

PARTNERSHIPS WITH MONARCHS – TWO CASE STUDIES:

CASE TWO

PARTNERSHIPS WITH MONARCHS IN THE DEVELOPMENT OF ENERGY RESOURCES: DISSECTING AN INDEPENDENT POWER PROJECT AND RE-EVALUATING THE ROLE OF MULTILATERAL AND PROJECT FINANCING IN THE INTERNATIONAL ENERGY SECTOR

(continued from Wendy N. Duong,* *Partnerships with Monarchs – Two Case Studies*, 25 U. PA. J. INT'L ECON. L. 1171 (2004))

NOTE FROM THE AUTHOR:

This article is part of a “twin series.” The analysis that follows constitutes the second case study as part of a comprehensive examination of two representative major international business transactions in the capital-intensive petroleum and energy sector. The first case study, entitled *Partnerships with Monarchs in the Search for Oil: Unveiling and Re-Examining the Patterns of “Third World” Economic Development in the Petroleum Sector*, was published in the previous issue of this *Journal*. The first part of the “twin series” (“First Article” or “Case One”) explores and critiques the current patterns of “Third World” economic development in the exploration for, development, and production of petroleum resources. The instant Article (“Case Two”) focuses specifically on the development of energy resources once petroleum has been extracted. Case Two dissects an Independent Power Project (“IPP”) and then re-evaluates the role played by Multilateral and Project Financing in such a project. The instant Article, or Case Two, should be read as a continuation of the First Article, Case One.

Although each case study is presented under separate title and published independently in two consecutive issues of this *Journal*, both titles should be considered part of one comprehensive study and analysis, with the instant Article serving as a continuation of

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the First Article (with continuing footnotes and the same usage of, and stylistic format for, defined terms). Both cases together represent the full cycle of petroleum resources development—they describe what happens when gas is found offshore and then transported onshore to be used as fuel supply for the generation of electricity in a “Third World” country. Only when readers examine both cases consecutively will the author’s objective be fully achieved—to offer the academic and legal community a comprehensive and critical examination of the patterns of economic development in a “Third World” environment. Both cases use the Socialist Republic of Vietnam as the representative deal and factual context. The final conclusions offered by the author are based on both case studies.

3.2. Case Two: The “Mid-Stream” Transaction

Suppose that in the Vietnam Deal, the International Oil and Gas Company (“IOGC”) had discovered Natural Gas (rather than Crude Oil) in the Contract Area.²⁹⁴ The IOGC would then have to evaluate the discovery and renegotiate the Production Sharing Contract (“PSC”) for more specific gas terms, because typically a PSC leaves the contractual terms governing natural gas for future negotiation.²⁹⁵ This is as much a necessity as a norm, since gas terms cannot be projected or particularized ahead of time without a technical evaluation of the type of gas discovered and the availability of a long-term gas sale market in the region. (Crude oil can

²⁹⁴ In a typical petroleum agreement, “Crude Oil” may be defined as “solid and liquid hydrocarbons in their natural state and also includes any liquid hydrocarbons extracted from Natural Gas except for methane.” See, e.g., China National Oil Development Corporation, Model Contract for Subject Area of the People’s Republic of China (Nov. 1995), in James Barnes, Granting Instruments Issues (Supp. Pt. 7). “Natural Gas” may be defined as both “‘Associated’ and ‘Non-Associated’ natural gas under natural conditions. It can be wet if it contains condensates, or dry if it does not contain them.” See, e.g., License Agreement for the Exploration and Exploitation of Hydrocarbons Entered into by and between PeruPetro SA and Great Western Ltd. Sucursal Del Peru Area (No. 68), in James Barnes, Granting Instruments Issues (Supp. Pt. 7); see also Model Contract, Oil and Gas Concession Agreement for Exploration and Production (Budapest, Dec. 1994) (“Gas [means] natural gas consisting of gaseous hydrocarbons and all non-hydrocarbons gaseous substances produced in the concession area regardless of whether such gaseous substances exist in liquid or gaseous form in the reservoir or in solution with crude oil, but excluding liquid condensate which by normal field method is separated from natural gas.”).

²⁹⁵ See Wendy N. Duong, *Partnerships with Monarchs – Two Case Studies*, 25 U. PA. J. INT’L ECON. L. 1171, 1275 n.249 (2004) (discussing “Renegotiation Clause” and gas terms).

be shipped all over the world. On the other hand, natural gas transportation by ship is only economically feasible if the natural gas is liquefied – the cooling and compression needed to “shrink” the gas from its original volume.)²⁹⁶

Gas discoveries are often non-commercial unless they are very large in quantity, are quite rich in liquids (this description refers to the density or percentage of liquid in the gas), and there exists a market for gas sale or use.²⁹⁷ Quite often, gas development in the developing nations is a large-scaled and long-term proposition, involving complex planning and technical gas processing.

Accordingly, many gas fields discovered in the “Third World” are still “waiting on pipe,” sitting idle for years awaiting development, due primarily to two reasons. First, many exploration acreages are located a long distance from the kind of gas markets that would make gas sales profitable. Second, if the gas is rich enough, liquid extraction is a development option, but liquefaction facilities are extremely expensive and take a long time to build (as long as two years or more). For example, the Arun liquefaction complex built by Mobil Oil Indonesia (now ExxonMobil) cost approximately \$3 billion.²⁹⁸

However, if gas is discovered in sufficient quality and quantity, and if adequate infrastructure for the transport of gas exists or can readily be contemplated, the gas discovered can become the fuel supply for power-generation plants, built to meet electricity needs of the host country, nearby nations, and the region as a whole. In the energy chain, the conversion of natural gas discovered at the wellhead into electricity can be classified as the “midstream” progression of an “upstream” exploration project such as the Vietnam Deal.²⁹⁹ Accordingly, as a continuation of the Vietnam Deal, this

²⁹⁶ A. Kaplan & Graham Marshall, *World LNG Trade Responding to Increased Natural Gas Demand*, OIL & GAS J., Nov. 24, 2003, at 74.

²⁹⁷ The construction and operation of a Liquefied Natural Gas (“LNG”) liquefaction plant involves significant capital costs, thereby requiring very large deposits of easily extractable natural gas to supply feedstock to the plant, and most of the projected output must be committed in long-term sales contracts before a project can receive third-party financing. Today’s new LNG facility will require certified natural gas reserves of more than 4 tcf in order to be considered for Non-Recourse Financing supported by long-term gas sales contracts. *Id.* Although the technology was developed in the U.K., the business of gas liquefaction really took off in Asia. Japan, which had no gas production of its own, adopted the technology and was quickly followed by South Korea and Taiwan. Steve Robertson, *LNG Spending Will Reach \$39 billion by 2007*, OIL & GAS J., Jan. 12, 2004, at 62.

²⁹⁸ Michael Shari, *Over a Barrel in Indonesia*, BUS. WK., Dec. 27, 1999, at 8.

²⁹⁹ See Duong, *supra* note 295, at 1193; Press Release, World Bank, Vietnam

Article will next dissect a typical IPP in which gas discovered upstream is used as fuel to generate electricity as a commodity for sale (the "IPP or Midstream Transaction").³⁰⁰ The IPP Transaction is selected because it is typically funded by Project Financing, a legal and business concept crucial to "Third World" economic development.

3.2.1. *Anatomy of an IPP Transaction*

The IPP Transaction is an integrated, multi-deal energy transaction consisting of several related agreements, concurrently negotiated and coordinated. At the heart of the transaction is the *Power Developer* (at times called the *Power Supplier*, or *Independent Power Producer*), which is the entity responsible for developing the *Power-Generation Facility* ("*Facility*") and supplying electricity to buyers. The agreements constituting the IPP Transaction consist of the following: (i) an agreement between the Power Developer and an expert contractor for the "*Engineering, Procurement, and Construction*" (the "*EPC Function*") of the Facility (the "*EPC Contract*"); (ii) an agreement between the Power Developer and an expert operator for the "*Operation and Maintenance*" (the "*O&M Function*") of the Facility (the "*O&M Contract*"); (iii) an agreement between a gas supplier and the Power Developer, who agrees to buy gas from the gas supplier as fuel for the Facility (the "*Gas Sales Agreement*" or "*Fuel Supply Agreement*");³⁰¹ (iv) a long-term electricity sale-

Project to Help Meet Power Shortfall; MIGA and ADB Support Phu My 3 Power Project (June 12, 2004) [hereinafter Vietnam Project to Help Meet Power Shortfall], available at http://www.worldbank.org.vn/news/press24_01.htm (last visited Jan. 26, 2005); Associated Press, *Pipeline from Vietnam's Offshore Gas Fields Reaches Land*, ALEXANDER'S GAS & OIL CONNECTIONS (June 17, 2002) [hereinafter *Pipeline from Vietnam's Offshore Gas Fields Reaches Land*] (showing integration of offshore gas field, pipeline construction, and power-generation plant onshore in the South China Sea project), available at <http://www.gasandoil.com/goc/news/nts22852.htm> (last visited Jan. 26, 2005).

³⁰⁰ The terms "Midstream Transaction" and "Independent Power Project ("IPP") Transaction" are used herein synonymously.

³⁰¹ Various transportation arrangements may be necessary to enable the delivery of gas fuel to the plants. These transportation agreements will also be part of the Project Documents submitted for bankers' review. Accordingly, an IPP transaction may occasion infrastructure building projects, such as pipeline construction and operation. For example, British Petroleum was instrumental in the development of an approximately \$1.3 billion pipeline project purported to transport gas from the South China Sea to various onshore fuel power stations in Vietnam. *Pipeline from Vietnam's Offshore Gas Fields Reaches Land*, *supra* note 299; Agence France Presse, *BP's Vietnam Gas Project Completed After a Decade*, THE VIETNAM NEWS (Nov. 25, 2002), available at <http://perso.wanadoo.fr/patrick>.

purchase arrangement (called “Power Purchase Agreement” or “PPA”) executed by the Power Developer and buyers of electricity. The PPA (or a cluster of PPAs) constitutes the core economics of the IPP Transaction because the PPA provides the income stream used to pay off the costs of Facility construction and operation, as well as the costs of gas fuel.³⁰² The income stream can last for decades, and will be used to pay off loan proceeds over the years. According to a joint study by the World Bank and USAID, PPA terms in Asia and Latin America may range from fourteen to forty years,³⁰³ and (v) an optional “Implementation Agreement” executed by the Power Developer with the host government. The Implementation Agreement sets the regulatory framework and standards for the project, based on, or in addition to, the applicable local law. The Implementation Agreement may act as the broader regulatory overlay, infusing its effect into all other agreements that, together, document the IPP Transaction.

All of the agreements described above constitute “Project Documents,”³⁰⁴ which must be reviewed not only by the parties, but also by financing institutions contemplating commitments to finance the project. Parties to these Project Documents constitute principal “Project Participants” in the IPP Transaction, each providing a critical function as described below. First, the Power Developer undertakes to develop and own the Facility. The Power Developer can be a single company, a consortium, or a joint venture, either incorporated or unincorporated. When the joint venture is incorporated under the law of the host country, the result is a *Pro-*

guenin/cantho/vnnews/bpvn.htm (last visited Jan. 13, 2005); see also Minh Ngoc, *BP Reaching for Target*, VIETNAM INVESTMENT REV. (Jan. 5, 2004) (discussing Gas Supply Agreement executed by PetroVietnam as buyer of gas from BP’s gas field to supply fuel to power-generation plant), available at <http://www.vir.com.vn/Client/VIR/index.asp?url=content.asp&doc=2156> (last visited Feb. 22, 2005); accord AsiaPulse via COMTEX, *Nam Con Son Production Set to Skyrocket Late This Year*, ALEXANDER’S GAS & OIL PRODUCTION (June 25, 2003), available at <http://www.gasandoil.com/goc/company/cns32860.htm> (last visited Feb. 3, 2005).

³⁰² Laura Onofri, *Contracts, Investment Incentives and Efficiency in the Restructured Electricity Market*, 16 EUR. J.L. & ECON. 23, 24, 34 (2003).

³⁰³ See, e.g., *id.* at 23-28. A Power Purchase Agreement may cover a period of fifteen to thirty years. *Id.* at 24; see also DAVID BAUGHMAN & MATTHEW BURESCH, *MOBILIZING PRIVATE CAPITAL FOR THE POWER SECTOR: EXPERIENCE IN ASIA AND LATIN AMERICA* (U.S. Agency for Int’l Dev. & World Bank, Discussion Paper No. 16276, 1994) (discussing PPA terms examined for studies ranging from fourteen years to forty years, with the average being twenty to twenty-five years).

³⁰⁴ This configuration of transactions does not include various financing agreements to secure funding for the project.

ject Entity bearing the juridical status of the host country. All Project Participants who contribute capital and hold equity interests in the project are functionally shareholders of the Project Entity. Second, the *EPC Contractor* undertakes the EPC Function and executes the EPC Contract with the Power Developer for the construction of the Facility. Third, the *O&M Contractor or Plant Operator* is responsible for the O&M Function and executes the O&M Contract with the Power Developer for the maintenance and operation of the Facility. Fourth, the *Fuel Supplier* is responsible for the supply, transportation, and delivery of fuel to the Facility. (Where gas from the upstream discovery becomes the source of fuel for a gas-fired facility as in the Vietnam Deal, fuel supply is provided by the IOGC that has discovered gas upstream. The IOGC may decide to act as the Power Developer, thereby wearing a "double hat.") Fifth, the *Power Purchaser* executes the PPA with the Power Developer, and hence provides the income stream for the project. The Power Purchaser can be governments, municipal authorities, or public utility companies in the region. Sixth, the host government or its designated state-owned entity can be a Power Purchaser, or the government can simply act as the overseeing regulatory authority that controls the utility sector or the project. The host government may also execute an optional Implementation Agreement with the Power Developer.

3.2.2. *IPP Transactions, Project Financing, and "Off-Balance-Sheet Accounting"*

Because of its self-sufficient nature, the IPP Transaction is the classic international business transaction typically funded by Project Financing. The structure of an IPP Transaction can best be explained in connection with Project Financing as a legal and business concept.

For several decades, Project Financing (sometimes called "*Segregated Financing*") has enabled billions of dollars of funding for economic development projects in the "Third World." The term, therefore, also refers to a specialty banking practice within the practice of law, focusing exclusively on this type of financing transaction. Simply stated, Project Financing is a financing method based solely on the merits of the project, rather than on the creditworthiness of the project sponsor. In the classic, purest form of Project Financing, all parties to the integrated deal (including bankers or financiers) look to (i) future revenues generated by the

project as the source of funds from which project loans will be paid; and (ii) the assets of the projects, whether physical or as contractual rights, as security or collateral for the loans. In traditional corporate financing, lenders typically have recourse to all of the project sponsor's assets and revenues. The structure of a Project-Financed transaction limits the lender's security to the assets and cash flow of the project itself, typically under the rubric of a project company formed specifically to construct, own, and operate the Project Facility.³⁰⁵ The loan is either with *limited recourse* or completely *no recourse* to the project sponsor, resulting in either limited or no encumbrance on the sponsor's balance sheet. Hence, the sponsor can maintain its general creditworthiness despite the high debt-equity leverage ratio that may have been incurred by virtue of the debtor's sponsorship of international Project-Financed transactions. The sponsor may contribute about twenty to forty percent of the investment as equity, with the remainder infused strictly as project debts.³⁰⁶ (For its equity contribution, the sponsor may use its earnings, raise money on the international or domestic capital markets by offering debt securities or equity securities, or otherwise obtain funding or loans via commercial sources and/or via the Multilateral Institutions. The sponsor can also spread risks by sharing equity contribution with other companies.) Overall, Project Financing enables the sponsor to limit its risk exposure to its own equity investment in the project.

From the lender's perspective, under Project Finance principles, when it is contractually established that the project can pay for itself over an extended period of time, bankers may be persuaded to make loans based on demonstration of the project's long-term self-sustaining capabilities and economic viability. Such demonstration of viability and assurances of an uninterrupted income stream are evidenced in the contractual arrangements among the Project Participants. Accordingly, in order to determine whether Project Financing is appropriate, commercial lenders will closely scrutinize Project Documents for any risks of disruption to the income stream or impairment of project assets. Lenders will examine the contractual language of all Project Documents to decipher whether these risks of loss have been adequately treated via transfer to the third

³⁰⁵ David Blumental, *Sources of Funds and Risk Management for International Energy Projects*, 16 BERKELEY J. INT'L L. 267, 270 (1998).

³⁰⁶ *Id.*; accord PETER K. NEVITT & FRANK FABOZZI, PROJECT FINANCING (6th ed. 1997) (discussing methods developed for Project Financing eligibility and offering examples of successful undertakings).

party, or assumed by an economically able Project Participant. If the lender or financier sees any untreated or uncovered risk of loss, it will either turn down the request for Project Financing, or ask for additional guarantees or other credit enhancement tools. These tools may alter the nature of financing from the *classic* form of Project Financing to a more *hybrid* form bearing more resemblance to other traditional methods of financing.³⁰⁷ The lawyering and business skills lie in the prospective prediction and mitigation of risks via tightly negotiated contractual language, as well as in the financial structuring and legal engineering that give lenders the necessary comfort in not seeking recourse beyond the project itself. The documentation for an international Project-Financed investment is among the most complex and voluminous of any financing transactions, and will encompass all kinds of debt and equity arrangements, credit support facilities, as well as credit enhancement tools to give lenders the assurances needed.³⁰⁸

The purest, classic form of IPP Project Financing is also described as "*Non-Recourse Financing*." Loan proceeds will be paid solely from the future income stream or cash flow generated by the project "*without recourse*" to the assets, or as individual obligations of the Power Developer or other Project Participants. In such pure Non-Recourse Financing method, the existing assets of a corporate sponsor are unencumbered by the debts. In contrast, in hybrid (rather than classic) Project Financing, lenders may still have "*limited recourse*" directly or indirectly to the assets of the corporate sponsor or equivalent. For example, the sponsor's parent company may have issued a corporate guarantee to secure the sponsor's performance or to guard against financial losses suffered by others resulting from the sponsor's non-performance. Such guarantee may provide lenders recourse to the parent company's corporate assets in case of loan defaults. As another example, bankers may require the sponsor to obtain a surety bond, or a Standby Letter of Credit issued by the sponsor's bank to guard against the sponsor's default.³⁰⁹ (In the case of a Standby Letter of Credit, the issuing bank

³⁰⁷ See generally, Scott L. Hoffman, *A Practical Guide to Transactional Project Finance: Basic Concepts, Risk Identification, and Contractual Considerations*, 45 BUS. LAW. 181 (1989) (discussing the fundamental aspects of project finance).

³⁰⁸ See generally, Harold F. Moore & Evelyn D. Giaccio, *International Project Finance*, 11 N.C. J. INT'L L. & COM. REG. 597 (1986) (defining international project finance and presenting its legal framework as well as recent field developments in the United States).

³⁰⁹ See UNCITRAL Secretariat, Explanatory Note, UNITED NATIONS

granting the credit will make good the financial loss occasioned by the sponsor's default, but ultimately the issuing bank will look to the corporate accounts or assets of the sponsor—the issuing bank's customer—via an indemnity or reimbursement agreement (executed separately between the issuing bank and the sponsor) as a condition precedent to the bank's issuance of the Standby Letter of Credit.)³¹⁰

For decades, the corporate sponsor has enjoyed the single most important benefit of pure or classic Non-Recourse Project Financing: the “off-balance sheet” accounting treatment, whereupon the liabilities incurred by the project are not reported on the corporate sponsor's balance sheet because there has been no encumbrance of corporate assets (the sponsor may still disclose the transaction under the textual Management Disclosure and Analysis (“MD&A”) or footnotes to the financial statements, depending on whether the sponsor and its auditors deem the project to be material to the fi-

CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT, 30th Sess., U.N. Doc. A/CN.9/431 (1996) (stating that the Convention is designed to facilitate the use of independent guarantees and Standby Letters of Credit), available at <http://www.uncitral.org/english/texts/payments/guarantees.htm> (last visited Feb. 22, 2005); Roy Goode, *Abstract Payment Undertakings in International Transactions*, 22 BROOK. J. INT'L. L. 1, 1-4, 16-17 (1996) (discussing international uniform standards in relation to abstract undertakings in general, and Standby Letters of Credit specifically); Egon Guttman, *Bank Guarantees and Standby Letters of Credit: Moving Toward a Uniform Approach*, 56 BROOK. L. REV. 167, 169-70 (1990) (remarking that unknown credit standing of purchasers has led to the development of Standby Letters of Credit); see also *Harris Corp. v. Nat'l Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982) (granting an injunction against receipt of payment on a letter of credit to Iranian defendants during the 1979-80 hostage crisis); *Int'l Housing, Ltd. v. Rafidain Bank Iraq*, 712 F. Supp. 1112 (S.D.N.Y. 1989) (holding payment of overdraft guarantees by a Canadian Bank into a U.S. account sufficient to establish subject matter jurisdiction under the Foreign Sovereign Immunities Act); *Am. Bell Int'l, Inc. v. Iran*, 474 F. Supp. 420 (S.D.N.Y. 1979) (denying injunction against payment of a letter of credit to Iran by an American bank consequent to the 1979 Islamic Revolution); Michael Stern, Comment, *The Independence Rule in Standby Letters of Credit*, 52 U. CHI. L. REV. 218 (1985) (examining the problem of defining “fraud in the transaction” (as opposed to “fraud on the document”) and applying it to cases involving Standby Letters of Credit).

For a critical analysis of Standby Letters of Credit as a risk-shifting mechanism and legal device, see Henry D. Gabriel, *Standby Letters of Credit: Does The Risk Outweigh the Benefits?*, 1988 COLUM. BUS. L. REV. 705 (1988) (arguing that the present level of regulation of standby letters of credit is insufficient); cf. John F. Dolan, *Analyzing Bank-Drafted Standby Letter of Credit Rules, the International Standby Practice (ISP98)*, 45 WAYNE L. REV. 1865 (2000) (challenging the economic efficiency of the International Standby Practices 1998 regime and advising that purchasers of Standby Letters of Credit insist on ISP98's selective application or abandonment).

³¹⁰ Blumental, *supra* note 305.

nancial picture represented).³¹¹ Corporate sponsors prefer pure or classic Non-Recourse Project Financing, and will bend backward to obtain or structure funding as such. The end result is evident—the high-risk “Third World” development project in question will leave no effect on their assets, credit, or balance sheet.³¹²

To a limited and highly technical extent, the post-Enron Corporation (“Enron”) legislation, the Sarbanes-Oxley Act of 2002, has taken away this “safety-net” from the corporate sponsor. Section 401(a) of the Act added a new Section 13(j) to the Securities Exchange Act of 1934 by requiring public companies to disclose in their 10K Annual Report and 10Q Quarterly Report all “material off-balance sheet transactions, arrangements, obligations, and other relationships of the issuer with unconsolidated entities.”³¹³ The SEC has interpreted “off-balance sheet arrangements” to include “Variable Interest Entities,” defined by FASB Interpretation No. 46 (“FIN 46”), as contractual, ownership or other pecuniary interests in an entity that change with changes in the entity’s net asset value.³¹⁴ Simply stated, “Variable Interests” are investments or interests that will absorb a portion of the entity’s expected losses if they occur, or receive portions of the entity’s expected residual returns if they occur.³¹⁵ FIN 46 describes Variable Interests Entities to include Project-Financed investments and certain lease-back fi-

³¹¹ In its latest Interpretive Release, the U.S. Securities & Exchange Commission (SEC) opined that Item 303 of Regulation S-K, Management’s Discussion & Analysis of Financial Condition and Results of Operation (“MD&A”), should enhance the overall financial disclosure and provide the context within “which financial information should be analyzed . . . so that investors can ascertain the likelihood that past performance is indicative of future performance.” The MD&A disclosure should reveal, inter alia, known material trends and uncertainties. Interpretation: Commission Guidance Regarding Management’s Discussion and Analysis of Financial Condition and Result of Operations, Release Nos. 33-8350, 34-48960, FR-72, 68 Fed. Reg. 75,056 (Dec. 29, 2003), available at <http://www.sec.gov/rules/interp/33-8350.htm> (last visited Jan. 28, 2005).

³¹² CREDIT AND RELATED DOCUMENTATION FOR PROJECT FINANCE TRANSACTIONS (PLI Commercial Law and Practice Course, Handbook Series, 1993).

³¹³ 15 U.S.C. § 78m(j) (2002).

³¹⁴ FIN. ACCT. STANDARDS BD. (FASB), FASB INTERPRETATION NO. 46: CONSOLIDATION OF VARIABLE INTEREST ENTITIES para. 2(c) (2003), available at <http://www.fasb.org/fin46r.pdf>; see also Laird H. Simons, III, et al., *SEC Issues Final Rule Regarding Disclosure of Off-Balance Sheet Arrangements and Contractual Obligations* (reporting the implementation of Section 401A of the Sarbanes-Oxley Act and discussing the scope required for disclosures as well as the situations to which the requirements may apply), at <http://articles.corporate.findlaw.com/articles/file/00050/008781> (last visited Jan. 28, 2005).

³¹⁵ *Id.*

nancing techniques. Therefore, currently, depending on how an IPP Transaction is structured (for example, which entity owns which interest, and receives income or absorbs losses in what manner or through what legal structure), under the widely cast net of Sarbanes-Oxley and in the SEC's view, an IPP Transaction may have to be disclosed in corporate public filings if it qualifies as a "Variable Interest" under FIN 46.

Hence, with Sarbanes-Oxley, management and its auditors no longer have the discretion whether to disclose off-balance-sheet Project-Financed transactions that arguably meet the definition of FIN 46. It should be noted, however, that Sarbanes-Oxley was not designed to address the structures of foreign direct investment ("FDI") transactions and their Non-Recourse or Limited-Recourse Project-Financing methods—these methods have been utilized by U.S.-based public companies for decades, all over the world. Instead, the legislation was specifically designed to deter the recurrence of the "Enron-type" fraudulent practice undertaken to dodge tax and accounting scrutiny via the use of "*Special Purpose Entities*" ("SPEs"), such as subsidiaries or limited partnerships set up solely for a special project. The "Enron" ills addressed by Sarbanes-Oxley consist of the hiding of debts and assets that perform poorly, as well as the quick execution of related-party transactions at prices that are inherently suspicious, via the use of SPEs. For example, a company may try to shift liabilities and assets to an SPE owned by it in order to manipulate and evade accounting and reporting requirements—the SPE may borrow funds, yet the debts are not shown in the books of the sponsoring parent. Or, the company may transfer bad investments to the SPE so that the declining value will not have to be recognized by the sponsoring parent. Or, the company may execute related-party transactions without regard to arms-length negotiated prices.³¹⁶ These situations are completely distinguishable from legitimate SPEs set up in accordance with a host country's legal requirements for the specific purpose of conducting a FDI overseas, which, by virtue of its Non-Recourse Financing structure, may enjoy legitimate "off-balance sheet" accounting treatment.

Overall, the new "off-balance sheet" disclosure requirement of

³¹⁶ *Enron's Accounting Rules: What Can We Learn to Prevent Future Enrons?: Hearing Before the House Comm. on Energy and Commerce, 107th Cong. 87-96 (2002) (testimony of Bala G. Dharan, Professor, Rice University), reprinted in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 113, 117-20 (Nancy B. Rapoport & Bala G. Dharan eds., 2004).*

Sarbanes-Oxley is to promote transparent financial reporting in the interest of the American investing public, rather than to address corporate FDI transactions or “Third World” beneficiaries of those transactions. At the same time, the “catch-all” safeguard of U.S. federal securities law’s anti-fraud provision in connection with the purchase or sale of securities, Section 10(b) of the Securities Exchange Act (the “Act”) and SEC Rule 10b-5,³¹⁷ will continue to safeguard the American trading public against fraudulent disclosure or non-disclosure of corporate transactions in all relevant aspects.

3.2.3. *Risk-Allocation as the Core Principle for Project Financing and IPP Transactions, and the Dynamics of Lawyering*

Even though “off-balance sheet” accounting may inherently be suspect, it cannot be generalized that FDI Non-Recourse Project-Financed transactions are per se indicia of any allegedly fraudulent intent on the part of the sponsor. Instead, these transactions typically involve the sponsor’s “good faith” risk assessment analysis in the course of its business judgment. Unless Non-Recourse, Off-Balance-Sheet Project Financing is available, the corporate investor is reluctant to take on high-risk FDI transactions in faraway lands or on foreign territories with political and legal concepts alien to the U.S.-trained business executive or lawyer. To ban or invalidate all such financing methods is *not* what the post-Enron legislation purports to do, as the Act only imposes a more intricate and more complete financing reporting requirement aimed to protect the U.S. investing public. Without the type of financing structure that helps buffer the corporate sponsor against investment risks, the corporate sponsor may not invest in a foreign country unless the profit margin is extremely high, which quite often is attributed to drastically cheaper labor and raw materials – the same type of conditions facing the colonists of the nineteenth and early twentieth centuries. (In the colonist model, all Political Risks were eliminated because the colonist government simply took over the territory and became the “Third World” monarch!)

At the onset, therefore, it must be noted that international Project Financing and risk-allocation principles go hand in hand and should not be segregated as unrelated concepts. Although I have

³¹⁷ Securities Exchange Act of 1934 (the “Act”) § 10(b), 15 U.S.C. § 78j(b) (2004); SEC Rule 10b-5, Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2004).

previously discussed project risks in upstream petroleum projects in Case One, to provide a thorough understanding of the dynamics of deal negotiation, a more in-depth focus on risk assessment is necessary at this point in the context of IPP Transactions and their enabling funding device, Project Financing.

From the owner-developer's perspective, risk-allocation involves more than merely obtaining financing or purchasing insurance. Risk-allocation principles seek to control and quantify potential losses for purposes of financial planning. Overall, risk management techniques may typically include the following considerations: (1) risk avoidance (for example: foregoing the project); (2) loss prevention (for example: taking steps to reduce loss frequency such as providing drivers' defensive driving training and imposing drug-testing procedures to prevent automobile accidents); (3) risk retention (for example: setting up reserves to pay for future losses); (4) risk transfer (for example: spreading risks through joint ventures, indemnification agreements, or assignments of interest); and (5) simply purchasing insurance or a surety bond (payment of premium for a third party to assume all quantifiable future risks of loss).³¹⁸ When the costs of all these risk management steps exceed the anticipated profit, the first step—risk avoidance—may become the conservative business decision not to invest or engage in the project.

Under these risk management concepts, even the highly volatile Political Risks inherent in "Third World" environments can scientifically be managed like any other project risks. Economists, lawyers, and business executives have long argued that even the most "slippery" and speculative Political Risks can be quantified and estimated for purposes of economic calculations,³¹⁹ and hence can be treated via loss prevention plans or contractual means. For example, the following loss prevention measures may be appropriate to avoid the risk of expropriation in an international project: (1) the investor should keep a low profile in the host country and des-

³¹⁸ DANIEL JOHNSTON, *INTERNATIONAL PETROLEUM FISCAL SYSTEMS AND PRODUCTION SHARING CONTRACTS* (1994). See also Margaret Rosso Grossman, *Biotechnology, Property Rights, and the Environment*, 50 AM. J. COMP. L. 215 (Supp. 2002) (revealing risk management concepts in the evaluation of the benefits and drawbacks of agricultural crops developed through biotechnology, as well as in the U.S. regulatory scheme that oversees them); Robert Rosenstock & Margo Kaplan, *The Fifty-Third Session of the International Law Commission*, 96 AM. J. INT'L L. 412 (2002) (revealing risk management principles in discussing state responsibility and the prevention of transnational harm from hazardous activities).

³¹⁹ JOHNSTON, *supra* note 318.

ignite government relations personnel to develop rapport with the local authorities; (2) the investor should utilize local industries and employ native personnel in order to build local support and alliances and to develop worker loyalty in the host country; (3) the investor should avoid geographical over-concentration and should locationally diversify its international investment portfolio; and (4) last but not least, the investor should involve the government in equity sharing, in order to get long-term governmental support.

Risk-allocation principles are supported primarily by two economic theories: (1) the fundamental theory of exchange, and (2) the general theory of competitive equilibrium.³²⁰ Under the "exchange" theory, parties to an economic transaction are better off if each produces the type of goods or services for which the party has a comparative cost advantage, and risks should be shifted to the party best equipped to prevent them. Under the "competitive equilibrium" theory, optimum production is reached when the cost to the provider equals the benefit to the receiver of products. Accordingly, a risk should be shifted until the cost of the risk equals the benefit of shifting it elsewhere.³²¹

A risk, in simplified business or economic frame of reference, is a possibility of financial loss. Certain commercial or business risks center on business relationships and may not be insurable because those risks may involve the speculative loss of the chance to make a profit, rather than physical and tangible losses that can be transferred to an insurance company at a premium.³²² (Most insurance contracts will exclude speculative losses from coverage.) Nonetheless, in an IPP Transaction, the costs of risks that are not insurable must still be absorbed or assumed by a responsible party in order for the project to sustain its economic health. When a risk is shifted or allocated to a party, it means that such party agrees to bear the costs of such risk because the party is most equipped to prevent or control the risk. This is where risk management principles and the practice of Project Financing coincide and overlap.

To bring home the risk-assessment philosophy underlying Project Financing, there is a need to re-examine the overall risk-allocation patterns of energy projects. Upstream petroleum explo-

³²⁰ JACK HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* 164 (1976); John G. Mael, *Common Contractual Risk Allocations in International Power Projects*, 1996 COLUM. BUS. L. REV. 37, 38.

³²¹ *Id.*

³²² Michael C. Loulakis et al., *Managing Construction Risks – The Owner's Perspective*, in CONSTRUCTION BRIEFINGS (Fed. Publ'ns, No. 91-5, 1991).

ration projects such as the Vietnam Deal are typically *not* funded by Project Financing. It is not unusual for an IOGC holding a Participating Interest in an oil and gas exploration project abroad to rely on its own assets (rather than borrowed funds) to finance the exploration venture,³²³ although the reputation and technological power of the IOGC may attract additional investors to share capital, as illustrated by the Vietnam Deal. (In the Vietnam Deal, the IOGC successfully brought in Russian and Japanese partners to share risks.)³²⁴ The unavailability of Project Financing in upstream projects is obviously due to the high and speculative appraisal risks involved in exploration activities.³²⁵ However, once the IOGC has discovered petroleum in commercial quantities such that projected investment return or an income stream is readily ascertainable, the IOGC may be able to borrow funds to take the project through the expensive Development and Production phases. Project Financing may be available at that time.³²⁶

In contrast, an IPP investment, as the midstream progression of a commercial gas discovery, may be ideally suited for Project Financing. In an IPP Transaction, prospective revenues from the sale of electricity secured by long-term contracts are used to discharge loan payment obligations. To satisfy the Project Financier, any risk of disruption to the revenue stream must sufficiently be buffered and covered via appropriate contractual risk transfers. Such contractual risk transfers may include express indemnification, warranty, or other remedy provisions, or otherwise be explicit or implicit in the delineation of rights and obligations among the Project Participants. The contractual risk-allocation mechanism is contained in a complex set of legal agreements, with each Project Participant assuming a special function and contributing a different expertise. All Project Documents must be tightly negotiated and drafted, such that all risks of loss will have been treated or shifted to the entities most suited to assume the risks. Such entity will either absorb the risk as part of its bargained-for benefit of the deal,

³²³ James E. Horrigan, *Foreign Natural Resource Investment*, in *THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS* (Ved P. Nanda ed., 1981).

³²⁴ R. THOMAS COLLINS, *BLUE DRAGON—RECKONING IN THE SOUTH CHINA SEA* (2002).

³²⁵ See, e.g., Terrell Hallmark, *Political Risk: Assessing Dangers in International Exploration and Development*, *OFFSHORE MAGAZINE*, May 1991, at 27 (discussing the effect that political risks may have on developing and financing an international project).

³²⁶ NEVITT & FABOZZI, *supra* note 306, at 23-25, 30-32.

or will charge other Project Participants a premium for assuming such risk, ultimately raising the price of the contract in question. Business sense dictates that no risk will be allocated or reallocated among the Project Participants without a premium.³²⁷

Accordingly, when risks are contractually shifted, identifying the party who should assume the risk and affixing a premium for the cost of risk-taking become crucial matters in IPP negotiation. While each project carries its own basket of risks, there may be risks common to all projects in the same industry. Risks involved in IPP Transactions are particularly exacerbated by high capital outlays, long construction and operation periods, and potentially unstable gas and electricity markets.³²⁸ The importance of the energy and utility sectors further reinforces the impact IPP Transactions may produce on the national and regional economy and, ultimately, upon "Third World" debts.

The job of the lawyer as planner, drafter, negotiator and reviewer of all such contractual transfers is undoubtedly essential. Depending on the corporate culture, lawyers often team up with business and technical personnel in the identification of project risks, even though the task at hand may not purely be legal. In that sense, the lawyer has a unique opportunity, not only to represent the interest of her Project Participant client in the allocation of risks, but also to oversee and observe the macroeconomic impact of balancing contractual risk-allocation patterns in order to achieve a certain level playing field and overall fairness. In fact, the risk-allocation mechanism behind a project is what drives the legal issues, shapes the legal structure of the deal, and in turn creates legal norms via the formation of *lex contractus*. I will illustrate the interdependence between legal issues and risk-allocation by examining, as an example, the treatment of Facility construction and operation risks in an IPP investment.

³²⁷ Michael C. Loulakis & Owen J. Shean, *Risk Transference in Design-Build Contracting*, in CONSTRUCTION BRIEFINGS (Fed. Publ'ns, 2d Series No. 96-5, 1996).

³²⁸ BAUGHMAN & BURESCH, *supra* note 303, at 25; John J. Beardsworth, Jr., *Negotiating Power Purchase Agreements: Fundamentals for Risk Allocation and Dispute Resolution*, in PROJECT FINANCING FROM DOMESTIC TO INTERNATIONAL 27 (PLI Commercial Law & Practice Course, Handbook Series No. A-707, 1995); Mael, *supra* note 320; Robert T. Smith, *Submission and Evaluation of Proposals for Private Power Generation Projects in Developing Countries*, in PROJECT FINANCING FROM DOMESTIC TO INTERNATIONAL 183 (PLI Commercial Law & Practice Course, Handbook Series No. A-707, 1995).

3.2.4. *Relationship between Risk Management and Legal Structure – An Example of Contractual Risk-Allocation in the Construction Phase of an IPP Investment*

The IPP Transaction consists of two principal phases: (i) the shorter-term construction of the Power-Generation Facility (the EPC Contract),³²⁹ and (ii) the longer-term distribution and sale of electricity to buyers and end-users.³³⁰ All risk-allocation principles in general construction contracting apply to the first phase of an IPP investment.

As I already stated, risk-allocation techniques determine the legal structure of the construction deal. This can be illustrated via four distinct legal issues in construction contract negotiation:³³¹ (i) type of contractor compensation: whether the EPC Contract should be structured as *fixed price* or *cost plus*; (ii) type of contract delivery method: whether the EPC Contract should be *single-sourced* or *multiple-sourced*; (iii) type of remedies or damages: for example, whether liquidated damages should be imposed upon a party for certain types of events; and most importantly; (iv) type of equity structure, which dictates the legal organization of the Project Entity that serves as the Power Developer: whether the project should be structured to include *Vendor Equity* or *Government Participation*.

3.2.4.1. *Type of Contractor Compensation*

The manner of compensation—whether fixed price or cost plus—can operate to shift the general risks of construction cost overruns or changes in costs entirely to the construction contractor. In a “fixed-price” contract, the risks of unexpected costs or cost variations are assumed by the contractor, who undoubtedly will raise the fixed price of the contract in order to absorb costs of the risks. If, however, construction cost overruns are occasioned by the Power Developer, the latter will be in a better position to control or absorb the risks, and a “cost-plus” type of contract will bet-

³²⁹ On the average, the construction of a power-generation plant takes approximately two years.

³³⁰ See discussion *supra* note 303.

³³¹ These legal issues, and hence the risk-allocation mechanism from which they derive, are addressed typically in the EPC Contract and the PPA. See, e.g., FEDERATION INTERNATIONALE DES INGENIEURS-CONSEILS, GUIDE TO THE USE OF THE FIDIC CONDITIONS OF CONTRACT FOR ELECTRICAL AND MECHANICAL WORKS 132 (3d ed. 1988).

ter serve such goal. On the other hand, a cost overrun caused by a political force majeure is typically within the control of the host government, which may act as a Power Purchaser in the project. In such a case, the Power Purchase Agreement ("PPA") is the proper place and means to allocate the risk of construction cost variations ultimately to the host government. The PPA may also revert the risk of such cost variations back to the Power Developer, who, in such a case, will undoubtedly charge the host government a higher "Monthly Capacity Payment" (the cost of consuming electricity to a certain level of capacity)³³² to compensate for the Power Developer's assumption of risks. Or, the host government may be asked to financially guarantee the obligations of their affiliated Power Purchasers. Such sovereign guarantee is the legal tool that serves to allocate risks of cost overruns ultimately to the buyers of the commodity and the host country.³³³

3.2.4.2. *Type of Contract Delivery Method*

In construction contracting, "*Contract Delivery Method*" refers to the organizational structure that governs the relationships among Project Participants such as the architect, engineer, owner, construction contractor, and service or supply subcontractors.³³⁴ As illustrated below, the Contract Delivery Method—a legal issue—can become, and has been used as a risk-allocation technique.

In the "*Traditional Contract Delivery Method*," the owner hires, *first*, an architect and/or an engineer to design the project, and, *second*, a general contractor to build the design.³³⁵ Construction performance risks are thus transferred to two sources: the design professional, and the construction professional. The owner will consequently be isolated from design issues, depending on the specific contractual risk-allocation language negotiated with each of the two contractors. This method of risk transfer is sometimes called "*Multi-prime Contracting*" (as opposed to "*Single-Source or*

³³² Capacity is defined as the "load," or "demand" for which a power-generating unit or station is rated either by the user or by the manufacturer. "Demand" means the rate at which electricity is delivered to or by a system. STATISTICAL COMM., EDISON ELEC. INST., GLOSSARY OF ELECTRIC UTILITY TERMS (1991).

³³³ Jonathan Inman, *Government Guarantees for Infrastructure Projects*, 68 PROJECT FIN. INT'L 36 (1995).

³³⁴ Loulakis & Shean, *supra* note 327.

³³⁵ *Id.*

Single-Point Contracting").³³⁶

The construction phase of an IPP investment typically is modeled after a *different* Contract Delivery Method called "*Design-Build*," suitable for projects in which the owner must require that the Facility meet specific performance such as output or air quality standards. Because the Power-Generation Facility must meet quantitative electricity output as well as qualitative performance requirements, it is better off being constructed via the Design-Build method. The importance of output or standardized performance criteria necessitates the transfer of all performance risks to one single source, accomplished in one "turn-key" operation. More importantly, because most IPP investments are "Non-Recourse Project-Financed," the Power Developer must select a construction contracting method that minimizes the risks to the financial and technical integrity of the project. The Design-Built approach utilizing the technical expertise of *one single source* for all technical fronts minimizes the chance of fragmented disputes and, hence, serves the "Project Financing" purpose well.³³⁷

Specifically, Facility construction is typically handled via the execution and implementation of an *Engineering, Procurement, and Construction (EPC) Contract*, also known as "turn-key" or "Single-Point" contract. The owner holds only one party, the EPC Contractor (often an international engineering and construction firm) responsible for the entire Facility, its output, and "*Commercial Operation*."³³⁸ Only one contractor (as opposed to multiple contractors) will handle all functions—from engineering and design to procurement of supplies and parts, and, ultimately, construction of the Facility. Upon timely completion and successful performance testing, the EPC Contractor will "turn the key" over to the owner and limit the contractor's risk exposure to the honoring of warranty obligations. This single-source method of contracting reduces management time, streamlines negotiation, lowers overall costs, enhances accountability, and enables faster completion in satisfaction of specific performance and output standards.

³³⁶ See, e.g., FEDERATION INTERNATIONALE DES INGENIEURS-CONSEILS, FIDIC CONDITIONS OF CONTRACT (INTERNATIONAL) FOR WORKS OF CIVIL ENGINEERING CONSTRUCTION (3d ed. 1977).

³³⁷ Michael C. Loulakis, *Power Generation Contracting Forms*, in CONSTRUCTION PROJECT FORM BOOK 257, 259 (Robert F. Cushman & P.J. Trimble eds., 1994).

³³⁸ The EPC Contractor may obtain the services of subcontractors, although it remains primarily liable to the owner-developer regarding all aspects of the EPC Contract. For a definition and discussion of "Commercial Operation," see Duong, *supra* note 295, at 1237 n.150.

3.2.4.3. *Type of Remedies or Damages*

From the owner-developer's perspective, the risk-allocation pattern in the Design-Build method, however, is not diversified. If things go wrong, the owner must rely on only *one* source for recovery or compensation. Accordingly, the owner must be protected by predetermined, well-calculated contractual remedies. If the EPC Contractor fails to fulfill any of its obligations (whether it be Facility output, Commercial Operation, or a target completion date), the owner-developer must impose very high and precisely calculated liquidated damages as a means of remedying risks of loss. Pure legal issues such as the imposition of liquidated damages thus become the primary mechanism to allocate the risk of delay in Facility completion or failure to achieve target performance. Such delay or failure will interfere with the predetermined income stream expected from scheduled electricity sales. The party who occasions the delay or failure, or is in the best position to prevent such delay or failure, must therefore be responsible for paying liquidated damages, or otherwise making good all financial losses, in amounts sufficient for the owner-developer to ultimately cover loan proceeds and to continue the project without interruption. That party may be: (i) the EPC Contractor, if the delay or failure occurs with respect to the completion or performance of the Facility; or (ii) the O&M Contractor (the Plant Operator), if the delay or failure occurs in connection with the ongoing operation and maintenance of the Facility. However, if the delay or failure of performance is attributed to political force majeure events, the host government, or the Power Purchasers, may ultimately be made to bear the costs by way of an increase in the Monthly Capacity Payments, payable to the Power Developer.

3.2.4.4. *Type of Equity Structure – Variation of Financing Structure and Legal Organization to Accomplish Risk-Spreading Objectives*

At least three variations in the equity structure and legal organization of an IPP investment have been devised by Project Participants in order to accomplish risk-spreading objectives: (i) the Power Developer may seek equity participation from the EPC Contractor, O&M Contractor, or Fuel Supplier as a means of enhancing proper project performance ("*Vendor Equity Financing*"); (ii) the Power Developer may seek equity participation from the host government in order to reduce Political Risks ("*Government Participa-*

tion"); and (iii) IPP investments may also be structured as the *Build-Operate-Transfer (BOT)* or *Build-Own-Operate-Transfer (BOOT)* model, which, for decades, has brought about several large-scaled infrastructure development projects in the "Third World." This model spreads project risks to the international public sector, via Multilateral Financing such as World Bank funding, or funding by the Regional Development Banks.³³⁹

These risk-spreading mechanisms, however, may occasion new vices, which can be examined by scrutinizing the special legal issues raised by the aforementioned financing and structural variations.

3.2.4.4.1. *Vendor Equity Financing*

Within the Design-Build model, the EPC Contractor may opt to be included in the owner-developer consortium or Project Entity. This is called the "*Vendor Equity*" structure of financing, referring to the inclusion of services or good providers or suppliers ("*Vendors*") in project ownership.³⁴⁰ In IPP investments, Vendor Equity typically includes equity interest held by the EPC Contractor, the O&M Contractor, or the Fuel Supplier.³⁴¹ (For example, in the Vietnam Deal, the IOGC who found gas upstream might decide to undertake the development of IPP midstream as a Power Developer. In that case, the IOGC would own both the fuel and the Power-Generation Facility, meaning it would be selling fuel to itself in a Vendor Equity structure.)

Overall, inclusion of Vendor Equity in the Project Entity increases expertise base in the owner group, helps diversify capabilities, secures loyalty from vendor-suppliers, and improves account-

³³⁹ For a discussion of Multilateral Institutions, see Duong, *supra* note 295, at 1181 n.21. See also, Vietnam Project to Help Meet Power Shortfall, *supra* note 299 (describing construction of power plant supported by funding and guarantees provided by MIGA and the Asian Development Bank); Press Release, Siemens AG, Siemens Builds Largest Private Power Plant in Vietnam (Oct. 13, 2003) [hereinafter Siemens Builds Largest Private Power Plant in Vietnam] (announcing the construction of the largest combined-cycled power plant in Vietnam built by Siemens Power Generation as a turn-key project structured under Build-Own-Transfer ("*BOT*") legal framework), available at http://www.siemens.com/page/1,3771,1103775-1-11_0-0-0,00.html (last visited Feb. 22, 2005).

³⁴⁰ Michael C. Loulakis, Managing Risks During the Construction of a Cogeneration Facility, Address Before the Association of Energy Engineers 8th Cogeneration & Independent Power Congress (June 15-16, 1993).

³⁴¹ *Id.*; see also Daniel Chao & Michael Selvin, *Project Development and Finance: The Evolving Role of the Engineering/Construction Contractor*, in PROJECT FINANCE Y.B. 1994/1995, at 1 (Adrian Hornbook ed., 1994).

ability by making vendor-suppliers an integral part of the project. Quite often, Vendor Equity also increases the owner group's chance of success in international competitive bidding (via the joining of forces that form a *de facto* cartel). But the benefits gained are also a potential source of vice: the Vendor Equity structure concentrates a number of major international corporate players into one owner group, typifying the often-taken-for-granted monopolistic characteristic of "Third World" economic development. A group of allied companies—a self-selected group of dominant players—controls the energy and utility sector, as well as a substantial portion of the economic landscape of a country or region.

Concerns raised by Vendor Equity go beyond the monopolistic pattern it may illustrate. An inherent conflict exists in Vendor Equity analogous to conflicts of interest issues raised by "related-party transactions" in U.S. financial disclosure law.³⁴² A vendor may have dual objectives—to participate in profit-sharing as a part owner of the Project Entity, and, at the same time, to profit from selling and supplying goods and services to the Project Entity of which he/she is a part. Negotiation for services or supply contracts between the Project Entity and the vendor will inherently include aspects of self-dealing, raising issues as to whether such negotiation is truly at arm's length.³⁴³ Yet, the deal and its related-party transactions may or may not be disclosed, depending on the

³⁴² 15 U.S.C. § 78j-1 (2004); *see also* 15 U.S.C. § 78m (2004) (requiring issuer's good faith duty to influence internal control systems of 50%-owned or less-than-50%-owned foreign subsidiaries); SEC Regulation S-K, 17 C.F.R. § 229.404 (2004); SEC Form 10-K, Item 13 (detailing the requirements of item 404 of Regulation S-K), available at <http://www.sec.gov/about/forms/form10-k.pdf> (last visited Feb. 22, 2005).

Overall, under state statutory law, related-party transactions must be approved by a majority of disinterested directors of public companies. *See* DEL. CODE ANN., tit. 8, § 144 (2004) (setting the number of directors that must be present to approve a transaction); *Pereira v. Cogan*, 294 B.R. 449, 518 (S.D.N.Y. 2003) (holding that related-party transactions with controlling shareholder must result from arms-length negotiation).

Likewise, the SEC has cautioned that material related-party transactions need to be discussed in Management Discussion and Analysis to the extent necessary for the investing public to understand the company's current and prospective financial results. *See* Disclosure in Mgmt.'s Discussion and Analysis about Off-Balance Sheet Arrangements and Aggregate Contractual Obligations, Exchange Act Release No. 33-8182, 68 Fed. Reg. 5982-01 (Feb. 5, 2003) (reinstating its January 2002 statement addressing, *inter alia*, related-party transactions).

³⁴³ Jane Stein, *Vendor Equity—An Inherent Conflict*, Address Before the International Conference of International Power Project Development, Common Problems and Practical Approaches (Oct. 1995).

financial disclosure requirements under the law of either the home or host jurisdiction. (Naturally, the legal systems of host jurisdictions are often under-developed). If self-dealing results in high costs, such costs are ultimately passed on to the inhabitants of the "Third World," which eventually may lead to more austerity or even more international debts incurred by the "Third World" nation.

3.2.4.4.2. *Government Participation*

The same inherent conflict of interest exists in a Government Participation structure, when the host government or its designated state-owned enterprise ("SOE") is included as equity owner of the Project Entity. The Project Entity, partly owned by the host government, may negotiate a Power-Purchase Agreement under which electricity will be sold to the host government or its political subdivisions as Power Purchasers. Thus, the government may be acting in a dual capacity: as both buyer and seller. The Project Entity will negotiate price, terms, and conditions of the electricity sale with the government as one of its shareholders, who also serves as the market regulator. Expectations of arms-length dealings are thus less linear and less clear. The chance exists for a corrupt or inefficient governmental apparatus (if that is the case) to be enriched at the ultimate expense of "Third World" inhabitants, as well as the shareholder public in the foreign investor's home base.

It is evident, therefore, that in both Vendor Equity and Government Participation, contractual measures are needed to eliminate or minimize the risk of less than arm's length negotiations, and to help delineate functions and capacities in order to prevent self-dealing and price manipulation. (This is the reason why in World Bank-funded IPP Transactions, the Multilateral Agency will supposedly assist the host government in designing (i) a workable utility rate-making or regulatory framework, and (ii) a model Power Purchase Agreement based on sound economic principles.) Preventive contractual measures may include: procedures to assure arm's length terms; setting parameters for contractual capacities of the parties; defining terms and conditions for withdrawal in the event of conflicts of interest; and/or similar safeguards to assure both quality services and fair and equitable dealings. In off-balance-sheet, unregulated "Third World" deals, these contractual safeguards may result from the parties' own wills, rather than a matter of mandatory protection for the larger public good. (The

only regulation may rest in the hands of a self-interested "monarch," whose lack of experience and capital may also be coupled with a corrupt and inefficient bureaucracy.)

Private-sector Project Participants, nonetheless, may view Government Participation as a necessity, as it brings to the IPP investment two principal risk-allocating advantages: (i) Government Participation can qualify the project for Multilateral Financing, since the Multilateral Agencies will only lend money to nation-states or their SOEs and not to private parties; and (ii) Government Participation can reduce Political Risks. The involvement of the host government as an equity partner in the IPP investment helps reduce the risks of materially adverse governmental action or governmental interference—why interfere if the government owns a stake in the project itself, since adverse or intervening sovereign action may cut against the government's own commercial interest? For example, in Facility construction, Government Participation alleviates such political risks as government-imposed changes in site conditions. (In the Design-Build model, the owner-developer often undertakes the entire responsibility over information and conditions regarding project sites, including land, access, right of way, existing core facilities, as well as support infrastructure, typically owned or controlled by today's "monarchs." Therefore, it is beneficial, efficient and desirable for the project if the host government occupies the owner-developer role.) Now that the "monarch" has entered the deal as a shareholder-investor, it will have all the incentive needed to support the project long-term and to protect its foreign partner, who happens to control the technology needed for the construction and operation of the Facility.

3.2.4.4.3. *The Build-Operate-Transfer or Build-Own-Operate-Transfer (BOT/BOOT) Legal Model for Infrastructure Building*

To further the risk-allocation goal of a Government Participation structure, a separate legal model has been devised and made applicable to the development of "Third World" infrastructure, called BOT or BOOT. The terms are self-explanatory. In the BOT/BOOT structure, the developer builds, owns and operates the Facility for a definite term. After a period of time (long enough for the developer to recoup its investment and earn the desired profit), the developer is contractually obligated to transfer the Facility to the host government or its designated SOE, which will then own

and operate the infrastructure from that point forward. This transfer of ownership and operation satisfies the host country's national interest, and enables the infrastructure to become a public operation. Initially, the developing nation has no technology or managerial know-how to construct and operate infrastructure systems, and must therefore invite foreign participation in those projects.³⁴⁴ Eventually, the government would want infrastructure to be part of the political economy, free from foreign control.

Because of the importance of infrastructure, many developing nations have enacted laws or promulgated regulations establishing the legal framework for the BOT/BOOT model, thereby elevating the model into legal mandates. The local law mandating the BOT/BOOT form for infrastructure investment projects may require the incorporation of a *BOT Company* or *BOT Entity* to serve as the developer of a particular infrastructure project.³⁴⁵ The BOT/BOOT structure may also involve both Vendor Equity and Government Participation, in which case both the vendor-supplier group and the host government functionally become shareholders of the BOT Entity.

For decades, the BOT/BOOT structure has channeled billions of dollars of both private and public funding into "Third World" economic development, and has become quite popular in Asia and

³⁴⁴ The principles behind the BOT and Built-Own-Operate-Transfer ("BOOT") structure date back to colonial days. In the past, incoming colonists had to construct infrastructure and educate a small class of native collaborators before economic exploitation of the native land and labor could take place. In that sense, the colonized territories and population incidentally benefited from these "good deeds" of the new rulers. After decolonization at the end of World War II, the developing nations inherited the infrastructures and facilities previously built and operated by colonist governments.

³⁴⁵ For example, in 1995, Vietnam promulgated its first BOT Regulations, requiring the establishment of a BOT Company in which the government holds an equity interest. See Wendy N. Duong, *Legal Framework for IPP Projects in Vietnam* (Feb. 1995) (unpublished paper prepared for Mobil Power Inc.) (on file with author, cited with client permission). In 2001, Vietnam signed a contract for the development of a 715 MW gas power plant with French state-owned Electricite de France ("EDF") under the BOT scheme, making the power plant the first BOT project awarded under international bidding procedures. See ASEAN Centre for Energy, *Vietnam Signs Phu My 2.2 BOT Contract* (Sept. 27, 2001) (discussing establishment of the BOT Mecco Company, sponsored by a French led-consortium to operate the gas-fired power plant in Vietnam), available at http://www.aseanenergy.org/information/news/2001/october/reserve/news_01sept.htm (last visited Feb. 22, 2005); see also Siemens Builds Largest Private Power Plant in Vietnam, *supra* note 339 (announcing the construction of the Phu My 3 combined-cycled power plant built by Siemens Power Generation as a turn-key project structured under BOT legal framework).

Latin America.³⁴⁶ Its popularity in Africa, central Asia, and certain parts of central or Eastern Europe will undoubtedly be forthcoming, if not already in existence. If the BOT Entity involves Government Participation, the BOT Entity may qualify for Multilateral Financing,³⁴⁷ since the Multilateral Agencies will only loan money to member states, not to the private sector (with the exception of the International Finance Corporation (IFC), the commercial arm of the World Bank).³⁴⁸

The application of the BOT/BOOT legal norm to an IPP Transaction begins with the prerequisite finding that the Power Generation Facility, as well as any gas processing, liquefaction, and transportation facilities (such as gas pipelines), be part of national

³⁴⁶ See, e.g., Mauel, *supra* note 320, at 39 n.6 (noting BOT schemes in China, Guatemala, India, Pakistan, Philippines, Thailand, and Vietnam).

³⁴⁷ For a definition of Multilateral Financing, see generally Harold Dichter, *Legal Implications of an Asia-Pacific Economic Grouping*, 16 U. PA. J. INT'L ECON. L. 99 (1995). For example, the International Bank for Reconstruction and Development ("IBRD" or the "World Bank") lends money to member states for specific reconstruction and development projects. See Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, art. I, 60 Stat. 1440, 1440-41, 2 U.N.T.S. 134. The World Bank also aims to promote foreign capital by means of guarantees and loan participation in investment projects sponsored by the private sector, and to conduct business "with due regard to the effect of international investment on business conditions in the territories of members . . ." *Id.* at 1440. In practice, this goal has been typically translated into IBRD funding of infrastructure-building projects.

The Regional Development Banks ("RDBs") share similar functions and goals as the World Bank Group. The African, Asian, and Inter-American Development Banks all have similar mandates as the IBRD. In contrast, the IMF is not a "development" institution, although its governance is similar to that of the development banks. The IMF is a fiscal and monetary monitoring organization which helps member states with funding to address macroeconomic issues. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. I, 60 Stat. 1401, 2 U.N.T.S. 39.

³⁴⁸ The International Finance Corporation ("IFC") provides both equity investments under its own name, as well as debt financing for the private sector. As a multilateral lender, it may serve as the lender of record for a commercial bank syndication, thereby boosting the private sector's confidence in the project. As a matter of policy, the IFC will not take a controlling interest or majority position in a project. Typically, the IFC will only fund up to twenty-five percent of a greenfield project, and under its own guidelines, may take an equity interest in the project of up to five to ten percent. See International Finance Corporation, *Basic Facts About IFC* (providing an overview of the function and mission of the IFC), at <http://www.ifc.org/about/basicfacts/basicfacts.html> (last visited Feb. 22, 2005). The IFC's Global PowerFund helps bring private international investors to privately sponsored IPP investments in the developing economies. Blumental, *supra* note 305, at 287 ("the IFC's Global PowerFund invests equity and provides subordinated debt and completion guarantees for construction of power projects").

infrastructure building. This can be a legal conclusion, either clearly stated in the local law, or otherwise accepted as a norm of practice by the business, legal, financial, or multilateral community. Without electricity as a critical infrastructure or pipeline systems to deliver energy sources to the market, the national economy and natural resources foreign investment can be retarded or incapacitated. Once the IPP investment and all support facilities have qualified as infrastructure building, with Government Participation, the IPP Transaction and related deals may receive World Bank or Regional Development Bank funding and assistance, in addition to private Project Financing. The BOT/BOOT structure that encompasses Government Participation and combines both private Project Financing and Multilateral Financing enables the Power Developer to accomplish two risk-allocation objectives: (i) to reduce Political Risks by according the host government a direct long-term financial interest in the project, and (ii) to spread investment risks to inhabitants of the developed nations. If the project fails, the corporate sponsor can be risk-free, except for its chance to make a profit, or any equity contribution it may have made out of its own pocket.

In summary, the midstream segment of the Vietnam Deal is a classic scenario for the structuring of a BOT/BOOT legal model that involves both Vendor Equity and Government Participation. Such a structure leaves much room and opportunity for related-party transactions tainted with classic conflicts of interest and potential self-dealing—one Project Participant may have its foot in several functions in the project. The structure evidences a close-knit, long-term, and interdependent relationship among private Project Participants, the Multilateral Institutions, and the “monarch.”³⁴⁹ In masterminding and implementing such a structure, the

³⁴⁹ See George Shultz, Ten Commandments for Evaluating Risk on Private Infrastructure Projects, Address Before the Bechtel Power International Private Power Forum (Nov. 9, 1995) (Mr. Shultz was formerly President of Bechtel):

My third commandment is: We have to keep forcing ourselves to think of creative ways to make agreements work[,] . . . look at the different risks and try to figure out who is going to bear what risk in a careful way. It may be things like production sharing with host governments, as a way to deal with these issues If you are going to buy a plant, make sure the government gets the subsidy out and raises the price of the product before you buy. If you are going to build a plant and electricity is priced way low . . . if you can get the government to get that price change before you enter the field, it is going to be a tremendous advantage because we all know that, if you are the guy that is raising the price of electricity by a lot, and that is what privatization means, then you are in deep

IOGC that has discovered gas as fuel supply for a gas-fired Power-Generation Facility will tend to look to dominant industry players that share its corporate philosophy and investment style, especially those who have established track records of successful partnerships with the IOGC and the same "monarch." This means that the selected Project Participants may have participated in joint operatorship or may have held joint interests with the IOGC elsewhere in the global economy, and/or may have successfully partnered with the host government in other national projects. In fact, typically all dominant players must have the approval and blessings of the host government. Close-knit partnerships with "monarchs" by a group of self-selected players continue to be the undeniable and inescapable profit-making pattern for the international petroleum and energy sector in "Third World" economic development.

Needless to say, cloaking an allegedly corrupt government as the project sponsor and equity owner in order to guarantee payment and profit for the private sector via Multilateral or Bilateral financing can be a dangerous proposition. This danger is amply illustrated in the scandal involving the outrageously costly and hazardous Bataan Nuclear Power Project in the Philippines.³⁵⁰ Bataan was the biggest independent power project undertaken in the history of the Philippines, constructed in 1977 and completed in 1984. Activists allege that the project was a means for the corrupt Marcos government to enrich itself. By sponsoring the project and partnering with U.S.-based Westinghouse, the Marcos regime was able to obtain public funding via the U.S. Export-Import Bank ("ExIm").³⁵¹ Such public money was used to pay, among others, Westinghouse (including, naturally, its desired profit for constructing and outfitting the nuclear plant), and to benefit the Marcos regime allegedly by way of illicit commissions payable to their al-

trouble!

[Y]ou probably want to think about international partners. The IFC is a leading candidate, and the World Bank group generally, because obviously it gives you a *certain kind of insurance policy*, because countries do not want to alienate this potential source of future finance . . . (emphasis added).

³⁵⁰ See PATRICIA ADAMS, *ODIUS DEBT: LOOSE LENDING, CORRUPTION, AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY* 165 (1991) (discussing new governments dishonoring onerous contracts entered into by previous regimes not recognized by the people).

³⁵¹ See discussion in Duong, *supra* note 295, at 1182 n.22, 1260-61 n.213.

leged “cronies”.³⁵² According to activists, international inspectors considered Bataan a health, safety and environmental hazard, and the Philippines ended up experiencing severe outages leading to a national power crisis, since Bataan never produced the expected volume of electricity. Notwithstanding the plant’s hazardous and inoperational status, the “beneficiaries” of Bataan, the “consumers, taxpayers, and host communities” of the Philippines, and not the ousted Marcos regime officials, ended up having to pay the ExIm debts (a total of direct loans and guarantees estimated at \$900 million). These loan obligations contributed substantially to the Philippines’ impoverished conditions and debt crisis.³⁵³

3.2.5. *A Critical Look at Project Financing and the Reality of Large-Scale “Third World” Economic Development*

Despite its utility, the BOT/BOOT structure creates at least three windfalls in the current funding patterns for “Third World” development projects: (i) the interdependence between Multilateral Financing and Project Financing, and the stimulating effect the former produces upon the latter; (ii) the triple benefits enjoyed by corporate sponsors whose projects qualify for Project Financing; and (iii) the real-life influence name-brand corporate identities may have on the risk assessment process that determines eligibility for Project Financing, thereby confirming the monopolistic and exclusive nature of large-scale “Third World” development project sponsorship.

These three windfalls are discussed below.

3.2.5.1. *The Interdependence between Multilateral Financing and Project Financing*

Among the most profound impacts of the BOT/BOOT structure is the effect that such a structure may produce upon project risk assessment in the determination of Project Financing eligibility. Not only does the BOT/BOOT structure enable public funding such as World Bank or Regional Development Bank loans, but it may also increase the success rate for qualifying related projects for private Project Financing, thereby stimulating the involvement of the private sector. In that sense, Multilateral Financing and Project

³⁵² Maristella Cardenas, *ECAs in the Philippine Power Sector and the Continuing Debt Problem* (Dec. 12, 2003), at <http://jubileesouth.org/news/EpZyVyuAVISMRrFluL.shtml> (last visited Feb. 4, 2005)

³⁵³ *Id.*

Financing are interdependent. The availability of Multilateral Financing in BOT/BOOT and other infrastructure projects motivates the corporate sector to seek partnerships with the Multilateral Agencies in nation building, even if the corporate goals are purely profit-seeking and not nation building. Such a partnership can generate more FDIs for the host country, not only because private investors will benefit from the availability of infrastructure, but also because Multilateral Financing acts as assurance for private lenders and financiers, and hence can practically become a risk management device to mitigate against the host environment's Political Risks. In simple terms, Multilateral Financing has the same effect as the corporate investor's de facto insurance policy.³⁵⁴ The presence of Multilateral Financing and their credit support facilities in a developing nation helps ease the private sector's anxiety, constituting the type of backing by the developed nations that make private investors feel safe.

Consequently, not only is the private sector more likely to invest, but it will actively assist the host government in meeting Multilateral Funding qualifications. Specifically, although the World Bank does not fund upstream energy projects, it generally supports privatization of certain segments of the energy chain that may be considered part of nations' infrastructure building, and hence will finance and/or guarantee projects that fall within its funding criteria.³⁵⁵ As of the end of the millennium, a commentator reported that out of the \$17 to \$20 billion of the World Bank's annual funding, approximately \$2 to \$3 billion goes to IPP and approximately \$1 billion goes to oil and gas midstream projects.³⁵⁶ The pipeline project in the Republic of Chad is an example of World Bank sup-

³⁵⁴ Regarding one example of corporate strategies in partnerships with governments and the Multilaterals, see Shultz, *supra* note 349.

³⁵⁵ The criteria for Multilateral Funding of reconstruction and economic development projects should be revisited. For example, "infrastructure" development criteria should include the provision of information technology and the outfitting of educational projects. In today's modern world, informational technology and education should qualify as infrastructure, just as roads, bridges, dams, electricity, and telecommunications have qualified as infrastructure in the past. An educated workforce with access to information technology is the key to economic development as well as the promotion of democratic principles against authoritarianism or isolationism. (In that sense, information technology represents a threat to dictatorships.) Liberalizing the definition of "infrastructure" will also enable participation by smaller and medium-sized entrepreneurs in "Third World" economic development, both from the foreign investor community as well as from the native community.

³⁵⁶ Blumental, *supra* note 305, at 276.

port available to the oil and gas industry in its partnership with the Republic.³⁵⁷ In addition, the gas development project offshore Vietnam sponsored by British Petroleum ("BP"), BP's accompanying pipeline project to transport its gas onshore, and the construction of gas-fired power-generation plants in Vietnam using offshore gas as fuel, supported by the Asian Development Bank and the Multilateral Investment Guarantee Agency ("MIGA"), are all evidence of an integrated IPP Transaction benefiting from the combination of Multilateral Financing, BOT financing, and private sector investment.³⁵⁸ IOGCs, Power Developers, their multinational contractors and suppliers, as well as their private bank syndicates will readily cooperate and assist host governments in the application for Multilateral Funding and credit support.

The same stimulating effect has amply been observed with respect to loan conditions established by the International Monetary Fund ("IMF") for the developing economies. Although the IMF has no direct role in the financing of international energy projects, its role as a global economic and monetary monitoring institution greatly impacts the risk assessment process performed by private lenders, at least in two separate aspects:

First, payment for energy as a commodity in a host country may be made in the local "soft" currency and must be converted into a "hard" currency such as the U.S. dollar or the euro to service project debts and to be repatriated as investor returns. IMF policies and rules for its member states, articulated in its Articles of Agreement,³⁵⁹ purportedly help stabilize and prevent local currency collapses, as well as reduce the risk of currency fluctuations in the local economy. Thus, a host country's membership in the IMF can serve as a bedrock to ease private lenders' anxiety.

Second, as a Bretton Woods institution, the IMF lends money to member states to help correct these countries' fiscal problems. IMF loan conditions, reflective of its economic policies, are purportedly designed to assure repayment of "Third World" debts. Accordingly, private bankers lending money to "Third World" projects have looked to IMF loan conditions as "risk management" tools,

³⁵⁷ See Duong, *supra* note 295, at 1178 n.15 (discussing the Republic of Chad).

³⁵⁸ *Pipeline from Vietnam's Offshore Gas Fields Reaches Land*, *supra* note 299; *Siemens Builds Largest Private Power Plant in Vietnam*, *supra* note 339; see also *Vietnam Project to Help Meet Power Shortfall*, *supra* note 299 (describing the construction and operation of a new Vietnamese power plant).

³⁵⁹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 821 (1987) [hereinafter FOREIGN RELATIONS RESTATEMENT].

and IMF loan conditions have typically been incorporated into private loan agreements, serving as "risk assurances" to stimulate private banks' funding of "Third World" development projects.³⁶⁰ Syndicates of private lenders have "ridden on the coat-tails" of not only the IMF but also other "development" Multilateral Agencies, at times creating de facto "creditors' cartels."³⁶¹

When pushed to the limit, this stimulating effect and over-reliance on the presence of the Multilateral Agencies in a host country can easily result in risk assessment errors committed by the private banking industry. Risk assessment errors can even be made by the Multilateral and Bilateral Agencies themselves, since

³⁶⁰ See, e.g., ERIK DENTERS, LAW AND POLICY OF IMF CONDITIONALITY 4 (1996) ("Practically all creditors trust the IMF's judgement, and are only prepared to provide support if the debtor[,] in consultation with the Fund, carries out an adjustment programme."); Cynthia C. Lichtenstein, *Aiding the Transformation of Economies: Is the Fund's Conditionality Appropriate to the Task?*, 62 FORDHAM L. REV. 1943, 1948 (1994) ("The result in the 1980s was arrangements among private bankers, indebted nations, and the Fund that linked extensions of both time to repay old borrowings and new bank loans to the applicant country's agreement to accept the Fund's prescriptions for regaining economic health.").

³⁶¹ For a discussion of the relationship between banking regulations and IMF goals, see Stephen Zamora, *Regulating the Global Banking Network – What Role (if any) for the IMF?*, 62 FORDHAM L. REV. 1953, 1967-73 (1994) (comparing regulatory issues with the "principal concerns of international monetary relations"). See also SIR JOSEPH GOLD, INTERNATIONAL MONETARY FUND PAMPHLET NO. 39, ORDER IN INTERNATIONAL FINANCE, THE PROMOTION OF IMF STAND-BY ARRANGEMENTS, AND THE DRAFTING OF PRIVATE LOAN AGREEMENTS (1982); Jonathan David Aronson, *Financial Institutions in the International Monetary System*, 12 CASE W. RES. J. INT'L L. 341 (1980); Joseph Gold, *The Growing Role of the IMF's Stand-By Arrangements*, 1984 J. BUS. LAW 315.

Some scholars have used the experience of Tanzania in Africa as an example to criticize the effectiveness of the International Monetary Fund ("IMF") global economic goals and strategies, viewing both the World Bank and the IMF as agents for the restriction of the welfare state. Tanzania was a stable democracy that could not continue to afford social programs that had produced the highest literacy rates in Africa and a tolerable life for Tanzanians. After fifteen years of IMF funding, half of the population allegedly live in poverty, although the country's macroeconomic picture has brightened with reduced inflation and growing GDP. Tony McAdams, *Globalization: New Demands for the Legal Environment of Business Course*, 19 J. LEGAL STUD. EDUC. 239, 253 n.94 (citing Eric Pooley, *The IMF: Dr. Death?*, TIME, Apr. 24, 2000, at 4); see also Press Release No. 04/18, IMF, Statement by IMF Deputy Managing Director Agustin Carstens at the Conclusion of a Visit to Tanzania (Feb. 3, 2004) ("In the past few years, Tanzania has made substantial progress in establishing the macroeconomic stability and deepening the structural reforms Despite these achievements, much remains to be done if Tanzania is to increase growth and raise living standards Participants emphasized the need for the IMF to be more flexible in its policy advice . . .").

Case studies such as Tanzania need empirical data support, rather than just editorialized conclusions.

one agency may undoubtedly be influenced by the activities of others within the same country or region, let alone the fact that these institutions typically share nation-state memberships.

The principles of risk management are not an exact science capable of mathematical precision at all times. Many subjective factors come into play. The ultimate inquiry rests in whether or not the financier or lender feels assured and comfortable with the prospect of recouping its funds together with the desired interest. In reality, especially in an international IPP Transaction, this level of assurance can be obtained in several ways, some of which may have little to do with the mathematical calculation of probability or risks. In fact, it is possible that the more substantial the financial stake is, the more the assurance is stimulated by psychological comfort or the totality of circumstances. The interdependence between Multilateral Financing and private Project Financing illustrates this point. What's more, the interdependent, stimulating effect described above also leads to the undeniable fact that all Multilateral Agencies, and not just the IMF, become the sheriff, regulator, insurer, and rescuer of both public and private "Third World" debts, even if some of them are not officially in the business of providing Political Risk Insurance—a function and specialty exclusively reserved for agencies such as MIGA, ExIm, or the Overseas Private Investment Corporation ("OPIC").³⁶² Further, when private and public loans are defaulted, debt or loan work-out solutions are often proposed or imposed by the Multilateral Agencies and/or major nation-contributors such as the United States to prevent global economic crises. The proposals and impositions may lead to more severe loan conditions, which in turn will cause more austerity and negative social and economic impact on the "Third World" population.³⁶³

³⁶² See Duong, *supra* note 295, n.21, n.213 (identifying and describing the Multilateral and Bilateral Institutions).

³⁶³ For a discussion of unresolved issues associated with sovereign insolvency, see, e.g., Stephen Zamora, *supra* note 361, at 1968 ("If it is true that banks are part of the problem, then the IMF cannot continue to ignore the regulation of private banking activities"); Philip J. Power, *Sovereign Debt: The Rise of the Secondary Market and Its Implications for Future Restructurings*, 64 *FORDHAM L. REV.* 2701, 2706-23 (1996) (reviewing the sovereign debt crisis of the 1980s, global responses, and options for avoiding the "nightmare scenario" that could result from the next such crisis); Rory MacMillan, *Towards a Sovereign Debt WorkOut System*, 16 *N.W. J. INT'L L. & BUS.* 57, 61-73 (1995) (discussing problems associated with sovereign insolvencies).

There has been no established international legal framework for sovereign bankruptcy. As one of the largest contributors to the IMF and World Bank sys-

3.2.5.2. *The Triple Benefits Enjoyed by the Corporate Sponsor Whose Infrastructure Projects Qualify for Project Financing*

From the discussion above, the following scenario becomes highly likely: if the IPP Transaction (and all related projects that may qualify as infrastructure building, such as gas processing, gas liquefaction, and pipeline construction) is structured as the BOT/BOOT model eligible for both Multilateral Financing and Project Financing, corporate sponsors that partner with "monarchs" and Multilateral Institutions may enjoy at least three benefits.

The first benefit results from the fact that foreign investors need the country's infrastructure in order to conduct their profit-making enterprises. The same infrastructure may even benefit the foreign investors' various projects in the region and not just in a single country. One can argue that under normal circumstances, the cost of the infrastructure needed to support the investor's various projects should be considered business expenses to be borne by the investor out of its own pocket (no more, no less than overhead costs any business enterprise may have to outfit, or no more, no less than the costs of hiring workers for production). Yet, if the corporate investor chooses to sponsor the infrastructure project, it can even make profit from the infrastructure that supports its other profit-making enterprises.³⁶⁴ In other words, the private investor

tems, and in the interest of major U.S. banking syndicates who financed international projects, the United States has undertaken to structure "Third World" debt "workout" solutions. In the "Baker Plan" — named after the then Secretary of State — new loans were made to help the developing nations pay interests, thus preserving the "book value" of defaulted loans. This short-term solution of injecting more funding for the Third World to satisfy interest obligations naturally resulted in tougher new loan conditions and more austerity for the developing economies. In contrast, the subsequent "Brady Plan" offered more long-term solutions: easing existing IMF loan conditions, reduction of debt value, and provision of new financial guarantees to stimulate more private capital and export growth. Aronson, *supra* note 361; Power, *supra* note 363; see also Lichtenstein, *supra* note 360 (discussing the G-7 Nations' efforts to use the existing IMF structure to disburse aid to Russia).

Recently, a movement referred to as the "Jubilee 2000" has advocated forgiveness for "Third World" debts as the socially desirable solution in the best interest of the global community. Tony McAdams, *supra* note 361 (citing Diane Coyle, *Wealthy Nations Should Cancel Third World Debt to Make Amends for Pollution*, THE INDEP. (London), Sept. 20, 1999, at 15); Paul Solman, *Forgiving the Debts?*, ONLINE NEWSHOUR, Apr. 11, 2000, at http://www.pbs.org/newshour/bb/economy/jan-june00/debt_4-11.html (last visited Feb. 9, 2005).

³⁶⁴ Recognizing this incidental benefit to the foreign investor, member states

can take two bites of the same apple—to benefit from the infrastructure and, at the same time, profit from the construction of the infrastructure as a project sponsor. Further, by partnering with the “monarch” and co-sponsoring the infrastructure project via Multilateral Financing, corporate sponsors can spread investment risks and transfer the costs of the very infrastructure that serves them to other nation-states. Since the host country that borrows Multilateral Funding will have to pay back those loans out of its treasury, the risks are ultimately borne by the poor citizenry of the “Third World.”

Second, although eligibility for Project Financing is in principle supposed to rest solely on the evaluation of the project’s economic viability, in reality, private bankers may be influenced by the availability of Multilateral Financing in the project. Hence, corporate investors seeking Project Financing stand to gain from this relaxed risk assessment process. Where Multilateral Funding has been made available to a project, corporate investors may stand a much greater chance of receiving favorable private Project Financing in the same project or in related ventures, including the construction of all other support facilities necessary for their investment.

Third, classic Project Financing acts as an effective risk transfer mechanism for corporate investors because of its Non-Recourse nature, thereby constituting another layer of benefit. If the project fails, the corporate sponsor is practically risk-free (other than any “down payment” or out-of-pocket equity that it may have advanced, depending on the project).

On one hand, the utility of, and justification for, Project Financing in “Third World” economic development are evident. Project Financing as a concept stimulates private investment in the “Third World,” especially in projects crucial to nation building. Without Project Financing, the undeveloped areas of the world will remain undeveloped, since foreign aids among nations and even Multilateral Financing cannot adequately supply the necessary funding and carry the financial weight. Private bankers should be encouraged to count on the ascertainable income stream evidenced by

have imposed or negotiated for “infrastructure payments” as part of funding advances required of the IOGC in petroleum joint venture contracts between the IOGC and the state. See, e.g., Peter Goodwin, Mobil’s Joint Venture Experience with State-Owned Companies: Kazakhstan, Presented at the Conference on Model Petroleum Contract (Feb. 12-13, 1998) (*cited with client permission*). However, this practice may not be universal.

contractual rights in order to pour more funding into the "Third World." Without Project Financing, developers may hesitate to initiate costly development projects in the unfamiliar territories of the "Third World."

On the other hand, Project Financing can create an anomaly. If the high investment risks do not fall upon the corporate sponsor, under established risk management principles these risks do not just disappear. They are simply shifted elsewhere, ultimately to the group of people who are the least equipped and the most ill-prepared to bear the loss. In that sense, the economic theories behind risk management philosophies discussed earlier have indeed been betrayed! The accuracy of risk assessment methods depends on whether the information taken into consideration is reliable and accurate. Imperfect information makes imperfect risk assessment and, therefore, results in flawed risk treatment. If, for any reason, the project fails, or the Power Developer goes under and fails to perform (as in the case of Enron), bankers will hurriedly foreclose on the project's physical assets or will take over the stream of income. If there is no income stream or the physical assets are inadequate or otherwise not salvable to satisfy the debts (as in the case of the Bataan project in the Philippines discussed earlier), bankers will have to face and absorb their risk-assessment errors, *without recourse* to the developer's corporate assets in the home jurisdiction or elsewhere. In the end, two groups of inhabitants ultimately bear the risk of loss: (1) the inhabitants and taxpayers of the capital-exporting countries will bear the financial impact of bank syndicates' risk assessment mistakes when loans are defaulted; and (2) the inhabitants of the "Third World," or the capital-importing countries, end up having no electricity yet still have to pay project debts. Ultimately, the poor citizenry gets poorer and poorer, having less and less economic means or disposable income because governments will seek to levy and make good the financial losses from their citizenry. In the worst scenario, since an IPP investment, viewed as an infrastructure development project, is typically funded *both* by private money (through Project Financing) and quasi-public money (through Multilateral Financing), the default of the private sector sponsor may also cause the "Third World" nation—a sovereign sponsor—to default on its international financial obligations,³⁶⁵ and a transnational insolvency problem may arise,

³⁶⁵ See Aronson, *supra* note 361 (discussing the possible monetary instability if the developing countries refuse to meet their bank debt obligations).

leading to global economic crises.³⁶⁶ The use of Project Financing as the corporate sponsor's risk-allocation mechanism is fatally flawed because it ultimately protects the corporate sponsor, the party who is in the best position to assess future risks of loss, and who benefits the most from the financial reward of the project, all to the detriment of those whom the project is supposed to serve. Under scientific risk management principles, those supposed beneficiaries occupy the least advantageous and the least equipped position to prevent or control the loss. In fact, they have no control at all. The ultimate noble goal of "Third World" economic development in the name of free market, in the worst case, will work to the severe disadvantage of the poor and the weak.

3.2.5.3. *The Monopolistic, Exclusive, and "Brand-Name" Nature of Large-Scale Project-Financed Transactions in Real World Application*

If a giant corporate sponsor is suffering financially or its management is deteriorating due to inefficiency or misconduct, the signs of financial ills and troubled corporate operation will manifest themselves and trickle down all operating units. Ultimately these problems will reach those international projects funded via Project Finance an ocean away. Yet, because of pre-Sarbanes-Oxley "off-balance sheet" accounting treatment, coupled with the illusory psychological comfort created by brand-name glory, the significance of potential financial and management ills manifested in international projects easily escaped the immediate attention of the investing and analyst community, making the prospect of financial disasters appear further removed or remote. As an incidental benefit of the Enron scandal, the prophylactic Sarbanes-Oxley arguably helps prevent this misleading appearance by requiring disclosures of certain "off-balance sheet" arrangements; but Sarbanes-Oxley does not change a Non-Recourse Financing transaction into a Full-Recourse financing transaction and, hence, does not help the lending community and the public it serves. Nor does Sarbanes-Oxley help prevent or correct the lending community's risk management errors, committed *at the time* the project is being contemplated, *not* at the subsequent time of disclosure in public filings or

³⁶⁶ See, e.g., Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 FORDHAM L. REV. 2531, 2532 (1996) ("A transnational insolvency problem arises whenever a multinational commercial enterprise falls into general default on its obligations.").

reports, after the deal has been finalized. The Enron scandal illustrates the danger of how brand-name corporate identities can psychologically distort and imbalance the private bankers' risk assessment process.³⁶⁷

The Enron 1999 10K Annual Report discussed the gas-fired power plant in the Maharashtra State of India (India's industrial heartland south of Bombay), developed by the Dabhol Power Company ("Dabhol"), majority owned by Enron.³⁶⁸ Dabhol was allegedly India's largest FDI project, valued at \$2.9 billion.³⁶⁹ Dabhol's revenues were counted as part of the bigger business segment, Enron Wholesales Energy Services ("Wholesales"), and reported collectively in Enron's Financial Statements as part of Wholesales' business unit.³⁷⁰ Overall, by fiscal year 2000—the year preceding the scandal, Enron's Wholesales Energy Operations and Services, including power development and infrastructure projects in the developing markets, were reported as Enron's largest business segment, with a sustained growth rate of 48% annually over a five-year period,³⁷¹ both domestically and internationally. Yet, by the end of 2001, when the scandal was first uncovered, the 2,184-megawatt plant in India had been shut down allegedly as a result of an ongoing dispute between Dabhol and its only customer, the state utility authority of Maharashtra, because of non-payment for the power supply.³⁷² Around this same time, Dabhol also served notice of terminating its sale of power to the state utility authority. This meant that the income stream from which loan proceeds were serviced would not be forthcoming.

Enron's financial meltdown threw the Dabhol project into more uncertainty. In the middle of the power purchase payment dispute, news from the United States arrived that Jeffrey Skilling, the CEO who allegedly was instrumental in Enron's transformation from a power development and pipeline business to an energy

³⁶⁷ All allegations and facts discussed in this Article are based on public press reports and public filings available in the SEC's Edgar System, <http://www.sec.gov/edgar.html>.

³⁶⁸ ENRON CORP., 1999 ANNUAL REPORT 14 (2000).

³⁶⁹ Saritha Rai, *New Doubts on Enron's India Investment*, N.Y. TIMES, Nov. 21, 2001, at W1.

³⁷⁰ 1999 ANNUAL REPORT, *supra* note 368, at 14.

³⁷¹ *Id.*

³⁷² *Id.*; Saritha Rai, *India: Dabhol Seeks Payment*, N.Y. TIMES, Sept. 19, 2001, at W1; Saritha Rai, *New Delhi to Intervene In Dispute with Enron*, N.Y. TIMES, Sept. 8, 2001, at C3.

trading company,³⁷³ had resigned after only six months on the job. Skilling's resignation forewarned the corporate giant's subsequent financial collapse.³⁷⁴ At some point during the following months, Dabhol's core physical assets were allegedly listed on the high priority sale by either the financially distressed Enron or its prospective buyer, Dynergy, Inc., of Houston, Texas, who eventually rescinded the acquisition after conducting a due diligence review of Enron's operations and records. The press reported that a consortium of Indian lenders led by the Industrial Development Bank of India, which apparently were once impressed by the mighty brand-name of Enron, and whose exposure in the form of loans and guarantees amounted to approximately \$1.5 billion, unsuccessfully attempted to stop the transfer of the Dabhol assets during Enron's financial meltdown.³⁷⁵ Assuming that the transfer actually occurred arguably pursuant to U.S. bankruptcy law, who but the poor people of India and its industrial heartland will bear the consequence of this asset loss and the stand-still of the Maharashtra power-generation system?

The Dabhol power purchase dispute originated long before the Enron financial scandal, presenting peculiar facts and allegations, yet receiving relatively modest attention, if any at all, from the U.S. investing or analyst community, perhaps due to the fact that the dispute was couched as an incident of a nation-state buyer's default in a developing economy so far away, with cultural and business practices so alien to the American mindset. Or, perhaps it is widely known to the investing public and its analyst community that such a project was Non-Recourse to Enron. The peculiar dispute was reported by the international press as early as February 2001, when Dabhol sought to invoke a \$50 million sovereign guar-

³⁷³ The transformation of Enron coincided with the deregulation trend in the power and utility markets. See Jacqueline Lang Weaver, *Can Energy Markets be Trusted? The Effect of the Rise and Fall of Enron on Energy Markets*, 4 HOUS. BUS. & TAX L.J. 1, 11-25 (2004) (hypothesizing that the deregulation of energy markets was a factor in Enron's expansion).

³⁷⁴ Richard A. Oppel, Jr. & Alex Berenson, *Enron's Chief Executive Quit After Only 6 Months in Job*, N.Y. TIMES, Aug. 15, 2001, at C1. On February 19, 2004, Skilling plead not guilty to conspiracy to commit wire fraud and securities fraud and was released on a five million dollar bail. Associated Press, *Ex-Enron CEO Indicted*, Feb. 19, 2004, available at <http://www.msnbc.msn.com/id/4311642> (last visited Jan. 26, 2004).

³⁷⁵ *Unit of Enron is Challenged*, N.Y. TIMES, Nov. 8, 2001, at C12; Saritha Rai, *India: Utility Transfer Notice*, N.Y. TIMES, Nov. 6, 2001, at W1. Public records do not readily reveal the financing structure or capital sources for the remaining \$1.4 billion invested in Dabhol.

antee provided by the Indian government, allegedly because Maharashtra had refused to pay for Enron's power supply.³⁷⁶ Both the local and central governments refused to honor the guarantee, citing as reasons Enron's technical failures in meeting contractual terms.³⁷⁷ The local utility buyer, in particular, complained about Enron's exceedingly high prices (often calculated in accordance with a long-term mathematical formula provided in the PPA).³⁷⁸ The dispute also halted the construction of Phase II of the power plant project.³⁷⁹ U.S. diplomats, at that time, reportedly stood behind Enron, warning that India's default on the sovereign guarantee might endanger future FDI projects in the country.³⁸⁰ Apparently, the mighty name Enron, at that time, stood parallel to the American interest.

The circumstances surrounding the Dabhol dispute might have suggested not only Enron's internal ills, but also a pattern of difficulties in the relationship between the foreign Power Developer and Maharashtra's government buyer in the implementation of the relevant Power Purchase Agreement. This problem could certainly be characterized and foreseen as a materialized Political Risk. The risk, however, was not completely unforeseen, yet the lenders involved did not seem to be affected by any such warnings, judging from the scarcity of press reports relating to any public reaction by the relevant lending community. The Dabhol project had experienced difficulty caused by the relationship between Enron and the local provincial government at the inception and during the early phases of the project. The early signs of ills had generated a volume of rather scandalous publicity. As of 1994, Dabhol was reported as the high-profiled power project that received India's full sovereign attention and a promise of "fast-tracked approvals," evidenced ultimately by the twelve-year guarantee provided by the central government to make good any defaults on bills unpaid by the individual power buyer-provincial state. Perhaps this sovereign support was justified, since the \$2.6 billion project was conceived and made feasible by two brand-name U.S. corporate giants — Enron, of Houston, Texas, and General Electric Company, of

³⁷⁶ P.J. Anthony, *Dabhol, Enron Unit in India, Invokes Payment Guarantee*, N.Y. TIMES, Feb. 7, 2001, at C4.

³⁷⁷ Celia W. Dugger, *Enron Payment Dispute*, N.Y. TIMES, Apr. 11, 2001, at W1.

³⁷⁸ Saritha Rai, *New Delhi to Intervene In Dispute with Enron*, *supra* note 372.

³⁷⁹ Saritha Rai, *India: Power Plant Dispute Continues*, N.Y. TIMES, June 19, 2001, at W1.

³⁸⁰ Dugger, *supra* note 377.

Fairfield, Connecticut. (General Electric is the known manufacturer-supplier of turbines and generators for power-generation facilities.³⁸¹ The U.S.-based international engineering and construction firm, Bechtel, was also allegedly involved in Dabhol as a contractor.)³⁸²

The Dabhol investment contract had been negotiated by Enron with a previous state government headed by the then ruling political party, as part of India's national movement for economic reform commenced in 1991. The reform movement allegedly replaced former socialist policies with more rigorous free-enterprise implementation to attract more foreign investment from the West. Subsequently, there was a change of guards in local government leadership, and, well into the fall of 1995, the new local officials in Maharashtra decided to cancel Dabhol, viewing it as "against the interest of Maharashtra and its people."³⁸³ Local officials claimed that the previous negotiation was one-sided and whatever Enron received whatever it wanted. Likewise, the president of the opposition party in India reportedly claimed that Enron executives took advantage of economic reforms, and were doling out bribes and kickbacks to Maharashtra state politicians in order to secure the power project.³⁸⁴ Notwithstanding the controversy, by 1996, Dabhol was reported as "back on track,"³⁸⁵ and Enron resumed construction, after reducing the costs charged for electricity in response to nationalist objections,³⁸⁶ and after receiving the Maharashtra state's formal offer to revive the cancelled project.³⁸⁷ In July of 1996, Dabhol received final approval and blessings from the Indian central government.³⁸⁸ Yet, by 2001, the Dabhol project

³⁸¹ Emily L. Aitken, *India Curries Favor With Foreign Investors*, PUB. UTIL. FORT., Sept. 15, 1994.

³⁸² ENRON CORP., 1993 ANNUAL REPORT (1994); ENRON CORP. 1994 ANNUAL REPORT (1995); ENRON CORP., 1995 ANNUAL REPORT (1996); Eric Weiner, *Canceled Deal Sets Back Reforms in India*, CHRISTIAN SCI. MONITOR, Aug. 11, 1995, at 7.

³⁸³ Weiner, *supra* note 382.

³⁸⁴ *Id.*; see also ENRON CORP., 1995 ANNUAL REPORT 9-12 (1996) (disclosing a dispute between Dabhol and Maharashtra; concluding that the outcome would not have a materially adverse effect on Enron's financial position).

³⁸⁵ John F. Burns, *Second Thoughts on India; Enron Project on Track, but Policy Doubts Remain*, N.Y. TIMES, Jan. 9, 1996, at 47.

³⁸⁶ Allen R. Myerson, *Enron Agrees to Resume Work at Project in India*, N.Y. TIMES, Jan. 22, 1996, at D2.

³⁸⁷ Associated Press, *Enron Says India State Offers to Revive Big Power Project*, N.Y. TIMES, Jan. 17, 1996, at D4.

³⁸⁸ Associated Press, *Enron Can Resume Big Indian Power Project*, N.Y. TIMES July 10, 1996, at D19; see also ENRON CORP., 1996 ANNUAL REPORT 9-13 (1997).

was shut down, and the heatedly disputed income stream came to a definite stop.³⁸⁹

The "brand-name" pitfall of Project Financing goes beyond the type of risk assessment errors that might have contributed to Dabhol's depressing story. The substantial size and impact of large-scaled Project-Financed transactions make them a natural fit for sponsors that are major energy MNCs who bring with them to the "Third World" their bankers, hotel chains, international law firms, international accounting firms, international engineering firms, as well as other brand-name international contractors. In fact, quite often, the banks, law firms, accounting firms, and other service industries (the "Service Providers") will "go Third World" first, in order to lay out the support structure for their wealthy clients, who will then "go" second, only after their comfort level has been satisfied via the work of the Service Providers. The Service Providers will send to the "Third World" those employees who uniquely can demonstrate cultural and linguistic abilities, as well as the flexibility and courage to operate in "substandard" living and working conditions of a transitional economy—commonly those "hyphenated-Americans" whom America's "diversity project" helps recruit. Quite often, when the Fortune 500 business executive's flight hits the "Third World" runway, their lawyers and accountants are already lining up to greet them with billable hours and timesheets. The network of these players works such that the players feed business to one another to the exclusion of smaller entrepreneurs, except for those local "privileged few" who are selected or recommended by the government due to their close-knit connections with government officials, a suspect link that may lead to the Fortune 500's derivative liability under the U.S. Foreign Corrupt Practices Act ("FCPA") (assuming that corporate "knowledge" of their

³⁸⁹ Enron's 10K Annual Reports filed for fiscal years 1997 and 1998 disclosed that Enron was developing Phase II of the Dabhol power project, which consisted of a 1,624MW combined-cycle power plant, together with the development of liquefied natural gas ("LNG") station and harbor to supply fuel to Dabhol. ENRON CORP., 1997 ANNUAL REPORT 13-15 (1998), ENRON CORP., 1998 ANNUAL REPORT 13-15 (1999). Enron's 10Ks also disclosed that financing for the Phase II project would commence in late 1999 (as per 1998 10K) or 2000 (as per 1999 10K), with commercial operation for the facilities to commence in 2001. *Id.*; ENRON CORP., 1999 ANNUAL REPORT 8-10 (2000). Enron reported that earnings from Enron Wholesale's energy-related assets increased, reflecting the operation of the Dabhol Power Plant in India. *Id.* However, in Enron's 10K Annual report for fiscal year 2000, the completion date for Dabhol Phase II was reportedly delayed to late 2001, and the LNG component's completion date was further delayed to mid 2002. ENRON CORP., 2000 ANNUAL REPORT 8-10 (2001).

local agents' bad acts can be established).³⁹⁰

Following is a specific example of how this close-knit network may work to the severe disadvantage of talents from the local community, using the legal practice as an illustration. In Vietnam (the investment environment for our 1994 Vietnam Deal), except for a couple of small boutique international law firms with established track records in the country prior to the Communist take-over in 1975, small local law firms had no chance to compete with MNCs' Service Providers. This was extremely ironic because the task of advising MNCs involved the interpretation of esoteric Vietnamese law (often appearing on yellow paper in manual typewriter type), which often seemed alien to lawyers trained in developed jurisdictions. Yet in the early 1990s, the timeframe for our Vietnam Deal, the international law and accounting firms, based either in the United States or United Kingdom, dominated Vietnam's legal and business advisory scene. The excuse used by the foreign investment community was that either local law did not exist, was not enforced, did not work for or apply to foreigners, or that corporate clients had no comfort in using local lawyers due to such lawyers' communist indoctrination and deficient knowledge of the Anglo-American legal system or capital market. These stereotypical assumptions were made, even though (i) the local tort and criminal law of the host jurisdiction had little to do with any Anglo-American legal system or capital market model,³⁹¹ and (ii)

³⁹⁰ See Duong, *supra* note 295, n.187, n.189-91 (discussing the "knowing" element under Foreign Corrupt Practices Act ("FCPA")). Under the FCPA, local, non-U.S. agents can also be prosecuted and can implicate the MNC and its employees, provided that the element of "knowledge" on the part of the MNC and its employees is proven. This linkage is distinguishable from a scenario where the MNC works with an agent of the host government. If the government requires dealing with the host government's agent as an in-between contact, the MNC will want to comply in order to gain support from the government. One such example is the recent scandal involving the President of Kazakhstan. U.S. prosecutors filed a criminal action against Kazakhstan's agent, a U.S. citizen, for FCPA violations. Jeff Gerth, *U.S. Businessman Is Accused of Oil Bribes to Kazakhstan*, N.Y. TIMES, Apr. 1, 2003, at A10.

³⁹¹ The assumption that the developing nation has no or little law is *not* always correct. In a lesser-developed and authoritarian country, law and order purposely become ways for the ruling elites to "flex their muscles" and to exhibit the oppressive regime's supreme authority to administer the "written law." Leaders will use or formulate written laws to justify their actions *ex post facto*. For example, in prosperous Singapore's model of "Asian-styled modified democracy," written laws (interpreted by common law precedents) were enacted to restrict freedom of speech and access to information, and to impose government licensing upon private acts. See, e.g., Scott L. Goodroad, Comment, *The Challenge of Free Speech: Asian Values v. Unfettered Free Speech, an Analysis of Singapore and Ma-*

aysia in the New Global Order, 9 IND. INT'L & COMP. L. REV. 259, 270, 288-89 (1998) (discussing, inter alia, Singapore's and Malaysia's Internal Securities Acts restricting freedom of speech, and the interpreting case of *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew*, [1992] 2 S.L.R. 310 (Sing.), available at 1992 SLR LEXIS 412).

The problem with the "rule of law" in many "Third World" nations is not whether laws exist, or whether laws exist in abundance. For example, in Vietnam, according to the private international bar, from the inception of Vietnam's "open door" economic policy to 1994, Vietnam passed 120 "Laws" (enactments by the National Assembly) and more than 1000 decrees, circulars, ordinances, and interpretative decisions (constituting what U.S. legal scholars know as public law or administrative law). See THE ECONOMIST CONFERENCES, OPERATING IN VIETNAM, A MANAGEMENT FORUM 16 (1994) (Conclusions Paper of Conference in Ho Chi Minh City, April 11-12, 1994 (statement by Nguyen Tan Hai, then Baker & McKenzie Representative based in Hanoi)). Instead, the challenges are whether law is fairly and equitably formed, whether law is enforced to effectively achieve both substantive and procedural due process, and whether the system of law is workable.

In general, in their "country report" style of providing advisory services, international legal advisors to foreign investors in the developing nations tend to focus on the countries' civil and commercial law systems (or lack thereof), as well as these countries' memberships in the Multilateral and Bilateral Institutions, rather than looking into the civil tort and criminal justice systems of the host countries. This decision tends to reinforce Fortune 500 management and general counsel's notion that what is important to them is a country's aspirations to invite foreign commercial interests. Hence, the Fortune 500's focus is on the investment climate and the country's foreign investment and natural resource laws. These "commercial interest" types of law receive Fortune 500 General Counsels' priority consideration, and are artificially segregated from the country's human rights and civil liberty records, or the relationship between a government and its own citizens.

For the following two reasons, I seriously question the soundness and wisdom of this segregation. In my view, the civil tort and criminal justice systems of a host country should be the first thing the international counsel needs to look at, and this task requires the full cooperation and utilization of the native legal scholars, regardless of differences in training or backgrounds.

First, criminal justice and civil tort systems, whether viewed as legally simplistic or complex and sophisticated from the perspective of the U.S.-trained lawyer, would provide the most direct and most profound insight into a society and its curve of development, as these foundational systems speak for human relations in society, the interaction between citizens and the State, and the role occupied by the sovereign state in private lives.

Second, foreign investors and their employees do travel, live, work, and engage in economic and commercial activities in the host nation. How can they then ignore the civil tort and criminal justice systems that govern the general population, unless there is an implicit understanding that the foreign investors are privileged or supreme citizens who are above the law?

In summary, I think that the "country report" accompanying the foreign investor to a foreign land should begin with the country's constitutional and political frameworks, as well as the country's civil tort and criminal justice systems. These topics require and demand the intimate involvement of, and constant consultation with, the native lawyers during the client advisory process, right from the start of any FDI projects.

both Hanoi and Ho Chi Minh City (the formerly capitalistic, entrepreneurial Saigon, once fully exposed to America's legal system and constitutional framework) were inundated with middle-aged or senior citizen former lawyers well trained in French civil and commercial law and/or Soviet legal principles, which, at that time, made up the legal system of Vietnam. (Any capital market model, in the heyday of Vietnam's economic development, was being drafted by government cadres in consultation with Western lawyers sent by the newly arrived investors, leaving the well-trained civil law and Soviet law scholars of Vietnam as second-class citizens performing interpreter and translator roles at a minuscule fraction of the salary of an expatriate Western lawyer practicing international business on Vietnam's soil. Those Western International Business Transaction ("IBT") lawyers worked in collaboration with a privileged few "local counsels" who were often high-ranking party members selected and recommended by the host government.)

The foregoing esoteric example involving the private international law practice typifies the close-knit alliance of multinational corporate brand-names found in a "Third World" environment, which disadvantages local talents. The same pattern of monopoly³⁹² exists when brand-name corporate players are involved in Project-Financed IPP Transactions—the formation of a self-feeding network that dominates the natural gas and utility sector in the "Third World." A couple of law school hypotheticals can help demonstrate how the tendency to favor brand-name corporate identities will inescapably and undoubtedly influence Project Financing bankers' risk assessment process.

Hypothetical #1: Suppose that my students, Reid and Megan, want to open a restaurant chain in the new Afghanistan. They would like to have a Project-Financed loan from J.P. Morgan Chase

³⁹² Cf. Jim Rossi, *The Electric Deregulation Fiasco: Looking to Regulatory Federalism to Promote a Balance Between Markets and the Provision of Public Goods*, 100 MICH. L. REV. 1768 (2002) (reviewing CHARLES R. GEISST, *MONOPOLIES IN AMERICA: EMPIRE BUILDERS AND THEIR ENEMIES FROM JAY GOULD TO BILL GATES* (2000) (tracing the evolution of monopolies and their control in the United States), RICHARD F. HIRSH, *POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM* (1999) (stating that deregulation of the utility industry and resulting competition enabled investment banks to earn banking fees from doing business with many new non-utility players, not just the regulated, brand-name utility companies), and PAUL W. MACAVOY, *THE NATURAL GAS MARKET: SIXTY YEARS OF REGULATION AND DEREGULATION* (2000) (discussing how regulatory efforts in natural gas have not contributed to consumer welfare nor produced gains to producers or pipeline operators)).

(which, at the time I finished writing this Article, was contemplating acquisition of Bank One).³⁹³ Having learned principles of Project Financing, Reid and Megan have managed to secure several catering contracts from business offices in the new Afghanistan. Under each contract, Reid & Megan LLC will provide hamburger lunches to all U.S. expatriates craving American food, and those native employees who want a "taste" of the American fast food culture. Reid & Megan LLC will also handle banquets for all these offices at every American holiday celebrated by U.S. expatriates in Afghanistan. Under the terms of these catering contracts, for the next five years, these businesses will pay for a minimum number of meals all year round, regardless of whether or not those meals are actually consumed by their employees—a "Take or Pay" concept analogous to gas sales terms in the energy sector: a gas buyer will pay for the supply, whether or not it actually takes delivery of the gas.³⁹⁴ These "Take or Pay" terms are to secure and stabilize long-term supplies of a scarce and unpredictable commodity in a seller's market. These "Take or Pay" terms are possible because Reid & Megan is the only supplier of hamburgers and American food in Afghanistan. The income stream produced by these catering contracts is sufficient to pay for debt services for the next five years.

Applying classic Project Financing principles, J.P. Morgan Chase should have no problem financing the Reid & Megan LLC deal, judging solely on the economic viability of its restaurant and catering project (as evidenced by well-secured, tightly drafted contractual rights producing a steady future income stream for five years). Nonetheless, J.P. Morgan Chase bankers may inescapably be influenced by the two youthful and obscure project sponsors, who have not demonstrated any experience in the food industry, in international business, or in the country of Afghanistan. In classic Project Financing, none of those factors should matter, since only the income-producing certainty of the project should drive the risk

³⁹³ *Bank MegaMerger Will Foster Another Mutual-fund Heavyweight*, WALL ST. J., Jan. 15, 2004; Michael Mackenzie & David Feldheim, *J.P.Morgan/Bank One Deal to Create New Credit Card Giant*, Jan. 14, 2004 (describing how J.P. Morgan Chase's purchase of Bank One will produce a combined financial institution to rival market leader Citigroup), available at http://global.factiva.com/en/arch/print_results.asp (last visited Jan. 18, 2005).

³⁹⁴ See, e.g., JOHN D. FINNERTY, PROJECT FINANCING ASSET-BASED FINANCIAL ENGINEERING 59-60 (1996) (discussing "Take-Or-Pay Contract" as a type of purchase-and-sale agreement concerning long-term supply of a scarce commodity in great demand in a seller's market).

assessment process. Nonetheless, there is a great chance that the bank will still require Reid's and Megan's parents to guarantee the debt, or an examination of at least two years' financials by Reid & Megan LLC showing its prior income in the food service business, which my two entrepreneurial students do not have. Reid & Megan LLC has no "brand-name" appeal or corporate reputational identity, which apparently Enron had with respect to its Dabhol project, prior to its scandalous collapse. The classic principles of Project Financing might have been applied full force and favorably to Enron's Dabhol, but not to Reid & Megan LLC. J.P. Morgan Chase may feel differently should the name Reid & Megan LLC be replaced with McDonald's Corporation, even if the project and its supporting catering contracts remain exactly the same. Although corporate brand-name is undoubtedly a factor in any kind of business judgment, here, in the context of Project Financing, it has diluted the very principle underlying the funding concept—it is the project, not the project sponsor, that should provide the basis for lending or collateralization.

Hypothetical No. 2: Assume further that Reid and Megan will be able to pull together a group of petroleum engineers trained by the prestigious School of Mines in Colorado. Together they will form a company to participate in "Third World" natural gas and IPP investments via the procurement of finders' fees or technical consulting contracts in exchange for a minimal equity interest of approximately 0.1%. Suppose that they were able to procure such an interest in a contemplated pipeline construction in the new Iraq. Again, my two students will go to J.P. Morgan Chase. The same dubious concerns might still characterize the loan application process because of Reid & Megan LLC's lack of "brand-name" appeal and track record, even though under Project Financing principles, bankers should be looking at the project, and not the project sponsors. Suppose further that Reid and Megan switched their investment and substituted Iraq with the Republic of Chad. The bankers might still be reluctant. Suppose, finally, that Reid and Megan were to show the bankers contracts between their LLC and ExxonMobil, guaranteeing Reid & Megan LLC's finder's fee in the pipeline and oil production project currently underway in Chad, which already received Multilateral Funding and was co-sponsored by ExxonMobil, ChevronTexaco, and Shell.³⁹⁵ The

³⁹⁵ See Duong, *supra* note 295, at 1171, 1178 n.15 (discussing the Republic of Chad).

bankers might just change their view about Reid & Megan LLC's Project Finance eligibility at that time, having been influenced by (i) the "brand-name" appeal, credibility and glory of ExxonMobil as a Fortune 500 entity, (ii) the mighty strength of the de facto "oil cartel" behind the Chad project; and (iii) the added assurances of Multilateral Financing already accorded to the overall project and the host country.

I have taken the liberty of speculating on what J.P. Morgan Chase bankers might have done with my two students and their Limited Liability Company, only to illustrate my point: Project Financing can operate as an exclusive privilege for corporate giants and sponsors of large-scaled projects. To fully realize the goals of free enterprise and to maximize the utility of Project Financing as a stimulant for "Third World" economic development, the concept must apply with rigor and fairness to the smaller entrepreneurs who take a chance with a "Third World" investment environment. The Multilateral Institutions, in their free-enterprise economic mission, should provide the fullest support to these small foreign or native entrepreneurs. This can only be done if the Multilaterals regard economic development projects and related infrastructure building in a broader and more flexible light. Without such multilateral support and a breakthrough in real-world application of Project Financing, very few small or medium-sized entrepreneurs can afford to compete against, for instance, the consortium of ExxonMobil, Royal Dutch Shell Group, BP-Amoco, and Chevron-Texaco in poverty-stricken Chad. Nor could any entrepreneurs formed by returning East Indian Americans have competed successfully against mighty Enron in the mid-1990s in a project like Dabhol, which was fully supported and made feasible by Project Financing; yet eventually turned out to be a sour experience for India. Even when the smaller entrepreneurs could raise funds or pull together their lifetime savings to pursue their "American dream" in the "Third World," they would most likely become the easy targets for bribery requests, or selective adverse material governmental action ("MAGA"), since typically they had no "brand-name" corporate clout to protect them. They might succeed if they somehow could tap into an existing network of governmental connections and benefits, which in all likelihood might carry grave FCPA implications. The smaller, independent entrepreneurs taking a chance with the "Third World" would operate in the worst risk scenarios.

In the experience of Vietnam, a good number of disappointed

and bankrupt Vietnamese American entrepreneurs (or returning Vietnamese expatriates from other developed nations such as France or Canada) have become witness to the failed American dream. For example, on May 15, 2003, the Wall Street Journal reported the sad story of two young Vietnamese who returned to their former home from their adopted home overseas in order to successfully operate a telecommunications business after helping Nokia and Samsung obtain an 80% share of the local market.³⁹⁶ (The popularity and high usage of cellular phones in the developing nations may surprise the American public, but the high usage may also include volumes of international, long-distance, and business calls made by the business and expatriate community.)³⁹⁷ According to the Wall Street Journal, the brothers' newly formed company allegedly surged to \$40 million in sales in 2002, but their success story did not last long. The Vietnamese government recently arrested both young entrepreneurs, accusing them of tax evasion and confiscating their business and inventory – something that it would probably not have done to a Fortune 500 executive who might legitimately have been paid offshore for services rendered in the country. Countless similar stories never made it to the Wall Street Journal for the benefit of the observing public. They became part of the continuing untold sad stories of exiled Vietnamese after half a century of war and bloodshed that had sent them away from their former home. Neither the allure of the “American Dream” nor the ennobled economic development of their root culture has saved these daring entrepreneurs from heartaches and bankruptcies.

In summary, the instigation of small business involvement in “Third World” economic development must be a joint project for the multilateral community, the private lending community, as

³⁹⁶ Barry Wain, *Two Vietnamese Brothers Fall Victim to Their Success*, WALL ST. J., May 15, 2003, at A15. The news story also references the arrest of the Vietnamese Australian owner of Peregrine Capital Vietnam in the 1990s.

In 2000, the Vietnamese government also sentenced a Vietnamese Canadian woman to death, having convicted her of drug trafficking and holding her in captivity (together with her aging mother), notwithstanding the Canadian government's plea for due process, procedural justice, and clemency. See Nguyen Nam Phuong, *Southeast Asia: Vietnam Debates Capital Punishment, Again*, ONLINE ASIA TIMES, May 31, 2000, at <http://www.atimes.com/se-asia/BE31Ae02.html> (last visited Feb. 22, 2005); *Le Vietnam, Aujourd'hui: Vietnam Executes Canadian Trafficker*, AGENCE FRANCE PRESS, Apr. 28, 2000. Both articles raise the question of whether the Vietnamese-Canadian woman might have been innocent.

³⁹⁷ Rasul Bailay, *Poorer Nations Lead Cellphone Growth*, WALL ST. J., Jan. 21, 2004.

well as governmental agencies of the home jurisdiction (entities such as the Small Business Administration or various state authorities and Chambers of Commerce in the United States). In the new global age, new visions and new roles for the smaller or medium-sized entrepreneurship must be born. In its purest form as an economic development stimulant, Non-Recourse Project Financing, after all, should not be just a benefit and risk-transfer mechanism for conglomerates of the powerful and the rich.

4. REFLECTION, RECOMMENDATIONS, AND CONCLUSION: THE ROAD TO TRAVEL

4.1. *The Need for Reflection*

I have by now unveiled before you certain transactional legal issues that may contribute to the pattern of "Third World" economic development projects in the petroleum and energy sector. The lawyer plays a pivotal role in the forming of such a pattern. This role deserves some reassessment.

The prospect of an equitable global economy was envisioned half a century ago when the Bretton Woods Multilateral Institutions were created in the aftermath of World War Two and the global depression. The World Bank has since proclaimed, as its motto, that it's "Dream is A World Free of Poverty."³⁹⁸ The new millennium calls for an examination, empirically and conceptually, of this mission's progress, not necessarily as a critique of the World Bank, but rather, as a suggested focus for researchers of the global economy.³⁹⁹

Recent events have afforded the American public an opportunity to reassess the role played by corporate America in foreign relations and "Third World" economic development. I recall seeing an interview of school children on national TV during the September 11 crisis. One schoolgirl asked the interviewer: "Why do those people hate us so much?"

The program ended there without an answer.

I am not sure there can ever be a comfortable or exhaustive an-

³⁹⁸ See The World Bank Mission Statement, available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040565~menuPK:34563~pagePK:51123644~piPK:329829~theSitePK:29708,00.html> (exploring the goals, values, and principles of the World Bank) (last visited Feb. 26, 2005).

³⁹⁹ *But see generally* 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (Kevin Danaher ed., 1994).

swer to the child's question. On network television back then, in the heart of the September 11 national wound and the peak of patriotism, it was not the kind of question we wanted to face. But the innocent question brought to our consciousness the perplexing root causes of anti-American sentiments that fertilize extremists' atrocious behaviors, in an era when, supposedly, all worlds should become one. In searching for an answer to the child's question, it is natural to focus our attention on U.S. foreign policies.⁴⁰⁰ What can easily be overlooked is the role of that "Quiet American"⁴⁰¹ who, outside the political arena, has long contributed to the image of Americans abroad.

Among these "Quiet Americans" are the corporate executive and his/her corporate lawyer, both of whom jointly map global development for profit. They travel to remote locations of distinctive ancient cultures to strike deals.⁴⁰² In the discrete ways that often characterize confidential economic negotiation, they become "de facto ambassadors" of the American way of life and the showcase of its influence abroad. Quite often, and acceptably so, cultural sensitivity is overshadowed by economic goals. But it goes without saying that in order to participate in the global economy, it is no longer adequate for an international executive and his/her lawyer just to surround themselves with their international "Service Providers." Nor is it adequate for the pair to arm themselves with a manual, "*Doing Business in XYZ jurisdiction*," or a nicely compiled "country report" on a nation's foreign investment legal framework and governmental structure, often curiously described

⁴⁰⁰ For a connection between the Bush Administration's Wilsonianism and the emergence of cultural globalization in which the American way of life plays a dominant factor, see CULTURAL MATTERS: HOW VALUES SHAPE HUMAN PROGRESS (Lawrence E. Harrison et al. eds., 2000), and Andrew J. Bacevich, *Culture, Globalization, and U.S. Foreign Policy*, 19 WORLD POL'Y J. 77-82 (2002) (reviewing MANY GLOBALIZATIONS: CULTURAL DIVERSITY IN THE CONTEMPORARY WORLD (Peter L. Berger & Samuel P. Huntington eds., 2002)).

⁴⁰¹ Term taken from international author Graham Greene's famous political novel. GRAHAM GREENE, *THE QUIET AMERICAN* (1955). Greene was credited with predicting the pessimistic outcome of the U.S. presence in Southeast Asia—that the "Quiet American" would die in Southeast Asia, symbolic of the U.S.'s loss in the Vietnam War (1954-1975). See, e.g., James Carroll, *The Age of Innocence*, BOSTON GLOBE, Feb. 18, 2003, available at <http://www.commondreams.org/views03/0218-02.htm> (analyzing the contemporary relevance of Graham Greene's "Quiet American") (last visited Feb. 22, 2005).

⁴⁰² See Daphne Eviatar, *Wildcat Lawyering*, AM. LAW., Nov. 2002, at 81 (discussing the phenomenon of big-firm lawyers following the trail of oil and pipelines, expanding their practices to deals made in remote countries and locations such as Baku, Azerbaijan, and Turkey).

in American legal jargon.

If this is not enough, what will be enough? The gravity of contemporary geopolitical issues and the complexity of today's world necessitate a reorientation of perspectives and outlook.⁴⁰³

4.2. *Five Suggestions*

I advocate the following five points, as part of what I consider an overall, systematic "public interest" approach to international deal-making.

4.2.1. *Systematic Training on Multiculturalism for the International Business Executive and Legal Practitioner, and Rewriting the Agenda of MNC Corporate Counsel*

Both the IBT executive and her lawyer should be trained on multiculturalism, and made cognizant of their "de facto ambassador" role. This training should be similar to the training of foreign service officers without the political overtone.⁴⁰⁴ I think of the traveling corporate executive and her lawyer specializing in "Third World" projects as those who have taken the "road less traveled" envisioned by Robert Frost.⁴⁰⁵ On such road less traveled, the traveler encounters burdens as well as benefits. More exotic life opportunities present unconventional responsibilities. The "de facto ambassador" role goes with the job, regardless of choice, because our world is getting extremely complex from all fronts, and all actors have become interdependent.

Likewise, the agenda of corporate counsel should be reevaluated and rewritten. It is no longer sufficient to devise minimal legal compliance. The artificial division between non-economic human rights concerns and private economic law is already blurred and should be alleviated, because, at the end of the day, for the transnational corporation, both platforms can be translated into

⁴⁰³ See, e.g., Jeffrey K. Walker, *Law and International Relations*, 51 U. KAN. L. REV. 297, 297, 301 (2003) ("The world did not change on September 11 . . . [r]ather, the United States suddenly noticed how the world actually is Although I refuse to blame Americans and American culture for the atrocities of September 11th, we need to do a better job of reaching out in tolerance to other peoples.").

⁴⁰⁴ The global workforce of MNCs include executives and lawyers from all cultures. As its ultimate objective, the training on multicultural sensitivity and awareness of geopolitical issues should apply to the global workforce, and not just U.S. professionals.

⁴⁰⁵ Robert Frost, *The Road Not Taken* (1916), reprinted in THE POETRY OF ROBERT FROST 105 (Edward Connery Lathem ed., 1969).

contingent or actual liabilities and monetary losses.

Many strata of the international community see the aspirational “rule of law,” whether it be public or private international law, as the rule that serves humanity. A “post-industrial sensibility” throughout the developed countries is being called to the center stage of policy-making, toward the search for some sort of a moral consensus in a world of differences and in the aftermath of several corporate scandals and tragic world events.⁴⁰⁶ Part of the challenge is the articulation of a “corporate morality” attached to a legal fiction such as the corporation. As an English jurist once declared, “[c]orporations have neither bodies to be punished, nor souls to be condemned. They therefore do as they like.”⁴⁰⁷

But even if such moral consensus may be far from reality, undoubtedly and justifiably issues such as international human rights, cultural property, and environmental issues should be part of the corporate counsel’s agenda, considering, inter alia, the recent spur of class action lawsuits against U.S.-based corporations by foreign workers, and recently renewed United Nations’ human rights initiatives.⁴⁰⁸ Specifically, companies in the extractive industry have recently become the renewed target of scrutiny due to

⁴⁰⁶ Lawrence E. Mitchell & Theresa A. Gabaldon, *If I Only Had a Heart: Or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645 (2002); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 2002 BERKLEY J. INT’L L. 45 (2001); William M. Sullivan, *Morality in America*, 12 THE RESPONSIVE COMMUNITY 79-82 (2002) (reviewing ALAN WOLFE, *MORAL FREEDOM: THE IMPOSSIBLE IDEA THAT DEFINES THE WAY WE LIVE NOW* (2001)).

⁴⁰⁷ Edward, 1st Baron Thurlow, *English Jurist* (1731-1806), available at http://www.saidwhat.co.uk/quotes/e/edward_1st_baron_thurlow_2392.php (last visited Feb. 22, 2005).

⁴⁰⁸ Jenna Greene, *Gathering Storm: Suits that Claim Overseas Abuse Are Putting U.S. Executives on Alert and Their Lawyers on Call*, LEGAL TIMES, July 21, 2003, at 1 (discussing foreign plaintiffs’ suits against MNCs based on the Alien Tort Claims Act: ExxonMobil was sued over the hiring of Indonesian soldiers as security guards; Unocal was sued over the Burma pipeline; IBM was charged with supplying computers that enabled the South African government to create devices to control black population; Ford Motor Company, General Motors, and Daimler Chrysler were named for providing armored vehicles to patrol townships; Citigroup, J.P. Morgan Chase, and Credit Suisse were sued for providing funding to South Africa to expand its police apparatus); see also *Economic, Social, and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., Agenda Item 4 at 1, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), available at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html> (last visited Feb. 22, 2005); accord Betsy Apple, *Blood on Their Hands: Corporations, Militarization, and the Alien Tort Claims Act*, 1 SEATTLE J. SOC. STUD. 127 (2002).

lawsuits brought under the Alien Tort Claims Act.⁴⁰⁹ It is incongruent to have U.S. public interest lawyers and workers of Non-Governmental Organizations (“NGOs”) and International Non-Governmental Organizations (“INGOs”) running around a developing country advocating and monitoring human rights compliance, while U.S. corporate executives are ignoring that aspect of reality, and, instead, concentrating *solely* on negotiating, outwitting, and partnering with the “monarch.” A short-term profit focus or the rush toward deal closings, without considering the real party-in-interest—the inhabitants of the developing economies—is the short-sighting of ultimate corporate goals and accountability. Corporations are citizens of every market and community in which they operate. In the United States, the same message has been spoken through the doctrine of social responsibility, made applicable to the corporation’s role by state incorporation statutes as well as by caselaw.⁴¹⁰ Similarly, aspirational international law also recognizes the doctrine of corporate social responsibility via the “social contract” theory— that the multinational corporation, by doing business, enters into a “social contract” between it and the host society.⁴¹¹

⁴⁰⁹ *Id.*; see also Duong, *supra* note 295, at 1202 n.69, 1269-70 n.239 (inventorying lawsuits brought by foreign workers and inhabitants against MNCs).

⁴¹⁰ See Duong, *supra* note 295, at 1191 n.37, 1253 n.197, 1257 n.208 (discussing the doctrine of corporate social responsibility). The scholarly debate regarding effective remedies for the implementation of the corporate social responsibility doctrine is ongoing. See, e.g., Eric Engle, *Corporate Social Responsibility: Market-Based Remedies for International Human Rights Violations?*, 40 WILLAMETTE L. REV. 103 (2004).

⁴¹¹ See, e.g., U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *The Social Responsibility of Transnational Corporations*, U.N. Doc TD/UNCTAD/ITE/IIT/Misc. 21 (1999) [hereinafter UNCTAD] (UNCTAD “serves as the focal point within the [U.N.] Secretariat for all matters related to foreign direct investment and transnational corporations”) (noting the complexity of determining transnational corporations’ corporate responsibility); THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* (1999) (discussing the application of social contracts theory to economic issues and extending the theory to MNCs); Thomas Donaldson & Thomas W. Dunfee, *Toward a United Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252 (1994) (advancing the integrative social contracts theory that recognizes ethical obligations based on consent); Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215 (2001) (endorsing the integrative social contracts theory but cautioning that the large multinational corporation is rapidly changing the traditional patterns of society and notions of community).

4.2.2. *Expanded Ethical Concepts Governing Lawyers to Accommodate a Legal Transnational Practice*

To date, the role of the international business transactional (IBT) lawyer in "Third World" economic development remains at best an elusive mystery. Her job involves an undecipherable, esoteric specialty in the eye of the international legal community. Two reasons explain the myth about the IBT practice. First, the number of truly full-time IBT lawyers is relatively small compared to the legal community at large.⁴¹² Second, what they actually do can be as imprecise and incomprehensibly exotic as the flexible nature of the curriculum of IBT courses in accredited law schools, quite often shaped by the individual view and previous work or research experience of the professor who teaches the course. The mystery is not clarified by the generally vague and non-standardized publicity material of law firms that hold themselves out as having an "international practice."⁴¹³ While the practice or teaching of torts, contracts, or criminal law can definitively be contoured, IBT can be anything that involves a cross-border touch or emphasis such as: the highly structured administrative practice of international trade concentrated in Washington, D.C.; the mammoth documentation of bank financing performed at a lawyer's desk in New York City; the "quickie" finalization of an international sale on a form invoice and purchase order anywhere in the U.S.; the intensive, nerve-wrecking negotiation of oil and gas interests in remote locations of the earth; or simply the routine handling of a business immigration visa by a small-town practitioner.

U.S. courts as well as the Federal Rules of Civil Procedure have recognized licensed practitioners as "officers of the court,"⁴¹⁴ ow-

⁴¹² For example, as of 1996, out of the corporate in-house staff of Mobil Corporation (now ExxonMobil), only twenty-five lawyers were classified as major transactional lawyers responsible for the negotiation and implementation of deals worldwide. This number did not include the headcount of lawyers assigned to the daily servicing of producing subsidiaries or affiliates overseas.

⁴¹³ For a look at international law firms' practice profiles, see Baker & McKenzie, at <http://www.bakernet.com/BakerNet/Practice/International+-+Commercial/default.htm> (last visited Feb. 26, 2005).

⁴¹⁴ See FED. R. CIV. P. 4(d) (referring to the lawyer's role as "advocate" and "officer of the court"). U.S. courts have frequently spoken of lawyers as "officers of the court" in various contexts, attributing this status to the attorney's sworn oath to undertake the practice of law. See, e.g., *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965) (stating that an attorney is an officer of the court); *Jackson v. State*, 413 P.2d 488, 490 (Alaska 1966) (holding an attorney to be an officer of the court assisting in the administration of justice). No court, bar, or code of ethics has defined the term "officer of the court." See also Robert Bloomquist, *The Phoe-*

ing responsibilities not only to clients, but also to the integrity of the profession and the justice system symbolized by the bench and the courthouse. The concept of lawyers as "officers of the court" should have its counterpart in a transnational practice.⁴¹⁵ The IBT lawyer should be cloaked with the responsibility, not only to zealously advance the cause of her client, but also to make a contribution to the goals of harmonizing national laws, toward the building of a "rule of law" system accepted by the "civilized nations."⁴¹⁶

nix Project: (Seriously) Renewing Public Trust in the American Justice System, 44 S.D. L. REV. 41, 46 (1999) (advocating making legal professionals more like officers of the court, quoting AMITAI ETZIONI, *THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY* 158 (1996) (referring to lawyer's role as officer of the court and as officers of "the community")); Ralph Nader, *Corporate Law Firms and the Perversion of Justice: What Public Interest Lawyers Can Do About It*, 1 WASH. U. J.L. & POL'Y 53, 60 (1999) ("Lawyers are the architects of justice in our society.").

⁴¹⁵ Although there is a gap in mandatory rules of conduct for transnational practitioners, who are typically regulated by the licensing home jurisdiction, several voluntary codes or guidelines have come into existence, thereby focusing the attention of the international legal community on issues involving a transnational practice. See, e.g., COUNCIL OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN UNION, *CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION* (2002) (setting forth a code of professional conduct that has been adopted by eighteen nations); SIR THOMAS LUND, *THE INTERNATIONAL BAR ASSOCIATION (IBA) INTERNATIONAL CODE OF ETHICS* (1970) (detailing rules of professional conduct collected from and applicable to countries across the globe); NAFTA Model Rule on Legal Services (Feb. 11, 1999); RESTATEMENT (THIRD) ON THE LAW GOVERNING LAWYERS (2000); Am. Bar Ass'n (ABA), *Report of the Commission on Multijurisdictional Practice*, 2002 A.B.A. 50 (encouraging jurisdictions to "adopt the ABA model rule for the licensing of legal consultants"); ABA Commission on Evaluation of the Model Rules of Prof. Conduct, *The American Bar Association's Evaluation of the Model Rules of Professional Conduct and MJP Issues*; Texas-Mexico Bar Ass'n, *The International Lawyer's Creed*; Union International des Avocats (UIA), *Statement on Standards for International Legal Practice*; cf. Detlev F. Vagts, Note, *The International Legal Profession: A Need for More Governance*, 90 AM. J. INT'L L. 250 (1996) (recognizing that national legal systems almost always become watchdogs for international lawyers' conduct, and that issues of professional behavior for transnational lawyers are plagued with problems and uncertainties).

For a comparative analysis of the international legal practice, see Peter Rorda, *The Internationalization of the Practice of Law*, 28 WAKE FOREST L. REV. 141 (1993), and Lauren R. Frank, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, 2000 U. ILL. L. REV. 957 (2000) (discussing developments in international law and the internationalization of the legal profession).

⁴¹⁶ FOREIGN RELATIONS RESTATEMENT, *supra* note 359, § 102.

With respect to ethical issues involving corporate counsel, see generally, RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* xxiv-xv (1996) [hereinafter *NO CONTEST*] (discussing corporate attorney ethical issues and the emerging role of corporations as private legislatures); cf. George A. Riemer, *Zealous Lawyers: Saints or Sinners*, 59 ORE. ST. BAR BULL. 32, 32 (1998); Lawrence J. Fox, *Lawyers' Ethics According to*

Whether or not IBT lawyers go to court, they should be made cognizant of their role as “officers” or “members” of such an international legal community working toward and sharing the “rule of law” common to all civilized systems of national laws. The public interest (concepts of *ordre publique* in civil law)⁴¹⁷ should not just be used to defend national sovereignty. *Ordre publique* should underlie the continued development of the “internationalization” and “legalization” trends, but only toward acceptance of a nucleus of universal legal concepts constituting modern international law, whether economic or humanitarian.

At the negotiation table, notwithstanding the IBT lawyer’s role as zealous advocate for her investor-client, she is, and should be in the best position to strike the balance between private profit incentives and the public interest. In the effective representation of her client, she should also be mindful of the overall ethical duty to advance the public good. This “double hat” function is implicit in the role of any lawyer, domestic or international. The notion, however, should eventually be expressed or incorporated explicitly in modern Codes of Professional Responsibilities all around the nation, as well as by the various voluntary bars, in order to accurately reflect the realities of today’s global economy.

4.2.3. *Use of Voluntary Corporate Compliance Programs as a Means to Police MNCs’ Conduct, under a “Management-Based/Enforced Self-Regulation” Model of Compliance*

The enforceability of a “Universal Code of Multinational Corporate Conduct” project has been talked about for years among U.N. work groups as well as among institutions and legal academia.⁴¹⁸ Still, the project has not become a reality. If we cannot

Nader: *Let the Corporate Clients Beware*, 12 GEO. J. LEGAL ETHICS 367, 372-73 (1999) (reviewing and critiquing Nader’s NO CONTEST); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 241-43 (1984) (“When my question—what does a business lawyer *really* do—is put to business lawyers, the familiar response is that they ‘protect’ their clients, that they get their clients the ‘best’ deal.”).

⁴¹⁷ See, e.g., Convention on the Law Applicable to Contractual Obligations, art. 16, 1980 O.J. (L 266) (incorporating concept of *Ordre Publique* in convention’s language).

⁴¹⁸ The Global Compact is a *voluntary* corporate citizenship initiative seeking to support ten labor, human rights, and environmental principles. See United Nations, *The Global Compact*, at <http://www.unglobalcompact.org/Portal/> (last visited Feb. 22, 2005). Proposed by U.N. Secretary-General Kofi Annan and launched at U.N. Headquarters in New York on July 26, 2000, the Global Compact is not a regulatory instrument. It does not police, enforce, or measure corporate behav-

come to an enforceable consensus on how to govern the conduct of MNCs, then we must let them govern themselves, and oversee that self-imposed process.⁴¹⁹

I suggest that the overseeing function start with the MNC's home jurisdiction, and that a "management-based," "enforced self-regulation," or "mandated self-regulation" model of compliance be utilized as the legal framework to address this perplexing challenge.⁴²⁰ Such a "management-based" regulatory model, to be administered by the MNC's home jurisdiction,⁴²¹ should utilize the MNC's voluntary "corporate compliance policies and programs" (already in existence in most, if not all, U.S.-based publicly traded companies) as the tool to achieve regulatory social goals.⁴²² The end result I hope for is the "double dosage" of public scrutiny so that MNCs will impose upon themselves a "public interest" ap-

iors. See also The CERES Coalition, *The Ceres Principles* (listing principles endorsed by nineteen U.S.-based publicly traded companies and directed by U.S.-based institutional investors, public interest groups, and environmental organizations), at http://www.ceres.org/our_work/principles.htm (last visited Feb. 22, 2005); UNCTAD, *supra* note 411; U.N. Working Group on the Working Methods of Transnational Corporations, Draft Commentary on the Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/XX, E/CN.4/Sub.2/2003/WG.2/WP.1 (2003); Jamie Cassels, *Outlaws: Multinational Corporations and Catastrophic Law*, 31 CUMB. L. REV. 311 (2001) (discussing the Union Carbide catastrophe in Bhopal, India and specifically pointing out that both international law and voluntary codes of conduct are generally unenforceable).

⁴¹⁹ Ans Kolk, et al., *International Codes of Conduct and Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves?*, 8 TRANSNAT'L CORP. 143, 175 (1999); KATHRYN GORDON, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, THE OECD GUIDELINES AND OTHER CORPORATE RESPONSIBILITY INSTRUMENTS: A COMPARISON (Working Papers, 2001), available at <http://www.oecd.org/dataoecd/46/36/2075173.pdf> (last visited Feb. 22, 2005); Codes of Conduct—Exploring Their Economic Significance (OECD May 11, 2001), available at <http://www.oecd.org/dataoecd/0/15/2681579.pdf> (last visited Feb. 22, 2005).

⁴²⁰ Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691, 694-96 (2003) (citing IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992), John Braithwaite, *Enforce Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466 (1982), Cary Coglianese & Jennifer Nash, *Environmental Management Systems and the New Policy Agenda*, in REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS? (Cary Coglianese & Jennifer Nash eds., 2001)).

⁴²¹ Compare Elisa Westfield, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075 (2002) (advocating a cooperative approach between MNCs and their headquarters' governments).

⁴²² I will save the precise or detailed construct of the model for another day.

proach to international deal-making. (My hope is built, first, on the common-sense philosophy that the human desire to “look good” before a scrutinizing audience is just as strong as the human desire to become powerful and rich; and, second, on the more sophisticated philosophy underlying U.S. corporate securities “disclosure” law – that full and accurate “disclosure” results in the best balancing of market forces toward the corporation’s self-correction of inefficiencies and defects.)⁴²³

The “management-based” or “enforced self-regulation” model has been presented and debated in both management and legal academic literatures, in connection with different issues such as environmental or product safety concerns. Also called “mandated self-regulation,” the model allows regulators to intervene at management’s planning stage (rather than at the output stage). The model aims to achieve regulatory social goals by allowing management to exercise its creativity in performing a “self-critical analysis and evaluation” of the organization’s internal programs.⁴²⁴ Whether regulators will approve, ratify, or review management plans, or otherwise require subsequent auditors’ certification of compliance will distinguish a “management-based” approach from a traditional “information disclosure” approach, although both models seek to provide greater availability of information to a concerned public.

The “management-based” approach places the responsibility for decision-making and program design with respect to legal compliance with those within an organization who possess the most information on risks and the control of risks. This model can be less costly and more effective than traditional government-imposed standards, and can improve employee morale and coop-

⁴²³ For a detailed explanation of federal and state implementation of the disclosure philosophy, see J. ROBERT BROWN, JR., *THE REGULATION OF CORPORATE DISCLOSURE* § 2.01, at 2-3 (3d ed. 1998).

⁴²⁴ The notion of “self-critical analysis” has been implemented in the securities industry’s self-compliance programs in order to help the securities broker-dealer firms satisfy their legal duty to supervise and police their own staff. Broker-dealers’ self-compliance programs serve regulatory preventive purposes, create effective compliance means by placing compliance functions within the firm’s normal operations, accommodate the particular needs and circumstances of the firm, incorporate businessmen and women’s creativity by cloaking them with regulatory power, and hence constitute a better means to monitor and achieve compliance goals. See, e.g., John H. Walsh, *Right the First Time: Regulation, Quality, and Preventive Compliance in the Securities Industry*, 1997 COLUM. BUS. L. REV. 165 (1997) (describing regulatory regimes for preventive compliance, supervision, and quality).

eration, since workers will tend to look at their own organization's rules as being more "reasonable" than onerous government-imposed rules.⁴²⁵ The model also helps mitigate problems associated with limited government resources and creates incentives for firms to seek innovative solutions.⁴²⁶

The term "management-based" distinguishes the model from specific government regulations directed at firms' output performances. In its most flexible form, "management-based" regulation need not be regulation at all, but rather serves as a voluntary option for firms. Market forces will cause firms to voluntarily devise, create, and comply. Because the model shifts the focus of policy-making from governments to private parties, it should be viewed as a regulating strategy, rather than a body of statutory or regulatory criteria. This type of strategic governmental intervention is often needed to address some of more intractable public policy concerns, for which governments have not been able to design uniform standards.

The downside of the model lies in the fact that it does not necessarily guarantee optimal results – firms may just go through the motions or "game," or simply consider the new law an additional nuisance, turning the "regulator" into a business "risk."⁴²⁷ The inherently adversarial nature of the relationship between businesses and their government in the U.S. has prompted a small number of authors to suggest an alternative "cooperative approach" to the interaction between the regulator and the regulated – a model more typically observed in Europe and Japan. These authors urge policymakers and the academy to utilize a comparative method to the study of regulatory models across borders, although the jury is still out concerning the efficacy of cooperative methods of legal enforcement.⁴²⁸ Other authors have urged, overall, a "consultative

⁴²⁵ Coglianesi & Lazer, *supra* 420, at 694-95 (2003).

⁴²⁶ *Id.* at 696.

⁴²⁷ In the most recent global survey of some 1,394 CEOs during the fourth quarter of 2003, "over-regulation" was rated as the number one risk by CEOs (the biggest threat to their business). Global terrorism was rated as the fifth risk factor. Marc Champion, *CEO's Worst Nightmares: An Old Bogeyman Replaces Terrorists Atop the List: Regulators*, WALL ST. J., Jan. 21, 2004, at A6.

⁴²⁸ REGULATORY ENCOUNTERS: MULTINATIONAL CORPORATIONS AND AMERICAN ADVERSARIAL LEGALISM (Robert A. Kagan & Lee Axelrad eds., 2000), reviewed by Sidney A. Shapiro, 50 AM. J. COMP. L. 229 (2002). See also Sanford M. Jacoby, *Corporate Governance in Comparative Perspective: Prospects for Convergence*, 22 COMP. LAB. L. & POL'Y J. 5 (2000) (comparing models of corporate governance between the U.S., Japan, and Western Europe in order to assess trends of convergence). It

and cooperative" preferred approach to the development and implementation of international standards for the global community, as part of the "legalization" movement.⁴²⁹

An effective "management-based" model will depend on the types of mandates regulators choose for various purposes, as well as the extent of government involvement or oversight included in the model. Such mandates must aim to create incentives for a "cooperative" model of enforcement that improves the regulated entity's public image, client base, and business goodwill, rather than the traditional adversarialism in which businesses view regulators as "nuisances," "risks," or "threats" to their existence, or simply an impediment to their thriving economic growth. To be effective, the mandates chosen must be aimed at the areas of overlap between firms' private interests and the public interest, in order to maximize the model's benefit.

One such area of overlap can be inferred from the fact that U.S.-based MNCs have long *voluntarily* devised corporate compliance policies and programs to curtail and police employee conducts, as well as to ensure compliance with existing U.S. laws and foreign laws where MNCs do business.⁴³⁰ (The same self-compliance trend and practice have long been established in the broker-dealer securities industry.)⁴³¹ These policies and programs are part of MNCs' legal defenses in litigation or in the event a government investigation is initiated. When legal liability is found, these policies and programs can be taken into consideration by the judicial officer

should be noted, however, that the strong U.S. economy in sharp contrast to the more mediocre Japanese and European economies in the last decade may tend to imply the superiority of the U.S. model, if efficiency and wealth optimization are the standards for evaluating governance models. Overall, more concise studies and better empirical data are needed to render meaningful conclusions to the comparative analysis. *Id.* at 25-32.

⁴²⁹ See, e.g., Herbert V. Morais, *The Quest for International Standards: Global Governance vs. Sovereignty*, 50 U. KANS. L. REV. 779, 815 (2002) (discussing how sovereign nations should not be concerned with the rapid trend in the development of international standards as a threat to their national sovereignty); see also Elisa Westfield, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075 (2002) (advocating a cooperative approach between MNCs and their home government).

⁴³⁰ See UNCTAD, *supra* note 411 (discussing Shell/Royal Dutch Group's and Mattel, Inc.'s self-imposed codes of conduct); see also 2000 *ChevronTexaco's Corporate Responsibility Report: Integrity and Learning in an Evolving World*, at http://www.chevrontexaco.com/cr_report/2002/docs/complete_report.pdf and http://www.chevrontexaco.com/cr_report/2002/docs/social_issues.pdf (last visited Feb. 22, 2005).

⁴³¹ Walsh, *supra* note 424, at 168.

under the Federal Sentencing Guidelines.⁴³²

Continuous emphasis on compliance training has already dominated the lives of international business executives and their lawyers, mainly because of the complex regulatory framework of U.S. laws with extraterritorial effect, among which are the Department of Commerce's export control; the Department of Treasury's foreign asset control; the Department of State's munition control; and the joint effort of the Department of Justice and the Securities & Exchange Commission over foreign corrupt practices.⁴³³ This emphasis has been evidenced by the wide range of corporate compliance programs in place in today's MNCs' internal regulations,⁴³⁴ as well as by the myriad of widely advertised continuing education programs organized by the American Practicing Law Institute ("PLI").⁴³⁵

In the marketplace, these voluntary corporate compliance policies and programs have either stated the "bare-bone" minimum expectations, or they have voluntarily included all aspirations for a higher and more detailed level of legal compliance and ethics. Or, quite often, publicly traded corporations have fluctuated their written policy statements and programs on a spectrum between the two extremes. I suggest the enactment of a new law in the home jurisdiction, requiring publicly traded corporations to devise and disclose corporate compliance programs designed specifically for

⁴³² U.S. SENTENCING GUIDELINES MANUAL § 8A1.2 Commentary 3(k) (2003); DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT § 10-2 (1999).

⁴³³ See, e.g., Michael Deal, *Tactical and Practical Considerations in Defending Export Control Enforcement Actions*, 15 INT'L Q. 163, 163-88 (2003); Peter L. Fitzgerald, *Hidden Dangers in the E-Commerce Data Mine: Governmental Customer and Trading Partner Screening Requirements*, 35 THE INT'L LAW. 47, 47-70 (2001) (identifying all governmental regulations and control applicable to export shipments and out-bound international business transactions); see also Duong, *supra* note 295, at 1205-06 n.75-79, 1245 n.164 (identifying U.S. laws with extraterritorial effect and various types of governmental control exercised over international business transactions as a result of U.S. economic sanctions taken against foreign nations).

⁴³⁴ For example, see General Electric's compliance program, *Operating Systems*, at http://www.ge.com/en/commitment/ehs/compliance/ehs_compliance.htm (last visited Feb. 22, 2005). Enron's Code of Ethics and Corporate Compliance Policy are now available on-line following the 2001 scandal, illustrating the lip service exhibited by certain members of Enron management, *Enron Code of Ethics*, at <http://www.thesmokinggun.com/graphics/packageart/enron/enron.pdf> (last visited Feb. 22, 2005).

⁴³⁵ For various Practicing Law Institute courses on corporate compliance for international businesses, see Practicing Law Institute, *Highlights*, at <http://www.pli.edu> (last visited Feb. 1, 2005).

their investments and economic conduct overseas. The contents of these programs, however, are completely voluntary. These international business corporate compliance programs will be required by the new law to be reported and filed with an overseeing non-partisan Commission appointed by the President, serving a set term.⁴³⁶ These voluntary programs will serve as the self-imposed standards for U.S.-based MNCs. The public will be able to scrutinize these self-imposed programs, which will subject the MNCs to constant scrutiny and pressure by the poll of community opinion. This disclosure law serves to increase the level of public exposure, awareness, and idea-stimulating debates.

In other words, MNCs are given a free hand to set their own standards. Once the standards are set, MNCs will be motivated to implement them via measurable programs, since all such self-imposed programs will be required by law to be disclosed to the public. The ensuing public debate will lead to effective self-regulation. Since MNCs are already competing against one another for favorable public opinion, under this model, industries will eventually come up with their own universal code of conduct. It is a "race to the top."

The proposal that the SEC should impose upon U.S.-based MNCs social accounting and social audit obligations and disclosures, at least with respect to environmental and civil rights issues, has already been injected into academic discourse and legal advocacy since the 1970s.⁴³⁷ Likewise, the concept of corporations' self-

⁴³⁶ The concept of an *ad hoc* governmental committee or work group -- formed to review or scrutinize corporate data for a specific purpose and as part of a voluntary "notification" process initiated by the companies -- is already present in U.S. law. For example, under the Exon-Florio Amendment to the Defense Production Act of 1950 (enacted as part of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (codified as § 721 of the Defense Production Act of 1950 at 50 U.S.C. § 2170 (1996)), the Committee on Foreign Investment in the United States ("CFIUS") is an *ad hoc* governmental body acting as delegate of the President to review incoming foreign investment and protect the United States' national security interests. *See id.*

The issue of whether in my recommendation, a new government body should be created, or whether the SEC should undertake the oversight function, is reserved for another day.

⁴³⁷ Douglas M. Branson, *Progress in the Art of Social Accounting and Other Arguments for Disclosure on Corporate Social Responsibility*, 29 VAND. L. REV. 539, 580-627 (1976); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1273-99 (1999). Advocates went to court to urge corporate disclosure requirements on environmental and civil rights compliance, but the SEC prevailed in resisting such efforts. Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1220-21 (2001-02).

governance and voluntary compliance with social goals has more recently been brought to the attention of policymakers. The Clinton Administration issued the Model Business Principles in 1994, although the Principles did not provide for implementation or enforcement, and in 1997, the Clinton Administration approved the apparel industry's Workplace Code of Conduct, which reflected an agreement between the industry and various human rights groups.⁴³⁸ In 1997, two legislative proposals were introduced to U.S. lawmakers toward the goal of establishing voluntary codes of conduct for corporations, although neither was enacted into law. The notable trend, as pointed out by a commentator, has been to encourage proactive self-regulated solutions volunteered by MNCs as an effort to correct or enhance their public corporate image, at least in the consumer goods and manufacturing sector and in the community of governmental contractors.⁴³⁹ The public benefit of encouraging corporations' voluntary disclosure and self-compliance programs with respect to anti-discrimination laws has also been suggested by commentators for public debate.⁴⁴⁰

In whatever form the final regulatory model may take, voluntary corporate compliance programs must extend beyond minimal compliance with a set of U.S. laws having mandatory extraterritorial effect. In this regard, the regulator may want to impose more specific guidelines. Specifically, the program should include detailed mandatory training for key expatriate and international business personnel on international relations, multiculturalism, cultural sensitivity, and geopolitical awareness, as I have suggested above.⁴⁴¹ These compliance programs may also include

⁴³⁸ Westfield, *supra* note 429, at 1097 (citing U.S. State Department, Promoting the Model Business Principles, available at http://www.state.gov/www/about_state/business/business_#principles.html); Bob Herbert, *A Good Start*, N.Y. TIMES, Apr. 14, 1997, at A17; Tim Shorrock, *Workplace Agreement Gets White House Nod*, J. COM., Apr. 15, 1997, at 5A.

⁴³⁹ Corporate Code of Conduct Act, H.R. 2782, 107th Cong. (2001) (previously introduced in June 2000 as the Corporate Code of Conduct Act, H.R. 4596, 106th Cong. (2000)); Good Corporate Citizenship and Federal Procurement Incentives Act, H.R. 2071, 105th Cong. (1997); Westfield, *supra* note 438, at 1098-1101.

⁴⁴⁰ See, e.g., Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389 (2002) (detailing how threats of shareholder derivative suits may encourage corporate executives to self-regulate with respect to race discrimination in employment).

⁴⁴¹ Cf. David Kahane, *Dispute Resolution and the Politics of Cultural Generalization*, 19 NEGOTIATION J. 5 (2003) (advocating the use of multicultural contexts in devising deliberative processes for dispute resolution and negotiation, even if generalizations about cultural identities and values must be utilized for lack of a

what the MNC views as its goals and responsibilities, as well as its implementation of self-imposed guidelines governing the MNC's international workforce, foreign asset base, and investment strategies. The disclosure must be made under the "Plain English" rule, a principle already incorporated into the SEC's disclosure requirements and guidance.⁴⁴² As Professor Jacqueline Lang Weaver has lamented, "the key to preventing Enron-type scandals is disclosure. . . . [but] [w]hat good is disclosure of something that almost no one can understand?"⁴⁴³

In summary, socially responsible citizenship in the world community by corporate America has an important role to play in the global economy. Short of an accepted universal Code of Conduct, the regulatory model to be used for governing MNCs should start with the home jurisdiction, modeled after the "enforced self-regulation" approach I discussed above. The model will turn the burden of being regulated into an opportunity for corporate America to showcase its social responsibility through voluntary compliance.⁴⁴⁴

Ultimately, the self-regulation model must be elevated to a global level as part of the "legalization" or "internationalization" movement, and hence should not remain solely with the home jurisdiction. In other words, similar self-regulation models should be implemented in the Northern Hemisphere (where most MNCs were formed or headquartered), among the developed nations sharing the same policy concerns. Otherwise, anomalous inequity will exist among MNCs. For example, U.S.-based MNCs will be burdened with the cost of funding and implementing the self-regulation model, whereas other MNCs may be able to escape such financial burdens simply because their home jurisdictions have not endorsed the same or similar model of compliance. This inequity will result in the loss of competitive advantage for U.S.-based companies, causing them to be demoralized, and rendering the self-regulatory model ineffective.

better alternative).

⁴⁴² See Plain English Disclosure, Exchange Act Release Nos. 33-7497, 34-39593, 17 C.F.R. § 228-30, 239, 274 (Oct. 1, 1998).

⁴⁴³ Jacqueline Lang Weaver, *Can Energy Markets Be Trusted? The Effect of The Rise and Fall of Enron on Energy Markets*, 4 HOUSTON BUS. & TAX L.J. 1, 147 (2004).

⁴⁴⁴ Cf. Morais, *supra* note 429, at 816-17 (2002) (advocating shifting part of the burden of enforcing standards to the marketplace that has more effective incentives for compliance and performance).

4.2.4. *Integration of Certain Prophylactic Principles of Law into International Deal-Making and the "Legalization" Movement*

The analysis of transactional patterns portrayed in this "twin series" of articles lends itself to certain legal concepts that can drastically change the landscape of current legal and business norms. However, time and space constraints do not permit me to explore these legal solutions here in depth. I will, however, summarize my suggested legal solutions here, as a starter for further discussion elsewhere or on another day.

Consistent with the "source" doctrine in international law,⁴⁴⁵ certain general principles of law common to "civilized nations" should be incorporated into modern transnational economic law. Specifically, to help safeguard against the potential ills explored in this "twin series" of articles, the following three legal concepts should govern certain types of business partnership between "Third World" governments and the private sector.

4.2.4.1 *The "Public Trust" Theory and Government as the People's Agent*

Property collectively belonging to the people is held in a "public trust" administered by the sovereign state.⁴⁴⁶ In industries where the state claims resource ownership for the "people," the government holds the "people's" property in "trust," resulting in the creation of certain loyalty, care, and good-faith duties implicit in the role of governments as the "people's" representatives.⁴⁴⁷

⁴⁴⁵ See FOREIGN RELATIONS RESTATEMENT, *supra* note 359, § 102 (identifying the sources of international law).

⁴⁴⁶ See, e.g., *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 51 (N.J. 1972) (stating that certain land "belonged to the sovereign, but for the common use of all the people . . ."). The genesis of this principle is found in Roman jurisprudence, which held that "by the law of nature . . . the air, running water, the sea, and consequently the shores of the sea . . . [were] common to all men." THOMAS COLLETT SANDARS, *INSTITUTES JUSTINIAN* 158 (Thomas C. Sandars trans., 1st Am. ed. 1876). The notion that natural resources located beyond a nation-state's continental shelf and exclusive economic zone belong collectively to humankind is also the tenet underlying the U.N. Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261.

⁴⁴⁷ In the context of property belonging to Indian tribes and other "aborigines of America," U.S. courts have regarded the government as a trustee owing fiduciary duties to the people, measured by the same strict standards applicable to private trustees. See *Ahuna v. Home Lands*, 640 P.2d 1161, 1168-69 (Haw. 1982) (recognizing Hawaiians as beneficiaries of trust; government as trustee, stating that "the trust obligations of [government] toward beneficiaries . . . may be deter-

Whether acting in a sovereign or commercial capacity, a "Third World" government or its negotiating instrumentality is simply an agent of the people.⁴⁴⁸ Governments must, therefore, discharge their fiduciary duties in the execution and performance of contracts governing the disposition, use, and exploitation of "the people's" property.⁴⁴⁹

4.2.4.2. *The "Corporate Derivative Fiduciary Duty" Theory*

As contractors of governments acting as agents for the "people," MNCs must derivatively exercise duties of care, good faith, and loyalty owed to the "people," and must discharge those duties

mined by examining well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans, i.e., American Indians, Eskimos, and Alaska natives."); *see also* *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) ("Under a humane and self-imposed policy . . . in many acts of Congress and numerous decisions of this Court, [the government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."); *United States v. Mason*, 412 U.S. 391, 398 (1973) (observing that the United States has a fiduciary duty as trustee for the Osage Indians).

⁴⁴⁸ *See generally* John W. Pratt & Richard J. Zeckhauser, *Principals and Agents: An Overview*, in *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* 1 (John W. Pratt & Richard J. Zeckhauser eds., 1991) (stating that the agency relationship is equally well established in the sphere of governments with the principals being the citizenry). For stronger advocacy of government's fiduciary duties derived from the agent-principal relationship, independent from the archaic "public trust" doctrine, see Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 *CAL. W. L. REV.* 239, 265-66 (1992):

Government officials are, in an economic and legal sense, agents. The principals of government agents are the people . . . [T]he insufficient incentive of government agents to protect collective rights in property . . . suggests the merit of a procedural remedy that allows or even encourages private persons to assert collective rights. We might view this as something analogous to a shareholder's derivative suit in which the individual shareholder brings suit on behalf of and for the benefit of the corporation. I emphasize that this problem, to the extent that there is one, calls for a procedural, rather than a substantive remedy. It merely confuses the matter to call this remedy an exercise of so parochial a thing as the public trust doctrine . . .

Id.

⁴⁴⁹ For a representative commentary on the origin of the "public trust" doctrine, see Cohen, *supra* note 448, at 249 ("The public trust doctrine comes to us from English common law that was at least tangentially related to earlier Roman law."). For an articulation of the modern public trust doctrine applicable in an environmental protection context, see JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 163 (1971).

in the performance of their investment contracts with governments, whether or not such duties are expressly embodied or delineated in contractual language.⁴⁵⁰ In this sense, corporate entities who contract with governments to take over essential governmental functions act as "sub-agents" of the "people."⁴⁵¹ Standards of conduct for certain types of FDI contractors who execute their contracts with governments acting as "agents" of the "people" should be construed in light of this "derivative fiduciary duty" overlay.

4.2.4.3. *The "Third Party Beneficiary" Theory*

Correspondingly, where the government holds property in "trust" for the people, there exists in every contractual agreement between MNCs and host governments a silent and innumerable group of parties in interest: the "people" as third-party beneficiaries of all such investment contracts.⁴⁵² As the natural consequence of theories such as the "Public Trust," "Government as People's Agent," or "Corporate Derivative Fiduciary Duty of MNCs as governments' sub-agents" described above, both the MNC's shareholder public⁴⁵³ and the people of the "Third World" should be re-

⁴⁵⁰ The U.S. Supreme Court has confirmed that government contractors can, under limited circumstances, enjoy the type of sovereign immunity often derived from, or attached to, the government's status. See, e.g., *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 826 (1976); see also *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959 (W.D. Ky. 1993) (applying the government contractor defense to preclude contractor liability when judgment would expend itself upon public treasury). The following question should be raised: if a civilized, developed jurisdiction such as the United States has derivatively extended the benefit of the government's status to a private contractor, why can't the fiduciary duties imposed upon the government be similarly extended to the same private contractor acting on the government's behalf?

⁴⁵¹ In *Rwanda v. Rwanda Working Group*, 227 F. Supp. 2d 45 (D.D.C. 2002), the federal district court recognized that a person who contracts with a foreign government for the performance of services may have agreed to act as the government's agent, and hence, will owe the foreign nation a fiduciary duty and a duty of loyalty, as judged under U.S. domestic law.

⁴⁵² See JOSHUA KARLINER, *THE CORPORATE PLANET: ECOLOGY AND POLITICS IN THE AGE OF GLOBALIZATION* (1997) (describing how grassroots globalization will aid true corporate accountability to the people); cf. *McAdams*, *supra* note 361, at 249 (stating that globalization strives for the riches of the global market, while leaving the "people invisible").

⁴⁵³ The notion that shareholders may directly or indirectly benefit or be injured by corporate management's actions is firmly established in U.S. corporate law via the procedures of either derivative suits or direct class actions. *Palmer v. U.S. Sav. Bank of Am.*, 553 A.2d 781 (N.H. 1989); *Marx v. Akers*, 666 N.E.2d 1034 (N.Y. 1996); *FED. R. CIV. P.* 23(a)-(b), 23.1. However, only in very narrow circumstances have U.S. courts recognized a shareholder's right to sue as third-party

garded as “third-party beneficiaries” of MNCs’ partnerships with governments. The interests of these two groups of “third-party beneficiaries” (quite often standing an ocean apart) may conceptually conflict, but ultimately can be brought together to a meeting point of consensus. The negotiation process, in which the IBT lawyer plays a pivotal role, can become the bridge upon which compromises are reached and mutual economic goals achieved, but this must be done with the “people’s” interest in mind.

These legal concepts are nothing new. They have inherently been acknowledged in existing business and legal norms under national laws, although their full impact has not been made mandatory or formally proclaimed to be for the benefit of “Third World people.” For example, FDI contracts in the petroleum and energy sector already recognize the role of the host government as sovereign power granting foreign investors access to natural resources, land, and surface use, which is owned or controlled by the state on behalf of the “people.” In fact, these concepts exist in U.S. jurisprudence and do not have to be recognized as part of customary international law⁴⁵⁴ in order for them to be enforceable against U.S.-based MNCs with respect to their conduct abroad. The United States as a sovereignty has always proclaimed that its “jurisdiction to prescribe”⁴⁵⁵ has valid extraterritorial effect, which enables it to curtail the conduct of its nationals and citizens abroad. This extraterritorial effect as an extension of U.S. sovereign power has provided the basis for several bodies of important U.S. laws and regulations, with very harsh and far-reaching sanctions and impact, both for the protection as well as for the curtailing of U.S. nationals’ economic behavior overseas. Examples of these “ET ef-

beneficiary of a contract between the corporate entity and a third party. *Glass v. U.S.*, 258 F.3d 1349 (Fed. Cir. 2001) (holding that a shareholder had third-party beneficiary status only if contract expressed promissor’s intent to benefit shareholder personally, independent of shareholder status).

⁴⁵⁴ Custom is a source of international law that is created through the practice and opinion (*opinio juris sive necessitatis*) of states and by behavior by a state when it acts out of a sense of legal obligation. FOREIGN RELATIONS RESTATEMENT, *supra* note 359, § 102(2); REBECCA M. M. WALLACE, INTERNATIONAL LAW 9, 15 (2d ed. 1992);

⁴⁵⁵ DETLEV F. VAGTS, TRANSNATIONAL BUSINESS PROBLEMS (2d ed. 1998); *see also* David J. Gerber, Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems (June 1-3, 2003) (unpublished paper, on file with the Association of American Law Schools and the European Law Faculties Association) (exploring national prescriptive jurisdiction over economic conduct of citizens).

fect" laws include federal income tax law,⁴⁵⁶ export control law,⁴⁵⁷ federal anti-trust laws,⁴⁵⁸ the Foreign Corrupt Practices Act (FCPA),⁴⁵⁹ economic sanctions law,⁴⁶⁰ certain aspects of U.S. anti-discrimination in employment laws,⁴⁶¹ the Carriage of Goods at High Sea Act (COGSA),⁴⁶² the Federal Bill of Ladings Act (FBLA),⁴⁶³ and most recently, the USA PATRIOT Act of 2001.⁴⁶⁴

Further, these legal principles do have support in existing international law, and customary international law is part of the law of the United States. The traditional concept of "statehood" in international law implies the integration of three elements: (1) the "people"; (2) their territory; and (3) their representative government. If one of these three integral elements is missing, there is no

⁴⁵⁶ See, e.g., Tax Reform Act of 1976, 15 U.S.C. § 999 (1978).

⁴⁵⁷ Export Administration Act, 50 App. U.S.C. § 2401 et seq. (2000) (continued by Executive Order 13222, Aug. 17, 2001). The act is implemented by regulations administered by the Bureau of Export Administration (BXA). 15 C.F.R. pts. 742, 744, 724, §§ 736.2, 742.8-10, 734.4, 740.3(d), 736.2, and 770.3 (Supp. 2001); see also Export Administration Regulations: Simplification of Export Administration Regulations, 61 Fed. Reg. 12714 (Mar. 25, 1996). For a non-U.S. view, see Tom Harris, *The Extraterritorial Application of U.S. Export Controls: A British Perspective*, 19 N.Y.U. J. INT'L L. & POL. 959 (1987).

⁴⁵⁸ See, e.g., Antitrust Enforcement Guidelines for International Operations (U.S. Dept. of Justice and Federal Trade Comm. April 5, 1996); John H. Chung, Comment, *The International Antitrust Enforcement Assistance Act of 1994 and the Maelstrom Surrounding the Extraterritorial Application of the Sherman Act*, 69 TEMP. L. REV. 371, 393 (1996).

⁴⁵⁹ 15 U.S.C. §§ 578m, 78dd-1-3, 78ff (2000).

⁴⁶⁰ U.S. economic sanctions are imposed against the following countries: (1) Iran, see Iranian Asset Control Regulations 31 C.F.R. pt. 535 (2004), Iranian Transactions Regulations, 31 C.F.R. pt. 560 (2004); (2) Burma, see Burmese Sanctions Regulations, 31 C.F.R. pt. 537 (2004); (3) Sudan, see Sudanese Sanctions Regulations, 31 C.F.R. pt. 538 (2004); (4) Lybia, see Libyan Sanctions Regulations, 31 C.F.R. pt. 550 (2004). See also Restrictive Trade Practices or Boycotts, 15 C.F.R. § 760.1 (2004); Terrorism Sanctions Regulations, 31 C.F.R. pt. 595 (2004); Terrorism List Governments Sanctions Regulations, 31 C.F.R. pt. 596 (2004). Other controls under the administration of the Department of State include the jurisdiction of the Office of Defense Trade Controls, 22 U.S.C. § 2778 (2004), the International Traffic in Arms Regulations, 22 C.F.R. § 120 (2004) and the U.S. Munitions List, 22 C.F.R. pt. 121 (2004).

⁴⁶¹ See, e.g., William Carmell, *Application of U.S. Anti-discrimination Laws to Multinational Employers*, 15 INT'L Q. 289-329 (2003) and all statutory provisions, regulatory provisions, and case law cited therein.

⁴⁶² The Carriage of Goods at Sea Act, 15 U.S.C.A. § 1300 (1994).

⁴⁶³ The Federal Bill of Lading Act, 49 U.S.C. § 80107 (1994).

⁴⁶⁴ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

statehood or sovereignty under international law.⁴⁶⁵ The interest of the “people,” therefore, is an integral part of any sovereign voice, yet in reality the voice of the host government is not always synonymous with the voice of the “people.” The notion that governments act in the best interest of citizenry is at best a rebuttable presumption—in “Third World” business deals, whether governments effectively act for the “people” may present a gap between law and reality.

4.2.5. *Incorporation of Two Practical Procedural Safeguards into the Current Pattern of Dispute Resolution Methods in International Deal-Making*

International business disputes are often resolved via either institutional or ad hoc arbitration.⁴⁶⁶ Where an arbitration award is non-binding or is otherwise challenged as invalid, or where arbitration has not been effectively agreed to, or cannot otherwise be enforced under the applicable law, there exists an opportunity for the foreign investor to bring a lawsuit against the host government or its SOE, or vice versa. (Suits will also have to be brought to enforce an arbitral award.)⁴⁶⁷ Where to file suit may practically depend on those assets of the defendant available for attachment or subject to judgment execution, together with other jurisdictional and forum non conveniens principles under the law of the forum

⁴⁶⁵ See, e.g., FOREIGN RELATIONS RESTATEMENT, *supra* note 359, at §201; NEIL C. BLOND ET AL, BLOND'S INTERNATIONAL LAW 80-83 (Marafino ed., 1991).

⁴⁶⁶ See, e.g., Mark Baker & Arif H. Ali, *Risk Management in International Commercial Transactions: Arbitration and Alternative Dispute Resolutions*, 15 INT'L Q. 252-288 (2003); Ian Brownlie, *The Peaceful Settlement of International Disputes in Practice*, 7 PACE INT'L L. REV. 257 (1995); William K. Slate II, *International Arbitration: Do Institutions Make a Difference?*, 31 WAKE FOREST L. REV. 41 (1996); see also Michael D. Goldhaber, *Arbitration Survey: Major European Arbitrations*, THE NAT'L L. J., Sept. 15, 2003, at 16 (surveying ten disputes going to arbitration: from oil pipelines to satellites, of \$700 million or higher at stake).

⁴⁶⁷ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter New York Convention], June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. The Convention is implemented in the United States via the Federal Arbitration Act, 9 U.S.C. §§ 201-08 (2000); see also *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310 (2nd Cir. 1998) (discussing an action for enforcement of foreign arbitration award against defendant under the New York Convention); *Hewlett-Packard Co. v. Berg*, 61 F.3d 101 (1st Cir. 1995) (analyzing the district court's authority to issue stay of confirmation of international arbitration award); RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL 66-70 (6th ed. 2000) (discussing enforcement of arbitral awards under New York Convention).

where suit is filed (*lex fori*).⁴⁶⁸

In dispute resolution, the interpretation of international economic law by judicial and arbitral tribunals must include these "third party beneficiary," "public trust," "government as people's agent," and "corporate derivative fiduciary duty" concepts. These concepts must be applied to the adjudication or resolution of international disputes, as courts, arbitrators, and legal drafting workgroups seek to doctrinally "internationalize" cross-border business contracts in order to supplement and harmonize national laws, toward the formation of a rule-of-law system that hopefully meets the consensus, conscience, and confidence of our modern civilized world.⁴⁶⁹

While the aforementioned legal concepts are sound and can even be viewed as jurisprudentially conventional, real-life issues do emerge in their application to certain FDI contracts. One such perplexing legal and practical issue is the challenge of identifying new causes of action for the "people," or according legal standing

⁴⁶⁸ For an assortment of secondary sources and commentaries discussing U.S. case law applying concepts of personal jurisdiction and *forum non conveniens* to the litigation of international disputes, see L.W. NEWMAN & D. ZASLOWSKY, LITIGATING INTERNATIONAL COMMERCIAL DISPUTES 29, 85 (West 1996); Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027 (1995); Earl M. Maltz, *Unraveling The Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California*, 1987 DUKE L.J. 669 (1987); Peter Prince, *Bhopal, Bougainville and OK Tedi: Why Australia's Forum Non Conveniens Approach is Better*, 47 INT'L & COMP. L.Q. 573 (1998); see also *Republic of Bolivia v. Philip Morris Co.*, 39 F. Supp. 2d 1008 (S.D. Texas 1999) (transferring suit filed by foreign government against U.S.-based MNC to District of Columbia); FOREIGN RELATIONS RESTATEMENT, supra note 359, § 421.

⁴⁶⁹ The doctrinal tension between a universal model of positivism and a relative multicultural concept allowing for variations of standards has been an ongoing debate in modern international jurisprudence. The post-World War II efforts at a universal human rights framework, via U.N. documents such as the various post-World War II human rights conventions, illustrate that a relative degree of success in attempting universal norms can be achieved over time. See *Human Rights Resources in the United Nations System*, at http://www.un.org/partners/civil_society/m-hr.htm (last visited Feb. 3, 2005). However, the problem and challenge continue to be the teeth, and the enforcement realism, of the current universal human rights framework. Universal human rights law, therefore, continues to be regarded as "soft" or aspirational law, rather than "hard" law having the effect of the "mandatory rules." But a set of aspirational universal standards that can serve as a checklist of goals is still better than no standards at all. Law has both a *prescriptive* as well as an *expressive* function. In its expressive function, law allows a society of free men and women to declare behavioral standards and articulate "*our aspirations for the kind of society we wish to be.*" Stephen L. Elkin, *Libertarian Confusions*, THE RESPONSIVE COMMUNITY, Fall 2002, at 49, 52 (emphasis added) (discussing RICHARD EPSTEIN, THE PRINCIPLES OF A FREE SOCIETY (2002)).

and parties-in-interest status to potential litigants for access to the adversarial and decision-making processes, both nationally and internationally. Specifically, in contract negotiation, as well as in arbitral proceedings or lawsuits, who can speak the voice of the “peoples/third-party beneficiaries,” apart from their governments? (Currently, the voice of the people at times can be heard ad hoc and in isolated incidents, primarily via public opinion often expressed outside the developing nation, or in the work of international public interest or shareholder activist groups. The voices expressed by these groups can also be politicized or fragmented in their own esoteric way. Public opinion often varies and can be highly politicized by tension and competition among various interest groups, especially in our pluralistic global community.)

Instead of attempting to substantively resolve these perplexing and potentially highly politicized issues, I will simply advocate two practical procedural solutions:⁴⁷⁰

(1) Because the voice of the “third-party beneficiaries” can relatively be represented by NGOs/INGOs,⁴⁷¹ and other shareholder activist groups, these public interest organizations should be given limited access to the negotiation of FDI projects receiving Multilateral Financing, even though these groups are not parties to the investment contracts.⁴⁷²

⁴⁷⁰ My choice to use procedural solutions to incorporate substantive law has support from at least one commentator. See Cohen, *supra* note 448, at 265-66:

Government officials are, in an economic and legal sense, agents. The principals of government agents are the people . . . [T]he insufficient incentive of government agents to protect collective rights in property . . . suggests the merit of a *procedural* remedy that allows or even encourages private persons to assert collective rights. I emphasize that this problem, to the extent that there is one, calls for a *procedural*, rather than a *substantive* remedy.

Id. (emphasis added).

⁴⁷¹ More than 10,000 Non-Governmental Organizations (“NGOs”) have developed around the globe as grassroots, public interest responses to global “civic” concerns. Organizations such as Amnesty International (human rights), Oxfam (poverty, hunger), and Greenpeace (ecology) have become highly visible and powerful. ANTHONY GIDDENS, *THE THIRD WAY AND ITS CRITICS* 123, 144 (2000); McAdams, *supra* note 361, at 247. The growth of NGOs suggests the vitality of an information market for the commercial future of the world. *Id.*

⁴⁷² For an account of the history of recent partnership between NGOs and MNCs in the corporate ethics crusade, see Ethan B. Kapstein, *The Corporate Ethics Crusade*, 80 FOREIGN AFF. 105 (2004) (describing NGOs and other organizations pursuing heightened corporate ethics); see also Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT’L L. 931, 947 (2002) (“International, regional, and non-governmental organizations—rather than treaty

As a matter of mandatory procedure, these groups must be invited to participate in the negotiation, at a minimum, in the form of written inputs presented to governments, the MNCs, and the various work groups within the Multilateral Institutions, with mandatory responses from these parties as a condition for funding. The negotiating parties to a deal will thus be placed directly under the pressure of formally responding to public scrutiny and will have to address public interest arguments during the formation of investment contracts. The selection of the participating public interest groups can depend on the recommendations of the Multilaterals and other international organizations, including the United Nations and its various organs. Priority should be given to locally formed NGOs.⁴⁷³ This procedure does not compromise confidentiality objectives, because in most cases, high-profiled multi-million-dollar FDI projects receiving Multilateral Funding are physically visible, and already attract publicity and news coverage. This limited "participating" procedure will also force the Multilateral Institutions to voluntarily implement more transparency in their internal workings and application of funding criteria.

(2) Decision-makers in dispute resolution—whether judges or arbitrators—should be mandated to consider voices of these same public interest groups by way of amicus curiae briefs and expert testimonies, or equivalent. In this regard, confidentiality requirements traditionally accorded institutional or ad hoc arbitration proceedings should be waived, but only to a limited extent. The resolution of international contractual disputes has traditionally been purely economic in substantive nature, and has remained private and confidential from a procedural perspective. Final resolutions have been popularized only by the mutual consent of the parties involved.⁴⁷⁴ The determination as to which INGOs/NGOs, or any

negotiations between sovereigns—have . . . played an increasingly important role in the development of law applicable to transnational activity"); Morton Winston, *NGO Strategies for Promoting Corporate Social Responsibility*, 16 ETHICS AND INT'L AFF. 71 (2002);.

⁴⁷³ Unfortunately, only approximately 15% of NGOs are from the developing countries. Ronald J. Glossup, *Global Governance Requires Global Government*, in TOWARD GENUINE GLOBAL GOVERNANCE: CRITICAL REACTIONS TO 'OUR GLOBAL NEIGHBORS' 43, 48 (Errol E. Harris & James A. Yunker eds., 1999); McAdams, *supra* note 361, at 241.

⁴⁷⁴ See, e.g., U.N. Commission on International Trade Law (UNCITRAL) Arbitration Rules Art. 32(5); American Arbitration Association (AAA) International Rules arts. 21(4), 27(5) & 28(5), app. I art. 6, app. II art. 1; Hong Kong International Arbitration Centre Mediation Rule 12(i); International Chamber of Commerce (ICC) Rules Art. 23(2); London Court of International Arbitration (LCIA) Rules

or any other public interest groups may be allowed access to an otherwise confidential and private proceeding, and to what extent, can rest in the capable hands and sound discretion of judicial and arbitral tribunals, who already are called upon and charged with the expertise to make many decisions and to exercise discretion routinely in dispute resolution.

At a philosophical level, incorporating a “public interest” approach to MNCs’ international business deal-making as a way of monitoring MNCs’ behaviors is not a novel concept. Similar proposals have been made to change the existing legal framework of corporate governance, although the effectiveness of these proposals in real-world dynamics remains questionable. For example, proposals to install “public interest directors” in Board composition have been challenged as merely serving a “window-dressing” function. In reality, these directors were regarded as antagonistic spies, were met with suspicion and treated with lack of cooperation and, hence, were often denied resources or information access. Eventually, these public interest directors became co-opted into the mainstream corporate culture, were transformed, and ultimately turned counterproductive to their original public interest mission. Likewise, proposals for corporate “social accounting” and “social audits” have also been criticized as “window-dressing,” unnecessarily increasing corporate expenditures without effectively furthering social goals.⁴⁷⁵

Accordingly, in whatever form the “management-based” self-regulation model may take, it should avoid the shortcomings of previous proposals. Its measurability, therefore, must be based on a “disclosure” or “monitoring” template that accomplishes all of the three following objectives: (i) allow management to become truly self motivated in the competition for improved public image

Articles 10(4) & 30; accord Charles S. Baldwin, *Protecting Confidential and Proprietary Commercial Information in International Arbitration*, 31 TEX. INT’L L. J. 451 (1996); Hans Smit, *Confidentiality*, Art. 73-76, 9 AM. REV. INT’L ARB. 233 (1998); Kenji Tashiro, *Quest for a Rational and Proper Method for the Publication of Arbitral Awards*, 9 J. INT’L ARB. 97 (1992); ICC International Court of Arbitration, *Rules of Arbitration*, at www.iccwbo.org/court/English/arbitration/rules.asp (last visited Feb. 22, 2005); Permanent Court of Arbitration, at <http://Pca-cpa.org> (last visited Feb. 22, 2005); American Arbitration Association: Dispute Resolution Services Worldwide, at www.adr.org/rules/international_arb_rules.html (last visited Feb. 26, 2005); see also AAA Code of Ethics for Arbitrators in Commercial Disputes (1977), reprinted in CODE OF PROFESSIONAL RESPONSIBILITY 5 (Rena A. Garlin ed., 1986); International Bar Association (IBA), *International Code of Ethics*, § 9 (1988).

⁴⁷⁵ See, e.g., Branson, *supra* note 437, at 1207, 1213-14 (discussing new trends in corporate governance in the future).

and goodwill in the marketplace; (ii) allow socially conscientious institutional investors and third-party institutions direct access to corporate governance; and (iii) allow regulators to effectively foster both management incentives and public-interest third-party input.

4.3. Rethinking Globalization, Legal Regionalism, International Harmonization, and Standardization of Law

A global market is one in which geography, political, or cultural norms do not restrain demand and supply. In a global market, economic functions are based on transnational interdependence. As such, the very notion of globalization threatens and undermines the sanctity of sovereign power. Globalization thus occasions the need for an integrated regulatory network in which sovereign mandates must be reconciled and compromised to avoid conflicts. Private enterprises will support such a network because it reduces the cost of compliance as well as the cost of dispute resolution under various national regimes. Because globalization enables the convergence of national substantive rules and legal norms, it serves the mutual interests of all economic and governmental actors.

International institutions have been, and will continue to be created to serve this goal. The WTO and NAFTA are examples of institutional frameworks created in the past decade, but these frameworks represent the perspective of governments. At the same time, the grouping of nation-states to develop legal norms (for example, a "regionalism" approach to the development of international economic law typified by the European Union model) has also forced nation-states to table their mutual interests and develop common grounds for "legalization." Efforts to harmonize national legal rules by the U.N. Commission on International Trade Law ("UNCITRAL"), the International Institute for the Unification of Private Law ("UNIDROIT"), the International Chamber of Commerce ("ICC"), and other international legal work groups also demonstrate this "legalization" trend. Yet, these institutional voices and efforts have not always truly reflected the interests of all market participants, especially those "Third World" inhabitants whose lives are directly at stake.

The harmonization of national laws does little to serve the global market if harmonization starts from systems of national laws that serve the unitary voices of corporate giants supported by renewed "monarchies" as their business partners. In order for le-

gal harmonization and economic globalization to be meaningful, the voices of “Third World” constituents—the third-party beneficiaries of certain government-private sector contractual arrangements in their countries—should drive the goals of global economic development, just as much as other institutional voices have driven the process. But who is to speak as the voice of such constituents? The regional and international law-drafting processes pioneered by work groups from the developed nations must be re-examined and expanded to include the voices of other actors. Specifically, these processes must include input of international and local public interest groups representing the voices of “Third World” inhabitants, as diversely and as widespread as possible.

In examining the action and policy of the Bush Administration, liberal scholars have cautioned that unilateralism will intensify gaps and conflicts among political, economic, and religious cultures, thereby confirming their notion that the United States, or the “West” it symbolizes, is imperialistic.⁴⁷⁶ Only true multilateralism worked from the “bottom up” in terms of the development ladder, rather than the “top down,”⁴⁷⁷ can adequately address these issues. So far, the Multilateral Agencies, MNCs and governments have become partners in “Third World” economic development in ways that may not always benefit the native inhabitants. Although the Multilaterals, in their fifty years of history, have been subject to much scholarly and community criticism with respect to their eco-

⁴⁷⁶ See, e.g., Michael J. Kelly, *The Bush Foreign Policy 2001-2003: Unilateralist Theory in a Multilateral World, and the Opportunity for Change Offered by Iraq*, 2 WASH. U. GLOBAL STUD. L. REV. 221, 225-26 (2003) (contrasting unilateralism against multilateralism; quoting President George W. Bush: “Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.” (citing President’s Message to Joint Session of Congress Responding to the Terrorist Attacks of September 11, 2001, 2 PUB. PAPERS 1140, 1142 (Sept. 20, 2001))); see also RANETA LAWSON MACK & MICHAEL J. KELLY, EQUAL JUSTICE IN THE BALANCE: AMERICA’S LEGAL RESPONSES TO THE EMERGING TERRORIST THREAT (2004); Harold Hongju Koh, *Rights to Remember*, THE ECONOMIST, Nov. 1, 2003, at 24-25 (discussing how September 11th changed America’s approach to human rights; written by the current Dean of Yale Law School).

⁴⁷⁷ Scholars have referred to the trend of unfettered, capital-driven force as “globalization from above,” distinguishable from “globalization from below,” which encompasses the notion of the welfare state. See DORVAL BRUNELLE, ALTERNATIVE TO GLOBALIZATION: A BETTER WORLD IS POSSIBLE (2004) (suggesting “World Economy and Fair Trade” as an alternative to “Globalization and Free Trade” and advocating engagement at both local and global levels); McAdams, *supra* note 361, at 268 (“[G]lobalization-from-below . . . would work to humanize and democratize the process of globalization and give attention to citizen interests not meaningfully represented by the current globalization-from-above [patterns].”).

conomic policies,⁴⁷⁸ they have also been praised for the *de facto* expansion of their original goals—a phenomenon described by commentators as the “mission creep.” This “mission creep” embraces other public concerns into the bundle of “economic considerations” traditionally characterizing the Multilaterals’ missions.⁴⁷⁹ This is the current status of “economic multilateralism” and “Third World” economic cooperation at the beginning of the new millennium.⁴⁸⁰

Globalization will only bear its fruits if it gives birth to a truly stronger, healthier, and all-encompassing “middle class” that transcends national and cultural borders. The emergence of such a borderless middle class will quickly alleviate the clash between the culturally or economically dominant and the culturally or economically oppressed, because the overall economic model strives to include all. To achieve this vision, all voices and interests should be reflected in the pattern of global economic development.

But even if the voices of INGOs, NGOs, and public interest groups are included and legitimized as part of negotiation and dispute resolution, this liberalization or expansion of processes does not necessarily assure that the interest of “Third World people” is adequately protected. The protection of these “third-party beneficiaries” can only ultimately be achieved in the formation and development of international economic law itself.⁴⁸¹ Whether influenced by a common-law or civil-law system, the harmonization of law, as well as the accompanying legal drafting and development processes should not be left to isolated national courts or confidentially shielded arbitrators who determine outcomes of dis-

⁴⁷⁸ See, e.g., JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 23-36 (2002). But see Brink Lindsey, *Bookshelf: Playing the Blame Game in a World of Trouble*, WALL ST. J., May 30, 2002, at D2 (reviewing Stiglitz’s book as a flat analysis of market fundamentalism in a globalized world).

⁴⁷⁹ The “mission creep” has prompted commentators to question whether roles of the Multilaterals should be expanded to include the implementation and enforcement of international humanitarian law. See, e.g., Daniel D. Bradlow, *Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law*, 50 U. KAN. L. REV. 695, 707-09 (2002) (arguing a distinction between implementing and enforcing international humanitarian law, where implementation is a more cost-efficient method).

⁴⁸⁰ McAdams, *supra* note 361, at 245, 252 (observing that critics view the WTO, World Bank, and IMF as a tool of rich industrial interests, and that these institutions restrict government programs in the developing nations toward further promotion of free-market strategies imposed upon loan recipients).

⁴⁸¹ *Id.* at 240, 242 (stating that globalization elevates the importance of law in the world trade community).

putes on an ad hoc, case-by-case basis. Harmonization should become part of an agenda that join together all economic, political, and public interests. Watchdog functions must be accomplished through 1) the dynamics of special interest lobbying and promulgation of multinational regulations by the MNC's home country under its prescriptive jurisdiction; 2) the law-making processes of the host country, whereupon the public interest voices are consulted and allowed to be involved in the drafting stages; and 3) last but not least, long-term meaningful political changes in the developing economies. Only responsible and competent governments can bring about true economic prosperity for the "Third World" public, but this can only be achieved if *equal opportunities in education* become available to "Third World" inhabitants as a necessary infrastructure for the future. Otherwise, regime changes in response to political chaos will simply be the outcome predicted in George Orwell's classic *Animal Farm*⁴⁸²—there is a change of guards, but the new guards are just a different manifestation of the old ones. This has been the hard fact of our world. The lesson of Vietnam (as in the Vietnam Deal) should serve as a *déjà vu* path to be watched out for, with respect to central Asia and oil-rich Iraq currently awaiting stabilization and development.

4.4. *The Role of MNCs and the Need for a Formalized "Public Interest" Approach Toward International Deal-Making*

The world community continues to face serious issues such as the eruption of violence, military aggression, and acts of war, all legitimized by slogans of national security, religion, and territorial principles. Addressing these issues in isolation in accordance with the political agenda of countries' leadership is to ignore the true undercurrent dynamics and the synchronized, cause-and-effect nature of these issues. Root causes, direct or indirect, contributing or primary, must be examined. Perhaps one such root cause is the increasing gap between the rich and the poor, regardless of national borders. Perhaps another such root cause is the disguised return of colonialism and monarchies, whether intended or coincidental. It is hoped that this Article has helped identify a small part of the landscape upon which some of these root causes may have arisen, ultimately raising these issues to a different level of awareness.

Despite the rapid privatization process since the collapse of Marxism as an economic model in Europe, the nation-state none-

⁴⁸² GEORGE ORWELL, *ANIMAL FARM* (1945).

theless remains the major economic force in developing countries, and is likely to retain its role in the foreseeable future. The continuing state involvement in business transactions with MNCs occasions a number of contractual techniques that have become legal norms by repetitive and prevalent usage and impact. The fact that the MNC-host government contract remains the main tool for patterning global economic development is *not* a vice in itself. After all, freedom of contract and the exercise of bargaining power are the gist of free enterprise. What may be problematic is the way in which the contract is formed and implemented. The goal, therefore, is not necessarily to eliminate these partnerships, as they are essential to nation building and the development of a world economy. Instead, there is a need for a formalized mechanism to enable public scrutiny of these partnerships. These partnerships must be examined, perhaps with more transparency, notwithstanding their confidential nature, via the direct participation of independent public interest actors, such that changes can take place in the way these partnerships are formed and shaped. Such a formalized "public interest" approach to the formation and interpretation of foreign investment contracts in certain industries comports with the spirit of what scholars have considered as the compassionate "Third Way" movement to global economics. The "Third Way" movement advocates "social democracy" based on social commitments to the poor and the disadvantaged without undermining the free market.⁴⁸³

MNCs do not categorically qualify as "bad guys" just because they are rich. Modern society's extraordinary economic and technological progress brought about by major corporations is undis-

⁴⁸³ The "Third Way" movement was allegedly supported by President Clinton, Prime Minister Tony Blair, and a number of research scholars. McAdams, *supra* note 361, at 267; see ANTHONY GIDDENS, *THE THIRD WAY AND ITS CRITICS* 123-24 (2000) (quoting Tony Blair supporting the Third Way movement); Richard Falk, *The Pursuit of International Justice: Present Dilemmas and an Imagined Future*, 52 J. INT'L AFF. 409, 432 (1999); cf. Branson, *Corporate Social Responsibility Redux*, *supra* note 437, at 1222-26 (discussing the "Green Movement" with respect to environmental issues as a principle component for new corporate social responsibility); John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information*, 79 MINN. L. REV. 245, 251-52 (1994) (noting that seventy-six percent of Americans consider themselves environmentalists); Joseph F. DiMento & Francesco Bertolinin, *Green Management and the Regulatory Process: For Mother Earth, Market Share and Modern Rule*, 9 TRANSNAT'L LAW. 121, 123 (1996) (examining relations with regulatory bodies and their "implications for the regulatory process of industry movement toward a more aggressive environmental protection strategy").

puted. What IOGCs are doing in the worldwide petroleum and energy sector simply reflects what humans have been doing since the beginning of history—the uncovering of natural resources to serve the needs of human survival and technological betterment. Today, if armed with a better breed of corporate counsel and executives, together with a differently focused, self-imposed corporate code of social responsibility, MNCs are among the group of actors best situated to address global issues—from the eradication of poverty, inequality, race, gender and religious discrimination, child labor, environmental pollution, overall workforce abuse and exploitation, to the wise and effective use of state-of-the-art technology to serve humankind. This “social responsibility” mission is only possible via the individual awareness and changing attitude of the MNC international executive and his/her lawyer, working as a pair as they continue their globe-trotting. The focus on MNCs should not be the rhetoric of holding money or power as the source of evil, since free enterprise should be allowed to work. Rather, scrutinizing MNCs’ conduct should constitute a wake-up call regarding the need for a formalized, systematic public interest check-and-balance approach toward the internationalization of law.

Overall, considering all angles of public debates, the stern critic and thoughtful policymaker should question whether the ultimate objective of the multilateral process—the eradication of “Third World” poverty, as administered by institutions such as the World Bank, the IMF, and the WTO—has adequately been discharged, and how government-MNC partnerships have helped or have hurt “the dream of a world free from poverty.”⁴⁸⁴ As the first step, new legal mechanisms must be made available for exclusive and confidential MNC-host government partnerships to formally include the voices of “Third World” inhabitants via independent public interest advocacy.

In summary, my thesis for reform can be cast as five main propositions. First, the role of, and the rules of ethics governing, the transactional lawyer in international deals should be reevaluated. Second, the role of international or global organizations, whose financial participation in these projects should also be reconsidered. Third, those laws of the United States that may govern the extra-territorial activities of U.S.-based MNCs should be utilized or expanded to harness those MNCs’ behaviors. Fourth, prescriptive mechanisms should also come from mandated changes in

⁴⁸⁴ See The World Bank Mission Statement, *supra* note 398.

corporate cultures, best accomplished via (i) a governmental requirement for self-imposed corporate compliance systems, (ii) the public interest dimensions of such compliance programs, and (iii) government-mandated public disclosures of these compliance programs' implementation. Fifth, the internal political and legal regimes of certain host countries should be changed to afford inhabitants the check-and-balance process of a rule-of-law system and liberal democracy. This last proposition is the hardest and perhaps the most idealistic goal of all.

This "twin series" of Articles explores and opens the debate as to how each of these five "pressure points should be deployed" (borrowing the words of an esteemed colleagues at the University of Denver Sturm College of Law).⁴⁸⁵ Within the vein of these five propositions, no detailed solution will emerge overnight, but as a starting point and for many years to come, this "twin series" of Articles hopes, at a minimum, to invite a dialogue on how these new legal mechanisms must be structured and implemented.

⁴⁸⁵ Interview with Edward Dauer, Professor of Law, University of Denver Sturm College of Law (on file with author).