



Moral Loopholes in the Global Economic Environment: Why Well-Intentioned Organizations Act in Harmful Ways

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ABSTRACT

Thomas Pogge's notion of moral loopholes serves to provide support for two claims: first, that the ethical code of the global economic order contains moral loopholes that allow participants in special social arrangements to reduce their obligations to those outside the social arrangement, which leads to morally objectionable actions for which no party feels responsible and that are also counterproductive to the overall objective of the economic system; and, second, that these moral loopholes are more likely to exist as our economic order becomes more global. Finally, it will be shown that attempts to rectify the situation with voluntary corporate codes of conduct are inadequate. The argument proceeds through analysis of one case study, concerning action by the executive of the Cerrejón mining operation at La Guajira Peninsular, Colombia.

Keywords: Global economic justice, Moral responsibility, Thomas Pogge, Role-related duties, Corporate responsibility, La Guajira, Cerrejón

RÉSUMÉ

La notion de vide moral de Thomas Pogge sert d'appui à deux revendications : premièrement, que le code éthique de l'économie globale contient des vides moraux qui permettent aux participants dans des arrangement sociaux spécifiques de réduire leurs obligations à l'égard de ceux en dehors de ces arrangements sociaux, ce qui conduit à des actions moralement condamnables pour lesquelles aucune partie ne se sent responsable et qui sont également contreproductives pour le système économique dans son ensemble. Deuxièmement, ces vides moraux sont d'autant plus susceptibles d'exister lorsque notre système économique devint plus global. Finalement, il est montré que la tentative de rectifier la situation à partir des codes de conduite volontaire d'entreprises est inadaptée. L'argument

s'appuie sur une étude de cas concernant l'action des dirigeants de Cerrejón mining operation à La Guajira Peninsular, en Colombie.

Mots clés: Justice économique globale, responsabilité morale, Thomas Pogge, devoirs liés au statut, responsabilité d'entreprise, La Guajira, Cerrejón

RESUMEN

La idea de Thomas Pogge de las escapatorias morales nos sirve para argumentar dos demandas: la primera es que el código ético de la economía global contiene escapatorias morales que permiten que los participantes de determinados acuerdos sociales reduzcan sus obligaciones frente a los que están fuera de los mismos, lo que nos lleva a acciones moralmente objetables de las cuales nadie se siente responsable y que además son contraproducentes para el objetivo global del sistema económico; y, en segundo lugar, esas escapatorias morales tienen mayores probabilidades de producirse a medida que nuestro orden económico se hace más global. Finalmente, se demostrará que los intentos de rectificar esta situación con códigos de conducta de las empresas, suscritos de manera voluntaria, son inadecuados. El argumento se muestra a través del análisis de un caso de estudio que tiene que ver con una acción del comité ejecutivo de la mina de Cerrejón que opera en la Guajira Peninsular colombiana.

Palabras clave: justicia económica global, responsabilidad moral, Thomas Pogge, responsabilidad corporativa, La Guajira, Cerrejón.

JEL Classification: F23, L72, M14, 025

INTRODUCTION: CERREJÓN MINING CASE

In the northeast corner of Colombia, on the peninsula of La Guajira, sits the world's largest open-pit coal mine. Construction of the mine's operation began in the early 1980s in a 50-50 joint venture between Carbocol, a state-owned enterprise, and Intercor, a subsidiary of Exxon Corporation. In October 2000, the state sold its share of the mine to a consortium consisting of Anglo American plc, Billiton plc, and Glencore International AG. In February 2002, the consortium gained 100% ownership of the mine by buying Exxon's 50% share. In the spring of 2006, Glencore sold its 1/3 share of the mine to Xstrata.¹ Today, the mine is owned by a consortium made up of three of the largest mining industry multinationals in the world: Anglo-American, BHP Billiton,² and Xstrata. Cerrejón Coal,³ the consortium's subsidiary, operates the mine and is Colombia's largest producer of

¹ At the time, Glencore owned approximately 1/3 of the shares of Xstrata.

² In March 2001, BHP of Australia merged with Billiton and took on the name BHP Billiton.

³ Hereafter, referred to as Cerrejón.

coal, an important product that represented approximately 25% of the country's total export earnings in 2009.⁴

Recently, the actions of Cerrejón have received international attention due to the human rights violations that have occurred against the people in the nearby communities. The people, indigenous Wayuu Indians and Afro-Colombians, have been there for as many as 3,000 years, living off the land, hunting and farming. That land has now been taken over by the mining operation, which has made the people's subsistence living even more difficult than it had been prior to the opening of the mine. It has been claimed that the local rivers, which are the communities' source of water, have been contaminated and occasionally diverted by the mining operations, and some communities have also claimed that their access to the rivers has been restricted by the mine's security forces. The vast amount of dust as a result of the mining operation, it is claimed, has led to an increasing number of respiratory problems for those living nearby. The communities charge that they continue to be harassed and intimidated by mine security forces as they attempt to go about their daily tasks of fishing and hunting on land that is now owned by Cerrejón. Additionally, the nearby community of Tabaco, consisting of approximately 200 families, was razed between August 2001 and January 2002, which resulted in some community members being forcibly removed from their home by security forces. As the mine continues to grow, plans for four other communities' resettlement are in place.⁵

The people in these communities believe that the strategy of the Cerrejón management with regard to land acquisition and re-settlement is one of driving the people away so that the company can acquire land without having to pay re-settlement costs.⁶ The Australian National Contact Point for the OECD Guidelines for Multinational Enterprises received a formal complaint lodged by the representatives of the communities surrounding the mine. The complaint claimed that the "owners and operators of Cerrejón attempted to depopulate an area of La Guajira Peninsular, Colombia, by destroying the township of Tabaco and through the forced expulsion of its population." The complaint also charges that "five other

⁴ U.S. Energy Information Administration (2010), Country Analysis Briefs.

⁵ For a more detailed account of the situation, see the following references: *The People behind the Coal*, eds. Avi Chomsky, Garry Leech and Steve Striffler; Independent Panel Report, 2008; Richard Solly, "Update on coal mining at El Cerrejón, Colombia,"; I used these sources along with my personal notes on a trip to the region in October 2006 with a delegation that talked with Cerrejón management and members of the surrounding communities. The communities slated for resettlement include Roche, Chancleta, Patilla, and Tamaquitos.

⁶ An independent panel was hired by Cerrejón following the razing of Tabaco and after the claimed violations were brought to the attention of the international community. See the Independent Panel Report (2008).

communities in the region are suffering the effects of a policy designed to make living unviable in the area and to drive the population out.”⁷

To complicate matters, Cerrejón exports all of the coal and has little interaction with the people in the surrounding communities other than the ongoing battle regarding the infringement of the mine’s operation on the people’s land and livelihood. The local people receive little benefit from the operation of the mine; few are employed by Cerrejón,⁸ they do not use the coal, and they have seen little financial benefit from Cerrejón. The company, however, claims it supports the communities with educational scholarships, health care, and access to electricity, although some, including an independent review panel, question whether Cerrejón is doing enough in social investment or doing it in the right way with the right input.⁹

At a 2006 meeting (at which I was present) with an international commission in support of the communities,¹⁰ the newly appointed Cerrejón management team argued that they had done nothing wrong; they stated that they were not responsible for the actions of their predecessors,¹¹ and had acted in accordance with Colombian law. Cerrejón president León Teicher stated that if the human rights of the people in the nearby communities are being violated, it is the responsibility of the government of Colombia to protect its citizens. Cerrejón management’s obligations, he argued, are to its shareholders; it is bound by its fiduciary responsibilities, which must be its primary concern.¹²

This case raises interesting questions regarding the ethical code of our global economy and the moral responsibility of corporations, governments, and international institutions. More specifically, it raises the question whether the formal and informal institutional structure that guides our conduct in the global economic order, what I will call the global economic ethical code, allows role-related duties that arise from participation in special social arrangements to override general moral

⁷ OECD (2009).

⁸ When I was there in Fall 2006, the people in the local communities made this claim. The Independent Panel Report conducted in 2008 (p. 26), however, states that 75% of the company’s employees are from La Guajira, although there is no data on the percent that come from the nearby communities that are directly affected by the mining activity.

⁹ See the Independent Panel Report (2008), p. 34-35.

¹⁰ The International Commission in Support of Sintracarbón and the Communities Affected by Cerrejón (ICSSCAC) met with León Teicher and several members of his management team on Tuesday, October 31, 2006.

¹¹ The razing of Tabaco, the single most mentioned violation by the mine, took place between Aug 2001 and Jan 2002. At that time, BHP Billiton and its consortium partners, Anglo American and Glencore, owned 50% of the mine, but Intercor, a subsidiary of ExxonMobil that owned the other 50% of the mine was in charge of operating the mine. The Consortium purchased ExxonMobil’s half of the mine in February 2002 and kept on the existing Cerrejón President, Hernan Martinez, who managed operations during the razing of Tabaco, until July 2002. Teicher’s statement that the Consortium was not responsible was an often-used claim by BHP Billiton and its partners.

¹² Teicher (2006).

obligations, leading to morally objectionable actions for which no party feels responsible. In the case of Cerrejón, does Teicher's role as Cerrejón's president allow his fiduciary duties to shareholders to override his duties to the people in the nearby communities? Does the ethical code of our global economic order allow Teicher or the consortium that owns Cerrejón to not feel any responsibility for the displacement of the communities? In this paper, I use this case to illustrate the special social arrangement of the corporate structure and argue for three claims: first, that the ethical code defined by the formal and informal institutional structure of the global economic order allows participants in special social arrangements to reduce their obligations to those outside the social arrangement, which leads to morally objectionable actions for which no party feels responsible and that are also counterproductive to the overall objectives of the economic system; second, that this type of morally regrettable conduct is more likely to occur as our economic order becomes more global; finally, that our attempt to rectify the situation with voluntary corporate codes of conduct is inadequate.

CLAIMS BASED ON MORAL LOOPHOLES

Cerrejón President Teicher claims that because of his special social arrangement with the owners of the company, his primary obligation is to maximize shareholder value, which, regrettably, has resulted in the local communities being forced off their land and left with no livelihood. Reasoning like Teicher's is called into question by Thomas Pogge in his book, *World Poverty and Human Rights*. Pogge asks us to consider the following example. The owner of an apartment building is presented with an idea to convert the building into luxury apartments and double the rent in order to increase his financial return. The owner is torn because most of his tenants have been there for decades, and they are old and on a fixed income. If he would make the renovations, his tenants would be forced to move out. In good conscience, the owner is unable to carry out this idea on his own because he feels it is morally wrong, yet he feels that he is missing an opportunity to increase his income. He decides to hire a lawyer and entrust the apartment building to her. The lawyer feels obligated, by virtue of the social arrangement with the owner, to do what she can to improve the return on the owner's investment. The lawyer has the building renovated into luxury apartments, the tenants are forced to move out, and the owner's financial return on the property is increased. The lawyer might consider herself free from any wrongdoing because of the special obligation she has to the owner. As Pogge argues, the lawyer has a responsibility to her client and it is not "her role to ponder whether her client is not rich enough as it is, and should not therefore forgo

some gain in order to preserve the tenants' community and form of life."¹³ Additionally, the prevailing ethical code not only prohibits the owner from converting the building himself, but provides the owner with an incentive to hire the lawyer, a loophole which allows the conversion and allows him to consider himself free from wrongdoing. Pogge argues that when there are loopholes due to social arrangements that allow these sorts of objectionable acts, the ethical code that bears on the situation is "sensitive to merely cosmetic differences."¹⁴ He asks, "should the minimal moral concern tenants are owed vary with whether the building is managed by a lawyer in the owner's behalf or by the owner himself?"¹⁵ Thus, incentives and actions are regrettable when the incentives guide adherents to act in ways that are morally objectionable by the codes own light.

Let me highlight some of the important aspects of Pogge's example. First, the owner could not carry out the renovation on his own because he thought it was morally wrong – i.e. it goes against the moral norms that bear on the relationship between a landlord and his tenants. Second, the owner was looking for a way to remove himself from personally carrying out the act. By hiring the lawyer, the owner distanced himself from the act, freeing him from any responsibility for the consequences. Finally, because of the special obligations the lawyer has to the owner as a result of the newly formed social arrangement, the lawyer feels obligated to carry out the renovation. It is the principal-agent relationship in this situation that provides the principal (i.e. owner) with distance from the action yet allows him to reap the benefits and requires the agent (i.e. lawyer) to act in the principal's best interest free from responsibility for the consequences. While the ethical code that applies in this situation does not allow the owner himself to renovate the building because of the obligation landlords have to tenants, the special social arrangement seems to create special obligations that usurp that obligation to the tenants.¹⁶ Pogge argues that the ethical code provides an incentive for the owner to hire the lawyer, and, thus, harms that are precluded by the code itself can be indirectly brought about. According to Pogge, the ethical code is structurally flawed because it contains a loophole that allows members in special social arrangements to reduce their obligation to those outside the social arrangement and leads to outcomes that are counterproductive to the overall objective of the code.

Let us now see how the Cerrejón case compares to Pogge's example. We have a similar, albeit more complex, special social relationship. Teicher is an agent working on behalf of the top executives of each multinational of the consortium, and the top executives, in turn, are agents working on behalf of the shareholders of each

¹³ Pogge (2002), p. 78

¹⁴ Pogge (2002), p. 85

¹⁵ Pogge (2002), p. 85

¹⁶ My claim here is not that the owner could not *legally* renovate the building himself; the point is that our ethical code would disapprove of such an action.

multinational. Thus, the top executives represent the principal in the relationship with Teicher and the agent in the relationship with the shareholders.¹⁷

An important point in Pogge's case is that the ethical code as understood by the principal deems the action to be morally objectionable, and, thus, the social arrangement was created with the intention of distancing himself from the act. The question to ask in the Cerrejón case is whether the ethical code that bears on this situation as understood by the parties of Cerrejón and the consortium deems the actions of Teicher to be morally objectionable. Because, unlike the Pogge example, the corporation was not created with the intention of providing a loophole (even though one exists), a second question arises: Do the principals in the consortium take advantage of the loophole by distancing themselves from the action while reaping the benefits?¹⁸

To answer the first question regarding the wrongness of the act, the multinationals' public websites, annual reports, and speeches by top executives give us an indication of the type of moral standards to which the corporate members aspire. While some might argue that this information is merely marketing propaganda, it does tell us what the executives believe is the public's perception of a moral and good company and, thus, what is moral per the ethical code that applies to corporations in the economic order. Each of the multinationals that make up the consortium has posted on its website its position with regard to the company's social responsibility and business principles. BHP Billiton's "Business Conduct Guide" states that they will "respect the traditional rights of indigenous peoples, care for the environment and value cultural heritage."¹⁹ Chip Goodyear, the Chief Executive Officer of BHP Billiton at the time, reiterated the emphasis his company places on its commitment to health, safety, environmental responsibility, and sustainable development.²⁰ Similarly, Anglo-American states on its webpage that it values "good relations between our operations and those communities that are affected by them."²¹ Finally, Xstrata, in its 2004 Sustainability Report, states that its management system enables them to "uphold fundamental human rights and respect the traditional rights of

¹⁷ In reality, there are multiple layers of principal-agent relationships due to the many levels of management hierarchy in this consortium, but for illustrative purposes, I will assume just two layers.

¹⁸ While Pogge's initial telling of the example has the owner hire the lawyer to create distance between himself and the morally objectionable act, Pogge later argues that it makes no difference what the reasons are for the creation of the special social arrangement. What is important is the existence of the special social relationship that leads to the moral loophole.

¹⁹ BHP Billiton (2007), p. 8.

²⁰ Goodyear joined BHP in 1999 as chief financial officer and later served as chief development officer (2001-2003). He was CEO of BHP Billiton from January 2003 through September 2007. As CEO, he said it was important how the company achieved its results because "good behavior enhances our license to operate, communities value companies that value them, and shareholders value companies that set up and live up to high standards" (Goodyear, 2004).

²¹ Anglo-American (2007)

indigenous peoples” and “to engage and communicate with communities, with due regard and respect for local interests, cultures and customs.”²²

From these public affirmations, one could conclude that the top executives of the consortium would consider behavior that runs counter to these stated values as morally objectionable. In fact, a potential shareholder might use these corporate pronouncements to help determine whether the company’s values and strategies were compatible with hers and worthy of her investment, and, as a shareholder, she would expect the company to live up to the stated values. Given the values and strategies that the multinationals have publicly endorsed, it does seem that the top executives and their shareholders would consider denying the people of La Guajira access to food, water, shelter, and their livelihood as morally objectionable.

The second aspect of the social arrangement in the example given by Pogge is that while the owner thought the act was morally objectionable, the ethical code provided him with a loophole whereby he could remove himself from personally having to carry out the morally objectionable act yet reap the benefits with a clear conscience. Hiring the lawyer accomplished that end, and the social arrangement allowed the lawyer to act with a clear conscience. Is there any evidence of a similar loophole in the Cerrejón case? Does the ethical code that bears upon this situation provide the top executives and shareholders with a loophole whereby they can remove themselves from personally having to carry out the morally objectionable act yet reap the benefits with a clear conscience? There is some evidence that suggests this is the case.

First, former Cerrejón President Alberto Calderón left this position in 2005 as a result of being promoted within BHP Billiton.²³ Generally, one is promoted when one’s superiors are pleased with one’s performance, so it does not seem unreasonable to assume that Calderón’s promotion was an indication that the corporate executives were pleased with Calderón’s actions during his tenure at Cerrejón and, yet, it was during Calderón’s tenure at Cerrejón that negotiations with the displaced people of Tabaco began. When Calderón was promoted and left Cerrejón, negotiations had

²² Xstrata (2004).

²³ Alberto Calderón replaced Hernan Martinez in July 2002 as President of Cerrejón and remained in this position until November 2005, at which time he was promoted to a London-based position (President of Diamonds and Specialty Products) in BHP Billiton (Lindsay and Sullivan, 2005). The current President, León Teicher, replaced Calderón. Later, Calderón was promoted once again, this time to the position of BHP’s Chief Commercial Officer (Dow Jones Newswires, 2007). On his promotion in 2005, the announcement from BHP had this to say about his tenure at Cerrejón: “During his time at Cerrejón Coal, Mr Calderón has successfully integrated the three companies and developed and overseen initiatives which have resulted in production increasing by close to 40 per cent, revenues increasing to US\$1.3 billion and net profit nearing US\$500 million” (BHP Billiton, 2005).

still not resulted in an agreement. Several years following Calderón's tenure, the people were still awaiting financial compensation and resettlement land.²⁴

Second, BHP Billiton Chairman of the Board Don Argus appeared to recognize a distance between his authority and control over Teicher and Teicher's actions. When questioned about the treatment of the people of Tabaco at a shareholders' meeting, Argus responded by saying: "We leave it up to the individuals who are running the mine over there. They're best placed to do that."²⁵ When pressed as to whether he would commit to collectively negotiate with the communities who wish to negotiate, Argus responded: "the only commitment that I'll give you is that we leave it in the hands of the person in charge of the mine to be able to deal with the local communities as they see fit to give a proper resolution."²⁶ It seems clear that the Chairman believed he had limited authority and control over Teicher's actions. The special social arrangement in this principal-agent relationship between Chairman of the Board Argus and Cerrejón President Teicher provided Argus with what seems to be a legitimate justification to not intervene in the affairs of Cerrejón. Regardless of how Argus felt personally about the actions by Cerrejón management, he did feel he had legitimate grounds for distancing himself from those actions. In fact, one might interpret his comments as seeing his role as the principal in this relationship as *requiring* him to distance himself from the actions of Teicher. A board of directors will hire an executive to do a job, and the mark of a good director is to give executives a certain degree of autonomy to do the job as they see fit. Clearly, the Board of Directors can fire executives if expectations are not being met, but the Chairman certainly would not want to micro-manage. Thus, the ethical code in this situation requires Argus to distance himself from Teicher's actions, regardless of how he personally feels about the distance.

The shareholders of the corporations of the consortium are also principals in this case. Do they also distance themselves from the morally objectionable acts? Generally this is hard not to do; the distance exists naturally. While the shareholders are the owners of the corporation, they act like investors, primarily basing their investment decisions on financial return. Moreover, the majority of investors' money is in mutual funds, pension plans, or retirement funds, where the manager of the fund or plan is making the decisions about companies in which to invest. It takes a concerted effort on the part of the investor to even know in what companies they are invested. Thus, it is unlikely that the shareholders feel responsibility for the

²⁴ The Independent Panel Report (2008) comments on the lack of progress in 2008 (p. 22). At the April 2010 Anglo American Annual General Meeting (AGM), the company was again questioned about the lack of progress in resolving the relocation issues that were raised by the Independent Panel (MAC, 2010).

²⁵ Argus (2006).

²⁶ Argus (2006).

actions of the managers of the company; they, more easily than the top executives, can distance themselves from the morally objectionable actions.

In summary, the Cerrejón case provides us with a special social arrangement in which the executives and the shareholders of the consortium (i.e. principals) would agree that to deprive the people surrounding the mining operation of food, water, shelter, and livelihood is a morally objectionable act based on the corporations' own code and their perception of the ethical code of the global economic order. And, similar to Pogge's apartment building example, the ethical code provides the principals with a loophole by way of the special social arrangement that allows them to distance themselves from the morally objectionable actions and yet to reap the benefits. Additionally, Teicher, similar to the lawyer in the Pogge example, feels obligated, by virtue of the social arrangement with the shareholders, to maximize shareholder wealth, regrettably requiring him to behave in otherwise morally objectionable ways, for which he feels free from any wrongdoing. The ethical code that bears on this situation allows for the members of the social arrangement formed by way of the multinational corporation to reduce their obligations to the communities. As in the Pogge example, the ethical code is structurally flawed because it contains a loophole that allows members in special social arrangements to reduce their obligation to those outside the social arrangement and leads to outcomes that are counterproductive to the overall objective of the code, namely to raise the living standard of society.

The global economic ethical code is based on the tenets of capitalism, the objective of which is to raise the standard of living of society. We have been convinced that Adam Smith's theory of production by specialization is most efficient in helping to achieve this end. Yet, it is because of specialization that we create special social arrangements with role-related duties; we *want* specialists to run our companies and to focus on the duties related to each role, which allows the agents to reduce their more general obligations with a free conscience. This is not to deny that no good comes from these special social arrangements. Cerrejón, for example, does provide jobs for workers and coal to its customers, just as the renovation of the apartment building provided jobs and more luxurious apartments. Yet, this gain has been achieved at the expense of denying some persons minimal human rights to which all are entitled.

As our economy becomes more global, the chain of special social relationships becomes longer, adding greater physical and cultural distance between the participants and those potentially affected by the actions of those in the social arrangements. Its ethical code regrettably provides moral loopholes by virtue of these social relationships that perpetuate morally objectionable behavior by agents for which no party feels responsible. Absentee ownership increases the physical and cultural distance and, thus, it is easier to not see or understand the harmfulness of the managers' actions. The consortium's top executives and shareholders never have to

see the local consequences of the managers' actions. Additionally, national governments and international institutions play an ever-widening role in global economic affairs, creating more layers of special social arrangements. With the increase in the privatization of state-owned enterprises, another special social arrangement is created: the government hires a corporation to manage its natural resources, just as the owner hired the lawyer to manage his apartment building. And, like the owner, the Colombian government is able to distance itself from the responsibility of the corporation that acts in ways that maximize financial return at the expense of the Colombian citizens, ways that are in some respects counterproductive to the objectives of the ethical code that bears on the relationship between governments and citizens. But the story is more complex than this; often the move towards privatization in developing countries has been forced upon them by agreements with the International Monetary Fund (IMF). This is the case in Colombia. The government sold its share of the mine to the consortium in order to comply with the terms of an IMF loan agreement, which is simply another special social arrangement. The IMF loaned the government money and defined terms to ensure that the government will be able to repay the loan. The Colombian government, the agent in this aspect of the relationship, is allowed to free itself from responsibility for the morally objectionable actions it feels obligated to carry out in order to comply with the terms of the loan. The IMF, in turn, whose objective is to promote international monetary cooperation and stability, is able to distance itself from the morally objectionable actions, even though it too would likely agree that the actions required by the loan agreement are morally regrettable. Our global economic order is filled with similar layers of special social arrangements, which only increase the likelihood of the presence of moral loopholes that allow members of these special social relationships to reduce their obligation to those outside the relationship, leading to outcomes that are counterproductive to the overall objective of the code.

CONCLUSION

What modifications to the global economic ethical code will help this situation? Activist groups and many NGOs are watching corporations and exposing their actions, hoping that exposure will drive corporate participants to accept responsibility for corporate actions. The international group Mines and Communities²⁷ and the Salem, Massachusetts North Shore Colombia Solidarity Committee,²⁸ for example, exposed the morally objectionable actions of Cerrejón. Similarly, business academics who work in the area of social responsibility overwhelmingly argue for voluntary corporate codes of conduct as the solution. They argue that corporations should not take advantage of the moral loophole that

²⁷ See <http://www.minesandcommunities.org/list.php?f=14> for more information on this organization.

²⁸ See <http://home.comcast.net/~nscolumbia/> for more information on this organization.

exists. In lieu of regulation, voluntary corporate codes of conduct are a way to establish good corporate behavior and, yet, maintain the efficiency of the capitalist system and ensure good social outcomes. Business's response in recent years has been to create these codes and to sign on to global or industry standards. This is exactly what the three multinationals that own Cerrejón did. All three partners had codes of conduct in place. Each is a signatory to the UN Global Compact,²⁹ Extractive Industries Transparency Initiative,³⁰ and the International Council on Mining and Metals,³¹ all of which commit its member companies to principles of ethics, human rights, and transparency. Why did this not work? How could Teicher still feel no responsibility for his morally objectionable actions? How could the consortium's executives and shareholders distance themselves from responsibility for such acts? I suggest that this is because adding corporate codes of conduct does not truly change the nature of the basic global economic ethical code. It merely adds a layer on top of the existing code, and does not eliminate the moral loopholes that exist in the basic code.

The sorts of corporate codes of conduct endorsed by defenders of voluntary codes can be understood as attempts to create a special class of new duties on top of an economic ethical code that is implicitly utilitarian. The new "duties" articulated in these codes are not viewed by participants in the economic order as specific binding obligations, but merely another set of considerations to be taken into account in the calculation of the utilitarian economic ethical code. Cerrejón, for example, is not completely oblivious to the obligations set forth in the codes of conduct to which it has signed up and does make efforts to fulfill these obligations by making provisions for schooling, health care, and utilities. In the final utilitarian economic calculation, however, the cost of letting the local communities either continue with life as they know it or receive just financial compensation for their land is considered too high a price to pay. While it is the corporation that makes the decision about how to behave, it is *our* utilitarian economic ethical code that guides corporate action and implicitly determines the price that can be paid. We do this through our decisions as consumers and investors. Every time we make purchasing and investment decisions, we set the price and guide the decisions corporations make. While the corporate

²⁹ Anglo American joined Jul 27, 2004, BHP Billiton joined Jul 21, 2003, and Xstrata joined March 22, 2006.

³⁰ EITI's first principle is "We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impact" (EITI, 2007).

³¹ ICMM claims its members are committed to 10 principles, the first of which is "Implement and maintain ethical business practices and sound systems of corporate governance." The third principle states "Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities" (ICMM, 2003). Anglo American has been a member since 2001, BHP Billiton since 2001, and Xstrata since 2006.

codes of conduct appear to guide actions to align with broad social considerations, consumer and investor actions, more often than not, guide corporate decisions back to narrowly defined considerations of efficiency and financial return. While the corporate codes of conduct may modify the behavior of some companies, it is still just a balancing act of social, environmental, and financial outcomes and not a modification that makes the obligations conveyed in the corporate codes of conduct imperative. Until we fundamentally rethink the ethical code of our economic system, moral loopholes will continue to be invoked and morally objectionable acts will continue to occur with all parties feeling free of responsibility.

Another available option to eliminate the moral loopholes in our global economic ethical code is to institute regulation that forbids corporations to act in ways that deny persons minimal human rights. This solution also has its difficulties, given that we have no global governing body, but it seems that we should not be too quick to abandon this idea. As our world has become more integrated, we have been able to make some progress in seeing the benefits of international regulation and standards.

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