THE FAILURE OF CORPORATE SOCIAL RESPONSIBILITY PROVISIONS WITHIN INTERNATIONAL TRADE AGREEMENTS AND EXPORT CREDIT AGENCIES AS A SOLUTION

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ABSTRACT

Corporate social responsibility encourages corporations to add value beyond profit. The international community has made concerted efforts to include corporate social responsibility within international agreements and, more recently, trade agreements.

This note discusses the ongoing debate on whether corporate social responsibility within trade agreements offsets the "race to the bottom" of environmental and labor standards or raises more trade barriers, or whether perhaps it does both things. This note gives a brief background of three major trade agreements, the North American Free Trade Agreement, the Canada-Peru Free Trade Agreement and the Trans-Pacific Partnership, that attempted to create enforceable and effective environmental and labor provisions. Although there have been attempts at including corporate social responsibility in each of these agreements, such provisions have failed to create effective enforcement.

Lastly, this note posits the use of export credit agencies as a way of adding "teeth" to corporate social responsibility provisions. Before providing essential financing to projects, export credit agencies would have to ensure the proposed project meets corporate social responsibility requirements.

Introduction

There is a continued debate on whether free trade creates economic and political stability or a "race to the bottom" that encourages developing countries to lower economic and labor standards to gain a competitive advantage over other nations.[1] The inclusion of corporate social responsibility provisions within free trade agreements has the power to not only quell the skeptics but, more importantly, to improve labor and environmental standards globally.[2] As the world becomes increasingly interconnected through technology[3] and trade agreements that expand corporate influence,[4] it is important to embrace the goals of transparency, sustainability, and fairness in international agreements. The United States is party to several major international trade agreements[5] that have the power to shape both domestic and foreign economies and societies. Corporate social responsibility provisions could help provide for greater transparency, steps toward stronger environmental protection standards, and safety standards for labor.[6]

The international community has made several attempts at integrating corporate social responsibility into international trade agreements for the past several decades,[7] with varying degrees of success.[8] This note will primarily focus on the environmental component of corporate social responsibility, explain the importance of export credit agencies within

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[1] Tamara L. Slater, Note, *Investor-State Arbitration and Domestic Environmental Protection*, 14 Wash. U. Global Stud. L. Rev. 131 (2015).

[2] *Id.*

[3] Joe W. Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution,* 6 Rutgers J. L. & Pub. Pol'y 334, 335 (2009).

[4] U.N. Environment Programme, *Corporate Social Responsibility and Regional Trade and Investment Agreements* 3, 20 (2011) [hereinafter UNEP].

[5] Madison Condon, *The Integration of Environmental Law into International Investment Treaties and Trade Agreements: Negotiation Process and The Legalization of Commitments,* 33 Va. Envtl. L. J. 102, 107-12 (2015).

[6] UNEP, *supra* note 4, at 24-26.

[7] John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 Am. J. Int'l L. 819, 820-22 (2007).

[8] The international community has attempted multiple times to encourage CSR through the standards set out in the International Organization for Standardization's 26,000 guidelines and the OECD's Principles on Corporate Governance. UNEP, *supra* note 4, at 15-20.

international trade,[9] and set forth that export credit agencies could provide the solution to otherwise ineffective corporate social responsibility provisions within international trade agreements. The North American Free Trade Agreement ("NAFTA"), the Canada-Peru Free Trade Agreement ("CPFTA"), and the Trans-Pacific Partnership ("TPP") will be examined for their attempts at including environmental and labor provisions and for the harmful impact of investor-state dispute resolution on these provisions. All three free trade agreements were chosen for a reason: The NAFTA was the first regional trade agreement to include environmental protection provisions; The CPFTA was one of the first to explicitly include corporate social responsibility provisions; and the TPP is far-reaching and has the potential to impact the environment.[10] The TPP was negotiated by President Obama but will likely not survive a Trump presidency.[11]

Lastly, this note will examine whether environmental and labor protection provisions, by prompting the introduction of new regulatory constraints, work counter to the purpose of trade agreements to lower trade barriers.

PART I. WHAT IS CORPORATE SOCIAL RESPONSIBILITY?

Although a variety of definitions exist for the concept of Corporate Social Responsibility ("CSR"),[12] the broadest definition is a corporate policy "addressing environmental and social, as well as financial concerns – the so-called triple bottom line."[13] The "triple bottom line" concept refers to the idea that companies can generate social welfare by pursuing, in addition to financial gains, environmental and social goals, and thus creating "value in multiple directions."[14]

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[9] Janet Koven Levit, *A Bottom Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 157-58 (2005).

[10] M. ANGELES VILLAREAL & IAN F. FERGUSSON, CONGRESSIONAL RESEARCH SERVICE, THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) (2015), https://www.fas.org/sgp/crs/row/R42965.pdf, at 8; SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 140 (Marie-Claire Cordonier Segger, Markus W. Gehring & Andrew Newcombe, eds. 2011); THE WHITE HOUSE, THE TRANS-PACIFIC PARTNERSHIP (last visited Nov. 11, 2016), https://www.whitehouse.gov/issues/economy/trade (stating that the TPP's "tough, fully-enforceable standards will protect workers' rights and the environment for the first time in history").

[11] David Nakamura & Ylan Q. Mui, *Donald Trump promised to rip up trade deals. TPP is the first casualty*, WASH. POST (Nov. 11, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/11/11/donald-trump-promised-to-rip-up-trade-deals-tpp-is-the-first-casualty/.

[12] Jeff Civens & Mary Mendoza, *Corporate Sustainability and Social Responsibility: A Legal Perspective*, 71 TEX. B. J. 368, 369 (2008).

[13] *Id.*

[14] UNEP, *supra* note 4, at 14 (citing VISSER ET AL., THE A TO Z OF CORPORATE SOCIAL RESPONSIBILITY 466 (2007)).

Traditionally, Europe has treated CSR through the lens of the "triple bottom line" principle, while the U.S. has taken a more individualist conception of CSR.[15] This individualist conception views CSR as "donations to social and artistic causes and other such acts of corporate philanthropy" rather than as a valid form of corporate governance and policy.[16] However, the traditional U.S. interpretation of CSR is evolving to become more like the European triple bottom line principle.[17] This shift towards the triple bottom line approach is due in part to the European Union's leadership and global influence, an increase in the market value for socially responsible companies, legislation such as the Alien Tort Claims Act, and leading U.S. companies, such as General Electric, that have embraced a policy of corporate social responsibility.[18]

When companies include CSR into their corporate governance and policy, they exceed the traditional profit maximization commitment to shareholders by also taking into account stakeholders' desiderata.[19] The term "stakeholders" is a CSR term for those who have an interest in the corporation beyond that of a shareholder.[20] Potential stakeholders in a corporation could be "creditors, employees, customers, local communities and the environment."[21] CSR offers companies an opportunity to provide financial gain to their shareholders while, for example, improving workplace safety, reducing pollution and emissions, and improving workers' quality of life.[22]

PART II. TRADE AGREEMENTS AND CORPORATE SOCIAL RESPONSIBILITY

CSR provisions that include environmental and labor objectives in international trade agreements are not a new phenomenon.[23] The international community has made several attempts to foster CSR by including it in international agreements, and, in particular, trade agreements; however, not all of these attempts have been successful.

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15 Pitts III, *supra* note 3, at 389.

16 *Id.* (quoting ABID ASLAM, BACKGROUNDER: CORPORATE SOCIAL RESPONSIBILITY (2007), http://policydialogue.org/publications/backgrounders/corporate_social_responsibility/en/).

17 Pitts III, *supra* note 3, at 389. According to some authors, the decision by corporations to surpass the traditional commitment to shareholders is inappropriate. *See infra* notes 121-24 and accompanying text.

18 *Id.* at 390.

19 UNEP, *supra* note 4, at 13.

20 Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style,* 29 DEL. J. CORP. L. 649, 651 (2004).

21 *Id.*

22 UNEP, *supra* note 4, at 13.

23 UNEP, *supra* note 4, at 25.

The largest attempt to foster CSR in the international marketplace came in 2000 with the United Nations Global Compact, which promoted labor rights and environmental sustainability, among other CSR values, within multinational corporations.[24] While initially praised, the "norms" that came out of the U.N. Global Compact lacked governmental support because governments tend to protect corporate interest and believe that any increase in regulation would be unappealing to corporations.[25]

The general awareness of the importance of CSR primarily began in the early 1990s with the rise of corporate power and increase in trade liberalization.[26] In response, nongovernmental organizations grew increasingly concerned with poor labor organization and environment degradation, both within the domestic territory and abroad.[27]

Although U.N. agencies have long promoted environmental protection and social responsibility through international agreements, those U.N. agreements[28] are largely non-binding or voluntary in nature.[29] By contrast, when embedded in trade agreements, CSR provisions can provide a legal commitment for the signatory countries to carry out and potentially allow for investor-state dispute resolution.[30] The importance of these provisions within several major trade agreements is discussed in greater detail below.

a. *North American Free Trade Agreement*

In 1992, the U.S., Mexico, and Canada signed NAFTA – a deal designed to "eliminate trade barriers, promote fair competition and increase investment opportunities" between North American countries.[31] NAFTA raised fears among environmentalists and organized labor groups, who believed it would lead to increased pollution and a lack of domestic sovereignty over environmental issues.[32] These concerns partially drove the creation of two NAFTA side agreements, the North American Agreement on Environmental Cooperation ("NAAEC") and North American Agreement on Labor Cooperation ("NAALC"), which

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[24] Ruggie, *supra* note 7, at 819-20.

[25] *Id*. at 821-22.

[26] Pitts III, *supra* note 3*, at* 357.

[27] *Id.*

[28] The U.N. has a demonstrated history of encouraging social responsibility for corporations through the creation and implementation of voluntary mechanisms for encouraging human rights, like the Declaration of Principles Concerning Multinational Enterprises, adopted by the International Labour Organization and the United Nations Global Compact. Ruggie, *supra* note 7, at 819-20.

[29] UNEP, *supra* note 4, at 25.

[30] UNEP, *supra* note 4, at 24 (explaining how, depending on where the language is placed within the agreement, the commitment to CSR carries different legal weight).

[31] Christine W. Lewis & Marcia J. Staff, *Arbitration Under NAFTA Chapter 11: Past, Present, and Future*, 25 HOUS. J. INT'L L. 301, 304 (2003).

[32] Condon, *supra* note 5, at 106.

aimed to protect the environment and labor rights, respectively.[33] NAFTA itself also marked the first trade agreement involving the U.S. to include provisions regarding the protection of the environment.[34] Although NAFTA's environment and labor protection language was innovative, NAFTA never explicitly mentioned CSR.[35]

In an attempt to make the environmental provisions of the NAAEC enforceable, the parties included an independent arbitration system that allowed aggrieved parties to bring claims against breaching countries.[36] This arbitration system could have solidified the effectiveness of the NAAEC by providing a place to rectify violations and enforce domestic environmental laws.[37] Though the investor-state dispute resolution system has never been used to bring an environmental claim against another member, there have certainly been NAAEC violations.[38]

According to the text of the NAAEC, all grievances, if determined to be a legitimate claim, are granted a "consultation" with the allegedly violating party.[39] The NAAEC Council acts as a mediator between the parties and makes recommendations as necessary to help reach a satisfactory resolution for all parties.[40] However, if a resolution cannot be a reached, an arbitral panel is convened to resolve the issue.[41] The arbitral panel is chosen off of a preset list of members who have experience in environmental matters.[42] In an effort to create an impartial panel, each country can select two members for the panel.[43] Following the decision of the panel, the parties create an action plan to address the grievance.[44] Once the parties are given a chance to rectify the violation, the panel determines if the action plan is sufficient.[45] If the panel determines that the violating party has completely failed to complete the agreed upon plan, it

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[33] These two side agreements are NAAEC and NAALC. UNEP, *supra* note 4, at 23.

[34] Condon, *supra* note 5, at 107.

[35] UNEP, *supra* note 4, at 23.

[36] Condon, *supra* note 5, at 109.

[37] Slater, supra note 1, at 143.

[38] Condon, *supra* note 5, at 150.

[39] Aaron Holland, Comment, *The North American Agreement on Environmental Cooperation: The Effect of the North American Free Trade Agreement on The Enforcement of the U.S. Environmental Laws*, 28 TEX. L. REV. 1219, 1238 (1997) (discussing NAFTA's side agreement, violations of environmental laws, and enforcement). *See* North American Agreement on Environmental Cooperation art. 22, Sept. 14, 1993, 32 I.L.M. 1482 [hereinafter NAAEC].

[40] NAAEC, *supra* note 39, at art. 23.

[41] *Id*. at art. 24.

[42] Holland, *supra* note 39. at 1239.

[43] *Id*. at 1240.

[44] *Id*. at 1242.

[45] *Id*.

is within the panel's discretion to impose "monetary assessments."[46] Monetary assessments under the NAAEC are capped at ".007 percent of total trade in goods between the parties" to the agreement.[47]

This dispute resolution system has been used various times by parties alleging lack of enforcement and violations of environmental laws.[48] One such violation claim was made in 1994 and 1995, soon after NAFTA's enactment, when it was alleged that "between 20,000 and 40,000 birds mysteriously died in . . . Guanajuato, a state in central Mexico . . .[,]"[49] a region particularly known for chromium pollution.[50] Yet, while acknowledging extreme pollution, the NAAEC Council alleged these deaths were caused by naturally occurring botulism, creating no liability for Mexico.[51]

Further departures from the NAAEC environmental provisions resulted when, in response to a petition, the Secretariat of the NAAEC found that although NAFTA creates an obligation to "effectively enforce its environmental laws,"[52] this duty only relates to the Executive branch.[53] Restricting the enforcement of environmental law to the executive body removes the 'teeth' from the environmental provisions because the legislative body may at any time suspend or rewrite the environmental legislation.[54] Although NAFTA included some safeguards for the protection of the environment, the NAAEC Secretariat finding has effectively created a loophole by claiming that parties retain the ability to legislate around the previously agreed upon standards. Further, it has disincentivized the creation of firm domestic environmental law because a foreign investor could reject the new legislation as contrary to the previously agreed upon NAAEC standards or as harmful enough to their business so as to warrant bringing a claim against the country.[55]

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[46] *Id.*

[47] *Id.*

[48] Some of these instances include using the dispute resolution mechanism to fight the slashing of the U.S. wildlife budget through the Hutchinson Rider bill and illegal border dumping of toxic waste. *Id.* at 1232.

[49] *See* Report of the Commission for Environmental Cooperation Secretariat to the Council of the Commission Submitted to the Council Pursuant to Art. 13 of the North American Agreement on Environmental Cooperation, *CEC Secretariat Report on the Death of Migratory Birds at the Silva Reservoir* (Oct. 1995).

[50] *Id.* at *8.

[51] Holland, *supra* note 39, at 1232.

[52] Comm'n for Envtl. Cooperation, Determination Pursuant to Article 14(1) of the North American Agreement for Environmental Cooperation (Dec. 14, 1998). *See* Holland, *supra* note 39, at 1234.

[53] Holland, *supra* note 39, at 1235.

[54] *Id.*

[55] Meredith Wilensky, *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership*, 45 ENVTL. L. REP. NEWS & ANALYSIS 10684, 10684 (2015).

b. *Canada-Peru Free Trade Agreement*

The regional free trade agreement entered into between Canada and Peru in August 2009 is one of the strongest examples of the inclusion of CSR within a trade agreement.[56] The CSR provisions, which relate to both environmental and labor rights, are broken down into two separate side agreements.[57] In addition, the preamble specifically references CSR, making it clear that CSR is an overall goal.[58] Further, the agreement should be read in light of its inclusion of CSR in several chapters and in the preamble of the agreement.[59]

The side agreement to the CPFTA, known as the Agreement on the Environment (the "Environment Agreement"), seeks to enforce both Peruvian and Canadian domestic environment laws and, uniquely, to protect Peruvian "biological diversity in a way that respects the interests of Peru's indigenous peoples."[60] The other side agreement, the Agreement on Labour Cooperation (the "Labor Agreement"), is the first of its kind to include protections for workers of both state parties, mandating "health and safety protections, elimination of forced or compulsory labour" and a duty to offer "the same legal protections for migrant workers" as those workplace conditions provided to nationals.[61]

Since the Environment Agreement is a side agreement to the main CPFTA, the Environment Agreement has a separate dispute resolution system specifically meant for environmental violations.[62] Much like the NAAEC, the Environment Agreement dispute resolution system only provides for "consultations."[63] This measure is clearly less forceful than the formal panel and final report that the CPFTA dispute resolution system produces.[64] A more formal process, similar to a court hearing, results if either party has a grievance related to a general provision of the

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[56] The text of the Canada-Peru Free Trade Agreement and its side agreements is widely available. *Canada-Peru Free Trade Agreement*, GLOBAL AFFAIRS CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/index.aspx?lang=eng. *See* UNEP, *supra* note 4, at 25.

[57] Greg Kanargelidis, Elysia Van Zeyl & Maha Hussain, *Canada Enter New Trade Agreements with South America*, 14(5) INT'L TRADE L. REG. 102, 103 (2008).

[58] UNEP, *supra* note 4, at 25.

[59] *Id.*

[60] Kanargelidis, Van Zeyl & Hussain, *supra* note 57, at 103.

[61] *Id.*

[62] Chang-fa Lo, *Environmental Protection through FTAs: Paradigm Shifting from Multilateral to Multi-Bilateral Approach*, 4 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 309, 324 (2009).

[63] *Agreement on the Environment between Canada and the Republic of Peru*, art. 12, ENV'T AND CLIMATE CHANGE CAN., https://www.ec.gc.ca/caraib-carib/default.asp?lang=En&n=8F165B2F-1.

[64] Canada-Peru Free Trade Agreement, ch. 21, GLOBAL AFFAIRS CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-21.aspx?lang=eng.

CPFTA.[65] However, the formal panel specifically *does not* apply to violations of the environment or labor provisions in the Environment Agreement or Labor Agreement.[66] In such cases, the panel hears the grievance and closes the proceedings with a final report that is to be implemented by the parties.[67]

Although the explicit inclusion of CSR in the CPFTA is groundbreaking, the language does not mandate CSR but merely "*encourages* enterprises operating within their territory or subject to their jurisdiction, to respect internationally recognized corporate social responsibility. . . ."[68] Further, in an effort to reduce the "race to the bottom," the CPFTA includes language stating that the parties "*should* not weaken or eliminate domestic environmental, health and safety laws in order to encourage foreign investment."[69] To make matters worse, these already weak principles are not subject to the dispute resolution and arbitration system in place for the rest of the CPFTA.[70] Therefore, should a party violate these principles, the other party has no effective way to bring its grievances or effect change, other than through "consultation."[71]

C. *Trans-Pacific Partnership*

The TPP is a multilateral trade agreement that originally began in the early 2000s as a small Pacific Basin-state trade agreement.[72] It has since grown in member size to include Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, U.S., and Vietnam, representing roughly 40 percent of the world's trade.[73] Although there are currently twelve member states of the TPP, the trade agreement will remain open for other states to join the agreement in the future.[74]

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[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] Kanargelidis, Van Zeyl & Hussain, *supra* note 57 (emphasis added) (quoting Canada-Peru Free Trade Agreement, *supra* note 64, at Preamble).

[69] Linda C. Reif, *Canada and Foreign Direct Investment in Latin American and the Caribbean: Evolution of an International Investment Agreement Framework*, 13 INT'L TRADE & BUS. L. REV. 86, 115 (2010).

[70] *Id.*

[71] *Id.* at 115-16.

[72] Larry Catá Backer, Article, *The Trans-Pacific Partnership: Japan, China, The U.S. and the Emerging Shape of a New World Trade Regulatory Order*, 13 WASH. U. GLOBAL STUD. L. REV. 49, 53 (2014) (explaining the history and evolution of the TPP negotiation rounds).

[73] Jackie Calmes, *Trans-Pacific Partnership Text Released Waving Green Flag for Debate*, N.Y. TIMES (Nov. 5, 2015), http://www.nytimes.com/2015/11/06/business/international/trans-pacific-trade-deal-tpp-vietnam-labor-rights.html?_r=0 [http://nyti.ms/1PoJ1l0].

[74] Wilensky, *supra* note 55, at 10683.

The primary objectives of the trade agreement are "increasing markets for exports, providing a basis for broad Asia-Pacific regional economic integration, and increasing the competitiveness of the participating states."[75] In addition to the aforementioned standard principles of a free trade agreement, the TPP also includes provisions concerning the environment and labor standards.[76] Further, the TPP was heralded by the Obama Administration as a way to combat the growing economic and regional power of China.[77] The TPP would create a trading block of nations in order to help foster trade between these Pacific Basin states and would specifically exclude China from the benefits of a free trade area.[78] Since the TPP will lower trade barriers between roughly 40 percent of the world's trade, the U.S., if it ultimately ratifies the TPP, will theoretically be more competitive and able to counter China's powerful trading power within the Pacific area.[79]

Although the TPP was heralded as having strong economic and labor commitments,[80] it has the same general structure and voluntary commitment to CSR as did NAFTA and the CPFTA. TPP member states have nothing stopping them from breaching these commitments. Similarly, Chapter 20 of the TPP is devoted to environmental protection and wildlife conservation,[81] but its language largely mirrors NAFTA's environment chapter, which requires each party to "effectively enforce its environmental laws."[82] As under NAFTA, this language has not been interpreted to limit the legislature from changing or weakening domestic environmental law, but rather it has been interpreted to be restricted solely to the executive.[83] Therefore, it is the TPP, like NAFTA, will likely provide little genuine environmental protection.

Following the release of thirty chapters from the secretive TPP text, many prominent politicians,[84] Fortune 500 companies,[85] and environmen-

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[75] Backer, *supra* note 72, at 54. (citing OFFICE OF THE U.S. TRADE REP., THE UNITED STATES IN THE TRANS-PACIFIC PARTNERSHIP (2011)).

[76] Calmes, *supra* note 73.

[77] *Id.* (describing how Obama envisions the TPP as a way for the U.S. to continue writing the "rules" and as a vehicle for preventing China from doing so).

[78] *Id.*

[79] *Id*.

[80] Jessica Glenza, *TPP Deal: US and 11 Other Countries Reach Landmark Pacific Trade Pact,* THE GUARDIAN (Oct. 5, 2015), http://www.theguardian.com/business/2015/oct/05/trans-pacific-partnership-deal-reached-pacific-countries-international-trade.

[81] OFFICE OF THE U.S. TRADE REP., TPP FULL TEXT, ch. 20 (2016) https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

[82] *Id*. at art. 20.3.4. *See* NAAEC, *supra* note 39, at art. 5.1.

[83] Holland, *supra* note 39, at 1235.

[84] Senator Elizabeth Warren has warned that the TPP threatens to give more power to multinational corporations and threatens U.S. sovereignty. Elizabeth Warren, Opinion, *The Trans-Pacific Partnership Clause Everyone Should Oppose*,

tal activists[86] have spoken out against the proposed trade agreement as not only a threat to the U.S. economy, but also weak on labor and environmental standards.[87] TPP opponents allege that tariffs are already low between the TPP member states, and that the TPP's main purpose is to adapt regulations to further favor big multinational corporations.[88] This charge of favoritism towards multinational corporations is further supported by the lack of transparency of the negotiations and by the fact that corporations were allowed to take part in negotiations while U.S. Congress was kept in the dark.[89]

Similar to NAFTA and the CPFTA, Chapter 28 of the TPP is dedicated to investor-state dispute resolution between the member states and investors seeking to resolve their grievances.[90] Investor-state dispute resolution allows for investors to bring claims against a host state alleging violations of a TPP provision through ad hoc tribunals.[91] However, "any damages awarded are paid out of the liable government's national treasury,"[92] potentially discouraging governments from creating and enforcing environmental and public health regulations.[93] Thus, environmental and labor standards could actually be harmed through the inclusion of an investor-state dispute resolution system.

An example of how investor-state dispute resolution systems could harm environmental and labor standards occurred recently in Australia. Australia passed the Tobacco Plain Packaging Act of 2011, which required cigarettes sold in Australia to be plainly packaged without identifying brands or appealing presentation.[94] The purpose of this piece of legislation was to "reduce the appeal of tobacco to consumers" and to "reduce the ability of the retail packaging to mislead consumers."[95] Soon after the bill's announcement, a tobacco company, Phillip Morris, under

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WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html.

[85] The Ford Motor Company, a Fortune 500 company, does not support the TPP. Calmes, *supra* note 73.

[86] The Sierra Club has joined other environmental groups in rejecting the trade agreement. *Id.*

[87] *Id.*

[88] Natalie Sears, *Trans-Pacific Partnership – Is it Really NAFTA on Steroids?,* 21 L. & BUS. REV. AM. 107, 110 (2015).

[89] Alleen Brown, *You Can't Read the TPP, but These Huge Corporations Can*, THE INTERCEPT (May 12, 2015), https://theintercept.com/2015/05/12/cant-read-tpp-heres-huge-corporations-can/.

[90] TPP Full Text, *supra* note 81.

[91] Wilensky, *supra* note 55, at 10683.

[92] *Id.*

[93] *Id.* at 10684.

[94] *Tobacco Plain Packaging Act 2011* (Cth) (Austl.).

[95] *Id.* at s 3.

Australia's Investment Promotion and Protection Agreement with Hong Kong,[96] filed a Notice of Arbitration against Australia for potentially billions of dollars.[97] As a result of the pending legal matter, Australia and other countries were forced to postpone their tobacco reform.[98] Australia's legal battle with Phillip Morris has also caused other states, such as neighboring New Zealand, to delay their own implementation of plain package legislation.[99] Therefore, instead of being a potential solution to the problem of unenforceability of environmental provisions, investor-state dispute resolution can have a harmful effect on the environment by dissuading countries from enacting new legislation aimed at environmental sustainability and public health concerns environmental measures.

Citizens of potential member states should consider the potential ramifications of investor-state dispute resolution, such as loss of sovereignty over domestic issues and potential state liability to multinational corporations. Australia, due to its own experience, likely finds the investor-state dispute resolutions to be potentially harmful. As a result, Australia has refused to incorporate investor-state dispute resolutions into any of its trade agreements since it believes such provisions "would constrain the ability of the Australian governments to make laws on social, environmental and economic matters. . . ."[100]

U.S. Senator Elizabeth Warren has also expressed her concern over the inclusion of investor-state dispute resolution provisions in the TPP.[101] She has spoken out against such provisions arguing that they could lead to "further favor of big multinational corporations" in the U.S. and could potentially "undermine US [sic] sovereignty."[102] The Australia-Phillip Morris legal battle evidences Senator Warren's concern that investor-state dispute resolution provides an avenue for multinational corporations with war chests, like Phillip Morris, to encroach on state sovereignty through stalling publicly beneficial legislation that the corporation believes to be damaging to its industry. Further, investor-state dispute

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[96] East Asia Forum, *Australia's Plain Packaging Laws Pass ISDS Round Two*, ECONOMY WATCH (Jan. 15, 2016), http://www.economywatch.com/features/Australias-Plain-Packaging-Laws-Pass-ISDS-Round-Two0115.html.

[97] Wilenskey, *supra* note 55, at 10685.

[98] *Id.* (mentioning that the Philip Morris litigation led Australia, Canada, and New Zealand to "delay implementation of . . . plain packaging laws until the dispute [was] . . . resolved").

[99] Tony Corbin, *Australia's Plain Pack 'Concerns' Slows New Zealand Progress*, PACKAGING NEWS (Feb. 16, 2016), http://www.packagingnews.co.uk/news/markets/tobacco/australia-plain-pack-concerns-slows-new-zealand-progress-16-02-2016.

[100] Wilensky, *supra* note 55, at 10865 (quoting Dept. of Foreign Affairs and Trade, Austl. Gov't, Gillard Government, Trade Policy Statement: Trading Our Way to More Jobs and Prosperity 14 (Apr. 12, 2011), http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf#investor-state).

[101] Warren, *supra* note 84.

[102] *Id.*

resolution will have an even greater impact on developing nations as they grow and seek to create new environmental and public health regulation. Arbitral proceedings are particularly expensive, each averaging nearly eight million U.S. dollars.[103] Developing countries cannot financially sustain a challenge brought by a company like Phillip Morris that "has an international annual sales total of $66 billion, which is more than 139 countries' GDP," and are therefore deterred from even attempting to create new regulation.[104] The ability of well-funded multinational corporations to outspend developing countries on legal battles presents the possibility for foreign corporations to ensure, at the expense of the public, that regulation of its industry never evolves and thus, that the developing country never develops.[105] Multinational corporations generally have the goal of maximizing profits, one of the easiest methods of which is to keep the costs of the supply chain low.[106] Therefore, corporations have a special interest in ensuring that developing countries, currently offering cheap materials and labor, do not increase regulation resulting in higher cost.

While investor-state dispute resolution provisions have the potential to allow foreign investors to challenge proposed environmental regulation, the TPP has included a different kind of dispute resolution in Chapter 20 that allows member states to bring claims against another member state for failing to "effectively enforce its environmental laws."[107] The allowance for state-state consultations and dispute settlement for environmental violations of domestic law is encouraging. However, it is unknown whether effective enforcement language will be interpreted in a manner similar to NAFTA's NAAEC, restricting the application to executive action only.[108]

As explored above, the international community has made several attempts at including CSR through environment and labor provisions. However, these attempts have failed to produce effective environmental and labor protection. In addition to the weak language and lack of enforceability, investor-state dispute resolution can further deter the creation and implementation of progressive environmental regulation

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[103] Brook K. Baker & Katrina Geddes, *Corporate Power Unbound: Investor-State Arbitration of IP Monopolies on Medicines*, 23 J. INTELL. PROP. L. 1, 17 (2015).

[104] Tsai-Yu Lin, *Preventing Tobacco Companies' Interference with Tobacco Control through Investor State Dispute Settlement under the TPP*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 565, 575 (2013).

[105] *See* Baker & Geddes, *supra* note 103.

[106] Debra Cohen Maryanov, Note& Comment, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain,* 14 LEWIS & CLARK L. REV. 397 (2010). *See* Milton Friedman, *The Social Responsibility of Business is to Increase Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine).

[107] TPP Final Text, *supra* note 81, at ch. 20, art. 20.3.4.

[108] *See supra* Part II.A.

because states are wary of entering lengthy and expensive legal battles with multinational corporations. The threat of litigation creates disincentives for developing countries to advance their environmental and labor regulations to match developed countries' regulations.

As a potential solution to the lack of effective enforcement, this note posits the use of export credit agencies as a means of providing 'teeth' to vague international commitments through domestic regulation in Part IV.

PART III. DO ENVIRONMENTAL & SOCIETAL PROVISIONS BELONG IN TRADE?

The primary purpose of trade agreements is to reduce and lower barriers to trade.[109] However, there has been much debate on whether the incorporation of environmental and societal provisions within trade agreements runs counter to this goal by raising more barriers. Some believe that the increased integration of trade provides an inlet for developed countries to promote and potentially enforce higher environmental and societal standards than previously existed in the host state.[110] Most opponents of the inclusion of human rights or societal and environmental provisions in trade agreements believe that these provisions do not belong in trade agreements because they add trade barriers.[111] At the core of this debate is whether trading partners, typically corporations, should be concerned with matters beyond maximizing profit or whether environmental and labor standards should be incorporated through CSR provisions.

At the broader level, a corporation's larger global impact comes through international trade. Professor Dr. Ernst-Ulrich Petersmann advocates for the inclusion of human rights, environmental, and labor provisions within both the World Trade Organization ("WTO") and trade agreements as a means of improving standards and using the agreement (and institutions) to create enforceable benchmarks.[112] Petersmann urges economists to expand their view of economic development beyond "purely quantitative terms" and to recognize the capacity trade agreements have for creating a beneficial change within a country, not only

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[109] Hon. Gregory W. Carman, *Resolution of Trade Disputes by Chapter Nineteen Panels: Long-Term Solution or Interim Procedure of Dubious Constitutionality*, 27 STETSON L. REV. 643, 643 (1997).

[110] Former President Obama argues that the TPP agreement provides an opportunity for the U.S. to create the 'rule book' in Asia including in terms of environment and labor standards in the region. *See* Calmes, *supra* note 73.

[111] James Thuo Gathii, *Construing Intellectual Property Rights and Competition Policy Consistently With Facilitating Access to Affordable Aids Drugs to Low-End Consumers*, 53 FLA. L. REV. 727, 745-46 (2001).

[112] Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621, 631 (2002).

economically but socially as well.[113] Petersmann recognizes many economists are concerned that including environmental and social provisions will create the possibility for protectionist measures.[114] However he believes social measures and trade agreements can be mutually beneficial.[115] The inclusion of environmental and social provisions will increase the stability of the country and foster foreign investment and trade. Further, if society is not provided with assurances of their rights, a society becomes open to "welfare-reducing private and governmental restrictions on competition."[116] Corporations' failure to adhere to CSR, especially environmental, can later create unforeseen effects. An example of this phenomenon occurs when agricultural businesses use excessive amounts of freshwater, further aggravating water scarcity.[117] Since the agricultural industry is dependent on freshwater, overusing freshwater is in fact damaging to the industry itself as well as the environment.[118]

Although Petersmann acknowledges there is *opinio juris* in international law for certain recognized environmental and social rights, he also believes there is a need to create concrete rights from which states cannot "contract out" of in trade agreements.[119] Petersmann believes the best opportunity to influence other states to create concrete environmental and social rights is through the incorporation of CSR into the WTO and, more specifically, into trade agreements.[120]

Professor Philip Alston has been an opponent of Petersmann's assertion that human rights could be solidified through incorporation of environmental and labor rights into trade agreements and the WTO.[121] Alston argues that there is only *opinio juris* for some rights, not all environmental and societal rights.[122] However Petersmann never addresses which rights he is specifically referring to and many of the rights, especially environmental and labor rights, have failed to reach the status of an international 'norm.'[123]

Beyond the potential for countries to create protected economies, the potentially larger issue remains as to whether restrictions should be placed on developing country parties' use of their environment and labor by more developed countries. "Britain, the USA, Canada, Germany and

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[113] *Id.* at 630.

[114] *Id.*

[115] *Id.* at 630-31.

[116] *Id.* at 632.

[117] Danielle Wolfson, *Come Hell or No Water: The Need to Reform the Farm Bill's Water Conservation Subsidies*, 45 TEX. ENVTL L.J. 245, 248 (2015).

[118] Petersmann, *supra* note 112, at 632.

[119] *Id.* at 634.

[120] *Id.*

[121] Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 815-16 (2002).

[122] *Id.* at 829.

[123] *Id.*

Japan after World War II, and the East Asian Miracle economies . . . all relied upon a mixture of protection, subsidies and regulation . . .” in the creation of their own economies.[124] Thus, developing countries believe it is hypocritical for developed countries to now impose increased regulation.[125] If developing countries with less bargaining power do not want these environmental and societal regulations, developed countries could try to impose their concepts of environmental protection, resulting in what could be construed as cultural colonialism.

There have been many critics of corporations’ adoption of CSR policies. One of the most influential has been Professor Milton Friedman, who articulated that the only ‘social responsibility’ a corporation has is to maximize profits on behalf of its investors.[126] Friedman contends that environmental and, more specifically, labor restrictions on companies affect private competitive enterprise and interfere with corporate will.[127] Since corporate stockholders’ will, in theory, is ignored, environmental and social provisions in fact create a less free society.[128] Friedman is a proponent of maximizing profit and allowing for the profit to trickle down to people who can make their own decisions on environmental and societal matters, rather than creating a system of requirements and enforcement.[129]

At the core of the issue is whether corporations have any responsibility to society in the form of environmental protections or labor rights. Proponents of CSR, like Whole Foods founder John Mackey, believe that corporations have an additional duty to stakeholders of the company, in the form of the community and the environment.[130] The modern corporation is aware that conducting their business in a socially responsible manner can actually be beneficial to the business as a whole through the creation of positive press and, further, can create value for all stakeholders, including investors.[131] Mackey acknowledges the necessity of creating high profits to complete his business objectives, but he rejects Friedman’s

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[124] ANTONIA ELIASON ET AL., THE REGULATION OF INTERNATIONAL TRADE 623 (4th ed. 2013).

[125] *Id.*

[126] Friedman, *The Social Responsibility of Business is to Increase its Profits*, *supra* note 106.

[127] *Id*.

[128] Milton Friedman, *Rethinking the Social Responsibility of Business: Making Philanthropy Out of Obscenity*, REASON (Oct. 2005), http://reason.com/archives/2005/10/01/rethinking-the-social-responsi, at *2.

[129] Friedman, *supra* note 106.

[130] John Mackey, *Rethinking the Social Responsibility of Business: Putting Customers Ahead of Investors*, REASON (Oct. 2005), http://reason.com/archives/2005/10/01/rethinking-the-social-responsi=, at *1.

[131] *Id*. at 1, 4.

assertion that profit maximization is the sole purpose of business.[132] Beyond creating value in a corporation's own community, Mackey finds that, "if we are truly interested in spreading capitalism throughout the world, . . . we need to do a better job of marketing it."[133] Conducting responsible capitalism not only at home but abroad will increase a foreign country's willingness to cooperate with a state that creates sustainable trade and enforces it through free trade agreements.[134]

Although the topic is highly contested, adopting CSR as a form of corporate governance has the potential to offset historically damaging behavior. One of the strongest arguments is posited by John Mackey: conducting responsible capitalism allows for countries to lead by example and eventually create an international "norm" of conducting business both domestically and internationally in a sustainable manner.[135] Many developing countries do not have strong labor or environmental standards out of fear that producers will not want to conduct business in a highly regulated state.[136] However, the increase in sustainable trade agreements will evidence that producers and, in turn, consumers are beginning to place value in both culturally and environmentally sustainable practices abroad. The second most persuasive argument is that social and environmental provisions within trade agreements provide developed countries the opportunity to influence foreign states' behavior by leveraging favorable trade agreements in exchange for elevating environmental standards.[137]

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[132] John Mackey, *Rethinking the Social Responsibility of Business: Profit is the Means, Not End*, REASON (Oct. 2005), http://reason.com/archives/2005/10/01/rethinking-the-social-responsi, at *3-4.

[133] *Id.*

[134] *Id.*

[135] *See generally* Justin Fox, *The HBR Interview: "What Is It That Only I Can Do?"*, HARV. BUS. REV., Jan.-Feb. 2011, https://hbr.org/2011/01/the-hbr-interview-what-is-it-that-only-i-can-do (discussing "conscious capitalism").

[136] Once countries invest in a particular area, other states, in order to attract such foreign investment, respond by lowering their regulatory standards, thus creating a "race to the bottom." *See, e.g.*, C.W., *Racing to the bottom*, THE ECONOMIST (Nov. 27, 2013), http://www.economist.com/blogs/freeexchange/2013/11/labour-standards.

[137] *See, e.g.*, EUR. COMM'N, TRADE (last visited Nov. 12, 2016), http://ec.europa.eu/trade/policy/policy-making/sustainable-development/ (explaining how "[t]rade policies and agreements can have wide-ranging effects on the economy . . . labour standards . . . and the environment . . . [and that] the EU wants to ensure that its trade actions are supportive of sustainable development within the EU . . . and globally").

PART IV. EXPORT CREDIT AGENCIES AS A SOURCE OF DOMESTIC "TEETH"

A. *What are Export Credit Agencies?*

Export credit agencies have existed since the early twentieth century as a way to bolster the export and import industries and foster trade.[138] Export credit agencies are official government-backed agencies with the goal of supporting their nationals' sale or purchase of products or services abroad.[139] Although, as government agencies, export credit agencies must only abide by domestic law, they generally choose to comply with the larger WTO and the Organisation for Economic Co-operation and Development's ("OECD") framework of rules.[140] Export credit agencies usually provide export credit and commercial risk insurance to the exporter or importer.[141] The number of export credit agencies has grown over the last century, creating more competition for the export/import business.[142] While there are other export credit agencies, the OECD currently only recognizes thirty-one countries with official export credit agencies, the majority of which are Western developed states.[143]

For example, when a U.S. company is attempting to sell an expensive piece of merchandise or technology to a foreign company, the U.S. company is usually in direct competition with other states' companies' merchandise or technology.[144] The potential buyer will likely be unwilling or unable to purchase the merchandise without credit, thereby requiring the buyer to weigh the U.S. merchandise and financing package against other competitor states' merchandise and financing packages. To meet the foreign company's need for credit, the U.S. company could extend credit to the foreign company itself, but this option would require the U.S. company to carry the liability on its balance sheet, reduce its own liquidity, and carry the risk of the foreign company's default on the loan.[145] Alternatively, to create the best possible financing package, the U.S. company could approach the U.S. export credit agency, Export-Import Bank ("Ex-

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[138] Rodney Short, Essay, *Export Credit Agencies, Project Finance, and Commercial Risk: Whose Risk Is It, Anyway?*, 24 FORDHAM INT'L L. J. 1371, 1371-72 (2001).

[139] Janet Koven Levit, *The Dynamics of Int'l Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 HARV. INT'L L. J. 65, 66 (2004).

[140] Short, *supra* note 138

[141] *Id.*

[142] *Id.* at 132-33.

[143] Countries using export credit agencies include Australia, Denmark, Germany, Japan, New Zealand, Portugal, Sweden, and the United Kingdom among others countries. Org. for Econ. Co-Operation and Dev., Official Export Credit Agencies (2015), http://www.oecd.org/trade/exportcredits/eca.htm [hereinafter OECD].

[144] *See* Levit, *supra* note 139, at 69.

[145] Levit, *supra* note 9, at 132.

Im Bank"), to support the transaction through the extension of credit.[146] Without export credit agencies, export/importers are left with few, unattractive options for credit.[147]

The U.S. export credit agency, the Ex-Im Bank, was created in 1934[148] through legislation and is evaluated every few years.[149] Before issuing the credit or insurance on the transaction, the export credit agency, like any other commercial bank, must evaluate the loan or guarantee.[150] The export credit agency only supports the transaction if there is a "reasonable assurance of repayment."[151] Since these agencies provide a lifeline to many transactions by reducing a company's risk and keeping companies competitive internationally, in an effort to secure funding, companies will try to be compliant with the export credit agencies' standards.

B. *Export Credit Agencies as a Solution*

A potential solution to the otherwise ineffective environmental and labor provisions previously included in international trade agreements is to encourage countries to require their respective export credit agencies to evaluate a company's CSR commitment before the issuance of the credit or insurance. Many developed countries have quasi-governmental agencies that issue credit to exporting or importing companies to help facilitate international trade.[152] These agencies keep companies liquid by reducing the companies' need to grant credit to foreign purchasers.[153] Given international business' reliance on credit to facilitate transactions, requiring export credit agencies to evaluate the environmental and societal impact of a transaction before issuing the credit could prove to be an effective solution. Further, export credit agencies are in the best position to monitor a potential borrower's conduct and withhold finance unless the conduct is sustainable.

Canada's export credit agency, Export Development Canada ("EDC"), is a leader in evaluating corporate social responsibility in the issuance of credit. EDC, formerly the Export Development Corporation, operates under the federal Canadian Crown and has been assessing environmental and societal impact since 1999 through the implementation of the Envi-

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146 Levit, *supra* note 139, at 70.

147 *Id*.

148 *The Export-Import Bank of the United States – History and Structure*, 3 L. INT'L TRADE § 79:2 (2016).

149 12 U.S.C.A. § 635(a)(1) (2012).

150 Levit, *supra* note 139, at 73

151 *Id*. (quoting 12 U.S.C.A. § 635(b)(1)(B)).

152 Levit, *supra* note 9, at 148 n.86 (citing Harvard Business School, Export Credit Agencies, http://www.people.hbs.edu/besty/projfinportal/ecas.htm (last visited Nov. 12, 2016)).

153 *Id.* at 132.

ronmental Review Framework.[154] EDC has since evolved to become increasingly concerned with the environmental and societal impact that its support can have abroad.[155]

Although EDC is a CSR leader today, in the past it was involved in several transactions that led to environmental and health crises.[156] In 1982, EDC supported the Ok Tedi Mine in Papua New Guinea through the issuance of 88 million dollars in export credits for the construction costs of the mine.[157] Two years later, the dam holding back the toxic water byproduct produced through the mining was destroyed.[158] However, the mine continued to function without a vessel to hold the toxic waste resulting in the direct dumping of toxic waste into the Fly and Ok Tedi Rivers.[159] After a series of environmentally hazardous ventures, mainly related to providing funding to foreign mining,[160] EDC has explicitly embraced CSR through the creation of procedures and rules for evaluating the environmental impact of supporting a transaction.[161]

The first step towards environmentally friendly practices came in June 2005 from the Parliamentary Subcommittee on Human Rights and International Development, which recommended that Canada work towards minimizing adverse environmental effects on local communities, especially in regards to Canadian mining activities abroad.[162] Initially, the Canadian government was resistant to making CSR a condition to receiving government support until CSR had been further researched and incorporated by other international bodies.[163] Today, EDC holds CSR to be a necessary component in carrying out its federal mandate as an agency of the Canadian Crown. All credit, insurance, and loan applicants are assessed for several factors: "industry sector being supported, the countries in which the borrower operates, the borrower's environmental and social track record (including compliance. . .)[,] and the borrower's

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154 Sara L. Seck, *Strengthening Environmental Assessment of Canadian Supported Mining Ventures in Developing Countries*, 11 J. ENVTL. L. & PRAC. 1, 4 (2001).

155 *Id.*

156 EDC was responsible for a series of environmentally degrading incidents involving EDC supported ventures, such as the toxic mine run off in Guyana, which destroyed local fishing, and the dumping of sodium cyanide that resulted from the lack of safety procedures. *Id.* at 8.

157 *Id.*

158 *Id.* at 9.

159 *Id.*

160 EDC has a history of providing finances to environmentally dangerous foreign mining projects, such as to Kumtor Gold Co. that accidentally dumped poison into a river and to the Lihir goldmine, which dumped waste tailings directly into the ocean. *Id.*

161 *Id.* at 4.

162 Sara L. Seck, *Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights*, 49 CAN. Y.B. INT'L L. 51, 51 (2011).

163 *Id.* at 56.

corporate capacity to manage environmental, social and human rights risks of its operations. . . ."[164] Further, EDC is committed to following the OECD's Revised Council Recommendation on Common Approaches on Environment and Officially Supported Export Credits ("OECD Common Approaches"), the Equator Principles, and Canada's own domestic requirements stemming from the Environmental Social Review Directive.[165]

The most widely accepted environmental and social protection framework is the OECD Common Approaches, created in 2003 as a method to evaluate the environmental and societal impact an export credit sponsored project can have in the community.[166] While all thirty-one OECD countries with export credit agencies, including Austria, France, Greece, Korea, Norway, and Switzerland, adopt OECD Common Approaches, the standards are largely 'soft law.'[167] The OECD Common Approaches require countries to "*encourage* the prevention and mitigation of adverse environmental and societal impacts" and "*encourage* protection and respect for human rights."[168] The OECD Common Approaches' weak language, coupled with the fact that compliance violations are left to the export credit agency to handle at their own discretion, creates a weak regulatory framework for export credit agencies to follow.[169]

Unlike the wide support that the OECD receives, as of 2015, only five export credit agencies have adopted the Equator Principles.[170] The Equator Principles were developed in 2003 as a means of monitoring the environmental and societal impact of supported international projects and are revised periodically.[171] Based on the standards set out in the Equator

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[164] Exp. Dev. Can., 2014 CSR Report 3, 22 (2014), http://www1.edc.ca/publications/2015/2014csr/en/15.shtml.

[165] *About Us*, Exp. Dev. Can. (last visited Nov. 11, 2016),http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Environment/Pages/default.aspx.

[166] ECA-Watch, Common Approaches, http://www.eca-watch.org/issues/common-approaches.

[167] OECD, *supra* note 143.

[168] *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence*, OECD 1, 6 (June 28, 2012) http://www.oecd.org/tad/xcred/the2012commonapproaches.htm (emphasis added).

[169] *Id*. at 11-12.

[170] Canada, Australia, Denmark, the U.S., and Norway have all adopted the Equator Principles. *Adoption News*, Equator Principles http://www.equator-principles.com/index.php/all-adoption?start=60.

[171] Joshua A. Lance, *Equator Principles III: A Hard Look at Soft Law*, 17 N.C. Banking Inst. 175, 175 (2013).

Principles, the export credit agency makes the determination of whether to financially support a proposed transaction.[172]

The Equator Principles are comprised of ten Principles that must be met in order to receive funding.[173] Principle 1 requires an institution, here the export credit agency, to sort the proposed transaction into three categories based on its potential environmental and social impact.[174] There are three potential categories a project can be assigned: Category A is the most serious with significant and irreversible damage not limited to the site; Category B is for limited and generally site-specific harm that could be predominately reversed;[175] and Category C is for minimal or no environmental or social harm.[176] A project's categorization has a significant impact on whether or not it will receive financing and on what type of environmental and societal restrictions could be placed on the proposal. Principle 2 requires Category A and B applicants to address the institution's concerns over adverse effects, to propose possible ways to mitigate or offset the harmful impact, and, where necessary, to perform a human rights assessment.[177]

Principle 3 evaluates the applicant's compliance with either host country environmental laws or with the International Finance Corporation's standards.[178] High Income OECD countries are held to their local environmental standards, but, critically, all other non-OECD projects are held to the potentially higher international standards.[179] The higher standards imposed on projects carried out in a non-OECD country could help to encourage developing countries to raise their environmental standards. Further, the adoption of higher standards demonstrates to these developing countries that stricter regulations on environment and labor will not reduce foreign investment.

Principle 4 requires projects in Category A and B to create Environmental and Social Management to address concerns and implement environmental standards.[180] The benefit of Principle Four is that it creates a team at the project site whose focus is on environmental and societal impact. Principle 5 requires Category A and B projects to engage the local community that may be impacted in a discussion about the pro-

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[172] Zhiyun Liu & Luying Zheng, *Equator Principles as "Norms of Self-Regulation": General Principles and Legitimacy Source*, 8 FRONTIERS L. CHINA 140, 141 (2013).

[173] *The Equator Principles III* 1, 4, EQUATOR PRINCIPLES (2013), http://www.equator-principles.com/index.php/equator-principles-3/38-about/about/195.

[174] *Id*. at 5.

[175] *Id*.

[176] *Id.*

[177] *Id*.

[178] *Id.* at 6.

[179] Douglas Sarro, *Do Lenders Make Effective Regulators? An Assessment of the Equator principles on Project Finance*, 13 GER. L. J. 1522, 1529 (2012).

[180] EQUATOR PRINCIPLES, *supra* note 173, at 7.

ject.[181] Principle 6 establishes a system for filing grievances for all Category A and some Category B projects, and this component allows for the local community to be engaged in the project.[182] Principles 7 and 9 require an independent consultant to evaluate the assessment and an independent environmental consultant to be continually employed, respectively.[183] Under Principle 8, Category A and B projects must "covenant in the finance documents to comply with all relevant host country environmental" regulation, a principle that would allow for the export credit agency to enforce the environmental assessment even after the credit has been provided.[184] Finally, in an effort to retain transparency even after funding has been received, Principle 10 compels financed projects to remain transparent by making available to the public both emissions reports and its environmental assessment.[185]

Notwithstanding their voluntary nature, the Equator Principles fill the vacuum by providing a level of environmental responsibility even in countries with minimal to no environmental standards.[186] The Equator Principles have the potential to become legitimate international "norms" and universally accepted as common values and standards.[187] However, more export credit agencies need to adopt the Equator Principles to demonstrate their commitment to CSR through limiting environmental degradation and social harm in their transactions.

The final component of EDC's CSR analysis is the Environmental and Social Review Directive, a Canadian domestic policy. This Review Directive requires the EDC to assess the environmental and societal impact of a proposed project.[188] The framework is a hybrid of the OECD Common Approaches and the Equator Principles; it employs independent environmental experts to provide EDC with an unbiased review of the potential impact the project will have on the local community.[189] The process of project approval and financing begins with the investor or exporter approaching EDC with a proposed project.[190] The proposed plan receives

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[181] *Id*.

[182] *Id*. at 8.

[183] *Id*. at 8, 10.

[184] *Id*. at 9.

[185] *Id*. at 10.

[186] Adebola Adeyemi, *Changing the Face of Sustainable Development in Developing Countries: the Role of the International Finance Corporation*, 16 ENVTL. L. REV. 91, 104 (2014).

[187] Liu & Zheng, *supra* note 172, at 152.

[188] *Environmental and Social Review Directive*, EXP. DEV. CAN. (last visited Nov. 11, 2016), http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Environment/Pages/default.aspx.

[189] Exp. Dev. Can., Understanding EDC's Project Review Process1, 7 *available at* http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Environment/Document/project-review-booklet.pdf.

[190] *Id*. at 5.

an initial evaluation by the agency followed by a more in-depth assessment by contracted independent environmental experts.[191] The experts, in turn, provide their recommendation on approval and, if necessary, suggest potential ways to mitigate the environmental and social impact of the project.[192] Ultimately, EDC makes the decision on whether to finance the project and determines which risks should be mitigated.[193] However, if the project receives financial assistance, the factors recommended to mitigate the impact will become requirements for the project to continue to receive financing.[194] Finally, EDC is held publicly accountable by having to disclose to the public the project it plans to finance, allowing for the community, including private citizens, to ask questions regarding the project and its potential impact.[195]

Although the loan has already been disbursed, EDC will continue to monitor the project for compliance with its environmental and social plan.[196] If the project neglects its environmental standards, the agency treats these violations "with the same degree of concern as repayment issues" resulting in the suspension of funds until the agency is satisfied with the project's remedy and compliance.[197] Holding the project responsible for environmental and social impact beyond the loan disbursement demonstrates how the export credit agency is not only committed to responsible financial lending on behalf of the Crown, but also takes the commitment to responsible environmental and social lending seriously.

Recently there has been a movement towards outsourcing regulation by allowing private companies to regulate both themselves and their partners down the supply chain.[198] The goal of the outsourcing is to extend domestic law outside the company's home country to reach the foreign supply chain.[199] However, the outsourcing leaves the regulation in the company's hands alone.[200] Professor Galit Sarfaty has has found that using domestic law through outsourcing provides an effective and promising method of "shap[ing] corporate behavior."[201] However, Sarfaty's research uncovered the fact that many companies do not effectively comply, causing due diligence gaps and a lack of transparency.[202] Sarfaty encourages greater domestic government involvement in monitoring the

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191 *Id.*
192 *Id.*
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.* at 6.
197 *Id.*
198 Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L. L. J. 419, 420 n.2 (2015).
199 *Id.*
200 *Id.*
201 *Id.* at 423.
202 *Id.*

outsourcing method.[203] Export credit agencies as quasi-government agencies could be the solution, as they would monitor companies' regulation of their supply chain.

As NAFTA, CPFTA, and TPP illustrate, providing environmental protection in international trade agreements alone is not enough due to the lack of an effective enforcement mechanism. Export credit agencies provide a necessary level of domestic enforcement through the adoption of environmental and social impact assessments. These assessments have the potential to not only enforce but also create incentive to comply with domestic and international environmental standards. Canada's 'troika' of OECD, Equator Principles, and domestic environmental legislation is what makes the EDC model an attractive complement to the inclusion of environmental provisions in international trade agreements. Although inclusion of environmental and labor provisions in free trade agreements can act as further reinforcement, the strongest incentives to environmental sustainability and CSR will come from export credit agencies adopting environmentally friendly procedures in the evaluation and issuance of credit and insurance.

Since export credit agencies hold the metaphorical purse strings, they have the capacity to enforce environmentally sustainable practices through the denial of funding for environmentally harmful projects or the withholding of disbursements in case of later non-compliance. Additionally, export credit agencies can provide a level of domestic oversight to help facilitate companies' incorporation of corporate social responsibility. Further, because export credit agencies are given direct access to the company's procedures in the application process, there is greater transparency and the agency has the information necessary to eliminate or mitigate environmental harm. Lastly, if a greater number of export credit agencies adopt more extensive environmental frameworks beyond the OECD, a "global environment law" will emerge as other states begin to reciprocate the "multi-country efforts of legal cooperation and standardization."[204]

Part V. Conclusion

Although the international community has made repeated attempts at developing CSR, through the creation of international organizations such as the U.N. Declaration on Human Rights and the OECD, and the incorporation by individual states of environmental and social provisions into international trade agreements, these attempts have failed to create a successful and enforceable framework. The lack of success is attributable to the agreements' use of weak language that merely "encourages" its state

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[203] *Id.*

[204] Sarro, *supra* note 179, at 1542 (quoting Tseming Yang & Robert Percival, *The Emergence of Global Environmental Law*, 36 Ecology L. Q. 615, 633 (2009)).

parties to obey environmental laws, coupled with the absence of an effective enforcement mechanism.[205] The agreements that do contain an enforcement mechanism in the form of investor-state dispute resolution, with the exception of the TPP, have purposefully excluded environmental and societal provisions from being brought under the investor-state dispute resolution system. Further, those that allow for investor-state dispute resolution can encourage governments not to pass any more environmental regulation because third parties could bring claims against the state.

As seen in NAFTA, the few environmental provisions the parties agreed to and incorporated into the agreement have not been enforced and are largely bypassed by governments, which claim the agreed upon provisions cannot bind the legislative branch.[206] The few environmental and social provisions the parties were able to include are not permanent but can be changed at any time by legislative amendments, leading to uncertainty about the status of environmental regulations.

Although historically environmental and social provisions have been largely unsuccessful within international trade agreements, it is important to keep including these provisions in new agreements because they help to create an international "norm." Further, as articulated by Whole Foods founder, John Mackey, continuing to include CSR establishes that sustainability is important to the participating countries and will continue to work towards responsible capitalism. In an era of free trade, many developing states believe the only way to remain competitive is to keep their environmental and social regulation low, creating a "race to the bottom" among developing countries. However, the incorporation of environmental and societal provisions can demonstrate to developing countries that developed countries and corporations will continue to conduct business within a more regulated state. Export credit agencies requiring CSR before the issuance of credit demonstrate the state's commitment to sustainability and can help further CSR among developing nations.

Although there has been much debate around whether environmental and social provisions should be incorporated into free trade agreements, these provisions may influence the growth of developing countries in a more sustainable manner. Further, they provide the opportunity for developing countries to create their own new regulations without the fear of retaliation by producers. CSR provisions belong in international trade agreements to help alleviate not only past violations but mitigate future environmental degradation as well.

Export credit agencies have the potential to provide the 'teeth' necessary to encourage and enforce CSR. The agencies are in the position of providing often essential financing to international projects and can withhold these finances if the project would be too harmful to the environ-

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[205] *See supra* Part.II.A-C.

[206] Holland, *supra* note 39, at 1235.

ment and labor relations. Export credit agencies are given access to a company's finances, data, and proposed project details and are therefore uniquely positioned to determine a transaction's impact. Further, export credit agencies can offer recommendations on how to mitigate the impact and make the financing contingent on implementation of the recommendations.

Unlike international trade agreements that use weak language, export credit agencies can provide both the "carrot," through financing, and the "stick," through the denial of financing or the suspension of the loan dispersal for noncompliance. The inclusion of environmental and social provisions within international trade agreements, coupled with export credit agencies extending credit and insurance only to projects and transactions with acceptable environmental impact, may provide the solution to the problem of under-enforced global environmental law.