

## BEYOND VOLUNTARISM: SOCIAL DISCLOSURE AND FRANCE'S NOUVELLES RÉGULATIONS ÉCONOMIQUES

Lucien J. Dhooge\*

Transnational companies have been the first to benefit from globalization. They must take their share of responsibility for coping with its effects.<sup>1</sup>

Ethics, social responsibility, environmental stewardship – whichever terms you want to use – are exquisitely personal. . . . [W]hat do all those words mean, exactly?<sup>2</sup>

### I. INTRODUCTION

The term “globalization” has threatened to become a trite phrase freely interchangeable with such terms as “international,” “multi-national,” and “transnational.”<sup>3</sup> Nevertheless, regardless of the name one chooses, it must be acknowledged that globalization is not simply economics. Rather, globalization has social, political, environmental, cultural, and legal components that have an effect upon the enjoyment of human rights by impacted populations.<sup>4</sup>

The best definition of globalization acknowledges and combines these components. Utilizing this definition, globalization represents “an accelerating

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\* Associate Professor of Business Law, University of the Pacific; Member, Colorado and District of Columbia Bars; LL.M., 1995, International and Comparative Law, Georgetown University Law Center; J.D., 1983, University of Denver College of Law; B.A., 1980, University of Colorado. The author thanks his family and friends for their constant encouragement and inspiration.

1. Kofi A. Annan, *Help the Third World Help Itself*, WALL ST. J., Nov. 29, 1999, at A28.

2. James K. Glassman, *Good for the Soul, Works for the Wallet*, WASH. POST, May 25, 2003, at F1.

3. Commentators cannot even agree on a common name for the concept of globalization let alone a comprehensive definition. See, e.g., ULRICH BECK, WHAT IS GLOBALIZATION? 10 (2000) (referring to the concept as “globality”); THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 169 (2000) (referring to the concept as “globalution”); PICO IYER, THE GLOBAL SOUL: JET LAG, SHOPPING MALLS, AND THE SEARCH FOR HOME 115 (2000) (referring to the concept as “the multiculture”); DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD 379 (2d ed. 2002) (referring to the concept as “globalization”).

4. See Lorne W. Craner, Assistant Secretary of State for Democracy, Human Rights and Labor, Promoting Corporate Social Responsibility Abroad: The Human Rights and Democracy Perspective, Remarks at the National Policy Association’s Surrey Memorial Lecture (June 18, 2002), at <http://www.state.gov/g/drl/rls/rm/11405.htm>.

integration . . . interweaving [and coordination] of national economies through the growing flows of trade, investment . . . capital . . . technology, skills . . . culture, ideas, news, information . . . entertainment, and . . . people.”<sup>5</sup> This definition serves to highlight the “total indivisibility” between all aspects of human existence, including economic, social, cultural, civil and political activities.<sup>6</sup> This indivisibility means that problems arising in one aspect of global human existence affect other aspects of such existence. Thus, “[e]conomic oppression is social oppression, [c]ultural discrimination is social discrimination, [p]olitical violations are social violations [and] [c]ivil abuse is social abuse.”<sup>7</sup>

Given this indivisibility, globalization inevitably has implications for human rights. This inevitability arises from the fact that, like globalization, modern human rights law also encompasses all aspects of human activity. The University of Minnesota Human Rights Library has identified 275 separate global and regional instruments, including treaties and covenants, which relate directly to or may impact international human rights.<sup>8</sup> These instruments cover a broad range of topics, including civil, political, economic, social and cultural rights, rights relating to specific groups of persons, such as children and women, and prohibitions upon particular practices such as torture and forced labor.<sup>9</sup>

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5. YERGIN & STANISLAW, *supra* note 3, at 383; *see also* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 9 (2002) (defining globalization as “the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital, knowledge, and (to a lesser extent) people across borders”).

6. Colm O’Cuanachain, *The Rights Based Approach to Development: Indivisibility and Interdependence of All Human Rights*, Remarks at the World Social Forum (Feb. 1, 2002), *at* [http://www.amnesty.asso.fr/05\\_amnesty/55\\_france/554/src\\_ent/speech\\_colm1feb02.htm](http://www.amnesty.asso.fr/05_amnesty/55_france/554/src_ent/speech_colm1feb02.htm).

7. *Id.*

8. *See* University of Minnesota Human Rights Library, *International Human Rights Instruments*, *at* <http://www1.umn.edu/humanrts/instree/ainstsl1.html> (last visited Mar. 24, 2004).

9. For human rights instruments relating to civil, political, economic, social and cultural rights, *see generally* *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. Doc. A/810 (1948); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); *International Covenant on Civil and Political Rights*, G.A. Res. 2200 A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). For human rights instruments relating to specific groups of persons, *see generally* *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993); *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989); *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979). For human rights instruments prohibiting torture and forced labor, *see generally* *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A.

Businesses may violate any number of these instruments to the extent that their operations negatively impact their employees, business partners, members of the surrounding community, the environment and public institutions.

In response to the indivisibility of business activities and human rights and the relevancy of information relating to their interaction to investors and other stakeholders,<sup>10</sup> France's Assemblée Nationale mandated social disclosure<sup>11</sup> as part of its Nouvelles Régulations Économiques (NRE). Adopted on May 15, 2001, Article 116 of the NRE required all French corporations listed on the premier marché (and thereby possessing the largest market capitalizations) to annually report on the social and environmental impact of their activities commencing with their 2003 annual reports.<sup>12</sup> The Assemblée Nationale subsequently implemented Article 116 through the issuance of Decree Number 2002-221 (Decree) on

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Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984); *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452(XXX), U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (1975); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 18 U.S.T. 3203, T.I.A.S. No. 6418, 266 U.N.T.S. 3 (1956); Protocol Amending the Slavery Convention, 7 U.S.T. 480, T.I.A.S. No. 3532, 182 U.N.T.S. 51 (1953); Convention Concerning Forced or Compulsory Labor, 39 U.N.T.S. 55 (1930); International Convention to Suppress the Slave Trade and Slavery, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253 (1926).

10. For purposes of this article, "stakeholders" are defined as any natural or juridical person affected by or who has an effect upon a business enterprise, including those maintaining ownership interests (including shareholders, general and limited partners, and members), labor (including employees, independent contractors, and temporary workers), customers (including members of their immediate household), participants in the distributive chain (including distributors, wholesalers and retailers), the national, state and municipal governments exercising jurisdiction over the enterprise's operations and members of the community. See SRI World Group, Inc., *Glossary of Socially Responsible Investing Terms by Category*, at <http://www.socialfunds.com/media/index.cgi/glossary.htm> (last visited May 28, 2003) [hereinafter Social Funds Glossary].

11. For purposes of this article, "social disclosure" is defined as public reporting of "information about the products a reporting company produces, the countries in which it does business, the labor and environmental effects of the company's operations . . . as well as specified information about political and charitable contributions." Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1201 n.5 (1999) [hereinafter Williams, *Corporate Social Transparency*]. The concept of social disclosure is based upon the idea that "investors and members of society should have consistent, high quality, accurate information available about the social, political and environmental effects of corporate action . . ." Cynthia A. Williams, *Codes of Conduct and Transparency*, 24 HASTINGS INT'L & COMP. L. REV. 415, 416 (2001).

12. See Law No. 2001-420 of May 15, 2001, J.O., May 16, 2001, art. 116, p. 7776. The premier marché consists of the largest French and foreign companies with public capital diffusion of twenty-five percent and capitalization value of €750 to €800 million. See Les Marchés, at <http://cobeg.free.fr/marche.htm>.

February 20, 2002. The Decree established nine separate categories of social information that must appear in the annual reports of listed French corporations.<sup>13</sup> Similarly, the Decree established nine categories of information for disclosure with respect to the environmental consequences of corporate activities.<sup>14</sup>

The Decree's social disclosure requirement has been subject to widespread commentary. Proponents praised the Decree as providing baseline sustainability reporting standards that could be utilized by French corporations to expand their voluntary reporting efforts.<sup>15</sup> Proponents also contended that the Decree would foster openness and transparency with respect to sustainability issues that had been previously lacking in French corporate culture.<sup>16</sup> Most importantly, the Decree placed corporate social responsibility issues in general and social and environmental issues in particular squarely on the agenda of every publicly listed French corporation.<sup>17</sup> The result would be to institutionalize these issues as well as the concept of the triple bottom line and provide French corporations with a competitive advantage over their European and international competitors.<sup>18</sup>

Conversely, critics noted that the Decree did not establish specific indicators and methodologies to be utilized in disclosure.<sup>19</sup> The environmental

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13. See Decree No. 2002-221 of Feb. 20, 2002, J.O., Feb. 21, 2002, p. 3360, art. 148-2.

14. See *id.* art. 148-3.

15. E.g., Sarj Nahal, *Mandatory CSR Reporting: France's Bold Plan*, BUS. FOR SOC. RESP., (Jun. 14, 2002), at <http://www.bsr.org/BSRResources/Magazine/CSRTrends.cfm?DocumentID=844>. Sarj Nahal is the International Director for The Social and Environmental Rating Agency (ARESE). *Id.* Headquartered in Paris, ARESE is a self-described "non-financial rating agency that produces research and ratings on the sustainability performance of European corporations." *Id.*

16. *Id.*

17. See *id.* For purposes of this article, "corporate social responsibility" is defined as "[t]he integration of business operations and values whereby the interests of all stakeholders . . . are reflected in the company's policies and actions." Social Funds Glossary, *supra* note 10; see also EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR EMPLOYMENT AND SOCIAL AFFAIRS, PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY: GREEN PAPER 8 (2001) (defining corporate social responsibility as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis"), available at [http://europa.eu.int/comm/employment\\_social/soc-dial/csr/greenpaper\\_en.pdf](http://europa.eu.int/comm/employment_social/soc-dial/csr/greenpaper_en.pdf) [hereinafter EU Green Paper].

18. Nahal, *supra* note 15. For purposes of this article, the "triple bottom line" is defined as efforts undertaken by enterprises to achieve balance between their financial, social and environmental performance. See Social Funds Glossary, *supra* note 10.

19. See William Baue, *New French Law Mandates Corporate Social and Environmental Reporting* (Mar. 14, 2002), at <http://www.socialfunds.com/news/print.cgi?sfArticleId=798>; see also Press Release, ARESE, *Mandatory Sustainability Reporting for French Corporations: The New Economic*

disclosure requirements were criticized as inadequate due to their failure to address several important issues and the long-term environmental impact of corporate behavior, including wide variances in impact resulting from the activities of different industrial sectors.<sup>20</sup> The Decree also was criticized for failing to clearly delineate its applicability to domestic and international operations of French corporations.<sup>21</sup> The lack of social auditing requirements and sanctions for noncompliance also were cited as evidence of the Decree's inadequacy.<sup>22</sup> Critics concluded that many affected French companies would fail to adequately comply with the Decree or would produce reports far short of stakeholder expectations.<sup>23</sup>

This Article examines the strengths and weaknesses of social disclosure as implemented in France. The Article examines the need for social disclosure and critiques the Decree utilizing the U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Human Rights Norms), the most comprehensive summation to date of the ethical obligations of businesses to their stakeholders.<sup>24</sup> The Article first provides a summary of the NRE and its implementation through the Decree. The Article then examines the need for social disclosure and provides a critique utilizing a comparison of ethical duties set forth in the Human Rights Norms with the Decree's reporting requirements. The Article concludes that there is a growing imperative for social disclosure as set forth in France's commendable, but flawed, social disclosure regime.

## II. FRANCE'S NOUVELLES RÉGULATIONS ÉCONOMIQUES AND SOCIAL DISCLOSURE

### A. A Brief History of the NRE

The NRE's social disclosure requirement was the product of three interrelated developments. Initially, there was renewed attention to corporate

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Regulations (Mar. 2002) (on file with author) [hereinafter ARESE Press Release].

20. See ARESE Press Release, *supra* note 19.

21. See Baue, *supra* note 19; see also ARESE Press Release, *supra* note 19.

22. See Baue, *supra* note 19. "Social auditing" is defined as "[t]he process whereby an organization can account for its social performance [and] report on and improve their [sic] performance [through assessment of its] . . . social impact and ethical behavior . . . in relation to its aims and those of its stakeholders." Social Funds Glossary, *supra* note 10.

23. See *Sustainability Reporting Becomes Law in France*, WORLD WATCH, Oct. 2002, at 25.

24. See generally, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, E.S.C. Res. 2003/16, UN ESCOR Comm'n on Human Rights, 55th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter *Norms*].

social responsibility in France commenced in the late 1990s.<sup>25</sup> Prior to the NRE, France had “a voluntary and limited tradition” of social disclosure.<sup>26</sup> For example, human resources data, such as employment indicators, remuneration, training, working hours, health, safety, equity and diversity, were traditionally contained in social reports authored by business associations and known as *bilans sociaux*.<sup>27</sup> However, these reports were prepared solely for internal circulation and were not generally available to shareholders or other stakeholders.<sup>28</sup> The authority responsible for the regulation of the French stock market, the Commission des Opérations de Bourse, also encouraged French listed companies to disclose information with respect to the environmental impact of their activities.<sup>29</sup> However, only fifty of the one thousand listed companies included discussion of sustainability issues in their annual reports.<sup>30</sup>

Second, the NRE’s social disclosure requirement also was influenced by the growing interest of European governments in sustainability reporting in the 1990s. Denmark became the first European state to adopt legislation mandating public environmental reporting in its “Green Accounting Law” in 1995.<sup>31</sup> Pursuant to this law, approximately 3,000 companies whose activities have a “significant impact” on the environment are required to publish a “Green Account” describing their impact and efforts to minimize and remediate resultant environmental damage.<sup>32</sup> Similar legislation in the Netherlands requires environmental reporting by more than 300 Dutch companies.<sup>33</sup> In Norway, the Accounting Act requires that all companies include environmental information in their annual financial reports in conformance with standards developed by the Ministry of the Environment.<sup>34</sup> By contrast, Sweden’s Environmental Issues in Financial Accounts Law of 1999 mandates annual environmental impact reports for companies requiring permits for their operations or under obligation to provide

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25. See EUROPEAN SUSTAINABLE AND RESPONSIBLE INVESTMENT FORUM, SRI HISTORY: FRANCE, at <http://www.eurosif.org/pub/sri/ctry/fr/hist.shtml#1> (last visited Mar. 24, 2004) (discussing the creation of a French forum for responsible investment, the so-called Forum pour l’Investissement Responsable, in 1999).

26. See *Sustainability Reporting Becomes Law in France*, *supra* note 23, at 25.

27. See ARESE Press Release, *supra* note 19.

28. See *id.*

29. See *Sustainability Reporting Becomes Law in France*, *supra* note 23, at 25.

30. See *id.*

31. See GLOBAL REPORTING INITIATIVE, GOVERNMENT INITIATIVES TO PROMOTE CORPORATE SUSTAINABILITY REPORTING ROUNDTABLE 14 (2001), available at [http://www.uneptie.org/outreach/reporting/docs/GRI\\_govtmeeting.pdf](http://www.uneptie.org/outreach/reporting/docs/GRI_govtmeeting.pdf).

32. See *id.* In addition, to the required “Green Account,” Danish companies also are subject to voluntary reporting with respect to their social performance and compliance with international labor standards pursuant to the Guidelines for Social Ethical Performance and Guidelines for Reporting on Working Conditions. See *id.* at 3.

33. See *id.* at 14.

34. See *id.*

public notice of their activities.<sup>35</sup> The NRE's social disclosure requirement may be viewed as a continuation of the emerging trend mandating such reporting in Western Europe as well as a forerunner to future European Union-wide requirements.<sup>36</sup>

The third development was the growing interest in socially responsible investing in France. At the time of the adoption of the NRE in 2001, there were forty-two mutual funds operating on the Paris Stock Exchange utilizing some form of socially responsible investing techniques.<sup>37</sup> Assets of these funds totaled in excess of € 924 million by the end of 2001.<sup>38</sup> In addition, in June, 2000, the Observatoire sur la Responsabilité Sociétale des Entreprises was established as a study center for corporate social responsibility and to promote socially responsible investment.<sup>39</sup> Novethic, a resource center for persons seeking information on socially responsible investing, opened in April 2001 and was followed two months later by the launch of the ARESE Sustainable Performance Index.<sup>40</sup> Finally, France's first Minister of Sustainable Development was appointed in June 2002.<sup>41</sup> Given this growing interest in socially responsible investing, the NRE's disclosure requirement was designed to "empower shareholders by giving them the right to have information on a company's financial, social and environmental performance available to them."<sup>42</sup>

Based upon these developments, French legislators concluded that the time was ripe for social disclosure by publicly listed French companies. Although the intentions of the legislators were undoubtedly diverse, three separate motives

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35. *See id.* at 8. Sweden also has required mandatory annual reporting of emissions and the use of chemicals at 6,000 sites in the country for which government permits or licenses are required since 1989. *See id.*

36. *See, e.g.,* EU Green Paper, *supra* note 17; SRI World Group, Inc., *Corporate Social Responsibility a Priority in Europe* (Oct. 4, 2000), at <http://www.socialfunds.com/news/print.cgi?sfArticleId=385> (noting that a survey entitled "The Responsible Century?" conducted by the public relations firm of Burson-Marsteller and The Prince of Wales Business Leaders' Forum found that eighty-nine percent of surveyed Europeans believed that corporate social responsibility was an important factor in their assessment of companies).

37. *See* European Sustainable and Responsible Investment Forum, SRI Key Features: France, at <http://www.eurosif.org/pub/sri/ctry/fr/feat.shtml#2> (last visited Mar. 24, 2004). There were 7,355 mutual funds listed in France at the time of the European Sustainable and Responsible Investment Forum's survey. *Id.*

38. *Id.* The total value of the capital equities quoted on the Paris Stock Exchange was € 1.4 billion at the time of the European Sustainable and Responsible Investment Forum's survey. *Id.*

39. European Business Campaign on Corporate Social Responsibility, Campaign Initiatives: France, at <http://www.csccampaign.org/capacity/default.asp?pageid=215> (last modified Nov. 25, 2002) (copy of Web page on file with author).

40. *Id.*

41. *Id.*

42. *Id.*

may be gleaned from review of the debate surrounding the adoption of the NRE. First, government officials expressed the need for greater transparency on behalf of listed companies with respect to social and environmental issues.<sup>43</sup> Growing stakeholder interest in such information mandated its disclosure in an accessible and consistent manner.<sup>44</sup> Current disclosure by listed companies was characterized as serving marketing rather than informational purposes.<sup>45</sup> The second motive was fulfillment of stakeholder expectations with respect to corporate behavior and accountability.<sup>46</sup> The fulfillment of workers' expectations was prominently featured in this regard.<sup>47</sup> Legislators expected companies to develop internal management procedures to fulfill stakeholder expectations through the information gathering process required by the NRE.<sup>48</sup> A final motivation was the changing global and European environment with respect to social disclosure.<sup>49</sup> Legislators noted the trend favoring such reporting in the European Union and some of its constituent states.<sup>50</sup> The need to place French companies on the cutting edge of international developments in this field also served as a motivation for the adoption of the NRE.<sup>51</sup>

The French government thus opened a consultative process with industry, trade unions and human rights and environmental non-governmental organizations to discuss the necessity of strengthening social disclosure in the country.<sup>52</sup> Although there was broad political consensus with respect to the necessity of adopting social disclosure, there remained numerous issues to be resolved which would shape the NRE as ultimately adopted.<sup>53</sup> A crucial issue in this regard was whether such disclosure should be governmentally-mandated or remain on a purely voluntary basis.<sup>54</sup> If disclosure was to be required, another issue arose with respect to its content. Disputes with respect to this issue related to what information to disclose and the specificity or generality of any information.<sup>55</sup> Legislators were concerned with finding a proper balance between quantitative and qualitative information and the development of sectorial approaches to

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43. See Vincent Jacob, New Obligations for French Listed Companies Regarding Social and Environmental Reporting, Address at the Meeting of the European Social Investment Forum 1 (Apr. 24, 2002) (transcript on file with author). Mr. Jacob previously served the French government as a counselor to the Minister of the Environment.

44. See *id.*

45. See *id.*

46. See *id.*

47. See *id.*

48. See Jacob, *supra* note 43.

49. See *id.*

50. See *id.*; see also *supra* notes 31-35 and accompanying text.

51. See Jacob, *supra* note 43.

52. See *id.* Government agencies primarily responsible for the consultative process were the Ministries of the Environment, Finance, Justice, and Social Affairs. See *id.*

53. See *id.*

54. See *id.*

55. See *id.*

disclosure.<sup>56</sup> Concerns were also expressed with respect to the necessity of external controls and enforcement mechanisms.<sup>57</sup> Finally, considerable attention was devoted to the mitigation of injury to the competitive position of French industry in the European and global economies resulting from any social disclosure regulation.<sup>58</sup>

### **B. The Social Disclosure Requirements of the NRE**

The ultimate result of this debate was the NRE's social disclosure requirement. This requirement consists of two separate initiatives. The first initiative was an amendment of Chapter V of Title 1 of the French Company Regulations as set forth in the Code of Commerce relating to the rights of shareholders.<sup>59</sup> Adopted on May 15, 2001 as Law Number 2001-420, this amendment added a new article to the content of annual reports to be filed by publicly-listed French companies.<sup>60</sup> The amendment detailed four specific topics to be included in these reports. Initially, in the annual reports, corporations were required to disclose "the total payments in cash and in kind, whatever their nature, made to each board member during the fiscal year."<sup>61</sup> Corporations were also required to disclose such payments received by board members from companies under control of the reporting company.<sup>62</sup> The third disclosure required listing of all "mandatory and functional positions occupied by each board member in all companies during the . . . fiscal year."<sup>63</sup> Finally, the reports of all listed companies were required to contain "information, the detail of which is being determined by a decree of the Council of State, on how the company takes into account the social and environmental consequences of its activities."<sup>64</sup>

The reporting requirements of Law 2001-420 were implemented by a decree of the Council of State. Adopted on February 20, 2002, Decree Number 2002-221 requires publicly listed companies to report against a set of social indicators encompassing three stakeholder issues: human resources, labor

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56. See Jacob, *supra* note 43. Although deemed more responsive to stakeholder needs, sectorial reporting requirements were ultimately rejected as politically impossible to achieve and impracticable in development and application. See *id.*

57. See *id.*

58. See *id.* In his remarks on the process by which the social disclosure requirement was ultimately adopted, Jacob acknowledged that companies failing to view the NRE as a positive opportunity to improve their competitive position and expressing reluctance in implementing reporting procedures would suffer economic injury as a result of the adoption of the NRE. See *id.* at 4.

59. See generally Law No. 2001-420 of May 15, 2001, J.O., May 16, 2001, p. 7776.

60. See *id.*

61. *Id.* art. 116.

62. See *id.*

63. *Id.*

64. *Id.*

standards, and community interests.<sup>65</sup> Reporting on human resources and labor standards consists of ten separate disclosures.<sup>66</sup> The initial three disclosures are set forth in considerable detail. First, companies must disclose and discuss information with respect to recruitment and utilization of their workforce, including distinctions between permanent and temporary workers and subcontracted labor, resultant redundancies, and the utilization of overtime.<sup>67</sup> Disclosing companies must also report staff reductions, if any, and employment safeguard plans, including redeployment and reemployment efforts with respect to affected workers.<sup>68</sup> The second disclosure requirement mandates reporting of the organization of working hours and their duration for permanent and part-time employees.<sup>69</sup> Companies are also required to disclose the frequency of employee absenteeism and possible motivations for such behavior.<sup>70</sup> The third topic for disclosure is employee compensation.<sup>71</sup> This specification requires disclosure of “[w]ages and their evolution, welfare costs . . . [and] professional equality between women and men.”<sup>72</sup>

The remaining human resource and labor disclosure requirements are not set forth in a detailed manner. Rather, these disclosures consist of a list of seven separate topics without further elaboration: industrial relations, the status of collective bargaining agreements, health and safety conditions, employee training, the integration of disabled workers, and company benefit and social schemes.<sup>73</sup> Finally, disclosing companies are required to report and discuss the importance of subcontracting to their operations.<sup>74</sup>

Disclosure of community interests consists of four reporting requirements. The initial requirement is a detailed description of how the disclosing company “takes into account the territorial impact of its activities as far as employment and regional development are concerned.”<sup>75</sup> Disclosing companies are also required to detail their relations with “associations for social integration, educational institutions, associations for the protection of the environment, consumers’ associations, and neighborhood populations.”<sup>76</sup> Subcontracting considerations constitute the third community disclosure requirement. The Decree mandates that companies indicate the importance of subcontracting to their operations and how they promote compliance by their

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65. See ARESE Press Release, *supra* note 19.

66. Decree No. 2002-221 of Feb. 20, 2002, art. 148-2.

67. *See id.* art. 148-2(1)(a).

68. *See id.* art. 148-2(1)(b).

69. *See id.* art. 148-2(2).

70. *See id.*

71. *Id.* art. 148-2(3).

72. Decree No. 2002-221, *supra* note 66, art. 148-2(3).

73. *See id.* art. 148-2(4-8).

74. *See id.* art. 148-2(9).

75. *See id.* art. 148-2.

76. *Id.*

subcontractors with fundamental labor rights, including conventions of the International Labour Organization (ILO).<sup>77</sup> Finally, the community disclosure provisions of the Decree require discussion of the methodology utilized by the company's foreign subsidiaries to account for the impact of their activities on regional development and populations.<sup>78</sup>

The final indicator upon which disclosure is required is environmental impact, management and protection. Article 148-3 of the Decree requires ten separate disclosures with respect to this topic.<sup>79</sup> Publicly listed companies initially are required to disclose their consumption of resources, including water, raw materials and energy.<sup>80</sup> This disclosure also includes the obligation to report efforts, if any, to increase energy efficiency and utilize sources of renewable energy.<sup>81</sup> The final component of this initial environmental disclosure criterion requires reporting of "conditions of soil use, air, water [and] soil pollution emissions that could affect dramatically the environment . . . [and] noise and olfactory pollution and waste."<sup>82</sup> The second required environmental disclosure concerns "[m]easures taken to limit the damage to biological balance, to the natural environment [and] to . . . protected animal and [plant] species."<sup>83</sup> Third, publicly listed companies are required to disclose all assessment or certification actions relating to environmental protection.<sup>84</sup> The fourth required environmental disclosure relates to actions to ensure the conformity of corporate activities with applicable legal requirements, if any.<sup>85</sup> The environmental provisions of the Decree also include a required accounting of "[e]xpenditures made to prevent the consequences of the company's activity on the environment."<sup>86</sup>

Environmental management issues are also subject to disclosure. Public reports of affected companies must disclose the existence of internal departments responsible for management of environmental issues and the nature of training and information provided to employees with respect to such management.<sup>87</sup> The report must also include discussion of the resources dedicated to the reduction of environmental risks and procedures adopted with respect to pollution and industrial accidents causing injury beyond the company's facilities.<sup>88</sup> Disclosing companies must also report the "[a]mount of provisions and guaranties allocated

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77. *See id.*

78. *See* Decree No. 2002-221, *supra* note 66, art. 148-2.

79. *See id.* art. 148-3.

80. *Id.* art. 148-3(1).

81. *See id.*

82. *Id.*

83. *Id.* art. 148-3(2).

84. *See* Decree No. 2002-221, *supra* note 66, art. 148-3(3).

85. *See id.* art. 148-3(4).

86. *Id.* art. 148-3(5).

87. *See id.* art. 148-3(6).

88. *See id.*

for environmental risks.”<sup>89</sup> However, affected companies may decline to report this information if disclosure is “likely to cause serious prejudice to the company in an ongoing lawsuit.”<sup>90</sup> Compensation for environmental damage payable as a result of court orders and remediation efforts also must be disclosed.<sup>91</sup> The final required environmental provision of the Decree requires discussion of the initial six environmental disclosures with respect to the reporting company’s foreign subsidiaries.<sup>92</sup>

### III. THE CASE FOR SOCIAL DISCLOSURE IN THE MODERN BUSINESS ENVIRONMENT

Corporate social responsibility may be viewed as creating standards of conduct for businesses or stating aspirations for future conduct.<sup>93</sup> If viewed as establishing standards of conduct, corporate social responsibility may largely track concomitant legal duties. By contrast, if merely viewed as stating aspirations, corporate social responsibility is outside of the realm of accountability and enforcement traditionally associated with legal duties. Nevertheless, however viewed, it is indisputable that corporate social responsibility is becoming increasingly important to domestic and transnational enterprises. This importance is based upon six developments impacting the modern business environment. These developments mandate a concurrent increase in corporate transparency and accountability, which may be achieved through social disclosure. This section of the Article identifies and addresses each of these developments and concludes that these goals may best be achieved through mandatory disclosure initiatives.

The preamble of the Universal Declaration of Human Rights (Universal Declaration), the self-proclaimed “common standard of achievement for all peoples and all nations,” states that “every individual and every organ of society . . . shall strive by teaching and education to promote respect for [human] rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”<sup>94</sup> Placement of the obligation to respect and protect human rights on all individuals and organs of society recognizes two realities associated with the modern business environment. First, the placement of these responsibilities upon the private sector recognizes that the economic aspects of globalization must also include social and ethical dimensions in order to be truly sustainable. While international trade agreements and institutions, most notably the General Agreement on Tariffs and Trade and the

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89. *Id.* art. 148-3(7).

90. Decree No. 2002-221, *supra* note 66, art. 148-3(7).

91. *See id.* art. 148-3(8).

92. *See id.* art. 148-3(9).

93. *See* Pall A. Davidsson, Note, *Legal Enforcement of Corporate Social Responsibility within the EU*, 8 COLUM. J. EUR. L. 529, 530 (2002).

94. G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., at 72, U.N. Doc. A/810 (1948).

World Trade Organization, provide a legal framework for the economic aspects of globalization, human rights standards provide balance by creating a framework for associated social and ethical dimensions.<sup>95</sup>

The second reality is the growing role and consequent power of the private sector. In the fifty-five years since the adoption of the Universal Declaration, the role of the private sector has expanded beyond economic considerations. The role of the state has been reduced, and there has been a corresponding increase in reliance upon the private sector “to resolve problems of human welfare, often in response to conditions generated by international and national financial markets and institutions.”<sup>96</sup> Although the state ultimately remains responsible for the full realization of human rights by its citizens, it is no longer taken for granted that such realization depends significantly on state action.<sup>97</sup> Rather, the modern global economy is characterized by increasing concentration of power in private actors.<sup>98</sup> Just as the state may violate the human rights of its citizens, so too may private actors violate the rights of populations in the states in which they operate.<sup>99</sup> Furthermore, as states are obligated to respect and protect their citizens from such violations, to an increasing degree, private actors are also obligated with respect to a widening variety of stakeholders.

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95. See Mary Robinson, *Globalization Has to Take Human Rights into Account*, Address Before the University of Tübingen (Jan. 21, 2002), at <http://www.globalpolicy.org/globaliz/econ/2002/0122mary.htm>; see also Davidsson, *supra* note 93, at 532-33 (noting the existence of more than 180 multilateral treaties adopted by the ILO recognizing the duty of private entities to respect and enforce labor and social standards).

96. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Jan. 22-26, 1997, ¶ 2, at [http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html) (copy on file with the Arizona Journal of Int'l and Comparative Law).

97. See *id.*

98. See Logan M. Breed, Note, *Regulating Our 21st Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 VA. J. INT'L L. 1005, 1007 (2002) (noting that the revenues of the 100 largest transnational enterprises surpass the economies of most states and that the human and financial resources of such enterprises exceed those available to many of the states in which they conduct operations); see also Sarah M. Hall, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401, 405 (2002) (noting that sales of the eighty-two largest U.S.-based transnational enterprises in 1999 exceeded the gross domestic product of Germany, France, and the United Kingdom); Beth Stephens, *The Amoral Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 57 (2002) (noting that only thirteen states have economies larger than the revenues of the fifteen largest transnational enterprises).

99. See, e.g., *Universal Declaration of Human Rights*, *supra* note 9, at pmb1. (providing that “every individual and every organ of society . . . shall strive by teaching and education to promote respect for [human] rights and freedoms and . . . secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”).

The second development increasing the visibility of corporate social responsibility and the need for transparency and accountability is the growing awareness of states of the social and environmental impact of business operations within their borders. An increasing number of states are regulating the activities of businesses within their boundaries.<sup>100</sup> Examples of this emerging trend remain haphazard, but are present nonetheless throughout the developing world. For example, in the past four years in Central and South America, Belize, Brazil and Ecuador have adopted legislation or taken action to slow the progress of deforestation, and Bolivia has committed \$90 million to efforts to eradicate child labor.<sup>101</sup> In Asia, Thailand has adopted legislation protecting women from sexual harassment and increased enforcement of prohibitions upon child labor and environmental degradation, while Cambodia has acted to impose criminal sanctions upon those involved in illegal logging operations.<sup>102</sup> In Nigeria, a country with a long history of human rights violations,<sup>103</sup> the government has directed enterprises engaged in the petroleum industry to submit reports on pipeline maintenance and plans to combat pollution associated with their

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100. See *infra* notes 101-15 and accompanying text.

101. See Cat Lazaroff, *Landmark Deal Will Protect Rainforests in Belize*, ENVTL. NEWS SERV., Aug. 3, 2001 (describing a debt for nature exchange in which the United States agreed to reduce Belize's debt by fifty percent in return for environmental protection of 23,000 acres of tropical rainforest located in the Maya Mountain Marine Corridor); see also *Brazil Recovers \$25 Million of Illegally Cut Mahogany*, REUTERS, Feb. 22, 2002, at <http://www.planetark.com/dailynewsstory.cfm/newsid/14669/newsDate/22-Feb-2002/story.htm> (detailing efforts at increasing protection of tropical rainforests, including the seizure by Ibama, Brazil's environmental enforcement agency, of 220,000 square feet of illegally cut mahogany); Press Release, World Rainforest Movement, Ecuador: Oil Exploitation Banned in Protected Areas (Mar. 21, 1999) (on file with author) (describing the issuance of two decrees by the Ecuadorian government prohibiting oil exploration in a 1.1 million hectare area inhabited by indigenous populations); Press Release, Child Labour News Service, Bolivia Presents \$90 Million Plan to Fight Child Labour (Apr. 15, 2001) (on file with author) (detailing a nine year plan to eradicate the worst forms of child labor and exploitation in the country, especially those in the extractive industries).

102. See Aphaluck Bhatisevi, *Law will Protect Women against Sexual Harassment*, BANGKOK POST, Jan. 15, 1998, at 1, available at 1998 WL 7885534; see also *Cambodia Moves to Axe Illegal Logging*, REUTERS, July 23, 2001, at <http://www.planetark.com/dailynewsstory.cfm/newsid/11706/newsdate/23-Jul-2001/story.htm>; Voranant Leelalakana, *Awareness Campaign on Child Labour to be Set Up; Ministry Concerned about Global Image*, BANGKOK POST, Mar. 29, 2001, at 4, available at 2001 WL 17377026; Kultida Samabuddhi, *Company Warned to Observe Environmental Regulations*, BANGKOK POST, Oct. 30, 2001, at 4, available at 2001 WL 26869542.

103. For a summary of the status of human rights protections in Nigeria, see generally U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, NIGERIA REPORT ON HUMAN RIGHTS PRACTICES FOR 2002, at <http://www.state.gov/g/drl/rls/hrrpt/2002/18220.htm> (Mar. 31, 2003).

operations.<sup>104</sup> Although states undoubtedly offer differing levels of protection, the rogue state that permits the unfettered exploitation of its human and natural resources is gradually becoming the exception rather than the rule in the developing world.<sup>105</sup> Furthermore, regardless of the level of commitment to social and environmental values in the boardroom, business enterprises operating in this regulatory environment now have legal duties with which to conform in addition to ethical obligations.

Increased corporate transparency and accountability is the evolving legal environment in the United States and abroad. In the United States, this evolution is best exemplified by the increase in litigation against transnational enterprises pursuant to the Alien Tort Claims Act.<sup>106</sup> This litigation consists of three distinct types of cases. The initial category of cases alleges complicity by transnational enterprises in violations of non-labor related human rights.<sup>107</sup> The second category of cases consists of those alleging violations of labor rights.<sup>108</sup> A third

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104. See Camillus Eboh, *Nigeria Demands Safety Report on Oil Pipelines*, REUTERS, Aug. 15, 2001, at <http://www.planetark.org/dailynewsstory.cfm/newsid/12026/story.htm>.

105. An example in this regard is the military dictatorship presently in control of Myanmar. The history of the dictatorship dates back to 1962 and is replete with allegations of summary executions, torture and imprisonment of dissidents (including Nobel laureate Daw Aung San Suu Kyi), widespread violations of civil rights, genocide of ethnic minorities and, most recently, forced labor. As a result, Myanmar has become an international pariah subject to divestment and sanctions by a multitude of states and international organizations. See Lucien J. Dhooze, *The Wrong Way to Mandalay*, 37 AM. BUS. L.J. 387, 390-407 (2000) (providing a history of human rights, divestment and sanctions directed at the military dictatorship in Myanmar).

106. See 28 U.S.C. § 1350 (2000) (providing federal jurisdiction for “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”).

107. See, e.g., *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000) (uncompensated confiscation of real property in Egypt); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (complicity in imprisonment, torture and murder of political activists in Nigeria); *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995) (complicity in fraud, breach of fiduciary duty and misappropriation of funds associated with the failure of the Bank of Credit & Commerce International); *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988) (complicity in false imprisonment for failure to pay debts in Saudi Arabia); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289 (S.D.N.Y. 2003) (complicity in genocide, war crimes and religious persecution of non-Muslims in Sudan); *Abdullahi v. Pfizer, Inc.*, No. 01 Civ. 8118, 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. Sept. 17, 2002) (unauthorized clinical drug testing in Nigeria); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997) (complicity in false imprisonment in Bolivia).

108. See, e.g., *Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (complicity in antiunion violence in Columbia); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003) (complicity in antiunion violence in Columbia); *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (utilization of forced labor in Myanmar); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (utilization of forced

category of cases consists of claims of environmental degradation claims.<sup>109</sup>

However, human rights-based litigation is not limited to the United States. Such litigation has become a noteworthy development in common law countries. For example, in 1996, landowners in Papua New Guinea were successful in obtaining compensation from Ok Tedi Mining Ltd. in Australia for environmental damage caused by tailings from the company's copper mine.<sup>110</sup> In June, 1998, the activist organization Recherches Internationales Quebec filed a class action in Quebec Superior Court on behalf of 23,000 Amerindians seeking \$47 million in damages from Montreal-based Cambior, Inc. for personal and environmental injuries resulting from its operation of a gold mine in Guyana.<sup>111</sup> In December, 2001, British building materials firm Cape Plc agreed to pay £21 million to 7,500 workers who contracted asbestos-related diseases as a result of their employment in the company's mining operations in South Africa during the 1970s.<sup>112</sup> In 2002, approximately one hundred transnational enterprises were defending litigation in South Africa arising from their financial support of the former apartheid regime.<sup>113</sup> Damages in this litigation have been estimated in excess of \$100 billion.<sup>114</sup> Despite claims that these cases, and their U.S. counterparts, constitute judicial imperialism, impose Western standards on non-Western cultures and embroil judges in international relations to a degree which few are adequately trained to handle, these cases and their progeny represent "a direct shot into every . . . corporate boardroom operating in the global economy."<sup>115</sup>

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labor in Myanmar).

109. *See, e.g.*, *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (environmental degradation resulting from the operation of a copper mine in the Indonesian province of Irian Jaya); *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510 (S.D.N.Y. 2002), *aff'd*, 343 F.3d 140 (2d Cir. 2003) (environmental degradation resulting from the operation of a copper mine in Peru); *Sarei v. Rio Tinto plc*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (environmental degradation resulting from the operation of a copper mine on the island of Bougainville in Papua New Guinea).

110. *See Victoria Court Sets Path for PNG Ok Tedi Lawsuit*, (Aug. 28, 2001), at <http://www.planetark.com/dailynewsstory.cfm/newsid/12166/newsDate/28-Aug-2001/story.htm>. Ok Tedi Mining Ltd. is a joint venture owned by Australian-based BHP Billiton (52%), Inmet Mining Corporation of Canada (18%) and the government of Papua New Guinea (30%). *See id.*

111. *See Canadian Mining Company Taken to Court*, INTER PRESS SERV., June 23, 1998, at <http://www.nextcity.com/ProbeInternational/Mining/articles/980623c.htm>.

112. *See Rex Merrifield, Cape to Compensate South Africa Asbestos Miners* (Dec. 24, 2001), at <http://www.planetark.org/dailynewsstory.cfm/newsid/13833/newsDate/24-Dec-2001/story.htm>.

113. *See Gavin du Venage, Lawyers for Apartheid Victims Suing Global Corporations*, S.F. CHRON., Aug. 9, 2002, at A18.

114. *See id.*

115. Elliot Schrage, *A Long Way to Find Justice*, WASH. POST, July 14, 2002, at B2; *see also* William Glaberson, *Courts in the United States Become Arbiters of Rights and*

The fourth factor supporting greater social disclosure is the increasing attention paid to such issues by shareholders and potential investors. Interest in the topic of socially responsible investing has increased significantly in recent years.<sup>116</sup> This interest is evident in the recent increase in shareholder resolutions concerning social and environmental issues. These resolutions have met with increasing success in recent years. For example, in 2001 there were 158 social issue proposals reportedly submitted for consideration to shareholders of publicly traded U.S. corporations.<sup>117</sup> This number increased to 280 annually by May, 2003.<sup>118</sup> Furthermore, the number of proposals garnering ten percent or more of the votes increased from seventeen percent in 2000 to twenty-eight percent in 2001.<sup>119</sup> Most of these proposals were directed at improvement of labor and environmental standards.<sup>120</sup>

Alternatively, shareholders may choose to divest from companies that violate human rights standards or who maintain facilities in countries that tolerate such practices. Although divestment by individual shareholders may have no appreciable effect, such action by institutional investors could have a significant impact on many businesses. A recent example in this regard is the human rights policy adopted by the California Public Employees Retirement System (CalPERS) in February, 2002.<sup>121</sup> The CalPERS criteria rate investments in emerging markets according to an analysis of country and market factors.<sup>122</sup> As a result of

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*Wrongs Around the World*, N.Y. TIMES, June 21, 2001, at A1 (noting that “[t]he cold war paradigm was the United States as global policeman [while] [t]he post-cold-war paradigm is the United States as global attorney”).

116. Socially responsible investing has been defined as the integration of “social and environmental values into the investment decision-making process . . . link[ing] financial and social goals [and] striving to deploy investment capital in a manner that is consistent with the needs of society and the limits of ecosystems.” Ethical Funds, Introduction to Socially Responsible Investing, at [http://www.ethicalfunds.com/content/sri/sri\\_intro/](http://www.ethicalfunds.com/content/sri/sri_intro/) (last visited Aug. 4, 2002) (copy of webpage on file with author); see also SRI World Group, Inc., *supra* note 36.

117. See William Baue, *Shareowners Increase Social Activism Significantly in 2001* (Nov. 28, 2001), at <http://www.socialfunds.com/news/article.cgi?ArticleId=721>. Shareholder support for these resolutions averaged 8.6%, which represented a one-percentage point increase from 2000. See *id.*

118. See William Baue, *Increasing Shareholder Action Fuels Record Proxy Season*, (May 20, 2003), at <http://www.socialfunds.com/news/article.cgi/article1127.html>.

119. See Baue, *supra* note 117.

120. See Mark Thomsen, *Socially Responsible Shareowner Proposals Continue to Receive Support* (Sept. 6, 2001), at <http://www.socialfunds.com/news/article.cgi?ArticleId=662>. Nine of the top vote-getting proposals submitted for shareholder approval in 2001 requested that the targeted corporations take steps to improve their global labor standards. See *id.*

121. CalPERS is the largest public pension fund in the United States with assets in excess of \$150 billion. See Bill Wallace, *Human Rights Now a Factor in CalPERS Investments; Fund won't Support Repressive Regimes*, S.F. CHRON., Feb. 20, 2002, at A7.

122. See WILSHIRE ASSOCS., PERMISSIBLE EQUITY MARKETS INVESTMENT ANALYSIS 3

application of these criteria, CalPERS disqualified undertakings in Colombia, Egypt, India, Indonesia, Jordan, Malaysia, Morocco, Pakistan, the Peoples' Republic of China, the Philippines, Russia, Sri Lanka, Thailand, and Venezuela from eligibility for future investments.<sup>123</sup> Although the impact of the CalPERS approach remains to be determined, the sheer size of the fund and its resultant significance to investment markets cannot escape the attention of businesses with operations in countries with dismal human rights credentials. The CalPERS approach may also serve as a model for other public pension funds with respect to socially responsible investing.

Interest in socially responsible investing is also evident in the increasing number of companies and methodologies that individual investors may utilize to rate the social and environmental practices of their investments. In a 2001 survey of U.S. investment trends, the Social Investment Forum reported that more than \$2.3 trillion is currently invested in professionally managed portfolios utilizing one or more measures of social responsibility.<sup>124</sup> This amount represents an \$18 billion increase in socially responsible investing since 1999 and 11.7% of the \$19.9 trillion currently under professional management in the United States.<sup>125</sup> In 2001, the Social Investment Forum further identified 181 mutual funds in the United States that incorporated social screens into the investment process,<sup>126</sup>

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(Feb. 2004) (providing a complete discussion of CalPERS' investment formula and its application), *available at* <http://www.calpers.ca.gov/eip-docs/about/press/news/invest-corp/2004-perm-qty-als.pdf>. According to CalPERS' country criteria, investment eligibility is dependent on political stability, transparency and maintenance of productive labor practices. *Id.* at 3-4. Political stability is defined to include respect for civil liberties, the existence of an independent judiciary and minimal political risk. *Id.* at 6. The criteria define transparency as the existence of a free press, the maintenance of accounting standards, monetary and fiscal transparency and listing requirements for stock exchanges. *Id.* at 6-7. Productive labor practices include ratification of ILO agreements and the effectiveness of their implementation. *Id.* at 7-8. Relevant market factors include liquidity and volatility, the regulatory and legal environment, investor protection, the openness of capital markets, settlement proficiency and transaction costs. *Id.* at 8-10.

123. See Wallace, *supra* note 121, at A7; see also CalPERS' *Asian Retreat is a Victory for Ethics*, FIN. TIMES (London), Feb. 22, 2002, at 21.

124. See Press Release, Social Investment Forum, Report: Socially Screened Assets Grew 1.5 Times Faster than All U.S. Managed Portfolio Assets Since 1999 (Nov. 30, 2001) (on file with author) [hereinafter SIF Statistics]; see also SRI World Group, Inc., *Statistics and Trends on Socially Responsible Investing*, at <http://www.socialfunds.com/media/index.cgi/stats.htm> (last visited Mar. 15, 2004) (estimating the amount of socially responsible investments in the United States at \$2.16 trillion in 1999) [hereinafter Social Funds Statistics].

125. See SIF Statistics, *supra* note 124; see also SRI World Group, Inc., *Introduction to Socially Responsible Investing*, at <http://www.socialfunds.com/page.cgi/article1.html> (last visited Mar. 14, 2004) (estimating that thirteen percent of funds under professional management in the United States are in socially responsible investments).

126. See SIF Statistics, *supra* note 124; see also Social Funds Statistics, *supra* note 124 (concluding that there were 175 screened mutual funds existing in the United States in

including indexing and screening.<sup>127</sup>

Another factor responsible for increasing attention to social disclosure is a growing awareness of the link between social responsibility, including respect for human rights, and profitability. In addition to enhancing corporate image, advocacy of human rights promotes much-needed integrity in national legal and fiscal systems.<sup>128</sup> In turn, this integrity creates a secure investment environment by discouraging arbitrary decisions, protecting intellectual property rights and ensuring economic stability, thereby fostering an atmosphere conducive to future growth.<sup>129</sup> Characterizing human rights in this manner serves to transform the topic from one posing a potential threat to one of corporate opportunity.

The evidence gathered to date supports this conclusion. For example, a 1999 self-study by 300 publicly traded companies that had adopted codes of ethics reported that their stock market performance was two to three times better than their counterparts without such policies.<sup>130</sup> Another study conducted by Harvard University concluded that “stakeholder balanced” companies generated four times the revenue growth and eight times the employment growth of companies maintaining a “shareholder-only” focus.<sup>131</sup> A study of financial performance of publicly traded pharmaceutical companies released by Innovest Strategic Value Advisors in July, 2002 found that the share value of companies committed to ethical values, including the maintenance of superior environmental standards, exceeded those of companies without such commitments by seventeen percent.<sup>132</sup>

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1999).

127. Indexing rates the social and environmental performance of industries and companies utilizing benchmarks and matrices. See Calvert Group, Calvert Social Index: About the Index, at [http://www.calvertgroup.com/sri\\_815.html](http://www.calvertgroup.com/sri_815.html) (last visited Mar. 13, 2004). Screening is a process in which portfolio management firms subject potential investment targets to analysis utilizing established social, environmental and human rights criteria. See Ethical Funds, Strategies of SRI, at [http://www.ethicalfunds.com/Do\\_the\\_right\\_thing/sri/what\\_is\\_sri/strategies\\_sri.asp](http://www.ethicalfunds.com/Do_the_right_thing/sri/what_is_sri/strategies_sri.asp) (last visited Apr. 9, 2004). “Negative screening” excludes certain companies from an investment portfolio where their performance is not consistent with social and environmental standards. SRI World Group, Inc., *Screening Your Portfolio: Introduction to Screening*, at <http://www.socialfunds.com/page.cgi/article2.html> (last visited Mar. 13, 2004). Conversely, “affirmative screening” includes companies that demonstrate strong performance across a range of social and environmental issues. See *id.*

128. See CHRISTOPHER L. AVERY, BUSINESS AND HUMAN RIGHTS: FIVE COMMON MISCONCEPTIONS (1997), available at <http://209.238.219.111/Misconceptions.htm> (last visited Mar. 16, 2004).

129. See *id.*

130. See Peter Sinton, *Crisis of Conscience: Corporations are Finding Social Responsibility Boosts the Planet and the Bottom Line*, S.F. CHRON., Nov. 22, 2001, at B1.

131. See *id.*

132. See Greenbiz.com, *Study Shows Eco-Efficiency Yields Healthy Returns on Pharmaceuticals’ Stock* (July 3, 2002), at [http://www.greenbiz.com/news/news\\_third.cfm?NewsID=21294&CFID=13003264&CFT](http://www.greenbiz.com/news/news_third.cfm?NewsID=21294&CFID=13003264&CFT)

These studies demonstrate that the “most durable guarantors of the stability, transparency, predictability and security that determine sustainable investment are respect for human rights, support for accountable governance, and adherence to the rule of law.”<sup>133</sup>

By contrast, damage to the reputation and current and future profitability of companies choosing to disregard human rights is inestimable. Human rights controversies can besmirch a company’s reputation overnight, and the resultant damage can linger in the public’s conscience for decades.<sup>134</sup> As noted by a scholar in 1997, rehabilitation of reputation and regaining public trust have been difficult for corporate miscreants such as Nestle, Union Carbide, and Exxon, who remain inextricably linked to their misdeeds despite the passage of time.<sup>135</sup> There is little, if anything, positive that may be salvaged by being listed as one of the “top corporate criminals of the decade,” the “ten planet trashers of the year” or being on any other notorious list.<sup>136</sup>

The evidence is replete with examples demonstrating that businesses are increasingly cognizant of their obligations with respect to human rights and the environment. Companies of all sizes and economic sectors, including transnational enterprises, have responded through the adoption of codes of conduct, statements of corporate principles, ethical guidelines, industry coalitions, social accountability standards, and similar initiatives.<sup>137</sup> These private initiatives have been implemented through compliance codes, corporate credos and management philosophy statements.<sup>138</sup> In addition, more than 2000 transnational

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133. Bennett Freeman, Corporate Responsibility and Human Rights, Presentation at the Global Dimensions Seminar (June 1, 2001), at <http://www.lse.ac.uk/collections/globalDimensions/seminars/humanRightsAndCorporateResponsibility/freemanTranscript.htm>.

134. See AVERY, *supra* note 128.

135. See *id.*

136. See William Baue, *Journalists List Corporations Found Guilty of Crimes Throughout the 1990s* (May 29, 2002), at <http://www.socialfunds.com/news/article.cgi/article850.html> (noting that ExxonMobil, Rockwell International, Royal Caribbean Cruises, Warner-Lambert, Teledyne and United Technologies appeared on the list more than once); see also Press Release, Friends of the Earth, Ten Planet Trashers: Why Corporate Accountability Matters (June 1, 2002) (on file with author) (naming ExxonMobil, AMEC (construction), Premier Oil, ICI (chemicals), Scotts (fertilizers), Barclays Group, Associated Octel (chemicals and fuel additives), Aventis Crop Science, Ltd. (herbicides and pesticides), British Nuclear Fuels and Associated British Ports as the ten companies most accountable for environmental degradation in the United Kingdom in 2001).

137. See Aaron Bernstein, *Do-It-Yourself Labor Standards*, BUS. WK., Nov. 19, 2001, at 74 (discussing private sector efforts to address labor and environmental issues arising from global business activities).

138. See Jill Murray, *Corporate Codes of Conduct and Labour Standards*, in MASTERING THE CHALLENGE OF GLOBALIZATION: TOWARDS A TRADE UNION AGENDA 60 (R.

enterprises currently report on their social and environmental practices on a voluntary basis.<sup>139</sup> These initiatives have been dubbed “human rights entrepreneurialism,” which is defined as “efforts by companies to compete with one another for consumers or investors through a commitment to human rights.”<sup>140</sup> Business associations and more informal gatherings of industry members also have issued guidelines and principles.<sup>141</sup> In addition, national governments,<sup>142</sup>

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Kyloh ed., 1998). The ILO defines “corporate codes of conduct” as “companies’ policy statements that define ethical standards for their conduct.” *Id.* These codes are implemented through compliance codes, which are defined as “directive statements giving guidance and prohibiting certain kinds of conduct.” *Id.* For examples of compliance codes, *see, e.g.*, LEVI STRAUSS & CO., GLOBAL SOURCING AND OPERATING GUIDELINES (2001); LIZ CLAIBORNE, INC., WORKPLACE CODE OF CONDUCT (2002); NIKE, INC., CODE OF CONDUCT (1997); VOLKSWAGEN, INC., DECLARATION ON SOCIAL RIGHTS AND INDUSTRIAL RELATIONSHIPS (2002). Corporate codes are also implemented through corporate credos, which are defined as “broad general statements of corporate commitments to constituencies, values and objectives.” *See Murray, supra* at 61. For examples of corporate credos, *see, e.g.*, FORD MOTOR CO., PROTECTING HUMAN RIGHTS IS A STRATEGIC BUSINESS ISSUE (2001); FREEPORT-MCMORAN COPPER & GOLD, INC., SOCIAL, EMPLOYMENT & HUMAN RIGHTS POLICY (2002); NOKIA, INC., CODE OF CONDUCT: HUMAN RIGHTS (2003); RIO TINTO GROUP, THE WAY WE WORK: OUR STATEMENT OF BUSINESS PRACTICE: HUMAN RIGHTS (2002); ROYAL DUTCH SHELL CO., OUR APPROACH TO HUMAN RIGHTS (2002). Finally, philosophy statements are formal enunciations of management’s approach to business. *See Murray, supra* at 62.

139. *See Sinton, supra* note 130, at B1.

140. Ralph G. Steinhardt, Litigating Corporate Responsibility, Presentation at the Global Dimensions Seminar (June 1, 2001), at <http://www.lse.ac.uk/collections/globalDimensions/seminars/humanRightsAndCorporateResponsibility/steinhardtTranscript.htm>. However, Steinhardt has further noted that the motivation for adopting such initiatives is not a growing commitment to human rights, the environment or triple bottom line but rather is the establishment of defenses against future liability lawsuits and avoiding governmental regulation through self-policing efforts. *See id.*

141. Examples of such guidelines and principles include the GoodCompany Guidelines for Corporate Social Performance and the Caux Round Table Principles for Business. The GoodCompany Guidelines for Corporate Social Performance were adopted by Canadian Business for Social Responsibility in 2002. *See generally*, CAN. BUS. FOR SOC. RESP., GOODCOMPANY GUIDELINES FOR CORPORATE SOCIAL PERFORMANCE (2002), available at <http://www.cbsr.bc.ca/resources/goodcompanypages.pdf>. Canadian Business for Social Responsibility is a national business association seeking to integrate triple bottom line philosophy into its members’ business practices. *See id.* Founded in 1986, the Caux Round Table is a self-described “global network of senior business leaders committed to principled business leadership, who believe that business has a crucial role in developing and promoting equitable solutions to key global issues.” Caux Round Table, Who are We?, at <http://www.cauxroundtable.org/Whoarewe.HTM> (last visited Aug. 5, 2002) (copy of webpage on file with author). The Round Table’s Principles for Business are based upon human dignity, *kyosei* (the belief of living and working together for the common good), shared prosperity, justice and civic responsibility. *See id.*

international organizations<sup>143</sup> and non-governmental organizations<sup>144</sup> have become involved in these efforts. The number of such initiatives continues to increase<sup>145</sup>

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142. See, e.g., U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, FACT SHEET: VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, available at <http://www.state.gov/g/drl/rls/2931pf.htm> (Feb. 20, 2001) (establishing a voluntary code of conduct for U.S. and British companies engaged in the energy and extractive industries). The Voluntary Principles were the result of consultations between U.S. and British-based oil, gas and mining companies (including British Petroleum, Chevron, Conoco, Freeport McMoRan, Rio Tinto and Texaco), non-governmental organizations (including Amnesty International, Human Rights Watch and the Lawyers Committee for Human Rights), corporate responsibility groups (including Business for Social Responsibility, the Council on Economic Priorities and the Prince of Wales Business Leaders' Forum), labor (including the International Federation of Chemical, Energy, Mine and the General Workers' Union) and the U.S. and British governments. See Freeman, *supra* note 133.

143. See, e.g., Norms, *supra* note 24, ¶¶ 1-22; Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Nov. 16, 1977, 17 I.L.M. 422 (an ILO agreement establishing voluntary standards with respect to employment promotion, equality of opportunity, treatment, security, training, wages, benefits, conditions of work and industrial relations); Declaration on International Investment and Multinational Enterprises, Guidelines for Multinational Enterprises, June 21, 1976, 15 I.L.M. 967 (an OECD agreement establishing voluntary standards for employment, industrial relations and environmental and consumer protection).

144. See, e.g., Global Sullivan Principles Org., Global Sullivan Principles of Social Responsibility, available at <http://globalsullivanprinciplesorg/principles.htm> (last visited Mar. 3, 2004). Initially created by the Reverend Leon H. Sullivan, a member of the board of directors of General Motors Corporation, to promote racial equality and improve the quality of life of non-white populations in South Africa, the Sullivan Principles are based on non-segregation, equal treatment and fair employment practices, equal pay for equal work, the initiation and development of training programs, the promotion of non-whites to managerial positions and improvement of the quality of employees' lives outside the work environment. See Murray, *supra* note 138, at 80-81. At its height, the Principles were endorsed by 178 companies employing 62,400 workers. See *id.* at 82; see also Social Accountability Int'l, Overview of S.A. 8000, at <http://sa-intl.org/SA8000/SA8000.htm> (last visited Feb. 28, 2004). S.A. 8000 has been described as an "international 'social accountability' standard that is designed to be used by independent third parties to audit a company's operations, nationally and internationally, and to certify that a company and its vendors and suppliers comply with international human rights treaties and international labor agreements concerning workplace practices." Williams, *Corporate Social Transparency*, *supra* note 11, at 1202 n.11; see also Coalition for Environmentally Responsible Economies Principles, Our Work: Corporate Environmental Reporting, at [http://www.ceres.org/our\\_work/environmental\\_reporting.htm](http://www.ceres.org/our_work/environmental_reporting.htm) (last visited Mar. 3, 2004). The CERES Principles have been described as "a set of principles for environmental performance and management, and a format for comprehensive disclosure of environmental information." Williams, *Corporate Social Transparency*, *supra* note 11, at 1202 n.12.

145. See, e.g., GLOBAL REPORTING INITIATIVE, 2002 SUSTAINABILITY REPORTING GUIDELINES (2002), available at [http://www.globalreporting.org/guidelines/2002/gri\\_2002\\_guidelines.pdf](http://www.globalreporting.org/guidelines/2002/gri_2002_guidelines.pdf). Inaugurated in April 2002 through the joint effort of the Coalition for Environmentally Responsible

as do the number of companies involved in compliance and monitoring efforts.<sup>146</sup>

A detailed discussion of the effectiveness of these efforts is beyond the scope of this article.<sup>147</sup> However, these efforts have been criticized on numerous grounds. Codes of conduct and related efforts to institutionalize human rights and environmental protection have been subject to criticism for failing to precisely delineate the limits of corporate responsibility through utilization of vague language and undefined terms.<sup>148</sup> These efforts have also been criticized for failing to include important protections, such as the right to organize, or focusing exclusively on one issue, such as child labor, to the exclusion of other concerns.<sup>149</sup>

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Economies and the United Nations' Environmental Program, the Global Reporting Initiative is an independent international organization striving to achieve transparency in corporate performance. See Mark Thomsen, *Corporate Sustainability Reporting is Here to Stay*, Apr. 5, 2002, at <http://www.socialfunds.com/news/article.cgi/article814.html>. The goal of the Initiative is to elevate reporting by publicly traded companies on social and environmental issues to the same level as financial reporting. See Irwin Arieff, *Firms Pushed to Disclose Their Impact on Society*, REUTERS, Apr. 8, 2002, at <http://www.planetark.org/dailynewsstory.cfm/newsid/15365/story.htm>. The Initiative consists of numerous working groups responsible for the preparation and implementation of measurement instruments and verification processes to be included within its Sustainability Reporting Guidelines. See GLOBAL REPORTING INITIATIVE, 2002 SUSTAINABILITY REPORTING GUIDELINES, *supra*.

146. Forty-five percent of the *Fortune* global top 250 companies issue annual environmental, social or sustainability reports in addition to their financial reports. Press Release, KPMG Consulting, Inc., KPMG Launches International Survey of Corporate Sustainability Reporting 2002 (May 29, 2002) (on file with author). Many companies issuing such reports elected to have their compliance with applicable human rights standards verified by independent consultants. Press Release, BASF Group, BASF Publishes its Social Responsibility 2001 Report: Report Independently Verified for the First Time (June 25, 2002) (on file with author) (noting that BASF's activities with respect to its employees, the community, human rights and marketing practices were verified by the accountancy and consulting firm of Deloitte & Touche); Press Release, Nike, Inc., Nike Releases First Corporate Responsibility Report (Oct. 15, 2001) (on file with author) (noting that Nike's compliance with applicable labor standards had been verified by "external independent monitoring").

147. For a comprehensive discussion of the effectiveness of corporate codes of conduct and other efforts to institutionalize human rights, see Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 WIS. INT'L L.J. 89 (2001).

148. See CLEAN CLOTHES CAMPAIGN, CODES OF CONDUCT FOR TRANSNATIONAL CORPORATIONS: AN OVERVIEW (1998) (criticizing corporate codes of conduct for their failure to address such issues as applicability to contractors, subcontractors, suppliers and product lines), at <http://www.cleanclothes.org/codes/overview.htm> (last visited Mar. 16, 2004); see also BOB JEFFCOTT & LYNDY YANZ, VOLUNTARY CODES OF CONDUCT: DO THEY STRENGTHEN OR UNDERMINE GOVERNMENT REGULATION AND WORKER ORGANIZING? (Workers in the Global Econ., Project Paper, 1999), at [www.laborrights.org/projects/globalecon/jeffcott.html](http://www.laborrights.org/projects/globalecon/jeffcott.html).

149. See CLEAN CLOTHES CAMPAIGN, *supra* note 148; see also JEFFCOTT & YANZ,

Another important shortcoming is the lack of implementation and independent monitoring of compliance.<sup>150</sup> As a result, companies may succumb to the temptation to portray their actions in a more positive light than warranted by on-the-ground realities.<sup>151</sup> Furthermore, some businesses, by the very nature of the products they produce, cannot act in conformity with human rights and environmental standards.<sup>152</sup> Finally, the multitude of codes, programs, initiatives and related efforts, each with its own scope and characteristics, has resulted in a cacophony of principles, which often defy standardization and comparative measurement.<sup>153</sup>

As a result, there is growing recognition of the insufficiency of voluntary initiatives alone in protecting human rights and the environment.<sup>154</sup> This recognition has resulted in renewed efforts to encourage social responsibility through mandatory initiatives, including social disclosure.<sup>155</sup> However, the propriety of a mandatory approach to social disclosure remains subject to debate. Mandatory social disclosure may be ineffective in promoting corporate social responsibility in a broader corporate context. It bears to note that, “[u]nless companies really own [corporate social responsibility], it is only window-dressing.”<sup>156</sup> The quality of such reports, including their breadth and veracity, reflects the culture of the reporting company. Companies lacking a culture of social responsibility accepted and enforced by management will produce inadequate reports at best and misleading or fraudulent reports at worst. These deficiencies will occur regardless of the credentials presented to the public

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*supra* note 148.

150. See CLEAN CLOTHES CAMPAIGN, *supra* note 148; see also JEFFCOTT & YANZ, *supra* note 148.

151. See, e.g., Danny Hakim, *Ford Issues Subdued Citizenship Report: Corporate Governance, Turnaround Supplant Environmental Issues*, S.F. CHRON., Aug. 20, 2002, at B5 (noting that Ford Motor Company’s third annual corporate citizenship report failed to adequately address the impact of sport utility vehicles on air pollution and methods to reduce greenhouse gas emissions and raise gasoline mileage); Press Release, Food First/Institute for Food and Development Policy, *McDonald’s and Corporate Social Responsibility?* (Apr. 25, 2002) (on file with author) (dismissing McDonald’s 2002 Report on Corporate Social Responsibility as a “Ronald McDonald fantasy” for its failure to address the impact of its operations on the environment and public health).

152. See, e.g., Alison Maitland, *Tobacco Company Launches Social Report*, FIN. TIMES (London), July 4, 2002, at 3 (noting the publication of British-American Tobacco Company’s first social responsibility report despite the negative health impact of its products).

153. See *Voluntarism v. Regulation - The Great Debate*, BUS. GROUP NEWSL. (Amnesty Int’l, U.K., London, U.K.), Spring/Summer 2001, at 6.

154. See Alison Maitland, *Moving Beyond the Voluntary Code*, FIN. TIMES (London), Feb. 18, 2002, at 22.

155. See *Voluntarism v. Regulation - The Great Debate*, *supra* note 153, at 6-7.

156. Will Hutton, *Capitalism Must Put its House in Order*, THE OBSERVER (UK), Nov. 24, 2002, at 30.

through codes of conduct, statements of principles, ethical guidelines, and similar initiatives. It is only by demonstrating to companies that corporate social responsibility is a preferable method of conducting business that such companies will adopt, implement, and enforce it in a willing fashion.<sup>157</sup> The most immediate and effective demonstration is the impact of the failure to conduct operations in a socially responsible manner on profitability and image.<sup>158</sup> Costs associated with human rights and environmental litigation, disinvestment by existing shareholders, and discouragement of potential shareholders also demonstrate the necessity of socially responsible practices.<sup>159</sup>

The incorporation of social disclosure into the regulatory framework also risks breaching the separation between ethical principles and legal requirements to the potential detriment of the future development of corporate social responsibility. It has been contended that corporate social responsibility can never be mandated through legal obligations as it only encompasses activities beyond regulation.<sup>160</sup> Furthermore, such incorporation threatens one of the core principles of corporate social responsibility, specifically, that a company's sensitivity to its social responsibilities may be determined by the extent to which its behavior exceeds its legal obligations.<sup>161</sup> An example of this separation is set forth in the European Commission's Green Paper on corporate social responsibility.<sup>162</sup> In its Green Paper, the European Commission defined corporate social responsibility as commitments voluntarily undertaken by companies "which go beyond common regulatory and conventional requirements."<sup>163</sup> This definition was echoed by the European employers' federation UNICE, which noted that European Union reporting initiatives would "run the risk of turning voluntary initiatives into a pro forma exercise, kill creativity and impose significant cost without bringing any of the desired results."<sup>164</sup> The changes in corporate culture sought to be fostered by social disclosure regulations, such as the Decree, will not occur to the extent their reporting requirements are viewed from a legal context as yet another regulatory hurdle to overcome.<sup>165</sup>

The effect of regulatory regimes, including social disclosure, upon the future development of corporate social responsibility is of particular concern. Any attempt to impose social responsibility through regulatory requirements must first define the purpose which it seeks to accomplish and the means selected for its achievement. The NRE and Decree are no different in this regard. Specifically,

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157. *See id.*

158. *See supra* notes 128-36 and accompanying text.

159. *See supra* notes 106-27 and accompanying text.

160. *See* Davidsson, *supra* note 93, at 542.

161. *See id.*

162. *See generally* EU Green Paper, *supra* note 17.

163. *Id.* at 4.

164. Alison Maitland & Michael Mann, *Challenge to a Voluntary Preserve*, FIN. TIMES (London), May 30, 2002, at 14 (quoting an unnamed spokesperson for UNICE).

165. *See* Davidsson, *supra* note 93, at 543.

the NRE and Decree attempt to foster transparency and establish a baseline for future information sharing with stakeholders by mandating reporting on human resources, labor standards, community interests, and environmental management.<sup>166</sup> Specificity in defining these purposes and the means by which they are to be accomplished is essential in order to crystallize the required or prohibited behavior, satisfy due process and ensure widespread compliance.

However, corporate social responsibility initiatives, including social disclosure, start with a concept that lacks a single and universally accepted definition. Corporate social responsibility means different things to different companies and within specific industrial sectors. Although the vast majority of companies would undoubtedly accept responsibility for the financial well-being of their shareholders and the health, safety and welfare of their employees, other classifications of stakeholders, such as the community at large, and other duties, such as those accruing pursuant to human rights and environmental protection treaties, are subject to controversy.<sup>167</sup> For example, the Code of Labour Practices for the Apparel Industry Including Sportswear drafted by the Clean Clothes Campaign emphasizes prohibitions upon forced and child labor and employment discrimination, and the recognition of the rights of labor to freedom of association, collective bargaining, a living wage, reasonable working hours and safe working conditions.<sup>168</sup> By contrast, the Voluntary Principles on Security and Human Rights establishing a voluntary code of conduct for U.S. and British companies engaged in the energy and extractive industries ignores these topics and focuses primarily on risk assessment and the utilization of public and private security forces.<sup>169</sup>

These different focuses reflect those areas deemed most relevant (or perhaps problematic) to businesses in their respective economic sectors.<sup>170</sup> Despite their differing emphases, each of these standards qualifies as a socially responsible initiative.<sup>171</sup> Attempts to legally define social responsibility may exclude some of these efforts, quash creativity in designing and implementing future guidelines and addressing currently unforeseeable issues and reduce incentives to undertake obligations beyond the regulatory regime.<sup>172</sup> In the case of social disclosure, this could result in the rote recitation of required categories of information with little effort to expand the scope or analysis contained in such

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166. See Decree No. 2002-221 of Feb. 20, 2002, arts. 148-2, 148-3; see also European Business Campaign on Corporate Social Responsibility, *supra* note 39.

167. See Davidsson, *supra* note 93, at 543.

168. See CLEAN CLOTHES CAMPAIGN, CODE OF LABOUR PRACTICES FOR THE APPAREL INDUSTRY INCLUDING SPORTSWEAR art. II (Feb. 1998), available at <http://www.cleanclothes.org/codes/ccccode.htm>.

169. See U.S. DEP'T OF STATE, *supra* note 142.

170. See Davidsson, *supra* note 93, at 543.

171. See *id.*

172. See Deborah Doane, *The Case for Mandatory Reporting*, BUS. GROUP NEWSL. (Amnesty Int'l, London, U.K.), Autumn/Winter 2002, at 3.

reports.

However, the benefits accruing as a result of social disclosure requirements, such as those set forth in the NRE and Decree, far outweigh the associated risks. Although the mere existence of social disclosure requirements will not prevent all corporate wrongdoing, it is effective to the extent that it discourages specific misdeeds, the discovery of which may be subject to public revelation in a forthcoming annual report. Such disclosure may also encourage the development of a corporate culture in which social responsibility and environmental stewardship are more readily accepted. The preparation of information for reporting and resultant public disclosure, when combined with the impact of the failure to conduct business operations in a socially responsible manner, may further the development of a socially responsive culture within individual companies. Corporate ownership of social responsibility is further enhanced by the process by which the board of directors or other governing authority review and adopt the reports submitted for their approval. Mandatory reporting also eliminates “free-rider syndrome” by requiring all companies to invest in the process rather than forcing socially responsive industry leaders to bear the costs and other burdens associated with disclosure.<sup>173</sup>

It is important not to place too much responsibility for the prevention of future human rights violations and environmental degradation on social disclosure requirements. From this point of reference, disclosure is not an end in itself but a means of judging corporate performance, providing baseline sustainability standards for future reporting initiatives, and institutionalizing triple bottom line.<sup>174</sup> Social disclosure must be viewed as complementary to other efforts to institutionalize social responsibility and place it upon the agenda of publicly listed companies.<sup>175</sup> The transparency resulting from the aggregation and public dissemination of information in response to disclosure requirements can only serve to imbue social responsibility in the affected corporate cultures.<sup>176</sup>

Opponents of the incorporation of social responsibility into the regulatory framework also fail to recognize that separation between ethical principles and legal requirements is not absolute. The recognition of an absolute separation between legal and ethical obligations implies that laws have no socially responsible characteristics and “no social or even moral value by themselves.”<sup>177</sup> This implication is untenable as numerous laws reflect considerations of morality and social responsibility. For example, U.S. laws establishing standards for such diverse topics as advertising and marketing practices,<sup>178</sup> food purity,<sup>179</sup> and equal

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173. See FRIENDS OF THE EARTH, CORPORATE ACCOUNTABILITY 5 (2002) (copy on file with Arizona Journal of Int'l and Comparative Law).

174. See Nahal, *supra* note 15.

175. See *id.*

176. *Id.*

177. Davidsson, *supra* note 93, at 545.

178. See, e.g., 15 U.S.C. § 45(a)(1) (2000) (prohibition upon unfair and deceptive trade practices); 15 U.S.C. § 52 (2000) (prohibition upon false advertising); 16 C.F.R. § 233.1-.5

employment opportunity<sup>180</sup> clearly are based on moral and social considerations.

Furthermore, activities do not abdicate their socially beneficial nature by subsequent metamorphoses into statutes or regulations. Application of this reasoning would lead to the amorphous result that corporate behavior would be deemed socially responsible depending on the jurisdiction in which it occurred.<sup>181</sup> Specifically, corporate conduct exceeding legal requirements of a state with respect to a particular area of regulation would be deemed socially responsible behavior. By contrast, this same conduct would not be deemed socially responsible in states where it merely conforms to more stringent regulatory standards. The true distinction between socially responsible and legally compliant behavior is thus “only a question of remedies and enforcement.”<sup>182</sup> When viewed in this light, corporate social responsibility and the legal requirements of the regulatory framework are merely different sides of the same coin.

#### IV. THE U.N. NORMS ON THE RESPONSIBILITIES OF

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(2002) (prohibition upon deceptive pricing); 16 C.F.R. § 238.0-4 (2002) (prohibition upon bait and switch advertising); 16 C.F.R. § 239.1-.5 (2002) (limitations on advertising of warranties and guarantees); 16 C.F.R. § 251.1 (2002) (limitations on use of the word “free” in advertising); 16 C.F.R. § 255.0-.5 (2002) (limitations on use of endorsements and testimonials); 16 C.F.R. § 260.1-.8 (2002) (limitations on environmental marketing claims). Particularly instructive in this regard are restrictions placed upon the advertising of tobacco products in the United States. *See, e.g.*, Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended in scattered sections of 15 U.S.C.) (requiring the placement of health warnings on cigarette packages); Public Health Cigarette Smoking Act, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended in scattered sections of 15 U.S.C.) (prohibiting cigarette advertising on television and radio); Little Cigar Act of 1973, Pub. L. No. 93-109, 87 Stat. 352 (codified as amended in scattered sections of 15 U.S.C.) (prohibiting cigar advertising on television and radio).

179. *See, e.g.*, 21 U.S.C. § 341 (2000) (establishing standards for food purity); 21 U.S.C. § 342(a)-(g) (2000) (banning sale of adulterated food); 21 U.S.C. § 343(a)-(s) (2000) (banning sale of misbranded food); 21 C.F.R. § 130.3-.17 (2002) (establishing safety standards for food); 21 C.F.R. § 189.1, .110-.301 (2002) (prohibiting the use of certain substances in food).

180. *See, e.g.*, 29 U.S.C. § 206(d)(1) (2000) (requiring equality in remuneration for equal work); 42 U.S.C. § 2000e-2(a)-(d) (2000) (prohibiting employment discrimination based on race, color, religion, gender and national origin); 42 U.S.C. § 2000e(k) (2000) (prohibiting employment discrimination on the basis of past, present or future pregnancy).

181. *See* Davidsson, *supra* note 93, at 544.

182. *Id.*

## TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS

### A. A Brief History of the Human Rights Norms

The Human Rights Norms represent the culmination of a thirty-one year effort by the United Nations. In 1972, the U.N. Economic and Social Council (ECOSOC) requested that the Secretary-General appoint a commission to study the impact of transnational enterprises on the world economy.<sup>183</sup> The resulting U.N. Commission on Transnational Corporations began formulating a code of conduct in 1977.<sup>184</sup> The final draft of what became known as the Code of Conduct for Transnational Corporations was completed in 1990 but was never adopted by the United Nations.<sup>185</sup>

Despite its previous failure, ECOSOC determined that a renewed effort was necessary for numerous reasons. ECOSOC cited “the emergence of the increasingly integrated global economy, the prominence of international trade and investment, the growth of information and communications technology . . . increasing privatization [and] concerns about the impact of globalization and trade on human rights” as grounds for the renewal of its efforts.<sup>186</sup> ECOSOC also noted increased stakeholder concerns about human rights manifested through increased consumer awareness, shareholder demands upon corporations for greater openness and public accountability, the proliferation of non-governmental organizations and increased reliance upon voluntary codes of conduct.<sup>187</sup> This renewed effort also recognized the enormous power of transnational enterprises to shape economic and social outcomes to a previously unknown extent.<sup>188</sup> This power is evident in the list of the one hundred largest economic entities compiled by the U.N. Conference on Trade and Development, which included seventy-one countries and twenty-nine corporations.<sup>189</sup> Finally, the renewal of ECOSOC’s efforts was an

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183. See *Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises: Introduction*, UN ESCOR Comm’n on Human Rights, 54th Sess., Agenda Item 4, at 4 n.6, U.N. Doc. E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1 (2002) [hereinafter *Introduction*].

184. See *id.*

185. For discussion of the history of the U.N. Commission on Transnational Corporations and its drafting efforts, see John C. Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 474-75 (2000); see also Paul Lansing & Alex Rosaria, *An Analysis of the United Nations Proposed Code of Conduct for Transnational Corporations*, 14 WORLD COMPETITION 35, 37 (1991).

186. *Introduction*, *supra* note 183, ¶4.

187. See *id.*

188. See Murray, *supra* note 138, at 66.

189. See *ExxonMobil Outranks 27 Nations on U.N. List of Economic Might*, S.F. CHRON., Aug. 13, 2002, at B2. According to the ILO, there are approximately 37,000 multinational enterprises that control one-third of the world’s private sector productive assets and generate global sales in excess of \$4.8 trillion annually. See Murray, *supra* note

acknowledgement that certain human rights instruments impose duties upon private individuals with respect to the recognition and protection of human rights.<sup>190</sup>

Efforts were renewed in the late 1990s with the creation of the Working Group on the Working Methods and Activities of Transnational Corporations of the Sub-Commission on the Promotion and Protection of Human Rights (Working Group).<sup>191</sup> The Working Group decided to revive efforts to draft a code of conduct for transnational enterprises in August, 1999.<sup>192</sup> The most recent version of what has subsequently become known as the Human Rights Norms was adopted by the U.N. Sub-Commission on the Promotion and Protection of Human Rights in August 2003.<sup>193</sup>

The Human Rights Norms recognize the interconnection between human rights and the global economy and the increased importance of transnational enterprises in the promotion of such rights.<sup>194</sup> The Working Group noted that transnational enterprises possess “the capacity to foster economic well-being, development, technological improvement, and wealth as well as the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations.”<sup>195</sup> Given this capacity, the Working Group considered it imperative to recognize corporate responsibility for the promotion of human rights.<sup>196</sup> Although primary responsibility for the protection

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138, at 65.

190. *See, e.g.*, Organization of African Unity: Banjul Charter on Human and Peoples' Rights, June 27, 1981, arts. 27, 28, 21 I.L.M. 58, 63 (1982) (providing that “every individual” has duties to society and his fellow human beings without discrimination and the obligation “to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance”); *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/ii.82 doc. 6, rev. 1, at 17, arts. XXIX, XXXV (1992) (providing that it is the duty of all individuals to conduct themselves in relation to others in order that “each and every [person] may fully form and develop his personality” and to “cooperate with the state and the community with respect to social security and welfare”).

191. *See Introduction, supra* note 183, ¶ 1.

192. *See id.*

193. *See Norms, supra* note 24.

194. Transnational corporations are defined in the Human Rights Norms as “an economic entity operating in more than one country or cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.” *Norms, supra* note 24, ¶ 20. The term “other business enterprise” is defined as “any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership entity.” *Id.* ¶ 21.

195. *Id.* pmbl.

196. *See id.*; *see also Introduction, supra* note 183, ¶ 7.

of human rights continues to reside with national governments, the Working Group concluded that states have the obligation to “promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law.”<sup>197</sup> This obligation extends to all “contractors, subcontractors, suppliers, licensees and distributors” with whom transnational enterprises conduct business.<sup>198</sup>

The ultimate fate of the Human Rights Norms is uncertain. Despite their adoption by the U.N. Sub-Commission on the Promotion and Protection of Human Rights, they remain pending before ECOSOC. The Norms have been endorsed by some human rights groups, including Amnesty International and Human Rights Watch.<sup>199</sup> However, other human rights groups have condemned the Norms as “represent[ing] a significant step backwards from the current state of international human rights law.”<sup>200</sup> Some industry organizations also have condemned the Norms as injurious to the current growth of voluntary corporate social initiatives, thereby echoing one of the arguments against the NRE.<sup>201</sup> Regardless of its ultimate adoption, the Human Rights Norms nevertheless represent a summary set of aspirations that represent good practices in the international marketplace. Despite their intended applicability to transnational enterprises, the Norms also represent the most comprehensive summation to date of the ethical obligations of businesses to their stakeholders. The Norms thus provide a source of comparison for domestic as well as transnational enterprises.

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197. *Norms*, *supra* note 24, ¶ 1. The terms “human rights” and “international human rights” are defined as “civil, cultural, economic, political, and social rights . . . as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the [U.N.] system.” *Id.* ¶ 23.

198. *Id.* ¶ 21. The terms “contractor,” “subcontractor,” “supplier,” and “licensee” are defined to include “any business enterprise . . . [that] has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security . . .” *Id.*

199. See *New Draft of UN Guidelines for Business and Human Rights*, BUS. GROUP NEWSL. (Amnesty Int’l, London, U.K.), Autumn/Winter 2002, at 12; see also Statement from Human Rights Watch to the U.N. Sub-Commission on the Promotion and Protection of Human Rights’ Working Group on the Working Methods and Activities of Transnational Corporations 1-2 (Aug. 2002) (on file with author).

200. Gustavo Capdevila, *U.N. Sub-Commission Debates Human Rights Responsibilities of Transnational Corporations*, INTER PRESS SERV., Aug. 7, 2002, at [http://www.cyberdyaryo.com/features/f2002\\_0807\\_05.htm](http://www.cyberdyaryo.com/features/f2002_0807_05.htm) (quoting a joint statement issued by the European-Third World Center headquartered in Geneva, Switzerland and the American Association of Jurists based in New York and Buenos Aires, Argentina).

201. See *id.* (noting condemnation of the Human Rights Norms by the International Chamber of Commerce based in Paris, France and the International Organization of Employers headquartered in Geneva, Switzerland).

## **B. The Substantive Provisions of the Human Rights Principles**

### **1. The Right to Equal Opportunity and Non-Discriminatory Treatment**

The Human Rights Norms impose six primary duties on transnational enterprises. The first duty is to ensure equality of opportunity and treatment in the workplace. This includes the elimination of discrimination based on “race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age – except for children who may be given greater protection – or other status of the individual unrelated to the inherent requirements to perform the job.”<sup>202</sup> Special measures designed to overcome past discrimination against certain groups do not constitute discrimination.<sup>203</sup>

### **2. The Right to Security of Persons**

The second duty imposed on transnational enterprises is the obligation to respect the security of persons.<sup>204</sup> Transnational enterprises are prohibited from engaging in and benefiting from “war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law, and other international crimes against the human person as defined by international law.”<sup>205</sup>

The duty to respect the security of persons also extends to security arrangements. Security arrangements must operate in conformance with human rights norms and the laws and professional standards of the states in which they are utilized.<sup>206</sup>

### **3. Workers’ Rights**

The third duty imposed on transnational enterprises is the obligation to respect workers’ rights. This duty encompasses five separate principles. Initially, transnational enterprises are prohibited from utilizing forced or compulsory labour.<sup>207</sup>

The second principle is the obligation to protect children from economic exploitation.<sup>208</sup> The third principle is the requirement to provide a safe and healthy work environment.<sup>209</sup> The fourth principle is the obligation to ensure an

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202. *Norms*, *supra* note 24, ¶ 2.

203. *Id.*

204. *See id.* ¶¶ 3-4.

205. *Id.* ¶ 3.

206. *See id.* ¶ 4.

207. *See id.* ¶ 5.

208. *See Norms*, *supra* note 24, ¶ 6.

209. *See id.* ¶ 7.

adequate standard of living for workers and their families. Workers are entitled to remuneration that “ensures an adequate standard of living for them and their families.”<sup>210</sup> Such remuneration is required to take into account the “needs [of workers and their families] for adequate living conditions with a view towards progressive improvement.”<sup>211</sup>

The final principle is the recognition of freedom of association and the right to collective bargaining. Workers are free to establish and join organizations of their own choosing “without distinction, previous authorization, or interference, for the protection of their employment interests.”<sup>212</sup>

#### 4. Respect for National Sovereignty and Local Communities

The fourth duty imposed on transnational enterprises is the obligation to respect the sovereignty of states and local communities. Transnational enterprises are required to recognize and respect applicable norms of international law as well as national laws, administrative rules and regulations, social, economic and cultural policies, and the authority of the governments of the states in which they operate.<sup>213</sup> Transnational enterprises are also required to respect the rights of all peoples to economic, social, cultural, and political development.<sup>214</sup>

The duty to respect national sovereignty extends to the use of bribery or other improper advantage. Transnational enterprises are explicitly prohibited from offering, promising, giving, accepting, condoning, knowingly benefiting from or demanding bribes or other improper advantages.<sup>215</sup> This prohibition imposes a reciprocal obligation on host governments, public officials, candidates for elective office, members of the armed forces or security services, and other similarly situated individuals and organizations to refrain from soliciting or demanding bribes or other improper advantages from transnational enterprises.<sup>216</sup> Transnational enterprises are also required to ensure that the goods and services they provide will not be used in furtherance of human rights violations.<sup>217</sup>

Finally, transnational enterprises are required to respect “economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion, and freedom of opinion and expression . . . .”<sup>218</sup> Transnational enterprises are

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210. *Id.* ¶ 8.

211. *Id.*

212. *See id.* ¶ 9.

213. *See id.* ¶ 10.

214. *See id.* ¶ 10.

215. *See Norms, supra* note 24, ¶ 11.

216. *See id.*

217. *See id.*

218. *Id.* ¶ 12.

specifically instructed to “refrain from actions which obstruct or impede the realization of [these] rights.”<sup>219</sup>

### 5. Consumer Protection

The fifth duty imposed on transnational enterprises relates to consumer protection. Transnational enterprises are required to act in accordance with “fair business, marketing and advertising practices and shall take all necessary steps to ensure the safety and quality of the goods and services they provide.”<sup>220</sup> In implementing this requirement, transnational enterprises are instructed to observe the precautionary principle.<sup>221</sup> Such enterprises must also refrain from producing, distributing, marketing, or advertising harmful or potentially harmful products for use by consumers.<sup>222</sup>

### 6. Environmental Protection

The final duty of transnational enterprises is environmental preservation. Transnational enterprises must undertake their operations in accordance with “national laws, regulations, administrative practices, and policies relating to the preservation of the environment in the countries in which they operate.”<sup>223</sup> Transnational enterprises are also required to operate in accordance with “relevant international agreements, principles, objectives, responsibilities, and standards with regard to the environment as well as human rights, public health and safety, bioethics, and the precautionary principle.”<sup>224</sup> All transnational activities shall be conducted in a manner that contributes to the goal of sustainable development.<sup>225</sup>

### 7. Additional Provisions

There are two additional provisions of the Human Rights Norms that merit attention. The initial provision relates to implementation. Transnational enterprises are instructed to adopt, disseminate, and implement internal rules of operation consistent with the Norms.<sup>226</sup> These efforts are to include incorporation of the Norms in all contracts with contractors, subcontractors, suppliers, and licensees.<sup>227</sup> Transnational enterprises must also undertake action to promptly

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219. *Id.*

220. *Id.* ¶ 13.

221. *See Norms, supra* note 24, ¶ 13.

222. *See id.*

223. *Id.* ¶ 14.

224. *Id.*

225. *See id.*

226. *See id.* ¶ 15.

227. *See Norms, supra* note 24, ¶ 15.

implement the Norms and periodically report on such efforts.<sup>228</sup> The implementation provisions of the Human Rights Norms also subject transnational enterprises to “periodic monitoring and verification” by the United Nations and other national, international, governmental, and nongovernmental mechanisms.<sup>229</sup>

Implementation is also the responsibility of national governments. National governments are instructed to “establish and reinforce the necessary legal and administrative framework for ensuring that the Norms . . . are implemented by transnational corporations and other business enterprises.”<sup>230</sup>

The final provision relates to remedies and the interaction of the Norms with previously existing international and national standards. Transnational enterprises are required to provide “prompt, effective and adequate reparation to those persons, entities and communities who have been adversely affected by failures to comply with [the] Norms . . . .”<sup>231</sup> This reparation is to consist of restoration, replacement, or compensation for damage inflicted or property confiscated.<sup>232</sup> The Norms are not to be construed as “diminishing, restricting or adversely affecting the human rights obligations of States under national and international law . . . [or as established by] more protective human rights norms.”<sup>233</sup>

## V. A CRITIQUE OF SOCIAL DISCLOSURE IN FRANCE UTILIZING THE HUMAN RIGHTS NORMS

The social disclosure requirement that emerged from the consultative process between the French government and industry representatives is not flawless.<sup>234</sup> Government commentators cautioned that the Decree’s full effect would not be immediately ascertainable.<sup>235</sup> Even with the passage of time, however, these commentators noted that the disclosure requirements were incomplete and highly dependent on corporate interpretation and stakeholder utilization of the proffered information.<sup>236</sup> This section of the Article examines the primary shortcomings of France’s social disclosure regime utilizing the Human Rights Norms.

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228. *See id.*

229. *Id.* ¶ 16.

230. *Id.* ¶ 17.

231. *Id.* ¶ 18.

232. *See id.*

233. *Norms, supra* note 24, ¶ 19.

234. *See* Jacob, *supra* note 43 (noting that the disclosure requirements that emerged from the consultative process were not “fully satisfying”).

235. *See id.*

236. *See id.*

### **A. The Adequacy of the Disclosure Requirements**

The first comparison that merits discussion is the Decree's adequacy in identifying businesses subject to social disclosure. The Decree fails to expand the companies subject to disclosure beyond those that are publicly listed in France. The Decree does not require reporting companies to disclose the activities of their subsidiaries, other than references within the regional development<sup>237</sup> and environmental impact provisions.<sup>238</sup> The sole reference to foreign subsidiaries with respect to regional development and environmental impact arguably creates an exemption for domestic subsidiaries. All other information with respect to domestic and foreign subsidiaries is exempt from disclosure by their parent companies, including activities relating to community interests, human resources, and labor. In addition, to the extent that the activities of subsidiaries are within the scope of the disclosure requirements, the Decree fails to define the term "subsidiary." The issue of whether an entity constitutes a subsidiary for disclosure purposes is thus left to corporate discretion without any governmental guidance.

The inadequacy of the disclosure requirements with respect to the operations of foreign subsidiaries is a particularly significant oversight. The reference to "subsidiaries" contained in the community interest provision with respect to compliance with ILO conventions may include foreign subsidiaries.<sup>239</sup> However, the term "foreign" is not specifically utilized in referring to these subsidiaries unlike other sections of the Decree. Thus, it may be contended with some conviction that the adjective "foreign" would have been used had it been intended that this requirement apply to such entities. The issue of whether the failure to include foreign subsidiaries in this section of the Decree evinces intent to limit such reporting to domestic subsidiaries remains unresolved. By contrast, the operations of foreign subsidiaries are expressly and commendably included within the environmental disclosure provisions.<sup>240</sup>

The Decree also fails to recognize that activities of reporting companies other than the operation of subsidiaries may merit public disclosure.<sup>241</sup> These activities include subcontracting, participation in joint ventures and commercial

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237. Decree No. 2002-221 of Feb. 20, 2002, J.O., Feb. 21, 2002, p. 3360, art. 148-2 (Fr.) (requiring disclosure of the methodologies utilized to ensure respect for ILO conventions by subsidiaries and utilized by foreign subsidiaries to account for the impact of their activities on regional development and neighborhood populations).

238. *See id.* art. 148-3(9) (requiring disclosure of resource consumption assessment and certification measures and expenditures incurred as a result thereof, compliance with applicable environmental laws and environmental management issues).

239. *See id.* art. 148-2 (requiring listed companies to report on measures to ensure that their subsidiaries abide by ILO conventions).

240. *See id.* art. 148-3(9).

241. ARESE Press Release, *supra* note 19.

partnerships, and business relationships with entities in the distributive chain.<sup>242</sup> The sole reference in this regard is to subcontracting. Specifically, reporting companies are required to disclose the importance of subcontracting to their operations and the methodology by which compliance of subcontractors with fundamental conventions of the ILO is ensured.<sup>243</sup> These are the sole references to subcontracting with respect to human resources, labor, and the community, and there is no reference to subcontracting in the environmental provisions. Thus, it may be assumed that other activities relating to subcontractors are exempt from disclosure regardless of their human rights or environmental impacts. In addition, the Decree fails to define the terms “subcontracting” and “fundamental ILO conventions” for purposes of disclosure.

The Decree’s silence with respect to other business relationships implies their exemption from disclosure. This exemption discounts the impact of these relationships on human rights and the environment. Cooperative business associations, such as joint ventures and partnerships, and contractual relationships with entities in the distributive chain clearly can have detrimental impacts as noted by their inclusion in the Human Rights Norms.<sup>244</sup> The Decree is inadequate to the extent that it fails to acknowledge the diversity of business relationships that may impact human rights and the environment.

The Decree is equally inadequate with respect to its coverage of global operations of disclosing companies, remaining completely silent on the obligation to report on international operations.<sup>245</sup> Although legislators may have intended French corporations to report on such operations, the Decree makes no mention of its applicability to operations beyond France’s national boundaries. The failure to differentiate between domestic and international operations may constitute an oversight on the part of French legislators. However, it is equally plausible that the omission of international operations is demonstrative of intent to exempt them from disclosure.

This omission ignores the potential widespread impact of the international operations of disclosing companies. As noted in the Human Rights Norms, international business operations affect a broad range of stakeholders. Such operations, either directly or through subsidiaries, joint ventures, and other cooperative business undertakings, may violate the rights of labor to equal opportunity and non-discriminatory treatment in the workplace.<sup>246</sup> Labor rights may also suffer through the utilization of forced labor or the economic exploitation of children,<sup>247</sup> the failure of employers to provide a safe and healthy

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242. *See id.*

243. *See* Decree No. 2002-221 of Feb. 20, 2002, arts. 148-2(9), 148-2.

244. *See Norms, supra* note 24, ¶ 21 (extending the obligation of transnational enterprises to respect, ensure respect for, prevent abuses of and promote human rights to all “contractors, subcontractors, suppliers, licensees and distributors”).

245. *See* Baue, *supra* note 19; *see also* ARESE Press Release, *supra* note 19.

246. *See Norms, supra* note 24, ¶ 2.

247. *See id.* ¶¶ 5-6.

work environment<sup>248</sup> and adequate standard of living,<sup>249</sup> or respect freedom of association and the right to engage in collective bargaining.<sup>250</sup> The interests of labor and the community may be impacted to the extent that business enterprises and their joint undertakings engage in violations of human rights<sup>251</sup> either directly or through their agents pursuant to security arrangements.<sup>252</sup> The rights of national governments are negatively impacted to the extent business enterprises and their joint undertakings disregard national laws, administrative rules and regulations, and the social and economic policies of the states in which they conduct their operations.<sup>253</sup> Similarly, communities are damaged by lack of respect for their civil, cultural, economic, political, and social rights.<sup>254</sup> Consumer interests may be injured as a result of the failure of businesses to engage in fair competition and marketing and advertising practices or ensure the safety and quality of their goods and services.<sup>255</sup> The Decree is inadequate to the extent that this wide range of potential global impacts is not addressed.<sup>256</sup>

### **B. The Identification and Protection of Stakeholder Interests**

Given its inadequacy in identifying businesses subject to social disclosure, it is not surprising that the Decree fails to fully address the interests of relevant stakeholders. Utilizing the Human Rights Norms' definition of stakeholders,<sup>257</sup> the Decree best serves the interests of labor and the community. By contrast, the interests of consumers, national and local governments, and shareholders are largely overlooked. It bears to note however that even those

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248. *See id.* ¶ 7.

249. *See id.* ¶ 8.

250. *See id.* ¶ 9.

251. *See id.* ¶ 23.

252. *See Norms, supra* note 24, ¶ 3-4.

253. *See id.* ¶ 10-12.

254. *See id.* ¶ 12.

255. *See id.* ¶ 13.

256. Despite this criticism, the Decree is adequate to the extent that it requires reporting by publicly listed French companies and their subsidiaries on the environmental impact of their operations. *See* Decree No. 2002-221 of Feb. 20, 2002, J.O., Feb. 21, 2002, p. 3360, art. 148-3 (Fr.). The Human Rights Norms specifically provide for the right to a clean environment and place responsibility for assessment, mitigation, and remediation of deleterious environmental and human health impacts on transnational enterprises and their associated business operations. *See Norms, supra* note 24, ¶ 14(a)-(g).

257. *See Norms, supra* note 24, ¶ 22 (defining stakeholders as "stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises"). Stakeholders may also include parties that are indirectly affected by the activities of such enterprises "such as consumer groups, customers, Governments, neighboring communities, indigenous peoples and communities, non-governmental organizations, public private lending institutions, suppliers, trade associations, and others." *Id.*

stakeholder interests that are served by the disclosure requirements are not addressed as thoroughly as necessary.

The Decree best serves labor interests. Several of the required disclosures are consistent with comparable provisions of the Human Rights Norms. For example, publicly listed French companies are also required to disclose information with respect to wages, benefits, and social schemes.<sup>258</sup> This required disclosure allows interested parties to determine if such companies are ensuring an adequate standard of living for their employees through the payment of fair and reasonable remuneration.<sup>259</sup> Required disclosure of assessments of the state of industrial relations and collective bargaining agreements will permit interested parties to determine the extent to which companies respect the rights of workers to freely associate, organize trade unions, engage in collective bargaining, submit grievances, and undertake collective action.<sup>260</sup> Additionally, disclosure of health and safety conditions will permit comparison with similar standards contained in the Human Rights Norms.<sup>261</sup> Finally, information concerning employee training is relevant to determining compliance with standards relating to the employment of security personnel and the adequacy of workplace safety and environmental protection precautions.<sup>262</sup>

However, there are four significant gaps in the labor disclosure provisions. The first gap is in the area of employment discrimination. Specifically, with the exception of disabled workers and ensuring compliance by subcontractors and subsidiaries with relevant ILO conventions, the Decree does not otherwise address the obligation of employers to ensure equal employment opportunity and eliminate discrimination.<sup>263</sup> The Decree is conspicuously silent with respect to disclosure of efforts to eliminate discrimination based on a wide range of factors, including race, color, religion, political opinion, nationality, social origin, social and indigenous status, and age.<sup>264</sup> Reference to gender discrimination is also absent from the Decree.<sup>265</sup> The sole reference to gender is the required disclosure of efforts to ensure wage equality between men and women.<sup>266</sup> The absence of further elaboration upon the right of workers to equal employment opportunity may be explainable given the Decree's reference to

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258. See Decree No. 2002-221 of Feb. 20, 2002, art. 148-2(3), (8).

259. See *Norms*, *supra* note 24, ¶ 8.

260. Compare Decree No. 2002-221 of Feb. 20, 2002, art. 148-2(4) and *Norms*, *supra* note 24, ¶ 9.

261. Compare Decree No. 2002-221 of Feb. 20, 2002, art. 148-2(5) and *Norms*, *supra* note 24, ¶ 7.

262. Compare Decree No. 2002-221 of Feb. 20, 2002, art. 148-2(6) and *Norms*, *supra* note 24, ¶¶ 4, 7, 14.

263. See Decree No. 2002-221 of Feb. 20, 2002, art. 148-2, 148-2(7).

264. See *Norms*, *supra* note 24, ¶ 2.

265. See *id.* ¶ 2.

266. See Decree No. 2002-221 of Feb. 20, 2002, art. 148-2(3).

compliance with “fundamental ILO conventions.”<sup>267</sup> However, as previously noted, the Decree fails to define what ILO instruments constitute “fundamental conventions.”<sup>268</sup> Furthermore, the mandate to disclose compliance with such conventions only relates to subcontractors and subsidiaries and does not include parent corporations or their foreign subsidiaries.<sup>269</sup>

The second gap in the Decree’s disclosure requirements relates to the exploitation of workers through slavery and forced or compulsory labor, which may include debt bondage and other contemporary manifestations.<sup>270</sup> Businesses are further obligated to protect children from economic exploitation.<sup>271</sup> Reference to these practices in the Decree may be unnecessary given their universal condemnation and possible inclusion within “fundamental ILO conventions.” However, as previously noted with respect to equal employment opportunity and nondiscrimination, the Decree fails to define what ILO instruments constitute “fundamental conventions.”<sup>272</sup> Furthermore, the mandate to disclose compliance

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267. *See id.* art. 148-2.

268. ILO conventions granting workers the right to equal employment opportunity and freedom from employment discrimination include:

Employment Promotion and Protection against Unemployment Convention (No. 168), Oct. 17, 1991, art. 6.1, at <http://www.ilo.org/ilolex/english/convdisp1.htm>;

Termination of Employment Convention (No. 158), Nov. 23, 1985, art. 5(d), at <http://www.ilo.org/ilolex/english/convdisp1.htm>;

Employment Policy Convention (No. 122), July 9, 1965, art. 1.2(c), 569 U.N.T.S. 65;

Convention Concerning Basic Aims and Standards of Social Policy (No. 117), June 22, 1962, art. 14.1(a)-(i), 494 U.N.T.S. 249; and

Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), June 25, 1958, art. 1.1, 362 U.N.T.S. 31.

ILO conventions prohibiting specific types of employment discrimination include:

Maternity Protection Convention (Revised) (No. 183), June 15, 2000, at <http://www.ilo.org/ilolex/english/convdisp1.htm>;

Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), June 27, 1989, 28 I.L.M. 1382;

Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159), June 20, 1983, at <http://www.ilo.org/ilolex/english/convdisp1.htm>;

Convention Concerning Basic Aims and Standards of Social Policy (No. 117), June 22, 1962, art. 14.1(a)-(i), 494 U.N.T.S. 249;

Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), June 25, 1958, 362 U.N.T.S. 31; and

Equal Remuneration Convention (No. 100), June 29, 1951, 165 U.N.T.S. 303.

269. *See* Decree No. 2002-221 of Feb. 20, 2002, art. 148-2.

270. *See Norms, supra* note 24, ¶ 5.

271. *See id.* ¶ 6.

272. ILO conventions granting workers freedom from slavery, forced or compulsory labor and child labor include:

Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182), Nov. 19, 2000, 38 I.L.M.

with such conventions only relates to subcontractors and subsidiaries and does not include parent corporations or their foreign subsidiaries.<sup>273</sup>

The third gap is lack of specificity with respect to terminology utilized in the human resources provisions of the Decree. For example, to the extent that disclosure with respect to corporate efforts to eliminate employment discrimination is required, the Decree is silent with respect to those actions that constitute “discrimination.” The same conclusion may be reached to the extent that the Decree requires disclosure of affirmative action initiatives.<sup>274</sup> Other examples include the previously noted failures to delineate those instruments that constitute “fundamental ILO conventions” and adequately include foreign subsidiaries, other types of cooperative business associations and global operations within the Decree’s disclosure requirements.

The Decree serves community interests to a lesser degree. Some of the required disclosures are consistent with standards for the protection of community interests established by the Human Rights Norms. For example, the Decree addresses the impact of business operations on communities, including economic development and sustainability, through the requirement that publicly listed French companies report on “the territorial impact of its activities as far as employment and regional development are concerned.”<sup>275</sup> Similarly, foreign subsidiaries are required to disclose methodologies utilized to “take into account the impact of their activities on . . . regional development and neighbourhood populations.”<sup>276</sup> These disclosures will permit interested parties to determine whether reporting companies are complying with the provisions of the Human Rights Norms requiring businesses to respect local communities.<sup>277</sup> Interested parties may be able to specifically determine the impact of business operations on land use, the exploitation of natural resources and cultural and intellectual property. Detailed disclosure by reporting companies also may identify negative impacts of such activities on a wide variety of community interests, such as health, the environment, culture and means of subsistence.<sup>278</sup> The duty to disclose the impact of business activities includes reporting on efforts to minimize harm

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Employment Policy Convention (No. 122), July 9, 1965, 569 U.N.T.S. 65;  
Abolition of Forced Labour Convention (No. 105), Jan. 17, 1959, 320 U.N.T.S.

291; and

Convention Concerning Forced or Compulsory Labour (No. 29), May 1, 1932, 39 U.N.T.S. 55.

273. *See* Decree No. 2002-221 of Feb. 20, 2002, art. 148-2.

274. *See Norms, supra* note 24, ¶ 2 (defining affirmative action as “special measures designed to overcome past discrimination against certain groups.”).

275. Decree No. 2002-221 of Feb. 20, 2002, art. 148-2.

276. *Id.*

277. *See Norms, supra* note 24, ¶¶ 10, 12.

278. *See id.*

and adequately compensate communities in the event of occurrence of injury.<sup>279</sup>

However, the effectiveness of the Decree's community interest provisions is largely dependent on the interpretation of reporting companies of the scope of their obligations. The Human Rights Norms require businesses to respect civil, cultural, economic, political, and social rights.<sup>280</sup> Some of these rights are readily identifiable, such as land ownership and use, natural resource exploitation and health. The impact of business activities on other community rights is not as apparent but equally significant. These rights are identified in the Human Rights Norms as adequate food, housing, education, and freedom of thought, conscience, religion and expression.<sup>281</sup> Community interest disclosures will be inadequate to the extent that reporting companies narrowly or selectively interpret their obligations or fail to fully research the civil, cultural, economic, political, and social impact of their activities. The Decree also does not distinguish between community rights that are clearly delineated and those that have not been specifically demarcated, such as those associated with indigenous populations.<sup>282</sup>

Furthermore, the Decree merely requires that companies disclose the procedures undertaken to account for the impact of their activities on surrounding communities.<sup>283</sup> However, consideration of community interests alone is insufficient to satisfy the obligation of businesses with respect to the impact of their activities on adjacent populations. Rather, businesses must respect community rights and contribute to their realization.<sup>284</sup> These obligations require active engagement and not merely passive acknowledgement.

Community duties are partially addressed by the Decree's requirement that disclosure include a description of "the relations the company develops with associations for social integration, educational institutions, associations for the protection of the environment, consumers' associations and neighbourhood populations."<sup>285</sup> However, the Decree is silent with respect to disclosure of the ultimate result of the consultative process. In addition, only publicly listed French companies are required to disclose their community consultation efforts, and there is no similar disclosure required of their foreign subsidiaries.<sup>286</sup>

The Decree also largely overlooks the interests of consumers. Consumer interests as set forth in the Human Rights Norms may be summarized as the right to purchase a safe product in reliance upon truthful advertising at a competitive

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279. *See id.*

280. *Id.* ¶ 12.

281. *See id.*

282. *See* Decree No. 2002-221 of Feb. 20, 2002, J.O., Feb. 21, 2002, p. 3360, art. 148-2 (Fr.).

283. *See id.*

284. *See Norms, supra* note 24, ¶ 12.

285. Decree No. 2002-221 of Feb. 20, 2002, art. 148-2.

286. *See id.*

price.<sup>287</sup> Companies are also responsible for ensuring that their products and services are not utilized to commit human rights violations.<sup>288</sup> By contrast, the Decree only requires disclosure of the reporting company's relations with consumer associations.<sup>289</sup> Members of the distributive chain to whom these same duties are owed are completely overlooked in the Decree.

Governmental interests are also largely overlooked. The Human Rights Norms place specific obligations upon businesses with respect to the security of persons, the protection of workers' rights, respect for national sovereignty, and consumer and environmental protection.<sup>290</sup> By contrast, the Decree only refers to governmental interests in three separate contexts. Specifically, businesses are required to disclose the compliance of their subcontractors and subsidiaries with ILO conventions to the extent that such conventions are deemed legal obligations in France.<sup>291</sup> The remaining disclosure requirements relate to environmental protection and do not address other governmental interests.<sup>292</sup> Particularly relevant in this regard is respect for national sovereignty, an issue of increasing importance given the growing power of the private sector and its consequent subjugation of national and local governments in the modern global economy.<sup>293</sup>

Although the interest of shareholders in profit maximization is not explicitly referenced in the Decree, their interest in investment protection is recognized to the extent that the disclosure requirements are similar to protections in corresponding human rights instruments, including the Human Rights Norms. Investment protection for shareholders is also served to the extent disclosure deters corporate misconduct. However, this interest is inadequately protected to the extent that the Decree falls short of the standards set forth in applicable human rights instruments or disclosure fails to deter corporate wrongdoing.

### **C. Reporting Standards and Guidelines**

The third feature of the Decree meriting discussion is the absence of reporting standards or guidelines. While the Decree obliges publicly listed French companies to report on a set of social indicators, it does not describe with any degree of detail how this is to be accomplished.<sup>294</sup> Most notably absent is a rating system or formula for measuring compliance with the social indicators listed in

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287. See *Norms*, *supra* note 24, ¶ 13.

288. See *id.* ¶ 11.

289. See Decree No. 2002-221 of Feb. 20, 2002, art. 148-2.

290. See *Norms*, *supra* note 24, ¶¶ 3-14.

291. See Decree No. 2002-221 of Feb. 20, 2002, art. 148-2.

292. See *id.* art. 148-3(4), (8) (requiring disclosure of actions taken to ensure conformity of environmental certification actions with applicable state law and compliance with court orders awarding compensation for environmental damage).

293. See *supra* notes 96-98 and accompanying text.

294. See European Business Campaign on Corporate Social Responsibility, *supra* note 39.

the Decree. There is a plethora of reporting frameworks, principles, and protocols that may be utilized by disclosing companies in addition to the Human Rights Norms. The Decree however fails to select or even recommend a framework to be utilized in satisfying its disclosure requirements. As noted by an ARESE analyst, the Decree lacks an “official [key performance indicator] to illustrate the compulsory disclosure.”<sup>295</sup> In addition to the absence of reporting standards and previously-noted definitional deficiencies, the Decree also contains no required or suggested format to be utilized by affected companies in the reporting of information.

The absence of reporting standards and formats may be beneficial to the extent that it allows maximum flexibility in providing the social disclosures required by the Decree. The absence of such standards also encourages corporate creativity in formulating appropriate response strategies. However, there are risks to both disclosing businesses and stakeholders as a consequence of the absence of such guidance. For reporting companies, the absence of standards creates needless uncertainty with respect to whether proffered disclosures are in compliance with the mandates of the Decree. The absence of such standards also prevents companies from comparing their disclosures with those of their competitors. The inability to conduct such comparisons prevents companies from assessing the status of corporate social responsibility within their competitors’ corporate cultures and, more broadly, within their industrial sector. This inability may in turn dampen the incentive to undertake changes to meet challenges presented by competitors deemed to be more socially responsible. The potential multiplicity of reporting methodologies also increases the cost of disclosure as companies invest resources in the development of individualized reporting protocols.<sup>296</sup> The significant resource investment that the development of individualized protocols entails, and the degree of familiarity that ensues from their long-standing utilization, also have negative impacts to the extent they discourage industry-wide efforts at harmonization.

The absence of disclosure protocol may also have an undue impact upon companies with little or no social reporting experience. Members of some industrial sectors, such as the garment and the extractive industries, are undoubtedly keenly aware of the social and environmental impacts of their activities.<sup>297</sup> Members of these sectors have long histories of sensitivity to such issues as a result of media attention, unfavorable publicity and perhaps environmental and human rights-related litigation. As a result, these companies have some degree of experience with respect to social disclosure despite the fact that they may not have reported upon such matters in the fashion required by the Decree.

By contrast, publicly listed companies engaged in industries with less

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295. Baue, *supra* note 19 (quoting ARESE senior analyst Jacky Prudhomme).

296. *See* Davidsson, *supra* note 93, at 537-38.

297. *See supra* notes 101-05 and 137-46 and accompanying text.

visibility with respect to social issues are now required to undertake comprehensive studies in areas that traditionally may have been outside ordinary corporate concerns. The financial services industry provides an example.<sup>298</sup> Although members of this sector undoubtedly have experience with a wide variety of voluntary and mandatory financial reporting standards, they may lack social reporting expertise with respect to their clients as well as their own internal operations. In addition, although these companies have policies that will assist in disclosures relating to human resources and labor standards, companies may encounter difficulty in translating these policies into meaningful disclosures complete with accompanying statistics.<sup>299</sup> Even more difficult are the required disclosures with respect to the impact of the reporting company's activities on society.<sup>300</sup> There are numerous issues presented by this disclosure, including identification of applicable measurement instruments and whether such disclosure must include negative community impacts occurring as a result of the activities of the company's clients. The same issues arise with respect to reporting of environmental performance. Reporting in this area may be further complicated by the absence of applicable policies and pertinent, readily accessible information other than perhaps relative to the generation of office waste and energy consumption.<sup>301</sup>

The absence of reporting standards also presents risks for stakeholders. In a fashion similar to reporting companies, the absence of standards creates uncertainty for stakeholders with respect to whether the disclosures proffered by companies in which they maintain an interest are in compliance with the mandates of the Decree. The absence of such standards also prevents stakeholders from comparing disclosures among companies. This inability prevents stakeholders from assessing the status of corporate social responsibility within corporate cultures and industrial sectors.<sup>302</sup> Stakeholders lacking evaluative experience with respect to social disclosure may be at a particular disadvantage in this regard. All stakeholders, regardless of their level of sophistication, are disadvantaged to the extent that the absence of reporting standards requires additional investments of time and effort in comprehension of annual reports and the conduct of comparative evaluations. As a result, the Decree's lack of a generally accepted and standardized reporting framework may result in disclosures that "lack consistency, comparability and credibility."<sup>303</sup> Stakeholders may be unable to

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298. See *Sustainability Reporting Becomes Law in France*, *supra* note 23, at 25. Other service industries with less visibility with respect to social issues include banking, engineering, insurance, media, and tourism. See Baue, *supra* note 19.

299. See *Sustainability Reporting Becomes Law in France*, *supra* note 23, at 25.

300. See *id.*

301. See *id.*

302. See Davidsson, *supra* note 93, at 538.

303. GLOBAL REPORTING INITIATIVE, *supra* note 31, at 13. However, it bears to note that this criticism occurred in the context of promotion of the Global Reporting Initiative as a framework for current and future social disclosure regimes. See *id.* (noting that "[a]

derive maximum value from the disclosures as sources of information about the desirability of current and future investments.<sup>304</sup> Rather, stakeholders may ultimately be left with little more than self-serving laundry lists of worthy deeds that are of little use in making investment and disinvestment decisions.

The difficulties that may be encountered by companies and stakeholders as a result of the absence of reporting standards also demonstrate another shortcoming of the Decree, specifically, the absence of sectorial reporting standards. The primary objection to the absence of sectorial standards from the standpoint of reporting companies undoubtedly relates to cost. Different industry sectors have different impacts on human resources and the environment. As a result, members of those sectors engaged in high impact activities will have developed considerable expertise with respect to the retention, compilation and reporting of relevant information. By contrast, publicly listed companies in sectors with lesser degrees of impact may possess little or no expertise with respect to social reporting. Nevertheless, as noted by ARESE, the Decree “appear[s] to institute a blanket requirement on all corporations regardless of industry sector – with a bank or insurance company, for instance, subject to the same requirements as an oil and gas company.”<sup>305</sup>

Regardless of the industrial sector to which they belong, companies will need to develop social reporting expertise in order to meet their disclosure obligations. The costs associated with developing such expertise, including the creation of data management systems, the training of individuals and document preparation, are presently unknowable. Despite this uncertainty, the costs certainly must be of some consequence if companies are to produce meaningful reports, thereby meeting their reporting obligations to the state and ethical obligation to stakeholders. The value of this “one size fits all” reporting standard to stakeholders is also subject to question.<sup>306</sup> Already besieged with information that they may lack sufficient expertise to decipher, the absence of sectorial reporting standards threatens to overwhelm stakeholders with reams of information having little relevance within particular industrial sectors. Although it was an understandable omission given political realities and the complexities associated with drafting and implementation, the absence of sectorial reporting standards further devalues the usefulness of information provided pursuant to the Decree.<sup>307</sup>

#### **D. Environmental Protection Reporting Standards**

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generally accepted framework, developed through a multi-stakeholder, consultative process, will correct this situation to the benefit of both reporters and report users.”).

304. *See id.*

305. ARESE Press Release, *supra* note 19.

306. Maitland & Mann, *supra* note 164, at 14 (quoting an unnamed spokesperson for the U.S. Council for International Business).

307. *See supra* note 56 and accompanying text.

One final aspect of the Decree's disclosure standards that merits discussion is their adequacy with respect to the environment. The Decree's environmental disclosure standards fail to address numerous environmental issues. These issues include the environmental impact of disclosing companies' products and services, including the methods by which they are delivered to the marketplace.<sup>308</sup> The Decree also fails to require disclosure of remediation of existing polluted sites.<sup>309</sup> In addition, the lack of sectorial standards will result in reports that fail to address specific environmental risks confronting different industries.<sup>310</sup> Finally, critics have contended that companies should file separate and more comprehensive environmental reports rather than narrowly drafted annual reports.<sup>311</sup> The necessity of more frequent and detailed environmental reporting is particularly important for those companies operating in high impact industrial sectors.<sup>312</sup>

In addition to these criticisms, the environmental disclosures are also inadequate in comparison to the requirements set forth in the Human Rights Norms. The failure to address the environmental impact of products and services overlooks duties placed upon companies by the Norms' consumer protection provisions. For example, the Norms require that companies "take all necessary steps to ensure the safety and quality of the goods and services they provide."<sup>313</sup> This duty implicitly includes the obligation to ensure that products and services do not negatively impact the environment. However, this is not addressed in the Decree's environmental disclosure provisions.

The Decree also fails to address duties set forth in the environmental provisions of the Human Rights Norms. Although corporate responsibility for the environmental and human health impacts of business activities may be implied from its separate environmental disclosures, the Decree does not contain an explicit statement to this effect.<sup>314</sup> Furthermore, although the Decree does require disclosure of environmental assessments, it is silent with respect to their performance on a continuing and periodic basis and the availability of results to concerned stakeholders.<sup>315</sup> The Decree also does not define the scope of these assessments, specifically, that they include evaluation of siting, extraction, manufacturing, sales, and waste disposal activities.<sup>316</sup>

Similarly, although the Decree mandates disclosure of "[m]easures taken to limit the damage to biological balance, to the natural environment [and] to the

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308. See ARESE Press Release, *supra* note 19.

309. *See id.*

310. *See id.*

311. *See id.*

312. *See id.*

313. *Norms, supra* note 24, ¶ 13.

314. *See* Decree No. 2002-221 of Feb. 20, 2002, J.O., Feb. 21, 2002, p. 3360, art. 148-3 (Fr.).

315. *See id.*

316. *See id.*

protected animal and vegetal species,<sup>317</sup> there is no reference to mitigation of deleterious environmental impacts or human health concerns.<sup>318</sup> In addition, there is no provision for the disclosure of the receipt and consideration of stakeholder reaction to such measures.<sup>319</sup> Finally, the Decree fails to require any discussion of best management practices and technology in responding to identified environmental and health risks.<sup>320</sup> Disclosure should include efforts to share technology, knowledge, and assistance and the reporting of actual or anticipated releases of hazardous and toxic substances.<sup>321</sup>

### **E. Verification and Enforcement**

Finally, the Decree's procedures with respect to verification and enforcement must be addressed. Despite the growing utilization of independent monitoring and other assessment procedures,<sup>322</sup> there is no defined process by which reporting companies must audit or verify the information set forth in their social disclosures.<sup>323</sup> Furthermore, the Decree makes no reference, either explicitly or implicitly, to the assessment of sanctions for violation of the social disclosure provisions.<sup>324</sup> It may be implied from this omission that companies that fail to comply, provide inadequate disclosure, or make disclosures utilizing false or misleading information are not subject to penalties.<sup>325</sup>

The absence of independent verification and sanctions provisions presents several obvious problems. Initially, mass compliance with the Decree is unlikely in the absence of such provisions.<sup>326</sup> Many companies will undoubtedly undertake good faith efforts to meet their disclosure obligations either from a sense of legal obligation, ethical duty, or the need to maintain corporate image. However, the absence of such provisions gives little incentive to companies to report beyond protecting their reputation.<sup>327</sup> As a result, some companies may take their disclosure obligation less seriously or view such obligations as opportunities for corporate image-cleansing rather than meaningful information

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317. *Id.* art. 148-3(2).

318. *See id.* art. 148-3.

319. *See id.*

320. *See* Decree No. 2002-221, *supra* note 314, art. 148-3.

321. The Decree does require disclosure of the adoption and implementation of environmental management systems. *See* Decree No. 2002-221 of Feb. 20, 2002, art. 148-3(6).

322. *See supra* note 146 and accompanying text.

323. *See* Baue, *supra* note 19; *see also* ARESE Press Release, *supra* note 19.

324. *See* Baue, *supra* note 19; *see also* ARESE Press Release, *supra* note 19.

325. *But see* Davidsson, *supra* note 93, at 553 (advocating legal remedies for the violation of mandatory corporate social responsibility standards, including the imposition of liability upon directors and officers for negligence in the reporting of the social and environmental performance of their organizations).

326. *See* Baue, *supra* note 19.

327. *See* Doane, *supra* note 172, at 3.

gathering, reflection, and publication. The unverified reports produced by such companies may be lacking in content, quality and credibility, without any external measures by which to compel greater or truthful disclosure or, for that matter, any disclosure at all.<sup>328</sup> The prevalence of such reports also may negatively impact the quality of reports submitted in good faith by complying companies. Such companies are unlikely to continue to prepare complete and accurate disclosures if such submissions place them at a competitive disadvantage. The result may be a downward spiral to the lowest common denominator established by the least transparent companies and accepted as complying with the Decree by French governmental authorities. Social disclosure under such circumstances is likely to fall short of stakeholder expectations.<sup>329</sup>

Additionally, the absence of verification requirements and enforcement procedures is contrary to the obligations of businesses pursuant to the Human Rights Norms. The Norms specifically require “periodic monitoring by national, international, governmental and/or nongovernmental mechanisms.”<sup>330</sup> This monitoring must be transparent, independent, and solicit input from stakeholders.<sup>331</sup> The Decree also fails to provide “prompt, effective and adequate reparation” to stakeholders who have been adversely affected by failures to comply with the Norms.<sup>332</sup> This requirement implicitly assumes the existence of procedures by which aggrieved parties may present their claims and receive “restoration, replacement or compensation.”<sup>333</sup> The absence of independent verification and enforcement procedures represents a failure by the French government to utilize the Norms as a model for legislative and administrative provisions relating to the conduct of businesses within their borders.<sup>334</sup>

French authorities responsible for the negotiation and drafting of the NRE and Decree have noted that shareholders can initiate litigation alleging required disclosure has not been made.<sup>335</sup> Leaving aside the inadequacy of this option to other affected stakeholders, private enforcement by shareholders is unlikely. Increased transparency may benefit shareholders by providing them with information relevant to the value of their investment and the desirability of maintaining their financial stake. However, shareholders may be reluctant to compel greater disclosure for fear of harming the value of their investments by

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328. See Davidsson, *supra* note 93, at 538; see also Doane, *supra* note 172, at 3; Maitland & Mann, *supra* note 164, at 14 (quoting John Elkington, the chair of the Sustainability Consultancy, that “[r]eporting without verification is like blood without haemoglobin”).

329. See *Sustainability Reporting Becomes Law in France*, *supra* note 23, at 25.

330. *Norms*, *supra* note 24, ¶ 16.

331. See *id.* ¶ 16.

332. *Id.* ¶ 17.

333. *Id.*

334. See Decree No. 2002-221 of Feb. 20, 2002, J.O., Feb. 21, 2002, p. 3360, art. 148-2, 3 (Fr.).

335. See Jacob, *supra* note 43.

causing financial loss or injury to the image of companies in their portfolios.

Even assuming that a group of shareholders files an action to compel greater disclosure, such litigation would be confronted by serious obstacles. Shareholders may be required to first exhaust their remedies by seeking greater disclosure prior to initiating litigation. The absence of any explicit provision within the Decree for civil actions to compel disclosure or receive money damages creates a further procedural impediment. Shareholders also are confronted with vague disclosure requirements subject to wide variance in interpretation by French courts. Litigation under such circumstances may encounter difficulty in attracting additional shareholders to participate as plaintiffs. Shareholders may seek the intervention of French governmental authorities to audit social disclosures and seek financial penalties for false or misleading reports.<sup>336</sup> However, the likelihood of such enforcement action is remote given the absence of explicit enforcement and sanctions provisions in the Decree and the novelty of mandatory social disclosure at this juncture.

## VI. CONCLUSION

Social disclosure as required by the NRE and Decree is not without flaws. Predictions that the Decree would be fully effective and capable of assessment within three years of implementation are overly optimistic given the above-noted inadequacies.<sup>337</sup> As noted by the Global Reporting Initiative, “[e]xperimentation, trial and error, learning and enhancement will characterize the next few years for all parties—reporters and report users alike.”<sup>338</sup> It is more likely that the Decree will undergo gradual and continuous improvement to address definitional, measurement and format issues.<sup>339</sup> There is also a distinct possibility that the Decree will become part of a larger social disclosure regime established by the European Union.<sup>340</sup>

Nevertheless, social disclosure as exemplified by the NRE and Decree represents “a new dynamic.”<sup>341</sup> This dynamic recognizes the indivisibility of economic, social, cultural, civil, and political activities and the interest of investors in such activities to the extent that they may eventually impact profitability.<sup>342</sup> This recognition renders it beyond serious argumentation that “today’s social issue is tomorrow’s financial issue.”<sup>343</sup>

The interrelationship of this wide variety of activities has been

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336. *See id.*

337. *See id.*

338. GLOBAL REPORTING INITIATIVE, *supra* note 31, at 16.

339. *See id.*

340. *See* Jacob, *supra* note 43.

341. *Id.*

342. *See* Williams, *Corporate Social Transparency*, *supra* note 11, at 1284-85.

343. *Id.*

acknowledged by a growing number of states through regulations requiring increased corporate social accountability, including social disclosure.<sup>344</sup> These states, to varying degrees, have recognized that one method “to achieve meaningful change in the way companies approach human rights issues is for there to be constructive dialogue as well as sustained pressure from many directions . . . [involving] consumers, shareholders, governments, the United Nations and other intergovernmental organizations, human rights and development organizations, and enlightened business people.”<sup>345</sup> Social disclosure and accompanying transparency are representative of such efforts designed to introduce human rights and environmental sensitivities to capital markets and organizations increasingly free of national constraints.<sup>346</sup> Despite their flaws, these efforts are a positive development in a rapidly expanding global economy dominated by gargantuan multinational enterprises obsessed with profits and rates of return at the potential expense of respect for individual rights.



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344. See *supra* notes 31-36 and accompanying text; see also William Baue, *Australia to Require Investment Firms to Disclose How They Take SRI into Account* (Jan. 3, 2003), at <http://www.socialfunds.com/news/print.cgi?sfArticleId=998> (discussing Australia’s Financial Services Reform Act that requires all investment firms to provide product disclosure statements to their customers, including descriptions of “the extent to which labour standards or environmental, social or ethical considerations are taken into account”); SRI World Group, Inc., *New British Law Encourages Socially Responsible Pension Funds* (July 17, 2000), at <http://www.socialfunds.com/news/print.cgi?sfArticleId=309> (describing the United Kingdom’s “Socially Responsible Investment Regulation” requiring pension fund trustees to disclose their policies on socially responsible investment, including shareholder activism).

345. SRI World Group, Inc., *Businesses Play Key Role in Human Rights* (Mar. 22, 2000), at <http://www.socialfunds.com/news/print.cgi?sfArticleId=196> (quoting Chris Avery, the author of Amnesty International UK Business Group’s publication entitled “Business and Human Rights in a Time of Change”).

346. See Jacob, *supra* note 43; see also Williams, *Corporate Social Transparency*, *supra* note 11, at 1296.