Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law

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INTRODUCTION

Private actors play an important role in transnational economic activity, and corporations are one of the dominant vehicles through which private actors participate in the global economy. Corporations wield tremendous economic, political, social, and legal influence. Some transnational corporations have more economic, social, political, and legal clout than many developing countries. The amount of money at stake gives

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corporations a strong incentive to engage in politics through means ranging from lobbying to bribery. The policies of corporations can directly stimulate or dampen urban development, promote or hinder access to education, and support or thwart family cohesiveness. Large corporations have the human capacity and economic resources to engage in complex, long-term legal strategies to influence law-making in a manner that is beneficial to the corporations' interests.

Transnational corporations operate in and are subject to the laws of multiple jurisdictions. As creatures of the state, the rights and obligations of corporations are determined in the first instance by the domestic law of their state of incorporation or real seat of business. Transnational corporations — corporations that own, operate, or control business ventures in countries other than the country in which they are incorporated or have their real seat (their "home country") — are subject to additional laws. In addition to the national law of the countries in which they operate, transnational corporations are subject to international law, such as international trade law and foreign direct investment law.

Although trade and foreign direct investment law are inherently intertwined, they followed very different paths in the second half of the twentieth century. In 1948, eighteen national governments signed the General Agreement on Trade and Tariffs ("GATT").[1] In 1995, 128 countries signed the World Trade Organization Agreements ("WTO Agreements"), which included the 1994 update of the GATT.[2] By 1998, 153 of the approximately 195 countries in the world had become members in the World Trade Organization ("WTO") and membership continues to grow.[3] The WTO serves as a point of convergence for all international trade issues. Under the umbrella of the WTO, a series of agreements and a body of cases have developed to govern international trade and the resolution of trade disputes. In contrast, efforts to create an international organization to address foreign direct investment issues have been unsuccessful. Although, international trade law developed and matured, multilateral foreign direct investment law stagnated.

Foreign direct investment remains underregulated and underenforced. There is no comparable international body shaping foreign direct investment law and handling disputes. Foreign direct investment policy-making continues to rely heavily on neoclassical economic theory. Under the

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1. Australia, Belgium, Brazil, Canada, Cuba, France, India, Luxembourg, Myanmar, Netherlands, New Zealand, Norway, Pakistan, South Africa, Sri Lanka, United Kingdom, United States of America, and Zimbabwe.

2. World Trade Organization [WTO], GATT Members, http://www.wto.org/english/thewto_e/gattmem_e.htm (last visited Oct. 20, 2009) (listing the 128 countries that had signed GATT by 1994).

3. *See* WTO, Understanding the WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Oct. 20, 2009).

neoclassical economic development model,[4] foreign direct investment will promote prosperity around the world, and so it should be promoted by minimizing government intervention. In practice, this means minimal laws and regulations.

However, despite inhibited regulatory development and cycles of deregulation, many of the anticipated benefits for developing countries and their citizens have yet to materialize. True, laws encouraging foreign direct investment contribute to technology transfer, increased tax revenues, and other economic benefits. However, existing laws are lax, one-sided, or limited in scope. They allow transnational corporations to cause harms such as property damage, personal injury, and significant environmental damage.[5] Insufficient protections and limited avenues for redress encourage transnational corporations to chase profits with limited concern for consequences.[6]

Legal scholarship on foreign direct investment often follows lines of inquiry that dovetail with neoclassical economic theory and prioritizes the protection of investments by transnational corporations.[7] Legal scholarship addresses issues ranging from attracting foreign direct investment to balancing differing interests of more developed and less developed

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4. In the neoclassical economic development model, economic development and prosperity can be promoted through economic policy that reduces regulation and limits intervention in private economic activity.

5. For purposes of this article I have depicted foreign direct investment with broad brush strokes. However, the types and extent of harms or benefits from foreign direct investment vary from sector to sector and region to region. Foreign direct investment also affects different groups differently, for example, by gender. *See generally* U.N. Research Inst. for Soc. Dev., *Foreign Direct Investment, Development and Gender Equity: A Review of Research and Policy*, Occasional Paper No. 12 (Jan. 2006) (*prepared by* Elissa Braunstein). Exploring foreign direct investment through the lens of specific sectors, regions, and specific groups offers an avenue to develop more nuanced recommendations for a mandatory legal framework for Global Corporate Citizenship. *See, e.g.*, Rachel J. Anderson, *Gender, Foreign Direct Investment, & Global Corporate Citizenship*, WOMEN'S RTS. L. REP. (forthcoming 2010) (manuscript on file with author). I will explore specific sectors, regions, and affected groups in future articles. For a more detailed discussion of future research, see generally Rachel J. Anderson, *Global Corporate Citizenship: A Research Agenda* (Working Paper Series, 2009), *available at* http://ssrn.com/abstract=1477137.

6. *See generally* Justice Ian Binnie, *Legal Redress for Corporate Participation in International Human Rights Abuses*, 38 THE BRIEF 44 (2009), *available at* http://www.icj.org/IMG/20091022093202185.pdf. This problem is exacerbated by a general lack of international civil law. *See also* Christopher L. Blakesley, *Criminal Law: United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109 (1982) ("[I]nternational law has tended to focus on penal rather than civil jurisdiction.").

7. *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 640 (1998) ("Although a substantial academic literature related to [bilateral investment] treaties exists, there has been surprisingly little analysis of the impact of BITs on the welfare of the countries that have signed them.").

countries.[8] The common thread remains the extent to which host states should protect or circumscribe the rights of transnational corporations to secure a hospitable atmosphere for foreign direct investment. This emphasis neglects the interests of individuals and communities in developing countries.[9]

The narrow approach to regulating foreign direct investment law proscribed by neoclassical economic theory and the corresponding circumscribed approach in legal scholarship are counterproductive to the point of being harmful. One of the most common forms of foreign direct investment law, the bilateral investment treaty, is generally structured to protect transnational corporations from acts of expropriation or naturalization by host country governments without adequate compensation. Bilateral investment treaties and the scholarship that analyzes them tend to omit societal stakeholders, such as individuals and communities affected by businesses owned, operated, or managed by transnational corporations.

Plaintiffs alleging harms by transnational corporations face substantive and procedural hurdles. The United States is one of the primary venues to bring claims against transnational corporations. This is particularly true when the defendant corporation is incorporated in the United States. The Alien Tort Statue provides an opportunity to seek redress in U.S. courts against U.S. corporations.[10] However, many claims do not rise to the level of violating the law of nations, as required under the Alien Tort Statute.[11]

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8. *See, e.g.*, Kojo Yelpaala, *In Search of Effective Policies for Foreign Direct Investment: Alternatives to Tax Incentive Policies*, 7 NW. J. INT'L L. & BUS. 208 (1985); Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259 (1994); Richard J. Hunter, Jr., Robert E. Shapiro & Leo V. Ryan, C.S.V., *Legal Considerations in Foreign Direct Investment*, 28 OKLA. CITY U.L. REV. 851 (2003); Ted G. Telford & Heather A. Ures, *The Role of Incentives in Foreign Direct Investment*, 23 LOY. L.A. INT'L & COMP. L. REV. 605 (2001); Kevin A. Hassett, *The Role of Trade & Foreign Direct Investment in Development*, 26 MICH. J. INT'L L. 355 (2004).

9. *See, e.g.*, Amanda Perry-Kessaris, *Enriching the World Bank's Vision of National Legal Systems and Foreign Direct Investment*, 2, Jan. 30, 2008, http://ssrn.com/abstract=1087547 (discussing the World Bank's disregard for "the fact that legal reforms designed to attract investors may be [sic] impede the ability of other actors, such as civil society representatives, to pursue their individual objectives through the legal system").

10. The applicability of the Alien Tort Statute to corporations is disputed. Petition for Writ of Certiorari at 10–11, Abdullahi v. Pfizer, No. 09-34 (2d Cir. July 9, 2009), 2009 WL 2173302 (arguing that there is a circuit split on the question of corporate liability under international law).

11. 28 U.S.C. § 1350 (2000) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). The law of nations is the Eighteenth Century term for what we now call customary international law. William S. Dodge, *After* Sosa*: The Future of Customary International Law in the United States*, 1, Nov. 13, 2006, http://ssrn.com/abstract=944245. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."

Thus, cases brought by plaintiffs alleging cultural genocide, certain human rights violations, and international environmental torts may be dismissed for failure to state a claim under the Alien Tort Statute.[12] Allegations of violations of rights to life, health, and sustainable development are also deemed by U.S. courts not to rise to the standard of violating the law of nations.[13] In addition to dismissal due to lack of subject matter jurisdiction, many cases in U.S. courts are dismissed on the basis of forum non conveniens, where a court determines that an alternative forum would be more appropriate.[14] This example highlights some of the challenges facing plaintiffs seeking redress for alleged harms that result from the operations of transnational corporations.

This Article argues for the reform of foreign direct investment law and proposes a new approach as a step toward a mandatory legal framework. Modern foreign direct investment law is a vestige of the colonial era during which early forms of transnational corporations emerged. Unlike international trade law and despite the dramatic developments of the twentieth century, foreign direct investment law remains largely unchanged. Prior multilateral efforts to implement comprehensive foreign direct investment law reforms have been largely unsuccessful. However, in recent years, growing political will has emerged under the umbrella of Global Corporate Citizenship and related movements.

Global Corporate Citizenship emerged in management and business scholarship in the 1990s, but has not yet entered the legal discourse to any significant extent. Theories of Global Corporate Citizenship address the ethical responsibilities of companies operating in a global market and the values that should guide corporations' engagement with society. Management and business scholars propose Global Corporate Citizenship as a voluntary framework that should be adopted by officers and directors because it is good for business. Theories of Global Corporate Citizenship offer a useful perspective with which to reframe and reform foreign direct investment law.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987). In the context of the Alien Tort Statute, this applies most clearly to "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . . ." *Id.* § 404. Customary international law is not static but rather it changes over time.

12. *See, e.g.*, Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997) (dismissing the case without prejudice for failure to state a claim under the Alien Tort Statute because cultural genocide, certain human rights violations, and international environmental torts are not widely accepted as violations of the law of nations).

13. *See, e.g.*, Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510, 515–19 (S.D.N.Y. 2002) (finding that claims of violations of rights to life, health, and sustainable development did not violate the law of nations and dismissing the case for lack of subject matter jurisdiction).

14. *See* Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 82–83 (2005).

This Article has three sections. Section I, Early Flaws and Subsequent Failures, explains the origins of asymmetries in foreign direct investment law through the birth of the transnational corporation in the shadow of colonial economics and imperialist theory. It highlights a subsequent lack of global leadership and corresponding failures to reform foreign direct investment law. Finally, Section I briefly sets out the current state of foreign direct investment law. Section II, Efforts to Regulate Transnational Corporations, identifies the existence of political will to reform foreign direct investment law expressed in decades of multilateral and private sector reform efforts. Section II helps to flesh out a trend toward regulation of transnational corporations in which some voluntary efforts are successful but mandatory requirements have not yet been achieved. Section III, Transforming Foreign Direct Investment Law, outlines the emergence of Global Corporate Citizenship theories in the management and business fields as a voluntary movement. Section III proposes Global Corporate Citizenship as an alternative theory that can inform efforts to develop mandatory regulations for transnational corporations in foreign direct investment law.

This Article is part of a larger project on Law and Global Corporate Citizenship analyzing ways to reform the regulation of transnational corporations. This series of articles identifies gaps in the international and domestic regulation of transnational corporations, explores reasons for these gaps, provides a Global Corporate Citizenship framework for more comprehensive regulation, and develops proposals for the implementation of a mandatory legal framework.

I. Early Flaws and Subsequent Failures

A. Vestiges of a Colonial Heritage

Historically, the purpose of foreign direct investment law was to protect the rights of investors. Protection of investors' rights encourages direct foreign investment by private actors. Foreign direct investment is seen as risky because private actors, whether as individuals or in the form of a corporate entity, are not on equal footing with the state in which they own, manage, or operate a business. Alone, private investors are often unable to protect their foreign assets against expropriation, the taking or modifying of their property rights by the government of a host country, or nationalization, the transfer of control or ownership of their assets to the government of a host country. Historically, military and political clout of a private actor's home country or some form of international agreement protected the rights of private actors.

Foreign direct investment law retains vestiges of the colonial era during which early forms of transnational corporations, colonial trading companies, were formed. During the colonial era, colonized peoples and territories were generally not accorded rights that were equivalent to those claimed by colonizing peoples and nations. Asymmetries in modern foreign direct investment law can be traced back to the economic and legal contexts in which early forms of transnational corporations emerged.[15]

Seventeenth century colonial trading companies are the predecessors of modern transnational corporations.[16] Colonial trading companies received their charters from a colonial sovereign, were headquartered in a colonizing nation, and operated in a colonized territory. During the colonial period, private trading companies engaged in foreign direct investment and international trade under the auspices of their home governments.

Protections for this early form of foreign direct investment by colonial trading companies were asymmetrical. Military power, colonial governments, and international treaties protected the rights and assets of colonial trading companies. Governments of colonizing countries also protected the property rights of colonial trading companies through state-to-state diplomacy. The rights of the inhabitants of colonized territories were not equally respected by colonizing countries and their representatives, colonial trading companies.

British and Dutch colonial trading companies are examples of early forms of transnational corporations. The company, now commonly known as the British East India Trading Company,[17] engaged in commercial activities in India under an English Royal Charter granted in 1600. For example, the British East India Trading Company's activities included the operation of a pepper factory in what is now Indonesia for approximately eighty years.[18]

The Dutch granted charters to two "Indian Trading Companies." In a structure that would become entrenched in colonial economics, each company had a dedicated sphere of control, operation, and influence. The Dutch East India Trading Company[19] carried out commercial activities in

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15. Transnational corporations significantly influenced the economic development of the host countries in which they operated — as colonies and later as independent states. *See, e.g.*, Rachel Anderson et al., *The Caribbean and the Banana Trade*, *in* BANANA WARS: THE ANATOMY OF A TRADE DISPUTE (Timothy E. Josling & Timothy G. Taylor eds., 2002) (discussing, among other things, the role of transnational corporations in the banana industry in the Windward Islands).

16. *See* Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401, 428 n.108 (2002); *cf.* PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 19–20 (1995); Yitzhak Hadari, *The Structure of the Private Multinational Enterprise*, 71 MICH. L. REV. 729, 735 (1973).

17. The formal name under which the company received its charter was the "Governor and Company of Merchants of London Trading into the East Indies." This formal name reflects the fact that the companies exercised sovereign powers. *See* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 68 (2004).

18. The pepper factory was established in Bantam in 1901 and was operated by the British East India Company until Bantam was captured by the Dutch in 1682. JOHN F. RIDDICK, THE HISTORY OF BRITISH INDIA: A CHRONOLOGY 126, 129 (2006).

19. The formal name under which the company received its charter was the "Vereenigde Oost-Indische Compagnie."

Asia, and the Dutch West India Company[20] did the same in the Caribbean. The Dutch West India Company also engaged in the slave trade in Africa, Brazil, the Caribbean, and North America.

In the course of their commercial activities in colonized territories, colonial trading companies engaged in activities that we would now describe as human rights violations. They used child and forced labor. They engaged in slavery,[21] torture, and summary execution. In addition, the colonial trading companies often protected their investments with their own private security forces. Many private security forces perpetrated substantial bodily and other harm on individuals and communities in colonized territories.

Colonial trading companies' discretion to shape their operations in colonized territories often was not circumscribed in any meaningful way by domestic or international law. Colonial trading companies possessed broad powers that were inextricably linked with the governance of the colonized territories in which they operated.[22] Colonizing nations posited that individuals and communities indigenous to colonized territories stood outside the community of "civilized nations." Colonizing nations, therefore, claimed that the people and communities in the colonized territories should not benefit from the rights and protections accorded to citizens of the so called "civilized nations."[23] This lack of checks on colonial trading companies contributed to an environment in which the pursuit of economic wealth trumped the values of civilized society and even human life.

Harms perpetrated by colonial trading companies foreshadowed many harms resulting from the acts of modern transnational corporations. Although modern transnational corporations are now incorporated rather than chartered, they continue to enjoy many rights possessed by colonial trading companies. Modern transnational corporations violate human rights and harm the environment in the course of their operations in developing countries, the successors of the colonized territories.[24] The lack of

20. The formal name under which the company received its charter was the "Geoctroyeerde Westindische Compagnie."

21. *See, e.g.*, PAUL E. LOVEJOY, TRANSFORMATIONS IN SLAVERY: A HISTORY OF SLAVERY IN AFRICA 135 (2d ed. 2000) ("In the early years of the colony [at Cape Town], the Dutch East India Company owned most of the slaves at the Cape, who were used to maintain the port facilities, and the [Dutch East India] Company always remained the largest single owner of slaves.").

22. *See* PETER WARREN SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 34 (2008).

23. For a discussion of the theories and jurisprudence regarding the exclusion of non-Christians and people not of European origin from the law of nations, see ANGHIE, *supra* note 17, at 52–65.

24. *See, e.g.*, Sarah A. Altschuller & Amy Lehr, *Corporate Social Responsibility*, 43 INT'L LAW. 577, 580–87 (2009) (discussing recent litigation alleging corporate complicity in human rights abuses in China, Colombia, India, Indonesia, Iraq, Ivory Coast, Jordan, Nigeria,

applicable foreign direct investment law combined with jurisdictional limitations often hinders potential plaintiffs alleging harms by transnational operations in less developed countries from seeking redress.

Modern foreign direct investment law retains asymmetrical legal protections that are its colonial heritage. More developed countries replaced colonizing countries as the more politically and economically advantaged group of nations. Less developed countries replaced colonized territories as the less politically and economically advantaged group of nations. Although the terminology changed, the asymmetrical power and rights relationships remained. Individuals in more developed countries are afforded more rights and protections against the excesses of transnational corporations. Individuals in less developed countries have fewer rights and protections against acts of transnational corporations that are incorporated in or have their real seat in more developed countries. This asymmetry is exacerbated by the fragmentation of foreign direct investment law on the international level.

B. Lack of Global Leadership

A lack of global leadership impeded the development of a comprehensive multilateral framework for foreign direct investment law. The twentieth century presented several distinct opportunities to reform foreign direct investment law. Although some opportunities were utilized to develop institutional and legal frameworks for international trade, national governments did not exploit these same opportunities to achieve a comprehensive reform of foreign direct investment law. As a result, foreign direct investment law and international trade law followed widely diverging paths since at least the mid-twentieth century.

The lack of political will among colonizing nations, and later more developed countries, to develop a comprehensive framework for foreign direct investment law is consistent with theories of imperialism underlying the colonial model. A legal framework balancing the rights of all interested parties is antithetical to the dominion of one group over another that is a central and foundational element of imperialism. Colonial trading

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Papua New Guinea, and South Africa). However, this is not to suggest that transnational corporations are always or inherently harmful. Transnational corporations do not operate in a vacuum but rather within legal, social, and economic structures. *See* Colin Marks & Nancy Rapoport, *The Corporate Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV, 1283, 1281–84, 1283 n.93 (2009) (discussing a tripartite approach to the legal, ethical, and economic responsibilities of corporations). Entrenched inequities and weak rule of law inhibit investment and the enforcement of rights and protections for individuals and communities in many developing countries. *See, e.g.*, Rachel J. Anderson, Comment, *Linking the Rule of Law and Trade Liberalization in Jamaica*, 7 AFR.-AMER. L. & POL'Y REP. 49, 51–52 (2005) (discussing the effects of Jamaica's history of democracy and weaker rule of law track record).

companies acted with the permission, and often explicit approval, of their national governments. Therefore, it is not surprising that effective action was not taken to limit the power of and regulate the operations of colonial trading companies in colonized territories.

Adopting a principle of limited interference helped governments of colonizing nations reap the benefits of imperialism and colonial commerce. At the same time, the principle of limited interference allowed governments of colonizing nations to turn a blind eye to egregious acts perpetrated by colonial trading companies. This principle of limited interference in transnational economic activity of private actors remains embedded in modern foreign direct investment law.

The international community missed an opportunity to reform foreign direct investment law during the period following the First World War. It was an era of reconstruction. In the post-World War I period, the rights of private actors regarding their foreign assets were a subject of dispute between national governments. One camp, which included the United States and the United Kingdom, believed that private property should be protected and that expropriation required compensation under customary international law.[25] Another camp, which included Russia and countries in Latin America, believed that a state's rights to expropriate and nationalize trumped the interests of private actors in foreign assets.[26] These two camps did not resolve their differences in the post-World War I period.

In the United States, the U.S. government missed opportunities to reform foreign direct investment law during the period following the Great Depression. It was an era of increasing regulation of investment activities. After the 1929 stock market crash, the U.S. Congress passed the Securities Act of 1933 to ensure investors' access to information and legal recourse in the case of fraud or illegality.[27] This act was followed shortly thereafter by the Securities Exchange Act of 1934, which created the U.S. Securities and Exchange Commission ("SEC") and gave the SEC broad oversight and enforcement powers.[28] However, the regulations promulgated in the Securities Act of 1933 and those promulgated in the Securities Exchange Act of 1934 focused on protecting shareholders and potential investors and not on protecting individuals and communities in developing countries.

25. *See* Andrew Newcombe & Lluís Paradell, *Historical Development of Investment Treaty Law*, *in* LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 12–14 (Kluwer Law Int'l 2009).

26. This position would later be recognized in a U.N. Resolution. *See*, Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), ¶ 4, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (Dec. 14, 1962).

27. Securities Exchange Act of 1933, 15 U.S.C. § 77 (2000); *see also* U.S. Securities and Exchange Commission, The Laws that Govern the Securities Industry, http://www.sec.gov/about/laws.shtml (last visited Sept. 8, 2009).

28. Securities Exchange Act of 1934, 15 U.S.C. § 78 (2006); *see also* U.S. Securities and Exchange Commission, The Laws that Govern the Securities Industry, http://www.sec.gov/about/laws.shtml (last visited Sept. 8, 2009).

They did not extend protections for non-investors harmed by the foreign operations of transnational corporations.

The period following the Second World War was another missed opportunity to reform foreign direct investment law. It was an era of transformation. Participants at the U.N. Monetary and Financial Conference at Bretton Woods created several institutions in an effort to create a global economic system. These institutions included the International Bank for Reconstruction and Development ("World Bank") and the International Monetary Fund.[29] The U.N. Economic and Social Committee also proposed an International Trade Organization to address international trade and investment.[30] However, these efforts were unsuccessful in part because of continuing disagreements about standards for investment protection, compensation for expropriation, and minimum standards for treatment of foreign direct investment.[31] These differences remained unresolved during the post-World War II period.

After World War II, decolonization resulted in the political independence of many countries in Africa, Asia, the Caribbean, Latin America, and the Middle East. It was an era of reform. This was an opportunity for newly-independent, developing countries to exercise their sovereign rights and advocate for the rights of and protections for their citizens and communities.[32] However, developing countries began to compete for foreign capital prompted by a belief that international investment facilitates economic growth and prosperity.[33] This competition benefitted transnational corporations and their home countries.

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29. Gerald M. Meier, *The Bretton Woods Agreement — Twenty-Five Years After*, 23 STAN. L. REV. 235, 235 (1971); International Bank for Reconstruction and Development, Articles of Agreement of the International Bank for Reconstruction and Development (1944), http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf; International Monetary Fund, Articles of Agreement of the International Monetary Fund (1944), http://www.imf.org/external/pubs/ft/aa/index.htm.

30. U.N. Conference on Trade and Employment, Havana Charter for an International Trade Organization and Final Act and Related Documents, 14, 19–21, 65, 125 (Nov. 1947 – Mar. 1948), UN Doc. ICITO/1/4/1948, *available at* http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

31. *See* Newcombe & Paradell, *supra* note 25, at 19–20.

32. In 1962, the United Nations recognized the right of sovereign nations to nationalize investments in their national resources. G.A. Res. 1803(XVII), U.N. Doc. A/5217 (Dec. 14, 1962). *See, e.g.*, Guzman, *supra* note 7, at 648 ("From 1962 through the mid 1970s, the United Nations General Assembly—dominated by LDCs—passed a series of resolutions intended to emphasize the sovereignty of nations with respect to foreign investment.").

33. Zachary Elkins, Andrew T. Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265, 299 (2008) ("This competition is driven by the desire of developing countries to participate in the global capitalist system.").

Transnational corporations and their home countries have a resource that is mobile and in high demand: foreign capital.[34] This allows transnational corporations to shop for the most hospitable political and legal environment for their operations, which, in turn, contributes to a race to the bottom in terms of the regulation of foreign direct investment in host countries. Competition for foreign capital creates an incentive for governments of developing countries to prefer laws that attracted foreign direct investment. From a purely economic perspective, such laws are often most attractive if they do not hinder the activities of transnational corporations with protections for the environment or human rights. In the end, the rights of individuals and communities in developing countries that are affected by the operations of transnational corporations lose out to the power of neo-classical economic development theory and the pursuit of profit.

C. A Fragmented Body of Law

The lack of a multilateral framework left a void, specifically the lack of an international organization or targeted international agreements. Bilateral investment treaties are flourishing in this vacuum as a means of regulating foreign direct investment.[35] Bilateral investment treaties are the progeny of Treaties of Friendship, Commerce, and Navigation, a form of international agreement that was common among colonizing countries.[36] Treaties of Friendship, Commerce, and Navigation allocated rights to colonial territories among colonizing countries to avoid war between the colonizing countries.

The number of bilateral investment treaties being entered into each year is increasing at a rapid pace. According to the U.N. Conference on Trade and Development, approximately four times as many bilateral investment treaties were entered into in the 1990s as were entered into during the

34. Mobility varies based on a variety of factors, including timing and the availability of resources. It is harder to move once a transnational corporation has invested in projects that cannot be moved like infrastructure projects. Transnational corporations engaged in resource extraction are limited to locations where oil or other resources are available.

35. One explanation for the proliferation of bilateral investment treaties is the concerns of investors regarding political risk and corruption in host countries. I do not intend to suggest that the concerns of investors are invalid. However, the need to address investors' valid concerns does not negate the need to shape laws to also protect the rights of citizens and communities in host countries.

36. *See* M. SORNARAJAH, INTERNATIONAL LAW ON FOREIGN INVESTMENT 229 (1994). For a discussion of the development from primarily diplomatic protection of foreign direct investment to bilateral investment treaties, see William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 5–9 (2006).

1980s.[37] Approximately ninety percent of the world's countries have entered into bilateral investment treaties.[38]

The substance of post-World War II bilateral investment treaties has not changed substantially over time, and they still omit many rights of and protections for individuals and communities in host countries.[39] However, bilateral investment treaties differ from Treaties of Friendship, Commerce, and Navigation in several respects. Treaties of Friendship, Commerce, and Navigation focused on the broad promotion of trade and commercial relationships. Bilateral investment treaties are narrower because they focus on investment, target less developed countries, and allow direct investor claims prior to exhausting local remedies.[40] Modern bilateral investment treaties focus on specific rights of and protections for foreign direct investment by nationals of countries that are a party to the treaty. This shift and the steady increase in bilateral investment treaties highlight the gap in the regulation of foreign direct investment by international law.

In part, the shift in the scope of bilateral investment treaties can be explained by the successful creation of the WTO as a multinational framework for international trade law. In the post-World War II period, the GATT was ratified and implemented. Since its implementation in 1947, the GATT, and later, the WTO Agreements facilitated the development and reform of international trade law. Broad goals of promoting trade and commercial relationships addressed in Treaties of Friendship, Commerce, and Navigation were subsumed into the GATT and the WTO Agreements. Bilateral investment treaties address issues that are beyond the scope of the WTO's activities.

In more recent years, foreign direct investment issues are increasingly incorporated into multilateral, regional, and bilateral trade agreements such as the WTO Agreements on Trade-Related Investment Measures, the General Agreement on Trade in Services, and the North American Free Trade Agreement.[41] Despite the incorporation of foreign direct investment issues into international trade agreements, foreign direct investment remains predominantly regulated by bilateral investment treaties and principles derived from customary international law.[42]

37. United Nations Conference on Trade and Development [UNCTAD], *Bilateral Investment Treaties, 1959–1999*, iii, U.N. Doc. UNCTAD/ITE/IIA/2 (Dec. 2000), *available at* http://www.unctad.org/en/docs/poiteiiad2.en.pdf.

38. *See id.*

39. *See id.* at 20.

40. *See* Dodge, *supra* note 36, at 14.

41. Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 50 (2008).

42. *See, e.g., id.* at 48; *cf.* David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757, 768 (2000) ("An interlocking network of rules for the protection and liberalization of [foreign direct investment] can be found in [bilateral investment treaties], in regional trade agreements such as NAFTA and the

Bilateral investment treaties represent an important site for the formation of foreign direct investment law. The shift from treaties of Friendship, Commerce, and Navigation to bilateral investment treaties represents a shift from North-North agreements to North-South agreements.[43] Modern bilateral investment treaties give investors even more advantages than under treaties of Friendship, Commerce, and Navigation. Bilateral investment treaties do not require the exhaustion of local remedies before allowing investors to file direct claims.[44] Bilateral investment treaties limit interference by host countries in the foreign activities of transnational corporations within their territorial jurisdiction. Customary international law and bilateral investment treaties protect the assets of transnational corporations in developing countries from uncompensated expropriation or nationalization. However, they do not generally promote comprehensive protections for individuals or communities in host countries.

Despite windows of opportunity and sporadic efforts by the international community, international law governing foreign direct investment has not moved far from the rules and principles that governed and protected colonial trading companies. Modern foreign direct investment law continues to protect the rights of transnational corporations. This encourages direct foreign investment by private actors despite potential risks and significant changes in the global economy. As a result, reforms are piecemeal and foreign direct investment law remains fragmented. Left unreformed, transnational corporations are allowed and even encouraged to act with impunity in ways that are harmful to individuals and communities in the countries in which they operate. Proposals to reform foreign direct investment law should capitalize on growing political will to reform the international economic system.

European Energy Charter Treaty, and at the multilateral level in the Agreement on Trade-Related Investment Measures (TRIMs). The World Bank has issued Guidelines on the Legal Treatment of Foreign Investment, and a similar set of nonbinding investment principles has been agreed to in Asian Pacific Economic Cooperation (APEC), while the OECD attempted, unsuccessfully, to complete the Multilateral Agreement on Investment (MAI) to which other states outside the OECD would have been invited to accede.") (citations omitted).

43. Dodge, *supra* note 36, at 14. However, more recently, bilateral investment treaties have been used to structure relationships between developing countries. One question this trend raises is whether this will result in a shift in the substance of bilateral investment treaties that is more beneficial to the citizens and communities in developing countries. *See* Larry Catá Backer & Augusto Molina, *Cuba and the Construction of Alternative Global Trade Systems: ALBA and Free Trade in the Americas*, 31 U. PA. J. INT'L L. (forthcoming 2010) (manuscript at 153, *available at* http://ssrn.com/abstract=1407705) (discussing certain bilateral investment agreements among developing countries).

44. Dodge, *supra* note 36, at 13–14.

II. EFFORTS TO REGULATE TRANSNATIONAL CORPORATIONS

Although state initiatives to develop a global multilateral agreement on foreign direct investment were unsuccessful, there are some noteworthy initiatives. This section discusses selected examples, including the OECD Guidelines for Multinational Enterprises, the U.N. Code of Conduct on Transnational Corporations, and Protect, Respect and Remedy: A Framework for Business and Human Rights. Non-governmental organizations and private sector entities have also put forth several initiatives. This section is not intended to be a comprehensive survey of initiatives, but rather to highlight points on a trajectory toward Corporate Social Responsibility and Corporate Social Accountability.

A. OECD Guidelines

The Organisation for Economic Co-operation and Development ("OECD") developed a set of voluntary guidelines that had some success.[45] The OECD membership is comprised of more developed countries and was established by the 1960 Convention on the Organisation for Economic Co-operation and Development.[46] In 1962, the OECD published the Draft Convention on the Protection of Foreign Property.[47] This convention never went into effect. However, later efforts by the OECD were more successful.

The OECD Guidelines for Multinational Enterprises ("OECD Guidelines") is a voluntary code of conduct OECD member countries

45. Similar initiatives are set out in documents such as the Basel Principles, the Equator Principles, and the IFC Performance Standards. *See* Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards: A Revised Framework* (Nov. 2005), http://www.bis.org/publ/bcbs118.pdf; *The "Equator Principles": A Financial Industry Benchmark for Determining, Assessing, and Managing Social & Environmental Risk in Project Financing* (July 2006), http://www.equator-principles.com/documents/Equator_Principles.pdf; International Finance Corporation [IFC], *Performance Standards on Social and Environmental Sustainability* (Apr. 30, 2006), http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf.

46. Organisation for Economic Co-operation and Development [OECD], Convention on the Organisation for Economic Co-operation and Development (1960), http://www.oecd.org/document/7/0,3343,en_2649_201185_1915847_1_1_1_1,00.html (last visited Sept. 11, 2009) (stating that the founding member countries were Austria, Belgium, Canada, Denmark, France, Germany, Greece, the Republic of Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, the Swiss Confederation, Turkey, the United Kingdom, and the United States).

47. *See* OECD, *Draft Convention on the Protection of Foreign Property*, 2 I.L.M. 241 (1962). The OECD adopted a revised version in 1967. *See also* OECD, *Draft Convention on the Protection of Foreign Property*, Oct. 12, 1967, O.E.C.D. Pub. No. 23081, *reprinted in* 7 I.L.M. 117 (1968).

adopted in 1976.[48] The OECD Guidelines address a range of issues, including labor and the environment.[49] Although the OECD Guidelines themselves are voluntary standards, each country that adopts them is obligated to establish a National Contact Point to promote and implement the OECD Guidelines. Numerous cases have been brought under the OECD Guidelines.[50] When a company is believed to be in breach of the OECD Guidelines, any interested party can raise the case with the appropriate National Contact Point. National Contact Points have had varying success.[51] The OECD Guidelines are currently being reviewed and a revised set of guidelines is expected to be completed by mid-2010.[52]

B. U.N. Initiatives

The United Nations also attempted to address the question of regulating transnational corporations. Although the United Nations was unsuccessful in its efforts to achieve a mandatory, legally-binding framework for transnational corporations, it has had some success with developing voluntary guidelines.

The U.N. Code of Conduct on Transnational Corporations is an early attempt by the United Nations to develop hard law rules governing foreign direct investment. The U.N. Economic and Social Council requested the drafting of a code of conduct for transnational corporations in 1982.[53] In 1984, the Intergovernmental Working Group on a Code of Conduct drafted the U.N. Code of Conduct on Transnational Corporations.[54] It addressed a wide range of issues including human rights, environmental issues, and

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48. For more on the early years of the OECD Guidelines for Multinational Enterprises, *see, e.g.*, DUNCAN C. CAMPBELL & RICHARD L. ROWAN, MULTINATIONAL ENTERPRISES AND THE OECD INDUSTRIAL RELATIONS GUIDELINES (1983).

49. OECD, *OECD Guidelines for Multinational Enterprises* (1976), http://www.oecd.org/dataoecd/56/36/1922428.pdf.

50. Over 200 cases have been filed with to National Contact Points between 2000 and 2009. OECD, *Summary Report of the 2009 Annual Meeting of the National Contact Points* 2 (2009), http://www.oecd.org/dataoecd/41/25/43753441.pdf.

51. *See* Amanda Perry Kessaris, *Corporate Liability for Environmental Harm, in* RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW (Malgosia Fitzmaurice & David Ong eds., forthcoming 2007) (manuscript at 13-14), *available at* http://ssrn.com/abstract=1087548 (discussing examples of environmental issues considered by the National Contact Points); *see generally* OECD Watch, *The OECD Guidelines for MNEs: Are They 'Fit for the Job'?* (June 2009), *available at* http://oecdwatch.org/publications-en/Publication_3201/at_download/fullfile.

52. *See* OECD Watch, *OECD Watch Open Letter to the OECD Council at Ministerial Level* (June 23, 2009), *available at* http://oecdwatch.org/publications-en/Publication_3104/at_download/fullfile.

53. U.N. Econ. & Soc. Council [ECOSOC], Res. 1982/68, ¶¶ 3–4, 6, U.N. Doc. E/1982/68 (Oct. 27, 1982).

54. U.N. Draft International Code of Conduct on Transnational Corporations, U.N. Doc. E/C. 10/1984/S/5 (May 29, 1984).

respect for social and cultural objectives and policies.[55] However, the drafters were unable to reach agreement on all issues and the United Nations never adopted the U.N. Code of Conduct on Transnational Corporations. Among other issues, the drafters did not resolve whether the U.N. Code of Conduct on Transnational Corporations would be a universally applicable, legally binding framework or a voluntary guideline for transnational corporations.[56]

Continuing the success it achieved developing soft law norms, the United Nations launched the U.N. Global Compact in 2000. The U.N. Global Compact is a voluntary international policy initiative that seeks to align the interests of business, governments, civil society, labor, and the United Nations. The U.N. Global Compact focuses on public accountability, transparency, and disclosure as tools to further "a more sustainable and inclusive global economy."[57] It promotes ten core principles that are grouped into four categories: human rights, labor, environment, and anti-corruption. Although its effectiveness is disputed, the U.N. Global Compact has over 5,000 business participants in 135 countries.[58]

In a subsequent attempt to regulate transnational corporations, the U.N. Working Group on the Working Methods and Activities of Transnational Corporations began drafting the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[59] The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights are based on human rights standards and numerous legal documents, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.[60] The U.N. Sub-Commission on the

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55. *See id.*

56. ECOSOC, Comm'n on Transnational Corps., *Report of the Secretariat on the Outstanding Issues in the Draft Code of Conduct on Transnational Corporations*, 23 I.L.M. 602, 614 (1984).

57. U.N. Global Compact, Corporate Citizenship in the World Economy 2 (Oct. 2008), *available at* http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf.

58. U.N. Global Compact, Annual Review 2008, at 5 (Mar. 2009), *available at* http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2009_04_08/GC_2008AR_FINAL.pdf.

59. ECOSOC, Sub-Comm'n on the Promotion and Prot. of H.R., *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003).

60. In the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, the Sub-Commission on the Promotion and Protection of Human Rights states "that transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments." *Id.* at 2.

Promotion and Protection of Human Rights approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights on August 13, 2003.[61] However, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights is a soft law document, and therefore, did not establish mandatory rules for transnational corporations.[62] The strength of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights lies in the potential for soft law to shape voluntary behavior, become the basis for developing binding treaties, influence public opinion, and document political will.

In 2005, the Commission on Human Rights recognized the relationship between transnational corporations and human rights.[63] Further, the Commission on Human Rights requested the Secretary-General to appoint a special representative for human rights and transnational corporations and other business enterprises.[64] John Ruggie was appointed the U.N. Special Representative of the Secretary General on Human Rights. In June of 2008, John Ruggie submitted his final report to the Human Rights Council ("Ruggie Report"). This report set out a framework with three core principles: "the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies."[65] The Ruggie Report and its related documents set out current perspectives on the relationship between business and human rights at the international level.[66] Although the Ruggie Report mentions environmental issues, its primary focus is the relationship between business and human rights. The Ruggie Report is an important step toward comprehensive laws regulating foreign direct investment by transnational corporations. It identifies a conceptual and policy framework that can integrate laws and regulations with other measures to address human rights abuses.

61. *Id.*

62. ECOSOC, Sub-Comm'n on the Promotion and Prot. of H.R., Res. 2003/16, at 52, U.N. Doc. E/CN.4/Sub.2/2003/L.11 (2003).

63. Office of the High Commissioner of Human Rights [OHCHR], Human Rights and Transnational Corporations and Other Business Enterprise, U.N. Comm'n on H.R. Res. 2005/69, at 1, U.N. Doc. E/CN.4/2005/L.10/Add.17 (Apr. 20, 2005), *available at* http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc.

64. *Id.*

65. Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, delivered to the Human Rights Council*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (prepared by John Ruggie), *available at* http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf [hereinafter Ruggie Report].

66. Christiana Ochoa, *The 2008 Ruggie Report: A Framework for Business and Human Rights*, ASIL INSIGHTS, June 18, 2008, http://www.asil.org/insights080618.cfm#_edn1.

C. Private Sector Initiatives

The private sector put forward several initiatives in the second half of the twentieth century.[67] More recently, a group of institutional investors engaged in the development of the Principles for Responsible Investment at the request of the U.N. Secretary-General.[68] The U.N. Environment Programme Finance Initiative and the U.N. Global Compact coordinated the process.[69] The voluntary Principles for Responsible Investment require signatories to incorporate environmental, social, and corporate governance issues into their investment decision-making processes and ownership practices. In July 2009, there were over 550 signatories to the Principles for Responsible Investment.[70]

Private sector initiatives are necessarily voluntary, and so far, successful multilateral efforts to regulate transnational corporations are also voluntary. However, financial crises and the stock market crash of 2008 called into question the neoclassical economical model and principle of non-interference into the economic activities of private actors. Voluntary measures are insufficient because foreign direct investment law does not create incentives for officers and directors of transnational corporations to act in a way that would result in a more equitable distribution of economic development and prosperity. Instead, foreign direct investment law grants rights to and protects the rights of transnational corporations without establishing corresponding obligations. Without enforceable legal

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67. Early efforts to draft multilateral agreements governing foreign direct investment included the 1957 *Draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries*. SOC'Y TO ADVANCE THE PROT. OF FOREIGN INV., DRAFT INTERNATIONAL CONVENTION FOR THE MUTUAL PROTECTION OF PRIVATE PROPERTY RIGHTS IN FOREIGN COUNTRIES (1957). Also, European business leaders and attorneys proposed the 1959 *Abs-Shawcross Draft Convention of Investments Abroad*, but it never went into effect. *The Proposed Convention to Protect Foreign Investment: A Round Table*, 9 J. PUB. L. 115 (1960). The failures of these attempts are highlighted by the 1959 signing of the first bilateral investment treaty, a treaty between the Federal Republic of Germany and the Islamic Republic of Pakistan. Treaty for the Promotion and Protection of Investments, F.R.G.-Pack., Nov. 25, 1959, 457 U.N.T.S. 24.

68. Principles for Responsible Investment, About, http://www.unpri.org/about/ (last visited Oct. 21, 2009).

69. *Id.*

70. There are 616 signatories to the Principles for Responsible Investment, including some of the top financial companies in the world such as BNP Paribas-France ($2,969,315 million total assets), HSBC-United Kingdom ($2,527,465 million total assets), JPMorgan-United States ($2,175,052 million total assets), and Mitsubishi ($2,200,818 million total assets). Principles for Responsible Investment, Signatories, http://www.unpri.org/signatories/ (last visited Oct. 21, 2009). The data on total assets is for 2008 and these companies ranked 11th, 5th, 29th, and 38th, respectively, among the top fifty financial companies in the world in 2008. UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* 234, U.N. Doc. UNCTAD/WIR/2009 (Sept. 17, 2009), *available at* http://www.unctad.org/sections/dite_dir/docs/wir2009top50_geospread_en.pdf.

obligations, parties injured by transnational corporations will continue to have insufficient legal protections and avenues to seek legal remedies.

III. TRANSFORMING FOREIGN DIRECT INVESTMENT LAW

Transforming foreign direct investment law requires rethinking the role of corporations, and particularly transnational corporations, in society. The debate about the role and responsibilities of public corporations is not new. In the United States, corporations generally are considered to have a primarily economic function with corresponding economic goals and responsibilities. This economic function is then tempered by legal and ethical restraints while still allowing corporations to take on discretionary responsibilities such as philanthropy.[71] However, the primacy of the economic function is questioned by both practitioners and theorists, and these voices became louder and gained broader credence in light of the recent financial crises. Nonetheless, however one comes out on this question, there is general agreement that corporations do not enjoy unlimited power. Legal and ethical restraints set the limits of corporate activity. Thus, the question remains where lines should be drawn and what constraints should be applied to corporate activity.

Although it may be more difficult to make the close calls, there is a strong argument to be made that certain core values are so important that they should be protected by law. These include human rights and environmental protection. This section discusses Corporate Social Responsibility and Accountability Movements, the emergence of Global Corporate Citizenship in the business and management literature, and opportunities and challenges for reform.

A. Corporate Social Responsibility and Accountability

Generally, when U.S. legal scholars question the role of corporations in society, they do so either in the context of Corporate Social Responsibility, Corporate Social Accountability, or both. These theoretical frameworks can be traced back to arguments advanced by E. Merrick Dodd in a debate between Adolph Berle and E. Merrick Dodd in the 1930s.[72] Berle

71. *See* Jeffrey P. Katz, Diane L. Swanson & Lori K. Nelson, *Culture-Based Expectations of Corporate Citizenship: A Propositional Framework and Comparison of Four Cultures*, 9 INT'L J. OF ORG. ANALYSIS 149, 151 (2001) (discussing Archie B. Caroll, *A Three-Dimensional Conceptual Model of Corporate Performance*, 4 ACAD. OF MGMT. REV. 497 (1979)).

72. Larry Catá Backer, *Multinational Corporations, Transactional Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 298–99 (2006).

essentially argued for the primacy of obligations to shareholders.[73] Dodd essentially argued that corporations have responsibilities to shareholders and societal stakeholders. The roots of the modern legal discourse on Corporate Social Responsibility are in Dodd's position.[74] In more recent decades, the Corporate Social Accountability movement expanded the discourse.[75]

The exact scope and contours of Corporate Social Responsibility are disputed within the U.S. legal discourse,[76] and they also vary from country to country. However, it is fair to say that Corporate Social Responsibility relates to the scope of ethical obligations that corporations have to shareholders, societal stakeholders, and society as a whole. In corporate legal theory, Corporate Social Responsibility generally focuses on economic and governance issues. The underlying question revolves around the purpose of the corporation. In the U.S. corporate law context, the rules governing Corporate Social Responsibility tend to be found in state and federal statutes. These "hard laws" are generally enforceable in a court of law.

In international legal theory, Corporate Social Responsibility generally focuses on human rights. The underlying question revolves around what constitutes acceptable conduct from a moral and societal standpoint. In international and transnational business, the rules governing Corporate Social Responsibility tend to be found in codes of conduct or documents produced by international organizations. These types of "soft law" tend to be non-binding and unenforceable in a court of law. In U.S. legal discourse, domestic corporate governance and international human rights occasionally have uncomfortable meetings. However, they have not yet been integrated into one overarching theoretical framework.

The Corporate Social Accountability movement attempts to implement the principles of Corporate Social Responsibility as legally enforceable "hard law." Among other things, Corporate Social Accountability is an attempt to link human rights, the environment, and other societal issues to the economic and corporate governance concerns of corporations. This can take the form of disclosure rules, national and international standards, and legal liability for the social and environmental effects of corporate actions.

Corporate Social Accountability is a shift from Corporate Social Responsibility because it moves from a discussion of moral and ethical obligations and responsibilities to a discussion of socially and legally

73. Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).

74. E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147 (1932).

75. *See* Backer, *supra* note 72, at 300–01.

76. For a categorization of the positions taken on Corporate Social Responsibility in the U.S. legal discourse, see Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 711–20 (2002).

enforceable obligations and responsibilities. Accordingly, Corporate Social Accountability is more instrumental than theoretical. It allows us to link domestic corporate governance with international human rights, but it does not offer a comprehensive theoretical framework for bridging gaps between the interests of shareholders and societal stakeholders.

There are many options for reframing foreign direct investment law, some more traditional and some more novel.[77] An alternative that some scholars have suggested is the multilateral negotiation of foreign direct investment law in a new international organization. The idea is that such an organization would do for foreign direct investment what the GATT and the WTO have done for international trade.[78] Another option would be to strengthen the role of the WTO in regulating foreign direct investment law. Alternatively, a non-governmental organization, also known as civil society, like the International Labor Organization, could be created in the area of foreign direct investment. Codes of conduct and other soft law options present further alternatives. Scholars have argued that these forms of non-binding soft law can contribute to the creation of responsibilities and obligations over time.[79]

A new international institution might be able to reduce fragmentation in international foreign direct investment law but would not necessarily be ideally equipped to reduce the asymmetries discussed above. A new international institution would be only one piece of the puzzle. Without the development of a new theoretical framework and mandate, such an institution may be insufficiently novel to resolve the underlying asymmetries. These asymmetries must be resolved to bring foreign direct investment law into the twenty-first century.

B. The Emergence of Global Corporate Citizenship

Global Corporate Citizenship[80] offers a useful theoretical framework with which to integrate and analyze the interests of shareholders and societal stakeholders in this age of globalization. Global Corporate

77. The need to reform foreign direct investment law is not a new issue and there is a wealth of scholarship on legal and policy regimes that have the potential to affect and transform foreign direct investment law. *See, e.g.*, LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT (Daniel D. Bradlow & Alfred Escher eds., 1999).

78. *See, e.g.*, Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5 (2003) (proposing a model for analyzing the application of national laws to multinational enterprises operating within their territories).

79. *See, e.g.*, Mary E. Footer, *The Role of 'Soft' Law Norms in Reconciling the Antinomies of WTO Law* (July 14, 2008), *available at* SSRN: http://ssrn.com/abstract=1159929.

80. "Global Corporate Citizenship" seems to be the term that is predominantly used in the management literature. "Global Business Citizenship" seems to be the term that is predominantly used in the business literature.

Citizenship posits that corporations have rights and obligations in society similar to citizens. It addresses the ethical responsibilities of companies operating in a global market and the values that should guide corporations' engagement with society.[81] In effect, principles of Global Corporate Citizenship require corporations to engage with shareholders and societal stakeholders as well as act as stakeholders themselves.

Global Corporate Citizenship is already influential in terms of policy and practice in several areas. International institutions are endorsing Global Corporate Citizenship as a framework for international development and economic policy. Many transnational corporations have incorporated Global Corporate Citizenship into their business goals and policies.[82]

Management and business scholars began theorizing Global Corporate Citizenship in the 1990s, and a substantial body of scholarship developed since that time.[83] Global Corporate Citizenship has been defined a variety of ways.[84] While the definitions vary, there are substantial commonalities. For example, corporations have direct duties to local, regional, national, and global societal stakeholders. Societal stakeholders include individuals, employees, shareholders, customers, suppliers, and communities where corporations conduct business and serve markets. Some scholars go further and argue that corporations should understand themselves as societal stakeholders with duties to contribute to the well-being of the world in general in addition to their duties to individual stakeholders and groups of stakeholders.[85]

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81. World Economic Forum, *Corporate Global Citizenship: The Leadership Challenge for CEOs and Boards* 6 (2002), http://www.weforum.org/pdf/GCCI/GCC_CEOstatement.pdf. Scholars do not agree on one definition of "Global Corporate Citizenship." In part, this discussion follows the lines of the universalism versus cultural relativism debate. For an argument in support of a universal definition, see Jacob Dahl Rendtorff, *Towards Ethical Guidelines for International Business Corporations: Aspects of Global Corporate Citizenship*, http://www.isbee.org/index.php?option=com_docman&task=doc_download&gid=247&Itemid=39.pdf (last visited Oct. 26, 2009).

82. For example, the Boeing web site announces that Global Corporate Citizenship is one of Boeing's core values and the Mitsubishi Corporation has added a "Global Corporate Citizenship" section to the its web site. Boeing, Global Corporate Citizenship, http://www.boeing.com/companyoffices/aboutus/community/ (last visited on Oct. 16, 2009); Mitsubishi Corporation, Corporate Citizenship, http://www.mitsubishicorp.com/jp/en/csr/ (last visited Oct. 16, 2009).

83. *See, e.g.*, HANDBOOK OF RESEARCH ON GLOBAL CORPORATE CITIZENSHIP (Andreas Georg Scherer & Guido Palazzo eds., Edward Elgar, 2008); Klaus Schwab, *Global Corporate Citizenship: Working With Governments and Civil Society*, FOREIGN AFF., Jan.-Feb. 2008, at 107, 111–12; Grahame F. Thompson, *Global Corporate Citizenship: What Does it Mean?*, 9 COMPETITION AND CHANGE 131, 131–52 (2005); *see also* Creative Capitalism, *Corporate Social Confusion*, http://creativecapitalism.typepad.com/creative_capitalism/2008/08/corporate-socia.html (last visited July 11, 2009) (suggesting that these issues are also being discussed by economists).

84. *See, e.g.*, DAVID LOGAN ET AL., GLOBAL CORPORATE CITIZENSHIP: RATIONALE AND STRATEGIES 6 (1997); Schwab, *supra* note 83, at 108.

85. Schwab, *supra* note 83, at 108, 114.

There is not universal agreement on the scope of Global Corporate Citizenship. Some management scholars view Global Corporate Citizenship as an umbrella for various forms of Corporate Social Responsibility.[86] Others claim that Global Corporate Citizenship is one of five core aspects of business engagement along with corporate governance, corporate philanthropy, corporate social responsibility, and corporate social entrepreneurship.[87] Going forward, this question will also need to be addressed in the legal context. However, human rights and environmental protection are core values that fall easily within the scope of Global Corporate Citizenship.

The underlying values of Global Corporate Citizenship are recognized by an increasing number of corporations and business leaders.[88] Corporations are becoming increasingly engaged in promoting Global Corporate Citizenship as a result of a lack of global leadership in the political, policy, governance, and legal fields.[89] In 2003, Chief Executive Officers of over seventy transnational corporations[90] published a joint statement with the World Economic Forum. This statement set out a framework for the implementation of Global Corporate Citizenship principles in the business context.[91] The integration of Global Corporate Citizenship into the policies of transnational corporations has moved beyond the group of companies and Chief Executive Officers associated with the joint statement. Transnational corporations have begun including Global Corporate Citizenship into the portfolios of their in-house counsel.[92]

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86. Lee E. Preston & Danielle Mihalko, *Corporate Responsibility: Comparative Analysis of Current Documents*, *in* PRINCIPLES OF STAKEHOLDER MANAGEMENT 21, 46 (1999), *available at* http://www.rotman.utoronto.ca/ccbe/Other/Principles%20of%20Stakeholder%20Management.pdf.

87. Schwab, *supra* note 83, at 110.

88. *See, e.g.*, The Conference Board, The Expanding Parameters of Global Corporate Citizenship, rep. 1246 (1999), *in* COMMUNICATING THE FUTURE (The Conference Board ed. 1999).

89. Schwab, *supra* note 83, at 108–09.

90. The corporations represented included ABB Limited, Abbott Laboratories, Abril Group, Accenture, Anglo American Plc, Anglovaal Mining Limited, Aramex International, Arthur D. Little Inc., Artoc Group for Investment & Development, Ayala Corporation, Bajaj Auto Limited, The Boots Company PLC, Budimex SA, Carlson Companies, The Coca-Cola Company, Corporacion Nacional del Cobre de Chile (Codelco Chile), Deloitte Touche Tohmatsu, Deutsche Bank Group, DHL Worldwide Express, Diageo plc, Electricité de France (EDF), Empresas Polar, Fleetboston Global Bank, Infosys Technologies Ltd, ING Group, Lafarge, McDonald's Corporation, Merck & Co., Inc., MTR Corporation Ltd, Organizações Globo, Phillips-Van Heusen Corporation, PricewaterhouseCoopers International Limited, Renault, Rio Tinto Plc, Royal Ahold, S. C. Johnson & Son, Inc., Siemens AG, Statoil ASA, Thames Water Plc, Transnet Ltd, UBS AG, WMC Resources Limited, and Xenel Industries Limited.

91. *See generally* World Economic Forum, *supra* note 81.

92. *See, e.g.*, Joe W. (Chip) Pitts III, *Business, Human Rights, & the Environment: The Role of the Lawyer in CSR & Ethical Globalization*, 26 BERKELEY J. INT'L L. 479, 482 (2008).

In addition to its integration into business policy and practice, Global Corporate Citizenship is also becoming institutionalized at the international level. For example, Global Corporate Citizenship is being promulgated by international institutions such as the U.N. Global Compact and the World Economic Forum.[93] The U.N. Global Compact[94] is a public-private initiative that seeks to promote ten principles that focus on human rights, labor standards, the environment, and anti-corruption.[95] The World Economic Forum is a Swiss non-profit foundation that focuses on values and rules shaping corporate governance and ensuring that economic progress and social development go hand-in-hand.[96] The U.N. Global Compact and the World Economic Forum support the creation of a framework that incorporates values and morals into corporate governance and transnational operations while simultaneously taking the interests of shareholders and societal stakeholders into consideration — key principles of Global Corporate Citizenship.

Although legal scholars noted as early as 2002 that the concept of Global Corporate Citizenship had entered the business lexicon, it has received only minimal resonance in the U.S. legal discourse.[97] There has not yet been an attempt to develop a theoretical framework for Global Corporate Citizenship in the legal context. Global Corporate Citizenship has been

93. For examples of the Global Compact and the World Economic Forum on Global Corporate Citizenship, see, e.g., Gavin Power, *Who Cares Wins: The Convergence of Global Corporate Citizenship and Financial Markets*, Keynote Speech at the Investment Management Institute Conference (Jan. 6, 2006), *available at* http://www.unglobalcompact.org/docs/news_events/9.6/power_miami_060106.pdf; World Economic Forum, *supra* note 81; U.N. Global Compact, Advancing Corporate Citizenship (June 2005), http://www.unglobalcompact.org/docs/about_the_gc/2.0.2.pdf.

94. For more on the Global Compact, see generally Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth From Realities*, 19 FLA. J. INT'L L. 1 (2007); Surya Deva, *Global Compact: A Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship*, 34 SYRACUSE J. INT'L L. & COM. 107 (2006); William H. Meyer & Boyka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT'L L.J. 501 (2001); Ambassador Betty King, *The UN Global Compact: Responsibility For Human Rights, Labor Relations, And The Environment In Developing Nations*, 34 CORNELL INT'L L.J. 481 (2001); Alexis M. Taylor, *The UN and the Global Compact*, 17 N.Y.L. SCH. J. HUM. RTS. 975 (2001).

95. United Nations, About the Global Compact: The Ten Principles, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited Oct. 20, 2009).

96. *See* World Economic Forum, *Our Organization: World Class Governance*, http://www.weforum.org/en/about/Our%20Organization/index.htm (last visited Oct. 20, 2009).

97. *See, e.g.*, Eric W. Orts, *War and the Business Corporation*, 35 VAND. J. TRANSNAT'L L. 549, 556 (2002) (noting that the concept of Global Corporate Citizenship had entered the business lexicon). Searches on July 11, 2009 for "global corporate citizenship" resulted in only 28 hits on Westlaw, 21 hits on Lexis, and 3 hits on SSRN. Searches on July 11, 2008 for "global business citizenship" resulted in only 2 hits on Westlaw, 2 hits on Lexis, and 2 hits on SSRN.

mentioned briefly in several international law articles in connection with descriptions or discussions of the Global Compact[98] and the Millennium Development Goals.[99] While some legal articles mention Global Corporate Citizenship in discussions of Corporate Social Responsibility and human rights,[100] others go further and contemplate the definition of a good global corporate citizen or propose regulating accountability for Global Corporate Citizenship.[101] A few legal articles briefly mention Global Corporate Citizenship in discussing how non-governmental organizations can strengthen their international roles and the role of non-governmental organizations in building global democracy.[102] Still others briefly mention the role that policymakers have in promoting Global Corporate Citizenship and how the tax advice of law firms and accounting firms may undermine Global Corporate Citizenship.[103]

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98. Adrienne Bernhard, *Response: Sara L. Seck, Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RTS. & DEV. L.J. 207, 213 (2008); Luis E. Cuervo, *OPEC from Myth To Reality*, 30 HOUS. J. INT'L L. 433, 489 (2008); Deva, *supra* note 94 at 136; Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 INT'L LAW. 69, 100 (2003); Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights*, 11 MINN. J. GLOBAL TRADE 101, 122 (2002).

99. Cuervo, *supra* note 98, at 550–51; Anne-Marie Slaughter, *Building Global Democracy*, 1 CHI. J. INT'L L. 223, 227 (2000).

100. Caroline Kaeb, *Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks*, 6 NW. U. J. INT'L HUM. RTS. 327, 353 (2008); Pitts III, *supra* note 92, at 482; Gary Lynch-Wood, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility by David Vogel*, 19 J. ENVTL. L. 145, 146 (2007) (reviewing DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY (2005)).

101. Symposium, *The Multinational Enterprise as Global Corporate Citizen*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 1, 12–14 (2001); Joel R. Paul, *Holding Multinational Corporations Responsible under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285, 295 (2001) ("Halina Ward discusses the concept of global corporate citizenship. Ward argues that there is a 'governance deficit' created by the power disparities between developing countries and global corporations. In her view, the equities of the situation demand that the 'flipside' of foreign direct investment should be 'foreign direct liability' and that the home country of the multinationals should insist that they are subject to the same standards of conduct abroad as they are at home. Ward suggests that the threat of liability could pressure multinational corporations to conform their behavior to international standards. She proposes an international convention to regulate foreign direct investment that would empower developing countries to hold multinational corporations accountable as global citizens.").

102. Cuervo, *supra* note 98, at 603–04; Slaughter, *supra* note 99, at 227.

103. Ethan S. Burger et al., *KPMG and "Abusive" Tax Shelters: Key Ethical Implications for Legal and Accounting Professionals*, 31 J. LEGAL PROF. 43, 51 (2007) (stating that "by crafting questionable tax shelters or encouraging lawmakers to look the other way as profits and gains (both legitimate or otherwise) are routinely concealed in offshore tax havens"); David Barnhizer, *Waking from Sustainability's "Impossible Dream": The Decisionmaking Realities of Business and Government*, 18 GEO. INT'L ENVTL. L. REV. 595, 621 n.64 (2006).

Developing Global Corporate Citizenship in the legal literature is an opportunity to reframe foreign direct investment law and policy and establish a legal theoretical framework that values ethics and morality as well as the interests of shareholders and societal stakeholders. Global Corporate Citizenship theory facilitates an analysis of the intersection of corporate governance and human rights from a legal perspective. It allows us to reframe foreign direct investment law so that we no longer focus exclusively on the nature of the corporation, but instead we are also able to focus on moral and ethical issues as they relate to transnational business. The development of Global Corporate Citizenship as a theoretical framework will make it possible to postulate that shareholder and stakeholder interests are interrelated and to systematically develop, analyze, and answer questions about the issues raised by their convergence.

C. Opportunities and Challenges for Reform

In 2008, business, economic, and financial institutions and systems around the world were in a state of crisis. The United States experienced the most severe financial disaster since the Great Depression and several major U.S. investment banks failed. Lehman Brothers filed for bankruptcy. The Federal Deposit Insurance Corporation seized Washington Mutual. Merrill Lynch was sold to Bank of America. Goldman Sachs and Morgan Stanley converted to bank holding companies. This financial crisis was not limited to the United States; its reverberations were felt around the world. Two banks in Iceland, Landesbanki and Glitnir, were seized. Yamamoto Life, a Japanese life insurance company, filed for bankruptcy. Global stock markets fell dramatically, and in some cases, the depreciation was the worst since the stock market crash of 1929.

In an effort to stop the economic freefall, the U.S. government and governments around the world took action. The Federal Housing Finance Agency placed Fannie Mae and Freddie Mac into conservatorship. The Federal Reserve stepped in to save American International Group from insolvency. The U.S. government passed the Emergency Economic Stabilization Act of 2008. The governments of Belgium, the Netherlands, and Luxembourg partially nationalized Fortis, a Benelux banking and finance company. National governments set up rescue plans for numerous major banks including the Swiss banks UBS and Credit Suisse. Several countries including Australia, Austria, Denmark, Greece, Ireland, the Netherlands, New Zealand, and Spain introduced or increased guarantees of bank deposits. Several countries including Brazil, Iceland, Indonesia, and Russia temporarily suspended trading on their stock markets. Several countries including Iceland, Hungary, Pakistan, Serbia, and Ukraine requested aid from the International Monetary Fund. However, although these and other emergency measures may prevent total collapse of the global economy, they do not suggest a model for the future.

Despite periodic reforms to the global economic system, the task of developing a comprehensive reform of foreign direct investment law remains incomplete. If history is any predictor, the most recent cycle of deregulation will end and we will enter a new cycle of increasing regulation in an effort to prevent a repeat of the stock market crash of 2008 and related financial crises. There are many vehicles for reform, whether through harmonization of domestic regulations, revising standards for multilateral, regional, and bilateral trade agreements, or the creation of a new international organization for international investment. Regardless of the vehicle, reforms should incorporate the development of a more consistent and comprehensive legal framework for foreign direct investment.

The present economic crisis presents challenges and opportunities.[104] Decreased willingness of companies to invest during a financial crisis is likely to increase competition for foreign investment among developing nations. Increased competition for foreign capital further reduces the likelihood of achieving an international consensus on the duty of states and companies to protect citizens and communities in developing countries. However, this is also an opportunity for governments and other societal stakeholders to engage or become re-engaged in defining the role of corporations in the global economy.[105] This question has long been left to the corporate actors themselves and the theorizing of academics as a result of a lack of global leadership in the political, policy, governance, and legal fields.[106]

Law and policy in this area is ripe for development. Principles of Global Corporate Citizenship can contribute to the reform of foreign direct investment law. Principles of Global Corporate Citizenship can be formalized and integrated into international law in multiple ways.[107] These

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104. *See generally* Daniel Bradlow, *Charting a Progressive Financial Agenda*, FOREIGN POL'Y IN FOCUS, Dec. 8, 2008, *available at* http://www.fpif.org/fpiftxt/5723.

105. This applies to host countries and the countries of origin of transnational corporations. Lack of laws or lack of enforcement of existing law in host countries is an important contributing factor to exploitation by foreign investors as well as the proliferation of bilateral investment treaties.

106. Schwab, *supra* note 83, at 108–09.

107. This raises numerous questions which I will flesh out in future articles. For example, on what theory or theories of jurisdiction would a legal theory of Global Corporate Citizenship rely? Addressing this question will have significant implications for the structure of a mandatory legal framework. Theories of criminal jurisdiction and extradition offer insights that may be useful in establishing jurisdiction in civil law for the protection of core values. For a discussion of the five traditional theories of criminal jurisdiction, see generally Blakesley, *supra* note 6, at 1110-11. *See also* Christopher L. Blakesley, *Autumn of The Patriarch: The Pinochet Extradition Debacle and Beyond - Human Rights Clauses Compared To Traditional Derivative Protections such as Double Criminality*, 91 J. CRIM. L. & CRIMINOLOGY 1, 15(2000) ("Extradition is an admixture of national and international law. It presents an interesting tension between principles of dualism and monism, between sovereignty and cooperation and between comparative and international criminal law." (citations omitted)).

include multilateral, regional, and bilateral trade agreements; guidelines and investment principles issued by international or multilateral organizations; and domestic regulations. However, in each of these cases, the problem remains that foreign direct investment law, as opposed to international trade law, is being approached in a piecemeal manner.

There are numerous sources of norms and law that, read together, offer standards by which protections for societal stakeholders can be judged. One important source is the Universal Declaration of Human Rights.[108] For example, the rights espoused by the Universal Declaration of Human Rights include "economic, social and cultural rights" and the right to "a social and international order in which the rights and freedoms set forth in [the Universal Declaration of Human Rights] can be fully realized."[109] Although the Universal Declaration of Human Rights is non-binding and aspirational, it helps flesh out the meaning of the prosperity to which foreign direct investment is believed to contribute.

This Article proposes transforming theories and practices of voluntary Global Corporate Citizenship into a mandatory legal framework. This framework would define the duties of transnational corporations to contribute to sustaining and improving the world's well-being and identify ways to incorporate this into binding and enforceable "hard law." Thus, a legal theory of Global Corporate Citizenship requires the re-conceptualization of the role of transnational corporations in the global economy. The voluntary Global Corporate Citizenship measures taken by transnational corporations, U.N. initiatives, and scholarship on human rights and environmental, social, and governance issues provide a starting point from which to determine the duties and obligations of transnational corporations in a legal theory of Global Corporate Citizenship.

As transnational corporations expand their operations and their reliance on contracting and sourcing in developing countries, there is an increasing need to integrate environmental, social, and governance issues into corporate decision-making. Environmental issues include climate change, water scarcity, local environmental pollution and waste management, new regulations expanding the boundaries of environmental product liability, and new markets for environmental services and environmentally-friendly products.[110] Social issues include workplace health and safety, knowledge and human capital management, labor and human rights issues within companies and their supply chains, and government and community

108. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (1948) (Dec. 10, 1948).

109. *Id.*

110. IVO KNOEPFEL & GORDON HAGART, WHO CARES WINS INITIATIVE 2004–2008, FUTURE PROOF?: EMBEDDING ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES IN INVESTMENT MARKETS 1, 13 (2009), *available at* http://www.unglobalcompact.org/docs/news_events/8.1/who_cares_wins_29Jan09webversion.pdf.

relations in developing countries.[111] Reforming international investment law from a Global Corporate Citizenship perspective includes integrating environmental and social issues into the duties and responsibilities of transnational corporations.[112]

Achieving the benefits of foreign direct investment requires managing a delicate balance. On one hand, transnational corporations must be sufficiently interested to invest despite potential risks. This means that transnational corporations must determine that the risk is appropriate in light of the expected returns. At the same time, the pendulum should not swing so far that the potential negative effects of foreign direct investment are ignored in the competition to attract foreign capital. Encouraging foreign direct investment and providing protections for societal stakeholders requires a comprehensive legal framework that balances the rights and obligations of states, transnational corporations, and societal stakeholders.[113]

CONCLUSION

A new theoretical framework should meet multiple criteria. It should differentiate between different types of foreign direct investment.[114] It should reflect the increasingly interlinked nature of global politics and economics. It should take into consideration the substantial economic, political, legal, and social influence of transnational corporations. It should be able to address issues arising out of the extreme legal, economic, and physical mobility of transnational corporations. It should promote economic, social, and cultural rights. It should promote more ethical economic activity that, in turn, promotes prosperity around the world. Global Corporate Citizenship is a theoretical and practical framework that has the potential to meet these criteria. Finally, it should be compatible with the protect, respect, and remedy framework for business and human rights set out in the Ruggie Report.[115]

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111. *Id.*

112. Admittedly, many host countries have laws that protect the environment. This is to say that the problem in many cases is not the lack of applicable law but the lack of enforcement. A legal framework for Global Corporate Citizenship will need to include a viable enforcement structure to be effective.

113. Developing mandatory Global Corporate Citizenship for foreign direct investment will necessarily implicate domestic law. This raises a series of policy issues, which I will address in future articles.

114. The potential influence of foreign direct investment, whether for harm or for good, differs from sector to sector. For example, the extraction and chemical industries may have more of an effect on the environment while the effects of high tech and service industries may be more likely to be felt in terms of employment and wages. Focusing on specific sectors will facilitate a more differentiated analysis of foreign direct investment law and help refine details of a legal framework for Global Corporate Citizenship.

115. *See generally* Ruggie Report, *supra* note 65.

Political will to rethink the regulation of transnational corporations has grown rapidly and exponentially. Successful reform of foreign direct investment law requires new ways of thinking and a new theoretical framework. A new approach should: (1) address substantive and procedural challenges facing potential plaintiffs from developing countries, (2) take into consideration the amount of economic, political, legal, and social influence wielded by transnational corporations, (3) capitalize on the growing political will to reform the international economic system, (4) incorporate modern notions of human rights and sustainable development, and (5) encourage moral and ethical business practices in transnational economic activities. In future articles, I will set out a law and Global Corporate Citizenship research agenda and propose options for the implementation of more comprehensive regulation of transnational corporations.