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David Hunter

American University Washington College of Law, dhunter@wcl.american.edu

Natalie L. Bridgeman

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ARTICLES

Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism

NATALIE L. BRIDGEMAN* AND DAVID B. HUNTER**

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* Independent Consulting Attorney, International Human Rights Counsel, San Francisco, California; B.A. Cornell University; J.D. UCLA School of Law, Program in Public Interest Law & Policy.

** Assistant Professor of Law and Director of the Program on International and Comparative Environmental Law, The American University Washington College of Law. The authors thank David Barnden, Daniel Bodansky, Steve Herz, Marcos Orellana and Martin Wagner for their comments on this article.

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I. INTRODUCTION

An ever-increasing number of standards, guidelines, principles, norms, and best practices (hereinafter “standards and norms”) have been adopted to address the environmental and social impacts of multinational enterprises (“MNEs”). This increase in standards and norms corresponds to a rise in MNE sensitivity to the environmental and social impacts that their activities have on local communities in developing countries.¹ Well-known examples of these standards and norms include the Organisation for Economic Cooperation and Development’s (“OECD”) Guidelines on Multinational Enterprises,² the United Nations Global Compact,³ the World Commission on Dams’ Principles and Recommendations,⁴ the Interna-

1. See, e.g., Natasha Affolder, *Cachet Not Cash: Another Sort of World Bank Group Borrowing*, 14 MICH. ST. J. INT’L L. 141, 144-45 (2006); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT’L L. 931, 933-35, 949-60 (2004).

2. Organisation for Economic Co-operation and Development, Guidelines for Multinational Enterprises, June 21, 1976, 15 I.L.M. 969 (1976), for the 2000 revision, see OECD Guidelines for Multinational Enterprises, DAF/IME/WPG(2000)15/FINAL (Oct. 31, 2001), available at [http://www.oelis.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime-wpg\(2000\)15-final](http://www.oelis.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime-wpg(2000)15-final) [hereinafter OECD Guidelines]; Organisation for Economic Co-operation and Development (OECD), *Updated Recommendation on Common Approaches on Environment and Officially Supported Export Credits – Updated Text*, TD/ECG(2005)3 (Feb. 25, 2005), available at [http://webdomino1.oecd.org/olis/2005doc.nsf/Linkto/td-ecg\(2005\)3](http://webdomino1.oecd.org/olis/2005doc.nsf/Linkto/td-ecg(2005)3) [hereinafter OECD Common Approaches].

3. United Nations Global Compact, available at <http://www.unglobalcompact.org/> (last visited Nov. 12, 2007).

4. THE WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISIONMAKING

tional Finance Corporation's ("IFC") Environmental and Social Standards,⁵ the Equator Principles,⁶ the Roundtable on Sustainable Palm Oil,⁷ Rio Tinto's corporate sustainable development policies⁸, and literally dozens of other industry- or company-specific standards and norms.⁹

These standards and norms are considered "voluntary" by definition because they are typically not state-sponsored or the product of public regulation. Although some of the norms and standards have benefited from the leadership or participation of intergovernmental institutions, many others have been derived from wholly nongovernmental, multi-stakeholder dialogues, industry-wide or sectoral processes, or the initiatives of individual MNEs. These standards and norms have also been the subject of substantial scholarship, reflecting the rise of democratic pluralism in international environmental governance.¹⁰

These standards and norms undeniably fill a normative gap located between

(Earthscan Publ'ns, 2000), available at <http://www.dams.org/docs/report/wcdreport.pdf>.

5. International Finance Corporation, Performance Standards on Social and Environmental Sustainability Apr. 30, 2006, available at [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf) [hereinafter IFC Performance Standards].

6. The Equator Principles: A Financial Industry Benchmark for Determining, Assessing and Managing Social & Environmental Risk in Project Financing, July 2006, available at http://www.equator-principles.com/documents/Equator_Principles.pdf [hereinafter Equator Principles II]; See Affolder, *supra* note 1, at 144-45 (discussing the Equator Principles).

7. Roundtable on Sustainable Palm Oil, RSPO Principles and Criteria for Sustainable Palm Oil Production (Sept. 22, 2005), available at <http://www.rspo.org> (last visited Mar. 12, 2007).

8. See Rio Tinto, Corporate Policies on Environmental, Human Rights, Land Access, Sustainable Development (Sept. 2005), http://www.riotinto.com/ourapproach/217_policies.asp (last visited Nov. 8, 2007).

9. See, e.g., FOREST STEWARDSHIP COUNCIL, PRINCIPLES AND CRITERIA OF FOREST STEWARDSHIP (1996), available at http://www.fsc.org/en/about/policy_standards/princ_criteria; Global Gas Flaring Reduction Public-Private Partnership, Voluntary Standard for Global Gas Flaring and Venting Reduction (2004), <http://webapps01.un.org/dsd/partnerships/public/partnerships/186.html>; International Cyanide Management Code for the Manufacture, Transportation and Use of Cyanide in the Production of Gold (2005), available at <http://www.cyanidecode.org>; UN Food & Agric. Org. [FAO], *Code of Conduct for Responsible Fisheries*, FAO Doc. 95/20/Rev/1; UN Sales No. E98.V.11 (1998), available at <http://www.fao.org/docrep/005/v9878e/v9878e00.htm>; IBM Corporation, Environment Affairs Policy, <http://www.ibm.com/ibm/environment/policy/index.shtml> (last visited Mar. 12, 2007); Voluntary Principles on Security and Human Rights (2000), available at <http://www.voluntaryprinciples.org/principles/index.php> [hereinafter Voluntary Principles]; UN Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), available at [http://www.unhcr.ch/huridocda/huridocda.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument](http://www.unhcr.ch/huridocda/huridocda.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument) [hereinafter UN Business Norms on Human Rights]; see also Stacy Mosher, *Global Codes of Conduct – A Summary*, CHINA RTS. F., May 2003, 43 (describing and comparing corporate codes of conduct).

10. See, e.g., Elisa Morgera, *Significant Trends in Corporate Environmental Accountability: The New Performance Standards of the International Finance Corporation*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 151 (2007); Erik Assadourian, *The State of Corporate Responsibility and the Environment*, 18 GEO. INT'L ENVTL. L. REV. 571 (2006); Surya Deva, *Sustainable Good Governance and Corporations: An Analysis of Asymmetries*, 18 GEO. INT'L ENVTL. L. REV. 707 (2006); Benjamin Richardson, *Financing Sustainability: The New Transnational Governance of Socially Responsible Investment*, 17 Y.B. INT'L ENVTL L. (forthcoming); David Hunter, *Civil Society Networks and the Development of Environmental Standards at International Financial Institutions*, 8 CHI. J. INT'L L. 437 (forthcoming Fall, 2007).

the state-centered focus of international law and the often inadequate or unenforced standards of the developing country hosts for MNE activities.¹¹ As a result, these standards and norms have the potential for improving the performance of MNEs and their subsidiaries or suppliers in developing countries and also for guiding MNE compliance with international legal and ethical obligations.¹²

Despite the attention given to the creation and substance of these new standards and norms, relatively little attention has been paid to mechanisms for ensuring compliance with them.¹³ To the extent that any of these standards and norms contemplate a compliance mechanism, they typically embrace internal monitoring or oversight with limited third-party or independent verification.¹⁴ In particular, although locally affected communities are often the presumed beneficiaries of the standards and norms, only a few of these systems provide any procedural or other rights to allow such communities to hold the MNEs accountable to the applicable standards and norms.¹⁵ The dearth of mechanisms for MNE accountability stands in stark contrast to the accountability systems present when states exercise their public power to regulate.¹⁶ Put differently, MNEs now operate in a 'norm-rich' environment that lacks effective governance structures for monitoring or enforcing compliance with the applicable standards and norms.

11. See, e.g., Peter Spiro, *NGOs in International Environmental Lawmaking: Theoretical Models*, TEMP. UNIV. BEASLEY SCH. OF LAW LEGAL STUD. RES. PAPER SERIES, No. 2006-26 at 31-32 (Nov. 10, 2006) (arguing that "non-state sponsored codes of conduct" are "more unstable than public forms of global regulation," but they are nonetheless important where no state-sponsored global regulation exists or is enforced).

12. See Elisabeth Wickeri, *IR 2008: Maximizing the Impact of CSR in China*, CHINA RTS. F., March-May 2006, 132, at 132-33 (describing the potential for improving human rights and environmental conditions in China as a result of the UN Business Norms on Human Rights, the UN Global Compact and other initiatives).

13. One of the few to raise the issue is UN Secretary-General Special Representative for Business & Human Rights, John Ruggie. See John Gerard Ruggie, UN Secretary-General Special Representative for Business & Human Rights, *Business and Human Rights, The Evolving International Agenda*, Working Paper No. 38 of the Corporate Social Responsibility Initiative at 16-26, June 2007 [hereinafter Ruggie Working Paper No. 38] ("The Achilles heel of self-regulatory arrangements to date is their underdeveloped accountability mechanisms.").

14. See, e.g., IFC Performance Standards, *supra* note 5, at ¶¶ 23-24 (requiring grievance mechanism and independent review for certain projects); Equator Principles II, *supra* note 6, at Principles 6-7 (requiring the same); UN Business Norms on Human Rights ¶¶ 15-19 (calling for periodic self-evaluation and implementation through national and international courts and tribunals); see also Section III, *infra*, describing the accountability mechanisms at various international financial institutions.

15. One of the rare exceptions is the IFC's Compliance Advisor/Ombudsman (CAO), who has authority to address complaints raised regarding violations of the IFC's Environmental and Social Performance Standards. The CAO is discussed *infra* at text accompanying notes 105-16. See generally Bart Mongoven & Dan Kornfield, *The Ruggie Report and A Corporate-Conduct Regime*, STRATFOR PUBL. POL'Y INTEL. REP. (Feb. 8, 2007).

16. Accountability has long been recognized as a necessary corollary to the exercise of state power and the international organizations that states create. See N. WHITE, *THE LAW OF INTERNATIONAL ORGANISATIONS* 189 (2d ed. 2005) ("accountability is fundamental to the exercise of power in liberal democratic systems [and is] increasingly important for the exercise of power by public bodies in the wider international framework."); JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 300 (2002); Daniel Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 403, 405-10 (2005).

The lack of effective compliance mechanisms may undermine the credibility and effectiveness of these standards and norms. Critics can (at times rightly) accuse MNEs of ‘green washing’ and make continued *ad hoc* (and *ad hominem*) attacks on their operations if no credible, effective, and objective mechanism exists for communities to challenge whether promises made are promises kept. In short, a new mechanism is needed to close the ‘accountability gap’¹⁷ between the aspirational quality of these standards and norms and their implementation.

This article proposes a new Foreign Investor Accountability Mechanism (“the Mechanism”). The Mechanism will enhance the environmental and social sustainability of foreign direct investment by holding MNEs accountable to project-affected communities. The Mechanism will narrow the ‘accountability gap’ by providing communities affected by foreign investment projects with an avenue for voicing their concerns and for holding MNEs accountable both to local and national laws that may apply. The Mechanism will also allow affected communities to enforce the various promises that MNEs make during project design, approval, and preconstruction phases, or to gain financing or the ‘social license to operate.’¹⁸ These promises may include:

- (i) commitments to follow international, industry-wide, or sectoral standards and norms;¹⁹
- (ii) commitments made as part of corporate-wide social and environmental policies;²⁰ and
- (iii) project-specific commitments made to secure host government approval or financing from financial institutions, such as the IFC,²¹ export credit agencies,²² or private commercial banks.²³

17. We use the term ‘accountability gap’ to describe the policy space between the many international norms that apply to MNE activities and the lack of corresponding mechanisms to require adherence to those norms. Cf. George W. Downs & Andrea W. Trento, *Conceptual Issues Surrounding the Compliance Gap*, INTERNATIONAL LAW AND ORGANIZATION 19, 19 (Edward C. Luck & Michael W. Doyle eds., 2004) (the authors define the ‘compliance gap’ as describing the “difference between the norms established by international agreements and the actual behavior of the signatory states.”).

18. See generally N. Gunningham, R. Kagan, & D. Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 308-09 (2004); IFC, WHO BENEFITS: FINANCIAL INSTITUTIONS, <http://www.ifc.org/equatorprinciples> (last visited Feb. 15, 2008); Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council” Addendum, delivered to the General Assembly*, U.N. Doc. A/HRC/4/35/Add.4 (Feb. 8, 2007); see also C. Williams & J. Conley, *Eighteenth Annual Corporate Law Symposium: Corporate Social Responsibility In The International Context: Is There An Emerging Fiduciary Duty To Consider Human Rights?*, 74 U. CIN. L. REV. 75, 78-81 (2005); Affolder, *supra* note 1, at 146-48.

19. See, e.g., sources cited *supra* note 9.

20. See, e.g., Shell, *Shell Code of Conduct*, available at <http://www.shell.com/codeofconduct>; ABN AMRO, *Our Business Principles* (2d ed., Spring 2004), available at <http://www.abnamro.com/com/about/bp.jsp>.

21. To obtain financing from the IFC, corporations must sign an IFC loan agreement, which requires adherence to IFC policies and procedures as well as local, domestic, and international legal obligations. See generally IFC Website at <http://www.ifc.org/> (last visited Feb. 15, 2008).

22. The world’s leading export credit agencies have agreed to apply minimum environmental and social

Most of the environmental and social commitments MNEs make with respect to foreign investments in developing countries are front-loaded, because communities have more leverage in exacting commitments prior to project approval or financial approval. Once project financing, national permits, or informal 'social licenses' are granted, it may be too late to introduce new environmental or social conditionalities into the project. Given the lack of opportunity for effective accountability and compliance, communities have less leverage to ensure that prior commitments are met. The Mechanism proposed in this article would help to empower local communities in monitoring MNEs throughout the project's lifetime.

The Mechanism also offers several advantages to MNEs, particularly those operating controversial projects. Due to civil society's global reach, MNEs are under increasing scrutiny wherever they operate.²⁴ An increasing number now recognize the need for a credible, predictable, objective, and cost-effective fact-finding mechanism that can answer the allegations, rumors, and other concerns that arise in project-affected communities.²⁵ The new Mechanism would also offer MNEs an opportunity to hold civil society groups accountable by forcing them to prove allegations of misconduct in an objective forum where the MNE's performance can be independently evaluated (and vindicated).

standards to projects they finance. *See generally* Organization for Economic Cooperation and Development, Trade Committee, Revised Council Recommendation on Common Approaches on Environment and Officially Supported Export Credits, Doc. No. TAD/ECG(2007)9 (June 12, 2007) [hereinafter 2007 Common Environmental Approaches for ECAs], available at [http://webdomino1.oecd.org/olis/2007doc.nsf/Linkto/tad-ecg\(2007\)9](http://webdomino1.oecd.org/olis/2007doc.nsf/Linkto/tad-ecg(2007)9).

23. The more than fifty-four commercial banks that have signed up to the Equator Principles, for example, require their project-finance clients to meet environmental and social standards patterned after the IFC. *See* IFC Performance Standards, *supra* note 5.

24. *See* Affolder, *supra* note 1, at 146-47.

25. *See, e.g.*, United Nations Environment Programme Finance Initiative, Working Capital Report, at 7, available at <http://www.unepfi.org/fileadmin/documents/WorkingCapital.pdf> (quoting Paul Watchman, a partner at LeBeouf, Lamb, Greene & MacRae: "Though the [Equator Principles (EP)] are non-binding, they have become an extremely important factor in the project finance market. There are no sanctions for breach of the EP but given their prevalence, the importance attached to compliance with the EP by leading bankers and the ever-increasing scrutiny of projects by civil society, it can be said that there is strong pressure to adopt the EP."); Press Release, Christian Brothers Investment Services, 91.6 Percent of Newmont Shareholders Support Resolution for Mining Company to Report on its Impacts on Local Communities (Apr. 24, 2007), available at <http://www.cbisonline.com/page.asp?id=873> (noting need for a board-led independent review of mining company's environmental and social impacts); *see also* Special Representative of the Secretary-General, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 15, UN Doc. E/CN.4/2006/97 (Feb. 22, 2006) ("some companies have made themselves and even their entire industries targets by committing serious harm to human rights, labour standards, environmental protection, and other social concerns. This has generated increased demands for greater corporate responsibility and accountability, often supported by companies wishing to avoid similar problems or to turn their own good practices into a competitive advantage."); Spiro, *supra* note 11, at 31-32 (noting that because corporations "abhor uncertainty" they will have an incentive to press for the adoption of codes of conduct and similar regimes as law once they have signed on because the "promise of greater stability over the long run"). For the same reason, corporations would benefit from the predictability of the Mechanism proposed here.

The new Mechanism would also help MNEs by creating an epistemic expert community around issues of compliance and implementation.²⁶ Many of the emerging standards and norms present similar compliance and implementation challenges, for example, around issues of involuntary resettlement, cumulative environmental impacts, or respect for the rights of indigenous peoples. The Mechanism would provide a structure for the development and sharing of best practices in these areas, allowing MNEs to learn from one another and to identify and access leading experts in the area.

A growing number of mechanisms already exist that subject MNEs to a variety of forums and procedures.²⁷ These mechanisms vary in their accessibility to communities, independence, and effectiveness, and all of them are tied to specific (and often narrow) institutional or normative standards. Thus, for example, the World Bank Inspection Panel can evaluate only those projects financed by the World Bank, and then can only review the projects against the World Bank's standards.²⁸ The Mechanism proposed here would be able to evaluate any project against all of the standards and norms to which the project's sponsors have committed. Eventually, the Mechanism envisioned here could supplant, complement, or harmonize with other accountability mechanisms applicable to private sector projects. Harmonization would create predictability of process that would lessen risk to MNEs. Furthermore, the Mechanism proposed here would be a cost-effective response to the growing need to provide MNE-sponsored accountability mechanisms because the costs could be spread across a wide range of MNEs and other institutions.

This article is divided into five sections. The next section, Section II, will look at the "enforcement gap" that exists in traditional approaches to holding MNEs accountable to environmental and social standards, including an exploration of the flaws in relying on host country legal processes. Section III will critically

26. For discussions of the value of the formation of epistemic communities in international law, see, e.g., Peter Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 INT'L ORG. 377 (1989); Peter H. Sand, *Lessons Learned in Global Environmental Governance*, 18 B.C. ENV'T L. AFF. L. REV. 265-66 (1991); Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992).

27. As discussed in detail below, the members of the World Bank Group, including the IFC, have their own accountability mechanisms, as do the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, the Japanese Bank of International Cooperation, Export Development Canada, the U.S. Overseas Private Investment Corporation and others. MNEs that operate in or from an OECD country are responsible for adhering to the OECD Guidelines for Multinational Enterprises and are accountable to National Contact Points. In addition, the financial institutions that have voluntarily subscribed to the Equator Principles must institute ad hoc "Grievance Mechanisms" which, for more socially and environmentally risky projects, require that a mechanism be integrated into the project's management system to allow the borrower to "receive and facilitate resolution of concerns and grievance about the project's social and environmental performance raised by individuals or groups from among project-affected communities." Equator Principles II, *supra* note 6, at Principle 6.

28. See International Bank for Reconstruction and Development [IBRD] and International Development Association [IDA], World Bank Inspection Panel, Resolution No. IBRD 93-10/IDA 93-6, ¶ 12 (Sept. 22, 1993).

examine the emergence of various international accountability mechanisms, including those mechanisms at international financial institutions, the OECD, and other institutions, that are intended to hold MNEs accountable to some environmental and social norms for projects in developing countries. This Section will discuss the insufficiency of these mechanisms in narrowing the 'accountability gap.' Section IV will address the reasons why a new Foreign Investment Accountability Mechanism is needed, and Section V will elaborate the outline for the new proposed Mechanism. The proposal builds on the experience of existing accountability mechanisms, particularly at international financial institutions, but it also takes lessons from the creation of the standards and norms themselves. Their creation has been marked by a lack of state control and a strong dose of democratic experimentalism. The result has been the spawning of *sui generis* normative frameworks that are relatively free of any formal institutional architecture.

The same is true of the Mechanism we propose here; it will exist free from any state sponsorship and will reflect the same democratic experimentalist spirit that animates the standards and norms themselves. While support for a new mechanism is mounting,²⁹ few proposals have discussed in detail how a new, community-driven mechanism would function.³⁰ This proposal will hopefully encourage debate and discussion so that movement can begin toward creation of a new mechanism.

II. THE 'ENFORCEMENT GAP' IN THE APPLICATION OF LAW TO MNEs

Three possible sources of laws at least theoretically apply to private sector actors operating in foreign jurisdictions: (1) host country laws; (2) home country laws; and (3) international law. The traditional assumption is that MNEs operating in the sovereign territory of a nation-state will be subjected to the laws, courts, and enforcement authorities of that jurisdiction – *i.e.*, the host country's laws.³¹ But in practice host country laws in many developing countries do not provide a realistic framework for the protection of local communities.³² More-

29. See, e.g., Surya Deva, *Human Rights Violations By Multinational Corporations And International Law: Where From Here?*, 19 CONN. J. INT'L L. 1, 24 (2003); see also Ruggie Working Paper No. 38, *supra* note 13.

30. But see BANKTRACK, PRINCIPLES, PROFITS OR JUST PR, TRIPLE P INVESTMENTS UNDER THE EQUATOR PRINCIPLES, AN ANNIVERSARY ASSESSMENT 43-45 (2004), available at www.pebls.org/files/Publications/Articles/BANKtrack_Principles_Profits_or_just_PR.pdf; ANDREA DURBIN ET AL., SHAPING THE FUTURE OF SUSTAINABLE FINANCE: MOVING FROM PAPER PROMISES TO PERFORMANCE 77-78 (World Wildlife Fund & Banktrack), available at http://www.povertyenvironment.net/?q=shaping_the_future_of_sustainable_finance_moving_from_paper_promises_to_performance. Other proposals focus on making unlikely changes to existing frameworks, such as the WTO as an enforcement body. See Deva, *supra* note 29, at 24.

31. See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287 (6th ed. 2003) ("The principle corollaries of the sovereignty and equality of states are: (1) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states . . .").

32. See Isabella Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM. U. INT'L L. REV. 1265, 1293-96 (2004).

over, despite the recent growth in use of extraterritorial jurisdiction in some home country courts (particularly the U.S. Alien Tort Claims Act), the exercise of home country jurisdiction over human rights and environmental claims from abroad is rare and available to only a few impacted communities. International law, at least in its traditional definition as the law between states, only indirectly addresses the activities of MNEs. Each of these sources and their shortcomings of law are addressed further below.

A. THE HOST COUNTRY “ENFORCEMENT GAP”

Basic tenets of state sovereignty imply that each nation-state has the authority and responsibility to set its own environment and development policies.³³ The regulation of the environment within a state, absent any transboundary impact or any international trade, is generally the responsibility of that state. To be sure, the growth of multilateral environmental agreements over the past two decades has led to the recognition that environmental protection in some contexts may be a “common concern” of humanity,³⁴ but even in those areas (*e.g.*, climate change or biodiversity conservation), implementation and enforcement of international environmental norms is within the purview of national legal authorities. Thus, environmental and social regulation of the construction and operation of industrial facilities, mines, oil pipelines, dams, or infrastructure projects, for example (assuming no transboundary impacts), are primarily within the ambit of the state in which they are located.

The traditional reliance on the domestic law of the host country for enforcing environmental and social norms means that vindication of a community’s rights or interests is dependent on the effective functioning of the host country’s regulatory agencies or judiciaries. Particularly in developing countries with weak governance systems, these fora have frequently proven to be insufficient to protect the rights and interests of affected communities. It is such insufficiency that has led to the proliferation of non-traditional environmental and social standards and norms (as well as increased efforts to use the laws of home countries to hold MNEs accountable).

If reliance on host country enforcement worked to protect local environmental and social interests, the development of international standards and norms and international fora to vindicate those interests would not be needed. For a number

33. *See, e.g.*, United Nations Conference on Environment and Development, Rio de Janeiro, Brazil June 3-14, 1992, *Rio Declaration on Environment and Development*, Principle 2, U.N. Doc A/CONF.151/26 (July 14, 1992); United Nations Conference on the Human Environment, Stockholm, Swed. June 5-16, 1972, *Final Documents*, Principle 21, U.N. Doc A/CONF.48/14 (June 16, 1972).

34. *See, e.g.*, The United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; S. Treaty Doc No. 102-38 (1992); U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 I.L.M. 849, pmb. (1992); The United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818, pmb. (1992).

of reasons, reliance on the national authorities and institutions of host countries, particularly developing countries, fails to protect adequately the environment or the rights and interests of local communities.³⁵

First, some countries do not have the political will or interest in enacting the laws and policies necessary to constrain private-sector behavior. For example, in some countries the perceived trade-offs between stricter environmental controls and the need for foreign investment to fuel development means that local environmental and social concerns are trumped by national desire for economic growth.³⁶

Second, many developing country governments simply lack the capacity to implement and administer environmental and social regulations.³⁷ Regulatory agencies often lack human, financial, and institutional resources to carry out effective monitoring and enforcement, judiciaries are frequently ill-equipped to handle environmental and social issues, and civil society is often not able to conduct independent monitoring.³⁸ Seen in this light, the lack of adequate environmental standards is not always the problem; rather the problem is the lack of capacity to implement and monitor the standards.³⁹ The capacity and governance concerns extend to developing country judiciaries as well. Courts often lack the capacity to hold MNEs accountable for violations because they are underfunded, have inadequate human or administrative resources, are vulnerable to political influence, or are part of legal systems without laws sufficient to sustain causes of action against MNEs.⁴⁰

35. See generally Edward D. McCutcheon, *Think Globally, (En) Act Locally: Promoting Effective National Environmental Regulatory Infrastructures in Developing Nations*, 31 CORNELL INT'L L.J. 395, 399 (1998).

36. For a passionate and fiery discussion of the sacrifice of local communities for the greater good, see Arundhati Roy, *The Greater Common Good*, FRONTLINE, May 22-Jun. 4, 1999, available at <http://www.hinduonnet.com/fline/fl1611/16110040.htm>.

37. See, e.g., Paula Barrios, *The Rotterdam Convention on Hazardous Chemicals: A Meaningful Step Toward Environmental Protection?*, 16 GEO. INT'L ENVTL. L. REV. 679, 681 (2004) (describing lack of capacity for hazardous waste protection in developing countries); William Onzivu, *International Environmental Law, the Public's Health, and Domestic Environmental Governance in Developing Countries*, 21 AM. U. INT'L L. REV. 597, 626 (2006) (describing lack of capacity to implement and administer environmental regulations in developing countries).

38. See generally Onzivu, *supra* note 37.

39. See Srinii Sitaraman, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 267, 307-15 (2007) (describing the administrative constraints, lack of capacity, and lack of political will to reduce pollution in China).

40. See generally The Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium held in Johannesburg, South Africa, on 18-20 August 2002, available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=259&ArticleID=3115&l=en> (identifying "deficiency in the knowledge, relevant skills and information in regard to environmental law" as a principle cause of the lack of effective implementation and enforcement); Onzivu, *supra* note 37; TRANSPARENCY INTERNATIONAL, REPORT ON THE TRANSPARENCY INTERNATIONAL GLOBAL CORRUPTION BAROMETER 2006, 9-10, available at http://www.tkenya.org/documents/GCB_2006.pdf (describing, for example, the large bribes paid to the legal system and judiciary within select African countries).

Third, corruption prevents adequate enforcement of environmental and social standards in many countries.⁴¹ Where MNEs or other private actors explicitly or implicitly barter for exemption from enforcement of human rights or environmental standards, the standards are undermined.

Fourth, many developing country governments suffer from disproportionate negotiating power vis-à-vis MNEs or other private sector actors. Although all governments have inherent regulatory authority, some may feel as if they are in no position to exercise this authority against large MNEs.⁴² Market forces allow MNEs to pit one country against another by threatening to make their investments elsewhere if the “investment climate” is not sufficiently benign.⁴³ Therefore, developing country governments may find or perceive themselves as competing against one another for foreign investments. Aside from offering financial incentives, governments may sacrifice environmental and social standards in a race-to-the-bottom process.

These four factors alone would be enough to raise concerns about relying on the ability of developing countries to regulate the private sector, but other pressures have developed that shift the balance of power even further toward private-sector actors and weaken the ability of developing country governments to regulate on behalf of the public’s environmental and social interests. Foremost among these additional factors are:

Investment Treaties. Investment treaties are intended to facilitate investment between two or more countries by establishing a stable and predictable investment climate.⁴⁴ In some instances, these agreements reduce the regulatory risk facing foreign investors by constraining the environmental and social regulatory options that are available to host countries. In investor-state dispute settlement regimes, such as those in NAFTA, MNEs have the added right to go to an international dispute panel to seek compensation for environmental and social regulations that go too far.⁴⁵ These investment agreements thus specifically

41. See generally TRANSPARENCY INTERNATIONAL, *supra* note 40.

42. See S. N. Bhargava, *Panel assessing Orissa mining impacts*, INDIA TOGETHER, Oct. 11, 2005, <http://www.indiatogether.org/direct/2005/cdr-000080.html> (Prof. Bhagwath Prasad Rath “stated that because Aluminum is an essential metal in the war industry, western/developed countries are exerting pressure on countries like India to permit the mining of bauxite. He added that not only himself but eminent social personalities like the late Manmohan Chowdhary and Kishan Patnaik have written to the government of Orissa protesting against their repressive attitude but the government has not even bothered to reply to date.”) (last visited Mar. 25, 2008).

43. See McCutcheon, *supra* note 35, at 396-99.

44. See Lucien J. Dhooge, *The Revenge of The Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 AM. BUS. L.J. 475, 480-83 (2001).

45. NAFTA’s Chapter 11 provides a dispute settlement forum for investors to bring claims against parties to NAFTA (Canada, Mexico or the U.S.) if a discriminatory domestic law or regulation is has caused damages to their business. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 605, Chapter 11, § B (1993). Such was the claim brought by Canadian MTBE manufacturer Methanex against the State of California for banning the chemical additive MTBE in gasoline, claiming that it was a discriminatory regulation and not enacted for the purpose of health and safety. The dispute settlement Panel ruled against Methanex in 2005. *Methanex Corporation v. United States of America*, 17 WORLD TRADE & ARB. MAT’L 61

constrain the host country government's regulatory power and expand the investor's rights and protections.

Host Government Agreements. The foreign investment contracts or host government agreements ("HGAs") that establish the relationship between the MNE investor and the host government can have the same deregulatory effect as investment agreements.⁴⁶ Often HGAs include stabilization clauses that are intended to eliminate the regulatory risk faced by MNEs by forcing host countries to pay for changes in environmental and social standards, or the application of those standards, throughout the life of projects.⁴⁷ These protections go far beyond the legal leniency a MNE would be able to obtain in its own country, and they weaken the regulatory authority of the host country state and shift the balance of power toward the MNE and away from the developing country.⁴⁸

Foreign Policy Pressure from Home Countries. Developing country governments are particularly vulnerable to the financial incentives and political pressures levied by MNEs' powerful home country governments. The United States and Europe often determine their foreign policies with the interests of their MNEs in mind. This, too, shifts the balance of bargaining power from the host developing country to the corporate investor.

When government-backed insurance or export credits are involved in a project, the positions of developing country host governments are further weakened. Agreements frequently use counter-guarantees, which oblige developing host countries to compensate the MNE's home country for any regulatory expropriation that is deemed to occur. Such agreements bring the political weight of the powerful home country governments to bear, and can chill the ability and desire of the developing host country to impose environmental and social regulations.⁴⁹

(2005). See also Howard Mann, et al., IISD Model International Agreement on Investment for Sustainable Development (April 2005), available at http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf.

46. See, e.g., Kyla Tienhaara, *Unilateral Commitments to Investment Protection: Does the promise of stability restrict environmental policy development?*, 17 Y.B. INT'L ENVTL. L. 139 (2007); International Institute for Environment and Development, *Lifting the Lid on Foreign Investment Contracts: The Real Deal for Sustainable Development*, Sust. Markets Briefing Paper (Sept. 2005).

47. See, e.g., Host Agreement Between and Among the Government of the Azerbaijan Republic and the State Oil Company of the Azerbaijan Republic, BP Exploration (Caspian Sea) Ltd., Statoil BTC Caspian as Ramco Hazar Energy Limited, Turkiye Petrolleri A.O., Unocal BTC Pipeline, Ltd., Itochu Oil Exploration (Azerbaijan) Inc., Delta Hess (BTC) Limited, 7.2(x) (October 17, 2000), available at <http://www.bp.com/genericarticle.do?categoryId=9006628&contentId=7013492>; see also BAKU CEYHAN CAMPAIGN, THE BTC INTERGOVERNMENTAL AND HOST GOVERNMENT AGREEMENT BETWEEN TURKEY AND THE BTC CONSORTIUM 5 (2002), available at <http://www.bakuceyhan.org.uk/legal.htm>.

48. See Abigail S. Reyes, *Protecting the 'Freedom of Transit of Petroleum': Transnational Lawyers Making (Up) International Law in the Caspian*, 24 BERKELEY J. INT'L L. 842, 855-56 (2006); Christopher P.M. Waters, *Who Should Regulate the Baku-Tbilisi-Ceyhan Pipeline?*, 16 GEO. INT'L ENVTL. L. REV. 403, 405-07 (2004).

49. Reyes, *supra* note 48, at 858-59. To be sure, pressure from OECD countries will condition investments in favor of environmental or social protections: in the case of Turkey's Ilisu Dam, developed country export credit agencies refused to give export credit support unless Turkey satisfied four conditions designed to address international concerns about the project's adverse impacts on human rights and the environment. See J. McCrystie Adams, Comment, *Environmental and Human Rights Objections Stall Turkey's Proposed Ilisu Dam*,

Jurisdictional Obstacles. Legal obstacles, including laws that protect parent MNEs from the jurisdiction of countries hosting only a subsidiary's operations, also limit host countries' abilities to regulate the private sector. Piercing the corporate veil to attach liability on the parent is particularly difficult, and a parent MNE can decapitalize a subsidiary and remove all of the parent's assets from a country to avoid liability. For example, according to a complaint filed in the United States, a subsidiary of Canadian mining corporation Placer Dome allegedly caused substantial environmental and health damage to the region around its mine in Marinduque, Philippines, then reportedly sold its share of the subsidiary to a separately incorporated Filipino company for \$1.00 and fled the jurisdiction.⁵⁰ Placer Dome has refused to accept process for any complaint subsequently filed against it in the Philippines.

The net result of these factors is that developing countries are at a major disadvantage in trying to regulate MNEs for environmental and social purposes. In many cases, the effective imposition of even modest environmental or social standards on MNE activities is jeopardized. Although the use of host country courts has increased in recent years,⁵¹ the obstacles to legal enforcement of social and environmental laws remain almost insurmountable in many cases. Indeed, it has been at least the perception of weak enforcement that has led to the emergence of other strategies by affected communities and their international NGO allies to hold MNEs accountable for some minimum environmental and social standards or norms.

B. THE HOME COUNTRY "ENFORCEMENT GAP"

Use of home country courts (generally speaking, courts in OECD countries) to bring accountability for MNE violations of social and environmental standards in developing countries is at least a theoretical possibility. Under the nationality principle, states may, in some circumstances, extend their jurisdiction to cover extraterritorial conduct based on the nationality of the actors.⁵² For example, the

12 COLO. J. INT'L ENVTL. L. & POL'Y (2000 Y.B.) 173, 175-76 (2001).

50. Plaintiff's First Amended Complaint at ¶¶ 176, 193, *Provincial Government of Marinduque v. Placer Dome, Inc.* (No. CV-S-05-1299-KJD-RJJ) (D. Nev. complaint filed Nov. 7, 2005).

51. See, e.g., OECD WATCH NEWSL., Apr. 2007, at 6, available at <http://www.germanwatch.org/corp/ownl07apr.pdf> (describing the Philippines' Supreme Court order that the City of Manila uphold "Ordinance 8027 and close the Pandacan oil depot, owned and operated by Shell, Petron and Caltex. The ordinance aims to protect residents from the health and safety dangers of the dilapidated depot, which is situated in the heart of densely populated Manila. In 2002, Manila's mayor bowed to pressure from the oil companies and signed a memorandum of understanding allowing a scaled-down depot to continue operations. In December 2002, Manila residents filed a lawsuit against the mayor for dereliction of duty. In March 2007, the Supreme Court ruled in favor of the residents and ordered the city to enforce the law and remove the depot within six months."). For more environmental law cases in national courts, see the website of the Environmental Law Alliance Worldwide, <http://www.elaw.org/news/> (last visited Feb. 15, 2008).

52. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987). The extraterritorial reach of home country courts to activities occurring abroad can also be premised on the *effects*

Marine Mammal Protection Act prohibits “any person subject to the jurisdiction of the United States or any vessel . . . subject to the jurisdiction of the United States” from taking protected marine mammals within U.S. territorial waters *or on the high seas*.⁵³ The extension of the Act to conduct outside of U.S. territory is based on the nationality of the vessel. Thus, U.S. corporations operating on the high seas could be subject to U.S. law or jurisdiction, because of the corporation’s nationality.

Despite this theoretical basis for extending home-state jurisdiction over MNEs, use of home courts is presently an option only in certain factually limited cases. Even then, jurisdiction based on the nationality principle is available only in a few home countries. Although home country courts *could* expand their regulatory reach over the environmental and social behavior of their MNEs, they rarely do so. The limitations on home county forums’ abilities to enhance MNE accountability toward local communities have made jurisdiction based on the nationality principle an insufficient option for accountability in most circumstances.

In the United States, for example,⁵⁴ foreign plaintiffs seeking to hold MNEs liable for environmental or social harms committed abroad face a nearly insurmountable set of jurisdictional, procedural, and substantive hurdles. To be sure, the increasing use of the Alien Tort Claims Act (“ATCA”)⁵⁵ and Unocal’s settlement in a case brought by anonymous Burmese plaintiffs,⁵⁶ suggest that some extreme cases of abuse may be brought successfully in U.S. courts. However, obstacles effectively bar the successful prosecution of most environmental and social violations in U.S. courts, even where the allegations in a complaint are properly pled and state meritorious claims. These obstacles include judicial application of three doctrines used to dismiss cases filed in U.S. courts to foreign jurisdictions or to dismiss them all together: (1) the doctrine of *forum non conveniens*, which provides a court’s discretionary power to decline to exercise jurisdiction when it appears that the case may be more appropriately tried

principle—i.e., that countries can regulate activities abroad in some circumstances to prevent negative effects on their own territories. Although this justification for extraterritorial reach of domestic law can be important in some specific cases, particularly those relating to global or transboundary environmental impacts, it does not provide a general justification for most environmental damage caused by MNEs of concern to local communities.

53. Marine Mammal Protection Act, 16 U.S.C. § 1372 (1972) (emphasis added).

54. The United States is a good example to look at in this context, because its courts are arguably the most open to local communities bringing actions against home-country MNEs, or at least the most cases have been brought in U.S. courts.

55. The ATCA became U.S. federal law in 1789 as part of the first Judiciary Act. It states: “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2007). The ATCA confers federal subject-matter jurisdiction when “(1) an alien sues (2) for a tort (3) committed in violation of the law of nations (*i.e.*, international law).” *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996) (*quoting* *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995)). *See also* *Trajano v. Marcos*, 978 F.2d 493, 499 (9th Cir. 1992).

56. *See infra* text accompanying note 63 (describing *Doe v. Unocal*).

elsewhere,⁵⁷ (2) comity, which provides that under certain circumstances deference should be given to the laws and interests of a foreign country,⁵⁸ and (3) the political question doctrine, which allows a judge to dismiss a case if the judge determines that hearing the case will interfere with U.S. foreign policy.⁵⁹

Other obstacles in the United States are the narrow extra-territorial application of U.S. law,⁶⁰ the rare application of foreign environmental and human rights law

57. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (upholding dismissal of an action by foreign plaintiffs based on the doctrine of *forum non conveniens*). In order to overcome a motion to dismiss on *forum non conveniens* grounds, the plaintiffs must show that the foreign forum is inadequate to hear the claim, and private and public interest factors must weigh in favor of maintaining jurisdiction over the case in the United States. See *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1177-82 (9th Cir. 2006); *Piper Aircraft Co.*, 454 U.S. at 235. The doctrine has been invoked to dismiss several cases brought by foreign communities or citizens who alleged environmental damage from the activities of U.S. corporations in their country. U.S. courts dismissed the actions brought against Union Carbide on behalf of the victims of the 1984 isocyanate leak in Bhopal, India. *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y.1986), modified 809 F.2d 195 (2d Cir. 1987), cert denied, 484 U.S. 871 (1987). Similarly, an action brought in Texas on behalf of thousands of agricultural workers injured from occupational exposure to pesticides in twelve countries was dismissed on *forum non conveniens* grounds. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995), aff'd 231 F.3d 165 (5th Cir. 2000) (dismissing on the basis of *forum non conveniens* a lawsuit brought by thousands of citizens of twelve foreign countries (Burkina Faso, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Ivory Coast, Nicaragua, Panama, The Philippines, Saint Lucia and Saint Vincent) who sought damages for personal injuries from alleged pesticide exposure); *Aguinda v. Texaco*, 303 F.3d 470 (2d Cir. 2002); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 65 (S.D. Tex. 1994); see generally MICHAEL KARAYANNI, *FORUM NON CONVENIENS IN THE MODERN AGE* (2004).

58. See *Sequihua*, 847 F. Supp. at 63 (dismissing a suit brought by Ecuadorian residents for damages caused by environmental contamination from Texaco's oil development. The Court argued deference should be shown to Ecuador's courts because: (1) the alleged harm occurred entirely in Ecuador; (2) the plaintiffs were all residents of Ecuador; (3) none of the defendants were residents of Texas; (4) enforcement of any judgment in Ecuador would be questionable at best; (5) the challenged conduct was regulated by the Republic of Ecuador and an exercise of jurisdiction would interfere with Ecuador's sovereign right to control its own environment and resources; and (6) the Republic of Ecuador had expressed its strenuous objection to the exercise of jurisdiction by the U.S. district court). *But see Jota v. Texaco*, 157 F.3d 153, 159 (2d Cir. 1998) (holding, in case with similar facts, that dismissal on the grounds of comity was inappropriate absent a clear finding that an adequate forum existed in the objecting nation, particularly in light of the Ecuadorian government's retraction of its sovereignty objection).

59. In several cases involving environmental and social allegations against MNEs for their activities abroad, the U.S. Department of Justice has submitted non-binding 'Statements of Interest' in an attempt to trigger dismissal based on the political question doctrine. For example, in *Sarei v. Rio Tinto*, the District Court judge dismissed the case after receiving a Statement of Interest arguing that the continued adjudication of the case would interfere with the Bush administration's U.S. foreign policy interests in Papua New Guinea. *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002). The Ninth Circuit has the case under consideration after having conducted a hearing by a three-judge panel and then re-hearing en banc. *Sarei v. Rio Tinto*, 499 F.3d 923 (9th Cir. 2007). Other cases, such as one against Occidental Petroleum for its operations in Colombia, *Mujica v. Occidental Petroleum Corp.*, have also been dismissed based on the political question doctrine upon the Justice Department's request in Statements of Interest. 381 F.Supp. 2d 1164, 1188 (C.D. Cal 2005).

60. The seminal case addressing congressional authority to regulate conduct outside U.S. territory is *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949). The Supreme Court ruled that a federal labor law did not apply extraterritorially to plaintiffs' claim for overtime pay for work performed in Iran and Iraq because legislation passed by Congress applies only within the territorial jurisdiction of the United States unless there is a clear congressional intent to apply a particular statute extraterritorially. The "Foley Doctrine" creates a presumption

in U.S. courts,⁶¹ and the limitations on the type of cases and circumstances under which claims may be brought under the ATCA.⁶² While the ATCA is available to close the accountability gap in certain circumstances, these circumstances are too limited to make it an effective option for most communities harmed by MNE activities.

An exception to the inability of U.S. law to provide redress to foreign communities is the *Doe v. Unocal* case.⁶³ Plaintiffs in *Unocal* were villagers from Myanmar (Burma) who lived along the construction route of a Unocal natural gas

against the extraterritorial application of U.S. laws and holds that a statute extends only to the territorial limits of the United States *unless* a contrary congressional intent appears either in the statute or in relevant legislative history. Most environmental statutes are unclear regarding the territorial scope of coverage, but in practice courts have generally restricted the extraterritorial application of environmental statutes. Jonathan Turley, *When in Rome: Multilateral Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U. L. REV. 598, 599-600, 627-34 (1990). An exception may be emerging where the underlying activities may affect U.S. territory or interests. Thus, for example, Filipino plaintiffs were denied their action based on CERCLA because the statute did not grant foreign claimants a cause of action for contamination of foreign soil. *ARC Ecology v. United States*, 411 F.3d 1092 (9th Cir. 2005); *see also* Anna D. Stasch, *Arc Ecology v. United States Dept. of the Air Force: Extending The Extraterritorial Reach Of Domestic Environmental Law*, 36 ENVTL. L. 1065, 1067-68 (2006). In contrast, U.S. citizens were able to sue a Canadian company under CERCLA for pollution caused in the United States. *Pakootas v. Teck Cominco Metals, Ltd.* 2004 U.S. Dist. LEXIS 23041, at *27-*28 (E.D. Wash. Nov. 8, 2004), *aff'd* *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1078-79 (9th Cir. 2006) (upholding the cause of action as a domestic application of CERCLA, because the release of hazardous substances was also occurring within the United States). Similarly, in 2005, a federal judge in California denied the defendants' summary judgment motion in a case alleging that, under the National Environmental Protection Act (NEPA), the U.S. export credit and insurance agencies (ECAs) must consider the greenhouse gas emissions resulting from projects they support in foreign countries. *Friends of the Earth, et. al v. Watson*, 2005 U.S. Dist. LEXIS 42335 (N.D. Cal. Aug. 23, 2005). These limited cases in the last few years appear to be opening U.S. courts as fora to resolve disputes over violations of environmental laws, at least to the extent impacts can be identified in the United States.

61. Most cases that might have applied foreign environmental law have been dismissed. *See, e.g.*, *Aguinda*, 303 F.3d at 470. *But c.f.* Plaintiff's First Amended Complaint, *Provincial Government of Marinduque v. Placer Dome, Inc.* (No. CV-S-05-1299-KJD-RJJ) (D. Nev. complaint filed Nov. 7, 2005) (plaintiffs are asking the court to apply Filipino law to the case; no opinion has yet issued).

62. U.S. Courts allow claims under the ATCA only for torts that are "specific, universal and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004) (holding that new ATCA claims may only be recognized if the claim rests "on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized."). Torts that violate the "law of nations" under the ATCA may include: forced labor, slave trading, genocide, war crimes, violations of the laws of war, racial discrimination, crimes against humanity, extrajudicial killing, torture, and cruel, inhuman or degrading treatment or punishment. MNEs may be sued for these torts either as private *or* state actors for *jus cogens* violations (violations, for which no state action is required, include war crimes, violations of the laws of war, and racial discrimination), or as a state actor if their alleged conduct violates the law of nations but has not risen to the level of a *jus cogens* violation. *See Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 313 (S.D.N.Y. 2001); *Kadic*, 70 F.3d at 240 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984)) (The "handful of crimes" that constitute *jus cogens* violations include piracy, slave-trading and certain war crimes such as genocide).

63. *See John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003); *see generally* Armin Rosencranz & David Louk, *Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 CHAP. L. REV. 135 (2005); Rachel Chambers, *The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, 13 HUM. RTS. BR. 14 (2005).

pipeline. Plaintiffs sued California-based Unocal Corporation in federal and state court, alleging that Unocal, working with the Myanmar military, subjected the villagers to forced labor, extrajudicial killing, rape, and torture. After many years of litigation, including numerous appeals, the parties settled on the eve of trial for a multi-million dollar award in favor of the plaintiffs. Prior to the settlement, U.S. courts had determined that Unocal knew about the human rights abuses that were committed in furtherance of its pipeline construction and did nothing to stop them. *Unocal* sets important precedent that corporations may be held liable—including for aiding and abetting and conspiracy – for human rights abuses under the ATCA.⁶⁴

In another example of a case brought under the ATCA, inhabitants of the Papua New Guinea (PNG) island of Bougainville sued London-based mining company Rio Tinto for war crimes, violations of the laws of war, racial discrimination and violations of the UN Convention on the Law of the Sea in association with Rio Tinto's mining operations on the island.⁶⁵ On appeal, the Ninth Circuit held that Rio Tinto could be held vicariously liable for "alleged war crimes and crimes against humanity committed at its behest by the PNG army."⁶⁶ The Ninth Circuit then vacated the opinion after a rehearing *en banc* and opinion is expected in 2008.

On October 12, 2007, the Second Circuit Court of Appeals issued a decision in *Khulumani v. Barclay National Bank, Ltd.*, an ATCA case alleging claims against corporations involved with crimes under the South African apartheid regime. The splintered majority held that the plaintiffs could base their arguments against the corporations on a theory of aiding and abetting international law violations.⁶⁷

While these cases demonstrate that the ATCA might in some circumstances be a mechanism for holding MNEs accountable where host country enforcement is absent, a number of limits on the Act make it an impractical tool in most situations.⁶⁸ The necessity of state action in most situations is an inherent limitation, as is the restriction imposed by the small number of actionable torts.⁶⁹ Thus far, the ATCA has only been

64. Another notable case against an MNE is *Estate of Rodriguez v. Drummond*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003). In that case, the families of murdered union leaders in Colombia sued Alabama-based mining giant Drummond Company for the torture and extrajudicial killing of the leaders that plaintiffs allege was orchestrated by Drummond and carried out by paramilitaries. That case survived the motion to dismiss stage and was tried to a jury in July 2007 in Alabama federal court. The jury found the company not liable, and the plaintiffs are appealing.

65. See *supra* note 59.

66. *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069 at 1078 (9th Cir. 2006), *vacated* 499 F.3d 923 (9th Cir. 2007).

67. *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007).

68. See *Kinley & Tadaki, supra* note 1, at 933-35, 949-60.

69. See, e.g., *Bowoto v. Chevron Corp.*, No. C 99-02506, 2006 U.S. Dist. LEXIS 63209, 2006 WL 2455752, at *1 (N.D. Cal. Aug. 22, 2006). The list of actionable torts is in flux and depends heavily on the judge, court, and circuit in which the case is brought. In general, actionable torts (some of which require state action and some of which do not), include: genocide, piracy, terrorism-related torts, slave trading, slavery, and certain forms of forced labor, crimes against humanity, torture, and extrajudicial killing.

applied to the most severe human rights violations. For the vast majority of situations where a MNE has caused harm (including in the many cases of development-induced displacement), the ATCA is not yet, and is not likely soon to be, available to local communities.

Doctrinal limitations, including the political question and act of state doctrines, cause ATCA cases against MNEs to be dismissed as well.⁷⁰ Most relevant to cases against MNEs is the doctrine of *forum non conveniens*, which allows judges to dismiss cases if there is a showing that there is an adequate alternate forum and the consideration of a number of factors, including convenience to the parties and availability of evidence, weighs in favor of dismissal of the case to another forum.⁷¹

Furthermore, the ATCA is not prospective or preventative; it redresses only past injuries and is thus suboptimal for facilitating agreements between MNEs and local communities on how to improve the future environmental and social conditions around MNE-controlled projects. In sum, the narrowness of the actionable torts, the ATCA's jurisdictional limits over defendants,⁷² and the procedural and political hurdles to ATCA litigation make the ATCA insufficient to address most environmental and social concerns of project-affected people.

Perhaps the most important limiting factors for broader use of home country courts are the relative time and cost to bring such actions. Host country courts do not typically come to the plaintiff; the plaintiff must come to the court and prepare and present the case, which may cost millions of dollars. While tort cases, including ATCA cases, in the United States are generally brought on a contingency fee or pro bono basis, such practices are not widely available in other countries. In fact, fee-shifting arrangements in some countries, including the United Kingdom, mean that a losing plaintiff can be liable for the attorney fees of the defendant.⁷³ The net result, in the United States and even more so in other jurisdictions, is that the use of domestic courts to hold home country MNEs

70. See, e.g., *Turedi v. Coca-Cola Co.*, 460 F. Supp. 2d 507 (S.D.N.Y. 2006) (case dismissed based on the doctrine of *forum non conveniens* where plaintiffs and evidence of defendants' labor rights violation were in Turkey); *Doe v. Exxon*, 393 F. Supp. 2d 20, 25 (D.D.C. 2005) (Indonesian citizens' ATCA claims dismissed where court held that inquiry into actions by Indonesian government would be an "impermissible intrusion in Indonesia's internal affairs.").

71. See, e.g., *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001).

72. The difficulty in obtaining jurisdiction over defendants is underscored in the *Presbyterian Church of Sudan v. Talisman* case. The plaintiffs, residents of an area in Sudan where Talisman operated an oil exploration and extraction business, sued the Canadian company for international law violations including genocide, extrajudicial killing, enslavement, and rape. Plaintiffs alleged that Talisman worked with the Sudanese military to commit the violations. After years of litigation, a judge in the Southern District of New York dismissed the case on a summary judgment motion because, in part, the plaintiffs had failed to provide evidence that the defendants were sufficiently connected to the conduct in question. The judge noted in dicta that there may not have been jurisdiction over the corporate parties that were more closely related to the conduct. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 638-39 (S.D.N.Y. 2006).

73. See Herbert M. Kritzer, *The English Rule*, 78 A.B.A. J. 54, 55 (1992).

accountable is too uncertain, too costly, and too cumbersome to offer local communities access to justice in most instances.

C. INTERNATIONAL LAW

The final potential source of law for holding MNEs accountable to affected communities is international law. In general, public international law (i.e., the law of nations) binds state actors.⁷⁴ The circumstances in which international law directly binds non-state actors, such as MNEs, are narrowly circumscribed.⁷⁵ Such circumstances may include where MNEs are complicit with host country governments or have otherwise aided or abetted violations of human rights.⁷⁶

The narrow jurisdiction and authority of international legal institutions over non-state actors such as MNEs compounds the normative limitations of international law as applied to MNEs. For example, “only states may be parties in cases before the International Court of Justice”⁷⁷ and most other international judicial fora.⁷⁸ One exception is the International Criminal Court, which can assert jurisdiction over non-State actors, but the court’s utility is restricted for our purposes by its relatively narrow jurisdiction, which is confined primarily to war crimes or crimes against humanity.⁷⁹

As important as the extent to which these international institutions assert jurisdiction over non-state parties, is the extent to which non-state actors, particularly local communities and their representatives, can bring actions. Neither the ICJ nor any other international court, except those in the human rights systems, allows individuals to bring actions before them.⁸⁰ The various compliance committees of the multilateral environmental agreements also restrict their

74. ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 28 (1999) (citing J.L. BRIERLY, *THE LAW OF NATIONS* (6th ed. Oxford 1963)(1928)). Cf. DAVID BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 1 (2001) (“in the twentieth century, States ceased to be the sole subjects of international legal rules.”).

75. See David Weissbrodt, *Corporate Social Responsibility In The International Context: Business And Human Rights*, 74 U. CIN. L. REV. 55, 59-67 (2005); Ilias Bantekas, *Corporate Social Responsibility In International Law*, 22 B.U. INT’L L.J. 309, 312-17 (2004); Kinley & Tadaki, *supra* note 1, at 944-47; Ruggie Working Paper No. 38, *supra* note 13, at 18-21.

76. EarthRights International, *The International Law Standard for Corporate Aiding and Abetting* (July 2006), available at http://www.earthrights.org/files/aiding_and_abetting_paper.pdf (last visited Jan. 12, 2008).

77. Statute of the International Court of Justice, art. 34(1), June 26, 1945, 59 Stat. 1031.

78. See, e.g., Statute of the International Tribunal for the Law of the Sea, Annex VI art. 20, Dec. 10, 1982, 1833 U.N.T.S. 3; 21 I.L.M. 1261.

79. See Rome Statute of the International Criminal Court art. 8.2(b)(iv), July 17, 1998, 37 I.L.M. 1002 (1998) (“Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” is a war crime.); see also John Alan Cohan, *Modes of Warfare And Evolving Standards of Environmental Protection Under The International Law of War*, 15 FLA. J. INT’L L. 481, 529 (2003); Marcos Orellana, *Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad*, 17 GEO. INT’L ENVTL. L. REV. 673 (2005).

80. Statute of the International Court of Justice, *supra* note 77.

authority primarily to state actors.⁸¹ Other than in the human rights arena, most of the international fora that are open to claims from individuals are accountability mechanisms of international financial institutions, such as the World Bank Inspection Panel, which are discussed further below.⁸²

Reliance on national courts to enforce international law carries many of the limitations discussed above with respect to actions brought both in host and in home country courts.⁸³ Claims in U.S. courts based solely on an MNE's alleged violation of international customary or treaty-based law face additional problems. First, "[a]s a general rule, international treaties, as agreements among sovereign nations, do not create personal rights that an individual may enforce."⁸⁴ The rationale behind this general rule is that treaties are between states and impose duties on states rather than individuals. In recognition of this fact, such treaties are often described as 'non-self-executing.'

If a plaintiff claimed a non-self-executing treaty provision as a cause of action in a U.S. court, the plaintiff would have to rely on Congressional implementing language.⁸⁵ The ATCA may create a cause of action for non-self-executing treaties in certain contexts where judges are willing to read them into customary international law as the basis for an actionable ATCA tort,⁸⁶ but this only emphasizes that such treaties *alone* may not create a cause of action.

Other than relatively rare areas where MNEs are complicit in the violation of significant rights, the application of international law to MNEs relies on implementation through national laws and institutions. This is particularly true if the goal is to provide affected communities with an avenue to challenge the activities of MNEs. For the reasons set forth above in Section II(A), reliance on national

81. Fourth Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone layer, *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Annex IV: Non-Compliance Procedure*, UNEP/OzL.Pro.4/15, (Nov. 25, 1992) reprinted at 32 I.L.M. 874 (1995). *But see* UN Econ. & Soc. Council (ECOSOC), *Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Report of the First Meeting of the Parties)*, ECE/MP.PP/2/Add.8 April 2, 2004 (allowing the public to submit complaints to the Compliance Committee).

82. *See infra* text accompanying notes 84-111; *see also* LINDA A. MALONE & SCOTT PASTERNAK, *DEFENDING THE ENVIRONMENT: CIVIL SOCIETY'S STRATEGIES TO ENFORCE INTERNATIONAL ENVIRONMENTAL LAW* (2006).

83. *See supra* Section II(B). For a general survey of the treatment of international environmental law by national courts, see MICHAEL ANDERSON & PAULO GALIZZI, *INTERNATIONAL ENVIRONMENTAL LAW IN NATIONAL COURTS* (2003).

84. *Jogi v. Piland*, 131 F. Supp. 2d 1024, 1026 (C.D. Ill. 2001). One exception is the Vienna Convention on Consular Relations which requires that a government officer notify a foreign national who has been arrested, imprisoned or taken into custody of his right to contact a consulate from his country of origin. Vienna Convention on Consular Relations art. 36(b), Apr. 24, 1963, 596 U.N.T.S. 261.

85. DAVID WEISSBRODT, ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 687-89 (3d ed. 2001).

86. *See Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1359 (S.D. Fl. 2001); *see also Ralk v. Lincoln County*, 81 F. Supp. 2d 1372, 1380-81 (S.D. Ga. 2000) (stating that the plaintiff could have brought his ICCPR claim under the ATCA, but because he did not and the treaty was non-self-executing, his claim was dismissed).

law does not provide adequate protections of community rights and interests.

III. EXISTING INTERNATIONAL ACCOUNTABILITY MECHANISMS

Certain international institutions have developed accountability mechanisms, in part because of an increasing recognition that locally-affected communities have little effective access to justice under international law.⁸⁷ By allowing locally-affected people to bring claims, these accountability mechanisms have expanded citizen access to some international decision-makers affecting their lives. In some contexts, use of the mechanisms has improved the lives of project-affected communities and has served to strengthen the accountability of MNEs to applicable environmental and social standards. To an extent, the existence of these mechanisms sets a precedent for the creation of a broader citizen-based mechanism, such as the one promoted here. Unfortunately, the contexts in which these mechanisms are effective tend to be narrow, either because the scope of the mechanism's jurisdiction is itself narrow or because the remedies available through the mechanism are inadequate to force meaningful change on the ground. While these institutions are important, they do not sufficiently narrow the MNE accountability gap. This section evaluates some of the existing mechanisms and highlights their strengths and weaknesses and their implications for the Mechanism proposed here.

A. THE IFI ACCOUNTABILITY MECHANISMS

Beginning with the creation of the World Bank Inspection Panel in 1993, international financial institutions ("IFIs") have begun to provide mechanisms for project-affected people to raise concerns regarding the environmental and social impacts of IFI-financed projects. In part, the IFIs created accountability mechanisms in recognition of their own purported immunity from community-based actions.⁸⁸ The IFI accountability mechanisms' foci are limited to the respective IFI's own compliance with its environmental and social policies and procedures. Thus, most do not directly address the conduct of MNEs. Despite the lack of direct jurisdiction over MNE activities, the IFI accountability mechanisms are worth surveying because MNEs involved in IFI-financed projects must comply with the respective IFI environmental and social standards. Moreover, the IFC's Compliance Advisor/Ombudsman⁸⁹ effectively reviews the private project spon-

87. For a general survey of such mechanisms, see MALONE & PASTERNAK, *supra* note 82.

88. See, e.g., Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: the Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177, 206 (2005); Bradlow, *supra* note 16, at 407.

89. See generally, Compliance Advisor/Ombudsman Website, <http://www.cao-ombudsman.org> (last visited Jan. 12, 2008).

sor's compliance with the IFC's Performance Standards.⁹⁰ Because the IFI accountability mechanisms are among the best analogs for the Mechanism proposed in this article, lessons learned from the IFI accountability mechanisms substantially inform the Mechanism proposed here.

Six multilateral financial institutions⁹¹ and three bilateral financial institutions⁹² currently provide locally-affected people access to accountability mechanisms where they can seek to enforce the environmental and social policies of the associated institutions. Each of these mechanisms differs to some degree, but they share one thing: they all provide local people with an opportunity to seek the institution's compliance with applicable environmental and social policies. Below, we review the two most used IFI accountability mechanisms—the World Bank Inspection Panel and the IFC Compliance Advisor/Ombudsman.⁹³ These mechanisms offer slightly different examples that can be instructive in evaluating the Mechanism proposed in Section V.

The World Bank Inspection Panel. The World Bank, through its Inspection Panel, was the first international institution to create a mechanism for affected citizens to request compliance with safeguard policies and procedures.⁹⁴ The Inspection Panel evaluates the Bank's performance against the Bank's operational policies and procedures. The Panel has no jurisdiction to review a complaint unless the project at issue in the complaint was financed in whole or part by either the International Bank for Reconstruction and Development ("IBRD") or the International Development Association ("IDA").⁹⁵

90. See IFC Performance Standards, *supra* note 5.

91. The six citizen-driven enforcement mechanisms at multilateral financial institutions include: (1) the World Bank Inspection Panel; (2) the International Finance Corporation's Compliance Advisor/Ombudsman; (3) the Asian Development Bank's Accountability Mechanism; (4) the InterAmerican Development Bank's Independent Investigation Mechanism; (5) the European Bank for Reconstruction and Development's Compliance Office; and (6) the African Development Bank's Independent Review Mechanism.

92. The mechanisms at the three bilateral financial institutions are: (1) the Japan Bank for Investment Cooperation's Examiner for Environmental Guidelines; (2) the Export Development Canada's Compliance Officer; and (3) the U.S. Overseas Private Investment Corporation's Office of Accountability.

93. See generally Bradlow, *supra* note 16 (providing an in-depth comparison of the IFI accountability mechanisms).

94. See Daniel Bradlow, *International Organizations and Private Complainants: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553, 553-554 (1994); David Hunter, *Perspective: Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People*, 4 CHI. J. INT'L L. 201, 201-11 (2003). For discussion of the Inspection Panel generally, see DANA CLARK ET AL., DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL (2003); IBRAHIM SHIHATA, THE WORLD BANK INSPECTION PANEL (2d ed., 2000); LORI UDALL, THE WORLD BANK INSPECTION PANEL: A THREE YEAR REVIEW (Bank Information Center, 1997); GUDMUNDUR ALFREDSSON & ROLF RING, EDs., THE INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE (2001); THE INSPECTION PANEL, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL TEN YEARS ON (2003).

95. The International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) are part of the World Bank Group. IBRD and IDA provide loans to support public-sector projects, and together IBRD and IDA are what most people refer to as the 'World Bank.' The primary difference between the IBRD and IDA is that IDA provides concessional or low-cost loans to the poorest countries (those having per capita annual income below \$1065 (in 2005 dollars)). The IBRD provides loans to other developing

The Panel is comprised of three permanent members, each of whom serves for five years. To ensure independence, Panel members cannot have served the Bank in any capacity for the two years preceding their selection, nor can they ever subsequently work for the Bank again. The Panel also has a permanent Secretariat with eight staff members.⁹⁶

Claims can be filed by any affected party or parties (other than a single individual) in the borrower's national territory.⁹⁷ Claims must be in writing and must explain how the affected parties' interests have been, or are likely to be, directly affected by "a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank."⁹⁸ The claimant must demonstrate that it has exhausted other remedies by first providing Bank staff a reasonable opportunity to respond to the allegations.

Upon receiving a complete request for inspection that is not clearly outside the scope of the Panel's authority,⁹⁹ the Panel registers the claim, notifies the claimant and the Board of Executive Directors, and forwards a copy of the claim to Bank Management, which has twenty-one days to respond.¹⁰⁰ The Panel then has an additional twenty-one days to review Management's response and to make a recommendation to the Board of Executive Directors regarding whether the claim warrants a full investigation.¹⁰¹

The Board of Executive Directors has exclusive authority to authorize or deny a full investigation. While this led to significant politicization of the Panel process in the first few years, the Board has supported every Panel recommenda-

countries and countries in economic transition at a near-market rate with longer repayment terms than commercial loans. The World Bank Group is also comprised of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA). The IFC and MIGA provide financial support to private sector projects in all developing countries or countries in economic transition. IFC makes loans and equity investments in private sector projects. MIGA provides insurance against political risks faced by private sector investments in developing countries (*i.e.*, risks from civil unrest or war). The World Bank Group also includes the International Center for the Settlement of Investment Disputes (ICSID), the leading international dispute resolution body for transnational investment disputes. *See generally* World Bank Website, <http://www.worldbank.org> (last visited Feb. 20, 2008).

96. For more information, see Inspection Panel website, <http://www.worldbank.org/inspectionpanel> (last visited Feb. 20, 2008).

97. Inspection Panel, *The Inspection Panel for the International Bank for Reconstruction and Development and International Development Association: Operating Procedures*, 34 I.L.M. 503, 527 (1995). The affected parties' local representative, the Bank's Board of Executive Directors, or, in some cases, any one Executive Director, are also eligible to file claims. Non-local representatives can represent affected parties only in "exceptional cases" where "appropriate representation is not locally available." *Id.*

98. *Id.*

99. *Id.* at 515 (Several types of complaints are explicitly beyond the Panel's jurisdiction, including complaints (i) addressing actions that are the responsibility of parties other than the Bank, (ii) relating to procurement decisions, (iii) filed after a loan's closing date or after 95 percent of the loan has been disbursed, or (iv) matters already heard by the Panel unless justified by new evidence.).

100. *Id.* at 522.

101. *Id.*

tion for an investigation since changes were made in 1999 after the Second Review of the Panel.¹⁰² Once an investigation is authorized, the Panel enjoys broad investigatory powers including access to all Bank staff. Members of the public may also provide the Panel with supplemental information relevant to the claim. After the investigation, the Panel issues a report evaluating the Bank's compliance with its policies. Within six weeks of receiving this report, Bank Management must submit a report to the Board of Executive Directors with recommendations in response to the Panel's findings. The Panel's Report, Management's response, and the Board's decision are publicly released two weeks after Board consideration.

As of November 13, 2007, the Inspection Panel had received forty-five formal requests for inspection and had registered all but six of them.¹⁰³ The Panel had found that the eligibility requirements were met and recommended an investigation in twenty-three claims, and the Board had approved investigations in eighteen of those requests.¹⁰⁴

As with the Mechanism proposed here, the Panel's power lies in the persuasiveness of its public reports and recommendations. While the process has the recognized flaw that those found in non-compliance (i.e., the Bank's management) are the very same as those charged with implementing the Panel's recommendations, pressure can build to implement the recommendations because of the costs to the institution's credibility and legitimacy when high-profile recommendations are not implemented.

The IFC's Compliance Advisor/Ombudsman (CAO). The CAO was created in 1999 to address complaints relating to the Group's private sector arms – the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) – neither of which is covered by the Inspection Panel. The CAO's office has both an advisory and compliance function, but it considers its ombudsman function as its primary and most important responsibility. The ombudsman function was designed to respond to complaints by persons who are affected by IFC/MIGA projects by “attempting to resolve fairly the issues raised,

102. See World Bank, *Conclusions of the Second Review of the World Bank Inspection Panel, April 20, 1999*, 39 I.L.M. 249, 250 (2000). Prior to the 1999 clarification, the Executive Directors frequently rejected the Panel's recommendations for an investigation, typically deciding instead to adopt 'action plans' that Bank Management had prepared in response to the claims. Although in some cases these action plans were responsive to the claimants' concerns, the Board's preemptive approval of the action plans meant that the claims were never fully evaluated, nor was implementation of the action plans adequately monitored. The claimants also never received their 'day in court' to have their allegations formally validated. See DANA L. CLARK, *A CITIZEN'S GUIDE TO THE WORLD BANK INSPECTION PANEL* 14 (2d ed. 1999) available at www.ciel.org/Publications/citizensguide.pdf; see also Mariarita Circi, *The World Bank Inspection Panel: Is It Really Effective?*, 6 GLOBAL JURIST ADVANCES 2006, at 8, available at <http://www.bepress.com/gj/advances/vol6/iss3/art10> (describing problems that the 1999 clarification attempted to solve).

103. See Inspection Panel, *Requests for Inspection*, <http://www.worldbank.org/inspectionpanel> (follow “Requests For Inspections” hyperlink) (last visited Feb. 20, 2008).

104. *Id.*

using a flexible, problem-solving approach.”¹⁰⁵

Any individual, group, community, entity, or other party affected or likely to be affected by the social or environmental impacts of an IFC or MIGA project may make a complaint to the ombudsman. Representatives of those affected by a project may also file a complaint with appropriate proof of representation.

The CAO acknowledges receipt of all complaints and evaluates whether the complaint falls within its mandate, and, if it does, whether to accept or reject the complaint. A complaint must demonstrate that the affected party has been, or is likely to be, affected by actual or potential social or environmental impacts on the ground. The complaint must relate to an aspect of the planning, implementation, or impact of an IFC or MIGA project. Complaints that are “malicious or trivial or that have been generated to gain competitive advantage” are not accepted.¹⁰⁶ The CAO also determines whether it thinks a problem-solving approach—for example facilitated dialogue, consultation, or mediation—could be effective in addressing the complainant’s concerns.

Once a complaint is accepted, the CAO immediately notifies the complainant, registers the complaint, refers the complaint to the relevant IFC or MIGA personnel with a request for information, and informs the project sponsor of the complaint. The CAO then undertakes an assessment to determine how it proposes to handle the complaint. During the assessment, the CAO will communicate with the claimant, the project sponsor, and the IFC to attempt to identify a process for resolving the dispute.

The CAO’s proposal may include anything from convening informal consultations with IFC/MIGA or the project sponsor to organizing a more formal mediation process. Overall, the ombudsman’s office seeks to take a proactive and flexible approach where the “aim is to identify problems, recommend practical remedial action and address systemic issues that have contributed to the problems, rather than to find fault.”¹⁰⁷ If at any time after completion of the assessment the CAO Ombudsman believes that resolution of the complaint is not possible, the complaint is automatically transferred to the compliance side of the CAO for an assessment of whether a compliance audit is warranted.¹⁰⁸

In both its ombudsman and compliance roles, the CAO has broad investigatory powers, including authority to review IFC or MIGA files; meet with the affected people, IFC or MIGA staff, project sponsors, and host country government officials; conduct project site visits; hold public meetings in the project area; request written submissions from any source; and engage expert consultants to

105. CAO, OPERATIONAL GUIDELINES 5 (April 2007), available at http://www.cao-ombudsman.org/html-english/documents/CAO_OpGuide_April07.pdf.

106. *Id.* at 15.

107. *Id.* at 11.

108. *Id.* at 15.

research or address specific issues.¹⁰⁹ Compliance audit findings are sent to senior IFC/MIGA staff for comment and ultimately to the President of the World Bank Group for review.

The CAO concludes the complaint process either when a settlement agreement has been reached through the ombudsman or when the IFC/MIGA are deemed to be in compliance with their policies. In this regard, the CAO will keep any compliance audit "open and monitor the situation" until it is satisfied that IFC/MIGA are moving back into compliance.¹¹⁰ The compliance audits and monitoring status of any projects under review are made public.¹¹¹

As of 2007, the CAO's ombudsman function had received 64 claims, involving 22 different projects.¹¹² Some of these claims, such as the complaint relating to the Newmont Corporation's Yanacocha gold mine in Peru, have resulted in long and complex involvement by the CAO. Other claims, such as a case involving one family's inadequate compensation for land lost to the construction of Chile's Panguue Dam, have involved relatively short interventions.¹¹³ The compliance side of the CAO has had less experience thus far. It had completed only four compliance reviews.¹¹⁴ Overall, the CAO is still too new to evaluate its ultimate effectiveness in meeting the aspirations of claimants, but it is certainly pioneering the use of dispute resolution methodologies for civil society complaints in the international context.

Both the Inspection Panel and the CAO are valuable for affected communities seeking to hold the World Bank Group accountable for the Bank's own safeguard policy violations. In an informal survey of claimants to the Panel, roughly half believed that filing a claim left them better off.¹¹⁵ An external review commissioned by the CAO's office found that a smaller percentage of claimants believed they had benefited from the CAO process.¹¹⁶ Some general conclusions can be drawn from the IFI accountability mechanisms regarding their effectiveness in enhancing IFI accountability to project-affected communities:

109. *Id.* at 16.

110. *Id.* at 33.

111. *Id.* at 25-26.

112. The Office of the Compliance Advisor/Ombudsman, 2006-2007 Annual Report, at 16, *available at* http://www.cao-ombudsman.org/documents/CAO_AR0607_Eng.pdf.

113. All of the cases brought to the CAO can be reviewed in the archive at the CAO's website at <http://www.cao-ombudsman.org/html-english/archive.htm>.

114. *See* Compliance Advisor Ombudsman, Compliance, <http://www.cao-ombudsman.org/html-english/compliance.htm> (last visited Feb. 15, 2008).

115. *See* DANA CLARK, ET AL., *supra* note 94, at 266-69.

116. *See* CAO, Report on the Activities of the IFC/MIGA Compliance Advisor/Ombudsman, June 2005-May 2006, *available at* <http://www.cao-ombudsman.org/html-english/documents/CAOAnnualReport2005-06English.pdf>.

- (1) the IFI accountability mechanisms demonstrate that citizen-based fact-finding and compliance monitoring mechanisms can operate effectively in the context of international projects;
- (2) the IFI accountability mechanisms are reliant on support from the financial institution to conduct investigations, report results, and to have their recommendations adopted; such support is typically politicized by the member states represented by Executive Directors;
- (3) the IFI accountability mechanisms are weakened by a lack of clear authority to monitor implementation of their recommendations;¹¹⁷ and
- (4) the mechanisms typically do not directly address the role of MNEs, being focused instead on the compliance of the IFIs, and the mechanisms do not apply to projects where no IFI funding is involved.

B. THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Because most foreign direct investment in developing countries involves MNEs or financing institutions from the thirty developed countries that are members of the OECD, the OECD is a potentially important source of standard setting and enforcement.¹¹⁸ The OECD member nations adopted revised Guidelines for Multinational Enterprises in 2000, which apply as “recommendations” to the thirty member countries of the OECD as well as six non-member, “adhering countries.”¹¹⁹ The Guidelines set benchmarks for the conduct of MNEs that operate from or within these countries. The Guidelines cover issues such as human rights, information disclosure, employment and industrial relations, environment, bribery, and consumer protection.¹²⁰

Implementation of the Guidelines rests with National Contact Points (“NCPs”) identified in each of the member and adhering countries’ national governments. The NCPs are “responsible for encouraging observance of the Guidelines in a national context and for ensuring that the Guidelines are well known and understood by the national business community and by other interested parties.”¹²¹ NCPs are also charged with handling enquiries and “solving problems

117. *But see* Asian Development Bank, Administrative Procedures for the Compliance Review Panel and the Office of the Compliance Review Panel, ¶¶ 54-56 (2004), available at [http://www.compliance.adb.org/dir0035p.nsf/attachments/Final%20Admin%20Procedures.pdf/\\$FILE/Final%20Admin%20Procedures.pdf](http://www.compliance.adb.org/dir0035p.nsf/attachments/Final%20Admin%20Procedures.pdf/$FILE/Final%20Admin%20Procedures.pdf) (authorizing the Compliance Review Panel to monitor implementation).

118. *See generally*, Organization for Economic Co-operation and Development, <http://www.oecd.org> (last visited Mar. 25, 2008).

119. The OECD Guidelines, *supra* note at 2; *see also* OECD, The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts, DAF/IME (2000)20, at 25-26, available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

120. *See generally* OECD Guidelines, *supra* note 2.

121. National Contact Points for the OECD Guidelines for Multinational Enterprises, http://www.oecd.org/document/60/0,2340,en_2649_34889_1933116_1_1_1_1,00.html (last visited Feb. 20, 2008) [hereinafter NCP Website]. The NCP for the United States is the Office of Investment Affairs at the Department of State. *See also* OECD Guidelines, *supra* note 2, at 35.

that may arise in this connection.”¹²² Even though they are given no enforcement authority, when “issues arise concerning implementation of the Guidelines in relation to specific instances of business conduct, the NCP is expected to help resolve them.”¹²³

Any interested party who believes the Guidelines have been violated or has a complaint about “specific instances of business conduct” may request consultations with the NCP.¹²⁴ The NCP offers its “good offices” to the parties to come to a negotiated agreement through non-adversarial methods such as conciliation or mediation.¹²⁵ If these discussions do not resolve the issue between the parties, the NCP issues a statement with recommendations regarding how the Guidelines should be implemented. If the NCP has a question about interpretation of the scope, meaning, or implementation of the Guidelines, the OECD’s Committee on International Investment and Multinational Enterprises (“CIME”) resolves the issue.¹²⁶ Even though NGOs do not formally have access to the CIME procedure, in practice they are invited to the meetings, and they do ask questions of interpretation.

As of June 2005, there had been 106 requests to NCPs to consider specific instances of conduct, “of which 71 were taken up.”¹²⁷ The outcomes of “concluded” requests seem to vary widely.¹²⁸ Lack of transparency in the process and the outcomes themselves are obvious barriers to fully understanding the value of the NCP process,¹²⁹ but some insights can still be gained.

Some outcomes indicate that the Guidelines can have a productive and positive impact on the activities of MNEs. One example is a case filed in 2005 by the NGO Forum for Environment and Development (ForUM) against a Norwegian company through the Norwegian NCP. The complaint argued that the company had breached Chapter 2, § 2 of the OECD Guidelines by contributing to the Guantanamo Bay, Cuba prison system that abused international and human rights law. The NCP held meetings with the NGO and the company. After the meetings, the company pulled out of the Guantanamo Bay project, although it cited losing a

122. NCP Website, *supra* note 121.

123. *Id.*

124. *Id.*

125. OECD Guidelines, *supra* note 2, at 36.

126. *Id.* at 36-37.

127. OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES: 2005 ANNUAL MEETING OF THE NATIONAL CONTACT POINTS, REPORT BY THE CHAIR 4, available at <http://www.oecd.org/dataoecd/20/13/35387363.pdf> (last visited Jan. 12, 2008).

128. See Ruggie Working Paper No. 38, *supra* note 13, at 22.

129. The functioning of the OECD NCP process has been criticized for failing to follow transparent and regularized procedures. See, e.g., OECD WATCH NEWSL., (Org. Econ. Coop. Dev., Paris, Fr.) Apr. 2007, at 7-8 (noting such criticism in the Netherlands, Germany and the United Kingdom). For an endorsement of the NCP process as it could operate in theory, see Heather Bowman, *If I Had A Hammer: The OECD Guidelines For Multinational Enterprises As Another Tool To Protect Indigenous Rights To Land*, 15 PAC. RIM L. & POL'Y 703 (2006) (arguing that the structure of the NCP process is well placed to prevent harm and provide a forum for the disenfranchised to have voice in disputes with MNEs).

bid as the official reason.¹³⁰

Unfortunately, in other cases NCPs have appeared to act arbitrarily and without transparency. For example, two NGOs, Rights and Democracy and L'Entraide Missionnaire, filed a complaint in 2005 against Canadian Anvil Mining Corporation to the Canadian NCP. The complaint concerned the October 2004 massacre of 100 people in the town of Kilwa in the Congo. The NGOs submitted evidence obtained from the company purporting to demonstrate its involvement in logistical support to the Congolese military who carried out the massacre. The company denied the allegations. The NCP rejected the NGOs' complaint in 2005 without explanation, stating that they were "not able to carry out investigations of the type requested by the complainants."¹³¹

In another example, the NGO Centro de Derechos Humanos y Ambiente ("CEDHA") complained to the Finnish NCP regarding the Finnish company S.A./Mestä-Botina's alleged breaches of the OECD Guidelines associated with their pulp mill project on the Argentine-Uruguayan border. The Finnish NCP closed the complaint in December 2006, eight months after the complaint was filed. The NCP report found that the "evidence presented does not prove that Botnia S.A has failed to comply with the OECD Guidelines."¹³² According to CEDHA, the Finnish NCP failed to properly investigate the alleged violations of the OECD Guidelines. CEDHA argues that the NCP cited CEDHA's complaint erroneously in their report, the NCP's findings conflicted with findings of the IFC's Compliance Advisor/Ombudsman (CAO), and the NCP held just one meeting with CEDHA and Botnia in which both parties offered to continue the dialogue further; however, the NCP closed the inquiry without giving the parties such an opportunity.¹³³

The OECD Guidelines are a step in the right direction in terms of setting minimal standards for MNE conduct, but the NCP process for evaluating complaints lacks transparency and consistency across the NCPs.¹³⁴ Moreover, an NCP's authority is limited to inquiring into violations of the relatively general OECD Guidelines; it has no authority to inquire into violations of any other

130. See OECD WATCH NEWSL. (Org. Econ. Coop. Dev., Paris, Fr.) June 2006, at 2, available at http://www.oecdwatch.org/docs/OW_newsletter_june2006_EN.pdf (last visited Jan. 12, 2008).

131. *Id.*

132. Finland's National Contact Point's Statement On The Specific Instance Submitted By CEDHA, An Argentine Non-Governmental Organisation, Regarding Botnia S.A./Metsä-Botnia Oy's Pulp Mill Project In Uruguay, Dec. 21, 2006 at 6, available at http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/botnia_muist.doc.

133. Letter from Center for Human Rights and Environment (CEDHA) to Manfred Schekulin, Chair, OECD Investment Committee, Jan. 12, 2007, available at http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/oecd-invest.pdf.

134. See e.g., OECD WATCH NEWSL., (Org. Econ. Coop. Dev., Paris, Fr.) Apr. 2007 (describing differences in process and outcomes among NCPs); OECD WATCH, MODEL NATIONAL CONTACT POINT at 5 (2007), available at http://www.oecdwatch.org/docs/OECD_Watch_Model_NCP_Final.pdf (describing divergent standards as impetus for Model NCP project).

environmental or social standards. At most, the NCP is authorized to issue a report of findings, which could in turn be used by civil society to 'name and shame' outside the NCP process if violations are found.

C. PERMANENT COURT OF ARBITRATION AND RECONCILIATION ENVIRONMENTAL RULES

The Permanent Court of Arbitration ("PCA") is another structure that may resolve international environmental disputes. The PCA is a forum for arbitration born out of the Hague Conventions of 1899 and 1907.¹³⁵ Currently, 106 States are parties to one or both of the Conventions.¹³⁶ In 2001, the PCA adopted Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources. In 2002, the PCA adopted the Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment. Together, the Environmental Rules¹³⁷ form dispute-resolution policies that may be used, *inter alia*, for disputes between parties to multilateral environmental agreements or between private parties, should they choose to use them.¹³⁸ Although the PCA could in theory be used for a citizen-driven environmental or social arbitration against an MNE, no community has yet used it. This is probably due to a combination of a lack of information about the PCA, a lack of any normative framework within which to conduct the arbitration, and the asymmetric power and resources that leave a community unable to advance an arbitration proceeding effectively. Moreover, although the PCA has a flexible fee schedule to pay for its services, a project-affected community would still be unlikely to have the resources necessary to bring an MNE to an arbitration forum such as the PCA.

D. PROJECT-SPECIFIC COMPLIANCE PANELS

As further evidence of the need for the Mechanism proposed here, some projects that have come under criticism for their alleged social and environmental policy violations have developed their own project-specific mechanisms to address compliance. British Petroleum, one of the investors in the Baku-Tbilisi-

135. See The Hague Convention for the Pacific Settlement of International Disputes of 1899, 1 Bevens 230; 1 AJIL 103 (1907); The Hague Convention for the Pacific Settlement of International Disputes of 1907, 1 Bevens 577; 2 AJIL Supp. 43 (1908).

136. See Permanent Court of Arbitration, <http://www.pca-cpa.org>.

137. See Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (approved June 19th, 2001 by the Administrative Council) [hereinafter Arbitration Rules], available at http://www.pca-cpa.org/showfile.asp?fil_id=590; Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment (approved April 16th, 2002 by the Administrative Council) [hereinafter Conciliation Rules], available at http://www.pca-cpa.org/showfile.asp?fil_id=589.

138. See Arbitration Rules at 183; Conciliation Rules at 213 ("The Rules, and the services of the Secretary-General and the International Bureau of the PCA, are available for use by private parties, other entities existing under national or international law, international organizations, and States.").

Ceyhan (“BTC”) oil pipeline project,¹³⁹ initiated the Caspian Development Advisory Panel in 2003. According to the Panel’s Terms of Reference, the Panel is charged with multiple functions, including assessing BP’s “plans to manage the environmental, social and economic impacts of [the project],” recommending improvement, examination and appraisal of BP’s “policies regarding the [project]” and its impacts, and advice on the “appropriate focus of social and community activities to enable BP and its partners to make a positive difference to the economies and societies of Azerbaijan, Georgia and Turkey.”¹⁴⁰ While BP did create a mechanism for reviewing the BTC project, the Panel does not accept claims from communities affected by the BTC project.

The demand for project-specific mechanisms may also increase significantly in the next few years. Both the IFC and the so-called “Equator Principle” commercial banks now require their clients in projects with significant environmental and social impacts to create a “grievance mechanism” to address the affected community’s environmental and social concerns.¹⁴¹ The Mechanism proposed here can help meet many of those requirements cost-effectively while also building credibility for the MNE and enhancing its social license to operate.¹⁴²

E. NGO INITIATIVES SUCH AS THE INTERNATIONAL OMBUDSMAN CENTRE FOR THE ENVIRONMENT AND DEVELOPMENT

The International Ombudsman Centre for the Environment and Development, known as “OmCED,” was created in 2000 by two NGOs: the Earth Council and the World Conservation Union (IUCN). The mission of OmCED was to prevent and mediate conflict arising from international disputes over the environment, natural resources and sustainable development. According to Caroline Rees, a Research Fellow at Harvard’s Kennedy School of Government, OmCED was to be located on the campus of the U. N. University for Peace. However, there is little trace of the Center ever having become operative, apparently because of a lack of funding.¹⁴³ Like the Permanent Court of Arbitration, OmCED was not

139. See *infra* Section II(A).

140. Caspian Development Advisory Panel Terms of Reference, <http://www.caspsea.com/terms.html> (last visited Feb. 15, 2008).

141. IFC Performance Standards, *supra* note 5, Performance Standard 1, ¶ 23 (providing that “if the client anticipates ongoing risks to or adverse impacts on affected communities, the client will establish a grievance mechanism to receive and facilitate resolution of the affected communities’ concerns and grievances about the client’s environmental and social performance.”); Equator Principles II, *supra* note 6, at Principle 6.

142. The IFC’s requirement for a community-based grievance mechanism is meant to act at the local level and be available for day-to-day concerns as well as more general concerns. However, to avoid such mechanisms becoming mere public relations exercises for the project, cases of more serious allegations should be brought to an independent fact-finder like that proposed here. See *infra* Section V. Thus, the Mechanism would not *replace* locally-based grievance mechanisms, but would serve as an *additional* layer of accountability to address serious grievances or when the local mechanism has allegedly failed.

143. Interview with Caroline Rees, November 12, 2007 (on file with author).

designed to address the inherent imbalance between communities and MNEs that makes arbitration a relatively ineffective option for the communities. Moreover, OmCED was tied to a normative framework—the Earth Charter—which is not widely accepted either by MNEs or communities as being a meaningful framework for evaluating project-level performance. OmCED's design flaws and the fact that it was never funded, let alone operational, serve as a warning to the design of future mechanisms.

IV. THE NEED FOR A NEW FOREIGN INVESTMENT ACCOUNTABILITY MECHANISM

Although the existence of the mechanisms described above generally confirms a demand for such mechanisms, the available mechanisms and forums do not provide sufficient avenues for affected people to hold MNEs accountable to applicable environmental and social standards and norms. Existing mechanisms are either not citizen-driven, are narrowly tied to a specific institution or a set of norms not widely accepted by communities, or are not established primarily for compliance monitoring. The following section offers additional justifications for a new Mechanism.

A. LOCALLY-AFFECTED PEOPLE BEAR ENVIRONMENTAL AND SOCIAL BURDENS OF FOREIGN DIRECT INVESTMENT, WITHOUT ACCESS TO JUSTICE

Locally-affected communities and their international allies frequently have evidence of significant environmental and social damage on the one hand, and company commitments to certain environmental and social standards on the other—with few ways of enlisting an independent outsider to evaluate whether the non-compliance caused the damage. Thus, for example, in the recent conflict over two pulp and paper mills in Uruguay, the Argentine NGO CEDHA found evidence of violations of the Equator Principles, but it had no mechanism through which to seek accountability of either of the two Equator Principle banks that had financed the project. CEDHA resorted to sending a public letter detailing the violations to the two banks.¹⁴⁴

B. MNES NEED TO INCREASE CREDIBILITY, AND DEMONSTRATE COMPLIANCE BY THEMSELVES AND OTHERS TO MEET REQUIREMENTS

1. Companies Would Benefit from a Credible and Independent Method for Objective Fact-Finding

Less than two decades ago, MNEs operating in remote developing country

144. Press Release, Centro de Derechos Humanos y Ambiente, CEDHA Files Equator Principles Compliance Complaint to ING On Pulp Paper Projects in Uruguay (Dec. 9, 2005) *available at* http://www.cedha.org.ar/en/more_information/cedha-compliance-complaint-ing.php. One of the banks subsequently withdrew support for the project, while the other chose to continue with the project.

communities could do so without concern that their operations would be exposed to international scrutiny. The rise of transnational NGO advocacy networks has brought an increase in the potency and effectiveness of international campaigns to spotlight MNE activities in developing countries. As Peter Spiro recently noted, “[c]orporations understand that they ignore NGOs at their peril.”¹⁴⁵

NGO networks build alliances with locally-affected people that allow them to tell their stories to the international community. These NGO networks also frequently put their criticisms in the context of violations of various international environmental and social standards and norms. For example, CEDHA, in addition to documenting violations of the Equator Principles as described above, cited violations of IFC’s environmental safeguard policies, the OECD Multinational Guidelines, and the OECD Common Approaches to Environmental Standards for Export Credit Agencies.¹⁴⁶

MNE objects of such international campaigns pay close attention to their impact, if for no other reason than to protect their reputations. For example, at an October 2007 seminar on sustainable finance sponsored by HSBC Mexico, UNEP Finance Initiative, and the Mexican Government’s National Ecological Institute, a presenter from ABN AMRO showed photos of protesters and NGO campaign ads in her presentation while making the point that “informal regulators”—NGOs and civil society—are requiring compliance with voluntary standards such as the Equator Principles. ABN AMRO views compliance with these standards as essential to risk management.¹⁴⁷ Similarly, a presenter from Rabobank displayed NGO campaign ads as evidence of the need for compliance with norms and standards as essential to risk management for a bank whose “reputation is everything!”¹⁴⁸

In the polarized atmosphere that can exist in local community-versus-MNE conflicts,¹⁴⁹ MNEs also can suffer from having no credible mechanism to

145. Spiro, *supra* note 11, at 26.

146. See, e.g., CEDHA, Paper Pulp Mills – Uruguay, http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/ (last visited Feb. 20, 2008) (collecting CEDHA press releases and other documents). Similarly, NGO advocates have cited the Baku-Tbilisi-Ceyhan pipeline for violations of IFC’s environmental and social safeguard policies, the OECD Common Approaches, the environmental standards of the UK Export Credits Guarantee Department, and of the European Union. See Baku-Ceyhan campaign, Legal Documents, <http://www.bakuceyhan.org.uk/legal.htm> (last visited Feb. 20, 2008).

147. See Cris Ronza, Banco Real, ABN AMRO, *Análisis de Riesgo en Procesos Crediticios en Latinoamérica* at 2, 4, 6 (presented October 4, 2007 in Mexico City, Mexico) (on file with author).

148. See Daniela Mariuzzo, Rabobank Brasil S. A., *Gestión del riesgo socioambiental del crédito para los sectores agrícola y de alimentos* at 8-9, 11 (presented October 4, 2007 in Mexico City, Mexico) (on file with author).

149. See, e.g., Bretton Woods Project, *IFC-funded goldmine shut down by local protest*, Update 43, Nov. 22, 2004, available at <http://www.brettonwoodsproject.org/art.shtml?x=83034> (“Following two weeks of protests and road blocks that shut down the city of Cajamarca in September, Peruvian minister of energy and mines Jaime Quijandría Salmon withdrew the Newmont Mining Company’s permit for mining on Mount Quilish. The Yanacocha gold mine, which is the largest in Latin America is operated by Newmont Mining Company and receives 5 per cent of its funding from the International Finance Corporation (IFC) [. . .] Local people intend to

investigate allegations of violations of human rights and environmental standards. Just as NGOs have no regular mechanism of holding MNEs accountable for such violations, MNEs have no formal way of combating such criticism when they feel it is unjustified. At times, MNEs have launched their own investigations; for example, BP created an independent panel to investigate environmental and human rights issues surrounding the BTC pipeline,¹⁵⁰ and Barrick Gold hired an independent lawyer from a leading Canadian firm to investigate allegations of Tanzanian miners being buried alive.¹⁵¹ The problem for an MNE is that any mechanism it creates and finances in response to a controversy will have little credibility with outside critics.

Creating the new Mechanism proposed here would allow MNEs to use a forum that is more independent and thus credible for an objective investigation and factual response to the allegations against them. MNEs could use the results of the fact-finding process as the basis for future dialogue and communication with the community. Where allegations are found to be true, the MNE can act proactively to address the situation; where the allegations are determined to be false, a credible fact-finder's report will effectively prevent the allegations from gaining further momentum in the international community.¹⁵² In all cases, MNEs would benefit from a new Mechanism to investigate and address allegations of violations of environmental and social standards and norms.

2. Some Financial Institutions Need a Mechanism to Demonstrate their Compliance and the Compliance of their Borrowers

Although the multilateral development banks have all created mechanisms for affected people to raise issues of non-compliance, other financial institutions have enacted environmental and social standards with limited internal capacity and no external mechanism for ensuring compliance. These include most notably the so-called "Equator Banks" (i.e., commercial banks that have signed on to the Equator Principles),¹⁵³ most Export Credit Agencies that have adopted environ-

resume their protest if Mount Quilish is not declared a mining-free area within the next two months."); *see also* Lawyers' Environmental Action Team (LEAT), *Bulyanhulu Gold Mine*, <http://www.lead.or.tz/activities/buly/> (last visited Feb. 15, 2008) (alleging that the Tanzanian Police and the Kahama Mining Corporation, Ltd., forcibly evicted up to 400,000 small-scale miners from their mines in 1996 to make way for the Bulyanhulu mine in Tanzania and in the process buried sixty-five miners alive).

150. *See infra* Section III(D).

151. *See* Barrick Gold Corporation, Independent Report at Bulyanhulu, <http://www.barrick.com/CorporateResponsibility/KeyTopics/IndependentReport/default.aspx> (last visited Feb. 15, 2008).

152. Although such a report may not completely prevent project critics from continuing its allegations, a credible fact-finder's report will reduce the likelihood that the allegations will garner the support of the transnational advocacy networks.

153. *See* Equator Principles Website, <http://www.equator-principles.com> (providing a current listing of banks that have signed on to the Equator Principles). In addition to the NGO CEDHA's attempt to raise Equator Bank non-compliance in the case of the pulp mills investment in Uruguay, discussed above in Section IV(A), Credit Suisse First Boston's support of the environmentally controversial Sakhalin II project in Russia also

mental and social standards to implement the OECD Common Approaches,¹⁵⁴ and the European Investment Bank.¹⁵⁵ These institutions still face persistent criticism that the principles they have adopted mean little if they are not subject to outside monitoring and accountability.¹⁵⁶ The proposed Mechanism could provide a means to ensure such outside monitoring and accountability.

3. MNEs Could Use the Mechanism for Ensuring Compliance by their Subsidiaries and Supply Chains

Many environmental and social standards and norms now require compliance by suppliers.¹⁵⁷ In addition, most MNEs have far flung subsidiaries that are subject to corporate-wide environmental and social policies.¹⁵⁸ The proposed Mechanism could be a cost-effective way for MNEs to gain objective evaluations of the compliance of their suppliers and subsidiaries with all applicable environmental and social standards and norms. For example, the Mechanism could be particularly useful for MNEs that have subscribed to voluntary industry-specific¹⁵⁹ and supply chain labor standards, such as SA8000,¹⁶⁰ and would benefit from a way to demonstrate compliance with these standards. Even if the Mechanism were not directly available to an individual MNE, the Mechanism's reports filed in response to community concerns would be useful for improving environmental management among the MNE's subsidiaries and for enforcing standards through the supply chain.

illustrates the need for a mechanism to address allegations of non-compliance. See Andrew Hardenbrook, *The Equator Principles: The Private Financial Sector's Attempt at Environmental Responsibility*, 40 VAND. J. TRANSNAT'L L. 197, 215-218 (2007).

154. See 2007 Common Environmental Approaches for ECAs, *supra* note 22.

155. The European Investment Bank, *Environmental Procedures*, available at http://www.eib.org/Attachments/strategies/envirproc_en.pdf.

156. See, e.g., Hardenbrook, *supra* note 153, at 215-218; Bank Information Center, European Investment Bank in Africa: Lack of accountability and transparency, <http://www.bicusa.org/en/Institution.Policies.18.aspx> (last visited Feb. 15, 2008).

157. See, e.g., IFC Performance Standards, *supra* note 5, Performance Standard 1, ¶ 6 ("Where relevant, the Assessment will also consider the role and capacity of third parties (such as local and national governments, contractors and suppliers), to the extent that they pose a risk to the project, recognizing that the client should address these risks and impacts commensurate to the client's control and influence over the third party actions.").

158. See, e.g., International Council of Toy Industries, Code of Business Practices, <http://www.icti-care.org/resources/codeofbusinesspractices.html> (last visited Feb. 15, 2008); see also Fair Labor Association, Third Party Complaint system, <http://www.fairlabor.org/about/complaints> (last visited Feb. 15, 2008).

159. See, e.g., International Council of Toy Industries standards or the Fair Labor Association standards cited *supra* note 158.

160. See Social Accountability International, *Overview of SA8000*, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageID=473> (last visited Feb. 15, 2008).

4. The Proposed Mechanism Would Help MNEs to Meet New Requirements for Community-Based Grievance Mechanisms

Increasingly, environmental management systems are expected to include grievance mechanisms to enable local communities to raise project-related concerns. This practice is now required in certain projects financed by the IFC or the Equator Banks.¹⁶¹ In April 2006, IFC launched its new Environmental and Social Performance Standards, which include the following grievance mechanism requirement:

If the client anticipates ongoing risks to or adverse impacts on affected communities, the client will establish a grievance mechanism to receive and facilitate resolution of the affected communities' concerns and grievances about the client's environmental and social performance. The grievance mechanism . . . should address concerns promptly, using an understandable and transparent process that is culturally appropriate and readily accessible to all segments of the affected communities, and at no cost and without retribution. The mechanism should not impede access to judicial or administrative remedies. The client will inform the affected communities about the mechanism in the course of its community engagement process.¹⁶²

The revised Equator Principles mirror the IFC's requirement to establish a grievance mechanism in projects with significant environmental or social impacts.¹⁶³ While this is a positive step for potentially enhancing accountability toward affected communities, it will present significant challenges to MNEs operating in developing countries. MNEs will be tempted to make the grievance mechanism an arm of their community outreach program, where it might have a promotional, rather than objective, nature. For the reasons discussed above regarding company-sponsored accountability mechanisms,¹⁶⁴ MNEs will have to be sensitive to issues of credibility and independence in establishing grievance mechanisms. MNEs face a tension: for many types of simple and more common community concerns, an informal and integrated grievance mechanism that can respond quickly and informally at the local level is ideal, but for the more complex and controversial issues, an in-house grievance mechanism may never enjoy the credibility required to help the MNE build trust with the community. An in-house grievance mechanism, or one established by the MNE for the specific project, will be viewed as a captured agency and will have little chance of

161. See IFC Performance Standards, *supra* note 5, Performance Standard 1, ¶ 23; The Equator Principles, *supra* note 6, at Principle 6.

162. See IFC Performance Standards, *supra* note 5, Performance Standard 1, ¶ 23.

163. See The Equator Principles, *supra* note 6, at Principle 6. The Equator Principles' Principle 6 Grievance Mechanism applies to "all Category A and, as appropriate, Category B projects located in non-OECD countries, and those located in OECD countries not designated as High-Income, as defined by the World Bank Development Indicators Database." *Id.*

164. See *infra* Section III (D).

channeling or calming community dissent.

When the concerns relate to more serious, widespread, or contentious allegations of non-compliance or allegations that the in-house mechanism is not working, the MNE and the community will benefit from having access to an independent fact-finder that can provide a credible factual background for future community dialogue. This article's proposed Mechanism would provide this service to the MNE and thus become an important component of an MNE's compliance with the IFC's and Equator Principle's grievance mechanism requirements. Such an "uncaptured" accountability mechanism would also be more cost-effective because start-up and overhead costs would be shared among a wide range of entities and MNEs would only be responsible for the costs of specific investigations.

V. PROPOSED DESIGN AND FUNCTION OF A NEW FOREIGN INVESTMENT ACCOUNTABILITY MECHANISM

The following section provides a brief summary of the potential design for the new Mechanism. The proposal is not developed in detail, but the general outlines of the Mechanism are provided to spark discussion.

A. PURPOSE OF THE NEW MECHANISM

The proposed Mechanism's primary purpose would be to investigate and report publicly on concerns raised by locally-affected people that projects are not meeting applicable environmental and social standards and norms. The Mechanism would provide communities with an opportunity to be heard and would provide access to an impartial fact-finder charged with evaluating on-the-ground reality against the framework of applicable environmental and social standards and norms. The new Mechanism proposed here would be a tool for determining compliance, not a mediation or arbitration mechanism.

Because the Mechanism would not be associated with any one institution or be charged with enforcing any one specific set of standards or norms, the Mechanism could also serve as an accountability clearinghouse. International standard setters or norm creators—for example, the Equator Banks or various export credit agencies that currently have no compliance mechanism—could include new provisions in their enabling resolutions referring compliance complaints to the Mechanism and, more importantly, requiring project sponsors to accede to the Mechanism's jurisdiction as a condition of funding.

Additionally, bodies that already have complaint mechanisms could use the new Mechanism as an appellate body or as a resource for assisting in carrying out their own investigations. For example, an NCP charged with responding to complaints regarding the OECD Guidelines for Multinational Enterprises could delegate the factual investigation to the Mechanism.

Among the institutions or organizations (and their associated norms) that could benefit from having a compliance mechanism are:

- Commercial banks committed to following the Equator Principles;¹⁶⁵
- Export credit and insurance agencies committed to adopting environmental policies under the OECD Common Approaches;¹⁶⁶
- National Contact Points tasked with responding to complaints of non-compliance with the OECD Guidelines for Multinational Enterprises;¹⁶⁷
- Corporations committed to implementing corporate-wide sustainable development policies for their operations and those of their suppliers;¹⁶⁸ and
- Corporations required to establish a grievance mechanism to receive funding from the IFC or other financial institutions.¹⁶⁹

Moreover, as noted below, the scope of the standards and norms that could form the framework for the Mechanism's operations would be tailored to each specific project, reflecting all environmental and social norms to which it has committed in the context of a specific project.¹⁷⁰ Where a company has committed to other frameworks, for example: the Voluntary Principles on Peace and Security,¹⁷¹ the Extractive Industry Transparency Initiative,¹⁷² the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises,¹⁷³ or the UN Global Compact,¹⁷⁴ the frameworks would become part of the terms of reference for any investigation.

Another positive byproduct of the Mechanism is that the membership of MNEs, interested NGOs, and the staff and consultants active in the Mechanism will over time strengthen an emerging epistemic community of experts in implementing social and environmental standards and norms.¹⁷⁵ This epistemic community will facilitate information sharing that, in turn, will lead to a more harmonized and consistent application of the standards and norms across and

165. See The Equator Principles and current listing of Equator Principle Financial Institutions (EPFIs) at the Equator Principles Website, *supra* note 6.

166. See OECD Common Approaches, *supra* note 2.

167. See OECD Guidelines, *supra* note 2.

168. See, e.g., Rio Tinto Policies, *supra* note 8.

169. See *supra* text accompanying note 8.

170. In addition to the standards and norms discussed *infra*, see generally Bunn, *supra* note 32.

171. See Voluntary Principles, *supra* note 9.

172. See Extractive Industry Transparency Initiative, <http://www.eitransparency.org> (last visited Feb. 15, 2008).

173. International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (4th ed. 2006), available at <http://www.ilo.org/public/english/employment/multi/download/declaration2006.pdf>.

174. See United Nations Global Compact, July 26, 2000, <http://www.unglobalcompact.org> (last visited Feb. 15, 2008).

175. On the value of epistemic communities, see Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992) (defining epistemic communities as "networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area").

within industry sectors. Participating MNEs will gain access to consultants and others who are identifying and promoting best practices in the field, which will serve as a foundation for building on other benefits and alliances with knowledge-based institutions.

B. PRINCIPLES

The proposed new Mechanism would be based on and judged against the following principles:

- a) Independence—the Mechanism would avoid undue influence from MNEs, states, NGOs, or complainants; potential panelists would be screened and rejected if they have been involved in self-dealing or nepotism; panelists would recuse themselves if there is an actual or potential conflict-of-interest;
- b) Transparency—the Mechanism would allow public comment and participation in rule-making; through clear, demonstrable, and publicly available rules of procedure, the new Mechanism would make public its methods of investigation, factual findings, non-confidential party submissions, and reports via a website and documents publicly available at the Secretariat; the Mechanism would make efforts to bring public awareness to its existence and operations;
- c) Fairness and objectivity—the Mechanism would be required to give equal weight to the arguments of all sides before conducting an independent and impartial investigation;
- d) Professionalism—the Mechanism’s panel members and secretariat would be expected to comport with the highest standards of objectivity, ethics and professionalism; the Mechanism would be able to hire consultants to bring specific expertise when needed;
- e) Accessibility—the Mechanism will maintain open communications lines and provide information in languages and formats that maximize access to affected people; and
- f) Effectiveness—the Mechanism should be evaluated against its effectiveness in objectively evaluating claims from affected communities and in communicating those findings back to the community, the relevant MNE, and the public.¹⁷⁶

176. See, e.g., ASIAN DEVELOPMENT BANK, REVIEW OF THE INSPECTION FUNCTION: ESTABLISHMENT OF A NEW ADB ACCOUNTABILITY MECHANISM, para. 58 (2003) available at http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp (declaring that its mechanism should be responsive to project-affected people, fair to all stakeholders, professional, independent, transparent, cost-effective and efficient) [hereinafter ADB Review]; BankTrack, *supra* note 30 at 42 (proposing an accountability mechanism for the Equator Banks should be independent, transparent, accessible, fair, objective and effective); David Hunter & Natalie Bridgeman, Working Discussion Paper on a Proposed EIB Accountability Mechanism (Jan. 3, 2007), available at http://www.bankwatch.org/right_to_appeal/background/hunter_bridgeman_bp.pdf (last visited Jan. 12, 2008) (proposing that any mechanism at the European Investment Bank ought to be transparent, independent, effective, and accessible). See generally, Daniel C. Esty, *Good Governance at the Supranational*

C. LOCATION OR INSTITUTIONAL HOME

The proposed Mechanism would be set up as an NGO independent of national and international governments. By remaining independent, unlike the World Bank Inspection Panel or the IFC Compliance Advisor/Ombudsman, the Mechanism will not be politically constrained by recalcitrant governments or international organizations. Moreover, the jurisdictional scope of the Mechanism will not be tied to any institution's jurisdictional constraints – for example, whether an MNE has financial support from a particular institution.

D. APPLICABLE NORMATIVE FRAMEWORK

A novel feature of the proposed Mechanism is that the normative framework that will be applied to each case will be project-specific – the Mechanism will review compliance against whatever standards and norms apply to the specific project. Thus, if a claim is brought by project-affected people in India against a Canadian company for alleged environmental violations associated with a mining project, the Mechanism will first identify the sets of norms or standards that apply to the specific project. These would include any Indian national and subnational law, Canadian extraterritorial law, international law applicable to the project; corporate environmental or social policies of the MNE; voluntary sectoral standards adopted by the MNE; and standards attached to the project's financing (for example, the IFC's Environmental and Social Performance Standards if there is IFC financing, the Equator Principle standards if an Equator bank is involved, or Export Development Canada's environmental policies if it is providing export credits). Because the company in the example is Canadian and Canada is a member of the OECD, the OECD Guidelines for Multinational Enterprises would apply as well. Finally, any project-specific promises the company made to local officials or community leaders in order to obtain the consent to operate would also be incorporated into the normative framework against which the project's compliance will be measured.

Under this approach no single set of international standards needs to be identified or endorsed in advance for the Mechanism to operate. Thus, governments, MNEs, communities, and other stakeholders do not have to reach consensus on a broad set of international standards to apply to all foreign direct investment, which would be a nearly impossible task.¹⁷⁷ Instead, the Mechanism recognizes that a normative framework for each project already exists, even if not developed by consensus, because the framework has been accepted by the MNE in developing the project (for example, through its own corporate policies or by

Scale: Globalizing Administrative Law, 115 YALE L. J. 1490, 1523-42 (2006). Esty's description of global administrative law norms are similar to those proposed here for the new Mechanism.

177. See, e.g., Deva, *supra* note 29, at 18-19.

choosing how it seeks financing).

Although this approach to norms may result in a ‘crazy quilt’ of different standards applying to each project, that crazy quilt already exists today. The standards mentioned above apply to the project independent of this Mechanism, and the Mechanism neither creates nor requires any new norms. Of course, the Mechanism would force MNEs and others to take these normative frameworks more seriously because a compliance mechanism could now look at their application.

The Mechanism would be tasked with sorting out how the standards apply. This may be less difficult than first assumed because many of the sets of standards build closely on one another and cover a limited set of issues. For example, the Equator Principles are based explicitly on the IFC’s Performance Standards.¹⁷⁸ Moreover, over time the Mechanism would be able to develop protocols that allow it to efficiently identify which issues are relevant to which standards. In the case of conflicting standards, for example, where two applicable standards respectively require and do not require certain conduct, the fact-finders would simply identify the standard that was violated, while finding the conduct in compliance with the other standard.

E. JURISDICTION OF THE MECHANISM

The proposed Mechanism’s jurisdiction would extend to those entities that had agreed or acceded to the Mechanism’s jurisdiction, mission, and operating procedures. Membership would thus work in a way not unlike that of the current Equator Principles. A set of principles, or in this case an outline for the new accountability Mechanism, would be presented, and entities such as MNEs, Equator Banks, export credit agencies, and others that are in need of a compliance mechanism would be free to sign up to the Mechanism, much as some commercial banks have signed up to the Equator Principles. There would thus be no quid pro quo between those that have signed up to the Mechanism, nor an agreement that could violate antitrust provisions. The Mechanism would be a free-standing entity and companies or other organizations would be free to accept its jurisdiction.

If a claim is filed against an MNE that has agreed to follow relevant international standards but has not acceded to the Mechanism’s jurisdiction, the Mechanism could still issue an ‘advisory opinion.’ Of course, the Mechanism’s ability to address such claims thoroughly and fairly would be disadvantaged because they would not be guaranteed access to the project site, records, or staff, and the MNE would not be as likely to listen to the recommendations.

178. See *supra* note 5; see also Durbin, *et al.*, *supra* note 30 (identifying standards and norms that affect international project finance).

F. ACCESSING THE MECHANISM

Any person or group of people who have been, or are likely to be, negatively affected by a project would be eligible to submit a claim to the new Mechanism's Secretariat.¹⁷⁹ The claim would have to allege that discernible international standards have been violated by a corporation, bank, or export credit agency. In most cases, complaints would be filed only against those entities that have previously agreed to the jurisdiction of the new Mechanism. Although as noted above complaints could also be allowed against MNEs who are not members.

Claims from affected people should receive the highest priority from the Mechanism. However, the Mechanism might have a secondary role of receiving claims from financial institutions, parent corporations, or purchasers interested in monitoring compliance with environmental and social norms. Thus, for example, the Mechanism might beneficially be used by Equator Principle banks as a way to ensure projects meet their obligations, or it may be used by an MNE to monitor the performance of enterprises in its supply chain. These functions provide an important benefit to the MNEs, but they should not diminish the Mechanism's primary function of responding to community-based claims.¹⁸⁰

G. COMPOSITION OF THE MECHANISM

The proposed Mechanism's leadership would include an executive committee (or board of directors) and a secretariat headed by the chairperson of the Mechanism. The membership would include all entities that had acceded to the Mechanism's jurisdiction. Thus, one of the benefits of agreeing to abide by the Mechanism's procedures and allowing communities to avail themselves of the Mechanism, is that the MNE or other entity would gain membership in the overall Mechanism. Membership would include the right to select the executive committee of the Mechanism, which could oversee and make broad policy decisions for the Mechanism. The membership could work like corporate membership in the World Business Council on Sustainable Development (WBCSD).¹⁸¹ It would be a statement by MNEs and others that they support the mission and methodology of the Mechanism and, most importantly, that they will

179. Compare to the World Bank Inspection Panel (any two or more affected persons can file a claim), Inspection Panel Operating Procedure II(A)(4)(a), *available at* <http://www.worldbank.org/inspectionpanel> (follow "Policies and Procedures" hyperlink; then follow "Panel Operating Procedures" hyperlink) (last visited April 15, 2008); IFC Compliance Advisor Ombudsman (any group of persons), CAO Operational Guidelines, § 2.1, *available at* <http://www.cao-ombudsman.org/html-english/documents/WEBEnglishCAO06.08.07Web.pdf> (last visited April 15, 2008).

180. Presumably other mechanisms exist for banks and buyers to monitor their lenders and suppliers, respectively.

181. Membership in the WBCSD is by Executive Committee invitation to companies meeting certain criteria. The members are governed by a Council that in turn elects the Executive Committee. *See* World Business Council for Sustainable Development, <http://www.wbcd.ch> (last visited Feb. 15, 2008).

support the Mechanism's operations with respect to projects in which they are involved.

NGOs would also be asked to participate as members of the Mechanism. NGO endorsement of the Mechanism's general approach is important for the Mechanism's credibility and its acceptance by affected communities. International NGOs that are members might also agree to voluntarily suspend campaigns against any project that is under investigation by the new Mechanism. Because NGOs are diverse and decentralized, MNEs should not expect all criticism to stop while a project is being investigated. After the fact-finding process is complete and a final report has issued, NGOs would be permitted under the rules to take any advocacy position they choose regarding the alleged violations. NGOs who are members of the organization would also be able to participate in the selection of the executive committee discussed below.¹⁸² NGO involvement in the Mechanism's processes will increase the Mechanism's credibility and provide incentives for MNEs to join the Mechanism.

The critical point with respect to both MNE and NGO membership in the Mechanism is that the organizations will make an upfront commitment to the Mechanism, free of debate over individual controversial projects. Advance agreement on the general operating procedures, fact-finding methodologies, reporting methodologies, and similar procedures would provide credibility to the process, notwithstanding acrimony in and around specific outcomes. Both MNEs and NGOs, including community activists, share in a desire to have credible and objective processes, even as they may disagree about the substantive outcomes. This is not to suggest that all NGOs or MNEs will endorse the Mechanism, nor that all advocacy would be suspended during the fact-finding investigation. Full MNE and NGO participation is neither possible nor necessary; a relatively small number of supportive international NGOs – and MNEs—would be sufficient to vest the Mechanism with initial credibility.

1. The Executive Committee

The primary role of the Mechanism's executive committee would be to select the secretariat of the Mechanism, including the chair or chief investigator. Other roles would include ensuring the fiscal accountability of the Mechanism and providing governance oversight, much like a board of directors does in any organization. To ensure credibility, the executive committee would include representatives of affected communities and other interested stakeholders, in

182. In some ways, it may be useful to think of this as a Partnership for Sustainable Development, like those championed at and since the World Summit on Sustainable Development. *See* UN Department of Economic and Social Affairs, Division for Sustainable Development, Partnerships for Sustainable Development, <http://www.un.org/esa/sustdev/partnerships/partnerships.htm> (last visited Feb. 15, 2008). This Partnership would be one for compliance and enforcement of norms—a “Global Compliance Partnership”.

addition to the members selected by the MNE and NGO membership. Such a body can be created. One recent example is the World Commission on Dams (WCD), which had representatives on the Commission with widely divergent views of dams.¹⁸³ The precedent of the WCD Commissioners suggests that the Mechanism could select a broadly representative executive committee that provides a credible balance of the many different interests involved in foreign direct investment projects.

2. The Panel Members

The basic structure of the Mechanism's fact-finding panels could be patterned after the World Bank Inspection Panel, which has a three-member panel including a full-time chairperson. These panel members are eminent and widely respected senior members of international society and have historically been defenders of their own independence, professionalism, and integrity. Having identifiable members of the Mechanism is important to ensure accountability and responsibility over time.¹⁸⁴ In order to avoid bias, panel members would have to meet several criteria before being eligible to participate in a case. Criteria would include:

- that the nominee have experience in the areas of dispute-resolution (preferably as a judge, mediator, arbitrator, or lawyer) and expertise in environmental assessment, human rights, indigenous peoples, or other development-related policies;
- that the nominee has not worked for the corporations or banks involved in the project, nor for the nominating NGOs, in the two years preceding the case and a moratorium on such employment for a period of two years after serving on a case;
- that the nominee disclose all personal and family financial interests, including in possible parties to a case. No nominee would be eligible to sit on a panel if a financial interest has created an actual or potential conflict. Individuals found to have been involved in self-dealing or nepotism would be ineligible; and
- that the nominee disclose all past and present lobbying relationships that would give the nominee special access to or influence over decision-makers.¹⁸⁵

One of the permanent panel members would be assigned as the principle investigator for any eligible claim. The permanent panel member would then chair an investigative panel drawn from a pre-identified panel of experts.¹⁸⁶ The

183. See THE WORLD COMMISSION ON DAMS, *supra* note 4 (discussing the World Commission on Dams).

184. See ADB Review, *supra* note 176.

185. See Esty, *supra* note 176, at 1525.

186. This approach is similar to the panels established when a complaint is filed under the North American

panel of experts would be drawn from nominations from both the business and NGO communities, with either the secretariat or the parties themselves selecting the experts for particular panels from those in the nominating pool.

3. The Secretariat

The Mechanism would have to include a permanent secretariat of staff that works in support of the Mechanism's permanent panel members. The secretariat would be responsible for day-to-day operations, including public outreach, responding to requests for information from communities and others, maintaining the public docket of claims, assisting in any investigations and in preparing reports, and supporting the executive council.

H. FUNDING

The proposed Mechanism must have an independent source of funding and substantial control over its budget to ensure it can effectively carry out its activities. The Mechanism should have sufficient funding to meet its core operating expenses as well as a revolving fund replenished annually that allows it to carry out necessary investigations.¹⁸⁷

The annual core budget could be supported by membership fees paid in by MNEs and other member entities. The fees would be analogous to fees companies pay to be a member of the World Business Council on Sustainable Development – although companies would obviously receive different benefits. Unlike fora such as international arbitration where the parties to the arbitration pay the associated costs, by definition claimants to the Mechanism will generally have few or no resources to fund a fact-finding investigation that may involve hiring expert environmental, social, or technical expert consultants.

The revolving fund should be replenished by the MNEs or other entities whose projects are being investigated. Much like court fees or attorneys' fees in the United States, the companies would have to pay contribution for direct expenses beyond the core budget expended in investigating any project. The fees would come due after the investigation was completed.

The key to funding the Mechanism is the understanding that the Mechanism, by providing a credible fact-finder, is providing a service to the MNEs and other entities. This is most obvious where MNEs may be under an obligation or under political pressure to create a grievance mechanism. In these instances, sharing the overhead costs across a wide cross-section of industry while bearing only the

Free Trade Agreement (NAFTA)'s investor-state provision. With NAFTA binational panels, members are selected on an as needed basis and are selected from the roster and mutually agreed upon by the parties themselves. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Annex 1901.2 Establishment of Binational Panels, Dec. 17, 1992, 32 I.L.M. 605 (1993).

187. Such a revolving fund has worked reasonably well for the IFC's Compliance Advisor/Ombudsman.

costs of specific investigations is a cost-effective response.

I. PROCEDURES OF THE MECHANISM

The full operating procedures of the Mechanism do not need to be, nor should they be, developed at this point. A commitment to transparency and broad participation in developing the procedures is more important than defining what those procedures would look like *a priori*. Ultimately, the Mechanism itself should develop its procedures in an open, transparent notice-and-comment process accessible through the internet. In this way, the initial Mechanism members, as well as the general public, and local project-affected communities, can participate in the process.¹⁸⁸ Such a process will not only improve the procedures, but also build support among multiple stakeholders.

J. REMEDIES

Remedies of the proposed Mechanism are necessarily limited. First, the proposed Mechanism is non-governmental and will not have its own enforcement authority or institutions to compel actions that are available to states to enforce national law. The Mechanism should not be perceived as replacing, and it should not replace, the continued application of national and international law by national courts. When enforcement authorities are not available, then the Mechanism *itself* is left with the same remedies as are available in many international fora: (1) the ability to provide credible and independent fact-finding and (2) the power to recommend remedies such as enjoining wrongful conduct, compensating the aggrieved, and actions toward compliance. The public reports and recommendations thus “name and shame” MNEs and others for their non-compliant conduct and encourage compliance.¹⁸⁹ Where recommendations urge changes, the claimants, media, and the public at large may lobby the MNE to make the changes or face public criticism.

Essential to any enforcement by the Mechanism itself (or by the agreement of external parties) is the Mechanism's ability to publicly issue its reports, including findings of fact and recommendations, without any control by the parties to the dispute. Publication is not unlike the remedies available to existing accountability mechanisms. The World Bank Inspection Panel, for example, can release a

188. Such process is now frequently undertaken at the multilateral development banks for major changes in their environmental and social policies or accountability mechanisms. Adoption of the Asian Development Bank's new Accountability Mechanism in 2003 entailed consultations with governments and the public in more than a dozen member countries, several iterative drafts, and detailed responses to public comments received during the process. See ADB Review, *supra* note 176.

189. See generally Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMP. LAW 561, 561-65 (2003) (discussing the power and limitations of shaming in the campaign to ban landmines); see also Deva, *supra* note 29, at 21.

report after it is reviewed by the World Bank Board of Executive Directors for final action.¹⁹⁰ The responsibility to make changes from the Inspection Panel's findings falls on the Executive Directors and the Bank staff. In this Mechanism the remedies would be similar. The Mechanism would issue public investigation reports and recommendations that would be submitted to the MNE and to any other relevant decision-making body.

For example, the Mechanism's findings that a project is non-compliant with the Equator Principles would be of interest to the MNE, the commercial bank that made the financing, and the Equator Banks.¹⁹¹ Each of these entities would have their own potential remedies available for responding to the Mechanism's non-compliance finding.

Enforcement of recommended corrective actions when there is a finding of non-compliance could take place through conditions built into project finance contracts, loan and insurance agreements, and other binding contracts. If, for example, a corporation voluntarily accedes to the Mechanism's jurisdiction and then applies for and receives financing from an Equator Bank, the financing agreement between the corporation and the bank could contain a provision requiring the corporation to adhere to the Mechanism's findings and recommendations. If the Mechanism determines that the corporation is in violation of one of its obligations, the bank would have enforcement rights under the financing agreement. The same type of external enforcement provision could be built into agreements with the international and regional development banks, export credit agencies, and bilateral and multilateral aid agreements. In theory at least, governments or MNEs could include accession to the jurisdiction of the Mechanism as a condition in foreign investment contracts that shape MNE investments.¹⁹² Host country governments might in some instances want to provide local communities with additional rights of redress, in addition to any already presented by the local courts (particularly given the possibility that parent MNEs will escape the jurisdiction of local courts). In addition, some of the promises made during project preparation (for example, conditions placed on the loans by

190. See, e.g., World Bank Inspection Panel, Operating Procedures, *supra* note 179; IFC Compliance Advisor/Ombudsman Operational Guidelines, *supra* note 179; ADB Review, *supra* note 176.

191. Although the Equator Banks are not publicly organized to receive such information, there is at least an informal governance structure among the Banks that will likely develop into a structure that could process and make decisions based on independent findings of non-compliance among members.

192. Cf. International Institute of Sustainable Development, Model Investment Agreement for Sustainable Development, available at http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf. As evidence of the recognition of the requirement of a social license to operate, examples of this are already occurring with companies like Barrick Gold and BP, which have incorporated the less rigorous Voluntary Principles on Security and Human Rights into their host government agreements. See Business & Human Rights, *Private security companies tracked on our website: Presentation by Business & Human Rights Resource Centre to the meeting of the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination* (Feb. 19-23, 2007) at 2, available at <http://www.reports-and-materials.org/BHR-statement-to-UN-event-private-security-companies-21-Mar-2007.doc>.

the IFC or the Equator Banks) are not enforceable by the local communities in a national court.

The MNE also could use the findings for their own internal auditing purposes to improve compliance of far-flung subsidiaries and supply chains and to create a project-specific action plan to improve the situation on the ground. The Equator Principle banks could, in theory, take collective action against any free-rider bank shown to be in noncompliance, by, for example, posting a decision on its website to suspend the non-compliant bank's participation in the Equator Principles.

Governments or intergovernmental organizations may also seek to use the good offices of the Mechanism as a credible fact-finder. Thus, the InterAmerican Development Bank ("IDB"), which currently has no accountability mechanism covering its private sector activities, could officially or unofficially use the Mechanism's findings of non-compliance with IDB standards as evidence for steps it might take to ensure compliance under its loans. National governments too might use the fact-finding reports as evidence of non-compliance with international obligations or national and local law.

The effectiveness of the Mechanism will depend on how the findings are used by other entities – i.e., the commercial banks, export credit agencies, the MNEs themselves, local community authorities, or local, national and international activists – in their own enforcement or monitoring activities. In each case, the public nature of the findings will be the critical driver for building pressure for changes on the ground.

K. PUBLIC REPORTING OF RESULTS

As suggested by the above discussion, the effectiveness of the proposed Mechanism and any potential remedy for non-compliance is going to depend on the public release of reports, including all facts, conclusions regarding compliance, and recommendations. Release of information should follow the practice of international institutions and should include publication of reports on a public website as well as the release of the results to the complaining party in an appropriate manner and language.

L. RELATIONSHIP BETWEEN THE MECHANISM AND EXISTING MECHANISMS

The proposed Mechanism could eventually supplant, complement, or harmonize other accountability mechanisms. If the new Mechanism functions in parallel to existing mechanisms, either during transition or permanently, the Mechanism could cite to the reports of other mechanisms in their interpretation of standards and norms such that a body of jurisprudence could develop among the institutions. This would increase the predictability of results, lower risk to MNEs, and likely improve the overall quality of the interpretation of standards and norms. The epistemic community that would develop around the Mechanism

would also contribute to harmonizing the interpretation of the standards and norms among MNEs.

VI. CONCLUSION

This article highlights an existing gap in the protections that international and national law provide to local communities harmed by the environmental and social impacts of development and investment projects. It proposes a new type of accountability mechanism that will hold MNEs accountable to the various normative (albeit voluntary) commitments they have made during project preparation, design, and approval to prevent or minimize environmental and social harms on communities affected by their operations. The Mechanism would harden the existing set of standards and norms and empower affected communities in their dialogues with MNEs. In short, the authors hope this article contributes to the ongoing dialogue on new and innovative ways to enhance MNE accountability to their host communities.

APPENDIX: LIST OF ACRONYMS

The following acronyms are used throughout this article.

- ADB – Asian Development Bank
- ATCA – Alien Tort Claims Act (28 U.S.C. § 1350)
- BTC – Baku-Tbilisi-Ceyhan (oil pipeline project)
- CAO – Compliance Advisor/Ombudsman (of the International Finance Corporation)
- CEDHA – *Centro de Derechos Humanos y Ambiente* (Center for Human Rights and the Environment)
- CIME – Committee on International Investment and Multinational Enterprises (OECD)
- IBRD – International Bank for Reconstruction and Development
- IDA – International Development Association
- HGA – host government agreement
- IFC – International Finance Corporation
- IFI – international financial institution
- IUCN – International Union for the Conservation of Nature and Natural Resources, or World Conservation Union
- MIGA – Multilateral Investment Guarantee Agency
- MNE – multinational enterprise
- NAFTA – North American Free Trade Agreement
- NCP – National Contact Point
- NGO – nongovernmental organization
- OECD – Organisation for Economic Co-operation and Development
- OmCED – International Ombudsman Centre for the Environment and Development
- PCA – Permanent Court of Arbitration
- WBCSD – World Business Council on Sustainable Development
- WCD – World Commission on Dams