"*WHEN CORPORATIONS RULE THE WORLD*"?
MAKING MULTINATIONALS ACCOUNTABLE THROUGH EXTRATERRITORIAL REGULATION

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"*There is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things - for the reformer has enemies in all who profit by the old order, and only luke-warm defenders in all those who would profit by the new order. The luke-warmness arises partly from fear of their adversaries who would have the law in their favour; and partly from the incredulity of mankind, who do not truly believe in anything new until they have had actual experience*"

(Niccolo Machiavelli, The Prince, 1513).

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[*] The title owes reference to David C. Korten's 1995 publication "*When Corporations Rule the World*" (Kumarian Press Inc. and Berrett-Koehler Publishers Inc.).

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"*WHEN CORPORATIONS RULE THE WORLD*"? MAKING MULTINATIONALS ACCOUNTABLE THROUGH EXTRATERRITORIAL REGULATION

INTRODUCTION: INTERNATIONALISATION AND THE ENVIRONMENT

Recent decades have been characterised by 'internationalisation', involving the increasing integration of production across the globe. This has been facilitated by the spread of multinational corporations throughout much of the world. At the same time, there has been an increasingly widespread awareness of the importance and fragility of the planet's ecosystem. It is suggested that 'humanity now stands at a decisive point in history' as we recognise the pressing need to preserve the biosphere, "the only known place where human and other forms of life are possible" (IUCN & ICEL, 1995: 43). Indeed, our continued existence may depend upon us acting now to protect the environment for future generations. As Peter Drucker argues, "[w]e still talk of 'environmental protection' as if it were protection of something that is outside of, and separate from, man. But what is endangered are the survival needs of the human race." (Drucker, in Stead & Stead, 1992: 77). This growing awareness is coupled with a recognition of the need to protect the human rights and cultural diversity of the Earth's peoples. These twin goals of environmental and social protection, both fundamental elements of sustainable development, are fast becoming a 'common thread binding together humanity' (IUCN & ICEL, 1995: 43).

There is particular concern over the threat posed to the Earth's environment and populations by a number of economic activities. As Brunton argues, "the ability of large-scale economic activity to absorb the costs it generates, and imposes on, society is grossly inadequate. The economic system cannot cope with the real costs of its own development and expansion. Insofar as the externalities impinge on the environment, they are out of control" (Brunton, 1997: 168). Many people are now suggesting that there is an urgent need to reassess and reprioritise the goals of 'development' to ensure that the pursuit of economic prosperity is not placed above the need for social and environmental protection. As Jean and W. Edward Stead suggest, "[h]umans simply cannot afford to dismiss the limits of the planet or the greater community and society in which economic activity takes place. … It seems only logical to acknowledge that global economic activity must function within the natural and social boundaries of the planet. It certainly has no place else to function." (Stead & Stead, 1992: 7). Clearly, it can no longer be seen as 'hippy idealism' to protest that economic activity must be sustainable, remaining within the bounds of the planet's ecosystem and supporting, rather than detracting from people's quality of life.

While there are a number of economic activities whose damaging environmental and social impacts make them targets for concern, the mining industry is often singled out as one of the major perpetrators. Indeed, over the last few decades the mining industry has become increasingly notorious for its repeated involvement in severe environmental disasters and the dislocation of local communities. These disasters plague mining companies from across the globe, including those based in Australia. In this light, where examples have aided clarity, the issues raised in this thesis are explored in relation to the Australian mining industry as representative of a broader phenomenon. The particular case of the mining industry is the focus of Part One.

The regulation of industries and attempts to minimise the damage they cause have become increasingly complex and difficult as the economy has internationalised. Regulating industry has traditionally been carried out by nation-states. However, when economic activities are no longer confined to national borders and firms become multinational, nation-based regulation becomes problematic. Activities which are linked through a number of national territories cannot be adequately regulated by each individual nation's domestic laws. The question of how to make multinationals fully accountable for their social and environmental impacts is therefore seen as "one of the most urgent challenges facing our era" (Amnesty International, 1999[*]).

The problems for regulation created by the spread of multinational corporations (MNCs) are often particularly acute for developing countries. Multinational firms based in industrialised nations are usually required to meet specific environmental and social standards in their operations at home. However, they are increasingly setting up operations in less developed countries (LDCs), where they are often subject to very little regulation as a result of the limited capacity of the host states. Therefore, while activities such as mining may cause environmental and social damage regardless of the character of the firms involved, there are particular problems when these firms are multinational, as they can set up operations in areas lacking effective regulation. Internationalisation and the particular problems of regulation in developing countries are explored in Part Two.

A number of approaches to controlling MNCs' environmental and social impacts have been developed in response to the problems of regulation in LDCs. There has been a proliferation of attempts at regulation by international agencies and non-government organisations, as well as pressure for self-regulation and more responsible practices in investment and insurance providers. However, despite these efforts, MNCs' activities are still causing an unacceptable number of environmental and social disasters across the globe, and particularly in LDCs. As explored in Part Three, all

[*] Where no page numbers are referenced for direct quotations, the source is a website with no page divisions.

of these approaches to controlling MNCs continue to be plagued by poor enforcement and monitoring of standards, such that they are inadequate to provide the necessary protection.

In light of these failures, a new suggestion for meeting the challenge of regulating multinationals in LDCs has recently been raised. It is suggested that MNCs should be forced to comply with the environmental and social standards they abide by in their home countries regardless of where they are operating in the world. This idea is based on the greater capacity of industrialised nations than developing states to regulate the activities of multinationals. As Duffield suggests, a question that increasingly confronts governments in the industrialised world is whether the "standards that are generally applied in the 'home country' of an MNC, by virtue of the domestic laws in operation there, should be applied where the domestic regulations are less thorough" (Duffield, 2000: 193). Proposals for the extraterritorial regulation of MNCs have been developed by an increasing number of environment and human rights non-government organisations (NGOs), as well as by a number of political parties throughout much of the world. These proposals are outlined in Part Four.

In contrast to current efforts at controlling the environmental and social impacts of MNCs, extraterritorial regulation can allow adequate enforcement of standards through binding legislation and effective and independent monitoring. Moreover, this would apply to each MNCs' operations worldwide. Thus, extraterritorial regulation would provide benefits for both LDCs and the international community via improved opportunities for sustainability in development. It would also benefit home states in terms of a competitive advantage for their national economies. Indeed, a reputation for sound environmental and social management is becoming increasingly critical for the international competitiveness of a nation’s firms.

However, there is considerable debate over whether the extraterritorial application of national laws is a legitimate and legally acceptable course of action. In addition, questions have been raised as to whether MNCs would be likely to 'change nationality' in order to escape such regulation and if, in any case, legislation is effective in the face of corporate pressure to limit its scope. These various debates concerning extraterritorial legislation are explored in Part Five. While the extraterritorial application of national environmental and social protection laws is a novel and somewhat unorthodox approach, *it is* legitimate and acceptable under international law. Moreover, extraterritorial legislation would apply to the parent companies of MNCs, which are institutionally and culturally embedded in particular national territories. Hence, they are unlikely to 'change nationality' in order to avoid these controls. This gives home states a greater capacity than developing host states to regulate the activities of MNCs. Corporate pressure to weaken and limit legislation does pose significant challenges for the extraterritorial regulation of multinationals. However, even the limited level of regulation extraterritorial legislation could provide would significantly improve environmental and social protection in LDCs. Moreover, as pressure for preservation of

environments and communities mounts around the world, the influence of those standing in the way of this change will gradually be undermined.

Therefore, extraterritorial regulation of MNCs can play a crucial role in the campaign for global environmental and social protection. In particular, where other efforts have failed, extraterritorial legislation can assist LDCs in developing along a sustainable path. In addition, while the other approaches examined have been unable to ensure adequate standards in MNCs' activities on their own, they each have particular merits and can make valuable contributions to the control of MNCs worldwide. Indeed, being matters of urgent and global concern, it is critical that every available opportunity is taken to ensure the sustainability of the Earth's communities and environments. The best approach to regulating multinationals is, therefore, a multifaceted one involving national governments, international institutions, NGOs and the corporations themselves. The challenge over the coming years will be to coordinate these efforts and create a 'culture of sustainability' at every level.

While many of the issues raised in this thesis are explored in relation to the Australian mining industry, the conclusions drawn are equally as applicable to other multinational industries with damaging social and environmental impacts. They can also be applied to MNCs based in any industrialised nation. The environmental and social impacts of the mining industry are the focus of the next section.

PART ONE:

THE ENVIRONMENTAL AND SOCIAL IMPACTS OF MINING

1.1 Environmental Impacts of Mining

There has been an increasing awareness over the last few decades of the importance of protecting the Earth's environment and the need to conduct economic activity sustainably within the planet's ecosystem. Mining has therefore been of particular concern, as mining operations have the potential to be environmentally devastating and have often directly violated the principles of sustainability. The list of potential environmental impacts of mining is extensive. Forest cover and other flora is often destroyed to clear the mine site and make room for the associated facilities. Overburden, including large amounts of soil and solid matter, dug from the mine often washes into streams and rivers. Sulphidic rocks may be exposed, causing 'acid rock drainage' which runs off into waterways. Surface and groundwater flows are often dramatically altered. A combination of these factors may mean biodiversity is significantly reduced. Tailings containing chemicals and heavy metals from ore processing plants are often dumped directly into waterways. Even when tailings are contained in dams, leakages cannot always be prevented (Atkinson, 1998; EPA, 1995). Other potential environmental impacts include "[d]estruction of wilderness value; introduction of exotic species, disease and competitors; increased risk of wildfires; fragmentation and isolation of breeding populations; … visual impact; noise; dust; water contamination; rubbish; roading; erosion; and, fuel and oil spills" (ACF, 1992: 1).

It has been suggested that the potential environmental impacts of mining operations may be getting worse. As open-pit mining increases, it allows the use of progressively lower-grade ores. In addition, many of the richest ores are "either being exploited or have already been exploited" (Vereniging Milieudefensie, 1997: 43). The use of lower-grade ores creates more waste and consequently the potential for more environmental damage. "Similarly," argue Friends of the Earth, "as the most accessible deposits have already been mined, mining companies increasingly enter less accessible areas in search of ores. Both trends mean that per amount produced, more damage is done to the environment and to the people that depend on it. This may partially be compensated for by the development of more environmentally-friendly methods, but on balance the trend is towards greater environmental damage per kilo of produced metal" (Vereniging Milieudefensie, 1997: 43).

1.2 Social Impacts of Mining

As well as these environmental impacts of mining, there are very often severe social impacts within the local and regional communities. This is of particular concern since, along with environmental factors, the protection of social factors is critical to sustainable development (OECD Secretariat, 1999). Mining operations are generally in remote areas, and the people who live in these areas often depend to a large extent on the natural environment for their livelihoods. Thus, any disruption to the environment can directly and severely affect them. As Atkinson argues, "[t]he stakes are high. The placing of a large modern mining operation in the midst of a remote or unsophisticated community is bound to have a dramatic effect on their lives; if it is not done properly, this can be a dramatically negative effect. The communities are often very vulnerable, living close to the poverty line and dependent for their livelihood on a physical environment which is being drastically disrupted" (Atkinson, 1998: 11). For example, the pollution of waterways by waste and tailings from mine sites can directly affect the livelihoods of people who depend on the waterways for fish, drinking water, cooking and washing. It can also affect other food sources such as birds and wildlife. Heavy sedimentation resulting from mine wastes can also make transportation along rivers and waterways very difficult. Atkinson argues that when environmental damage occurs, communities can lose "their fundamental rights to a livelihood, a home, clean water or a safe environment" (Atkinson, 1998: 58).

As well as dramatically affecting the livelihoods and lifestyles of local communities, mining operations can contribute to a variety of other social problems. These may include militarisation, human rights abuses, prostitution, violence, alcohol abuse and the breakdown in traditional community decision-making and power structures (Harris, 1997: 192).

The operations of mining companies have also often resulted in the local communities losing their land. For example, the ownership of land by many indigenous groups is based on customary law rather than official title. Thus, they can lose their land to a mining company without compensation (Atkinson, 1998). Even when compensation for the loss of land is provided, it is often inadequate or poorly handled such that it exacerbates the social problems created by the mine within the local community. Landowners are frequently ill-equipped to deal with such a "rapid and massive onset of cash" (Banks, 1996: 233). This can lead to leadership struggles and tensions within communities and families over 'who gets how much' and what is done with it. Overall, in many cases, local populations are "still being left destitute as a result of poor handling of resettlement or compensation" (Atkinson, 1998: 11).

Whether compensation is paid or not, the loss or destruction of land can be devastating and debilitating to local communities, whose economic welfare, culture, spirituality and sense of identity are often intricately bound up with the land (Atkinson, 1998). As Nash argues, the destruction of the landscape by mining operations is often a "cataclysmic event" for local subsistence communities. For these communities "there is no frontier, no prospects for escape, no endless scenes of other places electronically delivered to give them a fantasy sense of place, as television does with us. Their land is not only for material benefit, which compensation payments reduce it to; it encodes their history and

identity and is a major source of security" (Nash, in Kirsch, 1997: 120). The cumulative social impacts mentioned above mean that if not managed correctly, mining projects can "initiate a downward spiral of social disintegration" (Filer, in Kirsch, 1997: 119).

Subsidiaries of foreign mining companies often leave dealings with the local communities to the host government. However, as Atkinson clearly articulates, "this is not good enough when those laws deny indigenous people their basic rights. Nor is it in the best interests of companies who will have to deal with the consequent problems of local opposition and conflict" (Atkinson, 1998: 59). Environmental damage and the loss of land to mining companies have often been key causes of local opposition to mines. On a number of occasions, such opposition has been so violent it has forced mine closures (Atkinson, 1998).

1.3 Case Studies: Australian Mining Multinationals Operating Overseas

Australian-based mining multinationals are by no means the only contributors to the damaging effects of mining as illustrated above. However, they are significant players in the global mining industry, and their practices are representative of the industry worldwide. They are active all over the world, including Asia, South America, Africa, the South Pacific, Europe and North America. Both the number of their overseas operations and the level of their overseas investment are increasing. In 1996, they were involved in a total of six hundred and forty two projects abroad, many of which were in LDCs. This constituted around forty per cent of their total investment (Atkinson, 1998: 7). While Australian-based mining MNCs also have a number of operations in Australia, it is their mines in developing countries which have caused the most severe environmental and social impacts. Indeed, while the domestic practices of Australian based mining multinationals are regarded by some as close to world's 'best practice' (MCA, 1999), it has been suggested that the practices of these same MNCs in developing countries are among the world's worst. As Geoff Evans argues, "[b]arely a week goes by without an Australian mining company revealed as being involved in some controversy or another" (Evans, 2000a: 11).

Perhaps the best known example of massive environmental and social damage being caused by an Australian-based mining company was at Ok Tedi in Papua New Guinea (PNG). The Ok Tedi mine was operated by Ok Tedi Mining Limited (OTML), in which Australian company Broken Hill Proprietary Limited (BHP) had a principal share. Although the original environmental plan included a tailings dam at Ok Ma, a landslide destroyed the dam in 1984 while it was still under construction. Over the next two years, OTML persuaded the PNG government to let mining operations proceed in the absence of a tailings dam (Jackson, 1993). This was in despite of several studies which predicted that the decision not to contain the tailings would mean the river "would become unable to support human life and would

be biologically destroyed for generations" (Gordon, 1997: 143). Thus, around sixty six million tonnes of mine waste was discharged directly into the Ok Tedi River each year (eighty thousand tonnes per day) for over a decade of the mine's operation (Filer, 1997a: 62). These tailings included dangerous metals and chemicals such as copper, zinc, cadmium, cyanide and lead (AID/WATCH & MPI, 1999).

The resultant pollution and sedimentation of the river system severely affected thousands of villagers in the surrounding areas. One of the most severe environmental impacts was that the progressive sedimentation and aggradation of the river bed caused repeated flooding and deposition of mine waste on the fertile land along the river banks. Large amounts of forest and fertile gardening land were destroyed (Burton, 1997a; Filer, 1997a, Gordon, 1997). The river system was "super-saturated with sediment from the mine", threatening all riverine life as well as birds and other wildlife (Kirsch, in Filer, 1997a: 56). King describes the rivers downstream of the mine as, in some parts, resembling "solid grey clay" (King, 1997: 101). In 1993 the ACF termed the Ok Tedi river 'biologically dead' and a 'sacrifice zone for the mine' (in Gordon, 1997: 143).

In addition to the damage caused by the deliberate riverine disposal of the tailings, in June 1984 2,700 sixty-litre drums of sodium cyanide were lost in the Fly delta. Only 117 were recovered. At around the same time, 1,000 cubic metres of untreated cyanide tailings were accidentally discharged from a bypass valve into the Ok Tedi. OTML kept quiet about this for two weeks until large quantities of dead fish and reptiles in the river system prompted an admission (King, 1997: 99).

The livelihoods and subsistence lifestyles of communities living downstream of the mine were severely affected by the sedimentation and pollution. They lost access to clean water, aquatic protein and gardening land. In the words of one of the local villagers, "[n]ow we river people can no longer drink from the river, nor can we swim, bathe, wash clothes, or fish in the river. We are unable to replace the protein in our diet that was formerly provided by aquatic resources…The lives of all the people along the Ok Tedi river are a complete disaster… My people's main concern is quite clear: our lives and also the lives of other rural poor who are directly dependent on the use of natural resources including land, forest and water. The right to live is the most basic and sacred of all rights, and is inextricably linked with the use of natural resources in Papua New Guinea." (Maun, 1997: 114). Indeed, this right is affirmed in numerous international declarations. The Stockholm Declaration states that "[m]an [sic] has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being" (in IUCN & ICEL, 1995: 50). Clearly, the practices of OTML were in stark contrast to this principle.

The disastrous physical impacts on the local communities were also associated with a less tangible, but no less significant, impact on their belief systems. As Kirsch explains, "[t]he damage to their ecosystem ultimately weakens the

intimate association between [their] myths, religious beliefs, and their environment. … As events and actions are seen as mapped onto the physical world, environmental destruction also erases social histories and memories of the deceased" (Kirsch, in Filer, 1997a: 63). Indeed, it has been suggested that the Ok Tedi mine "has proved a social and ecological disaster. The local people have been alienated, their culture shattered… the local culture has little long term chance of survival so long as the mining continues" (Hyndman, in King, 1997: 96). Compensation to landowners affected by the mine was very poorly handled. The landowners in the immediate vicinity of the mine received compensation and benefits including health care, business opportunities and royalty and lease payments. However, the landowners living downstream of the mine, who suffered the heaviest environmental costs, were never considered for compensation (Banks & Ballard, 1997: 6).

Considerable opposition to the mine and OTML's practices from the downstream communities led to litigation proceedings against BHP in the Victorian Supreme Court, beginning in 1994. The case was brought before an Australian court on the grounds that BHP had at all times made the controlling decisions in regards to the mine's operations (Gordon, 1997). BHP responded to the litigation by drafting proposed legislation which would make it an offence for anyone to sue, or assist others to sue BHP in PNG. Furthermore, it sought to make it illegal to challenge the constitutional validity of the legislation. BHP then lobbied the PNG government to adopt this legislation in order to prevent the landowners from pursuing the case. For its part in this scheme, BHP was found in contempt of court (Gordon, 1997: 144). While the landowners were able to proceed with the hearing, the PNG government later passed an Act "making it illegal for PNG landowners to take legal action against a resource project" (AID/WATCH & MPI, 1999: 25).

The recorded observations of pollution at Ok Tedi date back to 1983. However, even as late as 1995, OTML were claiming that there was "a lack of any clear evidence of permanent environmental damage" (Uiari, in Burton, 1997a: 49). Burton suggests that "[g]iven the extent of dieback already known to have occurred, this was to speak in denial of reality, especially given the non-reversible scouring of garden land" (Burton, 1997a: 49). Later in 1995, BHP finally admitted liability. The parties reached an out-of-court settlement in June 1996. BHP agreed to pay a compensation package to the downstream landowners, as well as paying their legal costs and finding more effective ways of dealing with the mine waste (Filer, 1997b). Atkinson suggests that the compensation package may end up costing BHP up to half a billion dollars (Atkinson, 1998). However, AID/WATCH and the Mineral Policy Institute (MPI) have calculated that this "amounts to $12 per person per year until the expected mine closure date of 2010" (AID/WATCH & MPI, 1999: 25).

In the view of many people throughout the world, "'Ok Tedi' now stands for the image of an environmentally destructive, greedy multinational miner who, as the story progressed, was prepared to collaborate with the state to

refuse democratic and legal rights to those rural Papua New Guineans who opposed them." (Banks & Ballard, 1997: 3). The Ok Tedi mine is still operational, and BHP has conceded that the social and environmental destruction from the mine is continuing to get worse (AID/WATCH & MPI, 1999: 25). Since the settlement in 1996, the forest dieback related to the mine has increased, and it is likely to spread even further. Recent studies have indicated that "in the Lower Ok Tedi there has been an approximate 90% decrease in fisheries biomass, and in the middle Fly River around 75%, with some species no longer found in this stretch of river. Further decreases and even a total collapse of the fishery are possible" (Divecha, 2000: 8). It may take centuries for the copper-rich sediment deposits to be covered and sealed by unpolluted sediment cover (Brunton, 1997).

The Ok Tedi case stands as an example of some of the most severe environmental and social impacts of any mining operation worldwide. However, while there were hopes at the time that this kind of destruction would never happen again, similar disasters have continued to occur. As recently as January of this year, 100,000 cubic metres of cyanide-contaminated water spilled into the Tisza river in Romania from the tailings dam at the Baia Mare mine. The mine is part owned by Australian company Esmerelda Exploration Limited. Three major rivers flowing through Romania and Hungary were severely polluted by the spill, with cyanide measuring at seven-hundred times the normal levels (Barrett, 2000). This had a devastating impact on fish populations and the associated ecosystems, and severely affected thousands of local people who depended on the rivers for their livelihoods. The cyanide also contaminated major water supplies throughout Hungary, posing a significant health risk to up to 2.5 million people (MPI, 2000). Baia Mare has now been labelled an "ecological disaster area" and the "most polluted city in Europe" (Evans, 2000a: 11).

Mining activity is increasing internationally, such that "we will see dozens of new mining projects with the potential for major social and environmental impact being developed over the next ten years or more" (Harris, 1997: 190). Clearly, it is crucial that the environmental and social standards of the industry are improved worldwide.

PART TWO:

THE DIFFICULTIES OF REGULATING MULTINATIONALS IN LDCs

Recent decades have been characterised by the increasing integration of production internationally as multinational corporations have spread their activities across the globe. These enterprises consist of a decision-making centre and operating centres in two or more countries. The firms are linked such that one or more is able to exert a significant influence over the activities of the others (OECD, in van Hecke, 1984). In particular, these linked firms often share knowledge, resources and responsibilities (UNCTC, in FoE, 1998). With the rise and spread of MNCs, the regulation of industries in order to minimise the environmental and social damage they cause has become increasingly difficult. Traditionally, this regulation has been carried out by nation-states. However, when the scope of a corporation's activities is no longer confined to national borders, nation-based regulation clearly becomes problematic.

The difficulties this raises are often particularly acute for developing countries, where multinationals are increasingly setting up their operations. The vast majority of MNCs are based in industrialised nations and are usually required to meet specific environmental and social standards in their operations at home. However, their activities in LDCs have frequently evaded effective regulation. Thus, there is a persistent pattern of MNCs using lower environmental and social standards in their operations in LDCs than in their operations at home (Franco, 1998). It has often been suggested, by non-government organisations and industry representatives alike, that multinationals may even establish operations in LDCs in a deliberate effort to escape more stringent regulation in industrialised countries (MPI, 1998). For these reasons, it is often regulation of the *overseas* activities of multinationals which creates the most concern.

Regulation of multinationals in LDCs is often less adequate than elsewhere for a number of reasons. The governments of developing countries most often lack the capacity to effectively monitor or regulate MNCs. This lack of capacity is typically associated with a shortage of institutional, administrative, technical and financial resources, as well as the inadequacy of political and economic institutions (Weinstein, 1976; Dauvergne, 1997). In the case of mining, this problem is exacerbated by the spread of operations to increasingly remote and isolated areas as MNCs continue to search for untapped mineral resources. The more inaccessible and remote the area, the less likely the state will have the capacity for the effective monitoring of operations and the adequate enforcement of regulation. For example, King suggests that many "frontier" areas of PNG are "so underdeveloped as to be effectively outside the control of Papua New Guinea" (King, 1997: 97).

Thus, developing host states are often characterised by the general inability to implement policies. Gunnar Myrdal has described these countries as ‘soft states,’ in which laws are generally ignored and often unenforceable (in Weinstein, 1976: 287). Weinstein argues that this feature is common to most LDCs, where the “basic condition of underdevelopment” imposes “awesome obstacles” on state capacity (Weinstein, 1976: 295). In some cases, the capacity of developing states to enforce environmental and social regulations may be further undermined by weak legal powers over resources. For example, in the Solomon Islands, the state has limited legal capacity to manage forests, as most forest areas are controlled by customary landowners (Dauvergne, 1997).

Another major factor contributing to the lack of capacity of developing nations to regulate multinationals is their lack of bargaining power. The relative position of LDCs in the international economy and their lower levels of economic development mean that their governments are often willing to support development ‘at any price’ (Franco, 1998; Vereniging Milieudefensie, 1997). Environmental and social regulation of foreign investors is, therefore, often a low priority in developing nations. The host states’ desire for investment means that they are generally very constrained and limited in their ability to control the operations of multinationals within their borders. Indeed, in a bid to secure foreign investment, they generally offer highly favourable terms for multinationals, who threaten to otherwise invest elsewhere. These terms often include generous tax breaks, the repatriation of a large percentage of the profits and minimal environmental and social regulations. In this vein, governments of LDCs have often revoked or diluted resource management policies where they are perceived to threaten short term corporate profits (Dauvergne, 1997).

For the same reasons, LDC governments have often implicitly committed themselves to suppressing any local opposition to MNC operations. Indeed, in a number of concerning instances, multinationals have had so much influence that "police and armies have been 'turned into security guards' of multinational capital" (Gallin, in Duffield, 2000: 194). Thus, in many cases, the governments of developing host states “pander... to the whims of multinational corporations" (Brunton, 1997: 180) such that any powers they might otherwise hold have failed to have much impact on aggressive foreign investors.

Vernon has suggested that the power relations between foreign investors in resource industries and host states may change over time. The host government is endowed with valuable natural resources. However, it is unable to exploit them because of a lack of financial and technical power. Hence, the host government is initially in a poor bargaining position relative to the MNC possessing such power. To secure investment by the MNC the host government therefore offers generous concessions to the company. However, Vernon argues that once the investment is secured and operating successfully, the country's population no longer views the high levels of return to the company as appropriate. In addition, the state may enjoy increasing levels of technical expertise. This results in a situation where the government is increasingly pressured to raise demands on the foreign investor, while the investor is committed to

the project by the sinking of commitments and clearly desires to stay. Thus, over time, the balance of power changes and the host state can begin making stronger demands on the company. Vernon refers to this as the "obsolescing bargain" (in Jenkins, 1986: 141).

Some have even suggested that host states may in fact begin with considerable bargaining power over resource multinationals. The proposition is that since these MNCs seek access to resources which are located in the host states' territories, host states may be able to deny that access unless the corporations accept certain conditions. However, while the fixed location of natural resources may, under certain circumstances, mean that host states have more bargaining power over resource MNCs than over other multinationals, it does not imply that this bargaining power will be significant. The bargaining power of a developing host state will be limited as long as the country remains in a poor position in the international economy (Jenkins, 1986). Most often the first priority of these states is to secure foreign investment, and even natural resource MNCs can and do threaten to invest elsewhere if they feel the state's conditions are too severe. Therefore, in LDCs, the bargaining power of resource multinationals *is* initially stronger than that of the state. This is attested to by the large number of LDCs which continue to bid for investment from resource multinationals by keeping their environmental and social regulations to a minimum (Dauvergne, 1997). Moreover, even if LDC governments succeed in attracting resource multinationals despite theoretically stricter environmental and social standards, they most often lack the resources and capacity to effectively implement policy.

For similar reasons, Jenkins (1986) suggests that the 'obsolescing bargain' does not often occur in reality. As well as the bargaining power of the host state remaining weak, and contrary to Vernon's assertions, there is often continued or increasing support for the foreign investor among local elites as the project progresses. This is particularly the case when corporate bribes and pressure play a role. Further, MNCs often retain considerable leeway. For example, they may strike deals with the government, trading knowledge to bend government policy. Companies possess valuable technology that the government simply does not have access to. Thus, the shift in bargaining power is certainly not a foregone conclusion. Jenkins argues that "[w]hile the obsolescing bargain may explain why a host government feels compelled to exert control over MNCs, it disregards operative factors that may prevent governments from implementing such plans" (Jenkins, 1986: 407).

It is sometimes possible that the bargaining power of host states is increased when they are shareholders in or joint-venturers with the MNCs. However, even in joint ventures with a majority local ownership, the multinationals often still have the stronger bargaining position, as they provide the equipment, spare parts, financing, expertise and marketing services. Thus, Weinstein suggests that "the local owners would be able to disregard [the company's] advice only if they were prepared to sabotage the entire venture" (Weinstein, 1976: 289). Moreover, there is a significant conflict of interests when the government is both a shareholder in the company and the regulator of the developer's activities.

This is a common occurrence in resource projects in LDCs (Harris, 1997: 192). When there is this conflict of interests between the government's responsibilities to the company and its responsibilities to the people, "[a]s shareholders and directors the state's first legal duty is to the company" (Brunton, 1997: 182). Thus, there is a disincentive within the government to regulate the project in a way which increases up-front costs and decreases short-term profits, as may often be the case when implementing measures for environmental and social protection.

As well as a lack of institutional capacity, limited bargaining power and conflicts of interest, the ability of LDCs to regulate MNCs' activities is often further restricted by corruption within the host governments, political instability and corporate bribes and pressures (Dauvergne, 1997). Weinstein argues that corruption in LDCs is often widespread: "Corruption is a most serious condition in these countries less for moral reasons than for its reflection of the anarchy pervading both the political and economic arenas; it so pervades both public and private sectors and introduces such a high degree of unpredictability into decision making that it virtually precludes consistent implementation of policies in most fields" (Weinstein, 1976: 287). Similarly, Filer suggests that in many LDCs "the fluctuating personal interests of individual ministers and their own political patrons and clients have come to undermine the capacity of public servants to maintain the coherence of existing sectoral development policies" (Filer, 1997b: 115).

A combination of the above factors most often leads to poor environmental and social regulation of multinationals by developing host states. Indeed, Dauvergne suggests that "when a developing state is confronted by aggressive corporations that provide vital state revenue or crucial personal support for state members, then the state will exert weak control over corporate environmental practices" (Dauvergne, 1997: 6). Further, he argues that despite the ability of foreign firms to negotiate favourable agreements with developing host states, in many cases they break these agreements and largely ignore the very limited social and environmental rules.

For example, multinational timber companies operating in the Solomon Islands have consistently left behind more damage and less development than had been agreed upon with state officials and community representatives. This has included the pollution of rivers, violation of sacred sites and evasion of timber royalty payments. Indeed, Joses Tuhanuka, the former Minister of Forests, Environment and Conservation in the Solomon Islands has argued that "During my time as Minister, foreign logging companies persistently showed a blatant disregard for the nation's laws, regulations and policy of the government of the day" (in Dauvergne, 1997: 9). Further, in many instances, the commitments undertaken by foreign investors are accompanied by an 'escape clause,' in which it is understood that the commitment (for example the commitment to construct a tailings dam) is "contingent on its economic feasibility when the time for implementation arrives" (Weinstein, 1976: 293).

Similarly, Cameron suggests that the 'driving forces' of change in many LDCs have not been government ministries. "Trans-national economic interests, usually operating through trans-national corporations in the extractive and tourism sectors ... have set the pace and values of 'development' in the Pacific Islands, as elsewhere" (Cameron, 1997: 30-31). Indeed, many researchers have characterised MNCs in a number of developing countries as 'partial substitutes' or 'alternatives' to national governments (Filer, 1997a).

In a vast majority of cases, then, multinationals are able to operate within developing countries with little state scrutiny and almost no governmental restraints. These corporations have often become, in Moran's words, "non-governmental actors who possess par excellence the power to carry out their own foreign policy, to form alliances and exercise influence with a scope and range that exceeds the control of the countries in which they operate" (Moran, 1973: 305). Clearly, there is a need for improved regulation of the activities of multinational corporations in developing countries.

PART THREE:
THE FAILURE OF OTHER ATTEMPTS AT REGULATION

A number of approaches to controlling MNCs' environmental and social impacts have been developed in response to the problems of regulation in LDCs. There has been a proliferation of attempts at regulation at the international level, as well as influence from NGOs and pressure for self-regulation and more responsible practices in investment and insurance agencies. These approaches are outlined in sections 3.1 to 3.4 below.

3.1 Guidelines and Codes of Conduct Under International Agencies

It has often been suggested that in this internationalising era, a system of international management holds the most promise for adequately ensuring environmental and social standards in the operations of MNCs (Prince & Nelson, in Kirsch, 1997). A particular benefit of a successful international approach would be that the operations of MNCs in developing countries would come under the ambit of regulation. This has prompted the development of a proliferation of international mechanisms and programs designed to influence the behaviour of multinationals and deal with their impact on the environment and local communities. Perhaps the most well-known and influential of these programs have been developed under the United Nations (UN) and the Organisation for Economic Cooperation and Development (OECD).

Negotiations to establish the UN ‘Draft Code of Conduct on Transnational Corporations’ began in 1977 under the United Nations Centre on Transnational Corporations (UNCTC). The Code was intended to be voluntary, and to delineate the rights and responsibilities of MNCs in their investments. Major provisions of the draft Code established that MNCs should “respect host countries’ developmental goals, observe their domestic laws, respect fundamental human rights, adhere to socio-cultural objectives and values, abstain from corrupt practices, and observe consumer and environmental protection objectives” (FoE, 1998). Specific environmental protection objectives included that MNCs should abide by international environmental standards, take steps to protect the environment in conducting their activities, and rehabilitate the environment where they had caused damage. However, largely in response to pressure from the United States, the UNCTC was abolished in 1992 and the Code was abandoned, never having progressed passed the draft stage (FoE, 1998).

Recent efforts under the United Nations to establish controls on MNCs include negotiations over a draft Code of Conduct on corporations and human rights. Work is progressing on this Code under the Sub-Commission on the

Promotion and Protection of Human Rights. However, there is strong opposition to the development of the Code, particularly from the United States (US). The US has called on the UN to eliminate the Sub-commission entirely (Bruno & Karliner, 2000). There have also been developments under the United Nations Environment Program (UNEP), which has worked with individual industries to develop voluntary industry-wide codes (Adams, 1999). Also associated with the UN, voluntary codes have been developed under the United Nations Conference on Environment and Development (UNCED) as part of 'Agenda 21'. Chapter 1 is addressed to the behaviour of enterprises (Adams, 1999). Chapter 30, “Strengthening the role of Business and Industry”, also focuses on industry’s responsibility to reduce its environmental and social impacts. Agenda 21 has been signed by over one hundred and fifty countries (ACF, 1999: 23). Most recently, in July 2000, the UN launched its ‘Global Compact’ initiative under the agencies for environment (UNEP), labor (ILO) and human rights (UNHCHR). The Global Compact consists of nine principles which have been drawn out of key environmental, labor and human rights agreements. It seeks to establish ‘partnerships’ between UN agencies and multinational corporations in an effort to 'coax' MNCs into abiding by the principles (Bruno & Karliner, 2000).

The OECD has also established an agreement aimed at influencing the behaviour of MNCs. The OECD 'Guidelines for Multinational Enterprises' were produced in 1976 to ensure that MNCs “operate in harmony with the policies of the countries in which they operate” (FoE, 1998). They cover a range of issues, with one chapter dedicated to the environment. A review of the environment chapter was completed earlier this year (Bourne, 2000). The review attempted to address changes in international environmental standards and treaties, with the particular aim of including the principles outlined at the Rio Earth Summit in 1992 (FoE, 1988). The review process has included a number of stakeholders, including input from non-governmental organisations (NGOs). The Guidelines are voluntary and, by signing them, each OECD member country has agreed to recommend them to enterprises operating in their territories (Adams, 1999; Blanpain, 1977).

There has been much praise for these UN and OECD efforts at influencing the behaviour of MNCs. In particular, many have seen the UN as the organisation best suited to this role, being "the only international organisation with a significant degree of democracy and which is dedicated, through its charter, to uphold the values of human rights and environmental protection" (Bruno & Karliner, 2000). The benefits of these international codes and guidelines have largely been in terms of setting widely accepted minimum ‘benchmarks’ of acceptable corporate behaviour. These are often used by governments and corporations in developing their own guidelines. They may also serve as criteria by which NGOs, investors and other stakeholders can base their evaluations of individual companies and their activities, and can play an important political role in strengthening the case for higher standards. Franco (1998) has suggested that the development of such international guidelines may also strengthen the legitimacy of environmental and human rights NGOs by recognising them as negotiating parties.

However, there are significant problems with these international efforts at control. The various codes and guidelines are accused of being very limited in scope and detail and are plagued by ambiguous wording. The vagueness of these guidelines has been necessary to allow agreement by large numbers of negotiating parties. As Fauchald argues, “international rules tend to be general and unclear, partly because of the way in which treaties are negotiated and decisions are made during negotiations, and partly because countries' interests are different” (Fauchald, 2000: 279). In addition, these programs fail to give adequate weighting to the social impacts of MNCs' activities (Atkinson, 1998). This necessarily weakens their ability to provide for sustainable development.

As well as being limited in scope, these international codes and guidelines are limited in application. Being voluntary, there are no sanctions for non-compliance, such that commitments are easily evaded. As Franco argues, "[c]ompanies may sign onto voluntary standards yet not comply with them. As it is a company's choice to adopt them, it is a company's choice to apply them" (Franco, 1998). Breaches of these agreements are punished only by any bad publicity the companies and countries involved may face, potentially resulting in a withdrawal of support from consumers and investors. This in turn only happens when the breaches are exposed, and poor monitoring of compliance by the UN, OECD and other responsible agencies means that monitoring is largely left to poorly resourced NGOs (Clark, 1995). Indeed, Friends of the Earth argue that, in international agreements, monitoring and review mechanisms are most often either overlooked or deliberately ignored. Moreover, they suggest that these mechanisms are so essential that, without them, “there is no point in negotiating an agreement” (FoE, 1998).

There has been particular concern over the UN's new Global Compact initiative. Participation by corporations in partnerships with UN agencies is voluntary and there is no screening process as to which companies may join. Although the new guidelines state that corporations which violate human rights “are not eligible for partnership”, MNCs known for their human rights violations and environmental destruction, such as Shell Oil in Nigeria, have been invited to enter the Compact. In addition, there will be no enforcement or monitoring of companies’ commitments to the new Guidelines. Thus, “[c]ompanies that sign-up get to declare their allegiance to UN principles without making a commitment to follow them” (Bruno & Karliner, 2000).

The Guidelines also provide for the limited use of the UN logo by corporations in their marketing, such that they will be able to present a positive and responsible image while potentially engaging in environmentally and socially destructive practices. The Global Compact was opposed by a significant bloc of developing country governments, which sought a more binding set of rules over MNCs. Roberto Bissio of the Third World Institute in Uruguay suggests that “the developing countries were clearly not sympathetic to the Compact, not for any desire to leave transnational

corporations off the hook, but out of fear that such an arrangement might benefit them even more" (in Bruno & Karliner, 2000).

It is suggested that the Global Compact is biased towards corporate interests as a concession to the International Chamber of Commerce (ICC), an influential business lobby group, and the United States Government. As stated by Maria Livianos Cattui, the Secretary-General of the ICC, "business would look askance at any suggestion involving external assessment of corporate performance, whether by special interest groups or by UN agencies. The Global Compact is a joint commitment to shared values, not a qualification to be met. It must not become a vehicle for governments to burden business with prescriptive regulations" (in Bruno & Karliner, 2000).

In a similarly powerful attack on the OECD Guidelines, Friends of the Earth argue that they are "moderate, non-specific, voluntary, poorly-implemented and fail to call for public disclosure of information regarding TNC breaches ... In addition, they are in many cases not well-known and in all cases poorly regarded… Furthermore, since no calls for clarification of companies' activities under the Guidelines' 1991 Environment Chapter have ever been requested, and because those who investigate the activities of TNCs are not even permitted to refer to the companies by name, it becomes clear that the Guidelines are business-friendly to the point of being ineffective" (FoE, 1998). Moreover, the OECD has illustrated its lack of commitment to effective controls of MNCs' activities by pushing for the Multilateral Agreement on Investments (MAI), which sought to extend the rights and freedoms of corporations while winding back and limiting regulations over their behaviour (Clarke, undated).

The ineffectiveness of voluntary, non-binding agreements such as the OECD Guidelines is attested to by incidents such as the Exxon Valdez oil spill. After publicly endorsing the OECD Guidelines (Blanpain, 1977), Exxon Corporation was responsible for releasing forty million litres of oil into Prince William Sound, constituting one of the worst environmental disasters the world had seen. After the spill, Exxon was found liable and accused of having an "apparent lack of concern for the environment" (Punch, 1996: 26).

Thus, it is argued that being voluntary, all existing international agreements seeking to regulate the operation of MNCs are "weak and ineffective" (FoE, 1998). Arguments against voluntary, non-binding codes and guidelines have been taken so far as to suggest that they are not only less effective than mandatory ones, but in many cases actually delay the introduction of stronger agreements (FoE, 1998). The problems with voluntary codes have led Amnesty International to argue that they should not be seen as an effective substitute for legally binding regulation (Amnesty International, 1999). Amnesty's position reflects a broader sentiment among many human rights, labor and environmental groups from around the world. For example, the Millennium Forum, an event organized by the UN in May 2000 to gain widespread NGO input for the Millennium Assembly, called for a legally binding framework for

regulating corporations with respect to human, labor and environmental rights (Bruno & Karliner, 2000). Even discussions under the OECD have recognised that "legally binding standards … [which] include sanctions for non-compliance ... can help reduce the "free rider" problem associated with voluntary commitments" (OECD Secretariat, 1999: 17). Clearly, to ensure adequate social and environmental standards in the worldwide operations of MNCs, regulation must be legally binding and enforceable.

However, it is unlikely that binding codes or guidelines will be developed at the international level in the foreseeable future. The number of stakeholders involved in international agreements means that it is very difficult to reach a consensus unless the agreement is voluntary. Developed countries in particular have often argued against binding international regulations (van Hecke, 1982; Acquaah, 1986), being unwilling to 'abdicate' jurisdiction to an international agency (Franco, 1998). They have, therefore, indicated that they remain committed to unilateral regulation at the national level (OECD Secretariat, 1999). This is in stark contrast to the consistent position of many LDCs, which have sought binding international controls over multinationals. However, the stance of the industrialised countries is unlikely to change. Thus, as Theodore Vogelaar, Special Consultant to the OECD's Secretary General on International Investment and Multinational Enterprises, argues, "any attempt to establish a binding [international] code is, I am afraid, doomed to remain illusory" (in Blanpain, 1977: 38-9). The codes and guidelines developed by international agencies will, therefore, remain ineffective and unable to adequately ensure the environmental and social sustainability of MNCs' activities.

3.2 Human Rights and Environment Non-Governmental Organisations

Human rights and environment NGOs have made a significant contribution to making MNCs accountable through a variety of roles. They have been a considerable force in movements for increased consumer and investor action in demanding responsible behaviour from corporations, and in promoting investment in sustainable forms of development. They have also been crucial in contributing to community and independent expert advice in the development of attempted controls over MNCs (Harris, 1997). NGOs have played important roles as responsible partners in consultations with governments, concerning policies, and with business, concerning individual projects and corporate and industry codes of conduct (OECD Secretariat, 1999). Indeed, many have suggested that the involvement of NGOs in developing and implementing codes is essential to the codes' effectiveness (IUCN & ICEL, 1995). NGOs have also had a crucial 'whistle-blower' function in the monitoring of corporate activity, as they are able to provide external verification of data and bring breaches of codes and guidelines to public attention. The impact and scale of NGO actions is growing as the internet is increasingly used to rapidly relay information and coordinate public protests around the world (Goldenman, 1999).

On the international level, a number of NGOs have also developed a multitude of independent codes of conduct and principles of corporate responsibility. Corporations can make a voluntary commitment to adhere to these programs. Perhaps the most widely known of these are the 'CERES Principles', developed by the Coalition for Environmentally Responsible Economies (CERES). CERES is a coalition comprising fifteen major US environmental groups, as well as a number of influential churches, unions and universities. It also includes an array of socially responsible investors and public pension funds representing more than US$150 billion in invested funds (Adams, 1999). The CERES Principles are intended as a guide for corporations to follow in implementing environmentally and socially sustainable practices. There are ten Principles, covering substantive environmental issues such as the release of polluting substances, restoration of environmental damage and the reduction and safe disposal of wastes (Franco, 1998).

Companies voluntarily endorsing the Principles also commit to report on implementation and progress. The CERES Principles have been described as "the most ambitious and demanding of the general codes" (Adams, 1999: 100). According to the CERES website, fifty-four companies have so far endorsed the Principles (CERES, 1999). In addition, CERES has a 'Global Reporting Initiative' which is "attempting to bring together the various initiatives world-wide on corporate environmental reporting and to turn them into one set of coherent, consistent global standards. The aim is to generate standard environmental information akin to existing standard financial information" (Adams, 1999: 100). Similar codes developed by NGOs include the World Development Movement's 'Core Standards for Corporate Responsibility' (Franco, 1998), the Council on Economic Priorities' 'Social Accountability 8000' (Del Villar, 2000) and the 'Principles for Global Corporate Responsibility' (ILRIG, 1997: 55).

All these and similar NGO initiatives have, to varying degrees, contributed to the improvement of environmental and social standards in the activities of MNCs, including their operations in LDCs. However, the effectiveness of NGOs in their monitoring and 'whistle-blower' roles is severely restricted by their limited resources. Atkinson suggests that all most NGOs can do in this regard is 'occasional spot-checks' of MNCs' operations (Atkinson, 1998). The codes of conduct developed by NGOs have also had limited effect since all remain voluntary. These codes are non-binding as NGOs have no legal capacity for enforcement (Bourne, 2000). Thus, implementation of NGO programs is limited to the public pressure they can generate for improved corporate behaviour. As illustrated in Part 3.3 below, this has not been enough to ensure adequate environmental and social standards in MNCs' activities. Clearly, while NGO efforts at controlling multinationals play an important role, they cannot replace binding, enforced standards imposed by an authoritative body.

3.3 Self-Regulation

The lack of effective regulation of MNCs' activities in LDCs by host governments, international agencies and NGOs means that, in effect, multinational industries are largely left to police themselves. This has led to the development of a number of corporate and industry-wide voluntary codes of conduct which cover the global operations of the enterprises. These corporate and industry codes are often loosely based on the International Chamber of Commerce's (ICC's) 'Business Charter for Sustainable Development'. The Business Charter was adopted by the ICC in 1992, and consists of 16 principles that are described as "a framework to help industries and individual corporations define their own more specific environmental policies" (Adams, 1999: 96). More than 2000 companies have endorsed the Charter, many of them large MNCs (Adams, 1999).

Industry-wide codes have been developed at both the international and national levels. There are a number of these for the mining industry. The International Council on Metals and the Environment (ICME) consists of twenty-seven of the world's largest mining companies. In 1993 ICME adopted an 'Environmental Charter', consisting of voluntary guiding principles for its members (ACF, 1999). The Charter asks that members "adopt appropriate measures and implement enhanced risk management strategies, in current and future activities, to foster environmentally and socially sustainable economic development" (ICME, undated). ICME is also currently developing the 'Global Mining Initiative' (GMI). The stated aim of the GMI is to involve "a variety of stakeholders" in consultation to develop new voluntary guidelines (Institute for Environment and Development, in Burton, 2000a: 4).

At the national level, the Australian mining industry has developed the 'Code for Environmental Management', established under the Minerals Council of Australia (MCA) in 1996. A review of the Code was completed earlier this year. The Code applies to the operations of Australian mining firms both here and abroad which are members of the industry association. The aim of the Code is "to enhance the community's perception of the industry's commitment to environmental management by improving the industry's environmental performance and providing the community with the information to assess its performance" (in Atkinson, 1998: 76). The Code sets out seven basic environmental principles which signatories agree to adhere to. These are "Accepting environmental responsibility for all our actions; Strengthening relationships with the community; Integrating environmental management into the way we work; Minimising the environmental impacts of our activities; Encouraging responsible production and use of our products; Continually improving our environmental performance; and Communicating our environmental performance" (MCA, 2000).

In terms of implementation mechanisms, the MCA Code stipulates that signatories should produce a public report of their environmental performance and implementation of the Code within two years of signature. This report is to be subjected to an independent auditing process. According to Adams, this is an example of industry best practice in

terms of follow-up procedures for assessing how well signatories are implementing Code commitments (Adams, 1999). Speaking at the launch of the Code in December 1996, Jerry Ellis, the then President of the MCA, described it as "the most significant environmental initiative in the history of the Australian minerals industry" (in Murray & Williams, 1997: 201). By the 25th of September 2000, thirty-four companies had voluntarily agreed to implement the new Code. These include most of the larger Australian mining multinationals, such as BHP, Rio Tinto and WMC. A further twelve companies have signed the 1996 Code but not the 2000 version (MCA, 2000).

As well as industry-wide codes, many individual corporations have developed their own internal voluntary codes or statements of conduct. These range from "ethics statements which lay down expected standards of behaviour of employees, via value statements which give an organisation's operating philosophy and dedicated environmental policy statements to highly sophisticated published environmental accounts and reports" (Adams, 1999: 101). The majority of corporate statements refer only to environmental protection, although a number of newer ones incorporate both environmental and social concerns (Adams, 1999). Whilst the content and nature of corporate codes varies substantially, Adams suggests that "the emphasis is more often placed on internal corporate environmental, health and safety issues than on environmental issues more broadly" (Adams, 1999: 101). Murray and Williams illustrate that within the mining industry, "[t]he more 'progressive' companies are also pursuing a range of broader external initiatives such as establishing corporate governance advisory groups, defining sustainable development as a business concept, developing strategic relationships with NGOs and reporting publicly on their environmental performance" (Murray & Williams, 1997: 202). Some multinationals have also entered into 'voluntary agreements' with governments over how they will tackle particular environmental issues (Murray & Williams, 1997).

Within the mining industry, there are instances in which self-regulation has provided some protection for both the environment and local communities. This has particularly been the case in the aftermath of massive disasters such as Ok Tedi, which have spurred the industry to "adapt to proactively avoid such issues in the future" (Murray & Williams, 1997: 197). Indeed, as Murray and Williams suggest, "[t]he Ok Tedi debate drew the industry's attention to the need for change and therefore is now recognised as a major turning point in stimulating a strategic industry response to public opinion" (Murray & Williams, 1997: 200). Mining corporations are beginning to consider that "management of the environment is a critical element on the balance sheet, both in terms of individual project feasibility and as part of the total development agenda" (Taylor, 1997: 13).

However, the mining industry's commitment to real change is strongly disputed. Both industry-wide and corporate codes have been accused of being non-specific and very general in their prescriptions. As Atkinson argues, company codes "tend to be limited in coverage, vague and general in context, and lacking any reference to monitoring; that is, they are easy for a company to comply with, without having to make many changes in its actual operations… While

full of fine sentiments, these statements are… almost useless as standards against which compliance can be measured or monitored" (Atkinson, 1998: 78-79). In addition to being vague, industry codes are voluntary. This has meant that many companies have not signed them (CAA, 2000). An example of an Australian company which has not signed the MCA Code is Esmerelda Exploration Limited, which, as illustrated in Part One, was involved in the devastating cyanide spill in Romania earlier this year. As Community Aid Abroad argues, "[t]hose [companies] that want to continue with sub-standard practices will never be signatories. A voluntary code is always going to be ineffectual in combating such companies. For them, legislated controls are needed" (CAA, 2000).

Both industry and corporate codes are also undermined by the lack of effective monitoring and critical assessment of operations. For regulation to be effective, monitoring must be independent and impartial. This is clearly not the case when the monitoring process is paid for by the company. Another problem is that the reports of the monitors are usually kept confidential and not released to public scrutiny (Atkinson, 1998). Moreover, even public reporting on corporations' implementation of code commitments does not ensure the credibility and effectiveness of a code. For monitoring and reporting to be of significant use, there must be quantifiable targets against which actual environmental performance can be measured. However, as Adams argues, "[u]sually there are no agreed indicators of how to assess the level of implementation of code commitments" (Adams, 1999: 112). Similarly, Taylor suggests that there must be external standards set defining what is and what is not acceptable environmental damage. Clearly, "it is an absolute necessity to keep environmental regulation and audit at an arm's length" (Taylor, 1997: 24).

The lack of sanctions for non-compliance also means that voluntary, non-binding codes are often largely unenforceable. As Adams suggests, "there are usually no ultimate sanctions or institutionalised forms of peer pressure to deal with serious cases of non-compliance and to encourage better implementation and environmental performance … The most impressive words in the world will not lead to anything without implementation (Adams, 1999: 112). Punishment for breaches of the codes is restricted to possible damage to corporate reputation from negative public exposure. This does not ensure corporations will not try to cut corners in implementing proper environmental and social standards.

Indeed, Gerritsen and McIntyre (1991) argue that the 'capital logic' of industries such as mining dictates a pattern of expenditure in which corporations spend only to solve problems as they arise (in Kirsch, 1997). While, in the long term, sound environmental and social management are likely to provide a competitive advantage to corporations, most corporations focus instead on avoiding the short-term costs of implementing social and environmental protection programs. For example, even though the Ok Tedi disaster has illustrated the potentially devastating environmental and economic consequences of not containing tailings in a dam, all mines currently operating in Papua New Guinea continue to dispose of waste either into river systems or the ocean. This choice can only be explained by the fact that

it is a much cheaper option in the short term (Taylor, 1997). BHP itself appears not to have learnt its lesson from Ok Tedi. It is currently investigating oceanic dumping of wastes from the proposed Gag Island nickel project, 150 km west of West Papua, over which there is significant environmental concern (Burton, 2000b: 1). There are also concerns over marine pollution at BHP's Canadian Ekati Diamond mine. As well as BHP, there are a number of other signatories to the MCA Code which have been responsible for recent severe environmental damage (AID/WATCH & MPI, 2000). Clearly, simply altering the management practices of corporations is not effective without an accompanying shift in corporate culture away from the focus on short-term profits (Harris, 1997).

The lack of comprehensiveness and enforceability of corporate and industry codes has led to increasing suggestions that the codes are designed more to 'greenwash' corporate images than provide real protection for the environment and local communities. As Atkinson argues, having a voluntary and limited company or industry code of practice is not enough: "If not implemented properly, it is no more than a set of words. It is too easy for codes to be used by companies as a public relations exercise, as a way of persuading the public and shareholders that the company is doing the right thing when in fact little or nothing has changed" (Atkinson, 1998: 80). Similarly, Duffield suggests that corporations may "pay lip service to codes but may not change … [their] behaviour where profits are at issue" (Duffield, 2000: 203). Thus, Amnesty International argues that many corporate and industry codes of practice "have little or no significance" other than providing "a form of undeserved reassurance to consumers" (Amnesty International, 1999).

Indeed, in many cases, it seems that corporations merely "make minor concessions then proclaim 'sustainability'" (Evans, 2000b: 11). A prominent example in the mining industry is Australian-based WMC Limited. While WMC is spending a lot of money on "public relations campaigns that portray the company as green, clean and caring", there is a large gap between the company's rhetoric and reality (MPI, 1998: 4). WMC has taken some positive steps recently to improve its environmental performance and community programs, particularly in its Australian operations. However, it has recently been accused of misleading and coercing local communities into signing "sham" agreements, ignoring indigenous concerns and destroying sacred sites (MPI, 1998: 7). WMC mine sites continue to be plagued by environmental problems such as the poor management of tailings, problems with the clean up of operations, and a lack of planning for the ongoing management of uranium waste. At WMC smelters problems include dangerous levels of toxic emissions (MPI, 1998).

Perhaps most worrying is the apparent lack of change in the culture of WMC's management. At the same time that the company claims to be trying to improve its environmental and social practices, WMC's management has made public statements which fly in the face of their own social and environmental guidelines. For example, in its 1996 Environment Progress Report, WMC claimed to be promoting 'sustainable development' in its operations. Also in 1996, a

spokesperson for WMC argued publicly that "[t]o tie ourselves to Malthusian nonsense through the term 'sustainable development' is to embrace, by implication, flat earth economic history. The search for sustainability indicators … is the search for an illusion" (in MPI, 1998: 36). Indeed, it seems apparent that "[i]nstead of changing its attitude, the mining industry is working to change its language and image" (Burton, 1997b: 8).

Industry codes have also been criticised for their apparent conflict of interests. Adams suggests that industry associations which administer codes are generally "reluctant to exert significant peer pressure or publicly expose shortcomings. Their mission is simultaneously to promote the environmental image of the industry, fight off governmental regulation, and promote ... [sound environmental practices]. Some commentators have argued that there is an irresolvable internal conflict in this situation … An industry association needs to speak and work for all its members, not just the progressive leaders, so it will not want to criticise laggards and will tend to adopt a lowest common denominator approach" (Adams, 1999: 112). Indeed, it is suggested that in heavily promoting self-regulation and voluntary guidelines, and strongly resisting binding interventions, industry associations illustrate their lack of commitment to environmental and social goals (Bruno & Karliner, 2000). For example, Evans suggests that the MCA has remained silent in the face of repeated breaches of its Code by signatories since highlighting the breaches would generate public support for tougher government legislation. Further, he argues that this "telling silence by the MCA on the series of recent disasters is ample illustration of the irrelevance of the MCA Code" (Evans, 2000a: 11).

Clearly, 'self-regulation' by multinationals does not provide adequate assurances regarding independence, impartiality and effectiveness of efforts at control. It cannot be relied upon to deliver protection for the Earth's environment or the human rights of local populations. These issues are too important to be left to the voluntary and self-generated codes of conduct of the perpetrators themselves. To be effective, regulation must be comprehensive and independent, and there must be an external adjudicator with the authority to punish breaches of the codes.

3.4 Lending and Insurance Agencies

Another approach to influencing the worldwide operations of multinationals has been adopted by the World Bank and a number of national export credit and insurance agencies (ECAs). These agencies have attempted to incorporate environmental guidelines into their lending policies, which has made some contribution to improving the self-regulatory system.

Through its role in providing finance and insurance, the World Bank's Multilateral Investment Guarantee Agency (MIGA) has a significant influence over many projects developed by multinationals. It has developed 'Environmental

Guidelines' as contractual conditions attached to loans or insurance. Under these Guidelines, the Bank requires all proposed projects to be screened to determine their potential environmental impact. Projects identified as posing significant environmental risk must undergo environmental impact assessment (EIA). The result of the EIA may lead to mitigation efforts being built into the project deal, or the rejection of funding or insurance for the project (Goldenman, 1999). Under the Guidelines there is also a 'disclosure policy' for the public release of information and review procedures for social and environmental impact assessment (AID/WATCH & MPI, 1999: 39).

In recent years, the volume of lending and insurance provided by the World Bank has been overtaken by national ECAs. ECAs provide low-cost finance to development projects through loans and grants, as well as underwriting credit and providing political risk insurance. Until very recently, these institutions have been heavily criticised for their lack of screening “regarding the social, economic and environmental impacts of projects” they have assisted (AID/WATCH & MPI, 1999: 6). As their roles in international trade and investment have expanded, they have therefore come under increasing pressure to take responsibility for the environmental and social implications of their activities.

While most ECAs still have no environmental or social policies, those in the United States, Japan, Britain, Germany, Finland and Switzerland have all developed guidelines which require companies to demonstrate that projects are environmentally sustainable before they can claim any assistance. Australia’s ECA, the Export Finance and Insurance Corporation (EFIC), has introduced similar guidelines this year. Under its ‘Environmental Policy’ it asks that companies seeking assistance adhere to the guidelines listed in the World Bank Pollution Prevention and Abatement Handbook. The Environmental Policy also calls for the community assessment of projects and the participation of local communities in EIA processes (AID/WATCH & MPI, 2000).

However, while this trend represents a positive step forward, the World Bank and ECA guidelines do not "go far enough in preventing negative project impacts" (AID/WATCH & MPI, 1999: 39). These guidelines all use "discretionary and unspecific terms" and do not cover many of the social and environmental impacts of the projects they assess (AID/WATCH & MPI, 1999: 41). For example, the World Bank Guidelines fail to assess impacts on biological diversity (Young, 1994), and none of the guidelines "adequately accommodate the understandings of many local landowners and indigenous people about relationships between people, their environments and their cultures" (AID/WATCH & MPI, 1999: 44).

The World Bank and ECAs are also criticised for not being open or transparent. In a number of cases, these agencies have acted to restrict information about which projects they are assisting or their EIA processes. They have also been criticised for their lack of monitoring of firms’ adherence to directives after the projects have been approved (AID/WATCH & MPI, 2000). This raises serious questions about their accountability and commitment to

environmental and social objectives. EFIC's Environmental Policy is particularly weak as meeting the guidelines is not mandatory for project approval and corporations are merely 'encouraged' to meet them (AID/WATCH & MPI, 2000: 2).

Moreover, when proposed projects fail to meet the guidelines set out by MIGA or particular ECAs, the developers often go elsewhere for assistance or develop the projects without it. For example, when Freeport McMoRan sought to avoid further investigation into its gold mine operation in West Papua, it simply cancelled its insurance with OPIC (Goldenman, 1999). The Three Gorges Project in China (Tibet) was rejected for funding by the World Bank on environmental impact grounds but has gone ahead with backing from Canadian and European ECAs (AID/WATCH & MPI, 1999).

Clearly, while the development of environmental guidelines under the World Bank and various ECAs are positive steps, they cannot reliably prevent negative environmental and social impacts from MNCs' worldwide activities. Therefore, they are a complement rather than alternative to a more comprehensive, binding approach to regulation.

PART FOUR:
EXTRATERRITORIAL LEGISLATION - THE PROPOSED SOLUTION

4.1 Proposals for Extraterritorial Legislation

The failure of other attempts at regulating multinationals' activities, particularly in LDCs, has led to increasing suggestions for a new type of control. As Gentry argues, current approaches at influencing the behaviour of MNCs have resulted only in “incremental improvements” (Gentry, 1999: 42). It is suggested that there should be a more fundamental change, involving the extraterritorial regulation of MNCs by home states. Under this approach, MNCs would be forced by their home states to abide by the same standards in their worldwide operations as they follow at home.

Many suggest that there is considerable public support for, and even a "worldwide push" towards, the extraterritorial regulation of multinationals (Russell, 2000; Bourne, 2000). As Goldenman suggests, “[a] consensus has emerged over the years that source countries … have [a] responsibility to ensure that commercial activities originating on their territory do not cause environmental problems in another country’s territory” (Goldenman, 1999: 86). Support for the extraterritorial regulation of multinationals has been expressed by a number of NGOs both in Australia and overseas.

Within Australia, the Mineral Policy Institute (MPI), the Australian Conservation Foundation (ACF) and Community Aid Abroad-Oxfam Australia (CAA) have in recent years consistently promoted the extraterritorial regulation of the mining industry by the Australian government. They have called for the Australian government to develop “tougher legislation to pull Australian companies operating overseas into line and to take greater corporate responsibility in ensuring better social and environmental outcomes" (ACF, 2000: 1). This would involve ensuring that “Australian mining companies operating overseas conform to the highest standards of environmental management that are practised in Australia” (Krockenberger & Kinrade, 1994: 48). As Rosenbaum argues, “the Commonwealth government should play an active role in ensuring that Australian mining companies operating overseas do not create environmental and social havoc in the wake of their profits ... Legally binding codes of conduct should be central to achieving this... The mining industry strongly resists the concept of legally enforceable codes of conduct and argues that if codes are introduced at all, they should be voluntary. However, this stance overlooks the fact that many voluntary codes of practice already exist but have failed to prevent poor environmental management by some of our most profitable companies. Australian mining companies have had long enough to voluntarily prove their commitment to responsible management. Given the track record, there is no reason to believe that without legislation, social and environmental problems will not continue to dog Australian mining projects offshore” (Rosenbaum, 1996: 32).

Internationally, a comprehensive proposal for the extraterritorial regulation of multinationals has been developed by the International Union for the Conservation of Nature and Natural Resources (IUCN) and International Council on Environmental Law (ICEL). The proposal, developed as part of the 'Draft Covenant on Environment and Development', states that the home government should "impose its own standards of conduct on its nationals operating outside its territory, where these standards are more stringent than in the host Party, except where both Parties agree otherwise" (IUCN & ICEL, 1995: 125). In this case 'nationals' includes branches and subsidiaries of multinationals located overseas but owned or controlled by a domestic parent corporation. The provision is structured "so as not to interfere with the sovereign rights of the host Party to regulate as it sees fit… [It] will discourage the relocation of activities harmful to the environment to countries with weak environmental standards. By not allowing economic entities to escape more stringent rules, this provision may also remove the inducement to have weak standards to attract environmentally harmful activities and thus should enhance overall environmental protection" (IUCN & ICEL, 1995: 125). Under this proposal, home states could be held liable if they failed to ensure that activities within their extraterritorial control did not cause environmental damage in other states (IUCN & ICEL, 1995: 20).

Proposals for the extraterritorial regulation of multinationals are also increasingly being developed by political parties. Within the last few months the Australian Democrats have lodged the *Corporate Code of Conduct Bill 2000* in Federal Parliament. This Bill calls for the Australian Government to legislate to ensure that Australian-based multinationals abide by the same standards overseas as they do here. Since environmental and social regulation within Australia are largely matters for States and Territories, Australian corporations may be subject to a number of different regulatory regimes in their operations at home. The Bill therefore seeks to require corporations to abide by at least the lowest standards they operate under at home (*Corporate Code of Conduct Bill 2000*).

The Bill defines 'Australian Corporations' as any firms incorporated in the Commonwealth of Australia, as well as foreign subsidiaries and holding companies of these firms, regardless of where they are incorporated. The Bill has provisions for standards on the environment, human rights, health and safety, and requires companies to monitor and report on their environmental and social impacts (Bourne, 2000). It also has provisions for civil actions to be brought against Australian corporations in Australian Federal courts (*Corporate Code of Conduct Bill 2000*). The Bill has been referred to the Parliamentary Joint Committee on Corporations and Securities and will be reviewed by the 31st of March, 2001 (Parliament of Australia, 2000).

A similar Bill has also been tabled in the United States (US) Congress this year (Bourne, 2000), and work has begun on a similar project in the European Union (EU). The EU Parliament tabled a report in early 1999 which called for the

development of a legally binding code of conduct for the worldwide operations of corporations based in the EU. This would be enforced under domestic law (Bourne, 2000; Amnesty International, 1999).

Clearly, proposals for the extraterritorial regulation of multinationals are gaining significant support throughout the world. The following sections of this thesis examine the contribution extraterritorial regulation can make to the effective control of MNCs' operations worldwide.

4.2 Benefits of Legislation

The push for extraterritorial regulation has been based on the advantages it has over current approaches to controlling MNCs' behaviour. The major advantage of extraterritorial regulation by home states is that it can be legally binding. This is clearly not the case with self-regulatory approaches or efforts to influence corporate behaviour through lending and insurance agencies. Further, home states are more able than international organisations or developing host states to implement an effective legislative response to MNC behaviour. Industrialised nations have not agreed to provide international bodies with the scope to legislate. Moreover, as will be illustrated in Part 5.2 below, home states have a greater capacity than developing host states for legislative controls over MNCs.

The benefits of a legally binding approach to regulating multinationals are clear. Legal enforcement mechanisms and the threat of legal punishment for breaches of codes are the most effective means of holding multinationals accountable and ensuring the sustainability of their practices. As Katrine Del Villar argues, "[l]egislation is the most effective way of establishing binding and enforceable standards in areas such as the environment, human rights and employment conditions" (Del Villar, 2000: 3). The lack of legally enforceable regulations in current approaches means that existing standards are not being complied with, resulting in the degradation of environments and erosion of human rights around the world by MNCs. For these reasons, many have suggested “necessity of a legislative response to the activities of … multinational corporations" (Bourne, 2000).

As well as providing for the effective enforcement of standards through binding legislation, extraterritorial regulation of multinationals allows independent monitoring of corporate activities and compliance with codes. Independent monitoring is crucial for effective implementation of standards, and is notably lacking in current regulatory approaches to MNCs. Under an extraterritorial approach to regulation, independent monitoring may involve inspection visits to MNCs’ operations by representatives from local embassies overseas. It may also involve the appointment of government-funded ombudsmen for multinational industries, who would need legislated power to obtain information from companies about their activities (Atkinson, 1998: 82). Governments may also sponsor NGOs to monitor the

operations of MNCs overseas. Even under an extraterritorial approach, monitoring should not be left to the corporations themselves if it is to be independent and reliable.

In allowing the effective monitoring and enforcement of standards, extraterritorial legislation can meet the challenges of regulating multinationals' worldwide operations where the other efforts explored above have failed. As Maier argues, "the effects of commercial activities, and the resulting need to regulate them can no longer be localised within national boundaries. These increasingly complex inter-relationships between national, social and economic interests foster a recognition by the world community that there are occasions when both national and community interests are served by permitting a nation to address, under its laws, activities carried on outside its borders" (Maier, 1996: 65). By overcoming the limits of territoriality on national regulation, and by legally enforcing standards, extraterritorial regulation would allow MNCs to be held accountable for the worldwide impacts of their operations, including those in LDCs (Seidl-Hohenveldern, 1987).

Extraterritorial regulation could be applied to domestically incorporated firms as well as their foreign branches and subsidiaries, such that MNCs' operations in LDCs would not escape regulation. This would prevent multinationals from using 'double standards' in their operations at home and in developing countries. As Goldenman argues, extraterritorial regulation acknowledges that "the state remains the institution best placed to set in place effective controls over activities carried out within or from its territory. At the same time, it recognises some of the limits to reliance on state action in this area, e.g., when host countries lack the economic power, technical capacity or political will to set conditions with respect to a particular investment. In such instances other actors, including source countries, ... have vital roles to play" (Goldenman, 1999: 76). The contribution extraterritorial regulation of MNCs' operations can make to environmental and social sustainability would benefit not only developing host states, but also the entire international community.

4.3 Competitive Advantage for Home States

As well as being in the interests of host states and the international community, the extraterritorial regulation of MNCs is also in the interests of home states. In a world where environmental issues are increasingly impacting on decision-making, it makes economic sense for nations to ensure that corporations based in their territory which operate overseas are presenting a good environmental image. In a sense, they are representatives of the business practice of the home state. As an example, a number of Australian-based mining multinationals have been involved in serious environmental and social disasters over recent decades. In relation to this situation, Stewart Needham of the Environmental Protection Agency argues that '"[t]hese people [Australian mining multinationals] are effectively

ambassadors for Australia. It is not good if we are trying to promote Australia as a good and responsible international citizen, to find companies doing things that are environmentally unsound"' (in Atkinson, 1998: 77). Kirsch also makes an example of Australian mining practices, arguing that disasters such as Ok Tedi involving Australian corporations create diplomatic embarrassment for Australia. He suggests that "Australia has been critical of the way that Southeast Asian countries exploit their rainforests for timber, so the Ok Tedi case revealed an uncomfortable double standard. How could they wave the green flag with respect to endangered rainforests while their own mining companies were muddying the waters of Papua New Guinea's rivers?" (Kirsch, 1997: 133).

Moreover, as national governments become more sensitive to environmental issues and more receptive to environmental pressure groups, they will increasingly seek out multinationals with good environmental credentials. Indeed, one of the few parameters on which countries may discriminate between domestic firms and those with foreign shareholdings under the OECD Declaration on National Treatment of Investment is their impact on the environment (Rosenthal & Knighton, 1982). Continuing with the Australian example, the Hungarian Government has already been outspoken in condemning the Australian Government for not ensuring better environmental standards in its mining multinationals. This follows the cyanide spill involving Australian company Esmerelda Exploration Limited in Romania earlier this year. Indeed, this incident has been described as "the worst blow ever to the image of Australian mining on the international stage" (ABC, 2000). Clearly, such representations of Australian mining companies as environmental polluters do not bode well for future international investment opportunities.

If, through regulation, home states can ensure high environmental and social standards in the operations of domestically-based multinationals overseas, then these companies will face a more secure future internationally with more options open for investment. As Atkinson suggests of the Australian case, "[i]f, as a result of the effective maintenance of standards, Australian companies earn a reputation for operating with minimum social and environmental damage, and with maximum benefit to - and therefore least opposition from - local communities, they will increasingly be seen by host governments as having distinct advantages over companies with lower standards" (Atkinson, 1998: 78). Higher standards of Australian-based companies would mean that "[h]ost governments could place more reliance on Australian companies to do the right thing by their citizens and to apply a duty of care equivalent to that which they would apply in Australia" (Atkinson, 1998: 83). Thus, Atkinson asks "[w]hy should the Australian government involve itself in maintaining standards in the mining industry? Because it will help save Australia from future diplomatic embarrassment, and help protect the reputation of Australian business and therefore future business opportunities for other companies. Ultimately ... the maintenance of social and environmental standards will also provide a competitive advantage for Australian companies internationally" (Atkinson, 1998: 83).

Similarly, Clark contends that the adoption of improved technology for environmental performance can increase a company's competitiveness. He suggests that "[c]ompany-specific knowledge of how to best manage and develop … projects given the environmental risks involved has, at times, been an asset in gaining access to new sites of production in other countries" (Clark, 1995: 238). The competitiveness and market value of corporations is in part bound up with their environmental experience, expertise, management capacity and reputation. This kind of market value is embodied within the company and is difficult for others to replicate, often providing firms with a distinct international competitive advantage (Clark, 1995). Murray and Williams also argue that "it will be those companies that can adapt more rapidly [to demands of environmental and social protection] that will gain the greatest strategic advantage. In fact, those companies that fail to adapt may not survive in the longer term" (Murray & Williams, 1997: 204). Indeed, while the environmental guidelines of large lending and financial institutions, as outlined in Part 3.4, leave much to be desired, they clearly illustrate that environmental and social impacts are increasingly being used to judge the quality and desirability of MNCs' investments.

Most MNCs themselves have not taken the prospect of missing out on investment opportunities as a result of poor environmental and social performance seriously enough. As argued in Part 3.3, they have instead preferred to focus on their own short term profits and attempted to minimise initial costs by cutting corners in environmental and social management. Indeed, the vast majority of corporations seem to be resisting change and appear to have misjudged the potential for a future competitive advantage in sound environmental and social practices. Many corporations made a similar error of judgement a decade ago and, as a result, have missed the 'green consumerism bandwagon.'

Further, in relation to mining, Clark suggests that once the initial costs of developing a mining project have been sunk, even if improved environment-enhancing production methods and techniques become available, companies have a strong economic interest in continuing to operate sites of production using existing capital. He suggests that, at least at existing mine sites, innovations in environmental control are likely to be adopted only if governments impose increased standards of environmental protection (Clark, 1995).

Since multinationals seem reluctant to seriously take on the challenge of improving their standards themselves, the role of home states in this regard becomes even more important. This may be necessary in order to improve the reputation of the home state's corporations and thereby establish an international competitive advantage for both the individual corporations and the national industry. Indeed, the impact on international reputation may mean that the imperative to regulate adequately overseas is even greater than the imperative to do so at home.

As well as reducing MNCs' opportunities for investment, the laxity of environmental and social regulation of multinationals can also jeopardise their profitability once their investments are made. When poor environmental and

social standards in MNC operations lead to environmental accidents or disputes with local communities, production and hence profitability are disrupted. As Clark argues, "achieving maximum profits depends on capital utilisation to its feasible limits on a continuous basis without disruption. Poor environmental performance (accidents, spills, long-term degradation etc.) may actually decrease the rate of profit as disruptions to production decrease the rate of capital utilisation" (Clark, 1995: 239). Clearly, there is an economic benefit of continuous production, which can only be ensured when the company complies with adequate social and environmental standards. An extreme example of poor environmental and social standards leading to reduced profitability is the Bougainville crisis in Papua New Guinea. After a long period of violent land-owner discontent due to inadequate environmental management, Australian company CRA (now Rio Tinto) was forced to close its Bougainville copper mine in 1989 (Atkinson, 1998). Even when opposition is not strong enough to force the closure of operations, Hamilton argues that firms' costs will be lowest when political resistance to their operations is least (Hamilton, 1996).

Where environmental and social standards are lax, profitability can also be jeopardised by the possibility of massive compensation payouts. Again, as the companies themselves seem unwilling to ensure adequate environmental and social standards, there is a role for home states in protecting the investments of domestically-based corporations by enforcing such standards themselves. As Atkinson argues, "[a]ll of these costly and disruptive events could have been avoided if the companies had been required to meet proper standards of social and environmental management in the first place" (Atkinson, 1998: 77).

The future economic prospects of multinationals will also be influenced by their environmental and social credentials through shareholder actions and consumer boycotts. Mining does not produce consumer goods and, hence, is not directly influenced by the consumption choices of the public. However, it is significantly influenced by shareholder actions. Shareholders are becoming increasingly sensitive to the conduct of the companies they invest in. There is an increasing use of annual shareholder meetings, proxy rights and shareholder resolutions by concerned shareholders to pressure corporations over their environmental and social practices. In this way, shareholders are "using [their] investment power for social as well as financial returns" (Stead & Stead, 1992:152).

Moreover, Stead and Stead argue that these 'green investors' are often not satisfied by corporate claims of environmental and social responsibility, believing them, often justifiably, to be "little more than marketing gimmicks" (Stead & Stead, 1992: 147). They suggest that what these investors are looking for is "some kind of independent certification effort that they trust; something that has no conflict of interest; has no stock in the sales of any product; that comes in as an objective third party" (Hayes, in Stead & Stead, 1992: 147). When the demands of shareholders for corporate environmental and social responsibility are not met, they can withdraw their investment. For example, as the environmental damage from the Ok Tedi mine became increasingly apparent, and in the face of the failure of OTML to

effectively respond to the growing crisis, the German government sold their considerable share in the company in 1993 (Filer, 1997a).

There is steadily growing support for movements such as shareholder protests among many levels of society and they are likely to have increasing influence. Indeed, there is much evidence that markets are increasingly sensitive to environmental considerations (Clark, 1995). For example, there is growing pressure on financial analysts to seek information on environmental factors as part of their investment calculations (Gentry, 1999). Being able to respond to, and even anticipate, these changes is an essential component of international competitiveness. Clearly the future success of multinationals will increasingly depend on their ability to meet the demands of the growing number of 'green' and 'ethical' investors. In the face of continued resistance to these demands from the corporations themselves, regulation by home states may become increasingly necessary in maintaining investor and consumer faith in these companies.

Corporations have often argued that the extra initial expense of improved environmental and social protection measures would jeopardise the profitability of their investments and deter potential partners from entering into joint-operations with them. However, this argument is undermined by the increasingly apparent market advantages of having sound social and environmental practices, and the protection of investments which these practices confer. As Atkinson suggests, "[m]aintaining proper social and environmental standards should not be an onerous imposition for … companies. On the contrary, it could save them a lot of trouble and expense… The companies which gain a competitive advantage will be those which can best handle the more difficult problems, such as community relations and managing environmental problems" (Atkinson, 1998: 77). Similarly, Clark (1995) argues that the costs of environmental and social protection may be compensated for by their positive effect on the firms' international competitiveness. He suggests that companies can also lessen the impact of such costs through the choice of technology and production methods. Appropriate choices can increase productivity and output, thereby helping to cover higher initial costs by decreasing the average cost per unit produced.

Clearly, there is an increasing international competitive advantage for MNCs in maintaining adequate social and environmental standards. In a world where environmental and social values such as "clean water and biodiversity may ultimately be valued more than gold," the standards of MNCs' operations will need to improve dramatically if they are to avoid "being dumped on the sustainability slag heap" (Tomorrow, 1997 in Atkinson, 1998: 58). Extraterritorial regulation to ensure these standards is therefore "an attractive option" (Francioni, 1996: 123).

PART FIVE:
THE DEBATES OVER EXTRATERRITORIAL CONTROLS

While many argue that the extraterritorial regulation of MNCs holds promise in providing for environmental, social and economic goals, there are a number of debates over its legality and the capacity of nation-states to implement such a strategy.

5.1 Extraterritoriality - The Legal Issues

5.1.1 Territoriality and Extraterritorial 'Nationality' Jurisdiction

The jurisdiction of individual nation-states has traditionally been based on the inter-linked principles of territoriality and sovereignty. These principles are premised on the notion that "a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of the other states. When a state exercises an authority of this kind over a certain territory it is popularly said to have 'sovereignty' over the territory" (Brierly, in Rosenthal & Knighton, 1982: 10). Thus, territoriality and sovereignty give states jurisdiction over activities occurring within their territories.

However, there are limits to the territoriality principle, in that states may also have jurisdiction over their nationals, regardless of which territory they are acting in. This is the nationality principle. As Rosenthal and Knighton explain, "[t]he principle of territoriality is not usually applied strictly to exclude other jurisdictional bases. A sovereign state can and does by agreement (or waiver, explicit or implicit), confer partial jurisdiction upon others within its territory... Nations asserting territorial jurisdiction also generally recognize [sic] that it is legitimate (in certain circumstances) for a nation to assert jurisdiction over its nationals, even when they are residing abroad" (Rosenthal & Knighton, 1982: 10).

An example of extraterritorial legislation based on the nationality principle is the prohibition of the commercial sexual exploitation of children. Extraterritorial legislation has been enacted over this issue due to the international nature of the abuse, which often involves sexual exploitation resulting from tourism and foreign visitors. In particular, there has been growing concern over the large numbers of people traveling abroad to exploit children in the belief that they will escape the severe punishments for such action at home. This is particularly the case when laws on child exploitation or the enforcement of such laws in the country of destination are lax. As O'Briain argues, "many child exploiters will travel

to another country and feel themselves immune from prosecution for acts which they would be afraid to commit in their own jurisdictions" (O'Briain, 1996).

Several countries from which large numbers of tourists are believed to travel to exploit children abroad have responded by introducing extraterritorial legislation over their nationals. Belgium (1995), New Zealand (1995), Australia (1994), France (1994), and Germany (1993) have all enacted laws which make it an offence for citizens or permanent residents of those countries to engage in sexual conduct with children abroad which would be a crime at home. Prosecutions are therefore able to be made against nationals for conduct overseas even if the crime alleged is not a crime in the territory in which it was committed (O'Briain, 1996).

There are a number of other precedents in Australia for extraterritorial legislation based on the nationality principle. These include the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999*, which makes it an offence for Australian nationals to bribe public officials overseas (*Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999*). The *Criminal Code Amendment (United Nations and Associated Personnel) Bill 2000* seeks to make it an offence under Australian law to cause harm to United Nations and Associated Personnel overseas, where either the victim or the offender is an Australian (*Criminal Code Amendment (United Nations and Associated Personnel) Bill 2000*). Australia has also enacted federal environmental legislation which covers the activities of Australian corporations overseas, including the *Environment Protection and Biodiversity Conservation Act 1999*, the *Environment Protection (Sea Dumping) Act 1981* and the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Del Villar, 2000).

While the nationality principle is widely accepted under international law, there are often disputes when jurisdictions based on territoriality and nationality conflict. Notably, conflicts of jurisdiction have frequently occurred when the nationality principle has been applied not only to individuals but also to corporations, and particularly to foreign subsidiaries of multinationals. Thus, "if not new, ... clashes of national and territorial jurisdiction have become more frequent and more serious through the development of multinational enterprises" (van Hecke, 1984: 13). The US in particular has employed the nationality principle to argue that it has jurisdiction over both overseas branches and foreign incorporated subsidiaries of US parent corporations where the parent corporation retains control. Thus, under US law, a US corporation is defined as "any business located anywhere which is owned or controlled by US citizens, US residents (temporary or permanent) or US corporations" (Rosenthal & Knighton, 1982: 55). Georges van Hecke explains the principle behind the US claim: "In attempting to control the worldwide operations of its multinational enterprises, the State of the parent company relies on its jurisdiction to control the conduct of its nationals because it assimilates the foreign subsidiaries to a national company" (van Hecke, 1984: 13).

The US has most consistently used this line of argument in support of export controls, through which it has attempted to enforce various trade boycotts and embargoes which involve limiting the activities of corporations in foreign countries. For example, in 1981, after the Soviet Union was accused of instigating a political crisis in Poland, the US sought to prohibit all overseas branches and subsidiaries of US corporations, as well as all foreign companies controlled by US shareholders, from exporting parts to be used for the construction of the Siberian gas pipeline (van Hecke, 1984).

The US claims to jurisdiction over foreign subsidiaries of US parent firms have often been disputed by a number of other developed nations. A number of European countries in particular have argued that corporate nationality should more properly be determined by the place of incorporation rather than the place of control. The debate largely stems from the concern that the nationality principle interpreted as applying to all domestically controlled corporations poses a significant threat to territoriality and sovereignty. As Rosenthal and Knighton argue, "[i]f foreign subsidiaries, chartered under the laws of a foreign sovereign, are nationals of the nation of a parent enterprise, *from the fact of being controlled by that parent*, the opportunities for sovereign conflict are substantially increased" (Rosenthal & Knighton, 1982: 6, emphasis in original).

Indeed, the nationality of a corporation is most often determined for the purposes of law by its place of incorporation. According to this principle, domiciled companies incorporated in the home state but operating overseas are subject not only to the territorial laws where they do business, but also to the laws of the home state. This notion was affirmed in the *Barcelona Traction* case and gives support to US claims of jurisdiction over firms operating overseas but incorporated in the US (IUCN & ICEL, 1995). Australia's *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* and *Environment Protection and Biodiversity Conservation Act 1999* also define 'Australian corporations' as those incorporated in Australia or its external Territories (Del Villar, 2000).

However, international law does provide for the extraterritorial application of national laws to domestically owned or controlled corporations which are incorporated overseas. It is the consensus of some of the world's leading experts in environmental law that "[u]nder international law, nationality refers not only to the place of incorporation, but also [to] where effective control lies" (IUCN & ICEL, 1995: 125). Therefore, overseas subsidiaries of MNCs may be subject to the concurrent jurisdictions of the place of incorporation, the place of operations and the place of control.

This conclusion has been drawn after significant debate by members of the European based World Conservation Union's Commission on Environmental Law (IUCN CEL), the International Council of Environmental Law (ICEL), and the United Nations Environment Program's Environmental Law and Institutions Programme Activity Centre (UNEP ELI/PAC), with consultation also from the American Society of International Law. Similarly, Seidl-Hohenveldern states

that "[i]nternational law admits that a State may consider a corporation as its national … [when] the corporation is either established under its law, or has its seat, centre of management or exploitation there, or is controlled by shareholders who are nationals of the State concerned" (Seidl-Hohenveldern, 1987: 8). Defining corporate nationality on the basis of place of effective control as well as the place of incorporation significantly broadens the impact of extraterritorial legislation. If such legislation applied only to the place of incorporation, subsidiaries of multinationals which were incorporated in LDCs could still escape effective regulation.

Even the strongest critics of the US actions at times recognise that corporate nationality is not as simple as the place of incorporation. For example, during times of war most countries regard firms incorporated in their territory as having enemy character if they are controlled by enemy nationals or corporations. Similarly, in Europe, competition law asserts that foreign parent companies may be seen as 'effectively present' in the territories where the subsidiaries are incorporated where they control the actions of the subsidiaries. Indeed, the European 'economic entity' doctrine states that "the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company" (Neale & Stephens, 1988: 161). That is, “the two are viewed as a single enterprise” (Rosenthal & Knighton, 1982: 59).

This assertion is somewhat contradictory to the European position on the US actions. However, it is widely accepted largely because, unlike many of the US actions, it does not seek to challenge territorial jurisdiction in the home state (Rosenthal & Knighton, 1982). An accepted position in international law is that claims to extraterritoriality are limited where there are contrary laws in the territorial state. Thus, "[t]he nationality principle justifies proceedings against nationals of the state claiming jurisdiction of their activities abroad only provided that this does not involve interference with the legitimate affairs of other States or cause such nationals to act in a manner which is contrary to the laws of the State in which the activities in question are conducted" (Statement of principles appended to the United Kingdom Aide-Memoire of 20 Oct. 1969 addressed to the Commission of the European Communities in the *ICI Dyestuffs* case; in Rosenthal & Knighton, 1982: 56). Extraterritorial legislation is, therefore, legitimate only where it does not "prejudice the power or rights of another state or its subjects" (Huber, in Neale & Stephens, 1988: 13). Where the host state has no clear contrary legal norm to what the extraterritorial regulation proposes, the principle of comity asserts that "states will act … to enable the laws of other states to retain their effect to the extent that their own rights and power are not prejudiced" (Neale & Stephens, 1988: 13).

The criticism of the US actions has, therefore, often been justified. Contrary to international law, US extraterritorial regulations have often sought to directly contradict or override the laws of the host country. In many cases, this has threatened the host state’s economic position. For example, in the Siberian gas pipeline incident, US regulations asked companies incorporated in Europe to cease current contracts with the Soviet Union. This was contrary to the positions

of the host states, which required the firms to fulfill their contracts and stated that they were free to trade with whomever they wished. Furthermore, ceasing the contracts would have jeopardised the corporations financially and impacted negatively on the local economies (Rosenthal & Knighton, 1982). Thus, a major criticism of the US actions has been that they have often 'ignored or unilaterally overridden' the rights of the territorial states (Neale & Stephens, 1988: 189) and have sought to promote US interests at the expense of the interests of the host state. The approach more consistent with international law is that where claims to nationality and territoriality create a conflict of laws, the laws of the territorial state should prevail.

The extraterritorial application of national laws to foreign incorporated subsidiaries is an unorthodox approach to regulation. However, it is concordant with international law as long as the following conditions are met. Claims of extraterritorial jurisdiction to prescribe and enforce laws over corporations must be based on the nationality of the firms, defined either by their place of incorporation or the place of effective control. The latter, in turn, must be defined by an internationally accepted measure. Furthermore, the application of extraterritorial laws must be conditional on them not conflicting with the laws of the host state or seeking to further the interests of the state of origin at the expense of the interests of the host state. Where there is a conflict of laws, territorial jurisdiction should prevail. This will ensure sovereignty is not undermined. Sovereignty will also be protected when the extraterritorial laws are considered a 'baseline,' such that they do not challenge the sovereignty of host states to “adopt or implement more stringent measures" (IUCN & ICEL, 1995: 183). While there are, as yet, no accepted precedents for this approach under international law, it is clear that the law can accommodate this change as it adapts to new global realities (IUCN & ICEL, 1995; Neale & Stephens, 1998).

5.1.2 The Special Case of Extraterritorial Environmental and Human Rights Laws

The legal parameters explored above illustrate that, while not standard practice, the extraterritorial application of national laws to domestically controlled foreign subsidiaries is legitimate under international law. While, under certain circumstances, this is true of all types of regulation, it is least controversial in the case of regulations which reflect a 'global' interest.

The protection of the environment and human rights throughout the world are often seen to be 'common concerns of humanity' (*erga omnes*) as they have "global importance and consequences for all” (IUCN & ICEL, 1995: 48). In addressing *erga omnes* concerns, parallels can be drawn between the extraterritorial regulation of multinationals and the extraterritorial enforcement of child sexual exploitation laws as discussed in Part 5.1.1 above. Regulation of these activities does not serve any one nation’s interest over another's. There is international agreement that the sexual

exploitation of children should be prohibited and, similarly, there is an international interest in protecting the Earth's environment, peoples and cultures.

It is suggested that since all of humanity has an interest in the protection of environments and human rights, they are not matters "to be thought of as solely within the domestic jurisdiction of States" (IUCN & ICEL, 1995: 65). This is particularly important in preventing environmental and social damage in territories where regulation or enforcement of laws is lax. Therefore, in the absence of effective international regulation of the social and environmental impacts of MNCs, extraterritorial regulation by home states is seen as appropriate. As Bianchi suggests, "the demands of the international community are met by broadening the jurisdictional powers of states with regard to the enforcement of interests that the same states have indicated as primary values for the international community as a whole" (Bianchi, 1996: 100-1). Similarly, Francioni argues that an *a priori* preclusion of the extraterritorial application of environmental standards "would be inconsistent with the notion that states have obligations *erga omnes* in matters such as the protection of the global environment as well as the protection of human rights and international peace" (Francioni, 1996: 130).

Thus, being consistent with notions of obligations *erga omnes*, "unilateral … measures of an extraterritorial character enacted to sanction systematic and massive violation [sic] of human rights, to protect the environment or to prevent the spread of arms of mass destruction have not been the object of strong opposition by other states" (Bianchi, 1996: 88). Indeed, extraterritorial regulation, including the regulation of foreign subsidiaries of domestic parent corporations, is invariably accepted by other states when there is a common interest in the proposed extraterritorial measure. For example, opposition to US extraterritorial actions has been least when other countries have seen an interest in such action or have identified with the outcome these actions have sought to promote. For example, when US embassy staff were taken hostage in Tehran, the US government froze Iranian dollar assets in the American and European branches of American banks. In this case European governments moderated their criticism of the US action because of their agreement that what the Iranians had done was unacceptable (Rosenthal & Knighton, 1982).

Further, because of the common interest in environmental and social protection, it is possible that developing host states will often be willing to accept extraterritorial regulation of MNCs operating in their territories. Indeed, most developing countries have consistently argued for more binding international controls on MNCs, and have viewed this as serving their interests rather than as challenging their sovereignty. They have argued that what is needed for the protection of their environments and communities is a "binding [international] code containing penalties for non-observance" (Acquaah, 1986: 39). Clearly, many LDCs support much greater control over the activities of MNCs. As they have found themselves in a weak position to implement such controls, they have turned to the international community for help. Since international efforts have not been effective in providing this help, LDC's may be supportive

of extraterritorial regulation by home states and its promise for greater controls over MNCs. Clearly, as Bianchi argues, the "[u]nilateral enforcement of *erga omnes* obligations by means of the extraterritorial application of municipal law might be a novel method of enforcement of international law, but certainly one worth exploring" (Bianchi, 1996: 88).

5.2 Will Corporations 'Change Nationality' in Order to Avoid Control?

A number of theorists, such as Kenichi Ohmae and Robert Reich, have argued that rather than 'internationalising,' the current international economy is 'globalising.' It is suggested that, in this globalised economy, distinct national economies are subsumed by transnational processes, such that the world has become effectively 'borderless.' In this globalisation worldview, capital is seen to move across borders completely freely, and the primary actors are said to be 'transnational corporations' (TNCs). These TNCs transcend national boundaries and are 'footloose' in that they are tied to no national base and are free to relocate wherever they choose in order to escape national regulations. As Hirst and Thompson illustrate, TNCs are said to be "genuine footloose capital, without specific national identification and with an internationalized [sic] management, and at least potentially willing to locate and relocate anywhere in the globe" (Hirst & Thompson, 1996: 11). The regulation of TNCs at the national level is, therefore, seen as impossible as they can easily relocate to avoid national policies. When corporate nationality is determined by the place of control, in order for foreign subsidiaries of 'TNCs' to escape extraterritorial regulation by home states, the headquarters of the corporation would need to relocate to a different national territory.

However, despite the protestations of globalisation theorists, corporations are very unlikely to take this course of action. The international economy is not 'globalised' but 'internationalised.' In this highly internationalised economy, while production and finance are often organised at an international scale, national economies are not 'transcended.' As Hirst and Thompson explain, "[t]he international economy is an aggregate of nationally located functions" (Hirst & Thompson, 1996: 10). In this internationalised economy, genuinely transnational corporations are rare. While a few possibly exist in the finance sector, there is no major tendency towards the growth of truly transnational corporations (Hirst & Thompson, 1996; Ruigrok, 2000). Indeed, the vast majority of international companies are 'multinational' rather than 'transnational.' That is, they do not transcend national borders or make national bases obsolete. While internationally oriented, multinational corporations retain a clear national home base, "operating on the strength of a major national location" (Hirst & Thompson, 1996: 2). As Hirst and Thompson argue, "companies are not becoming footloose global capital ... [they] remain tethered to their home economies and are likely to remain so" (Hirst & Thompson, 1996: 17).

MNCs are tied to their home bases in a number of ways. The home base is often the "centre for their economic activities" (Hirst & Thompson, 1996: 95) as they rely on the infrastructure in their home country to support their 'core functions' such as research and development. Thus, they are often critically linked into distinct national institutional structures such as 'national systems of innovation' (Hirst & Thompson, 1996: 187). In addition to ties through infrastructural support and innovation systems, the headquarters' of MNCs are built into and around cultures and ways of operating which are often unique to their home territories. As Hirst and Thompson suggest, "[m]ost firms are embedded in a distinct national culture of business that provides them with intangible but very real advantages. Managers and core staff have common understandings that go beyond formal training or company policies" (Hirst & Thompson, 1996: 186). Thus, MNCs' headquarters are institutionally embedded in national communities as 'social organisations' (Hirst & Thompson, 1996: 187). The headquarters of these companies are "enmeshed in networks of relations with central and local governments, with trade associations, with organized [sic] labour, with specifically national financial institutions oriented toward local companies, and with national systems of skill formation and labour motivation. These networks provide information, they are a means to cooperation and coordination between firms to secure common objectives, and they help to make the business environment less uncertain and more stable" (Hirst & Thompson, 1996: 187). Clearly, there are very real benefits for MNCs in remaining distinctly attached, through their headquarters, to the home base and its cultural and institutional frameworks (Hirst & Thompson, 1996: 187). In severing these established links, relocating the company's headquarters to a new national territory would be risky and severely disruptive.

The fact that the headquarters of international corporations remain 'heavily nationally embedded' means that they are highly unlikely to relocate their headquarters offshore to escape national regulations. Thus, "it is not beyond the powers of … [home] governments to regulate these companies" (Hirst & Thompson, 1996: 98). This is in contrast to the position of LDCs, which often have little in the way of infrastructural support or developed national business systems to offer corporations. Indeed, while the headquarters of MNCs remain nationally embedded, this is often not true of their branches and subsidiaries in LDCs, which can pose much more threat of investing elsewhere to avoid regulation. As argued earlier in Part Two, MNCs therefore retain the stronger bargaining position in relations with governments in LDCs such that controls on these corporations in developing states are weak. The leverage home states have over MNCs headquartered in their territories therefore becomes a crucial tool that can be used to regulate the corporations' activities in countries with less regulatory capacity.

5.3 Does Corporate Influence Undermine Legislative Efforts?

Some have raised concerns over the effectiveness of legislative controls in the face of corporate pressures. Corporations have regularly mounted significant lobbying power and aggressively attempted to undermine efforts at regulating the social and environmental impacts of their activities. Business organisations have heavily promoted self-regulation over government intervention and the development of detailed guidelines for MNCs (Rees & Wright, 2000a). Indeed, it has been suggested that "most company directors are militantly against anyone other than themselves saying what they should or should not do" (ISC, undated). A well known example of corporate lobbying surrounded the 1997 World Environmental Conference in Kyoto. An international consortium of powerful corporations cooperated to derail efforts at imposing binding targets for reductions in greenhouse gas emissions (MPI, 1998). As Amnesty International argue, "[t]he MNC lobby is known to favour voluntary rather than treaty-based or statutory codes, observance on an optional rather than a binding basis, self-policing rather than independent monitoring & verification and a gradual approach to rights" (Amnesty International, 1999). Similarly, Bruno and Karliner suggest that the consistent position of business organisations over the last decade has been that "on matters under UN auspices such as environment and human rights, ... voluntary, toothless agreements are best. Meanwhile, when it comes to the WTO and other trade negotiations, binding, enforceable rules favorable to transnationals are deemed appropriate" (Bruno & Karliner, 2000).

Corporate pressure to undermine attempts at binding controls does, indeed, pose a significant challenge to effective regulation. As a result of corporate influence, the domestic regulation of corporate activity in industrialised countries is often inadequate to ensure environmental and social sustainability. However, in practice, even the level and enforcement of regulation in industrialised countries is at least better than that in most LDCs, and better than what can be provided by international bodies, self-regulation or the influence of NGOs or lending and insurance agencies. Since most MNCs are based in industrialised nations, the extraterritorial extension of home state laws to their operations in LDCs would ensure a significant improvement in the environmental and social sustainability of their activities. Indeed, pressure from MNCs for weakened controls over their activities does not suggest that attempts at effective controls should be abandoned. Rather, it is an impetus to develop at least the most effective legislative response possible.

Moreover, the level and effectiveness of legislative controls in home states and, by extension, extraterritorially, may well improve as pressure from NGOs and community groups forces environmental and social standards higher. Although regulatory space can be 'captured' by powerful interests such as industry, the interests states represent can and do change over time (Hancher & Moran, 1998). Indeed, as evidenced by recent large-scale 'anti-globalisation' protests around the world, there is a growing movement for powerful industry interests to be "matched by an equally powerful public opposition" (Burton, 1997b: 8). As pressure for the democratic control of MNCs mounts, states will increasingly seek to accommodate the demands of this growing interest group. They will also increasingly develop the political will to effectively regulate the activities of their MNCs overseas as they recognise the long-term economic

advantages of doing so. The environmental and social reputation of their national firms and, therefore, the economic opportunities open to them will increasingly counter corporate demands for weakened controls and become pressure points for effective legislation. This may be encouraged even further as more and more home states introduce extraterritorial legislation over their MNCs, prompting other countries to do the same or be left behind.

Clearly, despite the debates outlined above, nation-states do have the capacity to implement effective extraterritorial regulation of the overseas activities of their MNCs. A suggested model for regulating the environmental and social impacts of multinationals operating abroad, with extraterritorial legislation as its cornerstone, is outlined in the following section.

CONCLUSION:
A NEW MODEL FOR REGULATION

Extraterritorial legislation can clearly make a critical contribution to the effective regulation of MNCs' operations in LDCs. These operations have, to date, largely been able to escape effective regulation. Domestic regulation of these operations has failed due to the lack of bargaining power and limited capacity of the host states to implement effective controls over MNC behaviour. While international regulation has been seen to hold some promise in holding MNCs accountable for their worldwide operations, its effectiveness has been severely curtailed by its non-binding nature and lack of monitoring. Similarly, self-regulation by industries and corporations has not provided sufficient changes in corporate cultures or behaviours to adequately protect environments or communities. Other efforts at influencing corporate behaviour, such as efforts by NGOs and some lending and insurance agencies, have not been enough to stop repeated environmental and social disasters at the hands of multinationals.

Extraterritorial regulation has unique advantages over these efforts at controlling the impacts of MNC activities. Importantly, it can be effectively enforced due to its binding nature. Corporations would have a legal obligation to meet the required standards and would face heavy penalties for breaches. An extraterritorial approach could also satisfy the criteria of independence in monitoring necessary for the adequate enforcement of standards. Moreover, where corporate nationality is determined by the place of control, extraterritorial legislation would apply to MNCs' worldwide operations. Since industrialised home states often have a greater capacity than developing host states for controlling MNCs behaviour, most MNCs' activities in LDCs could therefore no longer escape effective regulation.

However, while extraterritorial regulation can add a new and promising element of control over MNCs' activities, other efforts should not be abandoned. Indeed, efforts at every level and every opportunity will be required to meet the enormity of the challenge to ensure the sustainability of the Earth's cultures, communities and environments. No single method of influencing corporate behaviour will be enough to guarantee this outcome. Therefore, it has been suggested that all actors, including international organisations, states, business groups, community associations and individuals, have an obligation to "take affirmative action" to protect and rehabilitate environments wherever and whenever they have the opportunity (IUCN & ICEL, 1995: 45). Similarly, Rees and Wright suggest that protecting human rights is the responsibility of every individual and organisation. The *erga omnes* nature of human rights means that "no one individual, group or institution is accountable for their advocacy… Human rights are everyone's responsibility and no one's particular preserve" (Rees & Wright, 2000b: xi). Moreover, as Franco argues, addressing the issue of regulating

corporate conduct "from different angles … ultimately creates a more encompassing and stronger framework for corporate accountability" (Franco, 1998).

In addition to extraterritorial regulation, there are important roles for NGOs, international institutions, corporations, industry bodies and lending and insurance agencies in promoting corporate accountability. Environment and human rights NGOs will play a critical role in pressuring governments to make international efforts at influencing MNCs' behaviour more comprehensive. In particular, this will allow international negotiations to produce more adequate core minimum standards for environmental and social protection. These international standards will allow a degree of coordination and coherence amongst the multiple levels of governance. NGOs will also be crucial in pressuring corporations to make more serious attempts to improve the environmental and social standards of their own operations. NGOs can also help encourage an increasing number of investment credit and insurance agencies to adopt more stringent screening processes such that they refuse assistance to investments with unacceptable environmental and social impacts. An important element of NGO efforts will also involve rallying the public behind this push to increase MNCs' environmental and social responsibility in an effort to counter corporate pressure for weakened controls. Home governments may also find it useful to work with NGOs in monitoring the overseas activities of MNCs. States must also provide opportunities for NGOs and indigenous people to participate in decision-making processes (IUCN & ICEL, 1995), as well as encourage commitment to environmental and social responsibility through educational institutions.

These combined efforts at controlling MNC behaviour will promote the development of a culture of respect for environmental and social values throughout every level of the international community. This will, in turn, aid in strengthening the attempts to make multinationals accountable. As Rees and Wright suggest, the challenge is to create a respect for environmental and human rights values "in every context, culture and country, in every sphere of family life and bureaucratic practice, in every project of government, business and industry" (Rees & Wright, 2000b: xiii). Only with a concerted effort at every opportunity will environmental and social sustainability be truly within reach.

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