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Minding Our Business
Corporate social Responsibility Pressures and the Failure to Develop Universal Global Rules to Govern Investors and States
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The most famous economist of the 20th century, John Maynard Keynes, had an evocative image of capitalism. He believed that markets were propelled by animal spirits. These spirits could yield growth, but at times must be domesticated to ensure that the law of the jungle-eat or be eaten--does not apply.

Lord Keynes led the British postwar planners, who worked with their U.S. counterparts on the initial design of policies and institutions to shape global markets for goods and capital. Their plans became the World Bank, IMF and the GATT/WTO. These institutions have served global capitalism well.

But there is one yawning gap where the animal spirits can run wild. There are no global rules governing the rights and responsibilities of international investors and recipient states.[1] While most companies maintain high social and environmental standards wherever they locate, some companies take advantage of nations with inadequate governance to locate their plants. This article will examine that gap in international rules and explain how it has been an important factor in growing

[1] There are, however, rules governing trade related investment measures within the WTO.

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public pressure on business to act in a globally Aresponsible@ manner.

This article begins with the failed history of international investment agreements. Policymakers in the developed and developing world have not been able to find common ground on the rights and responsibilities of investors and nations at the multilateral level. They recognize such rules could yield global economic efficiencies and cheaper more plentiful capital. But they also understand that global rules could limit the power of governments to shape investment flows.

I will argue that the absence of international accepted investment rules have led to a wide range of ad hoc attempts to regulate the behavior of corporations across borders. These Asoft law@ strategies include codes of conduct; voluntary corporate reporting of environmental and social performance; and corporate philanthropy partnerships with governments and international institutions. At the same time however, the sheer number of such strategies is leading business executives (as well as civil society activists) to call for a wide range of public policies to promote CSR at the multinational levelBor to put it differently, to encourage uniform adherence to globally responsible behavior. [2]

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[2] On the variety of U.S. responses, see Joshua D. Margolis and James P. Walsh, AMisery Loves Companies: Whither Social Initiatives by Business,@ 22 June, 2001; on Europe, see Susan Ariel Aaronson and James Reeves, AThe European Response to Public Demands for Global Corporate Responsibility,@ January 2002, at www.multinationalguidelines.org; and also a summary of Canadian initiatives at www.cbsr.org and www.dfait-maeci.gc.ca/tna-nac/social_links_e.asp; and

webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104560.htm

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A Brief Overview of Failed International Investment Negotiations

The ITO

During the postwar planning process, from 1942-1945, the U.S. and British planners tried to develop a system of rules governing international economic transactions. They designed an international charter to govern employment, commercial policies, and even business practices. Although the ITO was supposed to be comprehensive, its American and British architects did not see investment as part of the original ITO plan. In 1946, when the first draft charter was negotiated in London, it emerged with chapters on employment, commercial policy, business practices and economic development. But there was no chapter on investment. Many senior State Department officials feared that it would be impossible to achieve an international consensus on investment rules. Moreover, these officials (and many of their negotiating partners) were ambivalent about broadening the purview of the ITO. While it was clear that trade and investment were related, it was not clear how rules to govern both trade and financial flows could be linked without creating a multitude of exceptions.[3] U.S. business leaders in 1947, however, did not share policymakers= ambivalence. In meetings and public hearings, they made it clear that U.S. business groups really wanted such rules as a condition for their support for the ITO. Thus, State Department officials

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[3] Susan Ariel Aaronson, Trade and the American Dream (Lexington: University of Kentucky, 1996), 5-7, 67, 85-86, 90-91. The book is a history of the development of the ITO and the GATT.

included investment in the next draft, the Geneva draft of the ITO. However, the Treasury Department and the International Monetary Fund objected to the Geneva draft of the ITO=s investment provisions. Moreover, when the Geneva draft rules were made public, business leaders were furious at its language. Instead of inspiring greater business support, the Geneva draft investment provisions became a sticking point on the ITO. [4]

[4] Aaronson, Trade and, 83-86 fn. 17-20 on p. 212-213 list primary source evidence.

U.S. negotiators were determined to come up with a final Charter that could attract U.S. (and foreign business support). Thus they and other nations included business leaders in the delegations to Havana, where the final Charter was to be negotiated and signed. These executives gave the negotiators instantaneous feedback on how business constituencies might respond to the ITO=s investment clauses. Ultimately the delegates at Havana agreed to revise the investment articles to obligate members to afford adequate security to existing and future investment. The ITO Charter=s investment articles also provided that members could, upon request, negotiate treaties to protect foreign investment. However, although the charter set up the principle that foreign investors have justifiable rights, some business leaders perceived the investment articles as affirming the sovereign right of governments to expropriate. In addition, critics concluded that the charter emphasized the rights of capital importing countries more than those of investing nations.[5] As a result, the investment chapters inspired opposition to the ITO, rather than helping the Charter gain additional support.

Members of Congress became increasingly aware of such opposition. It was one of the many factors that led Congress to postpone a through discussion of the ITO. In 1950, the ITO was officially abandoned by U.S. and soon thereafter by the 53 other nations that signed the Charter in

[5] Ibid., 86-91, fns. 34-45.

Havana.[6] For the next 40 years, cross-border investment was governed principally by bilateral treaties. Such treaties were incredibly important between developed nations and developing nations, because many such nations did not have adequate judicial systems in place to protect private property.[7] But the lesson of the ITO, that it would be difficult to forge universal rules to govern the rights of investors and recipient states, was not lost upon policymakers.

Harmonizing the Rights and Responsibilities of Investors

[6] ITO members would have to afford adequate security to existing and future investments. However, the ITO set up no more rights to private property than that embodied in the U.S. Constitution, according to the negotiators.

[7] For a good understanding of investment agreements and development, see www.unctad.org/iia/iiapapers/index.htm, pp. 3-5.

From 1950-1970, investment and trade fueled economic growth around the world in both developing countries and industrialized nations. During the Cold War, policymakers tried to find ways to facilitate investment flows, because they believed that international capital mobility would create jobs, encourage economic diversification, and raise living standards around the world. [8] Moreover, they understood that foreign aid flows would never be sufficient or flexible enough to provide food, shelter and work for all of the world=s people. Yet ever so gradually, these men and women developed a more nuanced view of foreign investment=s effects upon economic stability and economic autonomy. UN bodies began to study the effect of foreign investment upon working and living conditions around the world. In 1970, the ILO began to assess the relationship between multinational corporations and social policies. In 1972, the United Nations Conference on Development passed several resolutions dealing with the relationship of foreign private investment to development, to restrictive business practices by multinational corporations, and to the transfer of technology. These resolutions gave notice that a growing number of developing country leaders were concerned about the Aadverse effects@ of multinationals upon their social, economic and

[8] Industrialized countries, particularly the U.S. receive the bulk of international investment. The U.S. today receives more than 30% of worldwide investment, according to the Council of Economic Advisors, Annual Report of the Council of Economic Advisors 2000 (Washington: GPO, 2000), 215. Economists believe the international capital mobility allows portfolio diversification, improves risk sharing and moves capital to those firms that are best able to make productive use of it.

political systems.[9] These men and women were beginning to see that foreign investment could help spur increased economic and political Afreedom,@ but it could also undermine longstanding social, cultural, and political morees.

The U.S. was the largest source of overseas capital. From 1945-the late 1960s, few Americans questioned the benefits of international investment to the global economy or polity.

[9] United Nations (UN) Department of Economic and Social Affairs, Multinational Corporations in World Development (New York: Praeger, 1974), 5-6, 108-115. In the 1960-1980s, many firms wanted stability and were attracted to set up operations in nations with stable authoritarian regimes, such as Indonesia or Korea. An interesting study, by David Jessup, ADollars and Democracy,@ 10, November 1999 at www.newecon.org/D-Dexecsummary.html found that Ademocratic countries in the developing world are losing ground to more authoritarian countries when it comes to competing for U.S. trade and investment dollars.@ However, four countries account for 67.6 percent of total U.S. Foreign Direct Investment in developing country manufacturing. Two of those countries, Brazil and Mexico have become more free. The other two, Malaysia and China are becoming more democratic, but remain relatively authoritarian, according to Freedom House=s ranking of human rights organization.

Labor leaders, however, were a prominent exception. Nor did policymakers and activists focus on the dark side of American capitalism around the world. This dark side included U.S. business links to corrupt and tyrannical regimes, the use of sweatshops by suppliers and subcontractors of U.S. firms, and a lack of concern for by U.S. executives of how U.S. multinationals affected the environment, worker rights, or local culture.[10]

[10] As this book will show, labor unions long sought to curtail U.S. foreign investment. For example, in 1971, labor unions supported the Foreign Trade and Investment Act (Burke-Hartke), which was rooted in the idea that multinationals had shipped jobs overseas and thereby eroded the U.S. industrial base. For a thorough history of this bill, see Kent Higgon Hughes, Trade, Taxes, and Transnationals: International Economic Decision Making in Congress (N.Y: Praeger, 1979).

In the 1970s, several events forced American policymakers, activists, and citizens to pay attention. First, Americans learned that prominent U.S. companies such as Pepsico had pressed the U.S. government to act against the elected Socialist Party government of Salvador Allende in Chile. ITT Corporation, a U.S. multinational and owner of Chile=s phone company, illegally channeled money into Republican party coffers to influence the Nixon administration to overflow the Allende government, because it feared that the Allende administration would nationalize this subsidiary. In addition, several American multinationals provided money to Allende=s opposition.[11]

[11] Primary source documents related to the sordid history of U.S. Government and business involvement in Chile in the 1970s. Several of the declassified Department of State documents describing this embarrassing history are available at the National Security Archive at www.gwu.edu/~NSAEBB/NSAEBB8/ch18-03.htm.Also see www.pir.org/chile.html; and ACIA Admits to Financing One of Hemisphere=s Worst Human Rights Offenders,@ www.coha.org/00_1718_CIA.htm..

These revelations coincided with a growing belief that U.S. law must regulate American multinationals. Congress acted on multiple fronts. In 1967, Congress amended the Fair Labor Standards Act of 1938. This legislation gave the President permission to restrict imports if the secretary of labor found that imported goods from low-wage nations impaired or threatened to impair the standard of living of U.S. workers or the economic welfare of U.S. communities. Neither President Johnson nor Nixon acted under the authority granted by the law, but in this way, Congress sent a message to U.S. multinationals that they would be watched. Meanwhile, environmentalists and executives were also beginning to debate the impact of inconsistencies between global rules governing trade and investment on one hand, and national rules governing worker, consumer, and environmental protections. During the hearings on the Trade Act of 1974, some witnesses noted the irony that Americans ate imported food from Mexico treated with pesticides banned in the U.S. The chemical manufacturer Cyanamid called for the harmonization of international standards, Ato bring about comparative equity between the foreign and domestic producers.@ And a representative from the International Union of Electrical, Radio and Machine Workers complained that America=s strong system of work protection cost his union jobs. ASuch things as the OSHA . . . that Congress has legislated for our benefit are not applicable@ to Mexico. This union leader alleged that America=s worker protections inspired American multinationals to ship jobs to Mexico to evade U.S. social regulations. [12] Finally, in 1977, Congress passed the Foreign Corrupt Practices Act,

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[12] Susan Ariel Aaronson, <u>Taking Trade to the Streets: The Lost History of</u>

which set rules regarding bribery and corruption in overseas operations.[13]

The U.S. was not alone in reexamining the impact of foreign investment. Diplomats worked at the United Nations and the Organization for Economic Development and Cooperation (OECD) to develop investment agreements that contained language that balanced clauses on the activities of multinationals with clauses on their fair treatment. But as in Havana, policymakers in New York and Paris failed to develop common ground on a well-balanced code.

Public Efforts to Shape Globalization (Ann Arbor: Michigan, 2001), 68, 74-84.

[13] American business initially argued that this law put them at a competitive disadvantage in many foreign markets. But instead of trying to derail the law in the U.S., they joined with civil society activists to create a code at the OECD which would be adhered to by other industrialized nations. In short, they sought to make sure that their foreign competitors would also have to avoid corruption. Robin Broad and John Cavanagh, AThe Corporate Accountability Movement: Lessons and Opportunities,@ September 1998, 24, in possession of author.

The UN was the site of the most ambitious attempt at creating just such a code. On July 2, 1972, the United Nations Economic and Social Council unanimously adopted Resolution 1721, which requested the Secretary General to appoint a group of eminent persons Ato study the role of multinational corporations and their impact on the process of development, especially that of developing countries . . . to formulate conclusions which may possibly be used by Governments in making their sovereign decisions . . . and to submit recommendations for appropriate actions.@[14] The Group of Eminent Persons hoped to develop a set of recommendations addressed to business and government, but it was never clear whether these recommendations would eventually be made enforceable as part of an international treaty.[15] As UN members continued to discuss what to do, it became clear that although multinationals were based in many nations, the multinationals many believed were out of control came from mainly one nation, the United States. [16] Thus, the negotiations were perceived in particular by U.S. businesses as tainted with anti-Americanism.

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14 Werner J. Feld, Multinational Corporations and U.N. Politics: The Quest for Codes of Conduct (New York: Pergamon, 1980), 35.

15 United Nations Department of Economic and Social Affairs, The Impact of Multinational Corporations on Development and on international Relations (New York: 1974), 55, 57.

16 Feld, Multinational Corporations, 39; and Robert Gilpin, AThe Political Economy of the Multinational Corporations: Three Contrasting Perspectives,@ American Political Science Review 70(March 1976): 184-91..

UN diplomats spent some 20 years trying to draft an internationally acceptable code. The participants struggled with not only the scope of the code, but with the definition of a transnational corporation, the legal nature of the code (is it binding or not), and how the code should be implemented. But these issues were never resolved.[17] However, during the twenty years of code negotiation, global market and political conditions changed dramatically. After the 1982 debt crisis, private and public leaders insisted that developing countries such as Mexico, Turkey, Brazil, Indonesia, and Thailand had over borrowed and must Aadjust@ their economies. Nations such as were pressured by international institutions and national aid agencies to practice fiscal discipline, privatize key sectors, and protect property rights. They were also encouraged to invest tax dollars in public goods such as education and develop an accessible, uncorrupt, and transparent system of regulation.[18] Soon thereafter, the old world order abruptly ended, when young Germans scaled the Berlin Wall and dismantled the concrete block that divided Berlin. Communism collapsed and the former Soviet Union was gradually dismantled.

These developments led many Americans and Europeans to question their governments= policy priorities. Some Americans, as example, noted that the money spent on defense could have

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[17] Feld=s book provides an excellent overview of these problems as of 1980, see pp. 60-107.

[18] Bela Belassa et al., Towards Renewed Economic Growth in Latin America (Washington: IIE, 1986); and John Williamson, Ed., Latin American Adjustment: How Much Has Happened? (Washington: IIE, 1990), see esp. 7-35.

been better invested in national education, public health or infrastructure. Moreover, Americans and Europeans also began to question the policies-especially trade and financial policies furthered by the IMF, the World Bank and other international organizations, that transferred capital from their countries to developing countries.[19] As activists and policymakers in the developing world became more enthusiastic about strategies to attract investment, as well as the potential of investment to spur both growth and democratization, many activists in the developed world began to sour on these outflows.

[19] Aaronson, Taking Trade, 92.

By the 1990s, according to Jane Becker of the Department of State, most developing countries were Amore interested in promoting foreign investment rather than trying to negotiate rules to regulate the ways in which foreign investment proceeded through transnational corporations.@ [20] Thus, in her view, developing countries now only wanted to attract investment, not regulate it. But the recipients of investment were not the only global actors who were ambivalent about the UN code. Many business leaders viewed the UN Code, as well as the actions of the UN=s affiliated Center for Transnational Corporations (CTC) as unhelpful. They saw this as an opportunity to dump what they perceived as the one sided code. The President of the 46th General Assembly told his counterparts that Aa fresh approach was needed,@ given the changed international economic environment.[21] In March 1993, under pressure from the George H. Bush Administration, UN Secretary General Boutros Boutros Ghali announced the restructuring of several UN agencies. The CTC staff was reduced and the CTC was converted into a smaller agency, part of

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[20] Statement of Jane Becker, Deputy Assistant Secretary, Bureau of International Organizations Affairs, Department of State, in AStatus of U.N. Code of Conduct on Transnational Corporations,@ House Committee on Foreign Affairs, 101 Cong, 1st sess., 15 November, 1989, 7.

[21] Sandrine Tesner and Georg Kell, The United Nations and Business: A Partnership Recovered (N.Y: St. Martins, 1999), 23, 168.

the UN Conference on Trade and Development.[22]

However, in this period, members of the OECD, an international organization of industrialized countries, were also attempting to negotiate an investment code that could stimulate investment, but also shape business behavior. In 1976, these nations developed a Declaration on Investment as well as Guidelines on Multinational Enterprises. The Declaration was designed to set rules governing investment and the Guidelines gave policymakers recommendations regarding how their multinationals should Abehave@ overseas. Thus, from day one, the OECD proceeded with an effort to balance rights and responsibilities.

22 Interhemispheric Resource Center, ABlood, Sweat and Shears: Corporate Codes of Conduct,@ at www.igc.org/trac/features/sweatshops/codes.html; and Broad and Cavanagh, AThe Corporate Accountability Movement: Lessons and Opportunities,@ 16.

While the Declaration has not changed since its initial drafting, the Guidelines were frequently revised to reflect changing market conditions and expectations for business. In 1998, officials at the OECD tried to reach out to civil society groups and involve them in redrafting the Guidelines. Thus, the latest (2000) version of the Guidelines address a wide swath of issues from technology to child labor. According to the OECD, the Guidelines Aprovide guidance on appropriate business conduct...including environmental standards, labour relations, human rights, and the conduct of business partners, including suppliers and subcontractors.@[23] However, the Guidelines are simply a benchmark, they do not override national or international law. For these reason, many civil society groups are ambivalent about the potential of the Guidelines. [24]

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[23] OECD, AThe OECD Guidelines for Multinational Enterprises, Revision 2000, June 2000. They are also available on the web at www.oecd.org/daf/investment/guidelines/faq.htm.. Quote from, OECD Proceedings,@Non-Member Economies and the OECD Guidelines for Multinational Enterprises, 12 December, 2000, 4. The Guidelines were revised in 1979, 1982, 1984 and 1991.

[24] The OECD hoped to build a broad international constituency by involving civil society groups, business, and labor groups in the latest revision of the Guidelines. Their positions were posted on the OECD web site, and the site was open to public comment.www.oecd.org/daf/investment/guidelines; Mark Valliantos,@OECD Guidelines: A Challenge to OECD governments to Ensure

Corporate Accountability,@ in possession of author; and comments of civil society representatives at NPA Conference, Can Governments Promote Global Corporate Social Responsibility?, June 11-12, 2001, Washington, D.C., see www.multinationalguidelines.org for a summary .

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The Guidelines appear to have had little impact on global business operations. Most governments have done little to inform their firms about the Guidelines and as a result, most corporate officials have not even heard of them. Moreover, the Guidelines are complex, legalistic, long and confusing. Their language on implementation is unclear. For example, the Guidelines urge firms to be responsible for their subcontractors, but do not delineate how companies can beheld responsible.[25] This is an important point because many large firms have high standards, but their subcontractors and suppliers (firms with significant influence in the developing world) do not share such high standards. These suppliers and subcontractors could help to raise standards and expectations for how workers and the environment should be treated as goods are produced, but the Guidelines don=t say how. Finally, the Guidelines were negotiated and implemented by industrialized nations, essentially for industrialized nations. Until the most recent revision, no middle income or developing nation was involved. As of this writing, (February 2002), the OECD still has no firm policies for encouraging non-OECD members to adhere to the Guidelines. This code, thus,

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[25] Susan Ariel Aaronson and James Reeves, AThe European Response to Public Demands for Global Corporate Responsibility,@ Report prepared for the Boeckler Foundation, Germany, February, 2002, 10-15, available at www.multinationalguidelines.org. For an additional criticism, see OECD=s own overview, OECD, <u>OECD Guidelines for Multinational Enterprises: Global Instruments for Corporate Responsibility</u> Annual Report 2001, 12-26; and Trade Union Advisory Committee (TUAC) ATuac Survey of the Functioning of National Contact Points in the above, 37-44.

is totally directed towards the supply side of investment. In a December 2000 conference sponsored by the OECD to entice developing and middle income countries to adhere to the Guidelines, several participating nations expressed concerns about the development and rationale of the Guidelines.[26] It was clear that they would not implement these Guidelines soon.

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[26] AOECD Proceedings: Non-Member Economies and the OECD Guidelines,@ 12 December 2000, 53, 55, 57.

This was not the only attempt by OECD policymakers to find a way to balance the rights and responsibilities of investors and states. In 1995, an OECD Committee asked OECD members to authorize negotiation of an investment treaty, the Multilateral Agreement on Investment (MAI), that could govern investment among industrialized nations. The MAI was designed Ato respond to the dramatic growth and transformation of foreign direct investment which has been spurred by widespread liberalization and increasing competition..for capital.@[27] According to economist Edward (Monty) Graham, industrialized country officials chose the OECD because its members were Alike-minded on investment policies and already had put in place relatively liberal investment regimes... Moreover, some nations, including the U.S., feared that a bloc of developing countries could have prevented any high-standards agreements from ever coming into force.@ Thus, they were only willing to begin international negotiations on investment with other investment

[27] Report by the Committee on International Investment and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT), at www1.oecd.org/daf/mai/thm/cmitcime95.htm. This site has all the official documents from the MAI negotiations.

suppliers.[28] The participating nations hoped to establish rules to remove existing barriers and controls on foreign investment, from portfolio investment to more longer term direct investment.

[28] Edward M. Graham, Fighting the Wrong Enemy: Antiglobal Activists and Multinational Enterprises (Washington: Institute for International Economics, 2000), 9-10.

As with the ITO and the UN Code of Conduct, the negotiations failed to produce an international treaty. The delegates found that the negotiating nations were not in fact like-minded. The U.S., for example, feared that European Governments would not let it maintain unilateral sanctions against foreign owned companies engaged in transactions with Cuba, Iran, and Libya. (These sanctions were considered discriminatory by America=s important Canadian and European trade partners.) The French and Canadian governments, in contrast, wanted to exclude cultural sectors from the MAI, fearing that foreigners would come to dominate movies, music, and literature, and national culture would vanish. In addition, the United States wanted the MAI to be like its bilateral investment treaties, where the U.S. demanded that investors be given not simply nondiscriminatory treatment but treatment that was Ano less favorable@ than that granted either to domestic investors or to foreign investors from other countries in similar circumstances. (This language might force a country to give preferential treatment to foreign investors.)[29]

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[29] See www.ustr.gov/reports/actpn/investment.html (in 1997). The ACTPN, the Advisory Committee on trade Policy and Negotiations, is the major trade advisory committee of the U.S. Government.

The MAI was the fourth failed attempt to develop international investment rules (although the 145 members of the WTO have agreed to try to negotiate investment rules under the aegis of the WTO). Each failed for a wide variety of different reasons. One common reason for each failure, however, was business ambivalence about the impact of such rules and concern that business would not get enough rights in return for delineated responsibilities..

But in contrast with the ITO, the UN, and the OECD Declaration on Investment, the MAI also failed because it aroused the opposition of a broad constituency of development, consumer, environmental, and civil society groups. These groups first became concerned about the global economic architecture as a result of a trade dispute between the U.S. and Mexico, which centered on how fisherman should protect dolphins as they fished for tuna. They eventually came to oppose the North American Free Trade Agreement because they feared its rules could undermine U.S. and Canadian environmental and social regulations. The MAI , although focused on investment rules, rather than trade rules, looked equally threatening. Like trade negotiations, the MAI negotiations were conducted in secret. However, many members of Congress were not even aware of these negotiations because they had not directly authorized them. The result was, in my opinion, a dramatic decline in trust of international economic policymakers and policies.[30]

[30] Aaronson, Taking Trade, 19-22; 146-165.

In May 1997, civil society activists obtained a copy of the secret negotiating draft and made it public on the Internet. As a result, the MAI stimulated a broad discussion among civil society groups about the impact of international economic agreements upon national laws and norms. Many such activists saw multinationals not as standard setters, but as corporate predators that scoured the world in search of lower standards for how workers and the environment should be treated as goods and services are produced.[31] Many environmentalists and public health activists for example, feared that firms would challenge national or state level environmental or consumer regulations because such regulations deprived such foreign investors of the value of their assets (or of potential markets). According to the investment scholar Monty Graham, Awhat the NGOs brought to light is that NAFTA (and the MAI, had it come into force) could be interpreted as creating a new doctrine towards regulatory takings...more friendly to owners of assets whose value might be diminished by regulation.@ Why would international investors get greater rights than domestic investors? These investors could seek compensation for such regulatory takings through the international agreement (whether NAFTA or the MAI). Such a mechanisms would not be available to local investors. Graham reports that the negotiators aimed to correct this language and did not intend to cover

[31] This has long been the view of many U.S. and European environmental, consumer, and human rights groups such as Public Citizen, SOMO in the Netherlands, and Greenpeace.

regulatory takings. But the damage (to the agreement, to trust of policymakers, even to support of economic internationalism) was done.[32] Many internationalist civil society groups (environmental groups such as Friends of the Earth) joined with nationalist groups (such as Public Citizen) to oppose international investment negotiations and to shape existing investment agreements through new law. However, other groups such as Human Rights Watch, Oxfam, the Prince of Wales Business Leaders Forum, ANPED (the Netherlands), World Resources Institute, CERES, and Friends of the Earth U.K., among others, also decided to develop other ways by which they could pressure companies to act responsibly.[33] They decided to pressure corporations directly by outing corporation wrongdoers.

From Investment Rules to CSR Pressures

International investment today is governed by a complex patchwork of rules. According to the UNCTAD, this framework includes Amany kinds of national and international rules and principles; an extensive network of bilateral investment promotion and protective agreements,@ government sponsored codes of conduct such as the OECD Guidelines; and Asoft law, including

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32 Graham, Fighting the Wrong, 40-49.

33 On opposition to including investment in the WTO, see www.tradewatch.org/MAI.htm. Pieter Van der Gaag to Stop WTO Round List: OECD Guidelines for Multinationals: Call to Action, e-mail 18 February, 2000. Pieter who comes from ANPED, the Northern alliance for Sustainability in the Netherlands, organized the civil society response to the OECD Guidelines and fully participated in the negotiations. Other civil society activists that were very involved in the negotiations were Duncan McLaren of Friends of the Earth U.K. and representatives from Oxfam, England.

corporate codes of conduct.@ [34] Bilateral investment agreements are negotiated primarily with developing and transition countries, and do not address development, environmental, and employment issues. A prominent exception is the NAFTA, which is not only a trade agreement, but an investment agreement between Mexico, Canada, and the United States. [35] The WTO, the international agreement that covers trade, only covers trade related investment measures.[36]

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[34] UNCTAD, AForeign Direct Investment and Development, IIA Issue Papers, at www.unctad.org/iia/iiapapers/index.htm.

[35] NAFTA=s investment provisions have become very controversial. In February, Bill Moyers aired two tv shows about NAFTA=s investment provisions (the show NOW on PBS). The Senate Report on HR3005 (the Bipartisan Trade Promotion Authority Act addresses concern about NAFTA=s investment provisions with specific legislative language to ensure that foreign investors can not challenge existing U.S. regulations as Aregulatory takings.@ Senate Finance Committee, AReport to Accompany HR 3005, February 2002, Section 2(b)3. Foreign Investment, p. 12-13.

[36] However, the members of the WTO agree to negotiate investment issues during the Doha Round of Global Trade Talks, launched in Doha, Qatar. The WTO members agree to take into account Adevelopment policies and objectives of host governments as well as their right to regulate in the public interest.@ World Trade Organization, AMinisterial Declaration,@ WT/MIN ()1)DEC/W/1/14 November, 2001. In the weeks that have followed, they have debated what this means.

Without common global rules of behavior governing how workers, communities and the environment should be treated, overseas investors sometimes get into trouble. Firms such as NIKE (which makes and designs sportswear and shoes), chemical giant Union Carbide, or oil company Exxon Mobil have been punished (by local law and consumer actions) for their lack of concern about their impact upon the workers and communities where they operate.[37] The actions of these companies (and others) have furthered a perspective among many of the world=s people that multinational businesses are too powerful, answering only to themselves.[38]

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37 See Edward Alden, ABrands Feel the Heat,@ Financial Times 17 July, 2001; and AThe Best Global Brands,@ Business Week, 6 August, 2001, 50-57; 60-64. Scholars acknowledge that it is very difficult to measure the bottom line impact of CSR. See Joshua D. Margolis and James P. Walsh, AMisery Loves Companies: Whither Social Initiatives by Business,@ 22 June, 2001, 8, fns 3, 4. This paper is available from the Aspen Institute=s Initiative for Social Innovation for Business.

38 NA, AGlobalization and its Critics: A Survey of Globalization,@ Economist 29 September, 2001, 743-13.

In recent years, citizens around the world have become more vocal in demanding that global business be held accountable for conduct that could undermine economic, social, or environmental progress. According to Federal Reserve Chairman Alan Greenspan, people are bothered about "the way markets distribute wealth and about the effects of raw competition on the civility of society."[39] Some observers believe that the protests at the Seattle World Trade Organization (WTO) ministerial, the Davos World Economic Forum, and the annual World Bank/International Monetary Fund meetings were essentially international protests about the behavior of global corporations.[40] While most citizens have not taken to the streets, polls show that citizens share protestors= concerns about the role of corporations in the globalization process. One poll of opinion leaders in the United States, United Kingdom, Germany, France, and Australia found that respondents trusted civil society groups twice as much as they trusted governments, media, or corporations "to do what=s right." Another, broader poll of 20,000 interviews across G-20 countries found that 45 percent of those polled say that they trust their national governments to operate in the best interest of society, while 42 percent think that corporations operate in society=s best interest. In contrast, 65 percent of those polled say that they trust civil society groups to work in the best interest of society. These polls should signal to policymakers that they want their elected representatives to do more to influence the behavior of

[39] Greenspan is quoted in John Plender, AUnpopular Capitalism,@ Financial Times 11 September 2000; AThe World=s View of Multinationals, Economist 29 January 2000, 21-22;and Aaron Bernstein, ABacklash: Behind the Anxiety Over Globalization,@ Business Week 24 April, 2000, 38-48.

global business. [41]

[40] See above and Aaronson, Taking Trade, 186-189.
[41] Poll conducted by Strategy One, an Edelman Company, from August 27-October 9, 2000. It had a small sample, however. The second poll conducted by Environomics from December 200-January 2001 had a much broader, more reliable sample. See APoll findings Suggest Trouble Ahead for the Globalization Agenda,@ www.wtowatch.org/news/index.cfm?ID=2638

Elites and activists increasingly agree that international law and policy must change to meet these concerns. Business leaders and social/environmental activists have proposed a wide range of policy fixes. Georg Kell (of the UN) and John Gerard Ruggie (of Harvard) noted in a 1999 paper, while there are good rules and enforcement mechanisms for global market actors, there are not good rules for the environment, human rights or poverty. This imbalance in global rules cries out for action. AAs a result, civil society actors are increasingly targeting TNCs (transnational corporations, today called multinational corporations) and the trading system as leverage...to pursue such concerns. We contend that this dynamic interplay provides a productive venue...to bridge the imbalance between economic globalization and the governance structures that it has left behind.@ [42] Dani Rodrik, a professor at Harvard=s Kennedy School of Government argues that the world trading system must be reformed to address income inequality by rules that link labor mobility, education and global market opening. [43] The former head of the WTO Renato Ruggiero, in an April 12, 1999 speech, took a different tack. Instead of expanding the scope of existing international organizations, Ruggiero suggests that policymakers develop new institutional structures that involve

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[42] Georg Kell and John Gerard Ruggie,@Governing the Public Domain beyond the Era of the Washington Consensus? Redrawing the Line Between the State and the Market,@ 3-4, Presented at York University, Toronto, Canada, 4-6 November, 1999, in possession of author. Kell is Director, UN Global Compact. Ruggie, former UN Undersecretary, is a Professor at Harvard University.

[43] Professor Rodrick proposes that the upcoming round of trade talks develop rules to allow people from developing countries to work for three to five years in rich countries, sending home part of their pay and going home to use their skills to help spur economic growth and lift incomes. Louis Uchitelle, AChallenging

developing country officials in a leading role.[44] In a frank speech to the participants to the World Economic Forum in 2002 UN Secretary General Kofi Annan, warned business leaders that they cannot ignore the inhumane conditions in which much of the world live and toil. He noted that while he believed that globalization holds the best hope of overcoming poverty and other social ills, it is up to you (the elite), Ato prove it wrong, with actions that translate into concrete results for the downtrodden, exploited and excluded.@ He noted that business leaders must take the lead in pressing for new social, public health, and poverty programs. The richest man in the world, Bill Gates, Chairman of Microsoft responded, Awe need a discussion about whether the rich world is giving back what it should in the developing world.@ [45]

But many executives do not think they owe anything to their global stakeholders, while others don=t know how to Agive back what it should.@ In response, some activists as well as executives have seized upon corporate social responsibility (CSR) as an additional tool to shape

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the Dogmas of Free Trade,@ The New York Times 9 February, 2002.

[44] ARuggiero Calls for New World Forum to Address Global Challenges,@ Inside U.S. Trade 16 April, 1999, 13.

[45] The remarks of both Annan and Gates were reported in Serge Schmemann, AAnnan Cautions Business as Forum Ends,@ New York Times 5 February, 2002, A14.

globalization. It is unclear how CSR strategies, which are essentially soft law strategies, can encourage the many private businesses that operate across borders to Ado the right thing@ everywhere they operate. Many of these companies have high standards, but do not hold their thousands of suppliers and subcontractors responsible for such standards. Moreover, it is unclear how companies that act responsibly can continue to maintain such policies in the very competitive global marketplace.

The Potential of Corporate Social Responsibility Strategies

Whether operating nationally or internationally, corporations have an obligation to their shareholders to produce or deliver high quality, reasonably priced goods or services and, by so doing, make profits. This is the economic purpose of the corporation. But corporations also have social purposes, a social impact, and, de facto, a social role. Business needs the approval of society to make profits and prosper over time. However, many executives have not found it easy to gain national, let alone global, approval of their operations. Private companies confront a world not only with many different governments, languages, cultures, and norms, but also with many different expectations for private sector activities.

The corporate form was actually developed to help private actors achieve public purposes. In the 15th century, European towns were incorporated to gain freedom from feudal lords. In the 17th century, England chartered joint stock companies that explored the Americas and the East Indies, set up settlements, and increased the nation=s global reach, wealth, and power.

But it was in the United States that incorporation became a principal tool to achieve public goals. In the early 19th century, as the new nation struggled to develop, U.S. states chartered corporations to achieve public goals. Between 1776 and 1800, according to historians Mandel Blackboard and K. Austin Kerr, some 300 companies were incorporated by state governments. The first corporations were transportation firms, bridge companies, banks, and insurance companies. These firms served the public by providing transportation, infrastructure, or financing to enhance economic development.[46]

By the end of the 19th century in the United States as well as in other industrializing nations, incorporation became a strategy to mobilize capital. But the notion that corporations should serve the public good has not been totally lost. In fact, the international reach of many corporations has created new and even greater expectations of business in the global community.

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[46] Mandel G. Blackboard and K. Austin Kerr, Business Enterprise in American History (New York: Houghton Mifflin, 1994), pp. 120-121.

The public purpose of the global corporation, however, is ambiguous. Almost everyone has a different definition of corporate citizenship. To David Grayson, President of Business in the Community in Great Britain, global corporate social responsibility entails "managing effectively the company=s actual and potential environmental and social impact on the communities in which [the firm] operates and on society as a whole." [47] To Siemens AG, headquartered in Germany, "Corporate citizenship is our global commitment. Our knowledge and our solutions help create a better world."[48] To Reverend David Schilling, Director of Global Corporate Accountability Programs for the New York-based Center on Corporate Responsibility, "The principles for global corporate responsibility call on companies to base their corporate policies on a vision of themselves as one of many stakeholders in the global community and to set high standards of conduct in relation to their employees, the environment, and the communities in which they operate."[49] Finally, according to the World Business Council for Sustainable Development, global corporate citizenship "is about what business puts backCCin return for the benefits it receives from society. This implies that the rights society bestows on business organizations come as an inclusive package that contains certain

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[47] David Gray son, Business in the Community, London, U.K., 23 February 1999 speech on corporate citizenship at 222.davidgrayson.net/speeches/leadnewyork_feb23.htm.

[48] W4.siemens.com/regionen/cc_en/mission.

[49] AReligious Groups Propose Principles for Global Corporate Responsibility,@ Corporate Crime Reporter, 5 February, 1996, at www.citinv.it/associazioni/CNMS/archivio/strategie/global_corporate.html.

obligations to behave in a way society finds acceptable."[50]

[50] World Business Council for Sustainable Development,@ Corporate Social Responsibility,@ 3.

Clearly, CSR has become quite fashionable among many of the world=s largest firms. Their annual reports are filled with examples of how they improve the environment and the communities in which they operate. Many of America=s, Canada=s, and Europe=s largest firms are members of national associations devoted to CSR. [51] Moreover, socially responsibly investing has become an important trend around the world. Even Zambia has a social investment fund. Last year, nearly one out of eight dollars invested in the United States under professional management was involved in socially responsible investment. In Europe, assets under SRI management increased by 36%, from euros 11.1.bn in 1999 to Euros 15.1billion in mid-2001. [52] But if the economic rationale for CSR is so clear and market forces are so strong, why should government play a role in CSR activities at all? The first reason for government to play a role in CSR stems from the problems of voluntary

[51] In the U.S., the association is called Business for Social Responsibility, www.bsr.org; in Canada its Canadian Business for Social Responsibility, www.cbsr.org. There are a number of organizations in Europe working in this area including the Prince of Wales Business leaders Forum; and the World Business Council for Sustainable Development.

[52] Social Investment Forum, A2001 Report on Socially Responsible Investing Trends in the United States,@ November 28 2001, at www.socialinvest.org/areas/research/trends/2001-Trends.htm. . A growing number of executives believe that decision-making should be linked to ethical values, and respect for people, communities and the environment. They argue that socially responsible investing can yield improved financial performance, reduce operating costs, improve business= ability to attract and retain employees, increase customer loyalty and sales, and yield higher productivity.

strategies. Aspirational strategies such as codes of conduct may be an attractive alternative to direct regulations, but they have no formal means of accountability. Moreover, many of these mechanisms, whether codes of conduct or reporting strategies, do not clarify if subcontractors and suppliers should also adhere to these codes and strategies. Policymakers may be called upon to provide such clarity through formal rules.

Moreover, there are simply too many such voluntary strategies. Activists, policymakers and executives have created what seems to be a code for every problem. The OECD recently reviewed 246 codes, some of which are addressed to suppliers and others to employees. Some of these codes are sector specific; others are designed to apply to all companies operating across borders. The sheer number of such codes sends confusing signals to corporate executives about the one(s) to which they should comply. Governments can alleviate some of this confusion and perhaps encourage a rationalization of this plethora of codes. Moreover, by promoting widespread business adherence to the codes, governments can help ensure that responsible corporate actors are not disadvantaged in global markets. [53]

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[53] Ginger Thompson, AWorkers at Nike-Reebok Contractor Attract Activists from U.S.,@ The New York Times 8 October, 2001, A3 and Claudia H. Deutsch, ATogether at Last: Cutting Pollution and Making Money,@ The New York Times 9

September, 2001.

The second reason for governments to play a role in CSR is because citizens are demanding that policymakers do so. But they have struggled to do so without thwarting investment to and from their borders. Policymakers want to encourage further economic integration. All nations need the investment, technology, employment, and cost efficiencies that global firms bring to national economic growth. On the other hand, most policymakers want to ensure that such corporations do not despoil the environment, produce defective products, or abuse workers. Yet, while they must act to cushion citizens from the side effects caused by global capitalism, policymakers are often unwilling to regulate at the national level. So they come up with a Clintonesque third way. CSR policies allow policymakers to try to hold corporations accountable without thwarting the many benefits companies bring to their stakeholders.

Executives are also calling for government to encourage CSR. Consumers and investors around the world are pressing companies to act responsibly. As a result, many corporations (and industry groups) have adopted codes of conduct or accepted reporting standards such as the SA 8000 or the Global Reporting Initiative. Sometimes, firms sign on to principles to forestall public protests about their activities. For example, many U.S. companies signed on to human rights principles to guide their operations in China. The principles were developed by human rights groups and urge companies to uphold basic labor standards defined by the International Labor Organization, and the United Nations Universal Declaration of Human Rights.[54] But companies can=t respect rights in China without backup from governmental policymakers. Business Week noted in a recent article on the growing number of global labor standards strategies , Ain the long run, the spread of private sector-standards may force global bodies...to step in.@[55]

[54] Reebok, Mattel, and Levi Straus, among other companies, signed on the U.S. Business Principles for human Rights of Workers in China. These business principles were promoted by the U.S. Department of Commerce. But the U.S. department of State has codes for the extractive sectors, and also promotes the OECD Guidelines. See Inside U.S. Trade, 28 May, 1999, 5.

[55] Aaron Bernstein, ADo-It Yourself Labor Standards,@ Business Week 19 November 2001, 74.

Activists are also demanding changes to business practices, and asking for governmental help. But not all activists thought CSR is an appropriate tool. To Susan George, a prominent European antiglobalization activist, Athere is no point in politely asking the transnationals to be a little less destructive...and to downsize marginally fewer people. The only way forward is to oppose not only what they DO but what they ARE. Codes of conduct suit their purposes, not ours,@[56] The AFL-CIO and many other labor, human rights, consumer, and environmental groups says corporations must be regulated globally. They continue to argue that the right place to write these rules are within the WTO.

[56] E-mail Susan George to stopwtoRound@onelist.com. I received a similar response from Lori Wallach, Director of Global Trade Watch, in discussions in the Hague, 26 November, 2001.

However, we are unlikely to obtain labor and environmental standards within the WTO in the near future. Thus, we are left with voluntary approaches, as noted above, because there are no multilateral rules governing investors and states. Consequently, some activists have tried to change corporate culture to get companies to monitor their social and environmental performance by showing how to report on their environmental, labor, civic and human rights activities. For example, the Global Reporting Initiative (GRI, which focuses on environmental reporting) and SA 8000 (which focuses on social reporting) give companies the tools to measure and monitor social and environmental performance (and perhaps prove that social/environmental high standards can also yield cost savings and higher profits). Companies have jumped on the reporting bandwagon. According to one study, about 64 percent of the world=s largest companies use their Web sites to disclose social and environmental activities and progress. However, there is no uniform approach to social and environmental reporting. As a result, some activists and corporate leaders have asked securities and investment regulatory authorities at the national and international levels to develop uniform rules for **A**triple-bottom Line reporting@-reporting on the social, environmental, and profit performance of corporations or investment vehicles.) [57]

Thus, while few businesses want governments to regulate corporate social responsibility, a growing number of executives (and activists) want policymakers to provide clarity to the plethora,

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[57] Workshop B4; Assessing Corporate Social and Environmental Performance, AProtestors could be Tomorrow=s Investors,@ at a November 27 Conference, Brussels, Belgium, ACorporate Social responsibility on the

ambiguity, and limitations of voluntary approaches to CSR. Some governments have responded creatively to this challenge, seeing CSR policies as an additional tool to govern globalization. These governments, include Britain, the Netherlands, and Canada. Other governments, such as the United States, Mexico, Brazil, and Germany, have done very little.

European Social Policy Agenda,@ at www.social responsibility.be.

CSR policies do not necessarily mean regulatory strategies. For example, Australia gives preferential tax status to Asocial companies,@ firms that prove that they are protecting the environment or workers. The U.S. government encourages public/ private partnerships (with tax credits as well) for firms that donate computer infrastructure to schools. The British require pension funds to report on the social, environmental, as well as profit performance of their investments. French law now requires companies listed on the stock exchange to describe the social and environmental consequences of their activities in their annual reports. [58] This strategy of using market forces and sunshine to encourage global CSR holds great promise.

Some governments, inspired by human rights problems in Nigeria, Chad and Burma, have tried to create their own voluntary codes. For example, in December 2000, the U.S. State Department and the British Foreign Office, in tandem with multinationals, unions, and human rights organizations, announced a statement of principles, the Voluntary Principles on Security and Human Rights. These principles were designed to provide guidance on business firms can help prevent

[58] Green Paper, APromoting a European Framework for Corporate Social Responsibility, July 18, 2001, COM (2001) 366 final, 17.

human rights violations, while at the same time meet legitimate corporate security requirements. The principles were signed by unions, NGOS, and major companies such as Rio Into, Texaco, BP Amoco, and Shell.[17] The Dutch government just agreed to implement them too.

Governments have also used the power of the purse. The Japan Bank for International Co-operation and the U.S. Export/Import Bank publish environmental guidelines that aim to set environmental standards for companies seeking financial support from those agencies. The Australia and New Zealand Government Procurement Agreement set out procurement guidelines that include a section on integrity and ethics.[59]

And some governments have tried to link codes of conduct to trade policy. The British government developed the Ethical Trade Initiative-a cooperative partnership between government, corporate, and labor officials and local civil society groups to improve labor standards at factories in the developing world. The Canadian government proposed linking the Free Trade Agreement of the Americas to a code of conduct. The OAS is currently researching how this link could be achieved without undermining support for this 34 country trade agreement.[60]

[59] OECD, Corporate Responsibility, 94.
[60] On the Ethical Trade Initiative, see www.ethicaltrade.org/_html/about/faq/content.shtml; on the OAS, see www.summit-americas.org/eng/quebec-summit1.htm., 16.

Developing and middle income countries are also responding to CSR. The Philippines (and Thailand) are examples of countries that are trying to ride CSR pressures to attract investment. Philippine clothes manufacturers take great pride that some 70% of their factors are inspected by outside labor auditors. Consumers can rest assured that their clothes were not made under sweatshop conditions. The Employers Confederation of the Philippines argues that labor audits of work conditions will allow Philippine industries to attract companies that want their consumers to know that their products are not made under sweatshop conditions. [61]

Unfortunately, many nations don=t have effective governance, and others have governments that barely function at all. Yet these nations too may be able to ride CSR pressures to get companies to provide goods and services that governments may be unable to provide. Thus, those firms that operate in Chad may have to provide transportation, education, housing and public health services to their employees in order to operate in Chad.

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[61] Bernstein,@Do-It yourself,@ 74

CSR is not always perceived by recipient countries as helpful. Some developing country policymakers fear that CSR strategies (if mandated or appear to be mandated) could become a de facto trade barrier, because CSR policies may place higher burdens on local producers. But CSR strategies do not necessarily favor bigger more efficient business. For example, governments can adopt tax policies that promote CSR such as write off provisions for investments in human capital or for provisioning for environmental liabilities. Such a strategy can benefit big as well as small business. Governments can also change their budgetary policies to promote CSR. Ending or reducing agricultural or mining sector subsidies can prevent deforestation or pollution. Middle income nations such as Brazil can use the power of the purse to deny taxpayer subsidized benefits to firms that don=t adhere to national standards (or internationally agreed to norms) overseas. [62]

Development funders such as the Dutch, Canadian and British have held conferences on how to use CSR pressures and socially responsible investment funds to partner with companies in encouraging social and economic development. In recognition of the importance of foreign investment, many are they are trying to create the partnerships that

[62] Many of my views on this issue were shaped by a discussion on CSR that I moderated on-line through the World Bank. It is viewable on-line at www2.worldbank.org/hm/hmethics/

encourage business to do the right thing and help developing nations do more.

Conclusion

CSR can not solve the problems of the global economy. After all, GE may bring good things to life, but it can not end poverty. Archer Daniels Midland may claim it is the supermarket to the world, but it can not ensure that no child goes hungry. DuPont may provide better living through chemicals, but it can not ensure safe drinking water worldwide. Problems of poverty; malnutrition; environmental degradation stem not from the evils of big business but from inadequate governance. These are services citizens should demand that governments provide. At the same time, however, policymakers should do everything they can to encourage investment, as they hold corporations accountable for how they treat workers and the environment in countries where governance is inadequate. A good approach might be to encourage market based solutions, focused on transparency, to hold these companies accountable. Firms can be required to do social, environmental reporting on their overseas operations.

To ensure that global markets work equitably as well as efficiently, global markets will need global rules. One strategy is to develop global investment rules, but such rules will be a long time coming. Moreover, it will be difficult to develop such rules given both the diverse status of regulations around the world, and the belief among some investors that such regulations may deprive them of markets. In the interim, many people will continue to rely on CSR strategies to encourage positive global business behavior.

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