

Apartheid, Profits, and Corporate Social Responsibility:

A Case Study of Multinational Corporations in Saudi Arabia

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Abstract

This paper looks at the real motivations behind the Corporate Social Responsibility (CSR) regime through the prism of American corporate activities in Saudi Arabia. The author finds that several companies generally hailed as leading the way in corporate social responsibility, such as Starbucks, McDonalds and the Hilton Corporation, are in effect perpetuating shocking abuses of human rights—specifically women’s rights—for the sake of maximizing profits. Such behavior suggests that, for many companies, the CSR regime is not motivated by a wider normative shift towards more socially responsible behavior, as many authors have suggested, but rather is simply a tool to maximize a corporation’s monetary value by appealing to niche markets. The author suggests that to end this troubling dynamic, the political and judicial branches of government should learn from the harsh lessons gained during the South African Apartheid and step forward to prohibit domestic companies from engaging in gross patterns of gender discrimination abroad.

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Acronyms

ADGA	Anti-Gender-Discrimination Act
ATCA	Alien Tort Claims Act of 1789
CAAA	Comprehensive Anti-Apartheid Act of 1986
CWP	Calvert Women's Principles
CSR	Corporate Social Responsibility
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRO	Corporate Social Responsibility Officer
FCPA	Foreign Corrupt Practices Act of 1977
GSP	Global Sullivan Principles
ILO	International Labour Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MDG	Millennium Development Goals
MNC	Multinational Corporation
OECD	Organization for Economic Co-operation and Development
SA8000	Social Accountability 8000
SAI	Social Accountability International
UN	United Nations
UNDHR	Universal Declaration of Human Rights
UNGC	United Nations Global Compact
US	United States

PART I

Introduction

Globalization has brought about foundational transformations to the international system. Today, non-state actors operate increasingly alongside—as opposed to beneath—states in governing the globe. Within this structure, multinational corporations (MNCs) are particularly important because of their enormous economic power and because globalization itself is seen as a “business driven phenomenon.”¹ The largest MNCs are now several times richer than most states and—given their transnational character—are no longer subject to the rules and regulations of their home governments. This phenomenon has led some to argue that “corporations now govern society, perhaps more than governments themselves do.”²

The ‘retreat of the state’,³ as Susan Strange called it, led to the birth of the corporate social responsibility⁴ (CSR) movement and increased the pressure on MNCs to

¹ EGBERT G. CH. WESSELINK ET AL., *MULTINATIONAL ENTERPRISES AND HUMAN RIGHTS* 16 (2d ed. 2000).

² JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 25 (2004).

³ SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996)

⁴ In this context, CSR is defined as the notion that “maximising shareholder value is not, in itself, an adequate measure of a firm’s responsibilities, and that firms should move beyond the focus on shareholders to consider the impact of their activities on stakeholders.” Paul Alexander Haslam, *Is Corporate Social Responsibility a Constructivist Regime? Evidence From Latin America*, 21 (2) *GLOBAL SOC’Y* 269, 271 (2007). Stakeholders are defined as “any individual or group likely to be affected either positively or negatively, in the short or long term, by corporate activities, policies or decisions.” Wesley Cragg, *Prosperity and Business Ethics—The Case for Corporate Social Responsibility in the Americas*, Focal Policy Papers, CANADIAN FOUND. FOR THE AMERICAS 6 (2001).

behave as socially responsible actors.⁵ In fact, commentators now doubt “whether a human rights system premised on state responsibility to respect human rights can be effective in a globalized world.”⁶

Corporate social responsibility is considered most vital in areas where “governments are either unable or unwilling” to enforce human rights and environmental standards.⁷ In other words, corporations operating in a globalized system are seen as responsible for regulating the negative impacts of their activities since states are no longer able to do so alone.⁸ Today, MNCs are not only expected to refrain from causing harm in the international arena, but are even expected to fill the governance gaps created by globalization and contribute to the well being of others.⁹ In the words of Joel Bakan, “Corporations are now often expected to deliver the good, not just the goods; to pursue values, not just value; and to help make the world a better place.”¹⁰

Accordingly, NGOs and other human rights activists have engaged in a number of campaigns to pressure firms to act as socially responsible actors.¹¹ These groups promote a form of moral protectionism and encourage consumers to boycott the goods and

⁵ See RODNEY B. HALL & THOMAS J. BIERSTEKER, *The Emergence of Private Authority in the International System*, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE (2002).

⁶ Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 281-82 (2002).

⁷ Andreas Georg Scherer, Guidio Palazzo, & Dorothee Baumann, *Global Rules and Private Actors: Toward a New Role of the Transnational Corporation in Global Governance*, 16 (4) BUS. ETHICS Q. 505, 507 (2006).

⁸ See, Dirk Matten and Andrew Crane, *Corporate Citizenship: Toward and Extended Theoretical Conceptualization*, 30 (1) ACAD. OF MGMT. REV. 166 (2005).

⁹ *Id.*

¹⁰ BAKAN, *supra* note 2, at 31.

¹¹ See Ethan B. Kapstein, *The Corporate Ethics Crusade*, 80 FOREIGN AFF. 105 (Sept./Oct. 2001); Morton Winston, *NGO Strategies for Promoting Corporate Social Responsibility*, 16 ETHICS & INT'L AFF. 71 (2002).

services offered by socially irresponsible companies.¹² The ‘naming and shaming’ of companies has succeeded in putting MNCs on an “ethics crusade” to at least appear to be socially responsible.¹³

Most companies now pay homage to the notion of CSR. Indeed, the great majority of firms now claim that they actively pursue a ‘triple bottom line’ and factor ecological and social considerations into their decision-making practices as opposed to solely pursuing profit maximization.¹⁴ Though MNCs continue to seek profit as their primary goal, they suggest that such materialistic concerns do not trump the need to “behave responsibly, and to respect, protect, promote and, where they can, fulfill human rights.”¹⁵

MNCs now develop comprehensive codes of conduct, have entire divisions devoted to CSR, and routinely publish ‘accountability reports’ to demonstrate their strict adherence to social and environmental norms.¹⁶ Some even suggest that MNCs are now on a ‘race to the top’, continuously trying to show themselves as more socially responsible than their competitors.¹⁷ Thus, one can view “corporate social responsibility

¹² Kapstein, *supra* note 11.

¹³ *Id.*

¹⁴ ANDREW W. SAVITZ & KARL WEBER, *THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL AND ENVIRONMENTAL SUCCESS-- AND HOW YOU CAN TOO* (2006).

¹⁵ WESSELINK ET AL., *supra* note 1, at 17.

¹⁶ *The Good Company*, *THE ECONOMIST*, Jan. 20, 2005, available at http://www.economist.com/displayStory.cfm?story_ID=3555212.

¹⁷ See Debora L. Spar, *The Spotlight and the Bottom Line: How Multinationals Export Human Rights*, 77 *FOREIGN AFF.* 7, 9-10 (1998); Kapstein, *supra* note 11; see also DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* 1-2 (2005) (providing examples of MNCs recent CSR initiatives).

[as MNCs'] new creed, a self-conscious corrective to earlier greed-inspired visions of the corporation.”¹⁸

CSR is, however, “by definition, a voluntary commitment.”¹⁹ Given the absence of binding international law to regulate the vast majority of corporate activities, crucial questions arise around the sincerity and the efficacy of voluntary codes of conduct. There is, in fact, a “strategic split between [CSR activists] that see themselves as primarily working for voluntary CSR and those that favor moving immediately to enforceable international legal standards.”²⁰ While some regard CSR as a “‘win-win’, and something to celebrate; others view it as a sham, the same old tainted profit motive masquerading as altruism.”²¹ The questions this study seeks to shed light on are: “what does it all amount to, really? Is CSR then mostly for show” or is it a manifestation of a deeper normative shift within the MNC?²² Moreover, regardless of its true motivations, does CSR provide an adequate check on corporate human rights violations or has CSR failed to guarantee protection for certain fundamental human rights thereby necessitating more robust regulatory mechanisms?

This paper looks at the activities of several CSR leaders operating in Saudi Arabia and argues that voluntary codes of conduct have failed to ensure adherence to universally recognized human rights. Specifically, this paper maintains that, in direct contrast to their professed CSR principles, Starbucks, McDonald’s, the Hilton Corp. and Yum! Brands—all champions of the CSR movement—have perpetrated grave violations of women’s

¹⁸ BAKAN, *supra* note 2, at 28.

¹⁹ Haslam, *supra* note 4, at 272.

²⁰ Winston, *supra* note 11, at 76.

²¹ *The Good Company*, *supra* note 16.

²² *Id.*

fundamental rights in Saudi Arabia. These findings raise serious doubts on the efficacy of voluntary codes in ensuring good corporate governance. Accordingly, we advocate for a series of more robust policies to ensure corporate compliance with international human rights principles.

Part I of this paper outlines the various debates surrounding the value of CSR and constructs a theoretical and practical context from which to analyze corporate activities in Saudi Arabia. This context includes establishing a baseline of what has been deemed acceptable treatment of women according to both international law and voluntary codes of conduct. Part II examines the actual activities of the aforementioned firms in Saudi Arabia and contrasts that behavior with their CSR codes. Finally, Part III interprets these findings within the CSR debate and presents a series of policy prescriptions for how to improve the human rights record for these companies in particular and for MNCs generally.

The Debate²³

The Optimists

The most prevalent mechanism for promoting good corporate conduct has been to encourage firms to adhere to a set of voluntary codes of conduct. Such codes have been formulated at both system-wide and individual levels. Global standards such as those developed by the International Labour Organization (ILO), the Organization for

²³ It should be noted that this divide is not exhaustive. Rather, several CSR scholars and activists may fall somewhere in between these two camps. Nevertheless, the value in presenting the debate as polarized lies in highlighting the strategies and beliefs that these parties emphasize generally. Moreover, both camps agree that exceptions exist to their conceptualization of CSR.

Economic Co-operation and Development (OECD), the United Nations (UN), and other international and non-governmental organizations, as well as company specific codes created by the MNCs themselves, form the body of CSR.

Not surprisingly, MNCs are the strongest advocates of this self-regulatory approach, to which they try to demonstrate their steadfast adherence. “MNCs insist that people should have trust in the companies’ statements as to their compliance efforts” and have successfully blocked efforts to establish enforceable human rights standards for corporate activities abroad.²⁴ Through such mechanisms as lobbying, public relations, and corporate giving, increasingly powerful MNCs have generated considerable support for self-regulation and, for the most part, have dissuaded lawmakers from enacting more stringent and enforceable measures.

In fact, several international and non-governmental organizations now believe that “voluntary codes of conduct offer perhaps the best” and most effective way to ensure corporate respect for human rights.²⁵ The primary purpose of CSR activists adopting this approach is to “persuade MNCs to adopt voluntary codes of conduct” and then to generate public pressure against those MNCs that fail to act in accordance with those

²⁴ S. Prakash Sethi, *Corporate Codes of Conduct and the Success of Globalization*, 16 (1) ETHICS AND INT’L AFF. 89, 96 (2002).

²⁵ *Id.* at 103. See also, *100 Best Corporate Citizens 2009*, CORP. RESPONSIBILITY OFFICER, n.d., <http://www.thecro.com/100best09> (describing how their ranking system has led to significant changes of the world’s largest MNCs).

codes.²⁶ Thus, public scrutiny is believed to constitute an adequate measure against corporate abuse.²⁷

These groups maintain that, since “the voluntary CSR approach [is] . . . work[ing] as an effective means of moving more companies to embrace [human rights],”²⁸ any form of regulation would actually “muddy the waters and weaken business support” for social issues.²⁹ Thus, “the CSR approach is seen by its boosters as a practical response”³⁰ to ensure “minimal necessary standards” for human rights.³¹ Many of these groups, such as the World Economic Forum, are often funded by the MNCs themselves.³² Optimists have offered a “ringing endorsement” of CSR codes such as the Global Compact, arguing that “[p]rospects are good for the Global Compact [to] . . . translat[e] words into deeds” and help promote “peace, stability, economic growth and wealth generation.”³³

This view has also gained substantial traction among academics who suggest that “that the importance of CSR as a set of norms that affects the behavior of [MNCs] should not be underestimated.”³⁴ Several constructivist scholars now argue that a veritable

²⁶ Winston, *supra* note 11, at 76; *See also*, Margaret E. Keck and Kathryn Sikkink, *Transnational Advocacy Networks in International and Regional Politics*, 51 (159) INT’L SOC. SCI. J. 89 (1999) (discussing accountability politics).

²⁷ *See, e.g.*, PETER UTTING, REGULATING BUSINESS VIA MULTISTAKEHOLDER INITIATIVES: A PRELIMINARY ASSESSMENT 61 (2002) (discussing how multistakeholder initiatives are encouraging companies to achieve a ‘triple bottom line’), *available at* <http://www.eldis.org/static/DOC11465.htm>.

²⁸ Winston, *supra* note 11, at 76 (quoting Noam Chomsky).

²⁹ Maria Livanos Cattai, *Business-UN compact could be at take-off point*, 26 July 2000, International Chamber of Commerce, <http://www.iccwbo.org/policy/law/iccbgjj/index.html>

³⁰ Winston, *supra* note 11, at 75.

³¹ Sethi, *supra* note 24, at 103.

³² B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 (1) EUR. J. INT’L L., 1, note 4 (2004).

³³ Cattai, *supra* note 29.

³⁴ Haslam, *supra* note 4, at 270.

transnational private authority regime is forming around CSR codes and is regulating corporate conduct.³⁵ This camp maintains that the ‘why’ for businesses is as much about the “social license to operate” and maintaining a sustainable business model that factors in human rights as it is about short-term profit maximization.³⁶ Harvard professor Ira Jackson coined this normative shift “capitalism with a conscience.”³⁷

According to this paradigm, CSR is a “set of principles, norms, rules and decision-making procedures” that successfully regulate corporate conduct.³⁸ Although corporations may initially agree to implement these voluntary principles for the sake of attracting funds from socially responsible investors, they eventually come to adhere to CSR codes out of a genuine sense of responsibility.³⁹ March and Olson have coined this outcome the “logic of appropriateness,”⁴⁰ which Bernstein and Cashore maintain stands “[i]n contrast to a utilitarian logic of consequences.”⁴¹ Thus, CSR norms can be seen as “an intervening variable, as Stephen Krasner put it, between fundamentals (the profit

³⁵ According to Clair Cutler, a private transnational authority regime is the most advanced form of private authority and is defined as “an integrated complex of formal and informal institutions that is a source of governance for an economic issue area as a whole.” CUTLER ET AL., *PRIVATE AUTHORITY IN INTERNATIONAL AFFAIRS* 13 (1999).

³⁶ Haslam, *supra* note 4, at 269-296 (2007).

³⁷ IRA JACKSON & JANE NELSON, *PROFITS WITH PRINCIPLES: SEVEN STRATEGIES FOR DELIVERING VALUES WITH VALUE* (2004).

³⁸ David A. Detomasi, *International Regimes: The Case of Western Corporate Governance*, 8 INT’L STUD. REV. 225, 231 (2006). This definition borrows the language from Stephen Krasner’s definition of a transnational regime. *See*, Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 (2) INT’L ORG. 325 (1982).

³⁹ Detomasi, *supra* note 38, at 231.

⁴⁰ James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT’L ORG. 943 (1998).

⁴¹ Steven Bernstein & Benjamin Cashore, *Can Non-State Global Governance be Legitimate? An Analytical Framework*, 1 REG. & GOVERNANCE 347, 355 (2007). It is important to note that although Bernstein and Cashore help conceptualize the notion of a “logic of appropriateness” they maintain that such an outcome has yet to be achieved.

motive) and outcomes (socially responsible behavior).”⁴²

Similarly, Matten and Crane suggest that CSR is far more than mere “strategic philanthropy” meant to increase profits by adding to a firm’s social and reputational capital.⁴³ Rather, they see CSR as an external manifestation of a preexisting internal reality whereby firms operating in areas devoid of government regulation take it upon themselves to provide for fundamental human rights.⁴⁴ According to this view, MNCs become agents of upholding and enforcing the citizenship rights of those within their spheres of influence.⁴⁵ Thus, corporations that have undergone this normative shift will behave as socially responsible actors even in the absence of external pressure to regulate their activities.⁴⁶

The Cynics

The claim that CSR codes suffice to ensure MNC compliance with international human rights principles has been met with considerable skepticism. The CSR cynics maintain that, “MNCs’ pledges toward reforms through code adoption are more rhetorical than substantive,” and that corporations’ insistence that the public trust their compliance efforts are “hollow claims.”⁴⁷ Joel Bakan, for example, a fervent critic of CSR, suggests that the corporation is a “pathological institution” that “pursue[s], relentlessly and without exception, its own self-interest regardless of the often harmful consequences it

⁴² Haslam, *supra* note 4, at 270.

⁴³ Matten & Crane, *supra* note 8, at 166-168.

⁴⁴ *Id.* at 166-179.

⁴⁵ *Id.* at 169-173.

⁴⁶ *See, Id.* at 166-179; Haslam, *supra* note 4, at 269-296.

⁴⁷ Sethi, *supra* note 24, at 93, 96.

might cause to others.”⁴⁸ Thus, the very notion of a ‘triple bottom line’ is a “dubious proposition under the best of circumstances.”⁴⁹

CSR cynics “accuse firms of merely paying lip-service to the idea of good corporate citizenship” and suggest that ‘optimists’ have “been conned . . . [by] a public relations excersize[] designed to give the impression that [M]NCs are concerned about social issues.”⁵⁰ Although even the staunchest CSR critic must agree that many corporations often engage in socially responsible practices, this camp suggests that CSR is used solely as a profit maximizing strategy. According to financier George Soros, for example, “corporate social responsibility [is] being used as a cover for business-as-usual practices by companies.”⁵¹ Soros maintains that companies “pretend to be interested in corporate social responsibility” to desensitize critics and to evade government regulation, but that “if there is a conflict between making money and social responsibility, then making money tends to dominate.”⁵² The only important consideration for businesses, therefore, is “what are the earnings this quarter?”⁵³ Thus, companies continue to pursue a single bottom-line—profit.

Whereas the optimistic camp sees global civil society as the force behind CSR, cynics suggest that it is the corporation that strategically uses CSR to pull the public along by turning potential veto players into stakeholders. This form of “corporate

⁴⁸ BAKAN, *supra* note 2, at 1-2.

⁴⁹ *The Good Company*, *supra* note 16.

⁵⁰ *Id.*

⁵¹ Toby Webb, *George Soros on Ethical Business*, ETHICAL CORP. Nov. 7, 2006, <http://www.ethicalcorp.com/content.asp?ContentID=4643&ContTypeID=43>.

⁵² *Id.*

⁵³ *Id.*

propaganda”⁵⁴ is “at best a gloss on capitalism, not the deep systemic reform that its champions” claim.⁵⁵ Thus, cynics reject the very notion of a ‘logic of appropriateness’ and suggest that companies are guided solely by a ‘logic of consequences’. Accordingly, this view maintains that “CSR enthusiasts are bound to be disappointed” since “the human face that CSR applies to capitalism goes on each morning, gets increasingly smeared by day and washes off by night.”⁵⁶

Cynics point to MNCs such as Enron, previously paraded as a “paragon of social responsibility and corporate philanthropy” that pledged to “put human rights, the environment, health and safety issues” at the core of its business operations, to show “just how wide a gap can exist between a company’s cleverly crafted do-gooder image and its actual operations.”⁵⁷ This camp maintains that there are “built-in incentives for hypocrisy” within the very notion of CSR, which lead to its failure as an adequate mechanism for ensuring responsible governance.⁵⁸

One critique of CSR often levied by the cynics revolves around the notion of unenforceability. Corporations that sign global codes drafted by international and non-governmental organizations do not accept binding obligations upon themselves and are free to “choose the degree to which they will abide by their gratuitous promises.”⁵⁹ Thus, MNCs may sign CSR ‘treaties’ “to curry political capital”⁶⁰ while “postpon[ing] urgently

⁵⁴ Winston, *supra* note 11, at 77.

⁵⁵ *The Good Company*, *supra* note 48.

⁵⁶ *Id.*

⁵⁷ BAKAN, *supra* note 2, at 57-58 (2004).

⁵⁸ Webb, *supra* note 51.

⁵⁹ Aaron N. Einhorn, *The Evolution and Endpoint of Responsibility: the FCPA, SOX, Socialist-Oriented Governments, Gratuitous Promises, and a Novel CSR Code*, 35 *DENV. J. INT’L L. & POL’Y* 509, 539-540 (2007).

⁶⁰ *Id.*

needed reforms.”⁶¹ Critics are even more weary about MNCs’ company specific codes, which they suggest “pose even greater enforcement difficulties” since they “not only are self-drafted and self-adopted, but also self enforced, leaving corporations to implement, monitor, and enforce them in a perverse concentration of power.”⁶² These “weak protective force[s] . . . offer no basis for legal claims . . . nor do they include any complaint procedures or . . . sanctions or remedies in case of non-compliance . . . [which] limits their meaning as a vehicle for a human rights policy.”⁶³

Another critique of voluntary codes surrounds their degree of specificity. Cynics suggest that voluntary codes are “put in vague terms and therefore fail to offer clear guidance in specific situations.”⁶⁴ Moreover, these codes “are presented as public statements of lofty intent and purpose,”⁶⁵ which can lead to an “obfuscation of norms.”⁶⁶ Thus, CSR codes are vague enough to enable MNCs to continuously evade criticism by citing adherence to one CSR code or another, even when committing egregious human rights violations.⁶⁷ Thus, for example, MNCs may justify corporate complicity in governmental abuses of human rights as ‘respecting local customs’ or “abstaining from participation in party politics and interference in political matters,” even when doing so goes directly against the spirit of CSR.⁶⁸

CSR cynics have responded to these purported shortcomings by actively pushing

⁶¹ Sethi, *supra* note 24, at 98.

⁶² Einhorn, *supra* note 59 at 539-540.

⁶³ WESSELINK ET AL., *supra* note 1, at 30.

⁶⁴ *Id.*

⁶⁵ Sethi, *supra* note 24, at 98.

⁶⁶ EGBERT G. CH. WESSELINK ET AL., *supra* note 1, at 58.

⁶⁷ *Id.*

⁶⁸ *See*, JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY 26 (2006) (discussing Shell’s activities with regard to the case of Ken Saro-Wiwa in Nigeria).

for more stringent regulatory measures. Amnesty International and Human Rights Watch, for example, supported the values espoused by the Global Compact, but refused to endorse it citing a “lack of independent verification and enforcement mechanisms.”⁶⁹ More vehement critics such as Green Peace, Third World Institute and Corporate Watch, “blast[ed] the Global Compact as threatening the mission and integrity of the UN.” These activists argue that CSR “allow[s] business entities with poor records to ‘bluewash’ their image”⁷⁰ by claiming to act in accordance with universal norms even when behaving irresponsibly. Similarly, Robert Reich argues that since corporations are incapable of acting responsibly, the sheer existence of a CSR movement is diverting people’s energy and resources away from the more important task of getting governments to regulate corporate behavior.⁷¹ Accordingly, this camp has stressed “the need to move toward legally-binding norms for corporations . . . backed by a range of implementation measures.”⁷²

Saudi Arabia: An Ideal Test Case

To help determine whether firms do in fact adhere to their self-professed CSR principles, an ideal test case would take leaders of the CSR movement, place them in an environment where the government is either unable or unwilling to regulate fundamental human rights, focus on an issue that is devoid of public scrutiny, but whose violation

⁶⁹ Winston, *supra* note 11, at 78. For more on the Global Compact *see* discussion *infra* pp. 32-35.

⁷⁰ *Id.* (quoting Corporate Watch founder Joshua Karliner).

⁷¹ ROBERT REICH, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* (2007)

⁷² Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM. U. L. REV. 1265, 1291 (2004). For a fuller discussion of possible enforcement mechanisms *see infra* Section III.

would lead to significant financial gains, and gauge the extent to which these firms' have conformed to their promises to behave as socially responsible actors. The treatment of women by US corporations in Saudi Arabia provides precisely such a case.

As the following sections will establish, Saudi Arabia's treatment of women falls far below the internationally recognized legal standard for human rights.⁷³ Moreover, with Saudi Arabia being the largest economy in the Arab world, conforming to its gender mores could lead to significant financial gains for US businesses.⁷⁴ Additionally, the treatment of women in Saudi Arabia has not been the subject of a widespread CSR campaign—as has been the case with other human rights violations such as the South African racial apartheid—thereby lessening the financial costs associated with conforming to Saudi practices.⁷⁵ Finally, Starbucks, McDonalds, the Hilton Corp., and Yum! Brands, have all been widely celebrated as CSR leaders and have made numerous, explicit promises to respect women's equal rights even when operating in repressive environments.⁷⁶ Consequently, the Saudi context provides an ideal case study to test competing views of CSR.

Women in Saudi Arabia

The condition of women living in Saudi Arabia is notoriously below the international legal standard. Out of the 128 countries surveyed by the World Economic Forum's Global Gender Gap Report in 2007, Saudi Arabia ranked last in political

⁷³ See discussion *infra* pp. 16-21.

⁷⁴ Vivian Salama and Arif Sharif, *BNP, Citi Exposed to \$6.3 Billion Saudi Debt Workout*, BLOOMBERG PRESS, June 24, 2009, available at:

<http://www.bloomberg.com/apps/news?pid=20601110&sid=aScOQdF6WVI4>

⁷⁵ See discussion *infra* n. 113.

⁷⁶ See discussion *infra* pp. 29-41.

empowerment, 127th in economic participation and opportunity, and 124th overall.⁷⁷ Women in Saudi Arabia have no right to vote, may not drive, must wear full length black *abayas* and head coverings in all public places at all times, are required to attend girls only schools and universities, are prohibited from studying certain subjects, are forced to eat in special ‘family’ sections of cafes and restaurants, may not play sports, must sit in the back of busses (even when the busses are empty), comprise a mere 5% of the work force, must work in segregated offices, have an illiteracy rate double that of men, are not allowed to leave their homes without being chaperoned by a male relative, are prohibited from conversing with unrelated males, and must get the express permission of a male relative before having surgery, traveling, accepting a job, buying a mobile phone, accepting a marriage proposal, or going to court (even when accused of murder).⁷⁸ “Saudi

⁷⁷ RICARDO HAUSMANN, LAURA D. TYSON, & SAADIA ZAHIDI, WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT (2007), *available at* <http://www.weforum.org/pdf/gendergap/report2007.pdf>.

⁷⁸ See U.S. STATE DEPARTMENT, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SAUDI ARABIA (2008) *available at* <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119126.htm>; Recent Case, *General Court Of Qatif Sentences Gang-Rape Victim To Prison And Lashings For Violating ‘Illegal Mingling’*, 121 HARV. L. REV. 2254 (2008); Katherine Zoepf, *Love on Girls’ Side of the Saudi Divide*, N.Y. TIMES, May 13, 2008, *available at* http://www.nytimes.com/2008/05/13/world/middleeast/13girls.html?_r=1&hp; *Driving Ban Stays for Saudi Women*, BBC NEWS, June 13, 2005, *available at* http://news.bbc.co.uk/2/hi/middle_east/4089332.stm; Colbert I. King, *The Saudi Sellout*, WASH. POST, Jan. 26, 2002, at A23; Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Saudi Arabia*, 40th Sess. (Jan.14 –Feb.1 2008) *available at* <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW.C.SAU.CO.2.pdf>; L. Azuri, *Public Debate in Saudi Arabia on Employment Opportunities for Women*, MIDDLE E. MEDIA RES. INST., No. 300. Nov. 17, 2006, <http://www.memri.net/bin/articles.cgi?Page=archives&Area=ia&ID=IA30006>; Rebecca Leung, *Women Speak Out In Saudi Arabia*, CBS NEWS, Mar. 24, 2005, <http://www.cbsnews.com/stories/2005/03/23/60minutes/main682565.shtml>; Ctr. for Democracy & Human Rights in Saudi Arabia, *Women’s Rights in Saudi Arabia: The Issue*, 2006, Last modified, October 21, 2008. <http://www.cdhr.info/Campaigns/>

women continue to resist and struggle against [these] discriminatory policies and laws,” but to little avail.⁷⁹

Women’s Rights: The International Legal Standard

The severe human rights violations against women in Saudi Arabia have been anathema to the international community. The New York Times recently reported gender segregation in Saudi Arabia to be “so extreme that it is difficult to overstate.”⁸⁰ Others maintain the status of women in Saudi Arabia to constitute a veritable “gender apartheid” tantamount to the racial apartheid of South Africa or to the Jim Crow era in the U.S.⁸¹ African American Pulitzer Prize winning journalist, Colbert King, highlighted this connection opining, “[n]ow substitute ‘African American’ for ‘Saudi Woman’ and ‘white male’ for ‘male relative’ . Get the picture?”⁸²

The UN Committee on the Elimination of Discrimination against Women—the UN’s authoritative body on matters of gender discrimination—concluded that it was “concerned” with the Kingdom’s treatment of women. In its final report on Saudi Arabia, the Committee noted that Saudi Arabian policies went directly counter to international

WomensRights; Faiza Saleh Ambah, *An Olympic Door Opens for Saudi Woman*, WASH. POST, Aug. 18, 2008 at A06, available at http://www.washingtonpost.com/wpdyn/content/article/2008/08/17/AR2008081702539_pf.html; Richard Abdy, *Closing the Gulf Between the Sexes*, ETHICAL CORP. Aug. 8, 2005 <http://www.ethicalcorp.com/content.asp?ContentID=3822>; Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?* 15 MICH. J. INT’L L. 307 (1994).

⁷⁹ Mayer, *Universal Versus Islamic Human Rights*, *supra* note 78, at 389.

⁸⁰ Zoepf, *supra* note 78.

⁸¹ *see* JOHN M. KLINE, ETHICS FOR INTERNATIONAL BUSINESS 180 (2005); Recent Case, *General Court of Qatif Sentences Gang-Rape Victim to Prison and Lashings for Violating ‘Illegal Mingling’*, 121 HARV. L. REV. 2254 (2008); King, *The Saudi Sellout*, *supra* note 78. (This piece received the Pulitzer Prize for Commentary in 2003).

⁸² King, *The Saudi Sellout*, *supra* note 78.

norms regarding the “principle of equality” and that Saudi Arabia’s “concept of male guardianship contributes to the prevalence of a patriarchal ideology with stereotypes and the persistence of deeprooted cultural norms, customs and traditions that discriminate against women and constitute serious obstacles to their enjoyment of their human rights.”⁸³ Moreover, the Committee urged Saudi Arabia to begin abiding by international human rights treaties by “abolishing de facto [gender] segregation.”⁸⁴

The most widely accepted of these treaties is the International Bill of Human Rights, which is composed of the 1948 Universal Declaration of Human Rights (UNDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).⁸⁵ The UNDHR has been ratified by every UN member state, while the latter two declarations have been ratified by over 140 nations each.⁸⁶ The UNDHR “set[s] basic minimum international standards for the protection of the rights and freedoms of the individual” and is “regarded as forming a foundation of international law.”⁸⁷ The Declaration begins by recognizing the “inherent dignity and . . . the equal and inalienable rights of all members of the human family” and affirms its “faith in fundamental human rights, in the dignity and work of the human person and in the equal rights of women.”⁸⁸ It goes on to prohibit discrimination and degrading treatment of any kind and entitles every person “to a social and international order in which the rights and freedoms set

⁸³ Committee on the Elimination of Discrimination Against Women, *supra* note 78, at 3;

⁸⁴ *Id.*, at 7.

⁸⁵ WESSELINK ET AL., *supra* note 1, at 43.

⁸⁶ *Id.*

⁸⁷ UN Global Compact, Overview, <http://www.unglobalcompact.org/AboutTheGC/index.html>

⁸⁸ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

forth in th[e] declaration can be fully realized.”⁸⁹ The ICCPR and the ICESCR reiterate the UNDHR’s commitment to everyone’s “civil and political rights, as well as [their] economic, social and cultural rights . . . without distinction of any kind as to race, colour, [or] sex”⁹⁰ and prohibit “discrimination of any kind . . . ensur[ing] the equal right of men and women to the enjoyment of all economic, social and cultural rights.”⁹¹

The core human rights treaty targeting gender discrimination specifically is the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which has been ratified by over 185 nations. Saudi Arabia ratified CEDAW in 2000 thereby officially binding itself to the Convention’s provisions.⁹² Saudi Arabia’s policies towards women, however, directly violate its international obligations.

CEDAW sees itself not as adding new provisions for the protection of women’s rights, but rather as framing the fundamental human rights already outlined in the UNDHR in a gender specific context.⁹³ CEDAW defines gender ‘discrimination’ as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁹⁴

⁸⁹ *Id.*

⁹⁰ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966).

⁹¹ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (Dec. 16, 1966).

⁹² Convention on the Elimination of All Forms of Discrimination Against Women, States Parties, <http://www.un.org/womenwatch/daw/cedaw/states.htm>.

⁹³ Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, (Dec. 18, 1979).

⁹⁴ *Id.*

The treaty “condem[s] discrimination in all its forms” and requires states to “eliminate discrimination against women by any person, organization or enterprise [and] [t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”⁹⁵ The specific rights enumerated in the treaty include the right to work, to vote, to an education, to travel, to receive medical treatment, to access the legal system, to marry freely, and to have equal protection before the law. The discrepancy between these provisions and the legally sanctioned treatment of women in Saudi Arabia is undeniable.⁹⁶

Respecting Local Norms or Violating Universal Human Rights?

Generally, Saudi officials seek to quell international concerns of its treatment of women in terms of cultural relativism and maintain that such critiques are nothing more than thinly veneered tools of Western hegemonic predation. When asked to comment on international critiques of the Kingdom’s policies, Saudi Minister of the Interior, Prince Nayef, lashed out at the “western media” stating that, “governed by our Muslim beliefs, we in the Kingdom respect human rights more than any other state or society in the world.”⁹⁷ Similarly, Saudi Labor Minister, Ghazi Al-Qusaibi, defended gender discrimination in cultural terms saying, “[t]he best place for a woman to serve is in her

⁹⁵ *Id.*

⁹⁶ Compare with discussion *supra* pp. 16-18.

⁹⁷ Mayer, *Universal Versus Islamic Human Rights*, *supra* note 78, at 38-39 (quoting Saudi Interior Minister).

[own] home,” and that other activities would only “interfere with her work at home with her family, or with her eternal duty of raising her children.”⁹⁸

There are certainly cultural differences in defining human rights. Accordingly, states are given the freedom to interpret human rights within a “margin of appreciation.”⁹⁹ Following World War II, however, the international community decided that some rights were inalienable to all persons and could not be ignored on grounds of cultural relativism. As stated in the Vienna Declaration, “The universal nature of . . . [human] rights and [fundamental] freedoms is beyond question.”¹⁰⁰ Thus, the ‘margin of appreciation’ is limited by core international human rights treaties and norms and “does not extend to [people’s] non-derogable rights.”¹⁰¹ In fact, most human rights scholars suggest this margin must be “small [and] . . . externally verified, for instance by committees of independent experts.”¹⁰² Accordingly, “these restrictions leave little room for the states’ own view.”¹⁰³ The core human rights declarations espoused by the international community, therefore, establish a global baseline of ‘non-derogable’ rights for all people—including Saudi Arabian women—which governments may not infringe upon and must protect, regardless of culture, tradition, or religious beliefs.

The abovementioned UN treaties obligate “every individual and every organ of society” to respect fundamental human rights. As ‘organs of society’, MNCs are also

⁹⁸ Azuri, *supra* note 78 (quoting Saudi Labor Minister).

⁹⁹ WESSELINK ET AL., *supra* note 1, at 43.

¹⁰⁰ World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ I,1, U.N. Doc. A/CONF.157/23.

¹⁰¹ WESSELINK ET AL., *supra* note 1, at 43.

¹⁰² *Id.*, at 43-44.

¹⁰³ *Id.*, at 44.

expected to respect these rights.¹⁰⁴ This notion was institutionalized in the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, which states that “business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law . . . for the purpose of eliminating discrimination based on race, colour, [or] sex.”¹⁰⁵

Although CSR codes stress compliance with these global norms, they also encourage MNCs to adopt policies that reflect proper deference and respect for local customs and mores.¹⁰⁶ Consequently, “problems arise if the[] requirements [of respecting local custom] do not fully concur with international treaties as ratified by the state in question.”¹⁰⁷ Needless to say, operating a business in Saudi Arabia constitutes a complex challenge for firms purporting to uphold universal standards of human rights while trying to respect local customs. Although both of these values fall under the umbrella of CSR, all of the CSR codes examined for this study express the view that:

The sovereign right of states to adopt their own laws and policies is restricted by international customary and treaty law. When a state does not bring its laws or policies into line with its international obligations, when it grossly and systematically violates human rights and does not allow companies to act in accordance with generally accepted international human rights standards, a rigid appeal on the maxim of compliance with national laws and policies cannot be upheld. In that case, it is justified to ask companies to protest and oppose the state’s laws and policies.¹⁰⁸

¹⁰⁴ WESSELINK ET AL., *supra* note 1, at 17.

¹⁰⁵ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 2003).

¹⁰⁶ *See infra* pp. 27-39.

¹⁰⁷ WESSELINK ET AL., *supra* note 1, at 33.

¹⁰⁸ *Id.* at 26-27. *See also infra* pp. 29-42 (discussing what the individual codes used in this study say about respect for fundamental human rights superseding respect for local custom).

Clearly, it would be preferable for an MNC to respect local customs rather than appear culturally insensitive. However, respecting all local customs in an environment that systematically violates fundamental human rights is in itself a human rights violation. As corporate ethics scholar John Kline argues:

Showing respect for local culture does not mean adopting a position of cultural relativism that rejects the possibility for global norms to override local cultural practices if values clash. . . . Not all cultural practices may merit respect, even when based on asserted religious beliefs. When in Rome, one should not always do as the Romans do. In fact, the old adage might even be reversed. When in ancient Rome, one should not engage in certain local customs, such as the practice of feeding Christians to the lions.¹⁰⁹

This notion lay at the heart of the anti-apartheid campaign in South Africa where local custom and laws fully supported the notion of racial segregation despite its being directly opposed to internationally recognized human rights standards. MNC's that elected to comply with (and benefit from) racial discrimination in South Africa were targeted and vilified for being complicit in apartheid and could not justify their behavior by appealing to the maxim of 'respecting local customs'.¹¹⁰ The same held true with regard to those firms that enforced discriminatory, albeit 'culturally sensitive', practices in the Jim Crow South and Nazi Germany. If such is the case with respect to race and religion, there is little moral footing to say that it does not apply to gender as well.

Additionally, as discussed more fully in Part II of this paper, companies who have signed the CSR codes used in this study have promised to resist local pressures to violate women's universal rights and to treat women with the same dignity they treat men, even

¹⁰⁹ KLINE, *supra* note 81, at 182.

¹¹⁰ See, ROBERT MASIE, *LOOSING THE BONDS: THE UNITED STATES AND SOUTH AFRICA IN THE APARTHEID YEARS* 268 (1997).

when operating in repressive environments.¹¹¹ Accordingly, even if one could argue that Saudi Arabia has the sole right to determine how equality principles are to be interpreted within its borders (which we think it cannot), we analyze these firms' behavior based on *their* own pledges to uphold the equal treatment of women everywhere. In light of these companies' own promises, therefore, MNCs cannot consistently take the position that discriminatory practices against women are tolerable based on appeals to local custom.

Costs and Benefits of Compliance

An additional reason for why the Saudi Arabian context provides a valuable case study for testing competing views of CSR is the relatively controlled payoff structure it provides with respect to compliance versus defection. As mentioned previously, CSR is most relevant precisely when states are either unable or *unwilling* to guarantee fundamental human rights.¹¹² When states do enforce such standards, MNC compliance with human rights norms cannot be said to be a function of CSR as much as simply following the law, which also happens to be inline with international norms. Testing the true impact of CSR, therefore, is best achieved through examining situations where the government either imposes no sanction for or actively endorses human rights violations. Only then can we determine how much of an effect voluntary codes really have on a company's core business practices. Thus, the Saudi regimes' approbation of gender discrimination better enables us to examine the efficacy and sincerity of self-regulation.

¹¹¹ See discussion *infra* pp. 29-41 (discussing how MNCs have promised "to ensure that cultural differences and customs never become an excuse for denying or abusing" women's rights and that MNCs will "hold themselves to higher standards than local contexts may prescribe or tolerate").

¹¹² Scherer, Palazzo, & Baumann, *supra* note 7, at 505-507.

Similarly, the lack of publicity given to the issue of MNCs treatment of women in Saudi Arabia allows us to analyze corporate conduct in the absence of significant public pressures. Despite very clear statements from both the international community and from women's rights groups asserting that Saudi Arabia's treatment of women incontestably violates universal human rights principles, the 'CSR movement' (composed of activists, NGOs, scholars and pundits) has not turned gender discrimination in Saudi Arabia into an issue of global proportions. This is in sharp contrast with the attention given to other corporate practices, such as the South African racial apartheid, use of child labor in developing countries, treatment of migrant workers, environmental degradation or substandard working conditions.¹¹³

¹¹³ Several explanations have been offered for why the systematic discrimination of women in Saudi Arabia has remained off the CSR radar. One prominent explanation is found in feminist theories suggesting that "women's concerns are naturally devalued [because] . . . men generally are not the victims of sex discrimination, domestic violence, and sexual degradation . . . [which] means that these matters can be consigned to a separate sphere and tend to be ignored." Ann Elizabeth Mayer, *A 'Benign' Apartheid: How Gender Apartheid Has Been Rationalized*, 5 UCLA J. INT'L L. & FOR. AFF. 237, 247 (Fall-Winter 2000-2001); see also Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 625 (1991). Moreover, in contrast to other human rights violations, women's oppression is "woven into the fabric of society" and "those that are behind it consider the subordinate and domestically oriented role and status of women part of the natural order . . . decreed by nature and therefore inevitable." Rebecca J. Cook, *The Elimination of Sexual Apartheid: Prospects for the Fourth World Conference on Women*, ASIL Issue Papers on World Conferences No.5, AM. SOC'Y OF INT'L L. 3 (1995).

Another explanation is based on the premise that the U.S. government "has [had] every reason to want to downplay the seriousness of Saudi [human] rights violations" in order to maintain its close economic and diplomatic ties with the strategically important Kingdom. Ann Elizabeth Mayer, *A 'Benign' Apartheid*, *supra* at 247; See also Mona Eltahawy, *Gender Apartheid*, MIDDLE EAST ONLINE, Nov. 26, 2007, <http://www.middle-east-online.com/English/?id=23243>; Tom Lantos, *Discrimination Against Women and the Roots of Global Terrorism*, A.B.A. SEC. OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, (2002) <http://www.abanet.org/irr/hr/summer02/lantos.html> (describing how the "Bush [administration has] shied away from pressing the women's rights agenda . . . and has turned a blind eye to U.S. business practices that aid and abet gender apartheid in Saudi

Whereas in these cases a firm may be abiding by its voluntary code of conduct solely for the sake of profit maximization (i.e., to appeal to niche markets and evade consumer boycotts), this context enables us to examine whether the normative shift outlined by the optimist camp is really occurring. In other words, compliance with a policy at the top of the CSR agenda can easily be viewed in terms of ‘branding’ and ‘marketing’ (as the skeptics suggest). The real question is how true companies will remain to their CSR principles and commit to pursuing a ‘triple bottom line’ in the absence of public awareness?

CSR Leaders

Finally, this case study looks at the actions of companies that are widely heralded as leaders of the CSR movement. Starbucks, McDonald’s, The Hilton Corp. and Yum! Brands, continuously emphasize their sincere commitment to upholding human rights and have all been ranked at the top of numerous CSR rankings for socially responsible

Arabia”) (It is important to mention that Lantos wrote this article while he was the ranking Democrat on the House International Relations Committee).

A third possible explanation relates to the fact that groups opposing Saudi policies have been severely restricted in their ability to mobilize against gender discrimination. Keck and Sikkink explain how one of the primary mechanisms through which issues get placed on the global CSR agenda is through what they term the “boomerang effect.” According to this view, in order to gain political ‘traction’ internationally, an issue must first be raised in the home state. It then gets picked up by social activists operating abroad who respond by putting their own pressure on the home government. Margaret E. Keck and Kathryn Sikkink, *supra* note 26, at 89-101. “Because of the high level of repression and the intolerance of dissent in Saudi Arabia,” however, “independent human rights organizations have been unable to function inside the country.” Saudi nationals who do attempt to criticize the Kingdom’s policies are punishable under Article 12 of the Basic Law. Ann Elizabeth Mayer, *A ‘Benign’ Apartheid*, *supra* at 365. In fact, calls by scholars and activists to improve the status of women are routinely responded to with arrests and McCarthy style blacklisting. *See id.*; Rebecca Leung, *Women Speak Out In Saudi Arabia*, CBS NEWS, Mar. 24, 2005, <http://www.cbsnews.com/stories/2005/03/23/60minutes/main682565.shtml>

companies.¹¹⁴ Although looking at the actions of just a few companies on the sole indicator of gender discrimination in one country may not suffice to arrive at determinative conclusions regarding the role of CSR on a firm's business practices, we can achieve greater explanatory power through analyzing firms that are considered 'CSR stars'.¹¹⁵ If these companies have failed to adhere to their voluntary codes of conduct, we can assume that many companies who have not been celebrated as socially responsible also fail to uphold CSR standards.

In sum, this paper takes leaders of the CSR movement, places them in a nation that has failed to regulate a fundamental human right, focuses on an issue that has not generated a significant amount of publicity, and analyzes whether the MNCs have adhered to their voluntary codes of conduct. The following section begins by outlining the most relevant voluntary codes and contrasts these corporations' promises to uphold gender equality with their actual behavior towards women in Saudi Arabia.

PART II

We now examine what some of the most prevalent CSR codes say about adhering to the international norms outlined above. Since defining a precise standard for what constitutes CSR is often an illusive task subject to much interpretation, we first establish a benchmark for minimum acceptable CSR standards based on the most authoritative

¹¹⁴ See discussion *infra*, pp. 37-41.

¹¹⁵ Paul Haslam suggests that social scientists can arrive at powerful conclusions even when utilizing small and narrow samples. By looking at 'hard cases', which he defines as those where one would expect a given hypothesis to not hold true, one can reasonably conclude that such findings would hold true in 'easier cases' as well. Haslam, *supra* note 4, at 271.

CSR codes. We establish this threshold by looking for points of convergence among the most widely accepted codes and these companies' own voluntary standards.

CSR: Global Codes

We will begin by looking at the CSR codes espoused by the ILO, the OECD, the United Nations Global Compact (UNGC), the Calvert Women's Principles (CWP), and the Global Sullivan Principles (GSP). All of the companies selected for this study have signed on to one or more of the codes created by these institutions. The ILO, OECD and UNGC are considered some of the most authoritative bodies for delineating acceptable corporate conduct and express the criteria by which CSR is very often measured. Thus, MNCs are considered to be socially responsible based on adherence to the standards outlined by these institutions. The CWP and the GSP focus on women's rights and discrimination respectively and are therefore tailored to deal with the particular issues presented in our case study. Although each of these codes possesses distinctive characteristics, all of them converge when discussing women's rights and prohibiting discrimination. In fact, the prohibition against gender discrimination is considered to be "cross-cutting" and to apply to every other provision within these codes.¹¹⁶

ILO

The ILO has a number of codes urging for the protection of women's rights. The

¹¹⁶ Juan Somavia, *ILO adopts landmark Declaration on Social Justice for a Fair Globalization*, Director General's Announcement, at 5, http://www.ilo.org/public/english/bureau/dgo/download/dg_announce_en.pdf; *On The Margins Of Profit*, New York University Law School & Human Rights Watch, CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE 7 (February 2008) available at <http://www.chrgj.org/publications/docs/bhr.pdf>.

Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy states that MNCs can make “important contribution[s] to the promotion of . . . social welfare . . . and to the enjoyment of basic human rights.”¹¹⁷ Although the Declaration states that MNCs must “respect the sovereign rights of States, obey the national laws and regulations, [and] give due consideration to local practices,” the code stresses that MNCs fundamental priority is to “respect relevant international standards.”¹¹⁸ When a given state fails to “pursue policies designed to promote equality of opportunity and treatment in employment, with a view to eliminating any discrimination based on race, colour, [or] sex”¹¹⁹ and “require[s] or encourage[s] multinational enterprises to discriminate,”¹²⁰ MNCs “should be guided by th[e] general principle[s]”¹²¹ of international norms and should “respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations.”¹²² Thus, MNCs’ international obligations trump respect for local custom when those norms conflict.

Similarly, the ILO Convention Concerning Discrimination in Respect of Employment and Occupation, which Saudi Arabia ratified in 1978, states that “all human beings, irrespective of race, creed or sex, have the right to . . . conditions of freedom and dignity [and] . . . that discrimination constitutes a violation of the rights enunciated by the

¹¹⁷ ILO Tripartite Declaration Concerning Multinational Enterprises and Social Policy, November 1977, Geneva; (1978) 17 ILM 422, *as amended at its 279th Session* (Geneva, November 2000), at Art. I, *available at* <http://www.ilo.org/public/english/employment/multi/download/english.pdf>.

¹¹⁸ *Id.* at Art. VIII.

¹¹⁹ *Id.* at Art. XXI.

¹²⁰ *Id.* at Art. XXIII.

¹²¹ *Id.* at Art. XXII.

¹²² *Id.* at Art. VIII. For what these standards are see Section I *supra*.

Universal Declaration of Human Rights.”¹²³ The Convention defines discrimination as “any distinction, exclusion or preference made on the basis race, colour, [or] sex.”¹²⁴ Finally, the ILO Action Plan for Gender Equality “promotes gender equality—not only as a basic human right—but also as an essential condition for achieving social and economic development” and utilizes the definition of equality established in the UNDHR and the CEDAW.¹²⁵

OECD

The OECD claims its Guidelines for Multinational Enterprises to be the “most comprehensive instrument in existence today for corporate responsibility multilaterally agreed by governments.”¹²⁶ The Guidelines reiterate the notion that “enterprises should . . . respect the human rights of those affected by their activities consistent with their host governments *international* obligations and commitments” and states that “the Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard.”¹²⁷ Thus, even though respect for national policies is important, companies facing “conflicting requirements” must “[h]ave

¹²³ ILO Convention Concerning Discrimination in Respect of Employment and Occupation, 362 U.N.T.S. 31 (1958), Sess. 42, entered into force June, 1960, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111>.

¹²⁴ *Id.*

¹²⁵ ILO Action Plan for Gender Equality, (Geneva, 2008). *available at* http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_092004.pdf

¹²⁶ OECD Guidelines for Multinational Enterprises (annexed to 1976 OECD Declaration on Investment and Multinational Enterprises, *infra*) (1976) 15 ILM 969, *available at* http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html

¹²⁷ OECD Guidelines for Multinational Enterprises, *supra* note 121, at Commentary on General Policies, Art. 4. (*emphasis added*), *available at* <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

regard to relevant principles of international law” as the baseline for acceptable behavior.¹²⁸ Like the ILO, the OECD urges MNCs to “not discriminate,” which it defines as “any distinction, exclusion or preference¹²⁹ . . . on such grounds as race, colour, [or] sex.”¹³⁰ In fact, the OECD calls “promot[ing] equal opportunities for women and men” and “prevent[ing] discrimination” an MNCs “fundamental” obligation.¹³¹ The OECD not only encourages MNCs to refrain from violating human rights, but rather “encourage[s] the positive contribution which multinational enterprises can make to economic, social and environmental progress, and minimize and resolve difficulties which may arise by their operations.”¹³² Thus, socially responsible MNCs are expected to take a proactive, rather than reactive, approach to “resolve” human rights violations that may emerge from their activities and those of their host governments.¹³³

UNGC

With over 5100 participating MNCs and stakeholders representing over 130 countries, the UN Global Compact “stands as the largest corporate citizenship and

¹²⁸ OECD Declaration on International Investment and Multinational Enterprises, Paris, June 21, 1976; (1976) 15 ILM 969, at Annex 2 (OECD Conflicting Requirements Imposed on Multinational Enterprises), Sec. I (a), *available at* http://www.oecd.org/document/25/0,3343,en_2649_34887_1933081_1_1_1_1,00.html

¹²⁹ OECD Guidelines for Multinational Enterprises, *supra* note 126, at Commentary 24, *available at* <http://www.oecd.org/dataoecd/56/36/1922428.pdf>

¹³⁰ *Id.* at Art. IV, 1(d).

¹³¹ *Id.* at Commentary 24, 21.

¹³² OECD Declaration on International Investment and Multinational Enterprises, Paris, June 27, 2000, DAF/IME(2000)/20, *originally adopted* June, 21 1976. *See supra* note 128. *available at* http://www.oecd.org/document/53/0,2340,en_2649_34887_1933109_119672_1_1_1,00.html

¹³³ *Id.*

sustainability initiative in the world.”¹³⁴ The Compact has placed corporate “support and respect [for] the protection of internationally proclaimed human rights within their sphere of influence” at the top of its agenda and seeks to “make sure that [MNCs] are not complicit in human rights abuses.”¹³⁵ The Compact defines ‘sphere of influence’ as “includ[ing] the company’s employees, neighbouring communities, business partners (including suppliers and contractors), and relevant authorities of the company’s host government.”¹³⁶ Drawing on a report by the Office of the High Commissioner for Human Rights (OHCHR), the Compact defines complicity in human rights abuses as instances when an MNC “authorizes, tolerates, or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse.”¹³⁷

This definition stresses the notion that:

[T]he participation of the company need not actually cause the abuse; rather, the company’s assistance or encouragement has to be to the degree that, without such participation, the abuses most probably would not have occurred to the same extent or in the same way.¹³⁸

¹³⁴ UN Global Compact, Overview, <http://www.unglobalcompact.org/AboutTheGC/index.html>

¹³⁵ UN Global Compact, the Ten Principles, Principles 1, 2, *available at* <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>

¹³⁶ Jonathon Hanks, *Understanding the implications of the Global Compact Human Rights Principles for Petrochemical Investment Activities in Developing Countries: A Case Study of Sasol*, in *EMBEDDING HUMAN RIGHTS INTO PRACTICE* 48, 51 (UN Global Compact and the Office of the High Commissioner of Human Rights 2007) *available at* http://www.ohchr.org/Documents/Publications/Embedding_II.pdf

¹³⁷ *Id.* at 52.

¹³⁸ *Id.*

The Compact also distinguishes between different degrees of complicity. “Direct Complicity” occurs when a “company actively assists in an abuse of human rights committed by others;” “beneficial complicity” refers to instances where a company benefits from human rights abuses committed by others; and “silent complicity” describes cases where the MNC has failed to “raise the question of systematic or continuous human rights violations in interactions with the appropriate authorities. For example, inaction or acceptance by companies of systematic discrimination in employment law against particular groups on the grounds of ethnicity or gender.”¹³⁹

Principle Six of the UNGC deals specifically with “the elimination of discrimination,”¹⁴⁰ which it defines as “treating people differently or less favourably” because of non-merit based characteristics such as “race, colour, [and] sex.”¹⁴¹ The Compact’s provisions note that “[m]ost commonly, discrimination is indirect and arises where rules or practices have the appearance of neutrality but in fact lead to exclusions.”¹⁴² The UNGC recommends companies operating in questionable environments to take a proactive approach to root out discrimination in all their corporate activities as well as “outside the workplace” by “eliminating discrimination, for example by encouraging and supporting efforts in the community to build a climate of tolerance and equal access.”¹⁴³ Evaluating the nature of corporate complicity in discrimination requires an MNC to “assess the extent to which the host government is oppressive (i.e., does it actively endorse the human rights violations) or ineffective (i.e., is it simply

¹³⁹ *Id.*

¹⁴⁰ UN Global Compact, About the Global Compact, The Ten Principles, Principle 6, *supra* note 135.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

incapable of preventing them). The Compact maintains that “[c]ompanies are less likely to be found complicit in state breaches of human rights where the breach is a result of ineffective enforcement rather than deliberate government oppression.”¹⁴⁴

CWP

The Calvert Women’s Principles is the “first global code of conduct focused exclusively on empowering, advancing and investing in women worldwide” and is geared “directly and specifically to corporate conduct.”¹⁴⁵ As in the previous codes, the Principles state that although cultural factors play a role in corporate conduct, “care must be taken to ensure that cultural differences and customs never become an excuse for denying or abusing” women’s rights.¹⁴⁶ Moreover, the Principles state that when operating in problematic states, MNCs should “hold themselves to higher standards than local contexts may prescribe or tolerate . . . and should assume a proactive leadership role in advancing the rights of women.”¹⁴⁷ The code urges MNCs to “promote and strive to attain gender equality [and] . . . eliminate gender discrimination . . . based on gender or cultural stereotypes” not only in its own practices, but with all its affiliates, vendors, suppliers, customers, and other non-employees with which they do business.¹⁴⁸ MNCs are expected to “work with host governments and communities” with the goal of ensuring

¹⁴⁴ Hanks, *supra* note 136, at 52.

¹⁴⁵ Calvert Women’s Principles, Preamble, *available at* <http://www.calvertgroup.com/womensPrinciples.html>

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at Art. I.

“the right of women to fully participate in civic life”¹⁴⁹ and to protect women from a “denial of their basic human rights by host governments or other non-governmental, political, religious or cultural organization.”¹⁵⁰

GSP

The Global Sullivan Principles on Corporate Social Responsibility focuses heavily on discrimination. More than twenty years after the adoption of the original Sullivan Principles designed to end South African apartheid, UN Secretary General Kofi Annan and Reverend Leon Sullivan established the Global Sullivan Principles to reiterate their commitment to, build upon, and expand the reach of the earlier code to include factors such as gender.¹⁵¹ The original Sullivan Principles prohibited segregation “in all eating, comfort, and work facilities,” urged “equal and fair employment practices for all,” and sought to “eliminate laws and customs that impede social, economic, and political justice.”¹⁵² The Principles have continued to receive widespread support and endorsement internationally.¹⁵³

The Global Principles urge MNCs to “support human rights and to encourage equal opportunity at all levels of employment, including racial and gender diversity.” As

¹⁴⁹ *Id.* at Art. IV.

¹⁵⁰ *Id.*

¹⁵¹ The Global Sullivan Principles, Preamble, *available at* <http://www.thesullivanfoundation.org/gsp/default.asp>; The Sullivan Principles, *available at* <http://muweb.marshall.edu/revleonsullivan/principled/principles.htm>

¹⁵² The Sullivan Principles, *supra* note 151.

¹⁵³ Colin Powell called the principles “universal,” Condoleeza Rice maintained that their spirit “remains as important and as relevant as ever,” and Hillary Clinton has called them “a framework for appropriate behavior and conduct by businesses.” The Principles, Notable Quotes, <http://www.thesullivanfoundation.org/gsp/default.asp>

in the aforementioned codes, it advocates for a proactive approach to CSR and supports the development and implementation of active “policies, procedures, training and internal reporting structures to ensure commitment to these Principles . . . to achieve greater tolerance . . . promote equal opportunity . . . with respect to issues such as color, race, [and] gender . . . [eradicate] female abuse . . . [and] work with governments and communities in which we do business to improve the quality of life.”¹⁵⁴

CSR: Company Specific Codes

The codes outlined above provide a general baseline of what the CSR community has deemed acceptable corporate behavior towards women rights. As the following section shows, the CSR movement has celebrated Starbucks, McDonald’s, the Hilton Corp. and Yum! Brands as some of the most socially responsible companies in the world based, in large part, on the criteria outlined in these codes. In addition to signing on to the above CSR codes, each of these MNCs possesses its own, company specific code of conduct.

Starbucks

Starbucks has been widely hailed as one of the most socially responsible firms in the world. It is one of only three companies to have made it on CRO Magazine’s Top 100 Best Corporate Citizens List for the past ten years consecutively¹⁵⁵ and was once again placed on the Ethisphere Institute’s 100 Most Ethical Companies List in 2009.¹⁵⁶

¹⁵⁴ The Global Sullivan Principles, *supra* note 151.

¹⁵⁵ CORP. RESPONSIBILITY OFFICER, *supra* note 25.

¹⁵⁶ *100 most ethical companies*, ETHISPHERE INST. (2009), *available at*

Moreover, Starbucks is part of the International Business Leaders Forum (reserved for CSR leaders),¹⁵⁷ and received the World Business Award for MNCs who have contributed to the Millennium Development Goals,¹⁵⁸ the third of which is “to promote gender equality and the empowerment of women.”¹⁵⁹ Starbucks has worn CSR as a defining ‘badge’ of its corporate culture and claims CSR to be “at the core of [its] guiding principles.”¹⁶⁰ Starbucks was an eager signatory to the Global Compact stating that, “[j]oining the Global Compact is a natural progression for Starbucks as our own guiding principles are already closely aligned with the Global Compact.”¹⁶¹ In fact, Starbucks CEO Orin Smith promised that, “Starbucks plans to take an active role in the organization by continuing to lead by example.” Similarly, Starbucks was the first MNC to sign onto the Calvert Principles stating, “Starbucks enthusiastically supports the Calvert Women’s Principles” and promised to “publicly support the principle’s goals” and take “concrete steps to implement the principles in [its] business practices.”¹⁶²

<http://ethisphere.com/wme2009/>

¹⁵⁷ International Business Leaders Forum, About Us, http://www.iblf.org/about_us.jsp

¹⁵⁸ Press Release, United Nations Development Programme, World Business Award Winners Announced, May 2, 2006, *available at* <http://content.undp.org/go/newsroom/2006/may/world-business-awards>.

¹⁵⁹ United Nations Millennium Development Goals, Goal 3: Gender Equality, *available at* <http://www.un.org/millenniumgoals/2008highlevel/pdf/newsroom/Goal%203%20FINAL.pdf>.

¹⁶⁰ Starbucks Coffee Company Joins United Nations Global Compact, June 24, 2004, CSR Wire, http://www.csrwire.com/press/press_release/24536.

¹⁶¹ *Id.* (Quoting Starbucks CEO Orin Smith).

¹⁶² William Baue, *Dell and Starbucks First Companies to Endorse Calvert Women's Principles*, SUSTAINABILITY INVESTMENT NEWS, Dec. 22, 2004, *available at* <http://www.socialfunds.com/news/article.cgi/article1597.html>.

McDonald's

Like Starbucks, McDonald's has been considered a champion of CSR and was placed on Ethisphere's 'World's Most Ethical Companies List' as well as on CRO Magazine's Top 100 Best Corporate Citizens List for 2009.¹⁶³ McDonald's touts itself as "a company committed to doing the right thing" and, given its "history of inclusion and diversity" promises to place "[g]ender diversity . . . as a priority for the company."¹⁶⁴ Thus, McDonald's contends that, "it should go without saying that we support fundamental human rights."¹⁶⁵ McDonald's is a participant in the Global Compact¹⁶⁶ and has an extensive CSR campaign of its own. The company has formed several internal positions and divisions to monitor and manage CSR issues including a "diversity champion" to ensure non-discrimination, a Worldwide Corporate Relations Council to ensure that core standards are uniform throughout all of its franchises, and a Corporate Responsibility Department to train employees in CSR.¹⁶⁷

The Hilton Corp.

As a member of the International Business Leaders Forum, the Hilton Corp. has promised to promote gender equality and empower women as part of fulfilling the UN Millennium Development goals and has also expressed its support for the Global

¹⁶³ ETHISPHERE INST., *supra* note 156; CORP. RESPONSIBILITY OFFICER, *supra* note 25.

¹⁶⁴ McDonald's Corporation, World Wide Corporate Responsibility Report (2008), <http://www.crMcDonald's.com/publish/csr/home/report/community.printreport.html>.

¹⁶⁵ *Id.*

¹⁶⁶ United Nations Office for the Coordination of Humanitarian Affairs, Global Compact (2008), *available at* <http://ochaonline.un.org/businesscontributions/Agencies/GlobalCompact/tabid/4458/language/en-US/Default.aspx>.

¹⁶⁷ McDonald's Corporation, *supra* note 164.

Compact.¹⁶⁸ In its CSR report, Hilton Corp. pledges to remain “committed to upholding the basic principles of Human Rights . . . consistent with the requirements of the Universal Declaration on Human Rights and maintain the spirit of the International Labour Organization core labour standards.”¹⁶⁹ Hilton Corp. is also viewed as a CSR leader. It was elected a member of the FTSE Good Index Series¹⁷⁰ and thoroughly trains all its employees in corporate responsibility through the Hilton University CSR training program.¹⁷¹ Hilton says that it is “embracing a culture based on diversity” and proudly boasts the high ratio of women employees in the “Hilton family.”¹⁷² In fact, Forbes magazine recently ranked Hilton one of the 50 best workplaces for diversity.¹⁷³

Yum! Brand

With nearly 36,000 restaurants in more than 110 countries and over 1.4 million employees, the Yum! Brand is the world’s largest restaurant chain.¹⁷⁴ Household names such as KFC, Taco Bell and Pizza Hut, as well as several others, fall under the umbrella of this mega-corporation, which gained a top spot on CRO magazine’s Top 100 Best

¹⁶⁸ International Business Leaders Forum, Business and The MDGs, http://www.iblff.org/activities/Business_Standards/Millennium_Development_Goals.jsp; UN Global Compact, <http://ochaonline.un.org/businesscontributions/Agencies/GlobalCompact/tabid/4458/language/en-US/Default.aspx>.

¹⁶⁹ Hilton Group plc., Corporate Social Responsibility Report (2005) at 25, *available at* www.ladbrokeplc.com/downloads/reports/CSR%20Report%202005.pdf

¹⁷⁰ “Designed to measure the performance of companies that meet globally recognised corporate responsibility standards” *Id.* at 18. For more on the FTSE *see* FTSE4Good Index Series, http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp.

¹⁷¹ Welcome to the Hilton University Course on Corporate CSR, www.hiltoncsr.com

¹⁷² Hilton Group plc., Corporate Social Responsibility Report, *supra* note 169, at 30.

¹⁷³ Hilton Group plc., Awards We’ve Won (2009), *available at*

http://hiltonworldwide1.hilton.com/en_US/ww/fob/landing/HI_Awards/index.do

¹⁷⁴ Yum! Brands, <http://www.yum.com>.

Corporate Citizen's List in 2009.¹⁷⁵ Despite the economic downturn, Chief Public Affairs Officer, Jonathan Blum, said Yum! was “dialing up, not dialing back” its CSR efforts, which he described as an essential “part of how we do business.”¹⁷⁶ Yum! sees itself as “part of the solution to the various aspects of social responsibility”¹⁷⁷ and is a charter supporter of the Global Sullivan Principles.¹⁷⁸ Yum! promises to maintain a “discrimination-free” work environment and to not tolerate any form of harassment, which it defines as including intimidation and discrimination on the basis of gender.¹⁷⁹

Expectations

We now formulate a set of expectations to help us analyze CSR's impact on corporate activities in Saudi Arabia. We base these expectations on the CSR debate, the international legal standard for women's rights, the norm for CSR as expressed in global codes of conduct, these companies' own commitments, and the recognition conferred on these firms as socially responsible actors.

H0: The Test Hypothesis: CSR represents a sincere and effective mechanism for ensuring corporate compliance with basic human rights principles

If CSR represents a sincere and effective mechanism for ensuring corporate compliance with basic human rights principles, then we would expect these companies to

¹⁷⁵ CORP. RESPONSIBILITY OFFICER, *supra* note 25.

¹⁷⁶ Tanya Lewis, *Yum Brands Takes on World Hunger*, PR WEEK, Apr. 20, 2009, <http://www.prweekus.com/Yum-Brands-takes-on-world-hunger/article/130633/>

¹⁷⁷ *Id.*

¹⁷⁸ Yum! Brands supported the Principles through its subsidiary, Kentucky Fried Chicken. See Global Sullivan Principles, Endorsers, <http://www.thesullivanfoundation.org/gsp/endorsers/charter/default.asp>

¹⁷⁹ Yum! Brands, *Worldwide Code of Conduct* (2008), at 10, available at http://www.yum.com/investors/governance/media/gov_conduct030408.pdf

adhere to their voluntary codes of conduct despite governmental complicity in human rights violations. Since we suggest a normative convergence with universal human rights standards, we would expect this to be the case even in the absence of a popularized public outcry by the ‘CSR movement’ urging these MNCs to respect women’s rights.

We use the fundamental principle of gender equality as our indicator for responsible corporate behavior. The International Bill of Rights and CEDAW are of particular relevance in helping us gauge the standard to which we hold these firms. In other words, we inform our conception of ‘human rights’ as outlined in global and company specific CSR codes in accordance with what the international community has defined such rights to mean. By discrimination we mean:

Whenever a company policy, practice or procedure specifically targets a particular group of people because of a distinguishing personal characteristic, and treats that group of people differently than the others for the worse. . . . The principles of non-discrimination and diversity extend not only to employment benefits, but also to the overall atmosphere and environment in the workplace.¹⁸⁰

Thus, if the discrimination of women violates “minimum common morality principles for a global society, and if those norms take priority over local cultural traditions, even if based on interpretations of religious beliefs, then the MN[C]s should not conform with discriminatory local practices.”¹⁸¹

Operating in countries where the government is complicit in human rights abuses presents a “complex dilemma” for MNCs.¹⁸² We can, however, establish some clear guidelines to help analyze a firm’s adherence to CSR. First, “[i]f the company is

¹⁸⁰ DANISH INST. FOR HUMAN RIGHTS, HUMAN RIGHTS COMPLIANCE ASSESSMENT 24, 28 (2006), available at http://www.humanrightsbusiness.org/files/422157696/file/quick_check_august_2006.pdf

¹⁸¹ KLINE, *supra* note 81, at 179.

¹⁸² WESSELINK ET AL., *supra* note 1, at 51.

complying with local legislation that may be seen to be in conflict with human rights obligations, do the company's activities violate the principle of the human right?"¹⁸³ Second "[t]hrough its activities and operations, does the company contribute to strengthening the role of civil society, or is it strengthening the role of the host government?"¹⁸⁴ Potential responses to operating in abusive countries can range from "seek[ing] an accommodation with local customs without sacrificing core standards . . . support[ing] active change in practices where local culture clashes with global values" or outright divestment.¹⁸⁵

Based on these criteria, we can distinguish between different degrees of culpability for violating human rights obligations.¹⁸⁶ Corporate obligations are highest when human rights violations are caused by the MNC itself (i.e., within the actual operation). At this level, "there is absolutely no excuse for human rights violations" and MNCs have "full responsibility for meeting human rights standards."¹⁸⁷ The second level is when the human rights violations occur within the MNCs sphere of influence. Here, the MNC does not cause the violation, but can use its influence to ameliorate the condition of those affected. At this level, socially responsible companies are "expected to do so."¹⁸⁸ The weakest obligation is when the MNC has no control over and no participation in the abuse. Even at the lowest level, the "MNC has the responsibility to create an environment

¹⁸³ Hanks, *supra* note 136, at 51.

¹⁸⁴ *Id.*

¹⁸⁵ KLINE, *supra* note 81, at 183.

¹⁸⁶ *See generally*, WESSELINK ET AL., *supra* note 1, at 47-52 (discussing different levels of corporate responsibility)

¹⁸⁷ *Id.* at 48.

¹⁸⁸ *Id.* at 50.

conducive to human rights” since “[a] company can never be seen as condoning a human rights violation.”¹⁸⁹

This continuum enables us to distinguish between two forms of CSR: ‘reactive CSR’ and ‘proactive CSR’. Reactive CSR refers to companies’ refusal to enforce or be actively complicit in human rights violations. Proactive CSR, on the other hand, refers to corporate efforts to actively promote human rights standards and to try to ameliorate the condition of those within their sphere of influence.

The four MNCs used in our study are considered to be CSR champions based on the criteria outlined in the global CSR codes noted above and have all promised to “minimize and *resolve*”¹⁹⁰ human rights violations. Therefore, at a minimum, we would expect them to take special precautions to ensure their compliance with universal human rights standards and to refrain from direct human rights violations. Moreover, given the fact that they operate in an environment where human rights abuses are prevalent, we would expect these corporations to take active measures to resolve those violations stemming from their activities since, “[i]n the face of strong cultural/religious tensions in the external environment, the company may have to take special measures to create an environment of trust and inclusion.”¹⁹¹ Thus, these firms will be “part of the solution to the various aspects of social responsibility.”¹⁹²

Accordingly, the ‘reactive’ measures we would expect in this case are for firms to prohibit discrimination from occurring on their premises and to enforce the equal

¹⁸⁹ *Id.* at 52.

¹⁹⁰ See OECD Declaration (2000), *supra* note 132.

¹⁹¹ DANISH INST. FOR HUMAN RIGHTS, *supra* note 180, at 28.

¹⁹² Lewis, *supra* note 176 (quoting Jonathan Blum, Yum! Brands SVP and Phief Public Affairs Officer).

treatment, rights, opportunities, and facilities for men and women. The ‘proactive’ measures we would expect these firms to take include favorable hiring practices, gender equality education (at a minimum for their employees), philanthropic contributions to women’s rights groups in Saudi Arabia, and formal protest when governmental abuse occurs within their spheres of influence. In cases where they fail to uphold these rights, we would expect them to admit this wrong and promise to improve rather than justify or ‘bluewash’ their behavior in accordance with another CSR principle (e.g. respect for custom).

In sum, we expect these firms to actively pursue a ‘triple bottom line’. Thus, we expect them to maximize profit; however, not at the expense of sacrificing the fundamental human right of gender equality.

HA: The Alternative Hypothesis: CSR does not represent a sincere and effective mechanism for ensuring corporate compliance with basic human rights principles

The alternative hypothesis makes the directly opposite prediction from our test hypothesis. According to the alternative hypothesis, we expect that MNCs will fail to adhere to the standards set forth in both global and company-specific CSR codes. These companies will not only fall short of their commitments to ameliorate the conditions of their surrounding communities, but will actually be complicit in government sanctioned human rights abuses. Rather than seeking an accommodation with local customs, actively supporting change, or divesting, firms will “adopt local values and practices.”¹⁹³ Thus, far

¹⁹³ KLINE, *supra* note 81, at 183.

from being “part of the solution”¹⁹⁴ MNCs will be ‘part of the problem’ and will violate both their reactive and proactive CSR obligations.

We expect only a single bottom-line—profit. Companies will be willing to sacrifice human rights standards and will enforce gender discrimination if doing so will appeal to ‘niche markets’ in line with the prevailing Saudi customs. Thus, we expect the treatment of women by these MNCs to be significantly worse than their treatment of men. Moreover, these MNCs will refrain from criticizing governmental human rights violations and, if exposed, will seek to justify their abuses in CSR terms. CSR, therefore, becomes a profit-maximizing tool in that it enables firms to escape public scrutiny and desensitize critics to an MNCs actual activities.

Comparative Analysis: Evidence from Saudi Arabia

In direct contrast to both global and their own voluntary codes of conduct, Starbucks, McDonald’s, the Hilton Corp. and Yum! Brands,¹⁹⁵ are all complicit in severe gender discrimination in Saudi Arabia.¹⁹⁶ As mentioned previously, women in Saudi Arabia are confined to strictly segregated ‘women only’ zones when in the public sphere.¹⁹⁷ These ‘socially responsible’ MNCs have “made a number of changes to their

¹⁹⁴ Lewis, *supra* note 176 (quoting Jonathan Blum, *supra* note 185).

¹⁹⁵ The subsidiaries complicit in Yum! Brand’s case are Kentucky Fried Chicken and Pizza Hut. See Nicole Manning, *U.S. Companies Support Gender Segregation in Saudi Arabia*, NAT’L ORG. OF WOMEN, Summer, 2002), <http://www.now.org/nnt/summer-2002/gender.html> (describing Pizza Hut); Lantos, *supra* note 113 (describing Kentucky Fried Chicken).

¹⁹⁶ For a brief summary of what these corporations are doing see Manning, *supra* note 195 (describing how McDonald’s, Pizza Hut, and Starbucks are “upholding gender apartheid in their franchise stores in Saudi Arabia).

¹⁹⁷ See discussion *supra* pp. 10-11. It is important to note, that some firms, such as Dunkin Donuts for example, have taken special precautions to ensure that this

business practices in ‘deference’ to Saudi”¹⁹⁸ mores and “enforce laws and customs that dehumanize women.”¹⁹⁹ Essentially, these policies entail segregating women entirely from men, providing them with far inferior substitutes, and failing to take any measures to ameliorate their dismal condition. Thus, these MNCs have violated both their ‘reactive’ and ‘proactive’ promises.

“One of the untold stories” of these MNCs is that they maintain “strictly segregated eating zones”²⁰⁰ and have “separate entrances” for women.²⁰¹ Although these firms contend that they “provide [separate but] equal amenities” to both women and men, the reality is very different.²⁰² While males are allowed to enter the ‘family’ sections, women are constrained to “tiny cubicles with long curtains around them” and are prohibited from stepping foot inside the ‘men only’ sector.²⁰³ Moreover, while “[t]he men’s sections are typically lavish, comfortable and up to Western standards . . . the women’s or ‘families’” sections are often run-down, neglected and, in the case of

requirement does not infringe on women’s rights. *See* discussion *infra* pp. 58-59. Thus, the argument that operating a business in Saudi Arabia necessitates this kind of treatment is erroneous. Dunkin Donuts was not included in this study because we are looking specifically at CSR leaders and Dunkin Donuts was absent from all of the most prominent ‘responsible companies’ lists we examined.

¹⁹⁸ Manning, *supra* note 195.

¹⁹⁹ Lantos, *supra* note 113.

²⁰⁰ Colbert I. King, Editorial, *Saudi Arabia’s Apartheid*, WASH. POST, Feb. 22, 2001, at A23, available at LexisNexis.

²⁰¹ Feminist Daily News Wire, U.S. Companies Promote Gender Apartheid in Saudi Arabia, Jan. 15, 2002, <http://feminist.org/news/newsbyte/uswirestory.asp?id=6074>

²⁰² Colbert I. King, Editorial, *Saudi Arabia’s Apartheid*, WASH. POST, Jan. 19, 2001, at A27, available at LexisNexis.

²⁰³ Caryle Murphy, *Saudi Arabia: Dining by Gender*, CSR MONITOR, Apr. 22, 2009, <http://features.csmonitor.com/globalnews/2009/04/22/saudi-arabia-dining-by-gender/>

Starbucks, have no seats.”²⁰⁴ Additionally, these firms routinely bar entrance to “women who show up without their husbands.”²⁰⁵

A few firsthand accounts of how gender discrimination is practiced by these firms should help shed light on the severity of the issue. Washington Post editorialist Margaret Lidsey explains how when she first entered a Starbucks in Riyadh, the ‘barista’ prohibited her from using the chairs in the men’s section and instructed her to sit in the “family section that was one-third the size of the men’s section and had no chairs or tables.” When she complained, the employee told her husband (he refused to speak to her directly) that, if she wanted a seat, “she could drink [her] coffee while sitting in [her] car.”²⁰⁶

Similarly, writing for the Los Angeles Times, staff writer Megan Stack recalls the first time she was ejected from the “men’s only” section of a Saudi Arabian Starbucks writing:

Starbucks had another unmarked door around back that led to a smaller espresso bar, and a handful of tables smothered by curtains. That was the ‘family’ section. As a woman, that’s where I belonged. I had no right to mix with male customers or sit in plain view of passing shoppers. Like the segregated South of a bygone United States, today’s Saudi Arabia shunts half the population into separate, inferior and usually invisible spaces.

Starbucks has refused to acknowledge its enforcement of gender discrimination and has sought to justify its behavior by appealing to the corporate value of ‘respecting local

²⁰⁴ Colbert I. King, Editorial, *Saudi Arabia’s Apartheid*, WASH. POST, Dec. 22, 2001, at A23, available at Lexis Nexis; Lantos, *supra* note 113 (quoting a U.S. official operating in Saudi Arabia).

²⁰⁵ King, Dec. 22, *supra* note 204 (discussing prohibitions against Western women); Lantos, *supra* note 113 (discussing prohibitions against Saudi Women).

²⁰⁶ Margaret Lidsey, Editorial, *Apartheid in South Africa*, WASH. POST, Jan. 27, 2002, at B06, available at Lexis Nexis.

custom'. In response to criticisms over its treatment of women, Starbucks issued a release stating:

[Starbucks is] a responsible, respectful and caring corporate citizen. . . . We are very sensitive to, and highly respectful of, local religious customs, social norms and laws . . . [O]ur position is that we will continue to work in the prevailing economic, social and political environment as long as we can do so within our business principles and values.²⁰⁷

These 'business principles and values' recently led an American businesswomen working in Saudi Arabia to be "thrown in jail, strip-searched, threatened and forced to sign false confessions" for sitting and speaking with a male in a local Starbucks.²⁰⁸ At her trial, the judge told her she "would 'burn in hell'"²⁰⁹ for her crime, which was "travel[ing] alone and sit[ing] with a strange man and talk[ing] and laugh[ing] and drink[ing] coffee together."²¹⁰

Once again, Starbucks sought to protect its image by appealing to its other corporate values. Starbucks' only response was that it was "concerned by reports that a customer was asked to leave one of our stores and arrested" and that it "takes pride in

²⁰⁷ King, Jan. 19, *supra* note 197 (quoting Starbucks International President, Peter Maslen). The same answer was given to this author when contacting Starbucks' CSR department on Apr. 16, 2009.

²⁰⁸ Sonia Verma & Sara Bonisteel, *American Woman Boasted of Saudi Freedoms To Bush Brother Before Arrest at Starbucks*, FOX NEWS, Feb. 7, 2008, available at <http://www.foxnews.com/story/0,2933,329605,00.html>

²⁰⁹ Sonia Verma, *Religious Police in Saudi Arabia Arrest Mother for Sitting with a Man*, TIMES ONLINE, Feb. 7, 2008, available at http://www.timesonline.co.uk/tol/news/world/middle_east/article3321637.ece

²¹⁰ Sonia Verma, *Saudi Arabia Stands By Its Arrest of An American Woman in Starbucks*, FOX NEWS, Feb. 19, 2008, available at <http://www.foxnews.com/story/0,2933,331254,00.html>; Sonia Verma, *Starbucks Mother Flouted the Law, Say Religious Police in Saudi Arabia*, TIMES ONLINE, Feb. 20, 2008, available at http://www.timesonline.co.uk/tol/news/world/middle_east/article3399484.ece

respecting different cultures.”²¹¹ Starbucks’ comment included no formal protest and failed to even mention the gender discrimination issue.

Although the arrest initially “sparked fierce debate within the country,”²¹² the local authorities made sure the matter would not get too much attention and “launched a crackdown on the local press” threatening to sue columnists covering the issue. Again Starbucks remained silent.²¹³

Like Starbucks, McDonald’s has refused to criticize Saudi Arabian policies or take steps to ameliorate the treatment of women.²¹⁴ Also like Starbucks, McDonald’s has a policy of segregating women in ‘family zones’ and “evict[ing] . . . unaccompanied (by a male) female customers.”²¹⁵ Multi-franchise owner Sheikh Khalid admitted that profit maximization was at the heart of these decisions. Khalid maintains he instituted this “scheme” as a result of “extensive feasibility stud[ies] and random surveys of potential customers.”²¹⁶ Once it was concluded that enforcing gender segregation would maximize profits (by appealing to “him, him, him and him,” opines Colbert King), Khalid implemented the policy.²¹⁷

The McDonald’s corporate headquarters has not only failed to criticize or regulate these activities, but has indeed showered an array of awards on its Saudi franchises for

²¹¹ Verma & Bonisteel, *supra* note 208. The same answer was given to this author when contacting Starbucks’ CSR department personally on Apr. 16, 2009.

²¹² Bonnie Malkin, *Mother Arrested for Having Coffee in Starbucks*, TELEGRAPH UK, Feb. 26, 2008, available at <http://www.telegraph.co.uk/news/worldnews/1579285/Mother-arrested-for-having-coffee-in-Starbucks.html>

²¹³ Notably, the US Embassy also refused to comment on the arrest stating that the matter was being covered as “an internal Saudi issue.” Lantos, *supra* note 113.

²¹⁴ See, e.g., King, Jan. 19, *supra* note 202 (describing how McDonald’s offered “no input” for how its Saudi franchises should treat women).

²¹⁵ Lidsey, *supra* note 206.

²¹⁶ King, Jan. 19, *supra* note 202 (quoting Sheikh Khalid).

²¹⁷ *Id.*

“outstanding” performance. Among these fifteen plus accolades, are included awards for “Outstanding Operations and People’s Development,” “Outstanding Sales,” “Outstanding Restaurant Development,” “Best Sales Accuracy,” “Best Brand Ambassador,” and the most coveted McDonald’s award of all, the “Golden Arches Award,” given to only the top 1% of stores based on qualitative standards such as customer service.²¹⁸ The message is clear, if segregation pays, do it.

The Hilton Corp. has similarly instituted discriminatory practices in its Saudi hotels. Rita Jensen, editor in chief for Women’s eNews, describes her stay at the Jeddah Hilton and claims she was barred from eating in the “expansive hotel dining area [which] was reserved for men” and was “relegated to the smaller ‘family area,’ that was blocked from public view.”²¹⁹ Moreover, Jensen claims she was prohibited from using “the hotel’s pool or athletic facilities,” which were both reserved for men only.²²⁰ Rather, Jensen explains how women who wanted to swim were forced to use the hotel’s ‘private beach’, “a half-hour’s drive away” with shuttles leaving only twice daily with “no possibility of returning at” one’s convenience since women are prohibited from driving.²²¹ Jensen describes the scene at the ‘private beach’ as follows:

Behind the Barricades: With its solid-steel rusted entrance gate and shabby-looking lounge chairs, the beach was like any facility designed for the exclusive use of those with lesser status. The faded, stained condition of it all caused spiffy visions of the Hilton pool to dance

²¹⁸ McDonalds Saudi Arabia, The Story, *available at* http://www.mcdonaldsarabia.com/english/ksa/about_story.asp; for a discussion of the criteria considered for the Golden Arches Award see, A Career with McDonald’s, <http://www.spiritofenterprise.net/studies2.php?studyid=19&edition=3>

²¹⁹ Rita Henley Jensen, *Taking the Gender Apartheid Tour in Saudi Arabia*, Women’s eNews, Mar. 7, 2005, <http://www.womensenews.org/article.cfm/dyn/aid/2212/context/ourdailylives>

²²⁰ *Id.*

²²¹ *Id.*

resentfully in my head.²²²

No matter how Hilton may try to justify respect for local custom, in this case, separate is far from equal.²²³

U.S. firms have also been complicit in discriminatory employment practices. As mentioned previously, women constitute a mere 5% of the Saudi work force and need a male relative's permission before accepting a job.²²⁴ The precise percentage of women employed in these American firms is difficult to estimate since "[t]he Saudis do not disclose employment practices of the more than 100 U.S. companies operating in Saudi Arabia."²²⁵ Moreover, these MNCs themselves refuse to disclose their percentage of women employees in Saudi Arabia, preferring instead to demonstrate their commitment to 'diversity' by publicizing the global average.²²⁶ It is important to note, however, that these firms do have country-specific websites that publish CSR diversity reports for several of the regions in which they operate. Interestingly, Saudi Arabia is one of the few countries that is never included on these lists.²²⁷ Given this lack of transparency and these firms' fervent respect for 'local customs', it would not be far-fetched to suspect that

²²² *Id.*

²²³ Although these assertions are based on Jensen's personal allegations and have not been independently verified, such critiques should be seen within the larger context of Saudi Arabia's systematic discrimination of women.

²²⁴ See discussion *supra* p. 17.

²²⁵ Barbara Slavin, *U.S. Firms' Saudi Offices Face Manpower Issues*, USA TODAY, May 13, 2002, at 5A, available at <http://www.usatoday.com/news/world/2002/05/13/saudi-women.htm>

²²⁶ Personal communication with the CSR departments of Starbucks, McDonald's, Yum! and Hilton on Apr. 16, 2009.

²²⁷ See, e.g., Starbucks International Sites, <http://www.starbucks.com/region.asp> (including a broad range of countries-specific websites, but omitting Saudi Arabia); McDonald's, World-Wide Corporate Responsibility Report (2008), <http://www.crmcdonalds.com/publish/csr/home/report/overview.printreport.html> (discussing a range of global diversity initiatives, but omitting information on Saudi Arabia); Yum! Brands, *Serving the World*, Corporate Social Responsibility Report (2008), <http://www.yum.com/responsibility/pdf/yum08csrpt.pdf> (same);

women are employed at rates comparable with the national average. In no instance have these firms publicly addressed the dismal representation of women in the Saudi workforce. If they were making efforts to improve the employment prospects of women, we would likely expect them to publicize such efforts. Moreover, there is no evidence that these firms have taken any other form of proactive measures to challenge women's inferior status in the Kingdom.

In fact, diplomats operating in the region say that most American MNCs in Saudi Arabia either "do not employ women" or, when they do, "make them work in offices segregated from men, as is the Saudi custom."²²⁸ Often these work places lack a "place for the women to sit or go to the toilet."²²⁹ Moreover, upon arriving at the Jeddah Hilton, Rita Jensen claims: "I noticed that all the hotel employees I had seen so far--from the greeters, bellstaff, security guards, registration clerks, tenders of the breakfast buffet--were male, a fact that remained true throughout my stay. Not a single female employee."²³⁰

Our findings suggest that Starbucks, McDonald's, the Hilton Corp. and Yum! Brands have been complicit in enforcing severe gender discrimination, despite very clear voluntary codes to the contrary. Several American commentators and government officials contend that, while the treatment of women by Saudi Arabia is unacceptable by the universal standard of human rights, it is the "willing compliance with apartheid on the part of U.S. firms [that is] perhaps the most galling."²³¹ These findings detract from assertions that CSR provides an adequate check on corporate behavior and suggest that

²²⁸ Slavin, *supra* note 225.

²²⁹ *Id.*

²³⁰ Jensen, *supra* note 219.

²³¹ King, Dec. 22, *supra* note 204 (quoting a U.S. diplomat serving in Saudi Arabia).

more robust measures are necessary to ensure corporate compliance with universal human rights principles.

PART III

Assessment

The activities of Starbucks, McDonald's, the Hilton Corp., and Yum! Brands, strongly support our alternative hypothesis. In the absence of governmental regulation and public scrutiny, these corporations have failed to abide by both global CSR standards and their own voluntary codes. These firms are not only failing to ameliorate the condition of women in Saudi Arabia, but are actively supporting severe gender discrimination through their practices. Thus, these firms are guilty of 'direct complicity', 'beneficial complicity', and 'silent complicity'.²³² These findings lead to two conclusions.

First, they call into question claims of a corporate normative convergence with universal human rights principles and lend credence to the notion that a 'logic of consequences', rather than of 'appropriateness', continues to dominate the motivations of several firms considered to be leaders of the CSR movement. We do not suggest that CSR codes have no value or fail to serve a purpose. Even the staunchest critic of CSR must admit that many firms act in accordance with a number of their CSR principles. Moreover, many firms engage in a myriad of socially responsible acts and refuse to engage in human rights violations. In Saudi Arabia, however, maximizing profits required firms to sacrifice their social bottom-line and enforce gender discrimination. In this case, CSR was ignored once it was pitted against profits. This demonstrates that, at least in some instances, many

²³² See Hanks, *supra* note 136.

firms celebrated for pursuing a ‘triple bottom-line’ will compromise their CSR values to maximize their monetary bottom-line. Thus, in the absence of public scrutiny and governmental regulation (which might have otherwise changed the ‘payoff structure’ associated with respecting CSR codes), even the most socially responsible firms have been complicit in violating fundamental human rights.

Second, our findings show that Saudi women’s non-derogable rights have fallen below the CSR radar. Therefore, relying solely on voluntary codes of conduct to regulate corporate behavior allows for the possibility that certain human rights abuses will continue unchecked. Thus, CSR can be said to leave behind significant gaps in global governance. Assuming “the CSR movement has developed in response to governance gaps,”²³³ we suggest that it has yet to fulfill its mission, and should, therefore, be supplemented with additional regulatory policies.

If Starbucks—the crown jewel of the CSR movement²³⁴—can engage in severe gender discrimination without incurring any form of serious protest from those activists charged with keeping it honest, many more firms can be assumed to be falling short of their CSR obligations in Saudi Arabia.²³⁵ In fact, even though not part of this study, firms such as “ExxonMobil, ChevronTexaco, and Boeing—do not employ any women. Several other U.S. companies, including Citibank, Saks Fifth Avenue, Philip Morris and Procter & Gamble, have women on their payroll, but they work in offices segregated from men.”²³⁶

²³³ ZERK, *supra* note 68, at 2.

²³⁴ See discussion *supra* pp. 37-38.

²³⁵ As noted previously, ‘hard cases’ tend to generate greater explanatory power, see Haslam, *supra* note 115.

²³⁶ Slavin, *supra* note 225. See also Lantos, *supra* note 113. (“What is even more appalling is the apparent willingness of U.S. corporations with operations in Saudi Arabia—ExxonMobil, ChevronTexaco, Boeing, Procter & Gamble, Citibank, Philip

The question then arises, in this context, what role has CSR played for these firms? Based on our findings, we suggest that CSR has—as the cynics maintain—served to shield these companies from criticism over engaging in and failing to protest gender discrimination. MNCs have justified their actions in Saudi Arabia according to the value of respecting local custom. Even though all the codes examined in this study urge respect for local practices, the same codes also state explicitly that MNCs should prohibit discrimination and should not bend to local pressures to the contrary. Despite this fact, however, these corporations have been able to choose which code to adhere to on an *ad hoc* basis depending on which value best serves them in a given context. Thus, these codes have, as the cynics maintain, “helped companies postpone urgently needed reforms.”²³⁷

These corporations’ appeal to ‘respecting local custom’ as a justification for engaging in gender discrimination has worked effectively to silence critics since firms are still adhering to a CSR code. This strategy has confounded the efforts of those CSR activists whose job it is to reward ‘do-gooders’ and shame wrongdoers, such as the Corporate Responsibility Officer, which placed three of the four firms in this study at the top of its 100 Best Corporate Citizens List in 2009.²³⁸ This has likely helped to prevent the anti-discrimination movement from gaining momentum in Saudi Arabia.

Although MNCs might argue that ‘getting a coffee’, ‘sitting in a seat’, and ‘swimming in a pool’ are not universal human rights, treating women equally

Morris, and others—to extend gender discrimination to their own hiring practices. . . . Denying qualified women equal employment opportunity in U.S. businesses is simply intolerable.”)

²³⁷ Sethi, *supra* note 24, at 97-98.

²³⁸ CORP. RESPONSIBILITY OFFICER, *supra* note 25.

incontestably is.²³⁹ Thus, regulating these activities in a separate and unequal manner solely on the basis of gender violates women’s fundamental rights as human beings.

These corporate justifications mirror those used by MNCs operating in South Africa at the time of Apartheid. There, MNCs also violated basic human rights claiming they had “no choice but to defer to the local ‘culture’.”²⁴⁰ The only difference in Saudi Arabia is that the victims are women.²⁴¹

Moreover, Starbucks’ promise that “while Starbucks adheres to the local custom by providing separate entrances, service and seating, all our stores provide equal amenities” echoes directly ‘separate but equal’ claims made during the Jim Crow era in the United States. First, these claims are simply false because women’s facilities are far inferior to those of men. Second, it is well established that separate is “inherently unequal.”²⁴² In *Brown v. Board*, the Supreme Court ruled that “the doctrine of ‘separate but equal’ has no place”²⁴³ noting that segregation, even when claiming to offer equal facilities, is meant to subjugate the marginalized group to their detriment.²⁴⁴ Similarly, the first principle articulated in the original Sullivan Principles (discussed below) is a company’s obligation to desegregate “all eating, comfort and work facilities,” which is the right that the companies in our study have violated most egregiously.²⁴⁵ As in the Jim Crow South, segregation in these fora is a fundamental indicator of inequality. By

²³⁹ See discussion *supra* p. 22.

²⁴⁰ King, Dec. 22, *supra* note 204.

²⁴¹ *Id.* (dismissing justification of ‘respecting local culture’); see also Manning, *supra* note 195 (discussing how “McDonald’s and Starbucks claim to be sensitive to local customs and laws, but they choose to ignore universal human rights laws”).

²⁴² *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (U.S. 1954)

²⁴³ *Id.*, at 494.

²⁴⁴ *Id.*

²⁴⁵ Sullivan Principles, *supra* note 151.

preventing one group of people from enjoying these rights freely, these firms are dehumanizing women and are enforcing a prime manifestation of deep-rooted female inequality and the perceived superiority of men. Again, it is not the ability to swim in a pool or sit in a courtyard *per se* that is the fundamental value. It is the right to be treated equally regardless of gender, race or any other natural characteristic.

Furthermore, the MNC's that have elected to engage in gender apartheid cannot shield themselves from criticism by arguing that alternatives are not available. Other firms operating in Saudi Arabia have pursued a compromise between accommodating local cultural norms and remaining true to their guiding principles. Dunkin Donuts, for instance, "has set an example"²⁴⁶ and operates an establishment in Saudi Arabia "where men and women can eat at adjoining tables in an open seating area."²⁴⁷ Thus, Dunkin Donuts has refused to place women in curtain-covered cubicles with no chairs and has taken active measures to ensure that men and women can sit openly and freely, thereby incorporating universal values into its business practices. Surprisingly, even though Dunkin Donuts was "the only exception to [women's] humiliation" among American restaurants in Saudi Arabia,²⁴⁸ the CSR community has yet to applaud it for its actions.²⁴⁹

Additionally, although not a corporation *per se*, UC Berkeley has found creative ways to maintain operations in Saudi Arabia while upholding universal human rights. When asked to team with the Saudi government in establishing a new university in the

²⁴⁶ Manning, *supra* note 195.

²⁴⁷ KLINE, *supra* note 81, at 180.

²⁴⁸ King, Dec. 22, *supra* note 204.

²⁴⁹ As noted previously, Dunkin Donuts was absent from all of the 'most socially responsible companies' lists noted above. This is one reason we did not use it in our actual case study, which looked only at CSR champions. Moreover, we were unable to locate any form of praise outside of these lists for Dunkin Donuts' refusal to engage in gender discrimination.

Kingdom, UC Berkeley conditioned its assistance on Saudi respect for women's rights. When criticized for "selling [its] name" and operating in a country that bars women from studying certain subjects, Berkeley was quick to reassure critics that the campus would be "an island of nondiscrimination" saying, "[w]e are going to have an agreement in which any kind of discrimination will be forbidden. This new university will have no discrimination at all."²⁵⁰

Although such exceptions are rare in Saudi Arabia, they demonstrate that it is possible to conduct business legally in the country without committing overt acts of gender discrimination. Therefore, "many of the policies enforced by [Starbucks, McDonald's, the Hilton Corp. and Yum! Brands] are conforming to custom rather than to legal mandates."²⁵¹ Thus, in some ways, companies that elect to comply with local customs that systematically deprive women of their fundamental rights bear an even greater culpability than their South African counterparts, where apartheid was legally mandated.

We do not advocate that firms refuse to alter their business practices in deference to Saudi customs. Rather, we advocate only that they do so within a "margin of appreciation" that retains well-established universal principles as the baseline for acceptable behavior.²⁵² These firms could avoid depriving women of equal rights in several ways. First, they could adopt policies similar to those of Dunkin Donuts or UC Berkeley and allow women to sit freely and openly with equal rights as men. This would

²⁵⁰ Tanya Schevitz, *UC Berkeley to Team with New Saudi University*, S.F. CHRON., Mar. 4, 2008, available at <http://www.sfgate.com> (quoting Al Pisano, chairman of Cal's mechanical engineering department).

²⁵¹ KLINE, *supra* note 81, at 180.

²⁵² See discussion *supra* pp. 17-21.

be a drastic improvement to placing women in seatless, curtained off sections and calling the religious police on those who show up without their husbands. In Hilton's case, the hotel could take special measures to ensure that women have access to the same amenities as men. Thus, Hilton could grant women access to its pools and gyms or, at a bare minimum, build women their own facilities of equal quality rather than forcing them to drive a half-hour out of the city to use a dilapidated beach.

Second, there is no requirement that these corporations even have seating areas or pools. While operating a coffee or burger 'stand' rather than having seats, or in Hilton's case not having a pool or gym, may lead to fewer profits, such policies would protect these firms from committing human rights abuses. Should Saudi Arabia not allow these firms to treat women equally, they could choose to do away entirely with their seating areas or pools. This would eliminate the negative psychological impact that *Brown v. Board* suggested was at the root of segregation.²⁵³ A woman walking into one of these establishments would no longer be treated as inferior to her male counterparts because of her gender. Although such measures might have a negative impact on the company's revenues as fewer Saudis may choose to patronize their establishments, this is precisely what these firms have promised to do in their CSR codes. As there appears to be no other persuasive justification for their failure to comply with their own CSR standards, the business practices of these companies in Saudi Arabia lead to the conclusion that, at least in some cases, they will sacrifice social responsibility in favor of profit maximization.

Finally, if voluntary compliance with CSR principles were always effective, one

²⁵³ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-494 (stating that segregation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

would expect these companies to work proactively to ameliorate women's condition in the work place. There are no laws prohibiting these firms from making special efforts to hire a greater proportion of women, support gender equality education, protest abuses or engage in other such practices that we would expect from CSR 'heroes' operating in a repressive environment. These firms' failure to do so despite their stated corporate commitment to gender equality leaves little doubt that human rights is not an intrinsic good for them that will always take precedence over corporate interests. Gender discrimination in Saudi Arabia has not (yet) mobilized CSR activists to call for any form of consumer or shareholder protectionism. Engaging in such proactive practices, therefore, would only lead to greater financial costs with no reputational gains and are consequently absent from these MNCs' agendas.

In the following Section we offer a series of more robust policy proposals that can serve to improve the human rights records of companies operating in Saudi Arabia by helping to ensure respect for women's fundamental human rights.

Policy Prescription

The current international architecture has allowed for deep governance gaps to develop with respect to regulating corporate conduct. This paper demonstrates that voluntary codes of conduct, national laws, and international treaties do not ensure that MNC's operating abroad will consistently protect fundamental rights established by international standards and incorporated in their internal codes of conduct. Assuming that the United States has an interest in ensuring that U.S. corporations respect people's internationally recognized 'non-derogable' rights, it is important to explore what

additional measures could further that end. We agree with John Ruggie's claim that "no single silver bullet can resolve the business and human rights challenge."²⁵⁴ Several possible solutions exist that range from 'softer', market-driven approaches, to 'harder', more legally enforceable measures. Accordingly, this paper proposes a series of both 'soft' and 'hard' measures that American corporations, the United States government and the international community as a whole can implement to promote a better human rights record for MNCs operating in Saudi Arabia.²⁵⁵

Monitored CSR

The unregulated CSR approach has allowed U.S. companies to evade public scrutiny even when committing gross human rights abuses. Voluntary compliance with CSR relies primarily on the power of public scrutiny, which is believed (correctly) to mold firm behavior. The public and shareholders, however, have paid relatively little attention to U.S. companies' infringement of women's right in Saudi Arabia. Given the lack of attention paid to these firms' activities in the region and given the importance of this issue, purely voluntary standards have failed to achieve their intended purpose.²⁵⁶ We argue that, at a minimum U.S. companies operating in areas where human rights violations are tolerated or even encouraged, should be required to report to the public and

²⁵⁴ Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) (prepared by John Ruggie, Special Representative of the Secretary-General).

²⁵⁵ Devising specific codes of conduct is beyond the scope of this essay and would require an extensive study in its own right. Rather, we merely try to give some general ideas that could serve to improve MNC conduct with respect to women in Saudi Arabia. The primary goal of this exercise is to demonstrate that measures can be taken to improve the regulation of corporations enforcing gender discrimination in Saudi Arabia.

²⁵⁶ See *supra* note 26 and accompanying text.

their shareholders any activities that violate their own CSR codes. This would at least prevent the type of hypocrisy George Soros suggested lay at the root of CSR.²⁵⁷

As long as consumers and shareholders remain ignorant about the actual practices of MNCs, it will be difficult to engender significant changes in corporate conduct since the ‘cost-benefit’ analysis of acting responsibly as opposed to irresponsibly remains unchanged. Thus, the first step to ameliorating the corporate human rights record is to ensure that consumers and shareholders be well-informed about the practices of those from whom they purchase and in whom they invest. Since our findings suggest that firms will pursue scrupulously those policies that help build their brand (and in turn enhance their financial bottom lines), this policy should help alter the ‘payoff structure’ for irresponsible behavior.

Scholars have termed such market-driven approaches ‘shareholder’ and ‘consumer’ activism²⁵⁸ and suggest that, “the market can and will respond if it has the right information.”²⁵⁹ This is based on the presumption that “like all ordinary people,” consumers and shareholders want to “live in a world that is civil”²⁶⁰ and are willing to direct their money to corporations that promise to help make it so. In fact, there are scores ‘socially responsible’ investment firms that oversee a combined total of nearly three

²⁵⁷ See discussion *supra* p. 12.

²⁵⁸ See, e.g., ROBERT MONKS, *THE EMPEROR’S NIGHTINGALE: RESTORING THE INTEGRITY OF THE CORPORATION IN THE AGE OF SHAREHOLDER ACTIVISM* 183-184 (1998) (arguing that solutions to corporate irresponsibility lie with the market and with shareholders in particular); JACKSON & NELSON, *supra* note 37 (describing consumer activism); See also Bernstein & Cashore, *supra* note 41 (describing non-state market-driven approaches).

²⁵⁹ MONKS, *supra* note 258, at 183-184.

²⁶⁰ *Id.*

trillion dollars in the U.S. alone.²⁶¹ Moreover, these funds are growing by a rate nearly six times that of the market as a whole.²⁶² Thus, by requiring firms to better inform their consumers and shareholder, we can improve corporate behavior.

Since the treatment of women is of paramount importance and is often shielded from public attention, the reporting requirement we advance would also include the establishment of an objective and independently verifiable rating system based on a company's treatment of women. As noted above, Amnesty International, Human Rights Watch, and Greenpeace, among others, refused to endorse the Global Compact precisely because of its lack of independent verification and enforcement mechanisms. These NGOs feared that such a lack of accountability would enable firms to reap the rewards of presenting themselves as socially responsible without any way of verifying their promises.²⁶³ Nevertheless, certain CSR measures do have the sort of verification and enforcement mechanisms advocated for by these groups. The SA8000, for example, is an independent auditing standard developed by Social Accountability International (SAI). The SA8000 operates under the presumption that "corporations cannot be trusted to self-monitor their compliance with their own voluntarily adopted ethical codes," and argues that, "corporate social performance needs to be independently audited on a regular basis by credible auditors."²⁶⁴

We suggest that without some form of independent accountability to ensure women's rights in Saudi Arabia, either by a private body such as SAI, or by the code

²⁶¹ Social Investment Forum, Report on Socially Responsible Investment Funds in the United States (2007), available at http://www.socialinvest.org/resources/pubs/documents/FINALExecSummary_2007_SIF_Trends_wlinks.pdf

²⁶² 2007 report on Socially Responsible Investment Funds in the United States

²⁶³ See *supra* notes 69-70 and accompanying text.

²⁶⁴ Winston, *supra* note 11, at 79.

creators themselves (ILO, OECD, UN, etc.), several firms will be able to escape regulation and will refuse to acknowledge their wrongdoing. Although to many this may seem like an obvious conclusion, this is precisely what these global CSR codes are relying on currently. As Aaron Einhorn suggests, “not only are [CSR codes] self-drafted and self-adopted, but also self enforced, leaving corporations to implement, monitor, and enforce them in a perverse concentration of power.”²⁶⁵

For example, celebrating Starbucks’ enthusiastic signing of the Calvert Principles, Elizabeth Laurienzo, Calvert’s director of corporate communications, stated that “Calvert is encouraging companies to *voluntarily* endorse the principles. . . . In the meantime, we have been careful to place disclosure and reporting at the heart of the Calvert Women’s Principles.”²⁶⁶ Starbucks is charged with ‘disclosing’ and ‘reporting’ on its own women’s rights abuses and has done neither. The purely voluntary approach, therefore, has failed to remedy a fundamental human rights abuse that in this case was the code’s sole purpose. Notwithstanding this failure, Starbucks’ enthusiastic signing of the Principles has enabled it to develop a closer relationship with its creator, Calvert Investments, which also happens to be the *largest* socially responsible fund in the world.²⁶⁷ Thus, through signing the voluntary code Starbucks has been able to gain immense reputational and financial capital despite its engaging in severe gender discrimination.

²⁶⁵ Aaron N. Einhorn, *supra* note 59, at 539-540.

²⁶⁶ Social funds, Sustainability Investment News, Dell and Starbucks First Companies to Endorse Calvert Women’s Principles December 22, 2004 (emphasis added) <http://www.socialfunds.com/news/article.cgi/article1597.html>.

²⁶⁷ CSR Press Release, Starbucks, Dell Endorse the Calvert Women’s Principles; New Code of Conduct for Corporations is First to Focus Exclusively on Women’s Rights, CSR WIRE, Dec. 20, 2004, http://www.csrwire.com/press/press_release/18369; *See also*, Financial Lifeline, Calvert Investments, <http://www.filife.com/companies/calvert-investments>.

Auditing and certification systems for ensuring corporate compliance are nothing new.²⁶⁸ In fact, “environmental auditing has grown rapidly and is now commonplace.”²⁶⁹ Unfortunately, however, “human rights auditing has not yet reached its embryonic stage.”²⁷⁰ This helps account for the CSR movement’s failure to discover, problematize, and combat corporate complicity in gender discrimination in Saudi Arabia. An enforceable reporting mechanism with precise and clearly defined principles upholding women’s fundamental rights, verifiable through an independent body would deter companies from engaging in flagrant human rights violations. Moreover, bodies such as the Global Compact, Calvert Women’s Principles and the Global Sullivan Principles should revise their CSR codes to include greater detail and should phrase those principles as enforceable, binding statements rather than vague statements of promise.

The groups charged with defining and monitoring these rules should be comprised of individuals who will be sensitive both to gender discrimination issues as well as to cultural differences and local practices. Thus, we suggest incorporating NGOs from women’s rights groups in addition to NGOs that are experts on local cultural norms. The Interfaith Center on Corporate Responsibility, for example, played a leading role in helping to put an end to apartheid in South Africa. Either it or a similar organization could help enforce non-derogable, universal human rights while paying special attention to ‘the margin of appreciation’ afforded each nation based on its distinctive culture.

The rating given to corporations operating in Saudi Arabia would be based on

²⁶⁸ See Bernstein & Cashore, *supra* note 41.

²⁶⁹ WESSELINK ET AL., *supra* note 1, at 61; see e.g. Council on Economic Priorities’ Campaign for Cleaner Corporations, which provides rating systems for corporations adopting eco-friendly practices. Council on Economic Priorities (CEP)

<http://www.web.net/~robrien/papers/sri/players/cep.html>

²⁷⁰ WESSELINK ET AL., *supra* note 1, at 61.

both the proactive and reactive forms of CSR we noted above. Thus, corporations would not only be prevented from condoning or enforcing gender discrimination, but would be motivated to take active measures to improve women's rights, at least within their spheres of influence. For example, signatories would be rewarded with a higher ranking based on efforts such as human rights training and awareness programs, employment equity, strengthening civil society, formally protesting human rights abuses, and other efforts undertaken to reduce the impact of gender discrimination.

The rankings generated would give the public a true and unbiased assessment of a company's treatment of women in Saudi Arabia and would be available to consumers, shareholders, and socially responsible funds. Those firms achieving high scores would be celebrated justifiably for being CSR heroes (such as Dunkin Donuts), while those complicit in gender discrimination would be exposed. Those MNCs who claim to uphold gender equality and prohibit discrimination, but refuse to sign the codes would generate suspicion over their failure to sign. Those who did sign, on the other hand, would enhance their legitimacy and credibility in the eyes of the public.²⁷¹

This market-driven system would be reminiscent of that which existed under the Sullivan Principles in South Africa during the days of apartheid. In that case, Leon Sullivan devised a set of seven concrete and verifiable principles that required U.S. companies to adhere to universal human rights standards, despite (or as a result of) their operating in an oppressive local environment.²⁷² Sullivan made sure that he had "a consistent monitoring system, understandable both to the companies themselves and to the anti-apartheid movement." To ensure compliance and prevent the regulatory issues

²⁷¹ *Id.* at 61 (discussing why signing enforceable codes adds to an MNCs' legitimacy).

²⁷² The Sullivan Principles, *supra* note 151.

associated with unenforceable CSR codes, Sullivan hired an independent auditing firm, Arthur D. Little, to monitor signatories. Each firm was then given a regular rating on “a scale of I (‘making good progress’), II (‘making progress’), or III (‘needs to become more active’).”²⁷³ Those who received a ‘I’ or a ‘II’ would pass. The rest would fail.²⁷⁴

A question normally raised with creating third-party enforcement mechanisms is how to generate funds. Yet, Sullivan was able to pay for these monitoring services from fees paid by the signatories themselves.²⁷⁵ In fact, being a part of the Sullivan Principles became so popular that although only twelve MNCs signed on initially, within just a few years “173 of the 300 firms doing business in South Africa had committed.”²⁷⁶

Four years after the Principles’ inception, “the number of black South Africans who held technical positions with American companies jumped from a token few to over 10,000,”²⁷⁷ and “Sullivan signatories contributed nearly \$300 million to public works (like improving African schools).”²⁷⁸ Comparing the original Sullivan Principles to a code such as the Calvert Women’s Principles provides a prime example of how a monitored code, as opposed to a purely self-regulating one, can better promote corporate respect for non-derogable rights.

A look at the Sullivan Principles also provides a good template with respect to what an anti-gender discrimination code for U.S. companies operating in Saudi Arabia could look like. By substituting the word ‘race’ with ‘sex’ and ‘blacks’ with ‘women’, the

²⁷³ Richard Rothstein, *The Starbucks Solution: Can Voluntary Codes Raise Global Living Standards*, 27 AM. PROSPECT 36 (1996), available at http://www.prospect.org/cs/articles?article=the_starbucks_solution

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Lantos, *supra* note 113.

²⁷⁸ Rothstein, *supra* note 273.

Sullivan Principles read:

1. Non-segregation of [the sexes] in all eating, comfort, and work facilities.
2. Equal and fair employment practices for all employees.
3. Equal pay for all employees doing equal or comparable work for the same period of time.
4. Initiation of and development of training programs that will prepare, in substantial numbers, [women] for supervisory, administrative, clerical, and technical jobs.
5. Increasing the number of [women] in management and supervisory positions.
6. Improving the quality of life for [women] outside the work environment in such areas as housing, transportation, school, recreation, and health facilities.
7. Working to eliminate laws and customs that impede social, economic, and political justice.

It would be surprising if the CSR ‘paragons’ used in this study would fail to adhere to, or at a minimum sign on to, such a code if it were implemented in Saudi Arabia and used by the CSR movement in its corporate evaluations. Given the large sums that MNC’s spend on branding, these companies’ cost/benefit analysis would change if prohibiting women from having equal treatment in their facilities would cause them to lose their spots on the 2010 ‘Best Corporations List’.

It is possible, however, that the threat of consumer or shareholder activism would not suffice to ensure that companies respect women’s rights. In fact, even though the Sullivan Principles are widely considered to be an essential component of the anti-apartheid struggle, Sullivan himself later abandoned this voluntary approach in favor of more stringent measures.²⁷⁹ Given the fact that this case in particular has fallen beneath the CSR radar, we believe that monitored CSR should be a first, but not a final step in

²⁷⁹ *Id.*

enforcing MNC compliance with universal human rights in Saudi Arabia. Rather, as Robert Reich suggests, an enforceable legal standard created through national legislation is perhaps the most promising and enduring way to ensure that corporations operating abroad treat women with the same dignity they purport to treat them with at home.²⁸⁰

Enforceable Legal Standards

CSR is expected to play its most important role where governments are either unwilling or unable to uphold human rights. If CSR codes have failed to govern these areas adequately, the most obvious solution is simply to fill the governance gaps created by globalization with enforceable laws. In other words, reverting to direct, state-based governance in those areas currently devoid of regulation. Government action would provide the largest change in a corporation's 'payoff structure' and would enforce respect for fundamental human rights in a way that voluntary measures could not. Although this is also the hardest standard to achieve from a political and jurisprudential standpoint, the U.S. has already shown its willingness to extend its jurisdiction beyond its national boundaries.

Congress has enacted several pieces of legislation to hold actors operating abroad accountable for human rights violations. Of particular relevance for our purposes are the Alien Tort Claims Act of 1789 (ATCA),²⁸¹ the Foreign Corrupt Practices Act of 1977 (FCPA)²⁸² and the Comprehensive Anti-Apartheid Act of 1986 (CAAA).²⁸³ These

²⁸⁰ REICH, *supra* note 71.

²⁸¹ Alien Tort Claims Act of 1789, 28 U.S.C. § 1350 (1789).

²⁸² Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1, 78dd-2, 78dd-3, 78ff).

measures granted long-arm jurisdiction to American courts in order to regulate activities that were seen as against the ‘law of nations’.

ATCA reads, “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁸⁴ Several lower courts have interpreted the ‘law of nations’ clause broadly and have granted causes of action against corporations operating internationally for a wide array of human rights abuses.²⁸⁵ The notion that “[c]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today” was central to these courts’ rulings.²⁸⁶ In defining modern international law, these courts considered “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states [and] international custom, as evidence of a general practice accepted as law.”²⁸⁷ Some courts have even gone so far as to recognize international corporate codes of conduct such as those enumerated by the ILO.²⁸⁸

In *Sosa v. Alvarez-Machain*, however, the Supreme Court severely narrowed ATCA’s scope ruling that only a “modest number of international law violations” defined

²⁸³ Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986) There are several other examples of US long arm jurisdiction to regulate corporate activities. *See, e.g.*, the Iran Sanctions Act ((P.L. 104-172) and the Clean Diamond Trade Act (P.L. 108-19 (2003)).

²⁸⁴ 28 U.S.C. § 1350.

²⁸⁵ *See, e.g.*, *Doe v. Unocal*, 963 F. Supp. 880, 883-884, 887 (C.D. Cal 1997) (denying motion to dismiss); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003) (same); *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 92 (2d cir. 2000) (reversing District Court’s dismissal on forum non conveniens grounds).

²⁸⁶ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 296 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995); *See also* *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

²⁸⁷ *Filartiga v. Pena-Irala*, 630 F.2d at 881.

²⁸⁸ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d at 305, 317.

with the specificity of “18th-century paradigms” would be actionable.²⁸⁹ The only violations that the Court decided met this level of specificity today were “torture, genocide, war crimes, crimes against humanity, summary execution, arbitrary detention and disappearance.”²⁹⁰ The Court refused to grant a cause of action for other human rights violations, stating, “we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly” and that “the decision to create a private right of action is one better left to legislative judgment.”²⁹¹ Thus, without a clear “congressional mandate,” the Court would refuse “to seek out and define new and debatable violations of the law of nations.”²⁹² In Justice Scalia’s view, this ruling was “sufficient to close the door to further independent judicial recognition of actionable international norms.”²⁹³

The Court’s decision to enforce only a very narrow range of international human rights violations highlights the need for legislative action geared towards enforcing corporate compliance with modern conceptions of non-derogable rights, in this case, gender equality. The Court did not state that such rights fell below the standard of international customary law, but rather that they would refrain from ruling on a myriad of human rights violations until granted an express congressional mandate to do so. Therefore, were Congress to interpret the ‘law of nations’ clause to include gender equality, ATCA could provide a jurisdictional basis for preventing U.S. corporations from engaging in gender discrimination.

²⁸⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724, 725 (U.S. 2004)

²⁹⁰ Pamela J. Stephens, *Spinning Sosa: Federal Common Law, The Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT’L L.J. 1, 5 (2007).

²⁹¹ *Sosa v. Alvarez-Machain*, 542 U.S. at 727.

²⁹² *Id.* at 728.

²⁹³ *Id.* at 729.

Congress has previously provided the judiciary with an express mandate for long-arm jurisdiction when it felt the national interest to be at stake. The FCPA, for example, demonstrates how targeted and robust national legislation can fill in the governance gaps created by globalization while still enabling MNCs to operate abroad. The Act criminalized foreign bribery and curtailed the corrupt business practices of over 400 U.S. corporations.²⁹⁴ The central reasons offered for the FCPA mirror directly the concerns the United States should have in allowing gender discrimination to go unchecked.

The legislative history of the Act states that bribery “is counter to the moral expectations and values of the American public”²⁹⁵ and that corporate corruption had led “the image of American democracy abroad [to have been] tarnished.”²⁹⁶ Specifically, the House maintained:

Corporate bribery also creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence.²⁹⁷

In response to claims that engaging in foreign bribery was a necessary part of doing business in certain countries, the Senate stated, “[m]any U.S. firms have taken a strong stand against paying foreign bribes and are still able to compete in international trade. Unfortunately, the reputation and image of all U.S. businessmen has been tarnished by the activities of a sizable number.”²⁹⁸ Additionally, the legislature stated, “not only is [bribery] unethical, it is bad business as well” since it “casts a shadow on all U.S.

²⁹⁴ H.R. REP. NO. 95-640 (1977).

²⁹⁵ H.R. REP. NO. 95-640 at 4 (1977).

²⁹⁶ S. REP. NO. 95-114, at 3 (1977)

²⁹⁷ H.R. REP. NO. 95-640 at 5 (1977).

²⁹⁸ S. REP. NO. 95-114, AT 3 (1977)

companies. The exposure of such activity can damage a company's image”²⁹⁹ and “reveal a lack of confidence about themselves.”³⁰⁰ Accordingly, the Senate argued that, “[a] strong antibribery law is urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.”³⁰¹

“[M]ost of the significant trading countries in the world” later followed Washington’s lead and ratified the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was based directly on the FCPA.³⁰² The Convention expanded the FCPA’s jurisdiction to “include all foreign persons who commit an act in furtherance of a foreign bribe while in the United States.”³⁰³ The United States codified the Convention in the International Bribery Act of 1998. The Act stated:

This exercise of jurisdiction over U.S. businesses and nationals for unlawful conduct abroad is consistent with U.S. legal and constitutional principles and is essential to protect U.S. interests abroad. It is within the constitutional grant of power to Congress to “regulate Commerce with foreign Nations” and to “define and punish . . . Offenses against the Law of Nations.” U.S. Const. art. 1, § 8, cl. 3 & 10.³⁰⁴

Thus, in this case, the United States legislature provided an express cause of action based on the ‘law of nations’, which it interpreted to include bribery. Similarly, for many of the same reasons outlined above,³⁰⁵ we suggest that Congress once again clarify its interpretation of ‘the law of nations’ to include prohibiting gender discrimination by U.S. corporations.

²⁹⁹ H.R. REP. NO. 95-640 at 5 (1977).

³⁰⁰ S. REP. NO. 95-114, at 3 (1977)

³⁰¹ *Id.*

³⁰² International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at §§ 78dd-1 to 78dd-3, 78ff).

³⁰³ S. REP. NO. 105-277, at 3 (1998)

³⁰⁴ *Id.*

³⁰⁵ See discussion *infra* pp. 77-84.

Such an act could resemble the anti-discriminatory legislation passed in response to South African apartheid. Notwithstanding Ronald Reagan’s veto, the CAAA “set forth a comprehensive and complete framework to guide the efforts of the United States in helping to bring an end to apartheid in South Africa and lead to the establishment of a nonracial, democratic form of government.”³⁰⁶ Sections 207 and 208 of the Act provide a template of the sort of regulation we envision. These sections state:

Sec. 207. (a) Any national of the United States that employs more than 25 persons in South Africa shall take the necessary steps to insure that the Code of Conduct is implemented. . . .

Sec. 208. (a) The Code of Conduct referred to . . . is as follows:

(1) desegregating the races in all employment [eating and comfort] facilities;³⁰⁷

(2) providing equal employment opportunity for all employees without regard to race or ethnic origin;

(5) increasing by appropriate means the number of persons in managerial, supervisory, administrative, clerical, and technical jobs who are disadvantaged by the apartheid system for the purpose of significantly increasing their representation in such jobs;

(6) taking reasonable steps to improve the quality of employees' lives outside the work environment with respect to housing, transportation, schooling, recreation, and health; and

(7) implementing fair labor practices by recognizing the right of all employees, regardless of racial or other distinctions, to self-organization and to form, join, or assist labor organizations, freely and without penalty or reprisal, and recognizing the right to refrain from any such activity.

(b) It is the sense of the Congress that in addition to the principles enumerated in subsection (a), nationals of the United States subject to section 207 should seek to comply with the following principle: taking reasonable measures to extend the scope of influence on activities outside the workplace, including

(1) supporting the unrestricted rights of black businesses to locate in urban areas;

(2) influencing other companies in South Africa to follow the standards of equal rights principles;

(3) supporting the freedom of mobility of black workers to

³⁰⁶ Pub. L. No. 99-440, § 4, 100 Stat. 1098 (1986).

³⁰⁷ The “eating and comfort” clause was added from the Sullivan Principles, *supra* note 151, at Principle 1.

seek employment opportunities wherever they exist, and make provisions for adequate housing for families of employees within the proximity of workers' employment; and
(4) supporting the rescission of all apartheid laws.³⁰⁸

Applying these corporate standards to gender discrimination in Saudi Arabia would almost certainly reduce MNC complicity in human rights abuses. For the purposes of this paper, we coin our proposed bill the Anti-Gender-Discrimination Act (AGDA). In addition to substituting 'gender' for 'race' and 'Saudi Arabia' for 'South Africa', AGDA would include some important distinctions from the CAAA. First, while the CAAA provided for sanctions against the South African regime itself, AGDA would be far narrower and apply only to the actual discriminatory practices of multinationals. Second, while the CAAA prohibited all new investment in South Africa, AGDA would still permit new investments in oppressive regimes, however, only when done within the boundaries of international human rights law. Thus, AGDA's scope resembles that of the FCPA and ATCA, while its anti-discriminatory provisions echo those of the CAAA.

It is important to note that Section 208 of the CAAA is divided into two parts, with Subsection (a) issuing strict standards and regulations that MNCs are prohibited from breaching and Subsection (b) suggesting certain proactive measures that corporations are encouraged to take. This divide resembles that between 'proactive' and 'reactive' CSR.³⁰⁹ Based on this template, AGDA would prohibit MNCs from discriminating directly while also suggesting some proactive measures corporations could take to improve their surroundings. The reactive measures would constitute the enforceable legal standards regulated by the government, while the proactive measures

³⁰⁸ Pub. L. No. 99-440, §§ 203-204, 100 Stat. 1098 (1986).

³⁰⁹ See discussion *supra* p. 44.

could be used by the CSR community in its corporate evaluations.

Unlike the FCPA, which provides for criminal penalties, we suggest that AGDA give a private cause of action to women who have been discriminated against in a foreign country by a company with minimum contacts in the United States. The cause of action should allow for punitive damages sufficient to counterbalance any financial gains earned through enforcing discrimination. Insofar as MNCs continue to support discrimination for monetary purposes, this would change the payoff structure so that the costs of violating equal rights principles outweigh the benefits to be gained from enforcing discriminatory practices. Thus, the amount of damages awarded should take into account the numbers of foreign women precluded from bringing suit in the United States. To “level the playing field” for American and foreign MNCs, the act should adopt the language of the International Anti-Bribery Act and “assert territorial jurisdiction broadly . . . to include all foreign persons who commit an act in furtherance of [gender discrimination] while in the United States.”³¹⁰ Such a measure would strongly dissuade MNCs with significant operations in the U.S. from instituting discriminatory practices.

Like bribery and racial apartheid, gender discrimination “is counter to the moral expectations and values of the American public.”³¹¹ American people have long accepted the principle that separate is “inherently unequal”³¹² and to allow American corporations to institute discriminatory policies goes directly against the harsh lessons this nation has learned over the course of its history. The United States cannot stand as a beacon of the principle of human dignity and freedom if it allows its own corporations to engage in

³¹⁰ S. REP. NO. 105-277, at 2 (1998) (substituting the terms “a foreign bribe” with “gender discrimination”).

³¹¹ H.R. REP. NO. 95-640 at 4 (1977).

³¹² *Brown v. Bd. of Educ.*, 347 U.S. at 494.

egregious human rights violations on the international stage.

Our case study shows that the discriminatory policies of these MNCs affect both American citizens and foreign nationals. Failure to check U.S. complicity in gender discrimination casts a shadow over the U.S.'s lofty proclamations of gender equality and compromises its leadership in promoting international human rights policy. Conversely, upholding fundamental human rights could help the United States regain some of the diplomatic capital it has lost in recent times and reestablish itself as a human rights leader. AGDA could eventually encourage the rest of the international community to adopt binding legislation upholding women's rights as the FCPA did with the OECD convention against bribery.³¹³

As established previously, cultural relativism does not provide an adequate justification for violating non-derogable human rights. Although several scholars are weary of enforcing Western values abroad, women's equality is neither a Western concoction nor a tool of American hegemonic predation.³¹⁴ It is a fundamental human right guaranteed to all people regardless of nationality, which the Saudis themselves have adopted, albeit only in principle.

The example of Dunkin Donuts shows that American corporations can still be respectful of local culture without enforcing gender discrimination. There is nothing in Islam that suggests that women be confined to sub-standard facilities.³¹⁵ In fact, Muslim human rights activists have harshly criticized Western reluctance to promote their interests because of a presumed notion in the West that suggests Muslims cannot be feminists; a

³¹³ See discussion *supra* pp. 73-74.

³¹⁴ Marina Ottaway, for example, argues against imposing Western values in Saudi Arabia. See Richard Abdy, *supra* note 78 (quoting Marina Ottaway).

³¹⁵ Mayer, A 'Benign' Apartheid, note 113, at 269-270.

presumption which is both insulting and unjust to the myriad of Muslim human rights activists around the world. Responding to scholars advocating restraint in promoting women's rights in Muslim countries, a group of feminist leaders from eighteen Muslim countries noted, "they (i.e. the cultural relativists) react much like fundamentalists do: they worry about our legitimacy, doubt our analysis, question our premises and challenge our conclusions. We are presumed to be 'westernized' and not authentic enough, we are not really 'Muslim'."³¹⁶ Needless to say, such a mentality risks leaving human rights activists operating in restrictive societies alone and without recourse to remedy.

Moreover, AGDA does not necessarily prevent those elements of society that prefer to live under segregated conditions from doing so. Those individuals are free to choose whether or not they would prefer to patron an establishment that afforded women equal treatment. Thus, AGDA actually leads to 'pareto efficient freedom', if we can call it such, since nobody's freedom is impaired while overall freedom is increased. Such a system stands in stark contrast to the prevailing policy that actively prohibits women from using certain facilities.

As in the debates surrounding the FCPA, some might suggest that a policy such as AGDA would compromise Washington's sensitive diplomatic relations in the region. Such arguments were at the heart of Reagan's veto to the CAAA and may explain why the Bush administration has refrained from making gender discrimination an issue of national concern.³¹⁷ AGDA, however, is very narrowly tailored and would not infringe on Saudi sovereignty. It does not impose human rights values directly on the Saudi Arabian

³¹⁶ *Id.* (quoting *Women Living Under Muslim Laws, Plan of Action--Dhaka 1997*, 14 (pamphlet)).

³¹⁷ See discussion *supra* n. 113 ¶ 2.

government. It merely prohibits corporations with significant ties to the United States from engaging in gender discrimination themselves. Thus, notwithstanding whatever other social conditions exist in Saudi Arabia—or any other oppressive regime for that matter—we can at least ensure that MNCs themselves will abide by universal human rights principles.

Additionally, while we certainly recognize that the Saudi regime’s friendly relations with Washington are important in a region where good friends are both hard to find and necessary, we maintain that having a strong diplomatic relationship does not entail condoning human rights violations. The United States can still keep Saudi Arabia as an ally while prohibiting its corporations from enforcing gender discrimination. Thus, we adopt the position of the District Court in the Southern District of New York, which refused to dismiss an ATCA claim holding:

[There is no] logical argument as to why the mere existence of certain U.S. diplomatic overtures . . . should prevent this case from proceeding. Indeed, as the world's foremost superpower, the United States has complex diplomatic relationships with virtually every country. This fact, without more, does not militate in favor of dismissal.”³¹⁸

This is particularly true in this case since many of the practices adopted by MNCs in Saudi Arabia are not illegal according to Saudi law, but rather adhere to custom alone.³¹⁹

In fact, promoting women’s equality may actually lead to even better long-term diplomatic relations both with the Kingdom and throughout the broader Middle East. Extremist religious groups are generally the most fervent proponents of gender discrimination and are also the most opposed to having friendly relations with Washington. Tom Lantos suggests that promoting gender equality “will tilt the balance in

³¹⁸ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d at 346.

³¹⁹ *See* discussion *supra* p. 59.

favor of tolerant policies . . . thereby weakening extremist influences in the country. [Moreover] [w]ith Saudi Arabia’s significant religious and economic influence regionally and globally, empowering women in Saudi Arabia will radically increase chances for democratic reforms in other Arab and Muslim societies worldwide.”³²⁰ In other words, promoting the equal treatment of women in the Kingdom would likely create ripple effects that could serve to reduce extremist influences and improve U.S. relations in the region.

Critics might also object to AGDA based on economic grounds. As Milton Friedman’s famous critique of CSR stated, “there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits.”³²¹ We suggest, however, that even adopting a purely profit maximizing approach points in favor promoting women’s equality. In her seminal work, the *Economics of Gender*, Joyce Jacobsen finds that enforcing gender segregation can severely retard economic growth.³²² Specifically, Jacobsen suggests that a few MNCs operating in oppressive societies may enjoy some short-term benefits by enforcing discriminatory practices, however, will sacrifice more sustainable, long-term gains in the process.³²³ The reasoning behind this theory is clear: “women’s inclusion in political and civic life would unleash a wealth of talent that could increase domestic economic activity,

³²⁰ Lantos, *supra* note 113.

³²¹ See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (1962). It is important to note, however, that even neoclassical economists such as Friedman suggest that corporations should only seek to maximize profits within “the rules of the game.” This statement has been interpreted as suggesting that MNCs “must still act fairly and honestly and within the law.” Insofar as gender equality constitutes international law, it is questionable to what degree neoclassicalists would accept the notion that corporations should violate fundamental human rights to maximize profits. ZERK, *supra* note 68, at 14.

³²² JOYCE P. JACOBSEN, *THE ECONOMICS OF GENDER* 301-314 (2d ed. 1998).

³²³ *Id.*

empower competition, reduce unnecessary costs of social segregation, enrich cultural and civic development, and help foster democratic institutions,” all of which promote economic productivity.³²⁴

A final critique against AGDA could be that it does not go far enough in preventing gender discrimination. Such criticisms were often lodged against those corporations that continued operating in South Africa even though abiding by the Sullivan Principles. These voices urged that the only way to bring an end to severe discrimination was through more radical policies such as complete divestment or sanctions. In fact, such arguments suggested that allowing corporations to continue operations in repressive regimes would lend legitimacy to those regimes and lessen pressures for more sweeping reforms.³²⁵

Although sanctions were eventually required against South Africa, the impact of corporations refusing to enforce apartheid “contributed more to the anti-apartheid struggle than activists acknowledged at the time.” By continuing to maintain operations in repressive regimes, but refusing to adopt repressive policies, MNCs can serve a norm generating function that can create substantive effects throughout other social and political fora. Thus, in the words of Sullivan himself, by upholding fundamental human rights while operating within oppressive societies MNCs can become “agents of change.”³²⁶ Moreover, a harsher stance would likely lead to a realization of the above-mentioned critiques such as infringing upon Saudi sovereignty, complicating diplomatic ties and lowering overall economic development. Thus, regulating corporate behavior

³²⁴ Lantos, *supra* note 113.

³²⁵ Rothstein, *supra* note 273.

³²⁶ *Id.*

while still allowing MNCs to operate is the least invasive and confrontational method of engendering critical human rights reforms.

Conclusion

We have found CSR to leave behind significant gaps in global governance and allow for certain human rights abuses to continue unchecked. It is not our position that CSR fails to serve a purpose. First, it gives us an important point of reference for being able to judge corporate activities. In fact, it is only because the firms selected for this study promised to adhere to some standard of behavior that we can accuse them of falling short of their obligations. Furthermore, corporations do act responsibly in many situations. We certainly prefer living in a world where firms protect children, recycle, purchase fair trade coffee, build hospitals, have decent working conditions and engage in the myriad of other causes for which CSR is best known. Notwithstanding these benefits, there are still severe human rights violations occurring in the international arena, which are not being regulated.

We refrain from issuing sweeping policy recommendations and do not advocate for a complete reversion to state-based governance as many activists do. Rather, we suggest only that issues constituting grave human rights violations for which CSR has failed to provide a remedy be regulated by more robust mechanisms such as monitored codes or enforceable legislation. Such remedies are more likely to secure respect for fundamental human rights as opposed to relying solely on an MNC's goodwill or voluntary CSR commitments, which, as we have seen, do not suffice to hold corporate actors accountable. CSR should still continue as a means

for firms to go above and beyond their basic duties. CSR should not, however, desensitize either the public or the state from scrutinizing closely corporate activities that may very well be violating not only a corporation's own CSR codes, but fundamental human rights.