

2010

Global Corporate Governance: Soft Law and Reputational Accountability

Kevin Jackson

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Kevin Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 Brook. J. Int'l L. (2010).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol35/iss1/2>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

GLOBAL CORPORATE GOVERNANCE: SOFT LAW AND REPUTATIONAL ACCOUNTABILITY

*Kevin T. Jackson**

INTRODUCTION	43
I. CORPORATE SOCIAL RESPONSIBILITY: THE PARADIGM.....	48
<i>A. History of Corporate Social Responsibility</i>	<i>48</i>
<i>B. Social Responsibility, Responsiveness, and Performance</i>	
<i>Distinguished</i>	<i>52</i>
1. Corporate Social Responsibility	52
2. Corporate Social Responsiveness.....	54
3. Corporate Social Performance (“CSP”)	54
<i>C. Corporate Social Responsibility and Global Governance.....</i>	<i>55</i>
II. CORPORATE GOVERNANCE GLOBALLY	58
<i>A. Monophonic Governance Model.....</i>	<i>59</i>
<i>B. Polyphonic Governance Model.....</i>	<i>62</i>
<i>C. Integrative Social Contracts Theory (“ISCT”).....</i>	<i>63</i>
<i>D. Corporate Reputational Capital: The Missing Link</i>	<i>66</i>
III. THE REGIME OF GLOBAL CIVIL REGULATIONS.....	67
<i>A. Background on Civil Regulations</i>	<i>68</i>
1. The Global Public Domain.....	69
2. Scope and Magnitude of the Regulations.....	70
<i>B. Characteristics of Civil Regulations</i>	<i>72</i>
<i>C. The “Triangular” Nature of Authority</i>	<i>74</i>
<i>D. Forms of Civil Regulations</i>	<i>75</i>
1. Voluntary Self-Regulation	76
2. Inter-Firm and Cross-Industry Cooperation.....	78
3. Co-regulation and Multi-Stakeholder Partnerships.....	80
<i>E. Why Global Businesses Adopt Voluntary Regulations.....</i>	<i>85</i>
1. Protecting Reputations	85
2. Breakdown in Global Governance	87
IV. REPUTATIONAL ACCOUNTABILITY MECHANISMS.....	88
<i>A. Legal Accountability</i>	<i>88</i>
<i>B. Reputational Accountability.....</i>	<i>90</i>
1. Elements of Reputational Accountability	91
2. Enforcement of the Rule of Reputation.....	92
<i>C. Networks of Reputational Accountability</i>	<i>96</i>

* Professor of Law and Ethics, Fordham University Graduate School of Business; B.A., 1978, M.A., 1985, Florida State University; J.D., Florida State University College of Law; Ph.D., 1990, University of Maryland at College Park.

<i>D. Reputational Accountability is Dynamic</i>	97
<i>E. Implications for Global Operations</i>	98
V. CRITICISMS AND REPLIES	99
CONCLUSION	105

INTRODUCTION

As transnational firms traverse the planet in today's global economy, they conduct many of their business activities beyond the legal reach of nation-states.¹ To some, this seems like one of globalization's most troubling consequences.² The conventional wisdom predicts that, if unchecked, corporations will freely flout societal interests and impose significant external costs on the public.³ However, globalization has been expanding the role of *nongovernmental* actors in shaping global governance.⁴ This trend tends to placate detrimental corporate conduct in the absence of governmental enforcement authority.⁵ Indeed, globalization has not only heralded a "global economy," but has also brought about the phenomenon of a broader "global civil society."⁶ Increasingly alert to the social and ecological dimensions of transnational corporate conduct, global civil society stands to exert significant regulatory control over firms simply by propounding public preferences and expectations.⁷ These

1. See generally John H. Dunning, *Introduction to GOVERNMENTS, GLOBALIZATION, AND INTERNATIONAL BUSINESS* 1–2 (John H. Dunning ed., 1997) (discussing the emergent relationship between the national jurisdiction and the mobility of multinational enterprise); KENICHI OHMAE, *Preface to THE EVOLVING GLOBAL ECONOMY: MAKING SENSE OF THE NEW WORLD ORDER*, at xiii (Kenichi Ohmae ed., 1995); Peter E. Drucker, *The Global Economy and the Nation State*, FOREIGN AFF., Sept.–Oct. 1997, at 159 (discussing the political economy of globalization and noting the dynamic of the relative decrease of nation-states' regulatory authority).

2. See generally RICHARD BARNET & RONALD MUELLER, *GLOBAL REACH: THE POWER OF MULTINATIONAL CORPORATIONS* 1 (1974) (providing an excellent discussion on the dynamics that ensue as a result of multinational corporations' global reach).

3. JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 113 (2004).

4. See Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in the International System*, in *THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE* 3, 4 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002); see also James N. Rosenau, *Governance in the Twenty-First Century*, 1 *GLOBAL GOVERNANCE* 13, 13–22 (1995); Jan Aart Scholte, *'In The Foothills': Relations Between the IMF and Civil Society*, in *NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM* 256, 256 (Richard A. Higgot, Geoffrey R. D. Underhill & Andreas Bieler eds., 2000). See generally A. Claire Cutler, Virginia Haufler & Tony Porter, *Private Authority and International Affairs*, in *PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS* 3, 3 (A. Claire Cutler, Virginia Haufler & Tony Porter eds., 1999).

5. See THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 30–35 (1989).

6. See Cutler, Haufler & Porter, *supra* note 4, at 3, 20. See generally Ronnie D. Lipschutz & Cathleen Fogel, "Regulation for the rest of us?" *Global Civil Society and the Privatization of Transnational Regulation*, in *THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE* 115, 115 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).

7. See DONALDSON, *supra* note 5, at 30–35.

preferences and expectations constrain corporate conduct and explain why firms have begun to self-impose civil regulations that proactively accommodate broader moral and social concerns.⁸

Also known as “soft law”⁹ or “quasi-legislation,”¹⁰ voluntary civil regulations will prove an important alternative to governmental authority in the era of globalization.¹¹ These emerging trends are arguably only the “tip” of a larger global social contract that has been forming in light of society’s demand for corporate social responsibility (“CSR”).¹² In fostering soft law, this new global governance paradigm¹³ reignites timeless

8. Jem Bendell uses the term “civil regulation” to refer to regimes situated between self-regulation by business and “hard” regulation by government. Jem Bendell, *Civil Regulation: A New Form of Democratic Governance for the Global Economy?*, in *TERMS FOR ENDEARMENT: BUSINESS, NGOS AND SUSTAINABLE DEVELOPMENT* 238, 246–49 (Jem Bendell ed., 2000).

9. The term “soft law” generally refers to non-binding, quasi-legal instruments, or to mechanisms whose binding force is relatively weaker than conventional legal instruments. See David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT’L L. 931, 960 (2004); see also Alan C. Neal, *Corporate Social Responsibility: Governance Gain or Laissez-Faire Figleaf?*, 29 COMP. LAB. L. & POL’Y J. 459, 464 (2008). From the standpoint of the international law nomenclature, “soft law” refers to international agreements not concluded as treaties and thus not yet binding. See, e.g., Mary Ellen O’Connell, *The Role of Soft Law in a Global Order*, in *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* 100, 113–14 (Dinah Shelton ed., 2000); Antonio Vives, *Corporate Social Responsibility: The Role of Law and Markets and the Case of Developing Countries*, 83 CHL-KENT L. REV. 199, 216 (2008). In addition, “soft law” denotes a self-contained set of obligations arising out of the occasional preference of nation-states to reach *non-binding* agreements and to pattern relations in ways that avoid application of treaty or customary law. See Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT’L L. 499, 501 (1999) (discussing the nature of the transnational self-regulatory and co-regulatory structures); see also Rebecca Kathleen Atkins, *Multinational Enterprises and Workplace Reproductive Health: Extending Corporate Social Responsibility*, 40 VAND. J. TRANSNAT’L L. 233, 239 (2007); Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B. U. INT’L L.J. 309, 317 (2004); Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC’Y REV. 635, 645 (2004).

10. See GABRIELE GANZ, *QUASI-LEGISLATION: RECENT DEVELOPMENTS IN SECONDARY LEGISLATION* 16–22 (2d ed. 1987).

11. See Christoph Knill & Dirk Lehmkuhl, *Private Actors and the State: Internationalization and Changing Patterns of Governance*, 15 GOVERNANCE 41, 43 (2002).

12. See generally THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* 233–36 (1999). In some sense, as a form of voluntary governance, corporate social responsibility was precipitated by global civil society’s pressure and constraints on multinational business interest.

13. Thomas Kuhn employed the term “paradigm” in an effort to account for the way that fields of knowledge are constituted by shared systems of belief which are defined by

principles and values such as human rights, environmental sustainability, responsible citizenship, and corporate accountability, as well as integrity and credibility of character.¹⁴ As a result transnational firms, despite their wherewithal, are now vulnerable as their brands have become susceptible to reputational harm in response to breaches of the social contract.¹⁵ Consequently, these firms are establishing regulatory regimes in an effort to build reputational capital and thereby enhance, or at least safeguard, their bottom lines.¹⁶

Global civil society primarily demands that businesses abide norms of social responsibility in their pursuit of profit.¹⁷ This emphasis on the “character” of transnational business conduct is a departure from the entrenched metaphor that sees corporations as amoral profit machines, utterly devoid of moral character or probity.¹⁸ The fact that transnational firms adopt civil regulations *voluntarily* in order to build credibility in the eyes of global civil society—i.e., the fact that firms proactively

a common vocabulary, a set of accepted problems and agreed-upon solutions. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 175 (2d ed. 1970). Thus, on the one hand, a paradigm defines a community of belief; on the other hand, communities of belief do not exist but for the shared beliefs, acknowledged problems and solutions that comprise a paradigm. *See id.* Although Kuhn’s book was aimed at the history of changes in the physical or “hard” sciences, John Kenneth Galbraith expresses a similar notion that is closer to the context of the present study: “The first requirement for an understanding of contemporary economic and social life is a clear view of the relation between events and the ideas which interpret them.” JOHN K. GALBRAITH, *THE AFFLUENT SOCIETY* 6 (4th ed. 1984). As to the emerging paradigm, stemming from the new forms of global corporate governance, the following passage is prescient:

“Tomorrow’s successful company can no longer afford to be a faceless institution that does nothing more than sell the right product at the right price. It will have to present itself as if it were . . . an intelligent actor, of upright character, that brings explicit moral judgment to bear on its dealings with its own employees and with the wider world.”

Anonymous, *Saints and Sinners*, *THE ECONOMIST*, June 24, 1995, at 15.

14. *See generally* William C. Frederick, *The Moral Authority of Transnational Corporate Codes*, 10 J. BUS. ETHICS 165, 165 (1991) (discussing how moral guidelines incorporated in various regulatory instruments influence sundry corporate practices).

15. *See* Harold James, *The Ethics of Business Life: Some Historical Reflections*, in *RETHINKING BUSINESS MANAGEMENT* 9, 14–15 (Samuel Gregg & James R. Stoner eds., 2008).

16. Kevin T. Jackson, *Natural Law, Human Rights, and Corporate Reputational Capital in Global Governance*, 8 CORP. GOVERNANCE 440, 451 (2008).

17. *See generally* LYNN S. PAINE, *VALUE SHIFT: WHY COMPANIES MUST MERGE SOCIAL AND FINANCIAL IMPERATIVES TO ACHIEVE SUPERIOR PERFORMANCE* 47 (2003) (arguing that beyond good public relations, corporate social responsibility is a powerful tool for achieving superior performance and generating greater profits).

18. *See generally* Gareth Morgan, *Paradigms, Metaphors and Problem Solving in Organization Theory*, 25 ADMIN. SCI. Q. 605, 616. (1980) (providing a critique of the metaphors that have “imprisoned” organization theory).

comply with the new global social contract—presupposes that international businesses are able to distinguish moral choices and then make them.¹⁹

Unlike traditional legal regimes whose norms are enforced through centralized systems of sanctions, the emergent soft law norms of global economic governance rely on decentralized enforcement mechanisms.²⁰ These emergent norms are not the product of parochial regulation or local cultural mores.²¹ Rather, they represent the expectations of various economic communities around the world that together comprise global civil society.²² Thus, the promulgation of voluntary civil regulations by firms reveals an acceptance of extant *global* social contracts borne of growing *global* societal consensus as to the proper performance, responsiveness, and responsibility of transnational corporations.²³

Consequently, transnational business enterprises are further committing to rule-making and rule-implementation in the spheres of social and environmental responsibility.²⁴ They engage in inter-firm cooperation and collaborate with nongovernmental organizations.²⁵ Over the past decade, CSR has gained prominence in both developed and developing countries at local, national, regional, and international levels.²⁶ International businesses are therefore under increasing pressure from civil society organizations and corporate accountability networks that monitor

19. See Kenneth E. Goodpaster & John B. Matthews Jr., *Can a Corporation Have a Conscience?*, HARV. BUS. REV., Jan.-Feb. 1982, at 132, 135.

20. See RICHARD HOLME & PHILIP WATTS, CORPORATE SOCIAL RESPONSIBILITY: MAKING GOOD BUSINESS SENSE 20 (2000); see also Jan Aart Scholte, *Globalization, Governance and Corporate Citizenship*, 1 J. CORP. CITIZENSHIP 15, 15–23 (2001).

21. See generally CYNTHIA DAY WALLACE, LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE 23 (1982) (providing examples and discussing distinctions among various forms of regulation).

22. See *id.* at 295–96; see also Scholte, *supra* note 20, at 19–21.

23. See Thomas W. Dunfee, *Business Ethics and Extant Social Contracts*, 1 BUS. ETHICS Q. 23, 24 (1991).

24. See JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 18 (2000); see also Cutler, Haufler & Porter, *supra* note 4, at 3.

25. See SIMON ZADEK, THE CIVIL CORPORATION: THE NEW ECONOMY OF CORPORATE CITIZENSHIP 91 (rev. ed. 2007). See generally CORPORATE SOCIAL RESPONSIBILITY: READING AND CASES IN GLOBAL CONTEXT 1 (Andrew Crane, Dirk Matten & Laura Spence eds., 2008).

26. See generally Archie Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC'Y 268, 268 (1999); Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization*, 30 ACAD. MGMT. REV. 166, 166 (2005).

business conduct.²⁷ In response, these firms are adopting responsible business policies.²⁸

Although the conventional views of corporate governance—“shareholder theory” and “stakeholder theory”²⁹—reach divergent conclusions about the proper nature and scope of CSR, both evolved at a time when firms were constrained, at least in principle, by the rule of law and legal sanctions.³⁰ Yet, unlike traditional hard law enforcement regimes, today’s emerging “civil regulations” are grounded in the “rule of reputation,” which ties accountability solely to reputational capital, or lack thereof.³¹ Operating internationally and faced with pressure to self-regulate, a company’s reputation has become one of its most valuable assets.³² Today’s companies must reconcile economic and moral value with traditional notions of corporate governance.

27. See generally Andreas Georg Scherer & Guido Palazzo, *Toward a Political Conception of Corporate Responsibility: Business and Society Seen from a Habermasian Perspective*, 32 ACAD. MGMT. REV. 1096, 1096–120 (2007).

28. See ZADEK, *supra* note 25, at 63.

29. Shareholder theory states that the corporation should serve the interests of shareholders only. See ARCHIE B. CARROLL & ANN K. BUCHHOLTZ, *BUSINESS AND SOCIETY: ETHICS AND STAKEHOLDER MANAGEMENT* 832–85 (7th ed. 2009). Grounded in agency theory, the underlying idea is that shareholders differ from other constituencies by virtue of being residual risk-bearers, and as such should exercise control over the firm. See *id.* at 84. Agency theory further asserts that, as residual risk-bearers, shareholders are in the best position to ensure that firms operate efficiently and focus on profit maximization. Thus, corporate managers answer only to shareholders and act only with the interests of shareholders in mind. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (1962). Stakeholder theory, on the other hand, maintains that since business serves the larger society, managers must be responsive to a broad constellation of constituencies both within and outside of the firm. See R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* 43 (1984). This theory is based on the premise that the employees of a corporation, especially its managers and directors, can be held accountable for harmful side-effects of corporate conduct. *Id.* Corporate employees should be held accountable for the realization of a variety of objectives of the corporation. Such widening of responsibility is deemed essential as stockholders’ liability is often remote and financially limited. *Id.*; see also Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 BUS. ETHICS Q. 53, 53–55 (1991). See generally Morey W. McDaniel, *Stockholders and Shareholders*, 21 STETSON L. REV. 121, 126 (1991).

30. Thomas Dunfee, *Corporate Governance in a Market with Morality*, 62 LAW & CONTEMP. PROBS., Summer 1999, 129, 134–35.

31. See KEVIN T. JACKSON, *BUILDING REPUTATIONAL CAPITAL: STRATEGIES FOR INTEGRITY AND FAIR PLAY THAT IMPROVE THE BOTTOM LINE* 28 (2004); see also Jackson, *supra* note 16, at 443–44.

32. Alasdair Ross, *Reputation: Risk of Risks*, THE ECONOMIST INTELLIGENCE UNIT, Dec. 2005, at 2; see Robert O. Keohane, *Complex Accountability and Power in Global Governance: Issues for Global Business*, 8 CORP. GOVERNANCE 361, 365 (2008).

In this Article, I will argue that corporate governance must focus on the role of soft law in today's global environment. Soft law is a novel mechanism for constraining corporate behavior. In reconciling financial and social imperatives, firms must consider its impact on reputational capital. In Part I, I analyze the emergence of the CSR paradigm and its connection to global corporate governance. By examining its history, I will first illustrate how the CSR movement has rendered firms' reputations accountable to the movement's demands, and then I will trace the conceptual expansion of CSR to the related notions of "corporate social responsiveness" and "corporate social performance." In Part II, I examine alternative conceptual models of global corporate governance including the "monophonic" model, the "polyphonic" model, the "integrative social contracts" model, and finally, the "reputational capital" model. In Part III, I examine specific types of global civil regulations in detail, and I discuss the bases for why global corporations accept the emerging soft law regime. After highlighting the chief characteristics of civil regulations in light of the underlying regulatory aim to bind firms and markets to worldwide norms, I will discuss the dominant forms of civil regulation within the triad of voluntary self-regulation, inter-firm and cross-industry initiatives, and co-regulation and multi-stakeholder partnerships.³³ In Part IV, I build on the discussion in Parts II and III to analyze the role reputational accountability mechanisms play in securing firms' compliance with global civil regulations. After distinguishing reputational accountability from legal accountability, I will explain the operational components of reputational accountability, the process by which key constituents of transnational firms enforce the "rule of reputation," and the strategic and operational implications firms face as a result of such enforcement. In Part V, I take on arguments in opposition to the emerging paradigm of global civil regulation.

I. CORPORATE SOCIAL RESPONSIBILITY: THE PARADIGM

A. History of Corporate Social Responsibility

The origins of the modern debate on corporate social responsibility can be traced to the early 1950s. Howard Bowen, a renowned economist, first coined the phrase when he argued that economic and social benefits would result if businesses introduced broader social goals into their

33. See David Vogel, *The Private Regulation of Global Corporate Conduct* 25–26 (Center for Responsible Business, Working Paper No. 34, 2006), available at <http://escholarship.org/uc/item/8g66g3hf>.

decision-making processes.³⁴ In the 1960s, the argument was extended further with the assertion that ethical principles should govern a corporation's relationship with society.³⁵ In the 1970s, the view emerged that business should not only protect but also improve the welfare of society.³⁶

Regarding the global context, attention to the ethics of international business has been mounting ever since the late 1960s.³⁷ It began as an activist movement aimed at U.S.-based multinational companies in France and later spread to other parts of the world.³⁸ Less-developed countries were especially worried about outside infiltration into their economies and the resulting dilution of national control. Yet, at the same time, as a means of economic development, they were interested in attracting foreign investment that would lead to a rise in employment. The expansion of direct foreign investment around the world prompted attempts to create codes of business conduct at the intra-firm and international levels.³⁹ One notable example of this dynamic could be seen as early as the 1940s with the promulgation in the United Nations of the Universal Declaration of Human Rights.⁴⁰ Another later example is the attempted development of a Voluntary Code of Conduct for Transnational Corporations at the United Nations Conference on Trade and Development ("UNCTAD") beginning in the 1970s.⁴¹ Similarly, national legis-

34. See, e.g., HOWARD ROTHMANN BOWEN, *SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN* 8 (1953).

35. See RICHARD EELLS & CLARENCE WALTON, *CONCEPTUAL FOUNDATIONS OF BUSINESS* 455-57 (3d ed. 1961).

36. See KEITH P. DAVIS & ROBERT L. BLOMSTROM, *BUSINESS AND SOCIETY: ENVIRONMENT AND RESPONSIBILITY* 8-9, 20-21 (3d ed. 1975).

37. See generally BARNET & MUELLER, *supra* note 2, at 113 (1974); JEAN JACQUES SERVAN-SCHREIBER, *Le Défi américain* [THE AMERICAN CHALLENGE] 1 (1968) (Fr.) (providing a provocative angle on America-style management, business, and ethics); RAYMOND VERNON, *SOVEREIGNTY AT BAY* 1 (1971) (a seminal book that was widely acclaimed to be "no more than the tip of an iceberg").

38. See, e.g., BARNET & MUELLER, *supra* note 2, at 113.

39. See DONALDSON, *supra* note 5, at 35-39; see also Paul M. Minus, *Introduction to THE ETHICS OF BUSINESS IN A GLOBAL ECONOMY* 1, 1 (Paul M. Minus ed., 1993); ROBERT C. SOLOMON, *THE NEW WORLD OF BUSINESS: ETHICS AND FREE ENTERPRISE IN THE GLOBAL 1990s*, at 167 (1994). See generally THEODORE H. MORAN, *MULTINATIONAL CORPORATIONS: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT* 1 (1985) (presenting an extensive and a thorough discussion of the sociopolitical developments resulting from spread of multinational corporations).

40. See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

41. See Development and International Economic Cooperation: Transnational Corporations, U.N. ESCOR, 2nd Sess., U.N. Doc. E/1990/94 (June 12, 1990); see also Draft United Nations Code of Conduct on Transnational Corporations, 23 I.L.M. 626 (1984) (setting forth comprehensive norms of transnational corporate conduct). Moreover, in

latures, backed by enforcement regimes, adjusted their laws to reach transnational firms doing business overseas.⁴² International treaties and national legislation, however, did not succeed everywhere in combating misconduct. Rather, in a significant number of cases, business reforms were precipitated by public outrage at corporate malfeasance.⁴³

In the 1980s, a number of ecological and social calamities began impacting the reputations of individual firms and the corporate world in general.⁴⁴ The ensuing reputational crises vividly illustrated the consequences of embracing a self-regulating, profit-maximizing, shareholder-focused brand of corporate governance, notwithstanding its substantial reputational risks.⁴⁵ Hitherto, the traditional governance paradigm of multinational corporations rigidly stressed shareholder profit maximization.⁴⁶ Essentially, in an effort to reach narrowly defined goals in the form of financial targets, many transnational firms failed to consider how backlash from public perceptions of raw corporate greed could affect business.⁴⁷ Instead, leading and aspiring multinational corporations traversed the globe seeking locations that offered low labor costs and lax environmental and socioeconomic regulations.⁴⁸

With the advent of the 1990s came a succession of ecological crises stemming from morally questionable business practices. This propelled

1977 the International Labour Organization (ILO) adopted its Tripartite Declaration of Principles Concerning Multinational Enterprises, calling upon businesses to voluntarily comply with ILO conventions and recommendations. See Int'l Labour Organization [ILO], Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 17 I.L.M. 422, para. 6 (1977).

42. Arlene I. Broadhurst, *Corporations and the Ethics of Social Responsibility: An Emerging Regime of Expansion and Compliance*, 9 BUS. ETHICS: A EURO. REV. 86, 88 (2000).

43. *Id.*

44. Noteworthy examples are the Bhopal disaster involving leakage of deadly MIC gas from one of Union Carbide's industrial plants, and the widespread calls for disinvestment of U.S.-based multinationals from apartheid South Africa. See Cortelyou Kenney, Comment, *Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation*, 97 CAL. L. REV. 857, 875 (2009); see also Kenneth A. Rodman, *Public and Private Sanctions Against South Africa*, 109 POL. SCI. Q. 313, 320 (1994).

45. See European Commission Green Paper on Promoting a European Framework for Corporate Responsibility, COM (2001) 366 final (July 18, 2001), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366en01.pdf (last visited Sept. 1, 2009) [hereinafter *EU Green Paper*].

46. See generally Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970.

47. Debora Spar, *The Spotlight and the Bottom Line*, FOREIGN AFF., Mar.-Apr. 1998, at 7-9.

48. See Morton Winston, *NGO Strategies for Promoting Corporate Social Responsibility*, 16 ETHICS & INT'L AFF. 71, 72-73 (2002).

multinational corporations further into the spotlight. The Exxon Valdes disaster in Prince William Sound and the Royal Dutch Shell controversy over the disposal of the Brent Spar in the North Sea were two well-publicized incidents that caused considerable damage to the reputations of the firms involved. Royal Dutch Shell also suffered reputational damage over its apparent complicity with the execution of Ogoni indigenous leaders in Nigeria, and Nike suffered significant backlash, especially between 1992 and 1997, when reports regarding the company's operations in Southeast Asia spawned public concern over child labor and poor working conditions in "sweatshops."⁴⁹

As a result of these public controversies, corporations began guarding their reputations while global civil society began questioning the unregulated market dominance of transnational firms.⁵⁰ Such unbridled control was exacerbating social inequalities and human rights violations while endangering the earth's ecological systems and depleting natural resources.⁵¹

Seeking institutional authority to voice its position, global civil society condemned multinational corporations collectively for failure to provide proper employment conditions and decent wages, and for failure to foster human rights as mandated by the United Nations Declarations and International Labor Organization Conventions and Recommendations.⁵² With respect to ecology, civil society began to insist that firms comply with United Nations' agreements and conventions on development and the environment.⁵³ Furthermore, pressured by civil society, firms began to recognize state-sanctioned environmental regulations promulgated by regional organizations, such as the European Commission.⁵⁴

Consequently, in the latter part of the 1990s, many firms began advocating the notion that responsible corporate conduct produces mid- to long-term financial rewards.⁵⁵ This idea stood in opposition to the long-

49. See U.N. Res. Inst. For Soc. Dev., Business Responsibility for Sustainable Development Project, *Working Paper: Barricades and Boardrooms: a Contemporary History of the Corporate Accountability Movement*, 32–34 (2004) (prepared by Jem Bendell) [hereinafter *Barricades and Boardrooms*]; DEBORA L. SPAR & JENNIFER BURNS, HITTING THE WALL: NIKE AND INTERNATIONAL LABOR PRACTICES Harvard Business School case 700-047 7–9 (rev. 2002).

50. Ngaire Woods, *Global Governance and Role of Institutions*, in GOVERNING GLOBALIZATION 25, 32 (David Held & Anthony McGrew eds., 2002).

51. See Winston, *supra* note 48, at 72–73.

52. *Barricades and Boardrooms*, *supra* note 49, at 14–16.

53. Winston, *supra* note 48, at 72–73.

54. Scholte, *supra* note 20, at 15.

55. See generally John G. Ruggie, *Reconstituting the Global Public Domain: Issues, Actors and Practices*, 10 EUR. J. INT'L REL. 499, 499–504 (2004).

held notion that corporate wealth is solely grounded in maximization of profits for stockholders.⁵⁶ Firms that were clinging to the conventional viewpoint were equally opposed to the advent of CSR because they believed it entailed significant financial costs.⁵⁷ To this day, the international business community remains at odds over these divergent perspectives. Nevertheless, several features of CSR have gained prominence, including:

- Adoption of voluntary initiatives aimed at elevating the ethical level of operations above that which is required by law;
- Internalization of externalities;
- Consideration of a range of stakeholder interests;
- Integration of the firm's social and economic mandates;
- Contributions to nonprofit, charitable, and other civic organizations and causes;
- Provision of employee benefits and improvement of quality of life in the workplace.⁵⁸

B. Social Responsibility, Responsiveness, and Performance Distinguished

Scholars have crafted a distinction between CSR, which stresses obligations and accountability, and "corporate social responsiveness," which emphasizes action and activity.⁵⁹ But beyond these distinctions, there is a third, results-oriented concept known as "corporate social performance." Below, I will explain all three perspectives on social-awareness.

1. Corporate Social Responsibility

Some say it is futile to attempt an operational definition of CSR because there are too many conceivable applications of CSR.⁶⁰ But, broadly stated, CSR merely implies that businesses share responsibility for societal conditions. Archie Carroll separates business obligations into

56. Friedman, *supra* note 46, at 32.

57. Winston, *supra* note 48, at 85.

58. See generally CORPORATE SOCIAL RESPONSIBILITY: READING AND CASES IN GLOBAL CONTEXT, *supra* note 25, at 1.

59. See William C. Frederick, *From CSR-1 to CSR-2: The Maturing of Business-and-Society Thought*, 33 BUS. & SOC'Y 150, 150-54 (1994) [hereinafter *CSR-1 to CSR-2*]; see also Barry M. Mitnick, *Systematics and CSR: The Theory and Processes of Normative Referencing*, 34 BUS. & SOC'Y 5, 6 (1995).

60. See Edwin M. Epstein, *The Corporate Social Policy Process and the Process of Corporate Governance*, 25 AM. BUS. L.J. 361, 374 (1987).

four classes: economic, legal, ethical, and discretionary.⁶¹ A firm has an economic responsibility to provide goods and services, offer employment at a living wage, and generate profits to survive.⁶² Through these obligations, firms enhance societal well-being. Similarly, corporations shoulder legal responsibilities imposed by courts, legislatures, and administrative agencies.⁶³ These responsibilities can assume many forms and may extend to consumers, employees, stockholders, suppliers, and other stakeholders.⁶⁴

In addition, CSR signifies conformity to society's expectations of appropriate business behavior such as honoring unwritten ethical standards.⁶⁵ For example, while corporations are not legally bound to contribute to charities, many citizens expect profitable enterprises to do so.⁶⁶ Moreover, as law sometimes lags behind social norms, some of society's normative expectations may eventually evolve into law.⁶⁷ Lastly, some of society's expectations are not clearly defined for corporations.⁶⁸ For instance, although society might expect corporations to invest in efforts to resolve significant social problems, society does not have a clear idea of what shape or form those solutions might take.⁶⁹

61. See Archie B. Carroll, *A Three-Dimensional Conceptual Model of Corporate Social Performance*, 4 ACAD. MGMT. REV. 497, 503 (1979).

62. Peter Drucker elaborates this point of view as follows:

Economic performance is the *first* responsibility of business. A business that does not show a profit at least equal to its cost of capital is socially irresponsible. It wastes society's resources. Economic performance is the basis; without it, a business cannot discharge any other responsibilities, cannot be a good employer, a good citizen, a good neighbor. But economic performance is not the sole responsibility of business.

PETER F. DRUCKER, POST-CAPITALIST SOCIETY 101 (1993).

63. See generally JOHN R. BOATRIGHT, *ETHICS AND THE CONDUCT OF BUSINESS* 1 (4th ed. 2003).

64. For instance, legal responsibilities imposed by FDA, FTC, OSHA, CPSC, EPA, EEOC, and SEC regulations, to name but a handful from the morass of U.S. regulatory agencies. See *id.* at 111, 210, 264, 272, 306–11, 339.

65. See *id.* at 369.

66. See Carroll, *supra* note 61, at 500.

67. See *id.* at 502–04.

68. See *id.* at 500.

69. See *id.* at 500.

2. Corporate Social Responsiveness

Robert Ackerman and Raymond Bauer claim that the term “social responsiveness” is a label more apt for a process-focused social outlook.⁷⁰ Ackerman and Bauer have argued that emphasizing companies’ obligations places too much importance on motivation rather than on performance.⁷¹ In their words, “Responding to social demands is much more than deciding what to do. There remains the management task of doing what one has decided to do, and this task is far from trivial.”⁷² Focus on responsiveness allows companies to fulfill social responsibilities without being distracted by issues of accountability that arise when organizations attempt, prior to acting, to determine their precise responsibilities.⁷³ Social responsiveness addresses a firm’s ability to be alert to social pressures.⁷⁴ Thus, rather than simply reacting to a crisis, the socially responsive firm would have preempted the crisis by implementing a process enabling it to foresee predicaments and be proactive in a productive and humanitarian manner.⁷⁵

3. Corporate Social Performance (“CSP”)

Under the “performance” viewpoint, it is firms’ capabilities that are paramount.⁷⁶ In other words, once a firm accepts that it has a “social responsibility” and adopts a responsiveness mentality, it is the *results* achieved thereafter that are critical. Constructing a CSP framework requires more than a determination of the nature of the responsibility.⁷⁷ It also involves articulating certain philosophies, patterns, modes, or strategies of responsiveness.⁷⁸ Carroll has designed a CSP model around three key facets: (1) social responsibility categories—economic, legal, ethical, and discretionary; (2) philosophies (or modes) of social responsiveness—reaction, defense, accommodation, and pro-action; and (3) social (or

70. See ROBERT ACKERMAN & RAYMOND BAUER, CORPORATE SOCIAL RESPONSIVENESS: THE MODERN DILEMMA 6–7 (1976).

71. See *id.* at 6.

72. See *id.*

73. See *id.*

74. See *CSR-1 to CSR-2*, *supra* note 59, at 154; see also Edwin M. Epstein, *The Corporate Social Policy Process: Beyond Business Ethics, Corporate Social Responsibility and Corporate Social Responsiveness*, 29 CAL. MGMT. REV. 99, 104 (1987).

75. BOATRIGHT, *supra* note 63, at 370 (discussing the difference between responsibility and responsiveness).

76. See Carroll, *supra* note 61, at 502, 504 (explaining the use of the social performance model to guide managerial actions in responding to a range of business obligations).

77. See *id.* at 500 (illustrating an elaborate framework of the “social issues involved”).

78. See *id.* at 501.

stakeholder) issues involved—consumer issues, environmental issues, and employee issues.⁷⁹ This configuration illustrates that corporate social responsibility is not separate from financial performance. Moreover, it places ethical and philanthropic expectations into a rational, economic, and legal structure.⁸⁰

C. Corporate Social Responsibility and Global Governance

As the preceding discussion suggests, the emergence of CSR⁸¹ poses a challenge to a corporate governance framework centered on shareholder value creation.⁸² The rise of CSR has engendered a debate about the ultimate purpose and essential nature of a business corporation.⁸³ The competing visions expose conflicting political and moral preferences regarding the corporation's nature.⁸⁴ In the same vein, scholars sympathetic to CSR argue that both the contractual model of the firm, where the corporation is seen as a "nexus of contracts,"⁸⁵ and the legal person model, where a corporation has a distinct legal personality,⁸⁶ do not establish a basis for conferring superior property rights to shareholders over employees.⁸⁷ It is argued instead that employees contributing labor

79. See *id.* at 502–04; Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, BUS. HORIZONS, July–Aug. 1991, at 42.

80. See sources cited *supra* note 79.

81. Hereafter "CSR" is used to designate corporate social responsibility, corporate social responsiveness and corporate performance collectively.

82. See Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 767 (2005); cf. Eric W. Orts, *The Complexity and Legitimacy of Corporate Law*, 50 WASH. & LEE L. REV. 1565, 1587 (1993) (arguing that the "policies underlying corporate law cannot be reduced to a unidimensional value, such as the economic objective of 'maximizing shareholders' wealth.'").

83. See Avi-Yonah, *supra* note 82, at 768–70 (delineating the parameters of the debate about the broader role of the corporations).

84. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992).

85. See Melvin A. Eisenberg, *The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 825–26 (1999); Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779, 782–84 (2006); see also JOHN R. BOATRIGHT, *ETHICS IN FINANCE* 176, 193 (1999).

86. David S. Allen, *The First Amendment and the Doctrine of Corporate Personhood: Collapsing the Press-Corporation Distinction*, 2 JOURNALISM 255, 259–260 (2001).

87. See Eisenberg, *supra* note 85, at 825; Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 294 (1998).

to the firm are entitled to legal recognition of their residual interest in the assets of the enterprise.⁸⁸

In addition, CSR advocates challenge narrow economics-based justifications for the stockholder-centered view, asserting that the ideal of corporate efficiency carries a broader meaning than elevated stock prices.⁸⁹ Accordingly, CSR-oriented theorists have generally repudiated the type of cost-benefit analysis that ignores and segregates distributive considerations from conventional notions of profit-maximizing efficiency.⁹⁰ Because a corporation's existence depends on sophisticated financial transactions, contracts, managers, employees, and other relationships among investors, it functions as a semi-public enterprise.⁹¹ However, this view is not universally shared among corporate governance scholars.⁹²

Consequently, CSR's main tenets have highlighted corporate stakeholders' interests. They have recognized that firms' constituencies play similarly active roles in corporate conduct and strategy.⁹³ Moreover,

88. E.g., Greenfield, *supra* note 87, at 304. Scholarly commentary has also focused on the property rights justifications for the notion of the shareholder primacy. See Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119, 1119 (1990). See generally Allen, *supra* note 84, at 270.

89. See generally Kent Greenfield, *There's a Forest in Those Trees: Teaching About the Role of Corporations in Society*, 34 GA. L. REV. 1011, 1011 (2000); Ronen Shamir, *The Age of Responsibilization: On Market-Embedded Morality*, 37 ECON. & SOC'Y 1, 1 (2008).

90. See generally Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 87, 117 (2005); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 590 (1992).

91. See KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 29 (2006). See generally Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 247 (1999) (building upon the presumption that corporate managers owe a duty beyond that which they owe to the shareholders).

92. For example, corporate law professors Henry Hansmann and Reinier Kraakman argue that "the recent dominance of a shareholder-centered ideology of corporate law among the business, government, and legal elites in key commercial jurisdictions" has left no serious contenders to this view of a corporation. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001); see also John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 650 (1999); Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 333 (2001). For a critique of Hansmann's and Kraakman's position decrying their perspective as "Americanocentric," see Douglas M. Branson, *The Very Uncertain Prospect of "Global" Convergence in Corporate Governance*, 34 CORNELL INT'L L.J. 321, 331 (2001).

93. See FREEMAN, *supra* note 29, at 24–25. See generally Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65, 65–66 (1995).

recent scholarly literature illustrates that conventional approaches to corporate governance are changing due to concerns facing management of multinational firms.⁹⁴ These changes have led to economic analysis of managerial incentives for undertaking corporate social responsibility,⁹⁵ fiduciary duties,⁹⁶ stakeholder-oriented management strategies,⁹⁷ and pro-CSR activism by corporate boards and their shareholders.⁹⁸ The inquiry also highlights quantitative metrics of ratings, reporting practices, and indexes that relate to corporate responsibility governance.⁹⁹ In addition, new methods have been suggested for allowing enhanced participation on the part of boards of directors.¹⁰⁰ Greater inclusion on a board will foster a stronger connection between corporate accountability and governance.¹⁰¹

94. See, e.g., Michael Bradley, Cindy A. Schipani, Anant K. Sundaram, & James P. Walsh, *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, LAW & CONTEMP. PROBS., Summer 1999, at 9, 9.

95. See generally Craig Mackenzie, *Boards, Incentives and Corporate Social Responsibility: The Case for a Change of Emphasis*, 15 CORP. GOVERNANCE: INT'L REV. 935, 935 (2007).

96. See Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1600–01 (2005).

97. See Bradley, Schipani, Sundaram, & Walsh, *supra* note 94, at 28–29; see also Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, LAW & CONTEMP. PROBS., Autumn 2004, at 109, 110.

98. See, e.g., Thomas W. Joo, *A Trip Through the Maze of “Corporate Democracy”: Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735, 754 (2003); see also Adam J. Sulkowski & Kent Greenfield, *A Bridle, a Prod and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior*, 79 ST. JOHN'S L. REV. 929, 938 (2005).

99. See Craig Deegan, *The Legitimizing Effect of Social and Environmental Disclosures: A Theoretical Foundation*, 15 ACCT. AUDITING & ACCOUNTABILITY J. 282, 283–86 (2002); see also Reggy Hooghiemstra, *Corporate Communication and Impression Management: New Perspectives Why Companies Engage in Social Reporting*, 27 J. BUS. ETHICS 55, 55 (2000); Ans Kolk, *Sustainability, Accountability and Corporate Governance: Exploring Multinationals' Reporting Practices*, 18 BUS. STRATEGY & ENV'T. 1, 3 (2008).

100. See generally Lawrence E. Mitchell, *The Board as a Path Toward Corporate Social Responsibility*, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 279, 302 (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007) (proposing several remedial measures).

101. See Arthur R. Pinto, *Globalization and the Study of Comparative Corporate Governance*, 23 WIS. INT'L L.J. 477, 479 (2005). See generally YADONG LUO, GLOBAL DIMENSIONS OF CORPORATE GOVERNANCE 131 (2007).

II. CORPORATE GOVERNANCE GLOBALLY

From the standpoint of global corporate governance, the discussion regarding corporate social responsibility, corporate social responsiveness, and corporate social performance is reduced to a debate about what may be termed a monophonic versus a polyphonic¹⁰² view of corporate objectives. For years, assuming various labels, the debate between the monophonic and polyphonic camps has encompassed business ethics, management, corporate law, and corporate governance theories.¹⁰³ The debate has focused predominately on the behavior of domestic, rather than multinational, business enterprises.¹⁰⁴ It has thus centered on interpretations of domestic corporate law (e.g., U.S. corporate law).¹⁰⁵ As the following discussion demonstrates, the monophonic-polyphonic controversy—either in a local or global context—aims to explain what form of governance would fulfill the obligations of corporate social responsibility while moving beyond the narrow goal of shareholder wealth maximization.¹⁰⁶

102. The author uses the terms by way of analogy to music. In musical composition, polyphony (derived from the Greek words for “many” and “voice”) refers to a texture made up of two or more independent melodic voices. By contrast, monophony refers to music composed with only a single voice. BARBARA RUSSANO HANNING, *CONCISE HISTORY OF WESTERN MUSIC* 44 (1st ed. 1998). Accordingly, a monophonic orientation in global corporate governance is characterized by its concern for the single voice of shareholders, while a polyphonic orientation seeks to orchestrate a plurality of stakeholder voices.

103. Depending on disciplinary context, the various designations have included: “communitarian versus contractarian,” “Berle versus Dodd debate,” “shareholder paradox,” “separation fallacy,” “separation thesis,” and “monotonic versus pluralist” and “unidimensional versus multidimensional.”

104. *But see* Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: A Search for the Best of all Worlds*, 33 *VAND. J. TRANSNAT'L L.* 829, 838–42 (2000) (arguing that differing corporate governance structures in Europe, Japan, and the United States restrict the extent to which transnational firms may permit stakeholder influences).

105. Curiously, the same conflict is embodied in the Company Law of the People's Republic of China, which sets out a legal framework for the organization and operation of private stock enterprises. *See* Michael Irl Nikkel, Note, “Chinese Characteristics” in *Corporate Clothing: Questions of Fiduciary Duty in China's Company Law*, 80 *MINN. L. REV.* 503, 523 (1995) (Whereas Article 102 states that shareholders “shall be the organ of authority” of the firm, Article 14 maintains that business enterprises must “strengthen the establishment of a socialist spiritual civilization, and accept the supervision of the government and the public.”).

106. *See* Orts, *supra* note 82, at 1587. *See generally* William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 *CORNELL L. REV.* 407, 407 (1989); Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 *WASH. & LEE L. REV.* 1409, 1409 (1993); Lyman Johnson, *The*

A. Monophonic Governance Model

Over the years, the debate over the nature and purpose of the corporate enterprise has lingered and has sought to apportion priority between shareholder and nonshareholder interests.¹⁰⁷ In the United States, the debate extends back to the landmark case of *Dodge v. Ford Motor Company*,¹⁰⁸ where the court held that a business corporation is organized primarily for the profit of its stockholders, rather than for its employees or the community.¹⁰⁹ The debate then poured into academia. Whereas Adolf Berle advocated the stockholder-centric view, E. Merrick Dodd urged increased consideration for nonstockholders.¹¹⁰

For a considerable time, the prevailing corporate governance paradigm was dominated by the monophonic perspective, which emphasizes the stockholder-centric approach to corporate governance.¹¹¹ Consequently,

Delaware Judiciary and the Meaning of Corporate Life and Corporate Law, 68 TEX. L. REV. 865, 865 (1990); David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 223 (1991); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 210 (1990); Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 856 (1997) (reviewing PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995)).

107. See Judd F. Sneirson, *Doing Well by Doing Good: Leveraging Due Care for Better, More Socially Responsible Corporate DecisionMaking*, 3 CORP. GOVERNANCE L. REV. 438, 439–40 (2007).

108. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

109. *Id.* The *Dodge* Court reasoned:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes.

Id. Later, the debate resurfaced in the context of corporate mergers and acquisitions during the 1980s. The Delaware Supreme Court held that the interests of non-shareholders could be taken into account by managers and directors when assessing the implications of the takeover bids. *Cf. Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 949 (Del. 1985) (finding a duty to evaluate the threat to the corporate enterprise as a whole).

110. See Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees*, 45 HARV. L. REV. 1365, 1365–66 (1932); see also Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931); E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1145–53 (1932); A. A. Sommer, Jr., *Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33, 36–38 (1991); C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 77–89, 89 n.4 (2002).

111. See BOATRIGHT, *supra* note 85, at 194.

corporate governance was focused mainly on the board's structure, its functions, and its relations with other corporate organs, and the emphasis was on profit maximization.¹¹² This governance model was heavily influenced by both Berle's and Means's analyses of principal-agent problems arising from separating stockholders' ownership rights from corporate managerial duties.¹¹³ The business community relies on corporate law to influence management so as to reduce such agency-cost problems.¹¹⁴ This enables shareholders to trust managers with their investments.¹¹⁵ With an emphasis on resolving agency conflicts, the monophonic corporate governance paradigm embraced a view of economic efficiency¹¹⁶ that favored cost-benefit analysis and value-maximization objectives in business decision-making.¹¹⁷ But it typically ignored adverse social and environmental externalities, downplayed the stakeholders' interests,¹¹⁸ and disregarded firms' obligations to nonshareholders.¹¹⁹

Milton Friedman advocated an extreme version of the monophonic view for promoting a free-market economy:

In such an economy, there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which

112. *Id.* at 172.

113. See generally ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 125–26 (rev. ed. 1967).

114. See Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, in *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 21, 21 (Reinier Kraakman et al. eds., 2004).

115. See *id.*

116. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976); see also Steven M.H. Wallman, *Understanding the Purpose of a Corporation: An Introduction*, 24 J. CORP. L. 807, 808–09 (1999); cf. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 279 (1998).

117. See Harold Demsetz & Kenneth Lehn, *The Structure of Corporate Ownership: Causes and Consequences*, 93 J. POL. ECON. 1155, 1155–56 (1985); see also FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 4–5, 17, 38, 70 (1991).

118. See LYNNE L. DALLAS, *LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH* 483 (2005).

119. See Michael E. DeBow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 398 (1993); see also EASTERBROOK & FISCHEL, *supra* note 117, at 70. See generally Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423–25 (1993).

is to say, engages in open and free competition, without deception or fraud.¹²⁰

This view emphasizes competition to maximize the bottom line. This approach, called the “separation thesis” by some, is antithetic to the view that economic value may flow from a firm’s commitment to social responsibility.¹²¹ Business managers view economics and ethics as two mutually exclusive spheres.¹²² From the monophonic standpoint, “social responsibility” possesses three key defects. First, it expresses a fundamental misunderstanding of the essence of a free market.¹²³ Second, it mistakenly allows the interests of groups other than shareholders to constrain, rather than expand, corporate activities.¹²⁴ Third, it does not provide evidence of any economic benefits from investing in social initiatives.¹²⁵ This position suggests a single argument for legal and ethical compliance; namely, to sidestep the monetary costs of noncompliance.¹²⁶ Accordingly, the monophonic view of corporate governance leads to reactive compliance with environmental and human rights standards but only insofar as these norms are grounded in the “hard” rule of law.¹²⁷ That is, under the monophonic view, corporations comply only when noncompliance threatens sanctions pursuant to the “hard” rule of law. The monophonic view is hardwired to legal accountability (legal norms

120. See FRIEDMAN, *supra* note 29, at 133; see also Willa Johnson, *Freedom and Philanthropy: An Interview with Milton Friedman*, 71 BUS. & SOC. REV. 11, 14 (1989). Friedman also offered this decidedly monophonic account of corporate governance:

In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.

Friedman, *supra* note 46, at 32.

121. R. Edward Freeman, *The Politics of Stakeholder Theory: Some Future Directions*, 4 BUS. ETHICS Q. 409, 412 (1994).

122. See JACKSON, *supra* note 31, at 87; Kevin T. Jackson, *A New Mindset for Business Education: Cultivating Reputational Capital*, in RETHINKING BUSINESS MANAGEMENT 149, 150 (Samuel Gregg and James Stoner, Jr. eds., 2d ed. 2008).

123. See FRIEDMAN, *supra* note 29, at 133 (arguing that a corporation’s social responsibility is to “increase profits”).

124. See *id.* at 133 (implying that social responsibility is distracting and restrains corporate activity).

125. *Cf. id.* at 133–36.

126. See Jackson, *supra* note 122, at 149, 150.

127. Jackson, *supra* note 16, at 448.

backed by hard sanctions) and fiscal accountability to stockholders, insofar as this is mandated by corporate law.¹²⁸

B. Polyphonic Governance Model

Whereas the monophonic model is addressed to matters of agency, the polyphonic model focuses on ethics and accountability to parties outside the firm.¹²⁹ Under the polyphonic approach, maximizing profits for shareholders is not the sole purpose of a business.¹³⁰ Polyphonic corporate governance seeks to link relationships among various parties together with a broadly defined corporate mission.¹³¹ This model sees businesses as fulfilling various functions within a society.¹³² Here, businesses serve an array of other constituents.¹³³ Thus, the scope of social responsibility extends beyond merely meeting the bottom line, and business firms' ethical and discretionary responsibilities go beyond their purely economic and legal objectives.¹³⁴ Nevertheless, the monophonic view retains the basic assumption that corporations are fundamentally profit-making enterprises.¹³⁵ Corporations strive to meet the bottom line as it is necessary to preserve their economic viability. They are not social welfare agencies. Stated differently, managers have an institutional and moral duty to broader constituencies to keep the firm profitable. Norman Bowie writes, "[N]ot only does Wall Street expect a business rationale for corporate good deeds; Wall Street has a moral right to those expectations."¹³⁶ Bowie continues, "This strategy grounds the motive to seek profits in ethics itself."¹³⁷ The polyphonic view, however, correctly assumes that,

128. *Id.*

129. See CARROLL & BUCHHOLTZ, *supra* note 29, at 83–85 (discussing the notion of a stakeholder, and what is at stake for stakeholders or those outside of the firm).

130. See *id.*

131. See generally Josep M. Lozano, *Towards the Relational Corporation: From Managing Stakeholder Relationships to Building Stakeholder Relationships (Waiting for Copernicus)*, 5(2) CORP. GOVERNANCE 60, 60 (2005) (discussing relations among stakeholders and shareholders).

132. Cf. Millon, *supra* note 106, at 225. See generally BOATRIGHT, *supra* note 63, at 1.

133. These constituencies include employees, customers, bondholders, suppliers, distributors, lenders, creditors, regulators, local communities, state and federal governments, special interest groups, the environment, the communities in which the firm operates. See FREEMAN, *supra* note 29, at 25; see also Goodpaster, *supra* note 29, at 54; McDaniel, *supra* note 29, at 123; David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1378–79 (1993).

134. See CARROLL & BUCHHOLTZ, *supra* note 29, at 87 (providing a graphical illustration of stakeholder view of the firm).

135. See Jensen & Meckling, *supra* note 116, at 310.

136. See NORMAN E. BOWIE, *BUSINESS ETHICS: A KANTIAN PERSPECTIVE* 142 (1999).

137. See *id.* at 142.

even in pursuit of profit, corporations must deploy financial, political, and social capital in a socially responsible way. Corporate governance must seek to confer not only financial benefits to shareholders, but also social benefits to all of the firm's stakeholders.¹³⁸

The monophonic perspective, which has been characterized as "corporate Neanderthalism,"¹³⁹ fails to account for the fact that, in today's information age, corporations are under meticulous observation.¹⁴⁰ It fails to consider that a watchful public, media, and government will hold multinational corporations accountable for "corporate Neanderthalism"; it ignores firms' broader social responsibilities; and it ignores the potential for firms to incur "ethical blowback"¹⁴¹ from broader constituencies. Robert Solomon, for example, attacks the monophonic model for its "pathetic understanding of stockholder personality as *homo economicus*."¹⁴² Whereas Amartya Sen challenges the mindset according to which "business principles are taken to be very *rudimentary* . . . essentially restricted . . . to profit maximization, but with a very wide reach [to] . . . all economic transactions."¹⁴³

Before turning to the question of whether a polyphonic approach to corporate governance provides a satisfactory theoretical anchoring for the emerging regime of civil regulations that increasingly characterizes global governance, it will be useful to examine an additional approach, known as "integrative social contracts theory."

C. Integrative Social Contracts Theory ("ISCT")

Both corporate social responsiveness and the stakeholder view alike are criticized on the ground that they do not provide management with precise standards of conduct.¹⁴⁴ By itself, the concept of corporate social responsiveness falls short of offering normative guidelines for managers

138. See BOATRIGHT, *supra* note 63, at 385 (setting forth the stakeholder theory).

139. DONALDSON, *supra* note 5, at 45.

140. Ross, *supra* note 32, at 7-8; Spar, *supra* note 47, at 7-9.

141. See Thomas Donaldson, "Ethical Blowback": *The Missing Piece in the Corporate Governance Puzzle—The Risks to a Company Which Fails to Understand and Respect Its Social Contract*, 7 CORP. GOVERNANCE 534, 536 (2007).

142. See ROBERT C. SOLOMON, *ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS* 45 (1992).

143. See Amartya Sen, *Economics, Business Principles, and Moral Sentiments*, 7 BUS. ETHICS Q. 5, 5 (1997). "In contrast, moral sentiments are seen to be quite *complex* (involving different types of ethical systems), but it is assumed, that at least in economic matters, they have a very *narrow reach* (indeed, it is often presumed that such sentiments have no real influence on economic behavior)." *Id.*

144. See BOATRIGHT, *supra* note 63, at 368; *see also* DONALDSON, *supra* note 5, at 45.

to pursue in response to social expectations and demands.¹⁴⁵ Likewise, stakeholder theory has been faulted for its failure to reconcile the competing interests of various stakeholders.¹⁴⁶

In response to these challenges, Thomas Donaldson and Thomas Dunfee developed a social contract theory of business.¹⁴⁷ The ISCT develops two key concepts: hypernorms and moral free space.¹⁴⁸ These concepts are illustrated by a reference to a series of concentric rings that represent core norms accepted by corporations, industries, or economic cultures.¹⁴⁹ Hypernorms, which rest at the center, are norms embodying transcultural values fundamental to human existence, such as prescriptions shared by main religions around the world and most basic human rights.¹⁵⁰ Such higher-order norms impose minimal necessary constraints on the capacity of communities to formulate their own rules.¹⁵¹ Advancing away from the center of the rings, one finds norms which have greater cultural specificity than those at the center.¹⁵² These rules are molded by the social norms of sundry economic communities, such as corporations, subunits

145. See BOATRIGHT, *supra* note 63, at 370 (noting that CSR requires “responsive-ness”); R. EDWARD FREEMAN & DANIEL R. GILBERT, JR., *CORPORATE STRATEGY AND THE SEARCH FOR ETHICS* 104–05 (1988); *CSR-1 to CSR-2*, *supra* note 59, at 152; Mitnick, *supra* note 59, at 6.

146. DONALDSON, *supra* note 5, at 45–46. Thomas Donaldson writes that “[d]espite its important insights, the stakeholder model has serious problems. The two most obvious are its inability to provide standards for assigning relative weights to the interests of the various constituencies, and its failure to contain within itself, or make references to, a normative justificatory foundation.” *Id.*; see also Thomas W. Dunfee & Thomas Donaldson, *Contractarian Business Ethics: Current Status and Next Steps*, 5 *BUS. ETHICS Q.* 173, 175 (1995). The stakeholder model has also been challenged on the ground that it does not provide sufficiently rigorous criteria for settling disputes about who or what qualifies as a legitimate stakeholder, as in the case of child laborers working for a multinational corporation’s supplier when the firm is in the process of a merger with another multinational firm. See Bert van de Ven, *Human Rights as a Normative Basis for Stakeholder Legitimacy*, 5(2) *CORP. GOVERNANCE* 48, 55–56 (2005).

147. See DONALDSON & DUNFEE, *supra* note 12, at 235–36; Thomas Donaldson & Thomas W. Dunfee, *Integrative Social Contracts Theory: A Communitarian Conception of Economic Ethics*, 11 *ECON. & PHIL.* 85, 85–86 (1995); see also Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 *ACAD. MGMT. REV.* 252, 252 (1994) [hereinafter *Toward a Unified Conception*].

148. DONALDSON & DUNFEE, *supra* note 12, at 222.

149. See *id.*

150. See *id.* at 74–81.

151. See *id.* at 49–52.

152. *Id.* at 222.

within firms, industries, professional associations, trade groups, governmental bodies, and so on.¹⁵³

The next ring represents moral free space, where one finds norms that are inconsistent with at least some other norms embraced by other economic communities.¹⁵⁴ Within moral free space, members are free to establish their own norms for economic conduct.¹⁵⁵ However, such norms must have the status of being both “authentic” and “legitimate.”¹⁵⁶ A norm is “authentic” if community members have given their informed consent to the norm’s existence while still retaining a right to exit the community should they come to disapprove of the norm.¹⁵⁷ The existence of specific authentic norms is established by empirical conditions expressing customary acceptance by the relevant economic community.¹⁵⁸

A norm is “legitimate” if it does not run afoul of a hypernorm.¹⁵⁹ At the outermost ring are illegitimate norms, which are incompatible with hypernorms. Donaldson and Dunfee assert that integrative social contracts theory provides a normative core for stakeholder theory.¹⁶⁰ Following this line of thought entails consulting relevant community norms to decide, first, who counts as a stakeholder, and, second, what obligations extend from the firm to the stakeholders.¹⁶¹ Conflicts between norms are resolved by determining the dominant legitimate norms, which are accorded priority.¹⁶²

The preceding discussion shows the need for corporations to adapt to societal expectations and adopt societal norms. While both CSR and stakeholder theory advance the general notion that corporations should be attuned to a variety of stakeholders’ demands, social contract theory makes a significant contribution beyond those accounts. Social contract

153. *Id.* at 40.

154. *Id.* at 222.

155. *Id.* at 38.

156. *Id.* at 46.

157. *Id.* at 43.

158. Most members of community C approve of compliance with N in recurrent situation S, most members of C disapprove of deviance from N in S, a substantial percentage (well over 50%) of members of C comply with N when facing S. *See Toward a Unified Conception*, *supra* note 147, at 263–64.

159. *Id.* at 265.

160. *Id.* at 254.

161. *See* DONALDSON & DUNFEE, *supra* note 12, at 235–36.

162. *Id.* at 49. In circumstances lacking dominant or well-established norms, firms remain in the area of moral free space. *Id.* at 85. It should be noted that, according to ISCT, all of firms’ activities must comply with extant and applicable hypernorms. *See* Donaldson & Dunfee, *supra* note 147, at 89; *see also Toward a Unified Conception*, *supra* note 147, at 268–69.

theory accords deeper meaning and substance to the notion of CSR by fastening it to communal norms.¹⁶³ The social contract perspective on corporate governance provides an explanation for corporations' acceptance of global civil regulations.¹⁶⁴ These regulations, as understood in ISCT's terminology, are "extant social contracts"—the product of economic communities voluntarily adopting norms within moral free space.¹⁶⁵ ISCT highlights the normative content of the standards necessary for adopting moral principles. Without definite content—i.e., without a definite mission for corporate governance—stakeholders would engage in power-wars over their respective interests.¹⁶⁶ CSR scholars and ethicists, for instance, consider the human rights and environmental norms that are voluntarily established by multinational firms to incorporate genuine moral obligations that are recognized by worldwide consensus.¹⁶⁷ Accordingly, ISCT's notion of hypernorms accounts substantially for the emergence of global civil regulations in the form of "soft" and "hard" law.

D. Corporate Reputational Capital: The Missing Link

Given its emphasis on the wider society, the rise of civil regulation should lead corporate governance to embrace the polyphonic view. Paradoxically, however, its rise has not diminished the importance global companies attach to the monophonic model.¹⁶⁸ Nevertheless, as many global companies have discovered, there is evidence that commitment to responsible global corporate citizenship comes with financial advantages.¹⁶⁹ The rise of civil regulations, therefore, begs the question whether corporate governance can effectively synchronize the monophonic and polyphonic viewpoints. When corporate governance, in an effort to

163. See, for example, Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 546 (1998), and Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 338 (1997), for a discussion of the concept of social norms.

164. See generally DONALDSON & DUNFEE, *supra* note 12, at 25 (discussing social contract and global civil regulations).

165. Thomas Dunfee, *Challenges to Corporate Governance: Corporate Governance in a Market with Morality*, LAW & CONTEMP. PROBS., Summer 1999, at 129, 145. See generally Dunfee, *supra* note 23, at 23.

166. See DONALDSON & DUNFEE, *supra* note 12, at 97 (the graphic table sets out the dynamics that occur in the "moral free space").

167. See, e.g., Frederick, *supra* note 14, at 165.

168. BAKAN, *supra* note 3, at 27.

169. See S. Prakash Sethi & Linda M. Sama, *Ethical Behavior as a Strategic Choice by Large Corporations: The Interactive Effect of Marketplace Competition, Industry Structure and Firm Resources*, 1 BUS. ETHICS Q. 85, 95–98 (1998).

stockpile reputational capital, begins to maximize shareholder wealth by properly accommodating various stakeholders' interests, synchronization may be attained.¹⁷⁰ In other words, reputational capital provides a missing link in global governance. The notion of reputational capital recognizes that the volume and breadth of social expectations are increasing. The ISCT provides the theoretical foundation. When micro-social contracts are breached, the breaches cause direct reputational harm and diminish corporate "reputational assets."¹⁷¹ When the "contracts" are "performed," the firm's reputational capital grows.¹⁷²

The concept of reputational capital emerged in tandem with the ideal of free-market capitalism, which has been modified with the advent of civil society's focus on CSR.¹⁷³ Reputational capital may prove to be indispensable for modern corporate managers. It illuminates how managers should commit to CSR to preserve and build a firm's intangible reputational assets.¹⁷⁴ Managers' commitment to CSR is further buttressed by the emerging corpus of global civil regulations.¹⁷⁵ Simply put, the "sanction" for noncompliance with civil standards translates into reputational loss. The "reward" for honoring the standards is reputational gain. Accordingly, the emerging "accountability regimes" sanction corporations for breaches of their CSR.

III. THE REGIME OF GLOBAL CIVIL REGULATIONS

I now turn to the emergence of a global governance regime that primarily stands for civil business regulation, or "soft law." Civil regulations utilize private, nonstate, and market-based regulatory regimes to

170. See Goodpaster, *supra* note 29, at 57–58.

171. See Donaldson, *supra* note 141, at 534–36.

172. The author defines "reputational capital" as a firm's intangible long-term strategic assets calculated to generate profits. The reputational capital of a corporation is a hybrid of economic values and moral values. See GRAHAME DOWLING, *CREATING CORPORATE REPUTATIONS: IDENTITY, IMAGE, AND PERFORMANCE* 23 (2001); see also CHARLES J. FOMBRUN & CEES B.M. VAN RIEL, *FAME & FORTUNE: HOW SUCCESSFUL COMPANIES BUILD WINNING REPUTATIONS* 32–35 (2004) (discussing "perceptual and social assets"); JACKSON, *supra* note 31, at 56; PAINE, *supra* note 17 (discussing numerous payoffs including increased market share, acquisition of ideas and talent, and diminished costs for activities such as funding, marketing, and recruiting). See generally RONALD J. ALSOP, *THE 18 IMMUTABLE LAWS OF CORPORATE REPUTATION* 17 (2004); CHARLES J. FOMBRUN, *REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE* 1 (1996).

173. See JACKSON, *supra* note 31, at 25–35.

174. Ross, *supra* note 32, at 8.

175. See Edwin Epstein, Commentary, *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*, 44 AM. BUS. L.J. 207, 214, 219 (2007).

govern multinational enterprises and their global supply networks.¹⁷⁶ They regulate the impact multinational companies and markets have on human rights practices, labor conditions, environmental sustainability, and community development, particularly in less developed countries.¹⁷⁷ In the past, businesses and their leaders sought to cure social ills at the local level through philanthropic initiatives.¹⁷⁸ Unlike local community philanthropy, however, CSR has become increasingly transnational in its reach due to the social contract for multinational business.¹⁷⁹

A. Background on Civil Regulations

Along with the growth of CSR, a surge of public interest advocacy, spearheaded by nongovernmental organizations (“NGOs”) and regulators, calls for the introduction of enforceable instruments to support supervision of social responsibility and corporate accountability.¹⁸⁰ Among the mechanisms to be employed are public monitoring campaigns and litigation targeting multinational enterprises over human rights and workplace violations, as well as promulgation of “soft” law norms.¹⁸¹ The goal is to increase businesses’ involvement with CSR.¹⁸² To that aim, civil society groups step in to pressure businesses and hold them accountable.¹⁸³

176. See generally David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261, 265–68. (2008) (discussing various aspects of civil regulation).

177. See *id.* at 262.

178. See, e.g., ROBERT H. BREMNER, *AMERICAN PHILANTHROPY* 45, 123 (1st ed. 1960) (noting that philanthropy occurred on the local, community level).

179. See DONALDSON & DUNFEE, *supra* note 12, at 15 (discussing the European social contract).

180. Jonathan P. Doh & Terrence R. Guay, *Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective*, 43 J. MGMT. STUD. 47, 47 (2006).

181. See Christine Parker, *Meta-Regulation: Legal Accountability to Corporate Social Responsibility*, in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* 207, 216–17 (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007) (proposing several remedial measures); see also Bronwen Morgan, *The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality*, 12 SOC. & LEGAL STUD. 489, 517 (2003). See generally BRAITHWAITE & DRAHOS, *supra* note 24, at 1 (providing a superb illustration of individual regulatory mechanism across various industry sectors); RONNIE D. LIPSCHUTZ & JAMES K. ROWE, *GLOBALIZATION, GOVERNMENTALITY AND GLOBAL POLITICS: REGULATION FOR THE REST OF US?* 76–78 (2005); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 543 (2000) (discussing private mechanism in public governance).

182. See Parker, *supra* note 181, at 207, 215–16.

183. See generally Winston, *supra* note 48.

Civil regulations differ from customary methods of business self-regulation in several ways. First, the regulations promote a variety of public interests, not just the interests of companies or industries.¹⁸⁴ Second, unlike established modes of business self-regulation, civil regulations arise in reaction to the society's expectations with respect to businesses.¹⁸⁵ Society's expectations, in turn, are driven by activists who expose corporations' breaches of their CSR, or, in terms of the ISCT, breaches of the "terms" of the social contract.¹⁸⁶ Finally, unlike conventional business self-regulation, civil regulation is more apt to engage nonbusiness constituents in processes that are pertinent to civil society.¹⁸⁷ In sum, the regulations establish nonstate mechanisms for governing transnational companies and markets.¹⁸⁸

1. The Global Public Domain

The growth of global civil regulation serves as an interface between multinational corporations and private governance. The rise of such regulation is connected to the emergence of a new global public domain.¹⁸⁹ Comprised of both private and public participants, the global public domain is a forum for discussion, debate, and activism regarding the creation of "global public goods."¹⁹⁰ In the context of global environmental and social responsibility, cooperation between multinationals and civil society institutions presupposes delineation of the scope of those responsibilities.¹⁹¹ Many of the entities comprising the global public domain are NGOs.¹⁹² NGOs are mainly headquartered in North America and

184. See Vogel, *supra* note 176, at 263.

185. See *id.* at 262–63.

186. See generally Donaldson, *supra* note 141.

187. See Vogel, *supra* note 176, at 263.

188. Robert Falkner, *Private Environmental Governance and International Relations: Exploring the Links*, GLOBAL ENVTL. POL., May 2003, at 72, 79.

189. See Ruggie, *supra* note 55, at 499–531.

190. See Inge Kaul, Isabelle Grunberg & Marc A. Stern, *Defining Global Public Goods*, in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 2, 14–15 (Isabel Grunberg, Inge Kaul & Marc Stern eds., 1999).

191. See *id.* 113–15; see also Ronnie D. Lipschutz, *From Local Knowledge and Practice to Global Environmental Governance*, in APPROACHES TO GLOBAL GOVERNANCE THEORY 259, 261 (Martin Hewson & Timothy J. Sinclair eds., 1999).

192. NGOs are turning increasingly global, as illustrated by the fact that over 1,000 of them have memberships comprised from three or more countries. See Shaughn McArthur, *Global Governance and the Rise of NGOs*, ASIAN J. OF PUB. AFF. 54, 60 (2009). NGOs are also becoming highly influential global agents. See *id.* Although a significant amount of NGO efforts have been directed toward public institutions and policies, in recent years, they have been seeking more and more to gain sway over practices of companies, industries, and markets as well. See Caroline Harper, *Do the Facts Matter? NGOs, Research,*

Europe.¹⁹³ They scrutinize and try to gain sway over an array of transnational business practices.¹⁹⁴ There are, however, other actors in the global public domain that exert influence on corporate accountability. Consumer organizations, environmental and sustainability groups, human rights advocates, labor unions, religious affiliations, student associations, social and ethical funds, and socially oriented institutional investors, are all part of the global public domain.¹⁹⁵

2. Scope and Magnitude of the Regulations

The quantity and span of global civil regulations grew substantially throughout the 1990s.¹⁹⁶ Private regulations that specify standards for responsible business conduct are in place for nearly all global industry sectors and internationally traded products or services.¹⁹⁷ Currently,

and *International Advocacy*, in GLOBAL CITIZEN ACTION 247, 247 (Michael Edwards & John Gaventa eds., 2001).

193. See Kal Raustiala, Note, *The "Participatory Revolution" in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537, 568 (1997); see also Sally Engle Merry, *Constructing a Global Law-Violence Against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 972–73 (2003) (arguing that NGOs with the most influence are mostly from North America and Europe).

194. Several prominent works have discussed the global civil society's emergence and its impact, as well as global citizen activism, including efforts to address corporate conduct. See generally GLOBAL SOCIAL MOVEMENTS 1 (Robin Cohen & Shirin Rai eds., 2000) [hereinafter MOVEMENTS]; MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS 43–44, 89–103 (1998); MARJORIE MAYO, GLOBAL CITIZENS: SOCIAL MOVEMENTS AND THE CHALLENGE OF GLOBALIZATION 31 (2005); SIDNEY TARROW, THE NEW TRANSNATIONAL ACTIVISM 27 (2005); Peter Newell, *Campaigning for Corporate Change: Global Citizen Action on the Environment*, in GLOBAL CITIZEN ACTION 189, 189 (Michael Edwards & John Gaventa eds., 2001).

195. An expansive body of scholarship has also examined the make-up of the global public domain. See, e.g., SRILANTHA BATLIWALA & L. DAVID BROWN, TRANSNATIONAL CIVIL SOCIETY: AN INTRODUCTION 1 (2006); TARROW, *supra* note 194, at 1 (2005); MOVEMENTS, *supra* note 194 (defining global social movements).

196. See ZADEK, *supra* note 25, at 1; U.N. Res. Inst. For Soc. Dev., Business Responsibility for Sustainable Development Project, *Working Paper: Corporate Codes of Conduct: Self-Regulation in a Global Economy* 1 (2001) (prepared by Rhys Jenkins), [hereinafter *Self-regulation In a Global Economy*].

197. In excess of 2,300 transnational companies have approved the Business Charter for Sustainable Development authored by the International Chamber of Commerce. See The Global Development Research Center, ICC's Business Charter for Sustainable Development, <http://www.gdrc.org/sustbiz/icc-charter.html> (last visited Sept. 1, 2009). Among them are apparel, athletic equipment, chemicals, coffee, cocoa, computers and electronic equipment, diamonds and gold, energy, financial services, fisheries, forestry, minerals and mining, palm oil, rugs, toys, and tourism. See Mathias Koenig-Archibugi, *Transnational Corporations and Public Accountability*, 34 GOV'T & OPPOSITION 234, 234–35 (2004); Ans Kolk & Rob van Tulder, *Setting New Global Rules? TNCs and*

approximately 300 products or industry codes are enacted.¹⁹⁸ Many of these codes speak to environmental or employment practices.¹⁹⁹ Multiple codes regulate a significant number of different products and sectors.²⁰⁰ Many companies periodically report their environmental and social practices.²⁰¹ A large number of these companies have formulated their own codes while also subscribing to additional industry and cross-industry codes of conduct.²⁰² For example, The United Nations Global Compact, which is the biggest private business code, boasts over 3,500 corporate signatories, spanning six continents.²⁰³ The number of major global financial institutions signing the United Nations Principles for Responsible Investment more than doubled to reach 381 in 2008, representing assets of \$14 trillion.²⁰⁴

As previously noted, the growth of civil regulations has resulted from civil society's increased expectations for CSR.²⁰⁵ Self-regulation and voluntary compliance²⁰⁶ have grown up within the global business framework.²⁰⁷ A variety of self-regulation tools are available to assist

Codes of Conduct, TRANSNAT'L CORPS., Dec. 2005, at 1, 1. See Michael Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 913 (2007), for an overview of the efforts of individual companies across various sectors in establishing networks of private contract to enhance environmental standards of their suppliers. See generally *Self-regulation In a Global Economy*, *supra* note 196, at 1; Gary Gereffi, Ronie Garcia-Johnson & Erika Sasser, *The NGO-Industrial Complex*, FOREIGN POL'Y, July/Aug. 2001, at 56, 56.

198. Vogel, *supra* note 176, at 262.

199. *Id.*

200. *See id.*

201. *See id.*

202. *See id.*

203. See generally U.N. GLOBAL COMPACT., CORPORATE CITIZENSHIP IN THE WORLD ECONOMY (2008), available at http://www.unglobalcompact.org/docs/news_events/8.1/gc_brochure_final.pdf. Among them are BP, Cisco Systems, Daimler Benz, Deloitte-Touche, DuPont, Hewlett-Packard, Novartis, Royal Dutch Shell, Unilever, and Volvo. The Compact contains 10 principles that aim to advance human rights and worker rights, protect the environment, and reduce corruption. *Id.* Firms wishing to join the Compact submit a letter of intent from the CEO and consent to publish in annual reports or similar communications an account of the ways they are lending support for the Compact. *Id.* The objective is to merge principles of the Compact into a company's business culture, strategy, and day-to-day undertakings. *Id.*

204. Press Release, U.N. Global Compact, Principles for Sustainable Development (June 17, 2005), available at http://www.unglobalcompact.org/newsandevents/news_archives/2008_06_17a.html.

205. See generally Ruggie, *supra* note 55, at 499–531.

206. See ZADEK, *supra* note 25, at 122.

207. Voluntary compliance takes various forms, but they are mainly best practices, codes of conduct, environmental and social management systems, performance standards,

firms in their commitments to corporate social responsibility.²⁰⁸ As the discussion below illustrates, these tools are used within the context of accountability regimes, which are principally linked to the firms' reputations. Thus in the context of reputational capital, the private sector is equipped with instrument to manage and regulate business conduct. This regulation seeks to reduce the degree of environmental and social risk that firms' actions otherwise cause.

B. Characteristics of Civil Regulations

Unlike traditional top-to-bottom relations established by governmental authority, no clearly established hierarchy exists among the various agents exerting influence on international commercial society within transnational civil regulation.²⁰⁹ For the past several decades, globalization has transformed the landscape of international civil and business regulations.²¹⁰ The polyphonic view has finally caught up with corporate

labeling and certification schemes, rating agencies, sustainable monitoring, reporting transparency, and disclosure guidelines. *Barricades and Boardrooms*, *supra* note 49, at 27–30.

208. See *EU Green Paper*, *supra* note 48, at 6.

209. See Ronnie D. Lipschutz, *supra* note 191, at 259, 261. Nevertheless, significant connections remain between civil regulations and conventional 'hard' legal regimes. See Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in *THE POLITICS OF GLOBAL REGULATION* 44, 48 (Walter Mattli & Ngaire Woods eds., 2009). For example, civil regulations adopted by private enterprise tend to incorporate host countries' domestic legal norms. See *id.* at 49. Moreover, many private regulatory initiatives result from regulatory standards promulgated by intergovernmental organizations, such as the International Finance Corporation of the World Bank, the International Labor Organization, and the Organization for Economic Cooperation and Development. *Id.* at 44. Further, the United Nations and the European Union, along with the governments of Austria, Belgium, France, Germany, Great Britain, and the United States, have all been involved in promoting the establishment of global industry codes of conduct. See K. J. Holsti, *Governance Without Government: Polyarchy in Nineteenth-Century European International Politics*, in *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* 30, 55–56 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

210. See Thomas J. Biersteker, *The "Triumph" of Neoclassical Economics in the Developing World*, in *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS*, 102, 110–11 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992); Rosenau, *supra* note 4, at 13; Scholte, *supra* note 20, at 15–23; cf. ROBERT W. COX, *Structural Issues of Global Governance: Implications for Europe*, in *APPROACHES TO WORLD ORDER* 237 (1996) (examining diminishing political authority of the European nation-states who are members of the European Union and its impact on its regulatory landscape).

governance.²¹¹ That, together with the advent of CSR, reveals the private sector's intensifying influence on public policy and regulation.²¹² Scholars have noted that the regulatory power of the state is undergoing extensive decentralization under the influence of globalization.²¹³ Accordingly, blends of state and market, public and private, and traditional and self-regulatory institutional structures, characterized by alliances built among nation-states, NGOs, and business enterprises, are replacing the traditional mode of top-to-bottom hierarchical regulation.²¹⁴

Public policy once created and enforced through official regulatory organs, such as environmental boards and employment nondiscrimination panels, is being handled by means of dialogue, negotiation, and cooperation between the public and private sectors.²¹⁵ Consequently, global business regulatory instruments are undergoing transformation.²¹⁶ Global business regulation is no longer restricted to administrative and legislative activity.²¹⁷ It encompasses market-oriented agents that impose business disclosure, monitoring, reporting, and transparency requirements, backed with reputational sanctions to address business misconduct.²¹⁸

211. Cf. Knill & Lehmkuhl, *supra* note 11, at 44–45. See generally R. Edward Freeman, Andrew C. Wicks & Bidhan Parmar, *Stakeholder Theory and the "Corporate Objective Revisited"*, 15 ORGANIZATION SCIENCE 364, 364 (2004); R. Edward Freeman, *supra* note 121, at 409–22.

212. See Lester M. Salaman, *The New Governance and the Tools of Public Action: An Introduction*, in THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 1, 8, 11–14 (Lester M. Salamon & Odus V. Elliott eds., 2002).

213. Cf. Yuval Feldman & Orly Lobel, *Decentralized Enforcement in Organizations: An Experimental Approach*, 2 REG. & GOVERNANCE 165–92 (2008) (concluding that social and cultural norms dominate state regulation and its policy-making as far as civil enforcement).

214. See generally Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498, 498 (2004) (discussing employment disputes, organizational compliance, financial regulation, and employee misconduct).

215. See, e.g., David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency*, 17 BUS. ETHICS Q. 453, 455 (2007); see also Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 371–76 (2004).

216. See Bruce L. Benson, *The Spontaneous Evolution of Commercial Law* 55 S. ECON. J. 644, 658 (1989).

217. See, e.g., O'Connell, *supra* note 9, at 110; LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 39 (1983) (delineating historical development of transnational business litigation); see also *supra* text accompanying note 9.

218. See Feldman & Lobel, *supra* note 213, at 165 (2008).

C. The "Triangular" Nature of Authority

Civil regulation is comprised of market-based, nonstate, and private regulatory structures.²¹⁹ These components govern the behavior of transnational enterprises along with their global supply networks.²²⁰ One of the chief characteristics of civil regulation is that its enforcement, governance, and legitimacy do not rest on traditional institutions of public authority.²²¹ Whereas, traditionally, corporate governance was shaped by substantive law promulgated by governmental authority, today's transnational businesses function within a new slate of authorities.²²² Areas of authority traditionally reserved to government are now shared with nonstate authorities.²²³

Civil regulations ordinarily function alongside nation-states, not from within.²²⁴ Thus, as opposed to hard law, civil regulations are the product of "soft law," or private law, rather than of nation-states' legally enforceable norms.²²⁵ In that sense, companies subject to a multitude of civil regulations face reputational rather than legal penalties.²²⁶ The advent of soft-law's regulatory influence outside nations' regulatory schemes has empowered transnational nonstate actors.²²⁷ The result is that the private sector has a much more prominent public role, and private authorities have a growing role in transnational economic regulation.²²⁸ Corporations increasingly form a part of an emerging global public domain. Civil regulations, however, do not supplant nation-states. Instead, they institute

219. Cutler, Haufler & Porter, *supra* note 4, at 3; *see* Scholte, *supra* note 20, at 19.

220. *See* sources cited *supra* note 219.

221. *See* sources cited *supra* note 219.

222. *See* Cutler, Haufler & Porter, *supra* note 4, at 4–18; Scholte, *supra* note 20, at 19.

223. *See* ROBERT W. COX, *Structural Issues of Global Governance: Implications for Europe*, in *APPROACHES TO WORLD ORDER* 237, 237 (1996) (discussing the shift of authority away from the states in the European Union).

224. *See* Virginia Haufler, *Globalization and Industry Self-Regulation*, in *GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION* 226, 226 (Miles Kahler & David A. Lake eds., 2003).

225. *See id.* at 226–27.

226. *See* John J. Kirton & Michael J. Trebillock, *Introduction: Hard Choices and Soft Law in Sustainable Global Commerce*, in *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE* 3, 6, 11 (John J. Kirton & Michael J. Trebillock eds., 2004). *See generally* *SOFT LAW IN GOVERNANCE AND REGULATION* (Ulrika Moth ed., 2004); Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 434–50 (2000).

227. *See* Haufler, *supra* note 224, at 226–27.

228. *See* VIRGINIA HAUFLER, *THE PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION, IN THE GLOBAL ECONOMY* 12–15 (2001); *see also* Hall & Biersteker, *supra* note 4, at 3–4.

governance systems within wider global structures of “social capacity and agency” where none existed before.²²⁹ The advent of civil regulation spells the emergence of what some scholars term a global “governance triangle,” wherein nation-states are but a single source of global regulatory authority.²³⁰

The notion of governance without government made its debut in the scholarly literature during the 1990s.²³¹ Its debut, precipitated by economic globalization, highlighted the changes that globalization caused in the governance structure of international society.²³² The term “governance” came to be used to refer to self-organizing systems that stand alongside the hierarchies and markets that comprise government structures.²³³ Global governance, in turn, refers to the expansion of the sphere of influence of governing structures to entities beyond nation-states that do not possess sovereign authority.²³⁴ Governance and government are in fact two logically distinct notions. Governance connotes a process founded on absence of centralized international governmental authority. Ideally, “global governance” undertakes the role within the international realm that governments assume within the nation-state.²³⁵

D. Forms of Civil Regulations

The growth of corporate social responsibility reveals the emergence of novel global governance mechanisms and business civil regulations.²³⁶ Global companies are deploying a variety of devices to propagate principles for responsible business conduct.²³⁷ These may be categorized as follows: (1) self-regulation—voluntary mechanisms taken on individually in the market; (2) inter-firm cooperation—voluntary tools established

229. See Ruggie, *supra* note 55, at 519.

230. See Abbott & Snidal, *supra* note 209, at 44–50.

231. See Linda Cornett & James A. Caporaso, “*And Still It Moves*” *State Interests and Social Forces in the European Community*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 219, 228 n.21 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

232. See *id.*

233. R. A. W. Rhodes, *The New Governance: Governing Without Government*, 44 POL. STUD. 652, 660 (1996).

234. Lawrence S. Finkelstein, *What is Global Governance?*, 1 GLOBAL GOVERNANCE 367, 369 (1995).

235. See James N. Rosenau, *Citizenship in a Changing Global Order*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 272, 286–87 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

236. See Cutler, Haufler & Porter, *supra* note 4, at 20.

237. See Laura Albareda, *Corporate Responsibility, Governance and Accountability: From Self-Regulation to Co-Regulation*, 8 CORP. GOVERNANCE 430, 430 (2008).

cooperatively between firms and business associations; and (3) co-regulation and multi-stakeholder partnerships—voluntary mechanisms developed collaboratively with other entities, such as public-private and hybrid partnerships (governments, international organizations, NGOs, trade unions, and governments).²³⁸

1. Voluntary Self-Regulation

Numerous large, global companies institute their own codes of conduct that aim to regulate their operations worldwide.²³⁹ One example of voluntary self-regulation is the Leon Sullivan Foundation's promulgation of the Global Sullivan Principles of Social Responsibility (the "Principles") in 1999.²⁴⁰ The Principles encompass a breadth of CSR concerns, such as: employee freedom of association, health and environmental standards, and sustainable development.²⁴¹ Fortune 500 companies are now motivated to adjust their internal practices to comply with the standards found within the Principles.²⁴²

238. *See id.* at 435–36.

239. *See, e.g.,* Gene R. Lacznia & Jacob Naor, *Global Ethics: Wrestling with the Corporate Conscience*, BUS., July–Sept. 1985, at 7 (discussing the examples of Allis Chalmers, Caterpillar Tractor, Chiquita Brands International, Medtronic, and S.C. Johnson). While there are firms that do not have comprehensive codes addressing their international operations, many adopt codes that include sections that speak to foreign practices. *Id.* For instance, Northrop Grumman Corporation's "Standards of Business Conduct" contains an "International" segment. Northrop Grumman Corporation, Standards of Business Conduct, at 10, http://www.northropgrumman.com/pdf/noc_standards_conduct.pdf (last visited Sept. 20, 2009). The section reads, in relevant part:

Employees and consultants or agents representing the company abroad or working on international business in the United States should be aware that the company's Values and Standards of Conduct apply to them anywhere in the world. Less than strict adherence to laws and regulations that apply to the company's conduct of international business would be considered a compromise of our Values and Standards of Conduct.

Id.

240. *See* The Sullivan Foundation, The Global Sullivan Principles, <http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp> (last visited Sept. 3, 2009).

241. The objectives of the Principles are to support economic, social, and political justice by firms wherever they conduct operations; to advance human rights and to promote equality of opportunity at all levels of employment, including racial and gender diversity on decision-making committees and boards; and to train and advance disadvantaged workers for technical, supervisory, and management opportunities. *Id.*

242. *See, e.g.,* Gordon Leslie Clark & Tessa Hebb, Why Do They Care? The Market for Corporate Global Responsibility and the Role of Institutional Investors 17–23 (June 16, 2004) (unpublished paper presented at the Using Pensions for Social Control of Capitalist Investment conference, available at http://www.community-wealth.org/_pdfs/

In 2005, the Global Business Standards (“GBS”) Codex was published by a group of scholars.²⁴³ Intended “as a benchmark for [firms] wishing to create their own world-class code,” the GBS Codex set forth eight principles shared by five well-known codes that are embraced by the world’s largest companies.²⁴⁴ Incorporated in the principles were standards in the following categories: citizenship, dignity, fairness, fiduciary, property, reliability, responsiveness, and transparency.²⁴⁵ Individual corporate codes of conduct usually contain an amalgamation of prudential, technical, and moral norms, declared as general principles.²⁴⁶ Critics point to the various codes’ failures to include enforcement sanctions and failures to emphasize profit maximization.²⁴⁷ Yet corporations increasingly specify criteria such as “profitability” and “shareholder interests” in their mission statements.²⁴⁸ Nevertheless, they also affirm that corporate responsibility for “stakeholder interests” means considering both community interests and sustainability.²⁴⁹

articles-publications/state-local/paper-clark.pdf) (noting that CalPERS’ may withhold investment in companies that do not meet the Sullivan Principles, thus creating the risk of reputational harm).

243. See Lynn Paine, Rohit Deshpandé, Joshua D. Margolis & Kim Eric Bettcher, *Up to Code: Does Your Company’s Conduct Meet World-Class Standards?*, HARV. BUS. REV., Dec. 2005, at 122.

244. *Id.* at 124–25.

245. See *id.* at 125.

246. See generally GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME (Oliver F. Williams ed., 2000); RAYMOND J. WALDMANN, REGULATING INTERNATIONAL BUSINESS THROUGH CODES OF CONDUCT 21 (1980).

247. WALDMANN, *supra* note 246, at 65 (discussing the need to emphasize profit); James E. Post, *Global Codes of Conduct: Activists, Lawyers, and Managers in Search of a Solution*, in GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME 103, 111 (Oliver F. Williams ed., 2000) (expanding on the lack of enforcement criticism).

248. Broadhurst, *supra* note 42, at 89.

249. The credo of Johnson & Johnson, for instance, is particularly noteworthy:

We believe our first responsibility is to the doctors, nurses and patients, to mothers and fathers and all others who use our products and services. In meeting their needs everything we do must be of high quality. We must constantly strive to reduce our costs in order to maintain reasonable prices. Customers’ orders must be serviced promptly and accurately. Our suppliers and distributors must have an opportunity to make a fair profit.

We are responsible to our employees, the men and women who work with us throughout the world. Everyone must be considered as an individual. We must respect their dignity and recognize their merit. They must have a sense of security in their jobs. Compensation must be fair and adequate, and working conditions clean, orderly and safe. We must be mindful of ways to help our employees fulfill their family responsibilities. Employees must feel free to make suggestions and complaints. There must be equal opportunity for employment,

2. Inter-Firm and Cross-Industry Cooperation

As key agents in the global economy, transnational firms wield enormous clout to influence economic activities.²⁵⁰ Firms utilize various instruments to influence global civil society. Among the more significant mechanisms are inter-firm and cross-industry cooperative instruments.²⁵¹ These instruments are developed through CSR business associations,²⁵² which formulate strategies for concerted action in the form of self-regulating proposals within the private sector.²⁵³ These nongovernmental associations of businesses promote the dissemination of best business practices.²⁵⁴ They seek to establish universal, uniform standards to combat a wide range of practices including apartheid, conflicts of interest, deception, discrimination, embezzlement, executive compensation, fraud, forgery, genocide, insider trading, the misuse of pension funds, slavery, theft, and corruption.²⁵⁵ Business associations serve as forums for corpo-

development and advancement for those qualified. We must provide competent management, and their actions must be just and ethical.

We are responsible to the communities in which we live and work and to the world community as well. We must be good citizens—support good works and charities and bear our fair share of taxes. We must encourage civic improvements and better health and education. We must maintain in good order the property we are privileged to use, protecting the environment and natural resources.

Our final responsibility is to our stockholders. Business must make a sound profit. We must experiment with new ideas. Research must be carried on, innovative programs developed and mistakes paid for. New equipment must be purchased, new facilities provided and new products launched. Reserves must be created to provide for adverse times. When we operate according to these principles, the stockholders should realize a fair return.

Johnson & Johnson, Our Credo, <http://www.jnj.com/wps/wcm/connect/c7933f004f5563df9e22be1bb31559c7/our-credo.pdf?MOD=AJPERES> (last visited Sept. 13, 2009).

250. Cutler, Haugler & Porter, *supra* note 4, at 6.

251. See Albareda, *supra* note 237, at 435–36.

252. See *id.* at 434.

253. Such business associations include: Business in the Community, Business for Social Responsibility, Caux Round Table, CSR Europe, Forum Empresa, International Business Leaders Forum, the International Chamber of Commerce (ICC) and World Business Council for Sustainable Development (WBCSD).

254. For example, Business for Social Responsibility runs programs including business ethics, the workplace, the marketplace, the community, the environment, and the global economy. See BSR, How We Work, <http://www.bsr.org/about/how-we-work.cfm> (last visited Sept. 12, 2009).

255. For example, the Caux Round Table, headquartered in Switzerland, has adopted an international code for multinational firms in Europe, North America, and Japan. The Code identifies five basic principles which, as statements of aspirations for business lead-

rate leaders to discuss and agree on a CSR plan. This entails creation of consolidated private rules, standards, and management instruments, all in the absence of legally enforceable “hard” sanctions.²⁵⁶ The associations often serve as a means for collective exertion of pressure, in order, for instance, to defend the corporations’ positions before national governments and international organizations, such as the European Union and the United Nations.²⁵⁷ As such, business associations serve as an interface between public and private authorities.²⁵⁸

Joining cooperative regulations is a wise business tactic for companies whose social or environmental practices have been targeted by activists. Whereas implementing higher environmental or social standards normally increases costs, attracting the competition to follow suit levels the playing field.²⁵⁹ At least in theory, industry and cross-industry standards inhibit companies from competing with each other. In their absence, firms would engage in a “race to the bottom” by adopting less rigorous protections for employees or the environment.²⁶⁰ Similarly, civil regulations help companies to assist each other in establishing best practices.²⁶¹ They also assist with communication and implementation of operational upgrades recommended by civil society.²⁶² It is noteworthy that NGOs’ participation in civil regulations accords a higher degree of legitimacy than obtained by codes of conduct authored by individual companies.²⁶³

ers worldwide, extend far beyond those embodied in earlier codes. The principles cover: 1) stakeholder responsibility, 2) social justice, 3) mutual support, 4) environmental concern and 5) avoidance of illicit operations and corrupt practices. Caux Round Table, Principles For Business, <http://www.cauxroundtable.org/index.cfm?&menuid=8> (last visited Sept. 22, 2009).

256. See Albareda, *supra* note 237, at 433.

257. For example, the “WBCSD defended a voluntary approach before the United Nations; CSR Europe did the same before the European Commission, [the executive branch of the European Union], and individual European governments, and BSR has done the the same with the United States government.” *Id.* at 435.

258. Although typically underwritten by corporate contributions, inter-firm initiatives sometimes obtain financial backing from international organizations. *Id.* at 436 (noting contributions from European Union, various national governments, and the United States).

259. See Sethi & Sama, *supra* note 169, at 89.

260. Debora Spar & David Yaffe, *Multinational Enterprises and the Prospects for Justice*, 52 J. INT’L AFF. 557, 557 (1999).

261. See Broadhurst, *supra* note 42, at 95–96.

262. See *id.* at 97.

263. See Dara O’Rourke, *Market Movements: Nongovernmental Organization Strategies to Influence Global Production and Consumption*, J. INDUS. ECOLOGY, Winter/Spring 2005, at 115, 122; see also Sethi & Linda, *supra* note 169, at 99–100.

This partnership increases the credibility of a company's commitments to corporate social responsibility.²⁶⁴

Moreover, transnational enterprises often follow their industry peers to implement comparable procedures and norms.²⁶⁵ This "follow the leader" dynamic spreads managerial protocols, global CSR undertakings being among them.²⁶⁶ Hence, if an industry leader consents to a code of practices, its industry peers typically follow suit.²⁶⁷ This trend also works across sectors.²⁶⁸ Indeed, the rise of civil regulations among global companies and industries has provided its own impetus as market participants wish to avoid losing reputational capital.²⁶⁹

Lastly, even ill-intended modifications in standards often have a substantial and lasting impact on business practices.²⁷⁰ CSR-type initiatives that originate as mere symbolic gestures or efforts at appeasement may well acquire legitimacy among global civil society.²⁷¹ In today's increasingly transparent global economy, staffing a CSR office, sending out an annual CSR report, combining forces with NGOs, signing on to voluntary industry codes, and having a chief reputation officer are all becoming standard operating practices for management at global companies that attract high visibility.²⁷²

3. Co-regulation and Multi-Stakeholder Partnerships

Together with self-regulation instruments, transnational firms are increasingly implementing various CSR mechanisms and civil regulations geared to a number of collaborative regulatory arrangements.²⁷³ They arise out of crossbreed devices originating with civil society bodies and

264. See O'Rourke, *supra* note 263, at 125.

265. See generally Marvin B. Lieberman & Shigeru Asaba, *Why Do Firms Imitate Each Other?*, 31 ACAD. MGMT. REV. 366, 366–75 (2006).

266. See *id.* at 366.

267. See Broadhurst, *supra* note 42, at 97.

268. See *id.*

269. See Alison Maitland, *Industries Seek Safety in Numbers*, FIN. TIMES (Special Report), Nov. 25, 2005, at 1. The headline by the author here is ostensibly intended as a quip.

270. See Lieberman & Asaba, *supra* note 265, at 366.

271. See Claire Moore Dickerson, *Human Rights: The Emerging Norm of Corporate Social Responsibility*, 76 TUL. L. REV. 1431, 1440 (2002) [hereinafter *Emerging Norm*]; see also Claire Moore Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 611, 613 (2001).

272. See generally *Emerging Norm*, *supra* note 271, at 1431 (discussing the relationship between corporate social responsibility and human rights movement).

273. See Albareda, *supra* note 237, at 435–36.

business associations.²⁷⁴ One of the motivations for collaborative governance is the ability to provide public goods through alliances.²⁷⁵ For example, some civil regulations and civil regulatory bodies have been instituted with the backing of trade unions, inter-state organizations, or governments.²⁷⁶ Nevertheless, nation-states have not insisted on enforcing the regulations, which, after all, are not compulsory.²⁷⁷ Instead, states have mainly played the role of intermediaries.²⁷⁸ They help companies and, in some instances, NGOs and labor unions, to reach a consensus on mutual standards.²⁷⁹ Such multi-stakeholder initiatives amount to public-private systems of co-regulation.²⁸⁰

Business-NGO cooperative arrangements have emerged over the past several years.²⁸¹ There is a significant variety among these cooperative arrangements.²⁸² In addition, an array of regulatory bodies is undertaking multi-stakeholder projects such as the Ethical Trading Initiative that

274. See *id.* at 435–36.

275. Simon Zadek, *The Logic of Collaborative Governance: Corporate Responsibility, Accountability, and the Social Contract* 4 (Corporate Soc. Responsibility Initiative, Working Paper No. 17, 2006), available at http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_17_zadek.pdf. See generally Ruggie, *supra* note 55, at 499–531.

276. The United Nations Environmental Program, for instance, assisted in setting up the Electronics Industry Code of Conduct. Similarly, the governments of the United States and the United Kingdom assisted companies in extractive industries in assembling Voluntary Principles on Security and Human Rights. In addition, the government of Austria helped underwrite the Forest Stewardship Council.

277. See generally O’Connell, *supra* note 9, at 110.

278. See, e.g., BRAITHWAITE & DRAHOS, *supra* note 24, at 198–200.

279. See, e.g., *id.*

280. See, e.g., *id.*

281. See Peter Utting, *Corporate Responsibility and the Movement of Business*, 15 DEV. PRACTICE 375, 384–85 (2005).

282. Various NGOs—such as Amnesty International, the Clean Clothes Campaign, the Council on Economic Priorities, Greenpeace, Oxfam, and the World Wildlife Fund—have partnered with trade associations active in the areas of apparel, cocoa, chemicals, coffee, electronics, mining, and toys, as well as trade unions, and other organizations, such as the International Textile Workers Association and the International Standards Organization. See Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297, 335 (2007) (discussing in detail case studies of the codes’ development in the apparel and timber sectors) [hereinafter *Institutional Emergence in an Era of Globalization*]; see also Tim Bartley, *Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Products Fields*, 3 POL. & SOC’Y 433, 434–35 (2003); Lars H. Gulbrandsen, *Overlapping Public and Private Governance: Can Forest Certification Fill the Gaps in the Global Forest Regime?*, 4 GLOBAL ENVTL. POL. 75, 81 (2004).

seeks to promote compliance with labor guidelines within the context of business supply chains.²⁸³

The growth of these arrangements has given corporations a role in global public policy networks.²⁸⁴ Global public policy networks are coalitions linking civil society organs, firms, government agencies, international organizations, NGOs, professional associations, and religious groups.²⁸⁵ Companies that join global public policy networks commit to dialogue with other stakeholders to devise ethical standards.²⁸⁶ Their objective is to establish monitoring mechanisms for firms, so as to improve accountability.²⁸⁷ The formation of global public policy networks takes place on three levels: (1) establishment of standards, (2) development of regulatory structures, and (3) creation of assessment and enforcement systems.²⁸⁸

For example, the Global Reporting Initiative is a partnership of the Coalition for Environmentally Responsible Economies ("CERES") and the United Nations Environmental Program ("UNEP"), linking firms, governments, the media, NGOs, and professional associations in order to establish uniform reporting standards to assess the organizations' environmental and social impact.²⁸⁹ Signatory firms agree to observe CERES principles and to preserve and protect the environment at levels exceeding what local law mandates.²⁹⁰ Every five years, CERES conducts an independent audit to certify that signatory companies are in compliance with the principles.²⁹¹

As for Western NGOs, many of them deem co-regulation initiatives an effective way to influence trends in transnational corporate conduct.²⁹² Altering procurement protocols of corporate giants such as Carrefour,

283. Other multi-stakeholder initiatives are the Forest Stewardship Council, the Global Reporting Initiative, the Marine Stewardship Council, and the United Nations Global Compact. See, e.g., GRI Portal, About GRI, <http://www.globalreporting.org/AboutGRI/> (last visited Sept. 1, 2009).

284. See generally David Antony Detomasi, *The Multinational Corporation and Global Governance: Modelling Global Public Policy Networks*, 71 J. BUS. ETHICS 321, 321 (2007).

285. See Wolfgang H. Reinicke, *The Other World Wide Web: Global Public Policy Networks*, FOREIGN POL'Y, Winter 1999, at 44. See generally WOLFGANG H. REINICKE, GLOBAL PUBLIC POLICY: GOVERNING WITHOUT GOVERNMENT 228 (1998).

286. See, e.g., BRAITHWAITE & DRAHOS, *supra* note 24, at 159–60.

287. See, e.g., *id.* at 168–69.

288. See generally *id.* at 550.

289. See Global Reporting Initiative, History, <http://www.globalreporting.org/AboutGRI/WhatIsGRI/History/> (last visited Sept. 1, 2009).

290. See *id.*

291. See *id.*

292. See Vogel, *supra* note 176, at 267.

Tesco, and Wal-Mart can obtain more substantial environmental and social results than enacting even massive quantities of national regulations.²⁹³ Although some NGOs stress strategies that “name and shame” multinational corporations, others opt to combine forces with companies and industry associations to establish voluntary standards and take an active part in their enforcement.²⁹⁴ The NGOs’ forming of coalitions with transnational companies has been instrumental to the creation, legitimacy, and efficacy of civil regulations.²⁹⁵

A number of Western governments, particularly those in Europe, are supporting civil regulations. The European Union has offered substantial support for global CSR.²⁹⁶ Some European governments implicitly endorse CSR by demanding that firms trading on their stock exchanges distribute annual reports detailing environmental and social performance.²⁹⁷ Additionally, public pension funds are either encouraged or, at times, required to take firms’ environmental and social track records into account in choosing investments.²⁹⁸ Moreover, some governments grant preferences for privately certified merchandise pursuant to their procurement policies.²⁹⁹

Various features of civil regulation resemble characteristically European attitudes toward business regulation. That is, the European Union, along with a number of European governments, lean heavily on voluntary agreements and soft-law, often turning to nonstate actors to formulate regulatory standards.³⁰⁰ In the eyes of some European governmental

293. Philipp Pattberg, *The Institutionalization of Private Governance: How Business and Nonprofit Organizations Agree on Transnational Rules*, 18 GOVERNANCE 589, 590 (2005).

294. See *Institutional Emergence in an Era of Globalization*, *supra* note 282, at 299–300.

295. See Pattberg, *supra* note 293, at 589–610; Gereffi, Garcia-Johnson & Sasser, *supra* note 197, at 61; Dennis A. Rondonelli & Ted London, *How Corporations and Environmental Groups Cooperate: Assessing Cross-sector Alliances and Collaborations*, 1 ACAD. MGMT. EXEC. 61, 62–76 (2003).

296. Kristina Herrmann, *Corporate Social Responsibility and Sustainable Development: The European Union Initiative as a Case Study*, IND. J. GLOBAL LEGAL STUD., Summer 2004, at 205, 227 (2004).

297. See *Institutional Emergence in an Era of Globalization*, *supra* note 282, at 302–03.

298. See *id.* at 336.

299. See *id.* at 337.

300. See, e.g., MICHELLE EGAN, CONSTRUCTING A EUROPEAN MARKET 263 (2001); Christopher Ansell & David Vogel, *The Contested Governance of European Food Safety Regulation*, in WHAT’S THE BEEF?: THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY 8–9 (Christopher Ansell & David Vogel eds., 2006); Jan Willem Biekart, *Negotiated Agreements in EU Environmental Policy*, in NEW INSTRUMENTS FOR

authorities, endorsing global civil regulations is a convenient way of assuaging home-country activists and trade unions that may well be antagonistic to globalization and the immense political sway held by multinational companies.³⁰¹ This, however, does not grant nation-states sole regulatory authority over firms operating in their territories.

Thus one notable benefit of civil regulations as a mechanism of global business regulation is that their terms are outside the World Trade Organization's ("WTO") purview, as the WTO's regulations have force only if accepted by national governments.³⁰² Whereas the WTO deems government-mandated eco-labels to constitute potential trade barriers, private product certifications and labels do not have that status.³⁰³ Similarly, whereas companies could require global suppliers' compliance with environmental rules and labor standards as a prerequisite for transacting business, governments typically may not condition market access upon such requirements.³⁰⁴

In the case of co-regulation and multi-stakeholder partnerships, CSR's focus shifts away from voluntariness and toward accountability backed by enforcement mechanisms.³⁰⁵ Accordingly, public accountability mechanisms for private actors constitute a centerpiece of the emerging global governance paradigm.³⁰⁶ As illustrated below, such emerging governance networks are "held in orbit" around the notion of reputational

ENVIRONMENTAL POLICY IN THE EU 166 (Jonathan Golub ed., 1998); Olivier Borraz, Julien Besançon & Christophe Clergeau, *Is It Just About Trust? The Partial Reform of French Food Safety Regulation*, in WHAT'S THE BEEF?: THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY 137–139 (Christopher Ansell & David Vogel eds., 2006); Jonathan Golub, *New Instruments for Environmental Policy in the EU: Introduction and Overview*, in NEW INSTRUMENTS FOR ENVIRONMENTAL POLICY IN THE EU 5, 13–15, (Jonathan Golub ed., 1998); Karl-Heinz Ladeur, *Towards a Legal Concept of the Network in European Standard-Setting*, EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS 151, 156–159 (Christian Joerges & Ellen Vos eds., 1999); Stephen Tindale & Chris Hewett, *new Environmental Policy Instruments in the UK*, in NEW INSTRUMENTS FOR ENVIRONMENTAL POLICY IN THE EU 52–53 (Jonathan Golub ed., 1998); Frans van Waarden, *Taste, Traditions, and Transactions: The Public and Private Regulation of Food*, in WHAT'S THE BEEF?: THE CONTESTED GOVERNANCE OF EUROPEAN FOOD SAFETY 56–57 (Christopher Ansell & David Vogel eds., 2006).

301. See *Institutional Emergence in an Era of Globalization*, *supra* note 282, at 337.

302. See Steven Bernstein & Erin Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. INT'L ECON. L. 575, 575–608 (2008).

303. See Organisation for Economic Co-operation and Development [OECD], *Informing Consumers of CSR in International Trade*, ¶¶ 44–46, June 28, 2006.

304. See Vogel, *supra* note 176, at 264–65.

305. See Utting, *supra* note 281, at 381.

306. See *id.* at 383–86.

capital. Reputational sanctions and rewards linked to global firms' most valuable asset (reputational capital) therefore constitute an emerging mode of accountability in global governance.³⁰⁷ Global firms utilize corporate legitimacy management to shift the role of businesses in society at large.³⁰⁸ Meanwhile, multi-stakeholder initiatives provide the forum for a dialogue between business and society—a dialogue that is required for accountability mechanisms to work.³⁰⁹ Moreover, involvement in co-regulation and enforcement of multi-stakeholder devices is connected with the new idea of corporate citizenship, or what has been termed “political activism.”³¹⁰ Through these devices, citizens can participate in dialogue with, and can influence, the conduct of businesses in the environmental and social spheres.³¹¹

E. Why Global Businesses Adopt Voluntary Regulations

1. Protecting Reputations

To a significant extent, the growth and influence of civil regulations is attributable to the rise of global brands. The pervasiveness of branding means that companies are becoming increasingly vulnerable to attacks on their reputations in consumer, labor, and financial markets. Moreover, firms' reputations are susceptible to technological advancements in communication via broadband internet, coupled with the advent of decentralized and globally available media, such as Facebook, YouTube, and Twitter, to name a few, as well as the proliferation of inexpensive voice and text communication via wireless handheld devices.³¹² Such

307. *Id.* at 384 (discussing the relationship between rewards and penalties on accountability and performance); Ross, *supra* note 32, at 8 (arguing that managing reputation requires awareness of stakeholder's opinion and the capacity to respond); see JACKSON, *supra* note 31, at 35–38 (explaining that the market rewards or sanctions corporate deeds and misdeed).

308. See Beverly Kracher & Kelly D. Martin, *A Moral Evaluation of Online Business Protest Tactics and Implications for Stakeholder Management*, 114 BUS. & SOC'Y REV. 59, 61–64 (2009) (discussing businesses' managing corporate image in response to activists' using the internet to protest “objectionable business practices”).

309. See Guido Palazzo & Andreas Georg Scherer, *Corporate Legitimacy as Deliberation: A Communicative Framework*, 66 J. BUS. ETHICS 71, 77, 82 (2006); Zadek, *supra* note 275, at 5.

310. See generally Virginia Haufler, *Self-Regulations and Business Norms: Political Risk, Political Activism*, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 199, 199 (A. Claire Cutler, Virginia Haufler & Tony Porter eds., 1999) (arguing that corporate behavior is guided by principles and norms beyond profit maximization).

311. See Dirk Matten & Andrew Crane, *Corporate Citizenship: Towards an Extended Theoretical Conceptualization*, 30 ACAD. MGMT. REV. 166, 172–173 (2005).

312. See Kracher & Martin, *supra* note 308, at 62–64; cf. Ross, *supra* note 32, at 7.

technologies subject companies to attack by blogs, spoofs, e-mail campaigns, parasites, and other protest campaigns.³¹³ This technology has made it easier for activists to obtain and disseminate information concerning business conduct at the speed of light around the globe.³¹⁴ Thus, inability to hide, literally and figuratively, in a distant part of the world has made reputation a valuable commodity.

Consequently, the bulk of civil regulations emerge as a result of citizen campaigns aimed at specific business behavior, enterprises, or industry sectors.³¹⁵ The number of such campaigns has gradually increased over the past two decades.³¹⁶ They address workplace conditions, fair wages, child labor, agricultural worker compensation, sustainable forestry practices, corruption, environmental preservation, and human rights.³¹⁷ Such campaigns to "name and shame" corporate character have targeted prominent companies including Citibank, Exxon, Levi-Strauss, Monsanto, Nike, Royal Dutch Shell, The Gap, Nestlé, Rio Tinto, Starbucks, Union Carbide, and Wal-Mart.³¹⁸ The assault on corporate character through modern media, reaching audiences globally, has pressured transnational companies to behave with increased responsibility.³¹⁹

The combination of two trends, in CSR and firms' building and preservation of their reputational capital, has manifested in a nascent framework of global governance. The movement has led companies to develop environmental and social standards and to formulate strategies that impact their supply chains.³²⁰ Additionally, companies have begun to reconfigure as "relational corporations," from "vertical" to "flat" and from domestic to international.³²¹ They have also begun to transition

313. See sources cited *supra* note 312.

314. See Kracher & Martin, *supra* note 308, at 62–64; cf. Ross, *supra* note 32, at 7–8.

315. See Tim Bartley & Curtis Child, Shaming the Corporation: Reputation, Globalization, and the Dynamics of Anti-Corporate Movements 2 (Aug. 11, 2007) (unpublished manuscript, available at <http://www.Indiana.edu/~tbsoc/SM-corps-sub.pdf>); see also O'Rourke, *supra* note 263, at 115. See generally NAOMI KLEIN, NO LOGO (2001) (providing a vivid discussion of the resulting dynamics triggered by activists, and their effect on the global brands and international business).

316. Vogel, *supra* note 176, at 268.

317. See generally *supra* notes 310–315 and accompanying text.

318. See Kracher & Martin, *supra* note 308, at 62; see also Bartley & Child, *supra* note 315.

319. See Kracher & Martin, *supra* note 308, at 59; see also O'Rourke, *supra* note 263, at 121–22, 124 (discussing the role of the media in successful campaigns by NGOs against companies, specifically by the foreign press and international NGOs in the anti-sweatshop market campaign against Nike).

320. See Vogel, *supra* note 176, at 268; see also Scholte, *supra* note 20, at 19.

321. See Lozano, *supra* note 131, at 60–63.

away from managing relationships and toward building relationships.³²² Moreover, in cooperation with civil society actors, firms continue to implement settled transnational, environmental, and social regulation standards, which substantially impact the firms' reputations.³²³

2. Breakdown in Global Governance

Over the last twenty years, globalization has transformed the world economic landscape.³²⁴ The situs of manufacturing has moved from industrialized nations to developing nations.³²⁵ In addition, global corporations' production and supply chains transcend national borders more than ever.³²⁶ The bulk of transnational commerce occurs among firms or inter-firm networks.³²⁷ The rise of global civil regulation has, in significant measure, resulted from the recognition that globalization dampens the ability of national legal authorities to effectively regulate global companies and markets.³²⁸ Hence, it has been observed that, although some multinational firms are as powerful as some small nation-states, they are less accountable.³²⁹

While state and international business regulations are still growing in range and degree, today's global economy, while highly integrated, is plagued by regulatory breakdown.³³⁰ The multinational nature of global manufacturing strains national governments' abilities to control economic activity outside of, and straddling, their own territories.³³¹ National and global regulatory frameworks will remain dangerously ineffective so long as national governments and global companies alike are incapable of controlling, or ill-disposed to control the international trade's envi-

322. *See id.*

323. *See* ZADEK, *supra* note 25, at 66.

324. *See generally* THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999) (providing a multifaceted account of the phenomenon that we call "globalization"); THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 51 (2007) (describing the "ten forces that flattened the world," global corporations being among them).

325. *See* CARROLL & BUCHHOLTZ, *supra* note 29, at 395 (noting the trend that jobs follow manufacturing).

326. *See* RICHARD T. DE GEORGE, *COMPETING WITH INTEGRITY IN INTERNATIONAL BUSINESS* 78-79 (1993); DONALDSON, *supra* note 5, at 30-35.

327. *See generally* sources cited *supra* note 324.

328. *See* Vogel, *supra* note 176, at 266.

329. *See* Peter Newell, *Environmental NGOs and Globalization*, in *GLOBAL SOCIAL MOVEMENTS* 117, 121 (Robin Cohen & Shirin Rai eds., 2000).

330. *See* Peter Newell, *Managing Multinationals: The Governance of Investment for the Environment*, 13 J. INT'L DEV. 907, 908 (2002).

331. Abbott & Snidal, *supra* note 209, at 44.

ronmental and socioeconomic externalities. Yet, the rise of civil regulation does not signify an outright replacement of state regulation. Rather, it signifies an attempt to expand regulation to a broad array of transnational corporate conduct that remains difficult to regulate via purely national mechanism.³³² The advent of novel types of public civil regulation has resulted in reputational accountability, complementing nation-states' regulations that have proven inadequate in the era of globalization.³³³

IV. REPUTATIONAL ACCOUNTABILITY MECHANISMS

As a result of major industry scandals, coupled with the recent global financial meltdown, and motivated by accountability principles, corporate management is implementing ethical, transparency, and disclosure standards.³³⁴ The following discussion aims to highlight the need for global corporate governance to recognize the crucial role of the rule of reputation. The need to adopt voluntary civil regulations is especially strong for firms operating in the global environment. The traditional concept of legal accountability is distinguishable from the emerging concept of reputational accountability. As will be shown, the latter is especially intricate since it entails multifaceted components of accountability. This section will illustrate how the reputational capital model of corporate governance influences managerial decision-making—namely, how managers seek to accommodate the burgeoning demands for reputational accountability under the emerging regime of civil regulations.

A. Legal Accountability

Legal accountability simply means that normative regulatory standards are enforceable.³³⁵ Compliance with black-letter legal rules creates a presumption of validity in the eyes of judicial tribunals or quasi-judicial forums.³³⁶ The notion of legal accountability stems from the rule of law

332. See Koenig-Archibugi, *supra* note 197, at 234–35.

333. See Knill & Lehmkuhl, *supra* note 11, at 44–45.

334. Some of the well-known institutions embroiled in the scandals are Nicholas Leeson, the British Barings Bank, as well as the infamous Enron, WorldCom, Aldelphia, Arthur Anderson, and Tyco. See Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 707 (2002); see also Note, *The Good, the Bad, and Their Corporate Codes of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 HARV. L. REV. 2123, 2126 (2003); Brian A. Warwick, *Commentary, Reinventing the Wheel: Firestone and the Role of Ethics in the Corporation*, 54 ALA. L. REV. 1455, 1466–71 (2003).

335. See Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 36 (2005).

336. Cf. HANS KELSEN, *PURE THEORY OF LAW* 11 (1967) (discussing validity of norms and noting that if a norm is not obeyed, it is thus not valid); H. L. A. HART, *THE CONCEPT*

maxim.³³⁷ A vast body of civil and criminal law has developed to hold non- and for-profit institutions legally accountable.³³⁸ In the international arena, the WTO Dispute Settlement System, the Hague International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court, are just some of the institutions that enforce “hard” international law.³³⁹ Of course, an actor’s failure to comply with law will typically trigger reputational sanctions as well; and compliance may provide for its own reputational rewards.³⁴⁰

Similar to the early international law phenomena, civil regulations, absent hard enforcement mechanisms, function as mere normative stan-

OF LAW 197 (1961) (noting that if the “system is fair,” it “may gain and retain allegiance”).

337. Throughout the latter part of the 20th century, one of the central topics addressed by legal philosophers was the nature of the rule of law. See Robert P. George, *Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition*, 46 AM. J. JURIS. 249, 249 (2001). Arguably one reason for the keen attention extended to the concept was the rise and decline of totalitarian governments. See *id.* “In the aftermath of the defeat of Nazism, legal philosophers of every religious persuasion tested their legal theories by asking, for example, whether the Nazi regime constituted a legal system in any meaningful sense.” *Id.* Following the collapse of communism throughout Europe, scholars of jurisprudence sought to account for the manner in which legal institutions and procedures foster respectable democracies. See *id.* Today, the rise of global civil regulations for business leads to the analogous question of whether, and to what extent, such initiatives embody the rule of law. On this point, reference to the fundamental components of legality is illuminating. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1964) (Basic elements constituting the “internal morality” of law are: non-retroactivity, amenability to compliance, promulgation, clarity, coherence, temporal constancy, generality, and congruence between official behavior and rules.). Arguably, global business civil regulations display many if not all of these characteristics.

338. See Parker, *supra* note 181, at 207–17; see also Alnoor Ebrahim, *Making Sense of Accountability: Conceptual Perspectives for Northern and Southern Nonprofits*, 14 NON-PROFIT MGMT. & LEADERSHIP 191, 194–95 (2003).

339. Concerning violence and nation-states, enormous changes have come about in relevant international standards, practices, and institutions. War crimes tribunals and the International Criminal Court were established in order to make accountable, to the point of incarceration, chiefs of states that deploy violence aimed at their own populace. These developments represent a tremendous departure from customary norms governing the principle of national sovereignty. That principle extended immunity to heads of states from legal petitions for accountability, save from members of their own principalities. Indeed, an inaugural precept of the nation-state system, observed all the way from Westphalia in 1648 to Nuremberg in 1946, dictated that heads of states enjoyed immunity from prosecution. See Geoffrey Robertson, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT’L L.J. 649, 650 (2005).

340. See Ross, *supra* note 32, at 11.

dards and are intended to persuade compliance.³⁴¹ Corporations comply with soft law in order to protect their intangible reputational assets; it is not that they are deterred by enforcement sanctions.³⁴² Arguably, a regime of global civil regulations and the accompanying rule of reputation comprise an integral part of both the domestic and international rule of law. They are, however, often ignored by commentators because they are only backed by reputational sanctions, the nature and extent of which are not always fully appreciated.³⁴³ To fully account for the ontology of civil regulation and actors' compliance internationally, the concept of reputational capital must be incorporated into our current thinking about corporate governance. A deeper inquiry into the various sources of soft law, however, reveals its intricacy and complexity. Global civil regulations embody a compromise among private and public entities. Rather than imposing cost of compliance with formal regulation, civil regulations encourage corporations to examine their conduct and guide it by means of voluntary self-regulation.³⁴⁴ Global civil regulations are continually undergoing an organic evolution, yet national law depends on its institutions to act, which takes longer.³⁴⁵

B. Reputational Accountability

From the standpoint of the conventional rule of law maxim and its experience, voluntary CSR seems utterly inadequate. That is, CSR is de-

341. Cf. Terry Nardin, *Theorizing the International Rule of Law*, 34 REV. OF INT'L STUD. 385, 389 (2008) (noting that compliance with international law is a result of a desire for legitimacy).

342. See Göran Ahrne & Nils Brunsson, *Soft Regulation from an Organizational Perspective*, in *SOFT LAW IN GOVERNANCE AND REGULATION* 171, 187–89 (Ulrika Mörtz ed., 2004).

343. Cf. Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT'L L. 515, 519, 522–23 (2009) (arguing that the reputational impacts of following or forgoing soft law is difficult to anticipate and remains a puzzle).

344. See Ian Maitland, *The Limits of Business Self-Regulation*, 27 CAL. MGMT. REV. 132, 132 (1985).

345. The sources of law applied and enforced by courts of law are generally understood by both legal practitioners and scholars. But what sources of “soft law” are applied by reputational accountability-holders? Consider the famous dictum that the task of jurists is to prophesize what courts will do. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457–58 (1897). This so-called “predictive theory” of law helps us understand the nature of the “soft law” of accountability holders. “The idea is that the law [of soft law] resides in the actual judgment given, not in any crisp preexisting formulation in a statute or case precedent.” JACKSON, *supra* note 31, at 38. The challenge for firms is to forecast what these (non-legal and unelected) accountability-holders expect. *Id.*

centralized, it carries conflicting norms, it is run by bureaucrats,³⁴⁶ and there are no hard sanctions for noncompliance.³⁴⁷ The concept of reputational accountability offers an explanation for how the enforcement of civil regulations makes global firms more accountable. Accountability means that actors may ensure that other actors also follow standards, and may apply sanctions for noncompliance with those standards.³⁴⁸ In the context of global corporate governance, civil regulations that impact a firm's reputational capital arguably represent the strongest sanctions, as a firm's most valuable, albeit intangible, asset is its reputation.³⁴⁹

1. Elements of Reputational Accountability

The process of corporate reputational accountability involves the following three components.³⁵⁰ First, reputational accountability presupposes the existence of civil regulations that hold companies accountable; thus, compliance is expected.³⁵¹ Similar to the maxim that the law must be knowable—i.e., that it must be published by the State so that citizens can discover what rights and responsibilities are given or imposed upon them by law—civil regulations must also be a matter of common knowledge.³⁵² Second, reputational accountability requires that “enforcement agents” possess relevant information about firms' actions to evaluate

346. From this standpoint, the rise of global governance raises questions about the legitimacy of the actors attempting to hold transnational firms accountable. The theory of rent seeking proceeds from the hypothesis that the priority of typical bureaucrats are to advance their own self-interest. Consequently, if restraints of accountability and election are removed, bureaucrats become owners of rents, with the power to potentially raise these rents at the cost of those for whom the resources are supposed to benefit. Rosemary Righter argues that United Nations institutions provide substantial income for the politicians and bureaucrats that control them, and that the objectives for which they were set up are absorbing ever smaller portions of their internal budgets. *See generally* ROSEMARY RIGHTER, *UTOPIA LOST: THE UNITED NATIONS AND THE WORLD ORDER* 56–63 (1995).

347. *See* Cyrus Mehri, Andrea Giampetro-Meyer & Michael B. Runnels, *One Nation, Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability, and Workplace Fairness*, 9 *FORDHAM J. CORP. & FIN. L.* 395, 400–01 (2004); *see also* Vogel, *supra* note 176, at 261, 264, 266, 273.

348. *See* Grant & Keohane, *supra* note 335, at 29.

349. *Cf.* Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 *J.L. & ECON.* 757, 758–59 (1993) (noting that majority of falling stock price in the wake of corporate malfeasance, whether proven or not, is attributable to reputational loss, whereas anticipated legal sanctions, including fines and damage awards comprise only 6 percent of the decline in share value).

350. This analysis builds upon the discussion by Robert O. Keohane, illustrating the power dimensions of accountability demands. *See* Keohane, *supra* note 32, at 362.

351. *Cf. id.* at 362.

352. *See supra* note 337 and accompanying text.

compliance with applicable civil regulations.³⁵³ Thus, on the one hand, to be held accountable, firms must be aware of the expectations.³⁵⁴ On the other hand, enforcement agents must know by what standards to render an assessment of business conduct.³⁵⁵ Because accurate information is essential, some measure of transparency and dialogue among stakeholders appears to be a prerequisite for reputational accountability.³⁵⁶ Third, reputational accountability depends upon the existence of incentives for compliance.³⁵⁷ That is, enforcement agents must be able to impose reputational sanctions or reputational rewards.³⁵⁸ Of course, no worldwide government, democratic or otherwise, exists to provide wholesale regulation.³⁵⁹ Consequently, demands for corporate accountability are decentralized and, thus, diffused.

2. Enforcement of the Rule of Reputation

Whereas the concept of legal accountability derives its central meaning from the notion of the rule of law (ultimately upheld by courts), the concept of reputational accountability may be understood in terms of the rule of reputation. The rule of reputation is upheld by market participants that evaluate business conduct within several forums. For instance, the "Forum of Key Constituents" is especially significant for business enter-

353. Keohane, *supra* note 32, at 362, 366.

354. See Ross, *supra* note 32, at 11.

355. See *id.* at 5.

356. See generally Pamela Stapleton & David Woodward, *Stakeholder Reporting: The Role of Intermediaries*, 114 BUS. & SOC'Y REV. 183, 184 (2009) (noting the important role of the dialogue with and among stakeholders).

357. According to Robert Keohane, the notion of accountability involves both sharing of information regarding actions, decisions, or behavior of some kind and the exercise of sanctions. See Robert O. Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 MICH. J. INT'L L. 1121, 1123–24 (2003).

358. See JACKSON, *supra* note 31, at 150–52.

359. In the eyes of one commentator, what we are witnessing is a worldwide diffraction of traditional forms of representative democracy, alongside an overall mistrust of politics. See PIERRE ROSANVALLON, *DEMOCRACY PAST AND FUTURE* 192–93 (Samuel Moyn ed., 2006). Replacing procedural representation by means of elections, alternative modes of representation are becoming prevalent within civil society, such as functional representation by experts, and ethical representation, asserted by social groups and NGOs. Such developments increase the number of political players, diffusing political legitimacy. "We are moving bit by bit to more disseminated forms of civil democracy," *id.* at 235, an "indirect democracy," created by "whole congeries of efforts—through informal social movements but institutions too—intended to compensate for the erosion of trust by institutionalizing distrust." *Id.* at 238. Indirect democracy is engaged in the deployment of "mechanisms of oversight, the creation of independent institutions, and the formation of powers of rejection." *Id.* at 239.

prises.³⁶⁰ “Key Constituents” are firms’ customers, employees, and investors, whose authority and control are exerted in transactions occurring in consumer, labor, and capital markets respectively.³⁶¹ For example, individual investors as well as mutual funds may cease investing in companies whose practices or policies they find objectionable.³⁶² Some pension funds shun securities of certain companies, often on the basis of criteria determined by their beneficiaries.³⁶³ Alternatively, investors may require higher interest rates on corporate bonds.³⁶⁴ Further, customers may decline to purchase the products produced by firms struck by negative publicity stemming from human rights violations, unfair labor practices, or environmental violations.³⁶⁵ It has been shown that consumers are willing to incur added costs, such as the cost of traveling greater distances, in order to punish retailers whose conduct they find egregiously unfair.³⁶⁶ Finally, those in employment markets may select among competing job offers on the basis of the prospective employer’s publicity and reputation.³⁶⁷

Business partners and associates comprise another type of forum for the evaluation of conduct. This forum functions as a peer-driven reputational accountability network powered by the process of business partners’ reciprocal appraisals.³⁶⁸ Institutional lenders, for instance, use caution in scrutinizing their borrowers’ creditworthiness as well as that of their

360. JACKSON, *supra* note 31, at 36.

361. *See id.* at 106–108.

362. The Council on Economic Priorities reports that there are three key factors accounting for escalation in social and ethical investing: (1) the existence of more reliable and more sophisticated data regarding corporate social performance than previously; (2) investment firms utilizing social criteria have a demonstrated track record, and it is not necessary for investors to sacrifice gains for principles; (3) the socially conscious generation of the 1960s is currently engaged in rendering investment decisions. *See, e.g.*, First Affirmative Financial Network, LLC, Socially Responsible Investing (SRI) In the United States, <http://www.firstaffirmative.com/news/sriArticle.jsp> (last visited Oct. 12, 2009); *see also* Samuel B. Graves & Sandra A. Waddock, *Institutional Owners and Corporate Social Performance*, 37 ACAD. MGMT. J. 1034, 1034 (1994).

363. *See* R. Bruce Hutton, Louis D’Antonio & Tommi Johnsen, *Socially Responsible Investing: Growing Issues and New Opportunities*, 37 BUS. & SOC. 281, 288 (1998).

364. LAYNA MOSLEY, GLOBAL CAPITAL AND NATIONAL GOVERNMENTS 18 (2003).

365. Spar, *supra* note 47, at 9.

366. *See* Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 718, 735–36 (1986).

367. JACKSON, *supra* note 31, at 13.

368. Grant & Keohane, *supra* note 335, at 35. “When standards are not legalized, we would expect accountability to operate chiefly through reputation and peer pressures, rather than in more formal ways.” *Id.*

partners' borrowers.³⁶⁹ Business enterprises that are rated low by their peers are less likely to find willing business partners among them.³⁷⁰ These businesses find themselves in a strategic disadvantage and therefore tend to stagnate.³⁷¹

Next is the forum of public opinion, or the proverbial "court of public opinion."³⁷² Public reputational accountability means that members of civil society penalize companies by promulgating negative publicity.³⁷³ Lawmakers, courts, government regulators, fiscal watchdogs, journalists, competitors, licensing boards, rating agencies, and markets, all render judgments about the reputations of market participants.³⁷⁴ In fact, reputation constitutes a type of "soft power," which has been characterized as "the ability to shape the preferences of others."³⁷⁵ Companies with tarnished reputations find it hard to establish relationships, assert authority, or attract loyalty from others.³⁷⁶

The Royal Dutch Shell scandal involving the Brent Spar and the Ogoni in Nigeria presents a vivid example of a company experiencing a reputational crisis as a result of its failure to comply with public social expectations and its neglect of both environmental and human rights standards.³⁷⁷ In 1995, Shell made plans to sink a large decommissioned oil buoy storage rig in the North Sea. It conducted an environmental impact assessment and gained approval from the government of Great Britain.³⁷⁸ Greenpeace activists challenged the proposed deep-sea dumping and alleged that Shell's sinking the rig would cause serious environmental

369. JACKSON, *supra* note 31, at 13.

370. *Id.* at 14.

371. *Id.*

372. *Id.* at 36.

373. "Reputation risk is the current and prospective impact on earnings and capital arising from negative public opinion." STEVEN HERZ, ANTONIO LA VIDA & JONATHAN SOHN, *DEVELOPMENT WITHOUT CONFLICT: THE BUSINESS CASE FOR COMMUNITY CONSENT* 14 (Jonathan Sohn ed., 2007), available at <http://www.wri.org/publication/development-without-conflict>.

374. See JACKSON, *supra* note 31, at 42, 45.

375. JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 5 (2004).

376. See JACKSON, *supra* note 31, at 15, 36.

377. See generally Joshua P. Eaton, Note, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B. U. INT'L L.J. 261, 261 (1997); see also Scott Greathead, *The Multinational and the "New Stakeholder": Examining the Business Case for Human Rights*, 35 VAND. J. TRANSNAT'L L. 719, 724 (2002).

378. See Graeme Smith, *Precedent Feared as Shell Saves £34m: Atlantic Grave Approved for Giant Oil Installation*, HERALD (Glasgow), Feb. 17, 1995, at 9.

damage.³⁷⁹ Shell disputed the claim on scientific grounds and maintained that sinking was the best available option.³⁸⁰ Since Shell refused to abandon its plans, Greenpeace, acting in front of television crews, surrounded the rig with small boats and even occupied it.³⁸¹ Millions of protests erupted throughout Europe.³⁸² In response to Greenpeace's pressure and the boycotts, Shell abandoned its sinking strategy and towed the rig to a Norwegian fiord.³⁸³

Reversing its original plan cost Shell considerable expense.³⁸⁴ In addition, when Shell failed in the same year to intercede to stop the execution of Ken Saro-Wiwa in Nigeria, voices worldwide expressed indignation.³⁸⁵ Saro-Wiwa, a writer, businessman, and political journalist, had organized the Movement for the Survival of the Ogoni People to take a stand against mounting problems with Shell and the government of Nigeria.³⁸⁶ Saro-Wiwa, along with nine others, was tried for the murder of four Nigerian officials, a fabricated accusation.³⁸⁷ Saro-Wiwa was not tried by a traditional court, but rather a special tribunal that refused to admit evidence of innocence.³⁸⁸ As the defendants were found guilty and sentenced to death, Shell stated that political issues were not their concern.³⁸⁹ Magazines and newspapers roundly called for punishment of Nigeria and Shell, the Sierra Club initiated a massive boycott campaign against the company, and celebrities advocated a U.S. oil embargo.³⁹⁰ Shell's subsequent efforts to revive its reputation in the aftermath of the Spar and Nigerian scandals, while very expensive, were successful at

379. *See id.* at 9.

380. *See generally Greenpeace Admits Error Against Shell*, L.A. TIMES, Sept. 6, 1995, at D2.

381. *See Shell Oil Platform to Become a Pier*, HOUSTON CHRONICLE, Jan. 30, 1998, at Business 1.

382. JACKSON, *supra* note 31, at 36.

383. *See Shell Oil Platform to Become a Pier*, HOUSTON CHRONICLE, Jan. 30, 1998, at Business 1.

384. In January 1998, after assessing a range of proposals, Shell opted to cut up the rig and turn it into a pier in Norway, costing the company approximately \$42 million, over twice the cost of dumping the rig into the sea. *See id.*

385. JACKSON, *supra* note 31, at 36.

386. Eaton, *supra* note 377, at 269.

387. *Id.* at 270.

388. *See id.* at 270 (citing Paul Lewis, *Nigeria Rulers Back Hanging of 9 Members of Opposition*, N.Y. TIMES, Nov. 9, 1995, at A9).

389. *See id.* at 271 (citing Paul Lewis, *Rights Groups Say Shell Oil Shares Blame*, N.Y. TIMES, Nov. 11, 1995, at A6).

390. Christopher S. Wren, *U.S. is Seeking Further Ways to Punish Nigeria for Executions*, N.Y. TIMES, Dec. 17, 1995, at 1.11.

averting a public relations crisis, which could have been relentless.³⁹¹ By contrast, companies that achieve superior reputations within each of the above forums, enjoy a host of advantages.³⁹² In that sense, reputational accountability involves not just punishing firms but also rewarding them for their compliance with civil regulations and commitment to CSR.

C. Networks of Reputational Accountability

Reputational accountability in global economic governance is multifaceted. Global companies operate within networks of continuous relationships. Firms are linked with their customers, suppliers, and even rivals via strategic alliances.³⁹³ When companies enter into arrangements with various parties, such as government regulators and special interest groups, they are in effect establishing "reputational networks." These networks form a variety of channels of accountability, which are divided by and cover a range of topical areas. On the other hand, relationships involving international organizations typically establish sequences of accountability.³⁹⁴ In addition, multiple intersecting accountability relationships exist when different groups of market participants, with potentially diverse interests, set out to hold other agents accountable for their behavior.³⁹⁵

In the modern business environment, companies confront manifold and frequently incompatible or contradictory reputational accountability demands.³⁹⁶ Often it is not sufficient to meet the demands of shareholders and credit markets.³⁹⁷ Moreover, it is not enough to comply with legal rules as law often lags behind rapidly evolving social norms.³⁹⁸ Busi-

391. See Eaton, *supra* note 377, at 270–71; see also sources cited *supra* notes 386–89.

392. See JACKSON, *supra* note 31, at 13, 47, 59.

393. See *id.* at 5.

394. In a common accountability sequence, an agent will be authorized by a given accountability relationship, and yet another such relationship will restrict it. Thus, the International Accounting Standards Board holds companies responsible for accounting practices, yet is itself accountable to the entities granting authority to it, namely the G-7 Finance Ministers and Central Bank Governors and the International Organization of Securities Commissions. See Keohane, *supra* note 32, at 364.

395. Thus, the World Trade Organization (WTO) and the Trade-Related Aspects of Intellectual Property Rights Agreement, both attempt to hold multinational pharmaceutical companies accountable, yet the shareholders of the pharmaceutical companies also hold the firms accountable. See Stephanie A. Barbosa, Note, *Implementation of the DOHA Declaration: Its Impact on American Pharmaceuticals*, 36 RUTGERS L.J. 205, 207–211 (2004) (citing Agreement on Trade-Related Aspects of Intellectual Property Rights, *opened for signature* Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197(1994)).

396. See Ross, *supra* note 32, at 8, at 11–13.

397. See *id.* at 7–8.

398. CARROLL & BUCHHOLTZ, *supra* note 29, at 41.

nesses, however, must remain mindful of their constituencies'—peers, the media, and advocacy groups—reactions to their actions. Various calls for reputational accountability concerning a firm's conduct reveal conflicting expectations of outside observers.³⁹⁹

A reputational crisis can also rapidly spread to infect an extensive network. For example, the uncovering of accounting irregularities at the Indian outsourcing firm Satyam Computer Services, Ltd. led to immediate suspicion about the firm's global auditor, PriceWaterhouseCoopers, and prompted a group of its clients, including Cigna, Citigroup, Coca-Cola, GlaxoSmithKline, Merrill Lynch, Nissan, Novartis, Pfizer, and State Farm Insurance to move their business away from the firm.⁴⁰⁰

D. Reputational Accountability is Dynamic

Mandates for reputational accountability undergo a constant process of change as activist campaigns are impermanent and public interest and attention are constantly shifting; in general, however, the bar continues to rise.⁴⁰¹ For example, only a few decades ago, controversy regarding environmental and labor conditions was almost nonexistent, whereas today it is front and center.⁴⁰² Those unable to forecast these shifts tend to lag behind the current norms.⁴⁰³ As far as reputational accountability is concerned, such lag may cause strategic problems.⁴⁰⁴ New laws and regulations may be enacted, the ire of civil society activists raised, or reputations sullied before managers implement remedial measures. Thus, a key

399. See generally JACKSON, *supra* note 31. For example, when U.S. West contributed to the Boy Scouts of America they were criticized by gay-rights activists. *Id.* at 109. Yet when Levi-Strauss ceased its funding of the Boy Scouts, they were attacked by many religious leaders. *Id.* Similarly, the retailer Dayton-Hudson donated to Planned Parenthood. *Id.* This led to anti-abortion demonstrators outside of the company's stores. *Id.* The company reversed its stance and began contributing to anti-abortion groups instead. This move was met by pro-choice protesters' denouncing the company for abandoning their cause. *Id.*

400. Sarah Johnson, *No Way Out?*, CFO, Mar. 2009, at 73; Lison Joseph, *Customer Desertion Could Lower Valuations of Satyam: iGate*, LIVEMINT.COM, Mar. 17, 2009, <http://www.livemint.com/2009/03/17225447/Customer-desertion-could-lower.html>.

401. See CARROLL & BUCHHOLTZ, *supra* note 29, at 15–16.

402. See generally *Institutional Emergence in an Era of Globalization*, *supra* note 282, at 297.

403. See generally Michael D. Watkins & Max H. Bazerman, *Predictable Surprises: The Disasters You Should Have Seen Coming*, HARV. BUS. REV., Mar. 2003, at 72, 74.

404. For example, in the Financial Times 1997 annual survey of Europe's most respected corporations, the Times cited the public criticism of Shell's ethical behavior in connection with environmental and human rights issues as the main cause of the firm's precipitous fall in ranking. *BP Steals the Limelight from Shell*, FIN. TIMES (Surveys edition), Sept. 24, 1997, at I-II.

motivation for companies to become industry leaders in building reputational capital is the need for additional insurance against reputational harm from negative publicity and pressures that may be detrimental to the company.⁴⁰⁵ In such instances, having a superior reputation may turn out to be a global company's most valuable asset, albeit an intangible one.⁴⁰⁶

E. Implications for Global Operations

To integrate the considerations of reputational capital into global corporate governance is to recognize the corporation's reputation as a productive asset that generates capital, not only for the firm's shareholders, but ultimately for a broad range of constituents. Of course, reputational capital goes unrecorded on corporate balance sheets. But creating shareholder value extends beyond capitalization on traditional balance sheet assets; it also entails leveraging value from the company's reputational capital.⁴⁰⁷

A firm will realize competitive advantage by correctly forecasting "new waves" of civil society's expectations for responsible corporate conduct. Corporate officers must develop the ability to effectively reach consensus with key decision makers regarding new waves of demand for CSR.⁴⁰⁸ To become industry leaders in terms of CSR standards, corporations must implement internal ethical standards and focus on their visions, developing strategies to beat the competition. Having to define accountability requirements imposes a burden and diverts managers from profit-

405. See generally JOE MARCONI, *CRISIS MARKETING: WHEN BAD THINGS HAPPEN TO GOOD COMPANIES* 26 (2d ed. 1997).

406. As one scholar writes:

[C]ompanies that have built up a stock of reputational capital may enjoy an extra measure of goodwill in times of difficulty or crisis. This goodwill can cash out in varied and sometimes surprising ways—as other parties refrain from using their superior bargaining power, remain willing to forego costly and time-consuming formalities, or tolerate mistakes they would otherwise challenge.

PAINE, *supra* note 17, at 49.

407. See DOWLING, *supra* note 172, at 145; FOMBRUN & VAN RIEL, *supra* note 172, at 33; see also FOMBRUN, *supra* note 172, at 1; JACKSON, *supra* note 31, at 1; PAINE, *supra* note 17, at 49. See generally ALSOP, *supra* note 172, at 1.

408. See SHARON H. GARRISON, *THE FINANCIAL IMPACT OF CORPORATE EVENTS ON CORPORATE STAKEHOLDERS* 3–6 (1990); Ian I. Mitroff & Mural C. Alpaslan, *Preparing for Evil*, HARV. BUS. REV., Apr. 2003, at 109, 115; see also Ian I. Mitroff, *Crisis Management and Environmentalism: A Natural Fit*, CAL. MGMT. REV., Winter 1994, at 101, 101–02.

creating activity.⁴⁰⁹ If firms fail to comply with reputational accountability requirements, however, they may eventually face reputational sanctions. Still, over time, industry as a whole seeks to catch up with its leaders and innovators.⁴¹⁰ At this point, no special advantage comes from compliance with the new norms. Nevertheless, the emerging global civil regulations function as sign-posts for corporations. Following their trends, firms may institutionalize norms to respond to their demands.

V. CRITICISMS AND REPLIES

On the one hand, the advent of global civil regulation and CSR has been hailed as a panacea to the unhealthy symptoms caused by the inability of nation-states to regulate internationally.⁴¹¹ For example, laws are often outpaced by rapidly developing technology.⁴¹² This often happens in technical fields, such as the supervision and regulation of risk in the banking industry.⁴¹³ In this context, international industry leaders call for allowing institutions' own risk models to participate in financial regulation.⁴¹⁴ On the other hand, while acknowledging the numerous positive aspects of self-regulation, critics contend that voluntary business regulations are intrinsically unable provide a comprehensive regulatory landscape, especially because transnational firms may evade regulation by relocating.⁴¹⁵ Moreover, critics allege that civil regulations are *too* soft when it comes to regulating conduct as compared to the hard rule of law.⁴¹⁶ For example, absent any adjudicative institution with multinational

409. See F.A. Hayek, *The Corporation in a Democratic Society: In Whose Interest Ought It and Will It Be Run?*, in BUSINESS STRATEGY 225, 225–26 (H. Igor Ansoff ed., 1969) (arguing that such activities place the corporation beyond what must be considered its “sole task” of generating capital); see also Keith Davis, *The Case for and Against Business Assumption of Social Responsibilities*, 16 ACAD. MGMT. J. 312, 318–19 (1973).

410. See generally JIM COLLINS & JERRY I. PORRAS, BUILT TO LAST: SUCCESSFUL HABITS OF VISIONARY COMPANIES 93, 181 (2002) (discussing the example of the Boeing Company).

411. See ANDREW SAVITZ, THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO 193–94 (2006).

412. See James, *supra* note 15, at 20.

413. See *id.*

414. See *id.*

415. See LIPSCHUTZ & ROWE, *supra* note 181, at 154, 167.

416. See, e.g., ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, VOLUNTARY APPROACHES FOR ENVIRONMENTAL POLICY: AN ASSESSMENT (1999); see also Madhu Khanna, *The U.S. 33/50 Voluntary Program: Its Design and Effectiveness*, in REALITY CHECK: THE NATURE AND PERFORMANCE OF VOLUNTARY ENVIRONMENTAL PROGRAMS IN THE U.S., EUROPE, AND JAPAN 15, 15 (Richard D. Morgenstern & William A. Pizer eds., 2007). See generally Michael J. Lenox & Jennifer Nash, *Industry Self-*

or international jurisdiction, it is difficult to obtain redress for human rights violations if the victim's home state does not provide the same.⁴¹⁷

In addition, conceptual difficulties arise to the extent that civil regulations amount to self-regulation and are voluntary codes that merely codify firms' or their primary subjects' responsibilities.⁴¹⁸ A potential drawback is the perception that compliance with the codes is undertaken on a purely voluntary or discretionary basis.⁴¹⁹ Nevertheless, logic dictates that responsibility for human rights, in their broad sense,⁴²⁰ stems from the fundamental maxim that people possess a bundle of human rights that may not be transgressed.⁴²¹ Acknowledging the universality of the human rights principle negates the notion that firms' human rights responsibilities are purely voluntary or discretionary. Rather, the universal maxim of human rights imposes overriding obligations on transnational firms. Human rights norms fall squarely within the category of hypernorms.⁴²² Therefore, any CSR initiative that seeks to comply with human rights hypernorms should be viewed as mandatory, rather than discretionary. The Integrative Social Contract Theory, however, fails to account for why corporations commit their resources to advancing human rights. While detailing the firms' decision making processes, the ISCT focuses on mechanisms for resolving conflicts between authentic norms and hypernorms.⁴²³ The theory does not address the businesses' economic motivations, resources, or competencies.⁴²⁴ The ISCT framework is thus deficient. Under the ISCT, a firm's decision to act responsibly with respect to human rights remains discretionary, or, within "moral free space."⁴²⁵ This, however, betrays the nondiscretionary nature of human rights. An alternative theory is necessary—namely, the theory of reputational capital. The latter best accounts for how firms, recognizing the mandatory nature of human rights obligations, can expect support from civil society while proactively advancing them, thus improving their financial and social standing.

Regulation and Adverse Selection: A Comparison Across Four Trade Association Programs, 12 BUS. STRATEGY & ENV'T 343, 343 (2003); Eaton, *supra* note 377, at 297.

417. See Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 Geo. INT'L ENVTL. L. REV. 309, 359 (1998).

418. See Khanna, *supra* note 416, at 15, 35.

419. See *id.* at 15, 31–32.

420. See Eaton, *supra* note 377, at 261, 297.

421. Ven, *supra* note 146, at 50.

422. See DONALDSON & DUNFEE, *supra* note 12, at 74–81.

423. See Donaldson & Dunfee, *supra* note 147, at 89.

424. See *id.* at 90–94, 109–110.

425. DONALDSON & DUNFEE, *supra* note 12, at 38.

While the practical impact of civil regulations is slight, it is nevertheless palpable. The scores of intergovernmental treaties and agreements have been ineffective, at least in the area of ecological preservation.⁴²⁶ Civil regulations provide greater influence than inter-governmental treaties with respect to human rights, workplace conditions, and forestry practices as they reach beyond national borders.⁴²⁷ Yet in the absence of universally accepted criteria for assessing such impact, it is difficult to draw solid conclusions.

But the reputational pressure is on. In order to effectuate positive change in businesses' environmental and socioeconomic practices in the developing world, activists in the West make public demands on well-reputed, high-profile transnational companies based in Europe and the United States.⁴²⁸ These demands and pressures often obviate the need for governmental involvement in the sphere that is left unchecked due to governments' limitations.⁴²⁹ The main aim in this process is to transfer the more demanding regulatory guidelines from the developed world to businesses, industries, and markets in the developing world.⁴³⁰ In doing so, civil regulations cause the "California effect"—the export of higher standards through international trade.⁴³¹

Of course, international civil regulations are arguably more effective than the human rights, environmental, and labor standards originating from the developing world.⁴³² Indeed, civil regulations are almost the exclusive source of effective business regulation for many developing countries.⁴³³ Global civil regulations have led to greater levels of compliance with human rights, workplace, and environmental standards by

426. See generally THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE (David G. Victor, Kal Raustiala & Eugene B. Skolnikoff eds., 1998).

427. See Winston, *supra* note 48, at 71–72.

428. See *id.* at 81.

429. See Virginia Haufler, *Global Governance and the Private Sector*, in GLOBAL CORPORATE POWER 85, 90, 92 (Christopher May ed., 2006); Oran R. Young, *The Effectiveness of International Institutions: Hard Cases and Critical Variables*, in GOVERNANCE WITHOUT GOVERNMENT 160, 170–71 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992) (as an example, discussing the whaling industry); see also Robert Falkner, *Private Environmental Governance and International Relations: Exploring the Links*, GLOBAL ENVIRON. POL., May 2003, at 72, 79 (2003).

430. See John Gerard Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 93, 106–08 (David Held & Mathias Koenig-Archibugi eds., 2003).

431. DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN GLOBAL ECONOMY 748 (1995).

432. See Winston, *supra* note 48, at 76.

433. See *id.* at 72–73.

Western companies or their affiliates operating in a developing region.⁴³⁴ However, some would deny this claim or discount its significance.⁴³⁵ Indeed, the traditional regimes of hard law and the emerging regimes of soft law are capable of working together.⁴³⁶ They are not mutually exclusive vehicles for corporate governance. While civil regulations offset some deficiencies in governmental regulation, they need not completely replace or substitute the hard regulation that originates in domestic, regional, or global arenas. The continuing success of private global business regulation hinges on the degree to which its standards and its instrumentalities for accountability can be successfully incorporated into, and strengthened by, regulatory procedures backed by both traditional legal sanctions and emergent reputational sanctions at domestic, regional, and transnational levels.⁴³⁷

Another criticism is that manufacturers in the developing world consider the Western civil regulations to be a burden on their development.⁴³⁸ Critics point out that compliance with Western codes elevates

434. See, e.g., A. Claire Cutler, *Transnational Business Civilization, Corporations, and the Privatization of Global Governance*, in GLOBAL CORPORATE POWER 199, 199–200 (Christopher May ed., 2006); Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 39, 39 (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink eds., 1999). See generally ASEEM PRAKASH & MATTHEW POTOSKI, *THE VOLUNTARY ENVIRONMENTALISTS: GREEN CLUBS, ISO 14001, AND VOLUNTARY ENVIRONMENTAL REGULATIONS* (2006); Jean-Philippe Thérien & Vincent Pouliot, *The Global Compact: Shifting the Politics of International Development*, 12 GLOBAL GOVERNANCE 55, 55 (2006) (discussing the example of the UN Global Compact).

435. See, e.g., Don Wells, *Too Weak for the Job: Corporate Codes of Conduct, Non-governmental Organizations and the Regulation of International Labour Standards*, 7 GLOBAL SOC. POL'y 51, 73 (2007). See generally JILL ESBENSHADE, *MONITORING SWEATSHOPS: WORKERS, CONSUMERS, AND THE GLOBAL APPAREL INDUSTRY* (2004).

436. Lorne Sossin & Charles W. Smith, *Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government*, 40 ALTA. L. REV. 867, 869 n.5 (noting that relationship between “soft” and “hard” law “is analogous” to the relationship between a computer’s software and hardware).

437. See, e.g., HALINA WARD, *PUBLIC SECTOR ROLES IN STRENGTHENING CORPORATE SOCIAL RESPONSIBILITY: TAKING STOCK* 381 (2004); see also CORPORATE SOCIAL RESPONSIBILITY INITIATIVE, *LEADERSHIP, ACCOUNTABILITY AND PARTNERSHIP: CRITICAL TRENDS AND ISSUES IN CORPORATE SOCIAL RESPONSIBILITY* (2004).

438. See, e.g., Orly Lobel, *Sustainable Capitalism or Ethical Transnationalism: Off-shore Production and Economic Development*, 17 J. OF ASIAN ECON. 56, 56 (2006). See generally DAVID HENDERSON, *MISGUIDED VIRTUE: FALSE NOTIONS OF CORPORATE SOCIAL RESPONSIBILITY* 58 (2001); DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2005).

business costs.⁴³⁹ Consequently, companies in developing countries are tempted to follow the bare minimum in terms of compliance with requirements foisted upon them by Western contractors.⁴⁴⁰ Their relationships with private inspectors and ethics auditors often turn hostile and even involve instances of deception.⁴⁴¹

Similar criticisms are leveled at Western companies as well. Critics contend that Western firms adopt civil regulations merely as public relations ploys to divert attention away from wrongdoing, or as marketing strategies, or in reaction to public and peer influences.⁴⁴² For example, the Global Compact is accused of “blue washing.”⁴⁴³ It permits member-companies to exhibit the blue logo of the United Nations, while ignoring their failure to file annual reports and their mere token efforts to comply with the Compact’s standards.⁴⁴⁴ Thus, critics contend that the corporations become free-riders.⁴⁴⁵ Some companies have even been accused of violating the Compact’s principles.⁴⁴⁶

Nevertheless, not all CSR initiatives lack genuine commitment. Arguably, those with genuine respect for civil regulations, as opposed to their mere instrumental value for good business, are most likely to reap long term reputational and financial rewards. The public, in the long run, is able to discern which firms exhibit a genuine commitment to CSR.⁴⁴⁷ Indeed, the critics’ assertions that many corporations act insincerely

439. See Lobel, *supra* note 438, at 56. See generally HENDERSON, *supra* note 438, at 58.

440. See Lobel, *supra* note 438, at 56.

441. For an insightful documentary into factories’ working conditions, see A DECENT FACTORY (First Run/Icarus Films 2004). See Dexter Roberts & Pete Engardio, *Secrets, Lies and Sweatshops*, BUS. WK., Nov. 27, 2006, at 50, 50–58.

442. See Surya Deva, *Global Compact: A Critique of the U.N.’s “Public-Private” Partnership for Promoting Corporate Citizenship*, 34 SYRACUSE J. INT’L L. & COM. 107, 147 (2006).

443. Ralph Nader, *Corporations and the U.N.: Nike and Others “Bluewash” Their Images*, SAN FRANCISCO BAY GUARDIAN, available at www.commondreams.org/views/091900-103.htm.

444. See Deva, *supra* note 442, at 147–48; see also Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 FLA. J. INT’L L. 1, 36–37 (2007).

445. See Pete Engardio, Commentary, *Global Compact, Little Impact*, BUS. WK., July 12, 2004, at 86, 86–87; Oliver F. Williams, *The UN Global Compact: The Challenge and the Promise*, 14 BUS. ETHICS Q. 755, 757 (2004).

446. Among those criticized were Aventis, Bayer, BHP, Nestle, Nike, Norsk Hydro, Rio Tinto, Shell, Unilever, and the International Chamber of Commerce. See David M. Bigge, *Bring on the Bluewash: A Social Constructivist Argument Against Using Nike v. Kasky to Attack the UN Global Compact*, INT’L LEGAL PERSP., Spring 2004, at 6, 12–13 (2004).

447. See Winston, *supra* note 48, at 86–87.

presuppose that it is possible to distinguish disingenuous public relations ploys from sincere moral commitments. In other words, the skeptic's argument assumes what it wants to deny—that corporations are behaving wrongly when they use CSR superficially instead of honoring environmental and social standards for their own sake. If it were true that all corporations always act insincerely, meaning, therefore, that they are incapable of acting otherwise, then what would be the point of drawing our attention to, and condemning, such behavior?

In addition, critics doubt whether firms that proactively comply with civil regulations in order to merely enhance profitability can ultimately grow reputational capital.⁴⁴⁸ In other words, critics insist that the pure profit motivation necessarily taints any purported ethical act. Addressing this important objection requires reflection upon two fundamental points. First, wealth creation is itself a source of public good.⁴⁴⁹ Second, while getting reputational rewards from CSR most likely requires genuine commitment, it is unnecessary and likely impossible to gauge the degree of its authenticity, as the motives for corporate compliance with CSR are notoriously complex.⁴⁵⁰ The public, however, deplores corporate marketing and public relations campaigns masquerading as citizenship and social responsibility initiatives, especially when used to divert attention

448. Ella Joseph & John Parkinson, *Confronting the Critics* 10 (Jan. 18, 2002) (unpublished manuscript, available at <http://www.ippr.org.uk/uploadedFiles/events/confrontingcritics.PDF>). But see Vogel, *supra* note 33, at 25–26.

449. Roger Scruton makes this point as follows:

The very same 'invisible hand' that, according to Mandeville and Smith, produces public good from the pursuit of private profit, produces private profit from the pursuit of public good. Moral and economic values are not in competition but, in the right context, to pursue the one is to obtain the other: and the dependency goes both ways.

Roger Scruton, *Virtue and Profit: a Critique of Managerial Reasoning*, in *RETHINKING BUSINESS MANAGEMENT: EXAMINING THE FOUNDATIONS OF BUSINESS EDUCATION* 22, 24 (Samuel Gregg & James Stoner eds, 2d ed. 2008).

450. One author identifies four ways in which companies respond to demands placed by CSR, arguing that taken together they establish a business case for CSR. ZADEK, *supra* note 25, at 64. The four approaches are distinguished as follows: (1) defensive approach, intended to alleviate pain; (2) traditional cost-benefit approach holding that firms commit to activities for which they can see direct benefits exceeding costs; (3) strategic approach, according to which firms recognize the changing environment and thus engage with CSR as part of a conscious emergent strategy; (4) innovation and learning approach, where active engagement with CSR both provides fresh opportunities to understand the marketplace and enhances organizational learning, all of which fosters competitive advantage. *Id.*

from a firm's own misconduct.⁴⁵¹ As has been shown, activists have been quick to expose firms that engage in disingenuous image-laundering tactics.⁴⁵² Any attempt to deceive the public, in today's age of far-reaching, decentralized media, will quickly cause reputational harm.

In other words, reputational capital is generated from CSR backed by genuine intention. A company will find it difficult to capitalize on compliance with civil regulations unless it has explicitly declared its moral commitment. Companies that exhibit the "it pays to be ethical" attitude will be undermining their efforts in the long run. From a purely financial standpoint, it arguably pays to appreciate the intrinsic value of good business conduct. Executives of multinational corporations should guide their organizations' actions by this premise.

Finally, some critics contend that the bulk of global CSR practices resemble corporate philanthropic efforts in the sense that they are situated at the outer margins rather than at the core of firms' business strategies.⁴⁵³ Thus, critics see the CSR practices more as constituting inoculation against public denunciation than as an effort at long-term competitive advantage. On the other hand, such companies as American Apparel, British Petroleum, Seventh Generation, Starbucks, Timberland, and Whole Foods make CSR commitments a vital component of their brands and their core business policies.⁴⁵⁴ As it is commonly suggested in order to debunk the widespread misconception that costly Madison Avenue advertising campaigns do not really work: if that were really true, then why would companies continue to spend so much on them?

CONCLUSION

This article has attempted to delineate the transformative trends in global governance that are backed by reputational capital. This change is taking place through emerging civil regulations enforced by reputational accountability mechanisms established by global civil society to impose responsibility on firms for environmental and social standards. Several

451. See, e.g., Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 854 (2008).

452. See Deva, *supra* note 442, at 148.

453. See, e.g., Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 78–92.

454. See generally Ruth V. Aguilera et al., Putting the S Back in Corporate Social Change in Organizations 5–6 (U. Ill. College of Bus., Working Paper No. 04-0107, 2004); Rimmy Malhotra, *Corporate Social Responsibility Done Right*, THE MOTLEY FOOL, Oct. 3, 2007, <http://www.fool.com/investing/value/2007/10/03/corporate-social-responsibility-done-right.aspx>.

factors have caused the emergence of CSR, including: economic globalization, the development of global civil society, and the role multinational enterprises have begun to play as private authorities. The efforts of businesses to advance human rights and to promote ethical, responsible, and sustainable practices continue to mature, manifesting in the advent of civil regulations and the emergence of a regime of global economic governance.

The rise of CSR is also the result of firms—pressured by the corporate accountability movement—seeking to address the social and ecological byproducts of their conduct. A set of self-regulating norms and mechanisms, along with multi-stakeholder initiatives and co-regulation, guide CSR. The global corporate governance paradigm continues to be shaped by ethical standards and the pursuit of greater accountability for business. As corporate social responsibility adjusts to meet expectations for transnational business conduct, it will coalesce within the space of reputational capital theory. Thus, reputational accountability will continue to fill the ever-expanding gap between national regulations and the burgeoning multitude of “soft law” civil regulations.