

CIVIL SOCIETY INITIATIVES AND “SOFT LAW” IN THE OIL AND GAS INDUSTRY

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I. INTRODUCTION

One of the persistent concerns in discussions of corporate accountability over the last decade has been the mismatch between transnational business enterprises and national systems of legal control. Transnational corporations comprise either twenty-nine or fifty-one of the world's one hundred largest economies, depending on how one measures companies' size.¹

* I would like to thank the people who generously offered their time to me to be interviewed about the initiatives described in this Essay: Bennett Freeman, former Deputy Assistant Secretary of State for Democracy, Human Rights and Labor, who discussed the Voluntary Principles for Security and Human Rights in the Extractive Industries; Karina Litvack, Head of Governance & Socially Responsible Investment, and Richard Singleton, Director of Corporate Governance, ISIS Asset Management plc, who discussed the Extractive Industry Transparency Initiative; and Allen White, Acting Executive Director of the Global Reporting Initiative. I appreciate their time and insights very much. I would also like to thank the New York University Journal of International Law & Politics for inviting me to participate in the Symposium on Oil and Gas, for which this Essay was prepared.

1. According to a study by the United Nations Conference on Trade and Development (UNCTAD), transnational corporations (TNCs) comprised 29 of the world's 100 largest economies in 2002, the largest being ExxonMobil (45th, with a “value added” of \$63 billion), followed by General Motors (47th; \$56 billion); Ford Motor Company (55th; \$44 billion); Daimler Chrysler (56th; \$42 billion); and General Electric (58th; \$39 billion). See Press Release, United Nations Conference on Trade and Development, *Are Transnationals Bigger Than Countries?*, Annex tbl.1 (Aug. 12, 2002) at <http://www.unctad.org/Templates/webflyer.asp?docid=2426&intItemID=2079&lang=1>. UNCTAD measures the size of companies as economic entities by calculating their “value added,” which it defines as the sum of salaries and benefits, pre-tax income, and depreciation and amortization. *Id.* It measures the size of countries' economies by using Gross Domestic Profits (GDP). *Id.* If one compares the size of countries' revenues with companies' revenues, then companies comprise 15 of the world's 28 largest economies. See Global Policy Forum, *Comparison of Revenues Among States and TNCs* (2000), at <http://www.globalpolicy.org/socecon/tncs/tncstat2.htm> (last visited Sept. 26, 2004). This comparison shows General Motors as the world's eighth largest economic entity, with revenues of approximately \$161 billion, smaller only than the economies of the United States, Germany, Italy, the United Kingdom, Japan, France, and the Netherlands. Using this

Under any measure it is clear that many entities with global reach, such as ExxonMobil; Royal Dutch/Shell; BP Amoco; Chevron/Texaco; Ford; Daimler Chrysler; General Motors; General Electric; Toyota; Siemens; Wal-Mart; and IBM (companies which routinely rank among the world's largest companies), possess an enormous amount of raw economic and social power. Of note to the current inquiry is the fact that a number of the world's most financially successful companies are oil and gas companies: ExxonMobil, which was the world's most profitable company in 2001, with profits of \$15 billion on revenues of \$192 billion; Royal Dutch/Shell, the world's fourth most profitable company that same year, with \$11 billion profits on revenues of \$135 billion; BP Amoco, the world's fifth most profitable company in 2001, with \$8 billion profits on \$174 billion in revenue; Total Fina Elf, which was tied with Wal-Mart for the world's sixth most profitable company, with profits of \$7 billion on revenues of \$94 billion; and Chevron/Texaco, the world's ninth most profitable company with profits of \$3 billion on revenues of \$100 billion.²

The concern about multinational reach as compared to domestic regulation is most pronounced with respect to companies' interactions with host governments in some emerging markets, where the transnational companies are economically and technologically much stronger than the host governments with which they interact. For instance, in 1999, ExxonMobil's revenues were \$185 billion, compared to gross domestic products in Chad and Nigeria, two countries in which ExxonMobil operates, of \$1.6 billion and \$43.3 billion.³ One concern is that the host governments will seek to attract foreign investment by lowering environmental, labor, or human rights standards, either in their laws as written, or more likely, by their

data, GM is followed by Daimler Chrysler (9th; \$154.6 billion); Ford Motor Company (11th; \$144.4 billion); Wal-Mart Stores (12th; \$ 139.2 billion); and Mitsui (16th; \$109.4 billion). *Id.*

2. Global Policy Forum, *Major Oil Companies Among Largest Transnational Companies*, at <http://www.globalpolicy.org/soecon/tncs/oiltable.htm> (last visited Sept. 26, 2004). The Global Policy Forum is a non-profit organization established in 1993 that has consultative status at and monitors policy developments within the U.N. For more information on the Global Policy Forum, see Global Policy Forum, *About GPF*, at <http://www.globalpolicy.org/visitctr/about.htm> (last visited May 1, 2004).

3. See Marina Ottaway, *Reluctant Missionaries*, FOREIGN POL'Y, July-Aug. 2001, at 44, 47.

patterns of non-enforcement of the law.⁴ Another concern, given that most (but not all) of the underlying problems of justice associated with oil and gas production involve operations in emerging market countries, where host governments may be weak, poor, or corrupt, is fundamental: What confidence can we have that purely domestic solutions will eventually solve the problems?⁵ Those problems include concerns about environmental degradation (as alleged in Ecuador, Peru, Indonesia, and Bolivia, for instance); violations of indigenous peoples' rights (as alleged in Colombia); violations of human rights by entering partnerships with repressive governments (as alleged in Myanmar, the country formerly known as Burma, or in the Sudan) or corrupt governments (as alleged in Colombia, Indonesia, or Nigeria, for instance); violations of human rights by the use of repressive military and para-military operatives to provide security arrangements for companies' infrastructure (as alleged in Nigeria and Colombia); or simply by virtue of companies' participation in partnerships with governments of the "resource-rich-but-poor" countries that fail to distribute the benefits of oil and gas production to their people in an equitable way (as alleged in every one of the countries mentioned above).⁶ So, without a supranational

4. See, e.g., Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable through Administrative Law*, 28 *FORDHAM URB. L.J.* 1477, 1481-83 & nn.14-20 (2001). Dean Aman has developed the concept of "global currency," which is "the price government is willing to pay to remain economically competitive on behalf of the residents already living and investing within its jurisdiction, as well as to be attractive to new investors of all kinds." *Id.* at 1481. He points out that global currency can be "legitimate," as in governments more efficiently providing services, investing in infrastructure and human capital, lowering taxes, or adopting policies to promote economic growth. *Id.* at 1481-82. He also recognizes that some forms of global currency, such as allowing child labor, poor wages, or unsafe working conditions are arguably illegitimate, since they "provide a competitive advantage to a particular location and individuals associated with it, but at a cost borne by people unable to choose fully for themselves or unaware of the true costs of the 'bargain' being struck." *Id.* at 1482-83.

5. Climate change is an issue associated with oil and gas production and use, but much of the locus of the problem is in developed countries such as the U.S. and the E.U., not in emerging markets.

6. For a survey of the views of executives on which corporate social responsibility issues predominate in their industry, see JONATHAN E. BERMAN & TOBIAS WEBB, WORLD BANK, *RACE TO THE TOP: ATTRACTING AND ENABLING GLOBAL SUSTAINABLE BUSINESS 2* (2003), available at <http://www.pelc.net/Ar>

government, what global constraints can meet the power of such economically overwhelming enterprises? What mechanisms can inspire companies to promote universal human rights, economic justice, and environmental stewardship, given that advancing these goals is demonstrably not their primary job, and given the difficulties of advancing these goals in countries without a strong rule of law, transparent government, or a stable social, political, and economic order?

One answer, and it may seem a particularly feeble one, is the developing norm of corporate social responsibility. I do not champion the corporate social responsibility norm as a complete answer to the problem of corporate power, by any means. Some of the most serious issues facing us, for instance, climate change, demand bitter medicine that the soft concept of corporate social responsibility seems unlikely to be able to deliver. Yet, in exploring that norm in the following Article, particularly as it applies to the oil and gas industry, I hope to show that the norm, the types of communication it is inspiring (corporate social reporting and multi-stakeholder dialogues between NGOs, companies, and government to create voluntary standards for corporate behavior), and the actions it is

ticles/Race_to_Top.pdf (stating that Board-approved policies were taken as an indication of the importance of an issue to a company and finding that “[e]xtractive-sector respondents reported significantly higher percentages of board-approved policies for land rights and environmental issues than did manufacturing or agribusiness.”). Individual oil companies’ citizenship reports also contain information on the companies’ views of the salient human rights issues. See, e.g., British Petroleum, *Location Report: The Caspian, Overview*, at <http://www.bp.com/sectiongenericarticle.do?categoryId=2010343&contentId=2014881> (last visited May 1, 2004). For an overview of some NGOs’ views on the human rights issues in oil and gas extraction, see Human Rights Watch, *Corporations and Human Rights*, at <http://www.hrw.org/doc/?t=corporations> (last visited May 1, 2004), or Amnesty Int’l, *Human Rights Principles for Companies* (1998), at <http://web.amnesty.org/library/print/ENGACT700011998>. Each of these issues has led to litigation in the United States under the Alien Torts Claims Act (ATCA). See Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. OF TRANSNAT’L L. 153, 161-63 (2003) (discussing ATCA litigation against ExxonMobil for security practices in Indonesia); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 751-61 (2002) (discussing ATCA litigation against Texaco for environmental harm in Ecuador; ATCA litigation against Royal Dutch/Shell for security practices in Nigeria; and ATCA litigation against UNOCAL for involvement with the repressive government of Burma) [hereinafter Williams, *Corporate Social Responsibility*].

motivating companies to take, may in fact be stronger than one might assume at first encounter. In particular, I argue that citizens' demands for corporate social responsibility, communicated by increasingly sophisticated non-governmental organizations (NGOs), are changing the social context in which companies operate in some consumer markets, are changing the way companies think about their strategic challenges, are changing the institutional investor context in some important markets (particularly London), and are changing the norms of appropriate industry action with respect to important questions such as environmental protection, security arrangements for pipelines and plants, and financial arrangements with host countries. Ultimately, these changing norms about responsible corporate action are creating global standards of action for companies,⁷ notwithstanding the weakness, desperation, or corruption of the countries with which companies interact and the power imbalances that therefore result.

Indeed, it may be that the voluntary standards for company behavior in the oil and gas sector that I discuss below, such as the Voluntary Principles for Security and Human Rights in the Extractive Industries, hammered out in negotiations between the U.K. and U.S. governments, major human rights NGOs, such as Amnesty International and Human Rights Watch, and oil and gas companies, such as BP, Chevron/Texaco, and Royal Dutch/Shell, are harbingers of regulatory things to come. More precisely, these are examples of the types of private governance regimes that are starting to create global governance, even without global government, as economic integration proceeds apace.⁸ Two other examples that

7. On the creation of global standards for countries' laws with respect to corporate governance and corporate social responsibility, fueled by institutional investors' decisions about which countries in which to invest, see Tessa Hebb and Dariusz Wójcik, *Global Standards and Emerging Markets: The Institutional Investment Value Chain and CalPERS' Investment Strategy* (unpublished paper, on file with the New York University Journal of International Law and Politics).

8. For an excellent introduction to the concept of global governance, see Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L. LAW 1041 (2003). On the shift from government to governance, see Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L. L. & BUS. 1014, 1018 (1996-1997) (stating that "there has been a trend towards disintegration of government and an increased

I will discuss are the Global Reporting Initiative, which is a multi-sector triple bottom line disclosure initiative in which major oil companies participate, and the Extractive Industry Transparency Initiative, which commits extractive companies to “publish what they pay” to host governments. Much of the debate surrounding the Voluntary Principles on Security and Human Rights, as with much of the debate surrounding corporate codes of conduct, or voluntary triple bottom line reporting under the GRI, or corporate social responsibility generally, concerns their voluntary nature. The question is whether voluntary initiatives can fully solve concerns about corporate social accountability, or, rather, whether they are primarily a strategy to deflect mandatory regulation, which might have higher standards for corporate behavior, and possibly be more effective.⁹ This is an important question, one that I do not seek to minimize at all. Yet, in today’s world, our understanding of what constitutes regulation may need to go beyond the dualistic categories of voluntary and mandatory.

Recent scholarship has focused on the phenomenon of transgovernmental regulatory networks, defined as “contacts, coalitions, and interactions [among government actors] across state boundaries that are not controlled by the central foreign policy organs of governments.”¹⁰ Some of these transgovernmental networks are quite broad, well-integrated, and tightly coordinated, such as the Financial Stability Forum, established in 1999, which seeks to develop systems to create a stable

delegation of regulatory authority and normative competence to professionals and specialists, such as lawyers, accountants, economists, scientific experts. Thus, there has been a shift from ‘government’ to ‘governance,’ as the central political institutions of the state have found it increasingly difficult to resolve social conflicts or to reconcile the diversity of social interests . . .”).

9. See, for instance, the recent report by the highly-respected British NGO, Christian Aid, criticizing corporate social responsibility as an “inadequate response” to protect the social and environmental rights of “poor people who come in contact with multinational corporations,” and asserting that self-regulation will never be sufficient to safeguard these rights. CHRISTIAN AID, BEHIND THE MASK: THE REAL FACE OF CORPORATE SOCIAL RESPONSIBILITY 2, 5, 50, available at <http://www.christian-aid.org.uk/indepth/0401csr/index.htm> (last visited May 1, 2004).

10. See Joseph S. Nye, Jr. & Robert O. Keohane, *Transnational Relations and World Politics: An Introduction*, in TRANSNATIONAL RELATIONS AND WORLD POLITICS ix, xi (Joseph S. Nye, Jr. & Robert O. Keohane eds., 1972), cited in Slaughter, *supra* note 8, at 1044 & n.8.

global financial architecture.¹¹ The Financial Stability Forum is comprised of, among others, central bank regulators (who, in turn, operate within their own transgovernmental network, the Basel Committee), securities regulators (whose network is the International Organization of Securities Commissions), and insurance supervisors (who formed the International Association of Insurance Supervisors), as well as representatives from international financial organizations such as the World Bank and the International Monetary Fund (IMF), and representatives from the Organization for Economic Cooperation and Development (OECD).¹² Other networks are more specific, focused on particular policy initiatives or best practices in one issue area, such as securities regulation (the International Organization of Securities Commissioners). As Professor Anne-Marie Slaughter points out, these organizations are not created by treaties nor composed of states and, therefore, do not fit the traditional model of an international, inter-governmental organization, such as the International Labor Organization (ILO) or the World Trade Organization (WTO). Yet, they are increasingly playing an important role in coordinating policies between states on a broad range of topics. Moreover, the primary mechanism for this coordination is the network articulating best practices around which domestic law-making and policy making then converge.¹³

In such a regime of “regulation by information,” according to Professor Slaughter, the “basic paradigm for global regulatory processes is the promulgation of performance standards, codes of best practices, and other aspirational models based on compiled comparative information”¹⁴ This description precisely fits the outcome of each of the initiatives developed in the multi-stakeholder dialogues described below. Thus, it could be that, in today’s networked, information-

11. See Fin. Stability Forum, *Financial Stability Forum* (2004), at <http://www.fsforum.org/home/home.html> (last visited Sept. 9, 2004).

12. See Fin. Stability Forum, *Who We Are*, at http://www.fsforum.org/about/who_we_are.html (last visited May 1, 2004).

13. See Slaughter, *supra* note 8, at 1046-47.

14. See *id.* at 1065. This model of governance by information prevails in the E.U. as it continues its process of economic and political integration. See Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. PUB. POL’Y 139, 147-48 (1997).

driven world, where one activist with a computer in Bangladesh can inspire a stock sell-off of one of the world's largest companies in London or New York, what we are seeing emerging from these government, NGO, and company dialogues is the new face of regulation.¹⁵ If so, then, although framed as voluntary, these initiatives are not quite voluntary, because they become the standard by which companies' actions are judged in the global economy (including by institutional investors) and because they become the performance standard towards which many companies then direct their conduct.

That, of course, does not answer the question of whether this "regulation by information" is an adequate answer to concerns about corporate action and corporate accountability. I will conclude with some preliminary thoughts on that question. To put the question narrowly, in August 2003, the Sub-Commission on the Promotion and Protection of Human Rights, Commission on Human Rights of the United Nations, adopted the U.N. Human Rights Norms for Business.¹⁶ If a treaty entered into force incorporating that document (which is not currently anticipated), how would it affect the obligations of oil and gas companies, and how would those obligations differ from those voluntarily undertaken by most of the industry by their participation in the GRI, the Voluntary Principles, and the Extractive Industry Transparency Initiative? What would be gained from such a treaty, as compared to the current state, and what, if anything, would be lost?

In this Article, I will proceed as follows. First, I will describe some indicia of the corporate social responsibility trend

15. There is a burgeoning and fascinating literature on new governance, a term that encompasses both trans-national networks of government actors using "regulation by information" processes, as Professor Slaughter describes and policy initiatives developed by government and private actors working in concert, as described in this Article. For a comprehensive overview of new governance writing, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. (forthcoming Dec. 2004) (collecting sources).

16. *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Comm'n on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., Agenda Item 4, E/CN.4/Sub.2/2003/12/Rev.2 (2003), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/64155e7e8141b38cc1256d63002c55e8?OpenDocument> [hereinafter U.N. Norms].

in business. I do not propose to fully describe all of the manifestations of the trend, nor do more than sketch its history. I simply want to provide enough information to suggest to someone new to this field of inquiry, or perhaps even to a skeptic, that there is such a trend, and that it is having an impact on what companies say about their economic, environmental, and social actions and obligations, even if it does not entirely structure what they do. Second, I will describe three multi-stakeholder dialogues that have emerged in reaction to the corporate social responsibility trend, involving participants in the oil and gas industry: The Global Reporting Initiative, the Voluntary Principles on Security and Human Rights, and the Extractive Industry Transparency Initiative. In those descriptions, I will focus on briefly answering the following questions: What is the initiative? Who participated? What was produced? Why did oil and gas companies participate? What is the current state of play with respect to the initiative?

Third, I will turn from describing these initiatives to evaluating them. Here, I am primarily interested in two questions. First, what can be said about their strengths and weaknesses in addressing the underlying problems of justice associated with oil and gas operations? Second, assuming that these initiatives fit with Professor Slaughter's descriptions of regulation by information, I will focus on evaluating what benefits and risks it creates for global corporate accountability efforts if we accept these types of initiatives as the new face of regulation, as Professor Slaughter suggests. In particular, I am interested in evaluating how the standards that companies have agreed to, both for disclosure and substantive conduct, compare to those that would be imposed under a treaty incorporating the U.N. Human Rights Norms for Business. What can we say about the voluntary versus mandatory debate from that comparison (given the caveat that voluntary standards, under a regulation by information approach, can develop a *gravitas* that is not precisely captured by the term voluntary, in ways that will be described below)?

II. THE CORPORATE SOCIAL RESPONSIBILITY TREND

Any understanding of these particular "new governance" initiatives logically begins with the developing importance of corporate social responsibility as an organizing idea within

civil society and the business community. While the idea of corporate social responsibility is old, as are debates about its meaning,¹⁷ in the last decade it has achieved new cogency through the convergence of a number of trends. First, and most important, is globalization itself, which has both heightened companies' visibility and fueled the anti-globalization movement among activists who are skeptical that business, on its own, can solve the problems of growing economic inequality and environmental degradation.¹⁸ Many businesses recognize that they need to manage the globalization backlash, and engagement with corporate accountability issues is one way to do so. As Carly Fiorina, CEO and Chairman of Hewlett-Packard Company, stated in a recent address on corporate social responsibility, "business can either take control of the corporate social responsibility trend, or the corporate social responsibility trend will take control of business."¹⁹

Second, is the increasing sophistication of civil society organizations, usually referred to as NGOs, such as environmental organizations, human rights organizations, and organizations, such as AccountAbility and SustainAbility in the U.K., that directly address corporate social responsibility. These organizations have developed into serious partners with business in addressing some of the difficult problems of globalization, economic injustice, and environmental harm, but they have

17. For an historical analysis of the global responsibilities of companies, beginning with the role of the Dutch East India Company in what became Indonesia, see DANIEL LITVIN, *EMPIRES OF PROFIT: COMMERCE, CONQUEST AND CORPORATE RESPONSIBILITY* (2003). For an overview of the modern corporate responsibility discussion from a British perspective, see SIMON ZADEK, *THE CIVIL CORPORATION: THE NEW ECONOMY OF CORPORATE CITIZENSHIP* (2001). For a brief overview of the drivers of the corporate social responsibility trend, as understood in the business management literature, see Sandra A. Waddock et al., *Responsibility: The New Business Imperative*, 16 *ACAD. MGMT. EXECUTIVE* 132 (2002). For one overview of the discussion in a legal context, see Williams, *Corporate Social Responsibility*, *supra* note 6, at 711-24.

18. See ZADEK, *supra* note 17, at 36 (noting that anti-corporate activists who call for increased government intervention in corporate activities are "products of both globalization and the corporate world"); Bennett Freeman et al., *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 *HASTINGS INT'L & COMP. L. REV.* 423, 424 (2001) (asserting that globalization has made companies' actions more visible and fueled the anti-globalization backlash).

19. Carly Fiorini, Address at Business for Social Responsibility (Nov. 17, 2003) (notes on file with author).

also become extremely well versed at harnessing the power of publicity to focus public and media attention on these issues when partnerships founder. Moreover, surveys show that people trust NGOs more than government or corporations, increasing their power to shape the public policy agenda to include corporate social responsibility issues.²⁰

Third, and related to both of the above, there have been a number of very visible campaigns that have put corporate social responsibility issues onto the front pages of major newspapers in the United States and the United Kingdom, at least. In the United States, campaigns were focused on sweatshop production in the apparel industry and light manufacturing (such as of toys and soccer balls), and the Nike Company became the face of corporate irresponsibility. In the United Kingdom, Shell Oil became the poster child for corporate accountability issues in 1995, based on two incidents. The first was its plan to dump the Brent Spar, a decommissioned oil buoy, in the North Sea—a plan that had been approved by the British government.²¹ This became a huge environmental *cause célèbre* in the United Kingdom, followed months later by human rights controversies stemming from Shell Nigeria's alleged failure to intervene to stop the Nigerian government from executing nine environmental activists from the Ogoni tribe who had vigorously opposed Shell's activities in Nigeria.²² Thus, in the United Kingdom, which has a high concentration of corporate social responsibility activists, engaged institutional investors, and a government that treats corporate social responsibility seriously, the issues that oil and gas companies confront became the face of corporate social responsibility.

20. See ZADEK, *supra* note 17, at 45 (reporting on survey data in the U.K. showing that 80% of the population had confidence in Friends of the Earth and Greenpeace, 85% had confidence in the World Wildlife Fund, only 30% had confidence in British Petroleum, and less than 20% had confidence in government ministers generally).

21. See Sharon M. Livesey, *The Discourse of the Middle Ground: Citizen Shell Commits to Sustainable Development*, 15 MGMT. COMM. Q. 313, 322-25 (2002) (discussing Shell Oil's social reports, and Shell's motivations in issuing its first report in 1998 as directly related to the Brent Spar incident).

22. See Ottaway, *supra* note 3, at 47; Sol Picciotto, *Rights, Responsibilities and Regulation of International Business*, 42 COLUM. J. TRANSNAT'L L. 131, 140 (2003).

Finally, as every reader undoubtedly knows, the anti-globalization movement developed a protest element that has led to thousands of people in the streets, including violent incidents in Seattle, Quebec, and Genoa, beginning with the "Battle of Seattle" in 1999 in conjunction with WTO meetings. These protests sharply focused corporate attention on the need to recapture public sentiment in favor of globalization and to maintain the corporate license to operate.²³ Indeed, had these protests not occurred, it is possible the copCSR trend would not have developed with the intensity and breadth that it has in a relatively short amount of time.²⁴

Five years after Seattle, the implications of this developing CSR trend can be seen in three new types of corporate communications: triple-bottom line reporting, multi-stakeholder dialogues, and discussions of CSR among business leaders and organizations, each of which can be seen among oil and gas industry participants.

First, over the course of the last ten years, there has been a decided increase in the percentage of transnational companies in various industries producing social, environmental or sustainability reports (which integrate social, environmental, and financial information), in addition to their financial reports. (Collectively, I will call these social reports.) Thus, in 2002, forty-five percent of the *Fortune* global top 250 companies (GFT250) produced a separate social report; this compares to thirty-five percent of GFT250 producing social reports in 1999.²⁵ Twenty-nine percent of these reports in 2002 were

23. See Freeman et al., *supra* note 18, at 424.

24. Cf. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1977) (developing the theory that redistributive legislation, such as the welfare rights legislation of the late 1960s, or legislation that redistributes political power, such as the civil rights legislation of the early 1960s, occurs when there are significant protest movements forcing government and elites to respond to restore order).

25. See KPMG, *INTERNATIONAL SURVEY OF CORPORATE SUSTAINABILITY REPORTING 2002*, at 16. KPMG has a sustainability business unit and has been surveying social reporting since 1993. *Id.* The survey was conducted by KPMG's Global Sustainability Services practice groups in 19 countries, with support from Ans Kolk and Mark van der Veen, from the Amsterdam Graduate Business School, University of Amsterdam. The 19 countries are Australia, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Japan, Netherlands, Norway, Slovenia, South Africa, Spain, Sweden, the United Kingdom, and the United States. Although the data were

independently verified, most often by accounting firms, compared to nineteen percent verified in 1999.²⁶ These statistics show trends begun in the early 1990s: The percentage of the top 100 companies in each of 19 countries that have produced social reports has grown from thirteen percent of such companies in 1993 to twenty-three percent in 2002.²⁷ Of these top 100 companies in nineteen countries, twenty-seven percent were independently verified in 2001, compared with eighteen percent in 1999.²⁸

Second, many of these same companies have begun to engage in stakeholder dialogues. Such dialogues are structured discussions among company participants, members of civil society, employees, and community members with various specific goals depending on the company and the social issues it faces. In some cases, as will be discussed below, these are dialogues between government, industry, and NGOs to develop soft law standards of conduct or social reporting formats. In some cases, as with British American Tobacco, these dialogues can, perhaps, best be understood as efforts to control the social agenda, including the regulatory agenda.²⁹ In general, though, they have the goal of creating a format for communication that provides information to the company about stakeholders' views as well as providing a context outside of advertising or formal public relations for the company to express its views to members of society about contested social issues. Each of the initiatives to be discussed below is a multi-stakeholder dialogue; therefore, further evaluation of this phenomenon will occupy the bulk of this paper.

collected between November 2001 and February 2002, and so most of the reports were actually issued in 2001, KPMG refers to them as 2002 reports. I will follow in that convention.

26. *See id.* at 18.

27. *See id.* at 12.

28. *See id.* at 18.

29. *See* Ben Coates, *Cigarette Company Documents Outline Strategy to Derail Global Tobacco Treaty*, CENTER FOR PUB. INTEGRITY, May 16, 2004, at <http://www.publici.org/report.aspx?aid=85&sid=100>. Relying upon tobacco industry documents maintained in the Minnesota Tobacco Document Depository, the Center for Public Integrity asserts that BAT "considered a two-pronged strategy" to defeat a World Health Organization treaty to regulate tobacco. That strategy involved "projecting a public image of corporate social responsibility while simultaneously working to prevent the enactment of a tough worldwide treaty." *See id.*

Third, the terms “corporate citizenship” and “corporate social responsibility” have re-emerged as part of the corporate lexicon, after a twenty-year hiatus. In some contexts, as in the United States during the Sarbanes-Oxley discussions in the summer of 2002, the term “corporate social responsibility” is being used narrowly to describe a company’s obligation to produce accurate financial statements. As such, it does not imply accountability to shareholders beyond that requirement. And, yet, in many other fora, the terms “corporate social responsibility” and “corporate citizenship” are being used to describe a concept of broader corporate social obligation (while the specific content of such obligation is often left undefined). One can see this broader concept expressed in public policy discussions at elite, global organizations such as the Davros World Economic Forum (Project on Corporate Citizenship, begun in 2001) or the United Nations (the Global Compact with Business, begun in 2000). The broader concept is also evident in a proliferating number of conferences, programs, and business organizations devoted to corporate social responsibility (such as the organizations Business for Social Responsibility (U.S.) or Business for Sustainable Development (E.U.)), as well as in a number of newswires that communicate daily about events, books, reports, and press releases in the corporate social responsibility field.³⁰ One executive from Phillip Morris (recently renamed Altria to project a new, higher sense of purpose) commented in January of 2003 that any executive who did not receive daily briefings on corporate social responsibility was “seriously behind the learning curve” and was likely to be “blind-sided by an important social issue.”³¹

III. A DESCRIPTION OF THREE INITIATIVES

These trends have had impacts in a number of industries, such as clothing, toys, rugs, soccer balls, athletic shoes, and diamonds, but the oil and gas industry has been a particular

30. See, e.g., SRI Media, at <http://www.srimedia.com> (for a U.K. corporate governance and social responsibility newswire) (last visited Sept. 8, 2004); CSRwire, at <http://www.csrwire.com> (for a U.S. view of the same topics) (last visited Sept. 8, 2004).

31. Senior Vice President for Corporate Responsibility, Phillip Morris, Address to Champaign/Urbana Chamber of Commerce (Jan. 14, 2003) (notes on file with author).

focus of attention. The following section will briefly describe three transnational, multi-stakeholder initiatives that either involve significant participation by companies in the oil and gas sector (the Global Reporting Initiative) or are specific policy initiatives addressing problems in this sector (the Voluntary Principles on Security and Human Rights and the Extractive Industry Transparency Initiative).

A. *The Global Reporting Initiative*

The Global Reporting Initiative (GRI) is a multi-sector, multi-stakeholder partnership that is working to create and refine a consistent, comparable format for companies to use to voluntarily report on the economic, environmental, and social impact of their actions, that is, to produce a sustainability report.³² It was established in 1997 by an NGO in the United States, the Coalition for Environmentally Responsive Economies (CERES), an organization which uses shareholder activism to get commitments by companies to produce environmental reports and implement environmental management systems.³³ The GRI reporting format has been developed by companies around the world, NGOs, accounting firms, institutional investors, and labor, for the most part, with the involvement of some government agencies (such as the U.S. Department of Labor, International Labor Affairs Bureau, or the French Ministry of the Environment) and the U.N. Environment Programme (UNEP).³⁴ In fact, the GRI is an official collaborating partner of the UNEP.³⁵ Moreover, it has been en-

32. Global Reporting Initiative, *GRI at a Glance*, at <http://www.globalreporting.org/about/brief.asp> (last visited May 1, 2004).

33. *Id.*; Global Reporting Initiative, *Frequently Asked Questions*, at <http://www.globalreporting.org/about/faq.asp> (last visited May 1, 2004).

34. GRI, *GRI at a Glance*, *supra* note 32.

35. Global Reporting Initiative, *Collaborating Centre of the UNEP*, at <http://www.globalreporting.org/divers/unep.asp> (last visited June 1, 2004). The GRI website states as follows about the implications of this partnership:

This affiliation [with the U.N. Environmental Programme] brings an international standing and close partnership with the UN that is a priority for a global institution such as GRI. UNEP ensures the involvement of fellow UN agencies as appropriate, depending on the relevant sustainability issue addressed. The continued partnership with UNEP includes collaboration on technical, outreach and regional development activities associated with GRI's Sustainability Reporting Guidelines.

dorsed by the U.N. World Summit on Sustainable Development, and the reporting format has been endorsed by securities regulators in such countries as diverse as Australia, France, and South Africa. As of late 2002, the GRI was established as an independent organization, with headquarters in Amsterdam, the Netherlands.³⁶

As of March 4, 2004, 416 companies in the automotive, utility, consumer products, pharmaceuticals, financial, telecommunications, transport, energy, and chemical sectors, in addition to public entities and non-profits, have published reports that adopt part or all of the Guidelines.³⁷ Since the effort is voluntary, companies can adapt the GRI reporting guidelines as they wish, so there is a range of adaptations of the GRI Guidelines, as well as some companies that follow them in all particulars. If a report is prepared "in accordance with" the GRI, meaning that every indicator to disclose the specified economic, environmental, or social information has been set out, or its absence explained, then the company can include the following statement in its report, signed by the CEO or Board: "This report has been prepared in accordance with the 2002 GRI Guidelines. It represents a balanced and reasonable presentation of our organisation's economic, environmental, and social performance."³⁸ Most reporters are "following" the GRI, or "using it," or "basing their reports on it," but are not reporting "in accordance with." In fact, to date, only 18 companies of the 398 are reporting fully "in accordance with" the GRI principles, including one oil and gas company, Canadian Suncor Energy.³⁹

Id.

36. See Press Release, Global Reporting Initiative, News Update (Oct. 2002), at <http://www.globalreporting.org/news/updates/2002/0210.asp>.

37. See Global Reporting Initiative, Reporters Statistics, Executive Summary (2004), available at <http://www.globalreporting.org/guidelines/ReportersStats.xls> (last visited Sept. 27, 2004).

38. See Global Reporting Initiative, *Sustainability Reporting Guidelines 2002, Reporting Expectations and Design* (2002), at <http://www.globalreporting.org/guidelines/2002/a13.asp> (last visited May 1, 2004).

39. See Global Reporting Initiative, *Reporters "In Accordance"*, at http://www.globalreporting.org/guidelines/reporters_IA.asp. One U.S. company to report "in accordance with" the GRI is the Ford Motor Company. The GRI website quotes Bill Ford, Chairman and CEO, in Ford's GRI report:

We said we would issue corporate citizenship reports yearly, using the Global Reporting Initiative (GRI) standard. We have done

Using the GRI framework, either completely or in part, commits a company to very specific reporting on its environmental, economic, and social profile, using both quantitative and qualitative indicators, as well as to producing an organizational profile that describes the reporting company, the scope of its GRI report, and the types of stakeholder relationships and consultations in which the company engages. Sector-specific reporting formats have been developed for the automotive, finance, telecommunications, and tour operators sectors, and current efforts are aimed at expanding sector-specific reporting formats.⁴⁰

The reporting format on environmental matters is the most highly developed of the GRI indicators and seeks to provide a picture of a company's "impacts on living and non-living natural systems, including ecosystems, land, air and water."⁴¹ Environmental reporting using the GRI format requires a company to produce and disclose specific information on its global usage of energy, water, and materials per million dollars of sales, its emissions to air and water, its waste management profile, the environmental profile of its products and services, its suppliers' environmental performance, and its effects on land use and biodiversity.⁴²

that. This report has been prepared in accordance with the revised 2002 GRI Guidelines. It represents a balanced and reasonable presentation of our Company's economic, environmental and social performance. The report provides a formal and systematic framework for improving the openness and accountability of the Company. In the four years we have been publishing it, it has given us an understanding of the expectations of our stakeholders and helped us to begin aligning our business model to meet them.

Global Reporting Initiative, *Ford Motor Company*, at http://www.globalreporting.org/guidelines/reporterdetails.asp?Organisation_pk=8709 (last visited June 1, 2004). What is interesting in this statement, to my mind, is Ford's explicit articulation of its effort to align its business model to meet its stakeholders' expectations, which I take as indicative of both the personal commitment of Chairman Bill Ford, and also "the Company's" recognition that society's expectations are changing about the relationship between companies and the societies in which they are embedded.

40. Global Reporting Initiative, *Sector Supplements*, at <http://www.globalreporting.org/guidelines/sectors.asp> (last visited May 1, 2004).

41. GLOBAL REPORTING INITIATIVE, SUSTAINABILITY REPORTING GUIDELINES 48 (2002), at http://www.globalreporting.org/guidelines/2002/gri_2002_guidelines.pdf.

42. *Id.* at 49-51.

Using the GRI economic reporting format commits a company to provide information on a company's direct and indirect impacts on "the economic circumstances of its stakeholders and on economic systems at the local, national and global levels."⁴³ GRI explains the relationship of this economic reporting to traditional financial reporting: "Financial indicators focus primarily on the profitability of an organisation for the purpose of informing its management and shareholders. By contrast, economic indicators in the sustainability reporting context focus more on the manner in which an organisation affects the stakeholders with whom it has direct and indirect economic interactions."⁴⁴ The economic indicators are still in an early stage of development, but focus on measuring monetary flows between the organization and its customers, suppliers, employees, providers of capital, and the public sector.⁴⁵

The social performance indicators are also less well developed than the environmental indicators. To date, using the GRI reporting format commits a company to provide information on the company's impacts on its stakeholders (employees, communities, customers, and the political system) locally, nationally, and globally. This reporting indicator includes statistical information on employees (including male/female diversity and "other indicators of diversity as culturally appropriate"); employee benefits and training opportunities; the company's health and safety record and labor/management relationships; the company's human rights policies and procedures, including efforts to evaluate and address human rights performance within the supply chain and with its contractors; the company's performance with respect to the various human rights and labor issues (non-discrimination, freedom of association and collective bargaining, child labor, forced and compulsory labor, disciplinary practices, security practices); and various aspects of the company's social and political relationships, including impacts on indigenous people's rights, policies to prevent bribery and corruption, policies and management of political contributions, policies to prevent anti-competitive behavior, customer health and safety issues related

43. *Id.* at 45.

44. *Id.* at 46.

45. *Id.* at 46-48.

to a company's products, policies with respect to advertising, and policies with respect to customers' privacy.⁴⁶

Twenty oil and gas companies are participants in the GRI process and are reporting on the economic, environmental, and social consequences of their actions, services, and products using the GRI reporting format to various degrees. These include, among others, British Petroleum (BP) (U.K.), Chevron/Texaco (U.S.), Cosmo Oil (Japan), Idemitsu Kosan (Japan), Marathon Oil (U.S.), Petro-Canada (Canada), Premier Oil (U.K.), Repsol YPF (Spain), Shell International (Netherlands), Statoil (Norway), Suncor Energy (Canada), Talisman Energy (Canada), Total (France), and Verbund (Austria).⁴⁷ Royal Dutch/Shell is a charter group member of the GRI, was a pilot company that tested the first set of GRI reporting guidelines, and continues to work with the GRI to further develop the guidelines.⁴⁸ And, while ExxonMobil is not listed as a GRI reporter, it has recently published its first citizenship report, dated 2002, discussing the same triple bottom line types of issues, but without using the specific GRI format.⁴⁹

There are a number of reasons that companies, particularly large, global companies, are participating in GRI or producing citizenship reports outside the GRI framework. All of these are direct implications of the pressures towards corporate social responsibility discussed above.

First, many consumers, NGOs, students, and civil society generally in Europe, the United Kingdom, and the United States are demanding transparency by global companies about their economic, environmental, and social impacts and are calling for more corporate attention to social responsibility issues such as sustainability and growing global inequality. Indeed, the particular issues of concern can be seen reflected, in part, in which companies are participating in the GRI report-

46. *Id.* at 51-56.

47. Global Reporting Initiative, *GRI Reporters per Sector*, at http://www.globalreporting.org/guidelines/rep_sector.asp?sector=47&SeaCou2=Search (last visited May 1, 2004).

48. Global Reporting Initiative, *GRI Charter Group*, <http://www.globalreporting.org/governance/archives/chartergroup.asp> (last visited May 1, 2004).

49. See EXXONMOBIL, CORPORATE CITIZENSHIP REPORT, available at <http://www.exxonmobil.com/corporate/files/corporate/CorporateCitizenship2002.pdf> (last visited May 1, 2004).

ing initiative. In the United Kingdom, food safety has been an issue of intense public concern. As a result, two grocery store chains in the United Kingdom are participating in GRI, J. Sainsbury and Safeway plc.⁵⁰ In the United States, environmental issues and concerns over sweatshops have been predominant; most of the participating U.S. companies are from industries likely to have a high environmental impact (chemicals, cars, energy production) or which have been identified with sweatshops (e.g., Nike).⁵¹

Second, another market trend likely to be affecting the increase in companies participating in social reporting is the growth of socially responsible investors (SRI), whose information needs are broader than those of typical financial investors. In addition, the publicity given to the fact that various SRI indices such as the Dow Jones Sustainability Group Index (U.S.) or the FTSE4Good Index (U.K.) have outperformed non-screened indices such as the S&P 500 has led companies to want to be included in the screened indices in order to attract and keep investor capital, at least at the margins. The Dow Jones Sustainability Group Index also publicizes sustainability leaders in each of six industry groups, which gives companies incentives to publicize any actions they have taken as a result of a commitment to sustainability so they might be included.

Third, given the stock market evidence that sustainable firms can outperform unsustainable firms,⁵² market leaders may see sustainability as a management tool that is potentially useful to enhance financial results; a number of GRI reports suggest this, in fact. If a company has made a commitment to sustainability for financial reasons, it then makes sense to publicize that fact so that the capital markets can reflect that infor-

50. See Global Reporting Initiative, GRI Reporters per Countries: United Kingdom, at http://www.globalreporting.org/guidelines/rep_country.asp?country=120&SeaCou=Search (last visited May 1, 2004).

51. See Global Reporting Initiative, *GRI Reporters per Countries: United States of America*, at http://www.globalreporting.org/guidelines/rep_country.asp?country=178&SeaCou=Search (last visited May 1, 2004).

52. See, e.g., Alison Maitland, *Profits from the Righteous Path*, FIN. TIMES, Mar. 3, 2003, at 13 (describing study by the U.K.'s Institute of Business Ethics that showed that companies with a strong commitment to ethical behavior "perform better financially over the long term than those lacking such a commitment").

mation in higher stock prices and a lower cost of capital. Finally, a number of accounting firms have recognized that social auditing, sustainability auditing, and risk assessment and management are business opportunities, so they are promoting the ideas and communicating best practices in this area to businesses—witness the KPMG Sustainability Group and Sustainability tri-annual surveys begun in 1993.

B. *The Voluntary Principles on Security and Human Rights*

In early 2000, the governments of the United States and the United Kingdom (the U.S. State Department, Bureau of Democracy, Human Rights and Labor, and the U.K. Foreign and Commonwealth Office) convened a stakeholder dialogue between seven participants in the oil, gas, and mining industry and nine major NGOs and labor organizations (such as Amnesty International, Business for Social Responsibility, Human Rights Watch, the International Federation of Chemical, Energy, Mine Workers Union, and the Prince of Wales International Business Forum) to address some of the human rights issues inherent in the extraction of oil and gas.⁵³ The dialogue was convened to try to develop a framework for identifying and addressing the broad range of human rights issues identified by NGOs as resulting from the extraction of oil and gas, such as violations of indigenous peoples' land rights, environmental despoilation, claims concerning security arrangements, distributional issues and corruption, and concerns about whether companies should be operating at all in certain countries with deplorable human rights record, such as Burma and the Sudan.

53. Industry participants included Chevron and Texaco prior to their merger, Conoco, BP, Shell, Rio Tinto and Freeport McMoran. See Bennett Freeman, *Managing Risk and Building Trust: The Challenge of Implementing the Voluntary Principles on Security and Human Rights*, Remarks at the Rules of Engagement: How Business Can Be a Force for Peace Conference (Nov. 13, 2002) (transcript on file with the New York University Journal of International Law and Politics). Mr. Freeman was a Deputy Assistant Secretary of State in the Department of State, Bureau of Democracy, Human Rights and Labor, and was responsible for convening the multi-stakeholder dialogue, on the U.S. Government side, that resulted in the Voluntary Principles. In addition to reading Mr. Freeman's published speeches on this matter, many of which are available over the Internet, I have interviewed him three times in connection with this Article: On February 10 and 15, 2003, and on July 2, 2003.

Ultimately, the participants decided to focus on one issue that seemed most amenable to agreement, that of the security arrangements oil and gas companies make to protect their infrastructure.⁵⁴ This issue arises because oil and gas companies' security arrangements with military governments or paramilitary private security forces have led to violence, political repression, and deaths in some well-publicized instances. One notorious example of this problem occurred in Nigeria, where the Royal Dutch Shell Company was alleged to have violated the human rights of numerous people in the Ogoni region by recruiting the Nigerian military to repress political opposition to Shell's activities that had threatened Shell's thousands of miles of oil pipelines and drilling stations.⁵⁵ Yet, companies need to protect their pumping infrastructure and pipelines because political conditions often lead to those pipelines becoming a focus of eco-terrorism and/or political controversy and attack. This dialogue ultimately led to the development of a voluntary set of principles for handling security arrangements within the extractive industry, the Voluntary Principles on Security and Human Rights, which the U.S. government unveiled in December 2000.⁵⁶

These principles begin by "recogniz[ing] that security and respect for human rights can and should be consistent" and that governments have "the primary responsibility to promote and protect human rights," but that "Companies recognize a commitment to act in a manner consistent with the laws of the countries within which they are present, to be mindful of the highest applicable international standards, and to promote the observance of applicable international law enforcement principles," as enacted in U.N. documents such as the U.N. Code of

54. See Bennett Freeman, *Drilling for Common Ground*, FOREIGN POL'Y, July/Aug. 2001, at 50. As Mr. Freeman stated, the participants decided to avoid the "admittedly tougher issues of whether, for example, Premier Oil should be in Burma at all, or what Occidental Petroleum's responsibilities should be with respect to indigenous peoples' land claims in Colombia." *Id.*

55. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92-93 (2d Cir. 2000) (asserting claims under the Alien Tort Claims Act for the deaths of two political leaders, Ken Saro-Wiwa and John Kpuinen, and for beatings and unjustified detention of other Ogoni citizens).

56. See Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *Voluntary Principles on Security and Human Rights* (2000), available at http://www.state.gov/www/global/human_rights/001220_fsdrl_principles.html (last visited Sept. 27, 2004).

Conduct for Law Enforcement Officials and the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁵⁷ The companies then expressed their support for incorporating these U.N. norms into three categories of company activity: their risk assessments when considering investing in new countries; their security arrangements with public security forces, such as the military or police; and their arrangements with private security forces when host governments are unwilling or unable to provide adequate security.⁵⁸

In their risk assessments, companies committed to identifying political, economic, civil, or social factor risks, including the potential for violence or civil unrest, prior to investing; to considering the human rights records of public security forces, paramilitaries, local and national law enforcement, and the records of private security; and assessing the robustness, or lack thereof, of a country's commitment to the rule of law.⁵⁹ In their relationships with public security providers, such as the police or the military, companies agreed to consult regularly with host governments about security arrangements; to communicate the company's policies concerning ethical conduct and protection of international human rights; to use their influence to promote compliance with international law enforcement principles, as embodied in the U.N. Code of Conduct for Law Enforcement Officials and the U.N. Basic Principles on the Use of Force and Firearms; and to ensure that credible allegations of human rights abuses are investigated and addressed.⁶⁰ In an interesting cross-over paragraph, the companies agreed to use their influence to ensure that individuals' rights were not violated while exercising rights to freedom of association and peaceful assembly, when asking for the right to collective bargaining, or when asserting other associated labor rights as recognized in the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.⁶¹ Thus, in this paragraph, the companies agreed to support important international labor rights, as well as the broader right for individuals to be free

57. *Id.*

58. *Id.*

59. *See id.*

60. *See id.*

61. *See id.*

from being subjected to excess force or violence or the threat thereof.

In the third part of the Principles, companies undertook voluntary obligations to structure their interactions with private security providers to ensure compliance with international human rights norms. These voluntary obligations include assessing human rights risks from historical data about private security providers; ensuring that providers have clear policies about the appropriate use of force; monitoring such providers and, in particular, paying attention to their use of force; and assessing and addressing credible allegations of violations.⁶² As part of the Principles, it was stated that private security forces should not employ people with a record of human rights abuses, nor violate employees' rights while employees sought to exercise their internationally recognized labor rights.⁶³ Moreover, companies agreed, where appropriate, to include the Voluntary Principles in their contracts with private security providers.⁶⁴

There are a number of important positive aspects about the Voluntary Principles that deserve mention, as well as some cautionary notes. First, because the process of crafting the Voluntary Principles was convened by the governments of the United Kingdom and the United States, they have a *gravitas* that purely voluntary industry initiatives might not have otherwise. This is evidenced, in part, by the fact that the Bush Administration continued to support the Principles after the Clinton Administration left office, that a number of additional governments have joined the process (Norway and the Netherlands), and that three more companies (Newmont Mining, Occidental Petroleum, and ExxonMobil) have signed onto the principles.⁶⁵ In particular, ExxonMobil was effectively pressed into signing on by the risks to its reputation inherent in being the only major oil company not to participate.⁶⁶

Second, by explicitly incorporating international human rights norms as codified by various U.N. instruments, the Prin-

62. *See id.* (at "Interactions Between Companies and Private Security").

63. *See id.*

64. *See id.*

65. *See* Schrage, *supra* note 6, at 171.

66. Interview with Bennett Freeman, former Deputy Assistant Secretary of State responsible for negotiating the Principles (Feb. 14, 2003) (notes on file with author).

ciples serve to overcome any ambiguities about whether companies, as private entities, can be bound by international treaties that are signed by states and that most directly address the obligations of states. One of the emerging difficulties for international human rights is the growing power of non-state actors, such as corporations, and the resulting question of the extent to which human rights treaty obligations and/or norms apply to them. There are arguments that companies are fully subject to international human rights norms, but those arguments have yet to be fully developed. So, for instance, while the Universal Declaration of Human Rights is defined as a “common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society” should work towards,⁶⁷ and, therefore, could be construed to apply to businesses as organs of society, the obligations of private actors under the Declaration are not as fully developed as those of public actors. The Voluntary Principles, by incorporating these norms and/or treaty obligations, clearly subject companies to the norms and treaty obligations and, thus, serve to advance the goals of international human rights protection. In this regard, it is particularly important that the Principles incorporate internationally recognized, but widely under-enforced, labor rights.

Third, in a number of instances, companies have incorporated the Principles into their contracts with host governments so that they become legally binding obligations. When BP signed a contract with the Indonesian government in 2002 for an oil concession, it first engaged human rights consultants to analyze the full range of human rights risks to operating in Indonesia, and it then included specific contractual language obligating it to follow the Principles in its relationships with security providers.⁶⁸ In another instance, a consortium of oil majors is engaged in the Baku-Tbilisi-Ceyhan project to extract the oil under the Caspian Sea and transport it through Turkey. In October 2003, the Turkish Mission delivered an Information Note to the European Parliament concerning the envi-

67. *Universal Declaration of Human Rights*, G.A. Res. 217(A), U.N. GAOR, 3d Sess., pmbl., at 71, U.N. Doc. A/810 (1948).

68. Interview with Bennett Freeman, former Deputy Assistant Secretary of State responsible for negotiating the Principles (Feb. 20, 2003) (notes on file with author).

ronmental and human rights aspect of the project.⁶⁹ In that Note, it was emphasized that security would be provided by Turkey, Azerbaijan, and Georgia and that these countries had agreed to abide by the Principles and to implement them in their national legislation and within the international agreements to which they are parties.⁷⁰ Thus, although voluntary, the Principles are becoming the international standard for best practice with respect to security issues in the extractive sector and, in some instances, are becoming mandatory through incorporation into contracts with host governments.

There are concerns as well, however. As with many international obligations, implementation and enforcement are major concerns, perhaps exacerbated by the voluntary nature of the Principles. Second, there are no agreed-upon mechanisms for third-party monitoring of implementation: While NGOs generally wanted such mechanisms included in the Principles, the companies would not agree to outside monitoring.⁷¹ Thus, there is a concern that, for some companies in some countries, the Principles represent a serious moral and even legal obligation, but that, for other companies in other countries, they are hortatory but not much more.

Moreover, there are instances in which both the U.S. Government (Bush Administration) and the British Government (Blair Administration) have taken actions that suggest a lack of seriousness about supporting implementation of the Principles. In the United Kingdom, there were allegations discussed in Parliament in 2002 that BP in Colombia had militarized their drilling sites, had passively stood by as union organizers were harassed and/or murdered, had refused to meet with union leaders or allow them to visit drilling sites, and had employed a private security firm that routinely violates the standards of conduct inherent in the Principles.⁷² The British Government had, apparently, been involved in interviewing people in Colombia about those allegations, but had not pub-

69. See TURKISH MISSION, INFORMATION NOTE ON THE BAKU-TBILISI-CEYHAN CRUDE OIL PIPELINE PROJECT (2003), available at <http://www.euro.parl.eu.int/meetdocs/delegations/turk/20031119/03.pdf>.

70. See *id.* at 2-3.

71. See Interview with Bennett Freeman, *supra* note 66.

72. See 389 Parl. Deb., H.C. (6th ser.) (2002) 770, available at <http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020722/debtext/20722-32.htm>.

licly responded to the allegations in a way that supported the importance of the Principles.⁷³

The Bush Administration's actions have been even less supportive. In one case, the Administration intervened in the Ninth Circuit to argue that the UNOCAL corporation should not be held liable in Burma for its alleged complicity with the military in serious human rights abuses of exactly the sort that motivated the Principles, such as forced resettlement of whole villages, forced labor, and killings.⁷⁴ In two other cases, the Administration has written letters suggesting that two Alien Torts Claims Acts (ATCA) suits should be dismissed, one against Exxon for its operations in Indonesia and the other against Rio Tinto for its operations in Papua New Guinea.⁷⁵ Both cases alleged human rights violations arising from companies' security arrangements and, therefore, challenged precisely the kinds of actions that the Principles were meant to address. In each case, the Administration identified U.S. foreign policy interests that were allegedly threatened by the ATCA litigation against American multi-national companies, given the potential embarrassment to foreign countries of having actions of their police or military judged in U.S. Courts. In Indonesia, the U.S. interest identified was in working with Indonesia to fight terrorism, and, in Papua New Guinea, the U.S. interest identified was in having the State Department's efforts to peacefully resolve the separatist dispute in Bougainville proceed unimpeded.⁷⁶ Yet, in each instance, the Administration lost an opportunity to put effective human rights enforcement on par with other important foreign policy and economic considerations. Moreover, by arguing against liability in U.S. courts for the sorts of human rights abuses the Principles were meant to address, the Administration's actions further emphasize the voluntary nature of the Principles, to their potential

73. *See id.*

74. *See* Brief for the United States of America, as Amicus Curiae at 4, 30, *Doe I v. Unocal Corp.*, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976, at *9-10 (9th Cir. Sept. 18, 2002), *vacated by* Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

75. These letters are described and discussed in Schrage, *supra* note 6, at 156 n.7, 162-63.

76. *See id.* at 162.

detriment as useful standards of required conduct in the future.⁷⁷

C. *The Extractive Industry Transparency Initiative*

A third multi-stakeholder dialogue, again involving government, oil companies, and NGOs, is the Extractive Industry Transparency Initiative (EITI), an initiative motivated by the Publish What You Pay coalition of 120 NGOs, led by Global Witness, an NGO in the U.K., and several other founding members.⁷⁸ This initiative seeks to start to redress the huge distributional disparities in resource-rich-yet-poor countries, where government corruption and lack of concern for the country's people can so often lead to enormous wealth for a very few people in the host countries, combined with a populace that is, on the whole, desperately poor.⁷⁹ The goal of the Publish What You Pay campaign is to instigate changes in international stock market and accounting rules so that oil, gas, and mining companies would be required to disclose, on a country-by-country basis, their net payments to governments in each country from which they extract natural resources.⁸⁰ The premise is that revenue transparency will help to promote government accountability and reduce corruption in many resource-rich-yet-poor-countries, such as Algeria, Angola, Azerbaijan, Cambodia, Chad, Colombia, Congo-Brazzaville, Democratic Republic of the Congo, Equatorial Guinea, Gabon,

77. Indeed, as Professor Schrage points out, U.S. foreign policy interests are arguably advanced more directly by U.S. actions to require U.S. companies to comply with high standards of responsible conduct, rather than by actions that have the effect of shielding them from liability. Thus, he argues, U.S. policy objectives in many developing countries are to promote "respect for the rule of law and compliance with international legal standards in the global economy;" those objectives could—and he argues should—include U.S. companies as exemplars of such an approach. *See id.* at 171-73.

78. *See* Global Witness, Global Witness Statement to the Extractive Industries Transparency Initiative (June 2003), at <http://www.globalwitness.org/reports/show.php/en.00043.html>.

79. *See id.*

80. *See* Publish What You Pay, *Publish What You Pay*, at <http://www.publishwhatyoupay.org> (last visited May 1, 2004).

Guinea Bissau, Indonesia, Iraq, Kazakhstan, Nigeria, Papua New Guinea, Sudan, Turkmenistan, and Venezuela.⁸¹

This initiative began in June 2002 with conversations between Global Witness and major British oil companies, such as BP and Shell, asking them to voluntarily disclose their net payments to host governments. (The International Monetary Fund and the World Bank, in parallel and during the same time frame, have begun to address transparency issues in their lending to resource-rich developing countries, which is one factor in the Publish What You Pay Campaign's rapid progress.)⁸² The companies responded by agreeing in principle with the concept of disclosure and readily recognized that their economic interests would be promoted by stable political conditions in the countries in which they do business—stability that could be promoted by greater disclosure and a resulting increase in public accountability.⁸³ Yet, there were a number of practical concerns that prevented BP and Shell from agreeing to take the lead on this issue. First, many of their contracts had confidentiality provisions that prohibited the companies from disclosing this information without the host governments' consent. Second, each had a concern about competitive disadvantages if only a few companies participated. That is, if Shell and BP insisted on disclosure, to the host government's perceived disadvantage, there were a num-

81. See Press Release, Bank, Fund Fail the Test Over Missing Oil Billions (Sept. 19, 2003), at http://www.globalwitness.org/press_releases/display2.php?id=217.

82. See HUMAN RIGHTS WATCH, WORLD REPORT 2002, 566-68 (discussing IMF efforts to promote oil revenue transparency and address corruption in Angola), available at <http://www.hrw.org/wr2k2/pdf/business.pdf>.

83. Interview with Karina Litvack, Head of Governance & Socially Responsible Investment, and Richard Singleton, Director of Corporate Governance, ISIS Asset Managers, PIC, in London, England (Jan. 14, 2004) (notes on file with author) [hereinafter Litvack & Singleton Interview]. ISIS is a \$100 billion asset management company that uses corporate governance and corporate social responsibility measures and engagement across its entire portfolio. It was one of the first institutional investors to support the Publish What You Pay Campaign. Ultimately, ISIS spoke in support of the EITI on behalf of institutional investors from the U.K., United States, Continental Europe, and Canada who, together with ISIS, manage about \$3 trillion of client funds. See Howard Carter, CEO, ISIS Asset Management, Address at the Extractive Industries Transparency Initiative (EITI) London Conference (June 17, 2003) (transcript available at http://www.dfid.gov.uk/news/news/files/eiti_draft_report_isis.htm#top).

ber of other large companies prepared to negotiate for the same concessions to extract resources without requiring disclosure. Thus, this was an area that Global Witness quickly recognized would need government intervention, such that there would be a level playing field among competitors.⁸⁴

The campaign got a serious boost when billionaire investor and social activist George Soros became interested in the issue and wrote to Prime Minister Tony Blair asking him to promote government regulation to require extractive industry transparency. Using a soft law approach, Prime Minister Blair and the British Government then took the lead in pulling together oil companies, international organizations, such as the IMF and the World Bank, investors, and NGOs to address revenue transparency through what became the EITI. The EITI was launched by Prime Minister Blair at the World Summit on Sustainable Development in Johannesburg, South Africa, in September 2002, where he encouraged all oil companies (public, private, and state owned), international organizations, investors, and NGOs to work together to develop a framework for reporting extractive revenues and payments.⁸⁵ At Evian, in early June 2003, the effort got another boost from the G-8 countries' growing concern about fighting corruption, which is coming to be understood as "one of the key obstacles to social and economic development," and their parallel concern about economic mismanagement.⁸⁶ The G-8 agreed on an action plan that included intensified, yet still voluntary, attention to transparency and accountability issues in countries where extractive industry revenues are important.⁸⁷

84. See GLOBAL WITNESS, *supra* note 78 (noting that it was "highly concerned" that the voluntary approach proposed by the EITI would "not work where it was most needed").

85. Information about the EITI, including its history, is available on the U.K. Government website. See, e.g., U.K. DEP'T FOR INT'L DEV., EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, at http://www.dfid.gov.uk/News/News/files/eiti_guide_b.pdf (last visited May 1, 2004).

86. See EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, STATEMENT OF PRINCIPLES AND AGREED ACTIONS, § II (June 17, 2003), at <http://www.dfid.gov.uk/pubs/files/eitidraftreportstatement.pdf> (last visited Sept. 27, 2004).

87. See *Fighting Corruption and Improving Transparency: A G8 Declaration* (June 2003), available at <http://www.g8.fr/evian/extras/506.pdf>.

On June 17, 2003, the British Government held a conference on the EITI where its Principles and Agreed Actions were publicly announced. Among the Principles are:

- A shared “belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts;”⁸⁸
- An affirmation that “management of natural resource wealth for the benefit of a country’s citizens is in the domain of sovereign governments to be exercised in the interests of their national development;”⁸⁹
- A recognition that “public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development;”⁹⁰
- An emphasis on “the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability;”⁹¹
- A belief that “payments disclosure in a given country should involve all extractive industry companies operating in that country;”⁹²
- An affirmation that in “seeking solutions, we believe that all stakeholders have important and relevant contributions to make—including governments and their agencies, extractive industry companies, service companies, multilateral organisations, financial organisations, investors and non-governmental organisations.”⁹³

Among the agreed actions were the following:

88. EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, *supra* note 86, at § III.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

- That participants would work to develop and test “methods of payment and revenue disclosure and publication in the extractive industries in countries heavily dependent on natural resources;”⁹⁴
- That participants would work at the country level “to implement reporting guidelines consistent with EITI principles, agreed between each host government and companies working in its country, along with support from civil society, international institutions and other relevant players.”⁹⁵

Perhaps most interesting is the broad range of countries, companies, NGOs, and investors that signed the Statement of Principles and Agreed Actions and are participating in the EITI—a much broader group than participated in the Voluntary Principles on Security.⁹⁶ The companies include AngloAmerican plc., Areva, BG Group, BHP Billiton, BP, ChevronTexaco, ConocoPhillips, DeBeers, ExxonMobil, Newmont Mining, NNPC, Repsol YPF, Rio Tinto, Shell, SOCAR, Sonangol, Statoil, and Total. The Governments, convened by the United Kingdom, include those of Azerbaijan, Belgium, the Democratic Republic of Congo, Equatorial Guinea, France, Germany, Ghana, Indonesia, Italy, Japan, Kazakhstan, Mozambique, Netherlands, Nigeria, Norway, Sierra Leone, Timor-Leste, Trinidad and Tobago, the United Kingdom, and the United States. International organizations include the IMF, the OECD, the U.N. Development Program, and the World Bank. A broad range of NGOs initiated and supported the EITI, including the following signatories: The African Network for Environmental and Economic Justice, CAFOD, CARE International, Global Witness, Human Rights Watch, Open Society Institute, Publish What You Pay coalition (which includes 120 organizations and individuals), Save the Children Fund, Transparency International, and Transparency Kazakhstan. In addition, institutional investors with \$3 trillion of funds under management signed onto the Princi-

94. *Id.*, at § IV.

95. *Id.*, at § IV.

96. For a discussion of the participants in the Voluntary Principles on Security, see *supra* note 53 and accompanying text.

ples, representing a broad spectrum of U.K., U.S., Continental European, and Canadian investors, led by U.K. investors.⁹⁷

There are a number of converging interests that explain, at least in part, why this issue developed so rapidly from an idea promoted by NGOs to a broadly supported, government-sponsored initiative now in the process of country-by-country implementation (such as in Angola, Nigeria, and Ghana).⁹⁸ Early on, companies, developing countries, and investors recognized that the initiative served their economic interests. Companies that are recognized as leaders in corporate social responsibility, such as BP and Shell, have adopted Codes of Conduct that do not permit paying bribes, and, therefore, want a level playing field, including broadly applicable bans on bribery, so that they can compete effectively. Thus, disclosure rules that discourage the payment of bribes by requiring their disclosure (at least in theory) are in the economic self-interest

97. See EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, *supra* note 86, § V. The signatories that joined the investor statement in support were Banco Fonder, Boston Common Asset Management, Calpers, Calvert Group Ltd., CCLA, Central Finance Board of the Methodist Church, Christian Brothers Investment Services, Co-operative Insurance Society, Deutsche Asset Management U.K., Dresdner RCM Global Investors, Domini Social Investments, Ethical Funds, ethos Investment Foundation, F&C Management Ltd., Fidelity Investments, Frater Asset Management, Henderson Global Investors, Hermes Investment Management Ltd., Insight Investment Management, ISIS Asset Management, Jupiter Asset Management, Legal & General Investment Management, Local Authority Pension Fund Forum, M&G, Merrill Lynch Investment Managers, Morley Fund Management, New York State Common Retirement Fund, Nottinghamshire County Council, Progressive Asset Management, Railpen, Sarasin, Schroders Investment Management, SNS, State Street Global Advisors Ltd., Storebrand, Trillium Asset Management, University Superannuation Scheme, and Walden Asset Management. *Id.*

98. Campaigners from Global Witness might disagree with the characterization of this issue as having developed “rapidly,” since they have been working on various transparency and anti-corruption issues for over ten years, and the Publish What You Pay campaign can be understood as having benefited in significant part from that foundation of coalition-building and expertise. Information on the countries that have started to implement the EITI comes from the Litvack & Singleton Interview, *supra* note 83, and updated information is also available on the Extractive Industries Transparency Initiative website, see <http://www.eitransparency.org> (last visited Sept. 27, 2004).

of responsible companies.⁹⁹ Many host governments now recognize that being perceived as corrupt, insufficiently serious about the rule of law, or mismanagers of their economy lowers foreign direct investment and can, therefore, reduce important sources of support, economic development, and revenue.¹⁰⁰ So, measures that support good government are increasingly welcome, again, at least in theory. Institutional investors in the United Kingdom, where the campaign began, recognized that the extractive industry entails long-term infrastructure investment and, as a result, is subject to significant financial risk where corruption, conflict, and desperate poverty intersect.¹⁰¹ Thus, the political and social stability of countries in which companies invest is understood by these investors to be a paramount concern.¹⁰² It also does not hurt to have a highly visible billionaire sponsor such as George Soros.

It should be noted that this initiative was developed without high-level involvement from the U.S. State Department, in contrast to the negotiations over the Voluntary Principles on security, and without serious support from the U.S. government. To keep U.S. companies and the U.S. government involved, the British government was pressured into backing away from supporting mandatory EITI disclosure. Thus, the EITI is currently a voluntary disclosure initiative, and the support of important U.S. players such as ChevronTexaco was ex-

99. This is actually quite a simplification since paying bribes, while widely condemned, is also widely practiced: A recent World Bank survey indicated that 40% of 3600 companies surveyed paid bribes. David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach: The C² Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593, 596 (2000), citing Thomas Omesstad, *Bye-Bye to Bribes: The Industrial World Takes Aim at Official Corruption*, U.S. NEWS & WORLD REP., Dec. 22, 1997, at 39, 42. Yet, public opinion is turning against this practice, even as international development organizations and NGOs are recognizing the hugely corrosive effects on sustainable development and poverty reduction of corruption.

100. Hess & Dunfee, *supra* note 99, at 600-01.

101. For instance, Nigeria, which has been the locus of continuing violence and conflict for a decade at least, has received over \$300 billion in oil revenues over the past 25 years, and is the world's sixth largest oil producer, and, yet, per capita income is less than \$1 per day. See Charlotte Denny, *Scramble for Africa: Corruption and Chaos: True Cost of New Oil Rush*, GUARDIAN (Manchester), June 17, 2003, at 1 (quoting Ian Gary of Catholic Relief Services) [hereinafter *Corruption and Chaos*].

102. Litvack & Singleton Interview, *supra* note 83.

PLICITLY premised on the initiative remaining voluntary.¹⁰³ Moreover, the Bush Administration's interest in expanding access to West African oil in order to "take the Saudi hand off the spare oil capacity spigot" has the Administration courting Senegal, Nigeria, and South Africa, and re-opening an embassy in Equatorial Guinea, where "oil revenues have boosted GDP by 60% over the last two years, despite state department reservations over the country's appalling human rights record."¹⁰⁴ For these reasons, campaigners from Global Witness and Catholic Relief Services, among others, do not expect the EITI to work: "[T]he purely voluntary approach will not work in the countries where it is most needed [such as Africa] because many political and business elites have major vested interests in avoiding transparency," according to one Global Witness spokesperson.¹⁰⁵ Since the Principles were only signed in July 2003, it is too early to evaluate their effectiveness, but the question these campaigners pose is the one to which I now turn: What are the strengths and weaknesses of these multi-stakeholder regulatory efforts generally, and, in particular, how do the standards of corporate conduct and transparency compare with what would be required by mandatory regulation incorporating the newly-promulgated U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises?

103. In its 2002 Corporate Responsibility Report, ChevronTexaco had the following to say about voluntary initiatives like the EITI:

Transparency is one of the fundamental values that guide ChevronTexaco's business conduct, and we have participated in the dialogue associated with many recent revenue transparency initiatives. A consistent message from ChevronTexaco has been that for any of these initiatives to be meaningful and achievable, they must honor the sanctity of contracts; be inclusive of governments, nongovernmental organizations and companies, without a unilateral focus on any one; and remain voluntary.

CHEVRONTXACO, 2002 CR REPORT: REVENUE TRANSPARENCY 13 (2003), at http://www.chevrontexaco.com/cr_report/social_issues/ethics/revenue_transparency.asp (last visited May 1, 2004).

104. See *Corruption and Chaos*, *supra* note 101 (quoting Duncan Clarke of Global Pacific & Partners Int'l.).

105. See *id.*, (quoting Simon Taylor of Global Witness).

IV. AN EVALUATION OF THESE MULTI-STAKEHOLDER EFFORTS

To state the obvious, in today's political context, in the absence of voluntary governance initiatives, there would be virtually no global regulation of oil companies (or other transnational companies, for that matter). There are inter-governmental organizations, such as the OECD, the International Labor Organization (ILO), and the United Nations, that have promulgated instruments directly applicable to transnational companies, such as the OECD Guidelines for Multinational Enterprises, the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the U.N. Global Compact, but these are all *recommendations* to multinational enterprises and not mandatory.¹⁰⁶ So, assuming most people would agree that some global regulation, even quasi-regulation, is better than none at all, the question is, how much better? Are there any reasons to suggest that these voluntary initiatives might actually be better than mandatory regulation, or might be functionally not much different than mandatory regulation? What are we losing by following this regulatory strategy, particularly in comparison to the U.N. Norms?

To address these questions, it is useful to describe, in broad strokes, how law operates to structure behavior. Many laws set out substantive standards for behaviors or outputs, and identify sanctions for failure to meet those standards. This has been called a command-and-control, or prescriptive, approach to law, and this model of what law is undergirds many economic models of law compliance.¹⁰⁷ Those economic models emphasize the deterrence effect of potential sanctions and hypothesize that law compliance, particularly by corporate actors, will entail a rational decision about the amount of money to invest in the law compliance function, given potential sanc-

106. See OECD, POLICY BRIEF: THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2001) (first issued in 1976 and revised in 2000), available at <http://www.oecd.org/dataoecd/12/21/1903291.pdf>; Int'l Labor Org., *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 279th Sess., Geneva, (adopted November 1977 and amended November 2000), available at <http://www.ilo.org/ilolex/index.htm>; THE GLOBAL COMPACT OFFICE, UNITED NATIONS, THE NINE PRINCIPLES, at <http://www.globalcompact.org> (last visited May 1, 2004).

107. See Robert A. Kagan et al., *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 L. & SOC'Y REV. 51, 61-62 (2003).

tions for non-compliance, as discounted by the probability of detection and prosecution.¹⁰⁸ Under unrefined economic theories of law, the existence of sanctions is critical to law's proper functioning to structure behavior, seemingly necessitating mandatory law, with clear sanctions and robust mechanisms for enforcement.

Other countries' approaches to law and other theories of regulation de-emphasize legalistic enforcement and emphasize cooperation between regulators and the regulated and a more flexible approach to the application of law, even where mandatory law (i.e., domestic or treaty-based law) is under examination.¹⁰⁹ Broadly speaking, flexible regulation is more the norm in the United Kingdom, Europe, and Japan, and some researchers have suggested that, in some contexts, such an approach achieves better results than the legalistic approach of the United States.¹¹⁰ Still, since this is mandatory law, there is always a credible threat of sanctions, and some theorists, such as Ian Ayres and John Braithwaite, have posited that a flexible approach requires a credible threat of sanctions if it is to achieve generally higher levels of law compliance than the legalistic approach.¹¹¹

108. The economic approach to law compliance was first articulated by Gary S. Becker in *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). The literature deploying economic theories of law compliance is voluminous, but, for an overview and critical evaluation, see Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265 (1998). Economic theories of law compliance have been substantially enriched in recent years by incorporating the insights of cognitive psychology, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 188 CAL. L. REV. 1055 (2000); evaluating the interplay of law and social norms, see Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); and developing theories of the expressive function of law, as described above, see Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000) [hereinafter McAdams, *A Focal Point Theory of Expressive Law*].

109. See Kagan et al., *supra* note 107, at 62-63 & n.14. See also REGULATORY ENCOUNTERS: MULTINATIONAL CORPORATIONS AND ADVERSARIAL LEGALISM (Robert A. Kagan & Lee Axelrad eds., 2000) (containing ten case studies that highlight differences in national legal and regulatory systems and focus on the consequences of the American system of "adversarial legalism").

110. See Kagan et al., *supra* note 107, at n.14 (citing sources).

111. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 19 (1992).

If the major mechanism by which law structures behavior is through the threat of sanctions, whether under the legalistic or flexible approach to regulation, then international law generally presents a serious puzzle, since even treaty law often includes no mechanisms for systematic enforcement or a realistic possibility of sanctions. Fortunately for the project of international law, including international human rights law, recent expressive theories of law are recognizing a more complex picture about the function of law and about the mechanism by which law structures behavior, which, while not rendering sanctions irrelevant, produce some elements of compliance without sanctions. My colleague Professor Richard McAdams and his co-author Professor Janice Nadler have been exploring the coordinating function of law and have posited (and have started to demonstrate empirically) that “[e]ven aside from the sanctions government may use to enforce its expectations, the mere knowledge of legal pronouncements will often create a ‘focal point’ that influences the behavior of individuals in a coordination game.”¹¹² In other words, where there are multiple behaviors possible in a given situation, the existence of a law can work to create a “focal point” around which people’s behaviors then cluster, causing that behavior to “stand out.”¹¹³ As Professors McAdams and Nadler have written, “[b]y making one outcome salient, legal rules and judgments can guide expectations toward that outcome and influence behavior independent of sanctions.”¹¹⁴

The sociologist Robert Kagan and his colleagues Dorothy Thornton and Neil Gunningham have studied the role of law in explaining environmental compliance and “super-compliance,” that is, going beyond what is required by law, and add another layer of understanding to the mechanisms by which

112. Richard H. McAdams & Janice Nadler, *Testing the Focal Point Theory of Legal Compliance: Expressive Influence in an Experimental Hawk/Dove Game 2* (Northwestern University School of Law, Law & Economics Research Paper Series, No. 03-14, Yale Law School, Center for Law, Economics and Public Policy, Discussion Paper No. 285, & University of Illinois College of Law, Law and Economics Working Paper Series, No. LE03-011, 2003), available at <http://papers.ssrn.com/abstract=431782>.

113. McAdams, *A Focal Point Theory of Expressive Law*, *supra* note 108, at 1668.

114. See McAdams & Nadler, *supra* note 112, at 7.

law works.¹¹⁵ They studied the environmental performance of fourteen paper mills in the United States (Washington State and Georgia), Canada (British Columbia), New Zealand, and Australia. These mills were subject to fairly wide variations in the regulatory structure and in enforcement patterns. Kagan et al. were interested in what mechanism had caused a narrowing of the gap between the best and worst environmental performers over the last two decades and also what explained the “substantial variation” in performance that still remained, even within the same jurisdiction.¹¹⁶ Kagan et al. used a combination of quantitative data about environmental performance and in-depth qualitative research, interviewing people at the fourteen mills to study these questions. They concluded that law is very important to establishing the benchmarks towards which the best and worst performers have converged.¹¹⁷ They also found that there is even a convergence of regulatory standards occurring across countries, given that the paper and pulp industry, which has a significant environmental profile, has “relatively standard processes of production and environmental technologies.”¹¹⁸ Yet, other factors interact to enhance the efficacy of law, such as economic pressures in an industry, including pressures by environmentally sensitive consumers;¹¹⁹ the importance of maintaining the firm’s reputation, which is affected by environmental activists, the media, and NGOs;¹²⁰ and financial factors, such as pressures by investors to manage environmental risks intelligently.¹²¹ Moreover, leadership mattered a great deal as to whether a firm was reluctantly reactive to environmental regulation or proactive in searching out opportunities to be environmentally sensitive while increasing efficiency and cutting costs.¹²² Kagan et al. concluded that the interaction of the different factors—the structure of regulation, market exigencies, and the social license to operate, me-

115. See Kagan et al., *supra* note 107, at 53.

116. See *id.*

117. See *id.* at 82-83.

118. See *id.* at 78 n.40.

119. See *id.* at 78-79.

120. See *id.* at 80 n.41.

121. See *id.* at 82.

122. See *id.* at 81-82.

diated by reputation, environmental activism and the media—often “exceeds the effect of each acting alone.”¹²³

Understanding law as having an important expressive function (one that can coordinate action towards a focal point, even without sanctions), and understanding various non-legal mechanisms as important enforcers and enhancers of that process (including by encouraging companies to go beyond the minimum requirements of law), one can then see the quasi-regulation of the GRI, the Voluntary Principles, and the EITI as having much of the effect of hard law. Indeed, “coordination towards a focal point” is exactly what Professor Slaughter suggests is produced by “regulation by information,” although she uses different language.¹²⁴ Each of these initiatives sets out either what is the expected substantive conduct, as in the Voluntary Principles on Security and Human Rights, or what are best practices in disclosure with respect to specified types of information, as in the GRI. If firms fall too far below these best practices, they can expect to be shamed by adverse publicity, and can expect pressure from their institutional investors, exactly as happens to firms that violate legal requirements.

I would not suggest that the potential to bring a lawsuit is unimportant, but I do suggest, as Kagan found, that companies are often more concerned with damage to their reputation than they are concerned with the possibility of legal liability¹²⁵ and are motivated “less by avoiding regulatory violations per se as [avoiding] ‘anything that could give you a bad name.’”¹²⁶ While empirical studies might find that there is more variation in compliance around quasi-regulation of the type we see in the global arena and perhaps there is more of a lag-time between promulgation and eventual full industry participation, I submit that the voluntary standards that we see under development in the oil and gas industry operate, as does traditional law, to coordinate behavior towards the standards of behavior described. That coordination function is undoubtedly facilitated when governments are involved in convening the dialogue that produces the voluntary standards

123. *See id.* at 77.

124. *See supra* text accompanying notes 13-14.

125. *See* Kagan et al., *supra* note 107, at 69.

126. *Id.* (quoting a manager of a pulp mill studied).

and can be undermined by those same governments failing to take the instruments seriously. But, for the reasons just articulated, the regulatory import of these quasi-regulatory efforts is greater than their voluntary nature might suggest.

In fact, it may be that this approach to regulation leads to higher compliance generally. As a theoretical matter, self-regulation should more effectively overcome psychological reactance, which can be understood as a tendency to resist solutions or requirements that are imposed from outside one's social group. A particularly dramatic demonstration of reactance was observed by NASA when it was studying the habitability of undersea scientific laboratories, where confined spaces over extended periods of time are the norm. One study looked at the food provided to these missions. Seven of the missions received high-quality, pre-programmed food that the NASA habitability researchers judged to be excellent. Three other missions had self-selected food which was dependent on what was locally available. In a number of instances, those three missions suffered from food shortages; indeed, they were left with no food at all when tropical storms made landing and purchasing food impossible. Yet, of 40 complaints about food from the 10 missions, 39 were received from the seven missions that had received consistent, pre-programmed meals!¹²⁷ This seems to indicate that otherwise rational adults would rather eat nothing at all than eat the food imposed on them from without. It is not an analytic stretch to suggest that the psychological phenomenon of reactance may have relevance to the question of the efficacy of voluntary versus mandatory regulation.

Psychological reactance has been demonstrated empirically in social psychology experiments with undergraduate subjects—a finding not surprising to any parent of teenagers—but has also been demonstrated in experiments with adult business managers.¹²⁸ For instance, Wit and Wilke studied sub-

127. See STEPHEN KAPLAN & RACHAEL KAPLAN, *COGNITION AND ENVIRONMENT: FUNCTIONING IN AN UNCERTAIN WORLD* 245-46 (1982) (discussing E.C. WORTZ & D.P. Nowlis, *The Design of Habitable Environments*, 5 *MAN-ENVIRONMENT SYSTEMS* 280 (1975)).

128. See Arthur A. Stukas et. al, *The Effects of "Mandatory Volunteerism" on Intentions to Volunteer*, 10 *PSYCHOL. SCI.* 59, 59-63 (1999) (supporting the theory of reactance, undergraduates who were required to volunteer time in the community had significantly lower intentions to volunteer in the future; this

jects' choices in a ten-person social dilemma game that simulated a problem about how to handle chemical pollution.¹²⁹ Subjects were either given rewards for cooperative behavior (compliance) or punishments for uncooperative behavior (non-compliance), and the reward was either from the government or the subject's parent company. Wit and Wilke found that both rewards and punishment were equally effective in promoting cooperation among 124 19-21 year olds, and this result obtained whether the government or a parent company supplied the incentives.¹³⁰ For 239 managers, however, government-supplied rewards aroused reactance and were counter-productive, while rewards supplied by the parent company promoted compliance.¹³¹

Yet, one might still have a concern that a given multi-stakeholder process will select the wrong focal point or, to use language that is more familiar, that the standards that are adopted as best practice will be too low. If the standards are too low, then, even if compliance is wide-spread, there will still be unaddressed social harms created. Comparing what the GRI, the Voluntary Principles, and the EITI require in the oil and gas industry with the newly-promulgated U.N. Norms for Multinational Enterprises, I conclude that this concern is valid and that the comparison between these instruments does suggest important improvements that could be made in the oil and gas quasi-regulatory regime.

First, it is undeniable that the U.N. Norms, which are applicable to the full range of enterprise action, articulate standards of conduct with respect to a much broader range of human rights protection than do the Voluntary Principles (the only one of the multi-stakeholder dialogues discussed in this Article that regulates behavior, not disclosure). What this suggests is that many more multi-stakeholder initiatives would be required in the oil and gas realm to create a framework for best practice that would address all of the social responsibility

study found that "required volunteerism is more likely to reduce the intentions of those who perceive they are being controlled than those who perceive themselves as volunteering freely").

129. See Arjaan Wit & Henk Wilke, *The Presentation of Rewards and Punishments in a Simulated Social Dilemma*, 5 SOC. BEHAV. 231 (1990).

130. See *id.* at 242.

131. See *id.*

issues that oil and gas production entails.¹³² In particular, environmental issues, indigenous peoples' rights, and the full range of labor rights and distributional issues have yet to be addressed in an oil and gas multi-stakeholder dialogue, while all but indigenous peoples' rights are explicitly or implicitly addressed in the Norms.¹³³ It is true that, in the one substantive area that is covered by quasi-regulation, security and human rights, what is required by the Voluntary Principles parallels the U.N. Norms, which makes sense since the Voluntary Principles incorporated U.N. standards for security and the use of force. The Norms are not as specific, as also would be expected. For example, the Norms state that "[s]ecurity arrangements for transnational corporations and other business enterprises shall observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate."¹³⁴ From this example, one could envision the Norms and specific issue multi-stakeholder dialogues working in parallel going forward: The Norms setting out general aspirations, quite broadly defined, and multi-stakeholder dialogues filling in the specifics about implementation on specific issues. This process would be perfectly consistent with the intentions of the drafters of the Norms, who envision them not as a purely voluntary initiative, since they incorporate prior binding instruments and an implementation process that includes NGO monitoring and possible compensation, nor as a fully-developed treaty—at least not yet.¹³⁵

One area in which the Norms show a higher standard of conduct than current quasi-regulation is with respect to monitoring and implementation. Paragraphs 15 through 19 describe procedures for implementation, including individuals'

132. The U.N. Norms themselves, albeit not a treaty, incorporate thirty U.N. treaties, conventions, and declarations, as well as all previous ILO instruments. Thus, they might, over time, become the general framework against which multi-stakeholder dialogues are measured and may ultimately supplant the need for additional specific issue dialogues.

133. See U.N. Norms, *supra* note 16, at ¶¶ 14 (environmental protection); 2, 5-9 (equal opportunity and labor rights, including rights to a living wage, respectively); 8, 12 (distributional concerns).

134. See *id.* ¶ 4.

135. See David Weissbrodt & Muria Kruger, *Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 913 (2003).

rights to compensation if their rights, as set out in the Norms, are violated. Paragraph 16 specifically provides that:

Transnational corporations and other business enterprises shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms. This monitoring shall be transparent and independent and take into account input from stakeholders (including non-governmental organizations) and as a result of complaints of violations of these Norms. Further, transnational corporations and other business enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms.¹³⁶

As stated above, efforts to include monitoring procedures in the Voluntary Principles were unsuccessful. Yet, academic research suggests that having specific external monitoring is critical to the efficacy of self-regulation.¹³⁷ So, in this way, too, full implementation of the U.N. Norms would be likely to more fully promote corporate social responsibility than would full implementation of the Voluntary Principles.

One area in which existing global quasi-regulation is more stringent than the Norms is that of disclosure. The standards for disclosure in the U.N. Norms are much less specific than those in the GRI. Paragraph 10 is the only part of the U.N. Norms that treats disclosure, and simply states:

Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate.¹³⁸

136. See U.N. Norms, *supra* note 16, ¶ 16.

137. See Ans Kolk & Rob Van Tulder, *The Effectiveness of Self-Regulation: Corporate Codes of Conduct and Child Labour*, 20 EUR. MGMT. J. 260, 270 (2002).

138. U.N. Norms, *supra* note 16, at ¶ 10. Paragraph 10 is the only part of the U.N. Norms that treats disclosure.

While I am certainly not one to understate the significance of disclosure as a regulatory strategy,¹³⁹ in many contexts disclosure is a means to the presumed end of greater corporate social accountability, and not an end in itself. For instance, disclosure of revenues and taxes paid to host governments under the EITI will, presumably, be useful to give NGOs and funding organizations the information they need to work to reduce corruption and to work for a fairer distribution of oil revenues. Yet, if such disclosure does not have the effect of encouraging countries to make significant improvements in their use of funds, then the disclosure will not have been effective as a regulatory strategy. What that implies to this author is that it is perfectly appropriate for the Norms to adopt a laser-like focus on the underlying substantive human rights protection that all of the treaties, conventions, declarations, and instruments the Norms incorporate seek to promote, rather than focusing on disclosure *per se*.

So, what is one to make of these quasi-regulatory initiatives, born out of multi-stakeholder processes amongst governments, companies, and NGOs? I have suggested, building on the work of others, that the process itself is global regulation, albeit couched in terms of voluntary initiatives. If this is true, then arguments over voluntary versus mandatory approaches may be misplaced, especially in the international arena, where implementation and enforcement of even mandatory standards is often problematic. It is encouraging that NGOs, investors (particularly engaged institutional investors), and other stakeholders have a recognized place at the table in developing these initiatives, especially in the United Kingdom, as evidenced by the EITI and the Voluntary Principles. In that sense, one might see this process as quite inclusive and responsive to stakeholder concerns for the public good.¹⁴⁰ What is worth worrying about, however, is whether the substantive

139. See, e.g., Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (arguing that the SEC should require public reporting companies in the U.S. to disclose much more social and environmental information).

140. This is a somewhat ironic argument, of course, since a recurring concern about global governance emphasizes the potential lack of democratic legitimacy, since the power to develop regulation is being transferred from democratically-accountable public actors to non-accountable private actors. See, e.g., Slaughter, *supra* note 8, at 1041-42.

standards are as broad as necessary to address the panoply of corporate social responsibility issues. The example of the oil and gas initiatives suggests that further work needs to be done to broaden the issues under examination and that more pressure needs to be brought to bear to ensure that adequate implementation and monitoring are part of the agreed-upon behavioral equilibria. In fact, a broader framework of issues has already been developed, set out in the U.N. Norms on the Responsibilities of Multinational Enterprises. Perhaps the next step is to use that framework as a statement of agreed-upon goals, as it was intended to be, and then use the processes of multi-stakeholder dialogues as the mechanism to bring multiple perspectives to bear to define the strategies for reaching those goals.

V. CONCLUSION

In the globalizing economy, we are seeing new kinds of regulatory processes. Those examined here are multi-stakeholder dialogues to create standards for corporate best practices. These dialogues do not create mandatory law, but they have developed something that is not purely voluntary either, since it has the imprimatur of government sponsorship, both in the United States and in the United Kingdom; it has the momentum of consistent re-evaluation by the NGO participants who are explicitly invited into the process; and laggards in the industry (such as ExxonMobil and UNOCAL) who either do not participate or do not meet the standards are called upon to explain their recalcitrance. One could argue that what we are seeing is government abandoning its responsibilities to make hard law. Conversely, I have argued here that what we are seeing is a broader process of making law, one that requires a different understanding of what law is in the global arena, and a different understanding of how law operates generally. Since these are new instruments, each put in place since the year 2000, it is a bit too soon to fully evaluate them, but the U.N. Norms provide a benchmark for that evaluation when the time is right.