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Oil's Not Well in Latin America: Curing the Shortcomings of the Current International Environmental Law Regime in Dealing with Industrial Oil Pollution in Latin America Through Codes of Conduct

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NOTE

OIL'S NOT WELL IN LATIN AMERICA: CURING THE SHORTCOMINGS OF THE CURRENT INTERNATIONAL ENVIRONMENTAL LAW REGIME IN DEALING WITH INDUSTRIAL OIL POLLUTION IN LATIN AMERICA THROUGH CODES OF CONDUCT

Santiago A. Cueto[*] [**]

I. INTRODUCTION

Finding it increasingly difficult to internalize the cost of complying with domestic environmental regulations, many U.S. multinational[1] oil companies

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** This note is dedicated to my parents, Guillermo and Norma Cueto, and to my family for all their love, support, and encouragement.

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1. Generally, multinational corporations (MNC) are "large commercial organization which operate — produce, extract, or provide services — in several countries, although their ownership, management and control are usually centralized in the one country which confers upon the parent firm or headquarters its nationality." HELGA HERNES, THE MULTINATIONAL CORPORATION: A GUIDE TO INFORMATION SOURCES, at xi (1977). The term MNC is sometimes used interchangeably with transnational corporation, or TNC, especially by the

have shifted their petroleum extraction and production operations to less developed countries where environmental regulations are far more pliable than in the United States.[2] Since 1989, the U.S. oil industry has spent more on exploration and production abroad, mainly in Latin America, than it has in the United States.[3] United States oil companies are the major foreign investors in Latin America's energy sector.[4] Many of the factors that have forced U.S. oil companies[5] to adopt environmentally sound practices at home are absent in investment-dependent Latin American nations because these governments lack both the financial resources and the regulatory mechanisms to force corporations to adopt environmentally safe operating procedures.[6]

United Nations. JOHN D. DANIELS & LEE H. RADEBAUGH, INTERNATIONAL BUSINESS: ENVIRONMENTS AND OPERATIONS 11 (5th ed. 1989).

2. JOSHUA KARLINER, THE CORPORATE PLANET: ECOLOGY AND POLITICS IN THE AGE OF GLOBALIZATION 80-81 (1997) (describing the impact of corporate globilization on the environment and examining how MNCs "continue to speed the planet full throttle down a socially and ecologically unsustainable course while whistling a tune of change"). The cost of complying with U.S. environmental regulations has cut deeply into oil industry profits. *Id.* at 71. According to one estimate, the U.S. oil industry spent approximately US$50 billion a year on environmental controls between 1989 and 1993, more than double the 1989 profits of the top oil and gas companies. *Id.* at 71-72.

3. *Id.* For example, "as recently as 1990 Chevron spent a majority of its exploration and production [outlays] in the United States, by 1996 it was spending a full 61 percent of this capital abroad." *Id.* In an annual report, Chevron reported that "[a]ttractive opportunities overseas combined with limited business opportunities in the U.S. due to stringent regulatory barriers, drilling bans and a dwindling number of high-potential exploration opportunities have resulted in a shift in investment emphasis." *Id.*

4. *U.S. Economic Agenda in the Americas, 1997: Hearings on the Americas Free Trade Pact Before the Subcomm. on Int'l Economic Pol'y & Trade of the House Comm. on Int'l Relations*, 104th Cong. (1997) (testimony of Alan P. Larson, Assistant Sec. of State for Econ. & Bus. Affairs) [hereinafter *Hearings*], *available in* WL 321830 (stating that "Latin America . . . supplies neraly 50 percent of [U.S.] daily oil imports. [United States'] oil companies are the primary foreign investors in the region's energy sector"). "The agenda at the 1994 Summit of the Americas in Miami [proposed establishing] a Free Trade Area of the Americas (FTAA) by 2005." *Id.* The FTAA will reduce tariffs and other trade barriers by establishing liberalized trade rules between the United States and 32 other countries in the region. *Id.* While the FTAA will promote the unfettered flow of goods between Latin America and the United States, with the potential of bolstering the economies of both, it also is likely that it will exacerbate Latin America's environmental problems.

5. *Id.* Texaco, Amoco, Mobil, Exxon, and Chevron rank among the 100 largest multinational corporations in the world, and collectively, hold over 129 billion dollars in foreign assets, according to the most recent World Investment Report. U.N. CONFERENCE ON TRADE & DEVELOPMENT (UNCTAD), WORLD INVESTMENT REPORT 1997: TRANSNATIONAL CORPORATIONS, MARKET STRUCTURE AND COMPETITION POLICY, U.N. Sales No. E.97.II.D.10, at 29-30 (1997) [hereinafter WORLD INVESTMENT REPORT]. Exxon and Mobil, the top two oil companies in the United States, recently agreed to a US$73.7 billion merger. Thor Valdmanis & Tom Lowry, *$73.7 Billion Merger*, USA TODAY, Dec. 7, 1998, at 1B. The merger creates the "world's largest oil company . . . with revenues of more than US$200 billion." *Id.*

6. Alan Neff, *Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act*, 17 ECOLOGY L.Q. 477, 492 (1990) (proposing a Foreign Environmental

A one-billion-dollar class action suit, representing the interests of 30,000 Ecuadorian citizens,[7] was filed against Texaco, and it poignantly illustrates the enormity of the problem created by the U.S. oil industry's shift of investment emphasis overseas.[8] The plaintiffs in *Aquinda v. Texaco* alleged

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Practices Act, in which the United States would "unilaterally declar[e] that U.S. citizens and U.S.-owned businesses must comply with U.S. environmental protection laws in all of their foreign operations"); *see also* Robert Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 3 (1995) (advocating the development of universal standards of behavior to "guide or direct" MNC activities wherever they occur). A 1992 study conducted by the World Bank revealed that " 'polluting industry activities are being dispersed internationally and the dispersion is greatest in the direction of developing countries.' " *Id.* at 16 (quoting Patrick Low & Alexander Yeats, *Do "Dirty" Industries Migrate?, in* INTERNATIONAL TRADE AND THE ENVIRONMENT 89, 98 (World Bank Discussion Papers, No. 159) (1992)). However, according to other studies, no evidence has shown that "differences in environmental regulation between countries have influenced the location of investment." *Id.* at 17. "[E]nvironmental regulations [in the United States] have not, in general, caused 'industrial flight' from the U.S." Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2079 (1993) (citing H. JEFFREY LEONARD, POLLUTION AND THE STRUGGLE FOR THE WORLD PRODUCT 55 (1988)). Although, the Leonard study found a small increase in direct investment by the U.S. chemical and mineral processing industries in facilities abroad from 1970-80, "the increase in heavily regulated industries' investment in developing countries was no greater than that of the U.S. industry as a whole." *Id.* at 2078. While some studies have concluded that environmental concerns are not the primary motivation for MNCs' shift of operations abroad, a study conducted by Tufts University, in which 40% of U.S. MNC respondents revealed that their companies shift operations abroad because of weaker environmental health and safety regulations, illustrates that reducing environmental compliance costs is nevertheless an increasingly significant factor. Fowler, *supra*, at 17 (citing Ann Rappaport & Margaret F. Flaherty, *Multinational Corporations and the Environment: Context and Challenges*, 14 INT'L ENV'T REP. 261 (1991) (summarizing the findings of the Tufts study)).

7. Diana Jean Schemo, *Ecuadorians Want Texaco to Clear Toxic Residue*, N.Y. TIMES, Feb. 1, 1998, at A1.

8. Aquinda v. Texaco, 945 F. Supp. 625, 627-28 (S.D.N.Y. 1996) (dismissing the case on the grounds of international comity and the doctrine of forum non conveniens, as well as on procedural grounds); *see* Sequihua v. Texaco, 847 F. Supp. 61, 63-65 (S.D. Tex. 1994) (dismissing the case on the grounds of international comity and the doctrine of forum non conveniens, as well as on procedural grounds); *see also* Mario Gonzalez, *Ecuador — Environment: Indigenous Appeal in Case Against Texaco,* INTERPRESS SERV., Aug. 18, 1997, *available in* 1998 WL 13256112 (reporting that Texaco is accused of "using inadequate and inappropriate technology, and of spilling thousands of barrels of crude oil into Amazonian rivers, containing a long list of carcinogenic agents"). *But see* Janet L. Stoner, Pres. Texaco Petroleum Co., Letter to the Editor, *Oil Operation Did Not Harm Ecuador*, CHI. TRIB., Aug. 30, 1996, at 26 (averring, as President of Texaco Petroleum Company, that throughout its 26-year tenure in Ecuador, Texaco has conducted its business with the utmost care and concern for the Ecuadorian rain forest and the people who live there). *See generally* Victoria C. Arthaud, Note, *Environmental Destruction in the Amazon: Can the U.S. Courts Provide a Forum for the Claims of Indigenous Peoples?*, 7 GEO. INT'L L. REV. 195, 210 (1994) (asserting that the United States can provide a forum to adjudicate claims for damages caused by U.S. companies operating in Ecuador); Jennifer K. Rankin, Note, *U.S. Laws in the Rainforest: Can a U.S. Court Find Liability for Extraterritorial Pollution Caused by a U.S. Corporation? An Analysis of* A[q]uinda v. Texaco, Inc., 18 B.C. INT'L & COMP. L. REV. 221, 262 (1995) (arguing that U.S. courts should assert extraterritorial jurisdiction, "recogniz[ing]

that Texaco, a U.S. multinational corporation (MNC) operating in Ecuador, dumped over a billion barrels of oil into Ecuador's Amazon oil fields between 1972 and 1989.[9] The resultant pollution transformed what were once pristine rivers and streams in environmentally fragile Amazon forests[10] into viscous waterways of petrochemical waste.[11] Although *Aquinda* was initially dismissed in 1996, the case was recently vacated by the U.S. Court of Appeals and remanded to the District Court for further consideration.[12] The case exposes the ineffectiveness of the current environmental regulatory regime in dealing with expanding oil and gas development in Latin America's ecologically sensitive rain forests. Latin American governments, dependent on foreign direct investment to stimulate their economies, and the U.S. oil industry are doing little to redress the situation. A cloud of environmental apathy hangs over the region and has led to unprecedented levels of environmental degradation. It is estimated that the vast majority of new oil and gas development will take place in the tropical zones of the

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that the international community will . . . encourage the assertion of jurisdiction"). For an environmental impact assessment of Texaco's activities in Ecuador, *see* Judith Kimerling, *The Environmental Audit of Texaco's Amazon Oil Fields: Environmental Justice or Business as Usual?*, 7 HARV. HUM. RTS. J. 199, 201 (1994) (arguing that the environmental audit of Texaco's activities in Ecuador "has proceeded behind closed doors, with Texaco and Petroecuador, both interested parties, acting as factfinders and arbiters . . . [and] have neither consulted or informed the residents of the Amazon").

9. Schemo, *supra* note 7, at A1. According to the Ecuadorian Ministry of Energy and Mines, Production of Petroleum, Formation Water, and Natural Gas, "[r]oughly 235 oil wells, designed and built by Texaco, generate more than 3.2 million gallons of toxic waste each day." Kimerling, *supra* note 8, at 205 n.26.

10. The ecological importance of rainforests cannot be understated. Rain forests produce 40% of the world's oxygen and absorb carbon dioxide, which counters the greenhouse effect. Michael S. Sher, *Can Lawyers Save the Rain Forest? Enforcing the Second Generation of Debt-for-Nature Swaps*, 17 HARV. ENVTL. L. REV. 151, 157 (1993); *see also* Jonathan Friedland, *Green Acres: Oil Companies Strive to Turn New Leaf to Save Rain Forest*, WALL ST. J., July 17, 1997, at A1 (reporting that oil companies are increasingly operating in rainforests). It is predicted that "over the next decade, 80% of new oil and gas development will take place in the humid tropics, including those of Peru, Bolivia, Columbia, and Venezuela." *Id.*

11. Kimerling, *supra* note 8, at 205. According to Jorge Alban, Ecuador's Under Secretary of the Environment, Texaco cleaned up 268 of these pools under an agreement, but left at least 400 pools "not covered by the agreement" untreated. Schemo, *supra* note 7, at A1.

12. Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. N.Y. 1998) (holding that the dismissal of *Aquinda*, on grounds of forum non conviens, international comity, and procedural reasons, was erroneous and remanding the decision to the district court for further consideration). If Ecuador loses the case, it would set a dangerous precedent and give free reign to oil companies doing business in developing countries to operate without being held accountable for any environmental damage they cause. Schemo, *supra* note 7, at A6; *see* Danielle Knight, *Case Against Texaco Resumes*, INTERPRESS SERV., Nov. 18, 1998, *available in* WL 19901607 (reporting on the latest development of the case).

world.[13] Although international environmental law has made some inroads in identifying global environmental problems, it has mostly proved ineffective at adequately addressing them.[14] The absence of a governing body to monitor and control the relationships between MNCs and host countries also permits MNCs to operate with virtual impunity. This note examines the shortcomings of the present environmental regulatory system and suggests as an alternative, voluntary codes of conduct.

Part II of this note provides background information on the economic and political transformation underway in Latin America, focusing on some of the factors that have contributed to liberalization of trade and investment. It also discusses factors that have influenced MNCs, specifically U.S. oil companies, to shift production to Latin America. It focuses on Latin America's more favorable regulatory climate for MNCs and the impact of investment activities in the oil sector and the environmental problems they have created for Latin America. In part III, this note discusses the shortcomings of recent legal trends in adequately addressing these problems at the national, regional, and international level. Part IV examines a promising alternative to the existing environmental framework, that is, voluntary codes of conduct, and their efficacy in dealing with the daunting environmental challenges facing Latin America. Part V concludes that it is essential that MNCs make a commitment to protect the environment in the future through voluntary codes of conduct.

II. BACKGROUND

A. *Latin America's Debt Crisis*

In response to the economic crisis[15] that hit Latin America in the 1980s,[16] many countries in the region implemented neoliberal[17] market

13. Friedland, *supra* note 10, at A1.

14. Neff, *supra* note 6, at 479-89 (discussing the shortcomings of international law in dealing with global environmental problems).

15. The economic crisis that rocked Latin America resulted in what is known as the "lost decade." Hugh Byrne, *"Saving Economies," Crushing the Poor*, WASH. TIMES, Nov. 9, 1998, at A19; *see also* E. BRADFORD BURNS, LATIN AMERICA: A CONCISE INTERPRETIVE HISTORY 296-341 (6th ed. 1994) (discussing political, cultural, and economic factors contributing to the debt crisis of the 1980s); JEFFRY A. FRIEDEN, DEBT, DEVELOPMENT AND DEMOCRACY (1991) (examining the political and economic dimensions of five Latin American countries between 1965 and 1985 and their responses to the debt crisis); William C. Smith & Carlos H. Acuña, *Future Politico-Economic Scenarios for Latin America, in* DEMOCRACY, MARKETS, AND STRUCTURAL REFORM IN LATIN AMERICA 1, 2 (William C. Smith et al. eds., 1994) (discussing the impact of the debt crisis on the economic policies of several Latin American countries and analyzing future "politico-economic scenarios" for Latin America).

16. Fiscally reckless authoritarian regimes, along with negligent international bankers, were largely responsible for the debt crisis of the 1980s. BURNS, *supra* note 15, at 313.

reform policies advocated by the U.S. government and international financial institutions.[18] The market-oriented development strategies emphasized the need to allow market forces a greater role in their economies and to grant a larger economic role to the private sector.[19] Although these policies succeeded in incorporating most of the region into the global economy, the drastic reduction in fiscal budgets effectively marginalized environmental programs in many countries.[20] The opening of the economies to international markets, the privatization[21] of state-owned enterprises, the promotion of foreign direct investment[22] to accelerate economic growth,[23]

Governments, saturated with petrodollars, borrowed heavily from banks to finance questionable infrastructure projects and to purchase military hardware. *Id.* Unable to make interest payments, the governments borrowed even more, until inevitably they defaulted on the loans sending many Latin American countries into an economic tailspin. *Id.* It is argued that the economic policies prescribed by international lending institutions, such as the International Monetary Fund, further inhibited economic development and undermined the economic stability of many Latin American countries. *Id.* at 314.

17. *See* Smith & Acuña, *supra* note 15, at 1. Based on the 18th century laissez faire principles introduced by Adam Smith in the *Wealth of Nations*, neoliberalism refers to contemporary free-market economic reform programs and emphasizes "the primacy of the market, the reduction in public spending for social services, [and] the reduction of government [intervention in the marketplace]." KARLINER, *supra* note 2, at 2. *Compare* David J. Pascuzzi, Note, *International Trade and Foreign Investment in Colombia: A Sound Economic Policy Amidst Crisis*, 9 FLA. J. INT'L L. 443 (providing a concise analysis of Colombia's success in implementing similar market-oriented reforms).

18. The major international financial institutions involved in Latin America are the International Monetary Fund and the World Bank. Juan Carlos Torre, *The Politics of Transformation in Historical Perspective, in* POLITICS, SOCIAL CHANGE AND ECONOMIC RESTRUCTURING IN LATIN AMERICA 31 (William C. Smith & Roberto Patricio Korzeniewicz eds., 1997) [hereinafter RESTRUCTURING].

19. Smith & Acuña, *supra* note 15, at 1.

20. Sher, *supra* note 10, at 157.

21. *See generally* GEORGE F. PALMER, THE ECONOMIST INTELLIGENCE UNIT, THE EIU GLOBAL PRIVATISATION MANUAL: A PRACTICAL GUIDE TO THE PROCESS AND PRACTITIONERS (1994) (providing an overview of different privatization schemes and how to implement them). Privatization, which was pioneered by the United Kingdom's Thatcher administration in the 1980s, is the process by which former state-owned enterprises are subjected to the competitive forces of the marketplace. *Id.* at vi, 1. The fundamental assumption underlying privatization is that politicians and public servants are poor managers because their allegiance lies with the state and not the firm. BUSINESS INTERNATIONAL CORPORATION (BIC), PRIVATIZATION IN LATIN AMERICA: NEW COMPETITIVE OPPORTUNITIES AND CHALLENGES 8 (1990) [hereinafter BIC] (discussing the success of privatization programs in Latin America).

22. MNC's are increasingly integrating Latin America into their global agenda. WORLD INVESTMENT REPORT, *supra* note 4, at 71, 73. In 1996, foreign direct investment (FDI) in Latin America reached a record US$39 billion. *Id.* at 73. Foreign direct investment from the United States during the first half of the 1990s reached almost US$66 billion and represented 58% of Latin America's total cumulative investments. *Id.*

23. Developing countries require capital to create jobs for their citizens and to fund international business transactions, both of which require the use of hard foreign currency. Pascuzzi, *supra* note 17, at 444 n.1.

and the maximization of exports through the exploitation of natural resources[24] were preeminent policy objectives.[25] This development resulted not only from the need to concentrate on economic growth, but also from the mistaken perception that restrictions, such as environmental regulations, would weaken the growth process.[26] According to the World Commission on Environment and Development, "the debt crisis is the most critical *international* pressure point forcing overexploitation of natural resources in high-debt countries."[27] The reasoning is straightforward. To counteract or minimize the impact of the crisis "[i]ndebted Latin American governments have devalued local currencies to stimulate exports and bring their external payments into balance."[28] This encourages Latin American governments to exploit their natural resources and encourages foreign direct investment.[29] The convergence of these factors created a favorable investment climate for MNCs.

B. *The Oil Industry's Shift in Investment Emphasis and Its Impact on the Environment*

The rapid expansion of the global economy during the last decade, along with increased competitive pressures, have forced the oil industry to expand its market base and curb production costs.[30] One cost cutting measure implemented by many multinational oil firms is to shift petroleum production and refining operations to developing regions, particularly heavily indebted Latin American countries, where production regulations are less stringent and

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24. Latin America's practice of selling off its natural resources has deep historical roots to when the Spanish came almost 450 years ago to plunder the Cerro Rico, or "Hill of Riches." Jonathan Friedland, *Latin America: Bolivia Mining Boom Leaves Some Skeptical*, WALL ST. J. EUR., Feb. 4, 1998, at 4. Their arrival triggered the region's first natural resources investment boom. *Id.*

25. *See* William C. Smith & Roberto Patricio Korzeniewicz, *Latin America and the Second Great Transformation, in* RESTRUCTURING *supra* note 18, at 1-15; *see also* Steven E. Sanderson, *Policies Without Politics: Environmental Affairs in OECD-Latin American Relations in the 1990s, in* THE UNITED STATES AND LATIN AMERICA IN THE 1990S: BEYOND THE COLD WAR 235, 236-61 (Jonathan Hartlyn et al. eds., 1992).

26. *See* Neff, *supra* note 6, at 486.

27. Sanderson, *supra* note 25, at 236-37.

28. *Id.* at 239.

29. *Id.*

30. KEITH CHAPMAN, THE INTERNATIONAL PETROCHEMICAL INDUSTRY: EVOLUTION AND LOCATION chs. 3-7 (1991) (tracing the development of the petrochemical industry from its provenance as a local processing enterprise to its present status as a global processing colossus); *see also* ECONOMIC AND POLITICAL INCENTIVES TO PETROLEUM EXPLORATION: DEVELOPMENT IN THE ASIA-PACIFIC REGION (Jeremiah D. Lambert & Fereidun Fesharaki eds., 1990) (describing the petroleum industry's international investment strategy and production operations).

oil[31] resources abundant.[32] United States oil companies have been motivated, in part, by a desire to escape what they perceive to be an unnecessarily burdensome and costly set of environmental regulations in the United States.[33] They view Latin America as providing a more pliable regulatory climate on environmental issues.[34] In addition to Latin America's pliable environmental regulations, the promise of greater economies of scale,[35] lower labor costs,[36] and accessible natural resources[37] influenced U.S. oil companies to shift production operations to the region.[38] Environmentalists correctly argue that the profit maximizing activities of MNCs operating in Latin America have profoundly damaged the environment by producing pollutants and stripping the region of natural resources.[39]

Petroleum companies are the primary emitters of toxic pollutants, as well as greenhouse gases.[40] Each stage of the operation — exploratory drilling,

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31. Throughout this note the terms "oil" and "petroleum" are used interchangeably. Generally, oil includes "oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged soil." James J. King, THE ENVIRONMENTAL DICTIONARY AND REGULATORY CROSS-REFERENCE 451 (3rd. ed. 1995). "Petroleum" is "the crude oil removed from the earth and the oils derived from tar sands, shale, and coal." *Id.* at 492.

32. KARLINER, *supra* note 2, at 80; *see also* JACK N. BEHRMAN & ROBERT E. GROSSE, INTERNATIONAL BUSINESS AND GOVERNMENTS (1990) (explaining the primary objective of multinational firms in establishing natural resource extraction operations abroad); JEAN-FRANÇOIS HENNART, A THEORY OF MULTINATIONAL ENTERPRISE (1982) (providing a succinct analysis of the economic principles that undergird managerial decisions to invest in production enterprises abroad); JOSEPH LAPALOMBARA & STEPHEN BLANK, MULTINATIONAL CORPORATIONS AND DEVELOPING COUNTRIES (1986) (discussing the relationship between MNCs and host-country governments, and the overall impact of the MNCs on the economic development of these countries).

33. KARLINER, *supra* note 2, at 80.

34. *Id.*

35. "Economies of scale" is defined as "the savings in unit costs associated with an increase in the volume of production." CHAPMAN, *supra* note 30, at 121.

36. *Id.* at 9-10 (noting that one cost reduction strategy that is employed by MNCs is to shift production from the developed to the less developed economies where labor costs are less). *But see id.* at 118-19 (arguing that the evidence supporting this view is the result of skewed statistics, and that the oil industry, in fact, shows "little evidence of dispersal, despite the efforts of some governments to encourage its establishment in peripheral regions").

37. *Id.* at 218-25.

38. *Id.* at 203-225.

39. *See* Sanderson, *supra* note 25, at 235-57.

40. CHAPMAN, *supra* note 30, at 93. "Greenhouse gases" are certain components of the atmosphere, such as carbon dioxide and methane, that contribute to the greenhouse effect, *i.e.*, the gradual warming of the Earth's climate. ALAN GILPIN, DICTIONARY OF ENVIRONMENT AND SUSTAINABLE DEVELOPMENT 102-03 (1996). The former U.N. Center on Transnational Corporations had reported that " 'the influence of transnational corporations extends over roughly 50 percent of all emissions of greenhouse gases[, which] includes about half of the oil production business.' " KARLINER, *supra* note 2, at 15 (quoting the U.N. Center on Transnational Corporations).

commercial extraction, and transport through pipelines — has devastating consequences on the environment.[41] The exploratory drilling stage, for example, can result in patches of rainforest being clear cut in order to make way for drilling wells.[42] Toxic wastes also are generated at this stage of the petroleum production process.[43] In Ecuador, for example, oil drilling waste, which includes toxic sludge, often are released untreated into local water supplies or stored in open pits that breakdown and leak the sludge onto the surrounding land.[44] Commercial extraction of oil is equally damaging to the environment. In Argentina, 14,000 contaminated pools, which are deposits for toxic wastes generated at the drilling sites in crude oil exploration areas, have resulted in widespread environmental damage, for example, the death of thousands of birds in the Patagonia region of Argentina.[45] Moreover, oil companies operating in Peru dumped an estimated 24,000 barrels of oil into an Amazon tributary.[46] Once oil wells are operating, "petroleum and chemical additives . . . are freely discharged, and waste gas is burned off without emissions controls, [and s]pills from wells, tanks, pits, and flow lines are frequent."[47] Pipelines used to transport the oil from the wells are "prone to spills" and often go untreated.[48]

Despite these disastrous consequences, Latin American countries, saddled with massive national debt[49] loads, may have no alternative but to pursue

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41. *See* Neff, *supra* note 6, at 490-91; *see also* Celia Campbell-Mohn, *Petroleum, in* ENVIRONMENTAL LAW INSTITUTE, SUSTAINABLE ENVIRONMENTAL LAW § 15.2 (Celia Campbell-Mohn et al. eds., 1993) (describing many kinds of toxic waste generated by the petroleum production process and providing a detailed analysis of environmental laws governing the petroleum industry through all stages of the production process).

42. Neff, *supra* note 6, at 490. The exploration stage of drilling involves "[s]earching for oil, geologic surveys, drilling exploratory wells or bore holes, conducting soil tests, to see if oil or gas exists in economically exploitable quantities." SENATE COMM. ON FOREIGN RELATIONS, 93RD CONG., GLOSSARY OF TERMS RELATING TO THE PETROLEUM INDUSTRY 3 (Comm. Print 1974) (providing concise definitions for technical terms used in the petroleum industry).

43. Neff, *supra* note 6, at 490.

44. *Id.*

45. *Environmental Events in Latin America, 1994*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 137, 146 (1995) (reporting on country-specific environmental issues). The clean-up plan entails US$85 million in costs to the oil companies. *Id.*

46. *Id.* at 147.

47. Neff, *supra* note 6, at 491.

48. *Id.* at 492. The magnitude of the environmental problems caused by pipeline spills alone cannot be understated. According to the Ecuadorian government, the Trans-Ecuadoran Pipeline (SOTE) has spilled approximately 16.8 million gallons of oil, mostly within the Amazon watershed. Martin A. Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations — Emergent International Rights and Wrongs*, 38 VA. J. INT'L L. 331, 399 n.30 (1998) (citation omitted). To put this figure in perspective, the *Exxon Valdez* released approximately 10.8 million gallons into Alaska's Prince William Sound. *Id.*

49. Latin America's external debt was projected to total US$631.9 billion in 1998. THE ECONOMIST INTELLIGENCE UNIT, COUNTRY FORECASTS: LATIN AMERICA (1997) (on file with

environmentally harmful development strategies.[50] The exploitation and devastation of the rainforests illustrates the desperation of these countries to meet loan payments.[51] Latin American countries see MNCs as engines of progress and prosperity.[52] State-centric attitudes and objectives steer many governments on a path paved with environmental indifference.[53] Compliance with international environmental laws "is voluntary as a result of the horizontal [rather than hierarchical,] nature of the international system [with] . . . little incentive to comply when noncompliance is perceived as better serving national interests."[54] Thus, the need to develop their economies often overrides environmental concerns.[55]

Another problem bedeviling the environmental protection movement in the region is the unpopularity of "the assertion that resources within the territory of a sovereign state now belong to all of humanity" as part of the "global commons,"[56] and that the "state cannot freely exploit those resources."[57] Latin Americans view these assertions as patently hypocritical and point to the rainforests in the Pacific Northwest of the United States, which have suffered far greater damage from development than have the rainforests of Brazil.[58] Even where countries in Latin America attempt to regulate the environmental impact of industry by implementing tougher environmental standards,[59] they lack effective enforcement mechanisms and adequate financial resources to manage and protect the environment. This lack of oversight and enforcement capability is due to "the resource-

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author). A number of Latin American countries "have nearly doubled their foreign debt." Jane Bussey, *Latin Debt Burden Has Been Building*, MIAMI HERALD, Sept. 20, 1998, at 2F. Argentina's debt for example, has increased 92%, from US$60.7 billion to US$116.4 billion; Brazil's has climbed 77% from US$122.1 billion to US$216.7 billion, and Colombia has increased 81% from US$17.6 billion to US$31.8 billion. *Id.*

50. ALLEN L. SPRINGER, THE INTERNATIONAL LAW OF POLLUTION: PROTECTING THE GLOBAL ENVIRONMENT IN A WORLD OF SOVEREIGN STATES 13 (1983).

51. *Id.*

52. KARLINER, *supra* note 2, at xii.

53. *Id.* at 6.

54. *Id.*

55. *Id.* at 13.

56. "Global commons" is defined as comprising areas " 'beyond the jurisdiction and sovereignty of any state, but [which] exist for the common benefit of all' and usage of which 'physically affects human beings around the world.' " *Id.* at 11 (quoting C.I. Jackson, *The Dimensions of International Pollution*, 50 OR. L. REV. 223, 223-43 (1971)).

57. *Id.* at 13.

58. *Id.*

59. *See* Kimerling, *supra* note 8, at 207. Ecuadorian Law is full of clear prohibitions on pollution and overall environmental degradation. *Id.* For example, Ecuador's Constitution guarantees the " 'right to an environment free of contamination.' " *Id.* (footnote omitted). Nevertheless, because Ecuador relies heavily on oil revenues to finance its economic development, the environmental problems caused by oil drilling receive little political attention. *Id.* at 208.

intensiveness of judicial and environmental bureaucracies, which has strained the already limited capacity of these countries."[60]

Finally, the "bargaining relationship" between MNCs and the host countries is largely disproportionate.[61] Although the balance of bargaining power may shift from one party to another throughout the project, MNCs have more to offer.[62] MNCs can leverage employment, balance of payments stability, and production sharing.[63] Host countries, on the other hand, offer only access to their petroleum reserves.[64] Without this "the host government does not generally offer any important opportunity to MNCs."[65] This is especially true if the MNC has alternative sources of supply in other countries, which further diminishes a governments ability to force the MNC to follow "its directions completely."[66] Consequently, this bargaining dynamic exacerbates the host government's already tenuous relationship with the environment and forces many host governments to push their environmental prerogatives onto the back burner in order to pursue more desirable policy objectives — attracting MNC investment.

III. CURRENT ENVIRONMENTAL FRAMEWORK

A. *Domestic Laws*

1. The United States

The activities of U.S. oil companies operating in the United States are heavily regulated. There are more than a dozen federal laws that solely apply to oil pollution of water.[67] The Environmental Protection Agency (EPA), a federal agency created by the U.S. government in 1970, monitors and enforces government pollution control programs.[68] Designed to serve as the public's advocate for a livable environment, the EPA strives to manage and

60. Donna Lee Van Cott, *Regional Environmental Law in the Americas: Assessing the Contractual Environment*, 26 U. MIAMI INTER-AM. L. REV. 489, 506 (1995).

61. BEHRMAN & GROSSE, *supra* note 32, at 8-9.

62. *Id.* at 9.

63. *Id.* at 8-9.

64. *Id.* at 10.

65. *Id.*

66. *Id.* at 9.

67. Ambrose O.O. Ekpu, *Environmental Impact of Oil on Water: A Comparative View of the Law and Policy in the United States and Nigeria*, 24 DENV. J. INT'L L. & POL'Y 55, 65 (1995). Oil pollution laws in the United States date back to 1899 when the Rivers and Harbors Act was enacted. *Id.*

68. OFFICE OF MGMT. & ORG. DIV., EPA, HOW EPA WORKS: A GUIDE TO EPA ORGANIZATION AND FUNCTIONS ch. 1-1 (Government Inst., Inc. 1995). The EPA, an independent agency of the executive branch, was established pursuant to Reorganization Plan No. 3 of 1970. *Id.*

control pollution systematically by combining a variety of "research, monitoring, standard setting, and enforcement activities."[69] The EPA was created to coordinate and effect action by the government to protect the environment.[70] United States environmental regulations are comprehensive and cover all stages of petroleum operations — drilling, refining, and disposal.[71] Oil companies must clear a number of regulatory hurdles before drilling operations can begin.

Regulations such as the Federal Land Policy and Management Act (FLPMA)[72] prohibit the extraction of petroleum in national rivers and other areas of "critical environmental concern,"[73] while the National Park System Mining Regulation Act [74] bans petroleum extraction in most national parks, natural or historical landmarks, and wilderness areas.[75] The Wild and Scenic Rivers Act,[76] which protects rivers possessing outstanding scenic, recreational, geologic,[77] or biological values, bans petroleum extraction within one-quarter mile of the bank of a wild and scenic river.[78] In addition, the National Environmental Policy Act (NEPA) requires all federal agencies to prepare an environmental assessment of the impacts of proposed drilling activities.[79] The regulations also require the disclosure of "any adverse environmental effects which cannot be avoided should the proposal be implemented."[80]

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69. *Id.*

70. *Id.*

71. Campbell-Mohn, *supra* note 41, § 15.2. *See generally* FRANK F. SKILLERN, THE ENVIRONMENTAL PROTECTION DESKBOOK (2d. ed. 1995) (providing a comprehensive examination of U.S. environmental regulations).

72. 43 U.S.C. §§ 1701-1784 (1994).

73. *Id.* § 1702(a) states:

> The terms "areas of critical environmental concern" means areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.

Id.

74. 16 U.S.C. §§ 1901-1902; 1907-1912.

75. *Id.* According to the American Petroleum Institute "over forty percent of federal onshore lands are off-limits to petroleum extraction." Campbell-Mohn, *supra* note 41, § 15.2.

76. 16 U.S.C. §§ 1271-1287.

77. *Id.* § 1271.

78. *Id.* § 1280. Over 105 rivers and lands adjacent to them are designated as parts of the national wild and scenic rivers system. *Id.* § 1274. An additional 107 rivers are designated as potential additions to the national wild and scenic rivers system. *Id.* § 1276.

79. 42 U.S.C. § 4332. The statute requires all agencies of the federal government to "include in every recommendation or proposal for legislation and other major federal actions significantly affecting the quality of the human environment." *Id.* § 4332(c)(i)-(ii).

80. *Id.* § 4332(c)(ii).

While many U.S. laws provide for wide-ranging environmental protection measures governing the petroleum industry, the most comprehensive and stringent legal regime addressing oil pollution liability and prevention in the United States is the Oil Pollution Act of 1990 (OPA).[81] OPA was enacted in direct response to the *Exxon Valdez*[82] oil spill off the coast of Alaska in 1989 and "set in motion the issuance of sweeping new requirements at the federal, state, and local levels."[83] OPA created a one-billion-dollar "Oil Spill Liability Fund" to finance cleanups and details procedures for obtaining access to the funding.[84] OPA and the Federal Water Pollution Control Act[85] address spill prevention control measures and countermeasures.[86] Both acts also impose harsh penalties for failing to restore contaminated areas.[87]

The Resource Conservation Recovery Act (RCRA)[88] is a comprehensive statute enacted to prevent hazardous waste dumping and imposes harsh penalties for illegal dumping.[89] While RCRA provisions generally exempt drilling fluids and other wastes produced by the extraction or production of petroleum,[90] wastes produced by the refining and transportation of petroleum are not exempt.[91] There is some overlap between OPA and the RCRA, which illustrates how comprehensive U.S. oil laws have become. Congress included a statement of purpose in the RCRA, noting that "open

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81. 33 U.S.C. §§ 2701-2761; *see also* Campbell-Mohn *supra* note 41, § 15.2; SKILLERN, *supra* note 71, at 290.

82. For a detailed discussion of the *Valdez* catastrophe and the ensuing lawsuit, see generally DAVID LEBEDOFF, CLEANING UP: THE STORY BEHIND THE BIGGEST LEGAL BONANZA OF OUR TIME (1997).

83. AUSTIN P. OLNEY, ENVIRONMENTAL LAW HANDBOOK (Thomas F.P. Sullivan ed., 14th ed. 1997). *Id.* at 161. Under OPA, state and local governments are free to enact additional statutes or rulings governing oil spill liability or requirements. 33 U.S.C. § 2718(a); *see* International Ass'n of Indep. Tanker Owners v. Locke, 148 F.3d 1053 ("None of the provisions of OPA 90 preempt the ability of states to add to federal requirements in the areas addressed by the Act.").

84. OLNEY, *supra* note 83, at 161.

85. 33 U.S.C. §§ 1251-1387.

86. In OPA, the pollution control measures and countermeasures are part of the Act's "Oil Pollution Research and Development Program." *Id.* § 2761. The Program provides for "research development, and demonstration of new or improved technologies which are effective in preventing or mitigating oil discharges and which protect the environment." *Id.* § 2761(c)(2). The FWPCA establishes "comprehensive programs for preventing, reducing, or eliminating[] pollution." *Id.* § 1252(a).

87. OPA, 33 U.S.C. § 2716(a); FWPCA, 33 U.S.C. § 1319.

88. 42 U.S.C. §§ 6901-6999.

89. Rankin, *supra* note 8, at 238.

90. 42 U.S.C. § 6921(b)(2)(A). The exemption lasts until the EPA determines that hazardous waste rules should apply. *Id.* § 6921(b)(2). In making this determination, the EPA weighs the impact of current regulations together with the cost of alternative measures. *Id.* § 6982.

91. Campbell-Mohn, *supra* note 41, § 15.1.

dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and land."[92] As a long-standing principle, however, U.S. law does not apply to the operations of U.S. oil companies in other countries unless Congress so declares.[93] The U.S. Congress has not officially addressed the conduct of multinational oil corporations operating on foreign soil since 1990.[94] This suggests that a general sense of apathy has pervaded U.S. government policymaking concerning the operations of its MNCs abroad and future congressional intent to apply U.S. environmental regulations extraterritorially is unlikely.

2. Latin America

Over the last several decades, U.S. oil companies operating in Latin America have polluted the region's environment with relative impunity.[95] Throughout the same period, many Latin American countries have been criticized for failing to promulgate legislation that would effectively address the region's many environmental issues.[96] A study conducted by the Inter-American Development Bank reported that "environmental legislation in the countries of the region . . . does not fulfill the basic function of defining national environmental policy and establishing legal mechanisms to enforce it."[97] In the years since the report was conducted, many Latin American countries have adopted "framework laws."[98] The U.N. Environmental Program has described framework laws as "lay[ing] down basic legal

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92. 42 U.S.C. § 6901(b)(4).

93. This principle is based on *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), where the Court held that the 1964 Civil Rights Act did not apply extraterritorially to regulate employment practices of U.S. firms that employ U.S. citizens abroad because Congress has not declared an intent to do so. *Id.* at 248-59. The Court concluded that Petitioners "f[e]ll short of demonstrating the clearly expressed affirmative congressional intent that is required to overcome the well-established presumption against statutory extraterritoriality." *Id.* at 244; *see* Arthaud, *supra* note 8, at 7.

94. *See U.N. Code of Conduct on Transnational Corporations: Hearing Before the Subcomm. on Int'l Econ. Pol'y, Trade Oceans & Env't of the Sen. Foreign Relations Comm.*, 101st Cong. (1990).

95. For example, Texaco was subject to "virtually no environmental oversight" in Ecuador. Kimerling, *supra* note 8, at 207.

96. Lawrence J. Jensen, *Environmental Regulation in Latin America: A Rapidly Changing Legal Framework*, 8 NAT. RESOURCES & ENV'T 23, 24 (1993) (discussing the development of framework laws in several Latin American countries and how they could affect U.S. companies operating in the region). Chile, for example, had a least 700 laws concerning environmental issues, but had promulgated them "in a piecemeal and haphazard fashion over a long period of time, with little coordination and often with the environment as only an incidental concern." *Id.*

97. *Id.*

98. *See id.*; *see also* INTERNATIONAL ENVIRONMENTAL LAW AND REGULATIONS (Dennis Campbell & Marilise Swart eds., 1996) (providing overview of recent environmental legislation promulgated in several Latin American countries).

principles without attempting to codify all relevant statutory provisions."[99] Framework laws generally begin with a declaration of national environmental goals and policies and include "institutional arrangements designating the competent governmental authorities and commissions and by common procedural principles for environmental decisionmaking . . . applicable to all sectors."[100] Broad and generally worded framework laws preserve preexisting legislation and usually have greater scope than U.S. environmental laws.[101]

Several Latin American countries have promulgated laws based on the framework model. In 1990, Peru enacted an Environmental and Natural Resource Code, and in 1991, Colombia adopted a National Environmental Policy.[102] Additionally, Bolivia adopted a General Environment Policy in 1992, its first environmental legislation.[103] In 1994, Chile enacted what is perhaps the most ambitious and comprehensive framework law in Latin America.[104] The country's Environmental Framework Law requires environmental impact studies for projects causing emissions and creating a potential health risk.[105] The law also creates an environmental action that allows citizens or government authorities to file lawsuits against people and businesses to compel polluters to restore the environment.[106] By a unanimous vote, the Uruguayan Senate approved a similar national environmental law that requires environmental impact assessments in new development projects.[107] Argentina added an environmental protection clause to its constitution.[108] The amendment declares that "all inhabitants should enjoy the right to a clean, balanced, and apt environment for human development."[109] The amendment also requires polluters "to repair environmental damage" and obligates the federal government to enforce these environmental rights.[110]

On the surface, these laws appear to address Latin America's serious environmental problems; however, a closer look reveals that many of the framework laws are nothing more than hortatory enactments, as recent developments suggest. For example, in 1997, Venezuela legalized mining in its ecologically sensitive Imataca reserve, "a Holland-size chunk of Amazon

99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Environmental Events in Latin America*, *supra* note 45, at 138.
105. *See* Jensen, *supra* note 96, at 25.
106. *See id.*
107. *Environmental Events in Latin America*, *supra* note 45, at 138.
108. *Id.* at 140.
109. *Id.*
110. *Id.*

rain forest."[111] Even more environmentally daunting is the enormous amount of oil exploration and oil production activity currently underway. The Venezuelan government opened up its oil sector to fifteen billion dollars in U.S. oil investment[112] and plans to double oil production to six million barrels a day by the year 2006.[113] The stakes are especially high for Venezuela, which has the largest proven oil reserves outside the Middle East,[114] because it is home to the perennially snow-capped Andean mountains, the world's highest waterfall, and two of the world's six largest national parks.[115] Moreover, Argentina and Brazil have leased hundreds of thousands of acres to new mining concessions,[116] while in Chile, a massive increase in copper production has begun.[117] In Peru, land leased to oil companies recently has tripled to about 8.5 million acres, a large part of which is in the Amazon valley.[118]

These developments demonstrate that the framework laws have failed to control exploitation of the region's natural resources. Developments also suggest that since the laws were enacted, exploitation may have actually increased. While framework laws are a small step towards the development of a more comprehensive environmental regulatory regime, they fail to bridge the gap between rhetoric and reality. The laws lack precision and fail to address the specific problems caused by the oil production process. Latin America's environmental laws are still in the embryonic stages of development, and until a highly developed environmental framework is crafted, they will remain nothing but codified and constitutionalized rhetoric.

B. *International Conferences and Principles*

International environmental law is generally found in international declarations and collective principles.[119] Declarations and conventions

111. Bart Jones, *Environmentalists Try to Save Ecological Paradise Venezuelan Government Wants Mining in Rain Forest*, CHI. TRIB., Aug. 21, 1997, at 8.

112. *Hearings, supra* note 4.

113. Friedland, *supra* note 24, at 4.

114. Jones, *supra* note 111, at 8.

115. *Id.* Venezuela is also home to a wide variety of exotic species including the saber-toothed payara fish, so ferocious they eat piranha. *Id.*

116. Friedland, *supra* note 24, at 4. It is estimated that about US$12 billion in new mining investment will flow to Latin America by the year 2000. *Id.*

117. *Latin American Copper Output Still Expected to Surge*, METALS WEEK, Sept. 14, 1998, *available in* WL 10021753.

118. Friedland, *supra* note 24, at 4.

119. LYNTON KEITH CALDWELL, INTERNATIONAL ENVIRONMENTAL POLICY FROM THE TWENTIETH TO THE TWENTY-FIRST CENTURY 146 (3d. ed. 1996) (stating that international environmental law is "the collective body of agreements among states regarding mutual rights and obligations affecting the environment. It is embodied in conventions among states (treaties) and, to [a] lesser effect, in international declarations, collective principles, opinions

adopted under the auspices of the United Nations, are the primary source of international environmental agreements. The United Nations has addressed the need to strike a balance between economic development and environmental issues in developing countries. These objectives are rooted in resolutions and declarations of the U.N. General Assembly and major international conferences such as the Stockholm Conference in 1972[120] and the Rio Conference in 1992.[121] The Stockholm Convention was the first convention that addressed environmental issues as a serious agenda and placed the protection of the environment at the forefront of international policy and law.[122] The Rio Conference continued the work begun at the Stockholm Conference.[123] It set normative goals that affect policymaking at both the national and international level.[124] Recognizing that trade and the environment are inextricably linked, the Rio Conference incorporated two major principles of environmental policy. The Precautionary Principle and Polluter Pays Principle have emerged to address the limitations of international environmental law.[125]

Regarded as one of the guiding principles of several global environmental instruments, the Precautionary Principle seeks to gain global recognition.[126] The Precautionary Principle imposes an obligation to prevent environmental harm.[127] It developed out of the growing recognition that scientific certainty[128] often comes too late to implement effective legal and policy

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of jurists, and generally accepted practices among states."). *Id.*

120. *Report of the Human Environment at Stockholm*, Stockholm Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14 (1972), *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter Stockholm Convention]. This Declaration considers the "need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment . . . [which is] the urgent desire of the peoples of the whole world and the duty of all Governments." *Id.* art. I, 11 I.L.M. at 1416.

121. *Report of the U.N. Conference on Environment and Development*, Rio Declaration of the United Nations Conference on Environment and Development, U.N. Doc. A/Conf.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 876 [hereinafter Rio Declaration].

122. BASIC DOCUMENTS ON INTERNATIONAL LAW AND THE ENVIRONMENT 1 (Birnie & A.E. Boyle eds., 1995) [hereinafter BASIC DOCUMENTS].

123. CALDWELL, *supra* note 119, at 104.

124. *Id.*

125. BASIC DOCUMENTS, *supra* note 122, at 9.

126. DAVID FREESTONE & ELLEN HAY, THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION 3 (1996) (asserting that the central tenets of the precautionary principle are increasingly being enacted and developed in international regimes). *Id.*

127. Rio Declaration, *supra* note 121, Precautionary Principle, 31 I.L.M. at 879.

128. Scientific certainty is the burden of proof required for concluding that environmental risks associated with a given activity are high enough to warrant preventative or remedial action. FREESTONE & HAY, *supra* note 126, at 210 (providing a detailed discussion on the principle of scientific certainty).

responses to potential environmental threats.[129] The principle embodies a "better safe than sorry" spirit, reducing the burden of proof necessary for triggering policy responses.[130] Although, the principle generally serves as a touchstone for environmental policy development rather than as a legally binding mandate, several countries have incorporated it in their laws. Colombia, for example, integrated it as a constitutional principle in Colombian Law Number 99.[131] The Precautionary Principle also has been used to counter environmentally disengaged trading agreements.

Addressing concerns about the prohibition against taking unilateral remedial measures under trading agreements such as the General Agreement on Trade and Tariffs (GATT), the U.N. integrated the Precautionary Principle into the Rio Declaration.[132] Woven into Principle 15 of the Rio Declaration, the principle reads: "In order to protect the environment the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[133]

The Polluter Pays Principle takes the Precautionary Principle one step further by imposing liability on any entity that causes environmental harm.[134] The Polluter Pays Principle asserts that the full cost of controlling pollution shall be carried out by the polluter without the help of public subsidies or tax concessions.[135] Instituting the Polluter Pays Principle ensures that the price of goods reflects the complete cost of production, including costs associated with pollution, resource degradation, and environmental harm.[136] Because the environmental costs are internalized in the price of the goods produced, goods that pollute less will cost less, and then consumers might switch to less polluting substitutes.[137] This would result in a more efficient use of resources and less pollution.[138] The Polluter Pays Principle has been adopted in several multilateral resolutions and declarations, including Principle 16 of the Rio Declaration.[139] Principle 16 provides that "[n]ational authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments,

129. *Id.* at 12-13.
130. *Id.* at 30.
131. *Id.* at 253-54.
132. *Id.* at 3.
133. Rio Declaration, *supra* note 121, 31 I.L.M. at 879.
134. SPRINGER, *supra* note 50, at 18.
135. FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 13.25 (1996) (describing the development of the Polluter Pays principle).
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*

taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."[140] The Polluter Pays Principle attempts to shift the cost of restoring polluted areas to industries that engage in environmentally destructive behavior.[141]

Although both the Precautionary and Polluter Pays Principles have been increasingly accepted as international environmental principles, Latin American countries generally reject them.[142] These countries impose few pollution control regulations on industries and lack the means to enforce them.[143] Moreover, applying the Polluter Pays Principle to the oil sector, one of the world's wealthiest industries, will probably have little or no financial effect on the way they conduct business.[144]

Many of the international treaties and conventions reached at the Rio Conference, such as the Biodiversity Convention[145] and the 900-page Agenda 21,[146] have the "potential to combat the growing . . . environmental crisis" in Latin America and to prevent environmental abuse by MNCs.[147] However, the achievement of any real substantive breakthrough in dealing with the crisis is unlikely. Conferences increasingly favor the interests of MNCs, whose efforts are directed at the modification or removal of environmental laws and regulations regarded as restrictive to international trade.[148] Another shortcoming of conferences is that the legal influence of U.N. declarations and resolutions "depends [largely on] the degree of [national] consensus and the extent to which those pronouncements can be applied in practice."[149] International conferences also tend to "compromise issues to the point of inaction."[150]

Moreover, many treaties, which are binding only if ratified by a

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140. Rio Declaration, *supra* note 121, 31 I.L.M. at 879.
141. GRAD, *supra* note 135, § 13.24.
142. *Id.* § 13.25.
143. *Id.*
144. *See supra* note 5 and accompanying text.
145. The Biodiversity Convention focuses on the conservation of species diversity through the integration of environmental and developmental concerns. BASIC DOCUMENTS, *supra* note 122, at 390.
146. Agenda 21 is an extensive and detailed statement of goals and principles to guide the actions of governments at all levels into the twenty-first century. It "calls upon the international community . . . to engage in a dialogue on trade, the environment and development policy-making, [focusing on] the promotion of environmentally sound investment measures." ZEN MAKUCH, GREENING INTERNATIONAL INSTITUTIONS 111 (Jacob Werksman ed., 1996).
147. KARLINER, *supra* note 2, at 50.
148. *Id.*
149. CALDWELL, *supra* note 119, at 147.
150. *Id.* at 63.

signatory,[151] are often rejected. Even though treaties may be entered into force, they are most likely to be either disregarded or only poorly enforced by the signatories.[152] Because multilateral environmental negotiations have become very complex, it often takes years for treaties to take effect. It is often the case that consensus is only found "on the terms of the least common denominator."[153] Arriving at a global consensus is difficult and cannot keep up with the rapidly changing and precarious environmental challenges facing ecologically sensitive regions such as Latin America.[154] Without mechanisms to bring transgressors into line, the development and implementation of an effective international environmental framework will remain glacially paced.[155]

C. *Multilateral Trade Agreements*

The movement towards increasingly liberalized trading arrangements poses the biggest threat to the environment. Global and regional free-trade agreements, such as GATT[156] and the North American Free Trade Agreement (NAFTA),[157] threaten to undermine the ability of Latin American governments to regulate multinational oil companies. These agreements permit governments to subsidize the development of the oil sectors, but attack regulations designed to provide subsidies for environmental conser-

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151. Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980. U.N. Doc. A/CONF.39/27 at 289, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]. Article 34 of the Vienna Convention reads "A treaty does not create either obligations or rights for a third state without its consent." *Id.*

152. CALDWELL, *supra* note 119, at 156-57.

153. SPRINGER, *supra* note 50, at 8.

154. *See* Jeffery L. Dunoff, *From Green to Global: Toward the Transformation of International Environmental Law*, 19 HARV. ENVTL. L. REV. 241, 242 (1995) (arguing that because some nations are underrepresented in the international environmental legal process, international environmental law "must create mechanisms" to effectively represent them).

155. *See* KARLINER, *supra* note 2, at 221-23.

156. General Agreement on Trade and Tariffs, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. Currently known as the World Trade Organization (WTO) Agreement, GATT is an international treaty that came into force in 1948 to promote world trade through the reduction of trade barriers. It is the "first [multilateral] accord to lower [tariffs] since Napoleonic times." THE ECONOMIST, May 16, 1998, at 21. As of 1998, GATT has 132 members with more than 30 waiting to join. *Id.* GATT is pejoratively described by environmentalists as a "corporate bill of rights" because of the "global freedom" to trade it bestows on MNCs. KARLINER, *supra* note 2, at 10.

157. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 289 [hereinafter NAFTA]. NAFTA is a tripartite pact between the United States, Mexico, and Canada that creates a free-trade zone between the three countries by reducing barriers to trade. *Id. See generally* Linda DuPuis, *The Environmental Side Agreement Between Mexico and the United States — An Effective Compromise?*, 8 FLA. J. INT'L L. 471 (1993) (noting the inherent defect of NAFTA and its Environmental Side Agreement).

vation as "barriers to free trade."[158]

According to the EPA, "NAFTA and its Environmental Side Agreement mark the first time environmental issues have been included in a major trade agreement."[159] The agreements "raised the profile of environmental protection in the process of economic and trade integration" and "heightened awareness in the hemisphere of the connection between economic competitiveness and environmental regulations."[160] Furthermore, unlike GATT, NAFTA prioritizes international environmental laws over its own provisions by obligating its members "to adhere to the trade obligations of [a number of] international environmental agreements in the event of a conflict."[161]

While supporters of NAFTA exhort that "it will benefit the environment of all three signatory countries," NAFTA fails to address specific environmental issues.[162] Although NAFTA recognizes many environmental concerns in several of its provisions,[163] the provisions do not have any regulatory force.[164] One of NAFTA's greatest shortcomings is that it lacks a specific provision for the protection of natural resources.[165] Moreover, most of its environmental regulations are broad, vague, and subject to differing interpretations.[166] Proponents of NAFTA argue that despite its shortcomings, NAFTA'S redeeming environmental quality is that it promotes environmental consciousness and provides Mexico with the financial resources that could aid it in enforcing its environmental laws.[167] Environmentalists fear, however, that because Mexico's environmental obligations are

158. KARLINER, *supra* note 2, at 82.

159. DuPuis, *supra* note 157, at 472

160. Van Cott, *supra* note 60, at 512-13.

161. *Id.* The following environmental agreements take precedence over NAFTA under Article 104 of NAFTA: Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T 1087; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550; Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, Mar. 22, 1989, 28 I.L.M. 657; Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug.14, 1983, U.S.-Mex., T.I.A.S. 10827; *see* Van Cott, *supra* note 60, at 513 n.116.

162. DuPuis, *supra* note 157, at 480.

163. One such provision is found in NAFTA's preamble, which states that NAFTA activities should be conducted "in a manner consistent with environmental protection and conservation" and strive to "strengthen the development and enforcement of environmental laws and regulations." *Id.* at 481.

164. *Id.* at 480.

165. *Id.* at 497.

166. *Id.* For example, article 906(1) of NAFTA states that the parties to the agreement will "work jointly to enhance the protection of human, animal and plant life and health, and the environment." NAFTA, *supra* note 157, at 387. Without language articulating specific standards for behavior "guidelines such as this are meaningless." Jeffrey A. Mello, *The Environmental Cost of Free Trade*, 91 BUS. & SOC'Y REV. 18, 27 (arguing that free-trade agreements have negatively impacted the environment).

167. DuPuis, *supra* note 157, at 496.

substantially lower than those in the United States, the United States will be forced to compromise its standards.[168] Similar criticisms have been voiced concerning GATT.[169]

To date, GATT has consistently claimed that it is not an environmental policymaker, but is mainly concerned with trade measures.[170] A recent GATT panel decision held that the U.S. Marine Mammal Protection Act as applied violated GATT because it prohibited the importation of tuna from Mexico.[171] The United States argued that the method used by Mexico for catching tuna caused a high rate death rate for dolphin and therefore was in violation of the Act.[172] The panel, in effect, concluded that multilateral trade imperatives are more important than environmental protection laws.[173] The panel decision illustrates how GATT damages the environment by limiting national sovereignty.[174] Under GATT, countries cannot apply "whatever environmental measures" they want or employ measures to "influence environmental policies abroad."[175]

A former Harvard Business School professor points out that by participating in the drafting of key provisions of these agreements, MNCs are " 'actively rewriting the rules of the market to assure their own rights and freedoms take precedence over the rights and freedoms of the world's citizens.' "[176] In addition, secretive decisionmaking panels are empowered to overturn national laws protecting the environment.[177] For example, a GATT panel ruled that "U.S. laws that tax oil and chemical feedstock to pay for hazardous waste cleanup are unfair barriers to trade."[178] GATT and

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168. *Id.* at 495.

169. *See, e.g.*, Jeffrey L. Dunoff, *Resolving Trade-Environment Conflicts*, 27 CORNELL INT'L L.J. 607, 608 (1994) (arguing that "GATT's fundamental objectives . . . hinder [its] ability to address global environmental problems"); Mike Meier, *GATT, WTO and the Environment: To What Extent Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade?*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 241, 243 (questioning "whether the GATT/WTO system truly permits members to have environmental and health requirements that may put foreign products at a disadvantage").

170. MAKUCH, *supra* note 146, at 112.

171. GATT: Dispute Settlement Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594, 1622 (1991) [hereinafter *Tuna Decision*]; *see* DuPuis, *supra* note 157, at 495-96 (discussing the Panel's decision).

172. *Tuna Decision*, *supra* note 171, at 1622.

173. *See id.*; *see also* Meier, *supra* note 169, at 243.

174. *See generally* William R. Sprance, *The World Trade Organization and United States Sovereignty: The Political and Procedural Realities of the System*, 13 AM. U. INT'L L. REV. 1225 (1998) (examining the question of U.S. sovereignty in light of the WTO agreement).

175. GILPIN, *supra* note 40, at 95 (defining and describing GATT).

176. KARLINER, *supra* note 2, at 42 (quoting David Korten former Harvard Business School professor) (citation omitted).

177. *Id.*

178. *Id.* at 42-43. GATT also restricts public participation and stipulates that its proceedings and documents be kept secret. MAKUCH, *supra* note 146, at 113.

NAFTA also have "a chilling effect" on the development of more stringent environmental laws by limiting governments to approaches in line with GATT or WTO rules.[179] Both are ineffective in addressing Latin America's environmental crisis. Further trade liberalization most likely will exacerbate these problems.

IV. CODES OF CONDUCT AS AN ALTERNATIVE TO THE CURRENT ENVIRONMENTAL REGULATORY FRAMEWORK

Although the current international environmental regime has made some progress in generating environmental consciousness, it has failed to effectively address Latin America's environmental crisis. A better approach in dealing with this crisis lies in the development of codes of conduct that would regulate the behavior of U.S. oil companies operating in this ecologically sensitive region. A code[180] of conduct is a written declaration of standards by which a host country expects a MNC to act.[181] These standards generally include a canon of ethics and statements not to exploit nations where MNCs operate.[182] Increasingly, codes of conduct and their accompanying benefits are being recognized.[183] Between 1971 and 1980, most major international organizations developed proposals for MNC codes of conduct.[184] In 1972, the U.N. Group of Eminent Persons Report,[185] formed to discuss the problems of MNCs, stated that codes of conduct are a consistent set of recommendations which are gradually evolved and which may be revised as experience or circumstances require. " 'Although they are

179. KARLINER, *supra* note 2, at 43.

180. RAYMOND J. WALDMAN, AMERICAN ENTERPRISE INSTITUTE STUDIES IN LEGAL POLICY, REGULATING INTERNATIONAL BUSINESS THROUGH CODES OF CONDUCT (1980).

181. In the national legal context the term "codes" generally has been used to describe a systematic collection or compilation of laws rules or regulations, while in the international legal context "codes" are generally characterized as an arrangement of conventions and recommendations. *Id.* at 19; *see also* EMERGING STANDARDS OF INTERNATIONAL TRADE AND INVESTMENT: MULTINATIONAL CODES AND CORPORATE CONDUCT (Seymour J. Rubin & Gary Clyde Hufauer eds., 1983) (discussing and describing the development of corporate codes of conduct).

182. Mark B. Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?*, 24 U. MIAMI INTER-AM. L. REV. 399, 409 (1993). Baker asserts that the conduct of MNCs should be self-regulated through "private internal codes of conduct." *Id.* at 401.

183. David M. Schilling & Ruth Rosenbaum, *Principles of Global Corporate Responsibility*, 94 BUS. & SOC'Y REV. 55, 55 (1995) (discussing the importance of codes of conduct in advancing global principles of corporate responsibility). A number of codes have been developed during the last 18 years, including the MacBride Principles on Fair Employment in Northern Ireland; the Maquiladora Standards of Conduct on fair employment, health and safety, environmental practices, and community impact of U.S. companies operating in Mexico; the CERES Principles, addressing company responsibilities for the environment; and the World Health Organization/UNICEF code on Instant Formula Marketing. *Id.*

184. Baker, *supra* note 182, at 409.

185. WALDMAN, *supra* note 180, at 20.

not compulsory in character, they act as an instrument of moral persuasion, strengthened by the authority of international organizations and the support of public opinion.' "[186]

Although dismissed at first as "toothless rhetoric," codes of conduct promise to play an important role in bridging international differences while still preserving the sovereign right of national governments.[187] The U.N. Center on Transnational Corporations (UNCT) codes has promoted corporate codes of conduct as valuable tools in guiding the behavior of MNCs.[188] The UNCT pointed out that " '[i]n some cases, self-regulation may be more effective than national regulations themselves, especially in those countries in which enforcement mechanisms are weak.' "[189] The inroads made by one code, known as the Sullivan Principles, illustrates the potency of these schemes.[190]

During the 1970s and 1980s, the Sullivan Principles, a code of conduct drafted in 1977 by Reverend Leon Sullivan, calling for desegregation in the workplace, equal pay, and equal employment practices in South Africa, was embraced by more than 100 U.S. companies after they were pressured by their stockholders critical of U.S. investment in apartheid South Africa.[191] The Principles fought apartheid by aiding black South Africans to gain workplace rights and influenced U.S. corporations in South Africa by calling their attention to the injustices of the South African employment system.[192] The Sullivan Principles represent a successful attempt by MNCs to come together against a clearly defined problem and illustrate that codes of conduct are and continue to be vehicles for change. Today, private codes govern the activities of many U.S. corporations operating in developing countries. Motorola Inc., Caterpillar Inc., and Boeing, for example, each have developed codes of conduct governing corporate behavior abroad.[193] Written by the

186. *Id.* (quoting the U.N. Group of Eminent Person's Report) (citation omitted).

187. JOHN M. KLINE, INTERNATIONAL CODES AND MULTINATIONAL BUSINESS: SETTING GUIDELINES FOR INTERNATIONAL BUSINESS OPERATIONS 3-4 (1985).

188. *Id.* at 4.

189. KARLINER, *supra* note 2, at 48 (quoting UNTCMD, WORLD INVESTMENT REPORT 1992: TRANSNATIONAL CORPORATIONS AS ENGINES OF GROWTH 90-91 (1992)).

190. *International Law Inc.*, 110 FOREIGN POL'Y 72 (1998); *see also Economic Sanctions and Their Potential Impact on U.S. Corporate Involvement in South Africa: Hearing Before the Subcomm. on Africa of the House Comm. on Foreign Affairs*, 99th Cong. (1985); *Hearing Before the Subcomm. on Domestic Monetary Policy of the House Comm. on Banking, Finance, & Urban Affairs*, 99th Cong. (1985); Anthony Lewis, *Sharp and Short and Dramatic*, N.Y. TIMES, Sept. 24, 1995, at A35.

191. *International Law Inc.*, *supra* note 190, at 72.

192. *Id.*

193. KLINE, *supra* note 187, at 130, 136, 146. According to one study, 83% of U.S. companies have adopted codes of conduct, which are sometimes called Corporate Directives, Administrative Practices, Standards of Business Conduct, or Code of Best Practice. THE BLACKWELL ENCYCLOPEDIC DICTIONARY OF BUSINESS ETHICS 114 (Patricia H. Werhone &

corporations themselves and not binding, codes of conduct have a greater effect on the environment than most treaties.[194] Unlike treaties, codes of conduct can be specially tailored for a specific industry.[195] This feature of codes makes them especially suited to oil companies operating in Latin America. For example, codes may specify special impact assessment requirements in particular areas and provide important monitoring mechanisms to ensure all phases of the oil production process are environmentally sound.[196] Public codes also may serve to guide the activities of oil companies operating in Latin America.[197]

The need to strike a balance between the integration of developing countries into the global economy and the promotion of corporate responsibility prompted the United Nations to draw up a code of conduct for MNCs operating in developing countries.[198] During the 1970s, the U.N. General Assembly passed three Resolutions that culminated in a Code of Conduct for Transnational Corporations as part of the U.N. Declarations on New International Economic Order.[199] In recent years, other organizations also have developed codes of conduct for guiding multinational behavior abroad, including the International Chamber of Commerce's Environmental Guidelines for World Business and its Business Charter for Sustainable Development.[200]

Regarded as "soft law,"[201] voluntary codes of conduct represent a starting point for "creating binding legislation."[202] The 1992 Guidelines on

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R. Edward Freeman eds., 1997).

194. *See* KLINE, *supra* note 187, at 157.

195. Baker, *supra* note 182, at 415.

196. *See id.*

197. *See id.*; *see also* WERNER J. FELD, MULTINATIONAL CORPORATIONS AND U.N. POLITICS: THE QUEST FOR CODES OF CONDUCT (1980) (discussing the development of several public codes of conduct); Seymour J. Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development*, 10 AM. U. J. INT'L L. & POL'Y 1275 (1995) (discussing the need to reinvigorate the development of public codes of conduct).

198. KLINE, *supra* note 187, at 18.

199. Declaration on the Establishment of a New International Economic Order, May 1, 1974, G.A. Res. 3201, 29 U.N. GAOR Supp.(No. 1), at 3, U.N. Doc. A/9559 (1974), *reprinted in* 13 I.L.M. 715 (1974); Charter of Economic Rights and Duties of States, Dec. 12, 1974, G.A. Res. 3281, 29 U.N. GAOR Supp. (No.31), at 50, U.N. Doc. A/9631 (1975), *reprinted in* 14 I.L.M. 251 (1975).

200. Fowler, *supra* note 6, at 29.

201. The soft law concept has been identified as "[d]eclarations, resolutions, guidelines, criteria, codes, recommended practices, standards, etc. [which] are increasingly used and increasingly legally significant as signposts on the way to customs and treaties." Van Cott, *supra* note 60, at 515 n.128 (citing Patricia Birnie, *International Environmental Law: Its Adequacy for Present and Future Needs, in* INTERNATIONAL POLITICS OF THE ENVIRONMENT 83 (Andrew Hurrell & Benedict Kingsbury eds., 1991)).

202. *Id.* at 515.

the Treatment of Foreign Direct Investment, which was crafted by the World Bank, are illustrative of soft law evolving into "hard" binding law.[203] Initially nonbinding on any bank member, the Guidelines set the standard for how developing countries should treat foreign capital in order to encourage investments.[204] The Guidelines served as the stimulus for the negotiation of a new treaty and prompted the Organization for Economic Cooperation and Development (OECD) to develop the Multilateral Agreement on Investment (MAI).[205] The MAI empowers foreign investors to take any government to international arbitration for compensation when a law or a state practice limits investors freedom to invest or divest.[206] Thus, what began as a nonbinding set of guidelines has developed into a binding mandate of international law.

Adopting codes of conduct as a regulatory framework to guide and regulate MNC behavior abroad promises to bring about much needed change in an area where accountability is currently nonexistent.[207] At the very least, codes of conduct may supplement the current environmental framework in confronting oil pollution in Latin America.[208] Whether developed by MNCs themselves or through intergovernmental organizations, the flexibility and versatility of codes of conduct are well suited to addressing Latin America's environmental crisis.[209] In responding to the crisis, oil companies should provide a structure for settling disputes and a mechanism for imposing sanctions. A comprehensive code should contain provisions that provide "competent compliance monitoring" and "institutional arrangements to modify the code or formulate more detailed rules."[210] Latin America's environmental problems should no longer be ignored or marginalized. Codes of conduct promise to be a powerful tool in bridging the different policy objectives between oil companies and the countries in which they operate.[211]

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203. *See World Bank General Counsel, Report to the Development Committee on the Legal Framework for the Treatment of Foreign Investment, S 2, reprinted in* IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: "THE WORLD BANK GUIDELINES" 193 (1993).

204. *See id.*

205. *OECD Multilateral Agreement on Investment, The MAI Negotiating Text* (as of Apr. 24, 1998) 21 <http://www.oecd.org/daf/cmis/mai/negtext.htm>.

206. *Id.*

207. *See* Baker, *supra* note 182, at 432.

208. *See* KLINE, *supra* note 187, at 50.

209. *See* Elizabeth Glass Geltman & Andrew E. Skroback, *Environmental Activism and the Ethical Investor*, 22 J. CORP. L. 465 (1997) (discussing the efficacy of environmental codes of conduct in addressing environmental concerns).

210. Baker, *supra* note 182, at 418.

211. KLINE, *supra* note 187, at 7.

V. CONCLUSION

The international community's efforts to mitigate the environmental impact of MNCs in Latin America and other less developed regions around the globe have made little progress. This note's evaluation of the current environmental regulatory framework reveals that it is based more firmly on rhetoric than reality. Although international environmental conferences and declarations have visionary appeal, they must be tempered by a keen sense of what is achievable. Codes of conduct are an attractive alternative to the present framework because they bring more stability and predictability between MNCs and developing nations. MNCs should develop codes of conduct because such codes are both environmentally and socially responsible. The development of a substantive international commitment to the environment should be firmly grounded on the principles of MNC responsibility and accountability, not merely under the rubric of environmental save-the-planet rhetoric.