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### Recommended Citation

Wagner, Constance Z., Corporate Social Responsibility of Multinational Enterprises and the International Business Law Curriculum. Chapter in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE, Picker et al., ed., Hart Publishing Ltd. (2008).

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CORPORATE SOCIAL RESPONSIBILITY  
OF MULTINATIONAL ENTERPRISES  
AND THE INTERNATIONAL BUSINESS LAW CURRICULUM

Constance Z. Wagner

I. Introduction

The thesis of this chapter is that corporate social responsibility (“CSR”) of multinational enterprises (“MNEs”) should be given more emphasis in the international business law curriculum in U.S. law schools. CSR, the notion that businesses have a broad set of obligations for ethical and socially responsible conduct, has become an important topic in recent years. It is receiving increased attention in the business world, in governmental and intergovernmental organizations, in non-governmental organizations, and in academic circles.

Traditionally, CSR has been thought to be synonymous with legal compliance and corporate philanthropy. However, in today’s world, the notion of CSR goes beyond this limited view and requires that corporations take into account the impact of their operations on a broad range of stakeholders, including not only shareholders, but also employees, customers, suppliers, community organizations, and local neighborhoods, as well as on the environment. It requires corporations to balance the needs of these stakeholders with their primary goal of generating profits for their shareholders. This topic has particular resonance in the international community with respect to the operations of MNEs, which have sometimes operated outside of the strictures of effective government control in areas such as labor and environmental regulation. CSR will remain an important topic in the years ahead as companies increasingly move across national

borders to conduct their business operations, and its coverage in the U.S. law school curriculum should be expanded.

This chapter is organized as follows. Section II will discuss the increasing significance of CSR in the context of international business operations of MNEs. Section III will discuss the current coverage of this topic in the curriculum in U.S. law schools. Section IV will discuss the arguments supporting expanded coverage of CSR in the law school curriculum. Section V will propose a framework for a law school course or seminar on CSR. Section VI will conclude with some recommendations on improving current approaches to CSR in the law school curriculum.

## II. The Growing Significance of CSR for MNEs

CSR is a concept that has attracted the attention of just about everybody who has a stake in what business enterprises do: corporate managers and their legal counsel, national governments, intergovernmental organizations (“IGOs”), business watch dog groups and other non-governmental organizations (“NGOs”), the media, investors, labor, and consumers. Since CSR has been taken up by so many different constituencies, there is no consensus on what the concept means. One widely accepted definition, used by the World Business Council for Sustainable Development, states that “CSR is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.”<sup>1</sup> A number of commentators have adopted the definition used by the International Chamber of Commerce, which provides that CSR is “the voluntary commitment by business to manage its role in society

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<sup>1</sup> The World Bank, What is CSR All About?, <http://worldbank.org/wbi/governance/CSR/Topic%201/whatiscsrabout.htm> (last visited Mar. 1, 2007).

in a responsible way.”<sup>2</sup>

The rationale for CSR is the notion that business and society are interwoven and that growing societal expectations about appropriate business behaviors and outcomes are legitimate. Some theorists have grounded arguments for the enhanced social responsibilities of business on the concept of a “social contract” between a corporation and its host society. This social contract extends beyond the legal charter that permits a corporation to operate within a system of laws and regulations, and encompasses additional obligations that extend beyond legal obligations to include those reflecting changing social norms that are not currently mandatory.<sup>3</sup> A complementary theory is stakeholder analysis, which posits that corporations have a broad set of responsibilities to groups or interests that impact or are impacted by a corporation’s actions.<sup>4</sup> This contrasts with the traditional notion of shareholder primacy in U.S. corporate law, which focuses on the responsibilities of corporate management in enhancing shareholder value.

The expanding interest in CSR is especially strong in the area of international business. This is due to a number of factors, including the rapid increase of foreign investment and cross-border trade that has occurred in recent years. CSR can be viewed as part of a more general effort to link social justice issues to international economic developments, and finds parallels in efforts made to address the social impacts of international trade law and policy and the social responsibility of international economic institutions.

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<sup>2</sup> Ramon Mullerat, *The Global Responsibility of Business*, in CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21<sup>ST</sup> CENTURY 1 (Ramon Mullerat, ed., 2005) (quoting the International Chamber of Commerce).

<sup>3</sup> U.N. Conference on Trade and Development [UNCTAD], *The Social Responsibility of Transnational Corporations*, 5, UNCTAD/ITE/IITMisc. 21 (Oct. 1999) (prepared by John M. Kline and Ludger Odenthal) [http://www.unctad.org/en/docs/poiteiitm21\\_en.pdf](http://www.unctad.org/en/docs/poiteiitm21_en.pdf) (last visited Feb. 20, 2007) [hereinafter UNCTAD Report].

<sup>4</sup> Adam Winkler, *Corporate Law or the Law of Business? Stakeholders and Corporate Governance at the End of*

In the arena of international business, it has become obvious that national laws and regulatory regimes do not provide sufficient protection against adverse social impacts caused by the operations of MNEs. One well-publicized case involving the 1984 Bhopal gas plant disaster highlighted the problem of safety standards and the regulation of hazardous materials.<sup>5</sup> Other prominent cases involving the use of child labor in the supply chain of the garment and sporting goods industries focused public attention on the need for regulation of core labor practices.<sup>6</sup> More broadly, such cases highlighted the need for a layer of regulation at the international level stemming from the recognition that the operations of MNEs may fall within a gray area that is not reached by either home country or host country regulation. The laws of a MNE's home country typically do not apply to the MNE's operations abroad, due to reservations about the extraterritorial application of home country laws and corporate structuring to minimize liability. The failure of a host country to effectively regulate the operations of MNEs within its borders may be a result of weak laws, lax enforcement, or lack of political will. While some have argued in favor of a binding international legal code for the operations of MNEs, a consensus on this issue has never been achieved.<sup>7</sup> Since many of the worst cases have involved investment by MNEs from developed countries in developing countries, one might assume that the lack of consensus is due to the so-called North-South split between the interests of rich and poor

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*History*, 67 LAW & CONTEMP. PROBS. 109 (2004).

<sup>5</sup> For a description of the accident, *see* *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984*, 809 F.2d 195, 197 (2d Cir. 1987).

<sup>6</sup> For a description of the use of child labor by Reebok International and Levi Strauss & Co., *see* KARL SCHOENBERGER, *LEVI'S CHILDREN* 133-140 (2000).

<sup>7</sup> The U.N. Centre on Transnational Corporations was established in 1974 as the organizational focal point for matters related to MNEs and foreign direct investment. The Centre drafted a code of conduct for MNEs but this effort resulted in failure and the Centre was disbanded in 1992. Since 1993, UNCTAD has been responsible for the U.N.'s Program on Transnational Corporations. *See* UNCTAD, *The United Nations Centre on Transnational Corporations*, <http://unctc.unctad.org/aspx/index.aspx> (last visited Mar. 6, 2007).

countries. In fact, the situation is far more complex, especially in today's globalized economy with national competition for foreign investment. The goals and priorities of developing countries may themselves diverge, prompting the governments of developing countries to resist enhanced CSR standards in light of their national interests.<sup>8</sup> Whatever the root cause of this failure to achieve international consensus on such issues, currently there are no binding international standards on CSR applicable to MNEs.

However, IGOs, NGOs, and the business sector have responded to the felt need for a principled approach to the conduct of international business by promulgating voluntary codes of conduct and guidelines for operations of MNEs. The most prominent examples of codes of conduct developed by international organizations covering a wide range of MNE activities include the United Nations ("U.N.") Global Compact ("Global Compact") championed by former U.N. Secretary-General Kofi Annan, the Organization for Economic Cooperation and Development ("OECD") Guidelines for Multinational Enterprises ("OECD Guidelines"), and the draft U.N. Norms on the Responsibilities of Transnational Corporations on Human Rights ("U.N. Norms").<sup>9</sup> Each of these three instruments sets forth non-binding guidelines for the conduct of MNEs in areas such as core labor standards, environmental protection, bribery of foreign government officials, and human rights. These guidelines are intended to form a baseline for the ethical business conduct of MNEs.

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<sup>8</sup> See UNCTAD Report, *supra* note 3, at 10.

<sup>9</sup> U.N. Global Compact, <http://www.unglobalcompact.org/index.html> (last visited Mar. 6, 2007) [hereinafter Global Compact]; OECD Guidelines for Multinational Enterprises, June 27, 2000, 40 I.L.M. 237 (2001) [hereinafter OECD Guidelines]; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion & Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003), <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?Opendocument> (last visited Mar. 6, 2007) [hereinafter UN Norms].

Both the Global Compact and the OECD Guidelines have gained wide acceptance in the business community. The Global Compact is designed as a network-based initiative that brings together companies, U.N. agencies, labor groups and civil society to support its principles and currently includes some 2,900 businesses located in 100 countries among its participants.<sup>10</sup> The OECD Guidelines are aimed at MNEs operating in or from the territories of member states, and have been described as the only multilateral, comprehensive code of conduct that governments are committed to promoting.<sup>11</sup> They have been accepted by the thirty OECD member countries, which represent the headquarters for most of the largest MNEs, along with seven other countries.<sup>12</sup> The U.N. Norms are still in draft form, but if finalized would become the strongest comprehensive statement by the international community on the social responsibilities of MNEs.<sup>13</sup>

In addition to these codes, there are a number of more specialized instruments that cover particular areas of concern. These codes have been developed by IGOs, NGOs, and the business community. For example, the International Labor Organization (“ILO”) promulgated the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises, which, among other matters, urges both ILO Member States and MNEs to respect the four core labor standards

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<sup>10</sup> U.N. Global Compact, What is the Global Compact?, <http://www.unglobalcompact.org/AbouttheGC/index.html> (last visited Mar. 6, 2007); The Global Compact Network, <http://www.unglobalcompact.org/ParticipantsandStakeholders/index.html> (last visited Mar. 6, 2007).

<sup>11</sup> United Kingdom National Contact Point, OECD Guidelines for Multinational Enterprises, <http://www.dti.gov.uk/europeanandtrade-policy/oecd-multinat-guidelines> (last visited Mar. 6, 2007).

<sup>12</sup> *Id.* See also OECD, *The OECD Guidelines for Multinational Enterprises*, <http://www.itcilo.ir/english/actrav/telearn/global/ilo/guide/oecd.html> (last visited Mar. 6, 2007).

<sup>13</sup> David Kinley & Rachel Chambers, *The U.N. Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUM. RTS. L. REV. 447, 493 (2006). For recent developments on efforts to develop such standards, see, U.N. Hum. Rts. Coun., *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc A/HRC/4/035 (Feb. 9, 2007), <http://www.business-humanrights.org/Documents/RuggieHRC2007> (last visited June

(freedom of association and the right to organize and bargain collectively, the elimination of forced labor, the abolition of child labor, and non-discriminatory treatment in matters related to industrial relations), as well as international human rights instruments.<sup>14</sup> In the area of environmental protection, a group of environmental organizations and institutional investors introduced the CERES Principles, which call on companies to act as stewards of the environment in conducting their business operations, including by protecting the biosphere, sustaining natural resources, and reducing the volume of waste.<sup>15</sup> Finally, the Global Sullivan Principles of Corporate Social Responsibility were developed by a coalition of U.S. companies under the leadership of the Reverend Leon Sullivan, a clergyman and civil rights activist, and were directed at improving the workplace and social conditions of blacks in South Africa during the period of apartheid.<sup>16</sup> Each of these codes has been influential in shaping corporate conduct on relevant CSR issues.

In addition to these developments, individual companies are beginning to adopt their own codes of conduct to govern their business operations, which are keyed to the developing international standards. Use of such codes is increasing in frequency among a wide range of companies involved in a variety of different industries. Some companies have had a historical commitment to CSR, which is reflected in their operating procedures and frequently embodied in

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14, 2007).

<sup>14</sup> Intl. Labour Org. [ILO], *Tripartite Declaration of Principles Concerning Multinational Enterprises*, ¶ 8, ¶ 22, ¶ 37, ¶ 41, ¶ 48 (2000), <http://www.ilo.org/public/english/employment/multi/download/english.pdf> (last visited Mar. 2, 2007) [hereinafter ILO Tripartite Declaration]. Revisions to the Tripartite Declaration in 2000 incorporated the ILO Declaration on Fundamental Principles and Rights at Work and urged the ratification of the ILO Convention on Minimum Age and the ILO Convention on the Worst Forms of Child Labor. *See*, ILO, *Report of the Subcommittee on Multinational Enterprises*, GB279/12 (Nov. 2000), <http://www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/gb-12.pdf> (last visited Feb. 28, 2007).

<sup>15</sup> CERES Principles, <http://www.ceres.org/coalitionandcompanies/principles.php> (last visited Mar. 2, 2007).

<sup>16</sup> The Global Sullivan Principles of Social Responsibility, <http://www.globalsullivanprinciples.org/principles.htm>



a code of conduct. An example is the Body Shop, whose corporate values center on those of its founder, Dame Anita Roddick. Its policies promote social and environmental change, including the defense of human rights, protection of the environment, and support of community trade.<sup>17</sup>

Other companies have had the harsh light of media and NGO criticism focused on their business operations due to problems with their labor or environmental records, and adopted codes of conduct in response to public pressure to correct such problems. For example, U.S. companies in the apparel, footwear, and sporting goods industry experienced consumer backlash when it was discovered that their subcontractors in foreign countries were using child labor in their manufacturing operations.<sup>18</sup> Well-known companies such as Reebok, Nike and Levi Strauss took remedial action to address the issue of child labor, including the adoption of codes of conduct that required their subcontractors to refrain from employing children younger than a specified minimum age in their factories.<sup>19</sup>

Other companies have acknowledged the importance of CSR in their business operations, even though they may not have a historical record of commitment to CSR or have experienced scandals involving their supply chain or other aspects of their business operations. CSR programs have become part of the “best practices” of many Fortune 500 companies, and supporting information is frequently posted on company web sites. Some companies have CSR officers or divisions devoted to the task of mainstreaming CSR throughout the organization.

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(last visited Mar. 2, 2007).

<sup>17</sup> The Body Shop, Our Values, <http://www.thebodyshopinternational.com/Values+and+Campaigns/Our+Values/> (last visited Mar. 2, 2007).

<sup>18</sup> SCHOENBERGER, *supra* note 6.

<sup>19</sup> University of Minnesota Human Rights Library, Reebok International Ltd., Human Rights Production Standards, <http://www1.umn.edu/humanrts/links/reebokcode.html> (last visited Mar. 2, 2007); Nike’s Code of Conduct, <http://www.itcilo.it/english/actrav/telearn/global/ilo/code/nike2.htm> (last visited Mar. 2, 2007); and <http://www1.umn.edu/humanrts/links/leviguidelines.html> (visited Feb. 27, 2007).

Consulting services for companies interested in designing CSR programs are also being offered. Business for Social Responsibility, based in San Francisco, California, is an example of such development. It describes itself as an association of companies that helps its members “achieve viable, sustainable growth that benefits stakeholders as well as stockholders. By providing tools, training and custom advisory services, BSR enables its members to leverage corporate social responsibility as a competitive advantage.”<sup>20</sup>

There are a number of reasons that MNEs and other corporations are taking CSR seriously, although there are very few legally binding norms that require them to do so.<sup>21</sup> Some investors view attention to CSR as a proxy for good corporate governance and value corporations following best practices on CSR more highly than those that do not. Some consumers are more willing to buy products from companies that can demonstrate they follow good labor and environmental standards than from those that cannot. NGOs and the media have frequently focused on some of the more egregious examples of socially irresponsible conduct by corporations, prompting increased attention to CSR. A further impetus for observing voluntary guidelines comes from corporate concern that national governments will impose greater regulatory requirements. Since businesses prefer the flexibility that voluntary guidelines permit them, this may be a powerful motivating factor to follow voluntary codes of conduct. Whatever the reasons for upholding CSR principles, MNEs in particular will find CSR an increasingly important topic.

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<sup>20</sup> See Business for Social Responsibility, BSR Details, <http://www.bsr.org/Meta/about/bsrdetails.cfm> (last visited Mar. 2, 2007).

<sup>21</sup> See generally, Business for Social Responsibility, Overview of Corporate Social Responsibility: Business Importance, <http://www.bsr.org/CSRResources/IssueBriefDetail.cfm?DocumentID=48809> (last visited Mar. 2, 2007).

There are also areas of legal liability involving CSR principles that are emerging as a result of national regulatory developments. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions requires signatories to adopt laws criminalizing bribery in connection with the conduct of international business.<sup>22</sup> The United States was in the forefront of this development, passing the 1977 Foreign Corrupt Practices Act prohibiting the payment of bribes to foreign government officials in order to obtain or retain business many years before the OECD Convention was adopted.<sup>23</sup> In the United States, MNEs have been named as defendants in law suits alleging that their complicity in violations of human rights by foreign governments is actionable under the federal Alien Tort Claims Act.<sup>24</sup> On the regional level, the European Union Modernization Directive mandates disclosure by certain companies located in Member States of their record on environmental and social issues and some countries have passed legislation requiring such disclosure by companies.<sup>25</sup>

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<sup>22</sup> Organization for Economic Cooperation and Development [OECD], Committee on International Investment and Multilateral Enterprises, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD Doc. DAFFE/IME/BR(97)20 (Nov. 1, 1997) [hereinafter OECD Bribery Convention].

<sup>23</sup> Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494 (1977), *amended by* International Anti-Bribery & Fair Competition Act, Pub. L. 100-415, 102 Stat. 1107 (1988).

<sup>24</sup> Alien Tort Claims Act of 1789, 28 U.S.C. §1350. *See, Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (reversing the grant of summary judgment by the district court on plaintiffs' Alien Tort Act claims based on allegations of forced labor, murder, and rape). The case was settled in December 2004. Center for Constitutional Rights, *Docket: Doe v. Unocal*,

[http://www.ccrny.org/v2/legal/corporate\\_accountability/corporateArticle.asp?ObjID=lrRSFKnmmm&Content=45](http://www.ccrny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=lrRSFKnmmm&Content=45) (last visited June 18, 2007) (reporting that the settlement consisted of compensation for the plaintiffs and funds to improve living conditions, health care, and education in the community where plaintiffs live).

<sup>25</sup> Council Directive 2003/51/EC, art. 1, §14 (a)(1)(a), 2003 O.J. (L178) 16, 18 (EU). France enacted legislation in 2001 as part of its New Economic Regulations requiring detailed reporting by all companies traded on the French stock exchange of environmental, labor, community engagement, and health and safety matters in annual reports. Law No. 2001-420, art. 116, of May 15, 2001, J.O., May 16, 2001, p. 7776. *See, Cynthia Williams & John Conley, An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493, 504 (2005). The U.K. Parliament enacted a statute in 2005 that required certain British companies to disclose social and environmental risks as part of an annual Operating and Financial Review and Directors Report. The Companies Act 1985 Regulations 2005, S.I. 2005/1011 (U.K.). This legislation was later rescinded. However, the U.K. Parliament revised U.K. company law in 2006 and British companies are now required to include reporting on social and environmental issues as part of a business review that must conform to the European Union

### III. Coverage of CSR in the U.S. Law School Curriculum

Currently, CSR is rarely referred to in the curriculum of U.S. law schools. Most law schools offer a number of courses where CSR is potentially relevant and might be discussed, including corporate law, international business transactions, international human rights, and international environmental law. This section will focus on the coverage of this topic in courses on corporate law and international business transactions.

In the typical corporate law course, CSR is not discussed at all. The phrase CSR is not even mentioned in most corporate law casebooks. Many corporate law courses cover the nature and purpose of the modern business corporation by discussing only the shareholder primacy model of corporate governance as the prevailing view. Shareholder primacy is the view that corporate managers are constrained in their decision-making by the requirement that they act in the best interests of the corporation, which is interpreted by courts to mean shareholder wealth maximization. Many casebooks use *Dodge Brothers v. Ford Motor Company*, dating from 1919, to illustrate this principle.<sup>26</sup> In *Dodge v. Ford*, the Michigan Supreme Court declared that the board of directors of Ford Motor Company had abused its discretion and showed a lack of good faith when it failed to continue a long standing practice of declaring large special dividends in a year when the company earned huge profits. The board's decision to use the company's profits to reduce the selling prices of its cars, pay increased wages to its employees, and expand its productive capacity by building an ore smelter was held not entitled to the protection of the

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Modernization Directive. The Companies Act 2006, ch. 46, §§172, 417. See, Cynthia Williams and John Conley, *Triumph or Tragedy? The Curious Path of Corporate Disclosure Reform in the U.K.*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 317, 317-318, 320-321 (2005).

<sup>26</sup> *Dodge Brothers v. Ford Motor Company*, 170 N.W. 668 (Mich. 1919).

business judgment rule. According to the court, a board of directors may not change the primary purpose of the business corporation from making money for the shareholders to focus on the interests of other stakeholders such as employees, consumers, or the general public.<sup>27</sup>

While it is true that the notion of shareholder primacy is a powerful force in U.S. corporate law, it would be an overstatement to claim that it is the only valid viewpoint.<sup>28</sup> A competing school of thought, the stakeholder theory, has been part of the landscape of U.S. corporate law at least since the 1930s when, in a series of articles in the Harvard Law Review, Professors Merrick Dodd and A.A. Berle, Jr. debated the question of whether corporate managers should consider only the interests of shareholders or whether they also should consider the interests of other constituencies as well.<sup>29</sup> A prominent legal commentator has remarked that these two views have continued to coexist within U.S. corporate law and that neither side has prevailed.<sup>30</sup> U.S. corporate law scholarship has continued to debate this point in recent years.<sup>31</sup>

Notwithstanding this dichotomy within the legal community, the usual corporate law course does not explore the stakeholder theory in any depth. Rather, most courses discuss corporate philanthropy as a limited exception to the norm of shareholder primacy. Typically, this is accomplished through a discussion of statutes that include charitable giving as a permissible

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<sup>27</sup> *Id.* at 670.

<sup>28</sup> See Henry Hansmann and Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001). (“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”)

<sup>29</sup> This academic exchange between Professors Dodd and Berle has been cited often as a classic statement of the two opposing viewpoints in this debate. See A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

<sup>30</sup> William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992).

<sup>31</sup> For two examples of this continuing debate, see Hansmann and Kraakman, *supra* note 28 (defending the shareholder primacy view) and Cynthia Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002) (advocating a more progressive view of corporate powers based on

corporate power and case law that upholds such gifts against claims that they are *ultra vires* subject to the condition that the gifts confer a corporate benefit and are reasonable in amount.<sup>32</sup> This conveys to the students the impression that corporate philanthropy is the sole instance in which managers may, or should, take the interests of other corporate constituencies into account in their corporate decision-making.

Most law students complete their course in corporate law without understanding the increased importance that CSR plays in the corporate world. They are left with the impression that the shareholder primacy model is the guiding light for U.S. corporations. They learn nothing about countervailing trends. In this sense, U.S. corporate law pedagogy has failed to stay in touch with developments in the modern business corporation and its operating environment. Shareholder primacy is no longer the predominant form of thinking among business people. Most corporations acknowledge the stakeholder theory of governance and proclaim publicly in their annual reports and in other promotional material, including their websites, that they are concerned with a wide range of corporate constituencies, including their employees, consumers, the environment, and the community in which they operate, in addition to their investors.

Courses on international business transactions (“IBT”) give more coverage to CSR, but such coverage is still rather limited. For example, one of the leading IBT casebooks covers two areas in U.S. law where legal liability may attach to U.S. companies doing business abroad, namely for bribery of foreign government officials under the Foreign Corrupt Practices Act and for alleged violations of human rights under the Alien Tort Claims Act.<sup>33</sup> Two other IBT

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the stakeholder theory in light of the globalization of business).

<sup>32</sup> See DEL. CODE ANN. title 8, §122; A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953).

<sup>33</sup> RALPH H. FOLSOM, MICHAEL WALLACE GORDON, JOHN A. SPANOGLE, JR. & PETER L. FITZGERALD,

casebooks currently on the market cover not only these two topics, but also include discussions regarding liability for environmental damage and voluntary corporate codes of conduct.<sup>34</sup>

Although this represents a good start for instructors interested in integrating CSR into the standard IBT course, it should be noted that these topics as presented form a relatively small part of the content of the IBT course, which tends to focus primarily on technical legal aspects of transactions. Some IBT casebooks on the market fail to include any mention of these topics and one may therefore conclude that CSR is not discussed at all in many IBT courses. One may also reasonably conclude from reviewing available commercial materials that even where CSR is addressed, the emphasis is on the potential for legal liability under existing regulations. Areas of growing importance are omitted, including the comprehensive scope of the international voluntary guidelines for MNEs that have been developed by IGOs and NGOs, voluntary company codes of conduct on labor and environmental issues, risk disclosure in the area of environmental and social concerns, and the significance of CSR as part of the best practices of MNEs.

To summarize, although CSR is a topic of growing importance for business, especially international business, discussion of it forms a small part of the standard curriculum in both corporate law and IBT courses. This highlights the need for increased coverage of the topic either in the standard IBT course or in a more specialized course or seminar devoted to the subject. Currently, specialized courses on CSR in U.S. law schools are uncommon, although there may be a handful of schools that include such an offering in their curriculum.

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INTERNATIONAL BUSINESS TRANSACTIONS 732-762, 1091-1151 (West, 9th ed., 2006).

<sup>34</sup> See DANIEL C. K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS (Aspen 2005); DAVID FRISCH & RAJ BHALA, GLOBAL BUSINESS LAW (Carolina Academic Press 1999).

#### IV. Reasons for Expanding Coverage in the Law School Curriculum

There are at least two distinct reasons supporting the argument that current coverage of CSR in the international business transactions curriculum is inadequate and should be expanded.

Both stem from the concern that law students are not being adequately prepared to represent clients in meeting the challenges of our current business environment. One is that the current approach does not reflect the growing importance of CSR in business, especially in international business. The other is that the current approach does not train law students to identify and analyze ethical and social issues that arise in the context of international business transactions and operations.

First, lawyers should be equipped to counsel their clients on emerging CSR norms, including potential legal liability related to such norms. Since very few law students are exposed to CSR during their law school careers under the current system, they may be ill-prepared to counsel clients in identifying and responding to CSR issues in an appropriate manner, whether in a business planning or litigation context. One commentator has argued that lawyers and law firms should be prepared not only to react to litigation or the threat of litigation based on claims of human rights violations by corporations, but also to advise clients in a proactive manner on practicing CSR and avoiding the conflicts that lead to litigation in the first place.<sup>35</sup> Both aspects of the lawyer's role will play a part in the future legal landscape that is developing alongside the increased emphasis on CSR in the business world.

The faculties in U.S. business schools are further along the learning curve in understanding the importance of CSR than U.S. law faculties. Business schools in the United

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<sup>35</sup> David Kinley, *Lawyers, Corporations and International Human Rights Law*, 25 THE COMPANY LAWYER 298



States are increasingly focusing on ethical issues in the curriculum and frequently require a core course on business ethics. Some business schools curricula also include courses on CSR in the context of their international business offerings.<sup>36</sup> There should be a similar emphasis on the legal aspects of CSR in U.S. law schools so that new lawyers will be prepared to meet the challenges faced by their business clients.

Second, lawyers should be educated in the fundamental skills and values of the legal profession, which should include the value of striving to promote justice, fairness, and morality. This was the position taken by the 1992 McCrate Report prepared under the auspices of the American Bar Association, Section of Legal Education and Admissions to the Bar.<sup>37</sup> Such training should include the professional value of “contributing to the profession’s fulfillment of its responsibility to enhance the capacity of law and legal institutions to do justice”.<sup>38</sup> Legal training in CSR contributes to this goal by addressing issues related to many aspects of social justice.

For some law schools, incorporating CSR into the curriculum will further their special mission of social justice. While all U.S. law schools strive to train students in the technical legal skills needed to pursue a successful career, some schools also seek to foster an awareness of social justice among their students through their curricular offerings and in the extracurricular

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(2004).

<sup>36</sup> GOPALKRISHMAN H. IYER, *TEACHING INTERNATIONAL BUSINESS: ETHICS AND CORPORATE SOCIAL RESPONSIBILITY* (2000).

<sup>37</sup> American Bar Association, Section of Legal Education and Admissions to the Bar, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992) at 140-141, *available at* <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html> (last visited Mar. 8, 2007) [hereinafter McCrate Report].

<sup>38</sup> *Id.* at 141 (Value 2).

projects they support. This is the case with Saint Louis University School of Law, which includes the following goal in its mission statement: “[s]ensitize students to ethical standards and norms, including the traditional obligation to engage in public service.”<sup>39</sup> Training lawyers on the social responsibility of MNEs and other businesses falls within this broader goal of social justice.

#### V. Framework for a Law School Course or Seminar on CSR

Ideally, law schools should offer a course or seminar on the corporate social responsibility of multinational enterprises as part of the IBT curriculum.<sup>40</sup> This section describes a proposed structure for such a course, including suggestions on the topics that might be covered and the types of course materials that might be appropriate.

Starting from the assumption that most students do not have training in any area of corporate law or IBT other than what is currently offered in the standard courses on that subject, a separate course devoted to CSR of MNEs should attempt to fill the gap in student’s knowledge and to train them to identify issues and analyze problems from the perspective of a lawyer representing a business. One way to structure such a course would be to devote separate units to each of the following topics: U.S. corporate law on the nature and purpose of the modern business corporation, including the stakeholder theory; the reasons for the rise of CSR and the meaning of CSR; the development of international codes of conduct for MNEs and environmental and social reporting as a means to encourage greater CSR; and the main areas of

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<sup>39</sup>Saint Louis University School of Law, Mission Statement, <http://law.slu.edu/curriculum/planning.html> (last visited Mar. 6, 2007).

<sup>40</sup> This author’s concern about the absence of a meaningful treatment of CSR in the IBT curriculum led her to design and teach a course devoted specifically to that topic as part of a summer study abroad program offered in Madrid,

concern in CSR as they relate to MNEs, namely bribery and corruption, core labor standards, human rights, and the environment; and the relevance of CSR to the practice of corporate law.

#### A. U.S. Corporate Law: The Nature and Purpose of the Modern Business Corporation

In order to set the stage for an understanding of the extent to which CSR is pursued by U.S. corporations, a course on CSR should begin by revisiting the theory and law on the nature and purpose of the modern business corporation. Many students will have already taken the basic corporate law course and will be familiar with the shareholder primacy theory. However, very few students, if any, will be familiar with the stakeholder theory. It would be useful to present both sides of the issue, starting with the historical background of the Berle-Means debate and updating with more recent discussions of the two competing theories.<sup>41</sup> It would also be useful to refer to case law and statutes that illustrate the unresolved nature of the debate and to make the point that there seems to be some tolerance in U.S. law for corporate decision-making that may benefit stakeholders other than shareholders.<sup>42</sup>

A second topic that should be explored is corporate philanthropy. This, along with compliance with laws, forms the historical bedrock of socially responsible business behavior in the United States. While current developments in CSR theory and practice would seek to expand the social obligations of businesses beyond this historical understanding, it is still useful to examine this topic since it has gained wide acceptance in the United States and is viewed by the public as a form of CSR. While some students may have been exposed to corporate charitable

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Spain by Saint Louis University School of Law. She has subsequently offered a seminar on the topic during the regular academic year.

<sup>41</sup> Berle and Dodd, *supra* note 29; Hansmann and Kraakman, *supra* note 28; Williams, *supra* note 31.

<sup>42</sup> Allen, *supra* note 30.

giving in their basic corporate law course, no student will have an in-depth knowledge of the state law limitations on charitable giving or the practices of U.S. corporations in terms of types of charitable gifts and amounts of charitable gifts. Including a discussion on international philanthropy as practiced by some U.S. companies will serve as a bridge to a discussion of the CSR responsibilities of MNEs.

#### B. The Rise of CSR and the Current Definition of CSR

Prior to discussing substantive CSR norms and their current legal status, it is useful background to analyze the reasons for the rise of CSR and its meaning. Students will benefit from a discussion of the rapid rise in foreign direct investment and cross-border trade, which has led to a rise in the operations of MNEs. Incorporating a discussion of some of the literature on globalization and its social implications and recent case studies on the negative consequences of MNE activity in host countries will help to focus the students' attention on the reasons for the heightened interest in the international community on developing CSR norms. Another topic that should be covered is the lack of effective national regulation to constrain the negative social consequences of MNE activities and the options for developing more effective control mechanisms. The choice of voluntary norms, which MNEs would prefer, versus legally binding rules is an important subject to explore with students.

#### C. International Codes of Conduct for MNEs; Environmental and Social Reporting

The failed attempt by the U.N. Centre on Transnational Corporations to regulate MNE conduct through adoption of international standards might be explored as a means to understand

the difficulties of achieving consensus on CSR issues.<sup>43</sup> More recent attempts to promulgate voluntary codes of conduct through IGOs and NGOs should then be covered, with a special emphasis on those that have broad scope and have achieved wide acceptance, namely the Global Compact and the OECD Guidelines.<sup>44</sup> It is worthwhile to compare these initiatives to the draft UN Norms, which would impose more stringent social standards for MNEs than any of the extant voluntary codes of conduct.<sup>45</sup> Another important area to explore is the development of international and national standards for corporate reporting on environmental and social issues arising in business operations.<sup>46</sup>

#### D. Substantive CSR Norms

There are four primary areas of concern in international instruments addressing CSR: bribery and corruption, core labor standards, human rights, and environmental impacts. Each of these topics merits a discussion in its own right. The use of case studies helps to focus student attention on the problems in each area and facilitates discussion of the appropriate standards that might be adopted to address these issues.

In the area of bribery and corruption, a discussion of the historical background surrounding the adoption of the Foreign Corrupt Practices Act can provide a focus for class discussion on the reasons for the U.S. prohibition on bribery of foreign government officials in order to obtain or retain foreign business.<sup>47</sup> A study of the Foreign Corrupt Practices highlights one of the areas of CSR in which legally binding national norms constrain MNE activity. It can

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<sup>43</sup> *Supra* note 7.

<sup>44</sup> *Supra* note 9.

<sup>45</sup> *Supra* notes 9 & 13.

<sup>46</sup> *Supra* note 25 and accompanying text.

<sup>47</sup> *Supra* note 23.

also be used to provide training on a significant litigation issue that may arise in practice when representing MNEs. The subsequent recognition by the international community of the social costs of bribery and corruption in international business and the development of the OECD Bribery Convention provides an interesting case study on the process of achieving consensus on a CSR issue at the international level.<sup>48</sup>

Regarding core labor standards, a case study focusing on the use of child labor by host country contractors for companies in the sporting goods or apparel industry, such as Reebok or Levi Strauss, is a good starting point. This will lead naturally into a discussion of the remedial efforts of such companies to address the problem of child labor and other violations of core labor standards through voluntary codes of conduct at the company level. It is also useful to explore the concept of core labor standards as they apply to MNEs through a study of the ILO Tripartite Declaration.<sup>49</sup>

Human rights violations by MNEs have been addressed through litigation in the U.S. federal courts under the Alien Torts Claims Act.<sup>50</sup> A study of one of the litigated cases in this area, such as the Unocal litigation eventually brought before the Ninth Circuit Court of Appeals, can provide a focal point for this discussion.<sup>51</sup> This is another area in which the course can provide training for U.S. law students on a litigation issue that they may encounter in practice. Finally, reference should be made to the proliferation of human rights standards on the international level and the approach adopted in the draft U.N. Norms on these issues.<sup>52</sup>

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<sup>48</sup> *Supra* note 22.

<sup>49</sup> *Supra* note 14.

<sup>50</sup> *Supra* note 24.

<sup>51</sup> *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).

<sup>52</sup> *Supra* note 9.

The topic of environmental impacts of MNE operations might be approached by reference to the litigation stemming from the Union Carbide gas plant disaster at Bhopal, India.<sup>53</sup> A discussion of the litigation and its resolution in U.S. and Indian courts will illustrate for students some of the impediments to securing remedies for environmental damage caused by MNE operations in foreign countries. This case will also provide an opportunity to explore the development of international standards on environmental issues, such as the CERES Principles, and whether they provide adequate protection for host countries and their citizens.<sup>54</sup>

#### E. CSR as Part of the Practice of Law

A good way to conclude a specialized course on CSR and to integrate the themes outlined above is to provide students with a case study that raises several CSR issues. There are numerous examples that could be used as the basis for such a final class exercise, including those that have arisen in extractive industries, such as gold mining or oil exploration. Such an exercise will train students to identify CSR issues that may arise in corporate legal practice representing MNEs and to respond by, for example, drafting a voluntary code of conduct for the company involved. This type of training prepares students to be proactive lawyers in the area of CSR.

#### VI. Conclusion: Improving Current Approaches to CSR in the U.S. Law School Curriculum

The U.S. law school curriculum has seen a proliferation in the number of courses offered in recent years. It may not be possible to incorporate yet another specialized course in the IBT curriculum in every law school. However, it is possible to address some of the concerns raised by this chapter within the context of the standard IBT course offered in many U.S. law schools.

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<sup>53</sup> *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December 1984, 809 F.2d 195, 197 (2d Cir. 1987)

<sup>54</sup> *Supra* note 13.

At a minimum, the content of the standard IBT course should be expanded to incorporate a discussion of the relevance of CSR to MNEs, including the importance of CSR as part of the best practices of many U.S. companies and the development of voluntary codes of conduct by IGOs, NGOs, and companies themselves as a means of regulation. Further, the practice of some IBT instructors of focusing on legally enforceable CSR norms in the areas of bribery of foreign government officials under the Foreign Corrupt Practices Act and human rights violations under the Alien Torts Claims Act should be continued. In this way, the best interests of students will be served because they will receive some training in both the reactive and proactive aspects of CSR practice. This change will better prepare students for representing MNEs in the business environment in which such companies currently operate. Such training will have the added benefit of introducing ethical considerations into the study of international business transactions. Issues of justice, fairness and morality have proven troubling in the current discussions over globalization and we must recognize that students will need to face such issues and find solutions to them in the years ahead.