/our_company/our_mission> (date accessed: 13 September 2006).

170 Ben & Jerry's, News Release, "Ben & Jerry's Names New Chief Euphoria Officer: Freese to Assume Top Leadership Job at Vermont Ice Cream Company" (1 November 2004), online: Ben & Jerry's <http://www.benjerry.com/our_company/press_center/press/WaltFreeseAnnouncement.html> (date accessed: 13 September 2006).

171 Ben & Jerry's, *Ben & Jerry's Social and Environmental Assessment 2004* at p. 17, online: Ben & Jerry's <http://www.benjerry.com/our_company/about_us/social_mission/social_audits/2004/index.cfm> (date accessed: 13 September 2006).

172 The Body Shop, online: <http://www.thebodyshopinternational.com/About+Us/Our+Company/> (date accessed: 13 September 2006).

first campaign was Save the Whales in conjunction with Greenpeace International in the United Kingdom in 1976. In 1994, The Body Shop launched the first "STOP Violence Against Women" campaign in 1996 and received the United Nations Grand Award for its international efforts. In fact, The Body Shop is recognized as a 'trailblazer' by the United Nations Environmental Program for publishing its *Values Report*. In 1996, The Body Shop was the first company to offer a fully-integrated *Values Report*, consisting of independently-verified statements on the Company's performance on social, environmental and animal protection issues. In the midst of all of its corporate activism, The Body Shop has been named One of "Canada's 50 Best Managed Private Companies" and one of the "Best 100 companies to work for in Canada", both awards granted by the *Financial Post*.

Companies like Chiquita, Ben & Jerry's and The Body Shop, to name but a few, have a brand image that is very much associated with CSR values. The roots of the corporate cultures of many CSR complaint companies extend back to the founding of the companies themselves. At that time, implementing CSR may have just been the "right thing to do" for the corporate decision-makers. Today, all of these corporate brands have become inexorably linked to high CSR standards and positive corporate citizenship.

x. Avoidance of Governmental Regulation

All international CSR efforts by companies to date have been voluntary as there is no international regulatory body that has created or attempted to enforce CSR. Instead, voluntary codes of conduct are the primary instrument through which CSR is carried out. The international regulation of corporate social responsibility would entail a move toward adopting corporate social *accountability* meaning that companies would then have a legal obligation to comply with international standards. There are a host of reasons why businesses should opt for voluntary compliance in an effort to keep international regulation from becoming a reality. As business leaders can appreciate, more regulation of business is cumbersome. Increased social, ethical and environmental reporting which would result from mandatory CSR initiatives would increase auditing and reporting costs to companies.

Added to these increased reporting costs would be the inevitable expenses associated with litigation and prosecution which would come with international regulation of CSR. Gathering documents in preparation for litigation represents time wasted by employees that could be put to better use in supporting the corporation. As well, litigation entails the public disclosure of private company documents which could greatly impair the public image of a company. Indeed, the costs associated with stock depreciation and destroyed public image following particularly bad media coverage is immeasurable and a good reason alone for companies to consider being preemptively CSR compliant.

VII. CONCLUDING THOUGHTS

CSR is a rapidly evolving field. From the development of ISO 26000, the recent appointment of a Special Representative on business and human rights by the UN, the recent progress of the Global Compact to further opportunities to harness the potential of socially responsible investing, interest in CSR implementation and reporting will certainly intensify in the coming years. Part of this interest is certainly due to the case studies, surveys and accumulating evidence of a business case in favour of CSR implementation. From strengthened brand image, meeting consumer demand, reducing operating costs, and improving relationships with stakeholders, the various elements of the business case discussed above are multi-faceted and complex.

Allen White, author of “Fade, Integrate or Transform? The Future of CSR” envisions three plausible scenarios for the future of CSR: the fad-and-fade scenario, the embed-and-integrate scenario and the transition-and-transformation scenario. In the fad-and-fade scenario, a severe global economic downturn causes a wave of multi-national company downsizing. CSR proves to be fragile and the attention of business and government turns to basic economic survival and recovery from the crisis. CSR moves quietly into the background and is characterized by practices associated with its earliest phase, namely compliance and philanthropy. In the embed-and-integrate scenario, CSR becomes embedded in company strategy and operations. Business managers no longer ask for the business case for CSR because it has been persuasively demonstrated. Finally, in the transition-and-transformation scenario, CSR has evolved and incremental progress has been achieved in human rights, labour and environmental performance. However, intensifying ecological stress and social inequalities have spurred a fundamental rethinking of the purpose of the corporation and the promise of CSR has not been completely fulfilled.[173] Which of these scenarios ultimately comes true remains to be seen.

For CSR considerations to become ingrained as part of mainstream corporate decision-making, a broad spectrum of corporate leaders must be convinced of the business case for adopting a triple-bottom line perspective on corporate performance. If this revolution in corporate thinking were to occur, civil society's demand for binding international regulation of CSR could conceivably abate. Until such a change in perspective occurs, concerns regarding the negative social implications of globalization and trade liberalization are likely to foster an ongoing debate regarding binding CSR regulation at the international level.

[173] Allen L. White, "Fade, Integrate or Transform? The Future of CSR", online: Business for Social Responsibility <http://www.bsr.org/CSRResources/ResourcesDocs/BSR_200508_Allen-White_Fade-Transform.pdf> (date accessed: 13 September 2006).