

**SYMPOSIUM:
THE MULTINATIONAL ENTERPRISE AS GLOBAL CORPORATE CITIZEN¹**

MR. CONE^{*}: Let's get started, if we may. The word "globalization" finds its way into many commentaries these days, in different ways and different connotations. Sometimes it is thought to be beneficial, and sometimes it's thought to be harmful. We have here today four people highly qualified to talk about this topic. The focus on the multinational enterprise, which is one of the terms that's used for a company that does business in many jurisdictions, is the focus of today's discussion, and whether and how multinational enterprises function as global corporate citizens.

The four distinguished and very qualified speakers that we have here are, in the order in which they will speak, José Alvarez of Columbia, Jim Gunderson of Schlumberger, Limited, probably one of the multinational enterprises in purest multinational form.

We will have John R. MacArthur, the publisher of Harper's and the author of the book on NAFTA² that is going into multiple editions, so I understand, will speak next, then Steve Ratner, who is on the law faculty of the University of Texas and is also at the moment on the law faculty at Columbia.

When I called José Alvarez to see if he would participate, he said, well, a far more qualified person would be Steve Ratner, but some days you get lucky and we have both of them here. I'm delighted.

I don't want to eat into the speakers' time. If you want to know more about them, there are biographies in the program. I would propose that we go directly to the program and I'll ask Professor Alvarez to start. José, please.

PROF. ALVAREZ³: I'm delighted to see so many of you here, and Professor Cone asked me to at least introduce the topic so that we all are at least starting on the same plane. Obviously, the whole topic of multinational enterprises raises a whole series of issues that are familiar to many of us just in reading the papers. When we're talking about a foreign investment, are we talking about the race to the bottom? That is, when we have liberalized investment flows, do those flows go to states or countries with lower environmental standards or lower labor standards? Is there a great "sucking sound," to quote Ross Perot, when these corporations locate overseas?

What's the relationship between liberalized foreign investment flows and economic development? If we're talking about gaps between the rich and poor, are we talking about a development in terms of globalization and the action of multinational enterprises that actually enhances economic development in terms of gross national product, or are we talking about a development that I believe the UN Development⁴ reports is really increasing the gap between the rich and poor, not just within the developing states, but also between the states?

Those are many of the issues. What I will be addressing in particular is what can we learn about the particular topic here, which is the status of these multinationals as good, global corporate citizens. We should examine their actions and inactions with respect to the recent attempt to negotiate a global packet on investment in the OECD,⁵ and I will use that as a test case for talking more generally

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4. United Nations Development Program.

5. Organisation for Economic Co-operation and Development.

about the topic.

But I guess I want to put this in context further. Most of us know about -- can you all hear me if I don't rely on this? Good, okay.

The literature on international civil society is, I am sure, very familiar to many people here. There's an increasing impact that non-governmental organizations, or NGO's, are having on international norms and institutions, and we all know that. It's old news. NGO's have taken credit for the increased transparency of a variety of international organizations, so that we have NGO's to thank, at least partly, for the fact that the World Bank now has an inspection panel to oversee some of its efforts and for the fact that there's an increased degree of coordination within the World Bank and local NGO's with respect to particular World Bank projects.

It's also clear that elements of international civil society have tried to extract a price from those institutions that refuse to be responsive to their concerns. So, for example, Public Citizen, the organization familiar to many of you that Ralph Nader has been much involved in, takes credit for both the fiasco of the 1999 WTO round in Seattle as well as the demise of the multilateral agreement on investment that I will be addressing. It's also clear that NGO's of varying stripes are changing the conduct and the results of worldwide treaty negotiations, so we don't have to look further than the Land Mines Convention recently or the negotiations for the establishment of an international criminal court to see the influence, the impact, of non-governmental organizations.

Now, for people like myself, international lawyers, many of us see this as a revolutionary, really, shift in how international law and international institutions work, including a shift in power from state to non-state actors in terms of success or failure, and many people praise this democratization of international legal processes and regimes. They see in this, in the NGO's growing impact in a number of areas, a new diversity of voices in the international community, an openness compared to what occurs in robust democracies. Other people criticize this, arguing that, for example, many NGO's represent or are accountable to no one in particular, suggesting that comparisons to democratic processes, at least internationally, are misconceived.

Now, the concept of international civil society, however, should not in my view be restricted to NGO's. NGO's are important, I think, and we all recognize them as important because they constitute actors that are distinct from states and because they articulate interests that are not heard if we rely only on governmental representatives. But I think that this is true. Both of these things are true with respect to the subject matter of this symposium: multinational enterprises that are engaged in commerce. Multinational enterprises with a diverse international or transnational presence have interests or represent a set of interests that are not always articulated by the representatives of states. Now, what I think is unfortunate in the literature on international civil society is that we have lost sight of focusing on multinational enterprises as actors in this sense, I think.

Among international lawyers these days, talk of the role of international civil society in short is usually talk about Amnesty International, not about Exxon or Shell. When we talk of corporate entities, the focus is likely to be on their misdeeds, that is, with respect to human rights and environmental degradation, and we will talk about many of those issues today on our panel.

But I think that what I'd like to do is focus on a particular, the multinational enterprise as an actual subject, not just a mere object of attention, and I think it merits discussion because given the collapse of alternatives to capitalism in many parts of the world, multinational enterprises are increasingly important. Good or ill, we have to put them back on center stage, and I think that the title of this symposium explicitly suggests something that would be an anathema to many people. That is that multinational enterprises are part of civil society. I think from an academic standpoint there are many good reasons to do this, to put them back on center stage. Many of the developments that are putting NGO's back at the center of international policy debates have the same effect with respect to multinational enterprises.

The NGO's, for example, are increasingly consulted and involved in the work of international

financial institutions and lending institutions like the World Bank for some rather obvious reasons. Why are NGO's increasingly important? Because those institutions, like the World Bank, are increasingly involved in activities that used to be the domain of governments. Privatization means that these international institutions, both with respect to particular projects, as well as with respect to policy generally, are involved in infrastructure, public utilities, et cetera.

There's also a second reason. Because international legal developments, that is, agreements on trade-related investment, measures services, intellectual property provisions of the World Trade Organization or regional agreements such as the NAFTA, increasingly are intruding on those regulatory areas that used to be the domain of governments and of domestic concern that NGO's were dealing with in terms of domestic concerns. But both things, privatization, as well as the increase in regulation at the international level, are equally relevant with respect to multinational enterprises. With privatization, private enterprise is being asked to assume much of what Government used to do, and that means that private enterprise may face the same complaints that governments used to face.

Privitization, then, threatens to pit multinational enterprises directly against NGO interests, and thus it's no surprise that, for example, human rights suits in U.S. courts under the Alien Tort Claims Act are today as likely to target multinational enterprises, or at least try to target multinational enterprises, as they would Government actors.

Now, the transfer of regulatory authority, or at least the scrutiny to the international regime, has I think increased the amount of attention that multinational enterprises need to pay attention to. That is, the question that I want to focus on initially is whether there is an international, new international regulatory landscape that multinational enterprises have to face, and I think the answer is clearly yes. That is, the new international regulatory landscape has increased the number of avenues – venues – that multinational enterprises now have to keep sight of: developments in the NAFTA, other regional economic entities, such as Mercosur regional banks, as well as the ISO,⁶ which sets international standards, the OECD, and even entities such as Unsetrop. This alphabet soup that I'm throwing at you suggests the many different places that multinational enterprises need to look at in terms of regulation that they will need to focus on, so that multinational enterprises now need to pay attention to the many international and regional tribunals throughout the world, whether these are dealing with European integration or human rights, the law of the sea or international criminal law.

Multinational enterprises will also need to heed an increasing number of arbitral precedents that are being set in the NAFTA, for example, in the investment chapter of that treaty, as well as through ad hoc arbitral tribunals throughout the world.

Now, in terms of my talk, I think I'll focus on initially what I consider to be, from the corporate standpoint, multinational enterprises' sins of omission with respect to such phenomena. In terms of the questions that were posed in the brochure for this symposium, we need to ask whether multinational enterprises are up to being good global corporate citizens. Now, here, others will be focusing on whether they're good corporate citizens in terms of very important and significant societal dimensions, as with respect to human rights or the environment.

I guess I want to address through one concrete example, that is, the multilateral agreement on investment and its demise, a much more simple question: Are multinational enterprises being good corporate citizens, just based on their own corporate interests? That is, just based on the bottom line, on profits, are they up to the new international regulatory environment? That is, a place, an environment where the site of regulation is as likely to be outside of DC as it is in Geneva, where the regulators that they will have to pursue are just as likely to be federal government bureaucrats, but also bureaucrats from a multitude of other countries, as well as NGO's based abroad and international civil servants. Are they up to dealing with that whole new regulatory environment?

I think the answer is, at least to me is, I'm not so sure they are, and so I'll start with the sins of omission with respect to the Multilateral Agreement on Investment. To me there's very little doubt that from the corporate bottom line, and here I'm just going to stress – – I'm not suggesting I endorse the

6. International Organization for Standardization.

multilateral agreement on investment. I'm just suggesting, from the corporate bottom line, there is no doubt that such a global packet on investment was very much in the interests of the multinational enterprise, especially one based in the United States.

Why? Well, had such an agreement been concluded under the OECD as it was planned, it would have regulated some 85 percent of the world outflows of foreign direct investment and two-thirds of its inflows. At one stroke, it would have established the baseline for regulation among the world's richest countries and by doing so, I think a race to the top in terms of investment rules for the rest of the world.

If we actually look at what the draft multilateral agreement had contained in it at the time the negotiations collapsed, I think it's fairly clear what a colossal good deal this was from the corporate bottom line. What we have in this agreement was a top down approach to investment regulation, unlike, for example, the gap in services agreement where countries got to serve which areas they would permit liberalization to occur. It would have included all forms of investment, including portfolio investment and intellectual property. It would have covered for national treatment and most favored nation treatment all stages, including the preinvestment stage, the right to invest, as well as violations of the investment contract itself. It would have covered all forms of regulation: laws, regulations, administration, rules of various kinds, judicial decisions, and by all levels of government, state and federal.

It would have covered privatization, disciplining privatization, and national treatment there. It would have applied to state monopolies, and there were all sorts of innovations on the right of a private investor to take these disputes directly to arbitration. That is far beyond what the bilateral investment treaties in place permit and even beyond what the NAFTA investment chapter permits, so we have the possibility of intra measures relief, for example, that an investor would have achieved through that dispute settlement clause.

And it would have disciplined considerably, that horrible word for many multinational enterprises, performance requirements. It would have actually said that many of these would have violated international law or at least the treaty. But we don't need to speculate about why the multilateral agreement would have been good for the multinational enterprise. We have pretty good evidence that it would. That is, when the U.S. Council for International Business canvassed its members in late 1999 and asked them what the most important priorities would be with respect to foreign investment, the Council members responded with two: first, the need for greater transparency in investment policies around the world, and second, to improve the means by which governments could be held accountable for violation of these policies and laws.

There is little doubt that the multilateral agreement on investment, whichever draft you look at, addresses both of these and would have gone farther than any other instrument now in existence to standardize, make transparent investment rules for the great bulk of all investment flows, and better still, would have committed the most important capital importing as well as capital exporting states to binding dispute settlement to make these rules effective and at the discretion of the investor, as I've suggested.

Yet multinational enterprises were missing in action, or MIA, when it comes to the multilateral agreement on investment, or the MAI. That is, the U.S. business community was not well informed as to these negotiations as compared to the NAFTA and did relatively little to support the effort. From the beginning, the multinational agreement on investment and the negotiations for it lacked the kind of business backing that was vital to getting the NAFTA negotiated and passed through the U.S. Congress. The constituency that was the most likely to benefit from the multilateral agreement on investment took a back seat, while those that were opposed to the effort coalesced and organized themselves into a formidable force.

While the U.S. business community ultimately did take some interest in the multilateral agreement on investment, this was not true for Europe and Japan. What were the reasons for this? One was lukewarm business enthusiasm, and I think it was based on an erroneous conception of what the multilateral agreement on investment could have realistically accomplished. Some multinational enterprises hoped, I think, for a tool that would remove at one blow all the existing investment barriers in the European Union. I think they lost sight of the intrinsic value of transparency and of dispute settlement, even without such up front liberalization.

There were other explanations, to be sure, such as the lack of high-level government support for these multilateral agreements. That is, this was a negotiation conducted at the low level of government bureaucracies, and the lack of the OECD to do a good job here, the absence of the OECD to do a good job of selling the benefits of this to the business community. There was also perhaps some business exhaustion after the NAFTA effort, but whatever the reason, it seems clear that we have here multinational enterprises' sins of omission from their own corporate benefit perspective, and that that was partly to blame for the demise of these global investment negotiations.

The MNE's⁷ mounted no serious counteracting effort to oppose NGO's to oppose those governments that were most in support of investment liberalization. It suggests to me that at least on this score, if we're looking at this and trying to draw general lessons, that the multinational enterprises are at least not quite ready to deal with a new international regulatory environment, as compared to at least some NGO's, and they're certainly not ready to be visionary about what that new international regulatory environment should look like.

Now, the second part of my talk is the sins of commission. The Multilateral Agreement on Investment also collapsed due to fears, especially within Canada and the United States, and within some circles in France as well, that investors would be able to use their rights in this global packet to seek investor state arbitration and to successfully challenge sovereign progressives, as they have begun to do under the NAFTA's investment chapter.

So that we have prominent examples, for example, Canada's withdrawal of environmental constraints on gasoline additives, faced with a challenge under the NAFTA investment chapter. Cases like this suggested that I think there are some multinational enterprise sins of commission that may have hastened the demise of this global investment packet, and what I'd like to focus on, just to suggest to you what some of these sins of commission might look like, is a case, the Loewen case,⁸ the funeral parlor case that some you may have heard of. It has become Exhibit 1 in Public Citizen's campaign to demonstrate how multilateral agreements such as the one I'm talking about, but also the WTO and the NAFTA, in the words of Public Citizen, undermine basic U.S. laws that have, quote, "nothing to do with trade, more grandly undermine U.S. democracy, the U.S. rule of law, and indeed the entire American judicial system."

Now, if you examine Loewen's pleadings -- this is Loewen. I will talk about it in a second. It's a pending arbitral case that is now pending under NAFTA, but many saw it as a harbinger of what we would expect if we had the global Multilateral Agreement on Investment in place. If you examine Loewen's pleadings before ICSID⁹ -- this is the arbitral body under the bank¹⁰ auspices to examine investment disputes -- you will see that despite the hyperbolic rhetoric of Public Citizen, there are some grains of truth here as to the threats posed by Loewen's case.

Let's look at those cases. I got the Loewen brief from the Justice Department, which despite objections from Loewen said that these were public documents that they could give me under the Freedom of Information Act. Loewen Group's claims against the U.S. Federal Government is what the case is now going against, and it grows out of a Mississippi jury verdict for some \$500 million in damages, including \$400 million in punitive damages.

Now, what was the original commercial dispute that led to this jury verdict? It involved three contracts between competitors in the funeral home and funeral insurance industries. The face value of that dispute was less than \$1 million, a proposed exchange of two funeral homes, value of that dispute, \$2.5 million, and for a Loewen funeral insurance company that was a third part of the claim. That value was about \$4 million, so if you total up the total value of what this commercial dispute might have been worth, it was less than \$10 million.

The heart of Loewen's case before ICSID was that commercial claims involving such a relatively

7. Multinational enterprises.

8. The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3.

9. International Center for Settlement of Investment Disputes.

10. The World Bank Group.

paltry sum of money can never result in such a massively disproportionate judgment, \$500 million, without a serious miscarriage of justice. More specifically, it challenged the Mississippi jury verdict as a denial of justice prompted by blatant appeals to discrimination against the Canadian company based on race and nationality. It alleged that the Loewen Group's payment--and here what Loewen did was to settle the case. It paid \$150 million to the plaintiffs and did not try to appeal to the Mississippi Supreme Court. Why not? Because under Mississippi law, you require an appellate bond in order to appeal to the Mississippi Supreme Court of 125 percent of the judgment, which would have to Loewen bankrupted the company.

And so, what they did was they settled the case and then promptly sued under the NAFTA, as is their right, the U.S. Federal Government for an expropriation of property. Now, Loewen's claims are not I think on their face frivolous, and in fact, if you examine their memorial, it's accompanied by the weighty expert opinion of Sir Robert Jennings, a noted international law scholar. And what does Sir Robert say? This is an alleged case of a government taking of property that is extremely different from those prompted by government decrees seizing property, and that is, I think, very different from the typical regulatory taking that we may know from U.S. law. Sir Robert's expert opinion suggests that a disproportionate judgment that is given by a common law jury, even if it were to consist of purely compensatory damages, that that judgment may be illegal under both international law and the law of the NAFTA concerning expropriation. He argues that punitive damages that are awarded to punish and deter can also constitute violations of the letter and spirit of a treaty that is intended to promote and encourage investment, that an unreasonably high appellate bond requirement as the one I just described in Mississippi can result in a finding that local remedies have in fact been exhausted, that a coerced settlement can in itself be the basis of a NAFTA claim, and that a manifestly perverse jury verdict may require under the NAFTA agreement an annulment as a remedy under that agreement.

Loewen's pleadings also imply that appeals to racial or national animus by a lawyer, if left uncorrected by a state trial judge, constitute violations of national treatment that trigger liability for the federal government, and then, to top it all off, the Loewen claim comes accompanied by an affidavit by a former Chief Justice of the West Virginia Supreme Court of Appeals, and he adds a structural argument for discrimination against the Canadian company. He says that racial polarization characterized this case, and it pitted a white corporate defendant against a predominantly black jury that was presided over by a judge elected from a deliberately gerrymandered black district -- I'm quoting from the affidavit -- and this predictably produced a trial tainted by anti-Canadian discrimination.

In this fashion, the Loewen case appears to indirectly challenge the legitimacy of the Federal Voting Rights Act. Surprise! As a result, what do we have? We have a foreign tribunal operating largely in secret, and it's being asked to decide such politically loaded issues as to whether the federal government, and of course the federal taxpayers, are liable for mistakes of the federal judicial system at a time when the U.S. Supreme Court seems to be leery of letting the federal government impose financial penalties on states, under the resurgence of new federalism jurisprudence. Arbitral proceedings that do not permit amicus from interested third parties may be canvassing such extremely sensitive questions that some of you may be reminded of the late, lamented O.J. cases, that is, including the relative merits of state versus federal trials, the legitimacy of verdicts by racially imbalanced juries, and the propriety of reasonable appeals within the U.S. judicial system. A case under international treaty then risks becoming a forum for discrediting the use of juries generally in civil cases, for particular appellate bond requirements under state law, and even the propriety of punitive damages.

Now, you don't have to be a friend of Public Citizen to be alarmed by the prospect of what an incautious panel of arbitrators can do with a claim like this, or the backlash against international arbitration that such a decision could provoke, and I think not just among defenders of states' rights. Moreover, as is suggested by the impact that even the threat of such a case has already had on the negotiations for the Multilateral Agreement on Investment, we don't really need to have the ultimate arbitral decision reached in this case. That is, in a case that says Loewen is right, that is, the result doesn't matter as much as the fact that such challenges, international challenges, now appear to be cognizable under an international agreement that is subject to binding dispute settlement.

Now, cases like Loewen's, and there are other cases, by the way, that we can discuss in the question and answer period, but cases like Loewen's under NAFTA are possible because that treaty treats foreign investors essentially like bearers of human rights in regional human rights systems. NAFTA investors are given broad rights to fair and equitable treatment, in accord with due process and the international minimum standard. They have a right not to be discriminated against. Their property, broadly defined to include contractual rights and intangible assets, cannot be taken without prompt, adequate, and effective compensation. Like individuals that have recourse to the Court of Human Rights at Strassburg, NAFTA investors need not exclusively rely on their home governments or their domestic courts for protection. They have direct access to international arbitration and can, if necessary, enforce any judgments in national courts through the New York Convention for the Enforcement of Arbitral Awards and similar arrangements.

Now, what lessons can we draw from the Loewen case and other cases like this that are now pending in NAFTA? The first lesson may be that multinational enterprises who take advantage of their direct access to international dispute settlements may be individually helping themselves at the expense of other multinational enterprises and the interests of the business community as a whole. There's clearly a risk that cases like Loewen's, however plausibly based on an expressed and expansive state of the art investment agreement, may in the end destabilize the NAFTA itself and the prospects for any further expansion of investment liberalization via comparable treaty routes, such as the Multilateral Agreement on Investment.

Now, I concede, there's not much we can do about this problem. This is reminiscent of the older prisoner dilemma problems in international affairs, and the essence of investor-state dispute settlement is precisely to have individual investors, not their home governments, in the drivers seat. So these kind of cases may be the price we pay for direct access to arbitration.

But there's a second lesson here buried in the Loewen case, and that is to remind us of the hidden virtues of other approaches to international dispute settlement. While multinational enterprises frequently complain about their lack of direct access to, for example, the WTO forms of dispute settlement, at least the WTO dispute settlement has insulated itself from comparably expansive claims by restricting access to that approach to governments, at least as claimants, through panels that are dominated by individuals with government ties, and by adhering to interpretations of the guarantees of the WTO that largely reflect the political consensus reached among members in the course of prior GATT rounds. So far, the WTO dispute settlement has been as acceptable as it has been to members because WTO panels have not dared to suggest that trade is a human or corporate, as opposed to governmental, right. Perhaps the WTO's lack of access to both multinational enterprises and to NGO's, at least as claimants, is a virtue, at least as it has protected that regime from claims as destabilizing as Loewen's claims may be to the NAFTA regime.

Now, at present, many of us in this room are probably not thinking about multinational enterprises. We may be learning that not everything can or should be resolved via hard fought or high profile litigation. We may be learning that even our own courts may be delegitimized if we ask them to solve all problems, even highly contentious political issues that are not subject to preexisting law, and it may be that multinational enterprises will need to learn the same lesson at the international level if we are to build legitimate forms of international dispute settlement that will actually stand the test of time. Whether one regards the multinational enterprises that I've described here in their sins of omission and commission as due to endemic collective action problems or simply because of the fact that they are ignorant with respect to the new international regulatory environment that they find themselves in, what we should realize is that the rise and fall of the Multinational Agreement on Investment suggests caution before we conclude that these enterprises, which are of course the primary agents and beneficiaries of globalization, are really ready for globalization's methods of regulation.

So my own conclusion based on this narrow case study is that even when it comes to pursuing their own rather short-term, perhaps, corporate interests, the jury is out on whether multinational enterprises are good global corporate citizens.

Thank you.

MR. CONE: Our next speaker is James Gunderson. I won't introduce him, and I failed to mention while he's threading his way to the podium, I failed to mention the obvious, that we really want to encourage discussion once the four speakers are finished, so I hope you all have questions, and I hope we will have discussion. Jim.

MR. GUNDERSON¹¹: Thank you, and good afternoon everyone. I'll be coming at this from a little bit different angle.

I won't be speaking for Schlumberger, the corporation that I work for, but a lot of my views are shaped -- I've been working with Schlumberger at least seventeen years now, so my experiences with the company has shaped a great deal the way I look at things. It's not as well known a company as many others, so I'll say a few words about it, not so I'm speaking for it, but so you get a chance of the perspective I've had in my work in the last few years.

Schlumberger is a very global company in the sense that it operates in dozens, probably 70, different countries. Our largest business area is oil field services, providing technology and services to the petroleum industry. We also have a much smaller but significant business serving utilities, really more like we do in the oil field, helping them gather information and process and use that information, and we have another group of businesses that include testing, equipment for testing microprocessors, that we provide to the semiconductor industry, and something that many of you may not be very familiar with, but we're very excited about, which are smart cards, these microprocessor cards used in phones and things.

So it's a technology-driven business. We have about 55,000 employees, revenue of about \$8 or \$9 billion, and our management complexion, like the complexion of our employees generally, somewhat matches the places where we work if you think in broad terms of continents around the world. Our board, our top management, and the management of the various operating subsidiaries tend to be quite diverse nationally, and we don't think of ourselves as a company as a national of any particular country, but do think of ourselves as a multinational.

So I guess the reason why we're not as well known as many companies is we serve companies. We provide technology and services to companies rather than to the public, so we're not that involved in big promotional campaigns because brand recognition is important with our customers, but not so much important with the public.

So what I'd like to do is talk a little bit about what I think global corporate citizenship means and what it means to be a good global corporate citizen. It is an exciting topic right now. It's something that, I mean, I not only get into discussions with my family, my friends, the people I work with, the organizations that I work for, but one is reading about it, and there is really something going on right now that I think has a lot of interest in what corporations are responsible for, and I think many companies are thrusting themselves through publicity campaigns right in the center of this question of what's good global corporate citizenship.

It's easy to forget, but I'd like to think from time to time how different things are today than they were back in 1974, when the UN's Economic and Social Council formed that committee -- I'm not sure whether it was Committee or Commission on the Multinational Enterprise or Transnational Enterprise, and that was an era when it was the governments of developing companies that were really anxious for a regulatory regime to protect them from the sort of invasive nature of multinational enterprises, and it was really. The sources were in the developed world that were questioning this sort of thing, and today, I mean, we have the same debates going on, but the players seem to have changed.

You have governments for developing countries very anxious for the development benefits of

11. James L. Gunderson is Secretary and General Counsel of Schlumberger Limited, Secretary of the New York Chapter of the National Association of Corporate Directors, an honorary lecturer at the Centre for Energy, Petroleum and Mineral Law and Policy at the University of Dundee, Scotland, and Vice Chairman of Schlumberger Excellence in Educational Development (SEED), a non-profit initiative that promotes internet connectivity at elementary schools in developing countries.

multinational enterprises, but you have NGO's very concerned, local communities very concerned by the impact on a local level, and you have developed country governments, I think all over the map, depending on the political balance within those countries.

I do think things have changed quite a bit in the last quarter century, and particularly I think, and what I'd like to talk about a bit, is what's changed from the corporate point of view, the corporation's view of what its citizenship obligations are or ought to be. We don't really find today, unlike a quarter century ago, many major multinationals that are trying to emphasize that all they're interested in or should be interested in is maximizing profit for their shareholders and are denying any interest in other stakeholders. I mean, I think we've moved beyond that. There may be retiring CEO's who feel this way. I don't really think the people who would be replacing a retiring CEO who feels this way would be as likely to think that way as perhaps a quarter century ago.

In the program, there's a short Texaco article¹² about a few months ago, and I have to say that Texaco is thinking, and not because they're in the midst of some corporate reorganization of their own. I think Texaco has been active in more affirmative notions of corporate responsibility than that article reflects, but I like that article because what it says in a five year time frame, as opposed to a 25 year time frame, is a corporate view on equal opportunity for employees, health, safety and environmental awareness, companies' relationships with constituencies, and from that standpoint, a relationship not really saying what they should be doing with those other constituencies and philanthropic programs.

I think today we all have a sense that these aspects of global corporate citizenship are so well aligned with business interests that there's not much to argue about. I think it's pretty easy to see today why companies should be concerned about their employees and good employment policies – health, safety, environmental – and why they have to pay attention to the other constituencies today.

I think there is a big shift that's going on right now that's very interesting for people within companies, and you know, if you'll excuse me, it's a little bit like those inflection points you hear about in Silicon Valley where the rules are sort of changing and people are trying to figure out what the new rules are. Particularly, management is trying to figure out what the new rules are.

But before I leave, let me go over a little bit of what I think is sort of generally accepted and given within corporate circles. I mean, the idea that one would be trying to create or thrive as a global enterprise and have double standards for your employees, or from a health, safety, and environmental standpoint, that you would engage in what's sometimes called regulatory arbitrage, and you would do awful things where you could get away with it and only do appropriate things where you were afraid of being prosecuted. I really find it difficult to imagine good management today thinking along those lines and not thinking a little bit more long term. Today, you have to be recruiting everywhere. Again, I'm from a technology company perspective. It could be quite different in other industries, but for us to get the people we need, we have to recruit everywhere. I mean, the Indian Institute of Technology or the engineering institutes around Beijing, they're vital sources of recruiting for us. I mean, to sell our services and products to people everywhere, and our customers are everywhere, we're operating everywhere, and you just – everywhere is our home as a multinational enterprise, so you can't really pick and choose that you're going to bet the future of your company on this market at the expense of all these other markets, or on this place to recruit at the expense of all the others.

So I think there again is a very close alignment between being a good citizen, trying not to do harm, and taking care of your employees. That and general business interests. Nobody wants to work for a bad company, and nobody wants to, no company wants to be a bad company.

So where I think the most interesting part of the debate today, at least what I find the most active area of questioning going on within business organizations is what I'll call affirmative civic duty, you know, the duty to be doing good as opposed to avoiding doing bad. This is where this inflection point is. I mean, I'm in discussions with different companies, including Texaco, about how we are going to address this and what is it that we're going to do. How can we be positive in these, in other areas, besides what we're accustomed to, which is really doing our business well and maximizing profit and that

12. See *Texaco and Social Responsibility*, DIRECTOR'S MONTHLY, May 1999 at 1.

sort of thing?

I think a big part of the change going on, and probably the simplest to describe, is that corporate philanthropy today is not as exciting a subject for companies struggling with this. That's really associated with promotion and marketing. I think people understand why companies get involved in philanthropic causes, and you often in discussion have to stop the conversation and say, 'look, we're not talking about giving to good causes; we're talking about doing good as a company that is presumably good at doing things.'

I don't believe it reflects the inflection point or this change in the rules really reflects a change of opinion of top management in big companies as much as it reflects a change in the way companies are being managed. Innovative people in large enterprises are not waiting to be told to try to do something to address the world's global issues. They're moving in that direction as part of a broader cultural change our society is going through today. Upper management is in many cases watching this going on. I think good management is trying to channel these, this drive within organizations, and I don't know how long this is going to last, but right now companies are very concerned about what they consider their up and coming or highest potential people, very concerned about keeping them motivated and keeping them channeled within the organization, so finding ways to allow them to pursue things like this that mean a lot to them is very important for management.

So, I believe companies have an affirmative civic duty to be trying to find what they should be doing to address what I think of as the big global issues: the issues that are so big today that we're all worried about and that we don't really see any institutions out there that we think by themselves are going to be able to address them.

Now, I don't think we can expect every single multinational enterprise to take on every major global issue threatening the planet. I don't think many of them are going to be very good at addressing many of them, and I'm not talking about some massive redirects of capital and all the inefficiency that it would entail.

What I believe is that it's part of a global corporation's civic duty to figure out which of these big, daunting, global issues they are close enough, or are related enough to what they are good at, that they can include those issues in their general strategic planning. I mean, this is fairly clear and I think is fairly well-observed in the environmental field.

Like a lot of companies, just to take an example from the company I know, Schlumberger, our attention to the environment was really stimulated back in the early 1980's when we acquired some companies, particularly one in the semiconductor industry, that have really been doing some very serious polluting. And so we felt bombarded by a lot of regulation, by a lot of cleanup problems, and by a lot of issues we didn't feel we had caused. Lawyers are dominating the activity. It was very defensive, very negative. I mean, it was producing an introversion on these issues, and we kind of along the way, like many companies, we've come a long way to being in an area that's quite positive today. It took time, but today in our research, in our technology centers, in the field, people take a lot of pride when they are rolling out environmentally friendly services and technologies. We've gone way beyond responding to regulation. I mean, there are still things for the lawyers to be doing, but we're really striving today to bring value to our customers and a better environment for our employees. It's positive, and it's harnessing creativity within the organization, and that's the kind of synergy with a global issue that companies should be recognizing and pushing because they have -- there are business reasons to do that, from a motivational standpoint, but it's just the right thing to do and I think an organization is a healthier organization if it can do and articulate ways it's trying to do the right thing. Almost all multinational enterprise activity relates to some kind of wealth creation, and I think the world or much of the world or many parts of the world look to major corporations as a best source for promoting entrepreneurship, particularly local entrepreneurship, that many view as essential to address the poverty gap and the problems of poverty and development.

Just an example of how a company in its global strategy should then incorporate poverty and development in its thinking, when it's searching for the best recruits, like I said we do at Schlumberger. We do it everywhere. Our management system should be emphasizing local decision making. This helps

promote local talent that will be available. I mean, a person may spend, to take the Schlumberger example, four to six years in their Schlumberger career. Many will go back because there's a lot of pride in many developing countries among people who do have an experience in a well-run multinational, learn skills, learn management, develop their management abilities, and want to go back and be successful entrepreneurs in, whether it's Nigeria, Brazil, or wherever.

And when companies sort of give a little bit more emphasis than they might otherwise in emphasizing local decision making, and when they're adapting products and services to local markets, that should take place locally in marketing, local technology centers, or local joint ventures. This is a big change in the way I at least do my work. There was a time when, in a local joint venture with a local partner, you looked at that local partner -- this is a lawyer speaking, not an executive speaking -- you looked at it, and you wanted to minimize, really, the sort of hassle associated with having this local partner. You didn't want any interference in the way you're doing business.

A very negative approach, I think at least I have learned, is not a particularly good approach from a business standpoint. Today, I think companies are much more interested in applying the same governance, corporate governance principles, to its joint ventures with partners than are operating in their companies generally because there is a reason why good governance produces good companies.

The whole point is to have it be a well disseminated, well understood goal of the company and a goal of all of its employees to want to earn a local reputation everywhere the company operates as a force of good. Now, one example that's in the program, SEED, the Schlumberger initiative to connect underprivileged schools in developing countries to the Internet. Schlumberger has been a leader in remote connectivity for a very long time, and we're very good at it, and when local managers get their remote offices hooked up and then turn to hook up, you know, they've gone through a lot of learning. They've got some expertise and know-how in getting a set of offices in Bali Popon or some remote part of the world hooked up, and then turn and do that for an underprivileged school in the area is an enormous motivational thing among the local employees. And this got started by a local manager, this kind of coincidentally with one of their midlevel executives in headquarters, having sort of the same idea at the same time. They got very active. They did the first SEED without top management even knowing about it within the organization, and then it caught on. There was a lot of enthusiasm among employees who, because Schlumberger is a place where you move around and your family is living in one country and then four or five years later living in another country, have a great desire for connection to where they are.

So this really caught on with Schlumberger in a strong way. You'll see when you look at the SEED booklet in the program. We obviously didn't have a PR firm help us with our booklet. It's obviously a home grown thing, but it's a powerful thing for the organization, and we don't have a clue today how it's going to translate into anything commercially beneficial, but we just know it's a good exercise.

Companies not only need to be contributing significantly to local development. I see SEED helping with local connectivity, with schools, that's helping education, that should help future economic activity, and SEED is also very active in trying to connect elementary school children in different parts of the world through a website, and it's easier for companies to find ways to do good on the development side.

The sustainable part, I think, takes a little more effort, a little more thinking, and a little more creativity. And when I say sustainable, you've got poverty as one of the global issues, greenhouse gas emissions, biodiversity loss, water shortages, fisheries depletion, and these huge, huge issues that seem beyond what any institution can deal with. It's not always obvious where companies should apply themselves. For example, although oil companies are associated with global warming, I'm not sure they're well placed. I'm not sure that's where they should be, claiming that you are going to be a company that's been very good at defending, finding, and developing oil, that you're going to be good at developing alternative sources. I don't know. Maybe it works, maybe it doesn't. In our case, I mean, global warming, I see it anyway on the

consumption end. Petroleum is not necessarily the problem. You may need a lot of hydrogen for some of the proposals for fuel cells and that sort of thing. It's burning, it's using the petroleum that creates

the problem, so maybe it's car companies as opposed to oil companies.

But as a company in the industry, Schlumberger, we're a leader in the technology for finding, evaluating, and managing oil and gas reserves. Many of our employees who are very concerned about global warming ask the question or are demanding when we have gatherings, what's our position, what are we doing. It's a source of debate, but the global issue that a group of our management actually got off the ground, and again sort of a grass roots rather than a top down decision, was water shortage. A few years ago, a group of up and coming managers initiated a startup business to adapt Schlumberger technology that's finding oil in the ground to finding, evaluating and managing water resources.

Now, I don't think there's anybody from that group here, so I can speak frankly. I don't see the remotest chance of that business producing a profitable activity in a very near term. If we were using the same measures for that activity that we use for many of our others, it would have been killed a long time ago, but it is important to these up and coming managers, so it's important to us that the company is pursuing it.

So, because of that, we're actually creating an incubator to help nurture and sustain projects and get more ideas from the organization that don't have to have anything to do with sustainable development or doing good things. It could be anything, but it was a spark for what I think was a good direction that the company should be going, and it was also good because you always, in the end, find the passover to promoting good business practice.

I don't think we would have our incubator for crazy high tech ideas that we have today if it wasn't for this initiative that was more driven at the time by managers from developing countries that knew of water shortage as the big problem at home, and they wanted this big company they work for to be doing something about it or playing a part there.

So that's kind of this view I have that companies are going to need to stretch a little bit to be good corporate citizens, from what I'm calling this affirmative or active civic duty context rather than the other aspects of it, which is not doing harm and taking care of your own, which is obviously important as well.

I must say I just can't resist referring you to the back of the program materials where I really like this chart, which you'll see at almost the next to the last page. It looks like this, if you want an image of what it's like for someone in my job to be coping with social responsibility. It's in the very back, almost the last page of the book, and you have what I grew up with, which is business ethics and compliance programs preventing harm, avoiding risk, I mean, a very internal protective thing and you have next to it corporate social responsibility efforts, positive force, gaining added value, external environment, and being more extroverted. This is what is happening right now, I think, and I like this image because people like me who are used to this left hand stream are having to get off of our behinds and working on the right hand stream. Most people that I'm working with within the organizations I work for see these as belonging together and actually see that we put them together. I had gathered some of the executives together and asked them very leading questions about some of these kinds of issues to get them to talk, get them to express their opinions, and from a compliance standpoint, being able to present a company's programs with a positive face to them, is actually very good for getting the people out in the field to listen and it made compliance programs more effective.

So as a lawyer, it's actually a positive thing.

Now, I'm going to say something that probably will strike some people as a little strange, but in part you can look at it as a reaction to Professor Alvarez's question of whether we have dropped the ball as multinational companies in not having played our part in the great international political arena in terms of what should be the rules, the legislation out there governing international activity. In my little paper in the beginning of the program, I probably carried it a little too far, but I used this analogy to individual citizenship of how can we understand corporate citizenship. There is one aspect where that analogy is very inappropriate. I don't really feel comfortable at all with corporate participation in the political process. I think running through the program and running through the concerns of people in my family, friends, and people I work with is this notion that there are these enormously powerful organizations that are applying a lot of the resources that I believe should be applied to value creation and wealth creation. They're applying them to the political process, both at home and abroad, in a way that I think makes it

hard for us to imagine how are we as a group of different players in this global community are going to come to consensus about what needs to be done and how we should go about doing it.

I find it surprising that there isn't more energy coming from civil society at trying to insure that corporations are more where they ought to be. I mean, I believe corporations have a great deal -- large enterprise -- I'm using corporation as sort of an abbreviation for large global enterprises. They know a lot, there's a lot of talent, a lot of technology, they can contribute a great deal to debate. They can contribute a lot of information, and it's a very big gray area between that exercise and lobbying, inviting yourself to testify before some hearing versus waiting to be asked and that sort of thing. And I don't have the faintest idea how one would go about trying to better regulate large enterprise involvement in the political process, but I don't, I mean, from my days in law school when I first heard that corporations had First Amendment speech rights, which I found very puzzling at the time, this notion of corporations as citizens in the sense that they should have an active -- I mean, the notion that my chairman and CEO should somehow be representing me as one of the employees of his organization, he should be determining the political point of view of our company, I find a little bit strange. So that's one part of the debate.

I hear and sense a lot of unease about the size and power of global multinationals and what seems to be happening behind closed doors and what they're doing, but I don't see that being channeled into campaign reform and improvements in the political process, but that's an area of very little expertise. We have a very clear policy in Schlumberger. It is forbidden in any country for any employee to make any donation to a political party or to a politician or a political group in any way that could be mistaken for a Schlumberger donation. It's a wonderful rule. It simplifies things immensely in terms of making sure people are doing things that benefit our shareholders rather than these large kind of -- I mean, we have -- we are blessed with not having big parts of our organization having to worry about legislation, which I think is a beneficial business characteristic of our company.

So those are my observations. Thank you.

MR. CONE: We now have Rick MacArthur, who will speak to us.

MR. MacARTHUR:¹³ Hi everybody. I usually speak with notes, but I had my pupils dilated this morning, and the ophthalmologist promised me I could see, and I can't. So you'll have real broad, broad brushstrokes.

My book is about NAFTA, but it's a way of getting into the way, quote, "free trade" has been sold and globalization has been sold in the United States to the American people. And as you can tell by the quotation marks around "free trade" in the title, obviously I don't think it's being sold on the up and up, and the basic point you need to understand is that NAFTA is not a free trade agreement; it's an investment agreement, or a labor exportation agreement, between the United States and Mexico, or it's a hoax, as Richard Gephardt put it so succinctly, and the expropriation insurance aspect of NAFTA which the international lawyers are even more expert on than I am, is an absolutely crucial feature to the NAFTA agreement. It's what distinguishes NAFTA from the Canadian-United States Free Trade Agreement of 1988, which if you just compare the expropriation clause, you'll see that the United States is much more concerned about Mexican expropriation than they are about Canadian expropriation, and this of course stems from the 1938 nationalization of oil in Mexico by the current Cardiness's father. But as an investigative reporter, which is what I am, I try to do investigative reading, which is a term I picked up from the great political writer, Walter Carp, great late political writer, and if you read the book or get into

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it, you'll see that my reading takes me into interesting areas.

Now, but just to summarize what happens in the book so you know what I'm talking about, if you're talking about corporations as global citizens, my corporate citizen is called Corporate Brands Acco, which owns a subsidiary called Swingline Staplers that used to operate in Queens and was shut down two years ago, or a year ago essentially and moved, lock, stock and barrel, to Mexico. The reason for moving, of course, was that the average wage rate in New York was about 11 bucks – \$10.54 an hour – 11 bucks an hour average, and the average wage right in Mexico and Nogales is a dollar an hour, and my corporate citizen is a labor racketeer. The way corporate citizens along the Maquiladora belt operate is there's a local Maquiladora association, the managers in these towns all meet on a regular basis, they all know what each of them pays the other, and each pays its employees. There is an understanding between the CTM¹⁴, which is the national labor union in Mexico, and the government. They've simply switched allegiance now from the PRI¹⁵ to the PAN¹⁶ led by Vincinte Fox, which is that nobody gets a raise unless the union agrees to it, which means nobody gets a raise unless the government agrees to it, and one of the paradoxes of Mexico is that the local corporate citizens pay slightly above the Mexican minimum wage. They don't have to, but they do, and it's good politics because it keeps the CTM from giving them a hard time.

But essentially, the CTM is engaged in a labor racketeering scheme with the Mexican government, with the local employers, and with the United States Border Patrol, because in all of these discussions about free trade, which incredibly ignore politics for the most part, what's not discussed is the simple fact that there is no labor mobility allowed in NAFTA or guaranteed in NAFTA, and if you read the works of David Ricardo, which nobody's read – – none of the politicians who espouse so-called comparative advantage have ever read Ricardo – – or even if you are a follower of the teachings of the great English radical Richard Cobden, you realize it has

nothing to do with free trade in the sense that they conceived it, which assumed a certain amount of labor mobility, or what is permitted in the European community.

Now, that being said, I'm not entirely hostile to free trade theory, especially in the Cobdenite sense. George McGovern, in my book, talks very eloquently about the advantages to corporations which know no flag, which are not nationalistic, and the advantages that can and sometimes do accrue to their employees in foreign countries, because it's true that in some foreign countries the corporations are treated better by the foreigners than by their domestic employers.

That being said, you have to understand that the corporate citizens are not going to these countries in order to be nice, nor should they. I don't believe that's their responsibility. They're going because of the cheap labor, and what NAFTA does and what PNTR¹⁷ does, the more recent manifestation of free trade propaganda, what they both do is lock in low labor wages and protect the host. The companies within these, to some extent, protect the companies within the foreign country from expropriation.

Now, I don't want to go into great length about this because I want to get the discussion going, but I would like to make a couple of observations about the way you should, the way I think you should, look at this issue of globalization. One of the observations I made, and this is where I part company with left wing critiques of free trade and globalization, and right wing, to that extent, is I think the left in this country, and possibly in Europe, still cling paradoxically to the notion that foreign countries that exploit or mistreat their employees, or rather – – see, I'm falling into the same rhetoric – – mistreat their citizens, can be reformed through corporate citizenship, good corporate citizenship. You'll hear it all the time that free markets lead to democracy, free markets lead to reform, that the process of globalization is ipso facto a process of global liberalization, political liberalization.

I think that's preposterous, and the reason I think it's preposterous is I've seen the way Mexico

14. Confederacin de Trabajadores de Mexico (Confederation of Mexican Workers).

15. Partido Revolucionario Institucional (Institutional Revolutionary Party).

16. Partido de Acci3n Nacional (National Action Party).

17. Permanent Normal Trade Relations.

operates close up, but I also think it's preposterous theoretically, because the idea that you're, and we talked about this at lunch, the idea that you would ask the plant manager of Motorola in whatever province in China he or she happens to be operating in to militate for human rights or for higher wages is preposterous. It's literally not their business. If they want to sort of go off on an independent career of human rights agitation or labor union organizing, of course they'll find themselves kicked out of the country very quickly or hauled back by management, which went to these countries in the first place in order to avoid the sort of strict, what used to be strict, labor law in the United States, and environmental regulation.

And on the question of sovereignty, again, I think it's overstated by both the right wing nationalists represented by Buchanan and what you would think of as left wing, I suppose, critics like Nader, even though I like Nader very much, because when push comes to shove, we simply in the United States simply abrogate treaties. My favorite example being the trucking provision of NAFTA. We should have allowed Mexican trucks into the United States as of January 1st of this year. That's guaranteed under NAFTA, but of course the Teamsters Union said, "If you do that, we're not going to endorse Gore," and Jimmy Hoffa, Jr. said very clearly, "I'm not endorsing anybody until I have assurances that this portion of NAFTA will be abrogated." Right now there are no Mexican truck drivers driving in the United States, and it's just not going to happen.

It's a blatant abrogation of NAFTA, and the Mexicans are going through the motions of complaining about it, but as Gephardt has pointed out, the NAFTA side agreements and tribunals are--well, I shouldn't say the side agreements, but the NAFTA tribunals are not very effective mechanisms for getting your way if you're not happy with one aspect or another of NAFTA.

Now, I just would make one other point about our friendly corporate citizens here. You should also know that in the history of NAFTA, NAFTA was not received well by the business community initially. Precisely because American business smelled a stealth liberal globalization strategy by, I suppose you could say, by the environmentalists, by labor unions, by Richard Gephardt, because they thought, quite rightly, that the left or the liberals would like to tack on all sorts of other social agendas to a trade agreement, which isn't even a free trade agreement. They had to be bludgeoned into it to some extent by the internationalists in the business round table. We're talking about the companies that really do live on free trade, American Express, or free investment, free movement of money across borders, Kodak and General Electric. There aren't very many pure multinationals in the United States, but they had to be talked into it, and they were talked into it, paradoxically or ironically, by a Democratic administration that recognized that free trade, in quotes again, always in quotes, "was a great fund-raising technique," and you will see now today that there is literally parity between the Democratic Party and the Republican Party in terms of soft money contributions. This is largely due to the fact that Bill Clinton understood that NAFTA was a great way to raise money. He talks the talk, the international peace and globalization and democracy, so on and so forth, but his principal motivation in pushing NAFTA and presenting himself as what they call the new Democrats, was fund-raising, and you could see the instant increase in soft money contributions to the Democratic Party once NAFTA passed. Companies like General Electric and American Express, which gave virtually nothing to the Democratic Party, suddenly they're giving as much or more to the Democrats as they gave to the Republicans.

I would also just make the point about the race to the bottom being a misleading -- again, I'm piling on the left, because they should be my natural allies, and as a good skeptical reporter, I like to beat up on my allies first. The race to the bottom is a misleading bit of rhetoric because it implies competition. It implies corporations duking it out worldwide for the cheapest, best labor. And when I go to great lengths to explain, and I show in the book that this is the last thing corporations want, they want a controlled labor environment, they want stability, they want level playing fields within a country, and they don't want their companies being raided by other companies in the local Maquiladora town or the local commune in China. They don't want anybody raiding each other, other than people here want companies raiding their best employees. They want stability, and they want a level playing field, so it's not really a race to the bottom. It's a plea for maintenance of the status quo, as long as the host government will permit it.

I just quickly gave you a couple of examples of things, interesting things, that are happening in the NAFTA world. You may have seen the story about the California case where a company that was organized in Southern California, a U.S. company, was instantly shut down, and the company decided to move it to Tijuana. The National Labor Relations Board went into court, I think federal court, to stop the company from moving to Tijuana on the grounds that this is a violation of the Wagner Act.

So when you talk about international law or international standards trumping national law, this is an example of national law trumping NAFTA, and for now the ruling stands. The company can't move to Tijuana. I have not heard of a comparable case. I don't think there's much hope for the labor movement, of course, because companies are flooding south in search of cheap labor. If you're a factory manager or factory owner, you'd have to be crazy not to take advantage of the controlled labor market in Mexico or China. It's too good a deal to pass up.

Then I would just also bring your attention to a recent Human Rights Watch report that was released, I think in the last two months, that talks about violations of international law within the United States. And I would say that while I am concerned about sovereignty on a theoretical basis like the Nader-Buchanan people, I still say that NAFTA, because it's clear that NAFTA and to some extent GATT trump the Wagner Act, you can't automatically assume that the sovereignty argument or the sovereignty problem is the principal problem here. I'm beginning to think more and more that these are strictly national political problems; they're not global political problems. As I pointed out, the principal motivation for the Democratic Party to support NAFTA or for Clinton to support NAFTA is because he can raise more money from corporations than he can raise from labor unions. It's a simple arithmetic decision, and I'll just leave it at that. Thank you.

MR. CONE: I'll ask Professor Steven Ratner to be our final speaker, and then we will go to discussion and questions. Professor Ratner.

PROF. RATNER¹⁸: Thank you very much. It's a great pleasure to be here today. I think I may need my water, since I'm struggling with a cold.

The last decade has witnessed a striking new phenomenon in international strategies to protect human rights, a shift by global actors concerned about human dignity from nearly exclusive attention to abuses committed by governments to close scrutiny of the activities of corporations, and in particular transnational corporations. Now, claims that corporations have a detrimental impact on human welfare are of course as old at least as Marxism and have always been a mantra of the left worldwide, but today's assertions are quite different. They come not from ideologies with a purportedly redistributive agenda, but from international organizations

composed of both rich states and poor states and from expected NGO's like Amnesty International and Human Rights Watch, whose very credibility turns on avoidance of political affiliation, and in making these claims, these states and these organizations are making claims based on widely ratified and widely accepted notions of human rights, and I'll just give you a few examples before I get into my talk of the sorts of claims that are being made.

The United Nations Security Council condemns the illegal trade in diamonds related to Sierra Leone and asks private diamond corporations to establish a regime to label diamonds of illegitimate origin. The European Parliament calls on the European Commission to develop a

multilateral framework, including a binding Code of Conduct for European corporations. The U.N. Human Rights Commission establishes a working group on the methods and activities of transnational corporations. Human Rights Watch establishes a focus group on corporations and issues

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lengthy reports about Texas-based Enron Corporation, Shell, Mobil, and other corporations of complicity in human rights abuses in India, Nigeria, and elsewhere.

The U.S. Government oversees the creation of an apparel industry code of conduct in response to public concerns about violation of labor rights. And lastly, citizens of Burma and citizens of Indonesia sue Unicol and Freeport-McMoRan in U.S. courts under the Alien Torts Claims Act, alleging human rights violations, although they lose both cases.

So what we have witnessed in these last two decades are strong claims being made by human rights groups without, in my view, any standards for judging them. Corporations have tended to respond by either denying the applicability of duties or denying the facts, and what I am trying to do in the course of a paper that I'm writing is to try to offer a theory under international law that would address the question of what sorts of human rights obligations corporations have. And I'd like to summarize that paper or that project in three parts today. First, by asking why we might want to hold corporations responsible for human rights abuses, secondly, how we would do it, and third, what implications it might have for international law.

I'll say before I even start that I believe quite firmly that any kind of theory for talking about corporate responsibility and human rights has to be overtly grounded in international law and not in parochial notions of individual governments or individual states like the United States. And so I don't give much weight to the cases now going on in the United States under the Alien Tort Claims Act, and I believe that one has to look at international law notions because the top multinational corporations are all based outside the United States. Most of the top five are all

based outside the United States, as are most of the top 25, so I think one has to have an international and not a U.S. approach to this problem.

Secondly, I very much want to start with what I believe is a nonbiased position, neither pro- or anti-multinational corporation. The only thing I'm pro is pro-human rights, and so I think it's necessary to develop a theory that doesn't get into the merits of whether or not Human Rights

Watch's accusation is right or wrong, and the facts I leave to somebody who actually knows or has been to the various countries where these alleged corporate violations are taking place.

Okay, now, why corporate responsibility? Historically, and I think Mr. Gunderson went into this to some extent in his talk, there's actually been a dynamic between the relationship between north and south, between the rich capital exporting countries and the poor capital importing countries, on the way multinationals should be treated. First, we had the Colonial era where we have a dynamic characterized by the rich states essentially controlling the poor states. They weren't even states back then; they were colonies. Multinational corporations were in a sense agents of the exploitation, and this lasted from the 1600's roughly through the war. After World War II, we have the period of decolonization, and what we see is a demand by newly independent countries for political, juridical, and economic equality. The U.S. accepts the idea of juridical equality, and the poor states start demanding economic equality by expropriating the assets of the multinational corporations, by calling for something called a new international economic order in the 1960's and '70's, and by demanding codes of conduct on corporations that they were concerned were violating their law. And there were some notorious episodes of corporate violations by ITT and by United Fruit that perhaps gave the Third World reason for concern.

Today, in this sort of globalization phase, we are seeing a sort of counter reaction to that, which is that much of the developing world sees that multinational corporations have a big role to play in economic development. There's a huge increase in foreign direct investment. The rhetoric of the 1960's and '70s, about how a new national economic order is replaced by this network of bilateral investment treaties that José talked about that give many guarantees to corporations, including the right to go to international corporations. So whereas corporations used to be concerned -- whereas, I should say, host states used to be concerned that multinational corporations were not complying with host country law, now they don't care as much about that or they've changed their law to in a sense accommodate the corporations. The result is that we see accusations by NGO's that the corporations are in fact working together with the government somehow to violate human dignity, or perhaps the corporation itself violates human dignity, so the problem is changed essentially from complaints that multinational

corporations violate host country law to complaints that they obey host country law, but they thereby ignore international standards.

Now, the typical response of my discipline and José's discipline is to treat these issues as what we call areas of state responsibility. In other words, human rights is something that creates duties for states. States are responsible for not abusing the rights of their people, and they pass domestic laws controlling private actors, but what those private actors do is not really within the ambit of international law. And I argue, I believe after having done some work on this, that this is not enough, that if indeed corporations represent a new loci of power, as Jose assumed, we can't just rely upon states to control the activities of a corporation.

First of all, the corporation may not be an agent of the state, and even if it is an agent of the state in some respects, it may not – – it may be desirable or it is desirable to target international legal norms towards the parts that are best able to control the offending behavior.

Now, is there any precedent for this, this idea that we could have international law putting direct duties on entities other than states? Well, in fact there's lots of precedent for it. In the human rights area, there's a whole area of law known as international criminal law that goes back to the Nuremberg era, which says that individuals have certain duties in the area of human rights, that individuals cannot commit certain grave violations of human rights, and there's a whole corpus of international law about what individuals can do and can't do, and targeting the individual is now seen as necessary to protect human rights, that targeting the state is not enough.

Outside the area of human rights, international law has already sort of crossed the Rubicon, as it were, and said that nonstate actors have direct duties and even that corporations have direct duties. International environmental law has lots of or several, probably about five or ten, treaties that say that polluters are directly liable for certain environmental harms. International labor law has rules on labor standards with respect to forced labor, with respect to child labor, with respect to other things. There's a new international regime on bribery which places direct duties on corporations. I'm sure Mr. Gunderson is involved in making sure his company stays clear of the law on this. There's a whole – – there's a new international bribery convention that says that corporations cannot bribe foreign governmental officials or they will be held criminally responsible for it. On top of this, corporations already have rights in international law. They have the right under the NAFTA and under the bilateral investment treaties to go to arbitration. They have the right under human rights law to make claims against governments for violations against free speech and other rights. So corporations already have rights. They already have duties, and what I'm suggesting is we need to talk about those duties in the human rights area as well.

Now, if the notion of state responsibility is not sufficient, in other words, if I argue going after governments is not an effective way to police the behavior of corporations because corporations may not be governmental actors or because the government may not have control over them or other reasons, why not just go after the individuals in the corporations? Why not just say, well, the president of this company that's been somehow implicated in the human rights abuse should be individually responsible under international law? Well, there's a short answer and there's a long answer. The short answer is in fact international criminal law actually holds individuals responsible for a very, very small number of crimes. Genocide, crimes against humanity, war crimes, the kinds of crimes that corporations are not typically involved in, in my view. Not the kind of things frankly that the NGO's are accusing corporations of.

The longer answer is, in fact, holding a corporation responsible accomplishes certain goals that individual responsibility has not. Any of you who have studied any theories of corporate law, corporate liability, know that the reason that we allow individual private suits against corporations and even individual criminal complaints against corporations is because penalizing the corporation for conduct by its officials is seen as having a useful deterrent effect, a useful controlling effect as compared to going after individuals. So I think we can see corporate responsibility as a response to the ineffectiveness of both state responsibility and individual responsibility.

Now, how could we conceive of holding corporations directly responsible? Well, I'm trying to, as I say, sort of build a framework here, which looks at, which has sort of two main pillars to it. First, what I call the sort of sphere of influence of the corporation, and second, the kind of human rights that the

corporation could conceivably be in a position to violate. Now, what do I mean about the sphere of influence of the corporation? Well, the sphere of influence component is actually composed of several different factors. First of all, I think that a corporation's duties in the area of human rights are first a product of the corporation's ties to the

government. That is, that all other things being equal, the closer a corporation has ties to the government, the larger are its duties in the area of human rights.

But how strong a tie are we talking about? Are we saying that any time they meet together or talk together or work on a project, that therefore the corporation is responsible for anything the government does wrong? Well, I think we have to be a little more careful than that, and in fact, international law provides some answers to this question. If, for instance, a corporation were somehow to receive instructions from a government to commit some kind of human rights abuse, if the government were to ask corporate security officials, employees of a corporation in a particular area, to assist the government in roughing up political opponents or something like that, international law would recognize that the government is liable and it would

recognize, I think, that the corporation is just as liable as the government.

International law recognizes the idea of complicity, that there is in fact a duty on private actors and on states not to be complicitous with each other in violating human rights. So that if a corporation is, as I say, if it's lending its equipment to the government for putting down a political rebellion in a way that might violate human dignity, or if a corporation is lending its personnel, which again, these are accusations that are being made by groups like Human Rights Watch, then we can talk about the corporation being complicit in the human rights violations of the government.

Indeed, it's even possible to talk about the possibility -- that's redundant -- it's even possible to think about the liability of the corporation for acts of omission. If, for instance, the government has handed over a large tract of land to a corporation to essentially sort of have kind of a de facto governance in that area, and the corporation does not sort of follow up on what the government might do in that territory, which is again one of the accusations that is being made against Freeport-McMoRan regarding Gary Injia, one could talk about the corporation being responsible under well-accepted theories of corporate responsibility.

The second factor with respect to the sphere of influence of the corporation is what I look at as the nexus of the affected populations. When it comes to states, we know who the right holders are. The citizens of a state, basically the residents of the state, are the people who have human rights that the government has a duty to respect. It doesn't work that way with corporations. Corporations don't operate in that same sort of neat, territorial way, and we need to have a sense of who the right-holders are, whose human rights can a corporation violate, and I would say that all other things being equal, the more control a corporation has over individuals, the more duties it has towards them. So we can talk about the difference between the duties of a corporation towards its employees, towards its employee's family, towards the people over a territory that it might be able to affect through pollution or to affect on the quality of life, and we can even imagine decreasing amounts of duties as the population gets further and further from the ability of the corporation to control it.

The third factor I would look at with respect to the sphere of influence of the corporation is who in the corporation is actually -- if there's something wrong that is happening, some complicity with the government, potentially, or some other violation of human rights, who is doing it? Is it being done by an employee of the corporation? Is it being done by a contractor? Is it being done by a supplier, a joint venturer? There are all these complicated corporate relationships.

As you know, some of you follow the Apparel Code of Conduct. It wasn't that Kmart was supposedly violating workers rights. It was what some subcontractor of Kmart did, or some subcontractor of a subcontractor of Kmart was doing it. Well, how far do we want to go up and down the subcontractor chain to say it's a little too far from Kmart to hold Kmart responsible? This is a difficult question. I would say it would turn for the most part on the corporation's control over the person committing the abuses. A contractual relationship might be evidence of this control, but it might be neither necessary nor sufficient, and you would have to make a judgment call as far as contractors, subcontractors, subsidiaries,

or suppliers as to whether or not their activities can somehow be attributed to the corporation as a whole. I think it's far-fetched to say that every single person in the supply chain of a multinational corporation, if they happen to commit a violation, that it's the responsibility of the multinational corporation. I think that's extending a theory of moral culpability much too thinly.

Now with respect to the issues of the rights at issue, which was sort of the second pillar of my theory of corporate responsibility. Human rights law in fact poses many different duties on states: the duty to prevent violations from taking place, the duty to educate governmental officials to insure that human rights aren't violated. Let's say it's the right against torture. You have to make sure that governmental officials don't torture people, you have to make sure they're educated so that torture is prevented, and you have to make sure victims of torture have a remedy. There's all sorts of corporate duty that human rights law places upon governments. I wonder and I question whether all of these duties can simply be transferred to a corporation. The fact is a corporation has a different stated purpose in life than a government does, at least liberal government. I think one of its main purposes is to protect the human rights of its citizens. This is not, let's face it, the principal purpose that corporations exist. They exist to generate economic wealth, both generally and for their shareholders, and I would say that to talk about imposing a broad range of duties on corporations is quite unrealistic, and what I would focus on is a duty on corporations to avoid direct infringement of human dignity.

Now, what do I mean by direct infringement of human dignity? I would say that corporations have, that the duties of corporations are highest, when it comes to their ability to have a direct impact upon the sort of physical, mental well-being of individuals, and that their duties are to prevent that from, to prevent those basic human rights from being undermined. And so a corporation should, for instance, insure that its managers don't inflict corporeal punishment on the employees, insure that it doesn't result, it doesn't conduct its activities, in a way that would eliminate the only supply of drinking water to a population, but because those are activities that have a most direct effect upon human dignity. I would say that a broader set of duties is on corporations with respect to, say, a duty that they have to go out and promote human rights. They have to promote human welfare in an affirmative way. I think that's great corporate policy as Mr. Gunderson said, but I would not say that they have a legal duty to engage in that sort of conduct.

I would prefer that the NGO's focus on the extent to which corporations are involved in somehow undermining human dignity in the most direct sense and place duties on them to prevent that sort of behavior.

So, in a sense, what my theory turns on is the answer to three questions: Who is violating the right, who within the corporate structure? Whose right is being violated? How close to the corporate activity? And what right is being violated, the difference between, let's say, the right to physical integrity and some other human rights which might be less important human rights? And essentially what I build or what I'm trying to build is sort of two sets of duties from all of this. One is what you might call complicity-based duties, that is, duties not to cooperate with the government when it is violating human rights, based on certain degrees of proximity with the government, and secondly, a set of duties not to directly infringe human rights itself, not to become a violator of human rights. What I'm trying to do and my thinking about this is kind of testing this against some of the claims made by NGO's, and if you want during the question and answer period, I can talk about this some more, but for instance, we could test this theory against the claims being made against Enron by Human Rights with regard to human rights abuses in Maharashtra State, India. We can test this against some human rights allegations by NGO's against some apparel manufacturers, and I think what we will do is see some of these claims might raise legitimate human rights concerns and some of these claims don't.

How could we implement this kind of a theory? I don't have time to go into a whole lot of detail, but there are four or five different ways in which we can imagine this theory of corporate responsibility being implemented. First of all, as a process matter, I would say this kind of theory has to be done in an open, transparent sort of way involving human rights groups, corporations, and governmental representatives. This can be done on a national level by empowering government agencies to monitor corporate conduct in a way they haven't done before. Right now, we monitor them for violations of

securities laws. We could empower the Department of Labor to monitor them for human rights practices based on data coming in from the State Department, perhaps. There are a whole lot of regimes. We already used the criminal method with respect to anti-bribery on corporations, so there's a range of machinations we can contemplate.

There are a range of international regimes we could contemplate through a treaty that could create a binding code of conduct. I'm not sure we have to go that far. We can talk about informal, nonbinding codes of conduct. Right now there are some very, very vague codes of conduct out there that have been passed by the -- have been adopted by the OECD and the ILO.¹⁹ Basically, they say things that corporations should protect human rights of the people affected. There's something of my theory in there when they talk about the people affected. I think that's the same as saying the people are under their control or within their sphere of influence, but that's not exactly detailed guidance that the General Counsel of Schlumberger or somebody else would want to give to his people in the field.

So I think we need to think about variety of international fora that could flesh out more detailed obligations of corporations in the human rights area. This could be done by, and this would need to be done by, international institutions that have credibility with states, with NGO's, and with corporations. There are international organizations that have credibility with some, but not others. OECD has plenty of credibility with states and multinational corporations, but not any with the human rights NGOs. The UN has plenty of credibility with the human rights NGO's, but none with the corporations.

So we have to look at other possibilities that include rich states and poor states, human rights NGO's and multinational corporations.

In addition, we can contemplate this being done outside of a sort of formal legal framework entirely, simply by asking the NGO's to use sort of clearer standards in their accusations being made against corporations. As I say, it has sort of framed the debate in more sort of legal terms so they can put reasonable legal expectations against corporations. Finally, the corporations, of course, can implement this theory themselves by taking the codes of conduct that a number of them have and making them more detailed with respect to the human rights issues and taking the compliance issue a bit more seriously than has been done to date with respect at least to the Apparel Industry Code of Conduct. So essentially my idea, at least I think, is trying to represent a challenge to a number of communities and areas of the law. It's a challenge to international law to more directly regulate nonstate actors, as José talked about in his introductory remarks. It's a challenge to human rights law to focus not just upon the state and, by the way, I'm not suggesting that corporations commit more human rights violations than states. I think that's ludicrous. The fact is that NGO's are absolutely right to continue their focus absolutely on the state, which is the entity with the most resources and most capability of committing human rights violations, but I would say that human rights law -- I think the NGO's are ahead of the law in this sense. Human rights law needs to recognize that violations of human dignity can come from other actors besides states.

I hope my proposal represents a challenge to the corporations themselves to in a sense stop trying to have it both ways, to stop trying to be the recipients of rights under the BIKs²⁰ and rights under human rights law, but to recognize that they are also the holders of duties, that if they have the power they are increasingly having and if they enjoy the power to impinge on human dignity, which some of them apparently do and a few of them apparently have, then I

think it's incumbent on them to recognize duties in this regard.

And finally, I hope my idea is a challenge to the NGO's themselves to focus their claims against corporations on those that really violate human rights law, and to sort of avoid the anti-multinational corporation rhetoric that seems to plague many of them. And ultimately, I guess in that sense, my goal is to sort of help end the dialogue of the deaf that I think is now taking place between NGO's and corporations, and to focus their concerns on legitimate human rights issues in the hope that corporations, like states, will be able to improve their practices in this area. Thank you.

19. International Labor Organization.

20. Benefits-in-kind.

MR. CONE: I hope we'll have some questions or comments. Yes, sir.

AUDIENCE MEMBER: This has to do with the relationship between legitimate human rights questions that Professor Ratner talked about and affirmative civic duty that Mr. Gunderson talked about. A person from Mars coming and listening to the panel would believe listening to one that maybe the main area of human rights of concern might be economic, social, cultural rights, sustainable development rights, environmental issues and so on, and listening to the other might say, oh, Professor Ratner seems to be echoing the rather limited mandate of many great human rights

organizations, including Human Rights Watch, which has blistering reports on corporations, primarily civil and political rights issues. My question, then, to these two gentlemen and to the whole panel, Professor Alvarez as well as Professor MacArthur, is that the way ultimately to put all this citizenship together, isn't it important to regard both sets of human rights and both approaches legal, going to certain kinds of legal codes and new developments on the one hand and the concern for affirmative civic duty, reading the UN development report and looking at growing gaps and wondering about corporations' impacts on marginalization. Isn't that also important?

MR. GUNDERSON: I think it's a very good point. I guess I would draw one distinction, which is I think the kind of accountability, legal accountability that Professor Ratner was talking about, is, as far as corporations are concerned, better suited for the human rights area to -- you have a natural phenomenon -- I mean, I'm one of these people that believes from my own experience that companies that actually operate, particularly service companies and technology service companies actually operating on the ground in a developing country, do naturally find themselves at odds with regimes that are trying to restrict human rights of the sort that relate to information, for example communication, that sort of thing, and a company that cannot operate the way it believes it ought to be operating vis-a-vis its employees, and what its employees are doing in order to operate. It doesn't believe it's operating in a way that it thinks is appropriate. It shouldn't be there, I believe, in that jurisdiction.

To ask it to be going much further than not violating human rights is likely to put it -- you heard my unease about the corporate role in the political process, and I think you're inviting corporations to maybe get, you know, offering foreign corporations to get involved in what I think are local political issues, but I do feel that I missed a very important, or did not emphasize, a very important subject in the human rights area, and I think it is that when human rights are being violated, as compared to many of the other things we're concerned about, I guess I would tend to think that's sort of the first order of business, to make sure human rights are not being violated. I don't know if that addresses your sense of dichotomy. I think it's a little bit saying it was just lacking in my presentation.

PROF. RATNER: I think you're absolutely right. I think one of the problems with some of the economic, social, and cultural rights is that, because of the nature of these rights, the standards are not what one thinks of as strict. I mean, the fact is that the way the covenants are worded, they give states much more leeway in terms of what they're allowed to do. They recognize human development.

Let's take a classic economic right, the right to a fair wage. You look at the ILO conventions on the right to a fair wage. They don't say the worker in Burma has to get paid the same as the worker in Germany. They basically say a fair wage is one that's consistent with local practices, that you, even the minimum wage convention, the ILO, which I can't even remember whether it's widely ratified, you know, gives great deference to local practices, and so to say that corporations have to comply, have to comply with these economic, social, and cultural rights, I think they should. I just don't know how far it gets you because in fact, the treaties give so much leeway anyway that I don't think that saying corporations have to respect economic rights is going to satisfy an NGO that's upset about wages in Guatemala.

You know, there are obviously some issues that cross the line. When you get to factory safety questions, you know, is this a civil and political right? Is this an economic, social, and cultural right? Well, it's a little bit of both, depending on how grave a threat to your physical integrity. That's why I come back to physical integrity being the touchstone on this. But I do agree with you that economic,

social, and cultural rights are an important element of this. The problem is that there's less consensus about what some of these things mean.

MR. CONE: Yes, ma'am?

AUDIENCE MEMBER: I'm interested in what role, if any, you see for Truth Commissions, especially in this period where transnational justice has become certainly a keystone of our foreign policy, political science departments, government departments, et cetera. I'm thinking specifically of the example of the Truth Reconciliation Commission of South Africa which was the only one to look at business accountability of human rights violations, the only Truth Commission out of the previous 17 or 18. At the same time, the Commission in fact did not have any leverage, they couldn't offer amnesty, they couldn't punish for any violations, and secondly, they did not use international law, whether it's the ILO standards or the ICCPR²¹, or other treaties and conventions guaranteed by trade unions, economic wage, et cetera.

But I'm interested in this historical period of what possibility you see to use this mechanism for accountability and under what circumstances.

PROF. RATNER: Is that for me?

MR. CONE: You've been elected.

PROF. RATNER: Well, I've read large parts of the TRC report, but I didn't know they had discussed the role of corporations in it, so I appreciate you bringing it to my attention because I teach and write a lot on this area of accountability. I think it's a great idea. I think, of course, the problem is that I think that the bulk of the Truth Commissions saw the primary instigator of human rights violations as the government or in some cases the opposition, but principally the government if you look at Argentina, Guatemala, Chile, the obvious cases where there have been Truth Commissions. Certainly to the extent that corporations might be complicitous under my theory, a broader theory probably as adopted by the human rights NGO, narrower theory by the corporations themselves, I think they're appropriate targets of the accountability that comes from shedding light that Truth Commissions offer, and I think that's actually an interesting way in which their activities could be brought to light, if in fact they have become complicitous with the government.

Again, it would really depend upon what the relationship is. I am not advocating -- in fact, I'm advocating the opposite, that the presence of a corporation in a country that violates human rights makes the corporation liable for those violations or complicitous in them. I don't buy that theory of agency or connection. I think that's a stretch. I think some human rights NGO's do believe it, and I think frankly, on one occasion at least, the international community as a whole basically bought it, which is during the Apartheid era. There was a sense that no corporation should invest, but I think that was an unusual case.

The fact is, I'm not willing to assume that kind of guilt by association. But if in fact there is evidence of complicity, I think a Truth Commission would be an excellent mechanism to shed light on it.

MR. CONE: I just venture to point out that the "R" in "TRC" was "reconciliation," and so there was, I think, quite an emphasis on amnesty in order to enable the Commission to work at all.

AUDIENCE MEMBER: Absolutely. But the amnesty provision specifically applied to individual perpetrators who requested amnesty, both the state and the liberation movements, and did not apply to the collective entities, which is the problem which business presents because the Commission tried to look at not just business, but what health care did under apartheid, what the media did, the legal profession did, et cetera, et cetera. So it didn't provide the same kind of leverage that was set forth here.

21. International Covenant on Civil and Political Rights.

It kind of talked about the issues of let's look at the truth in terms of what do we do about it now.

MR. CONE: Yes, sir.

AUDIENCE MEMBER: I had a question which was directed at Professor Ratner primarily, and that is the sort of bifurcation between this idea of direct infringement on human dignity and these affirmative legal duties. That follows on the last question, and it made me a little bit concerned that some other form of, sort of, indirect infringement which is not merely affirmative which is left out, which is precisely the issue of participation within the political process. That is, thinking of something like Article 28 of the Universal Declaration, the right to international and social order in which all rights could be realized could be eroded by, for instance, the Pharmaceutical

Manufacturers Association of America making it incredibly difficult for sublicensing countries, and also perhaps even blocking technology transfer through restrictive copyrights, et cetera, et cetera, et cetera, and this seems to me also on Mr. Gunderson's, I think this is very much something which is on the minds of NGO's and also human rights NGO's, and they're starting to look very much more at these sort of negative duties to refrain from harm, but they're indirect negative duties; they're not simply duties to simply not pollute a river.

PROF. RATNER: That's a great question, and I'll be honest with you. You're raising a problem with my theory in challenging it as being too limited, and the reason that I sort of took the take I did today is because the last time I presented this, the first time I presented this paper, which is about two weeks ago, a week and a half ago, at Columbia Law School, somebody gave me a hypothetical showing me how it was too broad and here is the hypothetical, which is, if I'm going to say that corporations have duties and respect to all civil and political rights, which is sort of my take on this problem, would I then be saying that if a corporation fired an employee for publicly criticizing the company and for publicly, you know, saying the product that they produced was a piece of junk or coming or that the competitor's product was better, that they were therefore violating the individual's right to free speech, and I'm not. I think that's kind of a far-fetched claim to make, so I'm not saying that.

But I do think you're right insofar as it is possible to imagine the corporation working with the government through bribery or other mechanisms in a way that would undermine other political rights besides those most closely associated with physical dignity, like the right to political participation that you mentioned, so I think it's a very good question.

AUDIENCE MEMBER: It seems to me that there's a natural conflict between a multinational corporation trying to produce wealth and the interests we have in human rights on an international level. Somebody has to figure out how much wealth will you give up to protect how much rights, and the problem now is that we need rules to control multinational enterprises. We need multinational rules to control them, but there is nobody that can weigh these two interests and come down with fair rules that balance the rights against the lost production.

Would anybody like to talk on that?

PROF. ALVAREZ: I think that's an excellent point, and I think we used to have one place, and that's the international courts. The problem we have today is you have these lesser developed countries anxious to get foreign investment, and they're the ones that are going to be the least likely to be able to do a fair trade-off on this, and I think Steve alluded to that basic dilemma. So what we have is a regulatory gap. Where we used to have both the host states of these foreign investors and to some extent the home states exercising their control power and their trade-off through their national courts, we now have the potential gap of no one doing that, hence Steve's point of trying to come up with an international regime of various types.

I guess I'm skeptical that we'll be able to reach that plateau, which is why I'm actually quite

supportive of the Alien Tort Claims Act approaches, because as I see much of international law, much of it developed from precisely national attempts like that, and of course what we're talking about are parochial attempts. When we look at these Alien Tort Claims Act involving corporations, what do they do, they reach for 1983 and they look at analogies to 1983 and I just pulled out one of the cases and what do they say? When is a corporation responsible as a state actor for human rights violations? Four tests: The joint action test, which asks whether a private party is a willful participant in the joint activity with the state. The nexus test, which asks whether there's a close enough connection between the challenged action of the defendant and the state so that the action may be fairly treated as state action. The public function test, which asks if a private party's exercising powers traditionally reserved to the state. And the state compulsion test, which examines whether the private actor's actions were actually compelled by the state.

Parochial to be sure, this is 1983. But if enough states develop under their own parochial law, we might reach the stage of actually getting to the stage that Steve suggests, and so I think what we're left with is the possibility of groping for a variety of places to go after the corporation, including in U.S. courts, even when they have nothing to do with the U.S. That is, the tort did not occur in the United States, but there is some personal jurisdiction connection that you can make.

These cases to date have not been successful. I'm not so sure that has to be the case. I think there's a prospect for that to change and I will say I will draw some comfort from the fact that other countries around the world are starting to take a second look at the Alien Tort Claims

Act approaches, and I think things like the Pinochet precedent and how that prompted the Chilean court to investigate their amnesty laws suggests there's a way of these things to communicate trans-boundary connections without having an international treaty or a conscious attempt to make international law on point.

MR. CONE: In the back?

AUDIENCE MEMBER: Professor Ratner mentioned that the UN does not have credibility with business, whereas the OECD does. What is the panel's opinion on the recent launch of the global compact mechanism whereby the UN and business will cooperate? There's a launch of the UN with approximately 50 multinationals around the world to launch -- there are now 300 such companies affiliated with global compact.

What do you think of this as a mechanism to spread human rights, environmental rights, and labor rights?

MR. GUNDERSON: I would like to make a comment with respect to the global compact. I think the credibility of the United Nations with the multinational sector has risen dramatically. One of the very interesting things about the global compact is it's not just another code of conduct or something like the Sullivan Principle that you're supposed to adopt. That is important, but more important is the forum that the global compact process has provided, where you have a very good, and I don't know this directly -- I know this from colleagues more than any direct activity that I'm familiar with, but the sense I have from companies participating is that the ability to be sitting down with representatives of organized labor, NGO's, as I understand it, under sort of UN kind of auspices to keep everybody talking is an extremely positive and useful thing to be going on, and these multiparty initiatives that I have to say I don't know much about. What I'm more impressed with is how much positive comment I hear about organizations like the Forestry Stewardship Council sort of defining what is good forestry or the World Dam Organization trying to define what is the right way to build a dam.

These are all modest, but very positive kind of multi player cooperation groups that are more important than the codes themselves, and I think in theory the OECD's contact points are supposed to accomplish the same sort of thing, but I hear more about the global compact than I do the OECD compact.

MR. CONE: One could overstate, Jim, the credibility of the OECD in the business community. Yes, ma'am?

AUDIENCE MEMBER: In contrast to the cost of human rights, it seems to me there are a number of ways that human rights actually can be of economic benefit to corporations. For example, universal primary school education in Taiwan is often touted as one of the bases for its current success, it's level of development. Is there any research being done into the positive economic aspects of implementing human rights?

MR. GUNDERSON: Sorry to make -- I'd like to make kind of a tangential comment, which is that, and this is partly my own problem of the perspective I have.

Outside of certain basic manufacturing sectors, a lot of the activities of multinational companies in countries is actually a virtuous sort of cycle with human rights, in the sense that the game is more productivity than it is low wages. There's a lot of sense, I think, that people think you go where you have low wages, and there are companies that do that, but a lot of the companies you probably think of when you think of big multinationals, they're not as interested in low wages as they are productivity gains, and what produces productivity, much of what produces productivity in a work force, I think you would find very close correlations to what you would consider beneficial from a human rights perspective in an environment.

So, I mean, certainly, I mean, it's -- the SEED program I mentioned is not to develop good elementary schools so we can ultimately hire these people. We're not that forward looking, but certainly at a secondary education level, we are concerned with programs in Kazakhstan. We're concerned with who the universities are bringing in and what they're doing to make sure they have people for engineering programs, because we're going to need those engineers.

So I think there's a lot of correlation between human rights and what companies ought to be wanting on the ground.

PROF. RATNER: I'd just make one more, I guess, tangential comment from a different tangent, which is what you're talking about are the way countries are guaranteeing economic, social, and cultural rights -- I mean, educational rights in this context. Of course, that's part of a very, very big debate between developing world countries and the west about which of these rights are more important, about sort of a cultural relativism debate about whether economical, social, and cultural rights are more important or civil and political rights.

Hidden in the question is the question of causation. Do you need great elementary education in order to have civil and political rights, or do you need civil and political rights first? And of course the west says you don't need to spend a lot to protect civil and political rights, and then some Asian leaders, I'm not so much sure about Asian citizens or the Asian NGO's, but some Asian leaders say, no, no, no, no, no, we have to focus on educating our people first and we can't afford to give them civil and political rights.

It's a classic Singaporean claim, less in Korea and Taiwan now that they're more democratic. But this whole question of what impact education has on human rights gets to big questions about which causes which to happen. Do you educate? Do educational, social, and cultural rights promote civil and political, vice versa, or are they working independently?

MR. CONE: Yes, ma'am? Anyone who hasn't asked a question? Okay, Yes, ma'am.

AUDIENCE MEMBER: I just wanted to make a very brief comment in terms of what you said made me think about it. The one piece of this argument that we're talking about as to why corporations are trying to do certain things, or what are the benefits of social economic conditions to corporations, stability, et cetera. The other piece that I think maybe the gentleman talked maybe getting to the UNTP

report is part of the reason we're in this situation is the whole, the failure of the structural adjustment programs, and the fact that the failure has been so bad, particularly in Asian and African countries, and the standards, and there's been a direct relationship between a loss in the standard of living in health care, housing, et cetera, and the amount of money that has to be paid out by a government to service the loans, all the stuff about the heavily indebted countries, heavily indebted poor countries, Jubilee, et cetera, et cetera.

I think that's an important factor because that's influenced the need for corporations now to approach some of these theories of openness and making democracy work, dealing with education, health care, et cetera, but we're talking -- I just realized it seemed to be missing from part of what we're talking about, but I think it's part of the context.

MR. CONE: I think in response to that and in conclusion, we've actually covered an amazing amount of territory. I think that each of Professor Alvarez, Mr. Gunderson, Professor Ratner, has in fact presented a program that could have been a stand alone program, and that we've managed to have all three of them have the interaction, have the audience response that we had, I find very satisfying, and I want particularly to thank each of the three of you for a really superb contribution and let you know that I and others in the room are very grateful.