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Multinational Enterprises and Workplace Reproductive Health: Extending Corporate Social Responsibility

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ABSTRACT

Corporate social responsibility is a relatively new approach to the protection of human rights. While the human rights to whole-body health and workplace health are long-standing, the right to reproductive health is a new topic of discussion. This Note examines the right to reproductive health in the workplace and proposes that it would be best protected by imposing an affirmative duty on multi-national enterprises via corporate social responsibility. Origins of human rights, corporate social responsibility, and reproductive health are discussed before turning to the developing stalemate between multi-national enterprises and less developed countries.

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I. INTRODUCTION

> The sound of freedom that resonates from civil and political rights rings hollow to a newborn who has . . . lost a parent due to an occupational accident, or whose parents are debilitated by occupational disease, or who may suffer personal injury due to the effects of a parent's workplace exposure to mutagens.[1]

Reproductive health is as important to sustainable growth and development as environmental protection. Multinational enterprises

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1. Ilise L. Feitshans, *Is There a Human Right to Reproductive Health?*, 8 TEX. J. WOMEN & L. 93, 94–95 (1998).

(MNEs) have a corporate social responsibility to work toward sustainable development and growth, which inherently entails the recognition and protection of certain human rights. Although this recognition and protection has traditionally been the duty of sovereign nation-states, MNEs' rise in economic power has placed these enterprises in a position to similarly infringe upon human rights. Unfortunately, the unequal bargaining power between MNEs and less developed countries (LDCs) is swiftly leading to a stalemate in the protection of human rights.

This Note posits that MNEs have an affirmative duty to recognize and protect reproductive health in the workplace based on corporate social responsibility and the recognition of various human rights in international documents. Part II discusses the various sources of corporate social responsibility, exploring both treaties binding on sovereign nation-states as well as various "soft law" instruments. After locating corporate social responsibility in human rights and the sustainable development that necessarily accompanies the achievement of such rights, Part III expands on the location of reproductive health in the human rights landscape. Part IV examines the developing stalemate in the protection of human rights, discussing traditional roles of the state actor and the difficult situation in which LDCs find themselves when faced with the allure of an influx of foreign capital. Finally, Part V offers a potential solution to the stalemate that respects both workers' autonomy and their right to be free from discrimination and hazards to reproductive health. This solution is designed to bind MNEs in order to recognize the large amounts of power and influence they have over individuals and LDCs.

II. WORKPLACE REPRODUCTIVE HEALTH: DEFINITIONS AND EFFECTS

Reproductive health, a relatively new human right, is a key factor in achieving sustainable development and growth on the international stage. Although a standard definition is still being developed, reproductive health generally encompasses all aspects of health that affect reproduction by males and females.[2]

The International Convention on Population and Development (ICPD)[3] encompasses a sex-neutral view of reproductive health and "is the only document that actually comes out and embraces a right to

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2. World Health Organization, Reproductive Health Strategy, http://www.who.int/reproductive-health/publications/strategy.pdf (last visited Oct. 29, 2006).

3. Programme of Action of the International Conference on Population and Development (1994), http://www.unfpa.org/icpd/icpd_poa.htm (last visited Nov. 26, 2006) [hereinafter ICPD].

reproductive health."[4] According to the ICPD, "[r]eproductive [h]ealth is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes."[5]

However, reproductive health is frequently discussed as a concept of women's health.[6] In fact, this frequently may be a starting point for many commentators, because women often are seen as the only sex with cause for reproductive concern. Therefore, under some definitions, reproductive health specifically includes "miscarriage, infertility, death from infectious diseases, pregnancy anemia, and complications from pregnancy that threaten to undermine the health of pregnant workers."[7] Significantly, a woman's reproductive health may not be confined to her reproductive years or to the time span of pregnancy. Maternal death, which is either death during pregnancy or within forty two days of pregnancy,[8] can be caused by "deficiencies of calcium, vitamin D, or iron" during infancy or before birth.[9] These deficiencies can "result in a contracted pelvis and eventually in death from obstructed labor[,] or in chronic iron-deficiency anaemia [sic] and . . . death from hemorrhage."[10]

Despite the prevalence of a female-centric definition of reproductive health, males also have reproductive health and cause for concern. "Male reproductive exposures are . . . proven or strongly suspected of causing not only fertility problems but also miscarriage, low birth weight, congenital abnormalities, cancer, neurological

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4. Feitshans, *supra* note 1, at 114; ICPD – Programme of Action, http://www.unfpa.org/icpd/icpd_poa.htm#ch2 (last visited Oct. 28, 2006).

5. ICPD, *supra* note 3, at art. 7.2. The ICPD also states that:

> Reproductive health . . . implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.

Id. While the Author agrees with these principles, she also acknowledges that they are very closely tied with cultural, moral, and religious beliefs. Accordingly, she does not address, nor intends to imply, any arguments concerning reproductive rights or freedoms.

6. See Rebecca J. Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. INT'L L. & POL. 645, 653 (1992).

7. Feitshans, *supra* note 1, at 93.

8. Cook, *supra* note 6, at 646.

9. *Id.* at 647.

10. *Id.*

problems, and other childhood health problems."[11] Studies have suggested that there are "significant associations between paternal [occupational] exposures and fetal health problems."[12] Paints, solvents, metals, dyes, hydrocarbons, toluene, xylene, benzene, TCE, vinyl chloride, lead, and mercury have all been associated with various health problems in the fetus during pregnancy or after birth.[13] Even the U.S. National Institution on Occupational Safety and Health has recognized the severity of occupational risk to male reproductive health, despite the fact that male reproductive health is discussed much less frequently than its female counterpart.[14] Therefore, any right to reproductive health, including rights to be free from hazards to that health, should include female and male concerns.

Reproductive health is inextricably linked to general, individual, workplace, and public health. Reproductive health affects more aspects of society than just the mother-to-be and the unborn fetus. Workplace reproductive health can affect current workers and potential future employees. To better understand the seriousness of MNEs' responsibility to recognize and protect reproductive health, it is necessary to discuss various workplace hazards in further detail.

Three types of workplace factors can affect reproductive health: physical, biological, and chemical.[15] First, physical factors mainly affect pregnant workers. "Regular exposure to shocks, vibration or excessive movement can . . . increase the risk of miscarriage, prematurity or low birth weight."[16] Additionally, "[p]rolonged exposure to loud noise may lead to increased blood pressure and tiredness."[17] Manual handling, working in hot conditions, and shiftwork can also affect the health of a pregnant employee, leading to potential injury, increased risk of fainting and heat stress, and low birth weight.[18] Second, biological agents such as "hepatitis B, HIV (the AIDS virus), herpes, TB, syphilis, chickenpox and typhoid"[19] "can

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11. Cynthia R. Daniels, *Between Fathers and Fetuses: The Social Construction of Male Reproduction and the Politics of Fetal Harm*, 22 SIGNS 579, 594 (1997) (citation omitted).

12. *Id.* at 595.

13. *Id.*

14. *See* NAT'L INST. ON OCCUPATIONAL HEALTH & SAFETY (NIOSH), THE EFFECTS OF WORKPLACE HAZARDS ON MALE REPRODUCTIVE HEALTH (1997), http://www.cdc.gov/niosh/malrepro.html (explaining how "substances in the workplace can cause reproductive problems in men").

15. Reproductive Health and Pregnancy, http://www.ascc.gov.au/ascc/healthsafety/managinghealthsafety/practicalohsguidance/managingworkplacehazards/reproductivehealthandpregnancy.htm (last visited Nov. 26, 2006).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

affect the unborn child if the mother is infected during pregnancy."[20] This category of factors clearly affects the health of all workers and further weighs in favor of a right to workplace reproductive health. Third, both males and females can suffer genetic damage due to exposure to hazardous chemicals.[21] This damage "can be passed onto [their] children through negative effects on development of the embryo, foetus and infant . . . [, potentially] result[ing] in fetal death, malformation, retarded growth and organ dysfunction."[22] Additionally, male "[e]xposure to . . . certain agents can result in decreased libido and impotence, testicular damage or infertility, and spermatoxicity."[23] These potential outcomes have the ability to impede not only the enjoyment of the rights to reproductive and general health, but also the sustainable growth and development of societies. Before discussing reproductive health more fully, Part III will discuss various foundations of corporate social responsibility.

III. CORPORATE SOCIAL RESPONSIBILITY

A. *Definition of Multinational Enterprise*

Many corporations around the world are increasingly operating on an international scale. The revised 2000 Organisation for Economic Co-Operation and Development Guidelines for Multinational Enterprises (OECD Guidelines) state that MNEs:

> [U]sually comprise companies or other entities established in more than one country and so linked . . . they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.[24]

These MNEs "have resources sometimes greater than those of many states,"[25] due to "[r]ecent developments throughout the world, including failed states, economic deregulation, privatization, and trade liberalization across borders."[26] Given that MNEs inherently

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20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309, 312 (2004). *See also* Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (2000), *available at* http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html [hereinafter *OECD Guidelines*].
25. Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 273 (2002).
26. *Id.*

deal with humans as employees, it is imperative that the global community recognize this power and explore a method of controlling abuse. While nation-states may have the power to regulate the activities of these companies within their own borders, there are few international regulatory schemes that reach MNEs. Corporate social responsibility (CSR) is one avenue for curbing such abuses; therefore, it is necessary to explore the origins of CSR and the duties it imposes on MNEs.

B. *Authoritative Foundations of Corporate Social Responsibility*

Shareholders are those individuals that own a share of the MNE such that collectively they are its owner. The classic view of corporate social responsibility (CSR) posits that a corporation has a duty only to its shareholders and that it best satisfies this duty by maximizing profits.[27] However CSR also "recognizes that corporations are not only responsible to their shareholders, but owe, or should owe, particular duties to persons or communities directly or indirectly affected by their operations; such persons or communities comprise a corporation's 'stakeholders.'"[28] Stakeholder theory "recognizes various forms of relationships between the enterprise and its stakeholders." [29] These stakeholders can be primary stakeholders—"employees, customers, investors, suppliers"[30]—or secondary stakeholders, who are other individuals affected by an MNE's operations.[31] By recognizing the important relationship between an MNE and its stakeholders, CSR provides a powerful vehicle for ensuring that an MNE's social responsibilities are equal to its power.

CSR can be grounded in either "binding treaties in which State entities are the direct addressees of rights and obligations, but which directly affect and have a domestic impact upon MNE operations, [or] soft law that is directly addressed to MNEs."[32] Binding treaties include the International Bill of Human Rights[33] and "the vast majority [of] International Labour Organizations (ILO) conventions," while soft law includes, *inter alia*, "the OECD Guidelines, the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, the Preamble to the 1948 Universal Declaration on Human Rights (UDHR), [and] the 1992 Rio Declaration on Environment and

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27. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, *available at* http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html.

28. Bantekas, *supra* note 24, at 311.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 312.

33. *See* discussion *infra* Part II.B.i.1.

Development."[34] The existence of soft law recognizes that MNEs have a direct and significant impact on the sustainable development of host countries.[35] Therefore, "direct participation"[36] by MNEs in "government policy and practice"[37]—the traditional arena for human rights—will ensure successful sustainable development and, subsequently, human rights protection.

CSR can also be grounded in various principles and reporting obligations of non-governmental organizations (NGOs).[38] For example, the Sullivan Principles are "[p]erhaps the oldest [NGO CSR] initiative"[39] and focus on "eight broad directives on labor, business ethics, and environmental practices of MNEs and their business partners."[40] These principles involve a commitment to "support . . . universal human rights and, particularly, those of [an MNE's] employees . . . [and] the communities within which [MNEs] operate,"[41] as well as a commitment to "[p]rovide a safe and healthy workplace; protect human health and the environment; and promote sustainable development."[42] While NGO CSR guidelines are effective to the extent that they involve voluntary reporting, which can provide "the only verifiable measure of MNE activity beyond the boundaries required under law,"[43] this Note focuses on binding treaties and soft law as sources for CSR.

i. Binding Treaties on Sovereign Nation-States

1. International Bill of Human Rights

The current state-centered approach to the protection of human rights "came in the wake of Hitler and World War II."[44] The global consensus at the foundation of the United Nations viewed the state actor as the prime threat to individual human rights.[45] The preamble to the UN Charter recognizes that the UN was formed in part:

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34. Bantekas, *supra* note 24, at 312.
35. *Id.* at 313.
36. *Id.*
37. *Id.*
38. *Id.* at 321.
39. *Id.*
40. *Id.*
41. The Global Sullivan Principles of Social Responsibility, http://www.globalsullivanprinciples.org/principles.htm (last visited Oct. 29, 2006).
42. *Id.*
43. Bantekas, *supra* note 24, at 322.
44. Julie Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Entities with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers,* 37 J. MARSHALL L. REV. 1205, 1211 (2004).
45. *See* U.N. Charter, *available at* http://www.un.org/aboutun/charter/ (last visited Nov. 26, 2006).

> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom. [46]

This commitment to the protection of human rights led to the formulation of other protective documents. The International Bill of Human Rights is composed of the Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social, and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); and the Optional Protocols to the International Covenant on Civil and Political Rights.[47] The International Bill of Human Rights thus identifies "the responsibilities of nations and individuals to respect those rights."[48] Because MNEs are typically considered individuals for legal purposes, any MNE that is operating in a UN-member country should be held to human rights obligations identified in these documents.[49]

The UDHR[50] is "one of the three founding documents of the UN."[51] The UDHR "has become the 'yardstick by which to measure the degree of respect for, and compliance with[,] international human rights standards.'"[52] The UDHR recognizes a number of rights that could affect an MNE's operations and treatment of reproductive health. For example, the "inherent dignity . . . of the human family;"[53] the right to be free from degrading treatment;[54] the right for "[m]en and women of full age, without any limitation due to race, nationality

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46. *Id.* at pmbl.

47. Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 160–61 (1997). *See also* Universal Declaration of Human Rights, G.A. Res. 217 A (III), at 71, U.N. Doc. A/810 (Dec. 10,1948), *available at* http://www.udhr.org/UDHR/default.htm [hereinafter UDHR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966), *available at* http://www.ohchr.org/english/law/pdf/cescr.pdf [hereinafter ICESCR]; International Covenant on Civil and Political Rights, G.A. Res 2200 A (XXI), 21 U.N. Doc. A/6316 (Dec. 16, 1966), *available at* http://www.ohchr.org/english/law/pdf/ccpr.pdf [hereinafter ICCPR]; Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI) (Dec. 16, 1966), *available at* http://www.ohchr.org/english/law/pdf/ccpr-one.pdf [hereinafter Optional Protocol 1]; Second Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res 44/128 (Dec. 15, 1989) [hereinafter Optional Protocol 2].

48. Frey, *supra* note 47, at 161.

49. *Id.* at 162–64.

50. UDHR, *supra* note 47.

51. Campagna, *supra* note 44, at 1208. The other founding documents are the U.N. Charter and the Statute of the International Court of Justice. *Id.*

52. *Id.* at 1208–09.

53. UDHR, *supra* note 47, at pmbl.

54. *Id.* at art. 5.

or religion . . . to marry and to found a family;"[55] and the "right[s] to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment"[56] are all rights that affect reproductive health.

The remaining documents in the International Bill of Human Rights resulted from an effort to draft a treaty in the 1960s which would "'make enforceable those rights laid down' in the UDHR."[57] This effort produced the ICESCR,[58] the ICCPR,[59] and the two optional protocols to the ICCPR.[60]

The preamble to the ICESCR recognizes that conditions must be "created whereby everyone may enjoy his economic, social and cultural rights"[61] in order to ensure that human beings enjoy "freedom from fear and want."[62] The preamble references the "obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,"[63] which will directly impact MNEs. However, the ICESCR preamble also recognizes that *individuals* have "duties to other individuals and to the community to which [they] belon[g], [and that the individual] is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."[64] This use of "individual" speaks directly to the corporate social responsibility of an MNE. Of the rights recognized in the ICESCR, the following rights will directly affect an MNE's protection of reproductive health in the workplace: the right to non-discrimination, the right to work, the right to just and favorable working conditions, the right to protection of the family, the right to an adequate standard of living, the right to health, and the right to participate in cultural life.[65]

The development of human rights law occurred at a time, post-World War II, when "international human rights law treat[ed] the state as the principal threat to individual freedom and well-being."[66]

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55. *Id.* at art. 16.
56. *Id.* at art. 23.
57. Feitshans, *supra* note 1, at 103.
58. ICESCR, *supra* note 47.
59. ICCPR, *supra* note 47.
60. Optional Protocol 1, *supra* note 47; Optional Protocol 2, *supra* note 47. While the ICCPR and its two optional protocols expand on the rights set out in the UDHR, few of these rights will directly impact an MNE's treatment of individuals.
61. ICESCR, *supra* note 47, at pmbl.
62. *Id.*
63. *Id.*
64. *Id.*
65. OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: AN INTRODUCTION TO THE CORE HUMAN RIGHTS TREATIES AND THE TREATY BODIES, FACT SHEET NO. 30 (June 2005), *available at* http://www.ohchr.org/english/about/publications/docs/fs30.pdf.
66. Campagna, *supra* note 44, at 1211.

However, "the surge of globalization and international markets that occurred at the end of the 19th century"[67] gave rise to the first efforts to create protection for human rights. The "protection of the fundamental rights of workers,"[68] the need that led to the first human rights conversations, is the same need driving current CSR efforts. It is, therefore, pertinent to examine documents produced by the ILO, the only surviving international organization from the Treaty of Versailles, which created the League of Nations after World War I.[69]

2. International Labor Organization Conventions

ILO conventions are another source of "binding treaties" on host countries that affect the formulation of CSR and the protection of reproductive health in the workplace. The ILO creates "[i]nternational labour standards[, which] are legal instruments drawn up by the ILO's constituents . . . setting out basic principles and rights at work."[70] These international labor standards can either be "conventions, which are legally binding international treaties that may be ratified by member states, or recommendations, which serve as non-binding guidelines."[71] These standards are particularly important to the CSR discussion because they are partly created by employers—"[t]he ILO has a unique 'tripartite' structure, which brings together representatives of governments, employers, and workers on an equal footing to address issues related to labour and social policy."[72]

In 1998, the ILO set out the Declaration on Fundamental Principles and Rights at Work (ILO Declaration),[73] which identifies:

> subjects that are considered . . . fundamental principles and rights at work: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.[74]

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67. *Id.*

68. *Id.*

69. About the ILO, Who We Are, http://www.ilo.org/public/english/about/index.htm (last visited Oct. 29, 2006).

70. INT'L LABOUR OFFICE (ILO), RULES OF THE GAME: A BRIEF INTRODUCTION TO INTERNATIONAL LABOUR STANDARDS 11–12 (2005) [hereinafter RULES OF THE GAME].

71. *Id.* at 12 (emphasis omitted).

72. *Id.* at 11.

73. ILO, ILO Declaration on Fundamental Principles and Rights at Work (1998), *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE [hereinafter ILO Declaration].

74. RULES OF THE GAME, *supra* note 70, at 12.

These principles, also known as the Core Labor Standards (CLS),[75] are embodied in eight conventions that have been designated as "fundamental."[76] Currently, the conventions that embody these principles have been ratified in 86% of possible cases.[77] The "Follow-up" to the ILO Declaration was enacted concurrently with the ILO Declaration[78] and requires member states "to submit annual reports on all the fundamental rights for which they have not ratified the corresponding ILO conventions."[79] This indicates member states' understanding that they must work toward "certain basic values that are inherent in ILO membership."[80]

Although there is a noticeable lack of any reference to health in the CLS,[81] an MNE should be aware that a host state's ILO membership requires the MNE to ensure the "elimination of discrimination in the workplace."[82] This obligation inherently affects certain attitudes towards reproductive health. Furthermore, MNEs may encounter similar pressure from other international bodies, such as the Organisation for Economic Cooperation and Development (OECD), the International Monetary Fund (IMF), and the World Bank, that have incorporated these rights and principles into their structure.[83]

ii. Soft Law

Soft law refers to agreements that are not binding on nation-states, frequently because of "their lack of specificity."[84] However, soft laws often increase awareness of pertinent issues and eventually

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75. *See generally* Philip Alston, *"Core Labour Standards" and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457 (2004) (describing the concept of "core labour standards" and the flaws that result from their use).

76. RULES OF THE GAME, *supra* note 70, at 12. These conventions are: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111). *Id.* at 13.

77. *Id.* at 12.

78. *Id.* at 89.

79. *Id.*

80. *Id.*

81. *See* Alston, *supra* note 75.

82. ILO Declaration, *supra* note 73.

83. Emily A. Speiler, *Risks and Rights: The Case for Occupational Safety and Health as a Core Worker Right*, *in* WORKER'S RIGHTS AS HUMAN RIGHTS 78, 83 (James A. Gross ed., 2003).

84. Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. OF INT'L. L. 499, 500 (1999).

become "hard" law.[85] Various soft law CSR documents have been developed in recent years. These types of documents clarify the parameters of CSR.

1. OECD Guidelines

The OECD is an economic counterpart to NATO that acts as a "forum where the governments of [member countries] work together to address the economic, social and governance challenges of globalisation as well as to exploit its opportunities."[86] The forum specifically welcomes "peer pressure [to] act as a powerful incentive to improve policy and implement 'soft law.'"[87] The OECD has produced a set of Guidelines for Multinational Enterprises that "provide voluntary principles and standards for responsible business conduct."[88] "[T]he OECD Guidelines are recommendations addressed by governments to MNEs. Although they are not legally binding on MNEs, OECD states have agreed to adhere to the Guidelines and encourage their companies to observe them wherever they operate."[89]

Similar to the approach of the ICESCR, the commentary on the General Policies acknowledges that "promoting and upholding human rights is primarily the responsibility of governments" [90] and also encourages MNEs to respect human rights.[91] Among the General Policies of the Guidelines are the duties to "[r]espect the human rights of those affected by [the MNE's] activities consistent with the host government's international obligations and commitments"[92] and "[e]ncourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees."[93] These duties would encompass the duty to acknowledge, respect, and protect the right to reproductive health, especially because this right is central to the formation of "human capital." Furthermore, in encouraging MNEs to respect human rights, the commentary specifically notes that "[t]he Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this

85. *Id.* at 501.

86. Overview of the OECD, http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html (last visited Oct. 29, 2006).

87. *Id.*

88. The OECD Guidelines for Multinational Enterprises: Frequently Asked Questions, http://www.oecd.org/document/58/0,2340,en_2649_34889_2349370_1_1_1_1,00.html (last visited Oct. 29, 2006).

89. Bantekas, *supra* note 24, at 319.

90. *OECD Guidelines*, *supra* note 24, at 41.

91. *Id.*

92. *Id.* at 19.

93. *Id.*

regard."[94] This reference would arguably incorporate the ICPD and the right to reproductive health recognized in the ICPD. Due to the OECD's commitment to peer pressure, the OECD guidelines have the potential to act as a powerful tool in the protection and recognition of the right to workplace reproductive health.

2. UN Draft Norms

There have been recent "efforts to internationalize the regulation of corporate social responsibility."[95] The almost decade-long journey embarked on by the UN culminated in the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms or Draft Norms).[96] Although the original force and objectives of the Norms have been abandoned by the UN,[97] "[t]here is a growing interest in discussing further the possibility of establishing a United Nations statement of universal human rights standards applicable to business."[98] Additionally, the Norms acknowledge that "transnational corporations and other business enterprises, their officers, and their workers are further obligated to respect generally recognized responsibilities and norms in United Nations treaties and other international instruments."[99] Therefore, a discussion of the Norms is pertinent as they may inform future human rights obligations imposed on MNEs.[100]

The Norms require "transnational corporations and other business enterprises"[101] to "respect, protect and fulfill human rights within their respective spheres."[102] This general duty affects

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94. *Id.* at 41–42.

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

96. U.N. Comm'n on Human Rights, Sub-Comm. on the Promotion & Prot. of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, U.N. DOC. E/CN.4/Sub.2/2003/12/Rev.1 (May 30, 2003), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.L.8.En?Opendocument [hereinafter U.N. Draft Norms].

97. *See* Backer, *supra* note 95, at 331–32.

98. U.N. Comm'n on Human Rights, Sub-Comm. on the Promotion & Prot. of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises With Regard to Human Rights*, ¶ 52(b), U.N. DOC. E/CN.4/2005/91 (Feb. 15, 2005), *available at* http://www.amnestyusa.org/business/OHCHR_final_report_BHR.pdf.

99. U.N. Draft Norms, *supra* note 96.

100. Backer, *supra* note 95, at 332.

101. U.N. Draft Norms, *supra* note 96.

102. Campagna, *supra* note 44, at 1205.

workplace reproductive health due to the Norms' definition of human and international rights:

> The phrases "human rights" and "international human rights" include civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system.[103]

This definition would also incorporate the ICPD and its right to reproductive health. Additionally, among other obligations to workers, MNEs would have a duty to "provide a safe and healthy working environment as set forth in relevant international instruments and national legislation as well as international human rights and humanitarian law."[104] The safe and healthy work environment duty, the incorporative definitional duty, and the duty to "respect . . . and refrain from actions which obstruct or impede the realization of" [105] the "rights to development . . . [and] the highest attainable standard of physical and mental health" [106] combine to obligate MNEs to respect and protect the right to reproductive health in the workplace.

The Draft Norms do include mechanisms for enforcement of the legally binding obligations. First, the Norms require that "each transnational corporation or other business enterprise . . . disseminate[] and implement internal rules of operation in compliance with the Norms."[107] Second, the Norms must be incorporated into "contracts or other arrangements and dealings."[108] Additionally, transnational corporations would be "subject to periodic monitoring and verification by [the] United Nations . . . regarding application of the Norms,"[109] and states would "establish and reinforce the necessary legal and administrative framework for assuring that the Norms and other relevant national and international laws are implemented by transnational corporations."[110]

The inclusion of these stringent enforcement mechanisms indicates that the Norms recognize that MNEs exert power in social, cultural, civil and political [111] arenas in ways that are "on par with economic purposes."[112] The UN Norms have the power to transform

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103. U.N. Draft Norms, *supra* note 96, at art. I.
104. *Id.* at art. D.7.
105. *Id.* at art. E.12.
106. *Id.*
107. *Id.* at art. H.15.
108. *Id.*
109. *Id.* at art. H.16.
110. *Id.* at art. H.17.
111. Backer, *supra* note 95, at 371.
112. *Id.*

the current understanding of the international legal system and utilize the economic power of MNEs to influence LDCs' human rights compliance.[113] The requirement that the Norms' provisions be incorporated into all MNE contracts, coupled with the monitoring and disclosure obligations, results in an effective circumvention of the traditional international law model.[114] By removing the obligation that host countries, often with limited resources or corrupt governments, ratify and enforce human rights agreements, the UN Draft Norms have the potential to change the relationship between sovereign states, MNEs, and international monitoring organizations.

Furthermore, the Norms have also proposed a new vision on corporate governance. They use the "coercive power of the political community to compel the construction of particular webs of contractual relations that effectively displace the shareholder model for a stakeholder model and incorporate public law social responsibility as a core norm of TNC corporate governance compliance."[115] The consideration of such a vast change indicates that MNEs may soon have an affirmative duty to comply with their corporate social responsibilities and, subsequently, with the duty to respect and protect workplace reproductive health.

3. UN Global Compact

The UN Global Compact (Compact) is another vital piece of soft law that supports a CSR duty. The Compact is "the world's largest voluntary corporate citizenship initiative"[116] and was launched with the goal of integrating responsible corporate citizenship with efforts by "social actors"[117] in achieving "a more sustainable and inclusive global economy."[118] The Compact is comprised of ten principles in the areas of "human rights, labour, the environment and anti-corruption."[119] These principles, or core values, are derived from the UDHR, the ILO's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration, and the Convention Against Corruption.[120]

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113. *Id.* at 333.
114. *Id.* at 357–58.
115. *Id.* at 340.
116. Press Release, United Nations Global Compact, The Coca-Cola Company Joins U.N. Global Compact (Mar. 8, 2006), http://www.unglobalcompact.org/NewsAndEvents/news_archives/2006_03_08.html.
117. U.N. Global Compact: What is the Global Compact?, http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Oct. 28, 2006).
118. *Id.*
119. U.N. Global Compact: The Ten Principles, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited Oct. 28, 2006).
120. *Id.*

Like other pieces of soft law, the Compact recognizes the potential impact an MNE can have on societies when affirmatively "support[ing] and respect[ing] the promotion of internationally proclaimed human rights."[121] For instance, "[s]ocieties where human rights are respected are more stable and provide a good environment for business."[122] Additionally, "[w]orkers who are treated with dignity and given fair and just rewards for their work are more likely to be productive and remain loyal to an employer."[123] Therefore, not only does an MNE have a corporate social responsibility towards sustainable development and the protection of human rights, but the protection of such rights will also benefit the MNE's pecuniary interests.

4. 1992 Rio Declaration on Environment and Development

The remaining important piece of soft law is the Rio Declaration.[124] While not expressly directed at MNEs' protection of human rights, the Rio Declaration is based on the premise that "sustainable development (including human rights) is necessarily dependent on MNE direct participation."[125] In this vein, the Rio Declaration speaks in terms of "all States and all people."[126] The creation of the Rio Declaration indicates that MNEs are powerful players in all aspects of globalization and have a responsibility in creating and maintaining all phases of sustainable development.[127]

IV. AUTHORITATIVE FOUNDATIONS OF REPRODUCTIVE HEALTH

As evidenced by the foregoing sections, CSR is inherently founded upon the concept of human rights. Reproductive health, as a distinct right, is a relatively new concept in the international arena. Before exploring potential reasons for protecting workplace reproductive health via CSR, it is necessary to discuss the location of reproductive health in the human rights context. The following sections will discuss the ICPD (which affirmatively recognizes a right to reproductive health), documents that paved the way for the ICPD,

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121. *Id.*

122. U.N. Global Compact: Principle 1, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html (last visited Oct. 28, 2006).

123. *Id.*

124. U.N. Conference on Environment and Development, June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev. 1 (1992), *available at* http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163 (last visited Oct. 28, 2006) [hereinafter *Rio Declaration*].

125. Bantekas, *supra* note 24, at 313.

126. *Rio Declaration*, *supra* note 124.

127. *See id.*

other international documents that guarantee a general right to overall health, and counter-arguments based on "quality control" concerns in the human rights arena.

A. *Explicit Authority*

As previously mentioned, the ICPD[128] is the only document to date that affirmatively recognizes reproductive health. Article 7 of the ICPD, entitled "Reproductive Rights and Reproductive Health,"[129] states: "[Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes."[130] Implicit in the right to reproductive health is the right to "the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems."[131]

While the ICPD was formulated in 1994, the ILO's Maternity Convention and the Convention on Elimination of Discrimination Against Women (CEDAW), formulated in 1919 and 1980, respectively, laid the groundwork for the ICPD. Although both of these documents focus specifically on women's reproductive health, their protections provide a valuable insight into the foundation of reproductive health as a human right for both women and men.

The ILO's Maternity Convention, originally formulated in 1919 and revised in 1952 and 2000, acknowledges a right to reproductive health in the workplace. The Convention provides that "pregnant or breastfeeding women [shall] not [be] obligated to perform work which has been determined by the competent authority to be prejudicial to the health of the mother or the child, or where an assessment has established a significant risk to the mother's health or that of her child."[132] This protection of the health of the mother and child is closely tied to CEDAW's focus on the elimination of discrimination against women.

In playing an important role "in bringing the female half of humanity into the focus of human rights concerns,"[133] CEDAW focuses on a woman's right to be free of discrimination, operating on

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128. ICPD, *supra* note 3.
129. *Id.* at art. 7.
130. *Id.* at art. 7.2.
131. *Id.*
132. ILO: Maternity Protection Convention, June 15, 2000 (C183), *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C183/.
133. U.N. Dep't of Econ. & Social Aff., Div. for the Advancement of Women: Convention on the Elimination of Discrimination Against Women (Sept. 3, 1981), http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm [hereinafter CEDAW].

the assumption that women will reproduce.[134] Although this expresses a limited view of reproductive health, it is an apt assumption given that many women do not have access to family planning methods. CEDAW recognizes the important function of reproductive health in the workplace by providing for "[t]he right to free choice of profession and employment;"[135] "[t]he right to protection of health and . . . safety in working conditions, including the safeguarding of the function of reproduction;"[136] and by prohibiting employment discrimination "on the grounds of pregnancy[,] . . . maternity leave[,] . . . [or] marital status."[137] CEDAW also acknowledges that reproduction, and therefore reproductive health, plays a key role in society by recognizing that "maternity [is] a social function"[138] and that men and women have a "common responsibility . . . in the upbringing and development of their children."[139] This acknowledgement is crucial to the CSR obligations of MNEs—without reproductive health, members of a society will not be able to participate in the sustainable growth and development of that society.

The ICPD, ILO Maternity Convention, and CEDAW all focus on the right to reproductive health. The ICPD is the only document to ground this right in a non-gender specific right to general health, as opposed to discrimination principles. Although some commentators may object to the ICPD's guarantee to reproductive health on quality control grounds, few can object to a general right to overall health.

B. *Implicit Authority in the General Human Right to Health*

Prior to the formulation of the specific right to reproductive health enumerated in the ICPD, advocates had been locating the right to reproductive health in other international health rights documents.[140]

The preamble to the World Health Organization (WHO) Constitution contains "[t]he most widely accepted definition of 'health' in the corpus of international human rights."[141] The constitution states that "[h]ealth is a state of complete physical, mental and social

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134. *See id.* For example, the preamble to the CEDAW specifically notes that "the role of women in procreation should not be a basis for discrimination." *Id.* at pmbl.

135. *Id.* at art. 11(1)(c).

136. *Id.* at art. 11(1)(f).

137. *Id.* at art. 11(2)(a).

138. *Id.* at art. 5(b).

139. *Id.*

140. *See* Feitshans, *supra* note 1, at 94–95; Cook, *supra* note 6, at 653 (locating the right to reproductive health in the following rights guaranteed by the CEDAW: the right to life, liberty and security; the right to marry and found a family; the right to private and family life; the rights regarding information, education, and assembly; the right to reproductive health and healthcare; and the right to benefits in scientific progress).

141. Feitshans, *supra* note 1, at 96.

well-being and not merely the absence of disease and infirmity."[142] Although controversially broad,[143] this definition has been copied into "hundreds of international conventions, treaties, and multilateral agreements."[144] The effectiveness of the WHO definition is apparent in the general health advancements throughout the world. It has "cured and prevented ancient problems, . . . eradicat[ed] . . . some illnesses"[145] and has been used to combat "unforeseen problems in health, such as the HIV/AIDS pandemic."[146] The ICPD drafters recognized the power of this definition when using it as a basis for the definition of reproductive health. As reproductive health is connected to "physical, mental and social well-being,"[147] the WHO definition of health supports an affirmative right to reproductive health.

The UN Charter and the UDHR also recognize the human right to health, both generally and in the workplace.[148] Article 55 of the UN charter hints at a goal of creating sustainable development, which is based on "higher standards of living, full employment, and conditions of economic and social progress and development," and solutions for international health problems.[149] The UDHR "provide[s] for the right to work in 'favourable conditions,' . . . an 'adequate standard of living' and the preservation of 'human dignity at the work site.'"[150] These provisions allow for the "inference that occupational safety and health protections fall within the UDHR's doctrine."[151] Furthermore, Article 7 of the ICESCR expands the understanding of the UDHR's provision for work in "favourable conditions" by ensuring "safe and healthy working conditions."[152] Article 12 also recognizes the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and indicates that "industrial hygiene" and "occupational diseases" are necessary considerations in achieving this general right to health.[153] Such general health protections must also inherently cover the right to reproductive health.

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142. Constitution of the World Health Org., *available at* http://www.opbw.org/int_inst/health_docs/WHO-CONSTITUTION.pdf (last visited Nov. 6, 2006).
143. Feitshans, *supra* note 1, at 97.
144. *Id.* at 96.
145. *Id.* at 97.
146. *Id.*
147. Constitution of the World Health Org., *supra* note 142.
148. Feitshans, *supra* note 1, at 100, 102.
149. U.N. Charter, *supra* note 45, at art. 55; Feitshans, *supra* note 1, at 100.
150. Feitshans, *supra* note 1, at 102.
151. *Id.*
152. *Id.* at 103. *See also* ICESCR, *supra* note 47, at art. 7.
153. Feitshans, *supra* note 1, at 104. *See also* ICESCR, *supra* note 47, at art. 12.

Finally, the Beijing Declaration on Occupational Health for All (Beijing Declaration)[154] was formulated at the Second Meeting of the WHO Collaborating Centres in 1994.[155] The Beijing Declaration was adopted in reaction to the fact that "rapid changes in working life [were] affecting both the health of workers and the health of the environment in all countries of the world."[156] Of particular interest to reproductive health concerns is Point 9, which affirms a worker's "right . . . to know the potential hazards and risks in their work and workplace."[157] This right requires employers to affirmatively recognize reproductive health and take steps to at least disseminate information to workers regarding risks to their reproductive health.

C. *"Quality Control" Concerns Regarding the Right to Reproductive Health*

Some commentators may argue against the recognition of a human right to workplace reproductive health due to quality control concerns. Professor Philip Alston suggests that ad hoc pronouncements of new rights may dilute the potency of the human rights framework.[158] Professor Alston notes the challenge of "achiev[ing] an appropriate balance between . . . the need to maintain the integrity and credibility of the human rights tradition, and . . . the need to adopt a dynamic approach that fully reflects changing needs and perspectives and responds to the emergence of new threats to human dignity and well-being."[159] In order to protect this balance, Professor Alston suggests that the UN General Assembly adopt a human rights recognition process, which would ensure that a proposed right is adequately considered and evaluated prior to official sanction.[160]

Despite these concerns, the recognition of a human right to workplace reproductive health will not dilute the overall dignity and integrity of human rights. The international community has recognized workplace reproductive health as a threat to "human dignity and wellbeing" as evidenced by the aforementioned CSR and

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154. Declaration on Occupational Health For All, WHO/OCH/94.1 (1994), *available at* http://www.who.int/occupational_health/publications/declaration/en/print.html [hereinafter Beijing Declaration].

155. World Health Org., Occupational Health, http://www.who.int/occupational_health/publications/declaration/en/ (last visited Oct. 29, 2006).

156. *Id.*

157. Beijing Declaration, *supra* note 154, ¶ 9. *See also* Feitshans, *supra* note 1, at 111 (discussing potential hazards).

158. *See generally* Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984) (defining human rights and exploring the possibility of introducing new rights).

159. *Id.* at 609.

160. *Id.* at 618–19.

sustainable development concerns, as well as the ICPD, ILO Maternity Convention, and CEDAW's focus on the elimination of discrimination against women. The WHO Constitution, the UN Charter, the UDHR, the ICESCR, and the Beijing Declaration all add support to the recognition of workplace reproductive health as a human right due to their foundations in the human right to general health. Workplace reproductive health should not be viewed as diluting the power of human rights, but rather as defining more specifically the right to general health as guaranteed by sovereign nation-states.

Due to the close connection between the protection of human rights and the duty of sustainable development, avoiding the issue of workplace reproductive health would actually dilute the potency of the human right to general health. Sustainable development is highly dependent on a healthy population. The lack of recognition of an affirmative right to reproductive health creates a crippling cycle in a society. Parents may be unable to care for children due to their own infirmity. Parents may also be unable to work due to their own illness or that of their children. This unemployment may lead to impoverished children, who may have been born with health issues. CSR affirmatively recognizes the duty of MNEs to participate in sustainable development and thus to acknowledge and respect workplace reproductive health.

V. A DANGEROUS STALEMATE BETWEEN MULTINATIONAL ENTERPRISES AND LESS DEVELOPED COUNTRIES

A. *The Sovereign Nation-State as the Traditional Protector of Human Rights*

"Two opposing views of globalization and its relationship to human rights have emerged: some see the two topics as mutually reinforcing and positive in improving human well-being, while others view globalization as posing new threats not adequately governed by existing international human rights law."[161] Without a recognition and demand for corporate social responsibility that is based on stakeholder theory, the latter view may become the predominant one. This section explores how globalization and the concomitant aggrandizement of economic power by MNEs may thwart or end the protection of human rights, and subsequently, reproductive health.

Since the end of the respective World Wars and the formation of the League of Nations and the United Nations, the protection of human rights has been the duty of sovereign nation-states. Most

161. Shelton, *supra* note 25, at 273.

international human rights documents presume that the prime threat to, and protector of, human rights is the sovereign state.[162] In fact, many of the CSR sources discussed above are also premised on this view. First, the UDHR, the ICESCR, and the ICCPR are the origins of international human rights law and are formulated on this premise.[163] Second, although all ILO conventions are created via the tri-partite system, their implementation takes place via nation-states.[164] Third, although the OECD Guidelines are not binding on states or corporations, they require *states* to encourage corporations to comply.[165] Fourth, despite their revolutionary potential, the UN Draft Norms explicitly recognize that "states have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of, and protect human rights."[166] Fifth, the Rio Declaration is expressly directed at nation-states.[167] The UN Global Compact is the only document to fill in the gaps left by the International Bill of Human Rights because it explicitly appeals to MNEs to "support and respect the protection of internationally proclaimed human rights."[168] This prevailing approach to the protection of human rights has enabled rapid globalization.

B. *Multinational Enterprises' Recent Rise in Economic Superiority*

Globalization, "failed states, economic deregulation, privatization, and trade liberalization across borders . . . have led to the emergence of powerful non-state actors."[169] The term "globalization" encapsulates the notion of the "integration of economies and societies." [170] It also connotes the fact that businesses are moving outside of domestic markets, resulting in more markets becoming intertwined.[171] This interconnectedness, along with access to a larger supply of resources, has created a global "race to the bottom" as MNEs seek out operating locations that are the most "cost-effective" to increase their bottom line. This race frequently

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162. *See* Beijing Declaration, *supra* note 154; Feitshans, *supra* note 1; Shelton, *supra* note 25 (fearing sovereign state as prime threat).

163. UDHR, *supra* note 47; ICCPR, *supra* note 47; ICESCR, *supra* note 47.

164. RULES OF THE GAME, *supra* note 70, at 12.

165. Bantekas, *supra* note 24, at 319.

166. U.N. Draft Norms, *supra* note 96, at pmbl., art. A.

167. *Rio Declaration*, *supra* note 124, at princs. 5, 7, 8.

168. U.N. Global Compact: Principle 1, *supra* note 122.

169. Shelton, *supra* note 25, at 273.

170. Joshua M. Chanin, *"The Regulatory Grass is Greener": A Comparative Analysis of the Alien Tort Claims Act and the European Union's Green Paper on Corporate Social Responsibility*, 12 IND. J. GLOBAL LEGAL STUD. 745, 745 (2005).

171. Dictionary.com, Definition of "Globalization," http://dictionary.reference.com/browse/Globalization (last visited Oct. 29, 2006).

brings MNEs to developing countries, which "provide easy access to untapped natural resources . . . and cheap labor markets."[172]

This race has proved fruitful for many of the participants. The sales of many MNEs are larger than the GDP of many LDCs.[173] As of Winter 2004, "[o]f the top 100 economies in the world, 51 [were] corporations. If the economies of the 10 most powerful countries were excluded, the combined sales of the top 200 corporations [were] greater than the combined economies of *all* the countries in the world."[174] However, where there are winners, there are losers—the economic power exerted by MNEs has left many developing countries crippled in their efforts to comply with modern human rights standards.

Countries are often placed in the tenuous position of choosing between protecting human rights with limited resources or avoiding compliance with human rights to bring perceived economic advantages to their countries. In fact, as MNEs race to the bottom, "developing countries have felt pressure to limit . . . labor regulations in order to attract foreign direct investment."[175] This creates a stalemate such that the OECD Guidelines approach, asking nation-states to encourage MNEs to comply with the principles, is analogous to asking a starving person not to steal a loaf of bread. If a country needs the influx of capital, has a corrupt government, or lacks the governmental structure to even begin to protect human rights, what is that country to do?

This stalemate is often seen in the negotiations of both private and public agreements. First, many LDCs desperately desire to attract foreign investment[176] and often "lack the power to negotiate or make demands of large global corporations seeking cheap labor."[177] This unequal bargaining power continues to manifest after the MNE has commenced operations in a host country as the MNE applies "significant pressure . . . in order to . . . win contracts, and/or to promote a political regime that will safeguard the interests of the subsidiary in the host State."[178] Second, multilateral and bilateral trade agreements hamper an LDC's ability to protect and regulate human rights on its own soil. An LDC's ability to encourage growth or protection in certain sectors may be "curtailed by trade agreements

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172. Chanin, *supra* note 170, at 748.

173. Rene Lopez, *Corporate Social Responsibility in a Global Economy After September 11: Profits, Freedom, and Human Rights*, 55 MERCER L. REV. 739, 749 (2004).

174. *Id.* at 752.

175. Chanin, *supra* note 170, at 746.

176. Bantekas, *supra* note 24, at 314–15.

177. Lopez, *supra* note 173, at 753–54.

178. Bantekas, *supra* note 24, at 315.

that they have signed at regional and international levels."[179] Recent empirical studies suggest that implementing the ILO's core labor standards would actually aid an LDC in improving its economy.[180] However, even multilateral agreements (which avoid the potential stigmatization inherent in bilateral agreements)[181] may be ineffective because they "are valuable only when prudently enforced at the domestic level, and the consequences of underdevelopment in most LDCs have precluded adherence at the domestic level by many MNEs."[182] Finally, the stalemate may be exacerbated by "MNEs . . . [seeking] out and [exploiting] states that have chosen not to ratify certain global compacts . . . essentially nullifying both substantive and policy-based advancements reached by these agreements."[183]

The current scheme of international human rights protection allows MNEs to continue to muscle their way into cost-efficient host countries without sanctions. "Since the addressees and bearers of human rights [and] labor . . . obligations under traditional treaty and customary international law have been States, MNEs have been able to . . . assert[] that whatever violations under international law the host State had committed were attributable to the State."[184] While those actors currently under human rights obligations should be punished for violations, the continued ignorance of MNEs' power will only perpetuate the stalemate. LDCs will continue to desire short term economic developments and rights will remain unprotected as the vision of "a more sustainable and inclusive global economy"[185] recedes further into the future.

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179. Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401, 428 (2001).

180. DRUSILLA K. BROWN, INTERNATIONAL TRADE AND CORE LABOUR STANDARDS: A SURVEY OF THE RECENT LITERATURE, OECD LABOUR MARKET AND SOCIAL POLICY OCCASIONAL PAPERS 45 (Org. for Econ. Co-operation & Dev., Paper No. 43, 2000), *available at* http://caliban.sourceoecd.org/vl=251329/cl=12/nw=1/rpsv/cgi-bin/wppdf?file=5lgsjhvj7rwd.pdf (last visited Jan. 10, 2007).

181. *See generally* Bantekas, *supra* note 24, at 311 (explaining how bilateral agreements can result in "the stigmatization or admonition of one State by another").

182. *Id.*

183. Chanin, *supra* note 170, at 751.

184. Bantekas, *supra* note 24, at 310.

185. U.N. Global Compact: What is the Global Compact?, *supra* note 117.

VI. PREVENTING A STALEMATE: RECOGNIZING THE IMPORTANCE OF REPRODUCTIVE HEALTH AND MULTINATIONAL ENTERPRISES' SUPERIOR ECONOMIC POWER THRU A PROPOSED INTERNATIONAL DOCUMENT BASED ON THE 1992 RIO DECLARATION

MNEs are powerful, integral players in the current wave of globalization. If the international community desires to improve the economic situation of many LDCs and continue this trend of globalization, it is imperative that MNEs be charged with responsibilities equal to their power. If MNEs were faced with such responsibility, the international community would be able to achieve advancements in protection of human rights analogous to successes achieved after human rights obligations were placed on sovereign nation-states. Although this position hints at far-reaching change, the discussion above regarding the legal foundations of corporate social responsibility and workplace reproductive health indicates that this change would be well founded in international law. Implementing this change with one right, namely that of reproductive health, will be a more workable task than tackling a more comprehensive right, such as the general right to health.

In addition, reproductive health is just as important to sustainable growth and development as is protection of the environment. An MNE that does not affirmatively recognize and protect reproductive health in the workplace may cause harm to workers and their current or potential families. This practice may, in time, lead to a community of unhealthy workers who are no longer able to perform at productive levels. Communities without a focus on reproductive health may face "[h]igher population growth, insecure livelihoods, higher risk of food insecurity," as well as larger than desired families, a more likely intergenerational poverty cycle, and a higher likelihood of "[c]hildren in large families [being] deprived in terms of nutrition and affection."[186] The UN Population Fund has indicated that these effects could lead to "[m]igration to crowded urban slums deteriorat[ing] local environmental resource base[s], [p]ressures on food and water security, [and e]xpansion into forested areas, marginal lands and fragile eco-systems."[187] MNEs may choose to relocate to another location, leaving in their wake a depleted community. A potential solution to this problem is for the UN to organize the tri-partite creation of a reproductive health document using a process similar to the ILO tri-partite process amongst workers, employers, and nation-states. This reproductive health

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186. Goal by Goal: Reproductive Health Counts: Quick Summary – UNFPA, http://www.unfpa.org/icpd/goalbygoal.htm (last visited Nov. 7, 2006) [hereinafter ICPD Goal by Goal].

187. *Id.*

document should be analogous to the Rio Declaration, explicitly addressing MNEs in a fashion similar to the UN Draft Norms and the Global Compact. The document would also create standards in a manner analogous to the UN Draft Norms, including obligations for incorporation into private contracts, reporting, and disclosure.

The Rio Declaration serves as a good example not only because sustainable development cannot be maintained without reproductive health, but also because many provisions of the Rio Declaration can be easily transplanted into the proposed document. For instance, Principle 1 states: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[188] This provision underscores the key importance of reproductive health to sustainable development because sustainable development is impossible without healthy human beings. Furthermore, Principle 3 states: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."[189] If "reproductive health" were substituted for "environmental," this provision would also fit into the proposed document because the development that present and future generations are entitled to will be severely impacted by MNEs' approach to reproductive health. Finally, Principle 5 states: "All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world."[190] This provision is easily transferable due to the fact that inattention to reproductive health reinforces the current poverty in the world, because individuals are either (1) unable to work, (2) unable to work at the same capacity, or (3) forced to spend all of their money on healthcare for themselves or their children.[191] All of these easily-transferable provisions could serve as a framework for showing that reproductive health is as important to sustainable development as environmental awareness and protection.

The standards promulgated by the proposed document would support the recognition and protection of workplace reproductive health. These standards would include the duty to research and share information regarding potential workplace hazards to reproductive health. This function would be supported by the formation of an international collaborative clearinghouse. This clearinghouse would minimize any duplicative work and costs of researching. The standards would also include a duty to fully disclose

188. *Rio Declaration*, *supra* note 124, at princ. 1.
189. *Id.* at princ. 3.
190. *Id.* at princ. 5.
191. *See* ICPD Goal by Goal, *supra* note 186.

all potential risks to workers in a comprehensible manner. Additionally, MNEs would be required to eliminate all hazards to workplace reproductive health in a non-discriminatory manner. Finally, a standard would also be included such that MNEs had to report to the collaborative clearinghouse on their attainment of the substantive standards. These standards would be explicitly tied to the principles of collective health, autonomy, individual reproductive health, the elimination of discrimination, and worker's rights. The following sections will explore these proposed standards, as well as the bases for them in more detail.

A. *Research and Share Information Regarding Workplace Hazards to Reproductive Health*

The standard to research and share information regarding workplace hazards to reproductive health would ensure that MNEs recognize the right to reproductive health as discussed above. Not only would this result in MNEs fulfilling their sustainable development and corporate social responsibility obligations, but it would also advance what has been called a collective human right to health.[192] As MNEs continue to gain economic power, their actions coupled with those of "global financial institutions" can leave "many developing states without the health resources and infrastructures necessary to respond to the majority of the world's disease burden."[193] This result is seen as LDCs avoid human rights compliance in order to encourage foreign investment. One commentator views these autonomy-diminishing effects of globalization as "necessitat[ing] a collective approach to health rights."[194] The proposed research and information sharing standard would advance individual reproductive health and collective reproductive health, especially when considering that an individual's reproductive health very rarely affects just that individual.

B. *Comprehensible Information Disclosure to Employees*

The standard on comprehensible information disclosure to workers is a necessary counterpart to the research standard because it ensures that workers are at least fully informed about potential risks in the workplace. This duty would mirror Point 9 of the Beijing Declaration on Occupational Health for All, which states that workers have a "right to know the potential hazards and risks in

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192. *See* Benjamin Mason Meier & Larisa M. Mori, *The Highest Attainable Standard: Advancing a Collective Human Right to Public Health*, 37 COLUM. HUM. RTS. L. REV. 101 (2005).

193. *Id.* at 109.

194. *Id.* at 119.

their work and workplace."[195] Furthermore, the absence of a disclosure requirement may result in MNEs hoarding any potentially damaging information, such that the purpose of the research requirement would be nullified. In addition to ensuring the achievement of the right to reproductive health, this disclosure standard respects an individual's right to autonomy and freedom from discrimination, as well as general worker's rights.

The UDHR recognizes the right of all individuals to be autonomous and free-willed by stating that "[n]o one shall be held in slavery or servitude."[196] Providing full information to workers about reproductive health hazards furthers the right to autonomy. Furthermore, some critics of the proposed protective reproductive health scheme may argue that the unimpeded operation of the marketplace can best protect human rights, and thus there is no need to provide a comprehensible information disclosure. However, this "efficient" functioning of the marketplace itself necessarily depends on all actors having full information. It is crucial that the information be comprehensible to workers because information that is highly technical or even presumes a base knowledge provides no more benefit than a complete dearth of information. Some may argue that the requirement of "comprehensibility" places MNEs in the traditional state actor role of educator. However, in order to avoid the violation of human rights by MNEs, it is necessary to couple their economic power with equal responsibilities.

C. *Non-Discriminatory Elimination of Hazards to Reproductive Health*

The affirmative duty to eliminate hazards to workplace reproductive health ensures individuals' enjoyment of rights to be free from discrimination as well as general worker's rights. This duty would essentially require MNEs to eliminate hazards that affect both sexes. Those hazards that are particular to only one sex would necessarily be disclosed under the previously mentioned full disclosure to employees policy. It is thus necessary to explore the impact of the inclusion of this standard on discrimination and general worker's rights.

MNEs have a duty to ensure non-discriminatory practices under CSR. Not only is freedom from discrimination a widely recognized human right located in the UDHR, the ICESCR, the UN Global Compact, the UN Draft Norms, and CEDAW, but the elimination of discrimination can have a positive impact on sustainable

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195. Beijing Declaration, *supra* note 157, ¶ 9.
196. UDHR, *supra* note 47, at art. 4.

development and growth.[197] "Economies that narrow the gender gap and improve the status of women grow faster."[198] Therefore, the observance of non-discriminatory elimination of hazards to workplace reproductive health will further sustainable growth and MNEs' duty to maintain it.

Workers' rights involve different concepts and frequently include those referenced by the ILO declaration, which includes "[f]reedom of association" and "[t]he elimination of discrimination."[199] Freedom of association necessarily includes the right to have power and control over one's life, because in an unregulated free market, the unequal bargaining power between an MNE and an individual employee will leave the individual powerless.[200] By regulating the power an MNE can exert through discriminatory hazardous practices, an individual's workers' rights are protected.

Additionally, the duty to eliminate hazards to workplace reproductive health promotes occupational health and safety, which has been advanced as a core workers' right.[201] "Until the recent development of the four core principles [of the ILO's Fundamental Principles and Rights at Work], working conditions, including health and safety, were consistently included in both national and international declarations."[202] Occupational health and safety are crucial to the attainment of other workers' rights, "'[b]ecause you can always quit . . . but you need two legs to walk out on.'"[203] Essentially, an MNE cannot fulfill its duty of CSR without affirmatively recognizing and protecting reproductive health in the workplace.[204]

Opponents to the recognition of occupational health and safety as a workers' right argue that the free market adequately enables workers to protect themselves from infringement upon their health rights.[205] While the proposed standard requiring comprehensible information disclosure of workplace reproductive health hazards aids in the operation of the free market, an affirmative regulation requiring the elimination of hazards is still necessary to ensure the achievement of reproductive health. "Workers may either not know

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197. *See* discussion *supra* Part VI.A.ii.

198. Gumisai Mutume, *Gender Discrimination Not Good for Growth*, http://www.freeindiamedia.com/women/21_july_women.htm (last visited Oct. 29, 2006).

199. ILO Declaration, *supra* note 73.

200. James A. Gross, *A Long Overdue Beginning: The Promotion and Protection of Workers' Rights as Human Rights*, *in* WORKER'S RIGHTS AS HUMAN RIGHTS 1, 4 (James A. Gross ed., 2003).

201. *See generally* Speiler, *supra* note 83, at 78–117 (discussing occupational health and safety as a core worker right).

202. *Id.* at 86.

203. *Id.* at 78.

204. *See* James Atleson, *"An Injury to One . . .": Transnational Labor Solidarity and the Role of Domestic Law*, *in* WORKER'S RIGHTS AS HUMAN RIGHTS 160, 162 (James A. Gross ed., 2003).

205. Speiler, *supra* note 83, at 90.

about or comprehend the risks . . . or they fail to 'bargain' for increased pay because of limited mobility in the labor market."[206] Furthermore, market forces are insufficient to protect the health of individual workers because "health and safety is a local public good: when health and safety conditions in a workplace are improved, they are improved for all workers who might otherwise be at risk."[207] Individual workers may not bargain efficiently for increased public health "because individual workers may be unwilling to modify wage demands enough to make investment in health and safety for the group worthwhile."[208] Thus, this regulation protects workers and their societies, because affirmatively eliminating non-discriminatory workplace hazards to reproductive health advances general workers' rights of freedom of association, elimination of discrimination, and occupational health and safety.

D. *Duty to Incorporate and Report Substantive Standards*

Finally, the inclusion of a requirement to incorporate the substantive standards into contracts and to report on them to a collective collaborative body serves all of the underlying principles of collective health, autonomy, individual reproductive health, the elimination of discrimination, and workers' rights. These procedural standards would give effect to the substantive standards by ensuring that MNEs are faced with obligations equal to the size of their economic power. By imposing the duty to incorporate and report, the importance of reproductive health will be underscored as MNEs achieve corporate social responsibility

VII. CONCLUSION

The protection of human rights is reaching a stalemate as globalization continues to increase MNEs' economic power and LDCs remain in weak bargaining positions. Sustainable growth inherently hinges upon the achievement of human rights because oppressed or unhealthy societies cannot maintain themselves. Therefore, sustainable growth suffers as the stalemate worsens.

MNEs have a corporate social responsibility to encourage and maintain sustainable growth and thus to acknowledge and protect human rights. This responsibility is grounded in the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work and is also evidenced by the growing

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206. *Id.*
207. *Id.* at 91.
208. *Id.*

amount of soft law surrounding CSR. One way for MNEs to begin to satisfy their obligations is to acknowledge and protect reproductive health in the workplace.

Reproductive health is as essential to sustainable development as the protection of the environment. An MNE that does not recognize and protect reproductive health in the workplace may create a crippling cycle of illness and poverty in the communities in which it operates. The organization of a tri-partite reproductive health document based on the 1992 Rio Declaration would help MNEs avoid this pitfall. Furthermore, this document would aid in the reorganization of power in the international arena, such that a human rights stalemate is avoided. This document should include standards requiring that MNEs (1) research and share information regarding workplace hazards to reproductive health, (2) disclose comprehensible information regarding workplace reproductive hazards to employees, (3) eliminate hazards to reproductive health in a non-discriminatory fashion, and (4) incorporate these standards into substantive contracts and report on them to a collective collaborative body. In this manner, workers, their families, and their communities will savor "[t]he sound of freedom that resonates from civil and political rights."[209]

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209. Feitshans, *supra* note 1, at 94–95.

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